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European Anti-Discrimination Law Review



In this Issue:

Articles on multiple discrimination, the ECJ and anti-discrimination law and the preliminary ruling procedure | ECJ and ECHR Case Law Updates | National Legal Developments | European Policy Update

For Diversity



Against Discrimination

An initiative of the EU

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

European Anti-discrimination Law Review

No. 2 - 2005



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(on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation)

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The Action Programme has three main objectives. These are:

1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
3. To promote the values underlying the fight against discrimination

For more information see: http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

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Introduction

This is the second issue of the bi-annual 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 six months prior to publication (the information reflects, as far as possible, the state of affairs on 22 July 2005).

In this second issue, Jan Niessen and Piet Leunis, the directors of the Network give a short update on the activities of the network. Professor Sandra Fredman of the Network's Scientific Board reflects on conceptual issues regarding multiple discrimination and EU law. Professor Miguel Poiares Maduro, Advocate General at the European Court of Justice, considers the implications of ECJ jurisprudence on discrimination on the grounds of nationality and sex for the interpretation of the Racial and Employment Equality Directives by the ECJ. Dr. Klaus Bertelsmann, Partner in Employment Law Practice Bertlesmann and Gaebert in Hamburg demonstrates the importance of the preliminary reference procedure to the European Court of Justice for employment lawyers representing victims of discrimination before their national courts.

In addition, you can find the usual updates on legal and policy developments at the European level in the regular sections on EU Policy, European Court of Justice Case Law, and European Court of Human Rights Case Law which includes 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 countries that make up the European Union, can be found in the section on News from the EU Member States.

Meet ordinary people in this Review, facing discrimination

A flying start: an update from the European Network of Legal Experts in the non-discrimination field

Jan Niessen and Piet Leunis

The Network's first year of operation was a busy year as a great many reports were produced and a new law review was launched. National experts prepared comprehensive reports describing in detail how the Racial Equality Directive and the Employment Equality Directive have been transposed in each of the 25 Member States. The scientific board and the experts on the Directives' five discrimination grounds (the ground coordinators) were fully involved in the drafting process. They read and commented on various drafts, as did lawyers from the European Commission. Member States were also given an opportunity to make comments. The 25 reports cover the many changes to national law, the putting in place of enforcement mechanisms and the adoption of other measures. They are a valuable source of information on national anti-discrimination law. The European Commission will post them on its website where they can be consulted by all stakeholders in the anti-discrimination field. A section of the Commission website has been dedicated to the work of the Network¹. A Comparative Analysis is published in English, French and German.

The Network kept track of changes in national anti-discrimination policies and law as well as of developing case law by writing so-called flash reports summarising these developments. More than 100 flash reports were written for the Commission which, after adaptation, were reproduced in the new European Anti-discrimination Law Review (published in English, French and German). The writing of comprehensive and flash reports supports the Commission to verify whether the Member States correctly transposed the Directive and to undertake appropriate action.

Three thematic reports were prepared and published electronically and are printed in English, French and German. The first offers an overview of the protection from discrimination under the 1950 European Convention on Human Rights and the 1961 European Social Charter as well as the 1996 Revised European Social Charter. It seeks to identify aspects of that protection which could influence outstanding questions of interpretation of the two anti-discrimination Directives.² The second report deals with age discrimination and explores how this form of discrimination is being combated in policy and law, focusing in particular on the extent to which the exceptions in the Employment Equality Directive are interpreted.³ The third report examines what the concept of 'effective, proportionate and dissuasive sanctions' requires EU Member States to do in the implementation of the two Directives. The report discusses the development and the meaning of the concept of effective, proportionate and dissuasive remedies in EC sex equality law and in general EC law. It also looks at remedies under international Human Rights law and deals with the issue of upper limits on compensation.⁴

¹ http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

² Olivier de Schutter, *The Prohibition of Discrimination under European Human Rights Law*, Relevance for EU Racial and Employment Equality Directives

³ Colm O'Cinneide, *Age discrimination and European Law*

⁴ Christa Tobler, *Remedies and Sanctions in EC non-discrimination law*, "Effective, proportionate and dissuasive national sanctions and remedies, with particular reference to upper limits on compensations to victims of discrimination".

In April 2005, members of the Network met during and were actively participating in the Annual Conference on Access to Justice in Lisbon. A seminar is prepared for October 2005 at which representatives of Member States, equality bodies and Network members will discuss issues taken up in the thematic reports and the Law Review. Finally, the Network contributed to the writing of the Commission's annual equality and non-discrimination report 2005. For next year the Network will be joined by a new legal experts on Roma issues. The Network will update the national reports and prepare six thematic reports dealing with such issues as the independence of equality bodies. The Network will continue to produce flash reports and bi-annual editions of the law review.

All reports can be downloaded from the European Commissions' website:

http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

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Kees | 1991

Marinde | 1994



Double trouble: multiple discrimination and EU law

*'All the Women are White; All the Blacks are Men; but Some of Us are Brave'*⁵

Sandra Fredman, Professor of Law, Oxford University

The expansion of EU discrimination law over a wider range of grounds opens up the prospect of claims based simultaneously on several grounds. Most people have multiple identities: we all have an age, a gender, a sexual orientation and an ethnicity; many have or acquire a religion or a disability as well. This means that discrimination may well occur on more than one ground. Most prominent is the cumulative effect of gender discrimination when it intersects with other grounds. Ethnic minority women, older women, black women and disabled women are among the most disadvantaged groups in many EU Member States. Similar multiple or intersectional discrimination is experienced by gay or lesbian members of ethnic minorities; disabled black people; younger ethnic minority members or older disabled people.

Recognition of multiple discrimination has been pioneered in the US by African American women, who have powerfully demonstrated the ways in which sex discrimination law focuses on white women, while race discrimination law is targeted at black men. As Kimberlé Crenshaw, a well known thinker on this subject, has argued: 'The paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged blacks. Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances, none of which include discrimination against black women!'⁶

There is now growing recognition that gender discrimination is experienced very differently by women in different situations. Factors such as class, caste, race, colour, ethnicity, religion, national origin and disability are 'differences that make a difference.'⁷ However, Crenshaw argues, multiple discrimination does not simply consist in the addition of two sources of discrimination; the result is qualitatively different, or synergistic. Thus the disadvantage experienced by black women is not the same as that experienced by white women or black men. Instead, black women form a separate and unique group for the purposes of discrimination law. For example, in an American case, black women claimed that they had been discriminated against in the application of their employer's seniority system.⁸ Because black women were recent entries to the company, they were made redundant first; thereby being worse off than both white women and black men. Thus they could not claim that they had been less favourably treated on grounds of either gender alone or race alone. It was only the cumulative situation, of being both female and black, which was the source of the discrimination.

⁵ Gloria T Hull (ed) *All the Women are White; All the Blacks are Men; but some of us are Brave* (The Feminist Press, 1982); cited in K Crenshaw "Demarginalising the intersection of race and sex" (1989) University of Chicago Legal Forum 139.

⁶ K Crenshaw "Demarginalising the intersection of race and sex" (1989) University of Chicago Legal Forum 139.

⁷ United Nations Division for the Advancement of Women: Gender and Racial Discrimination: Report of the Expert Meeting (2000).

⁸ *DeGraffenreid v General Motors Assembly Division* 413 F Supp 142 (US Federal Court of Appeals).

Within the EU, this is illustrated by the position of migrant women.⁹ Migrants of both genders tend to be concentrated in particular segments of the market, but women with a migrant background are particularly restricted, largely in low paying, low status and insecure jobs such as cleaning, catering, personal and domestic services, health and care.¹⁰ A recent study showed that in Spain, all foreign migrants are exposed to discrimination in the labour market, but that migrant women have to accept jobs below their level of qualification much more frequently than migrant men, in most cases as home helps.¹¹ Women immigrants to the EU from Muslim countries have particularly low activity rates and are largely excluded from the labour market.¹² Women in such communities could be facing discrimination from their own communities on grounds of gender as well as discrimination from the broader society on grounds of ethnicity or religion. In addition, women generally bear the brunt of cuts in public services and welfare, but this burden is disproportionately born by immigrant, minority, disabled and indigenous women.

The synergistic nature of discrimination means that it has proved difficult to frame policy and law in ways which can address multiple discrimination. As a start, judges and law-makers have been wary of opening a 'Pandora's box' to claims by multiple sub-groups. For example, in the US case referred to above, the US Federal Court of Appeals categorically refused to accept that black women formed a separate category, arguing that this gave them a 'super remedy' or 'greater standing' than black men or white women.¹³ Other US cases have been more promising, with the explicit recognition by a US Federal Court of Appeal that discrimination against black women can exist even in the absence of discrimination against black men or white women.¹⁴ However, courts remained concerned at the possibility of a flood of claims by numerous sub-groups. This led courts to hold that multiple discrimination should be restricted to a combination of only two of the grounds. On this analysis, only race and gender can be addressed; the impact of sexual orientation, religion, disability or age are ignored. The result is both artificial and paradoxical. The more a person differs from the norm, the more likely she is to experience multiple discrimination, the less likely she is to gain protection.

The synergistic nature of multiple discrimination also makes it difficult to monitor. Many national statistics do not include data disaggregated by both sex and race, still less by other sources of multiple discrimination, such as ethnicity and disability. Thus a recent Irish study demonstrates the invisibility of ethnic minority people with disabilities, an invisibility underlined by the total absence of this group in national statistics.¹⁵ Yet this group suffers in complex and often subtle ways from both race and disability discrimination. Service and health care providers tend to ignore their ethnicity in framing structures for accommodating disability, with the result that their culture and identity is devalued and they face greater difficulty accessing appropriate services. At the same time, they might face discrimination from their own ethnic community on grounds of disability.

⁹ United Nations Division for the Advancement of Women: Gender and Racial Discrimination: Report of the Expert Meeting (2000).

¹⁰ EU Monitoring Centre on Racism and Xenophobia, *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-discrimination in 15 Member States of the European Union* (2003).

¹¹ European Monitoring Centre on Racism and Xenophobia: Annual Report 2003 - 4 (2004).

¹² EU Monitoring Centre on Racism and Xenophobia, *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-discrimination in 15 Member States of the European Union* (2003).

¹³ *DeGraffenreid v General Motors Assembly Division* 413 F Supp 142 (US Federal Court of Appeals).

¹⁴ *Jefferies v Harris County Community Action Assn* 615 F 2d 1025 (5th Cir 1980) (USA Federal Court of Appeals).

¹⁵ M Pierce *Minority Ethnic People with Disabilities in Northern Ireland* (Equality Authority Dublin 2003).

The resulting difficulty in bringing multiple sources of discrimination into the frame means that policy is often directed at only one aspect of an individual's identity. Thus trafficking in women and girls is usually viewed as a gender discrimination issue.¹⁶ Recognition of an ethnic dimension is, however, crucial to appropriate policy making, since women who are racially marginalised are more at risk of becoming victims of human trafficking; while ethnic discrimination may create a particular demand in the country of destination.¹⁷ Similarly, domestic violence could be seen in terms of the synergistic impact of gender combined with racial or religious discrimination. Many black and minority women find it difficult to speak out against domestic violence, through fear of direct racism by police, or because they are concerned in case reporting violence will reinforce negative stereotypes and expose their own communities to racist treatment, including deportation or injury. Migrant women whose status depends on marriage are particularly vulnerable, since they face deportation if they leave an abusive relationship, a vulnerability compounded by language difficulties, lack of knowledge of sources of protection, and difficulties in finding work or other sources of income to support themselves and their children.¹⁸ This is true too of sexual harassment. Behaviour which would be harassing and insulting to white women may be thought to be somehow less so to other women, because of prejudiced images that cast black women or migrant women as promiscuous or thick-skinned.¹⁹

Possibly most at risk of multiple discrimination are women from the Roma, Sinti and traveller communities, as a recent report on the position of Roma and Sinti in Germany²⁰ demonstrates. While all members of these communities are seriously disadvantaged both at school and in the labour market, women are worse off still. Roma and Sinti girls have even higher rates of abandonment of school than boys, often because they marry early, and find further advancement impossible once they have children. Lack of educational achievement leads directly to rates of employment which are even lower than Roma men, compounded by their child-care obligations and the fact that they often live in remote areas. Training projects for women from majority groups and men from Sinti or Roma groups do not service Sinti or Roma women. Sinti and Roma women are also more likely to be harassed by the police, and multiple discrimination is compounded for those who do not have the country's citizenship. It is estimated that during the 1990s, up to 100,000 of the Roma in Germany were not German citizens. Many who are in fact long-term residents in Germany have no real residence status, only a temporary stay on expulsion ('duldung'), which must be renewed very frequently. As a result they live under extreme stress.

Particularly sensitive is the potential conflict between minority rights and gender equality, for example, where gender equality is portrayed as a western imposition, not appropriate for women in the minority community in question. In such circumstances, uni-dimensional approaches based on gender discrimination, race discrimination, or religious discrimination all fail to capture the complex confluence of discriminatory currents. A key question concerns whose portrayal of the religious, or community view of gender is taken as authoritative.

¹⁶ US Department of State Annual Report 2003. Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report. Available at <http://www.state.gov/g/tip/rls/tiprpt/2003/> (26.06.2003).

¹⁷ United Nations Division for the Advancement of Women: *Gender and Racial Discrimination: Report of the Expert Meeting* (2000).

¹⁸ S Fredman, *The Future of Equality in Great Britain* (EOC Manchester 2002) pages 25 - 6.

¹⁹ K Crenshaw "Race, Gender and Sexual Harassment" 65 Southern California Law Review 1467.

²⁰ EU Monitoring and Advocacy Program / European Roma Rights Center, *Shadow Report Commenting on the fifth periodic report of the Federal Republic of Germany submitted under Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (2004).

Gender discrimination may be legitimated within ethnic or minority groups by the internal leadership structures, and defended on grounds of multiculturalism or minority rights. Yet it must be asked whether the leadership structures are representative. Where unelected male community leaders mediate relations between the state and minority communities, they may be predominantly concerned with preserving family and religious and cultural values.²¹ Only when minority women are given the opportunity to frame their own position, from the perspective of both gender discrimination and discrimination based on ethnicity, race or religion, will it be possible to address this issue.

This raises the question of how multiple discrimination can be addressed within the framework of EU anti-discrimination law. Experience of other jurisdictions, particularly in the US, demonstrates the risk that such discrimination may not be captured within the structure of discrimination law, because of an assumption that discrimination falls neatly into one of the named categories. However, international human rights instruments are showing growing recognition of the issue. Most important was the contribution of the World Conference for Women held in Beijing in 1995, which drew attention to the fact that age, disability, socio-economic position and membership of a particular ethnic or racial group could create particular barriers for women. A framework for recognition of multiple and co-existing forms of discrimination became a key part of the resulting Beijing Platform for Action. Similarly, the preamble to the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) emphasises that the eradication of racism is essential to the full enjoyment of the rights of women. Correspondingly, in 2000, the Committee on the Elimination of Racial Discrimination adopted a general recommendation on gender-related dimensions of racial discrimination, which calls upon State parties to report on gendered aspects of race discrimination. As a consequence, Germany was specifically asked to undertake a comprehensive assessment of the position of foreign women and girls as part of its fifth report to the committee.

At EU level, the expansion of the grounds of discrimination opens up new possibilities for the recognition of multiple discrimination. However, the structure of the directives creates several potential obstacles. The first concerns the segmentation into three different sets of directives: one concerning race and ethnic origin,²² one concerning religion or belief, disability, age or sexual orientation,²³ and a set of directives on gender discrimination.²⁴ The list is an exhaustive list, leaving no scope to the ECJ to expand it. This contrasts with Article 14 of the European Convention on Human Rights, which prohibits discrimination on grounds '*such as sex, race, colour, language ... or other status*' (italics added). The non-exhaustive or open nature of this list has enabled the European Court of Human Rights to expand the list, to include, for example, disability and sexual orientation. On one argument, recognition of multiple discrimination entails the creation of a new sub-category, such as minority women, precluded by the exhaustive nature of the list, as well as the difficulty of straddling two directives. However, a better argument would be that it is open to the court to combine two or more grounds of discrimination. This approach is supported by the fact that the preamble of the Racial Equality Directive expressly declares that women are often the victims of multiple discrimination and therefore, that in implementing the

²¹ P. Patel, *An Urgent Need To Integrate: An Intersectional Perspective (Commission of Racial Equality (CRE) Notes on Gender and Racial Discrimination)*.

²² Racial Equality Directive (2000/43/EC).

²³ Employment Equality Directive (2000/78/EC).

²⁴ Equal Treatment Directive (76/207 EEC).

principle of equal treatment on grounds of racial or ethnic origin, the community should aim to eliminate inequalities and to promote equality between men and women.²⁵ A similar provision appears in the preamble to the Employment Equality Directive.²⁶

Possibly an easier route to recognition of multiple discrimination is the use of a non-exhaustive list. In fact, several Member States have chosen to implement the Directives by using a non-exhaustive list, adding a phrase such as 'or any other circumstance'.²⁷ This will permit courts to recognise additional grounds of prohibited discrimination. According to the Network's study of implementation of the Directives, non-exhaustive lists are found in Finland, Hungary, Latvia, Poland and Slovenia. In Belgium, the exhaustive nature of the list of grounds included in the legislation was subsequently held to be unlawful by the Court of Arbitration.²⁸

More difficult is the fact that the Directives have differing material scopes, with the Racial Equality Directive outlawing discrimination over a wider scope than the Employment Equality Directive. Thus whereas EC law prohibits race discrimination in housing and other services, it does not forbid discrimination outside of employment and vocational training on grounds of religion, disability, sexual orientation or age. This makes it difficult, for example, for older members of ethnic minorities to bring a claim of multiple discrimination in respect health care or housing. Such claimants would only have a claim under the Directives on grounds of ethnic origin. But such a claim might be precluded if younger members of their ethnic group do not suffer detriment. With the expansion of the coverage of the gender directive into a similar area as that of the Racial Equality Directive, this difficulty is unlikely to arise with respect to women suffering multiple discrimination on grounds of gender and, say, ethnic origin, but it will arise in respect of older women.

One way forward is for domestic legislation to go beyond the Directives, and provide for comprehensive coverage for all grounds covered by both Directives. This question was addressed by the recent study carried out by the Network into implementation of the two Directives in the 25 Member States²⁹. The study found that many Member States have maintained the diverging scope of the two Directives, outlawing discrimination in social protection, social benefits, education, goods and services available to the public only in respect of racial and ethnic origin discrimination. In such cases, the difficulty of addressing multiple discrimination remains acute. On the other hand, an important group of Member States provide for comprehensive coverage for all the named grounds. Thus, in Belgium all grounds of discrimination are legislated equally; the Czech Republic's draft law provides the same protection for all of the grounds specified in both Directives; and in France, the general principle of equality in public service guarantees equal treatment for all grounds in social protection, goods and services, and housing. Hungarian law has practically unlimited material scope, treating all grounds of discrimination equally. Irish law has equal material scope for nine grounds of discrimination; in Slovenia, all of the grounds in both Directives enjoy protection against discrimination in the field of social protection, social advantages, education and goods and services; and Spanish law prohibits discrimination in social advantages not just on grounds of race but also on the grounds of religion or belief, disability and sexual orientation. In these Member States, recognition of multiple discrimination is likely to be less problematic.

²⁵ Racial Equality Directive (2000/43/EC), Preamble, para 14.

²⁶ Employment Equality Directive (2000/78/EC), para 3.

²⁷ Developing Anti-Discrimination Law in Europe, the 25 EU Member States compared, Bell and Cormack, June 2005, page 8.

²⁸ Judgment no. 157/2004 of the Court of Arbitration, delivered on 6 October 2004: <http://www.arbitrage.be/public/f/2004/2004-157f.pdf>

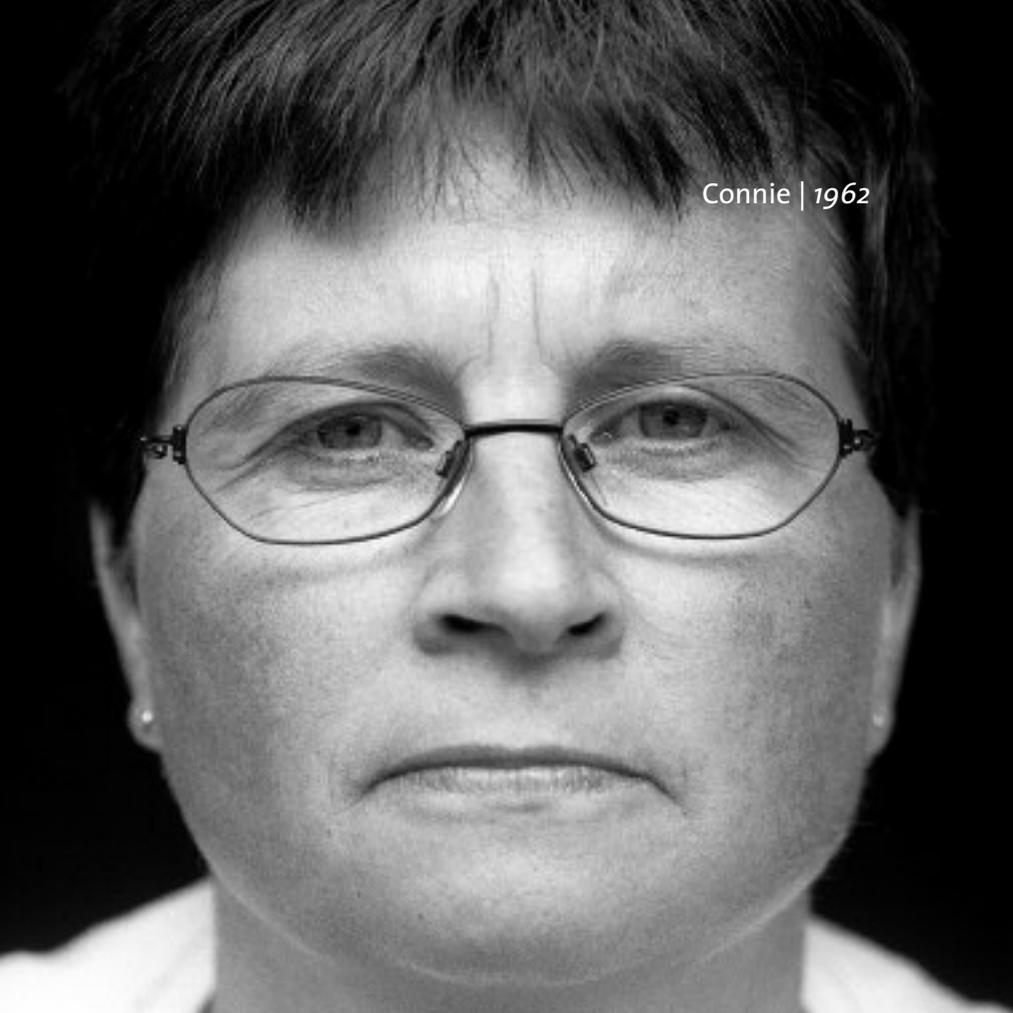
²⁹ http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

But does this mean, as US courts feared, that sub-groups can multiply indefinitely, opening the Pandora's box? Not necessarily. Crenshaw argues that discrimination experienced by black women is not simply additive, in that racism is added to sexism or vice versa. Instead it is synergistic, unique to black women.³⁰ Multiple discrimination only occurs when a group experiences discrimination from several different directions and is therefore multiply disadvantaged. The diversity of EU Member States means that multiple discrimination cannot yield a uniform set of groups across different states: a minority could suffer discrimination in one state and not in another. But in order to claim multiple discrimination, a group would need to fulfil the criteria of multiple disadvantage. This would be assisted by statistics disaggregated both by race and gender.

Recognition of multiple discrimination is also essential when considering positive action and reverse discrimination. It is well known that the most advantaged of a disadvantaged group may make best use or even capture the benefits of positive action measures. This problem could be mitigated by targeting positive action on groups defined on the basis of multiple discrimination, which by definition comprise the least advantaged in each of the relevant groups. It is arguable that this is possible under EU law. Article 7 of the Employment Equality Directive permits Member States to maintain or adopt specific measures in order to compensate for disadvantage 'linked to any of the grounds referred to' and Article 5 of the Racial Equality Directive similarly refers to compensation for disadvantages 'linked to racial or ethnic origin'. Measures directed at sub-groups defined according to multiple discrimination would be 'linked' to one or more of these grounds and therefore would, provided they fulfilled the other requisite criteria, be potentially legitimate.

The expansion of EU anti-discrimination law into a wider area of application opens up the possibility of addressing multiple discrimination. Although there are inevitable limits to what the law can achieve in this context, a crucial first step must consist in the recognition of the complex problems that multiple discrimination raises. Only once the invisibility of those suffering multiple discrimination has been recognised will it be possible to frame law and social policy accordingly.

³⁰ See further S Fredman and E Szyszczak, "Race and Gender: the difference approach" in B Hepple and E Szyszczak (eds) *Discrimination: The Limits of the Law* (Mansell 1992).



Connie | 1962



Amaran | 1955



Netaniel | 1997

The European Court of Justice and Anti-discrimination Law³¹

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This article will start by making some general comments on the role of the ECJ and the approach the court can follow in addressing the issue of non-discrimination and how this relates to the issue of access to justice. It will draw on the experience of the case law of the ECJ which has been mainly in the field of non-discrimination on the basis of nationality and sex, two very important areas of the court's case law. I will use some examples from the area of sex discrimination that I think will be important in understanding the potential interpretation that may be followed by the court in interpreting the Article 13 directives. Finally, I will consider one area on the margins of sex discrimination which may also prove to be of relevance for the Article 13 directives.

Overview of non-discrimination in the case law of the ECJ and in EU law

In very broad terms non-discrimination in the case law of the ECJ and in EU law covers mainly four areas: Firstly and most traditionally non-discrimination on the basis of nationality that is embodied in several rules of Community law, as expressed in the general principle of non-discrimination on the basis of nationality among European citizens. Secondly, the general principle of non-discrimination that the ECJ has derived from the general principles of law and fundamental rights that are part of the common constitutional traditions of the Member States. This general principle of non-discrimination is applicable both in the review of EU legislation and EU administrative acts, but also in the review of national acts within the scope of EU law. It may cover instances of discrimination that for example are not even addressed in Article 13 implementing legislation. It may be relevant if applied to national law when those national rules fall within the scope of application of Community law. The third area relates to sex discrimination in employment and this is limited to Article 141 EC Treaty and the directives implementing that Article. This provision has both a vertical and a horizontal application, that is it applies both in relation to the state and public authorities and in the context of private relationships. The fourth area is a new area regarding non-discrimination and is that which arises from Article 13 EC Treaty and its implementing legislation - the two directives that have been adopted to date. These new directives have not yet given rise to case law before the ECJ and even the references to Article 13 that one can find in the case law of the ECJ are still very limited, with most of them actually relating to cases of sex discrimination. Article 13 has been referred to in a couple of decisions by the ECJ, but only in support of another argument or used in the context of the interpretation of sex discrimination law.

This article will set out three broad considerations for the direction and the key issues involved for the ECJ in respect of discrimination, both sex discrimination and discrimination in the context of Article 13, namely on the basis of racial or ethnic origin, religion or belief, disability, age and sexual orientation. It will then go on to consider one area where the case law of the ECJ is very developed, namely sex discrimination because the parallels with Article 13 directives will be important in that context.

³¹ This text is a transcription of a talk given at The Annual Conference of the Community Action Programme to Combat Discrimination on "Access to Justice", Lisbon 25-26 April 2005.

Challenges faced by the ECJ in non-discrimination law

Three broad questions and challenges should influence the general orientation of the ECJ and the role of the court in the area of non-discrimination law.

Access to justice and effective judicial protection

The first challenge is the issue of access to justice and effective judicial protection. The ECJ has to pay particular attention to the nature of the relationships that underlie most instances of discrimination covered both by sex discrimination and by discrimination under the Article 13 categories. The reason for this is that the nature of the relationships and the nature of the litigation process and of the parties involved clearly shapes and limits the capacity of the courts to provide justice in these instances. This is because in most instances of discrimination there are high information costs on the one hand and weak parties with low information on the other. Therefore one of the problems is that most instances of discrimination will never reach court simply because parties are not informed, or they do not have the means to get information, or to organise themselves to protect their rights. A further reason is that in most instances of discrimination one has a kind of asymmetric legal relationship: on the one hand a weak party that will often also be a 'one-shot litigant' versus repeated litigants. For example, companies are clearly repeated litigants, having their own legal services that are engaged in many instances of litigation and have a good knowledge of discrimination law and labour law. On the other hand, single individuals may only litigate in one instance. This means that transaction and information costs are much higher for the one-shot litigant than for repeated litigants. This also tends to create an imbalance both in the way that one can expect those individuals to bring cases before the court and on the capacity they have to litigate once they reach court.

The other problem relates to the length of time of proceedings - a problem that is common in other areas of Community law such as free movement of persons. In justice time is always of the essence, but particularly in these cases: if the litigant has to wait two or three years or more to see justice done or to see an end to discrimination, that is quite likely to result in the litigant not having sufficient motivation or capacity to pursue the case to court. Consequently, the capacity for a court to address these issues and the extent to which one can expect that individuals affected by situations of discrimination actually bring all cases to the courts is very limited. From the perspective of the court therefore, the interpretation of the procedural rules of access to courts is very important, likewise participation in judicial proceedings and also defining the applicable degree of judicial scrutiny. In addition, from the point of view of the legislator, it is important to define mechanisms and alternative forms of bringing cases of discrimination before the courts. If individuals who experience discrimination cannot take those cases by themselves, then one has to develop alternative mechanisms of bringing these cases to court.

A quick review of the case law of the ECJ in the area of sex discrimination (mainly references from national courts), to see how many cases were brought by individuals, how many by agencies or by entities that have legal standing to pursue cases of discrimination or even by Trade Unions, reveals that most cases are still brought by individual litigants. Out of sixty-nine cases on Directive 76/207, four were brought by a representative organisation and all the others by individuals. Out of forty-three cases on Article 141 EC Treaty, only three were brought by a representative body or organisation, all others were brought by individuals. There is also an extreme variation among EU Member States on the cases that are brought in this area. The UK and Germany have brought many sex discrimination cases, while Portugal has not brought any. One cannot assume from these

statistics that there is a lot of sex discrimination in employment in the UK and Germany and none in Portugal. The explanation may have more to do with the mechanisms of access to court and protection in this area of law in the respective Member States. In the UK, one explanation is that even though the Equal Opportunities Commission does not have standing to bring cases themselves, they nevertheless actively support individual litigants in bringing cases. It is worth noting here that the Article 13 directives actually appear to promote the use of public agencies to support individual litigants in bringing cases of discrimination to court. However, that in itself may not be sufficient, particularly due to the length of time of proceedings, so one may need to consider whether in some cases it is appropriate to give standing to public agencies to pursue cases of discrimination themselves, independently of whether or not a specific individual would pursue the case. This may be the only way to face particular forms of structural discrimination, where for individuals there is no incentive whatsoever to bring the case because it will have no practical consequences.

Another mechanism that should be taken into account is the importance of what could be referred to as "catalytic groups" - organised groups such as NGOs, Trade Unions and other types of groups in supporting individuals and actually encouraging individuals to bring cases of discrimination. One of the most famous cases was in sexual orientation discrimination. In this instance, a test case was brought by an individual, effectively supported by a series of NGOs. The two mechanisms required are therefore, (i) granting standing to public bodies to bring cases of discrimination and (ii) providing the means for catalytic groups to support cases in this area of the law.

A third mechanism is one that may become increasingly important in order to overcome the difficulty of the judicial process due to both the nature of litigation in this area and the length of time required to actually achieve a substantive outcome in individual cases. This is to promote soft law in addressing cases of discrimination. For example the role of ombudsmen may prove to be extremely important in this area. It may be useful to develop circumstances such as those that exist in Sweden where there are ombudsmen for investigating complaints of maladministration in the public sector, but also an ombudsman for discrimination that can act directly with companies to prevent and correct instances of discrimination.

Degree of judicial scrutiny

The second kind of challenge faced by the courts can be called the degree of judicial scrutiny. Courts have a limited capacity to provide justice. It may be an unfortunate metaphor, but to a certain extent it is like any other market: justice depends on the demand and supply. How can we set up mechanisms that allow for a greater demand for justice in discrimination which provides more access to justice, and how can we structure courts so they are better able to provide justice in these cases? One issue is that, as courts have limits on their capacity, they have to set up priorities for judicial action, and these priorities depend very much on what individual courts consider to be the biggest malfunctions in the process of decision-making, be that in the market, in the political process or in any other institution. The development of the judicial criteria that is used in reviewing cases very much depends on how serious the courts perceive those malfunctions in the social mechanisms of decision-making to be in particular instances.

It is particularly important in cases of discrimination, as I pointed out as Advocate-General in a case that dealt with what were at the time third country nationals, that the courts, and particularly the ECJ should exercise a stricter degree of judicial scrutiny when faced with legislation that affects the rights of parties that are not sufficiently represented in either national political processes or in the Community political process. That is

particularly the case with what the United States Supreme Court famously defined as discreet and insular minorities - that is minorities that are defined not only because they are a minority but also because they are an easy target group since they are insular closed groups, such as is the case with religious minorities, sexual orientation minorities, but also racial minorities. It is in those instances that the ECJ has to be more careful in reviewing the legislation and the decisions that arise from the national political process because it is protecting the rights of parties that have no voice in the political process that decides the legislation. The same is true for litigation between private parties so far as the bargaining balance between the weak parties and the repeated litigants or stronger parties is concerned. To conclude, the degree and the form of judicial review has to adapt itself to what it identifies to be the problems and the under-representation of some social groups in society.

Concept of discrimination

The third challenge for the case law of the ECJ regarding the role of the court in non-discrimination cases is related to the concept of discrimination and what the equality that is to be obtained actually is. This concerns the criteria already under discussion in the case law of the court, the key elements of which appear to be: (i) What justifies different treatment? (ii) What constitutes objective justification? (iii) What amounts to discrimination? and (iv) What purpose is to be achieved through non-discrimination rules: equality of opportunities or equality of results? This latter issue for instance is very important in questions of affirmative action and has to do with, for example, whether the role of non-discrimination rules should be simply to prevent discrimination or should also be to compensate the under-represented groups for the discrimination to which they are subject or have been subjected to.

ECJ case law on sex discrimination: lessons for interpreting the Article 13 Directives

Affirmative action and positive discrimination measures

Positive discrimination measures to actually correct instances of under-representation of certain groups in society is, and has been the subject of intense discussion regarding Community law and the case law of the ECJ. Traditionally this has been discussed in the area of sex discrimination, where the basis for the acceptance of positive discrimination and affirmative action measures has been Article 2 of Directive 76/207, which allows for three exceptions to the principle of equal treatment. Among the three exceptions the one that is more relevant to affirmative action is the one that allows affirmative action measures to be adopted by national legislation when the national measure is designed to promote equal opportunities for men and women, in particular by removing existing inequalities that affect women's opportunities. Curiously this provision on affirmative action is also included in the Article 13 directives, but with an important nuance that brings it closer to what is in Article 141 EC Treaty after the Amsterdam Treaty. Article 5 of the Racial Equality Directive 2000/43 EC and Article 7 of the Employment Equality Directive 2000/78 provide that "with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin." The important thing to notice here is that the reference is no longer to removing existing inequalities, but to preventing or compensating for disadvantages linked to racial or ethnic origin in the case of the Racial Equality Directive, or to religion or belief, disability, age or sexual orientation in the case of Directive 2000/78 EC.

I have attempted to argue in a recent Opinion that the provision on compensation, which now appears in Article 141 EC Treaty broadens the scope of admissibility of affirmative action measures beyond the traditional approach of the ECJ in respect of sex discrimination and the acceptance of positive discrimination or affirmative action measures in that area of the law. The extent to which the ECJ can broaden it, is something I consider below.

The traditional interpretation of the ECJ has been based on an understanding of Article 2 of Directive 76/207 as authorising measures which, although discriminatory in appearance, are in fact "intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life."³² Therefore, the idea is to eliminate or reduce actual instances of inequality and I will try to explain what the ECJ means by that: what appears to arise clearly from the case law is that the court does not really include in the purpose of affirmative action, measures that may be justified as being designed to achieve substantive equality, but instead it has adopted a narrower interpretation, referring to the restricted concept of equality of opportunities. To a certain extent therefore, what the court understands by equality and non-discrimination rules is the furthering of equality of opportunities. The case law of the ECJ regarding affirmative action measures has therefore been framed largely by the notion of equality of opportunities. Three categories of positive measures have been distinguished in ECJ case law as constituting affirmative measures: The first category concerns measures aimed at improving the training and qualifications of women (what we see here in the case of sex discrimination can be extended to other areas). These are measures towards which the court has been very open and receptive. The second category consists of measures that enable women to better reconcile their role as parent and their professional activity and the court has also accepted that men can also benefit from these kinds of measures. The third category of measures, which has been the subject of the most intense debate in both ECJ case law and in academia includes measures which aim to achieve equality between men and women on the labour market and which are discriminatory in nature, in that they favour women in order to reduce their under-representation in professional life.

The ECJ has mainly been concerned with positive measures in this third category and it has dealt with it in a restricted manner. It has established a three-fold test for these measures: The first is that, to be acceptable, the measure must remedy an existing situation of imbalance between men and women, i.e. there must be an under-representation of either sex (it can be assumed that it will be extended to other groups). This must constitute an under-representation in the area that is the object of the measure itself. An under-representation in a certain employment market cannot justify affirmative action measures promoting stronger representation of women or another social group in a different employment area. This derives clearly from the case law of the ECJ. The second is that the measure is subject to an adequacy test. This refers to the likelihood that the measure taken will in effect remedy the concrete situation of under-representation. The notion here is that it will eliminate the discrimination that exists in that area of the law and therefore there is no notion of compensation. The third is that such a measure must be reconciled as far as possible with the principle of equal treatment and herein lies the problem. The ECJ has interpreted this aspect as excluding measures that establish automatic or absolute preference for women and one can therefore assume that this would also be the case for other under-represented groups. As the ECJ stated, a measure which is intended to give priority to the promotion of women in sectors of public service where they are under-represented must be regarded as compatible with Community law, if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidates are subjected to an objective assessment which takes into account the specific personal situations of all candidates. Therefore, what we can derive from the case law of the ECJ is that preference can be given to women as one of the criteria to be taken into account, but that the ECJ does not accept affirmative action measures including for example, closed competitions, or automatic and absolute preferences for women. To a certain extent what the court is saying is that it wants to prevent equality between individuals from being overridden by concerns of substantive equality between groups. To a large extent the court understands affirmative action measures as being designed to prevent discrimination in each individual case by

³² Case 319/03 *Briheche*, Judgment of 30 September 2004, para 22 and Case 409/95 *Marschall* [1997] ECR I-6363, para 26.

forcing the employer to place women in a similar position to men. Therefore the key idea is not that affirmative measures are accepted to reinstate equality of representation in certain areas of employment, but instead that they are used to restructure the decision-making mechanism of employers so that they do not discriminate in this area.

This narrow understanding obviously conflicts with the more ambitious goals sometimes attributed to measures of affirmative action. They are often vested with the purpose of eliminating or compensating for the under-representation of certain groups in society by giving preferential access to certain social groups. The question is whether by referring in Article 141 and now in Article 13 EC Treaty to compensation as one of the reasons that may also justify affirmative action measures, the Community legislator intended to be broadening the scope of admissibility of affirmative action measures. It cannot be excluded that the reference in Article 141 EC Treaty to compensatory measures has as its aim providing a broader margin of discretion to Member States in adopting measures of positive discrimination. The issue here for the ECJ, and the decision that it has to take regarding admissibility of affirmative action and positive discrimination measures adopted by Member States, is not actually whether affirmative action is the best way to fight discrimination and to reinstate equality in the labour market, but whether giving Member States a margin of discretion to decide what is compatible with the principle of equality. These are two different things. In my view, in an area such as this that is subject to intense discussion and scrutiny, it may be appropriate for the court to allow for some diversity of national political choice regarding the extent to which Member States adopt affirmative action measures. Member States can even work in that respect as a kind of legislative laboratory in pursuing and understanding which measures are more appropriate in actually achieving equality and these can then be copied by other Member States. I also believe that the reference to compensation is not necessarily incompatible with the traditional preference in the case law of the court for equality of opportunities, rather than substantive equality between groups: it can be argued that compensatory measures can either mean the need to compensate for past or existing social inequalities that justify favouring individuals in those groups, at the expense of discriminating against members of the over-represented groups, or the need to adopt measures of a compensatory-type that are necessary in view of the fact that the non-discriminatory application of the current societal rules is structurally biased. In the second interpretation, the purpose of compensatory measures is not to reinstate equality of representation between all groups at the expense of equality between individuals, but is instead a recognition that the processes of social decision-making in this area are so structurally biased that the non-discriminatory application of the rules would in effect lead to continued discrimination against certain under represented groups. In this second interpretation, I have argued that the admissibility of some forms of affirmative action can be justified as compatible with the preference that the court has given to the idea of equality of opportunities instead of equality between groups. The fact that one accepts affirmative action measures of this type does not necessarily mean that they are not subject to certain conditions that arise precisely from the need to reconcile this broader scope of affirmative action measure with the notion of equality of opportunities set out in previous ECJ decisions. In my view that can be achieved by imposing conditions such as the transitional character of the measure and the need to periodically reassess the need for these measures. In this way it may be possible to give, on the one hand, a broader margin of discretion to Member States in adopting affirmative action measures, and at the same time to remain faithful to what appears to be the underlying and core principles adopted by the ECJ in this area of the law, that has been developed in the area of sex discrimination and which can also be relevant in the context of the Article 13 directives.



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Who's afraid of the European Court of Justice? A Guide to the Preliminary Ruling Procedure for national courts

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The Preliminary Ruling Procedure according to Article 234 EC Treaty

The procedure is an action before the national court, which results in a reference from the national court to the European Court of Justice (ECJ) in the form of a preliminary ruling. By appealing to the EC directives, the procedure can ensure enforcement of individual claims which also has far-reaching effects beyond the individual case.

When a person feels discriminated against due to the conduct of another, for instance an employer, alleged rights can, as a general rule, be asserted before the competent court. The issue of a reference is raised in cases where the court is of the opinion that it can only decide the case if it can interpret European law. For example, if under German law it is permissible not to appoint a woman to a post because she is pregnant (in the context of a particular prohibition of employment during the pregnancy, for example, where there is a danger of infection for a nurse in parts of the hospital)³³ should the Equal Treatment Directive from 1976 be interpreted so that, at least under this Directive, such treatment is illegal?³⁴

The question of the interpretation of EC law thus arises before a court in cases where there is ambiguity and lack of clarity as to whether the national law corresponds to EC law. The question arises in particular when it is not clear whether a national law correctly implements standards established by EC directives.

The fundamental considerations behind the preliminary ruling procedure³⁵ were the following: EC law should not be interpreted by national courts themselves because conflicting interpretations of EC law might otherwise develop, not only in different Member States, but also in different courts of a single Member State or even in different divisions of the same court.³⁶ The authority to interpret EC law uniformly for all Member States rests exclusively with the ECJ. This guarantees that EC law remains uniform and "common" to all Member States.

Emphasis of Preliminary References: Interpretation of Directives

The emphasis of the preliminary ruling procedure is on the interpretation of directives. The focus on this particular legislative instrument makes the procedure relevant for both anti-discrimination Directives. Directives are the principal concern because they do not regulate every detail, but establish framework standards to be implemented by the individual Member States. The form and method of implementation can be different in each

³³ BAG v. 1.7.1993 - 2 AZR 25/93, NZA 1993, 933 et seq.

³⁴ C-207/98 *Mahlburg v Mecklenburg-Vorpommern* [2000] ECR I-549, exactly contrary to the Federal Labour Court.

³⁵ In the last few years, preliminary ruling procedures have made up approximately half of all newly registered procedures at the ECJ, e.g. in 2002, 462 out of 907 procedures.

³⁶ For example, see the two almost diametrically opposed references of two separate divisions of the Hamburg Labour Court of Appeal concerning occupational provision for old age for part-time employees: ECJ from 10.2.2000 - C-50/96 *Deutsche Telekom AG v Schröder*, [2000] ECR I-743 and from 10.2.2000 - C-234/96 and 235/96 *Deutsche Telekom v Vick und Conze*, [2000] ECR I-799.

Member State as long as the standards are met. For example, a Member State can, in the context of discrimination in the field of employment, provide for an individual's right to claim compensation, reinstatement or re-employment, or provide for criminal sanctions or other remedies, but the Member State must provide for effective, proportionate and dissuasive sanctions in order to ensure that the standards of the directive are enforced. Regulations which circumvent these standards are against EC law.³⁷

Thus, references concerning directives tend to pose the following question: does the transposition into national law actually meet the standards of the Directives? The references originate from domestic cases. EC law comes into play in cases where, under domestic law, the court would have ruled against the complainant. In such cases, the question arises as to whether the alleged conduct would be illegal under EC law and whether or not the relevant standard has been adequately transposed into national law.

Lawyers and EC law

Many lawyers are not sufficiently familiar with EC law to be able to recognise that an EC directive may be of significance for the case they have taken on. In order to use the preliminary reference procedure, lawyers must become more familiar with the contents of the Directives and be relatively adept at problem solving. It is also important to refer in deliberations to legal literature that examines similar issues in other Member States and to concepts, discussions and decisions emanating from other Member States. Cases from the USA can be particularly relevant, as many discrimination issues currently being raised in the EU were recognised years or decades ago in the USA and have been considered by their courts.

Litigators must always ask themselves whether a case is affected by EC law and whether the case could raise questions concerning the interpretation of EC law. Legal situations arising under both Directives should be compared with cases involving the equal treatment of men and women, as many of the same issues will re-emerge in the context of the new grounds of discrimination. This is particularly relevant for situations involving indirect discrimination which is often difficult to recognise and where the gender equality field has prepared much of the groundwork and already set the standards against which the same issues arising in other areas can be measured. In addition, imagination and sensitivity are also key to recognising hidden facts which could be indicative of discrimination.

The Timing of an Application for a Reference

Only a national court can decide to refer questions of interpretation to the ECJ. Lawyers have to consider at which level of the appeal system they should make an application to a judge for a referral. In making their assessment, they should also consider whether obtaining a positive decision within the national jurisdiction for reasons other than EC law is realistic, or whether waiting for such a decision is too risky for the outcome.

The following case serves as an example. German rules for the automatic promotion or upgrading of civil servants (i.e. advancement onto a better pay scale) required part-time employees to work twice as long as full-time employees before benefiting from such promotion. This rule, which had been applied for decades, was successfully challenged by a part-time employee before the Hamburg Labour Court (first instance) and confirmed before the Hamburg Labour Court of Appeal (second instance), but overturned on appeal to the Federal Labour Court³⁸ (third instance). For whatever reason the Federal Labour Court did not make a reference to

³⁷ Judgments of the ECJ from 10.4.1984 in C-14/83 *von Colson und Kammann* [1984] ECR 1891 and C- 79/83 *Harz/Tradax* [1984] ECR 1921; Judgment of the ECJ from 22.7.1997 C-180/95 *Draehmphael* [1997] ECR I-2195.

³⁸ BAG v. 14.9.1988 - 4 AZR 351/88, AP Nr. 24 zu § 23a BAT.

the ECJ. Fortunately, the unsuccessful part-time employee had a colleague with whom she shared the position. After her failure at the Federal Labour Court, identical proceedings were initiated by the "other half" of her job-share. This time, an application for a reference to the ECJ was immediately submitted by the Labour Court, as a different decision from the Federal Labour Court appeared unlikely. The questions of the Labour Court were answered by the ECJ³⁹ in favour of the claimant's argument (contrary to the Federal Labour Court), with the result that the Labour Court decided in the claimant's favour, in line with the earlier judgment of the Hamburg Labour Court of Appeal (second instance). On appeal, in the final judgment, the Federal Labour Court had to follow the ruling of the ECJ.⁴⁰ Thus, expectations concerning the outcome in domestic proceedings influence the decision as to when to apply for a referral (i.e. at which instance).

Cost considerations can also affect the choice of instance at which to apply for a referral. In Germany, for example, each party must bear their own costs at first instance before the Labour Court (and thus also the costs of the ECJ proceedings), while at second instance the losing party bears all the costs (including of the ECJ proceedings). As a result, it could make sense to only apply for a reference on appeal - though there would then be a time delay (and higher costs in the event that one loses the proceedings).

A special problem arises in Germany and possibly elsewhere, namely that the widely-used legal expenses insurance does not, according to § 4 (1)(o) ARB 75, cover the costs of a preliminary ruling procedure, regardless of the level of the court which makes the reference. Lawyers must, of course, point this out to the litigant, as his or her costs risk can rise considerably. If they cannot bear the costs for the procedure, "legal aid" can be granted by the ECJ under special circumstances, under Article 104 §5 of the ECJ Rules of Procedure. Prior to this, however, assistance with procedural costs should be sought at the national level.

Costs for proceedings before the ECJ are not an issue as the court procedure there is free. The national court decides who has to bear the costs for legal representation in front of the ECJ. Preliminary references are actually only interlocutory proceedings in the course of national proceedings so the apportionment of costs follows national guidelines.

Formulation of the wording of a Reference

A reference by a national court requires the formulation of reference questions. The legal representative is strongly advised to propose a formulation to the court. As a rule, national courts are not familiar with EC law and the ECJ and will have to examine ECJ procedure in some depth, even if the reference to the ECJ is only raised generally, as a possibility. A clear and precise presentation of the EC dimension to the interpretation problem will more easily convince the court to make a reference to the ECJ than a vague claim that a violation of EC law is involved. For obvious reasons, courts are much more inclined to bring a matter before the ECJ if the matter is presented to them in an easily digestible form. The author has formulated and proposed the questions for all the references that he has been involved in to date. In each case, a reference has ensued using either the questions as formulated or with only very slight modifications.

³⁹ ECJ of 7.2.1991 - C-184/89 *Nimz* [1991] ECR I-297.

⁴⁰ BAG v. 2.12.1992 - 4 AZR 152/92, NZA 1993, 367 et seq.

Formulating reference questions is relatively unproblematic. It must be made clear that the question is a problem of interpretation of EC law. So far, the ECJ has been able to attribute meaning to the most peculiar reference questions (partly through its own daring interpretations) and is able to provide answers to most questions. Moreover, it is also possible for the ECJ to seek clarification from the national court (Article 104 (5) Rules of Procedure).

Only those questions of interpretation that are necessary in order for the national court to be able to pass judgment should be submitted to the ECJ. A reference is not necessary where there is no reasonable doubt about the interpretation of EC law (*acte-clair* theory), i.e. an interpretation would be superfluous because the provision is unambiguous. Referrals should obviously also not occur if the question has already been clarified by the ECJ.

Right to Refer and Compulsory Reference of the Court

According to Article 234 of the EC Treaty, any court of a Member State may submit questions concerning the interpretation of EC law to the ECJ for decision. Any court can, but many courts must. Thus, Article 234 of the EC Treaty provides that if questions of interpretation of EC law are raised before a court of last instance, that court must bring the matter before the ECJ.⁴¹

The proceedings before the national court are stayed for the duration of the preliminary ruling procedure. In Germany, the national court does not necessarily have to provide reasons for the questions it has brought before the ECJ. However, it is preferable, from a professional point of view and out of respect for the ECJ, that in the explanation of the facts of the case, the national court should explain why the questions that have been referred to the ECJ arose.

The act of referring questions to the ECJ cannot be challenged - indeed Article 234 of the EC Treaty states that any court may make a reference. The next steps are simple: the order referring the question to the ECJ for a preliminary ruling, together with the factual and legal context of the question, should be posted to the ECJ.⁴² There are no official channels and there is no involvement of the foreign ministry or others.

Duration of the Preliminary Ruling Procedure

The duration of the preliminary ruling procedure is considerable and has grown over the last few years. However, a reduction is now in view thanks to restructuring. In 2000, the time from receipt of a reference at the court's registry to judgment was 21.6 months; in 2001, 22.7 months; in 2002, 24.1 months; in 2003, 25.5 months. In 2004, the duration of the procedure was reduced to 23.5 months.⁴³

⁴¹ In Germany breach of the duty to refer is a ground for a Constitutional Complaint (*Verfassungsbeschwerde*). It will be successful if in the court of last instance either a fundamental failure to recognise the duty to refer was discernable, or a conscious deviation from EC law in the absence of a willingness to refer can be established.

⁴² Procedural documents and any correspondence concerning cases before the ECJ should be sent to the Registry of the Court of Justice at the following address:

Registry of the Court of Justice, Bd Konrad Adenauer, L-2925 Luxembourg. Tel: + 352 4303 1. Fax: + 352 43 37 66. Email: ecj.registry@curia.eu.int

⁴³ For statistics see www.curia.eu.int/de/instit/presentationfr.

This is a lengthy procedure and a reduction would be welcome. However, compared to the average duration of Constitutional complaints before the German Federal Constitutional Court, one cannot complain.

The Procedure after the ECJ

The procedure at the ECJ itself cannot be discussed here; the relevant literature can be consulted instead.⁴⁴

A decision of the ECJ in the case is not the end of the original litigation: the referring court receives the answer to the questions from the ECJ and must then decide the case before it in light of the ECJ's answers.⁴⁵ For the most part, the implementation will be unproblematic: the result is a decision of the national court, which may be subject to further review through the usual domestic channels. The ECJ's reply to the questions referred to it is, however, binding for the referring court and for all further instances passing judgment in the case.

ECJ decisions on interpretation also develop a binding effect in practice by virtue of their leading role in the application of Community law. They have a "law-forming character." This is true for decisions on referrals from a Member State's own national courts as well as for decisions on questions of interpretation submitted by courts of other Member States. This effect testifies to the significance of the preliminary rulings procedure.

*Summary*⁴⁶

Litigators should not be afraid of the preliminary rulings procedure before the ECJ. The formalities are simple and can be easily fulfilled by legal representatives who do not deal with EC law on a regular basis. A litigator who has no prior experience of the procedure but recognises that a breach of an EC directive could be relevant to a case he or she has taken on, can take steps to initiate the procedure without much difficulty. Experience in Germany at least shows that the courts tend to respond positively to appropriate requests. An accurate and thorough presentation by the litigator of the EC legal issue involved makes it easier for the national court to obtain access to the ECJ. In any event, where there is doubt concerning the interpretation of EC law, the lower courts in Germany are prepared to bring the matter before the ECJ. It is important to state that the possibilities of the preliminary ruling procedure should be used.

The ECJ has had an enormously positive effect on the various legal systems of the Member States, particularly in the areas of employment law and social policy, as well as in the area of freedom of movement. In Germany we would not be where we are today without the decisions of the ECJ (including decisions stemming from referrals from other EC States). The effects of the many ECJ judgments on "part-time work" and "discrimination due to pregnancy" are good examples.

⁴⁴ For example, Bertelsmann, *Das Vorabentscheidungsverfahren beim nationalen Gericht und beim EuGH*, www.bertelsmann-gaebert.de, 2005, Bereich Aufsätze; Colneric, *AuR* 2005, 281 et seq.; Hakenberg/Stix-Hackl, *Handbuch zum Verfahren vor dem Europäischen Gerichtshof*, Baden-Baden 2000; Rengeling/Middeke/Gellermann, *Handbuch des Rechtsschutzes in der Europäischen Union*, München 2003.

⁴⁵ Common formula in the operative provisions of an ECJ judgment: "... unless factors justify this which have nothing to do with a discrimination. The national court is to verify whether this is the case," or: "In its decision the referring court must therefore do everything that lies in its jurisdiction" to prevent a violation of EC law.

⁴⁶ For further information on the preliminary ruling procedure see: Koen Lenaerts & Dirk Arts, *Procedural Law of the European Union* (Sweet and Maxwell, 1999); De Renaud and Dehouse, *La Cour de justice des Communautés européennes* (Montchrestien, 1996); Everling, *Das Vorabentscheidungsverfahren* (Baden-Baden 1986).

Like the directives concerning the equal treatment of men and women, the new non-discrimination Directives will also have to be enforced through the reference procedure from the national courts to the ECJ. There are countless situations in national legal systems that violate the standards of these Directives. The procedure offers people who have been discriminated against the possibility of enforcing the Directives' contents despite inadequate national regulations. In the past, the ECJ has contributed significantly to the enforcement of equal treatment between men and women and is likely to do the same in the context of the new non-discrimination Directives. The message is therefore, representatives of victims of discrimination have no reason to fear the ECJ.

For more information on preliminary rulings and the Court of Justice consult the Court's website (available in the EU official languages), including:

Information note on references by national courts for preliminary rulings:

<http://www.curia.eu.int/en/instit/txtdocfr/autrestxts/txt8.pdf>

Notes for the guidance of Counsel:

<http://www.curia.eu.int/en/instit/txtdocfr/autrestxts/txt9.pdf>

General questions about the Court:

http://www.curia.eu.int/en/instit/presentationfr/index_savoirplus.htm



Ashley | 1963

EU Policy and Legislative Process Update

1. Commission Communication: Non-discrimination and Equal Opportunities for All - A Framework Strategy

The Commission has published its Communication to the Council, European Parliament, European Economic and Social Committee and Committee of the Regions.⁴⁷ By way of a draft Decision, the Communication proposes that 2007 be designated 'European Year of Equal Opportunities for All'. This is the centrepiece of the Framework Strategy designed to ensure that discrimination is effectively tackled and diversity and equal opportunities for all are celebrated. The four key themes of the European Year are: 1) Rights: raising awareness of the right to equality and non-discrimination, 2) Representation: stimulating a debate on ways to increase the participation of under-represented groups in society, 3) Recognition: celebrating and accommodating diversity, and 4) Respect and Tolerance: promoting a more cohesive society.

The Framework Strategy on Non-discrimination and Equal Opportunities for All, which accompanies the draft Decision to establish the European Year, is to ensure that anti-discrimination legislation is fully implemented and enforced. The Commission is due to report in 2006 on the state of transposition of Directives 2000/43 and 2000/78, including, if necessary, proposals to revise and update the Directives. The Strategy also looks at what more the EU can do to tackle discrimination and promote equality beyond the legal protection of people's rights to equal treatment.

New initiatives announced are a feasibility study to examine possible new measures to complement existing EU anti-discrimination legislation and the creation of a high-level advisory group to look at the social and labour market integration of disadvantaged ethnic minorities, including Roma. An annual high-level "Equality Summit" bringing together key stakeholders is also proposed. The Framework Strategy and the European Year follow on from a wide public consultation conducted in 2004 on the basis of the Commission's Green Paper '*Equality and Non-discrimination for All in an enlarged EU.*'

2. No agreement on Council Framework Decision to establish common standards for combating racial crime

The European Ministers for Justice and Home Affairs failed to reach agreement on the Framework Decision on Combating Racism and Xenophobia during their meeting in Luxembourg on 2 June 2005.⁴⁸ The Framework Decision had been proposed by the Commission in November 2001. According to the Luxembourg Presidency the Framework Decision found large support but not unanimity and it was clear that Member States have different attitudes towards freedom of expression. The proposal for a Framework Decision provided for the approximation of laws and regulations of Member States to ensure that the same forms of intentional racist and xenophobic conduct would constitute a criminal offence in all Member States, punishable by effective, proportionate and dissuasive sanctions. It is now for the Commission to see how these proposals can be taken forward. The UK Presidency has not declared an intention to pursue discussions on this issue.

⁴⁷ Brussels, 1/6/2006 COM (2005) 224 final.

⁴⁸ Press Release 2/6/2005 at <http://www.eu2005.lu>

3. New Framework to ensure Commission legislative proposals compatible with EU Charter

On 27 April 2005 the Commission adopted a mechanism to systematically screen all legislative proposals for compatibility with the EU Charter of Fundamental Rights.⁴⁹ This is the first initiative of the new Commissioners' Group on Fundamental Rights, Anti-discrimination and Equal Opportunities. Key instruments in this process include impact assessments on the effect of legislation on fundamental rights and examination of legal reasoning for legislation. The Commissioners' Group will ensure that the results of these evaluations are taken into account throughout the legislative process.

4. Commission proposal for a Council Regulation to establish a EU Fundamental Rights Agency

On 30 June 2005 the Commission presented a proposal for a Council Regulation for the creation of an EU Fundamental Rights Agency.⁵⁰ The proposal followed a public consultation launched by the Commission on 25 October 2004 on the remit, rights, thematic areas, tasks and structure of the Agency.

It is proposed that the Agency will provide the relevant institutions and authorities of the Community and its Member States (when implementing Community law) with assistance and expertise on fundamental rights when they take measures or formulate courses of action within their spheres of competence. The proposed Regulation focuses on the competences of the Community under the EC Treaty, but a Commission proposal for a Council Decision would, if adopted, extend the scope of the agency's competence to include police and judicial co-operation in criminal matters under the EU Treaty. The Agency's geographic scope covers the Union, Member States, candidate and potential candidate countries which participate in activities of the Agency. The Commission may also request analysis of the fundamental rights situation in countries with which the Community has concluded (or intends to open negotiations with the aim of concluding) an association agreement, or an agreement with a human rights clause.

The EU Charter of Fundamental Rights, which includes provisions on non-discrimination and equality, is the point of reference for the Agency's mandate. Thematic areas of activity will be defined through a Multi-annual Framework to be adopted by the Commission. Within these areas the Agency will: 1) collect and analyse data on the practical impact of EU measures on fundamental rights and on best practice in respecting and promoting fundamental rights, 2) express opinions on fundamental rights policy developments, 3) raise public awareness and promote dialogue with civil society; and 4) co-ordinate with various actors in the field of fundamental rights. It will not have any powers to examine individual complaints.

A co-operation agreement will be concluded between the Agency and the Council of Europe to ensure synergies and avoid overlap. The Council will now negotiate over the proposals and the European Parliament will be consulted. According to the proposal if accepted, the Agency will have legal personality and should become operational by 1 January 2007.

⁴⁹ Commission Press Release IP/05/494, Brussels, 27 April 2005.

⁵⁰ Brussels, 30.06.2005 COM (2004) 280 final.

5. European Institute for Gender Equality

On 8 March 2005 the Commission issued a proposal for a Regulation to establish a European Institute for Gender Equality to support the Community institutions, in particular the Commission and Member States in promoting gender equality and combating sex discrimination.⁵¹ The Institute will have legal personality. Broadly, its role will be to gather, analyse and disseminate research data and information required by EU policy-makers, stimulate research and exchange of experience among stake-holders and policy-makers and raise awareness and develop tools to support integration of gender equality into all Community policies. The Institute will start operating 12 months after the regulation establishing it is adopted by the Council and the Parliament and it should be in operation by 2007.

6. European Parliament Resolution on the situation of the Roma in the EU

On 28 April 2005 European Parliament adopted a "Resolution on the situation of Roma in the EU" by a vote of 497 in favour, 25 against, with 30 abstentions. The Resolution calls on stakeholders, including EU institutions and Member States to undertake specific measures to tackle a range of exclusion and racial discrimination issues facing Roma in Europe. It notes "the importance of urgently eliminating continuing and violent trends of racism and racial discrimination against Roma" and calls on Member States which have not yet transposed the Racial Equality Directive into their national legislation to do so without delay. The Resolution calls on the Commission to prepare a communication on co-ordination between the EU and Member States for the improvement of the situation of Roma and to adopt an action plan with clear recommendations to the Member States and candidate countries aimed at improving integration of the Roma and to consider recognising the EU's 7-9 million Roma as a European Minority. The Resolution has been forwarded to the Council, the Commission, and the governments and parliaments of the Member States and candidate countries.

7. European Parliament Written Declaration on religious rights and freedoms in France and throughout the EU

On 21 February 2005 a cross-party group of 5 MEPs tabled a Written Declaration on religious rights and freedoms in France and the EU.⁵² The declaration was tabled in response to concerns over France's ban on the display of 'conspicuous religious symbols in schools' and called on Member States 'specifically to allow within educational and other state establishments the outward expression in a private manner of individual faith.' To become a resolution debated in the Parliament, a declaration requires the signatures of a majority of MEPs (367) within 3 months. However, this Declaration did not reach this threshold (only receiving 68 signatories) and it therefore lapsed on 21 May 2005.

⁵¹ Brussels, 8/3/2005 COM (2005) 81 final.

⁵² Written Declaration P6_DCL(2005)0005, PE 354.952v01 - 00.

European Court of Justice Case Law Update

Pending cases

Requests for preliminary ruling

C-13/05 Reference for a preliminary ruling by order of Juzgado de lo Social No 33 of 7 January 2005 in the case of Sonia Chacón Navas against Eurest Colectividades SA

Official Journal 19.3.2004/C 069/16

The reference concerns the interpretation of the concept of disability in Directive 2000/78. Spanish judge Pablo Aramendi referred the following questions:

1. Does Directive 2000/78, in so far as Article 1 thereof lays down a general framework for combating discrimination on the grounds of disability, include within its protective scope an employee who has been dismissed by her employer solely because she is sick?
2. In the alternative, if it should be concluded that sickness does not fall within the protective framework which Directive 2000/78 lays down against discrimination on grounds of disability and the first question is answered in the negative, can sickness be regarded as an identifying attribute in addition to the ones in relation to which Directive 2000/78 prohibits discrimination?



C-144/04 Opinion of Advocate-General in case of Mangold v Rüdiger Helm, 30 June 2005

The Advocate-General (AG) has issued his opinion in the Mangold case.⁵³ This is a preliminary reference from the Munich Labour Court which concerns the legality of a German legal provision permitting the unlimited use of fixed-term contracts for workers over the age of 52 (with a view to promoting their employment). The AG concludes that the provision is in breach of Article 6 of Directive 2000/78 on age discrimination, as well as violating the general principle of equality in Community law. The AG's decision is not binding on the Court of Justice, but the Court often follows the AG opinion in its judgments. <http://www.curia.eu.int>

Infringement procedures: Racial Equality Directive

C-326/04 Commission v Greece

Official Journal: 25.9.2004/ C239/11

The Commission has withdrawn the infringement procedure it had initiated against Greece on 27 July 2004 in respect of Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin equal treatment. On 12 May 2005, the Court of Justice ordered the case to be struck off the Court register and Greece to pay the costs as it only adopted measures⁵⁴ after the Commission had initiated infringement proceedings. <http://www.curia.eu.int/fr>



Infringement procedures: Employment Equality Directive

C-43/05 Commission v Germany

Official Journal: 2.4.2005/ C 82/14

⁵³ For the questions posed in the Preliminary Reference see Issue 1, European Anti-discrimination Law Review (EADLR).

⁵⁴ The Greek Law no. 3304/2005 was enacted on 18 January 2005.

C-70/05 Commission v Luxembourg
Official Journal: 2.4.2005/ C 83/23

C-99/05 Commission v Finland
Official Journal: 16.4.2005/ C 93/21

C-133/05 Commission v Austria
Official Journal: 11.6.2005/ C 143/20

In all of the above, the Commission claims that the Court should declare that, by failing to adopt by 2 December 2003, all laws, regulations and administrative provisions necessary to comply with Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, or to inform the Commission of any such provisions, the above mentioned Member States have failed to fulfil their obligations under that Directive and order the Member States to pay costs.

In respect of the action against Germany, this does not relate to the provisions of the Directive regarding age discrimination, as Germany had notified the Commission of its intention to make use of the 3-year extension period for transposition permitted under the Directive (the period for transposition of the age discrimination provisions of the Directive have therefore not yet expired for Germany).

In respect of Austria, the action relates to provisions of the Directive regarding disability discrimination at the federal level, and all provisions of the Directive at the regional level (with the exception of the regions of Vienna and Lower Austria).

Judgments

Infringement procedures: Racial Equality Directive

Case C-327/04 Commission v Finland, judgment of 24 February 2005
Official Journal 16.4.2005/C 93/3

C-320/04 Commission v Luxembourg, judgment of 24 February 2005
Official Journal 16.4.2005/C 93/2

C-329/04 Commission v Germany, judgment of 28 April 2005
Official Journal 11.6.2005/ C 143/13

Case C-335/04 Commission v Austria, judgment of 4 May 2005
Official Journal: 9.7.2005/ C 171/5

In all of the above judgments, the Court of Justice declared that, by failing to adopt all the laws regulations and administrative provisions necessary to comply with Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin before the date for transposition expired on 19 July 2003, the Member States had failed to fulfil their obligations under that Directive and ordered them to pay costs.



European Court of Human Rights (ECHR) Case Law Update

Judgments

Moldovan and others v. Romania (No.2), 12 July 2005 (nos. 41138/98 and 64320/01)

The Court held unanimously that there had been a violation of Article 3; the applicants' living conditions and the racial discrimination to which they had been subjected by the way in which their grievances had been dealt with by the authorities amounted to "degrading treatment" in the special circumstances of the case. The Court unanimously held that there had been a violation of Article 14 in conjunction with Articles 6 and 8; the applicant's Roma ethnicity appeared to have been a decisive factor in the length and result of domestic proceedings in which they had sought reparation for the destruction of their homes. It also noted the discriminatory remarks by the authorities when examining the applicant's rights under Article 8 and their refusal for 11 years to award non-pecuniary damages for the destruction of family homes.

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=14%20%7C%20protocol%20%7C%2012&sessionid=3573126&skin=hudoc-en>

racial
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Referral to the Grand Chamber

Leyla Sahin v Turkey (no. 44774/98)

On 29 June 2004 a Chamber judgment found no violation of Article 9 in a case concerning restrictions placed on the right to wear the Islamic headscarf by Istanbul University.⁵⁵ The applicant requested referral of the case to the Grand Chamber. On 18 May 2005, the case was heard by the Grand Chamber. It is now deliberating in private.

religion
or belief

Judgments of the Grand Chamber

Nachova and Others v Bulgaria, judgment of 6 July 2005 (no. 43577/98)

The Grand Chamber endorsed the Chamber's finding of 26 February 2005⁵⁶ of two violations of Article 2 concerning the shooting of the applicant's relatives by a military policeman and the lack of effective investigation into their deaths; and also a violation of Article 14, taken together with Article 2, in relation to the lack of effective investigation into their deaths. However, the Grand Chamber departed from the Chamber's approach and found no violation of Article 14, taken together with Article 2, in relation to the motive for the shooting.

Admissible

D.H. and others against Czech Republic (no. 57325), Decision 01.03.2005

The Court decided a petition presented 5 years ago by the applicants, a group of 18 Roma children placed in special schools in Ostrava, was admissible. The applicants complained of having been submitted to a form of de facto discrimination resulting from the general functioning of the system of special education. The special schools are intended for children with learning difficulties. The statutory procedure is for placements to be made

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⁵⁵ The judgment of the Chamber was reported in Issue 1, EADLR, page 37.

⁵⁶ The judgment of the Chamber was reported in Issue 1, EADLR, page 37.

by the Head Teacher at the child's original school on the basis of an IQ test and the recommendation of a child psychology centre with the consent of the child's legal representative. 14 applicants demanded a review by the Ostrava Education Department on the ground that the tests performed were unreliable and their guardians had not been sufficiently informed of the consequences of giving their consent. The Education Department found that the placements had been made in accordance with the statutory procedure. In addition, an appeal by 12 applicants to the Constitutional Court on the basis that their placement in special schools amounted to a general practice of segregation and racial discrimination was dismissed.

The Court unanimously declared the main complaint based on Article 14 in conjunction with Article 2 of Protocol No.1 admissible, reserving final judgment following consideration of all available evidence. All other claims, including a violation of Article 3 on the basis of being subjected to degrading treatment in the form of segregation on the grounds of racial origin and Article 6, that no reasons were stated for the decisions to place them in special schools and procedural safeguards had not been compiled with, were declared inadmissible.

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=13&portal=hbkm&action=html&highlight=%22R%C9PUBLIQUE%20TCH%C8QUE%22&sessionid=2594031&skin=hudoc-en>

Decisions of the European Committee of Social Rights

Complaint 15/2003, European Roma Rights Centre v Greece, 8 June 2005

The European Roma Rights Centre submitted a complaint under the Collective Complaints Protocol of the European Social Charter (Council of Europe). They argued that Greece was in breach of Article 16 of the European Social Charter. This provision guarantees the right of the family to social, legal and economic protection, including the 'provision of family housing'. The European Committee of Social Rights held that there was a violation of Article 16 because: 1) the number of permanent dwellings available to the Roma population was insufficient; 2) there was an insufficient supply of appropriate camping sites; and 3) the law governing eviction from unlawfully occupied sites was not satisfactory.

In evaluating the situation of the Roma, Greece argued that it lacked data on this community due to legal and constitutional restrictions. The Committee held that where 'it is also generally acknowledged that a particular group is or could be discriminated against, the authorities have the responsibility for finding alternative means of assessing the extent of the problem and progress towards resolving it' (para. 27).

http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints/1RC15_merits.pdf

List of Complaints to be considered by the European Committee of Social Rights

Complaint 31/2005 European Roma Rights Centre v Bulgaria

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. The complaint alleges that the situation of Roma in Bulgaria amounts to a violation of the right to adequate housing.

racial
or ethnic
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racial
or ethnic
origin

Maaïke | 1988

Yannicka | 1976



News from the EU Member States

Austria

Legislative developments

Legislation on discrimination on the ground of disability A so-called "disability package" consisting of a bundle of amendments to existing legislation and a new "Disability Equality Act" was passed by the National Council on 6 July 2005 and by the Federal Council on 21 July 2005.

A new "Disability Equality Act" (Behindertengleichstellungsgesetz) was passed and three existing acts dealing with disability were amended: the Act on the Employment of People with Disabilities (Behinderteneinstellungsgesetz), the Federal Disability Act (Bundesbehindertengesetz) and the Act on Federal Social Service (Bundessozialamtsgesetz) now contain essential provisions implementing Directive 200/78/EC. The Disability Equality Act in particular contains regulations which go beyond the requirements of the Directive. The provisions include, among other things definitions of direct and indirect discrimination, instruction to discriminate, harassment and victimisation, shift in the burden of proof, and "reasonable accommodation". Discrimination by association is also prohibited but limited to family members. A separate Ombudsperson (Behindertenanwalt) will be established and the regional offices of the Federal Social Service (Bundessozialamt) will have to conduct compulsory conciliation and mediation procedures in every single case before the applicants can bring their cases to court.



Anti-discrimination Acts in the Federal Provinces of Vorarlberg and Upper Austria

On 1 June 2005 the anti-discrimination legislation of provinces Vorarlberg and Upper Austria came into force. Already in force at provincial level are: the Carinthian Act on Anti-discrimination (since 1.1.2005), the Lower Austrian Equal Treatment Act (since 18.9.2004) and the Lower Austrian Act on Anti-discrimination (since 30.4.2005), the Styrian Equal Treatment Act (since 1.11.2004), the Tyrolian Equal Treatment Act (since 12.1.2005) and the Tyrolian Act on Anti-discrimination (since 1.4.2005), the Viennese Anti-discrimination Amendment Act (since 11.9.2004) and the Viennese Act on Anti-discrimination (since 9.9.2004). Implementing legislation is still to be adopted in the provinces of Burgenland and Salzburg.

The Upper Austrian Act covers discrimination on the following grounds: "race", ethnic origin, religion, belief, disability, age, and sexual orientation. The Act in Vorarlberg covers ethnic affiliation, religion, belief, disability, age, sexual orientation, and gender.

Policy developments

Minister of Interior demands prohibition of headscarves for teachers

On 8 March 2005 the new Minister of the Interior demanded a general prohibition of headscarves for Muslim teachers. In an interview with a Viennese magazine, she commented that she did not think that the wearing of headscarves by teachers was compatible with the values of Austrian society. The Islamic Faith Community and NGOs immediately condemned the proposition. The Minister for Education and the Federal Chancellor tried to calm the situation, by clearly stating that there are no plans to enact a prohibition of headscarves, as there is absolutely no need for it.



Case law

Judgment n° 04/2400 of 19 April 2005 of the First Instance Court of Nivelles (ref. T. N° 3643/05)

The judgment concerned the application of the Law of 25 February 2003 adopted by the Federal State which transposed Directives 2000/43/EC and 2000/78/EC in a context where a homosexual couple had expressed their interest in renting a house and had paid the rental agency the equivalent of one month's rent in order to confirm this. Two days later the couple were informed by the rental agency, acting on the owner's behalf, that the owner preferred to rent the house to a "traditional couple". In fact, the owner had shown the house to an acquaintance the day following the payment of the advance by the homosexual couple, that acquaintance had expressed an interest in renting the house and the owner notified the agency that he preferred to rent to that acquaintance. The rental agency left a message on the answering machine of the homosexual couple saying that "we have had the owner on the telephone and [...] he wishes to rent to a traditional couple", therefore the discriminatory motive behind the refusal to rent to that couple was clearly established.



The Centre for Equal Opportunities and Opposition to Racism, the equality body which has the power under the Law to file complaints against instances of discrimination, sought an injunction prohibiting the owner and the rental agency from adopting discriminatory behaviour vis-à-vis same-sex couples in the future; and it sought to have the judgment or a summary posted on all the properties of the defendant owners and on the internet website of the rental agency. They also sought an injunction against the rental agency prohibiting them from acting in fulfilment of a mandate received from a landlord which would be discriminatory. The judgment considered that the rental agency did not itself discriminate insofar as it simply gave the couple the information that the house had been rented: the agreement between the owner and the tenant had been concluded separately, without the rental agency being the intermediary in that transaction. Therefore, the rental agency could not have been said to have been complicit in the discrimination committed by the owner on his own initiative, and insofar as the request for an injunction concerned the rental agency, it was denied. However, the judgment did impose an injunction on the owners not to repeat the discrimination in the future, under the threat of a fine of € 100 per violation of that injunction. The request of the Centre that the decision be posted on the properties of the defendant owners was denied, because this, according to the judgment, would not contribute to avoiding a repetition of the discrimination, insofar as the property is now being rented and was not to be put up for rent in the near future. The judgment has not been appealed.

Order of 7 March 2005 of the President of the Tribunal de Commerce of Brussels in response to finding of age discrimination in goods and services

Journal des tribunaux, n°6183 of 28/5/2005, p. 382.

An order was delivered in response to a complaint of consumers' organisation, Test-Achats,⁵⁷ against an insurance company, DKV Belgium, which had unilaterally decided to raise premiums for clients which it insured against the costs of hospitalisation by imposing higher rises on the eldest section of its clients. More precisely, the level of the premiums was not raised for the clients between 0 and 19 years of age, was raised by 8 % for the clients between 20 and 39 years of age, by 16 % for the clients between 40 and 59 years of age, and by 24 % for clients of 60 years of age or more. As the rise in premiums was justified by DKV Belgium on the basis of a rise in



⁵⁷ An association acting with the agreement of the victims of the alleged discrimination, clients of DKV Belgium, as permitted under Article 31 of the Anti-discrimination Law of 25 February 2003.

the costs of medical hospitalisation, the President of the Tribunal de Commerce considered that this difference in treatment between different age categories constituted discrimination based on age, as the rise in these costs should in principle similarly affect all hospitalisations, there being no justification for considering that they would more particularly affect the eldest section of insured persons. Although undeniably the risk of hospitalisation was higher for the elderly, that risk had already been taken into account by the defending company in the initial calculation of its premiums, and such differentiation was not contested by Test-Achats, which agreed that the premiums could justifiably be higher for the upper age categories. What however Test-Achats disagreed with was the choice by DKV Belgium to impose higher rises on those categories without any statistical evidence to show that the general rise in the costs of hospitalisation would be particularly important with respect to the hospitalisation of the elderly. The order requires a cessation of the discriminatory practice. It has been appealed by DKV Belgium.

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Cyprus

Ombudsman reports

Discriminatory conditions in application form for civil service post

The Cyprus RAXEN National Focal Point filed a complaint with the Ombudsman concerning an application form for a civil service position within the National Commission for Equal Allocation of the Burden, a public body dealing with loans and other facilities to displaced persons as a result of the Turkish invasion in 1974 and regulated under secondary legislation. The application form for the post required applicants to supply personal information including: family status; maiden name of spouse; nationality of spouse at birth; religion and place of birth of applicant and spouse; profession; number of children; sex and age of children; full name, place of birth, religion and profession of applicant's parents. The complaint alleged that the form requested information that could amount to indirect discrimination or lead to discrimination on the grounds of religion, national or ethnic origin, family status and age for the purposes of access to employment.

The Ombudsman found that the information required by the form was not necessary for the purposes of appointment and left open the possibility of indirect discrimination on the grounds of religion, national or ethnic origin and family status. In her report of 27 May 2005, the Ombudsman noted that Cyprus was under an obligation under the Law on Equal Treatment in Employment and Occupation No.58 (1)/2004, to repeal all provisions of any laws, regulations or orders that are contrary to the anti-discrimination laws defined therein. The Ombudsman recommended that the regulation be urgently amended as it contains unlawful indirect discrimination. This is the first time the Ombudsman has decided that a provision of secondary legislation is discriminatory and recommended its amendment.

religion
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or ethnic
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Czech Republic

Legislative developments

Bill on registered partnership submitted to Parliament in fifth legislative attempt

On 24 June 2005, Bill 969/0 on registered partnership passed its first reading in the Chamber of Deputies, the Lower House of Parliament. This Bill is a second attempt in the present parliament to achieve a legislative basis for registered partnerships. This Bill would place same-sex partnerships on the same footing as married couples in respect of certain rights. The previous attempt failed to be approved by the Chamber of Deputies by one vote on 11 February 2005.



The Bill explicitly declares that a registered partnership is not an obstacle to a parent being awarded care of his/her own child, but it is an obstacle to adoption. The Bill does not explicitly exclude registered partners from fostering children who are not their own. It includes amendments to laws governing state social benefits and access to health (right of the partner to be informed about his/her partner's health state) and introduces a duty for support and maintenance between partners, expressly stating that the person living in a partnership cannot be regarded as a "single parent" for the purposes of maternity benefits, and generally for the purpose of considering entitlements to social benefits (for example benefits for a parent caring for a child or state contribution to accommodation costs) the income of both partners has to be taken into account, as with married couples. The Bill provides for partners to be allowed to act for each other in common affairs; to inherit in the first group according to intestacy rules; and in criminal procedure, to be able to refuse to testify in criminal proceedings where the other partner is being prosecuted and also to select legal representation for his/her partner.

The deputies submitting the Bill are from all political parties, except the Christian Democratic Party, who view the issue as a tool to destabilise the institution of marriage. However, repeated failures to legislate for registered partnerships are the result of negligence of those members of the Chamber of Deputies, who do not regard this legislation as important, rather than Christian Democrats opposition, given their 21 seats in the 200 member Chamber.

<http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=969&CT1=0>

Policy developments

President of Czech Republic refused to appoint new judges on age grounds

The President refused to appoint 32 out of 53 judicial trainees as judges because they were under 30. In an official letter of 16 March 2005 to the Minister of Justice, the President said he was convinced that only candidates over 35 years of age could provide a certain guarantee of meeting personal requirements, which one should expect from a judge. Although the power to appoint judges is vested in the President by Article 63 of the Constitution, this controversial decision caused indignation among the Czech Union of Judges, the Czech Bar and Ministry of Justice. The Chairman of the Union of Judges believes this decision to be unconstitutional on the grounds of age discrimination and the Ministry of Justice announced that the 32 who were refused appointment passed the justice exams with better results than those the President intends to appoint. All trainees were previously selected by strict psychological tests. The unappointed trainees future is uncertain when their trainee contracts terminate this year after 4 years of training. At present there are 2,885 appointed judges, 247 of whom are under 30 years of age. Another 42 people under 30 have already passed justice exams and another 100 are scheduled to take exams this year. The on-going lack of judges leads to long delays in court procedures.



The Constitution requires the appointment of a judge to be countersigned by the Minister of Justice. Although the Czech Charter of Fundamental Rights and Freedoms (Listina základních práv a svobod No. 2/1993 Coll.) does not explicitly mention age as a discrimination ground, Article 3 of the Charter prohibits any discrimination on any grounds. Article 26 of the Charter guarantees the right to choose an occupation and to train for it, and allows the law to stipulate specific conditions of access to certain occupations and activities. The Law on Courts and Judges requires judicial candidates to be at least 30 years old (this condition was inserted by an amendment, effective from 1.7.2003) and does not apply to candidate judges already admitted as judicial trainees prior to this. The constitutionality of the President's decision was publicly challenged on the ground of age discrimination.

http://www.epravo.cz/v01/index.php3?s1=3&m=1&typ=clanky&recid_cl=31776

http://www.sucr.cz/cz/zpr-stan_jud-leg.php

Case law

Appeal withdrawn against judgment of the Municipal Court in Prague

Rossman, the international chain of chemists withdrew its appeal against the decision of the Prague Municipal Court on 31 March 2004, apologising for discrimination and paying non-material damages of 50,000 CZK (€ 1,670) to the Roma woman who was discriminated against. In 2003, the claimant had applied for a job in a chemist in Cheb which had been advertised, but she was told that the position had already been filled. A woman acting as a tester, of the same age, with a hidden cassette recorder, was offered an interview only several minutes later, and even though she said that she had neither training nor experience, the deputy manager of the shop had indicated that she might be accepted. The claimant informed the court that she had had problems finding a new job and she was rejected everywhere, evidently for ethnic reasons. The victim was supported by Czech NGOs.

racial
or ethnic
origin

Judgment of the Prague High Court, 22 March 2005

In 2003, a Roma woman responded to an advert for a job as a shop assistant in the Prague 1 shop, the Scorpio Club, but was immediately told that the job was already taken. A few minutes after the rejection, a Czech female tester was invited to an interview for the same job and was told that the shop manager of their head branch would probably contact her as she might be recruited. Last June, the Prague City Court ruled that the Scorpio Club should apologise and pay non-material damages of 25,000 CZK (€ 835) to the claimant. This decision was confirmed on appeal before the Prague High Court. The victim was supported by Czech NGOs.

racial
or ethnic
origin

Judgment of the Regional Court in Ostrava, 24 March 2005

On 24 March 2005, the first instance court found that the owner of the Diablo Bar in Ostrava should apologise for discrimination and pay non-material damages of 90,000 CZK (€ 3,000) to each of the three claimants because the bar had refused to serve them because of their Roma origin. In 2004, the waitress in the bar had told them to leave because a private event was taking place in the Diablo Bar. Only several minutes afterwards a group of Czech NGO activists were served as normal. The victims were supported by Czech NGOs. The decision has been appealed.

racial
or ethnic
origin

Case law

Supreme Court Decision of 21 January 2005 on wearing of headscarves at work

After working for a company for some time, an employee decided to wear a headscarf for religious reasons. She was dismissed as the dress code stated that employees are not allowed to wear anything on their heads that was not part of the uniform. The High Court decided on 18 December 2003 that this was not a violation of the Act Prohibiting Discrimination in the Labour Market which protects against religious discrimination. The case was appealed to the Supreme Court with the support of the labour union (HK).



According to the Supreme Court, the company's dress code from August 2000 was adopted to show that the company was politically and religiously neutral. This policy affects Muslim woman in a negative way, but it is objectively justified and therefore does not violate the Act Prohibiting Discrimination on the Labour Market or Article 9 of the European Convention on Human Rights.

This is the first decision by the Supreme Court in a case concerning the wearing of headscarves. The reasoning of both the Supreme Court and the High Court gives rise to many questions: it is unclear if this now permits any employer to introduce such a dress code, as long as it is applicable to all employees and it may well allow companies to reject job applicants with headscarves in the future.

High Court Decision of 27 January 2005 narrowing the scope of the definition of work in relation to sheltered workshops

Published in Danish Law Weekly (UfR. 2005 p. 1429)

For a period of time the claimant lived in the St. Dannesbo sheltered home, while he was there he received social benefits. During his stay he also worked in St. Dannesbo's sheltered workshop. On top of his social benefit he received a so-called "working reward" of DKK 11.87 per hour (€ 1.5 per hour). On this basis, he asked for an employment contract, which according to Danish law all employers are obliged to issue to employees within one month of commencing work and which includes provisions on working conditions and working hours. The municipality argued that this was not real work and refused to issue the contract. Consequently, he brought a claim for compensation for a failure to supply an employment contract under the Act on Employment Contracts, because he had not received a contract one month after he started work.



The Eastern High Court held that the main purpose of his stay at St. Dannesbo was not to work but to provide him with shelter and care. The amount of money he received in the sheltered workshop was only pocket money and not a real salary but rather a "work reward." If he did not show up for work, he could not be dismissed and the production was not income generating. Even though he did pay tax on the "work reward" the Court concluded that these were not conditions of employment, but rather an offer to benefit his social skills and that consequently he did not have a right to an employment contract.

Although the claimant was not disabled, it may be concluded that disabled persons who are working in the (same) sheltered workshops are not protected by the employment laws, because such activities are considered to be outside of the scope of the definition of what is considered work. This may limit the protection under Directive 2000/78/EC in that employment does not include sheltered workshops.

Estonia

Legislative developments

Bill to abolish age as a legitimate ground for termination of an employment contract

On 19 April 2005 a faction of the Social-Democratic Party initiated a Bill (634) that would abolish Article 108 of the Law on Employment Contracts which allows an employer to terminate an employee's contract when he/she is 65 years of age and has the right to receive a full old-age pension. The explanatory note attached to the Bill referred to Directive 2000/78. The drafters of the Bill argued that the existing legal regulation in Article 108 was without foundation, because if an older employee is unable to fulfil work tasks he or she may be dismissed on other grounds such as long-term incapacity for work. On 12 May 2005 the Government decided not to support the Bill. Minutes of a governmental meeting suggest however that the idea was supported in principle, but that an integrated approach to labour relations indicated that age limits should be addressed in the new Law on Employment Contracts (<http://www.riik.ee>). Since December 2003, Parliament has been discussing a new Law on Employment Contracts (draft law no. 212) that included several anti-discrimination provisions. However, the second reading of draft law no. 212 has been suspended and there are indications that a revised text will be introduced to Parliament in the autumn of 2005 addressing the issue of age limits in a cautious way to avoid illegal discrimination of older workers.

age

International instrument provides additional anti-discrimination protection

On 8 June 2005 the Parliament ratified ILO Convention 111 concerning discrimination in respect of employment and occupation. The explanatory note to the ratification bill emphasised that the ratification will be an important tool for providing additional guarantees for all Estonian residents in their access to employment and occupation and that this convention is in line with Directives 2000/43 and 2000/78.

Attempt to abolish maximum age requirement for university candidates

Draft Law 456, reported in Issue 1 EADLR,⁵⁸ which aimed at abolishing the maximum age requirement ("younger than 60 years old") for rector candidates of public funded universities was not adopted. In November 2004 the draft was withdrawn.

age

Policy developments

Photographs of applicants with head-gear may be submitted in official procedures

New rules in force since 1 May 2005 established by governmental regulations nos. 79-81 of 18 April 2005 mean that it is now possible to submit a photograph of an applicant with head-gear in an official procedure. The list of procedures is set out in governmental regulations 361 and 364 (2002) and 30 (2004). These are the first legal provisions adopted specifically to accommodate the interests of Muslim minority groups. Prior to 1 May 2005 any photographs submitted to the Citizenship and Migration Board had to be a picture of a person without head-gear. It was thought that this provision might have a discriminative effect on several religious minority groups, especially Muslims as ID documents and other forms of documentation were necessary for unimpeded access to numerous benefits in both the public and private sectors.

religion
or belief

A photograph with head-gear may only be submitted for religious reasons when accompanied by a written opinion ("hinnang"), which assesses the necessity of such exceptions. The opinion shall be provided by the

⁵⁸ European Anti-discrimination Law Review, Issue 1, page 46.

Ministry of Interior, which exercises general control over the work of religious organisations. The government has indicated that such an opinion will be issued at the request of both individuals and religious associations. The Ministry of Interior might also inform religious associations about the issued opinions on its own initiative (see official comments on the agenda of the governmental meeting (17.4.2005) at <http://www.riik.ee/brf/?id=1196>).

The following legal acts were amended on 18 April 2005: (1) Regulation 361 of 26 November 2002 which lists certificates and information to be submitted in applications for identity cards, passports, temporary travel documents and travel documents for refugees. (Amendment Regulation no. 79 published in Riigi Teataja I 2005, 22, 155), (2) Regulation 364 of 26 November 2002 which sets out the application procedure for the issue, extension and revocation of residence and work permits. (Amendment Regulation no. 80 published in Riigi Teataja I 2005, 22, 156), and (3) Regulation 30 of 5 February 2004 which sets out the application procedure for the issue, extension and revocation of residence permits of EU citizens and their family members. (Amendment Regulation no. 81) published in Riigi Teataja I 2005, 22, 157).

Finland

FI

Case law

National Discrimination Board finds in favour of applicant for the first time

The applicant, a Russian woman claimed that the Helsinki-based restaurant Teatteri had denied her access to the restaurant because of her ethnic origin. She also claimed that the restaurant had violated the prohibition of victimisation, as she had been denied access again after she had submitted her complaint. The restaurant and the company from where it hired its doormen services claimed in response that the denial of access, in both situations, was based on the previous improper conduct of the applicant. The applicant was assisted by the Ombudsman for Minorities (vähemmistövaltuutettu).



In a decision of 26 April 2005, the Discrimination Board found that the respondents denied the applicant access to services on the basis of her ethnic origin. The restaurant, the doormen service company, and the individual doormen involved, were issued with an order prohibiting discriminatory conduct. The Board concluded that it could be presumed that the applicant had been discriminated against on the basis of her ethnic origin. The respondents were unable to produce the necessary evidence to rebut this presumption in accordance with the relevant provisions on the burden of proof. All those who had either taken part in the discriminatory decision, or who were aware of it and should have taken action to correct it, were issued with a prohibition order. As regards the victimisation claim, the Board concluded that the applicant had failed to produce the necessary evidence to substantiate her claim of a violation of the prohibition of victimisation and that the evidence produced in that regard was inconsistent. As the provision on the burden of proof does not cover victimisation, the Board concluded that the claim regarding victimisation was not sufficiently substantiated.

This was the first time that the national Discrimination Board (syrjintälautakunta) has found in favour of an applicant. In previous cases, applications have either been found inadmissible because they have been insufficiently grounded or outside the jurisdiction of the Board, or no discrimination could be established on the basis of the facts. The Discrimination Board was established in February 2004 pursuant to Directive 2000/43.

France

Policy developments

French Office for Data Protection (CNIL) recommendations on the collection of data on national, ethnic and racial origin, 5 July 2005

Recently studies, reports and public policy have launched a debate on the opportunity to revisit the position of the institutions managing the national policy on statistics and data protection, that prohibits the collection of data on national, ethnic and racial origin. At present, the collection of such data is prohibited by the Law on Data Protection (Loi informatique et libertés www.cnil.fr/index.php?id=301) which qualifies it as "sensitive personal data". In fact such data is only collected through small-scale research (based on a maximum representative sample of 5000 selected people) under the supervision of national statistic institutes, and is not collected in national statistical surveys or in institutional or corporate records. Therefore racial and ethnic statistical indicators created for monitoring purposes, which would allow the impact assessment of policies to be undertaken, do not exist. This results in serious methodological difficulties in creating tools to combat discrimination.

racial
or ethnic
origin

The Commission Nationale Informatique et Libertés (CNIL) created a working group with a particular focus on employment whose task was to consult national statistics institutions, audit current research projects and prepare recommendations for a possible way forward. On 5 July 2005, the CNIL made a number of recommendations in relation to monitoring discrimination and tools which can and should be used to combat discrimination in the work place. These can be found at:

[http://www.cnil.fr/index.php?id=1844&news\[uid\]=272&cHash=55f0416448](http://www.cnil.fr/index.php?id=1844&news[uid]=272&cHash=55f0416448)

<http://www.cnil.fr/index.php?id=1845> (summary)

Fauroux Commission Report on the Combat against Ethnic Discrimination in the Workplace, 8 July 2005

The Minister for Social Cohesion gave a mandate to a former president of the High Council for Integration (René Fauroux) and a former cabinet minister to preside over a Commission to evaluate the various initiatives and policies undertaken since 1992 to combat ethnic discrimination in the workplace, and to make policy recommendations. This Commission interviewed representatives of the business world, unions and the public sector who developed these initiatives and policies and produced a report. The report points to the need to address the ethnic and racial discrimination against people of colour and North African origin revealed by all statistics on access to employment. It recommends that the High Authority against Discrimination and for Equality be given the means to act effectively and stresses that unions have not sufficiently been involved in resolving discrimination in employment.

racial
or ethnic
origin

The report sets out the merits and impact of the various initiatives. To improve the neutrality of recruitment practices, it recommends that: 1) recruitment based on closed networks be relinquished; 2) recruitment practices must develop techniques to appraise competence, experience and skills; and 3) the recruitment process must be as open and transparent as possible. The use of practices based on the elimination of candidates' personal information, (anonymous CVs etc...) may be of interest but must be accompanied by other means to improve the objective evaluation of candidates. Methods based on simulation, tests and objective evaluation of results must therefore be developed. The report stresses that any development of practices to improve diversity in the workplace must benefit from tools allowing audits and impact analysis.

<http://www.communautarisme.net/docs/lutte-discriminations-ethniques.pdf>

Legislative developments

Law on sexist, homophobic and disability-discriminating language

Bill 1700 extending the repression of racist language to cover sex and sexual orientation, reported in Issue 1 of the EADLR,⁵⁹ was integrated into Title III (Articles 20-22) of Law 2004-1486 of 30 December 2004. The Law was then modified to cover discriminatory language targeting the disabled. Article 20 amends the Law on the press of 29 July 1881, to create a criminal offence based on provocation, of discrimination, hatred or violence against a person or a group of persons on the basis of their sex, sexual orientation or disability (Article 24). Article 21 amends the Law on the press of 29 July 1881 in order to punish slander and insult based on sex, sexual orientation and disability (Articles 32 and 33). Article 22 amends procedural requirements to extend the right to file complaints and intervene in criminal proceedings to NGOs acting against discrimination based on sex, sexual orientation and disability. Prior to this Law, the Law on the press of 29 July 1881 (as amended) already included these offences but only in respect of race.



Law 2005-102 of 11 February 2005 for the equality of rights and opportunities and social participation of the disabled

The Bill reforming the Law of 1975 concerning the disabled, reported in Issue 1 of the EADLR⁶⁰ became law on 11 February 2005. It implemented a vast reform of disability policy and completed the transposition of Directive 2000/78. The Law modifies the definition of "Disability" by articulating the rights of the disabled around the principles of non-discrimination, accessibility to the city and integration in society. It proposes a timetable for the implementation of all necessary measures to ensure a right of access to local schools and higher education; public buildings and housing; public transport and urban mobility. It requires measures to facilitate access to new information technology, voting and television and for the government to organise a national conference on disability every 3 years to follow up the implementation of the reform.



Article 2, inserted as Article L114 in the Code of Social Welfare, states that the definition of "disability" constitutes: "a complete limitation of activity or restriction of the ability to participate in society encountered by a person in his or her environment by reason of a substantial, lasting or definitive alteration of one or many physical, sensory, mental, cognitive or psychological faculties, of multiple disabilities or of a disabling illness".

Article 11 inserts into Article L114-1 of the same code the right to solidarity, to equal treatment and to the full benefit of citizenship. Article L114-1-1 lays down the right of access to local schools, the labour market, public institutions and to financial support. Article 2 and Title III state that, based on the principle of non-discrimination and the right to choose how to live one's life, society guarantees all disabled persons accessibility to the fundamental rights of all citizens and affirms the right to compensation for one's disability, i.e. support for all additional costs related to one's disability, as well as an allowance for each disabled adult (Article 11) and, within 3 years, a similar compensation for disabled children (Article 13).

The Law modifies all relevant aspects of labour law on the basis of the principle of reasonable accommodation (Articles 11). Article 24 adds Article L122-45-4 to the Labour Code (LC) which provides: "No salaried employee can be sanctioned, dismissed or be the object of a discriminatory measure by reason of his or her disability as the law guarantees the principle of equal treatment towards disabled workers" and that in the case of litigation relating to the application of this principle, the shift in the burden of proof is set out in Article L122-45 LC (resulting from

⁵⁹ European Anti-discrimination Law Review, Issue 1, page 50.

⁶⁰ European Anti-discrimination Law Review, Issue 1, page 49.



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the transposition of Directive 2000/78) is applicable. In addition, Article L122-45-5 is inserted into the LC in order to provide standing to NGOs acting for the rights of the disabled before the courts in matters of discrimination.

Article L323-9-1 LC is added to ensure respect for the principle of equal treatment towards the disabled, as defined in Article L114 of the Social Welfare Code. It provides that "employers are to take, in relation to the need dictated by a concrete situation, all necessary measures to allow disabled workers to have access to, or to keep a position of employment that corresponds to their qualifications, to practice it, progress therein or to have access to adapted professional training." The only limitation on this obligation is "disproportionate costs," evaluated by taking into account any financial support available to the employer (Article 37). Article L323-9-1 provides that "the refusal to take such measures may constitute discrimination according to Article L122-45 LC."

Similar provisions are integrated into Law 83-6345 of 13 July 1983 (rights and obligations of civil servants); Law 84-16 of 11 January 1984 (State civil service); Law 84-53 of 26 January 1984 (local government), and Law 86-33 of 9 January 1986 (hospital civil service). A fund for the integration of the disabled in public employment is created as well as sanctions against the public service if it does not respect the employment quota (Article 36 creating Article 323-8-6 LC).

Article 25 adds a requirement to Articles L132-12 and L132-27 LC that consideration of measures necessary for the professional integration of the disabled be on the agenda of the social partners' annual negotiations.

Other measures include the introduction of Article L 312-9-1 to the Code of Education to officially recognise French sign language for persons with impaired hearing. It recognises the right of persons with impaired hearing to a sign language interpreter in the civil and criminal courts, and the right of the visually impaired to the reading aloud of civil and criminal court records, all these measures being ensured at the cost of the State. In addition, a home for the disabled will be created in each department in 2006 in order to simplify administrative procedures for the disabled to a one-stop desk. Each departmental home will identify a referee who will be designated to support the disabled person in the case of litigation with any counterpart, whether public or private.

<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L>

Law 2005-158 of 23 February 2005 recognising the national contribution of the French repatriates (from former colonies)

The Law provides for the financing of research programmes and integrating into programmes of secondary education a true treatment of the history of French colonisation and the contribution of the colonies' native population to French history. The Law expressly forbids all insults and provides for an apology for crimes against the North African population that collaborated with the French (Harki). The Law provides for the recognition of their right to compensation and proposes a scheme for the Harki and their heirs.

<http://www.legifrance.gouv.fr/texteconsolide/PJEFS.htm>

Case law

Judgment of the Cour de Cassation, Social Chamber, 16 February 2005, no. 02-43402

An employee was recruited by way of an employment contract for an indefinite period with a trial period of three months. He fell ill a month later and his employer then notified the employee that his labour contract and his probation period were suspended for the duration of his illness. The employee returned to work after 3 and a half



months and after a few days the employee received a letter notifying him that the employer was ending his probation period and dismissing him. During the probation period the decision to interrupt the labour contract is discretionary and does not require justification of cause. However, in this case France's highest court decided that this discretionary power did not obviate the obligation of the employer to abide by the non-discrimination principle. It held that Article L122-45 Labour Code (LC) prohibiting dismissal for discriminatory reasons was applicable to the probation period and that the employer had dismissed the employee for discriminatory reasons based on a prohibited ground, his health.

This is the first civil case limiting the discretion of the employer during the probation period applicable to most employment contracts on the basis of Article L122-45 LC and the non-discrimination principle. The facts of this case found discrimination on grounds of health, but the principle is of general application and could presumably be founded on all grounds prohibited by law according to Article L122-45 LC.

<http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2005X02X05X00434X002>

Hamida and Audrey Hamida, Grenoble Criminal Court, 14 September 2004

The case of the landowner convicted of racial discrimination under Article 225-2 of the Penal Code for refusing to sell a piece of land on the grounds of race, reported in Issue 1 of the EADLR, has been appealed.

racial
or ethnic
origin

DE

Germany

Legislative developments

Bill implementing Directives 2000/43/EC and 2000/78/EC

A Bill was drafted on 16 December 2004 and introduced into Parliament in the same form on 21 January 2005, the date of its first reading. It aims to create a comprehensive anti-discrimination law.

The Bill contains exact definitions of all forms of discrimination set out in the Directives, including the provisions on harassment and the instruction to discriminate. However, direct discrimination occurs, "where one person is, has been or would be treated less favourably than another is, has been or would be treated in a comparable situation." Thus, the concrete danger of being treated less favourably than another person is sufficient. Additionally, direct discrimination occurs when different treatment is based on a reason which is effectively connected with one of the unlawful grounds of discrimination. This goes beyond the Directives, as direct discrimination can only be based on a specific ground. The Directives define harassment as "unwanted conduct [taking] place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment", whereas the Bill replaces the word "and" with the word "especially." The hostile environment just becomes an example for the violation of dignity, making the definition more subjective.

With regard to housing, different treatment on any ground is permissible for the "creation and preservation of socially stable resident structures and balanced economic, social and cultural circumstances." This provision appears in the context of positive action measures, but rather represents a justification of different treatment not in Directive 2000/43. An explicit victimisation provision only exists in relation to employment discrimination which fails to implement the Directive 2000/43 correctly.

The Bill is split into a civil law section and an employment law section. The employment law section includes provisions on age and disability discrimination, even though Germany informed the Commission that it would not implement these grounds before 2 December 2006. The Directive's provision on reasonable accommodation for disabled persons is not contained in the Bill. A similar provision only exists for severely disabled persons at present. An employer's liability for a third party under the Bill covers discriminatory acts (harassment, direct and indirect discrimination) of his/her own employees and his/her customers directed against the employer's own staff.

The Bill's civil law scope of application includes all grounds of discrimination set out in Article 13 EC Treaty. Protection from discrimination on grounds other than racial or ethnic origin is, however, limited to contracts "which are typically concluded in many cases under comparable conditions irrespective of the person concerned." The selling of shampoo in a supermarket would be such a contract, but not providing credit to someone. Different treatment with regard to such contracts may be justified on reasonable grounds. Different treatment in private insurance is deemed unlawful with regard to all grounds mentioned in Article 13 EC Treaty. The exception of "relationships involving special closeness or trust" from the scope of the Bill might violate the Directive 2000/43.

The Directives' burden of proof rule extends to discrimination on all grounds in civil law. Anti-discrimination associations may engage in judicial proceedings in relation to all grounds to enforce the victim's rights and also to bring claims for compensation, provided the victim has assigned such claims to them. Works councils and trade unions (not regarded as anti-discrimination associations) have the right to initiate legal proceedings without the approval of the discrimination victim.

The equal treatment body is competent with regard to all grounds of discrimination. It may not initiate judicial proceedings but it has competence for public relations work and to initiate mediation procedures. The body is also competent for queries within the scope of Directive 2000/78.

Claims for non-pecuniary and pecuniary damages are possible. However, since the claim for pecuniary damages is tied to personal fault, this may not comply with ECJ case law which states that liability should not be conditional on proof of fault. The civil law section further grants the victim the individual right to forbearance and to have the negative consequences of the discriminatory act reversed and provides for a specific performance remedy of an obligation to contract.

Implementing legislation further delayed as of 17 June 2005

The Bill which transposes most aspects of the Directives 2000/43 and 2000/78 has had a first of three required readings in the federal parliament, the Bundestag.⁶¹ After rumours that the legislative process will be suspended until after elections, a second and third reading are now scheduled for June, following which, the draft will go to the second chamber, the Bundesrat, which is governed by the conservative parties, where it will presumably not be passed before elections. The result of this will be that, it will fall victim to the principle of discontinuity, and the legislative process will have to be started anew.

⁶¹ Same version as that considered above

Greece

Legislative developments

Legislation transposing Directives 2000/43/EC and 2000/78/EC

On 18 January 2005, the Parliament enacted Law 3304/2005 on the application of the principle of equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age, or sexual orientation (Law Gazette A' 16). The definitions of the principle of equal treatment and discrimination are in line with the Directives (Articles 2 and 3). Chapters 2 and 3 cover the application of the principle of equal treatment regarding racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation in the field of employment or occupation.

Direct discrimination occurs when one person is treated less favourably than another is, has been or would be treated in a comparable situation. The definition in the Bill included the phrase "in an illegitimate or unjustified way." This was not retained in the Law. There is no illegitimate indirect discrimination when that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim is appropriate and necessary or, as far as disabled persons are concerned, when measures are taken in favour of them in compliance with Article 10 of the Law and Article 21(6) of the Greek Constitution (Article 7(1)(b)). This specific exemption from the absolute prohibition of the principle of indirect discrimination is connected mostly to disabled persons. Article 10 provides for reasonable accommodation and Article 21(6) of the Greek Constitution entitles people with disabilities to benefit from measures ensuring their self-sufficiency, professional integration and participation in the social, economic and political life. Thus, apart from providing one justified and legitimate reason for allowing indirect discrimination (measures taken in favour of disabled persons), the Law does not further clarify "legitimate aim" or "the appropriate and necessary means."

The Law adopts the exact wording of the Directives in relation to direct and indirect discrimination, the material scope, reasonable accommodation, positive action and special measures (although positive measures are not set out in the Law), harassment, burden of proof, victimisation, introduction of exemptions to the application of the principle of equal treatment such as nationality and conditions of entry into and residence of third-country nationals and stateless persons, payments made by state schemes or similar, including state social security or social protection schemes and the armed forces, as well as professional requirements, differences in treatment on the ground of age and instruction to discriminate.

Article 13 on the Defence of Rights provides that "legal entities which have a legitimate interest in ensuring that the principle of equal treatment is applied regardless of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation can represent the person wronged before any court and any administrative authority with the written consent of the person wronged." The only criminal sanction provided for is for the violation of the non-discrimination principle in relation to access and supply of goods and services to the public (imprisonment of between 6 months and 3 years and a fine between €1,000 and €5,000, payable to the state and not to the victim).

Four Specialised Administrative Bodies are entrusted with the promotion of the principle of equal treatment: 1) The Ombudsperson, 2) The Equal Treatment Committee, 3) The Work Inspectorate and 4) The Equal Treatment Service.⁶² Article 18 entrusts the Economic and Social Committee with drafting an annual report on the developments in the application of the principle of equal treatment, making suggestions to Government and the Social Partners on

⁶² The powers and competences of these bodies are the same as those set out in the Bill, described in detail in EADLR, Issue 1, page 54.

promoting equal treatment and non-discrimination, encouraging dialogue with NGOs and representative unions which have a legitimate interest in combating discrimination on the grounds covered by the Law.

The Law is without prejudice to other, more beneficial provisions relevant to the promotion and safeguarding of the principle of equal treatment and will not allow any reduction of the protection provided. Article 26 declares that any legal or regulatory provision contrary to the Law is repealed and provisions included in an employment contract or collective labour agreement, general terms of transactions, manuals of operation of companies, corporation charters of non profit or speculative organisations, independent professional organisations and trade unions of employers and employees, which are contrary to the principle of equal treatment are void.

Hungary



Policy developments

Hungarian equality body commences operation on 1 February 2005

The Equal Treatment Authority started operations on 1 February 2005. The Authority is an administrative organ authorised to take action against any discriminatory act irrespective of the ground of discrimination (including racial or ethnic origin, religion, age, sexual orientation, and disability) or the field (employment etc.). It can impose sanctions on persons and entities violating the ban on discrimination. The new body works under the direction of the government and supervised by the Minister for Youth, Family and Social Affairs and Equal Opportunities. However, neither the Government nor the Ministry may instruct the Authority when it performs its tasks under the Equal Treatment Act. This provision is intended to guarantee the Authority's independence from the government.

In its first month, the Authority received numerous complaints: most were racial discrimination claims from Roma, but complaints of discrimination based on age, health status, disability and motherhood were also submitted. Due to severe problems in financial planning, the Authority is presently heavily understaffed with a total of 9 employees, only 4 of whom deal with incoming complaints. In the last week of February the Authority received 50 complaints, so the personnel is likely to be soon overburdened. There are prospects that an additional 5 positions will be established in the second half of the year. The budget of HUF 133,000,000 (€ 543,000) seems insufficient compared to the body's very wide material, personal and geographical scope of authority.

Parliament adopts amendment threatening equality body's financial independence

On 18 March 2005 the government submitted a Bill to Parliament concerning the amendment of certain laws on taxes and fees (Bill T/15264). Article 50 of the Bill foresaw the abolition of Article 13(4) of the Equal Treatment Act (EqTA), which guarantees the financial independence of the Equal Treatment Authority by declaring that the Authority is a budgetary organ vested with "chapter-type authorisations." The fact that the Authority is vested with "chapter-type authorisations," means that its budget is the sole responsibility of its head, and that it is not subordinated to any other organs or person. The original text of the Bill would have abolished the Article which vests the Authority with this competence (Article 13(4) EqTA).

Following lobbying on the part of Authority, the Minorities Ombudsman and Human Rights NGOs, two MPs of the ruling Socialist Party submitted an amendment to the Bill to the Parliament's Human Rights Committee which would have preserved the Authority's budgetary independence. On 18 April 2005, the Committee

unanimously supported this amendment. However, the following day, one of the two MPs together with another Socialist MP submitted a new, so-called "attached amending proposal," which although not fully abolishing Article 13(4) EqTA, deprived the Authority of its chapter-type authorisations and thus (from a financial point of view) practically reduced the body to the level of a department within the Ministry Youth, Social and Family Affairs and Equal Treatment. The same MPs of the ruling party who had voted for the original amending proposal on the previous day, now supported the new and completely contradictory "attached amending proposal," while the opposition MPs abstained from voting. The proposal was therefore supported by the Committee. Citing the requirements of Directive 2000/43, ECRI's Policy Recommendations and the Paris Principles, four leading Hungarian Human Rights NGOs published a press release on 20 April 2005, warning against the elimination of the Authority's financial independence. However, on 25 April 2005, the Parliament adopted the "attached amending proposal." The law containing the Equal Treatment Act's above outlined amendment (Act XXVI of 2005) has received official promulgation and came into effect on 10 May 2005.

Equal Treatment Advisory Board set up to assist Hungarian equality body

Article 14(3) of The Equal Treatment Act (EqTA) prescribed the setting up of an advisory body, the Equal Treatment Advisory Board, to assist The Equal Treatment Authority with issues of strategic importance. The Board should consist of experts with outstanding experience of asserting the right to equal treatment. On 30 June 2005 the 6-member Board was appointed after an extensive consultation process, in the course of which 63 NGOs nominated 24 candidates. The members are widely regarded in professional circles as truly independent experts in the field. Government Decree 362/2004 on the Equal Treatment Authority and its Proceedings sets out the rules of the Board's operation: it shall have 6 members (3 proposed by the Minister of Justice and 3 by the Minister of Social and Family Affairs, Youth and Equal Opportunities (Article 18)). Candidates must have a clean criminal record and cannot have been MPs, members of government or political state secretaries, employees or representatives or political parties for the last two years. They serve 6 years in office and their office terminates with resignation, after 6 years, death or dismissal (Article 19). In case of dismissal the Prime Minister is under a duty to appoint a new member. The Board has co-decision powers with the Authority on the adoption of proposals for government decisions and draft legislation relating to equal treatment and on reporting in general. Its dissenting or concurring opinions shall be attached to the Authority's reports and proposals.

Case law

Labour Court condemns company for refusal to employ Roma security guard

In the first case in which the Labour Court applied the Equal Treatment Act, a man of Roma origin applied for a job at a security company in response to an advertisement. He had all the necessary qualifications for a security guard, but was turned down by an employee of the company who told him that they did not employ Roma. He filed a complaint with the Labour Inspectorate. During the proceedings, the owner of the company admitted the discrimination and expressed his regret but said that the company's clients do not want Roma security guards. The Labour Inspectorate imposed a fine of HUF 100,000 (€ 400) on the company.

The Roma man also brought an employment claim against the company for damages for non-pecuniary loss, based on the Labour Code and the Equal Treatment Act. He was assisted by the Legal Defence Bureau for National and Ethnic Minorities. On 13 October 2004, the Labour Court established that direct discrimination based on the claimant's ethnic origin had taken place, and awarded him HUF 500,000 (€ 2,000). The owner of the company, who admitted direct discrimination in court, appealed the amount of the damages, but the decision was upheld by the Labour Council of the County Court on 11 May 2005. The authorities acting in the case did not

racial
or ethnic
origin

accept the company's defence that it had only refrained from employing Roma because its clients required this. Therefore, the economic interest involved in complying with the discriminatory requirements of clients and business partners, and the possible loss of profit which could result from not doing so have not been accepted as qualifying for an exemption, despite previous fears that Article 7 of the Equal Treatment Act (according to which an act does not constitute discrimination if "it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation") would be interpreted in such a manner.

Supreme Court decision on declaration promoting exclusion of homosexuals from theological education at a Calvinist university

After dismissing a theology student who had declared his homosexuality to one of his professors, the Faculty Council of the Károli Gáspár Calvinist University' Theological Faculty (a church-maintained university that also receives state funding) published a general declaration on 10 October 2003 claiming that "the church may not approve of [...] the education, recruitment and employment of pastors and teachers of religion who conduct or promote a homosexual way of life." The gay and lesbian rights protection organisation "Háttér Társaság a Melegekért" brought an *action popularis* claim against the university under the Equal Treatment Act (EqTA), requesting the court to declare that the defendant had violated the right of homosexuals as a social group to equal treatment, to oblige the defendant to put an end to the infringement and to withdraw its declaration and pay punitive damages. The first instance court held that the declaration of the Faculty Council is an opinion protected by the freedom of expression and did not transgress the limits of constitutionality. The decision was upheld on appeal.⁶³

The gay and lesbian organisation then submitted a request for extraordinary review to the Supreme Court, claiming that the courts misinterpreted the EqTA's provision concerning the reversal of the burden of proof (Article 19), under which the claimant has to prove that he belongs to one of the protected groups and that he suffered a disadvantage. In the organisation's view even such an abstract disadvantage as the future possibility of exclusion is sufficient and therefore the defendant university should have had to prove that it met the requirement of equal treatment, or was not required to do so under one of the exempting provisions of the EqTA. As the EqTA does not acknowledge the freedom of expression as a ground for exemption, the courts' argument is not founded in law.

On 8 June 2005 the Supreme Court rejected the claim. The Court accepted the claimant's argument that even the proving of an abstract disadvantage may be sufficient for the establishment of discrimination and the shifting of the burden of proof. However, it adopted the stance that the denominational university is exempted from the obligation to abide by the requirement of equal treatment by virtue of the general exempting rule in Article 7(2) EqTA, according to which an action based on a protected characteristic "shall not be taken to violate the requirement of equal treatment if it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation." In the Supreme Court's view, in the case of a denominational university, it may objectively be considered to be reasonable to exclude homosexuals from theological education, taking in consideration the fact that later on they may become pastors.



⁶³ For further detail on the earlier court decisions see Issue 1 of the European Anti-Discrimination Law Review (EADLR), page 55.

Ireland

sexual
orientation

Policy development

Annual Report of Equality Tribunal published on 26 June 2005

The Annual Report contains the number of cases decided by the Equality Tribunal in the period 2003-2004. The figures show that no cases were decided on the ground of sexual orientation in 2003 or 2004, either in the context of the provision of goods and services, or employment. This may suggest one of two things, firstly that there is no discrimination on the grounds of sexual orientation, which seems unlikely, particularly in light of the call by the Gardai (police) on the 22 June to encourage the gay community to report homophobic attacks, as they claim there is underreporting. The second interpretation is that people who have been discriminated against on the basis of their sexual orientation do not feel empowered to use the legislation. This may be for a variety of reasons, including the necessity to declare one's sexuality in order to take such a case.

racial
or ethnic
origin

In relation to the traveller community in the area of provision of goods and services, there were 154 cases in 2003, but only 26 cases in 2004. This reflects the impact of the Intoxicating Liquor Act 2003 which ensured that all cases of discrimination in respect of licensed premises were removed from the jurisdiction of the Equality Tribunal and are now heard in the District Court. This change of jurisdiction has negative implications for the cost of litigation, the District Court is more formal, legal representation is necessary and costs may be awarded against the unsuccessful party. The drop in cases reflects the inaccessible nature of the court system compared with the Equality Tribunal.

http://www.equalitytribunal.ie/htm/about_us/annual_reports.htm

Case law

The Equality Authority v Portmarnock Golf Club, 10 June 2005 (unreported)

The Equality Authority sought a declaration that a club which refused membership to women was a discriminatory club within the terms of the Equal Status Act 2000 (Section 8). The District Court awarded a declaration and ordered the suspension of the certificate of registration and the alcohol license of the club. The club appealed to the High Court.

The High Court held that the golf club's rule, prohibiting women from joining as either members or associate members, was not discriminatory under the provisions of the Equal Status Act 2000 because it fell within an exception in the Act. Section 8 provides that a club shall be considered a discriminating club where it has a rule, policy or practice which discriminates against a member, or an application for membership, on any of the nine protected grounds: gender, race, religion, age, sexual orientation, disability, marital status, family status or membership of the traveller community. Section 9 of the Act states that a club shall not be deemed to be a discriminatory club if its principal purpose is to cater for the needs of one of the nine grounds and the golf club claimed that their male-only golf club fell within this exception. The High Court ruled that the golf club could rely on section 9 of the Act claiming its principal purpose was to cater for the needs of persons of a particular gender. An appeal of the High Court Decision is pending.

This case impacts on Directive 2000/43, as the legislation governing the prohibition of discrimination in the provision of goods and services is common to all nine grounds and therefore any interpretation of those provisions crosses all nine grounds. The Court's expansive interpretation of section 9 would seem to undercut the intent behind the Equal Status Act 2000 and call into question its compliance with Directive 2000/43.

*Case law***First judicial pronouncement on ethnic and racial discrimination**

On 19 May 2005, the court of first instance of Padua issued an order (*ordinanza*) against a company which owned a bar, it having been proved that higher prices had been applied to clients of non-Italian origin, as a way of decreasing the number of clients perceived as *extracomunitari* ("non-community citizens" a term usually used to refer to immigrants of non-Western or "remote" origin). It is one of the first judicial pronouncements on ethnic and racial discrimination following transposition of the Directive and it highlights some problematic issues.



The order was issued on the basis of the summary procedure set out in the 1998 Immigration Act, which is also used in cases arising under Decree (2003/215) which transposed Directive 2000/43. According to this procedure, such orders become final in the event that the parties do not require their review by the same court. The court recognised the existence of discrimination against the *extracomunitari* (the exact nationality of the nine claimants does not appear in the decision; their names are partly Slav and partly African/Arab). However, the court does not specify whether the discrimination is on the ground of ethnic origin or on the ground of nationality, the latter only being prohibited by the 1998 Immigration Act not by the decree transposing Directive 2000/43. The defendant was ordered to cease the discriminating activity and pay damages for non-pecuniary loss to the claimants of 100 EUR per person and costs. The court did not respond to the claimants' request for publication of the judgment in the press and on the web.

Two associations ("*Razzismo Stop*" and "*Associazione per gli Studi Giuridici sull'Immigrazione - ASGI*") were denied legal standing to engage in legal proceedings on behalf or in support of the claimants. According to the Court, the ground for this exclusion lies in the fact that according to Article 5 of Decree 2003/215, legal standing is restricted to associations active in the field of combating discrimination which are included in a list approved by a joint decree of the Ministries of Labour/Welfare and Equal Opportunities. As no such decree has been issued, no association can be deemed to have legal standing. This interpretation is also based on an opinion of the Department of Equal Opportunities of the Presidency of the Council of Ministers, issued on request of one the organisations taking part in the present case.⁶⁴

The order will become a final decision of the court (subject to the ordinary possibilities of appeal) once it has decided on the requests for review submitted by the parties. If the restrictive interpretation of legal standing is confirmed in the final decision, this will cast doubt on the effective transposition of Directive 2000/43, as legal standing of associations would be excluded pending approval of the list. ASGI has applied for a review of the decision by the same court on the issue of standing as well as other minor issues. ASGI's application requires the Padua court to refer the case for a preliminary ruling to the ECJ, in order to establish whether the conditions for legal standing imposed by Article 5 of Decree 2003/215 comply with Directive 2000/43. The first hearing of the review procedure is due to take place on 23 September 2005.

⁶⁴ According to UNAR, 90 associations have been inscribed in a national registry which will allow them to intervene in discrimination cases before the courts once the decree providing them with that right has been adopted.



Christina | 2004

Latvia

LV

Case law

First application of the non-discrimination provisions of Labour Law

A former Lutheran minister who lost his position after he publicly admitted his homosexuality (an event widely publicised at the time and subsequently) responded to an advertisement for a position as teacher of history of religion. Despite having been encouraged to submit his application following an initial telephone inquiry, when he later inquired about the progress of the application he was informed that another person had already been employed. The school claimed that the agreement with the successful candidate had been reached prior to the date when the advertisement was published and that the reason why the contract was only concluded at the end of the month, i.e. after the date of the application by the claimant, was that the successful candidate did not have his documents with him at the time of the interview, so the agreement was allegedly reached with him that the contract would be concluded following his return from a trip abroad.



In case no. C32242904047505, C-475/3, the Riga city *Ziemeļu* district court found that the school administration knew about the claimant's sexual orientation. It found that the submission of the school that the agreement with the successful candidate had been reached prior to the claimant's application was contradicted by the facts of the case, namely, the publication of the advertisement which showed that the school was continuing to look for suitable candidates. While both candidates had the degree of Master of Theology, the claimant was qualified as a teacher of mathematics and had pedagogical experience, while the successful candidate had no such experience and had only just been admitted to a programme to train as a teacher of religion and ethics.

The court held that in the circumstances where the candidate who was apparently more qualified than the person selected for the post was not even invited for an interview, direct discrimination based on sexual orientation had taken place. The court rejected the claim for pecuniary damages, but awarded LVL 2,000 (€ 2,850) in moral damages, accepting the claimant's argument that damages should have a dissuasive effect. The decision has been appealed.

This was the first case based on the non-discrimination provisions of the Labour Law. It also established that sexual orientation is to be considered a prohibited ground of discrimination, even though the open-ended list contained in the Labour Law provision does not expressly mention it. The judgment was made available to the parties on 25 May 2005. <http://www.politika.lv/index.php?id=111436&lang=lv>

Luxembourg

LU

Legislative developments

Proposed amendment to age requirement in the recruitment of state civil servants

On 14 June 2005 the government presented Bill 5485 which aims to modify the Law of 16 April 1979 (as amended), which introduced a statute for State civil servants. The Bill contains an amendment which would abolish the maximum age limit for the recruitment of state civil servants and align the law with Directive 2000/78. At present, Article 2 of the statute provides for a maximum upper age limit of 45 for recruitment as a trainee civil servant.



The motivation for the amendment ("Exposé des motifs") include the transposition of Directive 2000/78. Remarkably, in this Bill the government stresses that Directive 2000/78 is also applicable to the public sector, while the scope of Bill 5249, aimed at transposing this Directive, had not included the public sector. In the meantime, the government has announced that it will merge the two bills - 5248 and 5249 - to have one single text transposing both Directives 2000/43 and 2000/78, following the recommendation of the Council of State in its opinion of 4 December 2004.⁶⁵

On 13 June 2005 the professional body representing the collective interests of civil servants, the *Chambre des Fonctionnaires et Employés Publics*, expressed its total opposition to this modification. The Bill is certain to be approved by a majority in Parliament in the new Parliamentary session that starts in October.

<http://www.chd.lu/fr/portail/role/default.jsp> (projets de lois, Nr.5485)

MT

Malta

Case law

The National Commission for the Disabled v Michele Peresso Limited

The National Commission for the Disabled filed a writ of summons against the Michele Peresso Ltd., claiming that the lack of accessibility for disabled persons to the company's commercial outlet constituted discrimination against persons with a disability under the Equal Opportunities (Persons with a Disability) Act 2000. The Commission claimed the lack of access resulted from the ramp at the front side of the premises in question being too steep for wheelchair bound persons to go up on their own. Initial attempts to resolve this matter amicably failed. The Commission instituted legal proceedings against the company, requesting the Court to declare the company guilty of discrimination against persons with a disability under the Act, and to prescribe a time limit for the company to carry out the necessary alterations; and, if need be, to submit applications to the Planning Authority.



The company contested the Commission's action, arguing that (a) the Commission did not have the power to initiate legal proceedings under the Equal Opportunities (Persons with Disability) Act 2000; (b) as the Act came into effect on 1 October 2000 it was not applicable retroactively; (c) disabled persons did have adequate access, and (d) the company was itself being discriminated against by the Commission, as many other Maltese public places did not have adequate access to persons with a disability.

The First Hall Civil Court held on 25 February 2005 that the company was guilty of discrimination under Article 12(1)(c) of the Equal Opportunities (Persons with Disability) Act 2000. The Court granted the company a period of two months from the issue of the permits by the Planning Authority to carry out the necessary work to provide free and adequate access to the premises. The Court also ordered that the company must submit its application for the necessary permits within two weeks of the date of the judgment.

With regards to the company's plea that the Act is not applicable retroactively, the Court held that the *ratio legis* was for the Act to apply to all buildings to which the public have access and that therefore these premises must be accessible to persons with a disability; the parliamentary debates at the time the law was being enacted, clearly

⁶⁵ See Issue 1 of the European Anti-discrimination Law Review, page 59.

show that this was the intention of the legislator. As to the company's plea that the building provided access to persons with disability, the Court held that it was contrary to the spirit of the law that disabled persons be provided with access to premises through a secondary access, in this case a side door at the far end of the building. The Court stated that as far as is reasonably possible, any access for the disabled had to be close to the main entrance so there was minimum discrimination. The Court held that the Company failed to prove its claim that the alterations to the building would result in unjustifiable hardship to it. The Court found that the ramp on site was found to be inadequate in the circumstances. The company registered an appeal on 16 March 2005.

Netherlands

NL

Policy developments

Second Evaluation of the General Equal Treatment Act 1994

The second evaluation on the operation of the 1994 General Equal Treatment Act (amended in 2004) (GETA) was published on 14 June 2005. GETA provides for an evaluation by the Equal Treatment Commission (ETC) every 5 years. This second evaluation concerns the period 1999-2004. One of the general conclusions drawn in the evaluation is that the principle of equal treatment is effectively secured. The percentage of cases in which the "discriminator" complied with the opinion of the ETC has drastically risen (from 66% in 2001 to 84% at the beginning of 2004). Statistics show that the rate of compliance with the ETC's recommendations in court cases is high: in 61% of the cases which appear before the ordinary courts, the ETC's opinion is followed.

The evaluation stresses the need to explore ways in which GETA's scope of application should be extended and/or confined in relation to acts of the administration. The evaluation promotes an extension of the legal basis for positive action measures to all grounds unless "under-representation" cannot be established (currently, GETA only allows for positive action with regard to sex and race, while the Act on Equal Treatment on the grounds of disability and chronic disease permits positive action for disabled people). The need for better dissemination of information of the existence of GETA and its practical application was stressed, as only 3% of those who regard themselves as a victim of discrimination try to combat this by lodging a complaint. <http://www.cgb.nl>

Portugal

PT

Case law

Constitutional Court overrules decision of the Supreme Court ruling that Article 175 of Criminal Code is unconstitutional

A citizen was sentenced by the Supreme Court to 2 and a half years in prison for 2 crimes of homosexual acts with minors. He appealed to the Constitutional Court arguing the unconstitutionality and discriminatory nature of Article 175 of the Criminal Code due to its unequal treatment of heterosexual and homosexual acts. The sexual intercourse was consensual and no abuse of sexual inexperience had been proved.

Article 175 of the Criminal Code states "Whoever, being of the age of majority, practices homosexual acts with minors of 14 - 16 years of age or incites other persons to such acts can be punished by imprisonment of up to 2



years or a fine." The same type of acts do not constitute a criminal offence when the persons involved belong to different sexes. Article 174 of the Code states "Whoever, being of the age of majority, has sexual relations of copulation, anal or oral intercourse with minors of 14 - 16 years of age, abusing of his/her inexperience can be punished by imprisonment of up to 2 years or a fine". This article does not define the sexes involved in those acts. The issue at stake was to decide whether Article 175 of the Criminal Code goes against the principles stated in Articles 13(2) and 26(1) of the Constitution, in that it foresees the punishment of homosexual acts even if they have not abused the minor's inexperience, while Article 174 only punishes the heterosexual acts if they are practiced with abuse of the minor's inexperience.

In its judgment of 10 May 2005, the Constitutional Court questioned the constitutionality of the rule in Article 175 of Criminal Code as far as it relates the violation of the equality principle in respect of heterosexual and homosexual acts. The Constitutional Court held that Article 175 violates Article 13(2) (equality principle) and Article 26(1) (other personal rights) of the Constitution. This is the first time the Constitutional Court has decided against the Supreme Court stating that there is no reason to treat adolescents' homosexual or heterosexual acts differently only on grounds of "morality."

SK

Slovakia

Policy developments

Adoption of the National Action Plan for the Decade of Integration of the Roma

The government approved by Resolution 28/2005, the National Action Plan for the Decade of Integration of the Roma population for the period 2005-2015. This is a joint initiative of Bulgaria, Croatia, the Czech Republic, Macedonia, Romania, Serbia and Montenegro and Slovakia in co-operation with the World Bank and the Open Society Institute. This is the first long-term strategic planning of the social integration of Roma people in the broader regional context. The Programme's main goal is to expand and take forward the social inclusion of Roma communities, including raising their economic status. It focuses on four priority areas, namely education, employment, health and housing and the three related issues of poverty, discrimination and gender equality.

racial
or ethnic
origin

The National Action Plan was prepared by the Office of the Government Plenipotentiary for Roma Communities, the Ministries of Education, Construction and Regional Development, Labour, Social Affairs and Family, Health, the Statistical Office and NGOs. It sets goals, the means for achieving them, indicators, monitoring bodies and the budget for activities planned for 2005. The main goals in the area of education are the improvement of the level of education of Roma pupils, raising the number of Roma pupils in high schools, lowering the percentage of Roma pupils in special schools, and supporting lifelong education. Priorities in the field of employment are equal treatment regardless of ethnic origin and increasing the ability of disadvantaged groups to gain employment. The goals in the area of health and housing are an analysis of health awareness among the Roma community, the improvement of sexual health, increased levels of vaccination, the improvement of the level of housing, and the integration of the Roma from the Roma settlements. Among the Decade's activities is the establishment of the Roma Education Fund by the World Bank as a financial resource for implementing the national action plans. Activities will also be covered by the State budget, European Social Fund and the Phare Fund.

[http://www.rokovania.sk/appl/material.nsf/0/32E6E7D81370BF04C1256F82003A5F4F/\\$FILE/Zdroj.html](http://www.rokovania.sk/appl/material.nsf/0/32E6E7D81370BF04C1256F82003A5F4F/$FILE/Zdroj.html)

Legislative developments

Draft Agreements between the Slovak Republic and the Holy See; and registered churches and religious societies, on the right to exercise conscientious objection

The Ministry of Justice proposed legislation to draw up an Agreement between the Slovak Republic and the Holy See, and an Agreement between the Slovak Republic and registered churches and religious societies, on the right to exercise conscientious objection. Under both proposals a member of the Catholic religion, other registered Christian churches and the Jewish community could raise a conscientious objection in the area of employment, education, provision of health and legal services and serving in the armed forces. Conscientious objection means "an objection made on the ground of the freedom of conscience under which every person may refuse to do what they consider to be prohibited pursuant to their belief and moral principles." The agreements would not be self-executing so further detailed legal regulation on the application of these rights would be required.



Public debate on both draft agreements is focused on whether this kind of agreement is discriminatory towards citizens who are non-believers and whether it gives enough guarantees for the protection of rights of others, for example in providing health and legal services. Freedom of thought, conscience, religion and belief are guaranteed under Article 24 of the Constitution but this provision has not yet been used as a ground for a legal dispute concerning unequal treatment. Although the Slovak legal order guarantees the rights of all believers or non-believers in the area of exercising conscientious objection, both draft agreements can be seen as an attempt to regulate religious rights more specifically for certain religious groups.

The proposed agreements provide for the right of members of registered churches to exercise certain rights in occupational relationships which are crucial to their beliefs and this right is covered by Article 4(2) of Directive 2000/78 which allows exceptions to the principle of equal treatment in employment and occupation. However, the scope of the agreements is much broader: the guarantee for raising conscientious objection is in respect of every kind of organisation (no matter if religious or not) and the right would be applicable in all above-mentioned areas, not only employment or occupation. It may be said that the draft agreements secure the rights of individual believers towards employers in general, for example the right of a gynaecologist working in a state hospital to refuse to carry out abortions, whereas Article 4(2) of Directive 2000/78 defines exceptions for employers - the ethos-based organisations - towards its potential or existing employees. Apart from the fact that the draft agreements do not cover all religious groups which renders the rights of other believers in similar situation rather unclear, there is no clash between the draft agreements and the wording of Directive 2000/78.

<http://www.justice.gov.sk/dwn/I0/ZmlVyhSvN1.rtf>

<http://www.justice.gov.sk/dwn/I0/DohVyhSv.rtf>

Slovenia

SI

Legislative developments

National Assembly rejects proposal for a bill prohibiting positive action for Roma

On 25 January 2005 the National Assembly discussed the proposal for a bill on the position of the Roma community that had been introduced by the Slovenian National Party. The proposal for the bill only contained three articles and the only provision with actual content reads: "The Members of the Roma Community who live in the Republic of Slovenia do not have special rights and do not enjoy a privileged position. Everyone is



equal under the law." The National Assembly refused the adoption of the proposed bill with a high majority of votes (69 votes against, in favour only 6 votes). The government warned that the proposed bill was in contravention of the Constitution, the legal order of Slovenia and EU law, and that it also failed to conform to the Recommendations, Resolutions and Conventions of the Council of Europe on the position of the Roma, to which Slovenia is a signatory state.

Article 65 of the Constitution stipulates: "The status and special rights of Roma people living in Slovenia are regulated by law." Special rights of the Roma Community are regulated by nine sectoral acts; however a special bill for the protection of the position and rights of the Roma people has not yet been adopted. The Constitutional Court has already established in one of its previous rulings (U-I-416/98-38; <http://www.us-rs.si>) that Article 65 of the Constitution allows the legislator to grant special protection to the Roma people and positively discriminate in favour of Roma.

Act on the registration of same-sex unions adopted on 22 June 2005

On the 22 June 2005 a new act on the registration of same-sex unions was adopted in the National Assembly. The registration of same-sex partnerships will become possible after one year, as the Ministry of Labour, Family and Social Affairs firstly has to enact rules to make the registration possible in practice. The new act regulates the registration procedure of the union of two persons of the same sex, the conditions to be fulfilled for the same-sex partnership to be included in the Register, the legal consequences arising from registration of the union, and the regulation of the cessation of the union.



Important rights guaranteed to same-sex partners regulated by this new act are: the right to maintenance following the break-down of the union, the right to acquire property, the right to inherit the common property, the right to gather information on the health condition of an ill partner as well as the right to visit the partner in a hospital or clinic. The Act does not guarantee same-sex partners any rights to social security or health care, nor any other kind of social benefits otherwise guaranteed to couples. The adoption of the Act will probably have no impact on the material scope of Directive 2000/78, as its provisions only regulate technical aspects of registration of the union and only the rights and obligations in the areas explicitly listed in the Act.

<http://www.dnevnik.si/clanek.asp?id=127932>

Spain

Legislative developments

Law 14/2005 of 1 July 2005 allowing inclusion of clauses in collective agreements permitting termination of employees' contracts on reaching ordinary retirement age

Until 2001, the tenth additional provision of the Spanish Workers' Statute authorised the inclusion of clauses for the termination of employment contracts when workers reached the ordinary retirement age of 65 in collective agreements, without prejudice to the Social Security regulations. In 2001 this provision was repealed because, as argued in the preamble of the law repealing it, it "was based on demographic and labour-market realities different from those of today." However, some collective agreements continued to include these clauses. On 9 March 2004, 2 judgments of the Supreme Court declared these clauses illegal.



On 3 December 2004 the trade unions and employers' organisations signed an agreement with the government to reintroduce that provision into the Workers' Statute and thereby enable the social partners to include clauses in collective agreements on the termination of contracts when employees reach the ordinary retirement age, provided certain conditions are met.

On 29 June 2005 the Spanish Parliament passed Law 14/2005 on clauses in collective agreements concerning employees' reaching the ordinary retirement age which reinserted a "Tenth Additional Provision" into the Law on the Workers' Statute. This Provision states that "collective agreements may include clauses allowing the employment contract to be terminated when the employee reaches the ordinary retirement age as established in Social Security regulations," but adds two conditions: 1) the measure "is to be linked to objectives consistent with the employment policy expressed in the collective agreement, such as improvement of stability in employment, conversion of temporary contracts into indefinite ones, maintenance of employment, recruitment of new workers, or any other objectives aimed at enhancing quality of employment"; and 2) in addition, a clause is introduced stating that "a worker whose employment contract is terminated must have covered the minimum contribution period, or a longer one if so provided in the collective agreement, and must meet the other prerequisites specified by Social Security legislation for entitlement to a contributory retirement pension."

This Law resolves the problems raised by the Supreme Court ruling of 9 March 2004 in that, on one hand, a law will be passed enabling such compulsory retirement clauses to be included in collective agreements, and on the other, they will not be discriminatory because they are to be "objectively and reasonably justified," as they will be linked to "legitimate employment policy, labour market and vocational training objectives," as stated in Article 6 of Directive 2000/78.

<http://www.boe.es/boe/dias/2005-07-02/pdfs/A23634-23636.pdf>

Legislation passed to allow homosexual couples to marry

Law 13/2005 of 2 July 2005 amends the Civil Code with regard to the right to marry. The Law amended Article 44 of the Civil Code, which states that "Men and women are entitled to enter into a contract of matrimony pursuant to the provisions of this Code." A new paragraph has been added which provides that "Both parties, being of the same sex shall not prevent them from entering into a contract of matrimony nor diminish the effects thereof." A further 16 articles are also amended, with the terms "men/women" (hombre/mujer) being replaced by "spouses" (cónyuges). These articles refer to the rights and duties of spouses, the custody of children, donations and economic provisions, etc. An additional general provision states that "legal provisions containing any references to marriage shall be deemed applicable regardless of the sex of the spouses." This amendment of the Civil Code means that homosexuals are now entitled to marry and enjoy exactly the same rights (custody of children, adoption, inheritance) as heterosexual couples. <http://www.boe.es/boe/dias/2005-07-02/pdfs/A23632-23634.pdf>



Sweden

Case law

Withdrawal of employee from duties whose religion prevented fulfilling a considerable part of those duties did not amount to discrimination

Swedish Labour Court, Case 2005 No. 21 (AD 2005:21), 9 February 2005

The case concerned alleged discrimination on grounds of religion according to the 1999 Ethnic Discrimination Act. A part-time nurse at a nursing home for elderly people had taken on an extra job in December 2002 at the nursing home assisting with certain 'activities'. Her total involvement then amounted to 68% of full-time work. When her religion (Nonconformist Lutheran) prevented her taking part in the many activities which related to traditional feasts and which formed a considerable part of the extra job, the employer withdrew her involvement in the extra tasks as of the end of June 2003. She was thus deprived of her extra job and left only with the original part-time work as a nurse (56% of full-time work). She was offered another job with longer hours (83% of full-time work) but turned the offer down for personal reasons. As a reaction to the situation, which she claimed to be discriminatory, the nurse first telephoned the employer to, she argued, end the employment and then went on sick-leave. When she later refused to sign the withdrawal papers nevertheless the employer held her to have left her employment. With regard to the alleged discrimination (the withdrawal from the extra tasks), the Labour Court remarked that before Directive 2000/43 was transposed in 2003, the ethnicity concept of the 1999 Act already covered religion. However, no discrimination was considered to have taken place, as the employer would have been expected to have treated a hypothetical comparator who refused to carry out the same tasks for other reasons than religion in a similar way. As far as the termination of the employment as such was concerned, the employer was not able to prove that the employee had left of her own will, so was held responsible for wrongful dismissal.

religion
or belief

United Kingdom

Legislative developments

The Disability Discrimination Act 2005 received Royal Assent on 7 April 2005.

The Disability Discrimination Act 2005 amends the 1995 Disability Discrimination Act. It provides for the exemption to be lifted for transport services from the access to goods and services provisions of the 1995 Act and enables regulations to be made for different transport services, at different times and to different extents. Amendments to the Bill strengthened provisions on rail accessibility and provide that all rail vehicles must be made to comply with accessibility regulations by 2020. The Act amends the definition of 'disability,' bringing more people within the scope of the definition by providing that a person with HIV, multiple sclerosis or cancer will be deemed to be a disabled person from the point of diagnosis (although by regulations the government could exclude minor cancers), and by removing the requirement that a mental illness be 'clinically well-recognised', before it can count as a mental impairment for the purposes of the Disability Discrimination Act 1995. This brings mental illnesses into line with all other mental and physical impairments. The Act does not apply protection to persons who are perceived to be disabled or who are associated with a disabled person.

disability

The Act extends the prohibition of discrimination to most functions of public authorities and imposes a positive disability equality duty on public authorities; amendments to the Bill broadened this duty to encompass action

against all forms of harassment, promotion of positive attitudes towards disabled people and promotion of participation of disabled people in public life. Disabled elected members of local authorities will be protected against discrimination by those authorities in the carrying out of official business. Following amendments during passage through Parliament, the Act makes it easier for tenants to get consent to carry out disability-related improvements to certain rented property to improve access for disabled occupiers. By imposing positive obligations on public authorities (which includes private bodies carrying out public functions) the Act has the potential to create a better environment for disabled people without reliance on individuals seeking legal redress. Different provisions will come into force on dates between December 2005 and September 2007.

The Act does not apply in Northern Ireland as disability is a transferred matter. However, work on a Disability Discrimination (NI) Order is ongoing. The Order is broadly similar to the DDA 2005 and is expected to be made by the end of the year.

<http://www.opsi.gov.uk/acts/acts2005/20050013.htm>

Equality Bill proposes creation of Commission for Equality and Human Rights

The Equality Bill was published on 18 March 2005.⁶⁶ It proposed the establishment of the Commission for Equality and Human Rights (CEHR). The CEHR will be a specialised body in Great Britain covering sex, disability, sexual orientation, religion or belief, age (and, ultimately, race) as well as human rights. The Bill also provides for an extension of protection against discrimination on grounds of religion or belief beyond employment and a creation of a statutory duty on public authorities to promote equality between men and women. While a single equality body was established in Northern Ireland under the Northern Ireland Act 1998, until the CEHR is functioning the 3 separate specialised equality bodies for race, sex and disability will continue to operate and there will be no body for sexual orientation, or religion or belief. It is proposed that the CEHR will operate from October 2007 with responsibility for race functions following in April 2009.

The CEHR will apply the complex and inconsistent laws prohibiting discrimination on grounds of race, sex, disability, sexual orientation, religion or belief, and the awaited legislation on age. However, a governmental review of existing legislation has recently been established, alongside a major Equality Review, with a view to developing a simpler legal framework.

<http://www.publications.parliament.uk/pa/cm200405/cmbills/072/2005072.htm>

Proposal to amend anti-discrimination legislation to prohibit discrimination between civil partners and spouses

A consultation has taken place which sought comments on proposed amendments to the Sexual Orientation Regulations in Great Britain to provide for equal treatment between civil partners and spouses by May 2005. The Employment Equality (Sexual Orientation) Regulations 2003 for Great Britain and the parallel regulations for Northern Ireland transposed Directive 2000/78 as it applies to sexual orientation discrimination, but excluded rights to benefits dependent on marital status. The Regulations need to be amended to take into account the introduction of civil partnerships under the Civil Partnership Act which will enter into force on 5 December 2005. This Act will give same-sex couples in Great Britain and Northern Ireland the opportunity to gain legal recognition of their relationships and require equal treatment between civil partners and spouses in access to employment and vocational training and related benefits. The proposed amendments to the SO Regulations



⁶⁶ The Bill failed when Parliament was prorogued for the general election. A new Bill was re-introduced in May 2005 with only minor changes not considered here.

would come into force at the same time as the Civil Partnership Act.
http://www.dti.gov.uk/er/equality/eer_2003_amendments.htm

racial
or ethnic
origin

Racial and Religious Hatred Bill 2005 introduced to Parliament on 9 June 2005

The Racial and Religious Hatred Bill 2005 is before Parliament. There has been an offence of inciting racial hatred since 1965, but case law under the (civil law) Race Relations Act has established that only two religious groups - Sikhs and Jews - comprise ethnic groups. A central argument supporting this Bill is to provide equivalent protection for Muslims and other multi-ethnic faiths as currently exists for Sikhs and Jews.

religion
or belief

The government proposes to amend the 1986 Public Order Act (Part 3) to make it an offence to incite "religious hatred." That is defined to mean "hatred of a group of persons defined by reference to religious belief or lack of religious belief." The offences that would be created involve speaking outside of a dwelling, displaying material, broadcasting, publishing, possessing material that is insulting, abusive or threatening with the intention of stirring up religious hatred (as well as racial hatred that is already within the Public Order Act) or, in all of the circumstances religious hatred (or racial hatred) is likely to be stirred up. Prosecutions require the consent of the Attorney General.

The government stresses that the Bill will protect persons and not faiths, but there is concern that it will prevent open and honest criticism of religions in the form of debate, humour, theatre, literature and will be an unjustified interference with freedom of expression, with a potential conflict between rights under Articles 9 and 10 ECHR. Another argument is that attacks on Muslims and other multi-ethnic faiths are essentially racial rather than religious, and one amendment to the Bill clarifies that the existing law against inciting racial hatred can be used where religion is used as a proxy for race. The Bill completed its passage through the House of Commons on 11 July 2005 with an amendment to exempt the Bill offences from the power of citizen's arrest. The Bill was introduced to the House of Lords on 12 July 2005 and the second reading is due to be heard on 11 October. It is hoped that the Bill will receive Royal Assent by late November/early December, but it faces strong opposition in the House of Lords. The government has indicated that it will use the Parliament Act 1911 (under which the Lords can only delay, not defeat a Bill) to enact this measure.

<http://www.publications.parliament.uk/pa/cm200506/cmbills/011/2006011.htm>

age

Public consultation on draft regulations prohibiting unjustified age discrimination

On 14 July 2005, the government published draft regulations prohibiting unjustified age discrimination in employment and vocational training and opened a public consultation on them until October 2005. The final regulations will be submitted to Parliament for approval in early 2006 and the approved regulations will enter into law by 1 October 2006. The draft regulations confirm that the government is likely to permit employers to continue to make use of mandatory retirement arrangements that will enable them to terminate the employment contracts of employees of 65 years of age or older. The draft regulations appear to incorporate the age provisions of Directive 2000/78, but introduce more specific and detailed exceptions than other age discrimination legislation introduced in other European countries. Of note are the scope of the length of service provision and the decision to take advantage of the Article 6(2) exemption for the use of age-based distinctions in occupational pensions. The consultation will focus upon these exceptions and their scope. There is a suggestion that the government may consider a future extension of age discrimination legislation to goods and services.

<http://www.dti.gov.uk/er/equality/age.htm>

Case law

Igen Ltd. & Others v Wong , Chamberlin & Another - v - Emokpae, Brunel University v Webster, 18/2/2005 [2005] EWCA Civ 142

Three appeals from the Employment Appeals Tribunal to the Court of Appeal gave the Court its first opportunity to pronounce on the application of the shift of the burden of proof. The appeals relate to complaints of sex and race discrimination, but the decision is relevant to all grounds within the directives: indeed, the Court of Appeal was conscious of the "possible impact which our decisions in these appeals may have on practice in discrimination cases." As a ruling of the Court of Appeal, it will be binding on any tribunal or court in Great Britain or Northern Ireland hearing a case concerning the shift of the burden of proof. The Court of Appeal's guidance to courts of first instance on the shift of the burden of proof states that it is for the claimant to prove, on the balance of probabilities, facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex. If not the claimant will fail. If so, the burden shifts to the respondent who has to discharge that burden by proving, on the balance of probabilities, that the treatment was "in no sense whatsoever" on the grounds of sex. The Guidance can be found in full in paragraphs 1-13 of the annex to the judgment. <http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html>

R -v- Headteacher and Governors of Denbigh High School ex parte SB, 2/3/2005 [2005] EWCA Civ 199

SB, a Muslim girl, was a pupil at Denbigh High School, a secular school with high proportion of Muslim pupils. School uniform requirements allowed girls to wear a headscarf and shalwar kameeze (long tunic over loose trousers fitted at the ankle), which SB wore for 2 years. She then came to school wearing a jilbab, a full length loose-fitting dress she believed was required to meet the strict requirements of her religion. The school refused to allow her to attend if she did not comply with its uniform requirements. SB said it was against her faith to do so and stayed away from school for 2 years. The school regarded its uniform policy as important in promoting positive ethos, sense of communal identity, not favouring any particular faith, and protecting Muslim girls from undesired pressure to wear a jilbab.

The Court of Appeal held (i) the school had unlawfully excluded SB from the school, (ii) the school unlawfully denied her right to manifest her religion under Article 9(1) ECHR. Neither the Headteacher nor the governing body recognised that SB had a right to manifest one's religion recognised by English law and that the onus lay on the school to justify its interference with that right. Instead, it started from the premise that its uniform policy was to be obeyed by all pupils without exception and if the claimant did not like it she could go to another school (which ultimately she did).

From the Court's judgment, it can be seen that the school, as a public body, is required, under the Human Rights Act 1998, at all times to act in ways that are consistent with ECHR rights. However, had the school recognised from the outset that in deciding whether SB should be permitted to attend school wearing a jilbab instead of the prescribed school uniform they were dealing with a question of SB's right to manifest her religion under Article 9(1) and had they then gone on to consider whether their interference with that right could be justified under Article 9(2), they may have concluded that the uniform policy could lawfully be maintained. As the school did not carry out this exercise, SB's Article 9(1) rights had been violated. It was not necessary for the Court to determine whether the interference could be justified.

This decision received considerable media attention, and, in interviews, SB and others gave the decision an importance for the rights of Muslims to manifest their religion that a careful reading would indicate it did not



have. The decision is significant as a reminder to schools (and other public authorities) of the impact of the Human Rights Act on the wide range of decisions they are required to make which may interfere with ECHR rights and their consequent responsibilities.

The school has appealed the decision to the House of Lords. The Education Minister has announced that the government will make a submission to the Lords when the case is heard, in support of the appeal. This is on the basis that the Court of Appeal decision appears to require schools to take into account individual beliefs when drawing up school policies which could impose an excessive and unworkable burden on schools and local education authorities. <http://www.bailii.org/ew/cases/EWCA/Civ/2005/199.html>
<http://www.timesonline.co.uk/article/0,,2-1713854,00.html>

Cross and others v British Airways plc, 23/3/2005 [2005] UKEAT 0572_04_2303 -

This case was brought by female employees of British Airways (BA) against their employer as they wished to continue in employment until the age of 60 but they were obliged to retire at age 55. Their claims of unfair dismissal and sex discrimination were dismissed by the Employment Tribunal (ET) and their appeals dismissed by the Employment Appeal Tribunal (EAT) on 23 March 2005. The issue before the EAT was whether in the absence of legislation prohibiting age discrimination, termination of employment at 'normal retirement age' could constitute unfair dismissal or indirect sex discrimination.

The claims of unfair dismissal were brought by BA employees who had been transferred to BA in 1988 when British Caledonian Airways (BCal) merged with BA, and who, under their BCal contract had a contractual retirement age of 60. BA terms, to which these employees signed up, provided for retirement at age 55 (and had done since 1971). All have now worked for more than 15 years on the basis of a contractual retirement age of 55, and the uniform policy of BA has been for retirement at 55, which the ET and EAT held to be the 'normal retirement age' for BA employees; The Employment Rights Act excludes the statutory right not to be unfairly dismissed when dismissal occurs when the employee has attained the 'normal retirement age' for persons holding his/her position.

The claims of indirect sex discrimination also arose from a desire to work beyond 55. The women's claims referred to the contractual retirement age (age 60 for men; lower age for women) that applied to employees who had joined BA prior to 1971, of whom far more were men than women. In 1971, the contractual retirement age of 55 was introduced for all staff recruited after that date; an exception was made for men employed before 1971 who retained their contractual retirement age of 60; in 1975 when the Sex Discrimination Act came into force the contracts of women employed pre-1971 were harmonised to include a retirement age of 60. While both the ET and EAT accepted there was a disparate impact based on sex, having regard to the significantly smaller number of BA female staff who began prior to 1971 and the substantially greater number of women than men currently employed by BA, both tribunals were satisfied that BA was able to justify age 55 as the 'normal retirement age' for women recruited after 1971; the matters of cost and impact on pension schemes was sufficient to outweigh the discriminatory impact.

The decision of the EAT usefully distinguishes 'contractual retirement age' from 'normal retirement age,' the former being the starting point, but not decisive in determining the latter. 'Normal retirement age' is the age at which employees could reasonably expect to retire. The case represents the need for clear age discrimination legislation. The government has indicated that age discrimination legislation will include a default retirement



age of 65. A significant factor will be whether the proposed default retirement age will supplant or operate alongside 'normal retirement age' as the age when the employee is no longer entitled to protection against unfair dismissal.

<http://www.employmentappeals.gov.uk/uploads/UKEAT057204TM2332005/index.htm>

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