

European Anti-Discrimination Law Review

10

July 2010

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European Anti-discrimination Law Review

No. 10 - 2010



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

The content of this publication has been drafted by the European Network of Legal Experts in the non-discrimination field and does not necessarily reflect the opinion or position of the European Commission, Directorate-General for Employment, Social Affairs and Inclusion.

This publication is supported for under the European Community Programme for Employment and Social Solidarity – PROGRESS (2007-2013). This programme is managed by the Directorate-General for Employment, Social Affairs and Inclusion of the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment and social affairs area, as set out in the Social Agenda, and thereby contribute to the achievement of the Lisbon Strategy goals in these fields.

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The information contained in this tenth issue of the review reflects, as far as possible, the state of affairs on 1 January 2010.

ISBN 2-930399-56-2

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Introduction

The European Network of Legal Experts in the non-discrimination field has been managed by the Human European Consultancy and the Migration Policy Group (MPG) since 2004. This network is composed of one national expert per EU Member State, as well as senior researchers and ground coordinators. In addition to the EU Member States, the candidate countries Turkey, Croatia and the Former Yugoslav Republic of Macedonia have been part of the Network since December 2009. The aim of the Network is to monitor the transposition of the two Anti-discrimination directives¹ at national level and to provide the European Commission with independent advice and information. It also produces the European Anti-discrimination Law Review and various thematic reports, comparative analysis, which are all available in English, French and German. Full information about the Network, its reports, publications and activities can be found on its website: www.non-discrimination.net.

This is the tenth issue of the European Anti-discrimination Law Review to be produced by the European Network of Legal Experts in the non-discrimination field. The Law Review provides an overview of the latest developments in European anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 1 January 2010). Furthermore, it includes an article on the sources of United States equality law written by David B. Oppenheimer, Professor of Law, University of California, Berkeley School of Law, and an article by Julie Ringelheim, Researcher, Belgian National Fund for Scientific Research (FNRS) and the Centre for Philosophy of Law of the University of Louvain (Belgium), on the prohibition of racial and ethnic discrimination in access to services under EU law. In addition, there are updates on legal policy developments at European level and updates from the case law of the European Court of Justice and the European Court of Human Rights. At national level, the latest developments in non-discrimination law in the EU Member States can be found in the section on News from the Member States. These four sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Eirini-Maria Gounari) on the basis of the information provided by the national experts and their own research in the European sections.

In December 2009 two thematic reports were published. The first, Disability and non-discrimination law in the European Union, was written by Lisa Waddington and Anna Lawson. The second, written by Olivier de Schutter, analysed the Links between migration and discrimination. A third thematic report authored by Emmanuelle Bribosia and Isabelle Rorive examining the balance between the right to equality and other fundamental rights and the fourth edition of the comparative analysis (Developing anti-discrimination law in Europe, The 27 Member States compared) are also expected to be published before autumn 2010.

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

Isabelle Chopin
Piet Leunis

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

Meet ordinary people in this Review,
facing discrimination

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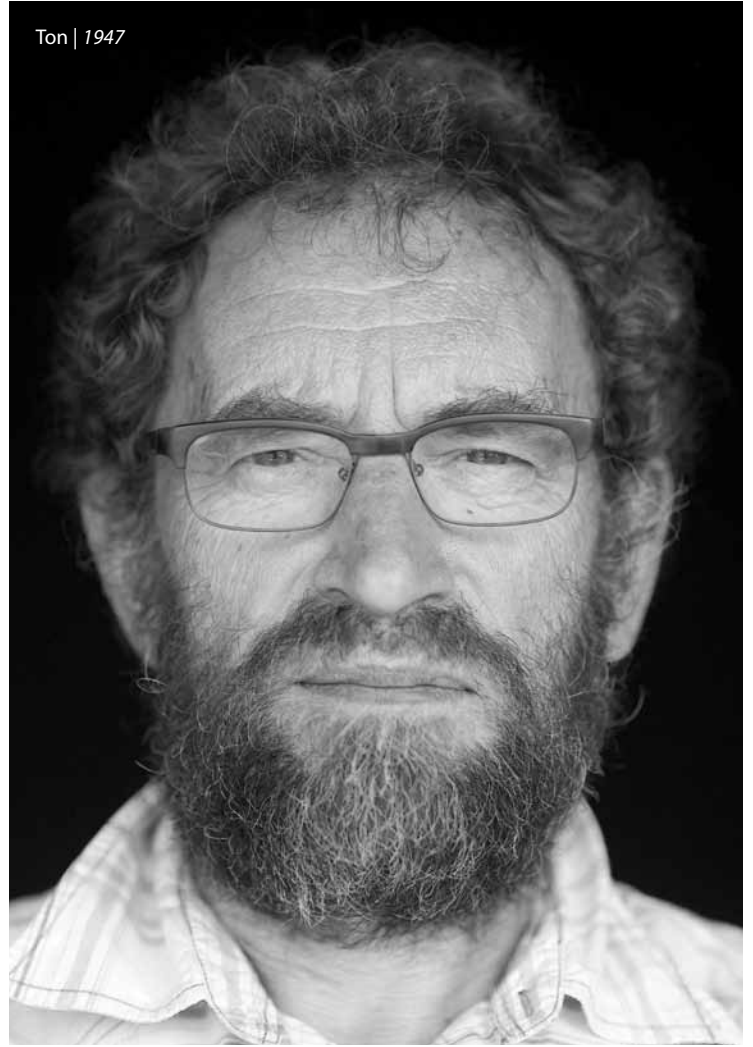
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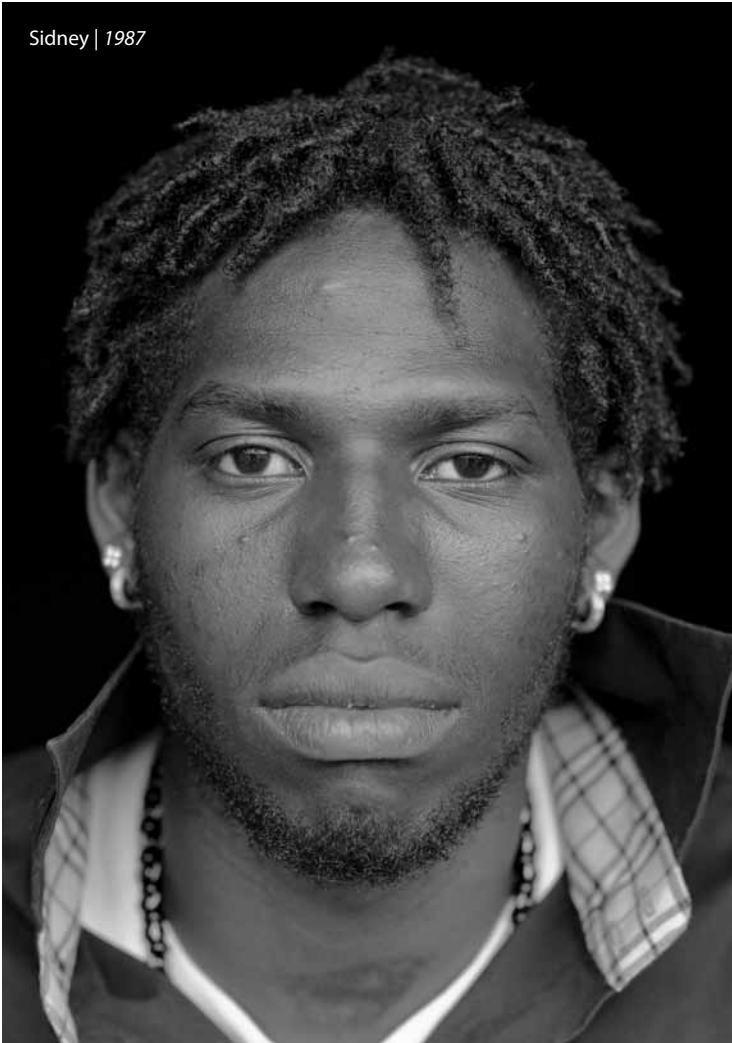
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Ton | 1947



Sidney | 1987



Hanke | 1957



The Prohibition of Racial and Ethnic Discrimination in Access to Services under EU Law

Julie Ringelheim²

Introduction

Prohibition of some form of discrimination in relation to the provision of services has been part of the law of the European Union (EU) since the Treaty of Rome. Until 2000, however, this prohibition was enshrined in EU law only as a corollary to the free movement of services. It was therefore restricted to discrimination based on nationality of a member state and to situations involving a cross-border element. The 'Racial Equality Directive' (Council Directive 2000/43³) adopted on 29 June 2000 was thus the first piece of EU legislation outlawing discrimination in access to services based on one of the grounds listed in Article 19 of the Treaty on the Functioning of the European Union (TFEU) (ex-Article 13 EC). This prohibition, moreover, seems to also concern wholly internal situations.⁴ More precisely, this directive forbids discrimination by public authorities or private persons based on race or ethnic origin in 'access to and supply of goods and services which are available to the public, including housing' as well as in employment, social protection, social advantages and education.⁵ Since then, protection against discrimination based on sex has also been extended to the field of provision of services by Directive 2004/113⁶ and in July 2008 the Commission presented a proposal for a Directive aimed at implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation outside the labour market, including in access to and supply of services.⁷

This article seeks to clarify the contours of protection from racial and ethnic discrimination in access to and supply of services under EU law. It addresses two central questions. First, what should we understand by 'services' in the context of the Racial Equality Directive? Second, what is the scope of this protection compared to protection from racial or ethnic discrimination in employment, on the one hand, and from sex discrimination in the provision of services, on the other hand?

² Researcher, Belgian National Fund for Scientific Research (FNRS) and the Centre for Philosophy of Law of the University of Louvain (Belgium). Julie Ringelheim is the author, with Olivier De Schutter, of *Ethnic Monitoring – The Processing of Racial and Ethnic Data in Anti-Discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights* (Bruylant, 2010). The author would like to express her gratitude to E. Bribosia, V. Moreno Lax, I. Rorive, V. van der Plancke and S. Van Drooghenbroeck for stimulating discussions on the topic of this article.

³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.07. 2000, 22).

⁴ M. Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press, 2002) p.137.

⁵ Article 3(1).

⁶ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373 of 21.12.2004, 37). This directive excludes from its material scope the content of media and advertising.

⁷ COM (2008) 426.

The notion of 'services' in the Racial Equality Directive

Services

As one author puts it, services are an 'amorphous concept': 'Insofar as they are capable of a general definition, they tend to be perceived as being intangible and incapable of being stored'.⁸ The Racial Equality Directive does not define the term 'services'. It only specifies that the services it covers are those that are 'available to the public' (see below). By contrast, Directive 2004/113 states in its preamble that the services it refers to are those within the meaning of ex-Article 50 EC (now Article 57 TFEU).⁹ Despite the silence of Directive 2000/43 on this point, one could *a priori* consider that the notion of 'services' in this instrument should be understood in light of the same Treaty provision. Article 57 TFEU, which appears in the section relating to the free movement of services, lays down that 'services' for the purposes of the Treaty are those that are normally provided for remuneration. In the same vein, the 2006 Internal Market Services Directive defines 'service' as 'any self-employed economic activity, normally provided for remuneration'.¹⁰ So defined, services include a wide range of activities, from hairdressing, banking, insurance, transport or travel services to cinemas, hotels' or restaurants' activities.

Yet the remuneration requirement sets a limit on the concept of services within the meaning of the Treaty. For the ECJ, the essential characteristic of 'remuneration' 'lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service'.¹¹ This notion has been interpreted broadly by the Court.¹² Remunerated services do not lose their commercial character either because the provider is a non-profit-making enterprise,¹³ or because of the recreational or sporting nature of the service.¹⁴ Services fall within the scope of the Treaty even when they are not paid for by those for whom they are performed, provided that there is remuneration from some party.¹⁵ For example, the organiser of an international sports competition 'may offer athletes an opportunity of engaging in their sporting activity in competition with others and, at the same time, the athletes, by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television broadcasters may retransmit and which may be of interest to advertisers and sponsors'.¹⁶

The Court also held that health care may constitute a service within the meaning of the Treaty, even when it is provided in the context of a social security scheme. This is valid when a medical service is paid for by a patient who can then claim a refund from his/her national health insurance¹⁷ as well as when hospital treatment is financed directly by health insurance funds on the basis of agreements and pre-set scales of fees, insofar as the payments made by the funds represent remuneration for the hospital which receives them.¹⁸

⁸ L. Woods, *Free Movement of Goods and Services within the European Community* (Ashgate, 2004), p.159.

⁹ Preamble, Recital 11.

¹⁰ Article 4(1) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376 of 12.12.2006, 36).

¹¹ Case C-263/86, *Belgian State v. René and Marie Thérèse Humbel* [1988] ECR 5365, para. 17.

¹² P. Craig and G. De Búrca, *EU Law – Text, Cases, and Materials* (Oxford University Press, 2008), pp. 818-823.

¹³ Case C-70/95 *Sodemare v. Regione Lombardia* [1997] ECR I-3395.

¹⁴ For example Case C-415/93 *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman* [1995] ECR I-4921.

¹⁵ Cases C-51/96 and 191/97 *Deliège v. Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549, para. 56.

¹⁶ *Ibid.*, para. 57.

¹⁷ Case C-158/96, *Kohll v. Union Caisses de Maladie* [1998] ECR I-1931, para. 21.

¹⁸ Case C-157/99, *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen*, [2001] ECR I-5473, para. 56-58.

However, some public activities have been deemed by the ECJ to fall outside the ambit of ‘services’ on the ground that they were not performed for remuneration. In particular, in the *Humbel* case, the Court ruled that courses provided under the national education system did not constitute services within the meaning of the Treaty because the essential characteristic of remuneration was absent. ‘First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.’¹⁹ By contrast, when courses are given in establishments of higher education which are financed essentially out of private funds, in particular by students and their parents, and which seek to make an economic profit, they do amount to a ‘service.’²⁰

Importantly, the application of Treaty provisions relating to free movement of services depends on establishing a cross-border dimension to the case: either the service provider moves to another member state, the service recipient moves to another member state or the service itself moves (e.g. in the case of broadcasting or telecommunications).²¹ However, the drafting of the Racial Equality Directive suggests that it is meant to prohibit discrimination in purely internal situations as well, for instance, a Swede discriminating against another Swede on the basis of ethnic origin in access to a discotheque in Sweden. The Preamble insists that ‘[i]t is important to protect *all natural persons* against discrimination on grounds of racial or ethnic origin.’²² At the same time, account must be taken of the fact that Article 3(1) specifies that the Directive applies ‘within the limits of the powers conferred upon the Community’. In other words, the areas listed in the Directive are covered only to the extent that the subject matter falls within the competences of the Community (i.e. the Union since the entry into force of the Lisbon Treaty). Indeed, it is within these limits that Article 19(1) TFEU gives the Council the power to take action to combat discrimination based *inter alia* on racial or ethnic origin. The question thus arises whether the Council is empowered to act to prohibit ethnic or racial discrimination in access to services regardless of any cross-border element. In this regard, it can be argued that the absence of uniform protection against such discrimination throughout member states is likely to hinder the capacity of service providers to develop cross-border activities and to deter individuals from making use of their rights of free movement. And protection limited to cross-border situations would be arduous to implement in practice for member states, given the close connection between many purely internal and cross-border situations as regards ethnic or racial discrimination. In addition, such limitation would be difficult to reconcile with member states’ international human rights obligations.

Assuming that the prohibition of racial and ethnic discrimination in provision of services under the Racial Equality Directive does cover wholly internal situations, the fact remains that if ‘services’ in this context must be taken to have exactly the same meaning as in Article 57 TFEU, access to a number of activities ‘available to the public’ but not provided for remuneration will be excluded from the coverage of this instrument. As regards state education and medical services, it must be noted, of course, that education and health care are explicitly listed among the areas to which the Directive applies.²³ The TFEU specifically gives the EU powers in the fields of education (Article 165 (ex-Article 149 EC)) and public health (Article 168 (ex-Article 152 EC)), although these powers are limited. But what about other services which are not economic in nature but are open to the public, for instance, access to public museums and libraries, cultural events or amateur sports clubs, when they are free of charge? Do these activities fall outside the material scope of the Racial Equality Directive?

¹⁹ Case 263/86, *Humbel*, para. 18.

²⁰ Case C-109/92, *Stephan Max Wirth v. Landeshauptstadt Hannover* [1993] ECR I-6447, para. 17.

²¹ L. Woods, *op. cit.* 163-164.

²² Recital 16, emphasis added.

²³ Article 3(1) e) and g).

As a general rule, directives should be interpreted in light of the Treaties. And as noted above, Directive 2004/113, which also concerns the field of equal treatment and was passed after the Racial Equality Directive, specifically refers to Article 57 TFEU's definition of services. Nonetheless, several arguments can be put forward to support the view that the notion of 'services' under the Racial Equality Directive is broader than under the free movement of services provisions. According to the ECJ, in interpreting EU legal provisions, 'it is necessary to consider not only their wording but also the context in which they occur and the objectives of the rules of which they are part'.²⁴ Provisions relating to free movement of services have a market focus: they are designed to contribute to the construction of a single market. It is consistent with this objective for them to be restricted to commercial activities. The Racial Equality Directive, in contrast, relates to human rights protection, recognised as one of the values on which the Union is founded,²⁵ and, more specifically, to equal treatment, which constitutes a general principle of Union law.²⁶ Its primary aims are to guarantee individuals the right not to be discriminated against on the basis of their race or ethnic background and to 'ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin'.²⁷ Arguably, 'participation in society' involves the opportunity to take part not only in economic activities but also in social and cultural ones, whether or not they have a commercial dimension. Significantly, the Preamble refers to a number of human rights conventions, including the European Convention for the Protection of Human Rights (ECHR), the International Convention on the Elimination of all forms of Racial Discrimination (CERD), and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which all contain a non-discrimination clause whose scope is by no means limited to activities that are economic in nature.

But a broad interpretation of the notion of 'services' would still have to be reconciled with the fact that the Directive applies within the limits of the powers conferred upon the Union. To determine whether the Racial Equality Directive can be interpreted as requiring member states to forbid discrimination in access to an activity not performed for remuneration, one would have to ascertain whether the subject matter falls within the competences of the Union. In relation to museums, the ECJ has emphasised on one occasion that 'visiting museums is one of the determining reasons for which tourists, as recipients of services, decide to go to another Member State'.²⁸ Accordingly, museum admission conditions may come within the scope of both freedom of movement and free movement of services.²⁹ More generally, with respect to cultural or sporting activities, the Court has ruled that access to leisure activities available in a member state where a national of another member state decides to enter in order to work as an employed or self-employed person is a corollary to freedom of movement.³⁰ One could also turn to the (limited) powers given to the EU by the Treaties in the field of culture (Article 167 TFEU (ex-article 151 EC)) and sports (Article 165 TFEU (ex-article 149 EC)) and analyse whether they could provide a legal basis for a non-discrimination action in these areas.

In sum, there is room for debate on whether the notion of 'services' under the Racial Equality Directive should be understood as limited to services provided for remuneration. In any case, even if the notion of services under Directive 2000/43 is restricted to 'services' as defined in Article 57 TFEU, this does not prevent member states from going beyond the Directive and outlawing discrimination in relation to

²⁴ For example C-1/96, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd* [1998], ECR I-1251, para. 49.

²⁵ Article 2 TEU. On the importance of this factor for the interpretation of the Directive, see E. Dubout, *L'article 13 du Traité CE – La clause communautaire de lutte contre les discriminations* (Bruylant, 2006) pp.116-120.

²⁶ For example Case C-144/04, *Mangold v Helm* [2005] ECR I-9981 para. 75.

²⁷ Race Equality Directive, Preamble, Recital 12.

²⁸ C-45/93, *Commission v. Spain* [1994] ECR I-911, para. 6.

²⁹ *Ibid.*, para. 10.

³⁰ For example C-62/96, *Commission v. Greece* [1997] ECR I-6725, para. 19.

non-economic activities. A number of them have indeed explicitly included within the material scope of their national legislation outlawing racial and ethnic discrimination access to places or activities open to the public regardless of whether they are remunerated. For instance, the Belgian federal law transposing Directive 2000/43 covers not only the 'provision of services' but also 'access, participation and any other exercise of an economic, social, cultural or political activity accessible to the public.'³¹ Also interesting is the wording of the British Race Relations Act 1976, which makes it unlawful 'for any person concerned with the provision (*for payment or not*) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services.'³²

Services available to the public

The services covered by Directive 2000/43 are those that are 'available to the public'. This specification should be read in conjunction with the Preamble, which emphasises the importance, as regards the provision of goods and services, of respect for private and family life and transactions carried out in this context.³³ In a similar vein, Directive 2004/113 specifies that it applies to the provision of goods and services which are available to the public and 'which are offered outside the area of private and family life and the transactions carried out in this context' (Article 3(1)).

The ECJ acknowledged in 1983 that the principle of equality has to be reconciled with the principle of respect for private life.³⁴ The drafting of the CERD also suggests that the non-discrimination rule does not extend to 'merely private' matters. When defining discrimination, it refers to any distinction, exclusion, or preference which impairs the enjoyment of human rights and fundamental freedoms in the 'political, economic, social, cultural or *any other field of public life*'.³⁵ The Explanatory Report to Protocol No. 12 to the ECHR provides some clues as to how to circumscribe the concept of 'purely private' relations between persons. It observes that insofar as the prohibition of discrimination laid down by the Protocol entails a positive obligation for states in the area of relations between private persons, it 'would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc)'. In contrast, 'purely private matters' would not be affected by the Protocol. The report further notes that regulation of such matters would be likely to interfere with the right to respect for private and family life, as guaranteed by Article 8 of the Convention.³⁶

Yet it may not always be easy to draw a precise line between services offered within the area of private and family life and those available to the public. The explanatory memorandum to the 2008 draft directive on equal treatment outside the field of employment mentions, as one example of a transaction that would be 'purely private' and hence would fall outside the scope of the proposed directive, the fact of letting a room in a private house, which, it is said, does not need to be treated in the same way as letting rooms in a hotel.³⁷ But some difficult cases could arise. For instance, what about individuals letting four rooms in their private house and offering 'bed and breakfast' services? Or an association organising a private party but advertising widely and charging admission? National courts and the ECJ will probably be called upon

³¹ *Loi tendant à lutter contre certaines formes de discrimination/Wet ter bestrijding van bepaalde vormen van discriminatie* (10.05.2007), *Mon./Belgisch Staatsblad* (30.05.2007), Article 5(1) 8°.

³² Section 20 (1), our emphasis.

³³ Recital 4.

³⁴ Case C-165/82, *Commission v. UK* [1983] ECR 3431. The case concerned sex equality in employment.

³⁵ Article 1(1), emphasis added.

³⁶ Explanatory Report to Protocol No. 12, point 28.

³⁷ Proposal for a Council Directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - COM (2008) 426, p. 8.



to specify whether such situations enter within the notion of ‘services available to the public’. However, not all member states reproduce in their national antidiscrimination legislation this distinction between services offered to the public and those that are only privately available. Cypriot, French, Italian, and Spanish laws on racial and ethnic discrimination, for example, do not explicitly state that they cover only access to services *available to the public*.³⁸ To what extent does the right to respect for private and family life limit the extent of the prohibition of discrimination in these countries? This too will likely be a matter for interpretation by courts.

The scope of protection

The Racial Equality Directive prohibits direct and indirect discrimination, harassment and instruction to discriminate in access to and supply of services as in the other areas covered by this instrument. Notably, the prohibition of direct discrimination is stricter in relation to services than in the context of employment. The Directive does permit a derogation to the ban on direct discrimination where by reason of the nature of particular occupational activities or of the context in which they are carried out, a characteristic related to racial or ethnic origin constitutes a ‘genuine and determining occupational requirement’.³⁹ The phrase ‘genuine occupational qualification’ clearly refers to a qualification of the person performing a particular job. Hence, it is exclusively concerned with the field of employment and cannot be applied to the *user* of a service. The Racial Equality Directive does not contain any exception to the prohibition of direct discrimination similar to that provided for in Directive 2004/113, which allows the provision of services exclusively or primarily to members of one sex when this is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 4(5)). This seems to allow, for instance, sex-segregation practices intended to encourage participation in socially beneficial activities, such as fitness and sport clubs, or in activities involving public nakedness, like the use of saunas, ‘by enabling participation by those who would otherwise be prevented by cultural or religious attitudes to decency, or by embarrassment, or fear of sexual harassment, from taking part’.⁴⁰ By contrast, racial or ethnic segregation in the provision of services – for instance, a hairdresser who would serve only Blacks or a dating agency that would only accept people from one ethnic community as clients – is always forbidden under the Racial Equality Directive. This is not to say that service providers may not in some circumstances use criteria that in practice advantage persons of a certain racial or ethnic origin, e.g. in the case of a hairdresser who chooses to specialise in Afro hairstyles. To be sure, this could constitute indirect discrimination (rather than direct discrimination) but only if the criteria at issue cannot be objectively justified by a legitimate aim or if the means used are not appropriate and necessary.

Interestingly, Directive 2004/113 also allows member states to permit proportionate differences between men and women’s premiums and benefits regarding insurance and related financial services where sex can be deemed a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data (Article 5(2)). No comparable derogation is authorised by Directive 2000/43.

The sole potential exception to the prohibition of direct discrimination based on race or ethnic origin in relation to services consists in positive action measures. One example of such positive action could be the so-called ‘set aside’ programmes, which have been developed in particular in the United States, Canada and South Africa. Such schemes are not, however, aimed at *consumers* but at *providers* of services. They consist in securing a proportion of government contracts to businesses owned by persons belonging to certain disadvantaged racial or ethnic minorities. Their objective is to encourage the economic betterment

³⁸ See the reports on national antidiscrimination legislation drafted by the Network of Legal Experts in the non-discrimination field: <http://www.non-discrimination.net/en/countries/Spain?jsEnabled=1> (last visit: 19.02.2010).

³⁹ Article 4.

⁴⁰ European Network of Legal Experts in the Field of Gender Equality, *Sex-segregated Services* (S. Burri and A. McColgan) (European Commission, 2008), p. 12.

of these minorities.⁴¹ Of course, such measures would have to be compatible with the conditions under which positive action is admitted under EU law.

Harassment and instruction to discriminate are both treated as forms of discrimination by the Equality Directives. Examples of instructions to discriminate in the field of services include the case of a bar manager who instructs her employees not to serve people of a certain race or ethnic origin or that of a landlord who seeks to rent his house through an estate agency and instructs it to exclude candidates belonging to certain ethnic communities. Interestingly, in a 1983 case before a British court, an employee complained of having been dismissed from his job in an amusement centre for failing to follow the instructions of his employer to exclude black customers from the centre. The employment appeal tribunal ruled that less favourable treatment given to the claimant for refusing to discriminate against others did amount to direct discrimination prohibited by the Race Relations Act 1976 because such treatment was still based 'on racial grounds'.⁴² An instance of alleged harassment in the context of access to services can be found in the case-law of the Supreme Court of the Czech Republic. The claimant, who was of Roma origin, complained about the fact that a restaurant owner displayed in the premises of his restaurant a statue holding a baseball bat in her hand with a visible inscription 'Go and get the gypsies'. He argued that this conduct had the effect of creating an environment that was 'intimidating, hostile, degrading, humiliating or offensive' for Roma. The Supreme Court agreed with this reasoning. Noting the absence of explicit provisions in Czech law on harassment in the area of supply of services, it ruled that the contested conduct fell under the personality protection provisions of the Civil Code.⁴³

Conclusion

Several aspects of the prohibition of racial and ethnic discrimination in access to services under EU law are open to discussion. The scope of the notion of 'services' within the meaning of the Racial Equality Directive is likely to give rise to debate. It seems *a priori* consistent to consider that the definition of 'services' in this context is the same as in Treaty provisions on free movement of services and thus limited to activities performed for remuneration. Yet in view of the Directive's objective, the case can be made that the concept of 'services' should be interpreted more broadly. But such a broad interpretation would need to be compatible with the principle that the Directive applies within the limits of the power conferred upon the Union. Besides, the distinction between services available to the public and those that are only privately available and fall outside the scope of the Directive could raise difficulties in certain cases.

As to the scope of the protection, the ban on direct discrimination based on race or ethnic origin in access to services is especially strict: some exceptions accepted under EU law in the case of direct sex discrimination in services cannot be relied upon where race or ethnic origin is at issue. Similarly, the 'genuine occupational qualification' derogation only applies to race or ethnic discrimination in the field of employment and has no equivalent in the area of services.

⁴¹ Ch. McCrudden, *Buying Social Justice* (Oxford University Press, 2007), pp. 8-9.

⁴² *Showboat Entertainment Centre Ltd v. Owens* [1984] IRLR 7, quoted in D. Schiek, L. Waddington and M. Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007), p.579.

⁴³ Supreme Court of the Czech Republic, Judgment No. 30 Cdo 1630/2004-156, decision of 30 June 2005, reported in *European Anti-discrimination Law Review (EADLR)*, issue 3, p. 57.

Sources of United States Equality Law: the View from 10 000 Meters

David B. Oppenheimer⁴⁴

US equality law 1776-1865

The American Declaration of Independence (1776) famously asserts as a 'self evident' 'truth' that 'all men [sic] are created equal';⁴⁵ but the Declaration is regarded as merely aspirational; it has no direct effect. The US Constitution, ratified in 1789, avoided using the term 'slavery' but nonetheless affirmed and preserved its legality.⁴⁶ When the Supreme Court ruled in the *Dred Scott* case (1857)⁴⁷ that slaves were property, not persons, even when taken into Northern 'free' States, the stage was set for the American Civil War.

US equality law during the post-Civil War 'Reconstruction' period

US equality law thus begins with the three Constitutional amendments of 1865-70, adopted as part of the victory of the anti-slavery North in the American Civil War (1861-65). The first, Amendment XIII (1865), outlawed slavery.⁴⁸ Amendment XIV (1870) bestowed citizenship on the former slaves and required the states to provide 'equal protection' to all persons.⁴⁹ Amendment XV (1870) provided universal suffrage for adult male citizens.⁵⁰

During these post-war years, known as 'Reconstruction' (1865-1877), Congress passed major civil rights bills prohibiting private racial discrimination (1866, 1871) and public racial discrimination (1875).⁵¹ But soon after the war ended, Reconstruction ended as well, and with it all meaningful enforcement of the equal protection principle. In the *Civil Rights Cases* (1883)⁵² the Supreme Court limited the equality principle to

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⁴⁵ The Declaration of Independence, para. 2 (US 1776).

⁴⁶ US Const., Art.1(1): 'Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons'. US Const. Art.1(9): 'The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person'.

⁴⁷ *Dred Scott v. Sandford*, 60 US 393 (1857).

⁴⁸ US Const. Amend. XIII: '1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction (...)'.

⁴⁹ US Const. Amend. XIV: '1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protect of the laws (...)'.

⁵⁰ US Const. Amend. XV: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude'.

⁵¹ Civil Rights Act of 1866, 42 USC. §§ 1981 (1866); Civil Rights Act of 1871, 42 USC. §§ 1983, 1985(3), 1988 (1871); Civil Rights Act of 1875, 18 Stat. 335 (1875).

⁵² *Civil Rights Cases*, 109 US 3 (1883).

state action and struck down the 1875 Civil Rights Act, and in *Plessy v. Ferguson* (1896)⁵³ the Court held that state-imposed public segregation was permissible as long as the separate facilities provided were 'equal'. Needless to say, they never were, but courts routinely found blatantly unequal facilities and services to be legal.

US constitutional equality law

In the 1940s the National Association for the Advancement of Colored People (NAACP), under the leadership of Thurgood Marshall and Charles Hamilton Houston, developed a litigation strategy aimed at undermining *Plessy*. After a series of victories in cases finding facilities unequal, and thus impermissible even under *Plessy*,⁵⁴ they fully succeeded in 1954 in *Brown v. Board of Education*,⁵⁵ which found that '[s]eparate educational facilities are inherently unequal' overruling *Plessy*. A series of cases soon followed, finding equal protection violations in cases of segregated public transit systems, hospitals, libraries, parks, and other publicly owned facilities.⁵⁶

With the end of this long period of disuse, the 'Equal Protection' amendment has become the most important constitutional source of equality law. It provides a constitutional mandate, subject to certain limitations discussed herein, that States and their subdivisions and agents refrain from treating persons and groups of persons differently without good cause. The Supreme Court has developed a scale of review depending on the extent to which the inequality is directed at a discreet and insular minority (or, more recently, whether a state action is based on a classification that is unlikely to be legitimate).⁵⁷ When the inequality is an explicit differential directed at one of the 'suspect' classes (or, more recently, using one of the 'suspect classifications' of race, national origin, or ethnicity), the State's conduct is subject to 'strict scrutiny' to determine whether the inequality is 1) justified by a 'compelling governmental purpose' and 2) is 'narrowly tailored' to achieve that purpose.⁵⁸ Under this test, most suspect classifications are prohibited, although some narrowly drawn affirmative action policies have been upheld.⁵⁹

A proposal to amend the Constitution to add a gender equality clause (termed the 'Equal Rights Amendment' or ERA) was passed by both houses of Congress in 1972, but failed to be ratified by three-quarters of the States, and thus died in 1979.⁶⁰ Thus, when the inequality is based on gender, an 'intermediate scrutiny' test is applied; if the State has an 'important government interest' and the difference in treatment is 'substantially related' to that purpose, the differentiation is permissible.⁶¹ Finally, if the difference is not subject to either 'strict scrutiny' or 'intermediate scrutiny', the State need only establish that the difference is 'rationally related' to a 'legitimate governmental interest'.⁶²

⁵³ *Plessy v. Ferguson*, 163 US 537 (1896).

⁵⁴ R. Kluger, *Simple justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1975).

⁵⁵ *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 US 483, 495 (1954).

⁵⁶ See *Boynton v. Virginia*, 364 US 454 (1960) (invalidating segregation on public transit); *Cypress v. Newport News General and Nonsectarian Hospital Ass'n*, 375 F.2d 648 (4th Cir. 1967) (holding segregation in hospitals unconstitutional); *Dawson v. Mayor of the City of Baltimore*, 220 F.2d 386 (4th Cir. 1955) (banning segregation on public beaches and in bathhouses); *Watson v. City of Memphis*, 373 US 526 (1963) (prohibiting segregation in parks and recreational facilities); *Shuttlesworth v. City of Birmingham, Ala.*, 394 US 147 (1969) (holding that an arrest of peaceful marchers violated the right to assemble in public places).

⁵⁷ See *Grutter v. Bollinger*, 539 US 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 US 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 US 469 (1989); see generally, J. Rubinfeld, *The Anti-Antidiscrimination Agenda*, 111 Yale L.J. 1141 (2002).

⁵⁸ See *Grutter v. Bollinger*; *Adarand Constructors, Inc. v. Pena*, 515 US 200 (1995).

⁵⁹ See *Grutter v. Bollinger*; *Shaw v. Hunt*, 517 US 899 (1996).

⁶⁰ Equal Rights Amendment, H.J.R. Res. 208, 92nd Cong. (1971).

⁶¹ See *Craig v. Boren*, 429 US 190 (1976).

⁶² See *Lawrence v. Texas*, 539 US 558 (2003); *Pennell v. City of San Jose*, 485 US 1 (1988).

The equal protection principle is substantially limited by three doctrines. First, it only applies to discrimination by the State and its subdivisions and agents (the ‘state action’ requirement).⁶³ Second, it is limited to intentional discrimination (the ‘intent’ test).⁶⁴ Third, the Supreme Court has recently read the principle as applying with nearly as much force to policies favoring minority groups as those disfavoring them (the ‘color-blindness’ doctrine), thus narrowing the ability of the States (and even the US Congress) to take affirmative actions to promote opportunities for disadvantaged minorities.⁶⁵ Because of these limitations, the most common sources of US non-discrimination law are statutes, regulations and executive orders, as discussed below.

US statutory equality law – federal law

In the 1960s the US Congress enacted three major civil rights statutes; along with their implementing regulations and an executive order, they remain the principal sources of statutory equality law at the federal level. Each of the statutes can be tied to the progress of the social movement for civil rights, and the strained yet critical working relationship between Rev. Dr. Martin Luther King Jr. and President Lyndon B. Johnson.

The first of the statutory acts was the 1964 Civil Rights Act, which was initially introduced during the administration of President Kennedy in response to the Birmingham crises, but was passed, following the longest Senate filibuster in US history, at the urging of his successor, President Johnson.⁶⁶ The Act prohibits discrimination based on race, color, religion, or national origin by private and public entities in access to public accommodations (such as hotels, restaurants, and theatres);⁶⁷ and prohibits discrimination based on these same factors (race, color, religion, or national origin) or sex,⁶⁸ by private employers of 15 or more employees.⁶⁹ It prohibits discrimination based on race, color or national origin by publicly funded educational institutions, and by public entities that receive funds from the federal government.⁷⁰ In 1972, it was amended to prohibit employment discrimination by public, as well as private, employers.⁷¹

The employment discrimination prohibition (Title VII) was initially broadly construed by the US Supreme Court and Circuit Courts of Appeal, which held that the Act applies to facially neutral policies that have a disparate impact (subject to affirmative defenses for business necessity and job relatedness);⁷² the burden of proof is easily shifted to the employer;⁷³ harassment, including sexual harassment without economic consequences, is covered by the prohibition of discrimination;⁷⁴ and the class action device is favored.⁷⁵ Subsequent decisions have cut back on these principles and raised a variety of roadblocks, setting off a series of long-standing disputes with Congress, which has amended the employment discrimination section several times to reverse decisions by the Court, as further discussed below.

⁶³ See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971).

⁶⁴ See *Personnel Administrator of Massachusetts v. Feeney*, 442 US 256 (1979); *Washington v. Davis*, 426 US 229 (1976).

⁶⁵ See *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 US 701 (2007); *Gratz v. Bollinger*, 539 US 244 (2003).

⁶⁶ B. and C. Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act 1-2* (Seven Locks Press 1985), p.200.

⁶⁷ 42 USC. § 2000a(a)-(b) (2006).

⁶⁸ 42 USC. § 2000e-2 (2006).

⁶⁹ 42 USC. § 2000e(b) (2006).

⁷⁰ 42 USC. § 2000d (2006).

⁷¹ 92 P.L. 261 (public employees).

⁷² *Griggs v. Duke Power Co.*, 401 US 424 (1971).

⁷³ *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 344 (8th Cir. 1972).

⁷⁴ *Meritor Savings Bank, FSB v. Vinson*, 477 US 57, 64 (1986).

⁷⁵ See for example *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968), *Bowe v. Collgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969).

Sylvia | 1962



Olivia | 1999



David | 1993



In 1965, on the heels of the Selma crises, Congress passed the Voting Rights Act, providing for federal oversight of States and communities with a record of suppressing minority voting.⁷⁶ The act was re-authorized in 1970, 1975, 1982 and 2006.⁷⁷

Also in 1965, President Johnson issued Executive Order 11246, which prohibits private companies providing goods or services to the federal government from discriminating based on race, and requires them to establish 'affirmative action' programs and policies to increase the number of minority employees and sub-contractors.⁷⁸ This expanded an earlier executive order by President Kennedy, which is generally identified as the initial source of the US policy of affirmative action.⁷⁹

In 1967, Congress passed the Age Discrimination in Employment Act, protecting workers over age 40 from age discrimination.⁸⁰

In 1968, in the days following the assassination of Dr. King, Congress passed the Fair Housing Act, prohibiting most housing discrimination based on race, color, religion or national origin.⁸¹ And, later that same year the Supreme Court found that the long dormant 1866 and 1867 Civil Rights Acts, prohibiting private racial discrimination, which had been ignored since the end of Reconstruction, remained valid.⁸²

Since 1968, Congress has passed several laws intended to broaden federal civil rights, either to include more groups or to reverse Supreme Court decisions. In 1972, Congress extended the prohibition of discrimination by educational institutions to prohibit sex discrimination (Title IX).⁸³ In 1973 Congress passed the Rehabilitation Act, which prohibited government employers and contractors from discriminating on the basis of disability.⁸⁴ In 1975, Congress passed the Education for All Handicapped Children Act, subsequently re-named the Individuals with Disabilities Education Act, which requires public schools to provide equal access to students with disabilities.⁸⁵ In 1978, Congress passed the Pregnancy Discrimination Act, reversing the Supreme Court's decision that 'pregnancy discrimination' was not 'sex discrimination' under the 1964 Civil Rights Act.⁸⁶ In 1990, Congress passed the Americans with Disabilities Act, prohibiting discrimination in employment, and requiring access to public accommodations for persons with disabilities.⁸⁷ The Act was amended in 2008 to reverse several Supreme Court decisions limiting its effect.⁸⁸ In 1990 Congress passed a 'Civil Rights Restoration Act' to reverse several Supreme Court decisions,

⁷⁶ 42 USC. §§ 1973-1973aa-5 (2006).

⁷⁷ Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Pub. L. No. 94-73, 89 Stat. 400 (1975); Voting Rights Act Amendments of 1982 Pub. L. No. 97-205, 96 Stat. 131, F. L. Hamer, R. Parks, and C. Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 Pub. L. No.109-246, 120 Stat. 577.

⁷⁸ Exec. Order No. 11246 (1965).

⁷⁹ Exec. Order No. 10925 (1961).

⁸⁰ 29 §§ USC. 621-634 (2006).

⁸¹ 42 § USC. 3604 (2006).

⁸² *Jones v. Alfred H. Mayer Co.*, 392 US 409 (1968).

⁸³ Patsy Takemoto Mink Equal Opportunity in Education Act Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 USC. § 1681 (2006)).

⁸⁴ Employment Opportunities For Individuals With Disabilities Act of 1973 Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at §§ 29 USC. 791-793 (2006)).

⁸⁵ Education For All Handicapped Children Act of 1975 Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 USC. § 1400 (2006)).

⁸⁶ Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 USC. § 2000e(k) (2006)), in response to *General Electric Co. v. Gilbert*, 429 US 125 (1976).

⁸⁷ 42 USC. §§ 12101-12213.

⁸⁸ ADA Amendments Act of 2008 Pub. L. No. 110-325, 122 Stat. 3553 (overriding, for example, *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 US 184 (2002)).

but it was vetoed by President George H. W. Bush.⁸⁹ It was re-passed and signed in slightly different form in 1991.⁹⁰ In 1994, Congress enacted the Violence Against Women Act.⁹¹ In 2009 Congress passed the 'Lilly Ledbetter Fair Pay Act', reversing a Supreme Court decision that held that the statute of limitations in pay cases ran from the first pay disparity, even if the Plaintiff did not know she was being paid less than her male co-employees; it was the first bill signed by President Barack Obama.⁹² Congress is currently considering a bill that would prohibit employment discrimination based on sexual orientation.⁹³

Beginning in the 1980s, Congressional expansion of equality rights has been resisted by an increasingly conservative Supreme Court. For example, the Court initially held in 1971 that Title VII prohibited not only intentional but also unintentional (or 'adverse impact') discrimination, which is comparable to European 'indirect' discrimination. The Supreme Court limited this doctrine in 1989,⁹⁴ though it was restored by Congress in the Civil Rights Act in 1991.⁹⁵ Similarly, in the *McDonnell Douglas* case (1973)⁹⁶ the Court held that the claimant's burden in an employment discrimination case was easily shifted to the defendant, but a line of cases beginning in the 1980s restricted this holding.⁹⁷ In several cases, the Court has rejected affirmative action regulations authorized by Congress requiring government contractors to attempt to use more minority and women-owned subcontractors, on the grounds that the regulations interfered with the equality rights of white men.⁹⁸ The Court had initially broadened the prevailing view of the reach of the sex discrimination prohibition in 1986 when it held that sexual harassment in the workplace is unlawful sex discrimination, even when it causes no tangible economic effect. But in 1998 it provided defenses for employers that have undercut the effectiveness of sexual harassment claims.⁹⁹ And, the Supreme Court recently held that efforts by school districts to prevent racial segregation of schools by assigning students based on their race violated the principle of color-blindness.¹⁰⁰ Chief Justice Roberts wrote that 'the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.'¹⁰¹

Similarly, in some cases the Court has restricted federal equality rights by holding them beyond the constitutional authority of Congress. Thus, the Court has held that Congress acted improperly in extending the protections of the Age Discrimination in Employment Act and the Americans with Disabilities Act to State government employees.¹⁰² And the Court ruled that Congress exceeded its authority when, in the Violence Against Women Act, it created a federal court civil claim for damages for women who were victims of sexual violence.¹⁰³

In a case expected to have a dramatic effect on employment discrimination cases, the Supreme Court recently reinterpreted the procedural requirements for pleading a claim in federal court, overruling

⁸⁹ 136 Cong. Rec. 31,868-69 (10/22/1990).

⁹⁰ Civil Rights Act of 1991 Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 USC. § 1981 (2006)).

⁹¹ Violence Against Women Act of 1994 Pub. L. No. 103-322, 108 Stat. 1796.

⁹² Pub. L. No. 111-2, 123 Stat. 5 (2009) amending 42 USC. § 2000e-5(e); overriding *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 US 618 (2007); Sheyl Gay Stolberg, *Obama Signs Equal-Pay Legislation* (N.Y. Times, 29.01.2009). <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>.

⁹³ H.R. 3017, 111th Cong. (2009).

⁹⁴ *Wards Cove Packing Co. v. Atonio*, 490 US 642 (1989).

⁹⁵ Civil Rights Act Of 1991 Pub. L. No. 102-166, 105 Stat. 1071 codified as 42 USC. § 2000e-2 (2006).

⁹⁶ *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972).

⁹⁷ See for example *St. Mary's Honor Center v. Hicks*, 509 US 502 (1993).

⁹⁸ *Adarand Constructors Inc., v. Peña*, 515 US 200 (1995). *City of Richmond v. J.A. Croson Co.*, 488 US 469 (1989).

⁹⁹ *Burlington Industries, Inc. v. Ellerth*, 524 US 742 (1998); *Faragher v. City of Boca Raton*, 524 US 775 (1998).

¹⁰⁰ *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 US 701 (2007).

¹⁰¹ *Ibid.*, at p. 748.

¹⁰² *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 US 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 US 62 (2000).

¹⁰³ *United States v. Morrison*, 529 US 598 (2000).

long-standing precedent.¹⁰⁴ The new interpretation requires plaintiffs to plead many more facts to avoid dismissal, which is particularly difficult in cases where an employer/defendant is in possession of most of the relevant information. A bill has been introduced in Congress to require courts to return to the earlier standard.¹⁰⁵

Despite these limitations, the federal civil rights statutes provide several procedural devices that make them very attractive to claimants. First, the civil rights acts provide for federal agencies to investigate discrimination claims at no cost to the claimant.¹⁰⁶ In 2008, the Equal Employment Opportunity Commission (EEOC) received 95 402 complaints, including 33 937 claims of race discrimination, 28 372 claims of sex discrimination, 24 582 claims of age discrimination, 19 453 claims of disability discrimination, 10 601 claims of national origin discrimination, and 3 273 claims of religious discrimination.¹⁰⁷ In 2009 the agency recovered \$338 million through settlement and conciliation, and an additional \$80 million through litigation.¹⁰⁸ In 2008 the Department of Housing and Urban Development (HUD) investigated 10 552 claims of housing discrimination. Approximately one in three was settled or litigated by the agency.¹⁰⁹ And the Department of Education, Office of Civil Rights (DOE, OCR) investigated 6 194 complaints of discrimination against educational institutions.¹¹⁰ When cases are unresolved at the administrative level, claimants may bring a civil action in the United States District Courts; in 2006, 32 865 civil rights claims were filed in these federal courts.¹¹¹ And although the usual rule in US civil litigation is that each side must pay its own attorneys, in federal statutory civil rights cases prevailing plaintiffs are entitled to have their attorneys' fees paid by the defendant.¹¹²

Specialized federal administrative sources of US equality law

Numerous federal agencies in specialized areas such as securities law, food and drug law, transportation, and military affairs have anti-discrimination language in their enabling legislation and/or in their administrative regulations.¹¹³ They may have internal procedures which an employee or contractor may invoke to complain of discrimination, although in most cases the procedures are not mandatory, or are

¹⁰⁴ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

¹⁰⁵ S. 1504, 111th Cong. (2009).

¹⁰⁶ Equal Employment Opportunity Commission (EEOC) <http://www.eeoc.gov/youth/filingfaq.html#Q1> (last visited 02.02.2010), Department of Housing and Urban Development (HUD) <http://www.hud.gov/offices/fheo/complaint-process.cfm> (last visited 02.02.2010).

¹⁰⁷ EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited 02.02.2010).

¹⁰⁸ EEOC, <http://www.eeoc.gov/eeoc/enforcement/index.cfm> (last visited 02.02.2010), EEOC <http://www.eeoc.gov/eeoc/litigation/index.cfm> (last visited 02.02.2010).

¹⁰⁹ The State of Fair Housing FY 2008 at 30. <http://www.hud.gov/content/releases/fy2008annual-rpt.pdf> (last visited 02.02.2010).

¹¹⁰ Department of Education, Office of Civil Rights Fiscal Year 2010 Budget Request at 20. <http://www2.ed.gov/about/overview/budget/budget10/justifications/cc-ocr.pdf> (last visited 02.02.2010).

¹¹¹ Bureau of Justice Statistics Special Report: Civil Rights Complaints in US District Courts, 1990-2006. <http://bjs.ojp.usdoj.gov/content/pub/pdf/crcusdc06.pdf>.

¹¹² See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 US 240 (1975); But see Civil Rights Attorney's Fees Awards Act of 1976, 42 USC. § 1988(b) (2006).

¹¹³ See Securities Exchange Act of 1934, 15 USC. § 78a *et seq.* (2009); Food, Drug and Cosmetic Act, 21 USC. § 301 *et seq.* (2005); Department of Transportation Act, 49 USC. § 306 (2003); See also Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. No. 107-174, 116 Stat. 566 (holding federal agencies accountable for violations of antidiscrimination and whistleblower protection laws).

a mandatory first step but are not exclusive, requiring only that the administrative remedy be exhausted before other remedies are sought.¹¹⁴

State and local sources of equality law

Several States, beginning with New York in 1945,¹¹⁵ and including New Jersey, Massachusetts, Illinois and California, had enacted anti-discrimination statutes prior to the federal 1964 Civil Rights Act.¹¹⁶ The federal law recognized that these State laws provided an independent basis for relief, which has become very important as federal courts have restricted the federal laws.

For example, a 1982 decision by the California Supreme Court permits claimants to be awarded emotional distress and punitive damages, in an amount determined by a jury.¹¹⁷ Federal law first permitted the award of emotional distress and punitive damages in the 1991 Civil Rights Restoration Act, and limits the damages awarded to \$250 000.¹¹⁸ Thus, although the State and federal courts have concurrent jurisdiction over employment discrimination cases, a study (by this author) of employment discrimination jury verdicts in California, reveals that nearly all reported verdicts were in cases tried in state court, rather than federal court.¹¹⁹

State law may cover types of discrimination for which there is no protection under federal law. For example, nearly half the States prohibit employment discrimination based on sexual orientation, and many also offer the same protection in the area of public accommodations and/or housing, while federal law does not.¹²⁰ Some States offer protection from discrimination based on political viewpoint or expression, a protection offered under federal law only to public employees.¹²¹ While the federal anti-discrimination employment statute applies only to employers of 15 or more employees, some states cover smaller employers (California's statute applies to employers of five or more employees).¹²²

And, although the public enforcement agencies that assist discrimination claimants are non-partisan and required to be non-political, many civil rights advocates believe that in times when the federal executive

¹¹⁴ See for example Memorandum from the Commissioner of Food and Drugs to All FDA Employees (10 Feb 2009. <http://www.fda.gov/AboutFDA/WorkingatFDA/EqualEmploymentatFDA/UCM062199.htm> (last visited 02.02.2010). See also HUD Alternative Dispute Resolution, <http://www.hud.gov/offices/odeeo/resolution.cfm> (last visited 02.02.2010), HUD Equal Employment Opportunity <http://www.hud.gov/offices/odeeo/eeo.cfm> (last visited 02.02.2010).

¹¹⁵ Law Against Discrimination, N.Y. Executive Law, § 296 (1945).

¹¹⁶ The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 (1945); Massachusetts Fair Employment and Practice Act, Mass. General Law 151B (1946); Illinois Fair Employment Practices Commission, Record Group 418.000 (1961); California Fair Employment Practices Act, Cal. Gov. Code §§12900-12996 (1959).

¹¹⁷ See *Commodore Home Systems, Inc. v. Superior Court*, 32 Cal. 3d 211 (1982).

¹¹⁸ Civil Rights Restoration Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

¹¹⁹ D. B. Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, (37 U.C. Davis L. Rev. 511 (2003)).

¹²⁰ See for example Cal. Gov. Code §§ 12920, 12940, 12926, 12949; Colo. Rev. Stat. § 24-34-401, Conn. Gen. Stat. §§ 46a-81c, 46a-81ac; Del. Code Ann. tit. 19 § 711; D.C. Code §§ 2-1402.11, 2-1402.11; Haw. Rev. Stat. §§ 368-1, 378-2; 775 Ill. Comp. Stat. 5/1-103, 5/1-102; Iowa Code §§ 216.2, 216.6; Me. Rev. Stat. Ann. tit. 5 §§ 4571-76; Md. Code Ann. Art. 49B §§ 14, 16; Mass. Gen. Laws ch. 151B, §§ 3(6), 4; Minn. Stat. Ann. §§ 363A.02, 363.03; Nev. Rev. Stat. §§ 610.185, 613.340, 613.405, 613.330; N.H. Rev. Stat. Ann. §§ 354-A:6, 21-I:42, 52, 58, N.J. Stat. Ann. § 10:5-4; N.M. Stat. § 28-1-7; N.Y. Exec. Law § 296; Or. Rev. Stat. 659A.003; R.I. Gen. Laws §§ 28-5-5, 28-5-7, 28-5-5, 28-5-7; Vt. Stat. Ann. tit. 21 § 495; Wash. Rev. Code §§ 49.60.010, 49.60.030 (1), 49.60.040 (15); Wis. Stat. §§ 106.50, 106.52, 111.31, 224.77, 230.18.

¹²¹ See District of Columbia Human Rights Act of 1977, District of Columbia Code § 2-1402.11 (2007); New York Labor Law § 201-d (amended 1993).

¹²² California Fair Employment and Housing Act, Government Code §12900-12996, § 12926(d) (2009).

branch is controlled by conservatives, claimants may receive greater assistance from some of the State anti-discrimination agencies.¹²³

Local governments may also pass anti-discrimination legislation, which may expand (but not contract) rights under state and federal law. Many large cities, including New York, Chicago, Los Angeles and San Francisco, have their own anti-discrimination laws, with administrative agencies to enforce them.¹²⁴

State constitutional law as a source of US equality law

In some States, the State Constitution may have broader equality guarantees than those provided under the federal Constitution. For example, under the California Constitution, actions may be brought against private parties as there is no 'state action' requirement,¹²⁵ and all persons are provided a right to pursue an occupation without discrimination based on sex.¹²⁶ This provision has been held to apply in situations where the state and federal statutes are, for various reasons, inapplicable.¹²⁷

Common law sources of US equality law

Sources of State law in the United States may be statutory (as discussed above), constitutional, or common law. In many states, the common law of torts and contract provides additional sources of equality law.¹²⁸ These sources may be favored by claimants at times because they may supply longer statutes of limitations; because they may not be subject to an exhaustion of administrative remedies, as required by some anti-discrimination statutes; or because they apply to employers too small to be subject to the anti-discrimination statutes.¹²⁹

Under tort law, in appropriate cases discrimination claimants may bring claims of defamation, assault, battery, negligent hire, negligent supervision, wrongful discharge in violation of public policy, and myriad related theories.¹³⁰ Many of the early developments in US sexual harassment law developed as tort law prior to the recognition of sexual harassment as a form of sex discrimination prohibited by the

¹²³ See for example E.Cose, *The GOP's Civil Rights Problem*, (Newsweek, 10.12.2009). <http://www.newsweek.com/id/226382>; N. A. Lewis, *Justice Dept. Reshapes Its Civil Rights Mission*, (N.Y. Times, 14.06.2007). <http://www.nytimes.com/2007/06/14/washington/14discrim.html>.

¹²⁴ See New York City Commission on Human Rights, N.Y. City, N.Y., Admin. Code tit. 8 §§ 1-7 (1991). <http://www.nyc.gov/html/cchr/html/hrlaw.html>; Chicago Human Rights Ordinance, Chic., Ill., Ordinance 2-160-010 through 2-160-120. <http://egov.cityofchicago.org/city/webportal/home.do>; Los Angeles County Commission on Human Relations, Los Angeles, Ca., Admin. Code ch. 2.78. http://search.municode.com/HTML/16274/_DATA/TITLE02/index.html; San Francisco Human Rights Commission, San Francisco, Ca., Admin. Code ch. 12A, <http://library.municode.com/index.aspx?clientId=14131&stateId=5&stateName=California>.

¹²⁵ Ca. Const., art. 1(7).

¹²⁶ Ca. Const., art. 1(8).

¹²⁷ *Rojo v. Kliger*, 52 Cal. 3d. 65 (1990).

¹²⁸ *Stevenson v. Superior Court*, 16 Cal. 4th 880 (1997).

¹²⁹ Cal. Civ. Proc. §§ 335.1, 337, 338 (imposing a statute of limitations from 1- 4 years for certain tort actions), *Stevenson v. Superior Court*, 16 Cal. 4th 880 (1997) (holding that state statute applies to employers with five or more employees), *Rojo v. Kliger*, 52 Cal 3d. 65 (1990) (holding that plaintiffs did not have to exhaust administrative remedies to pursue an independent action under a non-statutory theory in court).

¹³⁰ *Brown v. Superior Ct.*, 37 Cal. 3d 477 (1984) (holding that common law theories are applicable in discrimination cases even if they do not directly relate to discrimination); See also *Destefano v. Grabrian*, 763 P.2d 275, 287-288 (Colo. 1988); *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523 (1981); *Hawaiian Airlines v. Norris*, 512 US 246 (1994); *Rojo v. Kliger*, 52 Cal 3rd 65 (1990).



anti-discrimination statutes.¹³¹ In some States, these tort theories (or some of them) may expose the defendant to emotional distress and/or punitive damages in amounts higher than those recoverable under the anti-discrimination statutes.¹³²

Discrimination may also be regarded as a breach of the employment contract, or a breach of the implied covenant of good faith and fair dealing, which is generally regarded as an unstated term in US contracts.¹³³ In most States, however, contract claims are a last resort for claimants, because they only permit the remedy of economic damages, and probably do not permit attorneys' fees to be shifted.¹³⁴

Private sources of US equality law

Some employers may provide private anti-discrimination rights separate from, and even potentially more extensive than, rights provided by statutory or common law. These rights are often part of a package in which the employer and employee agree to use an alternative to the civil litigation system, such as private arbitration (discussed below). Employers who have negotiated contracts with unions may be obligated to comply with certain anti-discrimination policies provided in the collective bargaining agreement, which may be similar but not identical to the rights provided by statute.¹³⁵ The US Supreme Court has held that these agreements do not bind the government.¹³⁶ Thus the EEOC or other agencies may bring a civil or administrative complaint even if the employees have waived their statutory rights. But the Court has recently held that a union may waive an employee's procedural rights,¹³⁷ and the probable direction of the Court's view is that a union may waive an employee's substantive civil rights as well. If the Court so holds, it seems likely to this author that there will be yet another showdown between the Court and Congress.

Private enforcement of US equality law

An increasing number of US employers require their employees, as a condition of employment, to waive their right to bring employment discrimination cases in civil court. The employer usually imposes a system of private arbitration. Where the arbitration system appears even-handed, the Supreme Court has held that the waiver of procedural rights is proper.¹³⁸ A bill is currently pending in Congress to prohibit mandatory waivers of this sort.¹³⁹

¹³¹ See *Barnes v. Costle*, 561 F.2d 983 (1977) (J. Mackinnon, concurring, 'An act of sexual harassment ... would constitute a tort. Four other district courts have considered the question presented here; each has started from ... a tort perspective' (citing *Tomkins v. Public Service Electric & Gas Co.*, 13 F.E.P.C. 1574 (D.N.J. 1976); *Williams v. Saxbe*, 12 F.E.P.C. 1093 (D.D.C. 1976); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976); *Corne v. Bausch & Lomb*, 390 F. Supp. 161 (D. Ariz. 1975)).

¹³² See *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379 (1987); *Farmer v. United Brotherhood of Carpenters & Joiners*, 430 US 290 (1977), *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523 (1981).

¹³³ See *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (stating that there is an implied covenant of good faith and fair dealing in employment contracts).

¹³⁴ See *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (1988) (holding that punitive damages are not available for breach of the implied covenant of good faith and fair dealing in contracts by an employer and discussing unavailability of attorneys fees in contract actions).

¹³⁵ See *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 US 362 (1990).

¹³⁶ See *EEOC v. Waffle House, Inc.*, 534 US 279 (2002).

¹³⁷ See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009); But see *Alexander v. Gardner-Denver Co.*, 415 US 36 (1974).

¹³⁸ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 33 (1991).

¹³⁹ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

International sources of US equality law

The United States is a signatory to several international treaties that prohibit discrimination, including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on Eliminating All Forms of Discrimination Against Women (CEDAW) (signed but not ratified), and the Convention on the Rights of Persons with Disabilities (CRPD) (signed but not ratified).¹⁴⁰ It is rare, however, that US courts give direct effect to the treaties, or even refer to them as an auxiliary source of equality law.¹⁴¹ When members of the US Supreme Court have referred to the law of other nations in support of broad principles of law, the citation is viewed as highly controversial.¹⁴² Some US scholars and activists have proposed that US courts pay greater attention to these treaties and to the equality law decisions of other courts, including the European Court of Justice and European Court of Human Rights.¹⁴³

Conclusion

A person making a claim of discrimination in the United States must consider the availability of US and State constitutional law; US, State and local statutory law; US and State administrative law; State common law; private law; and (perhaps) international law. A claimant is wise to cast a wide net in the search for remedies, rather than relying on only the federal civil rights statutes, because as quickly as the Congress is expanding these rights, the US Supreme Court is restricting them.

¹⁴⁰ ICERD, 660 U.N.T.S.195 (1966) (ratified 21.10.1994); CEDAW, 1249 U.N.T.S. 13 (1979) (17.07.1980); CRPD 46 I.L.M. 443 (2006) (30.07.2009).

¹⁴¹ See for example *Medellin v. Texas*, 552 US 491 (2008) (holding that the Vienna Convention and Optional Protocol did constitute enforceable domestic law despite a memorandum from the President and a International Court of Justice ruling); See also United States Declarations and Reservations declaring the treaty non-self-executing. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec.

¹⁴² See for example J.O. McGinnis, *Foreign to Our Constitution*, 100 Nw. U. L. Rev. 303, 306 (2006) (stating 'these materials [foreign authority] are used to invalidate the results of the democratic process based on some notion of evolving standards' referring to *Lawrence v. Texas*, 539 US 558 (2003), *Atkins v. Virginia*, 536 US 304 (2002), *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005)); S. G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1130 (2004) ('[I]n *Lawrence* itself, foreign law ought not to be deemed relevant to constitutional decision making').

¹⁴³ See for example Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 125 (2006) ('international law has been a part of US constitutional interpretation from the beginning and a principled resort to international law is fully part of the American tradition'); M. Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-US Law*, 90 Minn. L. Rev. 1275, 1277 (2006) ('My goal in this essay is simply to lay out the criticisms of the use of non-US law in constitutional interpretation, so as to identify what might be correct (not much, in the end) in those criticisms').

European Legal Policy Update

European Commission closes legal cases on Austria and Finland

The European Commission decided on 8 October 2009 to cease infringement proceedings against Austria and Finland following their correct and complete implementation of EU rules to tackle discrimination in the workplace. The cases had been opened because national legislation in both countries was incompatible with the Employment Equality Directive 2000/78/EC.

In particular, the Commission had sent a reasoned opinion to Finland stressing that the prohibition of discrimination based on sexual orientation was not complete and the exception allowed by the Directive in the case of a genuine and determining requirement linked to the nature of the work was adopted in national law without all the guarantees stipulated by the Directive. Finland adopted new laws in 2007 and 2008.

In the letter of formal notice sent to Austria, the Commission pointed out that national law was not in conformity regarding definition of harassment, lack of appropriate sanctions in the case of discriminatory dismissals and lack of transposition of the rules on victimisation. At federal level, Austria amended its legislation in 2008 to take account of the Commission's remarks.

Internet link source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1467&format=HTML&aged=0&language=EN&guiLanguage=en>

European Commission sends reasoned opinion to the UK and closes cases for Slovakia and Malta

On 20 November 2009 the European Commission sent a reasoned opinion to the United Kingdom for incorrectly implementing the Employment Equality Directive. It has also decided to close infringement proceedings concerning the same Directive against Slovakia and Malta as their national legislation has been brought into line with EU requirements.

In the reasoned opinion sent to the United Kingdom, the Commission pointed out that there is no clear ban on 'instruction to discriminate' in national law and no clear appeals procedure for disabled people; in addition, the exceptions to the principle of non-discrimination on the grounds of sexual orientation for religious employers are broader than those permitted by the Directive.

In the letter of formal notice sent to Slovakia, the Commission had argued that its national legislation was not in conformity with EU rules regarding the definitions of the principle of equal treatment and of harassment; the exclusion of third country nationals from the application of the principle of non-discrimination arising from national justifications of differences of treatment; the obligation to provide reasonable accommodation to disabled employees; as well as regarding justification of differences of treatment on grounds of age. Slovakia has in the meantime adopted new laws taking into account the Commission's comments, which brought national law in line with the Directive.

The infringement proceeding against Malta has also been closed. In the reasoned opinion sent to Malta, the Commission mentioned the lack of protection against discrimination for civil servants and the restriction in Maltese law on access to justice for self-employed people. Malta has since amended the national anti-discrimination law to bring it in line with the Directive.

Internet link source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1778&format=HTML&aged=0&language=EN&guiLanguage=en>

Commission closes legal cases after Spain, Slovakia and Malta adapt racial equality laws

The European Commission decided on 20 November 2009 to close infringement proceedings against Spain, Slovakia and Malta after their successful implementation of EU rules to tackle racial discrimination. The cases had been opened because national legislation in these countries was incompatible with the Racial Equality Directive 2000/43/EC.

For Spain, the Commission had stressed that the required protection against victimisation was not complete and that the Equality body, although formally created by the law transposing the Directive in 2003, had not been established in practice. The first issue was clarified by Spain, in particular by citing the applicable constitutional case law on judicial protection of human rights. The second issue was solved by an implementing regulation and by the fact that in the meantime the Equality body had become operational.

The Commission had also pointed out to Slovakia that national law was not in conformity on the following points: application of the principle of equal treatment, definition of harassment, the concept of social advantage, the cases in which a difference of treatment could be justified, and the fact that the principle of non-discrimination did not apply to non-Slovak European citizens. Slovakia amended its legislation, bringing it in line with the Directive.

Regarding Malta, the Commission had raised concerns regarding an exception in national legislation for banks and financial institutions, but this has been satisfactorily explained by Malta. In addition, the independence of the Equality body had not been mentioned in the Equality for Men and Women Act, and the word 'determining' had been missing from the Maltese legislative provision relating to the exception for 'genuine and determining occupational requirements'. Malta has now brought its legislation into line with the Directive.

Internet link source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1783&format=HTML&aged=0&language=EN&guiLanguage=en>

European Court of Justice Case Law Update

References for preliminary rulings – Advocate General Opinions

*Case C-341/08 Opinion of Advocate General Bot in the case of Dr Dominica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, delivered on 3 September 2009*¹⁴⁴

A reference for a preliminary ruling was made to the European Court of Justice by the Dortmund Social Court (*Sozialgericht*) of Germany on 24 July 2008 regarding the interpretation of the justification of differences of treatment on the grounds of age and in particular of a clause in national legislation under which permission to practise as a panel dentist expires at the end of the calendar quarter in which the panel dentist reaches the age of 68. To summarise, Dr Petersen was admitted to practise as a panel dentist from 1 April 1974 and reached the age of 68 in 2007.

By a decision of 25 April 2007, the Admissions Board for Dentists for the District of Westphalia and Lippe¹⁴⁵ found that her authorisation to provide panel dental care would expire on 30 June 2007. Dr Petersen lodged a complaint against this decision, arguing in particular that it was contrary to Directive 2000/78/EC and the German anti-discrimination law. When her complaint was rejected, Ms Petersen brought proceedings against the decision before the referring court, the Dortmund Social Court.

The referring court accepted the reasoning of the Federal Constitutional Court (*Bundesverfassungsgericht*) in a 2007 judgment, according to which the age limit is justified by the need to protect patients insured under the statutory health insurance scheme against the risks presented by older panel dentists whose performance could decline after a certain age. The referring court was, however, uncertain whether that analysis is also valid with respect to the Directive and considered that the age limit at issue in the main proceedings is not a measure within the meaning of Article 2(5) of the Directive, since the protection of health, as the legislature itself considered, was not the reason for the adoption of the provision concerned. Nor does the age limit constitute a genuine and determining occupational requirement within the meaning of Article 4(1) of the Directive, in view of the exceptions laid down. Finally, the referring court was doubtful about the compatibility of the provision with Article 6(1) of the Directive.

The Dortmund Social Court therefore asked the ECJ whether Directive 2000/78 must be interpreted as precluding national legislation under which admission to practise as a panel dentist expires at the end of the calendar quarter in which the panel dentist reaches the age of 68. It also raised the question of how to identify the aim in the light of which the justification for a difference of treatment on grounds of age must be assessed by asking whether a legitimate aim within the meaning of Article 6 of the Directive could exist even where that aim was entirely irrelevant to the national legislature in the exercise of its legislative discretion. Finally, if the answers to the above-mentioned questions were negative, the referring court asked if it would be possible not to apply a national law enacted prior to the adoption of the Directive which is incompatible with that Directive, by virtue of the primacy of European law over national law, even where the national law transposing the Directive makes no provision for the primacy of European law in the event of a breach of the prohibition of discrimination by national law.

In his Opinion, Advocate General Bot remarked that the national legislation in question does not explicitly show that the age limit was introduced and maintained based on the presumption that from the age of 68 the quality of care provided by panel dentists diminishes.

¹⁴⁴ See *European Anti-Discrimination Law Review (EADLR)*, issue 8, p. 27.

¹⁴⁵ *Zulassungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*.



The Advocate General recalled that the decisive factor for this age limit in the German law was the maintenance of the financial balance of the statutory health insurance scheme, rather than the diminution in the quality of dental care where it is provided by panel dentists over the age of 68. Otherwise, these dentists would not continue to work where there is inadequate medical provision in a region, to provide cover, or where they have worked for a period of less than 20 years as panel dentists.

Furthermore, the Advocate General reiterated that based on related judgments of the Court, the aims that may be considered 'legitimate' within the meaning of Article 6(1) of the Directive and appropriate for the purposes of justifying derogation from the principle of prohibiting discrimination on grounds of age are social policy objectives, such as those related to employment policy, the labour market or vocational training. He stated that the aim of protecting public health can scarcely be treated as a social policy objective; therefore it should be examined in the context of Article 2(5) of Directive 2000/78 which expressly refers to the protection of health.

He further considered that a member state may adopt a regulatory measure setting an age limit of 68 for practising as a panel dentist, in the context of its power to organise the provision of dental care and with a view to attaining a high level of protection of public health; he also stated that such a measure is appropriate for securing the aim of protecting public health and underlined that in the light of the average ages which are generally adopted in the Member States for eligibility to a retirement pension, setting an age limit of 68 for pursuing the activity of a panel dentist is not disproportionate.

Consequently, he stated that the age limit of 68 may be regarded as necessary for the protection of health within the meaning of Article 2(5) of Directive 2000/78; also, the aim of ensuring that new generations have the opportunity to practise as panel dentists and, more generally, of encouraging the generational renewal of panel dentists constitutes a legitimate aim of social or employment policy. The Advocate General thus concluded that the difference of treatment on grounds of age is objectively and reasonably justified by the aim of ensuring that new generations have the opportunity to practise as panel dentists, and that it does not go beyond what is appropriate and necessary to achieve that aim; he therefore proposed that Articles 2(2)(a) and (5) and 6(1) of Directive 2000/78 must be interpreted as not precluding national legislation under which admission to practise as a panel dentist expires at the end of the calendar quarter in which the panel dentist reaches the age of 68.

Internet link source:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-341/08)

Latest news!

Case C-341/08 Dr Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe,¹⁴⁶
Grand Chamber Judgment of 12 January 2010
OJ C 260 of 11.10.2008, p.8

This Grand Chamber Judgment follows the Advocate General's Opinion discussed above. The European Court referred to its previous decisions, ruling that where the national legislation in question does not specify the aim pursued, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of the measure to be identified for the purposes of review by the courts of whether it is legitimate and whether the means put in place to achieve it are appropriate and necessary.¹⁴⁷ The Court examined the objectives of protecting health through ensuring the competency of practising doctors and dentists and of maintaining the financial balance of the statutory health

¹⁴⁶ See *European Anti-Discrimination Law Review (EADLR)*, issue 8, p. 27 and *European Anti-Discrimination Law Review (EADLR)*, issue 10, p. 33 for further reading on the Opinion of Advocate General Bot.

¹⁴⁷ *Palacios de la Villa*, paragraph 57, and *Age Concern England*, paragraph 45.

insurance scheme from the point of view of Article 2(5). It further accepted that in this context, a Member State may consider it necessary to set an age limit on practising a medical profession in order to protect the health of patients, and this consideration applies whether the objective of the protection of health is considered from the point of view of the competence of dentists or the financial balance of the national healthcare system.

Examining the facts, it emerged from national legislation that the age limit concerns only dentists practising under the panel system, while outside that system, dentists can practise their profession at any age, and patients can consequently be treated by dentists older than 68. The Court considered that, as the measure maintaining that age limit is intended to prevent the risk of serious harm to the financial balance of the social security system in order to achieve a high level of protection of health, which is for the national court to ascertain, the measure may be regarded as compatible with Article 2(5) of the Directive.

The European Court observed that Article 2(5) of the Directive must be interpreted as precluding a national measure setting a maximum age for practising as a panel dentist where the sole aim of that measure is to protect the health of patients against a decline in performance of those dentists after that age, since that age limit does not apply to non-panel dentists; also, that Article 6(1) of the Directive must be interpreted as not precluding such a measure where its aim is to share out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim. The Court thus concluded that it is for the national court to identify the aim pursued by the measure of the age limit, by examining the reason for maintaining that measure. Finally, it ruled that if national legislation was contrary to the Directive, it would be for the national court examining the dispute between an individual and an administrative body to refuse to apply that legislation, even if it were prior to the Directive and national law made no provision for disapplying it.

Case C-555/07 Seda Küçükdeveci v. Swedex GmbH & Co. KG, Judgment of 19 January 2010¹⁴⁸
OJ C 79 of 29.03.2008, p.12

A reference for a preliminary ruling was made to the European Court of Justice on 13 December 2007 regarding differences of treatment on the grounds of age as allowed by Directive 2000/78/EC. The Federal State Labour Court (*Landesarbeitsgericht*) of Düsseldorf asked the ECJ if a national provision stipulating that the periods of notice on termination which employers are required to observe are increased incrementally with the length of service, but disregarding periods of employment before the age of 25, is incompatible with Directive 2000/78/EC. The court also invited the ECJ to provide further clarification on whether the fact that employers are required to observe only a basic period of notice when terminating the employment of younger employees is justified on the grounds that employers are recognised as having a commercial interest in flexibility regarding staffing and that younger employees are not recognised as having the protection available to older employees with respect to their employment status or arrangements because younger employees are assumed to have greater professional and personal flexibility and mobility.

The ECJ noted that the national provision in question affects the conditions of dismissal of employees and remarked that it affords less favourable treatment to employees who entered the employer's service before the age of 25. This national provision thus introduces a difference of treatment between persons with the same length of service, depending on the age at which they joined the undertaking, and should be examined as to whether it constitutes discrimination prohibited by the Directive. The referring court

¹⁴⁸ See *European Anti-Discrimination Law Review (EADLR)*, issue 6/7, p. 57-58 and *European Anti-Discrimination Law Review (EADLR)*, issue 9, p. 35.

indicated that the aim of the national legislation at issue is to afford employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility.

The Court noted that the Member States enjoy a broad discretion in the choice of the measures capable of achieving their objectives in the field of social and employment policy, but this legislation affects young employees unequally, in that it affects young people who enter active life early after little or no vocational training, but not those who start work later after a long period of training. Therefore, the Court concluded that Directive 2000/78 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal. Moreover, the Court decided that it is for the national court to ensure that the principle of non-discrimination on grounds of age is complied with, by not applying if necessary any contrary provision of national legislation.

Internet link source:

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

European Court of Human Rights Case Law Update

Judgments

Féret v. Belgium (no.15615/07), Chamber Judgment of 16 July 2009

The applicant, Mr Féret, is a Belgian national who was born in 1944 and lives in Brussels. As chairman of the political party *Front National-Nationaal Front* he is the editor-in-chief of the party's publications and owner of its website. He was a member of the Belgian House of Representatives at the relevant time. Between July 1999 and October 2001 the distribution of leaflets and posters by his party, in connection with the *Front National's* election campaigns, led to complaints by individuals and associations of incitation of racial hatred, discrimination and violence under a law of 30 July 1981 which penalises certain acts inspired by racism or xenophobia.

In February 2002 Mr Féret was interviewed by the police regarding these complaints. The applicant's parliamentary immunity was waived on the request of the Principal Public Prosecutor at the Brussels Court of Appeal. In November 2002 criminal proceedings were brought against him as author and editor-in-chief of the offending leaflets and owner of the website. In June 2003, in order to be able to rule on the merits, the Brussels Criminal Court re-opened the proceedings. An appeal by Mr Féret concerning the jurisdiction of that first-instance court was declared inadmissible in June 2003, and in March 2004 the Court of Cassation dismissed his appeal on points of law against the Court of Appeal's decision.

In June 2004 the applicant was elected to the Bruxelles-Capitale Regional Council and to the Parliament of the French Community, both positions affording him new parliamentary immunity. The public prosecutor reactivated the proceedings in the same month and on 18 April 2006 the Brussels Court of Appeal sentenced Mr Féret to 250 hours of community service related to the integration of immigrants, together with a 10-month suspended prison sentence. It deprived him of his right to stand for election for ten years. Lastly, it ordered him to pay the symbolic damages of one euro to each of the parties claiming civil compensation.

The Brussels Court of Appeal found that the offending conduct on the part of Mr Féret did not fall within the scope of his parliamentary activity and that the leaflets contained passages that represented a clear and deliberate incitation of discrimination, segregation and hatred, and even violence, for reasons of race, colour or national or ethnic origin. An appeal on points of law by Mr Féret was dismissed on 4 October 2006.

Relying on Article 10 (freedom of expression) of the European Convention on Human Rights, the applicant claimed that his conviction for the content of his political party's leaflets represented an excessive restriction on his right to freedom of expression.

The European Court stated that the interference with Mr Féret's right to freedom of expression had been prescribed by law (Act of 30 July 1981 on racism and xenophobia) and had the legitimate aims of preventing disorder and of protecting the rights of others. It further commented that the leaflets presented the communities in question as criminally-minded and eager to exploit the benefits they derived from living in Belgium, and that they also sought to make fun of the immigrants concerned, with the inevitable risk of arousing, particularly among less knowledgeable members of the public, feelings of distrust, rejection or even hatred towards foreigners.

According to the judgment, while freedom of expression was important for everybody, it was especially so for an elected representative of the people, who represented the electorate and defended their interests. However, the Court reiterated that it was essential for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. It further held that the impact of racist and xenophobic discourse was magnified in an electoral context, in which arguments naturally became more forceful. To recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions. In the present case there had been a compelling social need to protect the rights of the immigrant community, as the Belgian courts had done.

With regard to the penalty imposed on Mr Féret, the Court noted that the authorities had preferred a 10-year period of ineligibility for electoral office rather than a penal option, in accordance with the Court's principle of restraint in criminal proceedings. The Court therefore found that there had been no violation of Article 10 (freedom of expression) and added that the remainder of the application was inadmissible.

Muñoz Díaz v. Spain (no. 49151/07), Third Section Judgment of 8 December 2009

The applicant, ML Muñoz Diaz, a Roma of Spanish nationality, submitted a complaint regarding a refusal to grant her a survivor's pension following the death of MD, also a Roma of Spanish nationality, on the sole ground that they were not a married couple under Spanish law. She alleged that there had been a violation of Article 14 of the Convention together with Article 1 of Protocol No. 1 to the Convention and with Article 12 of the Convention.

The applicant and MD, both members of the Roma community, were married in November 1971 according to their community's own rites. The marriage was solemnised in accordance with Roma customs and cultural traditions and was recognised by that community. For the Roma community, a marriage solemnised according to its customs gives rise to the usual social effects, to public recognition, to an obligation to live together and to all other rights and duties that are inherent in the institution of marriage.

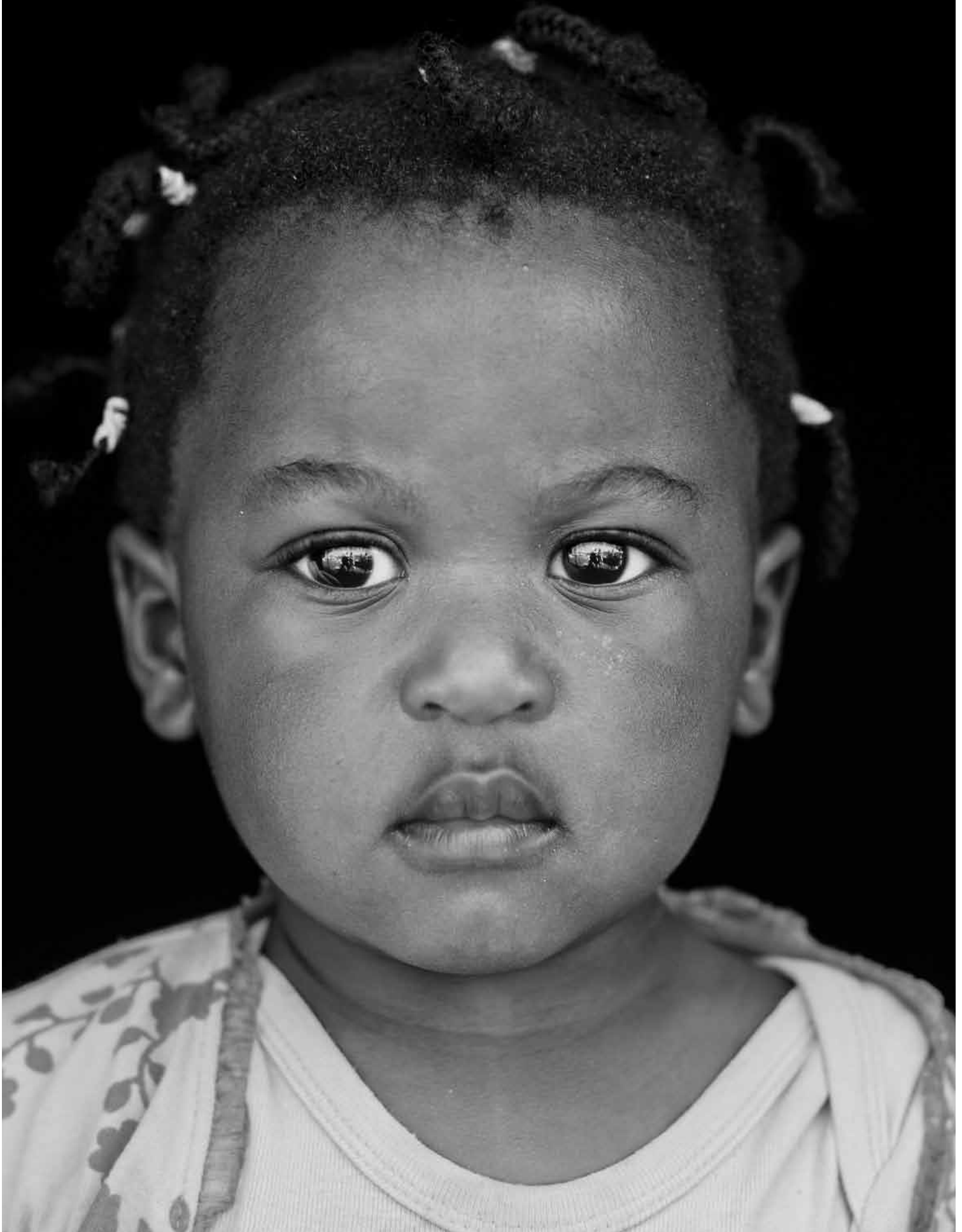
The applicant had six children, who were registered in the family record book issued to the couple by the Spanish civil registration authorities in August 1983. In October 1986 the applicant and her family were granted 'first-category large-family' status.

In December 2000 the applicant's husband died; at the time of his death he had been working and paying social security contributions for 19 years supporting his wife (registered as such) and his six children as his dependants.

The applicant applied for a survivor's pension. The National Institute for Social Security (INSS) refused to grant it on the ground that she '[was] not and [had] never been the wife of the deceased prior to the date of death', as required by the Civil Code and the General Social Security Act.

The applicant lodged a claim with the Labour Court of Madrid. In a judgment of May 2002, she was granted an entitlement to receive a survivor's pension, her Roma marriage therefore being recognised as having civil effects. The judgment said, *inter alia*, that 'Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin is applicable to the present case, where the denied benefit derives from the employment relationship of the insured person, who died from natural causes while he was still working'.

The INSS appealed the decision. In a judgment of November 2002 the Madrid Higher Court of Justice quashed the impugned judgment. The applicant lodged an *amparo* appeal with the Constitutional



Court¹⁴⁹ relying on the principle of non-discrimination on the grounds of race and social condition, but in a judgment of April 2007 the Constitutional Court dismissed the appeal.

The applicant complained that the refusal to grant her a survivor's pension on the grounds that her marriage, which was solemnised according to the rites of the Roma minority to which she belonged, had no civil effects, infringed the principle of non-discrimination of Article 14 of the Convention, together with Article 1 of Protocol No. 1.

The European Court found that it is disproportionate for the Spanish State, which issued the applicant and her Roma family with a family record book, granted them large-family status, provided health-care assistance to her and her six children and collected social security contributions from her Roma husband for over 19 years, now to refuse to recognise the effects of the Roma marriage when it comes to the survivor's pension.

The Court did not accept the Government's argument that it would have been sufficient for the applicant to enter into a civil marriage in order to obtain the pension claimed. As the judgment stipulated, the prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim's claims on the ground that s/he could have avoided the discrimination by altering one of the factors in question – for example, by entering into a civil marriage – would render Article 14 devoid of substance. Consequently, the Court ruled that there has been a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1.

Decisions

Aktas, Bayrakand and others v. France (no. 43563/08, 14308/08, 18527/08, 29134/08, 25463/08, 27561/08, Decision of 30 June 2009)

The plaintiffs were registered to attend state school for the school year 2004-2005, the first school year after adoption of the law prohibiting religious symbols in state schools (Law of 15 March 2004 no. 2004-228).¹⁵⁰ On the first day of school, the four Muslim girls (among the plaintiffs) were wearing the Islamic veil and the two boys were wearing the keski, which is a dark turban smaller than the traditional Sikh turban.

The directors of the schools, holding that these accessories were contrary to the legislative provisions on the prohibition of wearing symbols or clothing expressly showing the students' religion within the school's premises, asked them to remove these. Three out of the four Muslim girls agreed to wear a bonnet. After a mediation period the disciplinary councils of the schools pursued a disciplinary procedure and expelled all six students, whether or not they had changed their garments, on the grounds that they refused to abide by Article L141-5-1 of the Code of Education prohibiting the wearing of religious symbols

¹⁴⁹ Any citizen can submit an *amparo* appeal to the Constitutional Court if s/he considers that some of his or her fundamental rights have been violated by a public authority.

¹⁵⁰ See *European Anti-Discrimination Law Review (EADLR)*, issue 1, p. 50.

or garments. These decisions were challenged before the administrative courts, and the plaintiffs' requests were dismissed by the first instance court and the court of appeal.¹⁵¹

Following this, the plaintiffs submitted an appeal to the *Conseil d'Etat* (the highest administrative court), which dismissed the applications in cassation holding that the prohibition of religious symbols at state schools conformed to the requirements of Article 9 of the European Convention on Human Rights and that the keski and bonnet, although more discreet, remained distinctive religious symbols prohibited by the law.

The plaintiffs petitioned to the European Court of Human Rights between March and September 2008. They claimed insufficient impartiality of the disciplinary procedure on the ground of Article 6 (1), non-respect of their right to private life based on Article 8 of the Convention, violation of freedom of religion on the ground of Article 9 of the Convention, violation of their freedom of expression on the ground of Article 10 of the Convention, and denial of access to education on the ground of Article 2 of Protocol no 1 of the Convention. The European Court reiterated that, according to its jurisprudence, wearing the veil could be considered as 'an act motivated or inspired by a religion or a religious belief'; it further held that since the disciplinary procedure had been subjected to the scrutiny of a competent jurisdiction, the administrative court, the rights of the plaintiffs to present their arguments and be heard with impartiality had been respected. The Court stated that in a democratic society, where many religions coexist, it may be necessary to impose limitations on the freedom of religion appropriate in order to safeguard the different interests of the various social groups and to insure the respect of all religions. It repeated that the State can impose limits on the freedom of manifestation of religion, for instance the wearing of the Islamic veil, if the exercise of this freedom undermines the objective of protecting the rights and liberties of others, public order and public security. The Court further held that the prohibition of all visible religious symbols in state schools was fuelled only by the need to safeguard the constitutional principle of secularity and this objective complied with the principles included in the Convention as well as with the relevant jurisprudence on this issue.

The Court decided that the sanction of permanent exclusion from state school premises did not seem disproportionate; on the contrary, the parties concerned had the option to continue their education through distance learning, in a private establishment, or at home, as was explained by the disciplinary school authorities. It stated that the religious beliefs of the applicants were weighed against the imperative need to protect the rights and freedoms of others and the public order. The Court concluded that the legislative provisions on which the applicants relied in fact existed in order to preserve the neutral and secular character of educational establishments and were applicable to every visible religious symbol. The Court stressed the State's role as neutral and impartial referee responsible for ensuring public order

¹⁵¹ *Aktas c. France*: Administrative Court of Mulhouse 25 July 2005, Administrative Court of Appeal of Strasbourg, 25 May 2006, *Conseil d'Etat* 7 March 2008, unpublished;
Bayrak c. France: Administrative Tribunal of Caen 7 June 2005, Administrative Court of Appeal of Nantes, 8 June 2006, *Conseil d'Etat* 27 September, 2008, unpublished;
Gamaleddyn c. France: Administrative Court of Lyon 25 June 2005, Administrative Court of Appeal of Lyon, 3 June 2006, *Conseil d'Etat* 27 September, 2008, unpublished;
Ghazal c. France: Administrative Court of Nancy 30 August 2005, Administrative Court of Appeal of Nancy, 27 May 2006, *Conseil d'Etat* 5 December, 2008, unpublished;
J. Singh c. France: Administrative Court of Melun 19 April 2005, Administrative Court of Appeal of Paris, 19 July 2005, *Conseil d'Etat* 5 December, 2008, N° 285395, published: <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000018007889&fastReqId=76475577&fastPos=9>;
R. Singh c. France: Administrative Court of Melun 19 April 2005, Administrative Court of Appeal of Paris, 19 July 2005, *Conseil d'Etat* 5 December 2008 N° 285396, published: <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000018007890&fastReqId=76475577&fastPos=10>.

and the respect and protection of all religions and concluded that the objective of safeguarding the constitutional principle of secularity conforms to the underlying principles of the European Convention on Human Rights. It therefore dismissed the petitions.



News from the EU Member States

More information can be found at <http://www.nondiscrimination.net>

*Case law***Actions for annulment of the Flemish Decree of 10 July 2008¹⁵² and the Ordinance of the Region of Brussels-Capital of 4 September 2008¹⁵³**

A trade union organisation¹⁵⁴ which launched an action for the annulment of the Federal Anti-discrimination Act of 10 May 2007¹⁵⁵ for similar reasons launched an action for the annulment of some regional legislation. The Constitutional Court issued the same ruling as in the previous case¹⁵⁶ and expressly referred to it.

The applicants argued that a closed list of grounds of discrimination was discriminatory to all victims of discrimination based on grounds other than those listed in the Flemish Decree and in the Ordinance of the Region of Brussels-Capital. The Court held¹⁵⁷ that the legislator was in a position to appreciate which grounds should be listed in statutory law and benefit from particular legal protection. Moreover, the Court stressed that the victims of discrimination on grounds other than those listed in the Decree and in the Ordinance are not left without any remedy in Belgian law.

On the exclusion of trade union conviction from the closed list of grounds of the Decree and the Ordinance,¹⁵⁸ the Court referred to its Decision no. 64/2009 to rule that this was discriminatory. Consequently, the Court annulled Article 4, 2° and 3° of the Ordinance of the Region of Brussels-Capital of 4 September 2008 and Article 16, § 3 of the Flemish Decree of 10 July 2008, which contain a list of discrimination grounds, but only in as much as they do not mention trade union conviction. The Court duplicated its ruling in Decision no. 64/2009: given that the annulment is precise and comprehensive, until an amendment is made to the legislation, a civil judge faced with a claim of discrimination on the ground of trade union conviction has to apply the partially annulled provisions in conformity with Articles 10 and 11 of the Constitution (which endorse the principle of equality and non-discrimination). Consequently, a civil judge should act as if the criterion of trade union conviction had been enshrined from the beginning in the closed list of discrimination grounds. Conversely, with respect to the criminal provisions of the Act, the Court stressed that the principle of legality does not allow a criminal judge to fill legislative gaps in such a way.

As to the nullity of contractual clauses contrary to the principle of equal treatment, the Court considered that the sanction was applicable to written and non-written contractual clauses. The applicants also argued that the Decree and the Ordinance, which provide that a contractual clause that breaches their provisions is void, do not comply with the constitutional principle of equality and non-discrimination as they refer only to clauses written *before* discriminatory behaviour took place, and not to clauses written at the same time or after the occurrence of the discrimination. According to the Court, as the nullity of

¹⁵² Flemish Decree of 10 July 2008 establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkheidskansen en gelijkebehandelingsbeleid*).

¹⁵³ Ordinance of the Region of Brussels-Capital of 4 September 2008 related to the fight against discrimination and equal treatment in the employment field (*Ordonnance relative à la lutte contre la discrimination et à l'égalité de traitement en matière d'emploi*).

¹⁵⁴ *Landelijke Bediendencentrale – Nationaal Verbond voor Kaderpersoneel* or *Centrale nationale des employés*.

¹⁵⁵ See *European Anti-Discrimination Law Review (EADLR)*, issue 9, p. 47-48.

¹⁵⁶ *Ibid.*

¹⁵⁷ Constitutional Court decisions no. 122/16.07.2009 & 123/16.07.2009.

¹⁵⁸ These pieces of legislation cover the same grounds of discrimination as those covered by the three Anti-discrimination Federal Acts of May 2007. In addition, they cover the ground of language.

discriminatory provisions is a rule of public policy (*ordre public*), there is no justification for thus limiting it. Consequently, for the avoidance of doubt, the Court deleted the words 'in advance' in Article 27, § 1 of the Flemish Decree and in Article 21 of the Ordinance of the Region of Brussels-Capital.

Internet link source:

<http://www.arbitrage.be>

The Council of State overrules the dismissal of a teacher of Islamic religious studies because she refused to take off her headscarf



A teacher of Islamic religious studies in two primary public schools in Brussels was dismissed for serious misconduct (*motif grave*) because she refused to take off her headscarf when leaving her classroom and while she was still on the schools' premises. In application of the principle of the neutrality of state education as enshrined in the Declaration of Neutrality in Education of the Flemish Community, the school regulations forbade the wearing of religious symbols at school except for teachers of religious studies in their classrooms. The teacher brought an action in emergency proceedings before the Council of State to suspend and subsequently overrule her dismissal. On 18 October 2007, the Council of State allowed the action for suspension because the legislation proclaiming the principle of neutrality in the Flemish part of Belgium was not precise enough to infer a general prohibition of religious symbols in any school.

The Council of State (Flemish Chamber of the Administrative Section) confirmed the preliminary decision adopted on 18 October 2007. It overruled the dismissal of the Muslim teacher in a well argued decision.¹⁵⁹ The Council stated that the schools were not competent to forbid the wearing of religious symbols in their school regulations because the Flemish Decree on Education of 1998 expressly entrusts the Flemish Central Council of Education with the task of drafting the Declaration of Neutrality in Education. Contrary to the schools' submissions, it was not possible to directly infer a prohibition of wearing religious symbols at school from the Declaration of Neutrality in Education. Moreover, as no proselytism was proved by the school, the Muslim teacher could have correctly interpreted the Declaration of Neutrality as not prohibiting *per se* the wearing of her headscarf.

Internet link source:

www.raadvst-consetat.be

Bulgaria

BG

Legislative developments

Local government bans public expression of sexual orientation



The municipal council of Pazardzik adopted local public order regulations explicitly banning 'public demonstration and expression of sexual orientation in public places'. While the language is neutral, the intent is to curtail homosexual expression in public. It is noteworthy that this is the first time such a norm has been adopted in Bulgaria.

¹⁵⁹ Council of State (administrative section), decision no. 195.044 of 2 July 2009, *X v. Vlaamse Gemeenschap en het Gemeenschaps-onderwijs*.

Case law



Supreme Court confirms mayor liable for anti-Roma hate speech

The Supreme Administrative Court confirmed a decision by a lower court confirming a decision by the Equality body that a Sofia district mayor is liable for hate speech against Roma. The Court held¹⁶⁰ that extreme racist statements made on national radio constituted harassment of all Roma. The lower court and the Equality body had explicitly held that the question of the official's intent was irrelevant as regards harassment since the humiliation of the Roma and an offensive environment resulted. The Equality body imposed a fine of EUR 500.00 on the mayor, ordered him to apologise on the same radio station, to publish the ruling at his own expense in one of the two high-circulation daily newspapers and to not repeat similar statements in the future. The ruling of the Supreme Administrative Court is final and the mayor complied with these orders. This is the first time that a final court ruling has found public hate speech to injure an entire ethnic community.

CY

Cyprus

Legislative developments

Amendment of the Law on Equal Treatment

The Law on Equal Treatment in Employment and Occupation N.58(I)/2004, which transposes the employment component of the two Anti-discrimination Directives, was amended by Law 86(I)/2009 to the effect that all disputes arising under the said law, whether concerning access to employment, self-employment, training or membership of trade unions, will for the purposes of this law be deemed to be labour disputes in order to clearly fall within the Labour Court's mandate. The amendment follows a Labour Court decision of 2008 which ruled that the Labour Court had no jurisdiction to adjudicate on a complaint of a job candidate whose application had been turned down because of her age.¹⁶¹ The Labour Court in that case had relied on Law N.8/67 which sets out its mandate, according to which the Labour Court can try only labour disputes, defined in the law as disputes between employers and employees. According to the Labour Court, since the complainant was never hired, no employer-employee relationship emerged at any point in time. However, in view of the fact that the Law on Equal Treatment in Employment and Occupation N.58(I)/2004 expressly provides that the competent court to adjudicate on matters arising under the law is the Labour Court, the said court decision effectively denied claimants the right to legal redress when their claim involved discrimination in the absence of an employer-employee relationship. The new amendment essentially remedies this situation.



Enactment of a new law introducing positive measures for people with disabilities

A draft bill compiled in the second half of 2009 was passed in the House of Representatives on 23 December 2009, in spite of the objections of the KYSOA, the confederation of organisations of persons with disabilities. The new law introduces quotas for the employment of people with disabilities in the wider public sector with ten per cent of vacancies to be filled at any given time, provided that this does not exceed seven per cent of the total number of employees per department. The law defines a 'person with disabilities' as a person who, following an assessment by a multidisciplinary committee, is found to be

¹⁶⁰ Supreme Administrative Court decision N.14472 in case N.11158/2009.

¹⁶¹ See *European Anti-Discrimination Law Review (EADLR)*, issue 8, p. 41, case *Avgoustina Hajjavraam v. The Cooperative Credit Company of Morphou*, 30.07.2008.

suffering from a permanent or indefinite insufficiency or disadvantage causing physical, intellectual or mental restrictions in finding and keeping suitable employment. The quota applies to first appointments (i.e. excluding promotions) at the introductory grade (i.e. low in the hierarchy) and is specifically drafted to exclude areas where special provisions in favour of people with disabilities are already in place (such as the quota in favour of blind telephonists) and sections of the public service where 'all physical, mental or intellectual restrictions must necessarily be absent',¹⁶² which are the army, the police, the fire department and penitentiary institutions.

The confederation of organisations of persons with disabilities, the KYSOA, raised objections to the wide definition of the term 'disability', which includes chronic illnesses; the exclusion of high profile or promotion positions from the quota; compulsory admission exams; and the exclusion of KYSOA from the multi-disciplinary committee that assesses whether an applicant fits the definition of 'person with disabilities' provided in the law. Furthermore, the law remains open to the possibility of being declared unconstitutional by the Court, as has happened in the past with other laws introducing quotas¹⁶³ for violating the equality principle established by Article 28 of the Constitution.¹⁶⁴ This continues to be an issue in Cyprus despite an amendment of the Constitution in July 2006 giving primacy to EU laws.

Case law

The Equality Body considers a law establishing a preference in employment for blind persons as telephonists to discriminate against persons with other disabilities



The Equality Body investigated a complaint on behalf of a person with a severe mobility disability, claiming that the Law on the hiring of trained blind telephonists in the public and the educational sector and in public bodies (Special Provisions) N. 17/1988 (hereinafter 'the Law') is discriminatory against persons with other types of disability. The complainant alleged that his application for the post of a telephonist in a public hospital was rejected as a result of the Law and that this contravenes the law transposing Directive 2000/78/EC. According to the Department of Public Administration and Personnel, the equal treatment of people with disabilities is not and cannot be the result of a mathematical equation; positive action measures must be adopted upon consideration of real factors; and any other treatment would result in equal treatment of unequal situations, which is as unacceptable as unequal treatment. Article 3 of the Law provides that if blind persons are not available to fill vacancies for telephonists, then such positions will be offered to persons with other disabilities. However, the same provision requires all candidates to be 'adequately trained' telephonists and such training is offered only by one special school and only to blind persons.

The Equality Body¹⁶⁵ noted that Directive 2000/78/EC allows a deviation from the equality principle only for the purpose of realising essential equality and on the condition that it is objectively and reasonably justified. It added that when a benefit is granted by law, failure to grant the same benefit to the same condition violates the principle of equality. The report concludes that blind persons and persons with a severe mobility disability experience social and labour exclusion equally painfully and must thus be seen as equal. The complaint was therefore deemed to be well-founded and the said Law to violate the

¹⁶² Law introducing special provisions for the hiring of persons with disabilities in the wider public sector 146(I)/2009, Article 2.

¹⁶³ See for instance *Charalambos Kittis et al v. Republic of Cyprus*, 8.12.2006, Appeal No. 56/06, where the law granting priority in employment to war-disabled persons is declared unconstitutional as violating the equality principle.

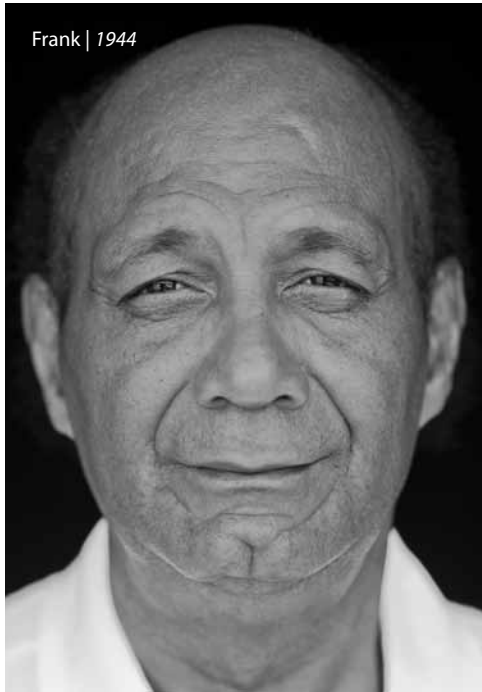
¹⁶⁴ In its statement dated 15.10.2009, the KYSOA expressed the view that the best way to ensure that the quota system is not declared unconstitutional is to amend Article 28 of the Cypriot Constitution, failing which any law providing quotas may at any time be declared unconstitutional by the courts.

¹⁶⁵ Equality Body Decision 2/2009, dated 19.11.2009.

Joy | 1996



Frank | 1944



Tanja | 1959



Joost | 1964



Maria | 1973



Debora | 1990



Jacomien | 1967



Victor | 1975



Olga | 1967



equality principle. As such, the Law was referred to the Attorney General for revision under Article 39(1) of the Law on the combating of racial and other forms of discrimination (Commissioner).

Czech Republic

CZ

Political Developments

Governmental decree on unlawful sterilisations of women

The Government acknowledged the submission by the Minister for Human Rights of a report¹⁶⁶ on unlawful sterilisations of Roma women in the Czech Republic, expressed its regret at individual irregular sterilisations carried out contrary to the Directive of the Ministry of Health, and instructed the Minister of Health to: (i) submit by 31 December 2009 information to the Government on measures taken with respect to unlawful sterilisations, (ii) to include the issue of sterilisations in the programme for developing standards of patient care and (iii) to verify that legal provisions are respected when sterilisations are carried out.

According to the report, the informed consent of women was not always obtained before sterilisation. This affected women without ethnic distinction. The report stated that consent was sometimes requested orally, immediately before the sterilisation, and without proper information being supplied to the women. It urges that new medical standards be established for sterilisations.

Internet link source:

<http://www.vlada.cz/assets/ppov/rlp/aktuality/USNESENI-VLADY.pdf>

Case law

Supreme Court decides on compensation to be awarded in racial discrimination case

A group of Roma and a group of Czech people conducted situation testing of restaurant premises in order to identify possible discriminatory patterns. While the Czech group of testers was properly served in a particular restaurant, the Roma were denied service and told that the restaurant was a private club. The Regional Court of Ostrava found in a 2005 decision that the treatment of plaintiffs was based on racial grounds and awarded compensation of CZK 50 000 (approx. EUR 2 000) to each of them.

The defendants lodged an appeal to the High Court of Olomouc, which concluded that the plaintiffs voluntarily subjected themselves to discriminatory treatment and they were turned away in quietly and without any noise; it therefore lowered the compensation awarded to CZK 5 000 (approximately EUR 200) to each of them. Subsequently, the plaintiffs submitted an appeal on points of law against the judgment of the High Court to the Supreme Court, challenging the compensation ruling.

The Supreme Court¹⁶⁷ quashed the decision of the High Court of Olomouc on points of law and returned the case to the High Court for a new decision in accordance with the legal interpretation given by the Supreme Court judgment, which has a binding effect.

In particular, the Supreme Court rejected the justification given by the High Court for lowering the compensation. According to the Supreme Court, the fact that the plaintiffs were conducting situation testing,

racial
or ethnic
origin

¹⁶⁶ Governmental decree No. 1424 of 23.11.2009.

¹⁶⁷ Supreme Court Judgment No. 30 Cdo 4431/2007 of 07.10.2009.

their personal motivation, as well as the fact that the incident ended quietly and the other guests in the restaurant did not notice anything, was irrelevant to the amount of compensation. These facts do not in any case mitigate the extent of the plaintiffs' right to personality protection. Concluding, the Supreme Court added that the extent of the violation of the plaintiffs' personal rights was not decreased by the fact that the incident was not noisy and that staff did not treat the plaintiffs with especial rudeness.

Internet link source:

<http://www.nsoud.cz/rozhod.php?action=read&id=52631&searchstr=30+Cdo+4431%2F2007>

DK

Denmark

Legal developments



Founder and President of the International Free Press Society may be prosecuted for derogatory remarks against Muslims

The President of the International Free Press Society¹⁶⁸ Lars Hedegaard declared, in an interview on a website critical of Muslims,¹⁶⁹ that Muslims rape their own children, lie without conscience and in general are immoral beings that degrade women.

Members of the International Free Press Society's advisory committee resigned, including a Liberal (*Venstre*) and a Conservative (*De Konservative*) MP. Hedegaard's comments were reported to the police as a violation of the prohibition of hate speech by Yilmaz Evcil of the City of Aarhus' Integration Council. The public prosecutor has not yet decided whether to prosecute Hedegaard for his statements. Hedegaard sent out a press release as a follow-up to his interview, stating that he did not regret the comments, but that he had not been talking about all Muslims but about Islam and its fundamental view of women.

Internet link source:

<http://www.trykkefrihed.dk/free-press-society.htm> and

<http://snaphanen.dk/2009/12/17/lars-hedegaard-islam-is-an-army/>

FR

France

Case law



Making an offer of employment subject to a discriminatory condition

Following a complaint submitted by SOS Racism based on a report of a labour inspector, the Public Prosecutor initiated criminal proceedings due to a refusal of employment on the grounds of racial and ethnic origin. According to the evidence, an advertising agency (Districom), which had been commissioned by a manufacturing company (Garnier) to run an advertising campaign, sent a document to a recruitment agency (Adecco) requesting that only young white women aged 18 to 22, with a maximum dress size of 40 and 'BBR' should be hired for the advertising campaign.¹⁷⁰ It was also proved that the recruitment

¹⁶⁸ The International Free Press Society (*Trykkefrihedsselskabet*) was founded on 01.01.2009 and is especially critical of Islam and what is seen by the society's members as the limitation to the freedom of speech imposed by Islam.

¹⁶⁹ <http://snaphanen.dk/>, interview published on 21.12.2009.

¹⁷⁰ The code BBR (*bleu blanc rouge*, i.e. blue white red) is frequently used to refer to a white person of European origin.

agency (Adecco) observed these instructions and over a long period searched for white European women for this contract, thereby complying with Districom's request.

The court of first instance dismissed the case and SOS Racism's application to be joined to proceedings as a party claiming civil damages, on the ground that no refusal to hire had been proved nor a victim identified. The Paris Court of Appeal on 6 July 2007 held that Adecco, Districom and Garnier had made an offer of employment subject to a discriminatory condition on the grounds of racial/ethnic origin. As a result, it imposed a fine of EUR 30 000 and awarded civil damages to SOS Racism. The three companies lodged an appeal. The Court of Cassation¹⁷¹ upheld the defendants' conviction but overturned the dismissal of SOS Racism's application to be joined to proceedings and sent the case back to the Court of Appeal for SOS's civil suit (i.e. the admissibility of its application and claim for damages) to be re-assessed.

Internet link source:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020875114&fastReqId=398917158&fastPos=1>

Comparative evidence for establishing a prima facie case of discrimination

During her first seven years of employment, the claimant had progressed substantially, rising through 14 grades on the employment scale, until she participated in a legal strike. Over the next 18 years she only progressed by two grades. She alleged that she was subject to harassment and interruption in her career progression due to her union activities. She established that her work duties were gradually changed so that they ended by becoming insignificant, that her office was moved to a very small space and that she was isolated at work by her superiors.

Her claim for discrimination was dismissed by the Court of Appeal on the ground that she did not present comparative evidence of the situation of her colleagues in support of her claim. However, the Court found against the employer on the basis of another submission, unrelated to allegations of discrimination, with respect to a violation by the employer of its obligation of good faith in the execution of the labour contract.

The Court of Cassation ruled¹⁷² that the Court of Appeal was wrong to require comparative evidence and did not take into consideration all the evidence adduced by the claimant. According to the Court, discrimination is not necessarily based on a comparison with the situation of other employees. The unfavourable modification of one's duties, the refusal to give an employee duties corresponding to his or her level and unfavourable working conditions are sufficient to lead to a presumption of discrimination. The Court of Cassation concluded that the lower court should have evaluated the career development of the claimant, taking into consideration evidence of her duties and situation, and determined whether her career difficulties were factual circumstances relevant to a claim of discrimination.

Internet link source:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021270548&fastReqId=197431819&fastPos=1>

Right to private and family life of Roma opposed to a request for expulsion by the State

Nineteen Romanian Roma adults and their children were camping illegally on a public property situated between the national railway tracks and the city tramway tracks in Lyon. The Prefect of the city department filed for injunctive relief alleging that the occupation of this plot was illegal and disturbed public



¹⁷¹ Adecco, Districom and Garnier, Court of Cassation, no 07-85109, 23.06.2009.

¹⁷² *Cour de Cassation*, Social Chamber, n° 07-42849, 10.11.2009.

order. The Prefect also alleged that the evacuation of the plot was urgent because the presence of these families hampered construction of the future *département* (area) archives.

The defendants claimed that there was no disturbance to public order and requested five months to evacuate the premises. They further pleaded that they were Roma from Romania, had been previously expelled from other camps around Lyon, and that some of them worked but none had adequate housing. As this camp constituted their family dwelling, they argued that there were no urgent circumstances requiring immediate expulsion since this plot was neither occupied nor for sale. In addition, they pleaded that they were victims of discrimination in their native country and that since they had repeatedly faced expulsion in their own country and in France, their right to normal family life and right to privacy, and the right of their children to care and education, justified that special consideration be given to their vulnerable situation. They hence considered that the violation of their right to privacy which would result from their expulsion must be limited to particularly urgent considerations of public interest, which were absent from this situation. Finally, they claimed the superiority of the right to dignity and family life over the right to private property.

According to the Court,¹⁷³ the Prefect did not demonstrate that living conditions on the Roma camp were such that they presented a particular danger and risks other than those which had been constantly present for a number of years in the various camps in Lyon. The Court stated that even if the defendants occupied public property illegally, it was undeniable that this camp constituted their residence and as such, it should be protected by Article 8 ECHR. It concluded that since the State's right of property was not jeopardised by this occupation, and since the Prefect did not demonstrate an immediate need to use the plot, in the absence of damage or disturbance to public order, expulsion of the occupying families did not seem appropriate and therefore dismissed the action.

DE

Germany

Case law



Federal Constitutional Court dismisses objection against 'stepchild-adoption'

A woman wanted to adopt the three-year-old child of her partner with whom she had a registered same-sex life partnership. After both the mother and the (biological) father of the child agreed, the competent youth welfare office recommended the adoption with respect to the child's well-being. However, the competent *Amtsgericht* (Local Court) of Schweinfurt suspended the adoption procedure and referred the case to the Federal Constitutional Court, holding that the relevant Sec. 9.7 sentence 2 Law on Registered Civil Partnerships¹⁷⁴ which - on further conditions - allows the adoption of a registered life-partner's child, was in breach of the German Basic Law (*Grundgesetz*), in particular its Article 6.2 sentence 1, which states that the care and education of the child are natural rights and duties of the parents.

The Federal Constitutional Court held¹⁷⁵ that the Local Court's submission was inadmissible not only because of formal shortcomings, but also because of its lack of adequate substantial justification. The Constitutional Court made it clear that according to its previous case law regarding Art. 6.2 Basic Law, biological parenthood does not take priority over legal and social-familial parenthood. It furthermore pointed out that the Local Court misinterpreted the case law of the Federal Constitutional Court: contrary

¹⁷³ *Tribunal de Grande Instance* (Regional Court) of Lyon, SALA, COVACI et al. n° 2009/02850, 16.11.2009.

¹⁷⁴ *Gesetz über die Eingetragene Lebenspartnerschaft*.

¹⁷⁵ *Bundesverfassungsgericht*, BVerfG 1 BvL 15/09, 10.08.2009.

to the Local Court's interpretation, the Constitutional Court did not state that only the child's mother and father could be regarded as its parents; in fact, it did not address the question of the parent's sex at all in its rulings.

Internet link source:

http://www.bverfg.de/entscheidungen/lk20090810_1bvl001509.html

Unequal treatment of marriage and civil partnership concerning survivor's pensions

According to Sec. 38 of the Statute (VBLS) on the Supplementary Pensions Agency for Federal and *Länder* Employees,¹⁷⁶ spouses of employees in the civil service are entitled to a survivor's pension. The provision, however, does not apply to registered civil partnerships. The plaintiff, working in the civil service and living in a registered same-sex civil partnership, claimed a violation of his constitutional rights by the decisions of civil courts (including the final judgement of the Federal Court of Justice (*Bundesgerichtshof*), where he had previously unsuccessfully challenged this) which affirmed the validity of the provision in question.

The Federal Constitutional Court decided¹⁷⁷ that the court rulings violated the general principle of equality, Art. 3.1 Basic Law (*Grundgesetz*). According to the Court, Art.3.1 Basic Law – which states that 'All persons shall be equal before the law' – demands strict scrutiny according to the principles of proportionality in cases where a differentiation is based on sexual orientation. Although favourable treatment of marriage by the legislature is in principle constitutional because of Art. 6.1 Basic Law (which provides for the 'special protection' of marriage and family by the State), the mere reference to this provision without factual reason is insufficient to justify unequal treatment. In particular, the consideration that married couples typically have pension entitlements different to those of civil partners due to gaps in their employment history caused by child-rearing, cannot be regarded as such a reason for differentiation: on the one hand not all married couples have children and on the other hand there is a considerable number of children living with registered civil partners. Furthermore, a more specific individual pension scheme irrespective of marital status could provide compensation for periods of child-rearing. The Court therefore concluded that that Sec. 38 VBLS is not void, but has to be applied to registered civil partners by supplementary interpretation with effect from 1 January 2005.

This decision provides a crucial clarification of the constitutional rights of same-sex partnerships. It relates closely to the issues discussed in Case C-267/06, *Maruko*, decided by the European Court of Justice on 1 April 2008.

Internet link source:

<http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-121en.html>

Greece

EL

Case law

Removal of religious symbols from Greek schools

In Greece religious icons have been hanging in schools for decades and the majority of the population is Orthodox Christian. At the end of 2009 four couples of parents (three Greek and one foreign) who considered the display of religious symbols in the classroom along with the practice of holding morning

¹⁷⁶ *Versorgungsanstalt des Bundes und der Länder – VBL*.

¹⁷⁷ *Bundesverfassungsgericht, BVerfG, 1 BvR 1164/07, 07.07.2009*.



prayers in state schools and attending a religious mass in church during school hours to be an infringement of their religious freedom, authorised the Greek Helsinki Monitor, a human rights NGO, to represent them in every relevant legal action.

The complainants decided not to submit their complaint to the schools' directors since the latter were obliged to comply with all circulars of the Ministry of Education and therefore they would not be entitled to change these practices on their own initiative. Consequently, they filed complaints through the Greek Helsinki Monitor to the Greek Ombudsman,¹⁷⁸ requesting its intervention for the removal of religious symbols from their children's classrooms. According to the complainants, the display of religious symbols in state schools and the practices of holding morning prayers in schools and attending a religious mass in church during school hours violate the European Convention on Human Rights, particularly in relation to Article 9 of the Convention in combination with Article 2 of the First Protocol. They claimed that in special places where the individual finds him/herself in a situation of dependence on the State, the government should abstain from the imposition of the dominant religion because the presence of an icon of Christ could be interpreted as an official educational policy favouring the Christian religion over non-Christian ones. The cases are still pending.

Internet link source:

<http://cm.greekhelsinki.gr/index.php?sec=192&cid=3569>

<http://cm.greekhelsinki.gr/index.php?sec=192&cid=3539>

<http://cm.greekhelsinki.gr/index.php?sec=192&cid=3546>

<http://cm.greekhelsinki.gr/index.php?sec=194&cid=3547>

<http://cm.greekhelsinki.gr/index.php?sec=194&cid=3550>

<http://cm.greekhelsinki.gr/index.php?sec=192&cid=3572>

Hungary

Case law

Equal Treatment Authority establishes harassment against mayor for hate speech

At a meeting of the local council of Edelény, the town's mayor declared that 'in the neighbouring settlements, in settlements with a Gypsy majority, for instance in Lak or in Szendrőlád, pregnant women take medication in order to give birth to demented children so that they would be entitled to increased family allowances. Women during their pregnancy [...] repeatedly hit their bellies with rubber hammers so as to give birth to disabled children'. The statement was widely covered by the national media and as a result, the Equal Treatment Authority launched an *ex officio* proceeding against the mayor. The Authority heard as witness the President of the Edelény Roma Minority Self-Government who submitted to the Authority a petition signed by 83 Roma women protesting against the mayor's statement. The Vice-president of the Szendrőlád Roma Minority Self-Government was also heard and submitted a joint complaint signed by 359 Roma women from the region.

The mayor attempted to defend his statement through a number of arguments which were not accepted by the Authority. In its Decision no. 1475/2009, the Equal Treatment Authority ruled that the mayor's statement was potentially capable of creating a hostile, degrading, humiliating and offensive environment for pregnant Roma women living in the two towns named and their neighbourhood and of exerting a negative impact on the identity, personality and future lives of these women, by contributing to their bad reputation and increasing the prejudices they face. Therefore, the Authority established that the mayor's statement

¹⁷⁸ Complaint numbers 23001/26-11-09, 23263/30-11-09, 23356/30-11-09, and 122869/7-1-10.



was harassment under Article 10 of the Equal Treatment Act and ordered the publication of its decision on its website for 90 days. The mayor filed for a judicial review of the decision, which is still pending.

Internet link source:

<http://www.egyenlobanasmod.hu/zanza/1475-2009.pdf>

Testing provides proof of discriminative practice in an *actio popularis* case against a bar regularly denying black people admission



Menedék – the Hungarian Association for Migrants - launched an *actio popularis* claim against a well-known Budapest bar because the bar regularly denied entrance to black people or allowed them to enter only after humiliating proceedings. After conducting situation testing, the Association confirmed that the white testers were allowed entry without any difficulty, whereas the black testers were sent away on the basis that they did not have a membership card.

In its decision of 3 December 2009, the Equal Treatment Authority imposed a fine of HUF 5 000 000 (approximately EUR 18 500) on the bar. When assessing the level of the fine, the Authority took into account that it had previously found in 2007 that the bar had violated the requirement of equal treatment (*vis-à-vis* Roma guests). It had not imposed a fine at that time on the expectation that the management would in the future respect the principle of equal treatment. As these discriminative practices were still in place, the Authority decided to impose a fine of a record amount.

Internet link source:

http://www.neki.hu/index.php?option=com_content&view=article&id=416:oetmillio-forint-birsagotkell-fizetnie-a-rio-cafenak&catid=1:friss-hk&Itemid=64

Ireland

IE

Legal developments

Complaint to the European Commission regarding national Equality body

The Equality & Rights Alliance (ERA), a coalition of 80 organisations formed to protect and strengthen equality and human rights, submitted a complaint in September 2009 to the European Commission that Ireland is in breach of European law and the obligations of Member States to retain an effective national Equality body under the EU Equality Directives. In particular, the budget of the Equality Authority, the specialised Equality body, was cut by 43% in October 2008, at a time when cuts to other departmental agencies were between 2 – 5%.¹⁷⁹ As a result, the number of posts was reduced from 38 to 15, and the number of case files handled by the Authority decreased from 488 in 2008 to 200 in 2009. According to the complaint, this budget cut is so severe that it undermines the independence and effectiveness of the Equality Authority. ERA also lodged a petition to the European Parliament, which is supported by all opposition MEPs in Ireland and by the Secretary-General of the Irish Congress of Trade Unions.

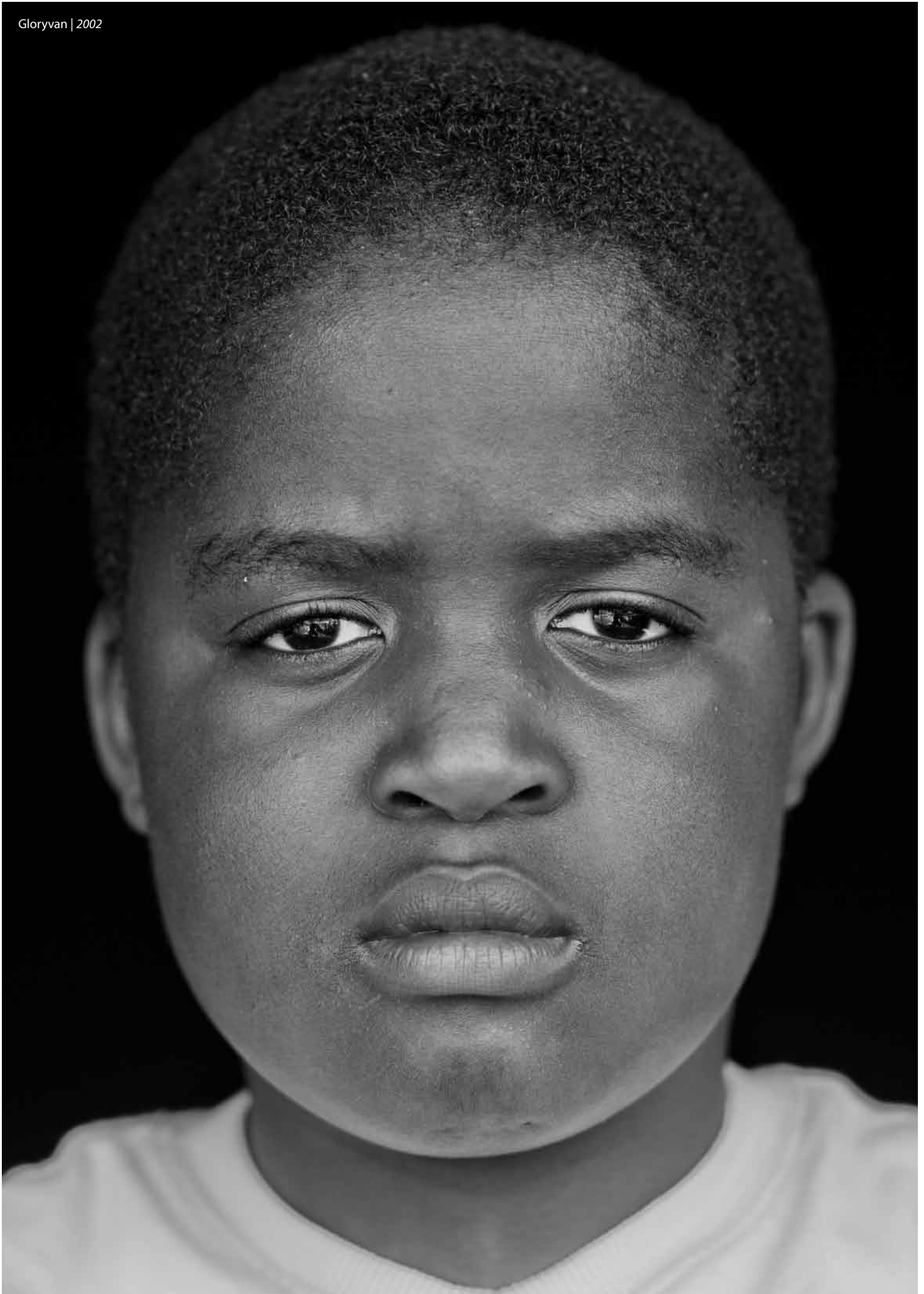
On 5 November 2009 the all-party Joint Oireachtas (Parliamentary) Committee on European Affairs held a hearing on the ERA's complaint.

Internet link source:

<http://www.eracampaign.org/>

<http://debates.oireachtas.ie/DDebate.aspx?F=EUJ20091105.xml&Node=H2 - H2>

¹⁷⁹ See *European Anti-Discrimination Law Review (EADLR)*, issue 8, p. 51.



Legislative developments

Civil Partnership Bill introduced

The introduction of the Civil Partnership Bill in Dáil Éireann (the House of Representatives) was welcomed by the Equality Authority, which described the move as an important step forward for civil rights in Ireland. The proposed legislation will give same-sex couples the right to have their relationships formally recognised by the State and enjoy the same social benefits as opposite-sex couples.



The Equality Authority supports the full implementation of the recommendations of the Government Working Group on Domestic Partnership, which strengthen equality-based reform for opposite sex, same-sex and non conjugal cohabitants. In this regard, the Equality Authority raised some concerns regarding the proposed legislation, chiefly regarding lack of reference to children and to adoption by same-sex couples in the legislation. The Working Group recommended that same-sex couples should be eligible for consideration as adoptive parents.

Internet link source:

<http://www.oireachtas.ie/documents/bills28/bills/2009/4409/b4409d.pdf>

Case law

Denial of health services to a person with HIV

The Equality Authority represented to the Equality Tribunal a person who had been denied a health service because of his HIV status. In detail, the complainant had received a Chiropody Card, issued to him by the Health Service Executive, which entitled him to four visits to a chiropodist per annum. The complainant visited the respondent's service for chiropody treatment and showed to the respondent his Chiropody Card. The respondent queried why he, a young man, was entitled to a podiatry card and the complainant revealed to the respondent his HIV status. The respondent informed him that there would be problems or complications with cutting, cross-infection, sterilisation, etc., and he needed to be treated by a practitioner who specialised in treating the feet of people with HIV, so he gave to the complainant the name of another chiropodist. The complainant stated that he was upset with this treatment but as he was genuinely concerned about the condition of his foot, he asked the respondent to examine it. The respondent briefly looked at his feet and declared them to be fine. The complainant was afterwards examined by another chiropodist, who found that he had an infection that required treatment with antibiotics.



The Equality Officer pointed out that the complainant was not seeking treatment for his HIV infection and considered that the reason why the respondent refused to provide the complainant with his services was because, having been told by the complainant that the complainant was living with HIV, the respondent decided that he could not manage the complainant's HIV infection. According to the decision, '(...) good practices and universal precautions are in place to protect everyone regardless of status and to ensure best health and safety practices for everyone. They are not in place to provide service providers with an exemption from non-discrimination as defined in the acts.'

The Equality Officer found that the complainant had established a *prima facie* case of less favourable treatment on the ground of his disability and awarded the complainant EUR 6 000 as compensation. In her decision the Equality Officer stated that the amount was to reflect the seriousness of the discrimination experienced by the complainant and to emphasise the importance of a person's right to receive health care in a non-discriminatory manner.

Internet link source:

<http://www.equalitytribunal.ie/index.asp?locID=165&docID=2167>

IT

Italy

Case law



Court declares the illegality of some of the initiatives adopted in the context of the alleged 'emergency situation' concerning nomad camps

Following the enactment in May 2008 of a decree declaring a 'state of emergency' in three regions (Lombardy, Lazio and Campania) in response to an alleged situation of crisis within the settlements known as 'nomad camps' (*campi nomadi*),¹⁸⁰ and its renewal one year later with an extension to two further regions (Piedmont and Veneto), a number of anti-discrimination suits were filed in the ordinary and administrative courts by Roma individuals supported by NGOs. So far, the most successful of these legal actions was the suit brought in the administrative court of Rome with the assistance of the European Roma Rights Centre.

The first decision issued by the Regional Administrative Court for the Lazio Region (*Tribunale amministrativo regionale per la regione Lazio, prima sezione*)¹⁸¹ recognised the illegality of some of the initiatives adopted to introduce stricter control over the presence of Roma groups in Italy. The Court did not consider that there was sufficient evidence that the ordinances declaring the emergency situation and accordingly taking a series of measures are *per se* discriminatory against persons of Roma ethnicity. Notwithstanding, the Court stated that the provisions of the ordinances prescribing the identification and census-taking of the persons, even minors, present in both authorised and illegal settlements, including through taking fingerprints, should be considered as violations of the 'general principles in the field of personal freedom, of the rules on protection of minors' and of the legislation on data protection. The question was, however, deemed to be superseded in practice following the publication of the guidelines of the Ministry of the Interior of July 2008, which prescribed stricter standards for the implementation of the identification procedures.

The applicants also questioned the legality of the internal regulations of the authorised settlements existing in Rome and Milan. The Administrative Court considered that several provisions of these regulations governing the life of persons living in the settlements were illegal infringements of their freedom of movement and their right to private and family life.

The enforcement of this decision was suspended until a final decision by the Supreme Administrative Court (*Consiglio di Stato*) on the appeal, with an interim decision issued in August 2009.¹⁸² The justification of the suspension included a reference to the 'complex and delicate questions concerning the respect of the fundamental rights, the dignity of the person and the prohibition [...] of racial and ethnic discrimination', but without explaining precisely why the interest of the administration should prevail until the decision on the appeal.

Internet link source:

<http://www.asgi.it>

¹⁸⁰ See *European Anti-Discrimination Law Review (EADLR)*, issue 8, p. 53.

¹⁸¹ Decision (*sentenza*) of Regional Administrative Court for the Lazio Region (first section) of 24.06.2009, registered on 01.07.2009.

¹⁸² Interim decision (*ordinanza*) of the Supreme Administrative Court (fourth section) of 25.08.2009, registered on 26.08.2009.

*Legislative developments***Draft law banning agitation for homosexuality and promotion of homosexual relationships**

A draft law supplementing the Penal Code and Code of Administrative Offences was put to Parliament on 9 July 2009. The suggested amendments aim to establish administrative liability for the promotion of homosexual relationships and the financing of public promotion of homosexuality and to criminalise public agitation for homosexual relationships.

According to the draft law, such actions may be punished by community service, fines or imprisonment. Legal persons are also liable for these actions. Parliament approved further consideration of this legislative initiative by the committees in the upcoming autumn session before it is returned to the assembly to be voted on.

The approval for further consideration of this law raised serious concerns and was criticised by local human rights and LGBT non-governmental organisations. The wording of the proposed bill is not precise; the term 'agitation' is not defined in the Penal Code, thus it is not clear how it would be interpreted in practice and what public actions would be considered as illegal. Although the initiators denied the discriminatory character of this draft law, the discussions in Parliament unambiguously indicate that the aim of the bill is to prevent any public events raising the issue of homosexuality. This would possibly contradict the constitutional right to information and freedom of expression and breach Lithuania's international commitments.

Internet link source:

http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=346176&p_query=&p_tr2=
http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=346178&p_query=&p_tr2=

Amendment of the Law on the protection of minors against the detrimental effect of public information excludes homosexuality clause

The Law on the protection of minors against the detrimental effect of public information (No. XI-333), which was adopted by the Parliament on 14 July 2009, was amended on 22 December 2009 to exclude a clause on homosexuality. The law, which will enter into force on 1 March 2010, defines public information that might have a detrimental effect on minors and sets the rules for its provision to the public.

The initial version of the law, among other clauses, contained a provision stating that 'promotion of homosexual, bisexual and polygamous relationships' as well as 'information which distorts family relationship and its values' were considered as having a detrimental effect on minors. The law was widely criticised for its vague wording and lack of clear definitions by local NGOs, the President, the international community as well as the European Parliament.¹⁸³

¹⁸³ European Parliament resolution of 17 September 2009 on the Lithuanian Law on the Protection of Minors against the Detrimental Effects of Public Information, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2009-0019&language=EN>.



The President of the Republic of Lithuania formed a working group of experts, who presented amendments to the law on 5 November 2009.¹⁸⁴ After lengthy debates which focused largely on the clauses regarding homosexuality, the new version of the law was adopted on 22 December 2009. Although the latest version of the law was still criticised for vague wording and lack of precision, it does not explicitly mention that information on homosexuality is considered as causing a detrimental effect on minors. However, Article 4 still addresses sexuality and family relations, stating that the following information is detrimental to minors:

‘15) [information] which promotes sexual relations;

16) [information] which expresses contempt for family values, encourages the concept of entry into marriage and creation of a family other than that stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania.’¹⁸⁵

The lengthy debate around the adoption of this law and the arguments of its initiators unequivocally focused on the possibility of banning agitation for homosexuality from schools and public life.

Internet link source:

http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=363137

Luxembourg

Case law

Potential discriminatory tax regime on occupational pension schemes

The Administrative Court¹⁸⁶ adjudicated an appeal against a decision of the Director of the Tax Revenue Administration. It rejected a complaint submitted by a widow against a taxation decision, according to which she was requested to pay about 17% tax on a sum that she received from the former employer (a bank) of her deceased husband, based on an occupational pension scheme.

Admission into the occupational pension scheme had been granted by her late husband’s employer prior to the adoption of the Law of 8 June 1999, which exempts payments from the occupational pension scheme made by employers from any tax, with a reduced tax rate being applied to payments made into the scheme.

In this case however, the insurance company of the claimant’s husband had refused to cover him because of his poor state of health. The bank nevertheless decided to grant its employee an occupational pension and upon his death, the bank paid a sum out of its own assets. The Tax Revenue Administration decided that such a payment was not valid according to the Law of 8 June 1999¹⁸⁷ and therefore the special (reduced) tax rate was not applicable to the payment made by the bank to the widow.

¹⁸⁴ The stenograph of the Parliament sitting is available in Lithuanian at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=357210&p_query=Nepilname%E8i%F8%20apsaugos%20nuo%20neigiamo%20vie%F0osios%20informacijos%20poveikio%20&p_tr2=2.

¹⁸⁵ Article 38 of the Constitution of the Republic of Lithuania provides that ‘Marriage shall be concluded upon the free mutual consent of a man and a woman.’

¹⁸⁶ Judgment of the Administrative Court Nr.23836 of 13.07.2009.

¹⁸⁷ Mémorial 74, 17.06.1999, p.1644.

The Administrative Court referred a preliminary question to the Constitutional Court, asking whether Article 3 (2) of the Law of 8 June 1999 is compatible with the constitutional principles of equality before the law and equality in tax matters. The underlying question regards the obligation of an employer to cover risks of disability and death with an insurance company in order to benefit from a reduced tax regime.

The Administrative Court asked whether this system resulted in discriminatory treatment of persons based on their health status. The administrative court refused to consider whether another insurance company would have agreed to cover the health risk of the deceased person against payment of a higher premium, holding that such an argument could result in discrimination on grounds of age or health during the recruitment process. This argument did not therefore prove that the current system was not *prima facie* discriminatory. The decision of the Constitutional Court is pending.

Internet link source:

<http://www.ja.etat.lu> (then select 23836)

Netherlands

NL

Legislative developments

Amendment to the Labour Act obliges employers to prevent discrimination

An amendment to the Health and Safety at Work Act (*Arbowet*) was enacted on 30 June 2009.¹⁸⁸ Under the new law, employers are obliged to prevent and take action against discrimination in their company/organisation. 'Discrimination' has been added to the list of possible causes of 'psychosocial pressures' in the workplace as listed in the definition provided by Article 1(3)(e) of the *Arbowet*. Under Article 3 (2), employers are obliged to protect their employees as much as possible against these psychosocial pressures. With regard to this obligation, Article 5 of the *Arbowet* obliges employers to conduct a 'risk assessment' of risks of psychosocial pressures (including discrimination, mobbing and sexual harassment). In addition to this assessment, the employer should adopt an action plan covering the risks identified.

The *Arbeidsinspectie* (Dutch Labour Inspectorate) is responsible for enforcing this obligation and is competent to impose fines upon employers who do not comply. In addition, in cases of persistent neglect of duty by the employer, a company/organisation may be forced by the *Arbeidsinspectie* to close.

Internet link source:

http://www.eerstekamer.nl/behandeling/20090421/gewijzigd_voorstel_van_wet_2/f=/vi4I9ox5qv6s.pdf (Amendment *Arbowet* to be found in Article V, p. 8)

http://home.szw.nl/index.cfm?menu_item_id=14762&hoofdmenu_item_id=13826&rubriek_item=391844&rubriek_id=391818&link_id=171933

Case law

Muslim nurse dismissed for not abiding to clothing requirements

A female nurse was dismissed from the hospital where she had worked since 2001 because she refused to observe the clothing requirements of the dialysis ward to which she was transferred in November



¹⁸⁸ *Kamerstukken Tweede Kamer* 2008-2009, 31 811 nr. A.

2007. Being a Muslim, the nurse believed that she should have her forearms covered up. However, the hospital clothing requirements as well as specific requirements for dialysis wards to prevent infection required that short sleeves be worn. At first, in April 2008, the nurse was seconded to another position during an inquiry by the hospital. As she refused to accept alternative work, she was eventually dismissed.

The nurse alleged that she was indirectly discriminated against on the grounds of her religion and submitted evidence that the hospital's clothing requirements were not maintained consistently in other wards of the same hospital. In addition, she claimed that the hospital rejected her suggestion to wear three-quarter length sleeves.

The hospital asserted that it was in the patients' interest that infection be prevented. According to it, the requirement to wear short sleeves was recommended by a commission of national experts, and was adopted by the Dutch Inspection for Health Care as a professional standard. In addition, it was argued that the risk of infection is particularly high in a dialysis ward.

The Cantonal Court (*Vrederecht*) of 's Hertogenbosch¹⁸⁹ upheld the dismissal of the nurse. The Court held that since the requirement to wear short sleeves was recommended by scientific experts in order to prevent infection of patients, complying with professional standards could not be held against the hospital. According to the decision, the hospital did not have to prove scientifically to what extent the alternative of three-quarter length sleeves would entail a higher risk of infection than wearing short sleeves: the hospital's main concern was 'to keep the risk of infection to a minimum'. In addition, it was accepted by the Court that the dialysis ward had a higher risk of infection than other wards. Therefore, the strict enforcement of the clothing requirement on this ward could be regarded as necessary and proportional.

Internet link source:

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BJ2840>



Tram driver not allowed to wear a cross with his uniform

The clothing requirements of Amsterdam's (privatised) city transportation company forbid the wearing of necklaces in general (regardless of their religious significance), not only to maintain the professional appearance of staff but also for safety reasons (since a necklace can be used to strangle a person). When new company uniforms were introduced in December 2008, the transportation company decided to promptly enforce the requirements regarding necklaces, and a Dutch Christian tram driver was ordered to remove his necklace or to wear it underneath his uniform. After two warnings and some discussions attempting to find a solution, he was eventually suspended.

The tram driver, who was a Coptic Christian, claimed that wearing the cross in a visible way was significant for his belief. His employer had not criticised his necklace with a cross since he started work for the company in 1998. He argued that he was discriminated against on the grounds of his religion/belief, all the more so as the new company uniforms also allowed a headscarf for Muslim women.

The Court of Amsterdam dismissed¹⁹⁰ the tram driver's claim in *Kort Geding* (summary proceedings). According to the Court, the clothing requirements of the transportation company were not unreasonable, as a headscarf worn by Muslim women is not comparable with a necklace, given that the headscarf cannot be worn in an invisible way. However, if it was considered necessary, the cross could be worn visibly on a ring or a bracelet, which the company had offered to pay for.

¹⁸⁹ Cantonal Court of 's Hertogenbosch, judgment of 13.07.2009.

¹⁹⁰ Judgment of the Court of Amsterdam of 14.12.2009.

Internet link source:

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BK6378>

Portugal

PT

Case law

Court's decision on homophobic assaults and robberies

A group of seven young men (under the age of 21) were accused of attacking and robbing homosexual couples in a violent manner provoking physical harm, as they used knives, sabres, short-bladed knives and switchblades during the assault.

The First Instance Court of Coimbra considered¹⁹¹ that it was proved that the youths were driven by homophobic hate and acted in a very violent manner. Three of the defendants were convicted to imprisonment for five to seven years. The other defendants were given a suspended sentence of four to five years. The Court reminded the defendants, who did not show any regret during the trial for their actions, that these sentences, although suspended, could be revoked at any time.



Romania

RO

Legislative developments

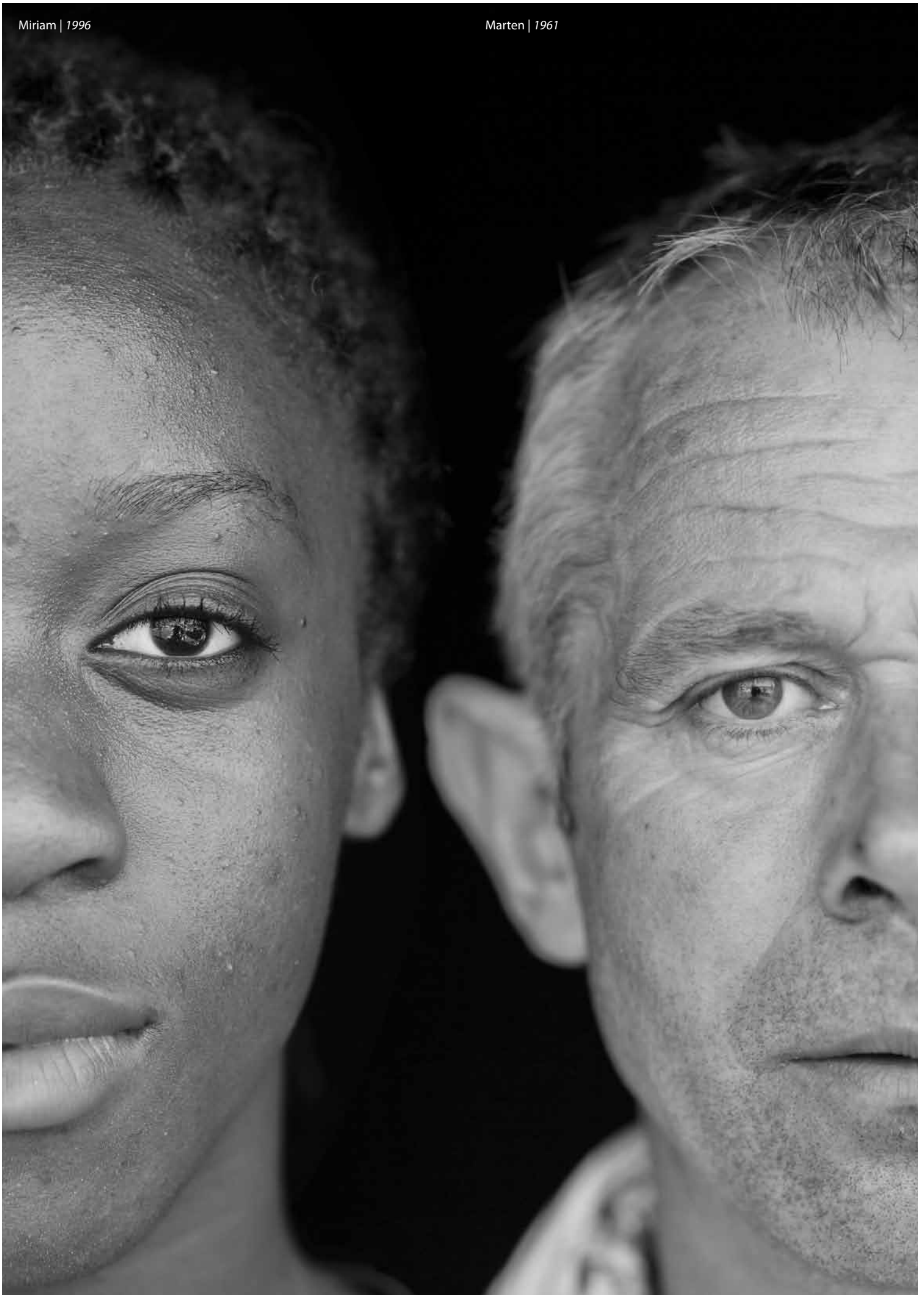
New Education Code includes provisions on prohibition of discrimination

The Government decided in September 2009 to initiate a constitutional procedure to assume responsibility¹⁹² before Parliament in prevision of the adoption of the draft new Education Code without further parliamentary debates. The procedure was completed in the same month, and on 23 September 2009 opposition parties lodged a complaint with the Constitutional Court about the procedure for adopting the new law and its content.

The new Education Code includes, among others, provisions on the principles of national education, the structure of the education system, education in the languages of national minorities, private and confessional education, special needs education, and the status of the educational personnel. The Education Code further provides in Article 9 that Romanian, EU and South Eastern European citizens have equal right to access to education and professional training in the national education system regardless of 'race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV status, belonging to a vulnerable group as well as any other criterion'. Third country nationals as well as stateless persons are also guaranteed access to the national education system.

¹⁹¹ Case 2354/08.1PBCBR of 12.01.2010.

¹⁹² The procedure for the Government to assume responsibility is provided by Article 114 of the Romanian Constitution. According to constitutional theory and jurisprudence, it is meant to be an exceptional constitutional measure to ensure the adoption of legislative provisions necessary to ensure the implementation of the government's programme. This provision allows the process of legislation to be accelerated by the Government if a motion of censure is not passed by the Parliament leading to the Government's dismissal.



Among the fundamental principles mentioned by the Education Code are the principles of equity and equal opportunities, inclusive education, respect for cultural diversity, respect for the cultural identity of national minorities and equal treatment. The Code prohibits any direct or indirect discrimination against a student on grounds of race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV status, belonging to a vulnerable group as well as any other criterion.

The Education Code defines segregation as ‘a serious type of discrimination’, stating that ‘the organisation, functioning and content of education cannot be structured upon exclusivist, segregationist and discriminatory criteria on grounds of ideology, politics, religion or ethnicity’. It specifically prohibits segregation without, however, providing a specific sanction.

Primary and secondary education includes religious education as a subject, and the Education Code maintains in Article 18 the current procedure according to which a student can choose the religion and the confession and parents or guardians can submit a written request for the student not to attend the class or a class organised for a particular denomination if available. Only the 18 state-recognised religious denominations can sign partnerships with the Ministry of Education to ensure that religious education classes are held as requested by students.

Education in the mother tongue is allowed at all levels and in all forms of education, and studying Romanian as the national language is mandatory for all students. A parent or legal guardian has the right to choose the language of education and the type, degree and form of education. Finally, the Code maintains current provisions regarding children with special educational needs in Articles 29 and 40.

The Education Code adopted still needs to be promulgated by the President of Romania - promulgation is automatic twenty days after receiving bills if the President does not return the laws to Parliament for reconsideration of their conformity with the Constitution.

Internet link source:

http://www.gov.ro/proiectele-de-lege-pe-care-guvernul-isi-va-asuma-raspunderea-in-fata-parlamentului__11a106509.html

<http://www.gov.ro/upload/articles/106509/legea-educatiei-nationale.pdf>

Case law

Discrimination triggered through legislative provisions cannot be sanctioned by the national equality body

The National Council for Combating Discrimination (NCCD) found in 2006 that a plaintiff was discriminated against by the Ministry of Internal Affairs acting as a legal representative of the General Inspectorate for the Border Police. In particular, the plaintiff’s daughter, who was in her mother’s custody after their divorce, was permanently taken out of Romania in spite of the plaintiff’s complaints to the authorities that he did not agree with his daughter leaving the country. The plaintiff submitted a complaint alleging that the law regarding the freedom of movement of Romanian citizens differentiates between parents granted custody and parents not granted custody, therefore affecting their right to maintain family relations with their children.

The Court of Appeal maintained the NCCD’s decision, considering that the decision also correctly referred to the commitments undertaken by Romania under the European Convention on Human Rights and the Hague Convention regarding civil aspects of international kidnapping and to legislation on the rights of the child.

The High Court of Cassation and Justice accepted the appeal lodged by the Ministry of Internal Affairs and found that 'the legal rights of the plaintiff were not infringed by an authority but by a law which, as adopted, does not provide any right for the other parent to condition, restrict or prohibit the parent who was granted custody from taking the minor abroad'. According to the Court, the Border Police only observed the law; the Court stated that the NCCD and the Court of Appeal wrongly applied the Anti-discrimination Law as they did not notice that 'the legal provisions, challenged for having a discriminatory impact in relation to divorced parents who do not have the custody of their child and cannot object to their children being taken abroad, cannot be the object of a petition under the Anti-discrimination Law and can solely be the object of a challenge regarding the constitutionality of the legal provision before the Constitutional Court (...). The High Court concluded that the NCCD acted beyond its institutional competence when it assessed the constitutionality of Article 30 of Law 248/2005 and when it analysed the consistency of this norm with the general legal framework regulating relations between parents and children and parental rights.

Internet link source:

<http://www.iccj.ro/cautare.php?id=45431>



Constitutional Court validates the Law on the Unitary Principles for the Calculation of Salaries of Personnel Paid from Public Funds

The Government decided in September 2009 to initiate the constitutional procedure for assuming responsibility before Parliament¹⁹³ in order to promote the Law on the Principles for Calculating Salary-related Rights in the Public Sector without undergoing parliamentary debate. The procedure was completed in the same month, and on 17 September the opposition parties filed a motion of censure. As less than 236 members of Parliament voted in favour of the motion, the Law was considered adopted.¹⁹⁴

The opposition parties challenged Law 330/2009 before the Constitutional Court. They alleged, *inter alia*, that the Law is unconstitutional because it creates differences between different categories of civil servants and personnel employed by various state-funded institutions (Art.2.2), that the Law specifies that only certain categories of employee may receive salary increases based on special laws and that only certain categories are allowed to hold multiple positions (Art.7.1). The applicants also stated that Articles 16 and 50 of the Constitution are infringed by Article 21 of the Law which grants bonuses of 15% of gross salary to blind persons while employees in general can receive maximum bonuses of 30% of gross salary (the plaintiffs alleged that the phrasing of Law 330/2009 would lead to a situation where blind employees would receive the 15% they are entitled to on grounds of their disability and another 15% to reach a maximum 30% bonus, while other, non-blind public employees could receive a 30% bonus).

The Constitutional Court ruled against all the challenges regarding the constitutionality of the Law, including provisions on calculating the salaries and salary-related rights of all categories of public sector employees.¹⁹⁵ The Court considered that the exemption provided in Article 2.1 of the Law for several public institutions¹⁹⁶ for which salaries will be negotiated rather than determined according to the Law, is 'a manifestation of the sovereign right of the Legislator to provide such exemptions and to grant a more favourable salary-related regime to certain categories of personnel, having in mind their area of activity'. As for exemptions from prohibitions and the possibility of certain categories of personnel to receive salary increases or hold multiple positions based on special laws, the Court referred solely to

¹⁹³ See preceding footnote.

¹⁹⁴ Romania/ Legea-cadru 330/2009 privind salarizarea unitara a personalului platit din fonduri publice, (9.11.2009).

¹⁹⁵ Romania/ Curtea Constitutionala, Decizia 1415, dosar 7490/2009 of 4.11.2009.

¹⁹⁶ Art. 2.1 of the Law states that the salary-related rights of the National Bank, the Commission for the Supervision of Insurance and the Commission for the Supervision of Private Pensions are exempt from the norms.

the constitutional provisions allowing multiple positions in the case of the Ombudsman, prosecutors, magistrates etc.

In regards to Article 21 which deals with the bonuses of blind employees, the Court emphasised the constitutional obligation to protect persons with disabilities and decided to provide an alternative reading of the legal provision. According to the Court, the Law does not clarify if the maximum bonus (30%) payable to all employees paid from public funds includes the 15% additional bonus to which blind people's disability entitles them. In order to avoid infringement of Article 50 of the Constitution (protection of persons with disabilities), it is obvious that this 15% bonus should be added to the bonus of 30%.

Internet link source:

Search engine of the RCC: <http://www.ccr.ro/cauta/Default.aspx>

http://media.hotnews.ro/media_server1/document-2009-09-7-6117252-0-proiect-legea-salarizarii-unitare.pdf

Slovenia

SI

Legislative developments

Proposed new Family Code includes equal rights for same-sex couples

In September 2009 the Ministry of Justice and the Ministry of Labour, Family and Social Affairs publicly presented a draft of the new Family Code which, if adopted, will replace the 1976 Marriage and Family Relations Act and the Registration of Same-sex Partnerships Act. The draft law amends the definition of marriage, currently defined as 'a legally regulated partnership between a man and a woman', to 'marriage is a life-long community of two persons'. The draft law also recognises civil partnerships of same-sex couples in the same way as opposite sex civil partnerships are already recognised, including the same social benefits, as the proposed definition reads 'civil partnership is a long-term community of two persons'.

The draft law was made available for a 30-day public debate which included a public hearing in the National Assembly on 12 October 2009.

Internet link source:

http://www.mdds.gov.si/fileadmin/mdds.gov.si/pageuploads/dokumenti__pdf/DZak__22.12.2009_.pdf

Case law

Court finds Same-sex Partnership Act discriminatory in relation to inheritance rights

The complainants were a same-sex couple that had registered their relationship in October 2006 in accordance with the Registration of Same-sex Partnerships Act. After the registration and the subsequent application of the provisions of the Act to their relationship, the complainants lodged a petition to the Constitutional Court to review Article 22 of this Act. They alleged that this provision, which would apply to them when one dies, was discriminatory, as it regulates inheritance rights differently than the Inheritance Act that is in place for spouses and opposite-sex civil partners. They also claimed that Article 22 was discriminatory



as it establishes different inheritance regimes for 'common' possessions and 'special' possessions¹⁹⁷ (while the Inheritance Act specifies only one regime for the entire estate of the deceased): the surviving partner is excluded from inheriting special possessions. Moreover, the Act does not prescribe an obligatory share for the surviving partner if the deceased leaves him/her out of the will.

The Constitutional Court found¹⁹⁸ that Article 22 of the Registration of Same-sex Partnerships Act is contrary to the Constitution. The decision specified that the National Assembly should remove the inconsistencies ascertained within six months of the publication of the decision in the Official Journal of the Republic of Slovenia. Until the inconsistencies were removed, the same rules were valid for inheritance between registered same-sex partners as for spouses of different sexes under the Inheritance Act. The Court asserted that the situation of partners in a registered same-sex partnership is, in relation to the right to the estate of a deceased partner, in its basic actual and legal elements comparable with the situation of spouses. The difference in the regulation of inheritance between spouses and partners in registered same-sex partnerships is not based on objective criteria, but on sexual orientation. The Court further stated that sexual orientation is one of the personal circumstances listed in paragraph 1 of Article 14 of the Constitution¹⁹⁹ for which discrimination is prohibited, and since there is no constitutionally justifiable reason for differentiation, such regulation is contrary to paragraph 1 of Article 14 of the Constitution.

Internet link source:

<http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/5EC66748A09C70A4C12575EF002111D8>

ES

Spain

Policy developments

Establishment of the national Equality body

The 'Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin'²⁰⁰ was set up on 28 October 2009 and immediately begun to be operational. It had been established by Law 62/2003 (Article 33) of 30 December, which transposed Directives 2000/43/EC and 2000/78/EC. The Council has 29 members nominated by their respective organisations and includes representatives of central government, regional governments, local governments, employers' organisations, trade union organisations and organisations active in the field of non-discrimination on the grounds of racial or ethnic origin.

¹⁹⁷ Under Slovenian law, common possessions encompass everything that partners acquire through work during the duration of the marriage/civil union /registered partnership, and possessions acquired with income deriving from their common possessions. Common possessions belong to both partners and their shares are not determined. Special possessions of each partner are those acquired before they entered into marriage/civil union/registered partnership, by inheritance or gifts, and income from their special possessions.

¹⁹⁸ Constitutional Court decision of 02.07.2009, Reference No. U-I-425/06, publication Uradni list RS, št. 55/2009.

¹⁹⁹ Paragraph 1 of Article 14 of the Slovenian Constitution does not explicitly mention sexual orientation as a ground of prohibited discrimination, but includes a general clause 'or any other personal circumstance'.

²⁰⁰ '*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*'.

*Legislative developments***Inquiry into extension of the prohibition of age discrimination**

The Swedish government decided on 13 August 2009 to appoint a special investigator to inquire whether there is a need to amend some provisions of the Discrimination Act (2008:567), in particular regarding age discrimination.²⁰¹ The purpose of the inquiry is to propose new legislation introducing a prohibition of age discrimination in the following areas: supply of goods, services and housing, including open meetings²⁰² and public events;²⁰³ health care and social services;²⁰⁴ social insurance, including unemployment insurance and educational grants;²⁰⁵ and public sector employment.²⁰⁶



The suggested changes to the Discrimination Act will anticipate the adoption of the proposed Council Directive²⁰⁷ implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation outside the field of employment and occupation, and implement the proposed Directive in national legislation. The results of the inquiry will be submitted to the Government on 27 August 2010.

Survey of discrimination in housing through situation testing

The Swedish Government decided on 15 October 2009 to request a survey from the Equality Ombudsman with regard to discrimination in the housing market and to allocate the sum of SEK 1.1 million (approximately EUR 110 000) for this purpose. The survey will cover the most important forms of housing, namely ownership,²⁰⁸ tenant-ownership,²⁰⁹ and tenancy,²¹⁰ and will conduct an analysis with regard, *inter alia*, to differences between regions, forms of housing, and between private and municipal landlords.

The Ombudsman will consider²¹¹ situation testing as a method to investigate the extent of discrimination. The Government envisages, for instance, sending applications to landlords or making offers to sellers from fictitious applicants or buyers using documents or other information that relate the applicants or buyers to different grounds of discrimination.

²⁰¹ Dir 2009:72.

²⁰² The Swedish word *sammankomst* refers to a gathering of a small number of people. If, for instance, a group organises a discussion on a subject and invites the public, the prohibition applies even though the number of participants is small.

²⁰³ Chapter 2 Section 12 of the Discrimination Act.

²⁰⁴ Chapter 2 Section 13 of the Discrimination Act.

²⁰⁵ Chapter 2 Section 14 of the Discrimination Act.

²⁰⁶ Chapter 2 Section 17 of the Discrimination Act.

²⁰⁷ COM (2008) 426 final.

²⁰⁸ Approximately 38% of Swedish homes are owned directly. This mainly applies to single family homes.

²⁰⁹ Approximately 18% of Swedish homes are held in 'tenant-ownership'. This is a form of co-operative, but the tenant has a very large degree of ownership, including the freedom to sell the apartment to the highest bidder and to make alterations to it, for instance by adding or removing walls within the apartment.

²¹⁰ Approximately 44% of Swedish homes are held in tenancy; in tenancies all forms of advance payment other than monthly rent is prohibited.

²¹¹ After considering situation testing, the Ombudsman is entitled to select a method other than situation testing.

United Kingdom

Political developments



The UK Equality and Human Rights Commission threatens the far-right British National Party (BNP) with legal action

The Equality and Human Rights Commission wrote to the extreme right-wing British National Party (BNP) over possible breaches of anti-discrimination law. The Commission demanded that the BNP address potential breaches of the Race Relations Act 1976 relating to its constitution and membership criteria, employment practices and provision of services to the public and constituents, with the Commission stating that in its opinion, the BNP discriminates against non-British persons in its membership admission rules and in the manner in which its elected representatives address the needs of constituents in their local areas.

The letter, sent to the BNP chairman Nick Griffin MEP, set out the Commission's concerns about the BNP's compliance with the Race Relations Act and requested that the BNP provide written undertakings by 20 July 2009 that it would make the changes required by the Equality and Human Rights Commission (EHRC). Failure to do so could result in the Commission making an application to a county court for a legal injunction restraining the BNP from discriminating against non-British ethnic groups. The BNP requested additional time to respond to the EHRC's allegations.

Internet link source:

http://www.equalityhumanrights.com/uploaded_files/letter_before_claim.pdf

Legislative developments

Progress in adoption of Equality Bill 2009

The Equality Bill 2009,²¹² which aims to consolidate, modernise and clarify existing anti-discrimination legislation on all protected grounds and to extend protection to discrimination on any two combined grounds, completed its passage through the House of Commons in December 2009 and has begun to make its way through the House of Lords. A number of concerns have been raised by commentators, in particular in regard to the complexity of the legislation, the fact that multiple discrimination provisions will extend only to two combined grounds and that the crucial positive obligations on public authorities to further equality and combat discrimination are being diluted. Religious leaders in the House of Lords are opposed to the Act on the grounds that it, like existing legislation, restricts the freedom to discriminate on grounds of sexual orientation as a result of the discriminator's religious beliefs.

Internet link source:

<http://www.publications.parliament.uk/pa/ld200910/ldbills/020/en/2010020en.pdf>

Latest news!

On 8 April 2010, the UK Parliament adopted the Equality Act 2010. A detailed account of this Act will be given in the next issue of this review. The following link provides access to the final text:

<http://www.publications.parliament.uk/pa/ld200910/ldbills/039/2010039.pdf>

²¹² See *European Anti-Discrimination Law Review (EADLR)*, issue 9, p. 78.

Justified to oblige a Registrar to officiate civil partnerships contrary to her religious beliefs



The claimant, who worked as a Registrar of Births, Marriages and Deaths employed by the London Borough of Islington,²¹³ was threatened with disciplinary action by her employer due to her refusal to conduct civil partnership ceremonies between same-sex couples which, as a result of the recognition of such partnerships by the Civil Partnerships Act in 2004, was included in the duties of Registrars. The Employment Appeals Tribunal (EAT) had ruled in December 2008 in an appeal against a decision of the Employment Tribunal that the claimant had not been directly or indirectly discriminated against or subject to harassment on the grounds of her religious beliefs as she had alleged. The Employment Appeals Tribunal refused the claimant permission to appeal against its decision, and the claimant applied to the Court of Appeal for such permission, which was granted.

The Court of Appeal was requested to examine whether the lower court had been entitled to rule that action taken against an employee who, on grounds of her religious beliefs, refused to fulfil her duties relating to civil partnerships between same-sex couples was necessarily justified by the employer's obligations not to discriminate on grounds of sexual orientation against service users, although it disproportionately disadvantaged the claimant as a Christian.

The Court of Appeal ruled²¹⁴ that the employer and the claimant, as an office holder, were prohibited by law from discriminating on grounds of sexual orientation and that, as a result, the indirect religious discrimination involved in insisting that the claimant perform her duties relating to civil partnerships was necessarily justified. The Court concluded that the claimant was neither directly nor indirectly discriminated against, nor harassed, whether by being designated a civil partnership registrar, by being required to conduct civil partnership ceremonies, or by any other aspect of her treatment by her employer.

Internet link source:

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html>

Non-admission to a Jewish faith school constitutes racial discrimination



A well-known school that received a much higher number of applications than places available established a policy giving preference to prospective students who were recognised as Jews by the Chief Rabbi of the United Hebrew Congregation of the Commonwealth; that is to say, to children of Jewish mothers or mothers who are Jews by conversion by Orthodox standards.

A father whose son was refused admission to the school because he was not recognised as a Jew by the Chief Rabbi, appealed to the Supreme Court alleging that this policy violated the Race Relations Act 1976. It should be noted that the father was recognised as a Jew but this was not considered by the Chief Rabbi as relevant, as the important factor was whether the child's mother was a Jew at the time of his birth. The mother, who was not a Jew, had undergone a course of conversion to Judaism before giving birth under the auspices of a non-Orthodox synagogue, not in accordance with the requirements of Orthodox Jews. As a result, while her conversion is recognised by Masorti, Reform and Progressive Jews, it was not recognised by the Chief Rabbi.

The Supreme Court had to examine whether the school's policy of restricting admission to those recognised as 'Jewish' by the Chief Rabbi amounted to direct racial discrimination, in respect of which

²¹³ See *European Anti-Discrimination Law Review (EADLR)*, issue 8, pp. 69-70.

²¹⁴ Court of Appeal (Civil Division) on appeal from Employment Appeal Tribunal, decision of 15.12.2009, *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.



no justification was available to the school under the Race Relations Act, or merely to direct religious discrimination in respect of which a specific defence would have been applied.

The Supreme Court ruled²¹⁵ that although the school was not racially motivated in its policy, this nevertheless constituted unlawful direct discrimination on the grounds of race. In particular, the claimant had been treated less favourably in relation to his admission to the school on the basis that he was not recognised as a Jew by the Chief Rabbi; the Court concluded that the test applied by the school was based on ethnic origin and therefore violated the Race Relations Act 1976; as a result, no relevant defence was available to the school.

Internet link source:

http://www.supremecourt.gov.uk/docs/uksc_2009_0105_judgmentV2.pdf

²¹⁵ Supreme Court decision of 16.12.2009, [2009] UKSC 15 on appeal from [2009] EWCA Civ 626.

