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In this Issue:

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Against Discrimination
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European Anti-discrimination Law Review

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Marieke | *1981*

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

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The information contained in this sixth and seventh issue of the review reflects, as far as possible, the state of affairs on 17 July 2008.

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Contents


Jan | 1930
Manisha | 2000


Bau | 1989

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. In July 2007, the European Commission launched a call for tenders for the continuation of the Network, which was won by Human European Consultancy and MPG, and the new contract started in December 2007. The European Network of Legal Experts in the non-discrimination field has slightly changed in its composition but will continue to be managed in the same way and will continue to produce the European Anti-discrimination Law Review and Thematic Reports. In autumn 2008, it will also organise a legal seminar for representatives of the Member States and the equality bodies (this year together with the European Network of Legal Experts in the field of gender equality).

This is the combined sixth and seventh issue of the European Anti-discrimination Law Review, prepared by the European Network of Legal Experts in the non-discrimination field. The review provides an overview of the developments in European anti-discrimination law and policy in the year prior to publication (the information reflects, as far as possible, the state of affairs on 17 July 2008).

In this issue you will find the following articles:

- An introduction to the European Network of Legal Experts in the field of gender equality, with which we will be starting joint activities.
- Colm O'Cinneide, Senior Lecturer in Law, University College London, considers age discrimination and mandatory retirement;
- Béatrice Vizkelety, Director of the Legal Department, Commission des Droits de la Personne et des Droits de la Jeunesse du Québec, gives an overview of discrimination law from the Canadian perspective;
- Olivier De Schutter, Centre for Philosophy of Law, Catholic University of Louvain, addresses the question of the liability of legal persons under national legislations implementing the Racial Equality and the Employment Framework Directives;
- Sandra Fredman FBA, Professor of Law, Oxford University, Fellow of Exeter College, Oxford, and barrister, Old Square Chambers, presents the promises and perils of positive duties in the equality field.

In addition, you can find updates on legal policy developments at the European level, updates from the case law of the European Court of Justice and the European Court of Human Rights, which include important complaints that have been brought before the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the Member States of the European Union can be found in the section on News from the Member States. These four sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Georgia Tsaklanganos) on the basis of the information provided by the national experts and their own research in the European sections.

Isabelle Chopin
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Meet ordinary people in this Review, facing discrimination

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Joël | *1988*

The European Network of Legal Experts in the Field of Gender Equality

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The objectives and tasks of the European Network of Legal Experts in the Field of Gender Equality are quite similar to those of the European Network of Legal Experts in the Anti-Discrimination Field. Both networks assist the European Commission in its monitoring function as guardian of the treaties. These networks inform the European Commission about the implementation of EU equality law and developments at national level regarding policies, legislation, case law and activities of equality bodies in their respective fields. Many issues are of common interest to both networks, such as the concepts of direct and indirect discrimination, harassment, affirmative action and enforcement. High-level, independent legal experts participate in the networks and some experts are even members of both networks.

As well as similarities, there are also some important differences between the two networks. The Gender Equality Network has assisted the Commission in its monitoring tasks for a considerably longer time. From 1984 a network of legal experts in the field of the equal treatment of men and women has provided information to the European Commission on relevant developments at EU level and in the Member States (and more recently in the EEA countries: Norway, Iceland and Liechtenstein). The continuity of the work of the network was enhanced due to the fact that Professor Sacha Prechal was coordinator of the network between 1991 and 2007 and most experts have participated in the network for some years. In the past many of the network's publications were meant for internal use by the European Commission and were not published. However, some electronic publications are available to the public (see below). Up to 2007, Bulletins provided information on developments in the field of gender equality on a regular basis and various reports were published, for example on the gender pay gap and different forms of leave. Each year, the main developments in EU gender equality law both at EU and national level were described in a general report, which was also published on the European Commission's website.

The current European Network of Legal Experts in the Field of Gender Equality started its activities in January 2008, with an expanded mandate. The network publishes a bi-annual electronic European Gender Equality Law Review, in English, French and German. The current work programme of the network includes the publication of a general report on Gender Equality Law in the EU, also available in English, French and German, and several thematic reports, some of which will be published. Furthermore (unpublished) flash reports inform the Commission each month of relevant developments and deal with various ad hoc requests from the Commission. The network meets twice a year in Brussels with representatives of the Commission in order to discuss recent developments in the field of gender equality across the EU. This area does not only include the application of the different directives on the equal treatment of women and men in (access to) employment and in access to and the supply of goods and services, but is also closely related to issues such as the reconciliation of work, private and family life, sexual harassment, domestic violence and women in decision-making.

The publications of the European Network of Legal Experts in the Field of Gender Equality can be found at: http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html.

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Age Discrimination and Mandatory Retirement

Colm O'Cinneide, Senior Lecturer in Law, University College London

Introduction

The use of age-based or age-linked distinctions to discriminate against individuals appears to still be relatively commonplace across Europe.[1] However, Council Directive 2000/78/EC now requires that less favourable treatment in employment or occupation on the grounds of age must be shown to be objectively justified: if this cannot be done, then that less favourable treatment will constitute unlawful discrimination. The Directive therefore requires significant changes in how older and younger workers are treated across Europe. If Member States are to comply with the Directive, they must be prepared to engage in a comprehensive re-assessment of when it is legitimate to use age-based and age-linked distinctions in national employment legislation, policy and practice.

This will require Member States to address some complex and difficult issues. In particular, serious thought needs to be given to the question of when employers should be able to require employees to retire at a fixed retirement age. US age discrimination legislation has prohibited the use of compulsory retirement or 'mandatory retirement' in most areas of employment since 1986. The Directive does not go so far. However, the age discrimination provisions of the Directive now require that the use of 'mandatory retirement ages' must to be objectively justified, as they involve less favourable treatment of older workers on the basis of their age. The European Court of Justice (ECJ) has recently confirmed this in its important decision in *Palacios de la Villa v Cortefiel Servicios SA*.[2] The Court of Justice will return to this issue again in the forthcoming case of *Age Concern v Secretary of State for Business, Enterprise and Regulatory Reform* (also known as '*Heyday*').[3] It is as yet unclear to what extent the age discrimination provisions of the 2000 Directive will impact on the use of retirement ages throughout the EU. However, it appears likely that significant changes will gradually come to pass in this complex yet important area of discrimination law.

The key elements of the general prohibition on age discrimination in employment and occupation

Age discrimination is for the most part based upon stereotypes that have their root in irrational assumptions and prejudiced opinions. Older workers are often viewed as lacking in health, efficiency and fresh ideas. Younger workers are often considered to lack basic knowledge or any real understanding of their chosen professions. Age discrimination based on these stereotypes can deny individuals the right to equality of treatment. It also can harm European economies, by excluding large groups of potential employees from the workforce and denying them the opportunity to contribute to society through the exercise of their skills and talents. This combination of concerns lies behind the prohibition on age discrimination introduced in Directive 2000/78.[4]

1 For example, in the Republic of Ireland, complaints about age discrimination now constitute the largest single category of Irish anti-discrimination cases in the employment context: see P. Cullen and L. Slattery, 'Age biggest single reason for workplace discrimination', *The Irish Times*, 19 May 2008.

2 Case C-411/05, Judgment of 16 October 2007.

3 CO/5485/2006.

4 See N. Bamforth, M. Malik and C. O'Cinneide, *Discrimination law* (London: Sweet & Maxwell, (2008), Ch. 15. See also S. Fredman, 'The age of equality', in S. Fredman and S. Spencer, *Age as an equality issue: legal and policy perspectives* (Oxford: Hart, 2003) pp. 21-70.

However, the Recitals to the Directive also recognise that there may be circumstances in which distinctions made between individuals and groups on the grounds of their age may be legitimate and justified.[5] Article 6(1) of the Directive provides that differences of treatment based on a person's age will not constitute discrimination if they can be 'objectively and reasonably justified by a legitimate aim…', and the means of achieving that aim must be 'appropriate and necessary'.[6] Therefore, treatment that would constitute both direct and indirect discrimination on the grounds of age may be justified, which is not the case for the other non-discrimination grounds recognised in EU law. This may have significant implications for the use of mandatory retirement ages.

Mandatory retirement and the objective justification requirement

When an employee is forced to retire in line with the requirements of a mandatory retirement age, this will constitute less favourable treatment on the grounds of age, as a distinction is being made between workers of a particular age and workers who are younger. This means that under the provisions of Directive 2000/78, the use by an employer of a mandatory retirement age should as a basic rule have to be objectively justified: if it cannot be shown to be justified, then it will constitute unlawful direct discrimination on the grounds of age. The ECJ has confirmed this in its judgment in *Palacios de la Villa*.[7]

This may appear to some to be a strange or undesirable consequence of the Directive's ban on age discrimination. Many people are happy to retire at the fixed retirement age for their profession or job. Many employees will retire with full pension entitlements and look forward to enjoying their leisure years. Most retirement ages are fixed by consensual collective agreements or agreed voluntarily between an employer and an employee.[8] However, other employees may wish to work on beyond the mandatory retirement age. Some employees may enjoy their work and wish to continue their employment beyond 65 or the relevant retirement age in question. Other employees may not have accumulated full pension entitlements and wish to work for longer to remedy this gap.[9] Alternatively, some employees may simply wish to continue to earn more money through their salary for a few years beyond normal retirement age. Even when a mandatory retirement age is agreed as a result of a collective agreement, certain employees may consider that their wish to carry on working had been overruled or disregarded to suit the majority interest, or that their consent was not extracted on a truly voluntarily basis.[10] For many workers, an obligation to retire when they reach the relevant mandatory retirement age will therefore constitute 'less favourable treatment' on the grounds of age. This is why the use of mandatory retirement ages has to be objectively justifiable under the terms of the Framework Equality Directive.

5 See Recital 25: '…differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States'.

6 For analysis of Article 6(1), see H. Meenan, 'Age equality after the Employment Directive' (2003) 10 *Maastricht journal of European and comparative law* 9-38; S. González Ortega, 'La discriminación por razón de la edad' (2001) 59 *Temas laborales* pp. 93-124.

7 Case C-411/05, Judgment of 16 October 2007, para. 51.

8 Advocate General Mazák suggested in his opinion in *Palacios de la Villa* that, "in general, retirement seems to be perceived more as a social right than as an obligation." See Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA*, Opinion of Advocate General Mazák, delivered on 15 February 2007, at para. 69.

9 Compulsory retirement is often a major contributing factor to high levels of poverty amongst older persons, especially in the case of women who may have taken time out for childcare and consequently had less opportunity to contribute to social insurance or occupational pension funds. See P. Meadows, *Retirement ages in the UK: a review of the literature* (London: Department of Trade and Industry, 2003).

10 In the US, the Older Workers Benefit Protect Act of 1990 (OWBPA) imposes certain conditions to ensure that contractual agreements between employers and employees on mandatory retirement ages do in fact reflect the voluntary consent of the employee. Employers are not permitted to circumvent the ban in US law on mandatory retirement by placing pressure upon employees into agreeing to retire early.

The intensity of review under the objective justification test in the context of age

So far, it is still not fully clear how the ECJ and national courts will apply the objective justification test in age cases. As a result, it remains uncertain how the objective justification test will be applied where use is made of mandatory retirement. Advocate General Jacobs in *Lindorfer v Council of the European Union* suggested that it was not appropriate, or indeed possible, to apply the prohibition of age discrimination as rigorously as the prohibition of sex discrimination.[11] Advocate General Mazák in his opinion in *Palacios de la Villa* considered that states should be given 'broad discretion' in using age distinctions as part of national social and economic policy and that the use of age distinctions should only be censured by the ECJ if 'manifestly disproportionate'.[12] Both these approaches would suggest that a diluted standard of review should be applied in age discrimination cases. However, in *Mangold v Helm*,[13] the ECJ appeared to take a significantly different approach. The Court of Justice was willing to recognise that states had considerable discretion in the area of national social and economic policy. However, the Court nevertheless applied a rigorous proportionality analysis in concluding that German legislation which limited the employment rights of workers over the age of 58 was not objectively justified.

In *Palacios de la Villa*, the ECJ applied a similar approach to the use of mandatory retirement ages in collective agreements. In its decision, the Court again recognised that states were entitled to a 'broad' margin of discretion when it came to issues of national economic and social policy and held that Spanish legislation permitting the use of mandatory retirement ages in collective agreements was objectively justified. However, the ECJ once again subjected the justification offered for this legislation to close scrutiny. The Court of Justice noted that the legislation was enacted after extensive discussion with the social partners and was intended to promote the important policy objective of facilitating access to the labour market. Particular emphasis was also placed by the Court on how the use of mandatory retirement ages was only permitted where the individuals affected had acquired sufficient pension entitlements to retire on an adequate income, and on the flexibility with which mandatory retirement ages could be applied and adjusted. Taking these actors into account, the Court concluded that the Spanish legislation was objectively justified: the law was rationally linked to the achievement of a legitimate aim of national employment policy, and did not have a disproportionately negative effect on those workers who could be compelled to retire.

The judgment in *Palacios* is striking for the Court's willingness to examine closely the specific features of this legislation and to subject its underlying justification to close scrutiny. The Court of Justice made no reference to Advocate General Mazák's suggestion that only 'manifestly disproportionate' age distinctions should be censured. As a consequence, it appears from both *Mangold* and *Palacios* that the ECJ will apply the objective justification test with considerable rigour in the context of age, including where the use of mandatory retirement ages is at issue. If Member States wish to permit mandatory retirement, then this rigorous objective justification test will have to be satisfied, even if a relatively broad margin of discretion will be given to states where national employment and social policy is at issue.

[11] Case C-227/04P, *Lindorfer v Council of the European Union*, Opinion of Advocate General Jacobs, delivered on 27 October 2005, paras. 71-93. Advocate General Sharpston took the same view in her subsequent opinion in the same case: see Case C-227/04P, *Lindorfer v Council of the European Union*, Opinion of Advocate General Sharpston, delivered on 30 November 2006, para. 67.

[12] Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA*, Opinion Of Advocate General.Mazák, delivered on 15 February 2007, paras. 73-74.

[13] Case C-144/04, (2005) ECR I-9981.

This could have considerable consequences for the use of mandatory retirement ages throughout Europe. However, the potential impact of the obligation to show that the use of mandatory retirement is justified has often been overlooked. This has been partially due to uncertainty about whether the age discrimination provisions of Directive 2000/78 actually apply to mandatory retirement ages. This confusion in turn stems from confusion as to the relationship between 'retirement ages' and the provisions of national social security legislation governing 'pensionable age'. It is important to minimise this confusion by distinguishing carefully between the different issues involved.

The difference between 'retirement age' and 'pensionable age'

'Pensionable age' is the age at which individuals become entitled to a pension provided by the state or to an occupational pension paid by a private employer. In contrast, a 'retirement age' can be defined as the moment when an employment contract is terminated on the grounds that the employee has reached a particular age. Both ages will often be the same. The standard pensionable age will usually mark the point in European societies where most individuals will choose to leave work and collective agreements and employment contracts often make express provision for this. Also, establishing the standard pensionable age as the mandatory retirement age ensures that most workers who retire at that age will have good pension entitlements. As a result, in many European countries, it is common for 65 to be both the normal pensionable age and the normal retirement age.

However, pensionable age and retirement age are distinct and separate concepts. There is no inherent relationship between the two ages that makes it necessary for employees who reach pensionable age to retire. State pension systems do not depend upon mandatory retirement to function. Indeed, national legislation and private pension schemes increasingly permit employees to defer collecting their pension and to continue working, or allow employees to keep earning a salary while also obtaining pension payments.[14] The fact that an individual has reached pensionable age or obtained full pension rights does not appear *by itself* to be a good reason for terminating their employment.

Article 3(3) specifically excludes state social security systems from the scope of the Directive. Article 6(2) also permits states to exempt the use of age-linked criteria in determining admission or entitlement to occupational pension schemes from the scope of the Directive. Therefore, the use of age distinctions in fixing pension entitlements will generally be exempt from the Directive. However, this does not appear to exempt employers using mandatory retirement from the necessity to show objective justification. Treating an employee's pensionable age as their relevant retirement age will not confer any special immunity on an employer.

Nevertheless, the practice of automatically terminating employment contracts when pensionable age is reached remains common across Europe, especially in collective agreements. Great caution needs to be exercised in this area: national governments and employers must be very careful not to make the mistake of automatically equating pensionable age with retirement age. In *Palacios de la Villa*, the Spanish law in question provided that mandatory retirement was only possible if employees had completed the minimum period of contributions necessary for them to become entitled to a retirement pension. As discussed above, the ECJ considered that this social protection provision was a factor that helped to establish that the law in question was objectively justified.[15] However, the Court of Justice did not consider

[14] For example, in the UK, workers who are entitled to a state pension have been able to continue to work without financial penalty since 1989. Approximately eight per cent of men and more than a quarter of women continue working beyond the state pension age in the UK, typically for a year or two for men and a little more for women: see P. Meadows, *Retirement ages in the UK: a review of the literature* (London: Department of Trade and Industry, 2003), pp. 64-67.

[15] Case C-411/05, Judgment of 16 October 2007, para. 73.

that the link between mandatory retirement and pensionable age was itself sufficient to justify the law in question: more was required, including the existence of a legitimate policy objective in the form of ensuring access to the labour market for younger workers.

Recital 14 – Are national laws governing mandatory retirement exempt from the scope of the Directive?

Another complicating factor which has muddied the waters of the debate about age discrimination has been the contents of Recital 14 to the Directive, which states that, "[t]his Directive shall be without prejudice to national provisions laying down retirement ages". The meaning of this statement is very unclear. There is also no express provision in the text of the Directive itself which gives substantive legal content to this uncertain phrase. Should the Recital be read as exempting national legislation governing retirement ages from the Directive, even though no exemption exists in the operative parts of the Directive? Should it in contrast just be read as making it clear that Member States still retain competency to legislate in this area? Should the text of the Recital be interpreted as guidance to courts applying the objective justification test set out in Article 6(1), as the Commission suggested in its intervention in *Palacios de a Villa*?

The governments of Spain, Ireland, the Netherlands and the United Kingdom, as well as the employer defendant itself, all made the argument in *Palacios de la Villa* that Recital 14 should be interpreted as establishing that the principle of non-discrimination on grounds of age as laid down in Directive 2000/78 did not apply to national laws such as the Spanish legislation permitting mandatory retirement in question, which gave effect to an important dimension of social and employment policy. Advocate General Mazák agreed, taking the view that such legislation was inextricably linked to national social security regimes.[16] He argued that the difficulty that can exist in determining when age discrimination is justified and the common use of age-related distinctions in social and employment policy indicated that a 'narrow interpretation' should be adopted of the scope of application of the age provisions of Directive 2000/78. He therefore suggested that national legislation on retirement ages should be exempt from the scope of the Directive.

However, the ECJ took a very different view, considering that Recital 14, "merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached".[17] In other words, the ECJ deemed national legislation governing the use of retirement ages in collective agreements to come within the scope of the Directive and therefore to be subject to the requirement to demonstrate the existence of objective justification. This appears to be the correct approach: an ambiguous and uncertain provision in a recital should not be interpreted as cutting back on the scope of protection against age discrimination.

[16] Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA*, Opinion of Advocate General Mazák, delivered on 15 February 2007, paras. 51-67.

[17] Case C-411/05, Judgment of 16 October 2007, para. 44.

The *Heyday* reference

However, the forthcoming *Heyday* case will further clarify the scope of the Directive. The UK legislation being challenged in this case permits employers to dismiss employees at the age of 65, subject to a requirement for the employer to consider requests from employees to stay on beyond the fixed retirement age.[18] Employers who make use of this 'national default retirement age' are completely exempted from having to show objective justification. (If employers wish to retire employees before this date, any such mandatory retirement will have to be objectively justified.) This has attracted considerable controversy in the UK, with the major organisations representing older persons coming together to bring the legal challenge to this legislation which has become the *Heyday* case.

The questions referred to the ECJ in *Heyday* centre around a number of issues. Firstly, the Court of Justice has been asked to return again to the question of Recital 14 and to clarify whether the Directive covers national legislation which establishes such a 'default retirement age'. It could be argued that the UK legislation is more in the nature of a 'national' retirement age (as referred to by Recital 14) in that it applies to all employers, while the Spanish legislation at issue in *Palacios* was concerned with the specific question of the use of retirement ages in collective agreements. However, it remains difficult to see how Recital 14 can be interpreted as narrowing the scope of protection available to workers under the Directive. Also, in practice, the distinction between the Spanish and UK legislation may not be substantial. One way or the other, the decision in *Heyday* may settle the question of the interpretation of Recital 14.

However, other interesting questions will also be analysed in *Heyday*. The ECJ has been asked to clarify other aspects of Article 6(1), such as whether the same test should be used in considering whether the use of age distinctions are objectively justified under Article 6(1) as is applied in indirect discrimination cases under Article 2(2) of the Directive. The answers to these questions may in turn provide valuable guidance as to when mandatory retirement will be justified.

In particular, *Heyday* may clarify when arguments based on national employment and social policy will provide objective justification for national laws permitting the use of mandatory retirement. The UK government has justified the introduction of a general exception for the use of mandatory retirement on the basis that significant numbers of employers make use of fixed retirement age as a necessary part of their workforce planning.[19] It is as yet unclear when the ECJ will accept that such general justification arguments are permissible under the Directive. The well-developed justifications offered by the UK government for retaining the possibility of mandatory retirement will be valid in the case of many individual employers. However, it can be questioned whether such broad and sweeping arguments justify national legislation which exempts every employer from having to show objective justification for the use of mandatory retirement.[20]

In *Palacios de la Villa*, the ECJ accepted that general goals of national employment policy could provide objective justification for national legislation permitting the use of mandatory retirement. As already discussed, the Court of Justice accepted that the Spanish legislation at issue could be justified as a way of creating vacant posts which would be filled by younger workers coming up through the labour market,

[18] See Regs. 47 and 48, as well as Schedules 6 and 7, of the UK Employment Equality (Age) Regulations 2006.

[19] See UK Department of Trade and Industry, *Equality and diversity: coming of age* (London: Department of Trade and Industry, July 2005), para. 6.1.14.

thereby ensuring greater 'transgenerational equity'. The argument that older workers must leave the workforce to make way for younger workers has been criticised in the relevant academic literature.[21] However, the Court took the view that Spain was entitled to a margin of discretion in this context. Therefore, broad justifications rooted in national employment and social policy will be capable in some circumstances of constituting objective justification.

However, in *Palacios*, the Court of Justice placed considerable emphasis on the fact that the Spanish legislation prevented the use of mandatory retirement when employees did not have sufficient pension entitlements. In contrast, the UK legislation challenged in *Heyday* permits employers to use mandatory retirement even where employees have not acquired sufficient pension entitlements. It remains to be seen whether the absence of this restriction on the scope of the mandatory retirement exception will call the objective justification of the UK legislation into doubt. This is linked to a wider question: should laws permitting the use of mandatory retirement be required to limit the circumstances when employers can compel workers to retire to particular and specific cases where objective justification will in general be clearly present, or can states simply maintain a general exemption for all employers, as the UK has done? The questions referred to the ECJ in *Heyday* seek clarification on this point: the Court of Justice's response to this question will be significant.

Justifying mandatory retirement

It also remains to be seen what evidence the ECJ will require from Member States to support arguments that mandatory retirement is necessary to advance national policy objectives. Not every argument based on factors relating to national social and employment policy may be deemed sufficient to establish objective justification. Member States may need to produce substantive arguments rooted in a firm evidence base before they can be confident that mandatory retirement laws will survive challenge under the Directive.

The same is also the case with individual employers who wish to use mandatory retirement but who are not covered by national legislation permitting them to do so. Such employers will have to show objective justification for their use of mandatory retirement on an individual case-by-case basis. The case law is slowly developing on this point throughout Europe. Thus far, employers in some Member States have been able to justify the use of mandatory retirement ages on the basis that they are necessary to open up job opportunities for younger workers: as older employees retire, younger employees obtain new opportunities for promotion and increases in salary. The Dutch Supreme Court has upheld the imposition of a compulsory retirement age upon airline pilots for reasons of ensuring adequate promotion and guaranteed employment opportunities for younger pilots.[22]

[20] M. Sargeant, 'The Employment Equality (Age) Regulations 2006: a legitimisation of age discrimination in employment' (2006) 35 *Industrial law journal*, pp. 209-227.

[21] See P. Meadows, *Retirement Ages In The UK: A Review Of The Literature* (London: Department of Trade and Industry, 2003), 60-61. See also *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: Ontario Human Rights Commission, September 2000).

[22] Dutch Supreme Court, 8 October 2004 - Nr. C03/077HR - *16 Pilots v. Martinair Holland NV and the Vereniging van Nederlandse Verkeersvliegers*. See also Dutch Supreme Court, 8 October 2004, Nr. C03/133HR, *Applicant v. Koninklijke Luchtvaartmaatschappij NV (Royal Dutch Airlines) and the Association of Dutch Traffic Pilots*.

Employers have also been able to justify mandatory retirement as necessary to preserve the firm's pension scheme in good condition.[23] Employers in other cases may be able to argue that mandatory retirement is necessary to ensure a turnover of staff, permitting older workers who may no longer be very productive to retire with dignity while new blood is brought into senior ranks. Health and safety requirements may also justify compulsory retirement in certain circumstances, especially where the safety of the public may be at issue and individual assessment of the health of employees may be impossible or excessively intrusive. Other factors may also serve to justify mandatory retirement. For example, to preserve judicial independence, it may be necessary to have a fixed retirement age for judges: otherwise, the process of assessing the continuing fitness of judges to remain on the bench might become a highly politicised process.

However, employers should be cautious in using such arguments in an automatic or unthinking manner to justify the use of mandatory retirement. Under the objective justification test, employers must show that mandatory retirement is rationally linked to achieving legitimate aims, which are appropriate and necessary: vague and unsubstantiated references to employment planning goals or health and safety requirements may not satisfy these requirements. Also, employers should be very careful before relying upon stereotypes about older workers. For example, the perception that older workers are inherently less productive or healthy than other workers appears to be contradicted by much of the available data.[24] As a result, it probably will not be possible to justify the use of mandatory retirement on these grounds alone.

Conclusion

As Europeans live longer and become increasingly more active in their later years, it is likely that more and more employees will wish to work beyond the relevant mandatory retirement age. European states increasingly encourage older workers to stay longer in employment in order to ensure that the European pension systems are adequately funded. Also, some older employees experience mandatory retirement as a hard blow to their self-esteem, or to their financial position. Others may feel that they have been treated as a disposable commodity, or denied the opportunity to continue their participation in work they enjoy on the basis of inflexible and unnecessary employment policies.[25] As a result, mandatory retirement ages will in all probability come to be increasingly resented and challenged by older workers.

Some concerns exist that abolishing mandatory retirement could actually have negative implications for the dignity of older workers, by enabling employers to put pressure on workers to stay in employment for longer or by encouraging employers to make more use of fixed-term contracts and individual job performance assessment. These concerns may be exaggerated, and do not appear to have been fully borne out in the US experience.[26] Some employers may need to maintain the use of mandatory retirement ages in certain circumstances. In particular, this may be necessary in professions where health and safety concerns are a serious issue and adequate and suitable individual assessment of employees is not possible.

[23] See for example the UK case of *Bloxham v Freshfields Bruckhaus Deringer* 2205086/2006 (ET), where an Employment Tribunal upheld the introduction of special transitory pension arrangements for partners of a leading London law firm over the age of 55 on the basis that this measure was objectively justified as necessary to maintain the financial well-being of the law firm's pension scheme.

[24] See P. Meadows, *Retirement ages in the UK: a review of the literature* (London: Department of Trade and Industry, 2003), pp. 15-26.

[25] See L. Friedman, *Your time will come: the law of age discrimination and mandatory retirement* (Social Research Perspectives, No. 10), (New York: Russell Sage Foundation, 1985).

[26] See Z. Hornstein (ed.) *Outlawing age discrimination: foreign lessons, UK Choices* (London: The Joseph Rowntree Foundation, July 2001).

For example, it may not be possible to consistently assess the reaction time and continued capability of air traffic controllers in a manner that respects their dignity after they reach a particular age. Alternatively, the specific nature of a particular profession may require the use of a compulsory retirement age or the imposition of maximum terms of service. The judiciary would be an example of such a profession, as may be airline pilots and other occupations with a clearly defined career progression and a narrow and limited range of top jobs which need to be opened up periodically in the interests of intergenerational equity in order for younger employees to enjoy their time in the sun. However, the requirement imposed by Directive 2000/78 for the use of mandatory retirement ages to be objectively justified may over time call into question many of the unthinking assumptions that often underlie the use of mandatory retirement in today's Europe. Taking age equality seriously means also thinking carefully about the continued use of mandatory retirement ages.

Judith | *1987*

Ruth | *1993*

Robin | *1989*

Discrimination Law – The Canadian Perspective

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Introduction

Canada is a federal state and the allocation of governmental and legislative powers between the federal Parliament and provincial Legislatures is governed by the rules of federalism under the Constitution. The *Canadian Charter of Rights and Freedoms*[28] ('*Canadian Charter*' or *'Charter'*) is part of the Canadian Constitution and, as the supreme law of Canada, overrides any statute inconsistent with its provisions. The guarantee of equality provided under section 15 of the *Charter*, in effect since 17 April 1985, ensures that, *"every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law"*. These 'four equalities' were introduced to avoid the restrictive interpretations that had plagued the Canadian Bill of Rights, enacted by Parliament in 1960, which limited judicial scrutiny to the manner in which the law was administered and consequently did not apply to substantive law. It also ensures that the guarantees extend to the discriminatory refusal to grant benefits provided by legislation. Because of Canada's federal structure, there are some 14 human rights acts across the country, the most recent being the Human Rights Act of Nunavut, which came into effect on 5 November 2004.

Main legislation

Equality rights and human rights legislation

The *Canadian Charter* applies to Parliament, Legislatures and government action, but does not extend to private acts of discrimination. Human rights legislation, often referred to as *quasi-constitutional* in nature, applies to both private and public acts and anti-discrimination provisions have implicit or express primacy over conflicting legislation. Where legislative provisions are ambiguous, they must be interpreted in a manner compatible with the *Canadian Charter* and human rights legislation.

Section 15 of the *Charter* contains a non-exhaustive list of prohibited grounds of discrimination based on *"race*[29]*, national or ethnic origin, colour, religion, sex, age or mental or physical disability"* and also covers 'analogous grounds' of discrimination held to include citizenship[30], sexual orientation[31] and 'Aboriginality-residence'[32].

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[28] The Constitution Act, 1982, Schedule B of the Canada Act 1982, c. 11 (U.K.), Part I.

[29] Protection from discrimination based on 'race' covers Aboriginal people.

[30] *Andrews* c. *Law Society of British Columbia*, [1989] 1 R.C.S. 143; *Lavoie* v. *Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23.

[31] *Egan* v. *Canada,* [1995] 2 S.C.R. 513*; Vriend* v. *Alberta*, [1998] 1 S.C.R. 493; *M.* v. *H.*, [1999] 2 S.C.R. 3 ; *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

[32] In Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, the Supreme Court of Canada found s. 77(1) of the Indian Act, which excluded off-reserve band members from voting privileges on band governance, to be inconsistent with s. 15 of the Charter. The exclusion was based on «Aboriginality-residence» which pertains to whether an Aboriginal band member lives on or off the reserve.

Unless implemented by Parliament or Legislatures, international conventions have no direct application in Canadian law[33]. However, they may serve as an interpretative device in the construction of domestic legislation[34].

Human rights legislation as we know it today in Canada was introduced in the 1960s. Typically, the wording of anti-discrimination provisions in human rights legislation contains a closed list of the prohibited grounds of discrimination that include colour, race, national or ethnic origin, religion, sex, pregnancy, civil or marital status, handicap or mental and physical disability. Although the wording may vary, most acts also provide protection from discrimination based on sexual orientation, social condition or source of income and criminal record. The activities that are covered by anti-discrimination legislation are clearly set out and usually deal with employment, housing or accommodation, contracts, goods, services and facilities ordinarily offered to the public. These in turn include social benefits, health services and education in both the private and public sphere.[35]

Hate propaganda, inciting discrimination, harassment and racial profiling

Public incitement of hatred and the wilful promotion of hatred against an identifiable group distinguished by colour, race, religion, ethnic origin or sexual orientation are classified as criminal offences.[36] Evidence that an offence (for instance, physical assault) is motivated by bias based on these grounds constitutes an aggravating factor that will usually lead to more severe punishment.[37]

Inciting discrimination through the use of signs, notices or symbols is generally prohibited by human rights legislation, but requires some evidence of coercion. In some instances, the legislation further prohibits statements, publications or messages that are likely to expose a person or class of persons to hatred or contempt. The *Canadian Human Rights Act* (*CHRA*) specifically allows the Canadian Commission and Tribunal to deal with complaints regarding the communication of hate messages by telephone and the Internet.

Harassment based on a prohibited ground of discrimination constitutes a form of discrimination and is therefore prohibited. Employers and institutions, such as school boards, have a duty to maintain an environment free of discrimination.[38]

Racial profiling practices have been addressed in criminal, civil and administrative proceedings. Incriminating evidence obtained as a result of racial profiling has been excluded from evidence[39] on the

33 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. http://scc.lexum.umontreal.ca/en/1999/1999rcs2-817/1999rcs2-817.pdf

34 Canada is a party to various international human rights treaties including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights,* the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention of the Elimination of All Forms of Discrimination Against Women* and the *Convention on the Rights of the Child.*

35 In Quebec, Saskatchewan and the Yukon, the legislation also contains a Charter or Bill of Rights, thus covering a wider range of rights than the right to non-discrimination.

36 *Criminal Code,* s. 319. See, for example, *R. v. Keegstra*, [1990] 3 S.C.R. 697 http://scc.lexum.umontreal.ca/en/1990/1990rcs3-697/1990rcs3-697.pdf

37 *Criminal Code,* s. 718.2(a)(i).

38 *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, para. 50.

39 *R.* v. *Khan* [2004] O.J. No. 3819 (Ont. C.J.) and *La Reine* c. *Campbell, Alexer*, C.Q. Montréal, n° 500-01-004657-042-001 27 January 2005, Westmoreland-Traoré J.; Similarly, *R.* v. *Brown* (2003-04-16) ONCA C37818.

grounds that the use of such evidence would likely bring the administration of justice into disrepute under s. 24 (2) of the *Canadian Charter.* Racial profiling is also regarded as a form of discrimination.[40]

Religious discrimination

In addition to the guarantee of equality without discrimination based on religion, s. 2(a) of the *Canadian Charter*[41] also guarantees freedom of conscience and religion, rights which are sometimes viewed as interchangeable and argued in combination with one another. Religious freedom entails both a subjective and an objective component and has been defined as follows: *"freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials."*[42] Relying on this extensive definition of the freedom of religion, the Supreme Court of Canada (SCC) has found that a public school commission's decision to prohibit a young orthodox Sikh from wearing a kirpan to school infringed his freedom of religion without reasonable justification and was, therefore, in violation of the *Canadian Charter*.[43]

Disability

Although statutes such as building codes and municipal by-laws require the removal of physical access barriers and the duty to avoid new barriers, they do so in a limited way. Also, persons with disabilities still face systematic exclusion from regular public transit. Anti-discrimination provisions and the duty of reasonable accommodation therefore constitute important means by which to challenge existing barriers preventing persons with disabilities from equal access to public spaces and services, as well as employment opportunities. Reinforcing the rights of the disabled, the SCC ruled, in *Via Rail*[44], that where there is a conflict between human rights law and other specific legislation, human rights legislation must govern as a collective statement of public policy. Standards must be as inclusive as possible and there is a duty to prevent new barriers.[45]

[40] Commission des droits de la personne et des droits de la jeunesse, *Racial profiling: context and definition*, Michèle Turenne, 2005, p. 18. The Quebec Human Rights Commission defines 'racial profiling' as follows:
"Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.
Racial profiling includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed."

[41] *Canadian Charter,* s. 2(a).

[42] *Syndicat Northcrest v. Amselem*, 2004 SCC 47, para. 46 (the case involved the unjustified refusal to allow owners of a condominium in a luxurious building to set up a Succah (temporary dwelling or structure) during the Jewish religious festival of Succot). http://scc.lexum.umontreal.ca/en/2004/2004scc47/2004scc47.pdf

[43] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, http://scc.lexum.umontreal.ca/en/2006/2006scc6/2006scc6.pdf

[44] *Council of Canadians with Disabilities* v. *Via Rail Canada Inc.*, 2007 SCC 15, http://scc.lexum.umontreal.ca/en/2007/2007scc15/2007scc15.pdf

[45] *Via Rail,* para. 186.

The SCC has also adopted a broad approach in addressing the scope of the protection from discrimination based on 'handicap' or 'disability' extending it to any handicap or disability that may be the "result of a physical limitation, ailment, social construct, perceived limitation or a combination of all of these factors"[46]. In a case involving the integration of a disabled child into a regular class, the SCC found that there was no presumption in favour of the regular classroom setting for children assigned to special-education programmes. Moreover, a school board's duty is determined according to the best interests of the child.[47]

Sexual orientation

The interplay between the *Canadian Charter* and human rights legislation is well illustrated by the SCC decision to 'read in' the ground of sexual orientation into the Alberta *Individual's Rights Protection Act*, which did not afford adequate protection from discrimination based on sexual orientation.[48] Once the State provides a benefit, it is obliged to do so in a non-discriminatory manner.[49] The SCC has also confirmed the constitutionality of legislation concerning same-sex marriages, stating that Parliament has the legislative competence to define marriage and to determine who has the legal capacity to marry.

Age

Mandatory retirement is generally regulated by human rights legislation or legislation regarding employment standards. Until recently, with the exception of Quebec and Manitoba,[50] protection from discrimination based on 'age' was in many jurisdictions limited to persons between the ages of 18 (or 19) and 65 years. In the 1990s, the Supreme Court of Canada found that mandatory retirement policies regarding university and college professors in particular were justified under the *Canadian Charter*. Nonetheless, the trend in recent years has been to strengthen human rights legislation in order to prohibit mandatory retirement in most jurisdictions in Canada. The legislation often states that these provisions do not necessarily affect the operation of a genuine pension or superannuation plan that is reasonable and bona fide.
It is worth noting that s. 48 of the *Quebec Charter of Human Rights and Freedoms* also protects against all forms of 'exploitation' of the elderly and disabled persons.

Definitions

Reprisals and the threat of reprisals resulting from the exercise of rights are prohibited in all jurisdictions. Human rights legislation in Canada prohibits discrimination based on assumed or perceived characteristics. In theory, it also prohibits discrimination by association,[51] but in practice the principle is rarely used. This is perhaps because the wording of anti-discrimination legislation lends itself more easily to an intersectional approach to discrimination[52] as well as complaints based on multiple grounds.

46 *Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Boisbriand (City)*, 2000 SCC 27, http://scc.lexum.umontreal.ca/en/2000/2000scc27/2000scc27.pdf

47 *Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241, http://scc.lexum.umontreal.ca/en/1997/1997rcs1-241/1997rcs1-241.pdf

48 *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, http://scc.lexum.umontreal.ca/en/1998/1998rcs1-493/1998rcs1-493.pdf

49 *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 http://scc.lexum.umontreal.ca/en/1997/1997rcs3-624/1997rcs3-624.pdf

50 Where mandatory retirement has long been prohibited by law.

51 Discrimination by association is expressly prohibited under, for instance, the Ontario Human Rights Code, s. 12.

52 See the Ontario Human Rights Commission definition of 'intersectional discrimination': http://www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtnts/view

For instance, cases involving parental duties and care for a child with a disability have mostly been dealt with under the double heading of 'disability' and 'family status'.[53]

Canadian law recognises three forms of prohibited discrimination. *'Direct discrimination'* occurs where an employer[54] adopts a practice or rule which on its face discriminates on a prohibited ground. *'Adverse effect discrimination'* or *'indirect discrimination'*[55] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral but which has a discriminatory effect on an employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.[56]

'Systemic discrimination', the third form of discrimination, is distinct from the second in that evidence of a specific rule or standard with a discriminatory effect need not necessarily be established by the plaintiff. It may be the result of numerous factors and institutional practices which interact in a manner that leads to the disproportionate exclusion of protected group members.[57] Courts have held that systemic discrimination results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. This is why courts have held that it is important to look at the results of a system.[58]

Where there is a constitutional challenge to legislation or government action, section 15 of the *Canadian Charter* guarantees not only the right to formal equality but also the right substantive equality.[59] Thus, the *Charter* protects not only against an intentional violation of *Charter* rights but also against laws and government action which *in fact* create inequality. A frequently quoted principle states that, *"the interests of true equality may well require differentiation in treatment".*

In order to show a violation of the right to equality under s. 15, the claimant must not merely establish a distinction based on a listed or analogous ground: the distinction must also constitute a 'violation of human dignity'.[60] The *human dignity* standard has been severely criticised because of the limitation brought to the equality rights provision and the added burden placed on claimants, which have led to the dismissal of applications without requiring that the government adduce evidence to justify the

53 *Health Sciences Assn. of BC* v. *Campbell River and North Island Transition Society* (2004), 50 C.H.R.R. D/140, 2004 BCCA; *Hoyt* v. *Canadian National Railway (No. 2)*, 2006 CHRT 33;*Johnstone v. Canada (Attorney General)*, 2007 FC 36.

54 Although defined in employment cases, the principles of direct and indirect discrimination similarly apply to other activities.

55 The expression 'constructive discrimination' is also used in Ontario.

56 *O'Malley* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, p. 551.

57 See definition of systemic discrimination adopted by the Quebec Human Rights Tribunal in *CDP (Rouette)* c. *Commission scolaire régionale Chauveau*, http://www.canlii.org/fr/qc/qctdp/doc/1993/1993canlii7/1993canlii7.html

58 Action Travail des Femmes v. Canadian National Railway, et al., [1987] 1 S.C.R. 1114, 1139. Similarly, see National Capital Alliance on Race Relations and the Canadian Human Rights Commission v. Canada (Health and Welfare) (1997), 28 C.H.R.R. D/179 (Can. Tribunal), involving allegations of racial discrimination. A recent decision dated September 11, 2008, provides a detailed analysis of the nature and scope of systemic discrimination in a case based on the exclusion of women from male-dominated jobs : Commission des droits de la personne et des droits de la jeunesse c. Gaz métropolitain inc., 2008 QCTDP 24 http://www.canlii.org/fr/qc/qctdp/doc/2008/2008qctdp24/2008qctdp24.pdf

59 *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, http://scc.lexum.umontreal.ca/en/1989/1989rcs1-143/1989rcs1-143.pdf

60 This requirement has been set out as part of the test developed by the SCC in *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, http://scc.lexum.umontreal.ca/en/1999/1999rcs1-497/1999rcs1-497.pdf

distinction. The *Law* test has been described by one constitutional expert as, *"vague, confusing and cumbersome to equality claimants"*.[61]

Not surprisingly, there has been a reluctance to incorporate the human dignity test into the definition of discrimination under human rights legislation. At present, most courts have found that, with the exception of cases involving a challenge to discriminatory legislation, the elaborate test required to determine whether the dignity interest of the claimant is engaged, will not be appropriate.

Special measures and affirmative action programmes

According to s. 15(2) of the *Canadian Charter*[62], the principle of equality does not preclude positive action programmes established in favour of disadvantaged groups or individuals. Thus, where the conditions of s. 15(2) are met, affirmative action or equity programmes will not be deemed contrary to s. 15(1) of the *Charter*.[63] To date, s. 15(2) has not been given independent application, but has often been used as an aid to the interpretation of the rights under s. 15(1). This provision combined with the substantive approach to equality also seem to have discouraged extensive use of 'reverse discrimination' challenges which are relatively rare in Canadian law.

The promotion of human rights through *proactive* legislation remains an important feature in some jurisdictions. In 2000, Quebec enacted the *Act Respecting Equal Access to Employment in Public Bodies*, under which public bodies and organisations with over 100 employees must implement an affirmative action programme in case of under-representation.[64] Federally regulated employers are covered by the *Employment Equity Act*[65] and both Quebec and the federal government administer contract compliance programmes.

Exceptions and exemptions

Although rarely used, there are provisions enabling Parliament or Legislatures to override *Charter* rights. The statute must express in clear terms that it operates notwithstanding the right to equality and the protection from discrimination. Under s. 33 of the *Charter* such acts are moreover subject to a sunset clause.

In general, the right to equality and non-discrimination is not absolute: constitutionally entrenched *Charter* rights are subject, under section 1, *"to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"*. While the burden of showing a breach of the *Charter* rests on the person asserting the right, it is for the government to persuade the court, by a preponderance of probability, that the breach is justified.[66] Essentially, the government must establish that the objective sought by the legislation is sufficiently important to warrant a limitation on a constitutionally protected right, that the measure is rationally connected to the objective and that the legislative restriction is proportional to the objective sought by the legislature.

61 Hogg, Peter W., *Constitutional law of Canada*, 3rd ed., (Toronto: Carswell, 1992), 52.24.

62 S. 15 (2) reads as follows: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

63 Human rights legislation similarly permits special programmes designed to assist or improve the condition of disadvantaged groups.

64 The target groups are women, Aboriginal peoples, disabled persons and visible minorities.

65 S.C. 1995, c. 44.

66 The criteria that must be met to establish that the limitation is justified are set out in *R.* v. *Oakes*, [1986] 1 S.C.R. 103 and *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

Under human rights legislation, where a complainant has made out a *prima facie* case of discrimination, it is then open for the respondent to show that the rule, practice or policy is justified. In such cases, the respondent carries the burden of showing, on a balance of probabilities, that the measure is justified as a bona fide occupational requirement. In the 1999 case of *Meiorin*[67], the SCC examined the practical difficulties of the conventional method of analysis which had previously drawn a distinction between the defence available in a case of direct discrimination and the defence used to justify adverse effect discrimination. Finding that the distinction was often artificial and ultimately compromised the broad purposes of human rights legislation aimed at the elimination of discriminatory practices, the court adopted a unified approach involving a three-pronged test of justification now used irrespective of the manner in which the discrimination is expressed.

According to the three-step test, an employer may justify the impugned standard by establishing on the balance of probabilities: (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[68]

The same principle applies in the context of the provision of goods and services,[69] housing and education.

Reasonable accommodation

'Accommodation' refers to that which is required in the circumstances to avoid or limit the negative consequences resulting from discrimination. Where a discriminatory effect is established, the defendant must show that the standard is reasonably necessary to accomplish its purpose and that he or she cannot accommodate persons with the characteristics of the claimant without undue hardship. Although expressly provided by legislation in some jurisdictions, the concept of reasonable accommodation is largely one developed by the case-law as an integral part of the bona fide occupational requirement ('bfor') defence discussed above. The principle of reasonable accommodation theoretically applies to all grounds of discrimination,[70] but is most frequently used in matters involving disability, religion and pregnancy.

Although the principle of accommodation seems to focus on finding a means to accommodate individuals on a case by case basis, employers and others governed by human rights legislation are required *in all cases* to accommodate affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. In other words, the principle of reasonable accommodation requires that standards must be as inclusive as possible.[71]

67 *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU,* [1999] 3 S.C.R. 3.

68 *Ibid.,* para. 50 and 54.

69 British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868 (Grismer), http://scc.lexum.umontreal.ca/en/1999/1999rcs3-868/1999rcs3-868.pdf

70 However, see *Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Maksteel Québec Inc.*, [2003] 3 S.C.R. 228, where the SCC refused to apply the concept of accommodation in a Quebec case involving the dismissal of an employee convicted of an offence and incarcerated.

71 *Grismer*, at para. 22.

In addition to defences based on bona fide occupational requirements, human rights legislation usually provides an exemption where the exclusion or distinction is justified by the charitable, philanthropic, religious, political or educational nature of a non-profit organisation or one devoted exclusively to the well-being of an ethnic group. While the wording may vary considerably from one jurisdiction to the other, human rights legislation also provides exceptions where insurance, pension or other benefits differentiate on the basis of a prohibited ground of discrimination but where the distinction is deemed reasonable and bona fide.

Enforcement and remedies

Human rights legislation does not provide for a reversal on the complainant's initial burden of proof. However, case-law has established that defendants must provide a credible explanation for the exclusion where the plaintiff has made out a *prima facie* case of discrimination. The proof must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities. Where the defendant raises a defence of justification, the onus falls on him or her to justify the discriminatory rule or practice on a balance of probabilities. A right of action based on a tort of discrimination does not exist in common law jurisdictions in Canada.[72] With the exception of Quebec,[73] specialised human rights tribunals have traditionally had exclusive jurisdiction to decide discrimination cases. Under the 'traditional' model, gate-keeping functions were conferred on human rights commissions, with the power to investigate and mediate complaints. Cases would then be referred to the tribunal where the evidence was sufficient to warrant a hearing. In recent years, new models allowing increased access to human rights tribunals have been developed mostly in response to criticism relating to the screening function exercised by commissions.

At the same time, courts have increasingly favoured "a general culture of respect for human rights throughout the entire administrative system" by recognising that administrative tribunals, which have the jurisdiction to decide questions of law, also have the authority to decide constitutional and human rights issues raised by the parties before them.[74] The SCC has also held[75] that the substantive rights and obligations of human rights legislation are incorporated into collective agreements over which labour arbitrators have jurisdiction.

In some instances,[76] the SCC has held that administrative tribunals have exclusive jurisdiction to hear a complaint of discrimination and that the proceedings before the specialised human rights tribunal should be stopped. This has given rise to considerable uncertainty as well as extensive litigation regarding jurisdictional issues and the most appropriate forum for hearing matters of discrimination.

[72] The Supreme Court of Canada was recently asked to revisit this issue, but refused to do so in *Honda Canada* inc. v. Keays, 2008 SCC 39, http://scc.lexum.umontreal.ca/en/2008/2008scc39/2008scc39.pdf

[73] The *Quebec Charter of Human Rights and Freedoms* gives the individual the option of going directly before the courts or filing a complaint of discrimination with the Human Rights Commission (Commission des droits de la personne et des droits de la jeunesse). Where the evidence is sufficient to take the matter further, an application may be filed with the Human Rights Tribunal.

[74] *Nova Scotia (Workers' Compensation Board)* v. *Martin; Nova Scotia (Workers'* Compensation *Board)* v. *Laseur,* [2003] 2 S.C.R. 504, 2003 SCC 54. http://scc.lexum.umontreal.ca/en/2003/2003scc54/2003scc54.pdf

[75] *Parry Sound (District) Social Services Administration Board* v. *O.P.S.E.U., Local 324*, [2003] 3 S.C.R. 157. http://scc.lexum.umontreal.ca/en/2003/2003scc42/2003scc42.pdf

[76] See *Quebec (Attorney General)* v. *Quebec (Human Rights Tribunal)*, 2004 SCC 40 and *Canada (House of Commons)* v. *Vaid*, 2005 SCC 30.

Human rights boards and tribunals usually have the power to issue cease and desist orders, to make available the rights denied, to award special damages for lost earnings, general damages for humiliation and hurt feelings, as well as exemplary damages for an intentional or reckless breach of the act. Courts have held that the purpose of compensation under human rights legislation is to restore complainants as far as is possible to the position they would have been in had the discrimination not occurred. In some jurisdictions, human rights tribunals also have the power to order special measures or affirmative action programmes as an appropriate remedy based on public interest.

Under human rights legislation a person or group of persons may file a complaint of discrimination.[77] Organisations may file a complaint on behalf of others but the consent of the individuals alleged to have been discriminated against may be required. In addition, organisations or unions may seek leave to obtain intervener status before the tribunal.

Equal treatment bodies

All jurisdictions, with the exception of British Columbia,[78] have human rights commissions with a mandate relating to the promotion and protection of human rights.[79] In general,[80] commissions have the power to investigate and mediate complaints of discrimination and to refer cases to the human rights tribunal. They have the authority to review legislation and make recommendations to the government, and to engage in education, policy development, research and cooperation with organisations including NGOs. The degree of independence enjoyed by commissions varies. For instance, in some jurisdictions annual reports are filed through the Attorney General whereas in others, for example Quebec, the annual report is filed to the president of the National Assembly.

77 The *Saskatchewan Human Rights Code* expressly allows class action complaints. Other jurisdictions and in particular Quebec, Ontario and British Columbia have enacted comprehensive statutory schemes governing class action practice, however, the rules do not apply to specialised human rights tribunals.

78 It may be argued that this situation is contrary to the *Principles relating to the status and functioning of national institutions for protection and promotion of human rights* (Paris Principles) endorsed by the United Nations General Assembly in 1993.

79 These bodies usually deal with the wide range of grounds of discrimination prohibited by their respective laws. It may be argued that such a broad mandate generally facilitates an intersectional approach to discrimination as well as an approach based on multiple grounds. Nor does this system prevent the creation of specific departments within a given organisation. Recent amendments to the *Ontario Human Rights Code* provide for an Anti-Racism Secretariat and Disability Rights Secretariat within the Human Rights Commission. Finally, specialised bodies, such as the Office des personnes handicapées du Québec, see to the development and implementation of programmes aimed at the social integration of persons with disabilities in schools and the workplace.

80 The *Ontario Human Rights Code* has recently been amended (Bill 107), revising the functions of the Ontario Human Rights Commission and providing that applications for infringements of rights under the Code be directly made to the Human Rights Tribunal. Although the complaints process has been eliminated, the Commission will still have inquiry powers in matters relating to public interest.

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The liability of legal persons in anti-discrimination law

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1. Introduction

This article addresses the question of the liability of legal persons under the national legislations implementing the Racial Equality and the Employment Equality Directives. This question matters particularly in the context of employment discrimination, where the question arises of the respective liabilities of, on the one hand, the employer (typically an undertaking or an organisation with a legal personality) and, on the other hand, the direct perpetrator of a discriminatory conduct prohibited under the Racial Equality Directive or the Employment Equality Directive (an individual whose liability may or may not be engaged in addition to, or instead of, that of the employer).

Both the Racial Equality Directive and the Employment Equality Directive require that, when the employer or another person to whom the Directives apply commits discrimination, it should result not only in the imposition of sanctions at least equivalent to those imposed for violations of similar provisions of national legislation (principle of equivalence), but that the perpetrator should also be subjected to effective, proportionate and dissuasive sanctions (principle of effectiveness).[81] There are instances envisaged under the Directives where the organisation as employer, rather than any particular individual implementing the employer's policy, is clearly directly liable for the discriminatory act. Examples of this include where a company introduces an occupational requirement imposing a particular disadvantage on a category of persons defined by a 'suspect' characteristic, beyond the limits authorised by the Directives[82]; where the company refuses to provide the accommodation required for a person with a disability to gain access to employment, although this would not impose a disproportionate burden on the company[83]; where a company employs victimisation measures against an employee who has filed a complaint for discrimination[84]; or where provisions contrary to the principle of equal treatment are included in contracts or in the internal rules of the company.[85]

In all the above instances, the employer as such will be sanctioned through the imposition of criminal, administrative or civil liabilities. Whether it is a department of the State (in the public sector) or a private undertaking (in the private sector), it is the organisation which has adopted certain measures and it is the organisation on which, therefore, certain sanctions should be imposed.

81 Article 17 of the Employment Equality Directive; Article 15 of the Racial Equality Directive. See, for an overview, C. Tobler, *Remedies and sanctions in EC non-discrimination law*, European Network of Legal Experts in the Non-Discrimination Field, DG Employment and Social Affairs, June 2005.

82 Articles 2(2)(b) and 4 of the Employment Equality Directive; Articles 2(2)(b) and 4 of the Racial Equality Directive.

83 Article 5 of the Employment Equality Directive.

84 Article 11 of the Employment Equality Directive; Article 9 of the Racial Equality Directive.

85 Article 16(2) of the Employment Equality Directive (stipulating that such provisions should be declared null and void, or be amended); Article 14(2) of the Racial Equality Directive (making the same stipulation).

Not all cases are as clear-cut, however. For example, direct discrimination may be committed by an employee who is in charge of the recruitment process within a company or whose duty it is to interview candidates for employment. Alternatively, it may be committed by a consulting firm which only has a contractual relationship with the employer, for instance when such firms are to pre-screen applications prior to submitting them to the employer. Under the Racial Equality Directive, instances could occur where the head teacher of a state school might seek to dissuade Roma parents from registering their child at the school, without this being the actual stated policy of the department of education under whose auspices the school operates.

In such circumstances, two questions should be asked. First, may it be inferred from the Directives that the organisation as employer or, as the case may be, the person who requested that a particular task be performed (as in the case of the recruitment being outsourced to a consulting firm distinct from the company seeking to recruit) should be held liable where discrimination has occurred, either jointly with or separately from the direct perpetrator of the discrimination? Secondly, what are the pros and cons of imposing such liabilities on the employer or the person for whom a particular task is performed? This second question should take into account the fact that the organisation 'behind' the particular discriminatory act is generally a legal person (whether it is the State, a public or private undertaking or another non-governmental organisation), whereas the direct perpetrator of the discriminatory act is a natural person. There are both advantages and difficulties in imposing liabilities on such legal persons, instead of, or in addition to, imposing them on the individuals who are the direct perpetrators of the discriminatory act. In identifying the pros and cons of different approaches, the balance of interests will vary, depending on whether the sanctions are of a civil, administrative or criminal nature.

The following sections first examine the framework set by the Equality Directives. Section 2 discusses the allocation of responsibilities between the natural person (the direct perpetrator of the discrimination) and the legal person (the organisation of which the direct perpetrator of the discrimination is the agent or against whose conduct the organisation failed to provide protection). Section 3 addresses the question of the effectiveness of the sanctions which may be imposed, respectively, on both actors. Finally, Section 4. examines the remaining areas of controversy, given this framework.

2. The allocation of responsibilities between the direct perpetrator of the discrimination and the organisation

As a general matter, the Directives do not specify under which conditions the EU Member States should divide the liabilities between (a) the direct perpetrators of the discriminatory acts the Directives seek to prohibit and (b) the legal persons of whom the perpetrators are the employees or with whom they have entered into other forms of contractual relationships. In principle, it is therefore for each Member State, in its domestic legislation, to decide which regime to adopt in this regard. The only exception is that an *instruction to discriminate* is considered a form of prohibited discrimination[86]. Thus, if an employer instructs its employees to implement discriminatory procedures for the selection or promotion of personnel (even where such instructions are not explicitly formulated as part of the policy of the organisation) or if it outsources certain functions with an understanding that the person to whom these functions are delegated will discriminate, the employer itself should be found liable, and effective, proportionate and dissuasive sanctions should be imposed on it.

[86] Article 2(4) of the Racial Equality Directive; Article 2(4) of the Employment Equality Directive.

The notion of an instruction to discriminate has a certain ambiguity attached to it.[87] In principle, though, it would seem to suggest that it requires that steps be taken by one person 'instructing' another, ordering or at least (in the absence of hierarchical relationship between the two parties) encouraging another person to commit discrimination. This overlaps with certain forms of complicity in criminal law: in general, the 'accomplice' is someone who, *inter alia*, by inducements or orders, provokes the commission of an offence or gives instructions to commit an offence. In addition, a number of EU Member States criminalise the 'incitement' to discriminate on grounds of race and ethnicity, since this is required under the International Convention on the Elimination of All Forms of Racial Discrimination.[88] However, for complicity in the commission of a criminal offence to give rise to liability, it is generally required that a discriminatory act has effectively taken place (in other terms, the complicity does not exist as a criminal offence independently of the main offence); and incitement, in general, will be punishable only if certain conditions of publicity are fulfilled. Therefore, even in Member States where discrimination on the grounds listed under Article 13 EC is defined as a criminal offence, the *independent* liability for having 'instructed to discriminate' – which does not require that such instruction has in fact been complied with and to which no condition of publicity is attached – will require more than mere reliance on the general provisions of the Penal Code concerning complicity or incitement.

It would stretch the terms of the notion of 'instruction' to extend this prohibition to situations where the employer has not exercised due diligence in seeking to prohibit discriminatory conduct by its employees or business partners. However, all Member States do recognise the principle of vicarious liability, which provides for the liability of employers for anything done by an employee in the course of his or her employment, unless the employer can prove that it took reasonably practicable steps to prevent the discrimination. In the United Kingdom for example, the *Race Relations Act 1976* (RRA) has been relied on by workers who have been subjected to racial harassment by their fellow employees, in order to engage the liability of the employer.[89] A similar rule is contained, *inter alia*, in the *Employment Equality (Sexual Orientation) Regulations 2003*,[90] under which employers and contract principals and their agents are vicariously liable under Reg. 22 for anything done by a person 'in the course of his employment', whether or not it was done with their knowledge or approval. In such cases, it is a defence for an employer or principal to show that he/she took such steps as were 'reasonably practicable' to prevent the employee from committing such an act.

87 The notion of an 'instruction to discriminate' is not addressed in the Preamble of the Directives. Nor is it discussed in the initial proposals put forward by the European Commission (see COM(1999) 564 final, 25.11.1999, and COM(1999) 565 final, 25.11.1999). We should therefore be guided in our understanding of the expression by the plain meaning of the Directives.

88 See Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, in force since 4 January 1969). The Luxembourg Council of State, for instance, in its opinion on the transposition of the Directives, explicitly noted that the notion of 'instruction to discriminate' is similar to the 'incitement' to discriminate criminalised under Art. 457-1 of the Penal Code. See D. Schiek, L. Waddington and M. Bell (eds), *Non-discrimination law*, Hart Publishing, 2007, pp. 569-570.

89 *Jones v. Tower Boot* [1997] IRLR 168.

90 See the Employment Equality (Sexual Orientation) Regulations 2003, Statutory Instrument 2003 No.1661 (01.12.2003), available at: http://www.opsi.gov.uk/si/si2003/20031661.htm (15.02.2008). In order to make very minor amendments to these regulations, additional legislative measures were later adopted for Great Britain by way of the Employment Equality (Sexual Orientation) Regulations 2003 (Amendment) Regulations 2003, Statutory Instrument 2004 No. 2827 (01.12.2003), available at: http://www.opsi.gov.uk/si/si2003/20032827.htm, and the Employment Equality (Sexual Orientation) Regulations 2003 (Amendment) Regulations 2004, Statutory Instrument 2004 No. 2519 (01.10.2004), available at: http://www.opsi.gov.uk/si/si2004/20042519.htm (15.02.2008).

However, the principle of vicarious liability of the employer for the acts of the employee does not necessarily extend to the situations where certain tasks are outsourced to a sub-contractor, unless specific instructions are given to that sub-contractor to discriminate. In other words, while a duty of care is imposed on the employer to control the behaviour of its employees, no such duty will, in principle, be imposed to monitor the conduct of the sub-contractor – for instance, the procedures followed by the consulting firm which selects personnel on behalf of a company. This distinction follows from the fact that employees work under the direct supervision of the employer. It is premised on the idea that the employment contract includes a commitment imposed on the employee to follow the employer's instructions.

3. The sanctions imposed on the direct perpetrator of the discrimination and the organisation

How the EU Member States allocate responsibilities between, on the one hand, the natural person who is the direct perpetrator of the discrimination and, on the other hand, the organisation, matters most because of the sanctions which can attach to both forms of behaviour. Indeed, where the victim of discrimination can trigger the liability of the legal person – the organisation behind the individual act of its employee, typically – the scope of remedies available may change significantly.

Sanctions belong to three categories. When imposed on legal persons, just as for natural persons, they may be civil (damages), administrative (such as exclusion from public contracts; exclusion from entitlement to tax benefits or other forms of public aid; temporary or permanent disqualification from the exercise of certain commercial activities; being placed under judicial supervision; imposition of a judicial winding-up order; or temporary or definitive closing of the establishments used to commit the offence) or criminal (criminal fines or any of the administrative sanctions enumerated above under a penal qualification). Where only civil sanctions are available, the much larger financial means of the organisation, as compared to those of the individual wrongdoer, will typically lead courts to allocate higher damages. Where administrative or criminal sanctions are available against the organisation, the dissuasive effect may be much more significant.

At the same time, as regards legal persons, the classification of sanctions as criminal, administrative or civil should be relativised. First, the most important sanction for the organisation, in most cases, will be the damage to its reputation resulting from a finding of discrimination, rather than the effective disbursement, for instance, of damages or criminal fines. Secondly, the nature of these various sanctions does not differ significantly: for instance, little distinguishes the damages to be paid following civil proceedings from the fine resulting from a criminal prosecution. In fact, what matters most are the differences between the various procedures for the adoption of the available sanctions. While this, of course, depends on the national legal system in question, it will not always be the case that criminal sanctions, by definition, will be more effective and dissuasive. It may be, for instance, that the civil parties – the victims of the behaviour of the corporation – will find it preferable not to have to depend on the initiatives of the public prosecutor, where they cannot directly oblige the investigating judge to commence an investigation, and would opt rather for a civil approach under which their own initiatives will play a more decisive role. It may also be that the rules of the criminal procedure, based on the need to respect the presumption of innocence and the principle of legality, will make it more difficult to prove certain events which may trigger the (criminal) liability of the enterprise, whereas the civil route would not encounter similar obstacles.

However, where discrimination is defined as a criminal offence, specific questions emerge, which deserve a separate comment. While most of the EU Member States have accepted the idea that legal persons may commit criminal offences, and thus be prosecuted and have sanctions of a criminal nature imposed on them, this is not the case for all of them.[91] Certain legal systems which oppose the idea argue that a legal person cannot have a mind of its own and cannot therefore have criminal intent (*societas delinquere non potest*). This would appear to be the case in the Czech Republic, Latvia and the Slovak Republic.[92] Two problems result from this situation.

First, there is the question of impunity for legal persons who commit or participate in, what is a criminal offence in one Member State, but who are domiciled under the jurisdiction of a State which does not provide for the criminal liability of legal persons – for example, where a company incorporated in Latvia, where legal persons are not criminally liable, commits discrimination in operations which it conducts in another Member State where discrimination is defined as a criminal offence.[93] Of course, the possibility cannot be excluded that such a company's role in the commission of the criminal offence will be investigated, and perhaps prosecuted, in the other EU Member State, either because the legislation in that Member State does not require the presence on the territory of the accused in order for such investigations or prosecutions to be initiated, or because the Member State has a broad understanding of the requirement of 'presence' as regards legal persons – not assimilating 'presence' to 'incorporation' but seeing it, for instance, as equivalent to the existence, under the jurisdiction of the forum State, of certain assets, or as requiring only a continuing business relationship with that State.

It is here, however, that we encounter a second problem. For the argument according to which the fact that a company has certain assets under the jurisdiction of the forum State, allowing that State to enforce any criminal sanctions its courts might have decided to inflict, is of course limited to situations where such sanctions do not require the cooperation of other States where the corporation has deployed its activities in order to be executed. But in certain cases, such cooperation will be required. The fact that the EU Member States have different approaches as regards not only the principle of criminal liability of corporations, but also the nature of the legal sanctions applicable to any offences they may have been found to have committed, may constitute an obstacle to such cooperation. This is what the European Commission is alluding to in the following:

There are no general instruments providing for common sanctions applicable to legal persons. It must be remembered that most legal persons have activities and assets in several Member States. If these measures are not available in all the Member States, there is a risk that legal persons will relocate their activities and or assets in the Member State where the risk of penalty is lowest or even non-existent.[94]

91 See generally S. Adam, 'Le droit européen et la responsabilité pénale des personnes morales', *Journal des tribunaux-droit européen,* 2006, pp. 200-204.

92 Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings (SEC(2006) 525) (COM(2006)187 final of 02.05.2006). Cf. Commission of the European Communities, *Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, COM(2004)334 final of 30.4.2004, p. 31 (where Greece, Germany, Luxembourg and Italy were referred to as unwilling to allow for the criminal liability of legal persons) and, for a similar finding, see D. Vandermeersch, 'La dimension internationale', in M. Nihoul (dir.), *La responsabilité pénale des personnes morales en Belgique*, Bruges, La Charte, 2005, p. 358.

93 The European Commission included the following question in its consultation document on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union: "To what extent should divergences between national rules governing the criminal or administrative liability of legal persons be narrowed, particularly to avert the risk of criminals relocating their activities in the field of financial crime?" (*Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, cited above, p. 53).

94 *Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, cited above, p. 52.

As its title indicates, the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties[95] seeks to facilitate the enforcement of financial penalties in a Member State other than the State in which the penalties are imposed, through the mechanism of mutual recognition. A decision imposing such penalties, along with the prescribed certificate, is transmitted to the competent authorities of the Member State in which the natural or legal person against whom a decision has been passed has property or income, is normally resident or, in the case of a legal person, has its registered headquarters. That Member State in turn recognises the decision which has been adopted and takes all the necessary measures for its execution without any further formality being required, unless the competent authority decides to invoke one of the grounds for non-recognition or non-execution.[96] A number of criminal offences, including 'racism and xenophobia', if they are punishable in the issuing State and as they are defined by the law of the issuing State, shall be recognised and enforced without verification of the double criminality of the act.[97] As regards other offences, the recognition and execution of decisions imposing financial penalties may be subject to the condition that the decision is related to conduct which would constitute an offence under the law of the executing State.[98]

This Framework Decision ensures that, at the latest after 2012,[99] where an EU Member State finds a legal person criminally liable for any offence listed in Article 5(1), the EU Member State where that legal person is incorporated is obliged to cooperate in the execution of the sanction imposing financial penalties, whether or not that State provides for the criminal liability of legal persons, and whether or not, if it does provide in principle for such liability, the offence in question may be committed by a legal person in its own legal order. This is a promising development, as it illustrates that it is possible, from both the political and the legal point of view, to overcome the differences of approaches between the EU Member States as regards the criminal liability of legal persons through the mechanism of mutual recognition.
At the same time, one obvious limitation is that this instrument applies only to *financial penalties* and not to other sanctions which may be applied to legal persons found guilty of a crime. Until further harmonisation is reached on the nature of such sanctions,[100] it is uncertain whether it will be possible to extend the principle of mutual recognition beyond financial penalties – which, as we have seen, are only one of the possible sanctions to be adopted against legal persons guilty of discriminatory conduct. This is a serious difficulty. It would be in violation of the principle of legality to allow for the execution, in any State, of a criminal sanction imposed following a conviction in another State, in the absence of a specific text providing for such a possibility. But apart from the recent Framework Decision on the application of the principle of mutual recognition to financial penalties, such texts do not exist concerning the

95 OJ L 76 of 22.03.2005, p. 16.

96 See, on the transmission of such decisions, their recognition and execution, Articles 4 and 6 of the Framework Decision.

97 Article 5(1) of the Framework Decision. This list may be extended by the Council following an evaluation of the application of the Framework Decision in 2012, five years after the implementation measures must have been adopted: see Article 5(2).

98 Article 5(3) of the Framework Decision.

99 With regard to legal persons, Article 20(2) of the Framework Decision allows each Member State, for a period of up to five years from the date of entry into force of the Framework Decision (22 March 2007), to limit the application of the Framework Decision to decisions related to conduct for which a European instrument provides for the application of the principle of liability of legal persons: see Article 20(2) of the Framework Decision).

100 The European Commission has suggested that, "As is the case for financial penalties, thought might be given to approximating sanctions ordered against legal persons where this is indispensable for the effective implementation of a Union policy in an area where there are harmonisation measures": *Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, cited above, p. 52. In its more recent Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005)195 final of 19.05.2005), the Commission announces an initiative in this regard: "Initial reflections on the need for a Union-wide definition of concepts such as the liability of bodies corporate or the approximation of fines were set out in the Green Paper on penalties. The Commission will make a proposal for a Framework Decision in 2007 following a Green Paper" (p. 8).

execution of criminal sanctions imposed on legal persons.[101] And since, by definition, the classical means of extradition (or surrender) are not available as regards legal persons, the criminal sanctions adopted in one State may well not be enforceable where the assets of the legal person which are present in that State do not suffice to ensure this enforcement.[102]

Comparable problems of judicial cooperation would presumably arise where a Member State sought to impose administrative sanctions on a company found to have acted discriminatorily, where the said company is incorporated in another Member State whose cooperation would be required for the execution of the sanction. By contrast, in the field of civil sanctions – damages compensating the victim of discrimination – such difficulties would not occur, since Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels I' Regulation)[103] determines the international jurisdiction of the courts in the Member States that are bound by the Regulation and facilitates recognition and introduces an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements.[104]

The EU Member States, in sum, may choose both the extent to which the organisation shall be found liable, in addition to the individual perpetrator of the discrimination, for the discriminatory act of the latter (unless the individual has been instructed to commit a discrimination) and the form of the sanction attached to such liablity (provided it is effective, proportionate and dissusasive, it may be civil, administrative or criminal in nature). However, the choice of the sanctions imposed on legal persons should take into account not only their content (and whether they will be more or less effective or dissuasive), but also the procedures through which, as a result of being classified as civil, administrative or criminal, such sanctions will be imposed. Account should also be taken of the need for judicial cooperation between Member States, where the activities of companies with operations in more than one Member State are concerned.

4. Outstanding controversies

Areas of controversy remain. First, there are certain hesitations as to the extent of the due diligence obligations imposed on the employer, where the discrimination is directly committed not by an employee, but by a third party, such as a service user, a customer or (in the educational context) a student. The UK House of Lords has held in *Pearce v. Governing Body of Mayfield School*[105] that where harassment of a

101 As regards criminal convictions of natural persons, see the Council of Europe Convention on the Transfer of Sentenced Persons, opened for signature and ratification in Strasbourg on 21 March 1983 (CETS n°112); and the Council of Europe European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, opened for signature and ratification in Strasbourg on 30 November 1964 (CETS n°51).

102 S. Adam, 'Le droit européen et la responsabilité pénale des personnes morales', cited above, p. 204.

103 OJ L 12 of 16.01.2001, p. 1. This regulation applies in all the Member States, except Denmark, for actions brought on or after 1 March 2002. The relations between Denmark and the other Member States bound by the Regulation will be governed by the 1968 Brussels Convention, which the Regulation incorporates into EC law, and the 1971 Protocol thereto.

104 On Regulation No 44/2001, see H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (2002); Kennet, 'The Brussels I regulation', *I.C.L.Q.* (2001), p. 725; G. Droz and H. Gaudemet-Tallon, 'La transformation de la Convention de Bruxelles du 27 septembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale', *Revue critique de droit international privé* (2001), p. 601; A. Nuyts, 'La communautarisation de la Convention de Bruxelles', *Journal des tribunaux* (2001), p. 913; Schmidt, 'De EEX-Verordening: de volgende stap in het Europese procesrecht', *Netherland Internationaal Privaat Recht* (2001), p. 150; N. Watté, A. Nuyts and H. Boularbah, 'Le règlement 'Bruxelles I' sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale', *journal des tribunaux – Droit européen.* (2002), p. 161.

105 *Pearce v. Governing Body of Mayfield School* [2003] Industrial Relations Law Reports 512.

worker is by a third party (not an agent of the employer), the employer cannot be vicariously liable. However, in May 2007, in *Equal Opportunities Commission v. Secretary of State for Trade and Industry*,[106] the High Court of England and Wales (Mr Justice Burton) ruled that such a narrow approach is incompatible with the definition of 'harassment' in EU anti-discrimination law which requires the law to facilitate claims where an employer knowingly fails to protect a worker from repetitive harassment by a third party.[107]

Secondly, there is a need to define the relationship between the liability of the legal person as such (the organisation) and that of the natural persons who are the direct perpetrators of the violation about which a complaint is made. Any definition of this relationship should take into account two conflicting requirements: first, of course, the need to ensure that the liability of the organisation is not so narrowly defined that it will be in most cases impossible to engage; secondly, however, the need to avoid any sense of collective punishment, where one individual uses his or her position within a company as a shield to escape his or her own liability or uses the company apparatus and operational resources to commit violations of the principle of equality for his or her purely private purposes. Indeed, whether the sanctions imposed on the organisation are criminal (for instance in the form of fines), civil (in the form of damages) or administrative (such as the exclusion from public contracts or the denial of export credits), in the final instance they may have repercussions on all the employees or members of the organisation, whether or not they bear any responsibility in the situation which led to such sanctions being imposed. It will be all the employees who will suffer damage to their reputations if the discrimination is attributed to a failure of the company, rather than only to certain individual employees of that entity.

The need to steer away from collective responsibility is particularly clear where liabilities are imposed on legal persons for conduct which would normally be of a criminal nature. This justifies the principle formulated, for instance, by the 1988 Recommendation of the Committee of Ministers of the Council of Europe to Member States concerning the liability of enterprises with legal personality for offences committed in the exercise of their activities. According to this, "The enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all the necessary steps to prevent its commission" (Principle I.4). Therefore, although the criminal liability of the enterprise may help to attain certain objectives of the criminal law and augment both its dissuasive effect and the chances of reparation for the victims (which will even justify the imposition of a criminal liability on enterprises, "for offences committed in the exercise of their activities, even where the offence is alien to the purposes of the enterprise"), not all the faults of its employees can be imputed to the company. Either the 'directing minds' of the company must have played a role in the commission of the offence – in the vocabulary of the common law[108] – or the company must have failed to exercise due diligence regarding the activities of its employees.

106 *Equal Opportunities Commission v. Secretary of State for Trade and Industry* [2007] Industrial Relations Law Reports 327.

107 These cases are discussed in the contribution of David Harris et al. to the study on combating homophobia in the EU commissioned by the EU Fundamental Rights Agency from its network of legal experts (FRALEX), in their report about combating homophobia in United Kingdom (on file with the author).

108 G. Ferguson, 'Corruption and corporate criminal liability', paper presented at the conference *Corruption and Bribery in Foreign Business Transactions: A Seminar on New Global and Canadian Standards,* 4-5 February 1999, Vancouver, Canada, p. 6. Cited in M. Wagner, 'Corporate criminal liability: national and international responses', International Society for the Reform of Criminal Law 13th International Conference, *Commercial and Financial Fraud: A Comparative Perspective*, Malta, 8-12 July 1999.

In the sphere of criminal law at least, these principles have now gained common acceptance[109]. They also guide Article 4 of the the Framework Decision of 19 July 2002 on combating trafficking in human beings, which states under the heading 'Liability of legal persons' that, "Each Member State shall take the necessary measures to ensure that legal persons can be held liable" for the offences identified in the Decision, "…committed *for their benefit* by any person, acting either individually or as part of an organ of the legal person, *who has a leading position within the legal person*, based on: (a) a power of representation of the legal person, or (b) an authority to take decisions on behalf of the legal person, or (c) an authority to exercise control within the legal person". The text goes on to add that, apart from the situation where the 'directing minds' of the enterprise have played a role in the offence, "Each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control" by a person with such a leading position in the company, "have rendered possible the commission of [the offence] for the benefit of that legal person by a person under its authority".

Thirdly, there arises the question of whether, where a legal person is found liable of discrimination, the personal liability of the directors may be engaged. In Cyprus, for example, if a legal person is found guilty of discrimination, the managing director, chair, director, secretary or other privileged officer of the legal personality or organisation shall be held guilty for the actions of the legal person and fined up to 4,000 Cyprus pounds (about 6,700 Euro) and/or six months imprisonment or both, if it is established that the offence is committed with their consent or collaboration or mere tolerance. Such liability would be in addition to that of the legal person itself, which can be fined up to 7,000 Cyprus pounds (about 12,000 Euro).[110]

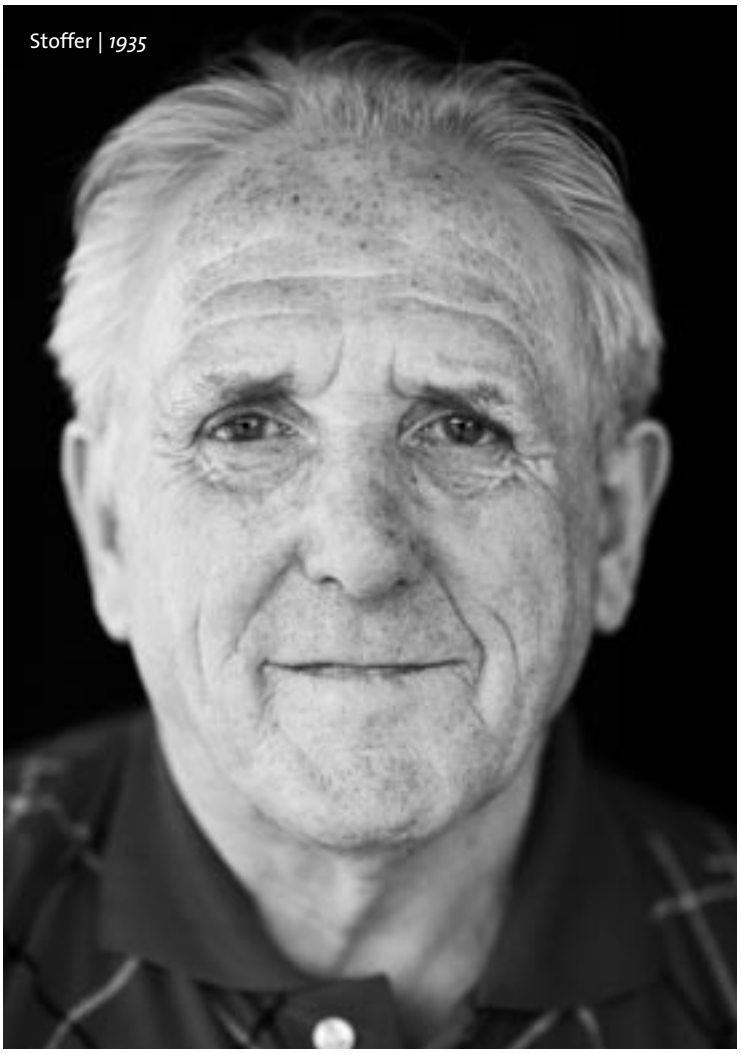
5. Conclusion

The discussion above has highlighted certain problems linked to connecting the respective liabilities of the direct perpetrator of discrimination (the natural person acting as the agent) and of the organisation to which that perpetrator belongs (and which typically will be the principal). This problem of the allocation of responsibilities becomes even more complex if the potential liability of the directors is also addressed. The lack of uniformity between the Member States about how to link these responsibilities and about which sanctions to impose on the parties concerned (the natural person acting as agent, the organisation as the legal person under the auspices of which the agent acts, and finally the directors or executives of the organisation) is not in itself problematic, except in the marginal case, discussed above, where a violation of the non-discrimination requirement leads in one Member State to the imposition of criminal sanctions against the legal person, which another State might refuse to execute, for example, when asked to seize assets of the defendant company which are located on its territory. Rather, the variety of approaches adopted towards the questions outlined above should be seen as an opportunity, if they can be systematically studied and can lead to the identification of the best existing practices.

[109] See also, e.g., Article 9 § 1 of Council of Europe Convention on the Protection of the Environment through Criminal Law of 4 November 1998 (E.T.S., n° 172), stating that, "Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in [the provisions of the Convention defining certain environmental offences] has been committed by their organs or by members thereof or by another representative". On 1 June 2002, only one State (Estonia) had ratified the Convention, which must be ratified by at least three States before it may enter in force.

[110] For disability, Article 9(e)(2) of the Law N.127(I)/2000 as amended by Law N.57(I)/2004, Article 6(γ)(4); for employment, Law N.58(I)/2004, Article15(1) and 15(2); and for racial discrimination Law N.59(I)/2004, Article13(1) and 13(2).

Victor | *1987*



Stoffer | *1935*

Merlinda | *1984*

Making a difference: the promises and perils of positive duties in the equality field

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Introduction

Over the last three decades, anti-discrimination laws have generally utilised a model with a specific and narrow remit. According to this approach, the aim is to tackle acts of discrimination by identifiable perpetrators against individual victims. The problem with this is that the sources of inequality are much deeper than individual acts of discrimination. Instead, inequality frequently has its origins in the institutions and structures of society. Is it therefore possible to develop a model which can address these deep-seated issues? It is in response to this challenge that a bold new generation of equality laws is being developed. Rather than merely prohibiting individual acts of discrimination, the new approach imposes a positive duty to promote equality. Instead of waiting for an individual to complain of discrimination, employers, service providers or public bodies more generally have a duty to take the initiative, examining existing structures to remove barriers to equality. Equally importantly, all new policies and practices must be assessed for their impact on gender, race or other grounds of discrimination. Where negative impact is found, policies must be adjusted.

This approach has much potential. But it also carries with it many challenges. Unless properly formulated, positive duties run the risk of relying too heavily on the good will of employers or policy-makers, substituting individual rights for vaguely formulated policies or bureaucratic procedures. This article sets out these challenges and examines ways of addressing them. It draws on some of the foremost approaches to proactive duties, ranging from gender mainstreaming at EU level, to statutory schemes in the UK and Northern Ireland. It does not aim, however, to provide an empirical survey of the range or nature of such policies among EU Member States.

1. Changing the norm

Anti-discrimination law has traditionally relied on an understanding of equality which focuses on prejudice or other irrational behaviour directed against an individual. It therefore aims to provide compensation to victims and to punish or deter perpetrators. However, it is widely recognised that the causes of discrimination stretch well beyond individual acts of prejudice, to the structures and institutions of society. Women's inequality in the workforce, for example, is not only due to individual acts of prejudice; it also arises because of the structure of the paid labour market, which rewards full-time work and does not accommodate child-care obligations. Similarly, discrimination on grounds of disability is due to the able-bodied norm which informs the structure of the built environment as much as it is to individual acts of prejudice. Nor is inequality always addressed by an injunction that likes should be treated alike. Different treatment might be necessary to achieve equality where there is antecedent inequality, differences in capabilities or different value structures. There is a need to change existing structures to accommodate child-care responsibilities and to ensure accessibility for all, whether able-bodied or disabled. Treating likes alike also assumes that everyone be treated as if they shared a single universal identity. Instead, it is necessary to affirm and accommodate differing identities.

With the recognition of the limits of formal equality as a basis for discrimination law has also come a critique of the system of enforcement based on remedies for individual victims. Particularly in jurisdictions based on an adversarial adjudicative system, enforcement depends on an individual to bring a claim to a court or tribunal for breach of her right. Remedies are retrospective, individual and based on proof of breach, or 'fault'. This is problematic in at least four different ways[111]. Firstly, reliance on an individual complainant to bring an action in court puts excessive strain on the victim both in terms of resources and personal energy. Litigation is lengthy and costly and remedies are often limited. Secondly, victim-initiated litigation cannot produce systematic or comprehensive progress towards the goals of equality. The court can only intervene when a complaint is brought, and since many individuals are unable to pursue their claim, enforcement is inevitably patchy and random. The result is that a large number of cases of discrimination go unremedied. Even if a case is pursued successfully, the remedy may be limited to compensation for the individual or group of complainants, with no ongoing obligations to correct the institutional structure which gave rise to the discrimination. Thirdly, the basis in individual fault means that there must be a proved perpetrator. Yet, as we have seen, much inequality is institutional and not the fault of any one person. Finally, because individual claims are based on proof of fault, they encourage a defensive approach by the respondent. Instead of viewing equality as a common goal, to be achieved cooperatively, it becomes a site of conflict and resistance.[112]

Proactive models aim to remedy these deficiencies. Firstly, instead of merely reacting to ad hoc claims brought by individuals, the initiative lies with those in a position to bring about change, such as employers (public or private), service providers, and public bodies more generally. This means that change is systematic, ensuring that the institutional and structural causes of inequality are addressed. Secondly, the focus is on revealing systemic discrimination and the creation of institutional mechanisms for its elimination. Thus there is no need to prove fault before remedial action is taken. Instead, the duty to bring about change lies with those with the power and capacity to do so. As a result, the right to equality is available to all, not just those who complain. Thirdly, proactive duties are prospective as well as retrospective. This means that remedies are not simply retrospective, compensatory and individualised. Instead, they require steps to be taken which are also forward-looking, structural and group-based. Finally, positive duties aim to enlist the cooperation of those responsible for bringing about change, rather than encouraging defensiveness.

Particularly valuable is the ability to address multiple or intersectional discrimination. One of the chief difficulties in addressing intersectional discrimination is the difficulty in finding an appropriate comparator who has been treated more favourably than the victim. Women from ethnic minorities suffer intersectional discrimination based both on their gender and their ethnicity. But it is difficult to say that discrimination is on grounds of their gender, since the majority of women do not suffer the same detriment. Nor can they assert that the discrimination is on grounds of their ethnicity, because men in their ethnic group do not suffer the same detriment. Positive duties surmount these difficulties because there is no need to prove specifically that a person was treated less favourably than a comparator is or would be. A sub-group, such as ethnic minority women, or disabled older people, or gay youths, can be separately identified as suffering from discrimination and measures taken to redress that. For example, Roma women suffer discrimination both because of the fact that they are women and because of their ethnicity. Measures aimed at women from majority groups do not service Roma women, because they

111 See further S. Fredman, *Human rights transformed: positive rights and positive duties* (Oxford University Press, Oxford 2008), ch. 7; S. Fredman 'Changing the norm: positive duties in equal treatment legislation' (2005) 12 *Maastricht journal of European and comparative law*, pp. 369-398.

112 Pay Equity Taskforce and Departments of Justice and Human Resources Development Canada, *Pay equity: a new approach to a fundamental right* (2004) p.98.

do not take into account Roma language and culture, or the discrimination faced by Roma people in education, or the difficulties in access due to the fact that the latter tend to live in isolated communities. Conversely, Roma women are overlooked by measures aimed at Roma men, because no account is taken of the women's child-care and domestic obligations. Positive duties make it possible to institute measures specifically focussed on Roma women. Similarly, disabled people from ethnic minorities may have their cultural and language needs ignored when their disability is being addressed. Positive measures can be shaped specifically to address these issues. Most importantly, monitoring should be based on specifically disaggregated figures to reflect cumulative discrimination.

2. Challenges

Positive duties in this sense are a radically new development. They are proactive in that they can be used to assess new policies and practices for their impact on affected groups. They can go further still, and require the creation and implementation of new policies to promote equality. But this in turn creates a series of new challenges. Firstly, if the duty is no longer geared to providing an individual remedy, what is the end result which is expected to be achieved? In moving beyond the idea that likes should be treated alike, a clearer notion of substantive equality is required. Secondly, the model is inherently a top-down approach, placing the initiative on those responsible for bringing about change rather than the victim herself. While this is one of the strengths of the new model, it also creates a potential participatory vacuum. Are we simply removing individual initiative and replacing it with a management tool which may not reflect the needs and entitlements of individuals, and which individuals have no power to enforce? This focuses on the need to build proper participation into the new model. Thirdly, without the spur of individual litigation, how can proactive action by public bodies be enforced? Finally, given that equality norms are delivered through policy rather than individual litigation, there is a danger that they may be regarded as discretionary rather than an essential mode of delivery of the fundamental right to equality. Ultimately, do proactive approaches run the risk of subtly transforming rights-based claims into mere policy imperatives? For example, as we will see, proactive approaches like mainstreaming rely heavily on the extent to which top management sympathises with the aims and is prepared to commit resources to its implementation. Research into gender mainstreaming in the EU shows that little is achieved in directorates where there is no genuine commitment to its aims.[113]

Several important steps in the direction of proactive duties have already been made, taken, both at EU level and in Member States. Gender mainstreaming has been a central tenet of EU gender policy for over a decade. Notably, this has been primarily a policy intervention, gaining its momentum from soft law initiatives such as the European Employment Strategy. At the other end of the spectrum is the statute-based approach in Northern Ireland and Britain, where public bodies are under a legal obligation to pay due regard to the promotion of equality of opportunity in relation to a wide range of functions. Other jurisdictions have used positive duties in various permutations. Such duties have been in place long enough for these challenges to emerge and to consider possible responses. Each of the challenges will be dealt with in turn.

[113] M. Pollack and E. Hafner-Burton 'Mainstreaming gender in the European Union' [2000] 7, *Journal of European public policy*, pp. 432-456.

(i) Aims of proactive duties

If policy-makers, employers and other relevant bodies are to implement the duties properly, they need a secure guide as to what they are aiming at. It is clear, as shown above, that it is necessary to move beyond the principle that likes should be treated alike towards a substantive concept of equality. But there remains little consensus on the precise connotations of substantive equality. In the UK, the new statutory duties specify that bodies should pay due regard to the need to promote 'equality of opportunity'.[114] But equality of opportunity is not further specified. Even less clearly formulated are the goals of gender mainstreaming. According to the EU, gender mainstreaming involves, "mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effects on the respective situation of men and women (gender perspective)". [115] This does not in itself specify the aims and objectives. Indeed, as Rubery shows, there is a lack of clear vision both at EU and Member State level as to what a gender equal society entails. For some, women's role as the primary caregiver is taken as given, and the aim of gender mainstreaming is to facilitate and not to challenge women's dual role. For others, gender equality entails challenging the role of men as well as women. Whereas the former requires women to conform to the mainstream, the latter entails transformation of the mainstream[116]. Rees in turn argues that mainstreaming could aim for three alternative objectives, which she vividly describes as 'tinkering, tailoring and transforming'. 'Tinkering' refers to the formal equality model described above, using anti-discrimination legislation and court enforcement to achieve equal treatment. 'Tailoring' recognises that specific measures are necessary to achieve equal outcomes, but aims to incorporate a disadvantaged group into existing structures, rather than changing the structures. A good example is that of child-care provision, which assists women to participate in paid work without adapting the structure of paid work. Transformative strategies go further, challenging the status quo and demanding changes in structure in order to achieve substantive equality[117]. This would involve changing the structure of the working day, allowing both parents to participate both in the world of paid work and in parenting.

Given that the transformation should be a central aim of positive duties, the nature of that transformation still requires further specification. It is suggested here that four broad aims should be specified, reflecting the general consensus on the underlying values behind substantive equality[118]. Firstly, the aim is not simply to ensure that people are treated alike, regardless of their gender, race or other prohibited ground. Instead, the aim is to redress the disadvantage and detriment attached to that status. Thus different treatment is prohibited where it aggravates or perpetuates that disadvantage. But different treatment may be necessary in order to redress that disadvantage. Specific schemes aimed at women, ethnic minorities, disabled people or others do not therefore breach the equality requirement, but are actively required. Secondly, equality should not require everyone to conform to the same norm. Instead, the aim should be to accommodate difference, changing underlying structures in order to facilitate genuinely equal participation. This would include duties of adjustment for disability and accommodation for religion, as well as restructuring working time and thereby aiming to change the gender distribution of labour in the home. A third aim of positive duties is to ensure respect and concern for all. Equal treatment in itself is not sufficient, if it means that everyone is treated equally badly, or that benefits are removed from one group in order to achieve equality by levelling down. Prejudicial treatment is wrong in itself, because

[114] Race Relations Act 1976, s. 71(1); Sex Discrimination Act, s. 76A; Disability Discrimination Act 1995, s. 49.

[115] EC (European Commission) (1996), Incorporating equal opportunities for women and men into all Community policies and activities, (COM(96)67final), European Commission, Brussels: http://ec.europa.eu/employment_social/equ_opp/gms_en.html

[116] J. Rubery 'Gender mainstreaming and gender equality in the EU: the impact of the EU Employment Strategy' (2002) 33, *Industrial relations journal*, pp. 500-522, at 503.

[117] T. Rees, *Mainstreaming equality in the EU* (Routledge 1998).

[118] S. Fredman, The Future of Equality in Great Britain, Equal Opportunities Commission (2002) Working Paper Series No. 5.

it is degrading. This means in particular that harassment, racism, sexism and other violence based on a prohibited ground is prevented. For example, homophobic bullying in schools would be prohibited. Finally, positive duties should promote equal participation. This is both political and social. It gives a voice in decision-making processes to those whose are systematically excluded, and aims to enhance the social participation of those who are marginalised from society, whether through age, disability, sexual orientation or poverty. Of course not all these aims will be relevant to all situations; and there are important overlaps and linkages between them. But they do provide central guidance as to the direction and destination of positive duties.

(ii) Participation

The second main challenge is to ensure that the duty is more than a top-down exercise. Participation of all those affected is important, both as a good in itself, and as a means to ensure that the duties properly reflect their needs. Participation is also an invaluable mechanism for enforcement. Without those affected keeping a close watch on outcomes, it is unlikely that social rights will be properly observed. Thus participation needs to take place at all stages of the duty, from its formulation to its implementation and enforcement. Yet participation itself is not easy to achieve. One problem is that the process of selection of participants favours better organised groups in civil society, running the risk of marginalising even further those who are not well organised. There may also be questions as to whether participants are representative of all the interests in their constituency. Representative structures, in the workplace or elsewhere, may reflect and reinforce the dominant voices within the body of workers or service users, rather than those of the minority. Rubery notes that there is little evidence, either within the EU strategy or the National Action Plans, of any awareness of possible gender bias arising from the lower representation of women in trade unions and collective bargaining.[119] Or there may be few representative structures to begin with, as in areas such as goods, facilities and services. Particularly complex is the question of how to ensure that those whose identity falls within more than one group and therefore suffer cumulative discrimination are properly represented.

To achieve proper participation therefore assumes a high degree of organisation, commitment and knowledge among potential participants. Even if consultation takes place, this might over-tax the resources of responding groups. As the Northern Ireland experience indicates, this brings a clear danger of 'consultation fatigue'. The Northern Ireland Equality Commission therefore stresses that work is required to ensure that organisations have the capacity to engage with the positive duty.[120] Thus it is essential to incorporate capacity building as part of the positive duty, making resources available for this purpose. Participants must have access to proper information, and training must be provided both to active participants and to all affected. The European Social Fund makes some progress in this direction, earmarking funds for the promotion of equal opportunities for all in a variety of contexts, including specific measures to improve the access and active participation of women in the labour market.[121] Particular attention must also be paid to the criteria for selecting the groups which are given access to the resources. Thus for genuine participation to take place, it is crucial for the positive duty to include a requirement for capacity building. There should also be provision for making sure that all interests within the group are able to articulate their perspectives.

(iii) Compliance

[119] J. Rubery, 'Gender mainstreaming and gender equality in the EU: the impact of the EU Employment Strategy' (2002) 33, *Industrial relations journal*, pp. 500-522.

[120] Equality Commission for Northern Ireland, *Keeping it effective: reviewing the effectiveness of Section 75 of the Northern Ireland Act 1998* (2007).

[121] Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the European Social Fund Official Journal L 213, 13/08/1999 P. 0005–0008.


Hylke | *1975*
Shuzelle | *1978*

The third challenge is to achieve compliance. Experience has shown that simply imposing duties on a body is unlikely to achieve real change. Without strong political and managerial support, the proactive approach can easily disintegrate into a mere gesture or even a pretext for inaction.[122] This has been demonstrated at EU level, where the success of gender mainstreaming is highly dependent on whether individual Directors General sympathise with its overall aims.[123] Similarly, in Britain, public bodies are under a duty to pay due regard to the elimination of unlawful discrimination and the promotion of equality or opportunity. Yet although the duty has led to greater awareness of the need for change, the new approach has not led most public bodies to implement the reforms as intended. Instead, the duty has primarily been manifested in procedure and paper work, leading to a general view that it is overly bureaucratic, process driven and resource intensive.[124] The Northern Ireland duty has been more effective, largely due to the energetic role of the Northern Ireland Equality Commission in providing advice and support, in monitoring implementation and in investigating breaches. In its review of the duty in 2007, the Commission states that the duty has effected substantial change in the manner policy is made in terms of equality of opportunity. Effective consultation has been particularly successful, giving rise to an inclusive policy-making process. However, there was less evidence that the legislation had had its intended outcomes for individuals. The report concludes that a shift in gear needs to take place within public authorities, away from concentrating on the process of implementation towards achieving outcomes.[125]

A key to successful compliance is therefore to harness the motivation of internal actors, with the appropriate combination of incentives and deterrents. A systematic and transparent plan of action should be produced, specifying goals, timetables and means to achieve the goals, drawn up with active participation of those affected. This ensures that an organisation plans properly and allocates responsibilities in a way which survives personnel changes. It also enhances transparency, and functions as a blueprint for accountability in respect of whether action has actually been taken. Such a plan should begin by providing for a review of the current situation in order to uncover structural obstacles to inequality and create a baseline against which progress can be measured. This review must be taken with a clear understanding of the processes by which discrimination occurs: without these, structural obstacles will remain invisible even under review. On the basis of such a review, goals should be specified together with steps to be taken to achieve those goals, with relevant timetables and proper resource allocation. An example is provided by the Northern Ireland duty of fair representation in employment, which requires employers to review the composition of their workforce every three years to establish whether there is fair participation of each of the two relevant communities, namely the Roman Catholic and the Protestant. If they find there is not, then they must compile an affirmative action programme[126]. Similarly, Canadian pay equity plans require a review to determine female-dominated occupations and compare their pay to a male-dominated comparable group. Where inequalities are revealed, steps must be taken to progressively eliminate the gap.

Particularly important is the need to put in place mechanisms for monitoring the effectiveness of the

122 F. MacKay and K. Bilton, *Learning from experience: lessons in mainstreaming equal opportunities*, (Scottish Executive Social Research 2003) p. 143.

123 M. Pollack and E. Hafner-Burton 'Mainstreaming gender in the European Union' [2000] 7, *Journal of European public policy*, pp. 432-456.

124 S. Fredman and S. Spencer 'Beyond discrimination: it's time for enforceable duties on public bodies to promote equality outcomes' [2006], *European human rights law review* pp. 598-606.

125 Equality Commission for Northern Ireland, *Keeping it effective: Reviewing the effectiveness of Section 75 of the Northern Ireland Act 1998* (2007).

126 Fair Employment and Treatment Order 1998 (FETO).

strategy and for periodic review in the light of experience. But this too is not without its challenges. Measures of success take the form of targets or objectives to be achieved over time, accompanied by indicators to measure progress. However, such indicators are themselves contestable. As Mackay and Bilton note, indicators are not 'facts' which exist 'out there' for the policy-analyst/maker to use. Rather, they are created and, "validate particular world views and prioritise selected areas of knowledge".[127] This underlines the need for continuing participation at all stages.

Such internal change will not, however, happen unless there are external drivers, whether in the form of incentives or deterrents. Hepple et al propose a compliance pyramid.[128] The first tier is one of encouragement and support, to promote a cooperative rather than an adversarial approach and to promote and preserve long-term relationships and avoid an adversarial climate. Also key is expert assistance and training, particularly where statistics are necessary and complex decisions are required as to appropriate pools of comparison.[129] Pay equity comparisons can be particularly complex; the Canadian Pay Equity Taskforce envisages a specialist pay equity oversight body as providing relevant statistical information and methodological guidance.[130]

The second tier requires external scrutiny of reports and equality plans. The importance of such scrutiny is underlined in respect of gender mainstreaming. The European Employment Strategy, as originally formulated, included equal opportunities as one of its four pillars. This meant that National Action Plans had to specify the steps taken by Member States to advance gender equality. However, as a recent report demonstrates, with the removal of the equal opportunities pillar from the guidelines, the attention paid to gender equality policies and gender mainstreaming in the national reports has declined.[131] In a small country or region, such as Northern Ireland, it may be possible for an equality body to scrutinise all plans by public bodies. Here advance approval of the equality scheme is required[132], with the result that about 160 bodies need to submit an equality scheme and then report annually on its progress. In most contexts, however, it will not be feasible to require advance approval. In any event, as the Hepple Report concluded, such an approach runs the risk of externalising the responsibility for implementing the plan, rather than building up energy and resources from within.[133] Instead, transparency and accountability to stakeholders ought to be required.

The third tier, if compliance is not achieved, consists of sanctions imposed externally, through fines imposed by regulatory bodies and ultimately, through judicially enforceable remedies. Many of the proactive models stress that innovative remedies are required, remaining within the spirit of a proactive model, and not regressing to an original fault-based approach. One approach is to utilise an equality commission or similar statutory body, giving it both investigatory powers and powers to order compliance where necessary. Judicial sanctions are necessary but only as a last resort. The Hepple report, however, recommended that instead of entrusting this function to a specialist regulatory agency, it should be carried out by bodies with established inspection and audit functions, such as inspectorates of prisons, schools and police.[134] Thought should also be given to whether the individual should be entitled to initiate

127 MacKay and Bilton (n 13 above) 46ff.

128 B. Hepple, M. Coussey and T. Choudhury *Equality: a new framework report of the independent review of the enforcement of UK anti-discrimination legislation* (Hart, Oxford 2000), p. 59.

129 C. McCrudden, R. Ford and A. Heath 'The impact of affirmative action agreements' in B. Osborne and I. Shuttleworth (eds) *Fair employment in Northern Ireland: a generation on* (Blackstaff Press, Belfast 2004), p. 125.

130 Pay Equity Taskforce and Departments of Justice and Human Resources Development Canada, *Pay equity: a new approach to a fundamental right* (2004), pp. 163, 406.

131 European Commission Group of experts on Gender, Social Inclusion and Employment, *Gender mainstreaming of employment policies: a comparative review of thirty European countries* (2007).

132 Northern Ireland Act 1998, Sch 9.

133 Hepple et al (n 19 above) 62.

compliance proceedings, in order to trigger collective rather than individual remedies. In the context of pay equity, the Canadian Taskforce suggests that there be recourse to a pay equity tribunal which, rather than being adversarial, uses conciliation and arbitration methods and with a range of innovative remedies. It too, however, recommends the court as the final enforcement body, so that cooperative solutions can always be backed up by judicial remedies if they fail.[135] Particularly important is the use of public procurement as a vehicle for achieving change.[136] By linking ever expanding and highly lucrative public procurement opportunities to obligations to further equal opportunities, the potential of positive duties can both be expanded and effectively enforced. However, a great deal of attention needs to be paid to the specifics of establishing such a linkage in order to ensure that it is genuinely effective.

3. Conclusion

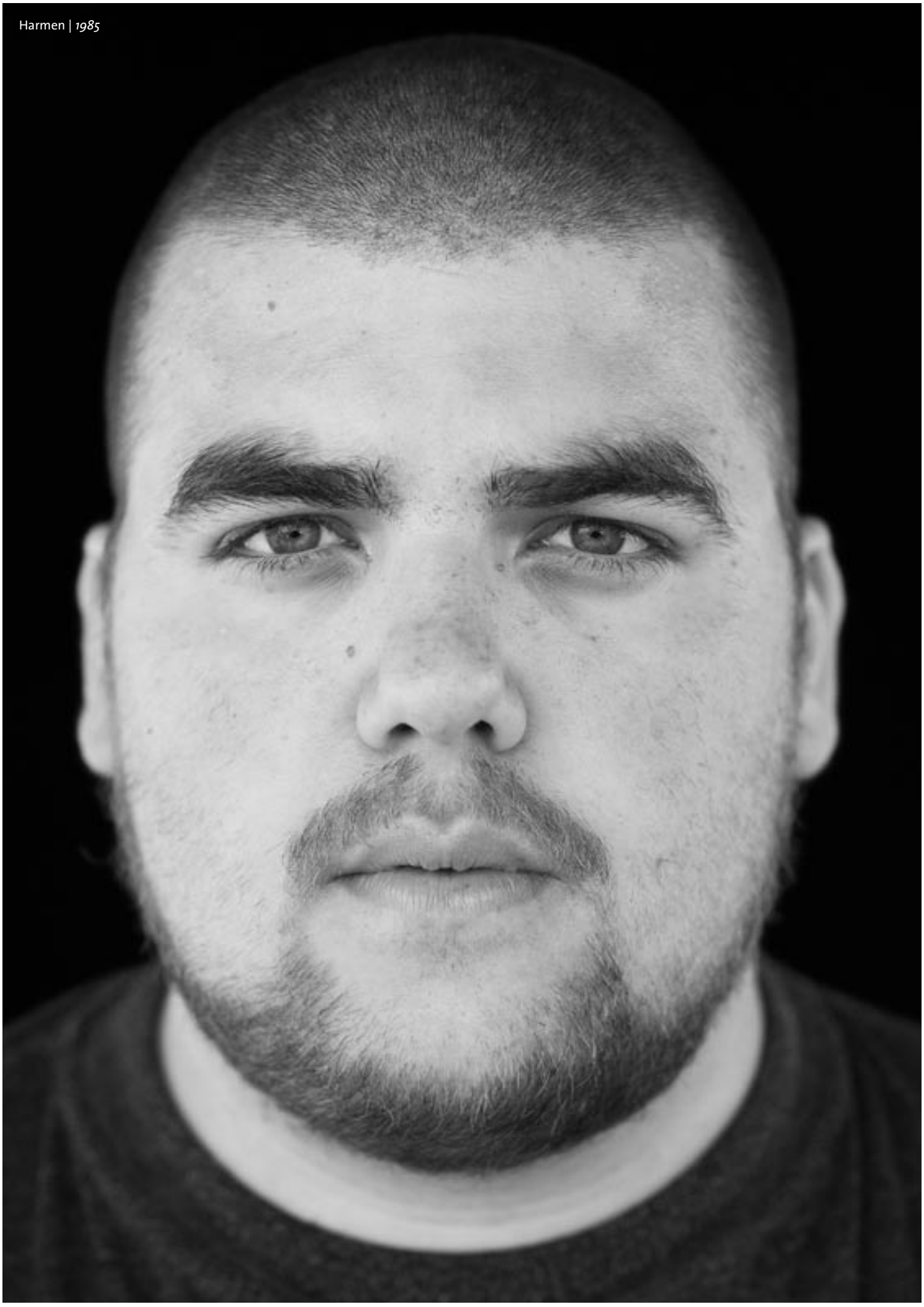
New generation proactive equality laws hold out much potential. However, they also carry significant risks. Bringing equality into the mainstream can dilute the energy necessary for progress, leaving it without the essential ownership necessary to bring about real change. A recent assessment of gender mainstreaming in thirty European countries demonstrates that, although most countries have developed initiatives regarding gender mainstreaming, a systematic and comprehensive approach is generally lacking and actual implementation is often problematic. Its dependence on political will also makes it vulnerable to political changes.[137] To succeed, positive duties need to be regarded, not as a policy tool, but as a binding duty to fulfil the right to equality. This requires that the aims be clearly specified, that a clear and transparent plan be drawn up showing the steps to be taken to achieve those aims, and that responsibility be born by a central figure with power and leadership within the public body or organisation. In addition, it is necessary for those affected to be involved throughout the process; for mandatory monitoring to be instituted, and for an appropriate combination of incentives and deterrents to be established in order to achieve compliance. Positive duties are vital to the continued progress towards equality. They have the potential to achieve real structural change; but only with sufficient attention to their structure and enforcement.

134 B. Hepple, M. Coussey and T. Choudhury *Equality: a new framework report of the independent review of the enforcement of UK anti-discrimination legislation* (Hart, Oxford 2000), p 64.

135 Pay Equity Taskforce and Departments of Justice and Human Resources Development Canada, *Pay equity: a new approach to a fundamental right* (2004) p. 401, 406.

136 C. McCrudden, *Buying social justice equality, government procurement and legal change* (Oxford University Press, Oxford 2007).

137 European Commission Group of experts on Gender, Social Inclusion and Employment, *Gender mainstreaming of employment policies: a comparative review of thirty European countries* (2007).



Harmen | *1985*

European Legal Policy Update

New European anti-discrimination measures, Article 13 EC Impact Assessment and Responses to the public and stakeholder consultation on non-discrimination measures

One of the fundamental goals of the European Union is the prevention and combating of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 13 TEC). However, EU-wide legal protection is not yet in place to deal with discrimination on the basis of religion or belief, disability, age or sexual orientation outside the labour market. In 2007, the European Year of Equal Opportunities for All, the European Commission announced that it intended to propose measures in mid-2008 to complete the legal framework. This took the form of a proposal for a directive adopted on **2 July 2008.**

In preparing the impact assessment for this initiative, the Commission held a public consultation, which ran from July to October 2007, in which it sought the views of a broad range of stakeholders who might have an interest. Below is a web link, in which the following documents may be found:
http://ec.europa.eu/employment_social/fundamental_rights/org/imass_en.htm

- proposal for a directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation
- impact assessment
- external study on discrimination (European Policy Evaluation Consortium – EPEC)
- press release and background paper on the public consultation
- overall results of the consultation
- responses to the consultation from equality bodies, non-governmental organisations and social partners among others

The European Business Test Panel was also consulted, and the results can be found at:
http://ec.europa.eu/yourvoice/ebtp/consultations/2007_en.htm

The Commission asked the EPEC to prepare a study on discrimination on the grounds of religion and belief, age, disability and sexual orientation outside employment. This study looks at the nature and extent of discrimination outside employment in the EU, and the potential (direct and indirect) costs this may have for individuals, society and providers of goods and services.

In addition, a Flash Eurobarometer survey on discrimination in the European Union was commissioned to measure attitudes and experiences of people in the EU with regard to discrimination in the areas of housing, healthcare, the education system and when buying products or insurance policies or using services. The fieldwork was conducted in January 2008.

Infringement procedures update regarding Directive 2000/43/EC
On 27 June 2007, the Commission sent formal requests to 14 Member States to fully implement EU rules banning discrimination on the grounds of race or ethnic origin (the Racial Equality Directive 2000/43/EC). The countries concerned – Spain, Sweden, Czech Republic, Estonia, France, Ireland, United Kingdom, Greece, Italy, Latvia, Poland, Portugal, Slovenia and Slovakia – have two months to respond, failing which the Commission can take them to the European Court of Justice. As a reminder, the Racial Equality Directive (Directive 2000/43/EC) was agreed in June 2000 with a deadline for implementation into national law by July 2003.

Despite the efforts of all EU countries to implement the Racial Equality Directive, not all national legislation fully conforms to its requirements. The Commission is in contact with all Member States on these issues and – in a number of cases – it is clear that changes to national laws are already in the pipeline. The formal request took the form of a 'reasoned opinion' to the 14 Member States which have not implemented Directive 2000/43/EC correctly. This is the second step of infringement procedures. The main problem areas include:

- national legislation limited in scope to the workplace, whereas the Racial Equality Directive also prohibits discrimination in social protection, education and access to goods and services, including housing;
- definitions of discrimination which diverge from Directive 2000/43/EC (in particular, in terms of indirect discrimination, harassment and instructions to discriminate);
- inconsistencies in the provisions designed to help victims of discrimination (such as the protection against victimisation, the shift of the burden of proof and the rights of associations to assist individuals with their cases).

If there is no satisfactory response, the Commission will refer the matter to the European Court of Justice in Luxembourg. It can also request that the Court impose a fine on the country concerned.

Infringement procedures update regarding Directive 2000/78/EC

On 31 January 2008 the Commission sent reasoned opinions to 10 Member States, requesting them to fully implement EU rules prohibiting discrimination in employment and occupation on the grounds of religion and belief, age, disability and sexual orientation. The countries concerned – Czech Republic, Estonia, Ireland, Greece, France, Hungary, Malta, Netherlands, Finland and Sweden – have two months to respond, failing which the Commission can decide to take them to the European Court of Justice. Also, the Commission sent a letter of formal notice to Germany. As a reminder, the Employment Equality Directive (Directive 2000/78/EC) was adopted in November 2000 with a deadline for implementation into national law of December 2003.

The main problem areas include:

- national legislation is limited in terms of the people and areas it covers, as compared to Directive 2000/78/EC (for example: lack of protection for civil servants or in access to self-employment);
- definitions of discrimination which diverge from the Directive 2000/78/EC (in particular, in terms of indirect discrimination, harassment and instructions to discriminate);
- lack of proper implementation of the obligation for employers to provide reasonable accommodation for disabled workers;
- inconsistencies in the provisions designed to help victims of discrimination (such as the shift of the burden of proof, the rights of associations to assist individuals with their cases and protection against victimisation).

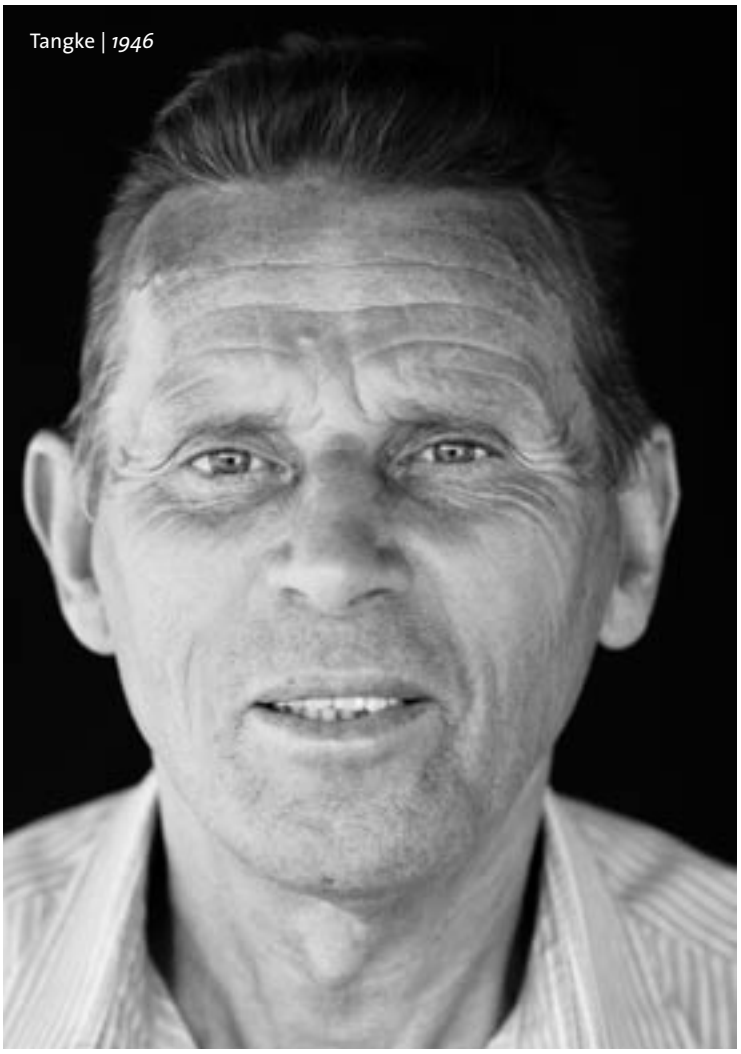
Germany received a letter of formal notice, which is the first step in an infringement procedure. It has two months to respond. Among the concerns of the Commission are:

- national legislation does not cover redundancies
- insufficient protection by the employer for people with disabilities
- the deadline of two months to file a complaint is too short

The Commission also decided to send additional letters of formal notice to Latvia and Lithuania about their transposition of Directive 2000/78/EC. These concerned, in particular, a definition of discrimination that was too restrictive (Latvia) and excessive exemptions regarding age discrimination (Latvia and Lithuania). First letters of formal notice were sent in December 2006 to 17 Member States. Meanwhile, the procedure opened against Slovenia and Cyprus for the incorrect transposition of Directive 2000/78/EC was closed in December 2007, following the adoption of new legislation in those countries which responded to the Commission's concerns.

The first stage of infringement procedures was also initiated against Belgium, Slovakia, Denmark, Poland, Portugal, Spain and the United Kingdom, but these cases are still being examined. Likewise, the Commission is still currently analysing the legislation transposing Directive 2000/78/EC in Austria, Luxembourg, Bulgaria and Romania.

Natasja | *1975*



Tangke | *1946*

Bep | *1929*

Johan | *1996*

European Court of Justice Update

References for Preliminary Rulings – Applications

Case C-388/07 Reference for a preliminary ruling in the case of the Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform of 9 August 2007

OJ C 283 of 24.11.2007, p.9.

Reference for a preliminary ruling was made to the European Court of Justice by the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) of the United Kingdom, regarding age discrimination in the context of Directive 2000/78/EC. Specifically, the questions referred are:

In relation to Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation ("the Directive"):

1. National retirement ages and the scope of the Directive
   - i) Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement?
   - ii) Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement where they were introduced after the Directive was made?
   - iii) In the light of the answers to (i) and (ii) above
     - (1) were section 109 and/or 156 of the 1996 Act, and/or
     - (2) are Regulations 30 and 7, when read with Schedules 8 and 6 to the Regulations, national provisions laying down retirement ages within the meaning of Recital 14 of the Directive?
2. The definition of direct age discrimination: justification defence
   - iv) Does Article 6(1) of the Directive permit Member States to introduce legislation providing that a difference of treatment on grounds of age does not constitute discrimination if it is determined to be a proportionate means of achieving a legitimate aim, or does Article 6(1) require Member States to define the kinds of differences of treatment which may be so justified, by a list or other measure which is similar in form and content to Article 6(1)?
3. The test for the justification of direct and indirect discrimination
   - v) Is there any, and if so what, significant practical difference between the test for justification set out in Article 2(2) of the Directive in relation to indirect discrimination, and the test for justification set out in relation to direct age discrimination at Article 6(1) of the Directive?

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN (search term: Case C-388/07)

Case C-555/07 Reference for a preliminary ruling in the case of Seda Kücükdeveci v Swedex GmbH & Co. KG) of 13 December 2007

OJ C 79 of 29.03.2008, p.12

Reference for a preliminary ruling was made to the European Court of Justice from the *Landesarbeitsgericht* (Federal State Labour Court) of Düsseldorf in Germany, regarding differences of treatment on the grounds of age as allowed by Directive 2000/78/EC. Specifically, the questions referred are:

1. (a) Is a national provision which provides for the periods of notice on termination which employers are required to observe to be increased incrementally with the length of service, but which disregards periods of the employee's employment before the age of 25, incompatible with the Community law prohibition against discrimination on the ground of age, and specifically with primary Community law or with Directive 2000/78/EC of 27 November 2000?

(b) Can the fact that employers are required to observe only a basic period of notice when terminating the employment of younger employees be justified on the grounds that employers are recognised as having a commercial interest in flexibility as regards staffing – an interest which would be adversely affected by longer periods of notice – and that younger employees are not recognised as having the protection available to older employees (in the form of longer notice periods) with respect to their employment status or arrangements, for example because, having regard to their age and/or their lesser social, family and private obligations they are assumed to have greater professional and personal flexibility and mobility?

2. If Question 1(a) is answered in the affirmative and Question 1(b) is answered in the negative:
   In legal proceedings between private individuals, must a national court disapply a statutory provision which is clearly incompatible with Community law, or is the legitimate expectation of persons subject to the law – that national laws which are in force will be applied – to be taken into account so that a national law is disapplied only after the Court of Justice has ruled on the provision at issue or on a substantially similar provision?

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN (search term: Case C-555/07)

Case C-88/08 Reference for a preliminary ruling in the case of David Hütter v Technische Universität Graz of 27 February 2008

OJ C 128 of 24.05.2008, p.21

Reference for a preliminary ruling was made to the European Court of Justice by order of the Austrian *Oberster Gerichtshof* (Supreme Court), regarding interpretation of the justification of differences of treatment on grounds of age of the Council Directive 2000/78/EC. Specifically, the question referred is: are Articles 1, 2 and 6 of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation to be understood as precluding national legislation (here: Paragraphs 3(3) and 26(1) of the Austrian *Vertragsbedienstetengesetz* 1948 (1948 Law on contractual employees)) which excludes accreditable previous service from being taken into account in the determination of the reference date for salary increments in so far as such service was completed before the person concerned reached the age of 18 years?

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN (search term: Case C-88/08)

References for Preliminary Rulings – Advocate General Opinions

Case C-427/06 Opinion of Advocate General Sharpston in the case of Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH delivered on 22 May 2008

A reference was made to the European Court of Justice on 18 October 2006[138] regarding the issue of age discrimination, and specifically a clause in an occupational pension scheme whereby a widow(er) of a private-sector employee who dies in service is excluded from entitlement to a survivor's pension if that widow(er) is more than 15 years younger than the deceased employee. The *Bundesarbeitsgericht* (Federal Labour Court) asked the ECJ whether such a clause is contrary to the general principle prohibiting age discrimination identified by the ECJ in *Mangold*[139] and invited the ECJ to provide further clarification as to the circumstances in which that principle may apply. Advocate General Sharpston in her opinion proposed that, in answer to the questions referred, the ECJ should rule that Member States are not under an obligation to guarantee protection under the general principle of equality (including equal treatment irrespective of age) contained in Community law if the alleged discriminatory treatment does not fall within the scope of Community law. According to the Advocate General, there is no specific substantive rule of Community law that may serve as the basis for applying the general principle of equality (including

[138] *See European Anti-Discrimination Law Review (EADLR)* issue 5, p. 52.

[139] Case C-144/04 [2005] ECR I-9981. The premise that this principle is settled law is challenged directly by the United Kingdom, and rather more indirectly by Germany and the Netherlands.

equal treatment irrespective of age) to the situation giving rise to the reference, since at the time of the specific case EU law did not protect against age discriminatory practices, as Directive 2000/78/EC had not been brought into force, and Article 13 of the Treaty gave no rights to protection against age discrimination.
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (search term: Case C-427/06)

Case C-303/06 Opinion of Advocate General Poiares Maduro in the case of S. Coleman v Attridge Law, Steve Law delivered on 31 January 2008
A reference was made to the European Court of Justice in July 2006.[140] To summarise, Ms Coleman was carer to her disabled son, and brought a claim against her employer under the UK Disability Discrimination Act 1995 (DDA) and Directive 2000/78/EC on the basis that she had been denied flexibility and support comparable to her colleagues who had non-disabled children. Ms Coleman claimed that the UK DDA did not fully implement Directive 2000/78/EC. The employment tribunal referred the case to the ECJ for guidance as to the meaning of Directive 2000/78/EC.

In his opinion, Advocate General Poiares Maduro proposed that the ECJ should answer the question of the Employment Tribunal judging that the Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, protects people who, although not themselves disabled, suffer direct discrimination and/or harassment in the field of employment and occupation because they are associated with a disabled person, namely, that "discrimination by association" is covered by Directive 2000/78/EC.

Furthermore, the Advocate General did not restrict his opinion to discrimination by association regarding only disability, but mentioned all the grounds protected under Directive 2000/78/EC, namely religion, age and sexual orientation. The Advocate General explained that the Directive does not allow the hostility an employer may have against people belonging to the enumerated suspect classifications to function as the basis for any kind of less favourable treatment in the context of employment and occupation, and that this, "hostility may be expressed in an overt manner by targeting individuals who themselves have certain characteristics, or in a more subtle and covert manner by targeting those who are associated with the individuals having the characteristics. In the former case, we think that such conduct is wrong and must be prohibited; the latter is exactly the same in every material aspect. In both cases, it is the hostility of the employer towards elderly, disabled or homosexual people or people of a certain religious persuasion that leads him to treat some employees less well" (para. 22). Finally, the Advocate General emphasises that recital 6 of Directive 2000/78/EC refers to "the importance of combating every form of discrimination." (para. 24).
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (search term: Case C-303/06)

Case C-54/07 Opinion of Advocate General Poiares Maduro in the case of Centrum voor gelikheid van kansen en voor racismebestrijding v NV Firma Feryn, delivered on 12 March 2008
Official Journal 14.04.2007/C82/21
The *Arbeidshof de Brussel* (Brussels Labour Court) made a reference to the European Court of Justice for a preliminary ruling in February 2006, referring six questions of interpretation of the Racial Equality Directive (Directive 2000/43/EC), regarding a case introduced by the equality body (Centre for Equal Opportunities and Opposition to Racism)[141].

[140] See *EADLR,* issue 5, p. 51.

[141] See *EADLR*, issue 5, pages 60-61.

In his Opinion, Advocate General Poiares Maduro develops interesting arguments regarding the notion of direct discrimination. He summarises the questions as follows: "Does it constitute direct discrimination for the purposes of the Directive if an employer publicly states, in the context of a recruitment drive, that applications from persons of a certain ethnic origin will be turned down?". Taking into account the purpose of Directive 2000/43/EC, he proposes to the European Court of Justice the following answer: "A public statement made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin will be turned down, constitutes direct discrimination within the meaning of Article 2(2)(a) of the Directive" (para. 19).

With respect to the burden of proof, the Brussels Labour Court had asked several questions of practical importance: "Having regard to the facts in the main proceedings, can a joint press release issued by an employer and the national body for combating discrimination, in which acts of discrimination are at least implicitly confirmed by the employer, give rise to such a presumption?"; "Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of (…) discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters from ethnic minorities?"; "Is *one fact sufficient* in order to raise a presumption of discrimination?"; "Can a presumption of discrimination (…) be rebutted by a simple and unilateral statement by the employer in the press that he does not or does not any longer discriminate and that fitters from ethnic minorities are welcome; and/or by a simple declaration by the employer that his company, excluding the sister company, has filled all vacancies for fitters and/or by the statement that a Tunisian cleaning lady has been taken on and/or, having regard to the facts in the main proceedings, can the presumption be rebutted only by actual recruitment of fitters from ethnic minorities (…)?".

The Advocate General points out that, "It is the task of the national court to apply these rules concerning the burden of proof to the specific circumstances of the case" (para. 23). Nevertheless, he stresses that "...in circumstances where it is established that an employer has made the kind of public statements about its own recruitment policy that are at issue in the main proceedings, and where, moreover, the actual recruitment practice applied by the employer remains opaque and no persons with the ethnic background in question have been recruited, there will be a presumption of discrimination within the meaning of Article 8 of the Directive" (para. 23).

As regards the matter of how the national court should appraise the evidence in rebuttal submitted by the employer, the Advocate General underlines that national procedural rules should be applied providing that they are in line with the principle of equivalence and the principle of effectiveness.
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (search term: Case C-54/07)

References for Preliminary Ruling – Judgments

Case C-267/06, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, judgment of the Grand Chamber of 1 April 2008
OJ C 128 of 24.05.2008, p.6
A reference was made to the European Court of Justice in June 2006[142], concerning the question of whether a registered life partner of the same sex may be entitled to a survivor's pension under an occupational pension scheme. According to the facts of the case, the compulsory occupational pension scheme for employees in the German theatre was limited to partnerships of a different sex; this regulation however was challenged as contrary to anti-discrimination law by the registered life partner of a deceased person

[142] See *EADLR*, issue 5, page 51.

entitled to the pension scheme. The *Verwaltungsgericht München* (Administrative Court of Munich) formulated the preliminary reference to the ECJ about this contention, as the national court must determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's pension at issue.

The European Court of Justice decided that occupational pension schemes of the kind under scrutiny (of the *Versorgungsanstalt der deutschen Bühnen – VddB*), are to be classified as pay within the meaning of Article 141 EC, as they originate in a collective agreement designed to supplement the social security benefits payable under national legislation of general scope. The scheme is paid into by workers and employers of the sector concerned, regards a particular group of workers and is related to the period of service and not fixed by statute; the fact that the VddB is a public body and that the scheme is compulsory is of no importance. Recital 22 of Directive 2000/78/EC, stating that Directive 2000/78/EC is without prejudice to national laws on marital status and the benefits dependent thereon, does not, in the view of the Court, preclude the application of anti-discrimination law to the case. The ECJ regarded the refusal to recognise Mr Maruko's entitlement to the pension scheme as direct discrimination on the ground of sexual orientation, if life partnership places persons of the same sex in a situation comparable to that of spouses as far as the survivor's benefit is concerned. It is, however, for the national court to decide whether a surviving life partner is in a situation comparable to that of a spouse entitled to the benefits of the scheme.

The decision clarifies various legal questions, some intensely debated within national legal systems in Europe. The first clarification concerns the fact that the scheme can be regarded as pay within the meaning of Article 141 EC, which is not a surprising outcome, given the jurisdiction of the ECJ in this respect. Very important and of potentially far-reaching effect is the statement of the ECJ that Recital 22 does not prevent the application of anti-discrimination law, as national courts have in the past relied heavily on this Recital, interpreting it as a fully-fledged exception with the meaning that different treatment of life partnerships as such is possible and is outside of the scope of Directive 2000/78/EC[143]. Therefore, it is a welcome result that interpretation has been given on Recital 22 in order to ensure uniform application from national courts.

Moreover, the ECJ decided that a different treatment of life partnership constitutes discrimination in the context of Article 2 of Directive 2000/78/EC, determining that the case amounts to direct discrimination. Consequently, the ECJ ruled that the refusal to grant the survivor's pension to life partners constitutes direct discrimination on grounds of sexual orientation, if surviving spouses and surviving life partners are in a comparable situation as regards that pension, leaving it to the national court to determine whether the surviving partner is in a similar position to the spouse.
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (search term: Case C-267/06)

Case C-411/05, Félix Palacios de la Villa v Cortefiel Servicios SA, judgment of the Grand Chamber of 16 October 2007
A reference was made to the European Court of Justice in November 2006 and the Opinion of Advocate-General Mazák in the case of *Félix Palacios de la Villa v Cortefiel Servicios SA* was delivered in February 2007[144]. To summarise, the referring Spanish court essentially wanted to ascertain whether the prohibition of discrimination on the grounds of age, as laid down in particular in Article 2(1) of Directive 2000/78/EC, precludes a national law allowing compulsory retirement clauses to be included in collective agreements. In the event of an affirmative answer, the referring court also wished to know if it is required to disapply

[143] German case-law: BVerwG 26.1.2006 – 2 C 43/04, para 18; BAG 26.10.2006 – 6 AZR 307/06 para 42; BGH 14.2.2007 – IV ZR 267/04 para 20.

[144] See *EADLR*, issue 5, p. 52.

the national law concerned. These questions have been raised in the context of a dispute between private parties, in which Mr Palacios claims that his dismissal on the ground that he had attained the compulsory retirement age laid down in a collective agreement was unlawful.

The judgement delivered on 16 October 2007 states that the prohibition of any discrimination on grounds of age, as implemented by Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, must be interpreted as not precluding national legislation such as that at issue in the main proceedings, pursuant to which compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime, where

- the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and
- the means put in place to achieve that aim of public interest do not appear to be inappropriate and unnecessary for the purpose.

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (search term: Case C-411/05)

Late News! *Case C-303/06 S. Coleman v Attridge Law, Steve Law, judgement of the Grand Chamber of 17 July 2008*[145]

On 17 July 2008, the European Court of Justice delivered judgment in the case of *Coleman v. Attridge Law and Steve Law*. The judgment interprets the meaning of the prohibition of direct discrimination and harassment in employment and occupation on grounds of disability pursuant to Article 2(2)(a) and Article 2(3) of Council Directive 2000/78/EC of 27 November 2000 and especially the meaning of discrimination by association.

The ECJ stated that the purpose of the Directive is to prohibit all forms of discrimination in employment and occupation on the protected grounds, namely disability, sexual orientation, age and religion and is not limited to a particular category of person. As the ECJ explained, "An interpretation limiting its application only to people who are themselves disabled is liable to deprive the Directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee." (para.51).

The ECJ concluded that Directive 2000/78/EC "...must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a)."

In relation to harassment, the ECJ used the same reasoning to conclude that "...the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3)."

[145] For more information on the concept of discrimination by association, please see Waddington, L., 'Protection for family and friends: addressing discrimination by association", *EADLR*, issue 5, p. 13. For more information on the Advocate General's Opinion in *Case C-303/06 S. Coleman v Attridge Law, Steve Law,* please see *EADLR*, issue 6-7, p. 59.

This judgment is very important, as it asserts the general principle that discrimination should also be prohibited when it results in view of the association of a person with other persons to whom a prohibited discrimination ground applies.
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (search term: Case C-303/06)

Late News! *Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn, judgement of the Second Chamber of 10 July 2008*[146]
On 10 July 2008, the European Court of Justice delivered judgement in the case of *Centrum voor gelikheid van kansen en voor racismebestrijding v NV Firma Feryn*. The judgement concerns questions of interpretation of Directive 2000/43/EC, regarding direct discrimination in the context of a recruitment drive where applications from persons of a certain ethnic origin were excluded.

The Second Chamber of the European Court of Justice ruled that: "The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market." The ECJ goes on to find that: "...public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43/EC. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment". Finally, the ECJ found that: "...Article 15 of Directive 2000/43/EC requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that Directive must be effective, proportionate and dissuasive, even where there is no identifiable victim."
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (search term: Case C-54/07)

[146] For information on the Advocate General's Opinion, please see *EADLR*, issue 6-7, p. 59.

Rachel | *2000*

European Court of Human Rights Case Law Update

Judgments

D.H. and others v. The Czech Republic, (no. 57325/00) Grand Chamber Judgment of 13 November 2007[147]
On 13 November 2007, the Grand Chamber of the ECtHR held by thirteen votes to four that there had been a violation of Article 14 in conjunction with Article 2 of Protocol No. 1 of the European Convention on Human Rights (ECHR) regarding the circumstances of the case of *D.H. and others v. The Czech Republic*. To summarise, between 1996 and 1999, the 18 Roma applicants were placed in special schools in Ostrava. Although individual circumstances differed, the placement was made in accordance with the law, on the basis of recommendations made by a psychological and educational centre; the parents expressed their consent with the placement and no appeal against the decision was lodged. The applicants claimed that their placement was discriminatory, basing their claim on statistical evidence. According to the statistical data collected in 1999 in Ostrava, a Roma child was 27 times more likely to be placed in a special school than a child from the majority population. According to the same data, more than half of special school pupils were of Roma origin. In February 2006, the second Chamber of the Court delivered a judgement that, although the Roma children suffered from a pattern of adverse treatment, the applicants had not proved the Czech government's intent to discriminate, and the case was referred to the Grand Chamber.

The judgement contains the most explicit acknowledgement of the prohibition of indirect discrimination as ensuing from the provisions of the ECHR, confirming the division of the burden of proof in relation to indirect discrimination. Once the disparate impact is proven by the applicant, the respondent State should provide justification of the measure in question. Reliable and significant statistics are considered sufficient to constitute the *prima facie* evidence that the applicant is required to produce, when it comes to assessing the impact of the measure in question. Specifically, the ECtHR held that the arrangements provided for education of Roma children were not attended by safeguards that would ensure that the State took into account their special needs as members of a disadvantaged minority. As a result, the applicants were placed in schools for mentally retarded children, isolated from pupils of the wider population and received an education which compromised their personal development. The ECtHR was not satisfied that the difference in treatment was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and aim pursued. Regarding non-pecuniary damages, EUR 4,000 were awarded to each applicant.
http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=4466836&skin=hudoc-en (search term: "57325/00" or name of case)

E.B. v France (no. 43546/02) Grand Chamber judgment of 22 January 2008
On 22 January 2008 the Grand Chamber of the ECtHR held by ten votes to seven that there had been a violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the ECHR. Under Article 41 (just satisfaction) of the Convention, the Court by eleven votes to six awarded the applicant EUR 10,000 in respect of non-pecuniary damages and EUR 14,528 for costs and expenses.

[147] For information on the EctHR Second Chamber's judgment and background information, please see *EADLR*, issue 5, p.54.

According to the facts, in 1998 the applicant was refused her request for authorisation to adopt a child, as during the process the applicant had mentioned her homosexuality and her stable relationship with another woman. The administrative courts dismissed the applicant's appeals as "having regard to her lifestyle", among other reasons. The present case concerned the procedure for obtaining authorisation to adopt rather than adoption itself. Accordingly, the Court was not required to rule whether the right to adopt did or did not fall within the ambit of Article 8 of the Convention taken alone. Given that French legislation expressly granted single persons the right to apply for authorisation to adopt and established a procedure to that end, the facts of this case undoubtedly fell within the ambit of Article 8 of the Convention. Consequently, the State, which had gone beyond its obligations under Article 8 in creating such a right, could not take discriminatory measures when applying it. Article 14 of the Convention, taken in conjunction with Article 8, was therefore applicable in the present case.

After drawing a parallel with the case of *Fretté v. France* (no. 36515/97, § 32, ECHR 2002-I), the Court noted that the domestic administrative authorities, and then the courts that heard the applicant's appeal, had based their decision to reject her application for authorisation to adopt on two main grounds: the lack of a paternal referent in the applicant's household and the attitude of her long-standing and declared partner. The latter did not feel committed to her partner's application to adopt. Her attitude was not without interest or relevance in assessing the application. It was legitimate for the authorities to ensure that all safeguards were in place before a child was taken into a family, particularly where they found that not one but two adults were members of the household. In the Court's view, that ground had nothing to do with any consideration relating to the applicant's sexual orientation.

The ground relating to the lack of a paternal referent did not necessarily raise a problem in itself, but in the Court's view such a ground, which ran the risk of rendering ineffective the right of single persons to apply for authorisation, might have led to an arbitrary refusal and have served as a pretext for rejecting the applicant's application on grounds of her homosexuality. The government had been unable to prove that use of that ground at domestic level had not resulted in discrimination. The fact that it was legitimate for this factor to be taken into account should not lead the Court to overlook the excessive reference to it in the circumstances of the present case. The fact that the applicant's homosexuality had featured to such an extent in the reasoning of the domestic authorities was significant even if the courts had found that this had not been the basis for the decision in question and had not been considered from a hostile position of principle. Besides their considerations regarding the applicant's "lifestyle", they had above all confirmed the decision of the president of the council for the *département* which had been based on certain opinions in which the applicant's homosexuality, or sometimes her status as a single person, had been a determining factor. The Court considered that the reference to the applicant's homosexuality had been, if not explicit, at least implicit, and that the influence of the applicant's avowed homosexuality on the assessment of her application had been established and, having regard to the foregoing, had been a decisive factor in the decision to refuse her authorisation to adopt. Accordingly, the domestic authorities had made a distinction based on considerations regarding her sexual orientation, a distinction that was unacceptable under the Convention.

French law allows single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual. Moreover, the Civil Code was silent as to the necessity of a referent of the other sex and, further, the applicant presented, in the terms of the judgment of the *Conseil d'Etat*, "undoubted personal qualities and an aptitude for bringing up children". The reasons put forward by the government could not therefore be regarded as particularly convincing and weighty such as to justify the difference in treatment of the applicant. The Court observed that the authorities had undertaken an overall assessment of the applicant's situation. This had not been based on a single ground, but on "all" the factors involved. Accordingly, the two main grounds used had to be assessed concurrently. Thus the illegitimacy of one

of the grounds (lack of paternal referent) had the effect of contaminating the entire decision. It followed that the decision refusing the applicant authorisation was incompatible with the Convention.

Alexandridis v. Greece, (no 19516/06) Chamber judgement of 21 February 2008
On 21 February 2008, the ECtHR held unanimously that there had been a violation of Articles 9 (freedom of thought, conscience and religion) and 13 (right to an effective remedy), finding a Greek court's practice not in conformity with the religious freedom rule of Article 9 of the ECHR.

According to the facts, when taking the oath of office before the Court, which is a precondition to practising as a lawyer, the applicant had been obliged to reveal that he was not an Orthodox Christian in order to take a non-religious affirmation rather than an oath on the Bible, and there was no remedy to offer redress for the violation of his freedom of religion. The ECtHR observed that the freedom to manifest one's beliefs also contained a negative aspect, namely, the individual's right not to be obliged to manifest his or her religion or religious beliefs and not to be obliged to act in such a way as to enable conclusions to be drawn regarding whether he or she held – or did not hold – such beliefs.

In the present case the ECtHR considered that when the applicant went before the national court he was obliged to declare that he was not an Orthodox Christian and, consequently, to reveal in part his religious beliefs in order to make a solemn declaration. The ECtHR observed that this procedure reflected the existence of a presumption that lawyers going before the court were Orthodox Christians. In this context the ECtHR also noted that, under Greek law, the oath that any civil servant was invited to take was in principle the religious oath (first paragraph of Article 19 of the Civil Service Code) and considered that the Greek government had failed to show the existence of any effective remedy by which the applicant could have sought redress for the violation of his freedom of religion.
http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=4466836&skin=hudoc-en (search term "19516/06"or name of case)

Sampanis and Others v. Greece, (no. 32526/05) Chamber judgment of 5 June 2008
On 5 June 2008, the ECtHR held unanimously that there had been a violation of Article 14 (prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 (right to education) and of Article 13 (right to an effective remedy) in the case of 11 Greek nationals of Roma origin in respect of the treatment of their children by the educational authorities in Aspropyrgos, Greece.

According to the facts, the applicants were refused permission to enrol their children in local primary schools on 21 September 2004, which meant their children missed the school year 2004-2005. Subsequently, from the first day of school for the year 2005-2006, the applicants' children when arriving at school, faced protests, requiring police intervention, from parents of the non-Roma children who blockaded the school. From 31 October 2005, the local educational authorities placed the Roma children in an annexe building, located five kilometres from the primary school, especially established for the Roma children to prepare them for integration into the primary school.

The ECtHR applied the jurisprudence established in *D.H. and Others v. the Czech Republic*, at a number of points in the judgment – for example, in regard to the presumption of discrimination and the principle that a *prima facie* case of discrimination is capable of triggering a shift of the burden of proof. The ECtHR opined that the competent authorities had not adopted a single, clear criterion in choosing which children to place in the preparatory classes. Furthermore, the government had not shown that any suitable tests were ever given to the children concerned in order to assess their capacities or potential learning difficulties. The judgment confirmed the ECtHR's position that the State duty, under Article 2 of Protocol 1, to provide equal access to education, includes an obligation to adequately assess the learning needs of

all children, including children belonging to disadvantaged ethnic minority communities. This judgement also confirms that discriminatory treatment of Roma children, namely their educational segregation on the basis of assumed learning needs, is a pernicious phenomenon that cannot be tolerated.

This judgment is an important step which strengthens Article 14 jurisprudence established in *D.H. and Others v. the Czech Republic*. The judgment represents another victory for combating discriminatory educational practices and affirms the equal rights of all to receive an education on an equal basis with others.
http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=4466836&skin=hudoc-en (search term "32526/05"or name of case).

Admissibility

P.B. and J.S. v. Austria, 20 March 2008(No 18984/02)
The applicants live together in a homosexual relationship and the second applicant, a civil servant, has accident and sickness insurance cover with the Civil Servants Insurance Corporation (CSIC). A request by the first applicant for the CSIC to recognise him as the second applicant's dependant for insurance purposes was turned down as the legislation applicable at the time defined "dependants" as either a related person or as an unrelated person of the opposite sex and so excluded persons living in a homosexual relationship.

The Constitutional Court declined to interfere with that decision as it considered that the legislature had acted within the bounds of its wide margin of appreciation in that sphere. An administrative court to which the case was subsequently transferred held that there was no issue under Article 14 read in conjunction with Article 8 of the European Convention as the latter provision did not guarantee specific social rights and the difference in treatment was in any event justified by differences in the factual situation. In a separate case, the Austrian Constitutional Court later ruled that two similar statutory provisions were discriminatory after expressly citing the European Court's judgment of 24 July 2003 in the case of *Karner v. Austria* (no. 40016/98, see Information Note no. 55). The application was considered admissible under Article 14, read in conjunction with Article 8 and in conjunction with Article 1 of Protocol No. 1.
http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=4466836&skin=hudoc-en (search term: 18984/02)


Joris | *1982*

European Committee of Social Rights

Resolutions

Resolution on complaint No. 31/2005 European Roma Rights Centre (ERRC) v. Bulgaria, 5 September 2007
The complaint, lodged on 22 April 2005, relates to Article 16 (right to social, economic, and legal protection) alone or in combination with Article E (non-discrimination) of the Revised European Social Charter. It is alleged that the situation of Roma in Bulgaria amounts to a violation of the right to adequate housing.[148] The European Committee of Social Rights declared the complaint admissible on 10 October 2005. The decision on the merits of the complaint was adopted by the European Committee of Social Rights on 18 October 2006 and transmitted to the Committee of Ministers in the form of a report on 30 November 2006. The Committee of Ministers adopted Resolution ResChS(2007)2 on 5 September 2007. According to the resolution, the inadequate housing situation of Roma families and the lack of proper amenities as alleged by the complainant organisation demonstrated that legal and practical measures were necessary to redress such a situation. As regards the adequacy of the measures taken by the government, the measures must meet the following three criteria: (i) a reasonable timeframe, (ii) measurable progress and (iii) financing consistent with the maximum use of available resources.

The resolution continues to find that the lack of legal security of tenure and the non-respect of the conditions accompanying eviction of Roma families from dwellings unlawfully occupied by them constitute a violation of Article 16 of the Revised Charter together with Article E. This is due to the fact that illegal Roma settlements have existed for many years and that state authorities acknowledged and tolerated *de facto* the actions of Roma, because provision of public services such as electricity, though not uniform, was ensured and inhabitants charged for it. Accordingly, although state authorities enjoy a wide margin of appreciation as to the implementation of measures concerning town planning, they must strike a balance between the general interest and the fundamental rights of the individuals, in this particular case the right to housing and its corollary of not making the individuals homeless.

The legislation on the legalisation of dwellings set conditions too stringent to be useful in redressing the particularly urgent situation of the housing of Roma families and thereby affected them in a disproportionate manner. Though in certain cases the Roma evicted were provided with alternative accommodation or compensation, these measures, on the one hand, did not concern all families involved because of the conditions set by the law, and on the other hand, accommodation was either substandard or of a temporary nature. It is the responsibility of the state to ensure that evictions, when carried out, satisfy the conditions required by the Charter, in particular respect for the dignity of the persons concerned, even when they are illegal occupants, and that alternative accommodation or other compensatory measures are available in order to ensure that the persons evicted are not made homeless. By failing to take into account that Roma families run a higher risk of eviction as a consequence of the precariousness of their tenancy, Bulgaria discriminated against them.[149]

[148] See *EADLR*, issue 5, page 55.

[149] https://wcd.coe.int/ViewDoc.jsp?id=1180705&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

Mica | *1992*

Frank | *1956*

Maurice | *1989*

Caroline | *1979*

News from the EU Member States

AT

Austria

Legislative developments

Amendments to basic Federal anti – discrimination legislation

With the opportunity of implementing Directive 2004/113/EC on equal treatment between women and men in access to and supply of goods and services, the Austrian Federal law-maker introduced amendments to the Equal Treatment Act, the Federal- Equal Treatment Act, and the Act on the Equal Treatment Commission and the Equal Treatment Office. The Equal Treatment Act and the Act on the Equal Treatment Commission and the Equal Treatment Office were amended by Federal Law Gazette I Nr.98/2008 and the Federal Equal Treatment Act by Federal Law Gazette I Nr. 97/2008. Both Acts were published on 2 July 2008 and will come into force on 1 August 2008.

The most important improvements involve: a new legal option in cases of discriminatory dismissal – the claimant can choose whether to have the dismissal annulled or demand (material and non-material) compensation and leave the post (§ 26/7 Equal Treatment Act); an increase of minimum compensation in cases of discriminatory non-recruitment – from one month's wages to two months' wages (§ 26/1/1 Equal Treatment Act); new minimum compensation set for harassment, from the €400 that existed previously to €720 (§ 26/11 and 35/2 Equal Treatment Act); a provision that multiple discrimination has to be taken into account when ruling on the amount of compensation (§ 26/13 Equal Treatment Act); and a narrowing of the exception regarding protection on the ground of nationality or citizenship to only citizenship – the new definition excludes alien law regulations and other legal regulations relating to citizenship only.
All mentioned amendments are equally reflected in the amendment of the Federal Equal Treatment Act as well.

Case law

Supreme Court decisions on age discrimination

On 2 February 2008 the Austrian Supreme Court (*Oberster Gerichtshof*) decided to put forward the following question to the ECJ, asking for a preliminary ruling: "Are Articles 1, 2 and 6 of Council Directive 2000/78/EC to be understood as precluding national legislation (§§ 3 (3) and 26 (1) of the Austrian law on contractual employees (*Vertragsbedienstetengesetz*)), which excludes accreditable previous service from being taken into account in the determination of the reference date for salary increments in so far as such service was completed before the person concerned reached the age of 18 years?"[150]

Only five days later, on 7 February 2008, the Supreme Court (*Oberster Gerichtshof*) found **no** age **discrimination** in the case brought by a 17-year-old apprentice against her employer because of an unequal pay regulation in § 1a of the Act on the Employment of Children and Youth (AECY), which demands a different basic salary and calculation of overtime hours for apprentices below and above the age of 18. The court held that the differential treatment is not based "only on the ground of age", but on the completely different potential of the two groups. This different potential is created by the AECY itself, which has the basic aim to protect young workers and therefore limits the ways younger workers can be employed. The court, referring to Article 6 of Directive 2000/78/EC, stated that this difference is objectively justified by the legitimate aims of educational policy and necessary protection of young people[151].

[150] Ref. Nr. 9ObA34/07a, date:, David Hütter vs. Technische Universität Graz [Graz University of Technology]For more information see also under References for Preliminary Rulings – Applications section, EADLR, issue 6-7, p. 58

[151] Ref. Nr. 9ObA76/07b, Case of Melanie O. vs. Johann H.

Administrative High Court ruling on limits of reasonable accommodation

The Austrian Administrative High Court (*Verwaltungsgerichtshof*), in its decision from 17 December 2007, held that the duty of reasonable accommodation does not comprise the duty to vacate suitable posts that are held by able bodied civil servants, in order to avoid disadvantaging a person with disabilities who has become unable to serve on his/ her post during his/her employment. The court stated that such a dismissal of an able bodied person would constitute discrimination on the ground of disability[152]. This decision reflects recital 17 of Directive 2000/78/EC.

Belgium

BE

Legislative developments

Adoption of an agreement on the concept of reasonable accommodation for persons with disabilities between the Federal State, the Communities and the Regions

On 19 July 2007 (published in the Belgian Official Journal on 20 September 2007) the Federal State and the competent authorities of the Communities and the Regions of Belgium reached an agreement on cooperation to define uniformly the concept of reasonable accommodation in Belgium. An agreement was necessary, as eight different authorities are all competent regarding policies for people with disabilities in Belgium. This agreement was reached in application of the federal Anti-discrimination Act of 25 February 2003, which has now been replaced by new statutes adopted on 10 May 2007. The agreement protocol provides a number of diverse guidelines, defining the concept of reasonable accommodation as a "concrete measure aimed at neutralising the restrictive impact of an inappropriate environment on the participation of a person with disabilities".

Furthermore, it gives examples and details of such measures, material and non-material, as well as collective and individual, and provides that reasonable accommodation must be efficient, must ensure equal participation by persons with disabilities, as well as autonomous participation, and must ensure the safety of those persons. The agreement then presents a non-comprehensive list of criteria to determine if the measure is reasonable or not, taking into account the financial impact of the measure as well as its organisational impact, the frequency of use of the accommodation, the impact on the quality of life of other people with disabilities, actually or potentially, the impact on the general environment or other people, the lack of appropriate alternatives, and the non-application of existent compulsory rules. Finally, the agreement puts in place a monitoring mechanism, requiring each authority to collect information on reasonable accommodation and examples of best practices.

The French Community Commission transposes equal treatment Directives

The French Community Commission (*Cocof*) exercises in the Region of Brussels Capital some of the competences of the French Community, regarding, *inter alia*, vocational training. On 22 March 2007, it adopted a statute transposing Directives 2006/54/EC, 2000/43/EC, 2000/78/EC, 97/80/EC[153] and 2002/207/EC. This statute entered into force on 24 January 2008, the date of its publication in the Belgian official journal (as stipulated in Article 18), and encompasses a non-exhaustive list (open list) of 14 discriminatory grounds, stipulating at the end "or any other ground of discrimination". The scope of the statute is limited to vocational guidance, vocational training, learning, advanced vocational training and retraining. The legislation applies to all persons managing those areas, including those who distribute publicity regarding the above-mentioned areas.

[152] Ref. Nr. VwGH 2006/12/0223.

[153] Of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

Article 3, which defines the notions of direct and indirect discrimination, follows EC law that direct discrimination shall be taken to occur where one person is treated less favourably than another and states "*is*, *has been* or *would be* treated as such in a comparable situation". Concerning justification for indirect discrimination, there is no discrimination if the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Furthermore, Article 7 enshrines an obligation to put in place reasonable accommodation for people with disabilities. Articles 4 and 5 state that harassment and instruction to discriminate amount to discrimination; harassment is defined according to Article 3 of the 2000/78/EC Directive.

Article 6, however, seems to give non-restrictive examples of grounds (matrimonial status, pregnancy, birth) that would be *indirect* discrimination on the basis of sex, yet differences of treatment based on pregnancy or maternity should amount to *direct* discrimination in accordance with European law. Article 8 encompasses a general justification for discrimination on the ground of age when it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, correctly transposing Article 6 of Directive 2000/78/EC.

Article 9 states that affirmative action can be taken or maintained to remedy factual inequality or to restore equal opportunities. Article 11 details some prohibited behaviours and, under the section "promotion of equality", Article 12 states that the Executive of the *Cocof* shall designate institutions (equality bodies) that will have the mission to assist victims of discrimination, write reports, conduct studies and make recommendations and exchange information with other institutions in Europe. Anyone who has an interest (even associations as detailed in Article 14) can bring a case to justice; the shift of the burden of proof is precisely transposed from the EC Directives. Finally, the statute establishes disciplinary proceedings, providing for the public authorities to be able to suspend approval of an institution responsible for vocational guidance, vocational training, learning, advanced vocational training and retraining.

Case law

Incitement to racism and insults by the police – ex-superintendent convicted of racism

A superintendent in the Antwerp police force was sentenced to four years' imprisonment (of which he must serve at least one year), a fine amounting to 1,250 Euro and the loss of his civil and political rights for five years. On 31 January 2008 the Antwerp Court of Appeals found that the police officer, who is also a representative on the municipal Council of Antwerp of the *Vlaams Belang*, a radical right-wing political party, was guilty of incitement to racism, administering deliberate blows and injuries and forging reports.

The proceedings started in 2003, following a complaint from five members of a family originating from Turkey, who were arrested on the day of the Muslim celebration Aïd-el-Kebir. During interrogation they were violently hit and the police officer incited his subordinates to use violence, expressing racist insults. The first instance court decision did not convict the police officer for incitement to racism, but the appeal court's decision is an important contribution in combating racism and discrimination, with the sentence being a reminder that racist insults are unacceptable and outlawed, especially when voiced by public officials.

Maintaining the corporate image can justify the firing of a sales woman who has started to wear the *hidjab* at work

According to the decision of the Labour Court of Brussels of 15 January 2008[154], the dismissal of a sales woman based on her wearing of a religious symbol (Islamic headscarf) is neither discriminatory, nor contrary to the principle of freedom of religion.

[154] Labour Court of Brussels (Cour du travail de Bruxelles) (4th Chamber), decision of 15 January 2008, published in *Journal des Tribunaux du travail*, June 2008, p. 140.

In 2004, a book store fired a sales woman who, after several years on sick leave, came back to work wearing the Islamic headscarf and did not comply with her employer's order not to wear it at work. The employee was dismissed with no compensation and no advanced warning and launched judicial proceedings, losing her case before the first instance Labour Court of Brussels on 21 March 2006. On appeal, the Labour Court confirmed the first instance decision on 15 January 2008, basing its ruling on several grounds.

First, freedom of religion is not at stake in this case, as what the company dismissed its employee for was not her belonging to the Islamic faith, but her coming to work while wearing an overt religious symbol. This was despite the fact that there were clear guidelines within the company, according to which workers should not only wear a uniform with company branding, but should also refrain from wearing any symbols or items of clothing likely to undermine the corporate image (described as an "open, available, sober, family-based and neutral" image). Secondly, the freedom to manifest one's religion is not absolute: restrictions are allowed where religious practices are "likely to lead to chaos" and the company could justify the dismissal on objective considerations linked to its corporate image. Thirdly, the Labour Court of Appeals found no discrimination as the company policy applies to all workers without any distinction.

Severe prison sentences for Molotov cocktail against African prostitutes

On 14 March 2008 the *Cour d'assises* (criminal court with a jury) of Mons delivered a severe judgment on three young people who attempted to murder three black prostitutes by throwing a Molotov cocktail at them. According to the facts of the case, during the night of 19 April 2006 three young people, one female and two male, aged between 17 and 19 years old, passing in their car through the red-light district of Charleroi, a city located in the south of Belgium, threw a Molotov cocktail at three black prostitutes. One of them suffered severe burns all over her body, the second, although hit by the Molotov cocktail, had time to get out of her burning clothes; the third one was not hit.
The previous evening the three young people had come into the area to insult the prostitutes and to throw an extinguisher at them. One of them answered back and threw a dustbin which hit the young woman. The Molotov cocktail operation was designed as a "punitive expedition".

The three criminals were charged with attempted murder with racist intent. They were all convicted and sentenced to 15 (the young woman who was pregnant and mother of a three–year-old child), 18 and 20 years' imprisonment. The abject motive was only upheld for the offender condemned to 20 years' imprisonment. The jury was convinced that, in his words, he wanted to "whiten those Black women" and that he was going "to scorch those Negroes". Since 2003, committing a crime with racist intent amounts to an aggravating circumstance in criminal law, increasing the punishment, according to the Criminal Code (murder and attempt to commit a crime) and the Act of 31 July 1981 criminalising certain acts inspired by racism and xenophobia (as modified in 2003 after transposition of Directive 2000/43/EC at the federal level). The sentences were considered to be severe and exemplary and the jury and Court were particularly concerned to take into account the execrable, xenophobic and racist character of the offence, as the young age of the offenders might have brought the Court to pronounce a lesser sanction.

Sentence for physical assault with racist insults

On the evening of 7 February 2008 in Liège, a major city in the south of Belgium, two young women of Moroccan origin were physically assaulted in the town centre. The attackers uttered racist insults ("filthy Arabs", "go home filthy race", etc.) and when the women answered back, they were threatened with a firearm and assaulted. The victims managed to follow their attackers while communicating with the police, who were therefore quickly able to apprehend them.

Informed of the case by the victims, the Centre for Equal Opportunities and Opposition to Racism intervened in the proceedings as a civil party. On 5 May 2008, the Criminal Tribunal of Liège condemned the first assaulter to 15 months' imprisonment without any probation and the second to 12 months' imprisonment with six months' probation, basing its judgment on Article 405*quater* of the Criminal Code (abject motive) together with Article 20 of the Racial Equality Federal Act (public incitement to racial hatred or violence). The first assaulter was linked to extreme-right and Nazi movements. The Centre for Equal Opportunities and Opposition to Racism described the decision as exemplary.

Policy developments

Code of conduct for Muslim patients in Flanders

On 21 April 2008 the Flemish Association of Gynaecologists announced the adoption of a code of conduct with the aim of setting out guidelines to address the requests of Muslim patients. As a matter of principle and alongside the respect of the right to freely choose one's medical doctor, Flemish hospitals will try to accommodate Muslim patients who do not wish to receive care from a male gynaecologist. In order to be applicable, the request should be presented in writing and from the patient herself, not her husband or family. However, in the emergency unit or during night shifts, this request might not be complied with. The patient remains free to refuse any care but would have to do so in writing. The code of conduct has been supported by the Centre for Equal Opportunities and Opposition to Racism and the Institute for Equality between Women and Men.

BG

Bulgaria

Case law

Hate speech ruling

In May 2008, the Sofia Appeals Court declared[155] that an (extremist nationalist) political leader and member of parliament had committed incitement to discrimination and harassment of ethnic minorities by making public statements denouncing the Romani, Turkish and Jewish communities and all "aliens". However, the court did not recognise that the claimant's rights had been breached, as the claimant was a member of the Armenian minority, which had not been specifically mentioned by the political leader; the court found insufficient the fact that the political leader had attacked all "non-Bulgarians" as such, in addition to expressly mentioning specific minorities, thus failing to recognise that anti-minority racist speech harasses and incites against all minority persons regardless of whether their particular identity is mentioned or not. Nevertheless, the decision recognises that political hate speech is in breach of equality law, contributing thus to the public debate on the limits of free speech. The case is part of a cluster of cases brought by different minority groups united in the Citizens Against Hatred Coalition, in opposition to the same respondent for the same hate speech.

Age discrimination in refusal of health insurance for infants

On 16 January 2008, the Sofia trial court ruled that the National Health Insurance Fund, the Ministry of Healthcare, the Bulgarian Medical Association and the Bulgarian Dental Association were liable for age discrimination against an infant under two years old whose genetic ailment required him to be fed only special dietary milk. The respondents discriminated against the baby by excluding infants under two years of age from access to National Health Insurance Fund subsidies for the purchase of this milk, while

[155] Decision N 116 of 26 May 2008 of the Sofia City Appeals Court.

granting such subsidies to children between two and 18 years of age suffering from the same ailment. The court ordered the respondents to end the exclusion of infants by providing them with equal access to the subsidies and to abstain from further repeating such practices. It awarded compensation for both pecuniary and non-pecuniary damages suffered by the baby's parents, the latter to the amount of the equivalent of 250 Euro for each parent.

Race discrimination in refusal of urgent medical aid

On 16 January 2008, the Sofia Appeals Court ruled that a hospital was liable for race discrimination against a Roma woman for having refused her urgent medical attention after a miscarriage, as the woman was told to pay for an examination in direct breach of urgent medical aid legislation. When the woman produced the money, hospital staff asked for a larger sum that the woman was unable to pay and she was sent away without being examined, although she was bleeding.

The Appeals Court overturned the trial court's decision, which had found against the claimant, deciding the case on the basis of the Constitution and international equality law, including the Convention on the Elimination of All Forms of Racial Discrimination and the European Convention on Human Rights, as the national legislation transposing the EC Directives was not applicable *ratione temporis*. Nonetheless, the Appeals Court applied the principle of shifting the burden of proof provided for under EC legislation, as it was considered retroactive as a procedural norm and because this is consistent with Article 13 of the requirement in the European Convention on Human Rights for an effective remedy. The Appeals Court reasoned that shifting the burden of proof reflected the weaker position of every discrimination victim and furthered the objective of the law to provide effective protection. The judgment declared the respondent hospital had failed to rebut the presumption of discrimination raised by the facts established by the claimant and awarded the symbolic compensation sought (the equivalent of 25 Euro), while explicitly reasoning that it was considered insufficient.

Equality body decisions/opinions/reports

Discrimination against ethnic minority children and children with disabilities in special schools

In October 2007, the national specialised equality body of Bulgaria[156] found that students in special schools suffer disadvantage compared to students in regular schools in terms of material conditions, learning tools and materials and accessibility of buildings. It also declared that the authorities' approach to evaluating children's intellectual abilities was not uniform, which was a factor for subjectivity in the assessment process.

The body instructed the Minister of Education to stop the enrolment in special schools of children for whom not all possibilities for integrated education in regular schools have been exhausted; to develop and apply a uniform methodology for assessing the possibilities for integrated education; to ameliorate the material conditions in special schools; to improve the quality of education in special schools by introducing modern re-socialisation and integration programmes; to act to prevent the enrolment of healthy children in special schools; and to stop the practice of determining children's ethnicity based on external appearance markers. The ruling was based on the findings of an expert group appointed by the equality body to review the processes of enrolment and teaching in special schools in order to identify potential discriminatory practices, after indications of segregation of children with disabilities in substandard special schools and the disparate impact of enrolment procedures on Roma children, which result in their overrepresentation in such segregated, inferior establishments, due to the cultural and linguistic insensitivities of testing procedures.

[156] Decision N 80 of 16 October 2007 of the Protection Against Discrimination Commission.

Exclusion of older people from access to adoption services

In October 2007, the specialised equality body found[157] that a 70-year-old woman was directly discriminated against on grounds of her age, following a refusal by the authorities to allow her to adopt a young child. The body's main reason for this ruling was that the refusal was based exclusively on the applicant's age, without taking into account the fact that she had applied together with her much younger husband, who was also willing and able to contribute as a parent. The decision criticised the authorities for ignoring the positive social report on the couple's capability to raise a child and the pressing need for children to be de-institutionalised via adoption. The body declared, *obiter dictum*, that the refusal also constituted discrimination against the applicant's husband, aged 50, because he was treated by the authorities as being irrelevant, based on his sex, to the couple's capabilities to raise the child. The decision instructed the authorities to stop the impugned treatment of the applicant, to refrain from further such action in the future and to ensure that all social welfare employees conform in their practices to the equality law. The decision includes quite positive *obiter dicta* statements denouncing sexist attitudes to the effect that only women are responsible for child-rearing, which in this case led the authorities to the neglect the husband's capabilities as a parent.

Racial segregation in school

In November 2007, the specialised equality body found that the maintenance of separate classes for Bulgarian and Turkish students in school constituted direct discrimination. The separation was found to be based on Bulgarian parents' demands not to have their children placed in classes together with their Turkish peers. The body further ruled that the school principal had failed to take effective measures to avert racial segregation, which it found constituted incitement to discrimination. The equality body instructed the school principal to end the practice and to take immediate measures to de-segregate classes and ensure balanced representation of both ethnic groups[158]. The decision is a positive expression of the equality body's determination not to tolerate certain blatant forms of race discrimination, even though instead of declaring the impugned practice *racial segregation*, a concept expressly banned and defined under national equality law, the equality body chose to qualify the practice as *incitement* to discrimination through failure to prevent segregation, as well as *direct* discrimination.

Racial profiling in police reporting of crime

In January 2008, the specialised equality body instructed the Minister of the Interior to abolish the police practice of publicly reporting the ethnicity of Romani crime suspects, but not others, without, however, explicitly asserting that this practice constitutes discrimination. The body had initiated its own proceedings upon the initiative of one of its members, a representative of the Romani community, who had established that a number of regional police directorates' websites reported only Romani suspects' ethnicity[159]. Although no consensus was reached to make a declaration of discrimination, in its reasoning the body clearly stated that, "reporting of suspects' Romani ethnicity in police crime bulletins […] is a real factor in creating and perpetuating societal prejudices against the Roma [...]" and instructed the Minister to put a stop to such reporting. The equality body looked at the facts of the case from the standpoint of harassment, instead of applying the concept of direct discrimination. It thus found no harassment, as the impugned police reporting was not the sole cause of existing negative public attitudes towards the Roma (established ex officio by the body and treated in essence as an indication of a hostile environment for the community).

[157] Decision N 83 of 25 October 2007 of the Protection Against Discrimination Commission.

[158] Decision N 91 of 8 November 2007 of the Protection Against Discrimination Commission.

[159] Decision N 21 of 25 January 2008 of the Protection Against Discrimination Commission.

Religious interference in university

In June 2008, the Supreme Administrative Court refused to recognise that a rule imposed on students by the Faculty of Theology of Sofia University to participate compulsorily in religious services as part of the curriculum constituted discrimination against non-believers. The judgment confirmed the decision of the equality body in the case, denying that involuntary involvement of a non-believer in religious practice was less favourable treatment of the latter compared to believers in the same situation[160]. The decision was criticised as being formalistic and rigid, showing inadequacy in handling the concept of direct discrimination as defined under the law and a lack of regard for individual dignity.

Cyprus

CY

Legislative developments

Amendment to disability law transposes burden of proof and duty of reasonable accommodation requirements

The disability law was amended in 2007 in order to bring its provisions in line with Directive 2000/78/EC with respect to the burden of proof and the duty of reasonable accommodation[161].

Law N. 57(I)/2004 purporting to transpose the disability dimension of Directive 2000/78/EC, was amended twice in 2007 introducing important changes. The burden of proof provision is amended in order to be harmonised with Directive 2000/78/EC and the employer's obligation to provide reasonable accommodation in the workplace for people with disabilities becomes more absolute. In particular, the burden of proof provision was extended to cover administrative judicial proceedings (but not proceedings before the equality body); the requirement for the claimant to prove (instead of merely introduce) facts from which a violation can be inferred was removed; and the provision that the accused is absolved from liability if s/he proves that her/his violation had no negative impact on the claimant was deleted. With regard to reasonable accommodation, the employer is now under an obligation to adopt all appropriate measures so that a person with a disability can have access to the workplace, to promotion and to vocational training so long as these measures are not disproportionately onerous for the employer.[162]

Prior to this amendment, the burden of proof provision was not in line with Directive 2000/78/EC; now, even though the burden of proof is not reversed in proceedings before the equality body, this appears to be in line with the exception in Article 10(5) of Directive 2000/78/EC since the equality body has the power to investigate the facts of the case before it.

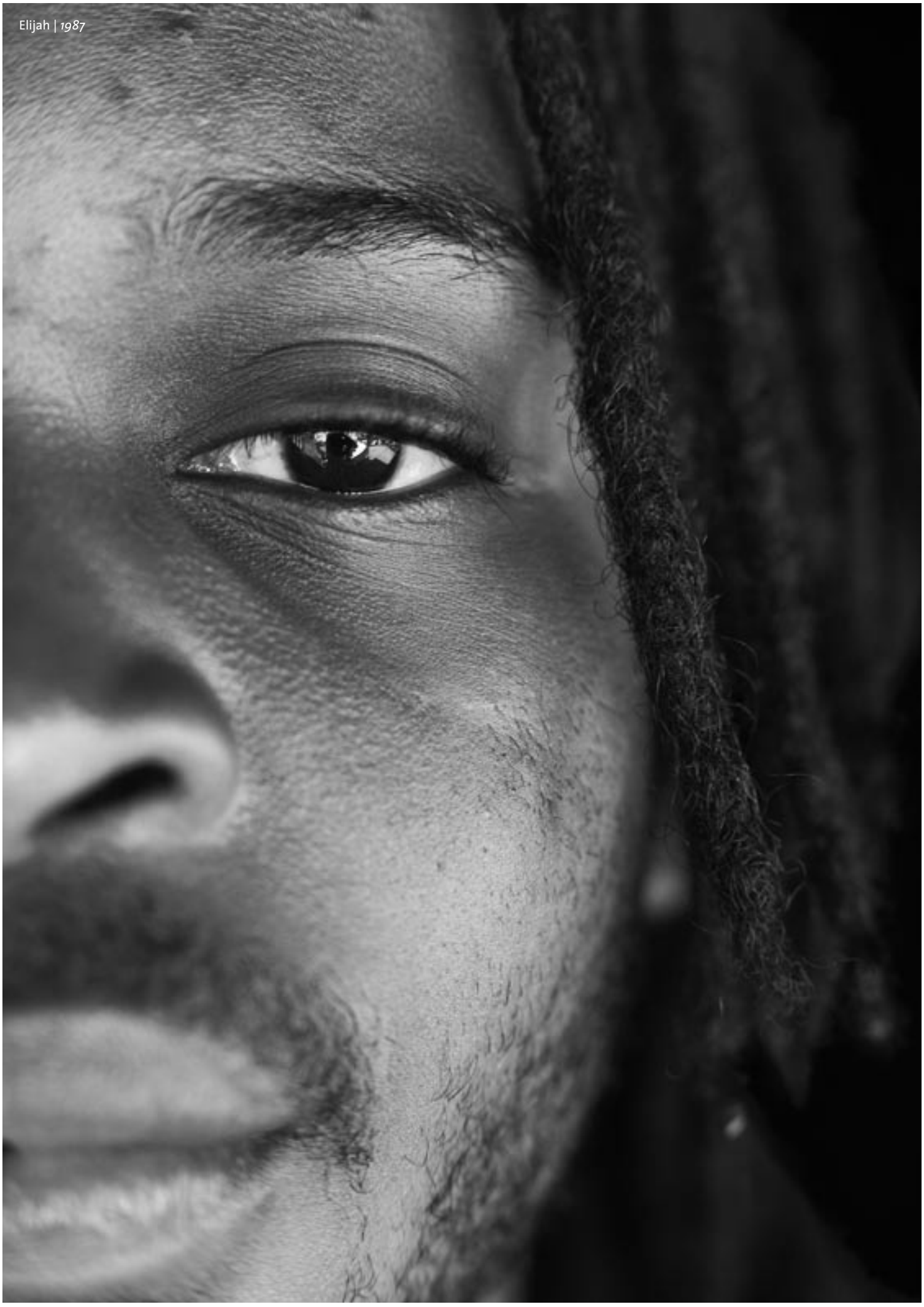
Regarding reasonable accommodation, prior to the 2007 amendment, the law provided a long list of prerequisites which needed to be taken into account before a mandatory obligation to provide reasonable accommodation was created[163] and employers could escape liability for not providing

160 Decision of 3 June 2008 of the Supreme Administrative Court.

161 Law on Persons with Disabilities N. 57(I)/2004, as amended by Law N. 72(I)/2007.

162 Article 5(1A) of the Law on Persons with Disabilities N. 127(I) 2000, as amended by Law 72(I)/2007.

163 The nature and the required expense for the taking of the necessary measures; the financial resources of employer; in the event that the measures are to be taken by the state, the public finances and other obligations of the state are to be taken into account; the provision of state aid or other contributions towards the cost of the required measures; and even the socio-economic situation of the person with a disability, albeit only in the non-employment field (Law on Persons with Disabilities N. 127(I)2000, article 9(2)). This provision is still to be found in the law in relation to the provision of reasonable accommodation outside employment.



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reasonable accommodation where their failure or omission was justified by 'reasonable cause'[164]. The 2007 amendment to the law has changed this, to the effect that an obligation is now placed on the employer to provide reasonable accommodation, subject only to the condition that the measure does not lead to disproportionate burden for the employer. The provision on the adoption of reasonable measures which applied prior to the 2007 amendment[165] continues to apply in respect of all other fields outside employment which fall within the scope of the law.

Case law

Supreme Court rejects application for referral to ECJ for interpretation of Racial Equality Directive

The Supreme Court rejected the request of an appellant to refer to the ECJ the question of whether Article 2 of Directive 2000/43/EC can be interpreted in a manner permitting an EU Member State to deny some of its citizens the right to sell their properties. The appellant is a Turkish Cypriot applying to the Court demanding the right to sell her property located in the Republic-controlled area, which had been placed under the custody of the 'Custodian' of Turkish Cypriot properties (which is the Interior Minister), as is the case with all Turkish Cypriot properties located in the Republic-controlled area.

The application was rejected on the ground of abuse of process, since the appellant had filed and withdrawn two similar applications in 2005 and 2007 respectively. The Court also found that the scope of Directive 2000/43/EC did not include the issue at stake, which was access to property. In describing the scope of the Directive, the Court mentioned only "conditions for access to employment, working conditions, social protection including social security and social advantages"[166]. The Court used its discretion to reject the request for referral to the ECJ on a technical ground but also went a step further to find that the scope of the Directive does not include rights pertaining to property, such as the right to sell one's property. The right not to be discriminated against in the field of housing was not considered by the Court as relevant, even though a more liberal approach would have found that housing includes the right to one's own property. Issues pertaining to the 'doctrine of necessity' and particularly to the right of Turkish Cypriots to their properties are inevitably politically charged and court decisions are not always uniform or consistent.

Equality body decisions/opinions/reports

Equality body exemplifies extent of the employer's duty to provide reasonable accommodation for employees with disabilities

A blind person employed at a state hospital complained that his access to the workplace was obstructed/inconvenienced by the fact that he did not have the key to the front door of the hospital[167] and had to use the back door, the way to which was often obstructed by boxes, and the parking space allocated to him was not protected with a chain, as a result of which it was often occupied by visitors or suppliers.

During the equality body's investigations, the former problem was remedied to the satisfaction of the complainant, as the efforts of the hospital management to supervise the access area to the back door and ensure that no boxes or other obstacles obstructed clear access to the back door were successful.

[164] Article 9(3) of the Law on Persons with Disabilities N. 127(I) 2000.

[165] Article 9(1) of the Law on Persons with Disabilities N. 127(I) 2000.

[166] *Perihan Mustafa Korkut or Eyiam Perihan v. Apostolos Georgiou through his attorney Charalambos Zoppos,* dated 17.12.2007, Supreme Court Case No. 303/2006.

[167] The complainant had been issued electronic keys to the front door but lost them as a result of his disability. The hospital management stated that there were no more keys to be made available to him because the system was quite old and no new keys could be issued. Instead, they supplied him with keys to the back door.

The parking problem, however, persisted. Quoting the 2007 amendments to the disability law which rendered the obligation to provide reasonable accommodation more absolute than in the previous law[168], the equality body found that the provision of reasonable accommodation is not only necessary for the effective implementation of the prohibition of discrimination, but it is also a specific legal obligation of the employer, adding that the principle of equal treatment does not prevent more favourable treatment of persons with disabilities in employment in order to ensure their integration into the labour market.

The report found that the employer responded satisfactorily to the complaint of access to the back door of the hospital (by ensuring that access to the door remains unobstructed at all times) but not to the issue of the parking space, where the employer had an obligation either to indicate and suitably adapt an alternative space or to supervise the parking area sufficiently, either through its own private security staff or with the assistance of the state police who are authorised to police any area to which the public has access. The decision contributes to defining the duty to provide reasonable accommodation and offers a significant precedent in concrete terms.

Equality body's first decision on sexual orientation discrimination

The equality body decided in favour of a third-country national, whose claim to the right to join his same-sex British partner in Cyprus was rejected by the immigration authority. A complaint was submitted to the equality body against the immigration authorities by a third-country national who had registered a civil partnership in the UK with a UK national. The complainant had applied to the immigration authorities for the rights of movement and residence afforded to partners of EU citizens under Directive 2004/38/EC; the application was rejected by the Cypriot immigration authorities on the ground that national legislation does not recognise same-sex marriages.

The decision of the equality body invoked European Court of Human Rights (ECtHR) case law, which establishes that the term 'family life' is not restricted to relationships within a marriage but includes also de facto family relations where the parties live together outside marriage. The decision found that an obligation exists to secure the enjoyment of legally guaranteed rights without discrimination, in accordance with Article 14 of the European Convention on Human Rights (ECHR) and Article 28 of the Cypriot Constitution which, according to ECtHR case law, is violated when there is differential treatment of similar cases which is not justified objectively and logically, or where the means used are disproportionate to the aim pursued. As a result, the immigration authority's decision to exclude the homosexual partner of any EU citizen from the rights afforded to heterosexual partners is unjustified discrimination on the ground of sexual orientation.

The finding is based on the fact that, although Directive 2004/38/EC allows discretion for Member States to decide whether and how to recognise same-sex marriages and registered partnership, and Cyprus chose not to recognise same-sex marriages or partners, it is nevertheless bound by the anti-discrimination acquis, international conventions and fundamental human rights principles that demand any discretion be exercised in line with the anti-discrimination principle.[169]

The equality body used the power granted to it by Article 39(1) of the Combating of Racial and Other Forms of Discrimination (Commissioner) Law N.42(I)/2004 to refer the law transposing Directive 2004/38/EC to the Attorney General for revision. It will be interesting to see if this referral brings any results, since all previous referrals made to the Attorney General by the equality body have not been acted upon.

[168] Law on Persons with Disabilities N. 127(I)/2000, as amended by Law N. 57(I)/2004 and N. 72(I)/2007.

[169] Case Ref. No. A.K.R. 68/2008, dated 23.04.08.

Equality body rules age limit unlawful in spite of existence of a legitimate aim, because the means used are not proportionate and necessary

Two public post office employees complained to the equality body that their fixed-term contract was not renewed because they had reached the age of 35. The age limit was introduced in 2007 only in relation to fixed-term contract employees and not for the permanent employees. The postal authorities' argument was that the nature of the work involved for this position is such that it requires the employees to ride a motorbike for about three hours on a daily basis in order to distribute mail; this means they have to be in perfect physical condition which the postal authorities associate with youth. In relation to the fact that the age limit was applied only to temporary (fixed-term) workers, the postal authorities reasoned that the category of temporary workers cannot be replaced with substitutes during their leave of absence for health reasons. In view of these factors, the authorities claimed that fixing the age limit was objectively justified by a legitimate aim, which is the increase in the speed of delivering mail.

Relying on statistical data provided by the postal authorities, the equality body established that there is no tendency for workers over 35 years old to take sick leave more often than younger workers. In fact, no employee in the 36-45 and 46+ age groups exceeded the lawful sick leave, whilst one person from the 18-24 age group and four people from the 26-35 age group exceeded the lawful limit. The decision found that a legitimate aim is not sufficient; in addition, the means used must be appropriate and necessary and in this case the age limit is not justified objectively and amounts to age discrimination. The decision noted that the postal authorities' views as to older people not being in good health are based on assumptions and stereotypes which are damaging to the people affected and, as shown by the statistical data and the case of the two complainants, are inaccurate.

The postal authorities' decision to impose an age limit relied on generalisations and invoked sections of the law which were inapplicable because they concerned minimum age limit[170] and positions for which training or prior experience is necessary[171], none of which apply in this case. The people affected by the age limit in this case were already in a vulnerable position compared to other postal workers, due to the temporary nature of their employment contract, and should have been afforded additional protection from discrimination, instead of being targeted with measures from which permanent workers were spared.

Czech Republic

CZ

Legislative developments

Anti-discrimination draft legislation update

The second reading of the Czech draft anti-discrimination legislation by the Plenary of the Chamber was scheduled for 11 March 2008. The proposals for amendments could bring considerable changes to the government's draft anti-discrimination law, mainly targeting the exception of the equality directives, which states that Member States do not need to apply the shift of the burden of proof to proceedings where it is for the court or other body to investigate the facts of the case. Conclusively, only a small number of the proposed amendments to the governmental proposal was approved, the most important being the repeal of Sec. 133a of the Civil Procedure Code (provision on the shift of the burden of proof establishing a refutable assumption of discrimination), and its replacement with wording very similar to that used by the Directives.

[170] Equal Treatment in Employment and Occupation Law N.58 (I)/2004, article 8(2)(b).

[171] Equal Treatment in Employment and Occupation Law N.58(I)/2004, article 8(2)(c).

Eventually, the Czech Parliament approved the Anti-discrimination Bill in the third reading, with the Deputies approving the amendment of the current provision of Sec. 133a of the Civil Procedure Code (burden of proof). In accordance with the set procedure, the Anti-discrimination Law, worded according to the approvedChamber of Deputies amendments, was forwarded to the Czech Senate; the Senate Constitutional Committee accepted a resolution proposing to return the Bill to the Chamber of Deputies with amendments. However, this proposal was rejected and the Bill was passed in the Senate in the wording approved initially by the Chamber of Deputies.

After its approval in the Chamber of Deputies and the Senate of the Czech Parliament, the Anti-discrimination law was finally refused signature by the Czech president on 16 May 2008. The Czech President's refusal can be overturned only by a repeat vote in the Deputy Chamber and the Bill rejected by presidential veto has to win at least 101 votes in the Deputy Chamber repeat vote. The date of this second vote is still unknown.

Case law

Condition of minimum age as a requirement for appointment of judge discriminatory

In 2001, the petitioner scored first out of 301 applicants in the competitive examination for positions of trainee judges and in 2005 he was among the candidates recommended by the Decree of the Government to the President of the Czech Republic for nomination as a judge. Out of 55 recommended candidates, the president nominated only 21, rejecting the rest because they were all under 30 years of age, despite the fact that these candidates were exempted by the express provision of the law on courts and judges, which sets up the minimum age requirement for judges to be 30 years.

The petitioner took an action against the President for inactivity, which was refused by the Municipal Court in Prague as inadmissible, but the decision was overturned upon appeal to the Supreme Administrative Court (SAC). The Prague Municipal Court subsequently declared the President's inactivity unlawful and set up a time limit for him to decide on the nominee. Instead, the Czech President appealed the judgment of the Prague Municipal Court at the SAC, which dismissed the appeal, finding that the Czech President had transgressed his competencies by undermining the nomination with an extra condition, that of age, which is not required by law. The SAC accepted that, although no entitlement to be nominated as a judge exists, the nomination of judges is the responsibility of the state administration and the President cannot refuse to act where there were no obstacles identified, and his decision should be reasoned lawfully.

Regarding the issue of age discrimination, the SAC confirmed that the minimum requirement of age in itself is not discriminatory if it is applied proportionately, since it does not exclude the candidate absolutely, as would be the case with a maximum age limit. In this context, the SAC referred to Article 6 of Directive 2000/78/EC, which allows Member States to provide for differences of treatment not constituting discrimination. The SAC stressed, however, that this does not change the fact that the claimant applied the condition of age arbitrarily. The considerations related to the age of the applicant can form part of legitimate decision-making, as an element of the personal qualifications of the candidate. The reasons should, however, target the individual conditions of the applicant and not a general condition which is not even required by law.

Difference in retirement age depending on number of children raised not discriminatory

The Supreme Administrative Court (SAC) of the Czech Republic submitted to the Constitutional Court a motion for the abolishment of Sec. 32 of the Law No. 155/1995 Coll. on retirement insurance, which excludes men from the possibility of lowering their official retirement age depending on the number of children raised, arguing that the provision is discriminatory and incompatible with the Czech Charter of Fundamental Rights and Freedoms. Although the retirement age is traditionally set up differently for

women and men, this was not challenged by the SAC; the Court pointed to the condition of law that reserves for women the possibility of having the retirement age further reduced, depending on the number of children raised. The SAC argued that excluding men from this opportunity, which concerns childcare, even in exceptional circumstances, lacks reasonable justification.

The proposal for the abolishment of Sec. 32 of the Law was rejected. The Constitutional Court did not find the provision discriminatory[172], reasoning that the abolishment of the challenged provision would only remove the advantage from women who raised children to have their retirement age reduced, without, however, providing arguments questioning the SAC assertion of the discriminatory character of the provisions concerned. Three years ago, the Constitutional Court held as discriminatory provisions of the same law, which imposed on men a duty to fill in a prescribed form when registering for retirement insurance during child care; the condition did not apply to women in the same situation. The requirement to fill in a registration form, however, represents a minor encroachment on individual rights in comparison to the modification of the retirement age. The Constitutional Court remarked that the removal of inequalities between women and men in the area of social security should follow the development of social relations in society.

Denmark

DK

Policy developments

Establishment of an equality body

The proposal for the establishment of an independent Common Complaints Board for Equal Treatment presented before the Danish Parliament was adopted on 13 May 2008. The Complaints Board for Equal Treatment is to handle complaints concerning discrimination based on gender, race, religion or faith, disability, nationality, social or ethnic origin, political views or sexual orientation, and will be structured following the same model of the existing Gender Equality Board.

One of the main changes is that victims of discrimination can be awarded compensation for non-financial damages directly by the Complaints Board for Equal Treatment. In addition, the Board is competent to bring cases before the courts if the perpetrator is not willing to pay such compensation. The Institute for Human Rights (DIHR) will continue to be the national body for promoting equal treatment regardless of race or ethnic origin and will thus be able to provide independent advice to victims of discrimination, undertake independent investigations concerning discrimination, publish independent reports and give recommendations regarding all topics related to such discrimination. However, DIHR and others have expressed specific concern that the Common Complaints Board for Equal Treatment does not have the mandate to take up cases *ex officio* and will only deal with the existing scope of protection, thus preserving the lack of protection outside the labour market against discrimination based on age, disability, political views and social origin.

Case law

Sexual orientation harassment

The Western High Court upheld the judgment of the District Court, ordering an employer to pay DKK 100,000 (13,210 Euro) to his employee, the claimant, due to discrimination on the grounds of the employee's sexual orientation and of harassment, with reference to Section 1(4) of the Act on Prohibition of Differential Treatment in the Labour Market, etc.

[172] Czech Constitutional Court decision No. Pl. ÚS 53/04, no. 341/2007 of the collection of laws.

The claimant, an apprentice at a bakery, decided in summer 2005 to announce that he was homosexual. From that moment on his employer began to systematically harass the apprentice, slandering him in front of other employees and customers, calling homosexuals the most disgusting people he knew and stating that homosexuals were mentally ill. The claimant reported sick in February 2006, with a medical certificate stating the cause as poor psychological working environment. Thereafter, the apprentice made contact with his trade union, which tried to resolve the case at a mediation meeting, asking the employer for compensation equivalent to one year's salary. The employer refused to admit having slandered the apprentice and the trade union decided to take the case to the court, where it won the above-mentioned amount.

Equality body decisions/opinions

Indirect discrimination on race/ethnicity - violation of the Act on Equal Treatment

The Complaints Committee for Ethnic Equal Treatment received a complaint from an individual in October 2006 who was prevented from using the SAS airline's self-service check-in facilities at Copenhagen Airport for a flight to London and was instead asked to report at the regular counter, where members of staff told him that it was company policy not to allow passengers with "strange names" to use the self-service check-in.

During the Complaints Committee's investigation of the case, SAS responded that the airline carries a responsibility to ensure that passengers bound for England have the travel documents required to enter the United Kingdom, and the airline may face financial penalties from British authorities if SAS does fulfil this duty. SAS explained that the airline uses a type of profiling based on, among other things, the names in which reservations are made, according to which passengers with non-Scandinavian or non-British-sounding names will be selected for visa inspection at the regular check-in counters. In the case of the complainant, SAS stated that the selection of this passenger for manual check-in, where staff could inspect travel documents, was based on the fact that the complainant did not have a Scandinavian- or British-sounding name.

The Committee found[173] that the airline's visa and check-in procedure was tantamount to indirect discrimination and thus in violation of the Act on Equal Treatment. The procedure was based on profiling reservations according to names; passengers with non-Scandinavian- or non-British-sounding names were prevented from availing themselves of self-service check-in facilities at the airport and were selected for visa scrutiny at the ordinary check-in counters.
Based on the information provided by SAS airline, the Committee reached the conclusion that the airline's inspection of documents did pursue a legitimate aim, but that SAS had not chosen a reasonable and necessary method to achieve this aim. The Committee therefore found that SAS had discriminated against passengers based on their names and thus indirectly based on their ethnic origin. Moreover, the Committee found that SAS had provided guidelines for such discrimination, since SAS had instructed the documents group as well as check-in staff to prevent passengers with non-Scandinavian- or non-British-sounding names from using the self-service check-in facilities in order to check travel documentation manually.

[173] Case of 10 October 2007 (Case no. 740.25).

Estonia

EE

Legislative developments

New comprehensive draft equality legislation

The draft Law on Equal Treatment was elaborated in 2006-2007 by the Ministry of Justice in response to the concerns raised by the European Commission in an official letter to the Estonian government. The previous government submitted the bill to Parliament on 25 January 2007 (bill no. 1101) but it was not adopted before the national elections of 4 March 2007. However, on 24 May 2007 the new government approved a revised text of the draft Law on Equal Treatment, which was submitted to Parliament on 30 May 2007 (bill no. 67). Unexpectedly, the bill was not adopted in the course of the final vote on 7 May 2008. On 8 May 2008 the ruling coalition parliamentary factions initiated a new similar bill (bill no. 262). It will be the fourth comprehensive attempt of the Estonian Parliament to transpose the EC anti-discrimination directives.

The aim of bills nos. 67 and 262 was and is to complete the process of transposition of the anti-discrimination directives (2000/43/EC and 2000/78/EC) into Estonian legislation. The Estonian authorities decided to adopt one comprehensive law to transpose the directives rather than to introduce amendments to numerous legal acts. According to the bill no. 262, the protected grounds are ethnicity, race, colour, religion or belief, age, disability and sexual orientation. The material scope of the draft law (for respective grounds) approximates the legislative provisions of Directives 2000/43/EC and 2000/78/EC.

Case law

Supreme Court proclaims as unconstitutional provisions that permit release from service solely due to age

Article 120 of the Law on Public Service permitted the release of public officials from service solely due to the fact that the official had attained the age of 65 years. With its decision of 1 October 2007, the Supreme Court found that this article and related provisions violate Article 12 (1) of the Estonian Constitution, which provides for equality before the law and bans discrimination on any ground.

The case in the Constitutional Review Chamber of the Supreme Court was initiated by the Tallinn Administrative Court, which refused to recognise as constitutional Article 120 of the Law on Public Service; the case concerned two public officials released from service due to age on the basis of this provision. The Tallinn Administrative Court and the Chancellor of Justice, representing the Ombudsman and equality body, presented in their opinion to the Supreme Court that Article 120 violates *inter alia* Directive 2000/78/EC.

In its decision the Supreme Court did not refer to the Directive, but to its own case law regarding the prohibition of treating similar people unequally being violated if two people, groups of people or situations are treated arbitrarily unequally. Unequal treatment can be regarded as arbitrary if there is no reasonable cause for it; if there is a reasonable and appropriate cause, unequal treatment in legislation is justified. However, in this particular case unequal treatment is neither reasonable nor justified and evidently arbitrary.

For the first time the Supreme Court decided on a case clearly related to the implementation of the anti-discrimination directives. The principles of Directive 2000/78/EC were recognised in spite of the lack of transposition of its specific provisions into national law, while references were formally made to Estonian

constitutional anti-discrimination provisions. A similar pattern of argumentation may be used in cases of discrimination on the basis of race/ethnicity in the areas where there are no detailed anti-discrimination provisions required by Directive 2000/43/EC.

FI

Finland

Legislative developments

Amendment of the Civil Servant Act by insertion of an express reference to sexual orientation

The two equal treatment directives were transposed into national legislation by means of the Non-Discrimination Act (*yhdenvertaisuuslaki* 21/2004), which is general in scope, and by means of amendments to existing non-discrimination provisions in specific acts. All the new and amended non-discrimination provisions expressly mention all the grounds covered by the two directives, in addition to supplemental grounds, e.g. language and health. The legal acts remain open-ended, prohibiting discrimination also "on other statuses related to a person".

The only exception in this regard was the Civil Servant Act (*valtion virkamieslaki* 750/1994) that did not expressly mention sexual orientation. The preparatory works, which play a major role in the interpretation of legislation in Finland, were, however, clear in that sexual orientation discrimination was also prohibited by the said Act. Notwithstanding, the European Commission sent Finland a letter of formal notice in December 2006 where it indicated its dissatisfaction at the lack of an express mention of sexual orientation in the Civil Servant Act.
The Parliament of Finland passed an amendment to the Civil Servant Act (*laki virkamieslain muuttamisesta* 1088/2007) in November 2007, by means of which the words "sexual orientation" were inserted into the list of expressly prohibited grounds of discrimination. The amendment entered into force on 1 January 2008.

Government bills to correct the transposition of Directive 2000/43/EC

The European Commission had started proceedings (2006/2451) against Finland due to inadequate transposition of Directive 2000/43/EC. Among other things, the Commission considered that Article 13 of the Directive had not been properly transposed, since there was no specialised body in Finland with the task of conducting independent surveys concerning discrimination. Furthermore, in a reasoned opinion of October 2007, the Commission considered that the scope of application of equal treatment legislation was too narrow, since Section 2, paragraph 2 (4) excludes relationships between private individuals and is thus in violation of Article 3 (1) h prohibiting discrimination in access to and supply of goods and services that are available to the public, including housing.

On 12 June 2008, the government submitted two bills to Parliament in order to correct the transposition regarding the above issues:
Government Bill 87/2008 establishes the Minority Ombudsman as the institution vested with powers to conduct and commission independent surveys concerning discrimination, whereas Government Bill 82/2008 amends the wording of Section 2 paragraph 2 item 4 of the Non-Discrimination Act (21/2004) so that it will be applicable to the supply of housing, and other tangible or non-tangible property or services available to the general public other than in respect of legal transactions within the sphere of private and family life.

The capacity of the Minority Ombudsman to conduct or commission independent surveys will depend on the extent to which this is taken into consideration in annual budgetary proposals issued by the government. Furthermore, the wording of the bill amending the scope of application of the Non-Discrimination Act differs from the reasoning of the bill. According to the reasoning of the Bill, the delimitations set forth for private transactions (i.e. prohibition of discrimination) are applicable only to such provision of goods which by nature come close to commercial activity. Moreover, it is stated that rental or selling of apartments and houses which have been in the personal use of the owner are not included in the scope of application since they are considered to belong to the sphere of private and family life. Such a policy of application indicates that discrimination on ethnic grounds will be accepted in part by the private housing sector, in view of the fact that in Finland as a rule the courts follow the guidance for application of legislation included in the reasoning of government bills, as far as they have been accepted by the Parliament.

Miscellaneous

The committee working on the reform of the Finnish equality law publishes its interim report

The Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)], which is the main piece of legislation adopted for the purposes of transposing the two EU directives, follows the directives very closely with respect to the material scopes of application and the establishment of equality bodies. In consequence, the law provides for better protection against ethnic discrimination than against discrimination on the other grounds. Gender equality is dealt with in a separate act and a number of specific acts include their own non-discrimination provisions, which makes the current legislation rather disintegrated.

The Finnish Parliament, upon adopting the Non-Discrimination Act in December 2003, expressed its dissatisfaction with the fact that the level of protection varies from ground to ground, and adopted a statement in which it requested the government to prepare a new bill that would put the different discrimination grounds, as a matter of principle, on an equal footing when it comes to the material fields of application and remedies. New action from the government was deemed necessary since at that point there was no longer time to work on the bill in Parliament, given that the deadline for the transposition of the two directives had already passed. In early 2007 the Ministry of Justice established a committee (the Equality Committee) for the purposes of preparing the new government proposal.

The Interim Report, published on 8 February 2008, states that its purpose is to examine the need and options for reform of the non-discrimination legislation and the related monitoring mechanisms. Accordingly, it does not at this stage take a stand on the different options, but simply presents different possible models aimed at addressing the identified problems, for the purposes of opening up a public debate on them.

The Equality Committee has held several rounds of hearings, on the basis of which it sums up some of the challenges and problems related to the existing law, including the following: the current law is decentralised (i.e. is a patchwork of several acts, decrees and provisions in specific acts) and is not coherent (i.e. different grounds are treated differently, different concepts and definitions apply e.g. with respect to gender discrimination and discrimination on the other grounds).

The Committee states that there are two basic principles that guide its work: (i) non-regression (i.e. the level of protection provided for by the existing legislation will not be downgraded) and (ii) promotion of the coherence of the legislation, so that the level of protection from discrimination would not depend on the ground of discrimination involved (as a matter of principle). The Equality Committee identifies four goals for the reform: (i) improvement of the coherence of the content of the legislation; (ii) improvement

Abdelwahed | *2002*

sarah | *1976*

of the promotion and supervision of equality and non-discrimination; (iii) improvement of co-operation, interaction and participation in equality and non-discrimination matters; and (iv) improvement of the clarity as well as legal and linguistic aspects of the legislation.

The Interim Report sets out three basic options for new legislation (a single equality act, a decentralised system with several acts and an intermediate option) and three basic options for the organisation of its supervision (a single equality authority under the Parliament, a single equality authority under the government and extension of the mandates of the existing Ombudsmen that deal with gender equality on the one hand and ethnic discrimination on the other). The Committee proposes that its membership be extended by means of the inclusion of the representatives of the two sides of industry and that a separate NGO section be established for the purposes of commenting on the committee's proposals. It also proposes that the deadline for its work be extended from 31.01.2009 to 30.09.2009. The Interim Report has been submitted for comment to a wide range of authorities, civil society actors and experts.
Internet link, source and additional information: an English summary of the Interim Report can be downloaded from the following address: http://www.om.fi/en/Etusivu/1201510078928

France

FR

Legislative developments

Law completing transposition of EC anti-discrimination directives
Law no 2008-496 of 27 May 2008 is intended to complete the transposition of Directives 2000/43/EC, 2000/78/EC and 2002/73/EC further to the Commission's infringement procedure.

Following the Commission's notices of infringement, the government introduced before Parliament Bill no 514 (Law no 2008-496 of 27 May 2008), relating to the adaptation of national law to Community law in matters of discrimination, completing the transposition of Directives 2000/43/EC, 2000/78/EC, 2002/73/EC, 2004/113/EC and 2006/54/EC. The law was adopted on 16 May 2008. The main changes introduced by this legislation include:

- Putting an end to uniformity of legal protection in French law. The legislation creates one legal regime specific to origin, one specific to sex, one specific to other Article 13 EC grounds and another for grounds specific to French law.
- Integrating all anti-discrimination legislation and amending the Labour Code, the Law of 3 July 1983 no 83-634 on the rights and obligations of civil servants, the Penal Code and the law creating HALDE (the national equality body) and transposing Directive 2000/43/EC.
- Introducing into law a definition of direct and indirect discrimination, harassment and sexual harassment, creating a civil offence of instruction to discriminate and assimilating all such behaviours to discrimination (Article 1).
- Eliminating from the definition of discriminatory harassment reference to a requirement of repetition of the behaviour and therefore conforming to the directive. The definition of direct discrimination does not appear to conform to the directive in the comparability test as it only provides for comparison with the decision that "*will have been*" instead of "*would have been*" taken.
- Extending the protection of the law against discrimination in relation to affiliation to and membership of a trade union or professional organisation, access to employment, access to the professions, non-salaried workers and all grounds prohibited by the directives (Articles 2 and 5) in the private and public sectors.

- Completing the framework of protection against retaliation (Article 3). However, the definition provides no indication as to the applicable burden of proof.
- Whereas in former legislation the French State had not prevailed itself of the possibility to provide for exceptions based on occupational requirements except on the ground of age, the bill adds a paragraph to the Labour Code that allows a characteristic based on the prohibited grounds to be presented as a professional requirement provided that "*its objective be legitimate and the requirement be proportionate*" (Article 6).
- As regards the burden of proof on the defendant as provided for in Article 4 of the law, it limits the requirements to establishing that the decision is objective and non-discriminatory, without requiring a demonstration that the decision is necessary and proportionate. Since this requirement is not already included in the definition of direct discrimination, it results in the creation of a lesser burden of proof on the defendant in cases of direct discrimination.

Internet link, source and additional information:
http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783&dateTexte=20080622&fastPos=1&fastReqId=442700769&oldAction=rechTexte
http://ameli.senat.fr/publication_pl/2007-2008/324.html.

Law no 2008-561 of 17 June 2008 relating to the reform of the statute of limitations

The law reforming the statute of limitations was adopted on 5 June 2008 and promulgated on 17 June 2008. It creates Article L1134-5 of the Labour Code, reducing the statute of limitations for salaried employment discrimination cases from 30 years to five years. The legislation was initiated by the Senate under the responsibility of Senator Jean-Jacques Hyest as a result of a hearing and deliberations pursued by the legal commission of the Senate between February and July 2007, regarding a general appreciation of the legal regime concerning the statute of limitations. The law reforms the entire system of prescription in civil cases in order to limit delays and systematise applicable rules, reducing to five years instead of the current 30 years, recourse in employment discrimination cases.

The discussions before the Senate did not raise controversy until the NGOs and trade unions realised that they had not been consulted and that the issue had an impact on labour court cases and discrimination cases. The law was adopted at the first reading on 21 November 2007, but many questions were subsequently raised when it was studied by the legislative commission of the National Assembly. After holding consultations, the legislative commission published its report on 30 April 2008 (no 847), which concluded that this reform could jeopardise access to the right of action as well as the possibility to claim for indemnification of a period of more than five years. The HALDE (national equality body) submitted an opinion to the National Assembly which was of a confidential nature.

On 18 March 2008, the magistrates union (*Syndicat de la magistrature*), the lawyers union (*Syndicat des Avocats de France*) and the trade union CGT (*Confédération Générale des Travailleurs*), held a joint press conference to object to the adoption of this provision, stating that the limitation on prescription in discrimination cases would in fact render access to redress ineffective, since most cases concern discrimination throughout one's career or regarding remuneration; this could considerably limit the liability of employers, whereas the text purports to respond to the concern about the increase in discrimination cases.

In an attempt to correct what appeared to be a reduction of the period protected by law, the text adopted states:

"Action to compensate for prejudice resulting from discrimination is prescribed to five years from the date when the discrimination becomes known.

Delay cannot be modified by contract.

Damages compensate for the entire prejudice resulting from the discrimination for its entire duration."

Hence, the law not only modifies the period within which the claim must be pursued, but also alters the

indemnification scheme. Prior to this reform, in French labour law the claimant could obtain an annulment of a discriminatory decision and correction of its impact in order, for example, to be reinstated at the level that should have been his or hers, with the decision having effect for the future. Now, however, compensation is limited to damages.
Internet link, source and additional information:
http://ameli.senat.fr/publication_pl/2007-2008/323.html and http://legifrance.gouv.fr/affichTexte.do?cid Texte=JORFTEXT000019013696

Case law

Discriminatory management practice on the ground of origin
Five claimants of African and North African origin, recruited between 1966 and 1972, presented a claim regarding discrimination before the Labour Court (*Conseil des Prud'hommes*) alleging that management gave different evaluations of employees depending on origin and that employees of African origin were paid less and had slower career development than white employees.

The Labour Court exceptionally ordered the production, to an especially designated investigative judge, of the defendant's records concerning the respective status, remuneration and career progression of the claimants and their colleagues. In addition, the Court appointed an expert to analyse the documents filed and carry out a comparative analysis of the employees' situation on the basis of their origin.

The expert found differential treatment in terms of salaries, status and career development. Moreover, an internal memo filed in evidence, dated 1972, established a classification of skills in relation to origin.

The defendant relied on evidence of its special management training for North African employees and its social support scheme for foreign employees (which provides for support in access to housing, return to the foreign country on retirement and designated social workers to help with accessing public services), in order to argue that the claimants had failed to establish that the management discriminated on the basis of race and the existence of a scheme designed on the basis of differential management on the ground of origin.

The Labour Court dismissed the claimants' case on the basis of the evidence produced by the defendant regarding support for foreign employees. The Labour Court concluded that there was evidence of differential treatment, but no evidence of intentional differential management on the ground of origin; therefore discrimination had not been established. The first instance judges appear to have been looking for evidence of direct discrimination and failed to enforce the prohibition of indirect discrimination prescribed by Article L122-45 of the Labour Code. The case was taken to appeal and the Versailles Court of Appeals, reversing the first instance judgement, concluded that evidence of discrimination existed in two of the five cases[174]. Even though the decision of the Court of Appeals is not yet available, reports indicate that the court undertook a comparative analysis of career and salary development and rendered its judgement in favour of two plaintiffs by applying the proper legal framework. Newspaper reports quote the court as follows: *"The employees' careers were blocked and their salaries maintained at a level inferior to that which would have been adequate"*.

The first instance court decision illustrates that, until solid jurisprudence is ascertained on the required evidence of differential treatment necessary to enforce direct and indirect discrimination, the lay judges of the labour court system will not be favourable to employees in all discrimination cases. Claimants will have to be prepared to appeal decisions to the second instance courts. The decision of the Court of

[174] Court of Appeal judgment in CGT, MRAP vs. Renault (Labour Court, 12 December 2005), 2 April 2008.

Appeals is not yet available, however, reports indicate that the court undertook a comparative analysis of career and salary development and rendered its judgement in favour of two claimants by applying the proper legal framework. Newspaper reports quote the court as follows: *"The employees' careers were blocked and their salaries maintained at a level inferior to that which would have been adequate"*.

Combating homophobia is a matter of public interest

The case concerns a refusal by local education authorities to certify an association dedicated to raising public awareness of homophobia, which requested to be included on the list of NGOs authorised to give presentations in schools. According to the facts of the case, the regional school authorities refused to certify the association on the ground that it did not pursue a discourse of public interest but rather the promotion of a specific community.

The HALDE (national equality body) investigated the NGO's claim of discrimination and concluded that combating homophobia could not be held as representation of a specific community or particular interest and decided to present an observation before the Administrative Court of Appeals.
The Court[175] followed the observations presented by the HALDE and overturned the decision on the ground that it was illegal, holding that combating homophobia is not the promotion of a community but a matter of public interest pursued by the law, as the programme proposed an educational approach of a high standard. Furthermore, the fight against homophobia is an issue that should be promoted in schools and the NGO provided all the necessary guarantees to respect the requirements of public service. The Court annulled the decision of the local authorities and required a renewed examination of the certification procedure.

Equality body decisions/opinions/reports

Recommendation to reform the legal regime applicable to national Romani populations under the name of travellers (*gens du voyage*)

There have been Romani populations (Tziganes, Gitans, Sinti and Romani) in France since the 15th century and they have always been the subject of a specific status and obligations. In 1912 their status was defined in accordance with their way of life and since then the laws regulating the specific obligations to which they are subject are established on the basis of the necessity to maintain a certain level of monitoring of a travelling population because of its way of life. In 2006 the HALDE (national equality body) constituted a working group with the mandate to look into the specific status of these populations and its conformity to community law and especially Directive 2000/43/EC. It was then to submit recommendations to the French government for the pursuit of all necessary reforms of the existing law. The conclusions of the working group were adopted by the HALDE in its deliberation no 2007- 372 of 17 December 2007 and submitted to the government.

The existing Law no 69-3 of January 1969 creates an obligation for citizens with no fixed abode who travel within the national territory to hold special travelling identity papers. These must be validated at the Ministry of the Interior's local office within 48 hours of arriving in the prefecture and can be inspected at any time. The HALDE concluded that this was a violation of the population's right to free movement and the right to privacy and recommended a reform of the status of travelling people in order to eliminate all specific identity papers and measures resulting in increased police control.

In addition, these citizens must specify a designated city in which to be domiciled, but are not entitled to vote for a period of three years after this, whereas the general population, including the homeless, are only required to have been registered for a period of six months in order to acquire the right to vote.

[175] CAA de Nancy, n° 07NC00335, 14/02/2008, Association Couleurs gaies.

The HALDE decided to further pursue the working group in 2008 in order to report on the implementation of targeted policies concerning access to camping space, housing and education.

Germany

DE

Case law

Justification of discrimination on the ground of religion

The claimant applied for a job as a social worker offered by a sub-organisation (*Diakonie*) of the Protestant Church of Germany. The claimant is of Muslim faith and the employment concerned work with immigrants, being part of the EU's EQUAL programme. The claimant received a phone call from the defendant, following her application, during which the defendant expressed interest in the application but asked about the religious affiliation of the claimant. After being informed that the claimant regarded herself as a non-practising Muslim, the defendant asked whether the claimant could imagine changing her religion. The claimant expressed her view that this was not necessary for the kind of employment she sought and she then received a letter rejecting her application.

The Labour Court of Hamburg decided[176] that the claimant was the victim of unjustified discrimination on the ground of religion. It took the view that Sec. 9 of the Equal Treatment Law (AGG) does protect the autonomy of the churches, but does not allow for differentiation without regard to the kind of work concerned. It saw no reason why the kind of job applied for could be done by only a Christian applicant and awarded 3,900 Euro in compensation.

This decision deviates from the long-standing case law of German courts which allows for wider autonomy of churches, allowing them to determine themselves which kinds of post must be filled by adherents of a particular religion. The argumentation takes up the view voiced in legal science about the new situation under the AGG. It is, however, highly contentious and it is very probable that other courts will not follow this course of jurisdiction.

Chamber of Federal Constitutional Court grants family allowance to spouses and not to registered same-sex couples

The claimant applied for a family allowance (*Familienzuschlag*) under German civil service provisions. The allowance was not granted as it is restricted by law to married couples, whereas the claimant lives in a registered (same-sex) partnership.

A Chamber (not the full senate) of the Federal German Constitutional Court decided that it is reconcilable with equality guarantees of the Basic law and European law, especially the interpretation of Directive 2000/78/EC by the ECJ in the *Tadao Maruko* case, to grant the family allowance only to married couples. The Court referred to previous jurisprudence where it provided that the constitutional justification for the different treatment is the constitutional demand for special protection of marriage and the family by Article 6 of the Basic Law. The Court reasoned that in the *Tadao Maruko* case the ECJ stated that unequal treatment of married and same-sex couples is direct discrimination only if the married and same-sex couples are in a comparable situation under national law. The Court decided that the family allowance issue does not fall into this category, since unlike same-sex couples, married couples typically have children; therefore a spouse caring for the children has a greater need for financial support. This typical situation is what the family allowance purports to redress, in the view of the Chamber of the Court.

[176] (20 Ca 105/07).

The decision of the Chamber may be seen as an example of the reluctance of courts in Germany to allow for full equality of married and same-sex couples. The ECJ's assessment in *Tadao Maruko* of whether or not same sex couples are in a comparable situation to married couples was in fact used by the German Court to allow for unequal treatment by denying that this equality exits. The reasoning of the Chamber of the Court, however, is not convincing, because the family allowance is not bound to children, but responds to legal obligations towards the spouse and these obligations are now the same for married and same-sex couples.

EL

Greece

Equality body decisions/ opinions/ reports

Foreign Affairs Ministry not in conformity with anti-discrimination law

Decision of the Court: complaint 16814/2006

In two advertisements for permanent posts for scientific personnel at the Special Legal Department and for permanent positions for information technology and telecommunications experts with the Ministry of Foreign Affairs, an age limit of 35 years had been set for participation in the selection process; this was also set out in Article 53 of Law 2594/98, which is the Organisation circular of the Ministry of Foreign Affairs. The Greek Ombudsman addressed in writing the competent departments and noted that the possible provision of an age limit in such processes should be expressly justified so that it is made clear that age is an essentially important factor determining the ability to execute specific professional duties, as is required by Law 3304/2005. The lack of such a justification constitutes a violation of the principle of equal treatment on the grounds of age and would undermine the validity and the legality of these advertisements as well as of the selection process. In addition, the Greek Ombudsman underlined the necessity for harmonising the provisions of the Ministry of Foreign Affairs with the provisions of the relevant EC Directives and Law 3304/2005.

In response, the Ministry claimed a previous decision of the Athens Administrative Court of Appeals according to which, due to the special status of all Ministry employees (as set out in the Organisation circular), "the clauses of the Organisation prevail against any other, even later general provision". Furthermore, the Ministry of Foreign Affairs claimed that Law 3304/2005 does not include any special arrangements on how a justified discriminatory treatment is established by setting an age limit. The Ombudsman decided to publish its report and to ask the Ministry to abolish the provision of the age limit of 35 or to fully justify it.

HU

Hungary

Case law

Second instance court decision in Roma school segregation case

The High Court of Appeals of Debrecen revised the first instance judgement[177], finding that segregation could not be established, due to the lack of intent and active behaviour, and established instead direct discrimination against Roma pupils[178].

[177] Decision of the High Court of Appeal of Debrecen (case no. Pf.I.20.361/2007).

[178] For more information on this case, see *EADLR*, issue 4, p.64.

In their appeal, the defendants contested the entitlement of the Chance for Children Foundation to launch an *actio popularis* claim, on the basis that the alleged victims of discrimination could be individually identified. The defendants emphasised that the first instance court unlawfully ignored the declarations written by parents of the pupils, in which they expressed their satisfaction with the education their children receive in the schools sued. As to the merits of the case, the defendants claimed that, as opposed to what the first instance court established, the separation of Roma children was a result of their ethnic minority education, which provides a legitimate ground for separate education. As to the different level of equipment in the central school buildings and the ones in which the majority of Roma pupils study, the defendants drew attention to the fact that the equipment available in the central buildings is not prescribed by any legal document, so their absence in the "Roma" buildings may not be regarded as direct discrimination.
The court of second instance acknowledged the legal standing of the Foundation, on the basis that the fact that, at a given point in the proceedings, the number of pupils was identified by an expert does not mean that all alleged victims can be identified, due to the possibility of future changes in the composition of the pupils and also changes during the proceedings themselves. The court emphasised the difference between direct discrimination and segregation and concluded that for segregation to be established, it needs to be proven that the defendants took active measures to segregate the Roma pupils and had the intention of unlawfully separating them from their non-Roma peers. The court stated that the defendants directly discriminated against Roma pupils, because the buildings where the majority of Roma pupils study, and in which it is almost exclusively Roma pupils who study, are much more poorly equipped than the central school buildings where the majority of pupils study.

Without any substantial explanation, however, the court of second instance diverted from its earlier jurisprudence, in which it expressly stated that segregation does not require active behaviour or any segregating intent, but can be realised through omission to act against segregation. While the court accepted the fact that there was a striking difference in the proportions of Roma and non-Roma children in the different buildings, it rejected the claim that the existence of segregation could be established, on the basis that the claimant could not prove the defendants' intent to cause or maintain this situation. The claimant launched an extraordinary remedy procedure before the Supreme Court, where the case is pending.

Revision of first instance judgment due to misinterpretation of rules of the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA)

The claimant requested that the court declare that the defendant had violated the principle of equal treatment when he refused to employ him because of his Roma origin. The court of first instance dismissed the claim, finding that the refusal of employment was not based on the ethnic origin of the claimant, but was a result of a reorganisation, putting an end to the recruitment process. Furthermore, the court of first instance declared that the causal link between the suffered disadvantage and the protected ground (the ethnic origin of the applicant) was not proven by the claimant. The claimant accepted the judgment on the merits, but requested the court of second instance to overrule the judgement concerning its dispositions on the burden of proof.

The court of second instance partly revised in early 2008 the first instance judgement, citing Article 19 of the ETA, which prescribes that the claimant must prove that he/she possesses a protected characteristic and that he/she has suffered a disadvantage. Beyond that, it is up to the alleged discriminator to prove that the requirement of equal treatment was duly observed, i.e. that there is no causal link between the protected ground and the disadvantage. In this case, the defendant proved that he did not have the possibility to take on a new employee, so there was no causal link between the claimant's ethnic origin and the disadvantage he suffered.

Correcting the erroneous interpretation of the first instance judgment, the court of second instance interpreted the provisions on the shifted burden of proof in line with its purpose of providing the victim of discrimination with a favourable position in proceedings launched due to the alleged violation of the principle of equal treatment.

Equality body decisions/ opinions/ reports

Direct discrimination in recruitment against Roma applicants

The three complainants were provided with the phone number of an employer by an administrator at a regional job centre. They called the manager of the company, who had registered with the centre with the aim of recruiting cleaners. During the call, the manager detailed the working conditions and agreed with the complainants that they could start working the next day. However, when one of the complainants asked whether their Roma origin was a problem in any way, the manager terminated the phone call. The following day the complainants revisited the administrator of the job centre and informed him about their case. The administrator called the manager, who admitted that he did not want to employ Roma people, because their employees did not like to work with them. Following that, the complainants turned to the Equal Treatment Authority, which launched a proceeding against the company. The manager denied that he had arranged a meeting with the complainants and also added that the vacancies had already been filled with members of his family at the time the complainants applied for the job.

In accordance with the rule on shifting the burden of proof, the complainants proved that they had suffered a disadvantage when they were not employed and they had a protected characteristic: their Roma origin. The Equal Treatment Authority stated that the respondent's arguments were contradictory; he could not prove that the vacancies were filled before the complainants' application. The Equal Treatment Authority found that the respondent had violated the principle of equal treatment, banned the continuation of the violation, imposed a fine of 500,000 HUF (1,900 Euro) and ordered the publication of its decision on the website of the Equal Treatment Authority for 90 days.

The respondent tried to rely on Article 6 of the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA), which exempts relations between family members from the requirement of equal treatment. Based on the assessment of the different facts, the Equal Treatment Authority rejected this defence and established violation of the principle.

Direct discrimination in a club due to exclusion of Roma customers from access to goods and services

In February 2007 five young Roma musicians wanted to enter a Budapest club where customers can participate in a jam session. The security guards prevented them from entering – at first because they were under age (two of them were above and three of them below 18) and later on the basis that they were not on a so-called VIP list. The applicants, however, saw that non-Roma customers could enter irrespective of their age and without proving any VIP membership. One of the applicants called his father who arrived on the scene together with non-Roma acquaintances, who tried to persuade the security guard at the door to allow the applicants to enter. They gave up when one of the security guards said in a very degrading tone to the non-Roma partner of the father that she should go to her "Roma friends".

Neither the owner of the club nor the company providing security put forth any substantive defence, so the Equal Treatment Authority established that the complainants had suffered discrimination based on their ethnic origin. The Authority imposed a fine of HUF 500,000 (2,000 Euro) on each of the two respondents and ordered the publication of the decision on its website.

Ireland

IE

Case law

Indirect discrimination on grounds of race by Dublin Vocational Education Committee

A student of Somali nationality complained that he was discriminated against on grounds of race and age contrary to the Equal Status Act, 2000, because the college had organised a separate graduation ceremony for participants in a course exclusively designed for and targeted at asylum seekers who were defined as unaccompanied minors under 18 years of age. The main graduation ceremony involved bar facilities at which alcohol would be served and the college argued that the purpose of excluding the student's class and organising a separate ceremony for them was only in order to protect children who were under 18 from exposure to alcohol provision. However, the student contended that some of the participants in his course had turned 18 during the year and, conversely, not all of the students in courses eligible to take part in the main ceremony were in fact aged18 or over.

The Equality Tribunal held that the failure to invite the student to the main graduation ceremony constituted indirect discrimination on grounds of race contrary to Section (3) (c) (iii) of the Equal Status Act, 2000. It found that the criterion for admittance to the main graduation ceremony was not in fact the requirement to be aged 18 or over, since some of the participants on the Somali student's course were over 18, and some of the students in the other courses were under 18. The condition of age that the college imposed was one that the student's class, being perceived to be minors, was unable to comply with, but that a substantially larger number of people enrolled in other courses were able to comply with. The complainant had established a prima facie case of discrimination on the race ground and the college had not rebutted it.

The student also complained of discrimination on grounds of age in the provision of educational services, which is covered by the Irish Equal Status Act, 2000 but not by the EU directives. However, his claim on this ground failed.
Internet link, source and additional information:
http://www.equalitytribunal.ie/index.asp?locID=121&docID=1686

Italy

IT

Legislative developments

Anti-discrimination legislation improved with regard to harmonising with EU directives

The Italian government responded to the remarks of the Commission (procedures 2005/2358 and 2006/2441) regarding the improvement of the decrees transposing Directives 2000/43/EC and 2000/78/EC, in order to eliminate some discrepancies in their content.

Abdelhamid | *1961*

Abdel | *2008*

Davide | *1994*

Thalitha | *1969*

Two articles of a recent legislative act[179], bearing several EU-related legislative changes, introduced a series of amendments to decrees 215/2003 (transposing Directive 2000/43/EC) and 216/2003 (transposing Directive 2000/78/EC). These amendments are partly aimed at correcting the discrepancies between the decrees and the directives which were officially noted by the Commission and partly at making the text of the decrees clearer. The amendments do not affect the overall technical structure of the two decrees or their relationship to the other anti-discrimination provisions existing in the Italian legal system. Particularly important are the changes made to the relevant articles of both decrees concerning the burden of proof. A clear reversal now exists once the claimant establishes factual elements that can precisely and consistently show the presumption of the existence of discriminatory acts, agreements or behaviours. In addition, in both decrees a new article is introduced providing specific legal protection against victimisation, in line with the directives, while the occurrence of victimisation was previously mentioned solely as a parameter to be taken into account in the assessment of damages. With regard specifically to grounds of racial and ethnic origin, the wording of the article of decree 215/2003 dealing with harassment is now made consistent with the directives and with decree 216/2003, while previously the environment created by the unwanted conduct had to be both "…humiliating *and* [not *or*] offensive".

With regard to all the grounds of discrimination dealt with in Directive 2000/78/EC, a passage in decree 216/2003 is abolished, which did not consider as discrimination the possibility of the "evaluation of such personal characteristics when they are relevant to establish whether a person is suitable to carry out the functions that the armed forces, and the police, prison and rescue services can be called to carry out"

With regard to all the grounds of discrimination dealt with in Directive 2000/78/EC, the right to take part in litigation, previously limited by decree 216/2003 only to trade unions, is now extended to other organisations and associations representing the rights or interests affected.

With regard specifically to discrimination on the ground of age, the previous provision of decree 216/2003 on the justification of differences in treatment is substituted with a much more detailed one, excluding from the applicability of the decree certain categories of rules, corresponding to those allowed by Directive 2000/78/EC under Article 6.1.

Lithuania

Legislative developments

Amendments to the Law on Equal Treatment

The political debate regarding the draft law amending the Law on Equal Treatment took almost a year. The draft law was issued by the government simply to transpose the Directives. However, during the debate the draft law was changed many times, with some politicians wanting to eliminate sexual orientation as a ground of discrimination. The law implements the provisions of the Directives and gives more possibilities for the protection of equal rights. The most important improvements are as follows.

[179] Articles **8-sexies and 8-septies** of the law of 6 June 2008, n. 101, converting into law, with modifications, the legislative decree of 8 April 2008, containing urgent provisions for the implementation of EU obligations and the execution of judgments of the European Court of Justice of the European communities, published in the Official Journal n. 132 of 7 June 2008 (*Legge 6 giugno 2008, n. 101, "Conversione in legge, con modificazioni, del decreto-legge 8 aprile 2008, n. 59, recante disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzione di sentenze della Corte di giustizia delle Comunità europee." pubblicata nella* Gazzetta Ufficiale *n. 132 del 7 giugno 2008*).

The burden of proof: Article 4 provides that a person or institution against which a complaint was filed must prove that the principle of equal rights has not been violated. This article shall be applied by the courts and the Equal Opportunities Ombudsperson.

The representation of discrimination victims by NGOs: Article 12 provides that all persons who consider that their rights to equality have been violated may apply to the Equal Opportunities Ombudsperson and /or have recourse to court. The second part of Article 12 provides the possibility for associations and other legal entities to engage in any judicial procedure if they have a legitimate interest.

The reimbursement of damages: the law provides that a person who has suffered discrimination has the right to demand that the culpable party reimburses the pecuniary and non-pecuniary damage according to the law.

Equality body decisions/opinions

Discrimination of Roma people

During the past year the Equal Opportunities Ombudsperson received a number of complaints from different parts of Lithuania, concerning Roma women claiming they were refused a job washing dishes because of their ethnic origin. Although in most cases difficulties occurred in identifying discrimination, one of the complaints was less complicated: a Roma woman from Klaipeda was accepted to work as a dishwasher in a coffee bar, but when she arrived on the first working day, her contract was taken by the administrator, who indicated that the woman was refused employment because of her ethnic origin.

The Ombudsperson received a justification from the office of the coffee bar explaining that the contract was signed only by the claimant and not the contractor and that the woman was refused because of her poor knowledge of Lithuanian. According to the administrator, the dishwasher should be fluent in the Lithuanian language, as it is required to keep account of chemicals. The Ombudsperson investigated the application form in this coffee bar and found that the application required additional information of a personal nature, including information on ethnic origin.

The Ombudsperson decided on 10 May 2008 that the case violated Article 7 of the Law on Equal Treatment and recommended the discontinuation of the actions violating equal rights. Furthermore, the Ombudsperson recommended changing the application form.

The Roma woman was applying for a very simple job – dishwashing. However, the employer claimed that a dishwasher is responsible not only for clean dishes, but for documents as well. After the decision was issued on 17 June 2008, the Parliament amended the Law on Equal Treatment, adding shifting of the burden of proof and reimbursement of damages. It is anticipated that after these amendments the rights of people who suffer from discrimination will be better protected.

Malta

MT

Case law

Incitement to racial hatred

The head of the organisation *Imperium Ewropa* was accused of committing the offence of inciting racial hatred, as per Article 82A of the Criminal Code. He used derogatory and insulting terms in referring to illegal immigrants, the Jewish and Muslim populations in two separate political events hosted by his organisation. He also used threatening and abusive terms in an article he wrote entitled 'Coming cataclysmic crises', which he posted on a public access website. The defendant claimed that he had not violated Article 82A, since his statements were protected by the right to freedom of expression.

The Court of Magistrates found[180] the defendant guilty of the offence set out in Article 82A of the Criminal Code, holding that a balance must be found between the right to freedom of expression and the right of others not to be insulted by such expression. It concluded that the words used by the defendant exceeded the balance of freedom of expression and were likely to create fear of persons of other races or ethnicities, therefore clearly falling within the scope of the offence set out in Article 82A of the Criminal Code. An appeal to this case decision was lodged on 8 April 2008.

Netherlands

NL

Legal/ political development

Covenant between four major cities in the promotion of equal rights for homosexuals

A covenant was signed between the Dutch government and the local governments of four major cities and 12 towns, laying down a guiding framework for these communities in the promotion of social acceptance of homosexuality and equal rights for homosexuals.

In March 2008 the Minister of Education, Culture and Science signed a covenant with the Mayors and Deputy Mayors of Amsterdam, Den Haag, Rotterdam and Utrecht and in April a similar contract was signed with the mayors of 12 other towns. The covenant is aimed at the improvement of social acceptance of homosexuality by the Dutch population and at offering more vigorous resistance to discrimination, intimidation and violence against homosexuals. In order to achieve these goals, the four cities agreed to work together intensively over the next few years, by sharing experiences and tackling difficult issues jointly. The agreement is one of the first results of the memorandum 'Gewoon homo zijn' ('Just being gay'), which describes the national policy for gay emancipation for the years 2008-2011.

The cities and towns will engage in various activities, which will be subsidised by the national government. Each city will receive 200,000 Euro for organising these activities and each town will receive 75,000 Euro. Education on sexual diversity will be given in schools and will be offered specifically to men of foreign origin. Violence against homosexuals by their families which can be labelled as 'honour crimes' will be combated more actively. Dialogues will be organised with religious leaders and other key figures from ethnic and religious communities to stimulate a positive attitude towards homosexuality. There will be specific trainings organised for social workers who will counsel homosexuals, training will be organised

[180] Police vs. Norman Lowell (Court of Magistrates (Criminal Judicature 27 March 2008)).

on the use of discrimination reporting mechanisms and informal relief networks for persons of foreign origin will be set up. The education aimed at younger people and the education aimed at the parents of younger people will be harmonised in order to stimulate positive results by a more coherent approach.

The signing of this covenant between the central government and local governments is a new method in combating discrimination against homosexuals. The government memorandum of November 2007, 'Gewoon homo zijn' ('Just being gay'), sets out the principal purpose of the emancipation policy: improving the social acceptance of homosexuality through solidarity, protection of minorities, prohibition of discrimination and respectful interaction between people.

A study by the Social and Cultural Planning Office (*Sociaal en Cultureel Planbureau*) of September, 2007 which was added to the memorandum, 'Gewoon homo zijn', shows that social acceptance of homosexuality is improving, but there is still some way to go. The principle of equal rights for homosexuals is supported by 67% of the population, 21% have no opinion and 12% have a negative view. With regard to the social acceptance of homosexuals in general, 52% of the population have a positive attitude, 33% are neutral and 15% are negative. There seems to exist a limit to the social acceptance of homosexuality, since over the last two decades a consistent group of 5% of the population thinks that lesbian and gay people should not be able to live their lives as they wish. Religious people, ethnic minorities, younger people, elderly, people with lower education and more men than women have a negative attitude towards homosexuality. A large part of the population still has a negative attitude against same-sex marriage and adoption rights. Rejection of same-sex marriage seems to have increased between 2002 and 2006.

Equality body decisions/ opinion/ reports

Registrars obliged to marry same-sex couples

A municipality in the Netherlands (*Gemeente Langedijk*) rejected an applicant for the position of registrar, for the reason that he was not willing to marry same-sex couples, even though same-sex couples have had the right to marry under Dutch law since 1998. The applicant stated that he had religious-based conscientious objections against same-sex marriage and therefore he was indirectly discriminated against on the ground of religion.

In earlier incidents (Opinions 2002-25 and 2005-26), the Equal Treatment Commission found that communities should search for 'practical solutions' in timetables, in order to employ applicants with conscientious objections against same-sex marriages and at the same time have same-sex marriages performed by colleagues without such objections. In this case, however, and in its Opinion 2008-40, the Equal Treatment Commission came to an opposite conclusion, according to which the municipality had a legitimate aim in combating discrimination and the rights of third persons, namely same-sex couples, were at stake. The Equal Treatment Commission did not see any other means for the municipality to prevent discrimination and deemed it to be "hard to justify" a municipality allowing a registrar to discriminate between same-sex and heterosexual couples. Therefore, the rejection of the applicant constituted indirect discrimination on the ground of religion, but this decision was objectively justified.

This politically sensitive case brings to the forefront the conflict between the general principle of non-discrimination with the equal right to be employed in public office. As mentioned above, the Equal Treatment Commission made a reversal with respect to earlier decisions in similar cases, making this opinion more fundamental on the principle of non-discrimination in comparison with the earlier practical solutions. The Equal Treatment Commission seems to attach more importance now to the exemplary role of a local government in combating discrimination and in connection to this less room is left for the individual religious conscience of the civil servant.

It should be highlighted that this Opinion of the Equal Treatment Commission is in opposition to the intended policy of the current national government to ensure the rights of same-sex couples simultaneously with the rights of individual local registrars with conscientious objections. According to the covenant signed by Dutch mayors, as described previously, every single municipality is obliged to perform same-sex marriages, but at the same time conscientious objections should be dealt with pragmatically. This means that every municipality is obliged to have one or more registrars who don't have objections towards same-sex marriage.

Some politicians have criticised the Opinion of the Equal Treatment Commission, finding it "gratuitously hard" towards individual registrars with conscientious objections. In an accompanying advice the Equal Treatment Commission (ETC *Advice* 2008-04) made a recommendation to the government not to allow individual registrars to refuse to perform same-sex marriages.

However, as the opinions of the ETC are not binding, it is not clear how such a case would be judged by the courts, which have deemed a dismissal by a municipality unlawful in the past in similar circumstances on the basis of general labour law provisions (District Court of Leeuwarden 24 June 2003, LJN AH8543).

Poland

PL

Legislative developments

Establishment of new institution – Government Plenipotentiary for Equal Treatment

On 7 March 2008, the day before International Women's Day, the Prime Minister announced the appointment of a new Plenipotentiary for Equal Treatment, who will be a member of the Cabinet, at the rank of Secretary of State, which is equivalent to Minister. The Plenipotentiary was then officially appointed in April and the new relevant law was adopted on 22 April effective as of 30 April 2008[181]. The task of the Plenipotentiary is to execute governmental policy with regard to equal treatment, including counteracting discrimination *in particular* because of gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, sexual orientation, civil (marital) and family status. The competencies of this new post include analyses and research, monitoring, collaboration with other bodies, local government and NGOs, preparation of draft laws, pronouncement of opinions about laws drafted by other bodies and taking actions aimed at the elimination or limitation of the results of violations of the principle of equal treatment.

After the abolition of the Government Plenipotentiary for the Equal Status of Men and Women in 2005 by the previous government, the competencies of this office were taken over by the Department of Women, Family and Counteracting Discrimination within the Ministry of Labour and Social Policy.

Appointment of the new institution may therefore be seen as the response of the new government, in power since autumn 2007, to the criticism arising from the abolition of the former institution. However, even though the new Plenipotentiary has quite a number of competencies, this institution still does not comply with Directive 2000/43/EC and may not play the role of an equality body, as the office does not take individual complaints, is not required to perform certain tasks independently, does not have an office and uses the office of the Prime Minister.

[181] Council of Ministers Ordinance of 22 April 2008 (effective since 30 April 2008-10-15) on the Government Plenipotentiary for Equal Treatment.

The situation is therefore unclear, especially regarding relations between the new post and existing ones, mainly the Ministry of Labour and Social Policy and its Department of Women, Family and Counteracting Discrimination, which acts concurrently and with partially similar competencies. The future will show whether the Plenipotentiary will play the role of coordinating body; at the moment the state of affairs is uncertain and it may also lead to the misrepresentation of the responsibilities of particular governmental organs.

Draft law on Equal Treatment

The preparation of the draft law on Equal Treatment, which aims to implement four directives, 43/2000/EC, 78/2000/EC, 113/2004/EC and 54/2006/EC, has reached its final stage, having passed the intra-governmental discussion and is to be presented to the Council of Ministers as a final proposal.

In April 2007 the Ministry of Labour and Social Policy announced the draft Act on Equal Treatment and sent it for social consultations to a list of 11 addressees, including four trade unions and two NGOs, the newly established Association of Anti-discrimination Law and the Helsinki Foundation for Human Rights. Following the announcement, several versions of the draft law were prepared which differed significantly. The list of social partners who received the draft law for consultations grew and reached 35 organisations, including trade unions and NGOs.

In April 2008 it was announced that the work on the draft Act on Equal Treatment was almost complete, with intra-governmental consultations having come to an end. The draft Act on Equal Treatment will be presented to the Council of Ministers as a final proposal and if accepted by the Council it will go before Parliament. There have been three different versions of the draft Act on Equal Treatment: the initial one announced in April 2007, a version from 21 January 2008 and the final draft from 24 April 2008.
Over the last two years there have been several versions of the draft law, with successive versions limiting the scope of the Act, narrowing it to an almost verbatim implementation of the directives, filling the gaps and correcting mistakes of the previous incorrect implementation of Directives 2000/43/EC and 2000/78/EC. The initial draft law (April 2007) was much wider and went beyond the scope of the directives, as it prohibited discrimination in access to social security, health care, education, access to goods and services which are publicly accessible, including housing, on the grounds of race and ethnic origin, nationality, gender, religion or beliefs, political beliefs, disability, age, sexual orientation, property, marital and family status. The draft of 21 January 2008 limited the scope of the law to protection of gender, race and ethnic origin in access to goods and services, leaving out protection of all groups in terms of social security, health care and education. The final draft of 24 April 2008 narrowed the scope even more, in order to simply implement the directives and not to go beyond them.

If passed, the law on Equal Treatment will be a huge step forward and will see the final implementation of the directives. However, the narrowing of its scope in consecutive versions is a source of concern, as some provisions raise doubts as to proper transposition. For example, the Minister of Employment is to play the role of an equality body, however, legal assistance for victims of discrimination is to be provided by the Commissioner for Civil Rights.

Case law

Court verdict in case of dismissal for publishing guide for teachers 'Compass – Education on Human Rights'

The Director of the National In-Service Teacher Training Centre (*Centralny Ośrodek Doskonalenia Nauczycieli)* brought a case to the District Court in Warsaw[182] for unfair dismissal and discriminatory treatment in employment on the ground of his political opinions. The Director was dismissed in June 2006 by the Minister of National Education for publishing the Polish translation of the Council of Europe's guide for teachers *Compass – Education on Human Rights*. The reason expressed by the Minister was that in the opinion of the Ministry the Compass Manual included statements which may be regarded as a promotion of homosexuality and, according to Article 38 of the Law on Education (*Ustawa o systemie oświaty*) the Director of the institution may be dismissed by the Minister of Education with immediate result "in particularly justified cases".

The District Court in Warsaw found[183] the dismissal unfair and a form of discrimination in employment, awarding the claimant damages of approximately 5,700 Euro. The ground for discrimination defined by the court, although the reason for dismissal was related to sexual orientation, was the different approach of the Director and of the Minister of National Education to the vision of education in Polish schools, which constitute the ground of political beliefs. The case was decided on the basis of Labour Code provisions introduced in order to implement Directives 2000/43/EC and 2000/78/EC. The Minister of National Education appealed the case to the Regional Court in Warsaw, which confirmed the discrimination, but lowered the amount of compensation to around 1,800 Euro[184].

The case of dismissal gained wide public attention, with a number of organisations and individuals protesting, including a letter from Terry Davis, Council of Europe Secretary General. Even though the case was won and the government has changed, the Compass Manual is still not used in schools.

Supreme Court rejects the claim in case concerning employment discrimination based on nationality

The claim was brought by three Polish nationals who worked as cashiers at a petrol station in Poland close to the German border. They were dismissed by the employer and in their positions new employees of German nationality/citizenship were hired, who received higher salaries. The claimants applied to the labour court for damages, for breach of the principle of equal rights of employees and prohibition of discrimination in employment. They argued that the reason for discrimination and unequal treatment was their nationality, since German employees were treated by the employer better, even though, except for the parts concerning salary and nationality, the other elements of the labour contract were exactly the same. The respondent argued that the duties of the old and new employees were not the same and that the better language and culture skills of the German workers constituted their higher qualifications.

The courts of first and second instances rejected the claim and the Supreme Court verdict upheld the decision of the lower courts, basing its decision on factual circumstances as established by the lower courts and the interpretation of the constitutional principle of equal treatment provided in the previous verdicts of the Supreme Court and Constitutional Tribunal[185]. The courts decided that different treatment of employees is possible if they have different qualifications. Knowledge of the German language and culture was of importance since many clients were Germans. In addition, the higher salary was justified

[182] Mirosław Sielatycki v. National In-Service Teacher Training Centre and Minister of National Education.

[183] 5 June 2007 judgment of the District Court in Warsaw.

[184] 31 March 2008 judgment of the Regional Court in Warsaw (XII Pa 681/07) following appeal of National In-Service Teacher Training Centre and the Minister of Education.

[185] Verdict of the Supreme Court from 5 October 2007, sygn. akt II PK 14/07.

since the cost of living in Germany (where the new employees lived), was higher. Finally, the new employees were employed during a different time period (after the old ones had been dismissed).

Taking into consideration the whole factual situation it would be difficult to challenge the decision of the courts. However, one may question the argumentation concerning the higher qualifications of the employees stemming only from their nationality. The presumption that German clients would prefer German employees could justify, if one follows that path, further situations where employers could make unjustified decisions based on the nationality of prospective employees, namely not hiring employees whose nationality would not be welcomed by the customers.

First case lodged in Polish court on access of blind person with guide dog to services.
Jolanta K. was not let into the Carefour Supermarket with her guide dog, despite the dog being adequately marked. Based on Articles 23 and 24 of the Civil Code regarding protection of personal values, she lodged a claim on 6 May 2008 with the Regional Court in Warsaw against the supermarket chain for damages to be paid to a given charity and for adequate action to be taken in order to remove the effects of the violation[186]. As a result of the case, Carefour Polska Sp.z.o.o. issued an internal regulation, which allowed blind people with guide dogs into their supermarkets and required employees to provide them with assistance. Furthermore, parliamentary work was undertaken to amend the law on occupational and social rehabilitation to specifically allow access for blind people with guide dogs into public institutions.

PT

Portugal

Legislative developments

Amendments to legislation
The Portuguese Criminal Code has recently been amended and Article 240 covers discrimination based on every ground referred to in the EC anti-discrimination directives plus nationality. Paragraph 1 of this article makes it an offence to establish organisations or engage in organised propaganda activities which incite or encourage discrimination on grounds of race, colour, ethnic origin or nationality, religion, gender or sexual orientation.

Paragraph 2 of Article 240 punishes anyone who in a public meeting, or in a paper intended for dissemination, or by any other means of social communication, provokes acts of violence against an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, gender or sexual orientation with the intention of inciting or encouraging racial or religious discrimination. Paragraph 2 also punishes anyone who in a public meeting, or in a paper intended for dissemination, or by any other means of social communication, defames or insults an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, sex or sexual orientation. Those who incite or encourage racial, religious or sexual discrimination will be subject to imprisonment of between six months and five years.

Furthermore, a new system of mediation and compensation for victims in criminal cases has recently been adopted. The Portuguese Parliament adopted new legislation, Law No 21/2007 of 12 June 2007, in order to meet requirements under Article 10 of the Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JAI). The law provides for a system of mediation to deal with criminal cases arising from complaints. This system came into force on 23 January 2008 and allows victims to receive financial compensation.

[186] Jolanta K. v. Carefour Polska Sp.z.o.o.

In addition, decree-law 324/2007 of 28 September 2007, which amends the Civil Register Code, allows for marriages celebrated by other religions or ministers of a church or religious community established in Portugal to be recognised as having the same effect as Catholic marriage. According to Article 37 of the Law on Religious Freedom, Law 16/2001 of 22 June, marriages are considered "established" (*radicada*) in Portugal when performed within religions that have been established in the country for 30 years.

Finally, decree-law 167/2007 of 3 May 2007 approves the organisation of the High Commissariat for Immigration and Intercultural Dialogue – ACIDI (*Alto Comissariado para a Imigração e Diálogo Intercultural I.P.*)[187], the former High Commissariat for Immigration and Ethnic Minorities (ACIME). It is now the responsibility of ACIDI to promote equal treatment for all, with no discrimination on grounds of racial or ethnic origin, and also to promote integration and dialogue between immigrants, ethnic minorities and religions. All the other competences of the former ACIME continue in the new ACIDI.

In addition, it is the competence of the High Commissariat in particular to coordinate the Choices Programme (*Programa Escolhas*) and the Structure Mission for Religious Dialogue (*Estrutura de Missão para o Diálogo com as Religiões*), as well as the Intercultural Secretariat (*Entreculturas Secretariat*). ACIDI considers Roma as a priority and has introduced a new website on Roma, the 'Ciga-nos'[188] ('Follow us'), where useful information about this community is available.

Case law

Discrimination against Roma in housing

Cases of discrimination in access to housing have been reported and complaints have been presented to ACIDI, which has imposed fines on those refusing to sell or rent houses to Roma. However, these fines have been subject to appeal and the courts have acquitted the accused, as happened in the Court of First Instance case of Vila Franca de Xira: the court acquitted the three defendants on the grounds that it was considered not proven that the refusal to sell the property in question was due to the Roma ethnic origin of the claimants.

Religious discrimination

The claimant was on probation to be admitted to the Barristers Association, with the final examination fixed for a Saturday in July. The Association refused the claimant's request to take the examination in a day other than Saturday because this day is a religious holiday for her Church. The First Instance Court denied the claim against the Barristers Association; the Appeals Court has abrogated the decision, ordering that the applicant should be considered as exempted from the exam on that date and that the Association should fix within a period of 10 days a new date for her exam. The Appeals Court considered that the Barristers Association had violated the right to religious freedom on the grounds of Articles 13 and 41 of the Portuguese Constitution.

Racist crimes proceedings

In April 2008, proceedings commenced at the Tribunal of Monsanto in Lisbon against 36 people, accused of crimes on grounds of racial discrimination, aggressions, abduction, illegal possession of firearms, distribution of Nazi propaganda and others. The indicted are accused of violent acts linked to the Portuguese Hammerskins, with the leader being initially in custody, but released until a sentenced is passed. The leader was convicted for the death of a Cape-Vert citizen in 1995 by a group of skinheads.

[187] ACIDI website: http://www.acime.gov.pt/

[188] Ciga-nos website: http://www.ciga-nos.pt

Benali | *1951*

Romania

RO

Legislative developments

Limitation of national equality body (NCCD) mandate through secondary legislation

Various categories of personnel working in the justice system filed cases against the Ministry of Justice before the courts of law and before the national equality body, claiming that they were discriminated against with regard to their salary-related rights, in violation of the general principle of equal treatment. When the national equality body found that discrimination had occurred, the Ministry of Justice took the case before the Court of Appeals and, during the proceedings, also challenged the constitutionality of the decision of the national equality body before the Constitutional Court. The case is still pending.

Before receiving a decision from the Constitutional Court, the government adopted an Emergency Ordinance[189], which is secondary delegated legislation adopted under Article115(4) of the Romanian Constitution, intended to address the issue of the financial disputes with the magistrates and auxiliary justice personnel. The Emergency Ordinance provides that the anti-discrimination law will be amended by Article19.3, which provides that petitions regarding legislative measures issued in the context of establishing salary-related policies for people working in the public sector do not fall under the mandate of the National Council for Combating Discrimination (NCCD), the national equality body.

The Emergency Ordinance establishes the courts of law as the only venue for submitting complaints against salary-related aspects for justice personnel, with the Court of Appeals acting as a court of first instance and the High Court of Justice and Cassation deciding on possible appeals. Cases currently under proceedings are to be discontinued and sent to the Court of Appeals or to the High Court accordingly.

The Emergency Ordinance will create multiple controversies, such as the following:

- it modifies an organic law through secondary legislation and fails to justify the reasons for using extraordinary secondary legislation to address the issue;
- it establishes a parallel system of solving cases on discrimination in employment (payment-related rights), arbitrarily distinguishing between public employees and employees in the private sector;
- it applies retroactively to cases already pending before the courts, establishing new rules of jurisdiction;
- it was issued at the moment when the Constitutional Court was expected to deliver a decision which would address some of the issues meant to be solved by the Emergency Ordinance 75/2008;
- of real concern is the fact that some parliamentarians, who constantly criticised the NCCD after being sanctioned for discriminatory remarks, will use the opportunity raised by the ratification of the Emergency Ordinance to further diminish the mandate of the national equality body.

Equality body decisions/opinions

Status of the recommendation of the national equality body on the display of religious symbols in state schools

Mr E. M. filed a petition with the National Council for Combating Discrimination arguing that the display of icons and religious symbols in the classroom of his daughter and in all classrooms of public schools in Romania amounts to discrimination on grounds of religion and requested for religious symbols to be

[189] Emergency Ordinance 75 from of 11 June 2008 regarding measures taken to solve financial issues in the area of justice-related work published in the Official Gazette 462 of 20 June 2008.

allowed in classrooms only during classes of religious education, which are not mandatory. In November 2006, the NCCD issued Decision No. 323, recommending the Ministry of Education to draft a set of regulations to ensure the exercise of the right to education in equal conditions for all pupils, to observe the right of parents and guardians to ensure the religious education of their children as they choose, to observe the secular character of the State and the autonomy of religious faiths, to ensure the freedom of religion and beliefs for all children equally and to allow for the display of religious symbols only during classes of religious education or in places devoted to religious education.

The appeal filed by the Ministry of Education and a number of religious NGOs was rejected by the Court of Appeals, which confirmed the decision of the NCCD. On 11 June 2008, the High Court of Cassation and Justice accepted the final appeal submitted by the Ministry of Education and a coalition of religious associations and overturned the decision of the Court of Appeals, which maintained the recommendation of the NCCD. The reasoning of the High Court is not yet available.

The National Council for Combating Discrimination had found that state schools must remain neutral and impartial and should observe the religious choices of all parents and pupils and that the unlimited and uncontrolled presence of religious symbols in public schools can run against the principle of the secular state and against the principle of neutrality, as well as against freedom of religion.

In its most controversial decision since its establishment, the NCCD tackled key substantive issues, such as the relation between church and state, the meaning of neutrality and secularism, the rights of the child and the obligation of the state to create an environment free of discrimination, discussed in the context of the duty to maintain and foster the dissemination of traditional religious values.

Discriminatory requirements in employment for civil servants

Mr A. M. complained against the advertisement of employment opportunities for civil servants with the local finances inspectorate, which mention as a specific condition "knowledge of the Hungarian language". The defendant, Harghita County Public Finances General Inspectorate, claimed that this condition was triggered by the legal requirement to make arrangements to ensure services for minorities where they amount to 20% of the total population.

The NCCD in its decision[190] assessed both the legitimacy of the aim pursued and the methods used by the defendant. Though the purpose of ensuring services to minorities in their mother tongue was legitimate and the defendant justified its actions by invoking the legal requirement of making arrangements to ensure services for minorities where they amount to 20% of the total population in a locality, the NCCD questioned the adequacy of the methods selected to reach that particular aim and emphasised their negative impact in relation to the Romanian community which, in that particular area, is a *de facto* minority.

The NCCD noted that, "the difference in treatment amounts to discrimination not only when people in comparable positions are treated differently without objective and reasonable justifications, but also when the state fails to treat differently persons who are in incomparable, different situations, also without objective and reasonable justifications". The NCCD sanctioned the Harghita County Public Finances General Inspectorate with an administrative fine of 1,000 RON (300 Euro).

[190] Decision no. 43 of 8 January 2008, file number 353/2007, A.M. v. Direcţia Generală a Finanţelor Publice a judeţului Harghita, *[A.M. v. Harghita county Public Finances General Inspectorate*]**.**

The NCCD used statistical analysis innovatively in determining the adequacy and appropriateness of the methods used in order to ensure the right of national minorities to use their mother tongue in relation to public local officials. The NCCD used the test developed by the European Court of Human Rights and cited the provisions of the Romanian Constitution, the European Convention on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the European Charter of Regional and Minority Languages and the Framework Convention for the Protection of National Minorities.

Slovakia

Legislative developments

Comprehensive amendment of the Anti-discrimination Act

On 14 February 2008 the Slovak Parliament passed the second amendment of the Anti-discrimination Act[191] harmonising national law with the existing EU directives. The amendment was proposed by the Slovak government, the Deputy Prime Minister for Knowledge Society, European Affairs, Human Rights and Minorities. The first amendment from June 2007 represented a quick response to the reservations about the existing Anti-discrimination Act expressed by the European Commission. This amendment is a follow-up to the first one as both the ministries and civil society represented by NGOs called for more systemic and substantial changes to the Anti-discrimination Act. The amendment is therefore the result of joint discussions between the representatives of government and NGOs.

The amendment changed the structure of the Act, making it more understandable and its interpretation clearer. One of the most important legislative changes is a clear statement of the grounds on which discrimination should be prohibited in all areas covered by the Act. The grounds are: sex, religion or belief, race, national or ethnic origin, disability, age, sexual orientation, marital status, family status, colour of skin, language, political or other opinion, national or social origin, property, lineage or other status. In comparison to the previous legislation, this provision broadens protection against discrimination, e.g. in the area of social protection as well as in access to goods and services, in which there was a minimum standard guaranteed by the Directives. As far as the ground of "sexual orientation" is concerned, the amendment introduced a definition of sexual orientation and this ground became explicit for the area of social protection, education, health care and access to goods and services. Before the amendment it could only be claimed in the above-mentioned areas under the general clause "other status".

Surprisingly, the amendment also established an unexplained restriction to the areas in which discrimination should be prohibited, as the new wording leaves out housing and social advantages, allegedly because there is no definition of housing and social advantages in the existing legislation.

The second amendment finally defines an exception for a genuine and determining occupational requirement which complies with both the Racial Equality and the Framework Employment Directives. The amendment also harmonises the Slovak anti-discrimination legislation with Directive 76/207/EEC and Directive 2004/113/EC on equal treatment between men and women in access to and supply of goods and services. The provision on shifting the burden of proof has been improved, making it clear that

[191] Act No. 365/2004 Coll. On Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws (Anti-discrimination Act) and Act No.308/1993 Coll. On Establishing the Slovak National Center for Human Rights.

the claimant before the court should indicate the facts from which discrimination may be presumed. The original wording used the expression "adduce evidence" which could be interpreted restrictively, putting the claimant into a disadvantaged position.

The most discussed and most criticised provision refers to positive measures, which is a very sensitive topic politically in Slovakia. In October 2005 the Constitutional Court declared the provision on positive measures linked to disadvantaged people of certain racial and ethnic origin to be unconstitutional. The newly proposed provision reflects the decision of the Constitutional Court and introduces very specific examples of temporary positive measures intended for the elimination of disadvantages linked to racial and ethnic origin, national or ethnic minorities, sex, age and disability, e.g. creating equal opportunities in access to employment and education through special preparatory programmes, spreading information, and other measures.

Nevertheless, the former Minister of Justice and current Member of Parliament, who initiated the proceeding before the Constitutional Court in 2005, insisted that introducing measures according to racial and ethnic origin was unconstitutional. He therefore suggested that the reason for positive measures should instead be social and economic disadvantages. Finally, the Parliament adopted the following grounds for introducing positive balancing measures: elimination of social and economic disadvantages and disadvantages linked to age and disability. The temporary measures can only be introduced and applied by state agencies.

Along with the amendment of the Anti-discrimination Act, the Act on the Slovak National Centre for Human Rights was revised. The Slovak National Centre for Human Rights, which fulfils the role of a national equality body, was granted new competencies, which amount to conducting independent surveys related to discrimination and preparing and publishing independent reports and recommendations on issues related to discrimination. The law became effective as of 1 April 2008.

Case law

Reviewed decision of the District Court in Michalovce on Roma discrimination in access to local bar-restaurant

The District Court in Michalovce decided against the case initiated by three Roma activists from the NGO Nova Cesta based in Michalovce[192]. The activists claimed that they were discriminated against in a local bar on the ground of their ethnic origin. The original decision of the court in August 2006 was the first to apply the Anti-discrimination Act of 20 May 2004, which transposed the Directives into Slovakian law.

The incident happed in April 2005. The Roma activists were not allowed to enter the local bar IDEA in Michalovce, as entrance was contingent on "club membership". However, the white activist from another NGO who followed them a few minutes later had no problem entering the bar. The first decision of the court was rendered in August 2006, with the court stating that the activists were discriminated against and ordering the owner to issue a written apology to the applicants. Nevertheless, the court failed to state on what ground discrimination occurred and did not accept the applicants' arguments that they were discriminated against on the ground of their ethnicity. According to the Court's reasoning the bar owner was successful in proving that he serves Roma customers in his bar and therefore generally establishing that he does not discriminate against them.

[192] For more information on the first instance case please see *EADLR*, issue 5, p. 95.

The appeal submitted by the applicants to the Regional Court in Košice was accepted, with the court ordering the abolishment of the decision and returning it back to the first instance court for a new decision.

The District Court in Michalovce, bound by the decision of the Court of Appeals, examined the case again on 29 January 2008 and decided[193] that the three activists were truly discriminated against on the ground of their ethnic origin. The bar owner was obliged to send a written apology to the applicants, the court, however, repeatedly did not grant the applicants' claim for financial compensation.

Legal aid to the Roma activists was provided by the NGO, the Centre for Civil and Human Rights (*Poradňa pre občianske a ľudské práva*). The NGO is ready to represent them further in the appeal proceeding, arguing the right of the victims to financial compensation.

Slovenia

Legislative developments

Controversial Draft Law on Regulating the Status of Erased People

On 26 February 1992 18,305 citizens of other republics of former Yugoslavia were unlawfully erased from the register of permanent residents. In 1999 and 2003 the Constitutional Court found the erasure unconstitutional and ordered state bodies to adopt measures to regulate the status of the erased individuals. The court required[194] that the status be re-established from the moment of erasure (26 February 1992), which is a requirement not followed in the proposal. The erased people are of Croatian, Serbian, Bosnian, Macedonian, Albanian, Montenegrin and Roma ethnicity and are recognised as discriminated groups by United Nations treaty bodies and the Council of Europe High Commissioner for Human Rights.

The government proposed in October 2007 a draft for a constitutional law on regulating the status of the erased people and submitted it to the National Assembly. According to the government, the draft constitutional law has the purpose of implementing Constitutional Court decision No. U-I-246/02 of 3 April 2003 and providing a legal basis for the regulation of the status of citizens of former Yugoslavia. The proposal foresees the re-establishment of status for those who have in the past already applied for the re-establishment of permanent residence (dating from the day the application was lodged). However, it would exclude the possibility of compensation for the damage the erased individuals might have suffered due to the erasure.

Amended Labour Relations Act

Article 6 of the Labour Relations Act was amended. It now contains in Paragraph 1 a prohibition of discrimination, while before it contained only the obligation to provide equal treatment. Paragraph 1 also now includes amongst the grounds, nationality and ethnic origin, but no longer includes political opinion – only opinion. Paragraph 2 now specifically lists areas within employment where discrimination is prohibited, namely employment, promotion, training, education, re-training, payment and other allowances, absences, work conditions, working time and termination of employment. Paragraph 3, in addition to direct and indirect discrimination, also prohibits instructions to discriminate. Paragraph

193 Decision of the Court: Decision of the District Court in Michalovce of 29 January 2008, 12C 139/2005.

194 Constitutional Court decision no. U-I-246/02 of 3 April 2003.

4 specifies as discrimination any worse treatment connected to pregnancy or parental leave. A new Paragraph 5 defines determining occupational requirements as exceptions from the prohibition of discrimination. Paragraphs 6 and 7, previously 5 and 6, define the principle of the shifting of the burden of proof. The new Paragraph 8 prohibits victimisation and protects the victim and their supporters from it. In conclusion, the content of Article 6 currently reflects more precisely the requirements of Directive 2000/78/EC.

Case law

Discrimination in Employment due to Belief

The Administrative Court found[195] that the Minister of Justice discriminated against the claimant on the basis of political opinion by selecting another candidate for the position of president of a district court. In accordance with the burden of proof rule, the Administrative Court concluded that the Minister did not prove that the reasons for the non-selection of the claimant were not discriminatory. By stating his qualifications and comparing them to the selected candidate, the claimant succeeded in proving that, in fact, he was a better candidate for the position. In addition, by listing media reports in which the Minister of Justice publicly opposed the claimant due to their political differences, the claimant succeeded in proving that the reason for his non-selection was discrimination.

This is the first judicial decision invoking political opinion as a ground of discrimination in Slovenia, based on Article 14 of the Constitution of the Republic of Slovenia and Articles 2, 22, and 4 (§2) of the Act Implementing the Principle of Equal Treatment. Due to the fact that the new Administrative Dispute Act, adopted in 2007, limited the right of appeal to the Supreme Court, it is not yet clear whether or not this decision is final. Namely, the Minister of Justice filed both an extraordinary legal remedy and an appeal to the Supreme Court stating the reason why such an appeal is justified. If the Supreme Court accepts the appeal and decides on its merits, only the Supreme Court decision in this case will be final.

Political development

Agreement between Ministry of Justice and Islamic Community

An agreement was concluded between the Islamic Community and the Ministry of Justice in the Republic of Slovenia, pursuant to the adoption of the Religious Freedom Act, which in Article 21 stipulates that the state may conclude an agreement with individual religious communities with the purpose of implementing the provisions of this Act. The agreement defines freedom of functioning and organisation, freedom of association and assembly, equal access to the media, the right to establish educational facilities, the right to maintain historical and cultural heritage, the right to execute religious activities in hospitals, retirement homes, the army and police forces and equality of Islamic charity organisations with other humanitarian organisations in Slovenia. The agreement is a special measure provided for the Islamic community and its members.

Equality body decisions/ opinions/ reports

Advocate of the Principle of Equality Report 2007

The Advocate of the Principle of Equality, who is competent to examine discrimination complaints in Slovenia, published her Annual Report for 2007. According to the report, in 2007 the Advocate examined 47 cases: in 17 cases discrimination was claimed on the grounds of gender, two cases claimed discrimination on the grounds of race or ethnicity, six cases disability and health status, six cases age,

[195] Decision of the Administrative Court No. U 1324/2007-24 of 26 November 2007.

three cases religion or belief, three cases sexual orientation and two membership of a trade union, while in eight cases it was not possible to assess what the ground of discrimination claimed was. In 20 cases the area of discrimination claimed was employment, in eight cases it was access to goods and services, in six cases family relations, in two cases education and in the remaining 11 cases discrimination was claimed in other fields. In seven cases out of 47 the Advocate found that discrimination occurred, in 13 cases she found no discrimination, while in seven cases it was not possible to establish whether or not discrimination occurred since the Advocate has no investigative powers. Eight cases were not examined by the Advocate since it was obvious from the case that discrimination did not occur. One case was terminated because of the lack of interest of the complainant, and in nine cases the Advocate offered legal advice and assistance to the complainant and the alleged perpetrator of discrimination; in the remaining cases the has not yet been concluded.

Spain

ES

Legislative development

Regulation of the "Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin"

A government decree[196] establishes and promotes the Council for the Promotion of Equal Treatment of all Persons without Discrimination on the Grounds of Racial or Ethnic Origin (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*), allowing the Council established by Law 62/2003 (Art. 33) to start functioning.

The Ministry of Labour has summoned (BOE, 30 January 2008) a process to choose the organisations and associations that will form part of the Council. The difficulty with the proposed body is that it may be hard to guarantee independence in the development of its functions and its effectiveness, as its independence for the performance of the required task is uncertain. Even though the Decree twice includes the word "independent" to develop a function related to the assistance of victims, and the elaboration of reports, which are two elements Law 62/2003 did not provide for, the structure that develops has a clear consulting character because half of its thirty members are representatives of the public administration and the other half are representatives of social organisations. The body does not have a permanent structure separate from the Administration, to which the citizen can apply, as the Council secretariat is a part of the Administration itself. Nevertheless, evaluations of the effectiveness of the Council should follow an examination of the way the Council is functioning.

Spain ratifies Protocol nº 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Spain signed and ratified Protocol nº 12 of the Convention on 4 October 2005, with the date of entry into force being 1 June 2008[197].

[196] Royal Decree 1262/2007, 21 September, which regulates the composition, competencies and regulations for the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (BOE, 3 October 2007).

[197] Instrument of Ratification of the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (25 January 2008).

SE

Sweden

Legislative developments

New comprehensive discrimination law adopted by the parliament
On 4 June 2008, the Swedish Parliament enacted a new discrimination law which will be entering into force in January 2009. As expected, the government passed the law through parliament without changes.

The proposed new legislation will apply to all areas. The current four anti-discrimination ombudsmen are to be amalgamated into one single ombudsman supervising the new law. The current seven discrimination laws are repealed as the new legislation enters into force.

The new legislation contains two new discrimination grounds, one of them being age, thus allowing Sweden to implement its duties with regard to this ground. The other newly protected ground is called **gender transgressing identity or expressions**. Legislation on discrimination due to parental leave and part-time work and atypical work remains outside the new comprehensive law.

Furthermore, an explicit legal ground for affirmative action for the disadvantaged sex in the labour market is provided, based on Article 141.4 EC. There is no legal ground, however, for affirmative action based on ethnicity and this is to be interpreted as a prohibition of all forms of direct affirmative action in the labour market.

Some of the criticism directed at Sweden's implementation of the directives will be addressed by the new legislation, including:
- The prohibition of instructions to discriminate will be widened to cover people who have agreed to perform a task for the employer.
- There will no longer be statutory limits to economic damages in certain situations related to the Employment Protection Act.
- There will be rights for NGOs, apart from unions or employers' organisations, to engage themselves on behalf of or in support of victims of discrimination.
- Private individuals offering goods or services to the general public will be covered.

Other criticisms, however, remain, for example:
- Legal persons will not be protected by the new law.
- Discrimination and harassment from fellow workers or third parties will not as such be prohibited.

UK

United Kingdom

Political developments

Reforms to UK legislation announced
On 26 June 2008, the UK Minister for Women and Equality announced the government's proposed substantive reforms to existing UK equality legislation, which will be introduced later this year as part of a single codified equality act. The key proposals made are as follows.

A single positive equality duty will be imposed on all public bodies, which will bring together the three existing race equality, gender equality and disability equality duties and extend these duties to the grounds of gender reassignment, age, sexual orientation and religion or belief. Public bodies will also be required as part of complying with this duty to report on any inequalities that exist within their workforce on gender pay, ethnic minority employment and disability employment.

The legislation will also ban 'secrecy clauses', which prevent employees discussing their own pay in the private and public sectors, in order to encourage greater transparency about pay levels. In addition, the government will consider over the next five years whether to use existing legislation to require greater transparency in company reporting on equal pay. The single equality duty will also require public bodies to tackle discrimination and promote equality through their public procurement functions.

The scope available in UK law for positive action will be considerably increased, with employers permitted to take into account under-representation of disadvantaged groups, for example women and people from ethnic minority communities, when selecting between equally qualified applicants.
The legislation will also confer regulatory powers on the UK government to outlaw unjustifiable age discrimination by those providing goods, facilities and services in the future. Employment tribunals will be permitted to make wider recommendations in discrimination cases, which will go beyond benefiting the individual claimant, so that there are benefits for the rest of the workforce of the employer found to have discriminated.

The government intends to explore further how to allow discrimination claims to be brought on combined multiple grounds, and to consider how representative actions by trade unions, the Commission for Equality and Human Rights and other bodies, with the permission of a court, could in the various UK legal systems take cases to court on behalf of a group of people who have been discriminated against.

A more comprehensive paper on the content of the proposed Equality Bill will be published, which will also include the government's response to the consultation, '*Discrimination law review; a framework for fairness: proposals for a Single Equality Bill for Great Britain*', which was carried out in 2007.

Internet link, source and additional information: for the text of the government paper, see http://www.equalities.gov.uk/publications/FRAMEWORK%20FAIRER%20FUTURE.pdf
http://www.commonsleader.gov.uk/output/page2438.asp

Case law

The application of the objective justification defence in the context of compulsory retirement ages by UK courts

In *Seldon v Clarkson Wright & Jakes*[198], a partner in a law firm challenged his dismissal, which he claimed constituted direct age discrimination as he had been dismissed when he reached the firm's compulsory retirement age. The law firm claimed that this compulsory retirement age was objectively justified as necessary to ensure good workforce planning within the firm and to open up vacancies at partner level for younger members of the firm.

In *Hampton v the Lord Chancellor and the Ministry of Justice*[199], a part-time judge challenged the mandatory retirement age of 65 imposed on all part-time judges in England, who are known as 'recorders', arguing

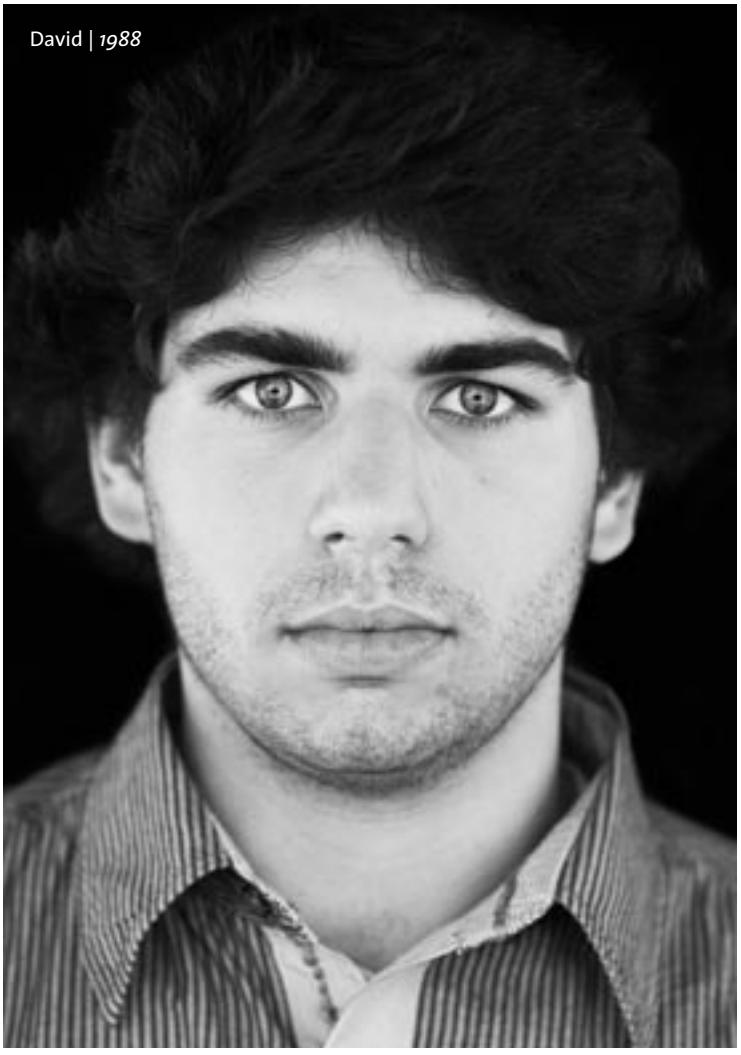
[198] ET/1100275/2007, published on 4 December 2007.

[199] ET/2300835/2007, published on 31 January 2008.


Andy | *1969*


Jeanet | *1957*


Gefke | *1948*


David | *1988*

that as full-time judges only had to retire at 70, the requirement for him to retire at 65 was not justified. The UK government argued the compulsory retirement age was justified as it was needed to create vacancies for new part-time judges, who usually act in this capacity before deciding to apply to become full-time judges. As neither the partner nor the part-time judge were an 'employee', the mandatory retirement ages in question were not covered by the general exception for such rules in the UK Employment Equality (Age) Regulations 2006.

Regarding the first case, in *Seldon v Clarkson Wright & Jakes,* the employment tribunal held that the compulsory retirement of a partner was discriminatory but justified. The tribunal held that encouraging younger employees' expectations for career advancement (i.e. encouraging 'young blood') was a legitimate objective. Workforce planning and avoiding through the use of compulsory retirement the need to use performance management assessments to determine whether partners were still capable of performing their role, were also held to be legitimate aims. The compulsory retirement of partners was held to be a proportionate means of achieving those aims.

By contrast, in the second case, *Hampton v the Lord Chancellor and the Ministry of Justice* another employment tribunal found that the compulsory retirement of recorders was discriminatory, but not justified. The tribunal held that the UK government's aim of maintaining a "reasonable flow of new appointments" for recorders' posts was a legitimate aim. However, the tribunal did not accept that the compulsory retirement age was a proportionate means of achieving that aim, as there was no evidence to suggest that this would increase the numbers of suitable candidates for the judiciary, which was the reason for the government's decision to maintain the retirement age at 65 and not at 70.

Furthermore, in October 2007, an employment tribunal decided in *Bloxham v Freshfields Bruckhaus Deringer* (reference not yet available), that requiring senior partners in a law firm to either retire or accept cuts in their occupational pension entitlements was objectively justified in the circumstances. The law firm argued that the considerable size of the pension entitlements of the senior partners meant that if they continued to accumulate pension payments, this could threaten the financial viability of the entire pension scheme. An employment tribunal held that protecting the overall pension scheme was a legitimate aim and that the means used to achieve that aim were proportionate.

The two reported cases above develop this analysis, with the UK tribunals taking a relatively broad view of what constitutes a legitimate aim but requiring that employers convincingly demonstrate that the means used were proportionate. The *Hampton* case in particular is seen as evidence that the UK employment tribunals will take a strong line on the need for employers to show objective justification for mandatory retirement ages which fall outside the general exception contained in the UK 2006 Regulations.
Internet link, source and additional information:
http://www.legalweek.com/Navigation/32/Articles/1113994/Employment+Age+before+duty.html

Dismissal on the ground that an employee is too young held to be unlawful age discrimination.
In the case of *Wilkinson v Springwell Engineering Limited*[200], Ms Wilkinson, 18 years old, was employed by Springwell Engineering as an administrator, having taken over the post from her aunt. She was informed in February that she was only achieving 90% of her duties and told that she would need to improve her work rate. Another, older administrator was assigned to cover some of Ms Wilkinson's work. On 16 March 2007, Springwell terminated MS Wilkinson's employment. Ms Wilkinson claimed she was told that she was too young for the job and that the employer had discriminated against her on the basis of her youth.

[200] ET/2507420/07, published on 5 March 2008.

The tribunal found that the employers had made stereotypical assumptions about the experience, age and capabilities of Ms Wilkinson. In this case they had assumed that her age meant she had insufficient experience and therefore insufficient capability to do the job. The tribunal concluded that the evidence clearly established that the employers had applied these stereotypes, and then proceeded to find that Springwell Engineering had not been able to discharge the burden of proof and establish that age was not the reason for the claimant's dismissal. The tribunal awarded Ms Wilkinson a total of £16,081 sterling.
This case is the first age discrimination case in the UK that has been decided by a tribunal on the basis that discrimination on the grounds of the youth of the victim had taken place.
Internet link, source and additional information: http://www.practicallaw.com/0-380-9782

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