

Issue No. 4 | November 2006

European Anti-Discrimination Law Review



In this Issue:

Articles on systemic racial discrimination before the ECtHR | the shift in the burden of proof | MEP's reflection on 2007 EU Year of Equal Opportunities | ECJ and ECHR Case Law Updates | National Legal Developments | European Policy Update

For Diversity



Against Discrimination

An initiative of the EU

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

European Anti-discrimination Law Review

No. 4 - 2006



Liewe | 1983

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

The contents of this publication do not necessarily reflect the opinion or position of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities

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The Action Programme has three main objectives. These are:

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

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

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The information contained in this fourth issue of the review reflects, as far as possible, the state of affairs on 15 June 2006

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Johnny | 1969



Introduction

This is the fourth issue of the bi-annual European Anti-discrimination Law Review, prepared by the European Network of Legal Experts in the non-discrimination field. The review provides an overview of the developments in European anti-discrimination law and policy in the six months prior to publication (the information reflects, as far as possible, the state of affairs on 15 June 2006).

In this fourth issue, Jan Niessen and Piet Leunis, the Directors of the Network give a short update on the activities of the Network. Claude Moraes, British Member of the European Parliament (PSE) reflects on the "Challenges for Anti-Discrimination Law and Policy for the 2007 Year of Equal Opportunities". Fiona Palmer, Legal Analyst at MPG examines the mechanism of the shift in the burden of proof and therefore the re-dressing of the balance of power in discrimination cases. Claude Cahn, Programmes Director of the ERRC (European Roma Rights Centre) challenges the tackling of systemic racial discrimination at the European Court of Human Rights.

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

Meet ordinary people in this Review, facing discrimination

Reporting on the Implementation of the Anti-discrimination Directives: An Update from the European Network of Legal Experts in the Non-discrimination Field

Jan Niessen and Piet Leunis

After the adoption of the Racial Equality and Employment Directives in 2000, Member State governments embarked on a process of reviewing and making changes to existing national legislation with a view to ensuring that national law complies with the new Community anti-discrimination standards. Although this process has not been finished by all Member States and has not been entirely and satisfactorily completed in every Member State, it is safe to say that legal protection against discrimination on the basis of race and ethnicity, religion and belief, disability, age and sexual orientation has been considerably enhanced.

The changes in national law are well documented by the 25 country reports prepared by the Network.¹ The reports describe how the provisions of the Directives have been incorporated into national law in such a way that it becomes easier for the European Commission, national governments and non-governmental stakeholders to assess whether or not Community law has been correctly implemented across the European Union. In addition, the reports are a unique and rich source of information on national anti-discrimination law. They were prepared as baseline reports during the Network's first full year of operation and have been updated in its second year. For this purpose the national experts monitored and reflected upon the changes in national law. They consulted official publications and scholarly reviews. Where the formulation of certain provisions left the door open for significantly different interpretations, the national experts consulted with colleagues from their own country as well as from other countries.

The Network's 'Discrimination-ground Co-ordinators' and Content Manager read and commented on the first draft of the reports. They looked at the consistency of the drafts, made sure that the five anti-discrimination grounds were all adequately covered and ensured that the reports were drawn up according to the agreed template. For the sake of completeness and factual correctness, the European Commission and the Member States were given the opportunity to read the reports which in some instances led to valuable comments. Human European Consultancy, co-ordinating the process and MPG, responsible for the content of all Network products, gathered in the comments and questions and discussed them with the national experts and oversaw the finalisation of the reports. The Network assisted the Commission with the analysis of the information by drawing attention to successful examples of transposition and to the main shortcomings. As with last year, a comparative analysis of the national reports has been prepared and will be made available in English, French and German.

The other activities of the Network include contributing to the writing of the legal chapter of the Commission's annual report and the preparation of three thematic reports, namely on data collection, on equality bodies and

¹ The full country reports and summaries are available at http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

on segregation of Roma in education. The reports on data collection and equality bodies will be printed, the report on segregation of Roma will be available on the Commission's web site and all three reports will be available in French, German and English in 2007.

An ongoing activity of the Network is the production for the Commission of so-called flash reports which provide updates on developments in law and policies in the Member States thus enabling the Commission to monitor and act upon them. The flash reports form the basis of the News from the Member States section of the Law Review.

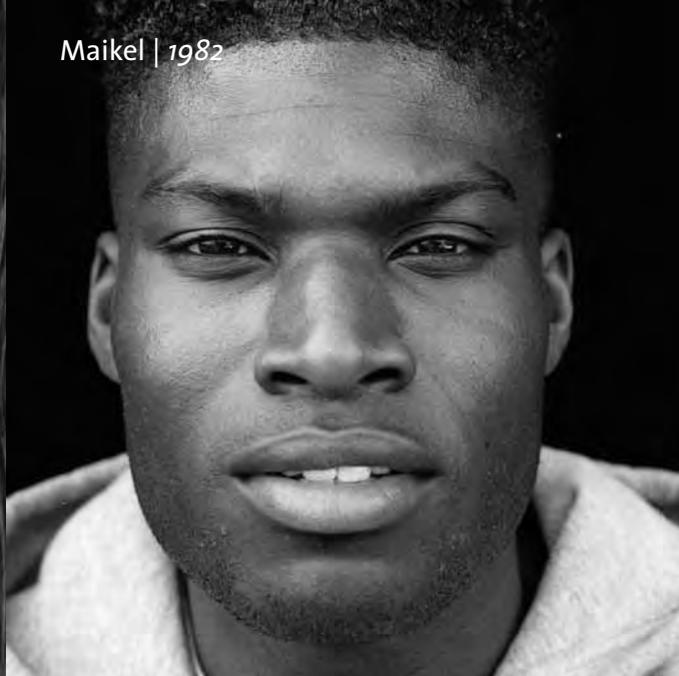
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Marieke | 1987



Maikel | 1982



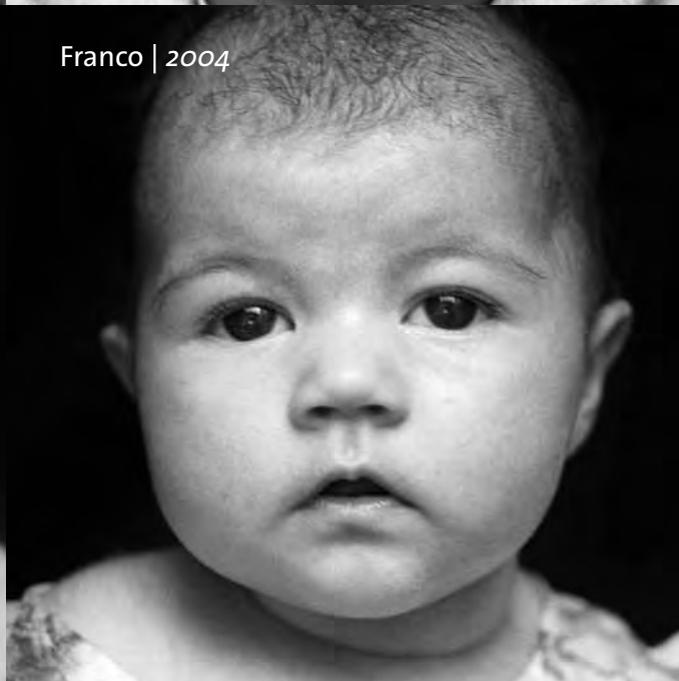
Janneke | 1962



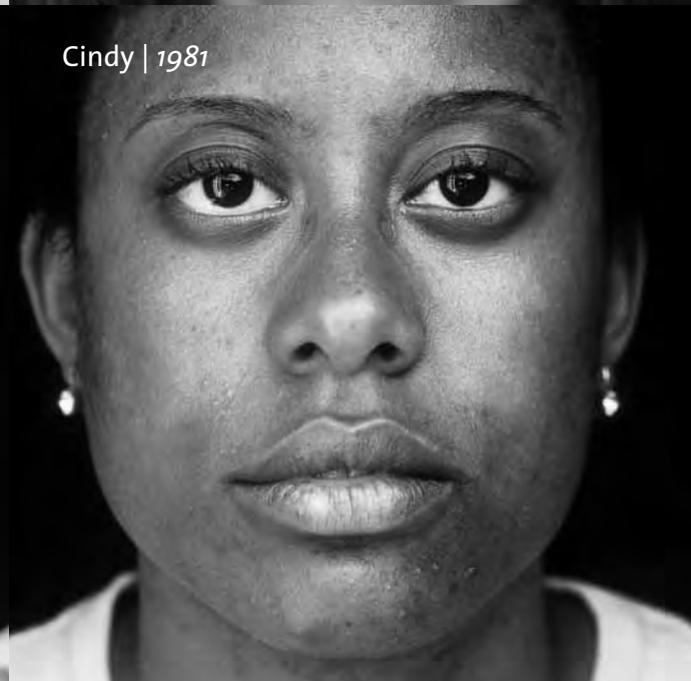
Shirley | 1954



Franco | 2004



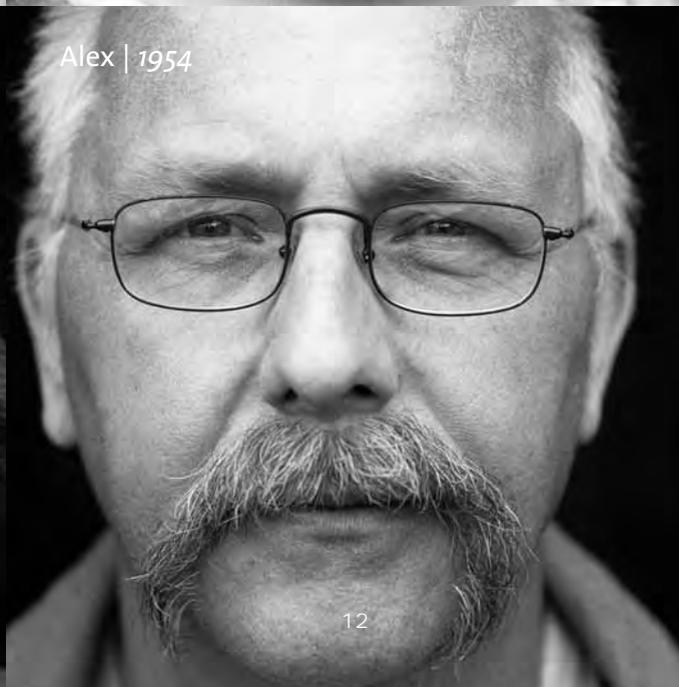
Cindy | 1981



Sarah | 1970



Alex | 1954



Gino | 1997



The Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights

Claude Cahn, Programmes Director European Roma Rights Centre (ERRC)²

The European Court of Human Rights has a tortured history in addressing racial discrimination. Until early 2004, the Court had never found a violation of the Article 14 ban on discrimination in a case involving allegations of racial discrimination. Until then, only two positive rulings on racial matters existed, none under the standard Article 14 provision. The Court's rigid approach on racial discrimination matters during the 1990s, guided in particular by the application of an apparently insurmountable "beyond a reasonable doubt" standard, brought an increasing chorus of dissent, not least from within the Court itself. Thus, for example, in a 2002 ruling in a Bulgarian police killing of a Romani man in which the Court found no violation of the Convention's Article 14 non-discrimination provisions, Judge Bonello provided the following dissenting opinion:

"Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court's case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination. The present case energises that delusion ... Frequently and regularly the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity. Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it."³

The Court has had particular difficulty identifying Convention issues where Roma are concerned, and some have alleged an anti-Romani bias at the Court itself.⁴ In the past two years, a shift appears to be taking place at the Court, with the result that greater credence is now being given to the problem of racial discrimination, and some states have been held to account in recent decisions involving racial discrimination. However, to date, the Court's approach is not yet consistent, and States have no clear guidance from the Court as to what matters might give rise to Convention violations in racial discrimination matters. Comparison of two recent judgments – one involving a vicious pogrom in Romania, and the other involving systemic school discrimination - highlights areas in which the Court must further elaborate its approach, such that EU rules, international law,⁵ and Convention jurisprudence are in harmony.

² Programmes Director, European Roma Rights Centre, ccahn@errc.org.

³ *Anguelova v. Bulgaria* (Application no. 38361/97), Judgment of 13 June 2002.

⁴ See Clements, Luke, "Litigating Cases on Behalf of Roma before the Court and Commission in Strasbourg", Roma Rights, Winter 1998, at: <http://www.errc.org/cikk.php?cikk=487>.

⁵ Including but not necessarily limited to the definition binding States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD): "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." (Article 1(1)).

On 20 September 1993, as the Council of Europe's Committee of Ministers was meeting to approve Romania's application to the Council of Europe, a mob of villagers in the town of Hadareni, Mures County, Romania, on the road between Cluj and Tirgu Mures, were killing three Romani men, and putting the rest of the community in flight. Following the knifing death of a non-Romani man, a mob involving most of the village chased three suspected Romani perpetrators into a house. With police looking on passively, villagers set the house on fire. Here, accounts differ. According to one version, the villagers beat to death two men who jumped out of the burning building, while a third perished in the fire. According to other accounts, all three men jumped out of the building, were beaten to death, and then the mob decapitated and cut off the arms and legs of the corpse of Mr. Mircea Zoltan and threw his mutilated body back into the burning house. There is no dispute as to what happened next: the mob proceeded to burn to the ground a further 14 houses in the Romani quarter in Hadareni.⁶

Following the pogrom, the surviving victims lived in degrading circumstances in various parts of Romania. They were forced to live in hen houses, pigsties, windowless cellars, in extremely cold and overcrowded conditions. These conditions lasted for several years and in some cases are still continuing. As a result, many applicants and their families fell ill. Diseases contracted by the victims included hepatitis, a heart condition (ultimately leading to fatal heart attack), diabetes, and meningitis. Some of the victims fled the country.

Complaints against the police were referred to the Military Prosecutor's Office, which issued a decision not to prosecute. That decision was upheld on appeal. Prosecutors did not bring any form of indictment against perpetrators in the case until 1997. When, under pressure, they finally did, the indictment read more like an indictment of the victims than of the perpetrators. To quote only a small part of the 12 August 1997 indictment, "Groups of Gypsies have been the source of numerous conflicts with the young people from the village, as they show aggressive behaviour, using force in order to acquire money and goods. Their conduct became in time even degrading, manifesting itself in insults and fights. Such incidents have occurred in the private bar owned by Nicolae Gall, where they have provoked quarrels and fights. Generally speaking, some of these Gypsies conducted themselves like 'masters', defying any social norms. The attempts of older persons with moral authority to convince them to change their behaviour failed, and such persons were threatened or intimidated. ..."⁷

In a judgment issued in July 1998, twelve individuals were convicted of destruction of property and disturbance, including the Deputy Mayor of Hadareni, and five were convicted of murder. The sentences, ranging from one to seven years were later shortened on appeal. The Supreme Court later acquitted two of the defendants and those remaining in custody were pardoned by the Romanian president in June 2000. A civil court awarded limited pecuniary damages to some of the victims, while rejecting all requests for non-pecuniary damages.⁸ In 1997, representatives of a number of the Romani victims filed an application at the European Court of Human Rights.

⁶ Over 30 such episodes took place in Romania in the period 1990-1994. The Hadareni pogrom is the first ruled on by the Court. Applications in three other such events – the pogroms at Plaesii de Sus, Casinul Nou and Bolintin Deal – are currently pending before the Court.

⁷ Full text of the indictment (English translation) available at: <http://www.errc.org/cikk.php?cikk=1792>.

⁸ The highest levels of damages provided by any court ruling the case, even after the favourable European Court of Human Rights ruling of July 2005, have been awarded to Nicolae Gall, one of the main perpetrators. He was convicted for acts related to the destruction of the houses (but not in relation to the killing, despite evidence of his involvement in the mob killings), imprisoned briefly, and then amnestied by President Iliescu. On the basis of the amnesty, he subsequently sued for wrongful imprisonment and was awarded damages amounting to the Romanian lei equivalent of more than 100,000 Euro.

The Court faced difficulties in admitting the case for ruling due to the fact that the pogrom had taken place a number of months before Romania actually joined the Council of Europe, and therefore before the Convention was in effect in Romania. It nevertheless agreed to hear the case, accepting arguments that the degrading living conditions in which the victims lived for many years after the mob violence, as well as the racially motivated failure to deliver justice in the case, constituted continuing violations of the Convention from 20 June 1994, when the Convention entered into effect in Romania.

Ruling on the case in July 2005, the Court held that Romania had violated multiple provisions of the European Convention on Human Rights. The Court ruled that there had been violations of Article 6(1) (right to a fair hearing) on account of the length of the proceedings, and Article 8 (right to respect for private and family life). The Court approached the problem of racial discrimination from a number of angles. Reviewing arguments that the Convention's non-discrimination provisions had been infringed with respect to the right to a fair hearing and right to respect for private and family life, the Court agreed, and accordingly found a violation of Article 14 of the Convention in conjunction with Articles 6(1) and 8. The Court also proceeded to find a violation of the Article 3 prohibition of inhuman or degrading treatment for reasons including racial discrimination:

“In the light of the above, the Court finds that the applicants’ living conditions and the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference with their human dignity which [...] amounted to ‘degrading treatment’ within the meaning of Article 3 of the Convention.”⁹

Ruling in the Hadareni case, the Court rose to the task of rendering justice where a Council of Europe Member State had failed, stepping in to correct severe harms – including racial discrimination harms – and providing due remedy to victims. The Court’s unequivocal approach in the Hadareni case contrasts starkly with the tormented, confused, and flawed conclusions in another case deliberated concurrently – the petition of a number of Romani children to the Court complaining of Convention harms in relation to their racially-driven placement in separate, substandard schooling arrangements for mentally disabled children.

The problem of racial segregation of Romani children in education has been a matter of public discussion since the late 1970s, when the Czechoslovak dissident initiative Charter 77 first called attention to the issue. In candid moments, the Czech government has acknowledged the extent of the problem. For example, it told the UN Committee on the Elimination of Racial Discrimination in 2000:

On the basis of psychological tests which do not take into account the social and cultural differences between Roma and non-Roma children, the children of the Roma minority are often transferred to schools for children with special educational needs (SEN schools), subject to their parents’ consent, although these schools are officially intended for children with learning difficulties that make it impossible for them to study at primary school or a special primary school. The problem is that the SEN school graduates have much lower chances in their life: they cannot be accepted to secondary schools, nor can they acquire a full-fledged vocational

⁹ *Moldovan and Others v. Romania* (Applications nos. 41138/98 and 64320/01), Judgment No. 2 of 12 July 2005, para 113.

education. Estimates say that 75 per cent of Roma children are transferred to or directly enrolled in these special schools.¹⁰

Even in this moment of relative frankness, the Czech government does not fully do justice to the extent of the problem. The schools at issue are not schools for the extremely mentally disabled, which were called, prior to the 2004/2005 school reform in the Czech Republic, “auxiliary schools.” The “remedial special schools” at issue provide reduced-quality schooling for children who have tested in outdated and rigid psychological tests applied to extremely young children, as being at, around, or slightly below the line of mental disability. There is no equivalent for such schools in many other countries, and some people allege that they were created specifically for the purpose of segregating Romani children.

A parent’s consent is required for placement in one of these separate, dumbed-down “special schools.” In the standard account provided by Romani parents, directors of both target (special) school and placing (mainstream) school reach agreement to place a Romani child in a special school. The child is then sent for psychological testing. Psychologists have total discretion in deciding which tests to apply. There are widespread allegations of discrimination in decisions to test children, with non-Romani children generally not referred for psychological testing. The tests themselves are not available to the public – only a licensed psychologist may have access to them. Armed with the failure of the Romani child – who may be as young as five years old -- at the psychologist, school authorities as a group bring pressure on the parent to agree to transfer the child to the special school. Arguments usually centre on the idea that the child “will be happier there,” for reasons including that she/he will not be bullied by non-Romani children (of whom there are few in such schools) and she/he will be “among her own kind” (because as everyone knows, the schools are Romani ghettos). The Romani parents often capitulate under such pressure – although some do not. Once placed in a school for the mentally disabled, there are few procedures for transfer back to a mainstream school, and in practice, after more than six months in such a school, the child will likely be too far behind to be able to be returned to a mainstream school without massive supplementary measures.

To date, no efforts by civil society, international monitoring bodies, the European Union, or even good-willed corners of the Czech government itself have been powerful enough to persuade the Czech government to undertake anything other than cosmetic changes to the school system.¹¹ Acting to challenge the racial segregation of Romani children in education in the Czech Republic, the ERRC undertook extensive documentation of the issue in the 1998/1999 school year. Because no accurate data on the ethnic composition of the Czech school system existed, the ERRC endeavoured to map it. Fearing embarrassment, Czech authorities were at best ambivalent about this effort, and in the absence of the full participation of state authorities, a

¹⁰ “Fourth periodic report of State Parties due in 2000, Addendum,” Czech Republic CERD/C/372/Add.1, 14 April 2000, para 134. The Czech government also has other modes, such as blaming the victim. Here, for example, is a passage from the Czech government’s draft Joint Inclusion Memorandum of 2004: “The main limitation disadvantaging Roma pupils in the education process in relation to the majority population is often the low social level of the Roma community, which undervalues the importance of education.”

¹¹ A widely advertised school reform in effect since January 2005 abolished special remedial schools for the mentally disabled entirely, and replaced them with similar arrangements with new names. Government officials have touted this reform as addressing the substance of complaints raised about special education in the Czech Republic (including the issue of racial segregation), but have not said how this reform might achieve the integration of Romani children into mainstream schooling. To date, there is no indication that it has had this effect. Indeed, the amended law establishing the reform provides school officials with new powers to establish separate classes, so the reform may ultimately entrench segregation rather than end it.

country-wide survey was impossible. Our sample therefore became the largest possible manageable unit: the city of Ostrava, the Czech Republic's 3rd largest city. During the 1998/1999 school year, Ostrava had 82 primary schools. Seventy of these were standard primary schools, 8 were special remedial schools – "zvlastni skoly"; the primary locus of racial segregation of Romani children in education in the Czech Republic. A further three were auxiliary schools for the extremely mentally disabled ("pomocne skoly"), and there was one school under Catholic church administration.

Efforts to design a methodology to count children in all schools ran immediately into the problem that little would be possible without the co-operation of school directors. Winning the co-operation of these was not easy, but once several had agreed to cooperate, all but one of the rest followed. It turned out that the special schools already had ethnic data on file. This was a revelation, since the Czech government, in its public pronouncements in the mid/late 1990s, strenuously denied that Czech public officials gathered ethnic data, usually with reference to Constitutional protections. School officials appeared blissfully ignorant of such protections. They produced tables listing Roma and non-Roma by class for each school we visited. We soon had a brimming notebook of such tables, by school.

Ultimately, the Ostrava data revealed the following portrait of Czech schooling as it existed in 1998/1999:

- Over half of the Romani children of school age in Ostrava attended special remedial schools;
- Over half of the student population of special remedial schools were Romani;
- Any randomly selected Romani child was approximately 27 times more likely to be enrolled in a school for the mildly mentally disabled than a non-Romani child;
- There was no significant overrepresentation of Roma in the auxiliary schools for the extremely mentally disabled;
- Romani children in regular primary education (i.e., in the 70 standard primary schools) were heavily concentrated in 3 primary schools;
- 32 primary schools had not one single Romani pupil, and as a result 16,722 non-Romani children attended school every day without a single Romani classmate.

In order to deflect the defence that Ostrava is not typical of the Czech Republic as a whole, we undertook documentation efforts in a number of other localities in the Czech Republic, including Brno, Opava, Olomouc, Prague, Bohumin, Ceske Budejovice, Usti nad Labem and Valasske Mezerici. Overall, it was possible to conclude that the forces at issue in Ostrava were general problems of the Czech school system as a whole, not merely the aberration of one city.¹² Research also focused on close examination of procedural issues, which revealed that, in the main, once forced to place a child in a school for the mentally disabled, parents had little if any recourse to have the decision reversed.

This and other research became the basis for the lawsuit which has come to be known as *D.H. and Others v. The Czech Republic*, on which the Court ruled in February of this year.¹³ The lawsuit was first brought to domestic

¹² The results of the 1998/1999 research were published in the ERRC Country Report No. 8, *A Special Remedy: Roma and Schools for the Mentally Handicapped in the Czech Republic*, June 1999. Two separate follow-up research efforts – one undertaken in 2002/2003, and the second undertaken in early 2005 – have concluded that despite the initiation of several superficial ameliorative programmes, no major changes have taken place in the extremity of racial segregation of Roma in the Czech school system since the initial 1998/1999 research.

¹³ *D.H. and Others v. The Czech Republic (Application no. 57325/00)*, Judgment of 7 February 2006 (hereafter "ECtHR Czech School Segregation Decision").

courts in June 1999 and then, following the exhaustion of domestic remedy, to the Court in early 2000. The suit, brought on behalf of eighteen Romani children alleged that race-based forced placement in schools for the mentally disabled, where no procedures existed to challenge wrongful placement or to bring about eventual transfer back into mainstream schooling, amounted to racial segregation, in violation of a number of the Convention's provisions.

The issues brought before the Court pertained to children and their educational careers, and so a timely response by the Court was urgently sought. The Court responded not at all to these concerns, and only managed to communicate the complaint to the Czech government in December 2004, over three and a half years after it was first lodged. Shortly thereafter, at the stage of admissibility, the Court eliminated from consideration all but one of the aspects of the complaint; it rejected out-of-hand the contention that these matters could rise to the level of degrading treatment as banned under Article 3, eliminated from consideration any concern over procedural matters, and agreed to hear matters solely as discrimination in the realization of the right to education: Article 14 in conjunction with Article 2 of Protocol 1, in the language of the Court. Finally, in February 2006, it held that not even this standard had been met, and it found no violation of any provision of the Convention.

In its terse ruling, after first reiterating its standards in this area,¹⁴ the Court proceeded to disregard them, managing both to weigh matters of little if any relevance to the case and to stampede willy-nilly over the facts. The Court for example disregarded evidence pertaining to one of the applicants that the Director of the remedial special school at issue requested that all children of one particular kindergarten be psychologically tested, because the school was in need of the supplementary school subsidies the enrolment of these children would bring. The school director's request makes direct reference to the Romani ethnicity of the children concerned. The Court also preoccupied itself with distracting issues. For example, "In the Court's view, the Government have nevertheless succeeded in establishing that the system of special schools in the Czech Republic was not introduced solely to cater for Roma children [...]" and "The Court observes that the rules governing children's placement in special schools do not refer to the pupils' ethnic origin. [...]"¹⁵

The ruling concludes by holding blithely that although "the general situation in the Czech Republic concerning the education of Roma children is by no means perfect, the Court cannot in the circumstances find that the measures taken against the applicants were discriminatory", and that it was unable "to conclude that the applicants' placement or, in some instances, continued placement, in special schools was the result of racial prejudice."¹⁶ In so ruling, the Court ratifies as "objective and reasonable" the placement in schools for the mentally disabled – schools with no effective curriculum to speak of – of more than half of the child population of an ethnic community, solely because school authorities have succeeded in bullying their parents into "agreeing" to such placement.

¹⁴ "The Court's case-law establishes that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (*Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV). The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (*Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 42), but the final decision as to observance of the Convention's requirements rests with the Court." (ECtHR Czech School Segregation Decision, para 44).

¹⁵ ECtHR Czech School Segregation Decision, paras 48 and 49.

¹⁶ ECtHR Czech School Segregation Decision, para 52.

Two of the seven judges who ruled in the ECtHR Czech School Segregation Decision were sufficiently ambivalent about its quality to issue alternate opinions, one dissenting, one concurring. Judge Costa's concurring opinion identifies the heart of the matter: "The danger is that, under cover of psychological or intellectual tests, virtually an entire, socially disadvantaged, section of the school population finds itself condemned to low level schools, with little opportunity to mix with children of other origins and without any hope of securing an education that will permit them to progress."¹⁷ However, Judge Costa ultimately sided with the majority, albeit ambivalently: "Yet in spite of all this, should the education policy of the Czech Republic be judged so severely? In particular, should the applicants themselves be regarded as victims of a violation of the Convention in those schools? It seems to me to be difficult to go that far without to some extent distorting the facts and the evidence or departing from the case-law (something which, under the Convention, the Grand Chamber is better placed than a Chamber to do)."¹⁸

The sole dissenting opinion in the decision, that of Judge Cabral Barreto, follows the lead of the majority opinion in departing from the Court's existing case law, although his particular departure differs from that of the majority. Judge Cabral Baretto heads into uncharted waters by dwelling on whether the measures undertaken "aggravate differences" between Roma and non-Roma or not, a test which seems likely to raise problems of dissonance with the emerging minority rights regime, among other weaknesses: "[...] the Czech State's 'different treatment' of the applicants served, in my view, to aggravate the differences between them and the pupils attending the ordinary schools."¹⁹ The shaky ground on which Judge Cabral Baretto has founded his dissent appears potentially to have alienated Judge Costa from arriving at his own.²⁰

The distance between the Court's decision in the matter of the Hadareni pogrom and its ruling in the matter of systemic racial segregation in the Czech school system can be expressed approximately as follows: Hadareni conforms to a vision of race-based harms driven by the genocides of World War II and the events preceding them, such as pogroms against Jews in eastern Europe in the late 19th and early 20th century. In Hadareni, the Court was confronted with an event echoing the reasons for which the Court was founded. With the past as mirror, the Court recognised the harms at issue. Narcissus-like, the Court is infatuated with its own reflection.

Challenged by systemic racial discrimination in the Czech Republic, the Court has floundered. Where members of one ethnic group – subjected to widespread contempt and presumed destined for failure – are as a matter of normalised routine shunted into schools and classes where their future is one of, first, mandatory content-deficient sub-schooling, followed by the marginalisation and poverty in adult life enforced by this wholesale abandonment during school-age, according to the European Court of Human Rights, everything is in order.

In its inability to recognise Convention violations in matters not involving extreme forms of vigilante or state-sponsored violence, the Court has eloquently expressed that it belongs with the majority in Europe: it is numb to the real effects of racial discrimination; it cannot understand that the cumulative effects of small decisions to mistrust and avoid pariah ethnic minorities result in powerful exclusion; it lacks entirely an ear for the harms which most minorities will endure in Europe, rather than the more picturesque ones which, thankfully, at present, most will not.

¹⁷ ECtHR Czech School Segregation Decision, Concurring Opinion of Judge Costa, para 4.

¹⁸ ECtHR Czech School Segregation Decision, Concurring Opinion of Judge Costa, para 7.

¹⁹ ECtHR Czech School Segregation Decision, Dissenting Opinion of Judge Cabral Baretto, para 5.

²⁰ "In conclusion, while I regret that I have not been able to agree with all the points made by my colleague in his dissenting opinion, I believe that the Chamber judgment is well-founded. I therefore have overcome my hesitations and voted accordingly." (ECtHR Czech School Segregation Decision, Concurring Opinion of Judge Costa, para 8).

In so ruling, the Court chose not to join growing recognition of these harms by other bodies, including other Council of Europe bodies.²¹ The Court has developed a powerful body of jurisprudence capable of addressing systemic, institutionalised racial discrimination.²² But, in the Czech School Segregation Decision, it chose not to apply this case law. The judgment not only is at odds with the Court's own case law, but also with a number of other provisions of international law. Systemic racial discrimination against Roma in European educational institutions thus as yet goes unacknowledged and un-redressed by the European Court of Human Rights.

More broadly, one might be tempted to conclude, on the basis of the Court's ruling in the Czech School Segregation Case, that ethnic minorities in Europe apparently must be sure to die or be maimed if they hope to gain the Court's sympathy. However, the Court's ruling in *Timishev v. Russia* indicates that in some cases, it is able to grasp racial discrimination matters outside the confines of extreme violence and failures of criminal justice.

But it is apparently not yet prepared to do so for Roma. The Grand Chamber of the Court has been asked to review the February 2006 judgment, and it has now agreed to do so. Grand Chamber hearing is currently scheduled for early 2007, close to seven years after the application was first made at the Court. At stake is the consistency of the Court's case law, its ability to recognise and redress systemic racial discrimination, as well as long-delayed justice for 18 Roma in the Czech Republic who were, once upon a time, children.

²¹ For example, in recent rulings in cases concerning systemic violations of the housing rights of Roma, the European Committee of Social Rights has found Greece and Italy in violation of provisions of the European Social Charter (see European Committee of Social Rights, Decision, Collective Complaint 15/2003, European Roma Rights Centre v. Greece, 8 February 2005; and European Committee of Social Rights, Decision, Collective Complaint 27/2004, European Roma Rights Centre v. Italy, 24 December 2005).

²² For example, in its December 2005 decision in *Timishev v. Russia*, a case involving discrimination in education against ethnic Chechens in Russia, the Court held, "A differential treatment of persons in relevant, similar situations, without an objective and reasonable justification, constitutes discrimination (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV). Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination [...]. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment (see *Nachova and Others*, cited above, § 145). [...] Once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified (see, for example, Applications nos. 25088/94, 28331/95 and 28443/95 *Chassagnou and others v France* 29 EHRR 615, §§ 91-92). [...] the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures." (Judgment, Case of *Timishev v. Russia*, Applications nos. 55762/00 and 55974/00, 13 December 2005, paras 56-58.

John | 1988

Stefan | 1979



Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof

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Introduction

Most Member States have transposed the Article 13 Directives – Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the “Racial Equality Directive”) and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the “Employment Equality Directive”). What now needs to be tested is whether the prohibition of discrimination on all the grounds contained in those Directives; racial and ethnic origin, religion or belief, disability, age and sexual orientation, is being enforced. There are many constituent parts to the Directives (such as provisions for dissemination of information, fostering dialogue with NGOs and between the social partners), but the core elements are a set of legal tools which should facilitate the effective use of the law to combat discrimination and achieve fair and equitable reparation for those who have suffered its effects. A commitment to the effective enforcement of the law provides not only protection for victims in the form of an individual right and remedy, but also expresses society’s firm opposition to discrimination. One of the central aims of the Directives is to widen and strengthen access to redress and the shift in the burden of proof is one of the main mechanisms in the directives which aims to ensure adequate levels of enforcement across all Member States. The correct application of the shift in the burden of proof is imperative to ensure victims are not deprived of an effective means of enforcing the principle of equal treatment. This article aims to raise some of the issues involved in attempting an assessment of this effectiveness.²³

The Article 13 Directives

The remedies and enforcement sections of the Racial Equality Directive²⁴ and of the Employment Equality Directive²⁵ contain the provisions on the burden of proof. The central element of which states:

*“Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them **establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.**” (emphasis added)*

These provisions explicitly state that they are not to apply to criminal procedures.

²³ For a recent account of the application of the shift of the burden of proof in racial equality cases see the report entitled “Changing Perspectives: Shifting the Burden of Proof in Racial Equality Cases” for the European Network against Racism (ENAR) by Dick Houtzager, published June 2006.

²⁴ Article 8 of Directive 2000/43/EC

²⁵ Article 10 of Directive 2000/78/EC

General principles of evidence

In litigation, the term “burden of proof” refers to the obligation imposed on a party to prove (or disprove) a fact in issue to the requisite standard of proof. A party who fails to discharge this burden will lose on the issue in question. The general rule is that where a given allegation forms an essential part of a party’s case, the burden of proof of such an allegation will rest on him (the prosecution in a criminal case or the claimant in a civil case.²⁶) One way of applying this rule in practice is to strike out of the court’s record the particular allegation in question. The burden of proof rests on the party whose case fails when this allegation is struck out. The burden is fixed at the beginning of the trial and does not shift during the course of the trial.

Application of this rule in discrimination cases under civil or employment law would mean that it would be for the claimant to prove discrimination on the balance of probabilities. Failure to so prove would mean that the claimant’s case would fail. This general evidentiary rule of civil procedure was recognised as problematic, particularly in the employment sector where an unequal power relationship between employer and employee exists; the employer being in a considerably stronger position than the employee, principally because much (if not all) of the information about how the allegedly discriminatory decision was arrived at is held by the employer. This is compounded by the reluctance felt by witnesses to testify against their employer. The Article 13 Directives therefore include a rule which would ease the evidentiary burden on victims in discrimination cases. The mechanism is based on that in Article 4 of Council Directive 97/80 on the burden of proof in cases of discrimination based on sex (the “Burden of Proof Directive”) which codified the principle that had been developed by the Court of Justice of the European Communities (ECJ).²⁷ It operates to ‘shift’ the burden of proof to the defendant in certain circumstances to redress the balance of power between the parties.²⁸

The Burden of Proof Directive

The ECJ had developed the principle requiring the burden of proof to shift to the respondent once a *prima facie* case of discrimination had been established by the claimant.²⁹ However, because the aim of adequately adapting the rules on the burden of proof had not been achieved satisfactorily in all Member States it became necessary to enact Community legislation to try to correct this. The Burden of Proof Directive had the express intention of ensuring that measures taken by Member States to implement the principle of equal treatment are made more effective. Article 1 describes its aim as being “*to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because of the principle of equal treatment has not been applied to them to have their rights asserted by judicial process...*”. This is reinforced by Recital 17: “*Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing **evidence of an***

²⁶ The author will use the term claimant in place of, but equivalent to “plaintiff” reflecting the current terminology under the civil procedure rules in the UK.

²⁷ The provisions have recently been recast in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the “Recast Directive”). This directive will replace the Burden of Proof Directive with effect from 15 August 2009.

²⁸ Recital 14, Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (and Recital 30 and Article 19 of the Recast Directive).

²⁹ For a concise history of the development of the principle see “ Changing Perspectives: Shifting the Burden of Proof in Racial Equality Cases;” Dick Houtzager, published by the European Network against Racism (ENAR), Brussels, June 2006.

apparent discrimination were not to impose upon the respondent the burden of proving that this practice is not in fact discriminatory.” (emphasis added).

Two-stage Test

The central definition which appears in the Burden of Proof Directive and the Article 13 Directives is made up of two parts. Stage one requires the claimant to “**establish facts** from which it may be **presumed** that there has been direct or indirect discrimination.³⁰ Recital 21 of the Racial Equality Directive and 31 of the Employment Equality Directive state the aim of the provision:

“the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.” (emphasis added)

‘Prima facie’ means at first appearance, or on the face of things. *Prima facie* evidence is used in common law jurisdictions to denote evidence that is sufficient, if not rebutted, to raise a presumption of fact or to establish the fact in question. The definition from the Oxford Dictionary is illustrative: “*evidence of a fact that is of sufficient weight to justify a reasonable inference of its existence but does not amount to conclusive evidence of that fact.*”

It is this part of the mechanism which attempts to address the inequalities which exist in discrimination cases concerning access to evidence. The evidence accepted by the national courts as establishing facts from which discrimination may be presumed will be key to claimants overcoming the first hurdle. What will amount to a *prima facie* case will depend on the facts of the individual case, appreciation of which is a matter for national judicial bodies in accordance with rules of national law and practice.³¹ The Racial Equality and Employment Equality Directives make explicit reference to the fact that “*such rules may provide, in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.*”

Although the shift will apply to cases of direct and indirect discrimination, there is a clear link between the shift and indirect discrimination. The ECJ recognised in the cases of *Enderby*,³³ *Brunnhofer*³⁴ and most recently in *Nikoloudi*³⁵ that statistical evidence is sufficient to shift the burden onto the employer in indirect sex discrimination cases. An important difference exists however in the definition of indirect discrimination which appears in the Burden of Proof Directive and the Article 13 Directives which may have implications for the nature and level of statistical proof necessary to effect the shift. The Burden of Proof Directive refers to “*an apparently neutral provision, criteria or practice which disadvantages a substantially higher proportion of members of one sex*”³⁶ with the consequence that the claimant has had to establish that a measure has in practice “*an adverse*

³⁰ Emphasis added.

³¹ Recital 15 of both Article 13 Directives and Recital 13 of the Burden of Proof Directive.

³² Recital 15 of both Article 13 Directives.

³³ Case C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR I-5535.

³⁴ Case C-381/99 *Brunnhofer v Österreichischer Bank Postsparkasse* [2001] ECR I-4961.

³⁵ Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE* [2005] ECR I-1789.

³⁶ Emphasis added

*impact on a substantially greater percentage of members of one or the other sex.*³⁷ The Article 13 Directives³⁸ refer to measures which would put persons of a racial or ethnic origin, a particular religion or belief, disability, age or sexual orientation “*at a particular disadvantage compared with other persons.*” This will have to be resolved by future ECJ case law on the burden of proof provisions of those directives, although it is worth noting that the wording of the Article 13 Directives has been adopted in the Recast Directive.³⁹

The second stage of the test requires that “*it shall be for the respondent to prove that there has been no breach of the principle of equal treatment*” and will only come into effect if the claimant has fulfilled the first part. In practice this requires the respondent to prove that he/she did not commit or is not to be treated as having committed the act, for instance because there are objective reasons which justified the difference in treatment. In respect of the Employment Equality Directive, Recital 31 adds that “*it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.*”

In a judgment of the second highest court in civil cases in England and Wales, the Court of Appeal of England and Wales in *Igen Ltd. and Wong*⁴⁰ set down guidelines for the lower courts and tribunals on the shift in the burden of proof. The guidelines provide that once the claimant has established a *prima facie* case, the burden moves to the respondent. In order to then discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex since “*no discrimination whatsoever*” is compatible with the Burden of Proof Directive. Although this is a ruling of a national court, it is worth stating that this same wording is mirrored in Article 2 of the Employment Equality Directive.

Shift, Reversal or Shared Burden

At the time of the drafting of the Article 13 Directives there was much discussion concerning the terminology to be used to describe the way the legal burden is distributed between the parties. Whilst a difference in terminology does not necessarily indicate inadequate transposition of the directives by Member States, a few comments should be made to try and clarify some of the confusion which arises from the existence of several terms. In Scandinavian countries, such as Denmark and Sweden, reference is made to a ‘shared burden of proof.’ The question arises whether this is the same as a shift in the burden of proof. In one sense the shift in the burden leads in reality to a sharing of the burden of proof, not a reversal of it as the onus remains on the claimant to establish facts from which discrimination can be presumed to have occurred. A few Member States appear to use the word ‘reversal’ in their legislation, even if on the face of it the legislation seems to provide in fact for a shift, for example Hungary and Belgium.⁴¹ There may be no practical implications flowing from this (case law will be the final determiner), however it is submitted that the use of the term ‘reversal’ is at the very least unhelpful in so far as ‘shift’ accommodates the reality that the facts necessary to prove an explanation for the conduct in question are normally in possession of the employer, whereas ‘reversal’ connotes that somehow the employer is disadvantaged and required somehow to prove a ‘negative fact.’ A good example of this is the recent Constitutional Court challenge to the compatibility of Czech provision implementing the shift in the burden of proof with the Czech Constitution by the Regional Court of Usti nad Labem. The Constitutional Court dismissed

³⁷ Case C-196/02 Nikoloudi, para 69.

³⁸ Articles 2 (b).

³⁹ [http://www.lex.unict.it/eurolabor/en/documentation/dirapprove/dir\(06\)-54en.pdf#search=%22directive%202006%2F54%22](http://www.lex.unict.it/eurolabor/en/documentation/dirapprove/dir(06)-54en.pdf#search=%22directive%202006%2F54%22)

⁴⁰ *Igen v Wong* [2005] EWCA Civ 142, judgment of 18 February 2005. <http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html>

⁴¹ http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

the Regional Court's argument that the provision operated as a reversal and therefore placed the respondent at a serious disadvantage, infringing their right to a fair trial.⁴²

Cases arising under the Article 13 Directives on the burden of proof

In many Member States, the burden of proof provisions following transposition of the Article 13 Directives remain untested. However, a number of issues have already been raised by the Network of Independent Legal Experts in the non-discrimination field.⁴³ In France, the enforcement of the rules of evidence is one of the real challenges facing the enforcement of anti-discrimination rules in civil matters, where the rules actually impede the process such that victims stand a greater chance of success before the criminal courts where the shift does not apply.⁴⁴ In Belgium, Article 19(3) of the Federal Law of 25 February 2003 which transposed the provision on the burden of proof expressly provides that statistical data and situation tests⁴⁵ can lead the judge to presume discrimination has occurred and that therefore the respondent will have to prove contrary to that presumption that there has been no discrimination. However, statistical data has so far not yet been invoked and there has been controversy around the legislation necessary to lay down conditions for the use of situation testing.⁴⁶ In Hungary victims are obliged to prove that a disadvantage was suffered, which is a higher threshold of certainty than an obligation to establish facts on the basis of which discrimination can be presumed.⁴⁷

In those countries where there have been cases of alleged discrimination, such as Sweden, very few have been successful. It has been suggested that in most cases before the Swedish labour courts this is due to the claimant's failure to even establish a *prima facie* case of discrimination.⁴⁸ In Denmark, in the first case concerning discrimination on the grounds of ethnic origin and the burden of proof under the Danish Act implementing the Racial Equality Directive the Copenhagen City Court found that the claimant had not established proof of discrimination. This was in contrast to an earlier finding of the Danish Complaints Committee, the designated equality body under Article 13 of the Racial Equality Directive. The facts of the particular case concerned training at a technical school during which students could work in a private company for a short period. The complainant had noticed a written note which stated that an employer did not want "P." When the teacher was asked about the meaning of this, the teacher confirmed that the private employer had instructed the school not to send a "Perker" (Danish slang for someone of "Pakistani/Turkish" origin) for training at that firm. The Danish Complaints Committee had found that on the basis of the written note, the employer had directly discriminated against the complainant and they therefore had recommended legal aid be granted to the complainant to enable him to pursue his case before the courts. Despite the existence of the written note the Copenhagen City Court was of

⁴² See the 'News from the Member States' section of this issue of the European Anti-Discrimination Law Review (EADLR), page 44.

⁴³ Comprehensive country reports on the anti-discrimination law in each Member State for each of the grounds under the Article 13 Directives can be accessed at: http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

⁴⁴ See the Country Report on France at http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/frrep05_en.pdf

⁴⁵ For more on this method of proof see Rorive's Article on Situation Testing in EADLR, Issue 3, page 31

⁴⁶ http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/berep05_en.pdf

⁴⁷ Hungarian Country Report for the Network of Independent Legal Experts in the non-discrimination field at: http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

⁴⁸ See Country Report of the Swedish Expert for the Network of Independent Legal Experts in the non-discrimination field at: http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

the opinion that the teacher who made the note would not use it to discriminate in connection with the allocation of pupils to this company as trainees. The decision has been appealed to the Eastern High Court.⁴⁹

In the first case in Poland concerning a disabled person taking action against his employer as a result of having been rejected for a promotion due to the state of his health, a judgment of the court of first instance which raised cause for concern was overturned on appeal. The appeal court found that there had been irregularities in the proceedings of the court of first instance relating to the evaluation of proof because the court of first instance had failed to take account of the testimonies of witnesses of the claimant.⁵⁰

The second highest appeal court in England and Wales set out very clear guidelines for the lower courts on the application of the shift in the burden of proof in the joined appeal cases of *Igen v Wong* which concerned race and sex discrimination, but the court was mindful of the importance of its guidance also for the application of the principle to the other grounds.⁵¹

Need for additional tools?

As the introduction of the shift in the burden of proof acknowledged, traditional ways of collecting evidence such as documentary evidence, witness statements and expert opinions are unsatisfactory in discrimination cases. Although it is still very early days, the first indications from the case law on the shift in the burden of proof are that proof of a *prima facie* case remains a difficult obstacle for claimants to overcome. Statistics are not always available and situation testing is not without controversy. In Great Britain, one effective tool which is invaluable in assisting to establish facts from which discrimination can be presumed (depending on circumstances) is the use of the questionnaire procedure under section 65 of the Race Relations Act 1976, as amended or section 74 of the Sex Discrimination Act 1975, as amended. The legislation permits questions to be sent by the complainant to the respondent in the form of a questionnaire to obtain information from that person in order to decide whether to bring legal proceedings.⁵² The claimant must state the nature of his/her complaint in order that this is clear to the employer from the outset. The questionnaire can contain general questions directed at such topics as whether the respondent has an equal opportunities policy and more specific ones for instance about individual training on discrimination that key players have received. In the event of the complainant taking legal proceedings, in appropriate cases, inferences can be drawn from evasive or equivocal replies to these questionnaires. This might be a tool which could be adapted to other systems to help ensure that implementation of the principle of equal treatment is made more effective.

The *Igen* guidelines referred to above⁵³ state that *"it is for the claimant who complains of [sex] discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by*

⁴⁹ The finding of the Danish Complaint's Committee can be found in EADLR, Issue, 1 pages 44-45 and the decision of the Copenhagen City Court from November 2005 in EADLR, Issue 3, page 60

⁵⁰ *Zbigniew Maciejewski v the County Police Headquarters (Komenda Powiatowa Policji)*, judgment of the District Court of Legnica from 20 June 2005 overturning the Decision of the Regional Court in Glogow from 8 February 2006. See the section on 'News from the Member States' in this issue of the EADLR, page 62.

⁵¹ *Igen v Wong* [2005] EWCA Civ 142. See Annex to the judgment for the 13 step guide to the application of the shift at <http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html>

⁵² http://www.eoc.org.uk/Docs/SDA_74.doc and <http://www.cre.gov.uk/rr65.pdf#search='65%20Race%20Relations%20Act'>

⁵³ *ibid*

virtue of Part II [of the Sex Discrimination Act] or which by virtue of s.41 or 42 of the Sex Discrimination Act is to be treated as having been committed against the claimant.” The Court of Appeal goes on to state that “it is important to remember that the outcome at this stage of the analysis by the tribunal will depend *on what inferences it is proper to draw from the primary facts found by the tribunal.*”⁵⁴ The Court of Appeal explicitly mentions that these inferences can include, in appropriate cases, any inferences it is just and equitable to draw in accordance with s.74(2)(b) of the [Sex Discrimination Act 1975] from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74 (2) of the Sex Discrimination Act.⁵⁵

The *Igen* guidelines also explicitly state that inferences can also be drawn from any failure to comply with any relevant code of practice. In a move which could be seen as a recognition of the importance of such additional tools as codes of practice, the Dutch Equal Treatment Commission, the designated equality body under Article 13 of the Racial Equality Directive, has reversed its long-standing opposition to involvement in more general tasks concerning the implementation of equal treatment laws beyond dealing with individual complaints and has now published guidelines for internal complaints procedures.⁵⁶ Such codes of conduct, with - where necessary - effective enforcement mechanisms, may also constitute a useful tool.

Conclusion

The consideration of the shift in the burden of proof in the case law of the ECJ in cases of indirect discrimination on the grounds of sex has so far centred around equal pay and the lack of transparency of practices and decision-making in the employment field. As far as the application of this case law to situations under the Racial and Employment Equality Directives is concerned it is easy to see how this jurisprudence will find an analogy with other employment procedures such as recruitment and promotion, but it is not so obvious regarding other sectors such as housing and education. The effectiveness of the mechanism of the shift in the burden of proof under the Article 13 Directives will only be revealed once case law starts to emerge from national courts and it is therefore imperative that this continues to be monitored.

⁵⁴ Emphasis added.

⁵⁵ The existence of this tool is explicitly recognised in Recital 15 Burden of Proof Directive (97/80/EC of 15 December 1997). “...it is necessary to take account of specific features of certain Member States’ legal systems, *inter-alia* where an inference of discrimination is drawn if the respondent fails to produce evidence that satisfies the court...that there has been no breach of the principle of equal treatment.”

⁵⁶ See the ‘News from the Member States’ section of this issue of the EADLR, page 59.



Nathan | 1984

Challenges for Anti-discrimination Law and Policy for the 2007 Year of Equal Opportunities

Claude Moraes MEP, President of the European Parliament's Anti-Racism and Diversity Inter-group⁵⁷

An initial optimism surrounded the passage of the EU's anti-discrimination legislation under Article 13 EC Treaty. However, despite the progress, implementation of the Racial Equality and Employment Equality Directives has not been as successful as envisaged and, closer to home, discrimination issues facing the European institutions themselves have also been weak. This article will examine some of these issues and will also set out some of the wider anti-discrimination challenges which may be addressed in the Year of Equal Opportunities 2007.

European Institutions have made a great leap in the last few years in terms of the work they have carried out combating discrimination. Ten years ago EU institutions were not addressing the question of integration, the definition of minorities, there were no racial equality or employment equality directives and no legislative path existed for the fight against discrimination on the grounds of race. Whilst the progress made has been significant, it must further advance to meet the growing demands of contemporary issues, in order to avoid ending up with different tiers of discrimination.

Article 13 of the Treaty of Amsterdam gave European Institutions the power to *"take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."* This was a milestone, and finally empowered the Community to take adequate measures to protect minorities against discrimination. This, in turn, also needed to be supported by adequate legislation from Member States, most of which have now implemented the two EU directives on racial equality and equality in employment. The success in achieving these goals was in part due to the hard work of many MEPs who consistently put pressure on the Commission to draw up legislation, and on Member States to adopt it. However, MEPs have also continued playing a vital role in ensuring that the directives are implemented adequately by Member States, a task which has often proved difficult.

The Parliament has a cross-party Anti-Racism and Diversity Inter-group (ARDI) which meets monthly or bi-monthly. The European Network against Racism (ENAR) acts as the secretariat for the ARDI. There have been various meetings on integration and the implementation of the Article 13 Directives; Roma; and Race and the Media. The Inter-group monitors Commission infringement proceedings and individual Inter-group MEPs follow-up questions they have formally through oral and written Parliamentary questions. The Inter-group regularly meets with Commissioners Špidla and Frattini and their staff to check on the progress on the Commission initiatives such as the Year of Equal Opportunities (see below). The ARDI is emerging as a proactive Inter-group mobilising MEPs on particular Parliamentary debates, resolutions and parliamentary questions, for example the ARDI's written declaration on Racism in football was the most successful declaration in terms of signatories in the Parliament's history. Recent topics discussed by the group have included ethnic profiling; the state of anti-Semitism in the EU; Islamophobia.

⁵⁷ Claude Moraes was previously a Commissioner for Racial Equality at the Commission for Racial Equality in Great Britain. The author would like to acknowledge the work of his Assistant, Asger van Lier, in the preparation of this article.

Turning back to consideration of the EU Institutions themselves for a moment: There are undoubtedly successes in terms of combating discrimination in the EU, particularly in the Institutions. For example, EU Institutions successfully abolished age restrictions in recruitment in 2002, based on Article 21 of the Charter of Fundamental Rights, which prohibits discrimination on any grounds. The Charter is not legally binding and in this respect has yet to be put into practice within the EU institutions, and was to be a part of the Constitution. The failure to ratify the Constitution and the Charter of Fundamental Rights sends out a negative signal to European citizens on how seriously the EU and its Member States take the fight against discrimination. Minority communities in the EU still suffer major inequalities in, amongst other areas, education, employment and housing. The problem is worsened still by the fact that many Member States have no statistics on such issues, making the problem harder to rectify as nobody is fully aware of how serious the situation actually is. In France for example, measuring discrimination against minorities is particularly hard, because the French model of integration does not recognise the existence of such minorities, due to the fact that the French State regards everyone as French, regardless of their background.

The lack of progress made by EU Institutions and most Member States in ensuring that non-white Europeans have an equal chance in job appointments is a cause of great concern. Add to this the very limited attention to issues such as religious discrimination and racial harassment at work and we have an area which has been much neglected within the EU. The Parliamentary Inter-group itself has concentrated its efforts in this regard on the religious provisions of the Employment Equality Directive, but has also worked with the Inter-group on ageing and the LGBT Group on the provisions on age and sexual orientation.

It is true that significant steps were taken by the European Commission and the European Parliament in creating the ground-breaking Racial Equality and Employment Equality Directives in the 1999-2004 mandate. There was great optimism when these directives were passed through the European Parliament with great speed. The Racial Equality Directive gave us the prospect of every Member State implementing comprehensive legislation covering race discrimination in employment and tackling the concept of "indirect," as well as "direct" discrimination in every aspect of life in the public sector, business, access to services, and social and cultural life. With the implementation date now long since passed, all the available research shows that most Member States have either failed to transpose the legislation or have grudgingly transposed weak legislation, destined to be under-promoted by national governments. The Commission has taken enforcement action against more than one Member State, and the Court of Justice of the European Communities (ECJ) has condemned Austria, Finland, Germany and Luxembourg for not properly transposing EU anti-discrimination legislation,⁵⁸ and it is hoped that by focusing on anti-discrimination, Member States will transpose laws with more haste and realise that discrimination will not be tolerated at any level.

What is going wrong both in the EU Institutions and in Member States? There are many reasons for the inaction, but in my experience there are a few key problems. The first, and most fundamental, is the way most EU Member States and the EU Institutions attempt to ignore the need for anti-discrimination policies. While the "integration" of migrants, ethnic and religious minorities is at the top of the agenda for many Member States, there is little acknowledgement that the State has a crucial role in providing legislative protection from race discrimination.

⁵⁸ In the meantime both Austria and Finland have enacted legislation in compliance with the ECJ rulings.

Secondly, there are inexcusable misinterpretations of the building blocks of a successful equal opportunities policy when it comes to race and ethnicity. Good policy recognises not the "victim" but the fact that racism stops the best candidates making progress. It is about "positive action" - breaking down discriminatory barriers to create a level playing field, not positive discrimination which gives an unfair advantage to one group over another. Good policy requires EU Institutions, for example, to practice what they preach. Every major employer with a good equal opportunities policy should begin with ethnic monitoring of its workforce. Without this confidential measurement how can a company or organisation know whether well qualified non-white employees are failing in job interviews and in promotion or retention? Back in June 2002, the European Ombudsman revealed that the European Commission itself failed to provide statistics on the number of people of ethnic minority origin in its workforce, citing the lack of definition of the term "ethnic minority" and data protection. Ethnic monitoring openly conducted, which is voluntary and carried out with all the necessary data protection safeguards, is the bedrock of any good policy in this area. A significant number of multinational companies now recognise that a strong equal opportunities policy gives them a competitive advantage. Where they were once compelled by law to introduce these policies, they now see that it gives them a wider pool of talent to draw from.

As someone of an Asian background, it is of deep concern to me that staff of the Parliament, the Commission and the Council, as well as the staff of political groups, trainees and assistants, and of course, the Commissioners and MEPs themselves are lacking in ethnic minority candidates. In an EU with millions of non-white citizens, it is disturbing not only that this is happening, but that so few take it seriously. The make-up of the EU Institutions should generally reflect the make-up of the wider society it seeks to represent.

The Anti-Racism and Diversity Inter-group will be addressing this issue, but if the responses to previous questions on this issue are anything to go by, then we will only see change when senior policy-makers in the EU Institutions take major steps. They must begin monitoring and start employing well thought out policies already used by some major business organisations and public bodies to tackle overt racism. Pervasive "indirect racism" must also be tackled. This produces similar job applicants with similar backgrounds again and again, while rejecting equally qualified non-white applicants. The EU Institutions need to be more pro-active in opening up their recruitment policy. New ways of advertising job opportunities should be introduced as well as looking at the types of schools and colleges it recruits from if real change is to be seen. It is time for serious action in this area.

In the European Parliament, we like to talk about discrimination against ethnic minorities, the Roma and Muslim communities as well as other groups, but meanwhile our equal opportunities practice in relation to race is poor. We need to ask the questions; what steps have been taken, for example, to analyse why ethnic minority graduates fail to apply for entry exams? What measures have been taken to recruit well qualified people from non-traditional backgrounds? The Institutions have many people who want to improve the policies in this area. They must now be allowed to do so.

Whilst the EU bodies are attempting to work on the issue of integration, which has in the past included the progressive Green Paper on anti-discrimination published by the Commission in June 2004, and the integration issues raised regularly in committee and in the Parliament chamber, there is still no integrated approach or idea that the problems and solutions should be viewed over the long term. This was one of the key reasons why the Anti-Racism and Diversity Inter-group was formed, to ensure that there was a representative voice on these issues. Only about a dozen MEPs out of 732 come from an ethnic minority background, and it is thus important that an ethnic minority voice be heard in the heart of Europe's Parliament.

A key task of the Inter-group will be to hold Member States to account for what they are, or not doing to tackle discrimination and promote integration. An obvious example is the way that most Member States have been reluctant to fully implement the aforementioned Racial Equality Directive and Employment Equality Directive. With some Member States ignoring the Racial Equality Directive and the substantial difficulties for new Member States to transpose this kind of legislation it is important for MEPs to work with the European Commission in moving this agenda forward.

What are the big challenges for EU institutions in the year of equal opportunities?

The aim of the European Year of Equal Opportunities is to give EU anti-discrimination legislation more focus, and to encourage more work on issues relating to discrimination, particularly on issues which cannot be addressed by legislation alone, including how to change peoples prejudices, behaviour and mentality. In addition it will send out a strong message on the benefits of having a diverse European Union and invigorate the fight against discrimination.

There are four core themes for the European Year of Equal Opportunities. Raising awareness of the right to equality and non discrimination, encouraging debate on ways to increase the participation of under-represented groups in society, celebrating and accommodating diversity and promoting respect and tolerance. The Year of Equal Opportunities will provide a new momentum towards encouraging the proper implementation of EU anti-discrimination legislation, which has so far been slow in several Member States.

The focus on equal opportunities will hopefully help make EU citizens better aware of their right to non-discrimination and equal treatment and promote equal opportunities for all. With any luck this will also demonstrate the benefits of having a diverse Union, and encourage people to embrace diversity rather than shrink from it. It will also encourage ways in which to increase the participation and representation of groups who are subject to discrimination, especially ethnic minority groups. This will also present an opportunity for Member States to both demonstrate and highlight their successes in trying to remove anti-discrimination, such as positive action in the UK, which includes advertising for jobs in Afro-Caribbean and Asian British newspapers. It will hopefully also encourage more positive action within the Institutions, including encouraging people from minorities to apply for jobs and be represented at European level.

With a proposed budget of just 13.6 million euros, one wonders however, exactly how much can be achieved, and whether the aims are too ambitious. Furthermore the Year of Equal Opportunities has not been clear enough in its expectations, and most people have little idea of how it will benefit them. It remains nonetheless an excellent idea, and promoting relations among all members of society is vital, as well as working on improving the serious issue of under-representation of minorities on all levels.

The Year of Equal Opportunities may hope to mirror the success of the 1997 European Year against Racism, which helped raise awareness of the fight against racism, and encourage legislative change in the European Union and which led to the Council setting up the European Monitoring Centre for Racism and Xenophobia in Vienna to provide the Community with reliable information on racism and xenophobia in Europe. However, whether the Year of Equal Opportunities will match this success remains to be seen.

In a recent meeting with Commissioner Špidla, I put forward some thoughts on what may be progressive elements to the Year of Equal Opportunities 2007. At the top of my own list is a renewed Commission campaign involving the parliament to ensure full implementation of the Racial Equality and Employment Equality Directives, and a comprehensive assessment of the quality of legislation already implemented by Member States. By this I mean how successfully have Member States not only transposed the Racial Equality Directive, but how have Member States dealt with key issues such as the positive duty to promote race equality in the public and private sector rather like the Commission for Racial Equality's Code of Practice in the UK. How easy is it in practice to bring a case of race discrimination in employment within any particular Member State? Does a tribunal system exist, and do avenues for legal assistance to victims of race discrimination exist?

The EU has undoubtedly done much to help achieve full equality for minority groups, however what is clear is that EU Institutions must set an example for the rest of Europe to follow. The make-up of the staff must change to reflect the diversity within the Union, and must actively encourage ethnic minorities to join the workforce. Without this, it remains difficult to prove just how fully committed they are to removing discrimination. There are many communities with huge and vibrant potential, and it is important that they are recognised and welcomed by the EU. As an MEP, I will continue to seek to highlight the positive impact that ethnic minority Europeans have made and continue to make across the European Union, making the European Union what it is today, a vibrant continent which will gain from respecting and including its minorities.

Kimberley | 1984

Maartje | 1986



EU Policy and Legislative Process Update

1. Expert group to promote inclusion of ethnic minorities in the EU

The first meeting of a high-level expert group on the social inclusion of ethnic minorities in the EU took place on 13 February 2006.⁵⁹ The group, established by the European Commission under its strategy for tackling discrimination, is composed of 10 eminent personalities from the business community, local politicians, civil society, academia and the media. The group will focus on issues such as good practices in the integration of disadvantaged ethnic groups in the labour market and the promotion of pragmatic and workable concepts in this area. In its work, the group will draw on a forthcoming study on the social and labour market integration of ethnic minorities that has been put out to tender by the Commission⁶⁰ as well as experience from existing EU programmes, such as the Community initiative EQUAL. It will present policy recommendations to the Commission before the end of 2007 on how the EU can address the social and labour market exclusion of disadvantaged minorities. The difficult situation faced by Roma throughout Europe in terms of employment, education, housing and in other areas will also be of particular concern.

2. Opinion from the European Economic and Social Committee on the EU fundamental rights agency

On 14 February 2006 the European Economic and Social Committee delivered its opinion⁶¹ on the Commission proposal for a Council Regulation seeking to establish an EU Fundamental Rights Agency.⁶² The Committee welcomed the decision to create a European Agency for Fundamental Rights and recommended that the Agency remain independent from both the European institutions and the Member States. Its main objective should be the formulation of recommendations on the basis of which institutions, organs, offices and agencies of the EU and its Member States would adopt measures and formulate actions in the area of fundamental rights, placing a high priority on issues such as the fight against racism and xenophobia. The resolution nevertheless expressed concerns regarding the lack of civil society representation within the proposed Management Board⁶³ and Consultative Forum of Fundamental Rights and insisted that the Agency should determine the compatibility between the Charter of Fundamental Rights and all new legislative proposals or community policies.

3. Written Declaration on tackling racism in football adopted on 14 March 2006

Following the initiative of 5 cross-party MEPs, a record number of 423 MEPs signed a written declaration on racism in football.⁶⁴ This declaration urges football authorities to introduce “sporting sanctions” such as disqualifying football clubs with problems linked to racism from participating in national and international competitions.⁶⁵

⁵⁹ <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/149&format=HTML&aged=0&language=EN&guiLanguage=en>

⁶⁰ Call for tender VT/2006/11 of Directorate General for Employment, Social Affairs & Equal Opportunities

⁶¹ EESC/2006/239 <http://www.europarl.europa.eu/oeil/file.jsp?id=5261032> (legislative observatory)

⁶² See the European Anti-Discrimination Law Review, Issues 2, page 38.

⁶³ According to the proposal from the Commission (COM 2005 (280) final), each Member State and the European Parliament should appoint one independent expert to the management Board.

⁶⁴ For further discussion see Claude Moraes' Article on page 31 of this Issue of the Review

⁶⁵ <http://www.europarl.eu.int/omk/sipade3?PUBREF=-//EP//TEXT+TA+P6-TA-2006-0080+0+DOC+XML+V0//EN&L=EN&LEVEL=0&NAV=S&LST-DOC=Y&LSTDOC=N>

4. European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council establishing a European Institute for Gender Equality

On 14 March 2006 the European Parliament adopted a report after its first reading of the proposal to set up an independent European Institute for Gender Equality.⁶⁶ While strongly supporting the creation of this new Community body, the report recommends shifting the focus of such a body away from the mere collection and recording of data on gender equality towards the analysis of such data, so as to enable the EU to “effectively promote and implement gender equality policy.”⁶⁷ If approved, the Institute will be funded with a proposed budget of 52.5 million for the period 2007 to 2013 and it is hoped the Institute will be able to start its activities in 2007.

5. Resolution of the European Parliament on social protection and social inclusion

On 15 March 2006 the European Parliament adopted a resolution⁶⁸ on social protection and social inclusion. While welcoming the Commission's Draft Joint Report on Social Protection and Social Inclusion,⁶⁹ the resolution reaffirms social protection based on universality, equity and solidarity as an essential component of the European social model. Despite significant structural improvements unemployment remains high in a number of Member States, especially amongst certain categories of people, such as the young, older workers, women, and people with specific disadvantages. Member States were urged to carry through a series of measures, including fighting against the high levels of exclusion faced by ethnic minorities and immigrants and eradicating discrimination against people with disabilities, by promoting equal opportunities and their full participation in work, society and political life. To this end, the resolution specifically calls for a proposal for a directive based on Article 13 of the EC Treaty to cover the areas still not dealt with in existing EU anti-discrimination legislation.

6. Commission Publication – “Putting equality into practice”

Published in April 2006, 'Putting equality into practice' provides an update of the work of the Community Action Programme against discrimination, and also looks to the future. The report includes a piece on how data can be used to promote equality and features on developing capacity to combat discrimination and raising awareness of rights.⁷⁰

7. Resolution from the European Parliament on guidelines for the employment policies of the Member States

On 4 April 2006 the European Parliament approved the proposed Council Decision on guidelines for the employment policies of Member States.⁷¹ It adopted a number of amendments to the recitals under the consultation procedure, underlining the importance of specific guidelines on issues such as combating discrimination. According to the Parliament, renewed emphasis should be placed on the employment of young

⁶⁶ As reported in the European Anti-Discrimination Law review, Issue 2, page 39

⁶⁷ P6_TA(2006)0074 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0074+0+DOC+WORD+V0//EN&language=EN>

⁶⁸ P6_TA(2006)0089 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0089+0+DOC+XML+V0//EN&language=EN>

⁶⁹ Commission Communication COM(2005)0014

⁷⁰ English, French, German and Polish versions are available at http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm

⁷¹ http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/lsa/88755.pdf

⁷² A6-0086/2006

<http://www.europarl.eu.int/omk/sipade3?PUBREF=-//EP//TEXT+TA+P6-TA-2006-0119+0+DOC+XML+V0//EN&L=EN&LEVEL=0&NAV=S&LST-DOC=Y&LSTDOC=N>

and older people, workers' health, the integration of vulnerable social groups, combating social exclusion, outlawing illegal work, improving the quality and stability of jobs and ensuring equal rights and opportunities for men and women.⁷²

8. Report from the European Parliament following a decision of the European Ombudsman on complaint 1391/2002/JMA against the European Commission

On 25 July 2002 Mrs. N. lodged a complaint with the European Ombudsman against the European Commission about the fact that the European Schools did not provide for the special educational needs of the complainant's daughter and that the Commission was not willing to cover the full cost of the child's special education in the chosen alternative education system, resulting in considerable cost to the family. On 27 May 2005, following an in-depth inquiry and a draft recommendation to the Commission,⁷³ the EU Ombudsman submitted a report to the European Parliament⁷⁴ recommending that the Commission take the necessary steps to ensure that parents of children with special educational needs that are excluded from the European Schools because of their degree of disability are not required to contribute to the educational costs of their children. On 6 April 2006, the European Parliament adopted a resolution⁷⁵ endorsing the Ombudsman's conclusions. This stressed that the right to education, the principle of non-discrimination and equal treatment and the prohibition of discrimination based on the grounds of disability are enshrined in the EC Treaty and the EU Charter of Fundamental Rights.

9. Resolution from European Parliament on Non-Discrimination and Equal Opportunities for All – A Framework Strategy

On 14 June 2006 the European Parliament adopted a resolution⁷⁶ based on the own-initiative report⁷⁷ drafted by Tatjana Ždanoka (Greens/EFA, LV) from the Committee on Civil Liberties, Justice and Home Affairs, in response to the Commission's Communication on a Framework Strategy for Non-discrimination and Equal Opportunities for all. The report was adopted by 390 votes in favour to 222 against, with 47 abstentions. The Parliament considers that the fight against discrimination should include legislative tools, but also employ education of people and promotion of best practices and that it must be based on an awareness of the social and economic impact of the phenomenon. Member States should involve the NGO community closely in their anti-discrimination policy. The resolution urges Member States which do not already have equality bodies to set up a specialised administrative body for equality and the fight against discrimination. These bodies should be independent and receive the necessary resources to enable them to help victims of discrimination in their dealings with courts and tribunals. The Parliament considers that these bodies should also have powers to investigate the cases referred to them and that any downgrading of such bodies should be considered an incorrect implementation of the anti-discrimination directives. The Parliament asked the Commission to evaluate the situation in Member States in this regard, notably the Polish government's decision to abolish the Office of the Government Plenipotentiary for Equal Status for Women and Men, the institution that was in charge of combating discrimination and promoting equality for all in Poland. The Parliament regrets that the Commission does not plan to propose a new legislative

⁷³ <http://www.euro-ombudsman.eu.int/recommen/en/021391.htm>

⁷⁴ <http://www.euro-ombudsman.eu.int/special/pdf/en/021391.pdf>

⁷⁵ <http://www.europarl.eu.int/omk/sipade3?TYPE-DOC=TA&REF=P6-TA-2006-0135&MODE=SIP&L=EN&LSTDOC=N>

⁷⁶ A6-0189/2006

<http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//TEXT+TA+P6-TA-2006-0261+0+DOC+XML+V0//EN&L=EN&LEVEL=1&NAV=S&LST-DOC=Y&LSTDOC=N>

⁷⁷ <http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//NONSGML+REPORT+A6-2006-0189+0+DOC+WORD+V0//EN&L=EN&LEVEL=2&NAV=S&LST-DOC=Y>

tool that would include all grounds listed in Article 13 (with the exception of race and ethnic origin) with a scope equivalent to Directive 2000/43/EC (social protection and advantages, education and goods and services).⁷⁸ Finally, the resolution urges the Council to adopt the Commission's Proposal for a Council Framework Decision on Combating Racism and Xenophobia, establishing a framework for punishing racist and xenophobic violence as a criminal offence.

10. Situation of disabled people in an enlarged Union: the European Action Plan 2006-2007 - Opinion of the Economic and Social Committee (ESC)

On 20 April 2006 the ESC issued an opinion which while welcoming the Commission's Communication⁷⁹ on the situation of disabled persons in the enlarged EU - the European Action Plan 2006-2007 - called upon the Commission to propose a disability-specific directive following the completion of the feasibility study on developing non-discrimination legislation at European level. The opinion also views the lack of concrete actions proposed in the European Employment Strategy as a major sign of insufficient commitment on the part of the EU. The ESC urges the Commission to pay specific attention in the future to issues such as the right of disabled persons not to be segregated from mainstream society in special institutions or excluded from society and the active political participation of people with disabilities. It stressed that areas outside employment such as education, culture and leisure should be addressed in the future.⁸⁰

11. European Year of Equality for all 2007

On 27 April 2006 the Council of the EU adopted a Decision to establish the European Year of Equal Opportunities for All (2007),⁸¹ the text of which reflects that agreed on a first reading between the European Parliament, the Council and the Commission.⁸² The Year will aim to strengthen European citizens' awareness of discrimination, to promote equal opportunities and to demonstrate how diversity makes the EU stronger. The year will have four themes - rights, representation, recognition and respect – and a total budget of 15 million for 12 months of events in the Member States. The Year will be marked by activities staged locally, regionally and nationwide. Several Europe-wide activities are also being planned, such as the Equality Summit, a survey to discover Europeans' attitudes towards discrimination and a pan-European campaign on European anti-discrimination policies and legislation. Each Member State will be required to present the Commission with their own ideas and strategy for the national level for the Year. The activities will start once the European Commission has reviewed and negotiated the national strategies. The activities will be co-ordinated by a "national implementing body" in each country.

The 7.6 million earmarked for national, local and regional activities will be matched by co-financing from national public and private sources.⁸³

⁷⁸ See the report on the Commission Communication in European Anti-Discrimination Law Review, Issue 2, page 37.

⁷⁹ See the European Anti-Discrimination Law Review, Issues 3, page 39

⁸⁰ EESC/2006/591 http://eescregistry.esc.eu.int/viewdoc.aspx?doc=\\esp\pub1\esp_public\ces\soc\soc230\en\ces591-2006_ac_en.doc (EESC opinion)

⁸¹ See the European Anti-Discrimination Law Review, Issue 3, page 39

⁸² http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/jha/89381.pdf

⁸³ http://ec.europa.eu/employment_social/equality2007/index_en.htm

12. New EUMC report on “Roma and Travellers in Public Education”

On 4 May 2006 the EU Monitoring Centre on Racism and Xenophobia released an overview report on the situation of Roma and Travellers in education across the EU. This report provides evidence that Roma and Traveller pupils are subject to direct and systematic discrimination and exclusion in education. Segregation still persists in many EU countries – sometimes as the unintended effect of policies and practices, and sometimes as a result of residential segregation. Wrongful assignment and hence over-representation of Roma pupils in special education institutions for mentally or physically handicapped children and/or for children with learning disabilities remains particularly common in some Member States. The EUMC calls for improvement of the situation through comprehensive strategies designed and implemented with the involvement of Roma representatives. These should among others include removing administrative requirements for enrolment, providing truly free access to education for Roma pupils, establishing parent-teacher programmes, reducing adult illiteracy, and focusing on pre-school programmes.⁸⁴

13. Opinion on different age limits for sexual offences

At the request of the European Commission, (the Justice and Home Affairs Directorate General), the EU Network of Independent Experts on Fundamental Rights has produced an *Opinion on the Equalisation of Treatment between Homosexual and Heterosexual Relations with Regard to the Age Limits for Sexual Offences – The Remaining Exceptions in the Member States*. The Opinion is dated 27 March 2006⁸⁵:

14. Late News! Publication of the Recast Directive

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. It codifies the legislation on gender equality in the area of employment and will lead to the repeal of many of the existing gender directives in favour of this consolidated directive.

⁸⁴ http://www.eumc.eu.int/eumc/material/pub/ROMA/roma_report.pdf

⁸⁵ http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2006_2_en.pdf

Leen | 1997

Andrea | 1961



European Court of Justice Case Law Update

Requests for Preliminary Rulings - Applications

Case C-87/06 Reference for a preliminary ruling in the case Vicente Pascual Garcia v Confederacion Hidrografica del Duero
A reference was made to the Court of Justice by order of the Juzgado de lo Social No3 on 14 February 2006 for a preliminary ruling on the interpretation of discrimination on the ground of age. The questions have already been put to the court in the case *C-411/05 Felix Palacios de la Villa v. Cortefiel Servicios SA, Maria Sanz Corral and Martin Tebar Less*.⁸⁶
<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=&domaine=PSOC&mots=article+13+directive+discrimination&resmax=100>

Requests for Preliminary Rulings – Judgment

*Case C-13/05 Sonia Chacón Navas v. Eurest Colectividades SA, judgment of 11 July 2006*⁸⁷

The Court ruled for the first time on the concept of 'disability' under Directive 2000/78 on equal treatment in employment and occupation and in doing so clarified the rules for protecting disabled persons as regards dismissal from employment.

The case concerned Ms Chacón Navas who was employed by Eurest, a catering company. In October 2003 she was certified as unfit for work on grounds of sickness which prevented her from returning to work in the short term. In May 2004 Eurest gave Ms Chacón Navas written notice of her dismissal and offered her compensation. Ms Chacón Navas brought an action against Eurest before the Spanish court. Given that sickness is often capable of causing an irreversible disability, the Spanish court took the view that workers must be protected in a timely manner under the prohibition of discrimination on grounds of disability. It referred to the ECJ the following questions on the interpretation of Directive 2000/78:

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

Firstly, the ECJ confirmed that the framework laid down by Directive 2000/78 applied to dismissals. The ECJ then went on to confirm the Advocate General's Opinion in the matter that as Directive 2000/78 does not define the term 'disability' and does not refer to national law for the definition of that concept, it must be given an autonomous and uniform interpretation.⁸⁸ The ECJ held that in the context of employment and occupation (the

⁸⁶ See the European Anti-Discrimination Law Review, Issue 3, page 42.

⁸⁷ The text of the judgment can be found at: <http://www.curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=navas&domaine=&mots=&resmax=100>

⁸⁸ C-13/05 Opinion of the Advocate-General in case Sonia Chacón Navas v. Eurest Colectividades SA of 16 March 2006, at: <http://www.curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=navas&domaine=&mots=&resmax=100>

Directive's remit) the concept of 'disability' must be understood as referring to a "limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."⁸⁹ The ECJ noted however, by using the concept of 'disability' in Directive 2000/78, the legislature deliberately chose a term which differs from 'sickness'. It therefore drew the conclusion that the two concepts could not simply be treated as being the same. The ECJ found that the importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for a limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time. There is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness. The ECJ ruled therefore that a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down by Directive 2000/78. As far as the dismissal of disabled persons is concerned, the ECJ held that Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.

In response to the second question of the Spanish Court the ECJ held that sickness could not be regarded as an additional ground to those in relation to which Directive 2000/78 prohibits discrimination.

The Advocate General's Opinion in this case was interesting for a number of reasons, not least because he was required to consider the admissibility of the preliminary reference in response to objections raised by the Commission in this respect⁹⁰. The Commission had argued that there were so many gaps in the facts of the case in the preliminary reference itself that it was not possible for the ECJ to give a precise answer to the questions so as to enable the national court to give its decision in the case. This argument was not accepted by the Advocate General who considered the case admissible on basis that six Member States had found there was enough material to file written observations in the case.

Infringement Procedures: Employment Equality Directive

*Case C-133/05 Commission v Austria, judgment of 23 February 2006*⁹¹

*Case C-43/05 Commission v Germany, judgment of 23 February 2006*⁹²

In the above cases, the Court of Justice (Fourth Chamber) declared that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, the Member States had failed to fulfil their obligations under that directive. The ECJ ordered them to pay costs.

⁸⁹ Para 43

⁹⁰ Paras 31-37

⁹¹ [http://curia.eu.int/jurisp/cgi-](http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=Austria&domaine=PSOC&mots=&resmax=100)

[bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=Austria&domaine=PSOC&mots=&resmax=100](http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=Austria&domaine=PSOC&mots=&resmax=100)

⁹² <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-43%2F05&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

European Court of Human Rights (ECHR) Case Law Update

Judgments

DH and others v. the Czech Republic, 7 February 2006 (no. 57325) – chamber judgment

As reported in Issue 2 EADLR,⁹³ the European Court of Human Rights delivered its chamber judgment in a case involving 18 applicants who are Czech national of Roma origin who complained that they were treated differently by the Czech education system to children who were not of Roma origin. The difference in treatment consisted in their being placed in special schools for children with learning difficulties, where they received a substantially inferior education to that provided in ordinary primary schools. The Chamber of European Court of Human Rights decided by six votes to one that there has been no violation of Article 14 of the Convention, taken together with Article 2 of Protocol No. 1. The Court held that the rules governing children's placement in special schools did not refer to the pupil's ethnic origin, but pursued the legitimate aim of adapting the education system to the needs and aptitudes or disabilities of the children.⁹⁴ The case has been referred to the Grand Chamber at the applicants request and the referral has been accepted. Under Article 43 of the Convention, referral requests are accepted if they raise serious questions affecting the interpretation or application of the Convention or their protocols, or a serious issue of general importance. No date has been scheduled for the hearing.

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=DH%20%7C%20Others%20%7C%20v%20%7C%20Czech%20%7C%20Republic&sessionId=8145263&skin=hudoc-en>

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=DH%20%7C%20Others%20%7C%20Czech%20%7C%20Republic&sessionId=8145071&skin=hudoc-pr-en>

Decisions of the European Committee of Social Rights

Complaint No. 27/2004 European Roma Rights Centre v Italy

The complaint, lodged on 28 June 2004, alleges that the situation of Roma in Italy amounts to a violation of Article 31 (right to housing) of the Revised European Social Charter. In addition, it alleges that policies and practices in the field of housing constitute, inter-alia, racial discrimination and racial segregation, both of which are contrary to Article 31 itself or read in conjunction with Article E (non-discrimination). In December 2005, the European Committee of Social Rights concluded unanimously that i) insufficiency of camping sites for Roma constituted a violation of Article 31(1) of the Revised Charter, taken together with Article E; ii) forced evictions and other sanctions constituted a violation of Article 31(2) of the Revised Charter, taken together with Article E; and iii) a lack of permanent dwellings constituted a violation of Articles 31(1) and 31(3) of the Revised Charter, taken together with Article E.

On 3 May 2006, the Committee of Ministers adopted Resolution ResChS(2006)⁴⁹⁵ re-iterating the decision of the Committee and stating that under Articles 31(1) and 31(3), it is incumbent on state parties to ensure access to social

⁹³ European Anti-discrimination Law review, Issue 2, page 42.

⁹⁴ For further information on this case and its implications see the article entitled "the Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights" by Claude Cahn on Page 9 of this issue of the review.

⁹⁵ <https://wcd.coe.int/ViewDoc.jsp?id=996303&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>
Resolution ResChS(2006)4

housing for disadvantaged groups, including equal access for nationals of other Parties to the Charter lawfully resident or regularly working on their territory. On the issue of permanent dwellings, the Committee noted that while Italy was committed to the principle of equal treatment for Roma as regards access to social housing, it failed to provide any information to show that this right of access is effective in practice or that the criteria regulating access to social housing are not discriminatory. The Committee will be kept informed about what the Italian authorities are doing to improve the situation.



Faitha | 1982

News from the EU Member States

Austria

Policy developments

NGO reports 100 discriminatory advertisements for jobs or housing to authorities

On 26 January 2005 the anti-racist NGO, ZARA held a press conference in Vienna explaining that within the period of two weeks two of their volunteers had found 100 advertisements in newspapers and online media that were openly discriminatory. This fact was notified to the competent regional authorities with a request for action to be taken to prosecute under §24 of the Equal Treatment Act concerning advertisements for employment vacancies and under Art. XI of the Code of Administrative Procedure¹ for advertisements for housing. In order to assess the efficiency of the new anti-discrimination regulations, the NGO will be supported by the National Ombudsman (Volksanwalt) who will keep track of all proceedings and assess the outcome later this year. The National Equality Body was also informed about all cases. The media has reported extensively on this action and announced that it was unlawful to publish adverts for jobs or housing using criteria such as “Austrians only” or “no foreigners” as well as “German native speakers only.” Politicians from opposition parties criticised the existing anti-discrimination policy for being too weak.

www.zara.or.at

<http://derstandard.at/?id=2324592>

<http://volksgruppen.orf.at/diversity/stories/45116/>



First meeting to establish dialogue with NGOs

On 8 May 2006 the Minister for Health and Women, Mrs Rauch-Kallat, held a first meeting with NGOs to discuss anti-discrimination issues.² The Minister invited all those NGOs who are members of the umbrella organisation “Litigation Association of NGOs against Discrimination” with the exception of those dealing with issues of disability as disability falls within the competence of the Ministry of Social Affairs. The meeting was received very positively by the NGOs as the Minister announced that she would seek financial support for the Litigation Association and was open to criticism in relation to practical problems in the enforcement of the Equal Treatment Act. The Minister promised that there will be meetings at least twice a year to engage in a continuing dialogue with NGOs.

Legislative developments

Federal Act introducing a Supplementary Act to the Disability Equality Act

In December 2005 the Federal Minister for Social Affairs put forward a proposal for a “Supplementary Act to the Disability Equality Act.” The government bill (Regierungs vorlage) was considered by the National Council (Nationalrat) on 24 May and was adopted by the Council of Ministers (Bundesrat) on 9 June 2006. The Act will enter into force on 1 September 2006. The main changes consist of changes of formulation for certain requirements for a wide-range of jobs such as pharmacists, midwives, nurses and teachers, civil servants, judges and others. In most cases the wording “physical and mental suitability” is changed to “appropriate state of health” which means that people with disabilities will not be excluded automatically.

One important change which the bill purported to introduce concerned the easing of business transactions of everyday life. At present, blind and deaf people are obliged to use a notary for a variety of contracts especially in connection with banks (for instance to obtain a loan). The proposed changes would have meant that blind and



¹ Einführungsgesetz zu den Verwaltungsverfahrensgesetzen, BGBl. Nr. 50/1991, as last amended by BGBl. I Nr. 137/2001.

² The minister “hosts” the National Equality Body and the Equal Treatment Commission.

deaf people would be entitled to do this on their own with the use of some technical equipment such as scanners and screen readers for blind people and to use sign language and interpreters for those with hearing impairments. These provisions were however removed from the bill as further consultation on them was necessary as it was identified in the legislative process that changes to the Act on Notaries will be required. A proposal for such changes is expected.

Province of Salzburg transposes equal treatment legislation

On 31 March 2006, the province of Salzburg published the Salzburg Equal Treatment Act in the Salzburg Law Gazette No. 31/2006. The Act entered into force on 1 May 2006. Salzburg is the last Austrian province to introduce legislation implementing Directives 2000/43 and 2000/78. There are provisions concerning access to employment, promotion, working conditions, training, and dismissal. It includes definitions of discrimination, harassment, victimisation and of reasonable accommodation for disabled people. The system of sanctions and remedies mirrors the model of the Federal Act; using civil claims for compensation. Specialised institutions in Salzburg will be the Equal Treatment Commission, the Officer for Equal Treatment and "Contact-Women."

Belgium

BE

Legislative developments

Plans to reform federal anti-discrimination legislation

The judgment of the Court of Arbitration no.157/2004 of 6 October 2004 and the threat of infringement proceedings by the European Commission for a failure to adequately implement the Directive 2000/43 have led the Federal Government to recognise the need to adapt, on fundamental points, the current instruments adopted in transposition of the anti-discrimination directives. On 24 May 2006 the Council of Ministers decided to approve three bills which will be submitted to the Council of State and thereafter presented for adoption by the House of Representatives. The three texts are 1) a law prohibiting discrimination on the grounds of race, colour, national or ethnic origin and nationality, implementing Belgian obligations under Directive 2000/43 and the International Convention for the Elimination of All Forms of Racial Discrimination, by modifying the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia; 2) a specific piece of legislation, which would amend the Law of 7 May 1999 which prohibits discrimination on the grounds of sex, which would ensure implementation of the directives adopted on the basis of Article 141 EC (in particular Directive 2002/73/EC) and of Directive 2004/113/EC; and 3) a more general piece of legislation, building on the existing Federal Anti-discrimination Law of 25 February 2003, which would prohibit discrimination based on the grounds of age, sexual orientation, civil status, birth, property, religion or belief, political opinion, language, state of health (actual or future), disability, physical characteristics, genetic characteristics. This list includes all grounds mentioned in Article 13 EC (except for race and ethnic origin, and sex, which are covered by the two other legislative proposals).

According to the proposals approved by the Council of Ministers, the three laws would be identical in material scope, which is roughly equivalent to the very broad scope of the initial version of the Law of 25 February 2003. However, the material scope of application has been explicitly extended to all areas covered by Directive 2000/43 with the exception of areas outside the competence of the Federal State such as vocational training and education, which belong respectively to the Regions and the Communities. The definitions of the prohibited forms of discrimination and the procedural provisions (the shifting of the burden of proof, the role of

organisations, the level of sanctions), have been systematically aligned with the requirements of the Article 13 Directives.

The proposed amendments should result in a significantly improved framework for combating discrimination, in accordance with the requirements of Directives 2000/43/EC and 2000/78/EC. It may take a few months for the Council of State to take a position on the proposed changes however, not only because of the complexity of the matters involved, but also because of the absence of a consensus on the precise division of tasks between the Federal State, the Regions and the Communities in the implementation of the anti-discrimination directives. A plenary session of the Council of State may have to settle this question. Whatever the position adopted by the Council of State on the division of competences, certain matters will still have to be regulated by the Regions and Communities, in particular discrimination in vocational training and education, and arguably the obligation to provide reasonable accommodation to disabled people as disability policy is a matter for which the Communities are competent.

CY

Cyprus

Equality body decisions/opinions/reports

Discriminatory rejection of a job application on grounds of the applicant's ethnic origin

In 2004 the University of Cyprus announced a vacancy for a teaching position. Cypriot nationality was not one of the selection criteria. One of the applicants, a Greek national, was found by the University Special Committee, to be the most qualified candidate. However, the electoral body of the University refused to endorse this decision and decided in favour of another candidate, a Cypriot national. The Senate endorsed the decision of the electoral body. The Greek candidate complained of discrimination to the equality body. In the course of its investigation, the equality body established that at the meeting of the electoral body, reference was made to the fact that the candidate selected was a Cypriot, but the Dean subsequently refused to record this comment in the minutes. In addition, there were conflicting views amongst the participants as to what was said concerning the selection criteria.

racial
or ethnic
origin

On 11 May 2006, the equality body found that the applicant had successfully proven a *prima facie* case of discrimination and in accordance with Article 10 of Directive 2000/43, transposed by Article 11 of Law 58(I) 2004, the burden of proof is now on the University to prove that there had been no discrimination. However, the equality body concluded that it could not make any concrete recommendations, because third party rights are involved and because an appeal, filed by the complainant is before the Supreme Court, which seeks to annul the University's decision to select the other applicant.

Although the report of the equality body acknowledged that the selection process was influenced by the applicant's nationality, it fell short of deciding in favour of the applicant on the issue of discrimination. Since no binding decision was issued, the finding regarding the burden of proof is of some value only if the complainant applies to the District Court, claiming compensation for discrimination. The equality body avoided making use of its legislative power to decide on discrimination on the ground of nationality, preferring to give a wide interpretation to the term 'ethnic origin' to include Greek nationals. It is unlikely that any further action will be taken by the equality body, since the law prevents it from acting when there is a court case in process. The Supreme Court case concerns maladministration and is unlikely to be influenced by this report.

Decision on age discrimination in state subsidies

The equality body examined a complaint against the government regarding a special scheme intended to revitalise the countryside and discourage urbanisation. The scheme provided that a lump sum subsidy plus a low-interest loan for the acquisition or repair of a house in the countryside payable to, *inter-alia*, married persons (of any age) or single persons over 35 years of age.

On 17 May 2006, the equality body found that exclusion from the scheme of persons due to their young age or their marital status could not be justified by any objective or reasonable cause. In addition, the equality body pointed out that the eligibility conditions of the scheme are not only discriminatory but touch upon the nucleus of fundamental rights such as the right to personality and private life. This is the first time that the equality body has decided an age discrimination case from the perspective of younger rather than older person.

Decision on the use of the Turkish language by the government

The equality body examined a complaint against the failure of the Government to use the Turkish language, one of the two official languages for publishing in the Official Gazette, on public sign-posts, in public announcements and publications in violation of the Constitution and of the anti-discrimination laws.

On 31 May 2006, the equality body found that the obligation to use the Turkish language in public documents as set out in Article 3(1) of the Constitution, was one of the provisions suspended by the 'law of necessity', adopted by the Supreme Court in the case of the *Attorney General v. Mustafa Ibrahim*, in order to 'support institutions and protect law and order'. This dogma has subsequently been confirmed by other Supreme Court decisions.

The Ombudsman referred to the decision of the European Court of Human Rights in the case of *Aziz v Republic*,³ which established that state discretion must be exercised in a manner that does not violate the nucleus of rights or the principle of equality. Whilst acknowledging that the law of necessity cannot be invoked to justify human rights violations; that the non-use of Turkish must not prevent Turkish-Cypriots from accessing public services; and that discrimination against Turkish-Cypriots does seem to exist at the level of access to public services, it concludes that it cannot interfere on the issue of the Gazette, nor does it offer recommendations on the issue of discrimination.

The decision not to act on the issue of the Official Gazette is problematic considering that the Gazette publishes information of a vital nature for Turkish-Cypriots, such as the expropriation of their properties in the south, public tenders, vacancies in the public service, giving rise to further discrimination. In effect the 'dogma of necessity' is given priority over human rights, despite the proclamation of the opposite contained in the report. Law N.59(I)2004 transposing Directive 2000/43 makes no reference to the 'law of necessity' and it is questionable whether earlier Court decisions may be invoked to justify potential violations of this law.

Opinion survey commissioned by the equality body on the attitudes of the public towards homosexuality

Between 5-22 January 2006 a survey was carried out by a private firm under the instructions of the equality body, on attitudes towards homosexuality. The sample was 500 persons over 18 years of age; half men, half women; 70% residing in urban centres and 30% residing in rural areas. The majority of the interviewees stated that they consider relationships between same-sex partners as wrong; only 3% said they are 'rarely wrong' and another 3%

³ Application no. 69949/01 *Aziz v Cyprus*, judgment of 22 September 2004



'never wrong'. Amongst the 54% who replied that same-sex relationships are always wrong, men and persons over 45 years of age, as well as persons of low education, with children, or residing in rural areas were more critical than the rest. In comparison with another survey carried out in 2001, this survey concluded that attitudes towards homosexuality have become worse during the last two years. The worsening of attitudes was attributed by the researchers to the de-criminalisation of homosexuality and to the fact that homosexuals have recently become more demonstrative in public. Despite the high levels of homophobia illustrated by the survey, the equality body did not issue any policy recommendations or a code of conduct or launch an awareness raising campaign to address the phenomenon.

Czech Republic

Legislative developments

Anti-discrimination bill did not pass in the second voting of the Deputy Chamber of the Parliament

When the Anti-discrimination Bill failed to pass through Czech Senate, with 39 Senators voting for its rejection and 27 against, the rejected bill went back to the Deputy Chamber. The arguments expressed by the Senate referred to positive measures as being something known more widely as "positive discrimination,"⁴ or concerned doubts about whether Czech Republic really needs the EU Directives implemented in the way set out in the present bill, or whether it would not be better to insert new provisions into existing laws.⁵ The bill was placed on the agenda of the Deputy Chamber for 15 March and 25 April, but the discussion was repeatedly interrupted. In the final vote on 23 May 2006, at the last session of the Deputy Chamber before its dissolution due to Parliamentary elections on 2 and 3 June 2006, 83 Deputies voted in favour and 45 against. However, in the second round of voting, a higher majority (101 out of 200) was necessary to secure approval of the bill and this was not therefore attained.

The final failure of legislation implementing the EU non-discrimination acquis was due to the protracted procedure of the bill which was marked by its failure to pass through the Senate with its high majority of conservative senators. Its ultimate failure subsequently resulted from the impending elections. This time around, the bill was not even supported by the deputies of one small governmental party (The Christian Democrats), who it is currently believed will join a more conservative government after the elections. The outcome will be clearer after the elections, however, the prospects for anti-discrimination legislation are not good.

<http://www.psp.cz/eknih/2002ps/stenprot/056schuz/s056027.htm#r3>

Law on Registered Partnerships

Published in Collection of laws 2006, no.38, p.1362

On 15 March 2006 Law no. 115/2006 on registered partnerships for same-sex couples was approved by the lower chamber of the Parliament. The law will now be published in the Collection of Laws and enter into force on 1 July 2006. The content of the law is the same as that of the bill considered in Issue 2 EADLR.⁶



⁴ Reporter of the Constitutional Committee, Senator Volný

⁵ Reporter of the EU Committee, Senator Müllerova referring to the debate in the Committee

⁶ European Anti-discrimination Law Review, Issue 2, October 2005, page 49.

A second round of voting became necessary after the Czech President vetoed the Law in February. The President said at the time that he had vetoed the Law because the legislation represented such a far-reaching intervention into existing legislation governing personal relations that he considered it necessary that it obtains the approval of more than half the deputies in the Deputy Chamber. This could only be accomplished by his vetoing the Law and returning it to the Deputy Chamber to vote on it again (to overturn a presidential veto, the Czech Constitution requires the bill to be approved by 101 votes out of 200).

Case law

Constitutional Court rules that the provision implementing burden of proof is not unconstitutional

In a case of alleged discrimination of a Roma group in a restaurant before the Regional Court of Usti nad Labem, the Court suspended proceedings to file a motion with the Constitutional Court. The motion reflected the Regional Court's concern that the provision requiring the shift in the burden of proof which it was required to apply was unconstitutional. The Regional Court was of the view that §133a of the Civil Procedure Code placed the entire burden upon the defendant with the claimant having no obligation to support allegations with any evidence and therefore rather than "shifting" the burden of proof the provision operates as a "reversal".

On 26 April 2006, the Constitutional Court dismissed the argument of the Regional Court, that §133a places the respondent at a serious disadvantage, infringing his/her right to fair trial. It first pointed to the wording of the Article 13 Directives, mentioning the duty of the person who considers themselves wronged by discrimination, to establish facts from which discrimination may be presumed before it shall be for the respondent to prove that there has been no breach of principle of equal treatment. Finally the Constitutional Court quoted the decision of the European Court of Justice which reached the same conclusion in Case C-196/02 *Nikoloudi v OTE*, 10 March 2005. http://www.judikatura.cz/cgi-bin/jus/aspj_lit_4?WVCNC+2596+jus-1

Denmark

DK

Legislative developments

Exception for young people under 18 from age discrimination principles

On 18 January 2006 the Government introduced Bill No. 98 into Parliament. This Bill was introduced to amend Act No. 31 on the prohibition of discrimination in respect of employment and occupation, which prohibits discrimination in this sector on the grounds of age, disability, race and ethnicity, sexual orientation and religion and belief. Since the beginning of 2005 this Act has prohibited all discrimination on the grounds of age in relation to recruitment of staff, working conditions such as level of salary and dismissals.

During the first year Act No. 31 was in force it became clear that many collective agreements between the social partners in the labour market included specific provisions for salaries of young people under 18. The amendment which will become the new section 5 A, paras 5 and 6 of Act No.31, will mean that young people under 18 are no longer protected against discrimination on the grounds of age, if collective agreements allow for differential treatment. The amendments to Act No. 31 were approved by the Parliament at the end of March 2006.

In relation to the transposition of Directives 2000/78 and 2000/43 in 2004/5, including the provisions on age discrimination, the Government pointed to the possibility that collective agreements can form part of the



transposition according to recital 27 of the Directive 2000/43 and 36 of Directive 2000/78. If a young person now takes legal action against unequal treatment in the labour market due to age, it is difficult to see how such differential treatment could be justified in court, whether or not this is part of a collective agreement. www.folketinget.dk

EE

Estonia

Legislative developments

New law to encourage employers to provide reasonable accommodation for unemployed disabled people

RT I 2005, 54, 430

The Law on Employment Services and Allowances entered into force on 1 January 2006. It provides unemployed disabled persons with special services, including “accommodation of the workplace and means to work.” This service might be granted on the basis of an administrative contract between the Labour Market Board and an employer, in which the state will compensate the employer for up to 50% of expenses necessary for the accommodation up to a specified maximum amount. Another service, namely “providing free use of a technical appliance necessary for work,” could be offered. Two other new services are “support at the interview [with a potential employer]” and “work with [the assistance of] a support person.” According to Article 9(5) of the Law, all of these services will only be granted to disabled persons if they are necessary to overcome the disability-related obstacle to his or her employment, and if other employment services, such as vocational training have been ineffective.



The Law on Employment Services and Allowances was not adopted to implement Directive 2000/78/EC: This law does not oblige employers to do something for disabled persons. Partial reimbursement by the state of expenses for accommodation will hopefully encourage employers to employ disabled people. This is important as there are currently no effective legal norms to address the issue of reasonable accommodation.

Parliament abolishes age as a basis for termination of employment contracts

According to Article 86(10) of the Law on Employment Contracts it was possible for an employer to terminate the employment contract “due to the age of an employee.” Article 108 of the same Law provided: “An employer has the right to terminate the employment contract of an employee on the basis prescribed in Article 86 (10) if the employee has attained sixty-five years of age and he or she has the right to receive full old age pension.” After several attempts to abolish age as a basis for termination of an employment contract⁷ on 8 February 2006, the Parliament finally recognised, the discriminatory character of Articles 86(10) and 108 of the Law on Employment Contracts and abolished them through the adoption of the Law on Amendments to the Law of the Republic of Estonia on Employment Contracts, in line with an earlier recommendation of the Estonian equality body.



Changes to criminal law

On 14 June 2006 the Parliament amended the Criminal Code by virtue of the adoption of Bill no. 913. The Bill changed the wording of Article 151 of the Criminal Code which penalises activities which publicly incite hatred, violence or discrimination on the basis of ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion, financial or social status “if they have endangered the life, health or property of a

⁷ See Issues 2 and 3 of the European Anti-Discrimination Law Review, pages 52 and 60 respectively.

person.”⁸ The scope of application of Article 151 has, therefore, been narrowed. For instance, it seems that Article 151 can no longer be used in many cases of hate speech. Legal persons may also now be held liable on the basis of this article. Additionally, “sexual orientation” as a prohibited ground of discrimination was added to Article 152 of the Criminal Code, which penalises the unlawful restriction of the rights of a person or the granting of unlawful preferences to a person. It is expected that the above-mentioned amendments will enter into force from July 2006.

www.riigikogu.ee (text of the bill)

Finland

Policy development

Discrimination testing experiment reveals systematic discrimination of Roma

The Roma living in Pori, a city of 76 000 inhabitants on the western coast of Finland, have been complaining about discrimination against them for years, without being able to attract much attention to this problem. On 3 June 2006, a group of three Roma men and one Roma woman, together with two witnesses, took part in a discrimination testing experiment. The group attempted to enter 16 different restaurants in Pori, but were refused entry into each one of them. The events have garnered major public attention, with both newspapers and ordinary citizens condemning the events. The test group has announced that they will take legal action against the restaurants in question. On 5 June 2006 the group filed crime reports with the police who have launched an investigation.



FI

France

Legislative developments

Law on Equal Opportunities adopted on 8 March 2006

The Law on Equal Opportunities entered into force on 8 March 2006. This Law reflects the Government’s positive action policies in reply to the riots in November 2005.⁹ To combat discrimination, an Agency for Social Cohesion and Equal Opportunities has been created. It will fight illiteracy and operate the new voluntary civil service, through which young people can gain training experience and a special qualification. This structure will absorb the work of the FASILD¹⁰ – a public structure which finances most of the actions targeting the integration of immigrants and combating discrimination in underprivileged suburbs (actions directed at new migrants will be managed by the National Agency for Migrants).



FR

The main changes concern the High Authority against Discrimination and for Equality (HALDE). Section 2 of the Law provides for the reinforcement of its powers. It allows the HALDE to propose that the perpetrator pay a “transaction pénale.” This is a fine that expresses an admission of criminal liability. The HALDE proposes a fine to the perpetrator and the victim, and if the parties agree, it is ratified by the criminal court, which prevents

⁸ Wording added by the amendment is in italics.

⁹ See Issue 3 of the European Anti-Discrimination Law Review, page 62.

¹⁰ Fonds d'action et soutien pour l'integration et la lutte contre les discrimination.

indictment of the perpetrator by the public prosecutor. If the perpetrator fails to comply, the HALDE can unilaterally pursue prosecution. If this happens the HALDE will have to prove the case again before a judge.

In addition, Article 41 of the Law provides agents of the HALDE with a special power to carry out inspections and situation testing and to issue sworn statements attesting to the existence of discriminatory situations and Article 42 grants the HALDE full rights of intervention to appear and present its observations before all courts (administrative, penal, labour and civil) as a 'neutral' party to the case by transmitting its investigation file to the court, presenting written observations and oral observations at any hearing. Article 45 of the Law creates Article 225-3 of the Criminal Code, which codify the precedents of the Court of Cassation and legally recognises the admissibility of situation testing as a form of evidence to prove the criminal offence of direct discrimination. Section 3 imposes positive obligations on the radio/television regulating agency (CSA) to combat discriminatory content and impose on public television the positive obligation to ensure that professionals presenting programmes reflect the composition of society.

http://ameli.senat.fr/publication_pl/2005-2006/242.html

Code of Criminal Procedure amended to incorporate the "transaction pénale"

Journal officiel, no. 127, 02/06/2006, p. 8335

Decree no. 2006-641 of 1 June 2006 adds Article D1-1 to Part III of the Criminal Procedure Code in order to lay down an enforcement procedure for the power of "transaction pénale" conferred upon the HALDE under the new Law on Equal Opportunities. The HALDE's Council confers a mandate on its President to negotiate a "transaction pénale" with the alleged perpetrator of the discrimination. No "transaction" is possible if criminal proceedings have already been initiated by the public prosecutor.

The proposed "transaction pénale" may be: a) A fine of a maximum of 3,000€ for a natural person and 15,000€ for a legal person; b) Compensation of the victim; c) Publication of a notice for a period and in a location specified in the "transaction," and; d) Transmission of a notice to the alleged perpetrator's internal employee representative.

The proposed "transaction pénale" is communicated to the alleged perpetrator or its representative by registered post. It sets out the HALDE'S conclusions on the facts and their legal implications, the nature of the proposed measures and the period within which they must be executed, as well as the amount of the compensation to be paid to the victim in addition to the criminal fine and other measures. The alleged perpetrator must inform the HALDE of its decision within 15 days by way of sworn statement or letter sent by registered post.

The file together with the parties' consent is submitted to the competent public prosecutor to be ratified by the court. The court will ratify if it is satisfied with the evidence transmitted by the HALDE and agrees that the facts give rise to a criminal case. Once ratified, the HALDE addresses the decision to the perpetrator setting out the obligation which the perpetrator undertakes, together with a document which indicates the procedure which must be followed for execution of that obligation.

Execution of the perpetrator's obligation extinguishes the right of the state to pursue a criminal prosecution. If the perpetrator does not perform his obligation within the prescribed period or refuses the proposed, "transaction pénale" the HALDE has the right to initiate the public penal action. In the event that the perpetrator has consented to the transaction pénale but does not perform, the victim has a right to require the execution of

the “transaction pénale” in the same way as if it benefited from a judgment.
<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSD0630063D>

Case law

Decision of the Constitutional Council of 30 March 2006 on the Law on Equal Opportunities adopted on 8 March 2006

Article 8 of the Law created a special category of employment contracts for employers of 20 employees or more, targeting persons under 26 years of age. This employment contract of unlimited duration, provided for a trial period of two years that could be terminated at any time during those first two years, with an increased redundancy payment of 8% of the average salary earned up to the point of termination, and the payment of unemployment benefits after a minimum of four months worked. Following the adoption of the Law on Equal Opportunities through the accelerated legislative procedure, a joint motion of more than 60 senators and members of the Assemblée Nationale subsequently triggered the Constitutional Council’s constitutionality compliance procedure. It raised the unconstitutionality of the Law on many grounds, including arguments concerning Article 8 of the Law which relate to the “First Employment Contract” (contrat première embauche or CPE) on the basis that it did not conform to the European Social Charter, ILO Convention no. 158 and Directive 2000/78; and it violates the principle of equality before the law.¹¹ The Constitutional Council appears to have adopted a more restrictive approach to its competence to review the conformity of national legislation with EU Law. Previous case law had held that EU law formed part of the internal legal order against which the Council was to monitor compliance of any new national laws (no 2004-496 DC of 10 June 2004, cons. 7; 2004-497 DC of 1 July 2004, cons. 18; 2004-498 DC, cons. 4; 2004-499 DC, both of 29 July 2004, cons. 7 et 8). However, the Council ruled that it had no competence to monitor the conformity of national legislation with EU directives where the national law had not been adopted in order to transpose EU law. The Council also did not examine the principle of proportionality.

<http://www.conseil-constitutionnel.fr/decision/2006/2006535/2006535dc.pdf>

<http://www.conseil-constitutionnel.fr/cahiers/ccc20/jurisp535.htm>

Update: Following the social partners’ request to abandon the provisions on the CPE, the Parliament decided to delete the concerned provisions from the Law.

Germany

Legislative developments

Bill implementing Directives 2000/43/EC, 2000/78/EC, 2002/73/EC and 2004/113/EC

The German Government presented the Bill to Parliament on 18 May 2006. The Bill is made up of a general equality bill (Allgemeines Gleichbehandlungsgesetz), a bill on the protection of soldiers against discrimination (Gesetz zum Schutz der Soldatinnen und Soldaten vor Diskriminierungen) and the amendment of various statutes concerning matters of discrimination.

The Bill is based on the bill presented in 2005 by the former SPD and Green government which got blocked in the Bundesrat and was not enacted because of the dissolution of the Parliament and the election in that year. The

¹¹ This motion did not question the constitutionality of the provisions relating to the increased power of the HALDE.



most notable feature is the inclusion of all grounds in the Bill in both labour law and civil law, with the exception of belief in civil law due to last minute amendments. In this respect the Bill goes beyond European law. This has been the most contentious aspect of the Bill. The major changes concern eased duties of the employer to prevent discrimination; a potentially far-reaching protection of the right of self-determination of religious communities and philosophical belief; a reduced time limit to bring claims from 6 to 2 months; weakened demands on the actuarial justification of unequal treatment based on religion or philosophical belief, disability, age and sexual identity; and no right to assign claims to associations concerned with enforcing the measures of anti-discrimination.

Late news! The Bill was passed by the Parliament on 29 June 2006 and entered into force on 18 August 2006. The Bill is in many respects a satisfactory implementation of the directives and in some respects even goes beyond what is demanded by Community law. However, it has some severe shortcomings as well. These include: an exception of dismissal from the application of the prohibition of discrimination; an intended, though legally not totally clear exception of housing from the material scope of application for all grounds, if the provider has less than fifty flats; an exception from the material scope of the provision of goods and services for all transactions involving a special relationship of trust and proximity between the parties or their family, including the letting of flats for all grounds including race and ethnic origin, which raises problems under Directive 2000/43 depending on its judicial interpretation; and the requirement of fault or malign intent of the discriminator for an award of compensation for material loss. As a result of last minute technical failures, a correcting bill will have to be issued in the Autumn.

www.bmj.de or www.bundesrat.de (Drucksache 329/06), www.bundestag.de BT. Dr. 16/780. The last minute changes are based on a Beschlussvorlage, Bt. Dr. 16/2022 amending Bt. Dr. 16/1780

Case law

Decision of the Federal German Administrative Court on equal treatment concerning employee benefits for homosexual partnerships

BVerwG, 2 C 43.04, 26.1.2006

The applicant lived in an "eingetragene Lebenspartnerschaft," the special legal framework created by German law for homosexual partnerships. She is a civil servant. She applied for supplementary payments granted by her (public) employer to married couples. It is legal to grant supplementary payments only to married civil servants and not to civil servants that live in registered partnerships. According to the Court, the constitutional guarantee of equality is not violated due to the special protection granted to marriage under Constitutional law and European law is not violated, as it prohibits unequal treatment on the ground of sexual orientation but allows for advantages connected to family status.

The decision raises questions about the relationship of the German Lebenspartnerschaft to marriage. The German Constitutional Court has ruled that the introduction of the Lebenspartnerschaft is not contrary to the Constitution. The Federal Administrative Court has now pronounced on the possibility of continuous preferential treatment, having considered the constitutional equality guarantee and European Law. www.bverwg.de



*Equality body decisions/opinions/reports***First report of the Ombudsman on complaints under the Anti-Discrimination Law**

According to Article 19(1) of Law 3304/2005 on the application of the principle of equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age, or sexual orientation, the Ombudsman is one of three Equality Bodies. The Ombudsman only has jurisdiction over discrimination carried out by “public services.” Article 3(1) of Law 3094/2003 (“The Ombudsman and other provisions”) defines “public services” as: a) the public sector, b) local and regional authorities, c) other public bodies, state private law entities, public corporations, local government enterprises and undertakings whose management is directly or indirectly determined by the state by means of an administrative decision or as a shareholder. Banks and the Athens Stock Exchange are exempted.”

The Ombudsman published its first report on the complaints under the Anti-Discrimination Law 3304/2005 on 3 March 2006. The first cases to come before the Ombudsman since Law 3304/2005 came into effect, and which were therefore investigated under the new provisions, reached a total of 26; 9 of which are still under investigation. Of the remaining cases, 4 had positive outcomes. One of these cases concerns a Muslim doctor, former citizen of Jordan, who had acquired Greek citizenship. He complained about the refusal of the Medical Association of Thessalonica to register him as a member, although he met the required criteria. After an informal intervention of the Ombudsman’s Office, the Office was informed that finally the registration had taken place (case 12573/2005); 7 were judged not to fall under the provisions of Law 3304/2005; 3 were dismissed as being without grounds and 3 as not falling under the jurisdiction of the Ombudsman. These cases are summarised in the Ombudsman’s Report and are categorised on the basis of discrimination ground and the relevant field of protection.

Among other conclusions, the Ombudsman noticed that the relative ignorance of the provisions of the law; the fear of social exposure or suffering unofficial sanctions (for example, by a teacher of a public school on grounds of sexual orientation); in addition to the relatively low participation of persons from visible minorities on the staff of the Greek administration may explain the low number of serious complaints. The small number of complaints itself cannot however be seen as proof of the non-existence of serious phenomena of discrimination.

Finally, the Ombudsman said that one must not overlook the exception from the regulatory field of Law 3304/2005 concerning discrimination on the grounds of citizenship. So long as discrimination based on citizenship is not in this legislation, in combination with the fact that in Greece, access to a number of fields of employment continues, perhaps unjustifiably to be tied to Greek citizenship, the preconditions are created for extensive discrimination against foreigners due to race or national origin.

http://www.synigoros.gr/docs/discrimination_ish_metaxeirish.pdf



George | 1969

Legislative developments

President returns legislation aimed at amendment of the Equal Treatment Act and the Disabled Persons Act to Parliament

Bill no. T/18902 containing proposed amendments to the Equal Treatment Act (ETA) was submitted to Parliament in December 2005. The new law would have remedied some discrepancies between the Hungarian legislative framework and the relevant EU acquis: By restricting the scope of the general exemption in the ETA, it would have brought the ETA in line with Directive 2000/43 which does not allow for objective justification of direct discrimination on the grounds of race. The new law would also have eased the assertion of rights for victims of discrimination by exempting them from having to pay the alleged discriminator's costs arising from proceedings before the Equal Treatment Authority even if their complaint is rejected (with the exception of cases where the Authority considers the complaint to have been made in bad faith).

As regards the Disabled Persons Act, one amendment would have postponed the deadlines for making public buildings maintained by the state and by local councils accessible until 2010 and 2013 respectively. Other amendments would have set out a much more explicit obligation for making public services and buildings accessible to disabled persons. The annexes prescribe for instance that from 2007 onwards, 37 court buildings should be made accessible every year.

The Parliament adopted the amending legislation on 13 February 2006, however, on 1 March 2006 the President returned the amending law to the Parliament for reconsideration, because he regarded the deadlines for making public buildings accessible to disabled people to be too long. As a result of elections in April the amending law will not be adopted before the autumn of 2006.

Equality body decisions/opinions

Equal Treatment Authority establishes discrimination in employment based on testing

The complainant responded to a newspaper advertisement seeking painters. He met the requirements of the employer, but when he informed the employer that he was of Roma origin, he was rejected. The complainant turned to the Legal Defence Bureau for National and Ethnic Minorities (NEKI), which conducted a situation test in order to substantiate the suspicion of discrimination. Two testers called the employer, both of them claiming that they had the required skills and experience. The only difference was that one of the testers introduced himself as Kolompár (a typical Roma name in Hungary), while the other person used a Hungarian name. While the "Roma" tester was not provided with any details of the job, the non-Roma tester was informed at length about the tasks, payment and other relevant circumstances. Based on the result of the testing, NEKI filed a complaint with the Equal Treatment Authority on behalf of the complainant.

Taking into consideration the result of the testing, the Equal Treatment Authority found in March 2006 that the employer directly discriminated in breach of Article 8 Equal Treatment Act and imposed a fine of HUF 700,000 (EUR 2,800) on him. This was the first case in which the result of testing was taken into consideration as evidence substantiating an individual complaint that took place beforehand.

<http://www.egyenlobanasmod.hu/zanza/477.pdf>





Equal Treatment Authority establishes discrimination with regard to accessibility of court building

A disabled person filed a complaint with the Equal Treatment Authority claiming that he had not been able to attend the court hearing of his own civil law claim because the Central District Court of Pest (CDCP) is not accessible for persons using wheelchairs, and the employees of the CDCP did not provide him with appropriate assistance. The CDCP did not question the fact that compared to clients with no disabilities, the complainant had suffered a disadvantage on the grounds of his disability, but claimed that the distinction had an objectively reasonable ground, namely the fact that the State had not provided the courts with the budgetary resources necessary to make court buildings accessible. (According to Article 29(6) of the Disabled Persons Act, this obligation should have been performed by 1 January 2005). Despite the fact that Article 7(2) of the Equal Treatment Act allows for the objective justification of direct discrimination claims, the Equal Treatment Authority, in April 2006, did not accept the reference to financial problems as an exempting factor. The Authority obliged the CDCP to terminate the injurious situation within 60 days and ordered that its decision be published on its own website.

<http://www.egyenlobanasmod.hu/zanza/zanza0307.pdf>

Case law

Successful appeal of court decision on action popularis claim concerning segregation of pupils

As reported in Issue 3 EADLR, in April 2004 the local council of Miskolc integrated seven schools without simultaneously re-drawing the catchment areas, with the result that the segregation of Roma children was maintained. In June 2005 the Chance for Children Foundation (CFCF) brought an *actio popularis* claim against the local council, alleging that they were indirectly responsible for segregation of Roma children in primary education. In November 2005, the Borsod-Abaúj-Zemplén County Court acknowledged the fact that Roma children were over-represented in some of the merged schools, but it rejected the claim.¹² The CFCF appealed.



On 9 June 2006 Debrecen Appeals Court partially modified the first instance judgment. It found that as a result of the decision to integrate the schools without simultaneously re-drawing the catchment areas, Miskolc local council had maintained the segregation of Roma children in violation of their right to equal treatment based on ethnic origin. The court ordered Miskolc to publicise its finding through the Hungarian Press Agency. However, the court stated that it could not grant the order requested by CFCF to integrate Roma children into mainstream classes along the lines of the relevant provisions (Article 39/D of Decree 11/1994 of the Ministry of Education on the Operation of Educational Institutions, defining integrated education) and ministerial guidance (Instruction 1/2003 of the Ministry of Education on the measures aimed at the realisation of integrated education) in force at the time of the local council's measure as it would be beyond the civil court's scope of authority to instruct a public authority in detail on how such integration should be achieved. The court noted that in the absence of a detailed and school-specific integration plan it could not render any other decision.

The second instance court laid down very important principles that will hopefully serve as guidelines for future implementation. The court observed that the legal provision regulating the reversal of the burden of proof in fact created a legal presumption to the effect that once the protected ground (Roma ethnicity) and the disadvantage suffered (separate education of lower quality) had been established, the burden of disproving the discrimination automatically fell to the defendant. Another important point is that the court agreed with CFCF in that not only active, but also passive conduct could lead to a breach of the obligation of equal treatment, especially of the obligation to accord a similar quality service in education to all.

http://www.cfcf.hu/?nelement_id=29&article_id=38

¹² For further information on the background to the case and the first instance decision see EADLR, Issue 3, page 68.

*Case law***Equality Authority granted the right to appear as Amicus Curiae to assist in enforcement of Directive 2000/43**

The Housing (Miscellaneous Provisions) Act 2002 amended the Criminal Justice (Public Order) Act 1994 and criminalises trespass on public and private land. This provision applies to all groups but has a disproportionate impact on members of the Traveller Community. The Lawrence family is challenging the provision on the basis that it has a discriminatory impact on Traveller families in the case of *Lawrence v. Mayo Country Council and Ors.*¹³ It permits the police to arrest people for being on specified land and to remove caravans.

On 11 January 2006 the Equality Authority applied to the High Court to be given the right to appear in the case as an 'amicus curiae' or friend of the court¹⁴, to give evidence in relation to Directive 2000/43 in the Lawrence case. The application was not opposed by the respondents. The High Court for the first time permitted the Equality Authority the right to appear in that role. In effect if any element of the case has relevance to Directive 2000/43 the Authority can intervene. This presents a valuable precedent in assisting the Equality Authority to ensure the working of the Equality provisions in Ireland.

Amicus Curiae role for Equality Authority challenged

The case of *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government Ireland, and the Attorney General* concerns two elderly members of the Traveller Community who are in poor health and who seek habitable accommodation from their local housing authority - the First Named Respondent - through the provision of a caravan. The Applicant's case is that they are discriminated against because in providing accommodation under the Housing Acts, 1966-2004, (the "Housing Acts") the housing authority merely provides a site (at a halting site) but no habitable accommodation (namely a caravan or mobile home) to Travellers, in contrast to their treatment of the settled community who are accommodated in houses. The applicants have relied on both the Equal Status Act 2000-2004 and Directive 2000/43/EC contending that discrimination in the provision of accommodation to members of the Traveller Community is contrary to both Irish and EC law. They also contend that there has been a failure to transpose Directive 2000/43 into Irish law by reason of a failure to amend section 6(6) of the Equal Status Act 2000-2004 to render it compatible with the Directive. Section 6 prohibits discrimination in the disposal of premises and the provision of accommodation. Section 6(6) states that the prohibition on discrimination does not prohibit housing authorities from providing different treatment to persons based on family size, family status, marital status, disability, age or membership of the Traveller community. A further contention is that the housing authority is under a legal duty (based on the European Convention on Human Rights Act, 2003 and the provisions of the Housing Acts) to provide the applicants with a caravan that will allow them to lead a normal family life together.

An application has been brought before the High Court by the Equality Authority seeking leave to be joined to these proceedings as *amicus curiae*. This was granted on 22 May 2006. The application was brought before the Supreme Court by way of an appeal by the Second, Third and Fourth Named Respondents against the Order of Mr. Justice Quirke in the High Court. The County Council did not appeal this decision. The basis of the Second,

¹³ Record No. 5813P.

¹⁴ Refers more specifically to persons asking for permission to intervene in a case to which they are not a party in order to present their point of view. This is common in matters of broad public interest such as civil rights cases

racial
or ethnic
origin

racial
or ethnic
origin

Third and Fourth named respondents appeal and the issue for the court to determine is whether the Equality Authority's application to apply to be joined and to intervene as *amicus curiae* is within the power of the Equality Authority. The appeal is expected to be heard on 30 June 2006.

Italy

Case law

Supreme Administrative Court decides that the display of crucifixes in classrooms is not contrary to fundamental rights and religious freedom



On 13 February 2006 the sixth section of the Italian Administrative Supreme Court (*Consiglio di Stato*) gave the final word in decision no. 556 (at least as far as administrative courts are concerned) on the debate about the legality of the display of the crucifix in classrooms. The display of the crucifix in classrooms is defended referring to two regulations of 1924 (no. 965) and 1928 (no. 1297), while opponents claim that these contravene the principle of the "religious neutrality" of the Italian state - *principio di laicità*, - which is not expressly stated in the Constitution, but which the Constitutional Court has consistently derived from Arts. 2,3,7,8,19 and 20 of the Constitution.

The cornerstone of the decision lies in the interpretation of the idea of the religious neutrality of the state. The principle of *laicità* is usually considered as the synthesis of specific provisions in the Constitution referring to the religious dimension (freedom of religion, non-discrimination on religious grounds, autonomy of religious denominations). While confirming that the principle of *laicità* remains a "supreme principle of the constitutional order," the Court declared that its "conditions of use" must be "determined with reference to the cultural tradition and the customs of each people¹⁵, insofar as such tradition and customs have been transposed into its legal system." It therefore stressed that the actual structure of the principle of religious neutrality can take different forms in different legal systems (reference is made to England, France and the USA) in different times. The Court, in considering the regulation of 1924 which is still in force, affirms that the display of the crucifix is not in conflict with the principle of *laicità*. In the Court's view, the crucifix in schools must not be considered as an object of devotion, but as a symbol "useful to express the high foundation of civic values." It has the role of "representing and recalling in synthetic form civic values (*valori civilmente rilevanti*)" such as tolerance, mutual respect, solidarity and non-discrimination, that "characterise Italian civilisation"¹⁶ and are now embedded in the Italian constitutional system.

¹⁵ "alla tradizione culturale, ai costumi di vita, di ciascun popolo".

¹⁶ "che connotano la civiltà italiana".

*Legislative developments***National Human Rights Office officially designated as Article 13 Body under Racial Equality Directive**

On 15 December 2005 in the final reading of the Bill amending the Law on the National Human Rights Office, the Latvian Parliament adopted amendments specifically designating the National Human Rights Office as the body responsible for the implementation of the principle of equal treatment. While its mandate was already broad enough to encompass the task of fighting discrimination, up until this point this had not been expressly stated in law. Article 2.6.1 of the amendments designates the Human Rights Office as the body responsible for the implementation of the principle of equal treatment, Article 2 adds to the competence of the Office to deal with human rights violations a competence specifically concerning violations of prohibition against differential treatment. Article 10 confers on the Office the power to submit an application before a relevant administrative institution or bring a court case with the consent of the person concerned when the case is about violation of prohibition of differential treatment. The amendments to the Law were officially published on 29 December 2005 and entered into force on 12 January 2006. <http://www.likumi.lv/doc.php?id=124708> (in Latvian)

Amendments to social security law

On 1 December 2005 amendments to the Law on Social Security introduced, inter-alia, Article 2.1 which prohibits differential treatment based on a person's race, colour, gender, age, disability, health, religious, political or other conviction, national or social origin, property or family status or other circumstances in the provision of social services. Sexual orientation is not expressly stated as a prohibited ground. The amendments also re-define social services, extending the application of the Law on Social Security. The amendments also introduce a definition of differential treatment as direct and indirect discrimination, harassment and instruction to discriminate, as well as definitions of these concepts; and provide that differential treatment (with exception of harassment) can be justified if there is a legitimate goal and the means employed are proportionate. <http://www.likumi.lv/doc.php?id=124266> (in Latvian)

Bill on Amendments to the Labour Law

On 15 June 2006 in its third reading of the Bill on Amendments to the Labour Law the Latvian Parliament debated amendments to the Labour Law, aiming inter-alia to introduce in the list of prohibited grounds in the non-discrimination provision an express reference to sexual orientation (currently the list of grounds is left open using the formulation "or other circumstances"). The explanatory memorandum to the bill explains that this addition is necessary in order to comply with Directive 2000/78. Another provision in the amending bill provides for an exception to the prohibition of discrimination on the ground of religious belief in the area of employment by religious organisations.

The Parliamentary debate raised many points of view. It referred inter alia to Christian and family values. It was noted that as far as the implementation of directives is concerned Article 249 EC Treaty leaves to the national governments the choice of means to attain the result sought and that as Latvia condemns any kind of discrimination, this is already expressed in the wider scope of the current provision and therefore it is supposedly unnecessary to spell out this particular minority. By a vote of 48 votes in favour, 19 votes against and with 19 abstentions the Parliament adopted the proposal to delete the reference to the sexual orientation from the bill.



Late News! The President of the Republic of Latvia vetoed the bill on 21 June with the explanation that it does not comply with Latvia's EU obligations. The veto means that the Parliament has to vote again on the text of the bill. When the Parliament again debates the bill, it can only debate the objections of the President and the proposals related to them – namely, new formulations of the disputed provision, the departure point being the bill as it stands now. It will then take a vote on the law as a whole; a simple majority is then required for the adoption of the bill as law. 1 September has been set for the submission of the proposals, and there are no rules on how soon the Parliament has to take the repeat vote. Given that general elections are scheduled to take place on 7 October, the Parliament has the option of simply killing the bill by not debating it until the end of its mandate. When the new Parliament convenes on 7 November, the new Parliament will then have to take a vote on which bills inherited from the previous Parliament it wants to pursue. If the current Parliament debates the bill there is little doubt about the outcome of the vote.

Lithuania

Equality body decisions/opinions

Prohibition of photo exhibition of non-traditional families

In March 2006 the Ombudsman of Equal Opportunities received a complaint from the Lithuanian Gay League which complained that in Juodkrante (a small seaside town) local officials had prohibited an exhibition called "Traditional and non-traditional families." The League claimed that this is discrimination based on sexual orientation. The Ombudsman issued a decision stating that the municipality of Juodkrante had violated Article 3 of the Law on Equal Treatment which provides that the State must assist organisations assisting in the implementation of equal treatment. The decision did not go so far as to treat this as discrimination on the grounds of sexual orientation.

sexual
orientation

Governmental Regulation violates the principle of equal treatment

A complaint was made to the Ombudsperson of Equal Opportunities by T.Kobeckis, who was born a Karaite¹⁷ and has grown up in Lithuania and has Lithuanian citizenship. In his complaint Kobeckis stated that he was discriminated against on the basis of ethnic origin when he was asked to pay 70 litas (€20) for the recognition of his higher education diploma obtained in a foreign establishment. The law provides that for ethnic Lithuanians, who are not citizens of Lithuania (who are living abroad) the fee is reduced by 100 percent.

racial
or ethnic
origin

In a decision of 11 April 2006, the Ombudsperson of Equal Opportunities pointed to Article 3 of the Law on Equal Treatment and recommended that the Government change its Regulation to levy administrative fees in a manner which treats all citizens equally without having regard to their ethnic origin. In reaction, the Ministry of Education and Science informed the Ombudsperson that they will prepare a draft regulation which will establish equal treatment for all Lithuanian citizens. However, to-date this draft Regulation has not been issued.

Age discrimination in motor insurance

The Ombudsperson of Equal Opportunities received a complaint from M.Monkevicius' claiming that he was discriminated against on the grounds of age by some insurance companies. The tariffs for people up to 25 years old are much higher than for those over this threshold.

age

¹⁷ Karaite Judaism is a Jewish denomination.

In decision No.(05)-SN-61 of 21 April 2006, the Ombudsperson stated that the way insurance premiums for liability arising out of the use of motor vehicles are established violates the Law on Equal Treatment. Levels of insurance premiums shall be fixed by the insurer, but age is not an appropriate criteria. Acceptable criteria may be health, driving experience and, as the Ombudsperson suggested, individual qualities.

The Ministry of Finance has produced a draft law designed to amend the Law on Equal Treatment. Article 2 of this draft law sets out certain exceptions to the principle of equal treatment, one of which is that evaluation of insurance risk which takes into account age, health and profession is not to be treated as discrimination under the Law on Equal Treatment. If the Parliament adopts this draft law, the insurance companies will have the right to establish different insurance premiums taking age into account.

Luxembourg

LU

Legislative developments

Opinion of the Advisory Commission on Human Rights on Bill no. 5518 transposing Directives 2000/43 and 2000/78

On 21 February 2006 the Advisory Commission on Human Rights issued an opinion on request of the Government on the transposition of Directives 2000/43 and 2000/78, through Bill No. 5518¹⁸. After analysing all its articles the Commission approved the Bill but found that the exclusion of civil servants from some of the provisions of the anti-discrimination law was not acceptable. The Commission also criticised the lack of a clear definition of indirect discrimination as far as criminal law was concerned, as this must be strictly interpreted. It also underlined that the aim of avoiding discrimination must not lead to a restriction of freedom of expression. Finally the Commission expressed the view that the Centre for Equal Treatment, that should be established by the Bill, has not been adequately resourced. The lack of permanent staff as well as the fact that the persons involved would only work for the Centre as a secondary task to another permanent function within the civil service would mean that staff would not be able to fulfil its mandate, as they would be overloaded with work. The budget of the Centre would also be insufficient.

Opinion of the Council of State on draft legislation transposing Directives 2000/43 and 2000/78 from 20 June 2006

This is a second opinion of the Council of State on draft legislation to transpose the Directives, following the re-drafting of the two former bills into one, single (Bill No. 5518). In general the opinion is much more positive than the first one. However, some criticism has still been made, especially concerning the definition of discrimination, copied from the Directives. The Council suggests that the legislator should just state that direct and indirect discrimination are prohibited, without taking over the definitions of the Directives, referring to the already existing principle of equality of Article 10b of the Constitution. The Council formally opposes the exclusion of public servants from protection from discrimination for recruitment and promotion purposes. It also formally opposes the restriction of the scope to the private sector as set out in Articles 4 to 7 of Chapter II, which excludes payments of any kind made by State schemes or similar, including State social security or social protection schemes, which also includes special provisions for occupational requirements and includes conditions for the reasonable accommodation of disabled people. Further proposals for changes are made to several provisions and

¹⁸ For a discussion on the contents of the bill see European Anti-Discrimination Law Review, Issue 3, p. 74



Wessel | 1997

the Council criticises the insufficient defence of rights mechanism. As far as sanctions are concerned, it formally opposes the inclusion of indirect discrimination in the criminal law, which requires proof of a criminal intention to establish an infringement. Finally it feels that the mandate and powers and competences of the Centre for Equality of Treatment have not been sufficiently described and that its independence is not guaranteed.

<http://www.chd.lu/fr/portail/role/default.jsp> (click on "projets de loi", go to "page 2" and click next to 5518 on A03)

Law abolishing age limit on recruitment to civil service passed

Publication au Mémorial du 28/12/2005 (216/2005)

On 23 December 2005, a law entered into force which amends the Law of 16 April 1979 and abolishes the upper age limit for recruitment to the civil service.¹⁹

<http://www.legilux.public.lu/leg/a/archives/2005/2162812/2005A3382A.html>

Malta

Legislative developments

Amendments to Criminal Code to increase sentences for racially or religiously aggravated offences

The Maltese Parliament is debating a Bill which makes several amendments to the Criminal Code. The amendments should implement measures to ensure a better and more expeditious administration of justice. One of the amendments provides for an increase in sentences for those found guilty of offences which are racially or religiously aggravated. This may be seen as a step in the right direction in view of the growing support for those persons/groups which are of a far-right political leaning and of the recent spate of racially motivated incidents which have occurred in Malta during the past months and which have targeted persons who have spoken openly (in the media) in favour or in defence of, or who assist, irregular immigrants.

<http://www.doi.gov.mt/EN/bills/2006/Bill%2069.pdf>

religion
or belief

racial
or ethnic
origin

MT

Netherlands

Policy developments

Report on formal or substantive systems of equality

A report by the Raad voor het Openbaar Bestuur (Council for Public Administration) published in April 2006²⁰ asks whether the non-discrimination or equal treatment norm has not in fact been interpreted in the wrong way where this has led to severe restrictions on the public administration to be able to differentiate between groups in society in different positions. The Council states that the principle of equality is a fundamental value in the Dutch democratic society but acknowledges that the way in which this principle has been elaborated in formal equality laws has had some negative effects. The Council states that a distinction should be made between discrimination on 'suspect grounds' and other forms of unequal treatment. In the latter case a different model to test whether the treatment is objectively justified should be applied. There should be more room for objective justification for the public administration to develop policies that are aimed at improving the position of certain

¹⁹ See EADLR, Issue 2, p.67.

²⁰ Report entitled 'There should be difference: administration between discrimination and differentiation'. The Hague, April 2006.

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groups. The Council illustrates this point with the example (among others) of publicly funded schools that want to avoid that their student population turns 'black'. Taking measures against this happening, e.g. by setting quotas for students from a non-Dutch background is not allowed under the General Equal Treatment Act, according to the Equal Treatment Commission.²¹ The Council states that there should be more room for the public administration to weigh and balance the interests at stake, and in so doing not only formal equality should count. http://www.rfv.nl/website/Frames/Rob/Rob_framestart.html



disability



age

Report by Committee of Experts on the extension of list of grounds in Constitution

Article 1 of the Constitution provides that all who are in the Netherlands, shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex or on any other ground is prohibited. A Parliamentary motion to include 'disability' and 'chronic disease' in the list of covered grounds was accepted in 2001. The Government was of the opinion that this was covered by 'any other grounds'. Nevertheless, it investigated the possibility of an expansion of the list. In 2004, the Equal Treatment Commission (ETC) advised the Government to expand the list to all of the grounds covered by the General Equal Treatment Act, the Age Discrimination Act and the Disability Discrimination Act.²² In reaction to that the Government announced that for the time being it would stick to its earlier opinion, and at the same time it commissioned an in-depth study into this matter by experts in constitutional law.

These experts published a report on 12 April 2006. The report reaches the conclusion that it is not necessary to expand the list of grounds in Article 1 of the Constitution since this provision can also be applied by judges in cases of disability, age or the other grounds included in the General Equal Treatment Act that are not expressly covered in the list. The inclusion in the Constitution of such grounds does not offer additional protection against discrimination. In addition, the Commission remarks that there is a danger that endlessly extending the non-discrimination grounds in the Constitution will have an "inflationary effect" meaning that Article 1 may lose some impact when a whole array of grounds are added. Especially when it concerns grounds that are less unconditionally discriminatory than the grounds currently mentioned in Article 1. It is not clear from the report on which research this conclusion was based. The Minister of Interior and Kingdom Relations has presented the report to Parliament and subscribes to the main conclusion of the Commission that adding grounds to Article 1 will not increase the legal protection against discrimination on these grounds.

http://www.minbzk.nl/grondwet_en/grondwet/grondrechten/persberichten/artikel_1_grondwet

Publication of Equal Treatment Commission guidelines for internal complaints procedures

In many cases brought before the ETC it is apparent that the organisation lacks an internal complaints procedure. In February 2006, the ETC published guidelines for a careful and correct internal complaints procedure that meets the procedural standards that have been set out in the opinions of the ETC over the past years. In this 'checklist' the ETC mentions a number of criteria for such procedures, among which are the necessity to: (a) investigate a complaint in a careful way by persons who are not directly involved with the complainant or the (supposed) perpetrator; (b) deal with complaints in a quick and timely way; (c) hear both parties and inform both parties about the outcome of the investigations and the measures that will be taken; and (d) take appropriate action after the investigation has been closed. The ETC also sets out some more general guidelines stating that any complaints procedure should be written in a clear and transparent way and should be made public within the organisation. Also, it should be clear to whom complaints can be directed.

²¹ E.g. Equal Treatment Commission Case 2005-25 from 18 February 2005.

²² Advice of the ETC 2004/03, 26/02/2004. All publications of the ETC can be found at www.cgb.nl.

The publication of this checklist is a sign that the ETC is taking its more general tasks with regard of the implementation of equal treatment laws more seriously (instead of only dealing with individual complaints). In the past the lack of such policies by the ETC has been a subject of criticism in the Netherlands. http://www.cgb.nl/newsitem.php?n_id=30

Legislative developments

Changes to the General Equal Treatment Act

Staatsblad 2005, 516

A Law of 15 September 2005 came into being as a reaction to the first evaluation of the Equal Treatment Act 1994 which took place in 2000.²³ The law contains several changes to this core piece of anti-discrimination legislation. The changes are especially important with a view to implementing Article 13 of the Racial Equality Directive, which requires Member States to have equality bodies. The new law has lifted some obstacles to the Equal Treatment Commission (ETC) performing its function in the sense of Article 13 of the Racial Equality Directive (performing independent surveys). Surveys can now be conducted in all sectors (public or private). The legal provision about the payment and the labour conditions of the members of the ETC has been clarified and extended. This further guarantees the independence of the ETC.

These changes come into being a long time after the first evaluation of the law. Many of the changes proposed by the ETC and by independent experts were not followed up by the Government. They have postponed these (proposed) changes to the so-called "integration law" in which the Government wants to integrate all the separate non-discrimination laws that currently exist into one General Equal Treatment Act. A Bill for such an "integration law" has not yet been sent to Parliament. <http://www.overheid.nl/op/index.html>

New criminal law provisions against discrimination on the ground of disability

Staatsblad 2005, 111

Changes to the Criminal Code which take effect from 1 January 2006, prohibit any discrimination on the grounds of a person's physical, psychological or mental disabilities. Articles 137c-137f are criminal law provisions, prohibiting several forms of conduct that can constitute discrimination. Article 429 quarter contains less serious criminal offences, which prohibit discriminatory acts by civil servants carried out in the course of their professional activities. It has taken almost 10 years of forceful debate and legal struggle for disability to be added to the non-discrimination grounds in the Criminal Code. Finally, in December 2002, a Bill was presented to Parliament.²⁴ The legislative procedure took almost two and a half years. One of the points for discussion was whether it would be necessary to include a definition of disability in the law. The government decided not to do so. The Explanatory Memorandum to the Bill argues that this is not necessary because other non-discrimination grounds are also not defined in the law, e.g. race. It is up to the judiciary to interpret the law and to create clarity as to when certain behaviour or practices constitute unlawful discrimination on this particular ground. <http://www.overheid.nl/op/index.html>



²³ See Issue 2 of the European Anti-discrimination Law Review, page 69.

²⁴ Bill TK 2001-2002, 28 221.



Equality Body decisions/opinions

School's refusal to admit Islamic woman who would not shake hands with men constitutes indirect discrimination on the grounds of religion

This case concerned an Islamic woman who was rejected for a place at a school where she wanted to be trained as an education assistant. The ground for the refusal was that she had indicated that she did not want to shake hands with men. In its opinion on the case from 27 March 2006, the ETC found that this is a manifestation of a religious belief. The ETC reached the conclusion that the refusal amounted to indirect discrimination on the ground of religion as the school did not directly refer to the applicant's religion. The school stated that its policy was based on the idea that pupils of the school need to be educated in the general norms and values of Dutch society. The ETC held that, by focusing on the behavioural codes of Dutch society, the school excludes pupils from minority cultures. The conclusion of the ETC was that there is no objective justification for the refusal to admit the applicant to the training programme and that therefore there was a breach of the equal treatment norms.

<http://www.cgb.nl/opinion-full.php?id=453055799>

Annual Report of the Equal Treatment Commission reveals increase in discrimination complaints

In June 2006 the ETC published its annual report on the year 2005. In 2005, 621 requests for an opinion were made to the ETC. This means that there was an increase of 45% in the number of requests from 2004. This increase is mainly due to the fact that a large number of age discrimination complaints (36% of all complaints concerned age, 20% sex and 13% disability and chronic illness). The ETC issued 4 general pieces of advice about the implementation of the Age Discrimination Act. The ETC gave 245 opinions in individual complaint cases (186 in 2004).

The effects of the opinions of the Commission were also measured. In 61% of the cases in which the ETC came to the conclusion that there was a breach of the law there was some kind of follow-up. In 17% of the cases follow-up was not possible (e.g. because the employment contract had already ended). In 22% of the cases no measures were taken. In 73% of the cases in which a follow up was possible the Commission's opinion was followed. www.cgb.nl

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Poland

Policy developments

Homophobic statements by the leaders of the League of Polish Families

After a coalition consisting of the Law and Justice, Self-Defence, and the League of Polish Families parties was created on 5 May 2006, several protests were organised against the appointment of Roman Giertych (Chairman of the League) to the position of Minister of National Education. Some of them (but not all) were inspired by the statement of Giertych who announced on 16 May 2006 that "in Polish schools there is place for tolerance but there is and will be no place for homosexual propaganda."²⁵ In response to the protests the Vice-President of the League of Polish Families Wojciech Wierzejski addressed a written parliamentary question to the Minister of Interior and Administration and the Minister of Justice in which he wrote "...it is commonly known that homosexual circles are interested in disseminating deviant attitudes among young people and are connected



²⁵ "...Tolerancja – tak, propaganda nie... w polskich szko łach nie ma i będzie miejsca dla propagandy homoseksualnej..." (TVP 16.05.2006).

with criminal circles with among others things a paedophile character...²⁶ He urged both Ministers to examine links between homosexuals' organisations and paedophiles/drug-mafia. He did not give any evidence for these words but said that these are facts commonly known like e.g. the fact, that "...the majority of homosexuals in Poland were confidants of the secret service..."²⁷ He also mentioned in relation to the planned Parada Równości Warsaw Pride 2006, that "...if the deviants will start to demonstrate, it is necessary to use truncheons..."²⁸ and with reference to German politicians who announced an intention to take part in the march, he said that "...they are not serious politicians but gays. When they will get coshed, they will not come for the second time..."²⁹ Rafal Pułka, Secretary General of the Movement New Generation, has put forward a motion to the public prosecutor's office against Wierzejski. The Social Democratic Party of Poland has submitted a motion to the Parliamentary Commission of Ethics demanding his punishment.

Violent anti-semitic incidents

The day before the visit of the Pope Benedict XVI to Auschwitz on 27 May 2006 Michael Schudrich, Chief Rabbi of Poland was attacked on the street in the centre of Warsaw. The speaker of the Ministry of Interior and Administration said that the attack could have been a provocation aiming at creating a bad image of Poland as an anti-semitic country. The incident happened in a broader context of anti-semitic violence and verbal attacks. Some commentators are concerned that these incidents might be a result of tolerating racist and anti-semitic publications by the Polish authorities. Others link such behaviour with the inclusion of radical parties (League of the Polish Families and Self-Defence) in government and the activities of radicals from All Polish Youth (Młodzież Wszechpolska). http://www.trybuna.com.pl/n_show.php?code=2006052904

Case law

First case establishing discrimination on grounds of disability

Zbigniew Maciejewski v. the County Police Headquarters - Court of Legnica of 20 June 2006

The claimant, Zbigniew Maciejewski had been working full time at the County Police Headquarters in Głogów since 17 April 1996 as a computer technician on a permanent employment contract. On 3 March 2005 the authority recognised him as a person with a moderate level of disability without setting any time limits for a review of this state. In July 2005 he took part in a recruitment process for the position of senior clerk in the team for communication and information technology in the County Police Headquarters in Głogów. On 21 July 2005 he found out that his application had not made it to the second round of the recruitment process. The commission informed him in a letter of 21 July 2005 that a disabled person could not be taken into account in the recruitment process, which had been allegedly clear from the advertisement. The claimant decided to take action for infringement of the principle of equal treatment on grounds of disability.

During the course of proceedings County Police Headquarters argued they needed someone who could work 8 hours/day and 40 hours/week and that according to Article 15 of the Act on Disabled the claimant, as a person with a moderate level of disability, would be only able to work only 7 hours/day and 35 hours/week and not 8

²⁶ "...Powszechnie wiadome jest, że środowiska homoseksualne programowo zainteresowane są upowszechnianiem postaw dewiacyjnych wśród młodzieży oraz co gorsza powiązane są ze światem quasi-przestępczym o charakterze m.in. pedofilskim..." <http://wiadomosci.onet.pl/1323066,11,1,1,,item.html>

²⁷ "...większość homoseksualistów w Polsce był o konfidentami służb specjalnych..." (Rzeczpospolita, 17.05.2006, p. 3)

²⁸ "...jeżeli dewianci zaczną protestować, to należy im dolać pałami..." (TVP, 31.05.2006), <http://tvp.pl/120,20060516342753.strona>

²⁹ "...to nie żadni poważni politycy, tylko geje. Jak dostana parę pał, to drugi raz nie przyjadą..." (TVP, 31.05.2006), <http://tvp.pl/120,20060516342753.strona>



hours/day and 40 hours/week. The Act stipulates however that it is possible for a disabled person to work 8 hours/day and 40 hours/week, but only on the basis of a medical certificate of a doctor. As Maciejewski neither attached such a document, nor declared himself able to work full-time, he could not be qualified as an “available employee” under Article 15 of the Act on the Disabled. On 3 November 2005 a doctor confirmed in a certificate that Maciejewski could work full-time, however the certificate could not be attached to his application, because it was not possible to do this retrospectively. The claimant brought an action against County Police Headquarters.

On 8 February the regional court dismissed the claimant’s case finding no proof of direct or indirect discrimination. It was of the opinion that the claimant could not be recognised as an “available employee” under the law, when he is allowed to work only 7 hours/day and 35 hours/week. Further, it ruled that even though he knew exactly which documents he should have given to the recruitment commission (in particular a medical certificate or at least his own–availability declaration) he did not do this.³⁰

The claimant appealed the judgment on the basis that the regional court had focused solely on his results at work and his absence, without having properly evaluated the actual recruitment process. The Helsinki Foundation for Human Rights was involved in the case, first as *amicus curiae* then by submitting a motion to the court urging it to ask the European Court of Justice for a preliminary reference on whether Articles 15 and 16 of the Act on Disabled are in accordance with Directive 2000/78/EC.

Late news! On 20 June 2006 the appeal court in Legnica found that there had been irregularities in the proceedings of the Regional Court in Głogów concerning, among others, the evaluation of the evidence. In the opinion of the court in Legnica, the lower court in Głogów had not taken into consideration the testimonies of witnesses of the claimant. The court in Legnica found that there had been discrimination in the recruitment process at the Police Headquarters under the Act on Disabled – more specifically, the provision which was aimed at protecting the disabled from indirect discrimination by virtue of the additional requirement that the claimant supply a certificate which attested to the possibility to work overtime and at nights. It awarded however only a symbolic amount of compensation of 899 PLN (ca. 224 EUR), because Maciejewski had not proved he had suffered damage.

This is the first time a disabled person who was rejected for a promotion because of the state of his health has brought an action against the employer. The Court in Legnica awarded compensation on the basis of the Labour Code implementing the Directive 2000/78/EC, which is the first ruling in Poland in this field.

District Court dismisses sexual orientation discrimination claim

B.K. v. “CZA-TA” Ltd. in Piotrków Trybunalski, District Court (Sąd Rejonowy) in Płock, Department IV for Employment and Social Insurance, IV P 353/05

On 20 May 2005 B.K. brought a compensation claim for an unlawful termination of an employment contract before the district court. According to the claimant his performance at work was negatively evaluated by a supervisor because of his sexual orientation.



³⁰ *Zbigniew Maciejewski v. the County Police Headquarters Department IV for Employment*, Sentence of 08.02.2006, IV P 467/05.

On 16 March 2006 the court found that the claimant had not proved facts which would render it probable that discrimination on the ground of sexual orientation had occurred in his case. The court therefore dismissed the action without shifting the burden of proof towards the employer, finding that on the basis of the gathered evidence it was impossible to prove that the equality principle had been violated. For the Court it was decisive that the claimant had not proved such facts as would make it probable that he terminated the employment contract because of discrimination on the ground of his sexual orientation. The court did not exclude that a claimant may have felt pressure and criticism at work, but it was not clear, whether the reason for an unfriendly atmosphere was his sexual orientation or rather his poor professional performance. The court established that "CZA-TA" employees did not know B.K.'s sexual orientation, so an unknown fact could not have been made public.

Portugal

Policy development

Extensive search by the police forces of a social housing quarter in Lisbon

On 3 May 2006 the PSP – Polícia de Segurança Pública (Public Security Police) under the instructions of the public prosecutor and accompanied by a judge of instruction conducted a joint search of a social housing quarter – Bairro da Torre in Camarate, allegedly in search of illegal weapons. In this operation police destroyed doors and windows when forcing entrance to 138 shanty houses. They arrested 10 people who were later released. 18 firearms (13 shotguns, 3 rifles and 2 pistols) were found. Despite the entrance of the police to the houses having been authorised by a judge, several representatives of NGO's and newspapers criticised the violation of human rights, namely the inviolability of the home and the disproportion between the means used and the results. The Ministry of Internal Affairs has been accused of racist and xenophobic behaviour as most of the houses belonged to people from ethnic minorities, including Roma.

Legislative developments

Changes to Nationality Law will reduce cases of discrimination on the grounds of nationality which often coincide with discrimination against ethnic minorities

Law no. 2/2006 came into force on 11 July 2006 and constitutes the fourth amendment to Nationality Law no. 37/81. According to the Government the law constitutes "an important step against exclusion." It will ease the integration of second and third generation foreign citizens born in Portugal and reduce cases of lack of equal treatment on the grounds of nationality which in many cases coincide with discrimination against ethnic minorities. Portuguese nationality can be acquired notably, by third generation immigrants, if they have a parent born in Portugal and by second generation immigrants if the parent has his or her legal residence in and has been settled in Portugal for at least five years. Immigrants' associations consider that this law will simply benefit the third generation by leaving out most of the immigrants born in Portugal. Some NGO's have criticised this law as the acquisition of Portuguese nationality still depends on the progenitor's legal residence in the country. This new nationality law is considered as a step to reducing discrimination based on nationality. This law is applicable to all pending cases before administrative authorities and courts, except those where sanctions for discrimination can be imposed. As foreseen in law, these sanctions cannot be retroactive.

racial
or ethnic
origin

racial
or ethnic
origin

Slovakia

Policy developments

The Slovak Government brought down by controversy over proposed treaties on right to exercise conscientious objection



The controversy over the proposed treaties between The Slovak Republic and the Holy See, and between the Slovak Republic and registered churches and religious societies, on the right to exercise conscientious objection has led to break-up of the coalition Government and to an early parliamentary election. The Ministry of Justice proposed legislation for two treaties: the first agreement was proposed in April 2003 and the latter in February 2005. The political debate, which started in May and June 2005³¹, was reignited in January 2006 when the Christian Democratic Movement (KDH), one of the parties in the governing coalition pushed for further legislative action within the Government and the Parliament. Although the process of commenting on the agreements had already finished, the Slovak Democratic Union (SKDU) – a political party which included the Prime Minister and the Minister of Foreign Affairs – refused to put the proposal to the cabinet meeting and asked instead for further political discussion. On 4 February 2006 the Christian Democratic Movement announced its intention to leave the coalition if the proposals were not submitted to the next cabinet meeting. As this was not done, the Christian Democratic Movement terminated its membership of the Government.

The public debate has shown that there are still many controversies about the principles underlying the proposals, mainly about the impact of the treaties on everyday life situations, interference of the teaching of churches in the Slovak legal order, and about alleged favouritism of Catholic believers.

Spain

Legislative developments

Bill on offences and sanctions in the field of equality for disabled people



Law 51/2003 on Equal Opportunities, Non-discrimination and Universal Access for Disabled Persons of 2 December 2003 and Law 62/2003 on Fiscal, Administrative and Social Measures of 30 December 2003, which transposed Directive 2000/78 into Spanish law, did not establish an adequate system of sanctions in cases of disability discrimination. The Bill on offences and sanctions in the field of equality for disabled people defines as “administrative offences” any infringements of disabled people’s rights to equal opportunities, non-discrimination and universal access involving direct or indirect discrimination, harassment or non-compliance with requirements for accessibility and reasonable accommodation, along with non-compliance with positive action measures set down in law, especially where there are economic benefits for the offender. These offences may be “minor”, “serious” or “very serious.” Offences will be punished with fines ranging from 301 euros to one million euros, depending on their seriousness. The criteria taken into account in the sanction scale will be the offender’s intention, negligence, fraud, non-compliance with prior warnings, turnover and the number of people affected. The Bill, approved by the Government on 13 January 2006, has been negotiated with the Spanish Committee of Representatives of the Disabled (CERMI) and was reported on favourably by the National Disability Council. The Autonomous Regions were also consulted. This Bill complies with the provisions on required

³¹ European Anti-Discrimination Law Review, Issue 2, p. 71

sanctions included in Article 17 of Directive 2000/78, and was drawn up with consultation with NGOs, as required by Article 14 of the Directive. It is now before the Parliament for discussion.

<http://www.congreso.es/> (Iniciativas > Proyectos de ley > En tramitación)



Bill recognising sign language and speech aid systems

This Bill, apparently the first of its kind in Europe, responds to a long-standing demand from Spanish associations representing deaf, hearing-impaired and deafblind people. Its aim is to facilitate deaf people's access to information and communication, taking into account their heterogeneity and their specific needs. The Bill foresees that education authorities shall provide what is necessary to promote the learning of Spanish sign language by deaf, hearing-impaired or deafblind pupils that freely opt to learn this language. The Bill promotes the use of sign-language interpreters for deaf, hearing-impaired and deafblind people and the provision of communication aids, where required, in various public and private spheres: 1) publicly-provided goods and services (education; training and employment; health; culture; sport and leisure); 2) transport; 3) relations with public administration; 4) political participation; and 5) the media, telecommunications and the information society. The Bill, approved by the government on the 13 January 2006, also provides for the creation of a "Centre for Linguistic Standardisation of Spanish Sign Language". The purpose of this body will be to investigate, promote and disseminate this language and to supervise its use. This is a notable development in equal treatment in all spheres of social life for hearing-impaired groups. <http://www.congreso.es/> (Iniciativas > Proyectos de ley > En tramitación)

Bill regulating the amendment of entries in official registers regarding people's sex

Transsexuals wishing to change their name and sex in the register of births, marriages and deaths in Spain currently need a court ruling and must undergo sex reassignment surgery. This process takes several years and is moreover costly and hazardous. A Bill introduced to Parliament on 2 June 2006 solves this problem by allowing people to change their names in the register of births, marriages and deaths by means of submitting "existential evidence" ("prueba de vida"). This gender identity bill was included in the governing Spanish Socialist Party's electoral programme.

In its preamble the Bill states that transsexuality is a social reality that needs to be addressed by the law so as to guarantee the free personal development and dignity of those whose current gender identity does not match the sex with which they were initially registered.

<http://www.congreso.es/> (Iniciativas > Proyectos de ley > En tramitación)



Case law

Constitutional Court decision on sexual orientation

P.C. vs. Alitalia Italian Airlines, judgment of 13 February 2006 (STC 41/200)

Airline company Alitalia dismissed a worker (P.C.) ostensibly for "indiscipline" at work in July 2002. The worker brought an action under Article 55.5 of the Workers Statute for his dismissal to be declared void on the basis that he was the victim of discrimination on the grounds of his sexual orientation. Social Court no. 24 of Barcelona declared the dismissal void in November 2002. The company appealed against this ruling and the Social Division of the High Court of Catalonia found in the company's favour in June 2003, deeming the dismissal to be valid. The Constitutional Court has overturned this ruling, and therefore invalidated the dismissal. The Court ruled that Alitalia must reinstate the worker and must pay all his salary in arrears from the date of the dismissal by virtue of Article 55.6 Workers Statute. The Constitutional Court's ruling refers, *inter-alia*, to Article 13 of the EC Treaty, Directive 2000/78, articles of the Workers' Statute which transposed the Directive (Articles. 4.1.c, 4.2.e and 17.1 in



conjunction with Article 55.5) and Article 14 of the Constitution, which provides for equality before the law and prohibits discrimination “on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance”. Even though sexual orientation is not expressly cited in the Article, the Constitutional Court’s ruling states that sexual orientation is “undoubtedly a circumstance included in the expression ‘any other circumstance’”. <http://www.tribunalconstitucional.es/JC.htm>

Sweden

Policy developments

Inquiry Commission proposes a ‘Single Non-discrimination Act’

Following four years of investigation, the Discrimination Inquiry Commission (DIC) presented its findings in February 2006 concerning consolidated legislation against discrimination covering all grounds of discrimination and areas of society.³² According to the DIC’s proposal, the current seven domestic acts dealing with discrimination will be replaced by a single ‘Prohibition and other Measures against Discrimination Act’ covering all grounds and areas of society. The new Act is proposed to cover sex, ethnicity, religion and other belief, sexual orientation and functional disability but also sexual identity (transpersons) and age, both of which have not previously been explicitly covered by non-discrimination legislation. The proposed Act is divided into four chapters: Chapter 1 contains introductory provisions and definitions, Chapter 2 deals with working life. Chapter 3 with education and other areas of society, and Chapter 4 contains rules on how the supervision of compliance with the Act should be arranged. Additionally, the Commission proposes that the four existing Ombudsmen (the Equality Ombudsman, the Ombudsman against Ethnic Discrimination, the Disability Ombudsman and the Ombudsman against Discrimination on the grounds of Sexual Orientation) be merged into one authority - the Office of the Ombudsman against Discrimination, which would then cover all the protected grounds and be headed by a collective of ombudsmen.

It is suggested that the new Act covers not only natural persons but also legal persons in the areas of society where this is considered justified (including labour market policy activities, business operations, membership of employers or workers organisations, or any organisation whose members carry on a particular profession, goods, services, housing, public appointments and awarding of public assignments). Another new feature is that the discrimination prohibition concerning goods, services and housing will apply to anyone (also private persons) providing such items to the public. Further investigations are considered to be required before the discrimination prohibition based on age can be formulated in areas such as goods and services and housing, public meetings and public events, the social insurance system and social services, health and medical services. So far, the main matter of dispute seems to be over the Commission’s suggestion that positive special treatment (in the form of affirmative action when equally or almost equally qualified) be allowed in working life not only on the grounds of sex but also on the grounds of ethnicity.

Today’s Swedish non-discrimination legislation bans discrimination outside working life on all grounds covered by the Directives (except age, so far). This would still be the case under the proposed new Act. The major achievement of the proposed Act is that it would finally address the issue of age discrimination. The Act is not likely to be in place, though, within the period for implementation. It is now the subject of a consultation procedure.

³² For the inquiry Commission’s terms of reference, see Dir. 2002:11, 2003:69 and 2005:8. The proposal was published in the Swedish Government Report series, SOU 2006:22.

Right to wear a head-scarf in schools

A young girl started her first year of compulsory primary education in the private school Minervaskolan in Umeå. From the start and for religious reasons she wore a head-scarf. This was against the school rules prohibiting the use of any type of hat, etc., during school-hours. The Headmaster made clear that she had to abide by the rules or change school. As a result of the denial of her right to wear a head-scarf the girl changed schools.



In a decision of 22-05-2006 (Dnr 52-2006:689), the Swedish National Board of Education (Skolverket) concluded that a prohibition against wearing a head-scarf at school was contrary to the requirement of providing a school 'open to all pupils' under Chapter 9 Sec. 2 of The School Act. According to the Board the choice of clothing is a personal choice normally not to be guided by school rules. Prohibitions are only acceptable if there are public order or safety reasons for doing so. To prohibit a pupil from wearing a head-scarf in accordance with general school rules is to deny such a pupil access to schooling for religious reasons.

The right to wear a head-scarf is therefore considered a part of the freedom of religion and would now – after 1 of April 2006 and the entry into force of the Act prohibiting discrimination in basic education (see report directly below) – also amount to discrimination. The Board has however, in another decision (Dnr 58-2003:2567) stated that it is possible to prohibit the use of the burqa in schools if these cause danger and disorder in school, if they offend others in that it constitutes an offending religious expression, or if they cause pedagogical problems. The Board's decision sets the standard for all schools in Sweden. There is no sanction or remedy related to the decision as such. www.skolverket.se

Legislative developments

New Act prohibiting discrimination in basic education

On 8 February 2006 the Swedish Parliament adopted a new Act banning the discrimination against children and pupils and prohibiting other degrading treatment of them in order to fully implement the Racial Equality Directive, the Employment Equality Directive and the amended Equal Treatment Directive (SFS 2006:67).³³ The Act will enter into force on 1 April 2006 and goes beyond the requirements of the Directives covering all grounds equally, except age. The Act applies to pre-school facilities, childcare for children of school-age, primary and secondary school and municipal adult education. The Act prohibits direct and indirect discrimination including harassment, instructions to discriminate and victimisation and applies the shift in the burden of proof in cases of alleged discrimination. The new law covers children and pupils who are harassed or who have their dignity violated by other pupils or the school's personnel. The competences of the existing Ombudsmen have been expanded and they may also represent a pupil who is an alleged victim of discrimination in court (the parents are the legal representatives of the pupils if the child is under 18) and the consent of the parents (and the child when mature enough) is required if an Ombudsman is to take a claim to court. Claims are filed with the ordinary civil courts and the remedies are damages for the violation and economic loss caused by discrimination.

Case law

Swedish Labour Court decision on discriminatory language requirements

Labour Court Decision of 19 October 2005, AD 2005 No. 98

The alleged victim of discrimination from the former Yugoslavia was among five applicants who had applied for a position as a municipal architect who were invited for interview. As a result of his lack of Swedish language skills, demonstrated during the interview, he was disregarded for the position. The Ombudsman, representing



³³ SFS 2006:67. See further also Government Bill 2005/06:38.

the alleged victim of discrimination claimed that his language skills had been misinterpreted during the interview and that this amounted to direct discrimination on the grounds of ethnicity. In the alternative, the Ombudsman argued that the language requirements amounted to unlawful indirect discrimination.

The Labour Court did not accept the allegations of direct discrimination. The Court found that the interview had actually gone badly and that all the members of the Appointment Committee had agreed that the alleged victim of discrimination did not meet the language skills required for the position. The question was then whether these language requirements amounted to indirect discrimination on the grounds of ethnicity. The Labour Court answered in the negative. The position of municipal architect implied acts of public governance and it was objectively justified, adequate and necessary to require good (though not perfect) knowledge of written and spoken Swedish of the person to be appointed.

In this case the concept of indirect discrimination is argued in some detail. In contrast to the employer, the Ombudsman argued that in a case like this it is sufficient to prove a *prima facie* case of indirect discrimination that the language requirements are to the detriment not only to people of the same ethnic origin as the alleged victim of discrimination but of 'any person who do not have Swedish as their mother tongue'. The Labour Court concurred with the Ombudsman.

Supreme Court case on incitement to hatred against homosexuals

Supreme Court Decision of 29 November 2005 in Case B 1050-05

A pastor held a sermon entitled 'Is homosexuality congenital or the powers of evil meddling with people' where he developed his religious beliefs with regard to homosexuality blaming homosexuals for Aids, linking them to the sexual abuse of children and characterising them as 'a serious cancerous growth on the body of society.' A District Court had sentenced him to one month in prison for incitement to hatred on the grounds of sexual orientation. This was overturned on appeal by the Court of Appeal.

On appeal to the Supreme Court, it upheld the judgment of the Court of Appeal. According to the Supreme Court, the statements made by the pastor could not be considered to be direct expressions of Biblical verses but implied insulting judgments about the group in general, over-stepping the limits of an objective and responsible discourse regarding homosexuals. The statements could therefore be deemed to have expressed contempt for homosexuals as a group according to the meaning of Chapter 16 section 8 of the Criminal Code as expressed in the *travaux préparatoires*. However, Chapter 16 section 8 also has to be interpreted in the light of the Swedish Constitution and the European Convention of Human Rights (ECHR). As regards the ECHR, the Supreme Court did find however, that it was 'likely that the European Court in Strasbourg, in a determination of the restriction of (the defendant's) right to preach his Biblically-based opinion that a judgment to convict would constitute, would find that this restriction is not proportionate, and would therefore be a violation of the European Convention on Human Rights'. Despite the pastor's extreme statements they could not be labelled 'hate speech' under Chapter 16 section 8, the Court held.

www.hogstodomstolen.se/2005/Sammanst.htm



Policy developments

Disability Rights Commission issues interim report into inequalities in health care

The Disability Rights Commission Act 1999 gives the Disability Rights Commission powers to undertake formal 'general' investigations into areas of service provision and other areas of social activity. The interim report of this investigation from December 2005 contains extensive evidence that certain categories of disabled persons, in particular those with long-term mental health problems and learning disabilities, are being denied equality of treatment in access to health services. The final report of the investigation, expected on 14 September 2006, will set out strategies for overcoming these problems.

<http://www.drc-gb.org/newsroom/healthinvestigation.asp>

Under the Equality (Disability, etc.) (Northern Ireland) Order 2000 the Equality Commission for Northern Ireland (ECNI) has similar powers to conduct investigations. ECNI is currently conducting an investigation into the accessibility of health information in Northern Ireland for people with a learning disability.

<http://www.equalityni.org/ftp/FormInv1>

Legislative developments

Disability Equality Duty Codes of Practice issued for Public Authorities

The Disability Discrimination Act 1995 has been amended by the Disability Discrimination Act 2005 to place a 'general' duty on all public sector authorities to eliminate unlawful disability discrimination and disability-related harassment, to promote equality of opportunity for disabled persons, and to promote positive attitudes and encourage disabled people to participate in public life. A set of 'specific' duties has also been imposed upon public authorities, which requires authorities listed in regulations to publish a Disability Equality Scheme by 4 December 2006 that sets out the steps they will take to meet the general duty, to monitor the impact of their policies on disabled persons and report on progress. The Disability Rights Commission has produced statutory codes of practice to guide public authorities in how to comply with their positive duties. The codes of practice were issued in December 2005 and while not legally binding, can be taken into account by courts in enforcing the duties.

http://www.drc-gb.org/employers_and_service_provider/disability_equality_duty.aspx

The Disability Discrimination (Northern Ireland) Order 2006 introduces a similar duty for Northern Ireland.

<http://www.equalityni.org/whatsnew>

Equality Act 2006 establishes new Commission for Equality and Human Rights for Great Britain and expands the scope of equality law

The Equality Act 2006 completed its passage through the UK Parliament and became law on 16 February 2006. It was not significantly altered in the final debates upon its provisions. The Act establishes the Commission for Equality and Human Rights (CEHR) for Great Britain and defines its purpose and functions. It will take on the work of the existing equality Commissions,³⁴ and will also assume responsibility for promoting equality and combating unlawful discrimination on the basis of sexual orientation, religion or belief, and age. The CEHR will also have responsibility for the promotion of human rights. It is expected that the Commission will take over the competences of the EOC and DRC, as well as taking on its new competences in respect of sexual orientation, age and religious discrimination by October 2007, although this may be delayed. The Commission will take over the competencies of the CRE by 31 March 2009 at the latest.

³⁴ The Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC).



The 10-15 member Commission will be appointed for terms of 2–5 years, by the Secretary of State Communities and Local Government. It will be funded out of the budget of the Department for Communities and Local Government, in a manner comparable to the existing commissions. It will have powers to assist individual victims of discrimination, but will have to set its own priorities and decide which individual cases it chooses to support. It is expected that it will adopt a strategic approach to litigation rather than supporting many individual claims. It will have power to conduct formal investigations and to enter into binding agreements with public or private sector organisations. It will be able to issue codes of practice, to undertake research, to provide education and training and to publish and disseminate ideas and information. It will have the power to provide grant aid to others in support of its functions.

Part 2 of the Act makes discrimination on the grounds of religion or belief unlawful in England, Wales and Scotland in the provision of goods, facilities and services, education, the use and disposal of premises, and the exercise of public functions. It uses slightly different and perhaps weaker definitions than those in the Employment Equality (Religion or Belief) Regulations 2003 (enacted to transpose the Employment Framework Directive) for “religion or belief”, direct and indirect discrimination. It does not provide protection against harassment. There are complex exceptions that apply to faith-based charities and faith schools. These provisions will come into force in April 2007.

The Act enables the government to introduce regulations throughout the UK, including Northern Ireland, prohibiting unjustified discrimination on the grounds of sexual orientation in the provision of goods, facilities and services, education, the use and disposal of premises and the exercise of public functions.

The Act also creates a positive duty on public authorities to promote equality of opportunity between women and men (‘the gender duty’), and prohibits sex discrimination and harassment in the exercise of public functions. The CEHR is given the responsibility for enforcing the positive duty to promote gender equality, and has been given wider powers to also enforce the pre-existing race and disability positive duties, including the ability to investigate alleged breaches of the general duty to promote equality.

<http://www.opsi.gov.uk/acts/acts2006/20060003.htm>

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orientation

Government consultation on the extension of prohibition of discrimination on the grounds of sexual orientation to the provision of goods and services

The Equality Act 2006 enables the government to introduce regulations prohibiting unjustified discrimination on grounds of sexual orientation in the provision of goods, facilities and services, education, the use and disposal of premises and the exercise of public functions. The government is now consulting on how to draft these regulations. Areas of difficulty include what exceptions should exist for a) religious organisations, b) charities with a religious ethos, c) charitable and social activity that is usually directed at and often confined in scope and access to persons of a particular sexual orientation (such as anti-HIV programmes directed specifically at members of the gay community); d) renting or sharing accommodation. The consultation will conclude on 5 June 2006, and the regulations are expected to become law in April 2007. Separate regulations will be brought forward in Northern Ireland, where a separate consultation, concluded on 25 September 2006, was carried out.

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Case law

Obligation to retain appearance of impartiality in adjudicating discrimination cases

Diem v Crystal Service plc, 16 December 2005, [2005] UKEAT 0398_05_1612

The claimant was of Vietnamese ethnic or national origin. The employment tribunal dismissed a complaint of

unfair dismissal, race discrimination and victimisation against her former employer. During the claimant's cross-examination, the chairman asked whether she was claiming to be non-white and said that her skin colour was as white as the English, pointing to the skin of his other hand and adding that 'your skin looks whiter than mine.' The claimant appealed to the Employment Appeal Tribunal (EAT), alleging that she had not received a fair hearing as the chairman's questioning was racially insensitive and would appear to be offensive to any reasonable person.

The EAT considered that the chairman's desire to establish whether the claimant was departing from her case as outlined by her counsel at the outset of the hearing, was perfectly legitimate. However, the enquiry became a problem when the chairman engaged in prolonged questioning as to how the claimant viewed her own skin colour and in making comparisons with the chairman's own. The fair-minded observer would have concluded that the remarks made were likely to cause the claimant to feel unsettled, humiliated and embarrassed. Therefore, under the common law, the decision had to be overturned and the case sent back to another employment tribunal to be reheard.

http://www.bailii.org/uk/cases/UKCAT/2005/0398_05_1612.html

House of Lords uphold school decision to exclude a girl for wearing a form of Islamic dress, which breached the school's uniform code.

R(Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15

A Muslim teenager, Shabina Begum attended a state school in Luton which had a Muslim headmistress and 79% of its students were also Muslim. The school requires its students to wear school uniform, but consulted with the local Muslim community and Imams from the three local mosques in drawing up a dress code, establishing that Muslim students could wear a range of Islamic dress, including headscarves. On 3 September 2003, Ms Begum (then age 14) arrived at school wearing a long coat-like Islamic garment called a jilbab, which was not approved uniform wear, and was told to go home and change into the approved uniform. She alleged that not being allowed to wear the jilbab violated her right to freedom of religion under Article 9 ECHR and the right to education under Article 2, First Protocol ECHR. Ms Begum lost at first instance, but succeeded in the Court of Appeal.³⁵ The school appealed to the House of Lords.



On 22 March 2006 The House of Lords held unanimously that Ms Begum's ECHR rights had not been violated as Ms Begum's family had chosen to send her to that particular state school, although three other state schools were willing to admit her and to permit her to wear the *jilbab*. All five of the Law Lords also held that even if there had been interference with her right to religious freedom, the interference in the circumstances had been justified as necessary to maintain a uniform policy, which had been carefully designed to comply with mainstream Muslim opinion. The Law Lords were at pains to emphasise that the decision was based upon the specific facts in question. Baroness Hale suggested that wearing religious dress could in many circumstances constitute an important form of expression, expressing support for the similar view adopted by Judge Tulkens in his dissenting opinion in the ECHR case of *Layla Sahin v Turkey* (2005).³⁶ However, all Law Lords agreed that schools were entitled to maintain a uniform policy, as long as that policy was proportionate in making allowance for religious beliefs.

<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060322/begum-1.htm>

³⁵ See EADLR, Issue 2, p.77

³⁶ (2005) 41 EHRR 8. For a report on that case see EADLR, Issue 3, p.48

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Exemplary damages awarded in race discrimination case

Husain v Chief Constable of Kent, Employment Tribunal, 6 April 2006

Kent Police twice rejected job applications from Shujaat Husain, for employment as an intelligence analyst in 1999 and 2000. Following this, the Kent police prepared a report on Mr Husain, on the basis that there had been 'material differences' between his applications for the two jobs: the report suggested that he had falsified elements of his qualifications and professional experience. The report was circulated to other police forces, and warned them to be aware of a 'potentially fraudulent' application. Mr Husain was then later arrested and detained for 10 hours when he applied for a job at Avon and Somerset police force although he holds 4 A' Levels and was a high-ranking officer in Pakistan where he was director of intelligence in Karachi. The employment tribunal decided that Mr Husain had been subjected to serious race discrimination by Kent police. The suggestion by the police that he was falsifying his qualifications was the result of racial stereotyping. The tribunal awarded exemplary damages due to the seriousness of the discrimination of £65,000 (93,000 euros). Such damages are rare in the UK legal system, and reflect the seriousness of the case.

http://news.bbc.co.uk/2/hi/uk_news/england/kent/4885562.stm

Court of Appeal dismisses a race discrimination claim brought by an elected member of a far-right political party following his dismissal from employment

Serco Ltd. v Redfearn [2006] EWCA Civ 659

Serco Ltd is a private company that supply transport services to public authorities. Its buses are used to transport adults and children with physical or mental disabilities in the Bradford area, and the majority of the passengers are of Asian ethnic origin. Mr Arthur Redfearn, a bus driver and an employee of Serco Ltd, was elected as a local councillor for the British National Party (BNP), a far-right political party. Serco Ltd dismissed Mr Redfearn on the basis that his political views could cause distress to his passengers. Mr Redfearn brought a claim for direct race discrimination, on the basis that he had been dismissed on the grounds of the race and ethnic origin of Serco's passengers. He also brought a claim for indirect race discrimination, on the basis that his dismissal for membership of the BNP constituted a practice that had an adverse impact upon persons of white English ethnic origin, as the membership of the BNP was almost completely made up of white English individuals.

The employment tribunal held that the dismissal was not based upon racial or ethnic grounds, so no issue of direct discrimination arose. It also dismissed the indirect discrimination claim, on the basis that the dismissal was objectively justified on the grounds of ensuring the health, safety and peace of mind of the passengers of the bus services. On appeal, the Employment Appeals Tribunal overturned the tribunal's decision on the basis that insufficient consideration had been given as to whether the dismissal was actually based upon the ethnic origin of the passengers rather than on health and safety concerns, and therefore was driven by racial considerations, even if they were well-intentioned. However, the Court of Appeal reversed this decision finding that the decision was legitimately based upon the possible detrimental effects to Serco Ltd. of Mr Redfearn's membership of the BNP, and his election to office representing that party with its racist ideology. The Court considered that Serco were adopting a policy that would apply to any member of a racist political party, and therefore no issue of direct or indirect discrimination arose. <http://www.bailii.org/ew/cases/EWCA/Civ/2006/659.html>

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Gay employee receives payment in settlement of sexual orientation discrimination case

This case, which was supported by the Equality Commission for Northern Ireland, was brought to the Industrial Tribunal under the Employment Equality (Sexual Orientation) Regulations (NI) 2003, which implement the Directive 2000/78. A 23 year old man from Belfast complained that he was subjected to homophobic harassment

sexual
orientation

while working in a warehouse, including name-calling and insults. The case was settled, with the claimant receiving £5,000 from Next plc, a leading UK clothing company who owned the warehouse. As part of the settlement arrangement, Next plc affirmed its continued commitment to the principle of equality of opportunity and undertook to train all temporary staff employed in its warehouse in its equal opportunities policy.

<http://www.equalityni.org/whatsnew/newsdetails.cfm?Storyid=513>

Employment Tribunal finds that dismissed gay employee faced stereotyping

Case: Lewis v HSBC plc, Case Number: 3200440/2005

HSBC's global head of equity trading, Mr Peter Lewis was sacked by the bank in February 2005 for "gross personal misconduct", following an incident where Mr Lewis was accused of sexual harassment and inappropriate behaviour in the bank's gym by another male employee of the bank. Mr Lewis alleged that his dismissal had been motivated by prejudice. The employment tribunal held that Mr Lewis had not been dismissed on the grounds of his sexual orientation, and that the bank had legitimately concluded that Mr Lewis had engaged in some misconduct. However, the tribunal did find that he had received less favourable treatment on the grounds of sexual orientation in relation to how the bank's internal investigation was conducted, and in the decision to suspend him. Damages remain to be decided.

http://www.bindmans.com/fileadmin/bindmans/downloads/Documents/Judgement_Lewis_v_HSBC.pdf



Court of Appeal confirms role of Equality Commission in Northern Ireland to enforce positive equality duty

On 8 March 2006, the Court of Appeal confirmed the finding of the Northern Ireland High Court as reported in the previous edition of the EADLR³⁷ that the Equality Commission in Northern Ireland could investigate the type of procedural failure alleged to have happened in this case; namely the failure by Northern Ireland Office to conduct a proper equality impact assessment on the issuing of Anti-Social Behaviour Orders on different social groups, including young men. Indeed, the Court of Appeal stated that the Equality Commission had a duty to investigate complaints that a public authority has not complied with its equality scheme.

³⁷ European Anti-discrimination Law Review, Issue 3, April 2006, page 86.

