

**HANDBOOK**

Handbook on European non-discrimination law

# Handbook on European non-discrimination law



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# Handbook on European non-discrimination law



## Foreword

In January 2010, the European Court of Human Rights and the European Union Agency for Fundamental Rights decided to collaborate on the preparation of this Handbook on European case-law concerning non-discrimination. We are pleased to be able to present the concrete results of this joint effort.

With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union became legally binding. Furthermore, the Lisbon Treaty provides for EU accession to the European Convention on Human Rights. In this context, increased knowledge of common principles developed by the Court of Justice of the European Union and the European Court of Human Rights is not only desirable but in fact essential for the proper national implementation of a key aspect of European human rights law: the standards on non-discrimination.

2010 marked the 60th anniversary of the European Convention on Human Rights, which sets out a general prohibition on discrimination in its Article 14, and the 10th anniversary of the adoption of the two fundamental texts in the fight against discrimination at EU level – the Racial Equality and Employment Equality Directives. With the impressive body of case-law developed by the European Court of Human Rights and the Court of Justice of the European Union in the field of non-discrimination, it seemed useful to present, in an accessible way, a handbook with a CD-Rom intended for legal practitioners in the EU and Council of Europe Member States and beyond, such as judges, prosecutors and lawyers, as well as law-enforcement officers. Being at the forefront of human rights protection, they, in particular, need to be aware of the non-discrimination principles in order to be able to apply them effectively in practice. For it is at the national level that non-discrimination provisions come to life, and there on the front line that the challenges become visible.

**Erik Fribergh**

Registrar of the  
European Court of Human Rights

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for Fundamental Rights



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# Abbreviations

<b>CEDAW</b>	Convention on the Elimination of Discrimination Against Women
<b>CETS</b>	Council of Europe Treaty Series
<b>CoE</b>	Council of Europe
<b>CRC</b>	Convention on the Rights of the Child
<b>ECHR</b>	Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ECJ</b>	European Court of Justice (now Court of Justice of the European Union)
<b>ECRI</b>	European Commission against racism and intolerance
<b>ETS</b>	European Treaty Series
<b>EU</b>	European Union
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>HRC</b>	Human Rights Committee
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Court of Justice
<b>TCN</b>	Third-country national
<b>UN</b>	United Nations
<b>UN CRPD</b>	UN Convention on the Rights of Persons with Disabilities



# 1

## Introducing European non-discrimination law: context, evolution and key principles

This introductory chapter will explain the origins of non-discrimination law in Europe, as well as current and future changes in both the substantive law and the procedures for protection.

It is important from the outset to note that both judges and prosecutors are required to apply the protections provided for under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and those under the European Union (EU) non-discrimination directives irrespective of whether a party to the proceedings invokes them. The national courts and administrators of justice are not limited to the legal arguments advanced by the parties, but must determine the applicable law based on the factual matrix forwarded by the parties involved; essentially, this means that the parties to a case effectively choose how to present a non-discrimination claim through the arguments and evidence that they advance. This is consequent to the governing legal principles evident in each respective system, for example, the direct effect of EU law in the 27 Member States that make up the EU and the direct applicability afforded to the ECHR, which means that it must be complied with in all EU and Council of Europe (CoE) Member States. However, there is one significant constraint on this requirement, and this is in the form of any applicable limitation period. Before considering applying the non-discrimination protections, practitioners will have to familiarise themselves with any relevant limitation period applying to the jurisdiction being considered and determine whether the court in question can deal with the issue.

The practical consequences of this are that practitioners, where appropriate, are able to invoke the relevant non-discrimination instruments and pertinent case-law before national courts and authorities.

This makes it imperative that practitioners understand the systems that are currently in place in the area of non-discrimination, their application, and how they apply in given situations.

## 1.1. Context and background to European non-discrimination law

The term ‘European non-discrimination law’ suggests that a single Europe-wide system of rules relating to non-discrimination exists; however, it is in fact made up of a variety of contexts. This Handbook draws mainly from the ECHR and EU law. These two systems have separate origins both in terms of when they were created and why.

### 1.1.1. The Council of Europe and the European Convention on Human Rights

The CoE is an inter-governmental organisation (IGO) that originally came together after the Second World War with the aim of promoting, among other things, the rule of law, democracy, human rights and social development (see Preamble and Article 1 of the Statute of the Council of Europe). The CoE Member States adopted the ECHR to help achieve these aims, which was the first of the modern human rights treaties drawing from the United Nations Universal Declaration of Human Rights. The ECHR sets out a legally binding obligation on its members to guarantee a list of human rights to everyone (not just citizens) within their jurisdiction. The implementation of the ECHR is reviewed by the European Court of Human Rights (ECtHR) (originally assisted by a Commission), which hears cases brought against Member States. The Council of Europe currently has 47 members and any State wishing to join must also accede to the ECHR.

The ECHR has been altered and added to since its inception in 1950 through what are known as ‘Protocols’. The most significant procedural change to the ECHR was Protocol 11 (1994), which turned the ECtHR into a permanent and full-time body, and abolished the Commission. This Protocol was designed to help the ECHR mechanisms cope with the growth in cases that would come from States in the east of Europe joining the Council of Europe after the fall of the Berlin Wall and the break-up of the former Soviet Union.

The prohibition on discrimination is guaranteed by Article 14 of the ECHR,<sup>1</sup> which guarantees equal treatment in the enjoyment of the other rights set down in the Convention. Protocol 12 (2000) to the ECHR, not yet ratified by all EU Member States,<sup>2</sup> expands the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right (including rights under national law). According to the Explanatory Report to the Protocol, it was created out of a desire to strengthen protection against discrimination which was considered to form a core element of guaranteeing human rights. The Protocol emerged out of debates over how to strengthen sex and racial equality in particular.

Although not a primary focus of this Handbook, it is worth noting by the reader that the principle of non-discrimination is a governing principle in a number of CoE documents. Importantly, the 1996 version of the European Social Charter includes both a right to equal opportunities and equal treatment in matters of employment and occupation, protecting against discrimination on the grounds of sex.<sup>3</sup> Additional protection against discrimination can be witnessed in the Framework Convention for the Protection of National Minorities,<sup>4</sup> in the CoE Convention on Action Against Trafficking in Human Beings,<sup>5</sup> and in the CoE Convention on the Access to Official Documents. There is also protection against the promotion of discrimination in the Additional Protocol to the Convention on Cybercrime. The issue of non-discrimination has clearly been influential in the shaping of the legislative documents produced by the CoE and is seen as a fundamental freedom that needs to be protected.

## 1.1.2. The European Union and the non-discrimination directives

The European Union (EU) was originally an inter-governmental organisation, but is now a separate legal personality. The EU is currently made up of 27 Member States. It has evolved from three separate IGOs established in the 1950s that dealt with energy security and free trade (collectively known as the 'European Communities'). The core purpose of the European Communities was the stimulation of economic

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1 A training guide in the form of a PowerPoint presentation offering guidance on the application of Article 14 of the ECHR can be found on the Council of Europe Human Rights Education for Legal Professionals website: [www.coehelp.org/course/view.php?id=18&topic=1](http://www.coehelp.org/course/view.php?id=18&topic=1).

2 For the actual number of EU Member States that ratified Protocol 12, see: [www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=7&DF=16/07/2010&CL=ENG](http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=7&DF=16/07/2010&CL=ENG).

3 See Article 20 and Article E in Part V of the European Social Charter.

4 See Articles 4, 6(2) and 9 in the Framework Convention for the Protection of National Minorities.

5 See Article 2(1) in the CoE Convention on Action Against Trafficking in Human Beings.

development through the free movement of goods, capital, people and services. In order to allow for a level playing field between the Member States, the original Treaty Establishing the European Economic Community (1957) contained a provision prohibiting discrimination on the basis of sex in the context of employment. This would prevent Member States gaining a competitive advantage over each other by offering lower rates of pay or less favourable conditions of work to women. Although this body of law evolved considerably to include areas such as pensions, pregnancy and statutory social security regimes, until 2000 non-discrimination law in the EU applied only to the context of employment and social security, and only covered the ground of sex.

During the 1990s, significant lobbying was carried out by public interest groups calling for the prohibition on discrimination to be extended in EU law to cover other areas such as race and ethnicity, as well as sexual orientation, religious belief, age and disability. Fears of resurgent extremist nationalism among some EU Member States stimulated sufficient political will among leaders to allow for the European Community Treaty to be amended, giving the Community the competence to legislate in these areas.

In 2000, two directives were adopted: the Employment Equality Directive prohibited discrimination on the basis of sexual orientation, religious belief, age and disability in the area of employment; the Racial Equality Directive prohibited discrimination on the basis of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, and goods and services. This was a significant expansion of the scope of non-discrimination law under the EU, which recognised that in order to allow individuals to reach their full potential in the employment market, it was also essential to guarantee them equal access to areas such as health, education and housing. In 2004, the Gender Goods and Services Directive expanded the scope of sex discrimination to the area of goods and services. However, protection on the grounds of sex does not quite match the scope of protection under the Racial Equality Directive since the Gender Social Security Directive guarantees equal treatment in relation to social security only and not to the broader welfare system, such as social protection and access to healthcare and education.

Although sexual orientation, religious belief, disability and age are only protected grounds in the context of employment, a proposal to extend protection for these grounds to the area of accessing goods and services (known as 'Horizontal Directive') is currently being debated in the EU institutions.

## 1.2. Current and future developments in European protection mechanisms

### 1.2.1. EU Charter of Fundamental Rights

The original treaties of the European Communities did not contain any reference to human rights or their protection. It was not thought that the creation of an area of free trade in Europe could have any impact relevant to human rights. However, as cases began to appear before the European Court of Justice (ECJ) alleging human rights breaches caused by Community law, the ECJ developed a body of judge-made law known as the 'general principles' of Community Law.<sup>6</sup> According to the ECJ, these general principles would reflect the content of human rights protection found in national constitutions and human rights treaties, in particular the ECHR. The ECJ stated that it would ensure the compliance of Community Law with these principles.

In recognising that its policies could have an impact on human rights and in an effort to make citizens feel 'closer' to the EU, the EU and its Member States proclaimed the EU Charter of Fundamental Rights in 2000. The Charter contains a list of human rights, inspired by the rights contained in the constitutions of the Member States, the ECHR and universal human rights treaties such as the UN Convention on the Rights of the Child. The Charter, as adopted in 2000, was merely a 'declaration', which means that it was not legally binding, although the European Commission (the primary body for proposing new EU legislation) stated that its proposals would be in compliance.

When the Treaty of Lisbon entered into force in 2009, it altered the status of the Charter of Fundamental Rights to make it a legally binding document. As a result, the institutions of the EU are bound to comply with it. The EU Member States are also bound to comply with the Charter, but only when implementing EU law. A protocol to the Charter was agreed in relation to the Czech Republic, Poland and the UK which restates this limitation in express terms. Article 21 of the Charter contains a prohibition on discrimination on various grounds, which will be returned to later in this Handbook. This means that individuals can complain about EU legislation or national legislation that implements EU law if they feel the Charter has not been

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<sup>6</sup> The European Court of Justice is now referred to as the 'General Court' after amendments introduced by the Lisbon Treaty. However, this Handbook continues to refer to the ECJ in order to avoid confusion since most existing literature that practitioners may wish to consult was published before the entry into force of the Lisbon Treaty in December 2009.

respected. National courts can seek guidance on the correct interpretation of EU law from the ECJ through the preliminary reference procedure under Article 267 of the Treaty on the Functioning of the EU.

## 1.2.2. UN human rights treaties

Human rights protection mechanisms are, of course, not limited to Europe. As well as other regional mechanisms in the Americas, Africa and the Middle East, there is a significant body of international human rights law that has been created through the United Nations (UN). All EU Member States are party to the following UN human rights treaties, all of which contain a prohibition on discrimination: the International Covenant on Civil and Political Rights (ICCPR),<sup>7</sup> the International Covenant on Economic Social and Cultural Rights (ICESCR),<sup>8</sup> the Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>9</sup> the Convention on the Elimination of Discrimination Against Women (CEDAW),<sup>10</sup> the Convention Against Torture,<sup>11</sup> and the Convention on the Rights of the Child (CRC).<sup>12</sup> The most recently created human rights treaty at UN level is the 2006 Convention on the Rights of Persons with Disabilities (UNCRPD).<sup>13</sup> Traditionally, human rights treaties have been open to membership only for States. However, as States cooperate more through inter-governmental organisations (IGOs), to which they delegate significant powers and responsibilities, there is a pressing need to make sure that IGOs also commit themselves to give effect to the human rights obligations of their Member States. The UNCRPD is the first UN level human rights treaty that is open to membership by regional integration organisations, and which the EU ratified in December 2010.

The UNCRPD contains an extensive list of rights for persons with disabilities, aimed at securing equality in the enjoyment of their rights, as well as imposing a range of obligations on the State to undertake positive measures. Like the Charter, this binds

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7 999 UNTS 171.

8 993 UNTS 3.

9 660 UNTS 195.

10 1249 UNTS 13.

11 1465 UNTS 85.

12 1577 UNTS 3. In addition, some Member States are also party to the UN Convention on the Rights of Persons with Disabilities (UN Doc. A/61/611, 13 December 2006) and the International Convention for the Protection of All Persons from Enforced Disappearance (UN Doc. A/61/488, 20 December 2006); however, none are yet party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (UN Doc. A/RES/45/158, 1 July 2003).

13 UN Doc. A/61/611, 13 December 2006.

the EU institutions, and will bind the Member States when they are applying EU law. In addition individual Member States are currently in the process of acceding to the UNCRPD in their own right, which will also impose obligations upon them directly. The UNCRPD is likely to become a reference point for interpreting both EU and ECtHR law relating to discrimination on the basis of disability.

### 1.2.3. European Union accession to the European Convention on Human Rights

Currently EU law and the ECHR are closely connected. All Member States of the EU have joined the ECHR. As noted above, the ECJ looks to the ECHR for inspiration when determining the scope of human rights protection under EU law. The Charter of Fundamental Rights also reflects (though is not limited to) the range of rights in the ECHR. Accordingly, EU law, even though the EU is not yet actually a signatory to the ECHR, is largely consistent with the ECHR. However, if an individual wishes to make a complaint about the EU and its failure to guarantee human rights, they are not entitled to take the EU, as such, before the ECtHR. Instead they must either: make a complaint before the national courts, which can then refer the case to the ECJ through the preliminary reference procedure; or complain about the EU indirectly before the ECtHR while bringing an action against a Member State.

The Lisbon Treaty contains a provision mandating the EU to join the ECHR as a party in its own right and Protocol 14 to the ECHR amends it to allow this to happen. It is not yet clear what effect this will take in practice, and in particular what the future relationship between the ECJ and the ECtHR will be, as the negotiations for EU accession may take several years. However, it will at the very least allow individuals to bring the EU directly before the ECtHR for failure to observe the ECHR.

#### Key points

- Protection against discrimination in Europe can be found within both EU law and the ECHR. While to a great degree these two systems are complementary and mutually reinforcing, some differences do exist which practitioners may need to be aware of.
- The ECHR protects all individuals within the jurisdiction of its 47 States parties, whereas the EU non-discrimination directives only offer protection to citizens of the 27 EU Member States.
- Under Article 14 of the ECHR, discrimination is prohibited only in relation to the exercise of another right guaranteed by the treaty. Under Protocol 12, the prohibition of discrimination becomes free standing.

- Under EU non-discrimination law, the prohibition on discrimination is free standing, but limited to particular contexts, such as employment.
- The EU institutions are legally bound to observe the Charter of Fundamental Rights of the European Union, including its provisions on non-discrimination. EU Member States must also observe the Charter when they are implementing EU law.
- The European Union will join the UNCRPD and the ECHR. This will place the EU under the supervision of external monitoring bodies, and individuals will be able to complain of violations of the ECHR by the EU directly before the ECtHR.

## Further reading

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# 2

## Discrimination categories and defences

### 2.1. Introduction

The aim of non-discrimination law is to allow all individuals an equal and fair prospect to access opportunities available in a society. We make choices on a daily basis over issues such as with whom we socialise, where we shop and where we work. We prefer certain things and certain people over others. While expressing our subjective preferences is commonplace and normal, at times we may exercise functions that place us in a position of authority or allow us to take decisions that may have a direct impact on others' lives. We may be civil servants, shopkeepers, employers, landlords or doctors who decide over how public powers are used, or how private goods and services are offered. In these non-personal contexts, non-discrimination law intervenes in the choices we make in two ways:

Firstly, it stipulates that those individuals who are in similar situations should receive similar treatment and not be treated less favourably simply because of a particular 'protected' characteristic that they possess. This is known as 'direct' discrimination. Direct discrimination, if framed under the ECHR, is subject to a general objective justification defence; however, under EU law defences against direct discrimination are somewhat limited.

Secondly, non-discrimination law stipulates that those individuals who are in different situations should receive different treatment to the extent that this is needed to allow them to enjoy particular opportunities on the same basis as others. Thus, those same 'protected grounds' should be taken into account when carrying out particular practices or creating particular rules. This is known as 'indirect' discrimination. All forms of indirect discrimination are subject to a defence based

Non-discrimination law prohibits scenarios where persons or groups of people in an identical situation are treated differently, and where persons or groups of people in different situations are treated identically.<sup>14</sup>

on objective justification irrespective of whether the claim is based on the ECHR or EU law.

This chapter discusses in greater depth the meaning of direct and indirect discrimination, some of their specific manifestations, such as harassment or instruction to discriminate, and how they operate in practice through case-law. It will then examine how defences to discrimination operate.

## 2.2. Direct discrimination

Direct discrimination is defined similarly under both the ECHR and EU law. Article 2(2) of the Racial Equality Directive states that direct discrimination is 'taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'.<sup>15</sup> The ECtHR uses the formulation that there must be a 'difference in the treatment of persons in analogous, or relevantly similar, situations', which is 'based on an identifiable characteristic'.<sup>16</sup>

Direct discrimination will have occurred when

- an individual is treated unfavourably
- by comparison to how others, who are in a similar situation, have been or would be treated
- and the reason for this is a particular characteristic they hold, which falls under a 'protected ground'.

### 2.2.1. Unfavourable treatment

At the heart of direct discrimination is the difference of treatment that an individual is subject to. Consequently, the first feature of direct discrimination is evidence of unfavourable treatment. This can be relatively easy to identify compared with indirect discrimination where statistical data is often needed (see below). Here are examples taken from cases that are referred to in this Handbook: refusal of entry to a restaurant or shop; receiving a smaller pension or lower pay; being subject to verbal abuse or violence; being refused entry at a checkpoint; having a higher or

<sup>14</sup> See, for example, ECtHR, *Hoogendijk v. the Netherlands* (dec.) (No. 58641/00), 6 January 2005.

<sup>15</sup> Similarly: Employment Equality Directive, Article 2(2)(a); Gender Equality Directive (Recast), Article 2(1)(a); Gender Goods and Services Directive, Article 2(a).

<sup>16</sup> ECtHR, *Carson and Others v. UK* [GC] (No. 42184/05), 16 March 2010; para. 61. Similarly, ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007, para. 175; ECtHR, *Burden v. UK* [GC] (No. 13378/05), 29 April 2008, para. 60.

lower retirement age; being barred from a particular profession; not being able to claim inheritance rights; being excluded from the mainstream education system; being deported; not being permitted to wear religious symbols; or being refused social security payments or having them revoked.

### 2.2.2. A comparator

Unfavourable treatment will be relevant to making a determination of discrimination where it is unfavourable by comparison to someone in a similar situation. A complaint about 'low' pay is not a claim of discrimination unless it can be shown that the pay is lower than that of someone employed to perform a similar task by the same employer. Therefore a 'comparator' is needed: that is, a person in materially similar circumstances, with the main difference between the two persons being the 'protected ground'. The cases discussed in this Handbook illustrate that proving a comparator is often not controversial, and sometimes neither the parties to the dispute, nor the court, will discuss the comparator explicitly. Below are some examples of cases where proving the comparator was expressly raised as an issue by the deciding body.

Example: in the *Moustaquim* case, a Moroccan national had been convicted of several criminal offences and, as a result, was to be deported.<sup>17</sup> The Moroccan national claimed that this decision to deport him amounted to discriminatory treatment. He alleged discrimination on the grounds of nationality, saying that Belgian nationals did not face deportation following conviction for criminal offences. The ECtHR held that the applicant was not in a similar situation to Belgian nationals, since a State is not permitted to expel its own nationals under the ECHR. Therefore, his deportation did not amount to discriminatory treatment. Although the ECtHR accepted that he was in a comparable situation to non-Belgian nationals who were from other EU Member States (who could not be deported because of EU law relating to freedom of movement), it was found that the difference in treatment was justified.

Example: in the *Allonby* case, the complainant, who worked for a college as a lecturer, did not have her contract renewed by the college.<sup>18</sup> She then went to work for a company that supplied lecturers to educational establishments. This company sent the complainant to work at her old college, performing the

<sup>17</sup> ECtHR, *Moustaquim v. Belgium* (No. 12313/86), 18 February 1991.

<sup>18</sup> ECJ, *Allonby v. Accrington and Rossendale College*, Case C-256/01 [2004] ECR I-873, 13 January 2004.

same duties as before, but paid her less than her college had done. She alleged discrimination on the basis of sex, saying that male lecturers working for the college were paid more. The ECJ held that male lecturers employed by the college were not in a comparable situation. This was because the college was not responsible for determining the level of pay for both the male lecturer who it employed directly and the complainant who was employed by an external company. They were therefore not in a sufficiently similar situation.

Example: in the *Luczak* case, a French farmer living and farming in Poland complained because he was refused entry into a Polish specialised social security regime established specifically to support Polish farmers, since this was not open to non-nationals.<sup>19</sup> The ECtHR agreed that the applicant was in a comparable situation to Polish farmers, who benefited from this regime, because he was a permanent resident, paid taxes just like nationals and thereby contributed to funding the social security scheme and had previously been part of the general social security regime.

Example: in the *Richards* case, the complainant had undergone male-to-female gender reassignment surgery. She wished to claim her pension on her 60th birthday, which was the age that women were entitled to pensions in the UK. The government refused to grant the pension, maintaining that the complainant had not received unfavourable treatment by comparison to those in a similar situation. The government argued that the correct comparator here was 'men', since the complainant had lived his life as a man. The ECJ found that because national law allows an individual to change their gender, then the correct comparator was 'women'. Accordingly, the complainant was being treated less favourably than other women by having a higher retirement age imposed on her.<sup>20</sup>

Example: in the case of *Burden v. UK*, two sisters had cohabited for a period of 31 years.<sup>21</sup> They owned a property jointly and each had left their share in the property to the other in their will. The applicants complained that because the value of the property exceeded a certain threshold, upon the death of one, the other would have to pay inheritance tax. They complained that this was a discriminatory interference in their right to property because married couples and

19 ECtHR, *Luczak v. Poland* (No. 77782/01), 27 November 2007; see also, ECtHR, *Gaygusuz v. Austria* (No. 17371/90), 16 September 1996.

20 ECJ, *Richards v. Secretary of State for Work and Pensions*, Case C-423/04 [2006] ECR I-3585, 27 April 2006.

21 ECtHR, *Burden v. UK* [GC] (No. 13378/05), 29 April 2008.

couples that had entered into civil partnerships were exempt from inheritance tax. The ECtHR, however, found that the applicants as siblings could not compare themselves to cohabiting couples who were married or civil partners. Marriage and civil partnerships amount to special relationships entered into freely and deliberately in order to create contractual rights and responsibilities. In contrast, the applicants' relationship was based on consanguinity and so was fundamentally different.

Example: in the case of *Carson and Others v. UK*, the applicants complained that the UK government did not apply the same increment to the pension payments of those living in retirement abroad as those living in retirement in the UK.<sup>22</sup> According to UK law, increments were only applied to UK residents with the exception of UK nationals who had retired to States with which the UK had a reciprocal social security arrangement. The applicants, who did not live in a State that had concluded such an agreement, argued that they had been discriminated against on the basis of their place of residence. The ECtHR disagreed with the applicants who argued that they were in a similar position to those living in retirement in the UK or to those UK nationals who had retired in countries with which the UK had a reciprocal agreement. The ECtHR found that, although these different groups had all contributed to government revenue through the payment of national insurance, this did not constitute a pension fund but rather general public revenue to finance various aspects of public spending. Furthermore, the duty of the government to apply increments was based on consideration of the rise in cost of the standard of living in the UK. The applicants were therefore not in a comparable situation to these other groups and there had accordingly been no discriminatory treatment.

The apparent exception for finding a suitable 'comparator', at least in the context of EU law within the scope of employment, is where the discrimination suffered is due to the individual being pregnant. In a long line of ECJ jurisprudence, starting with the seminal case of *Dekker*, it is now well established that where the detriment suffered by an individual is due to their being pregnant then this will be classed as direct discrimination based on their sex, there being no need for a comparator.<sup>23</sup>

<sup>22</sup> ECtHR, *Carson and Others v. UK* [GC] (No. 42184/05), 16 March 2010.

<sup>23</sup> ECJ, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, Case C-177/88 [1990] ECR I-3941, 8 November 1990. Similarly, ECJ, *Webb v. EMO Air Cargo (UK) Ltd*, Case C-32/93 [1994] ECR I-3567, 14 July 1994.

### 2.2.3. The protected ground

Chapter 4 will discuss the range of ‘protected grounds’ that exist in European non-discrimination law, namely, sex, sexual orientation, disability, age, race, ethnic origin, national origin and religion or belief. This chapter will focus on the need for a causal link between the less favourable treatment and the protected ground. In order to satisfy this requirement one merely has to ask the simple question: would the person have been treated less favourably had they been of a different sex, of a different race, of a different age, or in any converse position under any one of the other protected grounds? If the answer is yes then the less favourable treatment is clearly being caused by the ground in question.

The rule or practice that is being applied does not necessarily need to refer explicitly to the ‘protected ground’, as long as it refers to another factor that is indissociable from the protected ground. Essentially, when considering whether direct discrimination has taken place one is assessing whether the less favourable treatment is due to a ‘protected ground’ that cannot be separated from the particular factor being complained of.

Example: in the case of *James v. Eastleigh Borough Council*, Mr James had to pay an admission fee for entry into a swimming pool within Eastleigh, while his wife, Mrs James, did not.<sup>24</sup> Both were aged 61 years. The benefit of free admission was only available to Mrs James because she was retired, whereas Mr James was not yet retired, since in the UK men retire at the age of 65 years while women retire at the age of 60 years. Although the rule of free admission to the swimming pool was based on the status of being retired, eligibility for retirement was dependent on sex. The UK House of Lords concluded that if Mr James had been of the opposite sex, then he would have been treated in line with the treatment received by his wife. Furthermore, it was determined that the intention and motivation behind the treatment was irrelevant, the focus being merely on the treatment.

Example: in the *Maruko* case, a homosexual couple had entered into a ‘life partnership’.<sup>25</sup> The complainant’s partner had died and the complainant wished to claim the ‘survivor’s pension’ from the company that ran his deceased partner’s

<sup>24</sup> *James v. Eastleigh Borough Council* [1990] UK House of Lords 6, 14 June 1990.

<sup>25</sup> ECJ, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, Case C-267/06 [2008] ECR I-1757, 1 April 2008.

occupational pension scheme. The company refused to pay the complainant on the grounds that survivors' pensions were only payable to spouses and he had not been married to the deceased. The ECJ accepted that the refusal to pay the pension amounted to unfavourable treatment and that this was less favourable in relation to the comparator of 'married' couples. The ECJ found that the institution of 'life partnership' in Germany created many of the same rights and responsibilities for life partners as for spouses, particularly with regard to State pension schemes. It was therefore prepared to find that, for the purposes of this case, life partners were in a similar situation to spouses. The ECJ then went on to state that this would amount to discrimination on the basis of sexual orientation. Thus, the fact that they were unable to marry was indissociable from their sexual orientation.

Example: in the case of *Aziz v. Cyprus*, the applicant complained that he was deprived of the right to vote because of his Turkish-Cypriot ethnicity.<sup>26</sup> Cypriot law as it stood allowed Turkish-Cypriots and Greek-Cypriots only to vote for candidates from their own ethnic communities in the parliamentary elections. However, since the Turkish occupation of Northern Cyprus, the vast majority of the Turkish community had left the territory and their participation in parliament was suspended. Consequently, there was no longer any list of candidates for whom the complainant could vote. While the government argued that the inability to vote was due to the fact that there were no candidates available for whom the complainant could vote, the ECtHR was of the view that the close link between the election rules and membership of the Turkish-Cypriot community, together with the government's failure to adjust the electoral rules in light of the situation, meant this amounted to direct discrimination on the basis of ethnicity.

The courts have given a broad interpretation to the reach of the 'protected ground'. It can include 'discrimination by association', where the victim of the discrimination is not themselves the person with the protected characteristic. It can also involve the particular ground being interpreted in an abstract manner. This makes it imperative that practitioners embark on detailed analysis of the reasoning behind the less favourable treatment, looking for evidence that the protected ground is causative of such treatment, whether directly or indirectly.

<sup>26</sup> ECtHR, *Aziz v. Cyprus* (No. 69949/01), 22 June 2004.

Example: in the *Coleman* case, a mother claimed that she received unfavourable treatment at work, based on the fact that her son was disabled.<sup>27</sup> Her son's disability led her to be late at work on occasion and request leave to be scheduled according to her son's needs. The complainant's requests were refused and she was threatened with dismissal, as well as receiving abusive comments relating to her child's condition. The ECJ accepted her colleagues in similar posts and with children as comparators, finding that they were granted flexibility when requested. It also accepted that this amounted to discrimination and harassment on the grounds of the disability of her child.

Example: in the *Weller* case, a Romanian woman was married to a Hungarian man, and the two had four children.<sup>28</sup> She was not eligible to claim maternity benefit payable after giving birth because she was not a Hungarian citizen. Her husband tried to claim the benefit but was turned down by the government which stated that it was payable only to mothers. The ECtHR found that he had been discriminated against on the basis of fatherhood (rather than sex), since adoptive male parents or male guardians were entitled to claim the benefit, while natural fathers were not. A complaint was also lodged by the children, who claimed discrimination on the basis of the refusal to pay the benefit to their father, which the ECtHR accepted. Thus, the children were discriminated against on the grounds of the status of their parent as the natural father.

Example: in the case of *P. v. S. and Cornwall County Council*, the complainant was in the process of undergoing male-to-female gender reassignment when she was dismissed by her employer. The ECJ found that dismissal constituted unfavourable treatment.<sup>29</sup> As to the relevant comparator, the ECJ stated that '[w]here a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'. As to the grounds, although it could not be shown that the complainant was treated differently because she was a man or a woman, it could be shown that the differential treatment was based around the concept of her sex.

27 ECJ, *Coleman v. Attridge Law and Steve Law*, Case C-303/06 [2008] I-5603, 17 July 2008.

28 ECtHR, *Weller v. Hungary* (No. 44399/05), 31 March 2009.

29 ECJ, *P. v. S. and Cornwall County Council*, Case C-13/94 [1996] ECR I-2143, 30 April 1996.

## 2.3. Indirect discrimination

Both the ECHR and EU law acknowledge that discrimination may result not only from treating people in similar situations differently, but also from offering the same treatment to people who are in different situations. The latter is labelled ‘indirect’ discrimination because it is not the treatment that differs but rather the effects of that treatment, which will be felt differently by people with different characteristics.

Article 2(2)(b) of the Racial Equality Directive states that ‘indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons’.<sup>30</sup> The ECtHR has drawn on this definition of indirect discrimination in some of its recent judgments, stating that ‘a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group’.<sup>31</sup>

The elements of indirect discrimination are

- a neutral rule, criterion or practice
- that affects a group defined by a ‘protected ground’ in a significantly more negative way
- by comparison to others in a similar situation.

### 2.3.1. A neutral rule, criterion or practice

The first identifiable requirement is an apparently neutral rule, criterion or practice. In other words, there must be some form of requirement that is applied to everybody. Below are two cases for illustration. For further examples, see Chapter 5 on evidential issues and the role of statistics.

Example: in the *Schönheit* case, the pensions of part-time employees were calculated using a different rate to that of full-time employees.<sup>32</sup> This different rate was not based on the differences of the time spent in work. Thus, part-time employees received a smaller pension than full-time employees, even taking into account the different lengths of service, effectively meaning that part-time workers were being paid less. This neutral rule on the calculation of

30 Similarly: *Employment Equality Directive*, Article 2(2)(b); *Gender Equality Directive (Recast)*, Article 2(1)(b); *Gender Goods and Services Directive*, Article 2(b).

31 ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007, para. 184; ECtHR, *Opuz v. Turkey* (No. 33401/02), 9 June 2009, para. 183; ECtHR, *Zarb Adami v. Malta* (No. 17209/02), 20 June 2006, para. 80.

32 ECJ, *Hilde Schönheit v. Stadt Frankfurt am Main* and *Silvia Becker v. Land Hessen*, Joined Cases C-4/02 and C-5/02 [2003] ECR I-12575, 23 October 2003.

pensions applied equally to all part-time workers. However, because around 88% of part-time workers were women, the effect of the rule was disproportionately negative for women as compared to men.

Example: in the case of *D.H. and Others v. the Czech Republic*, a series of tests were used to establish the intelligence and suitability of pupils in order to determine whether they should be moved out of mainstream education and into special schools.<sup>33</sup> These special schools were designed for those with intellectual disabilities and other sources of learning difficulty. The same test was applied to all pupils who were considered for placement in special schools. However, in practice the test had been designed around the mainstream Czech population with the consequence that Roma students were inherently more likely to perform badly – which they did, with the consequence that between 50% and 90% of Roma children were educated outside the mainstream education system. The ECtHR found that this was a case of indirect discrimination.

### 2.3.2. Significantly more negative in its effects on a protected group

The second identifiable requirement is that the apparently neutral provision, criterion or practice places a ‘protected group’ at a particular disadvantage. This is where indirect discrimination differs from direct discrimination in that it moves the focus away from differential treatment to look at differential effects.

When considering statistical evidence that the protected group is disproportionately effected in a negative way by comparison to those in a similar situation, the ECJ and ECtHR will seek evidence that a particularly large proportion of those negatively affected is made up of that ‘protected group’. This will be considered in detail in Chapter 5, which relates to evidential issues. For now, reference is made to the collection of phrases used by the ECJ appearing in the Opinion of Advocate General Léger in the *Nolte* case when speaking of sex discrimination:

‘[I]n order to be presumed discriminatory, the measure must affect “a far greater number of women than men” [*Rinner-Kühn*<sup>34</sup>] or “a considerably lower percentage

33 ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007, para. 79.

34 ECJ, *Rinner-Kühn v. FWW Spezial-Gebäudereinigung*, Case C-171/88 [1989] ECR 2743, 13 July 1989.

of men than women” [*Nimz*,<sup>35</sup> *Kowalska*<sup>36</sup>] or “far more women than men” [*De Weerd, née Roks, and Others*<sup>37</sup>].<sup>38</sup>

### 2.3.3. A comparator

As with direct discrimination, a court will still need to find a comparator in order to determine whether the effect of the particular rule, criterion or practice is significantly more negative than those experienced by other individuals in a similar situation. The approach of the courts does not differ in this respect from that taken to direct discrimination.

## 2.4. Harassment and instruction to discriminate

### 2.4.1. Harassment and instruction to discriminate under the EU non-discrimination directives

A prohibition on harassment and on instruction to discriminate as part of EU non-discrimination law are relatively new developments, which were introduced to allow for more comprehensive protection.

Harassment features as a specific type of discrimination under the EU non-discrimination directives. It had previously been dealt with as a particular manifestation

According to the non-discrimination directives, harassment will be deemed to be discrimination when

- unwanted conduct related to a protected ground takes place
- with the purpose or effect of violating the dignity of a person
- and/or creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>39</sup>

<sup>35</sup> ECJ, *Nimz v. Freie und Hansestadt Hamburg*, Case C-184/89 [1991] ECR I-297, 7 February 1991.

<sup>36</sup> ECJ, *Kowalska v. Freie und Hansestadt Hamburg*, Case C-33/89 [1990] ECR I-2591, 27 June 1990.

<sup>37</sup> ECJ, *De Weerd, née Roks, and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others*, Case C-343/92 [1994] ECR I-571, 24 February 1994.

<sup>38</sup> *Opinion of Advocate General Léger* of 31 May 1995, paras. 57-58 in ECJ, *Nolte v. Landesversicherungsanstalt Hannover*, Case C-317/93 [1995] ECR I-4625, 14 December 1995. For an example of a similar approach having been adopted under the ECHR, see the case of *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007 (discussed in Chapter 5.2.1.).

<sup>39</sup> See: Racial Equality Directive, Article 2(3); Employment Equality Directive, Article 2(3); Gender Goods and Services Directive, Article 2(c); Gender Equality Directive (Recast), Article 2(1)(c).

of direct discrimination. Its separation into a specific head under the directives is based more on the importance of singling out this particularly harmful form of discriminatory treatment, rather than a shift in conceptual thinking.

The Gender Equality Directives also specifically set out sexual harassment as a specific type of discrimination, where the unwanted 'verbal, non-verbal, or physical' conduct is of a 'sexual' nature.<sup>40</sup>

According to this definition, there is no need for a comparator to prove harassment. This essentially reflects the fact that harassment of itself is wrong because of the form it takes (verbal, non-verbal or physical abuse) and the potential effect it may have (violating human dignity).

Much of the guidance on harassment at EU level is derived from the Council Declaration of 19 December 1991 on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the Code of Practice to Combat Sexual Harassment.<sup>41</sup> EU law adopts a flexible objective/subjective approach. Firstly, it is the victim's perception of the treatment that is used to determine whether harassment has occurred. Secondly, however, even if the victim does not actually feel the effects of the harassment, a finding may still be made so long as the complainant is the target of the conduct in question.

Questions of fact, relating to whether conduct amounts to harassment, are usually determined at the national level before cases are referred to the ECJ. The following illustrative cases, therefore, are taken from national jurisdictions.

Example: in a case before the Swedish Court of Appeal, the complainant had attempted to purchase a puppy. Once the seller realised that the buyer was homosexual, they refused to complete the sale on grounds of the puppy's well-being, stating that homosexuals engage in sexual acts with animals. The refusal to sell the puppy was found to constitute direct discrimination in the

40 Gender Goods and Services Directive, Article 2(d); Gender Equality Directive (Recast), Article 2(1)(d).

41 Council Declaration of 19 December 1991 on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment, OJ C 27, 04.02.1992 p. 1; Commission Recommendation 92/131/EEC on the protection of the dignity of women and men at work, OJ L 49, 24.02.1992, p. 1.

context of goods and services, being specifically found by the Swedish Court of Appeal to constitute harassment on grounds of sexual orientation.<sup>42</sup>

Example: in a case before the Hungarian Equal Treatment Authority, a complaint was made about teachers who told Roma students that their misbehaviour at school had been notified to the 'Hungarian Guard', a nationalist organisation known for committing acts of extreme violence against Roma.<sup>43</sup> It was found that the teachers had impliedly endorsed the racist views of the Guard and created a climate of fear and intimidation, amounting to harassment.

In addition, the non-discrimination directives all state that an 'instruction to discriminate' is deemed to constitute 'discrimination'.<sup>44</sup> However, none of the directives provide a definition as to what is meant by the term. In order to be of any worth in combating discriminatory practices, it ought not to be confined to merely dealing with instructions that are mandatory in nature, but should extend to catch situations where there is an expressed preference or an encouragement to treat individuals less favourably due to one of the protected grounds. This is an area that may evolve through the jurisprudence of the courts.

Although the non-discrimination directives do not oblige Member States to use criminal law to address acts of discrimination, a Framework Decision of the European Council does oblige all EU Member States to provide for criminal sanctions in relation to incitement to violence or hatred based on race, colour, descent, religion or belief, national or ethnic origin, as well as dissemination of racist or xenophobic material and condonation, denial or trivialisation of genocide, war crimes and crimes against humanity directed against such groups.<sup>45</sup> Member States are also obliged to consider racist or xenophobic intent as an aggravating circumstance.

42 *Ombudsman Against Discrimination on Grounds of Sexual Orientation v. A.S.*, Case No. T-3562-06, Svea Court of Appeal, 11 February 2008. English summary available at European Network of Legal Experts on the Non-Discrimination Field, 8 (July 2009) 'European Anti-Discrimination Law Review', p. 69.

43 Decision No. 654/2009, 20 December 2009, Equal Treatment Authority (Hungary). English summary available via: European Network of Legal Experts in the Non-Discrimination Field, 'New Report': [www.non-discrimination.net/content/media/HU-14-HU\\_harassment\\_of\\_Roma\\_pupils\\_by\\_teachers.pdf](http://www.non-discrimination.net/content/media/HU-14-HU_harassment_of_Roma_pupils_by_teachers.pdf).

44 Article 2(4), Employment Equality Directive; Article 4(1), Gender Goods and Services Directive; Article 2(2)(b), Gender Equality Directive (Recast); Article 2(4), Racial Equality Directive.

45 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55.

It is quite probable, therefore, that acts of harassment and acts of incitement to discriminate, in addition to constituting discrimination, may well be caught under national criminal law, particularly where they relate to race or ethnicity.

Example: in a case before the Bulgarian courts, a member of parliament made several statements verbally attacking the Roma, Jewish and Turkish communities as well as 'foreigners' in general. They stated that these communities were preventing Bulgarians from running their own State, were committing crimes with impunity and depriving Bulgarians of adequate healthcare, and urged people to prevent the State becoming a 'colony' of these various groups.<sup>46</sup> The Sofia Regional Court found that this amounted to harassment as well as instruction to discriminate.

## 2.4.2. Harassment and instruction to discriminate under the ECHR

While the ECHR does not specifically prohibit harassment or instruction to discriminate, it does contain particular rights that relate to the same area. Thus, harassment may fall under the right to respect for private and family life protected under Article 8 of the ECHR, or the right to be free from inhuman or degrading treatment or punishment under Article 3, while instruction to discriminate may be caught by other Articles, such as freedom of religion or assembly under Article 9 or 11, depending on the context. Where these acts display a discriminatory motive, the ECtHR will examine the alleged breaches of relevant Articles in conjunction with Article 14, which prohibits discrimination. Below is a selection of examples that show cases on similar facts to those discussed above, considered in the context of the ECHR.

Example: in *Bączkowski and Others v. Poland*, the mayor of Warsaw made public announcements of a homophobic nature stating that he would refuse permission to hold a march to raise awareness about discrimination based on sexual orientation.<sup>47</sup> When the decision came before the relevant administrative body, permission was refused on the basis of other reasons, such as the need to prevent clashes between demonstrators. The ECtHR

<sup>46</sup> Sofia Regional Court, Decision No. 164 on Civil Case No. 2860/2006, 21 June 2006. English summary available at FRA InfoPortal, Case 11-1.

<sup>47</sup> ECtHR, *Bączkowski and Others v. Poland* (No. 1543/06), 3 May 2007.

found that the mayor's statements could have influenced the decision of the relevant authorities, and that the decision was based on the ground of sexual orientation and so constituted a violation of the right to free assembly in conjunction with the right to be free from discrimination.

Example: in *Paraskeva Todorova v. Bulgaria*, the national courts, when sentencing an individual of Roma origin, expressly refused the prosecution's recommendation for a suspended sentence, stating that a culture of impunity existed among the Roma minority and implying that an example should be made of the particular individual.<sup>48</sup> The ECtHR found that this violated the applicant's right to a fair trial in conjunction with the right to be free from discrimination.

## 2.5. Special or specific measures

As noted above, in cases of indirect discrimination, the reason that discrimination is found to occur is due to the fact that the same rule is applied to everyone without consideration for relevant differences. In order to remedy and prevent this kind of situation, governments, employers and service providers must ensure that they take steps to adjust their rules and practices to take such differences into consideration – that is, they must do something to adjust current policies and measures. In the UN context, these are labelled 'special measures', while the EU law context refers to 'specific measures' or 'positive action'. By taking special measures, governments are able to ensure 'substantive equality', that is, equal enjoyment of opportunities to access benefits available in society, rather than mere 'formal equality'. Where governments, employers and service providers fail to consider the appropriateness of taking special measures, they increase the risk that their rules and practices may amount to indirect discrimination.

The ECtHR has stated that 'the right not to be discriminated against in the enjoyment of the rights guaranteed under the [ECHR] is also violated when States ... fail to treat differently persons whose situations are significantly different'.<sup>49</sup> Similarly, the EU non-discrimination directives expressly foresee the possibility of positive action stating: '[w]ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining

<sup>48</sup> ECtHR, *Paraskeva Todorova v. Bulgaria* (No. 37193/07), 25 March 2010.

<sup>49</sup> ECtHR, *Thlimmenos v. Greece* [GC] (No. 34369/97), 6 April 2000, para. 44. Similarly, ECtHR, *Pretty v. UK* (No. 2346/02), 29 April 2002, para. 88.

or adopting specific measures to prevent or compensate for disadvantages linked to [a protected ground]’.<sup>50</sup>

Article 5 of the Employment Equality Directive contains specific articulations of the general rule of specific measures in relation to persons with disabilities, which requires employers to make ‘reasonable accommodation’ to allow those with physical or mental disabilities to be given equal employment opportunities. This is defined as ‘appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer’. This might include measures such as installing a lift or a ramp or a disabled toilet in the workplace in order to allow wheelchair access.

Example: in the case of *Thlimmenos v. Greece*, national law barred those with a criminal conviction from joining the profession of chartered accountants, since a criminal conviction implied a lack of honesty and reliability needed to perform this role. The applicant in this case had been criminally convicted for refusing to wear military uniform during his national service. This was because he was a member of the Jehovah’s Witnesses, which is a religious group committed to pacifism. The ECtHR found that there was no reason to bar persons from the profession where their criminal convictions were unrelated to issues of reliability or honesty. The government had discriminated against the applicant by failing to create an exception to the rule for such situations, violating the right to manifest his religious belief (under Article 9 of the ECHR) in conjunction with the prohibition on discrimination.

Example: in a case before the Equality Body of Cyprus, the complainant, who was visually impaired, took part in an exam to qualify for the civil service.<sup>51</sup> The complainant had requested extra time to complete the exam and was allowed an additional 30 minutes, but this was deducted from the break to which everyone was entitled. The Equality Body found that no standardised procedure existed for examining when reasonable accommodation should be made for candidates with special circumstances, and that on the facts not enough had

50 Racial Equality Directive, Article 5; Employment Equality Directive, Article 7; Gender Goods and Services Directive, Article 6; and also with a slightly different formulation: Gender Equality Directive (Recast), Article 3.

51 Equality Body (Cyprus), Ref. A.K.I. 37/2008, 8 October 2008. English summary available at European Network of Legal Experts on the Non-Discrimination Field, 8 (July 2009) ‘European Anti-Discrimination Law Review’, p. 43.

been done to create conditions where the complainant could compete fairly with other candidates. The Equality Body recommended that the State establish a team of experts as part of a standardised procedure to consider such cases needing reasonable accommodation on an individual basis.

Example: in the French courts, a wheelchair-bound individual brought a claim against the Ministry of Education for failure to be appointed to a particular post.<sup>52</sup> The complainant's application was ranked third in the list of candidates. When the first two candidates turned down the offer of the post, the offer was then made to the fourth candidate, rather than the claimant. Instead, the claimant was offered a post in a different department that had been adapted for wheelchair access. The State justified this decision on the basis that it was not in the public interest to invest funds to make alterations to the premises in order to fulfil the duty of reasonable accommodation. The court found that the Ministry of Education had failed in its duty of reasonable accommodation of persons with disabilities, which could not be diminished by management considerations.

The term 'special measures' is sometimes taken to include a situation where differential treatment takes place that favours (rather than disadvantages) individuals on the basis of their protected grounds; for instance, where a woman is chosen over a man for a particular post because she is a woman and the employer has a policy of redressing the under-representation of women among their staff. The terminology used to describe this varies greatly to include 'positive' or 'reverse' discrimination, 'preferential treatment', 'temporary special measures' or 'affirmative action'.<sup>53</sup> This reflects its accepted function as a short-term and exceptional means of challenging prejudices against individuals who would normally suffer discrimination, as well as creating role models to inspire others sharing that characteristic.

52 Rouen Administrative Court, *Boutheiller v. Ministère de l'éducation*, Judgment No. 0500526-3, 24 June 2008. English summary available at European Network of Legal Experts on the Non-Discrimination Field, 8 (July 2009) 'European Anti-Discrimination Law Review', p. 46.

53 For example, the UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination' UN Doc. CERD/C/GC/32, 24 September 2009; UN Committee on Economic Social and Cultural Rights, 'General Comment 13: The Right to Education' UN Doc. E/C.12/1999/10, 8 December 1999; UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 25: Article 4(1) of the Convention (temporary special measures)' UN Doc. A/59/38(SUPP), 18 March 2004; UN Human Rights Committee, 'General Comment No. 18: Non-Discrimination' UN Doc. A/45/40(Vol.I)(SUPP), 10 November 1989; UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 30 on Discrimination against Non-Citizens' UN Doc. HRI/GEN/1/Rev.7/Add.1, 4 May 2005.

The permissibility of taking positive measures in favour of disadvantaged groups is further reinforced by guidance issued by several of the monitoring bodies responsible for interpreting UN human rights treaties. These bodies have stressed that such measures should be temporary in nature, not extending in time or scope beyond what is necessary to address the inequality in question.<sup>54</sup> According to the UN Committee on the Elimination of Racial Discrimination, in order to be permissible such measures should have as their sole purpose the elimination of existing inequalities and the prevention of future imbalances.<sup>55</sup> The UN Committee on the Elimination of Discrimination Against Women elaborated that such ‘temporary special measures’ could include ‘preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems’.<sup>56</sup> According to the case-law of the ECJ, discussed below, the proportionality of such measures will be examined strictly.

The courts have tended to treat discrimination in this context not as a distinct form of discrimination in itself but as an exception to the prohibition on discrimination. In other words, the courts accept that differential treatment has occurred, but that it may be justified in the interests of correcting a pre-existing disadvantage, such as under-representation in the workplace of particular groups.

This justification for differential treatment has been advanced by States from time to time. It can be understood from two different angles. From the perspective of the beneficiary, more favourable treatment is accorded on the basis of a protected characteristic, by comparison to someone in a similar situation. From the perspective of the victim, less favourable treatment is accorded on the basis that they do not hold a protected characteristic. Typical examples include reserving posts for women in male-dominated workplaces or for ethnic minorities in public services, such as policing, in order to better reflect the composition of society. It is sometimes labelled ‘reverse’ discrimination because the discriminatory treatment is given in order to favour an individual who one would expect to receive less favourable treatment based on past social trends. It is sometimes labelled ‘positive’ action because it is action specifically taken to redress past disadvantage by promoting the participation

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54 Ibid.

55 UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination’ UN Doc. CERD/C/GC/32, 24 September 2009, paras. 21-26.

56 UN Committee on the Elimination of Discrimination Against Women, ‘General Recommendation No. 25: Article 4, para. 1 of the Convention (temporary special measures)’ UN Doc. A/59/38 (supp), 18 March 2004, para. 22.

of traditionally disadvantaged groups; in this sense, it is based on a benevolent aim, rather than being based on prejudice against particular groups.

The concept features rarely in the case-law of the ECtHR, although it has received greater consideration in the context of EU law, where the ECJ has dealt with cases in the sphere of employment. Specific measures appear as a defence in their own right under the non-discrimination directives and in the case-law of the ECJ, as well as within the specific defence of ‘genuine occupational requirement’, as discussed below in Chapter 2.6.4.1.

The principal ECJ cases concerning special measures have arisen in the context of gender equality, namely the *Kalanke case*,<sup>57</sup> the *Marschall case*<sup>58</sup> and the *Abrahamsson case*.<sup>59</sup> Together these cases defined the limits on how far special measures can be taken in order to compensate for the previous disadvantages suffered by, in these particular cases, female workers over the years.

Example: in the *Kalanke case*, the ECJ took a strict approach to according preferential treatment to correct the under-representation of women in particular posts. This case concerned legislation adopted at the regional level, which accorded automatic priority to female candidates applying for posts or promotions. Where male and female candidates were equally qualified, and where female workers were deemed to be under-represented in that sector, female candidates were to be given preference. Under-representation was deemed to exist where female workers did not make up at least half of the staff in the post in question. In this case an unsuccessful male candidate, Mr Kalanke, complained that he had been discriminated against on the basis of his sex before the national courts. The national courts referred the case to the ECJ, asking whether this rule was compatible with Article 2(4) of the Equal Treatment Directive of 1976 (the predecessor to Article 3 of the Gender Equality Directive on ‘positive action’), which states that: ‘This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities’.<sup>60</sup>

<sup>57</sup> ECJ, *Kalanke v. Freie Hansestadt Bremen*, Case C-450/93 [1995] ECR I-3051, 17 October 1995.

<sup>58</sup> ECJ, *Marschall v. Land Nordrhein-Westfalen*, Case C-409/95 [1997] ECR I-6363, 11 November 1997.

<sup>59</sup> ECJ, *Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, Case C-407/98 [2000] ECR I-5539, 6 July 2000.

<sup>60</sup> Equal Treatment Directive 76/207/EEC, OJ L 39, 14.02.1976, p. 40.

The ECJ stated that Article 2(4) was designed to allow measures that, 'although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life'.<sup>61</sup> It was accepted that the rule pursued the legitimate aim of eliminating inequalities present in the workplace. Accordingly, in principle, measures that give women a specific advantage in the workplace, including promotion, would be acceptable, so long as they were introduced with a view to bringing an improvement in their ability to compete in the labour market, free of such discrimination.

However, it was also stated that any exception to the right to equal treatment should be strictly construed. It was found that where the rule in question guaranteed 'women absolute and unconditional priority for appointment or promotion', this would in fact be disproportionate to achieving the aim of eliminating inequality relative to the right of equal treatment. Accordingly, the preferential treatment could not be justified in this case.

Nevertheless, later cases show that specific measures may be acceptable where the rule does not require automatic and unconditional priority to be accorded.

Example: the *Marschall* case concerned legislation similar in substance to the *Kalanke* case. However, the rule in question stated that equally qualified women should be given priority 'unless reasons specific to an individual male candidate tilt the balance in his favour'. Mr Marschall, who was rejected for a post in favour of a female candidate, contested the legality of this rule before the national courts, which referred the case to the ECJ, once again asking if this rule was compatible with the Equal Treatment Directive. The ECJ found that a rule of this nature was not disproportionate to the legitimate aim of eliminating inequality as long as 'in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that their candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate'. Thus, discretion built into the rule, prevented the priority from being absolute and was therefore proportionate to achieving the aim of addressing inequality in the workplace.

<sup>61</sup> This wording has been largely adopted in the preambles to the non-discrimination directives: para. 21 of the Gender Equality Directive (Recast); para. 26 of the Employment Equality Directive; para. 17 of the Racial Equality Directive.

Example: the *Abrahamsson* case concerned the validity of Swedish legislation, which fell between the unconditional priority of the rule in the *Kalanke* case and the discretion created in the *Marschall* case. The rule stated that a candidate of an under-represented sex who possessed sufficient qualifications to perform the post should be accorded priority, unless 'the difference between the candidates' qualifications is so great that such applications would give rise to a breach of the requirement of objectivity in the making of appointments'. The ECJ found that in effect the legislation automatically granted priority to candidates from the under-represented sex. The fact that the provision only prevented this where there was a significant difference in qualifications was not sufficient to prevent the rule from being disproportionate in its effects.

These cases highlight the fact that the ECJ has generally been cautious in its approach of allowing specific measures to override the principle of fairness. Only in limited circumstances where the specific measures are not unconditional and absolute will the ECJ allow national rules to fall within the derogation of Article 2(4).

When faced with an issue concerning specific measures under the EU non-discrimination directives, practitioners must devote special attention to the 'action' that has been put in place to favour a particular group of persons. It is clearly the position, as evinced by the ECJ case-law above, that specific measures are a last resort. Practitioners and court officials if dealing with a case involving specific measures must ensure that all candidates considered by the employer in question, including those that are not targeted by the special-measures provision, are assessed objectively and fairly for the position in question. Special measures can only be utilised where such an objective assessment has determined that a number of candidates, among whom individuals from a targeted group, are all equally capable of fulfilling the role available. It is only in such circumstances that a member of a targeted group, which is selected due to previous historic discrimination in the workplace, can be selected ahead of an individual that falls outside the targeted group.

The ECtHR has not yet had the opportunity to devote in-depth consideration to cases of special measures; however, it has been considered in a limited number of cases.

Example: in the case of *Wintersberger v. Austria*,<sup>62</sup> the ECtHR issued a decision relating to the admissibility of a claim. The applicant, who was disabled, had

<sup>62</sup> ECtHR, *Wintersberger v. Austria* (friendly settlement) (No. 57448/00), 5 February 2004.

been dismissed from his or her employment by the State. According to national law, persons with disabilities received special protection from dismissal in that prior approval for dismissal had to be received from a special committee. In the case where the employer was unaware of the disability, this approval could be issued retroactively. No such approval was needed for persons without disability. The applicant argued that the fact that approval could be issued retroactively for persons with disabilities, but not for non-disabled persons, amounted to discrimination. The ECtHR found that this provision in fact existed for the benefit of persons with disabilities and was therefore justified as an example of reverse discrimination. The claim was, accordingly, declared inadmissible.

## Key points

- Discrimination describes a situation where an individual is disadvantaged in some way because of a 'protected characteristic'.
- Discrimination has different guises: direct discrimination, indirect discrimination, harassment and instruction to discriminate.
- Direct discrimination is characterised by differential treatment: it must be shown that the alleged victim has been treated less favourably based on the possession of a characteristic falling under a 'protected ground'.
- Less favourable treatment is determined through a comparison between the alleged victim and another person in a similar situation who does not possess the protected characteristic.
- It may be that the 'protected ground' is not the express reason behind the differential treatment. It is enough for the express reason to be indissociable from the 'protected ground'.
- The ECJ and national courts have accepted the notion of discrimination by association, where an individual is treated less favourably because of their association with another individual who possesses a 'protected characteristic'.
- Harassment, while treated separately under EU law, is a particular manifestation of direct discrimination.
- Indirect discrimination is characterised by differential impact or effects: it must be shown that a group is disadvantaged by a decision when compared to a comparator group.
- Proving indirect discrimination requires an individual to provide evidence that, as a group, those sharing their protected characteristic are subject to differential effects or impact, by comparison to those without this characteristic.

- In order to ensure that everyone has equal enjoyment of rights, governments, employers and service providers may need to take special or specific measures to adapt their rules and practices to those with different characteristics.
- The terms 'special measures' and 'specific measures' can be taken to include redressing past disadvantage suffered by those with a protected characteristic. Where this is proportionate, it may constitute a justification of discrimination.

## 2.6. Defences of less favourable treatment under European non-discrimination laws

### 2.6.1. Introduction

In particular circumstances, the courts will accept that differential treatment has been carried out but that it is acceptable. The form of approach to defences under EU law differs from that of the ECtHR; in substance, however, they are very similar.

Within European non-discrimination law, a defence can be phrased in general or more limited specific terms. The approach of the ECtHR is to operate a generally phrased defence, in the context of both direct and indirect discrimination. In contrast, EU law provides only for specific limited defences to direct discrimination, and a general defence only in the context of indirect discrimination. In other words, under the non-discrimination directives, direct discrimination will only be capable of being justified where it is in pursuit of particular aims expressly set out in those directives.

The specific defences under the non-discrimination directives can be placed in the wider context of the general defence recognised by the ECtHR and are consistent with the way that the general defence is applied in the case-law. In essence, the specific defences under the non-discrimination directives are particular articulations of the general defence that operate in and are adapted to the field of employment.

### 2.6.2. Breakdown of the general defence

As noted, the general defence is available with regard to both direct and indirect discrimination under the ECHR, and available with regard only to indirect discrimination under EU law. According to the ECtHR,

*'... a difference in the treatment of persons in relevantly similar situations ... is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.<sup>63</sup>*

Similar wording is used by the EU non-discrimination directives in relation to indirect discrimination. The Racial Equality Directive states:

In order to justify differential treatment, it must be shown:

- that the rule or practice in question pursues a legitimate aim;
- that the means chosen to achieve that aim (that is, the measure which has led to the differential treatment) is proportionate to and necessary to achieve that aim.

*'[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.'<sup>64</sup>*

According to the wording used by both the ECtHR and the non-discrimination directives, this is not, strictly speaking, a defence to discrimination as such but rather a justification of differential treatment, which will prevent a finding of discrimination being made. However, in substance, if not in form, the courts treat issues of justifications as defences to discrimination.

Example: the ECJ offered an in-depth explanation of the idea of objective justification in the case of *Bilka-Kaufhaus GmbH v. Weber Von Hartz*.<sup>65</sup> Here, part-time employees, who were excluded from the occupational pension scheme of Bilka (a department store), complained that this constituted indirect discrimination against women, since they made up the vast majority of part-time workers. The ECJ found that this would amount to indirect discrimination, unless the difference in enjoyment could be justified. In order to be justified, it would need to be shown that: 'the ... measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued, and are necessary to that end'.

63 ECtHR, *Burden v. UK* [GC] (No. 13378/05), 29 April 2008, para. 60.

64 Article 2(2)(b), Racial Equality Directive; Article 2(2)(b), Employment Equality Directive; Article 2(b), Gender Goods and Services Directive; Article 2(1)(b), Gender Equality Directive (Recast).

65 ECJ, *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, Case 170/84 [1986] ECR 1607, 13 May 1986.

Bilka argued that the aim behind the difference in treatment was to discourage part-time work and incentivise full-time work, since part-time workers tended to be reluctant to work evenings or on Saturdays, making it more difficult to maintain adequate staffing. The ECJ found that this could constitute a legitimate aim. However, it did not answer the question of whether excluding part-time workers from the pension scheme was proportionate to achieving this aim. The requirement that the measures taken be 'necessary' implies that it must be shown that no reasonable alternative means exists which would cause less of an interference with the principle of equal treatment. It was left to the national court to apply the law to the facts of the case.

In order to determine whether the differential treatment is proportionate, the court must be satisfied that:

- there is no other means of achieving that aim that imposes less of an interference with the right to equal treatment. In other words, the disadvantage suffered must be the minimum possible level of harm needed to achieve the aim sought;
- the aim to be achieved is important enough to justify this level of interference.

### 2.6.3. Application of the general defence

In the context of employment, the ECJ has been reluctant to accept differential treatment based on reasons of management that are related to the economic concerns of employers, while it is more willing to accept differential treatment based on broader social and employment policy goals with fiscal implications. In cases concerning the latter considerations, the ECJ will accord States a broad 'margin of discretion'. In the context of the ECHR, the ECtHR is less likely to accept differential treatment where this relates to matters considered to be at the core of personal dignity – such as discrimination based on race or ethnic origin, home, or private and family life – and more likely to accept differential treatment where this relates to broader social policy considerations, particularly where these have fiscal implications. The ECtHR uses the terminology of the 'margin of appreciation', which refers to the State's sphere of discretion in determining whether differential treatment is justified. Where this margin is deemed 'narrow', the ECtHR adopts a higher degree of scrutiny.

### 2.6.4. Specific defences under EU law

As discussed above, under the non-discrimination directives a specific set of defences exist allowing differential treatment to be justified in a limited set of

circumstances. The ‘genuine occupational requirement defence’ is present in each of the directives (except the Gender Goods and Services Directive, since it does not relate to employment); this requirement allows employers to differentiate against individuals on the basis of a protected ground where this ground has an inherent link with the capacity to perform or the qualifications required of a particular job.<sup>66</sup> The other two defences are found only in the Employment Equality Directive: firstly, the permissibility of discrimination on the basis of religion or belief by employers who are faith-based organisations;<sup>67</sup> secondly, the permissibility of age discrimination in certain circumstances.<sup>68</sup> The strict approach of the ECJ to interpreting defences to differential treatment suggests any exceptions will be interpreted narrowly, since it places emphasis on the importance of any rights created for individuals under EU law.<sup>69</sup>

### 2.6.4.1. Genuine occupational requirement

According to the non-discrimination directives, in so far as they deal with the sphere of employment:

*‘Member States may provide that a difference in treatment based on a characteristic related to [the protected ground] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’<sup>70</sup>*

This defence allows employers to differentiate against individuals on the basis of a protected characteristic, where this characteristic is directly related to the suitability or competence to perform the duties required of a particular post.

There are well established occupations that fall under the genuine occupational requirement derogation: in *Commission v. Germany*, the ECJ, relying on a Commission survey on the ambit of the derogation in relation to sex discrimination, indicated

66 Article 14(2), Gender Equality Directive (Recast); Article 4, Racial Equality Directive; Article 4(1) Employment Equality Directive.

67 Article 4(2), Employment Equality Directive.

68 Article 6, Employment Equality Directive.

69 See, for example, ECJ, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84 [1986] ECR 1651, 15 May 1986, para. 36.

70 Article 14(2), Gender Equality Directive (Recast); Article 4, Racial Equality Directive; Article 4(1) Employment Equality Directive.

particular professions where the defence was likely to be applicable.<sup>71</sup> Particular attention was given to artistic professions which may require particular attributes that belong to individuals as inherent characteristics, such as requiring a female singer to fit with a taste in performance style, a young actor to play a particular role, an able-bodied individual to dance, or men or women for particular types of fashion modelling. However, this was not an attempt at providing an exhaustive list. Other examples might include employing an individual of Chinese ethnicity in a Chinese restaurant in order to maintain authenticity or the employment of women in women-only fitness clubs.

Example: in *Commission v. France*, the ECJ found that in certain circumstances it will not be unlawful to reserve employment positions primarily for male candidates in male-populated prisons and for female candidates in female-populated prisons.<sup>72</sup> However, this exception could only be used in relation to posts that entailed those activities where being of a particular sex was relevant. In this case, the French authorities wished to retain a percentage of posts for male candidates as there may arise a need to use force in order to deter potential troublemakers, along with other duties that could only be undertaken by men. Although the ECJ accepted the arguments in principle, the French authorities failed to satisfy the requirement of transparency in relation to specific activities that would need to be fulfilled by male candidates only; generalisations of sex suitability will not suffice.

Example: in the *Johnston* case, a female police officer working in Northern Ireland complained that her contract had not been renewed. The Chief Constable justified this on the grounds that female officers were not trained in the handling of firearms and this was on the basis that 'in a situation characterised by serious internal disturbances the carrying of firearms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety'. The ECJ found that, while the threat to safety should be taken into account, the threat applied equally to men and women, and women were not at greater risk. Unless the justification related to biological factors specific to women, such as the protection of her child during pregnancy, differential treatment could not be justified on the grounds that public opinion demand that women be protected.

71 ECJ, *Commission v. Germany*, Case 248/83 [1985] ECR 1459, 21 May 1985.

72 ECJ, *Commission v. France*, Case 318/86 [1988] ECR 3559, 30 June 1988.

Example: in the *Mahlburg* case, the complainant, who was pregnant, was turned down for a permanent post as a nurse where a substantial amount of work was to be conducted in operating theatres.<sup>73</sup> This was justified on the basis that harm could be caused to the child because of exposure to harmful substances in theatre. The ECJ found that because the post was a permanent one, it was disproportionate to bar the complainant from the post, because her inability to work in theatre would only be temporary. While restrictions on the working conditions of pregnant women were acceptable, these had to be strictly circumscribed to duties that would cause her harm and could not entail a generalised bar to work.

Paragraph 18 of the Preamble to the Employment Equality Directive contains a more specific articulation of the genuine occupational requirement defence in relation to certain public services relating to safety and security. This is not of itself a separate defence, but it should rather be regarded as making express one of the consequences of the genuine occupational requirement defence in a particular context:

*'This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.'*<sup>74</sup>

Typically, this might apply to a situation of refusing certain posts that are deemed to be highly physically demanding to those beyond a certain age, or with a disability. In this respect, Article 3(4) of the Directive permits Member States to exclude expressly the provision of its terms to the armed forces. While this provision does not appear in the Gender Equality Directive (Recast), it is possible to appreciate how it might operate by examining two cases relating to sex discrimination and the armed forces. These cases were considered under Article 2(2) of the Equal Treatment Directive, which contained the defence of 'genuine occupational requirement' now found in Article 14(2) of the Gender Equality Directive (Recast).

Example: in the *Sirdar* case, the complainant had served as a chef as part of a commando unit. She was made redundant following cutbacks in military

<sup>73</sup> ECJ, *Mahlburg v. Land Mecklenburg-Vorpommern*, Case C-207/98 [2000] ECR I-549, 3 February 2000.

<sup>74</sup> Employment Equality Directive 2000/78/EC, OJ L 303, 2.12.2000, p. 16.

spending which introduced the principle of ‘interoperability’ for commando units.<sup>75</sup> ‘Interoperability’ required that each individual be capable of performing a combat role, due to manpower shortages. The ECJ accepted that all-male commando units were justified in order to guarantee combat effectiveness, and that the principle of interoperability thereby excluded women. This was because the commandos were a small, specialised force that was usually in the first wave of any attack. The ECJ found the rule to be necessary in pursuit of the aim of ensuring combat effectiveness.

Example: in the *Kreil* case, the complainant applied to work as an electrical engineer in the armed forces.<sup>76</sup> However, she was refused a post since women were barred from any military posts involving the use of arms and could only participate in the medical and musical services of the forces. The ECJ found that this exclusion was too wide since it applied to almost all military posts simply because in those posts women might at some point have to use weapons. Any justification should be more closely related to the functions typically performed in particular positions. The credibility of the government’s justification was also questioned because, even in those posts that were open to women, they were still obliged to undergo basic weapon training for the purposes of self-defence or defence of others. The measure was therefore not proportionate to achieving its aim. Furthermore, distinctions should not be made between women and men on the basis that women require greater protection, unless these relate to factors specific to the circumstances of women, such as the need for protection during pregnancy.

The ability to justify sex discrimination by reference to the effectiveness or efficiency of particular security or emergency services may well prove more difficult over time as gender roles and social attitudes develop, and Member States are under an obligation to reconsider restrictive measures in light of this periodically.<sup>77</sup>

#### 2.6.4.2. Religious institutions

The Employment Equality Directive specifically permits organisations that are based around a ‘religion’ or ‘belief’ to impose certain conditions on employees. Article 4(2) of the Directive states that it does not interfere with ‘the right of

<sup>75</sup> ECJ, *Sirdar v. The Army Board and Secretary of State for Defence*, Case C-273/97 [1999] ECR I-7403, 26 October 1999.

<sup>76</sup> ECJ, *Kreil v. Bundesrepublik Deutschland*, Case C-285/98 [2000] ECR I-69, 11 January 2000.

<sup>77</sup> Article 31(3), Gender Equality Directive (Recast).

churches and other public or private organisations, the ethos of which is based on religion or belief ... to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'. Furthermore, employers connected to religious organisations may fall within the scope of the 'genuine occupational requirement' defence allowing for differential treatment based on religious tenets of the organisation in question.

Article 4(1) and 4(2) thus allow organisations such as churches to refuse, for instance, to employ women as priests, pastors or ministers, where this conflicts with the ethos of that religion. While the ECJ has not yet had the opportunity to rule on the interpretation of this provision, it has been applied at the national level. Below are two cases relating to the invocation of this defence to justify differential treatment on the basis of sexual orientation.

Example: in a case before the Finnish courts, the Evangelical Lutheran Church of Finland refused the appointment as chaplain (assistant vicar) of an individual who was in a same-sex relationship.<sup>78</sup> The Vaasa Administrative Court annulled the decision on the basis that being heterosexual could not be considered to be a genuine occupational requirement for this post. Attention was paid to the fact that no mention of sexual orientation was made in the Church's internal rules relating to the appointment of vicars and chaplains.

Example: in the *Amicus* case, the UK courts were asked to rule on the compatibility of national regulations transposing the genuine occupational requirement defence in the context of religious employers with the Employment Equality Directive.<sup>79</sup> It was emphasised that any exception to the principle of equal treatment should be narrowly interpreted. The wording of the national regulations permitted differential treatment where the employment 'is for the purposes of an organised religion', and it was underlined that this would be far more restrictive than 'for purposes of a religious organisation'. The court thus agreed with the submissions of the government that this exception would apply in relation to a very limited number of posts related to the promotion or representation of the religion, such as religious ministers. It would not allow religious organisations, such as faith schools or religious nursing homes, to

78 Vaasa Administrative Tribunal, Finland, Vaasan Hallinto-oikeus - 04/0253/3. English summary available at FRA InfoPortal, Case 187-1.

79 *Amicus MSF Section, R (on the application of) v. Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin), UK High Court, 26 April 2004. English summary available at FRA InfoPortal, Case 187-1.

argue that the post of a teacher (which is for the purposes of education) or a nurse (which is for the purposes of healthcare) was part of the ‘purpose of an organised religion’.

### 2.6.4.3. Exceptions on the basis of age

Article 6 of the Employment Equality Directive provides two separate justifications of differences of treatment on grounds of age.

Article 6(1) allows age discrimination that pursues ‘legitimate employment policy, labour market and vocational training objectives’, provided that this meets the proportionality test. A limited number of examples for when differential treatment may be justified is provided: Article 6(1)(b) allows for the ‘fixing of minimum conditions of age, professional experience or seniority in service for access to employment’. However, this list is not intended to be exhaustive and so could be expanded on a case-by-case basis.

Article 6(2) permits age discrimination with regard to access to and benefits under occupational social security schemes, without the need to satisfy a test of proportionality.

Example: in the *Palacios de la Villa* case, the ECJ had its first opportunity to consider the ambit of Article 6, being asked to consider its application in the context of mandatory retirement ages.<sup>80</sup> In finding that a mandatory retirement age did fall under Article 6, the ECJ then considered whether it could be objectively justified. The ECJ considered the following issues to be of importance:

- firstly, the original measure was expressed to create labour market opportunities against an economic background characterised by high unemployment;
- secondly, there was evidence that the transitional measure was adopted at the instigation of trade unions and employer organisations, to promote better distribution of work between the generations;
- thirdly, Law 14/2005 was again enacted with the cooperation of trade unions and employer organisations, this time with an expressed requirement that that measure be ‘linked to objectives which are consistent with employment policy and are set out in the collective agreement’;

<sup>80</sup> ECJ, *Palacios de la Villa v. Cortefiel Servicios SA*, Case C-411/05 [2007] ECR I-8531, 16 October 2007.

- fourthly, the compulsory retirement clause in the collective agreement was expressed to be 'in the interests of promoting employment'.

Having considered these factors, the ECJ concluded that when 'placed in its context, the ... transitional provision was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment'. On this basis, the ECJ decided that the collective agreement fulfilled a legitimate aim. Having accepted that a legitimate aim was being pursued, the ECJ then needed to consider whether the measure was 'appropriate and necessary' in achieving that aim. The ECJ reiterated that Member States have a broad margin of discretion in the area of social and employment policy, and this has the implication that 'specific provisions may vary in accordance with the situation in Member States'. What appeared key was the requirement that the workers concerned have access to a retirement pension, 'the level of which cannot be unreasonable'. Equally influential was that the provisions in question were determined by collective agreement between trade unions and employer organisations, building into the process a level of flexibility that enabled the decision to retire to take into account the labour market concerned and the specific job requirements. On this basis, the ECJ held that the transitional measure, affecting Mr Palacios, and the collective agreement were objectively justified and thus compatible with EU law. The approach highlighted by the ECJ is that Article 6 will be considered in the same manner that objective justification is under the other grounds of non-discrimination protection, as discussed above.

Example: in the UK case of *MacCulloch*, the court was asked to consider the position of redundancy payment schemes that saw enhanced redundancy payments according to age and length of service.<sup>81</sup> This had the obvious result of older employees with longer periods of service being entitled to a much greater redundancy payment than younger, newer members of staff. The UK appeals tribunal accepted that, in principle, this could be objectively justified as a means of rewarding older workers for their loyalty, giving them larger payments to take account of their vulnerability in the job market, and encouraging older workers to leave, thus freeing up jobs for junior employees. However, guidance as to how the issue of objective justification should be approached was also given, with an intimation that the issue of proportionality

<sup>81</sup> *MacCulloch v. Imperial Chemical Industries plc* [2008] IRLR 846, UK Employment Appeals Tribunal, 22 July 2008.

requires extensive consideration before conclusions on objective justification can be made.

Example: in the *Hütter* case, the ECJ was asked to consider a reference relating to an Austrian law providing that work experience prior to attaining the age of 18 years could not be taken into account for the purpose of determining pay. Mr Hütter and a colleague were both apprentices at the Graz University of Technology, who on completing their apprenticeships were offered a 3-month contract. On the basis of the legislation in question, Mr Hütter, who was just over 18 years of age, had his pay determined with reference to his acquired 6.5 months' work experience, whereas his colleague who was 22 months older than him had her pay determined in line with her acquired 28.5 months' experience. This led to a difference in monthly pay, despite each having gathered similar levels of experience.

Mr Hütter brought a claim contending that the rule was more favourable to persons who attained their experience after they had reached the age of 18 years. The ECJ accepted that the legislation's primary aims could be deemed legitimate: (1) so as not to place persons who have pursued a general secondary education at a disadvantage, compared with persons with a vocational qualification; and (2) to avoid making apprenticeships more costly and thereby promote the integration of young persons who had pursued that type of training into the labour market. Although appreciating that in determining whether the legitimate aims were appropriate and necessary the Member State had a broad margin of discretion, the ECJ found that an objective justification had not been properly made out as it had a disproportionate impact on younger workers, especially in those cases where the length of experience was the same, yet the age of the applicant affected the value of remuneration, as in this case.

It should be noted that this approach is also consistent with that of the ECtHR which examined the issue of different pensionable ages in the context of the ECHR, discussed in the *Stec and Others* case, in Chapter 4.2. In this sense, the exceptions relating to age are consistent with the courts' approaches to employment and social policy justifications.

## Key points

- Under the ECHR, there is a general defence to direct discrimination. Under EU law there are specific defences to direct discrimination, which are tailored to the context of employment.
- Indirect discrimination under the ECHR and EU law is subject to a general defence of objective justification.
- Differential treatment may be justified where it pursues a legitimate aim and where the means to pursue that aim are appropriate and necessary.
- In addition to the general defence to indirect discrimination under EU non-discrimination law, there are more specific defences, namely: (i) genuine occupational requirements; (ii) exceptions in relation to religious institutions; and (iii) exceptions particular to age discrimination.
- Age discrimination is the only EU protected ground where direct discrimination can be objectively justified.

## Further reading

Bamforth, Malik and O'Connell, *Discrimination Law: Theory and Context* (London, Sweet and Maxwell, 2008), Chapters 4, 5, 6, 8.

Barnard, *EC Employment Law* (Oxford, Oxford University Press, 2009), Chapters 6, 7, 8, 9, 10.

Bercusson, *European Labour Law* (Cambridge, Cambridge University Press, 2009), Chapters 10, 11, 22.

Dubout, 'L'interdiction des discriminations indirectes par la Cour européenne des droits de l'homme : rénovation ou révolution ? Epilogue dans l'affaire D.H. et autres c. République tchèque, Cour européenne des droits de l'homme (Grande Chambre), 13 novembre 2007', 19 *Revue trimestrielle des droits de l'homme*, (2008) 75.

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European Network of Legal Experts in the non-discrimination field, *Beyond formal equality: positive action under Directives 2000/43/EC and 2000/78/EC* (Luxembourg, Publications Office, 2007) – also available in French and German.

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Marguénaud, 'L'affaire Burden ou l'humiliation de la fratrie : Cour européenne des droits de l'homme (Gde Ch.), Burden et Burden c. Royaume Uni, 29 avril 2008', 20 *Revue trimestrielle des droits de l'homme*, (2009) 78.

Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing, 2004), Chapter 7.

Schiek, Waddington and Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford, Hart Publishing, 2007), Chapters 2, 3 and 7.



# 3

## The scope of European non-discrimination law

### 3.1. Introduction

While European non-discrimination law prohibits direct and indirect discrimination, it does so only in certain contexts. In the EU, non-discrimination law was introduced in order to facilitate the functioning of the internal market, and was therefore traditionally confined to the sphere of employment. With the introduction of the Racial Equality Directive in 2000 this sphere was expanded to include access to goods and services, and access to the State welfare system, out of consideration that in order to guarantee equality in the workplace it was also necessary to ensure equality in other areas, which can have an impact on employment. The Gender Goods and Services Directive was then introduced in order to expand the scope of equality on the grounds of sex to goods and services. However, the Employment Equality Directive of 2000, which prohibits discrimination on the grounds of sexual orientation, disability, age and religion or belief, applies only in the context of employment. As discussed in Chapter 1.1.2., the expansion of protection of these grounds to the context of goods and services and access to the welfare system is currently under consideration by the legislature.

In contrast, Article 14 of the ECHR guarantees equality in relation to the enjoyment of the substantive rights guaranteed by the ECHR. In addition, Protocol 12 to the ECHR, which entered into force in 2005, expands the scope of the prohibition on discrimination to cover any right which is guaranteed at the national level, even where this does not fall within the scope of an ECHR right. However, the Protocol has been ratified by only 17 of the 47 CoE members, among which six are EU Member States. This means that among the EU Member States there exist different levels of obligations in European non-discrimination law.

This chapter will set out the scope of application of European non-discrimination law. It will begin with a general exposition of the scope of Article 14 and Protocol 12 to the ECHR and the method adopted by the ECtHR to determining its sphere of application. It will then examine particular substantive areas covered by the non-discrimination directives, indicating where this corresponds to a sphere also covered by Article 14. It will finally give an overview of those areas where the ECHR applies beyond the specific contexts of EU law, such as in the area of law enforcement and the 'personal sphere'.

## 3.2. Who receives protection under European non-discrimination law?

A preliminary point should be made on the issue of the beneficiaries of protection under EU law and the ECHR. The ECHR guarantees protection to all those within the jurisdiction of a Member State, whether they are citizens or not, and even beyond the national territory to those areas under the effective control of the State (such as occupied territories).<sup>82</sup> In contrast, the protection of EU law is more limited in scope. The prohibition on nationality discrimination in EU law applies in the context of free movement of persons and is only accorded to citizens of EU Member States. In addition, the non-discrimination directives contain various exclusions of application for third-country nationals (TCNs). A TCN is an individual who is a citizen of a State that is not a member of the EU.

The non-discrimination directives expressly exclude their application to nationality discrimination, which is regulated under the Free Movement Directive.<sup>83</sup> According to the latter, only citizens of EU Member States have a right of entry and residence in other EU Member States. After a period of five years' lawful residence in another EU Member State, an EU citizen is entitled to a right of permanent residence, giving them equivalent rights to those in the category of 'worker'. This, of course, does not mean that nationals of other Member States are not protected by the non-discrimination directives. Thus, a German homosexual dismissed from employment in Greece because of his sexual orientation will be able to rely on the Employment Equality Directive. It simply means that when making a complaint of discrimination on the basis of nationality, either the victim will have to try to bring this within

82 ECtHR, *Loizidou v. Turkey* (No. 15318/89), 18 December 1996.

83 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p 77.

the ground of race or ethnicity, or they will have to rely on the Free Movement Directive.

Both the Racial Equality Directive and the Employment Equality Directive state that they do not create any right to equal treatment for third-country nationals (TCNs) in relation to conditions of entry and residence. The Employment Equality Directive further states that it does not create any right to equal treatment for TCNs in relation to access to employment and occupation. The Racial Equality Directive states that it does not cover 'any treatment which arises from the legal status of third-country nationals'. However, this would not appear to allow Member States to exclude totally protection for TCNs, since the preamble states that TCNs shall be protected by the directive, except in relation to access to employment. The Gender Equality Directive (Recast) and Gender Goods and Services Directive do not exclude protection for TCNs.

However, TCNs will enjoy a right to equal treatment in broadly the same areas covered by the non-discrimination directives where they qualify as 'long-term residents' under the Third-Country Nationals Directive (which requires, among other conditions, a period of five years' lawful residence).<sup>84</sup> In addition, the Family Reunification Directive allows for TCNs lawfully resident in a Member State to be joined by family members in certain conditions.<sup>85</sup>

Of course, these rules under EU law do not prevent Member States introducing more favourable conditions under their own national law. In addition, the case-law of the ECHR, as discussed in Chapter 4.7., shows that while a State may consider nationals and non-nationals not to be in a comparable situation (and consider it to be permissible for them to be treated differently in certain circumstances), in principle all the rights in the ECHR must be guaranteed equally to all persons falling within their jurisdiction. In this respect the ECHR places obligations on Member States with respect to TCNs which in some areas go beyond the requirements of EU law.

84 Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.01.2004, p. 44.

85 Directive 2003/86/EC on the right to family reunification, OJ L 251, 3.10.2003, p. 12.

## 3.3. The scope of the European Convention: Article 14 and Protocol 12

### 3.3.1. The nature of the prohibition on discrimination in the Convention

Article 14 guarantees equality ‘[i]n the enjoyment of ... [the] rights and freedoms’ set out in the ECHR. The ECtHR will therefore not be competent to examine complaints of discrimination unless they fall within the ambit of one of the rights protected by the ECHR.

Whenever the ECtHR considers an alleged violation of Article 14, this is always done in conjunction with a substantive right. An applicant will often allege a violation of a substantive right, and in addition a violation of a substantive right in conjunction with Article 14. In other words, the interference with their rights was, in addition to failing to meet the standards required in the substantive right, also discriminatory in that those in comparable situations did not face a similar disadvantage. As noted in Chapter 4, it is often the case that, where the ECtHR finds a violation of the substantive right, it will not go on to consider the complaint of discrimination where it considers that this will involve an examination of essentially the same complaint.

This chapter will first briefly set out the rights guaranteed by the ECHR and then explain how the ECtHR has interpreted the scope of the ECHR for the purposes of applying Article 14.

#### 3.3.1.1. Rights covered by the Convention

Since Article 14 is wholly dependent on discrimination based on one of the substantive rights guaranteed in the ECHR, it is necessary to gain an appreciation of the rights covered by the ECHR. The ECHR contains a list of rights, predominantly characterised as ‘civil and political’; it does, however, also protect certain ‘economic and social’ rights.

The substantive rights contained within the ECHR cover an exceptionally wide breadth, including, for example: the right to life; the right to respect for private and family life; and freedom of thought, conscience and religion.

Wherever an issue of discrimination relates to one of the areas covered by an ECHR right, the ECtHR will consider complaints alleging a violation of Article 14.

This is an extremely significant distinction between EU law and the ECHR, in that the ECHR provides protection from discrimination over issues that EU non-discrimination law does not regulate. Although the EU Charter of Fundamental Rights obliges the EU not to interfere with human rights in the measures it takes (including a prohibition on discrimination), the Charter only applies to the Member States when they are applying EU law. The Charter applies to them in this limited circumstance simply because the EU itself does not really have the administrative machinery in place in the Member States to implement EU law – rather, EU law is put into effect by the administrations of the Member States themselves. Therefore, in those areas where the Member States have not delegated powers to the EU, the Charter has no effect.

Since the introduction of the non-discrimination directives and the extension of protection to accessing goods and services and the welfare system, the difference in scope between the protection offered under the ECHR and the directives has diminished. Nonetheless, particular areas where the ECHR provides protection over and above EU law can be identified. These will be examined below.

### 3.3.1.2. The scope of convention rights

When applying Article 14, the ECtHR has adopted a wide interpretation of the scope of ECHR rights:

- firstly, the ECtHR has made clear that it may examine claims under Article 14 taken in conjunction with a substantive right, even if there has been no violation of the substantive right itself;<sup>86</sup>
- secondly, it has held that the scope of the ECHR extends beyond the actual letter of the rights guaranteed. It will be sufficient if the facts of the case broadly relate to issues that are protected under the ECHR.

Example: in the case of *Zarb Adami v. Malta*, the applicant complained of discrimination on the basis of sex due to the disproportionately high number of men called for jury service.<sup>87</sup> Article 4(2) of the ECHR prohibits forced labour.

<sup>86</sup> See, for example, ECtHR, *Sommerfeld v. Germany* [GC] (No. 31871/96), 8 July 2003.

<sup>87</sup> ECtHR, *Zarb Adami v. Malta* (No. 17209/02), 20 June 2006.

However, Article 4(3)(d) states that 'normal civic obligations' are not comprised within the notion of 'forced labour'. The ECtHR found that, although 'normal civic obligations' are not covered by this Article (in other words, the ECHR does not confer a right to be free from performing jury service), the facts of the case did fall within the scope of the right. It based its reasoning on the fact that what constitutes 'normal civic obligations' may become 'abnormal' where these are applied in a discriminatory manner.

Example: in the case of *E.B. v. France*, national authorities refused an adoption application from a lesbian living with her partner.<sup>88</sup> The applicant alleged a breach of Article 8 taken in conjunction with Article 14. The ECtHR noted that it was not being requested to rule on whether Article 8 of itself had been violated, which it regarded as significant because Article 8 did not of itself confer a right to found a family or to adopt. The ECtHR, however, underlined that it was possible for a complaint of discrimination to fall within the scope of a particular right, even if the issue in question did not relate to a specific entitlement granted by the ECHR. It found that because France had in its national legislation created a right to adopt, the facts of the case undoubtedly fell within the ambit of Article 8. On the facts of the case, it also found that the applicant's sexual orientation played a determinative role in the refusal of the authorities to allow her to adopt, which amounted to discriminatory treatment by comparison to other single individuals who were entitled to adopt under national law.

Example: in the case of *Sidabras and Džiautas v. Lithuania*, the applicants complained that their right to respect for private life was subject to interference by the State placing a bar on their access to employment in the public service and certain aspects of private employment.<sup>89</sup> There is no right to work guaranteed within the ECHR. Nevertheless, the ECtHR found that this fell within the ambit of Article 8, since it 'affected their ability to develop relationships with the outside world to a very significant degree and has created serious difficulties for them in terms of earning their living, with obvious repercussions on the enjoyment of their private lives'.<sup>90</sup>

Example: in the case of *Carson and Others v. UK*, the applicants complained that the government had discriminated against them on the basis of residence

88 ECtHR, *E.B. v. France* [GC] (No. 43546/02), 22 January 2008.

89 ECtHR, *Sidabras and Džiautas v. Lithuania* (Nos. 55480/00 and 59330/00), 27 July 2004.

90 *Ibid.*, para. 48.

by refusing to allow their pension payments to be revised upwards on the same basis as pensioners residing within the UK or within one of the countries with which the UK has concluded a bilateral agreement in that respect.<sup>91</sup> The ECtHR found that although the ECHR creates no right to social security or pension payments, where the State itself decided to do so, this would give rise to a proprietary interest, which would be protected under Article 1 of Protocol 1.

The ECtHR has similarly found in many other cases where any form of State benefit becomes payable that this will either fall under the scope of Article 1 of Protocol 1<sup>92</sup> (because it is deemed to be property)<sup>93</sup> or Article 8 (because it affects the family or private life),<sup>94</sup> for the purposes of applying Article 14. This is particularly important in relation to nationality discrimination, discussed above in Chapter 3.2., since EU law is far more restrictive in this respect.

### 3.3.1.3. Protocol 12

Protocol 12 prohibits discrimination in relation to ‘enjoyment of any right set forth by law’ and is thus greater in scope than Article 14, which relates only to the rights guaranteed by the ECHR. The Commentary provided on the meaning of these terms in the Explanatory Report of the Council of Europe states that this provision relates to discrimination:

- i. in the enjoyment of any right specifically granted to an individual under national law;
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;

<sup>91</sup> ECtHR, *Carson and Others v. UK* [GC] (No. 42184/05), 16 March 2010.

<sup>92</sup> Full consideration of Article 1 of Protocol 1 can be found on the CoE Human Rights Education for Legal Professionals website: Grgić, Mataga, Longar and Vilfan, ‘The right to property under the ECHR’, *Human Rights Handbook*, No. 10, 2007, available at: [www.coehelp.org/mod/resource/view.php?inpopup=true&id=2123](http://www.coehelp.org/mod/resource/view.php?inpopup=true&id=2123).

<sup>93</sup> For example, ECtHR, *Stec and Others v. UK* [GC] (Nos. 65731/01 and 65900/01), 12 April 2006 (pension payments and invalidity benefits); ECtHR, *Andrejeva v. Latvia* [GC] (No. 55707/00), 18 February 2009 (pension payments); ECtHR, *Koua Poirrez v. France* (No. 40892/98), 30 September 2003 (disability benefit); ECtHR, *Gaygusuz v. Austria* (No. 17371/90), 16 September 1996 (unemployment benefit).

<sup>94</sup> For example, ECtHR, *Weller v. Hungary* (No. 44399/05), 31 March 2009 (a social security payment for the purposes of supporting families with children).

- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law-enforcement officers when controlling a riot).<sup>95</sup>

The Commentary also states that while the Protocol principally protects individuals against discrimination from the State, it will also relate to those relations between private persons, which the State is normally expected to regulate, 'for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity'.<sup>96</sup> Broadly speaking, Protocol 12 will prohibit discrimination outside purely personal contexts, where individuals exercise functions placing them in a position as to decide on how publicly available goods and services are offered.

In the only case examined by the ECtHR under Article 1 of Protocol 12, *Sejdić and Finci v. Bosnia and Herzegovina*, discussed in Chapter 4.6., the ECtHR stated that this instrument 'introduces a general prohibition of discrimination'. It also stated that the analysis of discrimination cases would be identical to that established by the ECtHR in the context of Article 14.

### 3.4. The scope of the EU non-discrimination directives

Under the non-discrimination directives, the scope of the prohibition on discrimination extends to three areas: employment, the welfare system, and goods and services. Currently, the Racial Equality Directive applies to all three areas. While legislation which will extend the Employment Equality Directive to all three areas is under discussion, this Directive currently only applies to employment. The Gender Equality Directive (Recast) and the Gender Goods and Services Directive apply to employment and access to goods and services but not to access to the welfare system.

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<sup>95</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), Explanatory Report, para. 22. Available at: <http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>.

<sup>96</sup> *Ibid.*, para. 28.

### 3.4.1. Employment

Protection against discrimination in the field of employment is extended across all the protected grounds provided for under the non-discrimination directives.

#### 3.4.1.1. Access to employment

The concept of ‘access to employment’ has been interpreted widely by the ECJ.

Example: in the case of *Meyers v. Adjudication Officer*, the ECJ held that access to employment covers ‘not only the conditions obtaining before an employment relationship comes into being’, but also all those influencing factors that need to be considered before the individual makes a decision of whether or not to accept a job offer.<sup>97</sup> In the *Meyers* case, the granting of a particular State benefit (payable depending on level of income) was capable of falling in this area. This was because the candidate would be influenced by whether they would be entitled to this benefit when considering their decision to take up a post. Consequently, such a consideration had an impact on access to employment.

Example: in the case of *Schnorbus v. Land Hessen*, the complainant applied for a training post as part of her qualification to join the judiciary.<sup>98</sup> Under national law it was necessary to pass a national exam, followed by a period of training and a second exam. The complainant had passed the first exam but was refused a training post on the grounds that there were no vacancies. Her entry was consequently delayed until the next round of posts became available. The complainant argued that she had been discriminated against because priority was accorded to male candidates who had completed their military service. The ECJ found that national legislation regulating the date of admission to the training post fell within the scope of ‘access to employment’ since such a period of training was itself considered as ‘employment’ both in its own right and as part of the process of obtaining a post within the judiciary.

#### 3.4.1.2. Conditions of employment, including dismissals and pay

Again, the ECJ in interpreting what falls within this field has applied a fairly wide understanding. This has ultimately led to any condition derived from the working relationship to be considered as falling within this category.

<sup>97</sup> ECJ, *Meyers v. Adjudication Officer*, Case C-116/94 [1995] ECR I-2131, 13 July 1995.

<sup>98</sup> ECJ, *Schnorbus v. Land Hessen*, Case C-79/99 [2000] ECR I-10997, 7 December 2000.

Example: in the case of *Meyers*, the applicant, a single parent, complained of indirect sex discrimination due to the method used for calculating the eligibility of single parents for family credit.<sup>99</sup> It fell to the ECJ to clarify whether the provision of family credit (a State benefit) was solely a social security issue, or whether it constituted a condition of employment. The ECJ took into consideration that the family credit in question was payable when the following three conditions were satisfied: the income of the claimant did not exceed a specified amount; the claimant or their partner was working; and the claimant or their partner had responsibility for a child. The ECJ held that the Equal Treatment Directive (now replaced by the Gender Equality Directive (Recast)) would not be considered inapplicable solely because the benefit in question formed part of a social security system. Instead, a wider approach was adopted looking at whether the benefit was given in connection to a working relationship. In this case, to benefit from the family-credit system, the applicant had to establish that either they, or their partner, were engaged in remunerative work. This requirement to establish a working relationship brought the family-credit system within the category of working conditions.

Applying such a wide definition to the concept of employment and working conditions led the ECJ to find that the provision of workplace nurseries<sup>100</sup> and the reduction of working time also fell within its ambit.<sup>101</sup>

The ECJ has also adopted a fairly inclusive approach to the issues of dismissals and pay. In relation to the area of dismissals, this covers almost all situations where the working relationship is brought to an end. This has been held to include, for example, where the working relationship has been brought to an end as part of a voluntary-redundancy scheme,<sup>102</sup> or where the relationship has been terminated through compulsory retirement.<sup>103</sup>

The concept of pay has been defined in Article 157 of the Treaty on the Functioning of the EU as being the 'ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly

99 ECJ, *Meyers v. Adjudication Officer*, Case C-116/94 [1995] ECR I-2131, 13 July 1995.

100 ECJ, *Lommers v. Minister van Landbouw*, Case C-476/99 [2002] ECR I-2891, 19 March 2002.

101 ECJ, *Jamstalldhetsombudsmannen v. Örebro Lans Landsting*, Case C-236/98 [2000] ECR I-2189, 30 March 2000.

102 ECJ, *Burton v. British Railways Board*, Case 19/81 [1982] ECR 555, 16 February 1982.

103 ECJ, *Palacios de la Villa v. Cortefiel Servicios SA*, Case C-411/05 [2007] ECR I-8531, 16 October 2007.

or indirectly, in respect of his employment, from his employer'. This covers a wide variety of benefits that a worker receives due to having entered a working relationship. The ambit of this definition has been considered in a range of cases before the ECJ, and this has been held to cover all benefits associated with a job, including concessionary rail travel,<sup>104</sup> expatriation allowances,<sup>105</sup> Christmas bonuses,<sup>106</sup> and occupational pensions.<sup>107</sup> What one is essentially looking for in determining whether the issue falls within the term 'pay' is some form of benefit, which is derived from the existence of a working relationship.

### 3.4.1.3. Access to vocational guidance and training

The definition of 'vocational guidance and training' has received attention from the ECJ in the context of the free movement of persons.<sup>108</sup> The ECJ has adopted a broad definition.

Example: in the *Gravier* case, a student who was a French national wished to study strip cartoon art at the Académie Royale des Beaux-Arts in Liège.<sup>109</sup> She was charged a registration fee whereas students from the host State were not. The ECJ stated that:

'... any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education.'

Example: this definition was applied in the *Blaizot* case where the complainant applied to study on a veterinary medicine course.<sup>110</sup> The ECJ found

104 ECJ, *Garland v. British Rail Engineering Limited*, Case 12/81 [1982] ECR 455, 9 February 1982.

105 ECJ, *Sabbatini v. European Parliament*, Case 20/71 [1972] ECR 345, 7 June 1972.

106 ECJ, *Lewen v. Denda*, Case C-333/97 [1999] ECR I-7243, 21 October 1999.

107 ECJ, *Barber v. Guardian Royal Exchange Assurance Group*, Case C-262/88 [1990] ECR I-1889, 17 May 1990.

108 According to Article 7(3) of Regulation 1612/68 on freedom of movement of workers within the Community (OJ L 257, 19.10.1968, p. 2), a worker shall 'have access to training in vocational schools and retraining centres' without being subject to less favourable conditions when compared to national workers.

109 ECJ, *Gravier v. Ville de Liège and Others*, Case 293/83 [1985] ECR 593, 13 February 1985.

110 ECJ, *Blaizot v. Université de Liège and Others*, Case 24/86 [1988] ECR 379, 2 February 1988.

that in general a university degree will also fall within the meaning of ‘vocational training’ even where the final qualification awarded at the end of the programme does not directly provide for the qualification required of a particular profession, trade or employment. It was sufficient that the programme in question provides knowledge, training or skills required within a particular profession, trade or employment. Thus, where particular trades do not require a formal qualification, or where the university degree does not of itself constitute the formal entry requirement to a profession, this will not prevent the programme being regarded as ‘vocational training’. The only exceptions to this are ‘certain courses of study, which of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation’.

#### 3.4.1.4. Worker and employer organisations

This not only deals with membership and access to a worker or employer organisation, but also covers the involvement of persons within these organisations. According to guidance issued by the European Commission, this acts to ensure that discrimination cannot occur in the context of membership or benefits derived from these bodies.<sup>111</sup>

#### 3.4.1.5. The European Convention and the context of employment

Although the ECHR does not itself contain a right to employment, Article 8 has under certain circumstances been interpreted as covering the sphere of employment. In the above-mentioned case of *Sidabras and Džiautas v. Lithuania*, a government ban on former KGB agents accessing employment in the public sector and parts of the private sector was held to fall within the ambit of Article 8 in conjunction with Article 14 since it ‘affected their ability to develop relationships with the outside world to a very significant degree and has created serious difficulties for them in terms of earning their living, with obvious repercussions on the enjoyment of their private lives’.<sup>112</sup> Similarly in the case of *Bigaeva v. Greece*, it was held that Article 8 can also cover employment, including the right to access a profession.<sup>113</sup>

111 Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(1999) 566 final, 25.11.1999.

112 ECtHR, *Sidabras and Džiautas v. Lithuania* (Nos. 55480/00 and 59330/00), 27 July 2004.

113 ECtHR, *Bigaeva v. Greece* (No. 26713/05), 28 May 2009.

The ECtHR will also prohibit discrimination on the basis of membership of a trade union. Furthermore, the right to form trade unions is guaranteed as a stand-alone right in the ECHR.<sup>114</sup>

Example: in the case of *Danilenkov and Others v. Russia*, the applicants had experienced harassment and less favourable treatment from their employer on the basis of their membership of a trade union.<sup>115</sup> Their civil claims before the national courts were dismissed, since discrimination could only be established in criminal proceedings. However, the public prosecutor refused to bring criminal proceedings because the standard of proof required the State to show ‘beyond reasonable doubt’ that discrimination had been intended by one of the company’s managers. The ECtHR found that the absence in national law of effective judicial protection of freedom of association for trade unions amounted to a violation of Article 11 in conjunction with Article 14.

### 3.4.2. Access to welfare and forms of social security

Of the non-discrimination directives, only the Racial Equality Directive provides broad protection against discrimination in accessing the welfare system and other forms of social security. Encompassed within this is access to benefits in kind that are held ‘in common’ by the State such as public healthcare, education and the social security system. However, the Gender Social Security Directive does establish a right of equal treatment on the basis of sex in relation to the narrower field of ‘social security’.

#### 3.4.2.1. Social protection, including social security and healthcare

The precise ambit of this area is uncertain since it is not explained within the Racial Equality Directive and has yet to be interpreted through the ECJ case-law. As noted above, the Gender Social Security Directive provides for equal treatment on the basis of sex in relation to ‘statutory social security schemes’.<sup>116</sup> Article 1(3) defines these as schemes which provide protection against sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment, in addition

<sup>114</sup> For example, ECtHR, *Demir and Baykara v. Turkey* (No. 34503/97), 12 November 2008.

<sup>115</sup> ECtHR, *Danilenkov and Others v. Russia* (No. 67336/01), 30 July 2009.

<sup>116</sup> As opposed to ‘occupational’ schemes, which are classified as ‘pay’ by the Gender Equality Directive (Recast).

to 'social assistance, in so far as it is intended to supplement or replace' the former schemes.

It is unclear what is meant by 'social protection', although the Explanatory Memorandum to the Commission's proposal for the Racial Equality Directive, as well as the wording of the Directive itself, does imply that this will be wider than 'social security'.<sup>117</sup> Given the intended breadth of the provision, it should be understood that any form of benefit offered by the State whether economic or in kind would be caught within the category of social protection, to the extent that it is not caught by social security. In this sense, it is highly probably that the individual areas of application of the Racial Equality Directive overlap with each other.

The scope of the protection from discrimination in the field of healthcare also remains unclear. It would seem that this will relate to access to publicly provided healthcare at the point of delivery, such as treatment accorded by administrative and medical staff. Presumably, it will also apply to insurance where health services are provided privately, but patients are reimbursed through a compulsory insurance scheme. Here, it would seem that a refusal to insure an individual or the charging of increased premiums based on race or ethnicity would fall under the scope of this provision. In the alternative, this would fall under the provision of goods and services.

### 3.4.2.2. Social advantages

The scope of 'social advantages' is well developed through the ECJ case-law in the context of the law on the free movement of persons and has been afforded an extremely broad definition.

Example: in the *Cristini* case, the complainant was an Italian national living with her children in France, whose late husband had been a 'worker' under EU law.<sup>118</sup> The French railways offered concessionary travel passes for large families, but refused such a pass to Ms Cristini on the basis of her nationality. It was argued that 'social advantages' for the purposes of EU law were only those advantages that flowed from a contract of employment. The ECJ disagreed, finding that the term should include all advantages regardless of any contract of employment, including passes for reduced rail fares.

<sup>117</sup> Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(1999) 566 final, 25.11.1999.

<sup>118</sup> ECJ, *Fiorini (née Cristini) v. SNCF*, Case 32/75 [1975] ECR 1085, 30 September 1975.

The ECJ defined ‘social advantages’ in the *Even* case as advantages

*‘which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community’.*<sup>119</sup>

The term applies to virtually all rights so long as they satisfy the *Even* definition: there is no distinction between a right that is granted absolutely or those rights granted on a discretionary basis. Further, the definition does not preclude those rights granted after the termination of the employment relationship being deemed a social advantage such as a right to a pension.<sup>120</sup> Essentially, in the context of free movement, a social advantage relates to any advantage that is capable of assisting the migrant worker to integrate into the society of the host State. The courts have been quite liberal in finding an issue to be a social advantage. Examples have included:

- the payment of an interest-free ‘childbirth loan’. Despite the rationale behind the loan being to stimulate childbirth, the ECJ considered this to be a social advantage as it was viewed as a vehicle to alleviate financial burdens on low-income families;<sup>121</sup>
- the awarding of a grant under a cultural agreement to support national workers who are to study abroad;<sup>122</sup>
- the right to hear a criminal prosecution against an individual in the language of their home State.<sup>123</sup>

### 3.4.2.3. Education

Protection from discrimination in access to education was originally developed in the context of the free movement of persons under Article 12 of Regulation 1612/68,

119 ECJ, *Criminal Proceedings against Even*, Case 207/78 [1979] ECR 2019, 31 May 1979, para. 22.

120 ECJ, *Commission v. France*, Case C-35/97 [1998] ECR I-5325, 24 September 1998.

121 ECJ, *Reina v. Landeskreditbank Baden-Württemberg*, Case 65/81 [1982] ECR 33, 14 January 1982.

122 ECJ, *Matteucci v. Communauté française de Belgique*, Case 235/87 [1988] ECR 5589, 27 September 1988.

123 ECJ, *Criminal Proceedings against Mutsch*, Case 137/84 [1985] ECR 2681, 11 May 1985.

particularly directed at the children of workers. The area of education will presumably overlap with that of vocational training. It is unclear whether it will also include those higher education programmes excluded from the area of vocational training that are intended only for the purposes of improving general knowledge.

Example: in the case of *Casagrande v. Landeshauptstadt München*, the complainant was the daughter of an Italian national who was working in Germany.<sup>124</sup> The German authorities paid a monthly maintenance grant to schoolchildren who were of school age, with the aim to facilitate 'educational attendance'. The ECJ held that any general measures intended to facilitate the educational attendance fell within the scope of education.

### 3.4.2.4. The European Convention and the context of welfare and education

While there is no right to social security under the ECHR, it is clear from the jurisprudence of the ECtHR that forms of social security such as benefit payments and pensions will fall under the ambit of Article 1 of Protocol 1 or Article 8.<sup>125</sup>

Although there is no right to healthcare under the ECHR, the ECtHR has held that issues relating to healthcare, such as access to medical records,<sup>126</sup> will fall under Article 8 or Article 3 where a lack of access to health is serious enough as to amount to inhuman or degrading treatment.<sup>127</sup> It might therefore be argued that complaints relating to discrimination in relation to accessing healthcare would fall within the ambit of Article 14.

It is unclear whether access to social advantages in the form of benefits in kind such as travel passes would fall within the ambit of the ECHR; however, the ECtHR's generous interpretation of Article 8 would suggest that this may be the case, particularly where these benefits are intended to benefit the family unit.

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<sup>124</sup> ECJ, *Casagrande v. Landeshauptstadt München*, Case 9/74 [1974] ECR 773.

<sup>125</sup> In particular, see the following cases: ECtHR, *Andrejeva v. Latvia* [GC] (No. 55707/00), 18 February 2009; ECtHR, *Gaygusuz v. Austria* (No. 17371/90), 16 September 1996; and ECtHR, *Koua Poirrez v. France* (No. 40892/98), 30 September 2003, all discussed in Chapter 4.7.

<sup>126</sup> ECtHR, *K.H. and Others v. Slovakia* (No. 32881/04), 28 April 2009.

<sup>127</sup> ECtHR, *Sławomir Musiał v. Poland* (No. 28300/06), 20 January 2009.

Article 2 of Protocol 1 to the ECHR contains a free-standing right to education, and accordingly the ECtHR would regard complaints of discrimination in the context of education as falling within the ambit of Article 14. Discrimination on the grounds of education under the ECHR is discussed in the case of *D.H. and Others v. the Czech Republic*<sup>128</sup> in Chapter 2.3.1. and in the case of *Oršuš and Others v. Croatia*<sup>129</sup> in Chapter 5.3.

### 3.4.3. Access to supply of goods and services, including housing

Protection from discrimination in the field of access to the supply of goods and services, including housing, applies to the ground of race through the Racial Equality Directive, and on the grounds of sex through the Gender Goods and Services Directive. Article 3(1) of the Gender Goods and Services Directive gives more precision to this provision, stating that it relates to all goods and services ‘which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context’. It expressly excludes, in paragraph 13 of the Preamble, application to ‘the content of media or advertising’ and ‘public or private education’, though this latter exclusion does not narrow the scope of the Racial Equality Directive, which expressly covers education. The Gender Goods and Services Directive also refers to Article 57 of the Treaty on the Functioning of the EU:

*‘Services shall be considered to be “services” within the meaning of this Treaty where they are normally provided for remuneration ...*

*“Services” shall in particular include:*

- (a) activities of an industrial character;*
- (b) activities of a commercial character;*
- (c) activities of craftsmen;*
- (d) activities of the professions.’*

<sup>128</sup> ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007.

<sup>129</sup> ECtHR, *Oršuš and Others v. Croatia* [GC] (No. 15766/03), 16 March 2010.

It would thus seem that this area covers any context wherever a good or a service is normally provided in return for remuneration, so long as this does not take place in an entirely personal context, and with the exclusion of public or private education.

Case-law from national bodies suggests that this will cover scenarios such as gaining access to or the level of service received in bars,<sup>130</sup> restaurants and nightclubs,<sup>131</sup> shops,<sup>132</sup> purchasing insurance,<sup>133</sup> as well as the acts of 'private' sellers, such as dog breeders.<sup>134</sup> Although healthcare is covered specifically under the Racial Equality Directive, it may also fall under the scope of services, particularly where this is private healthcare or where individuals are obliged to purchase compulsory sickness insurance in order to cover health costs. In this sense, the ECJ has interpreted services in the context of the free movement of services to cover healthcare that is provided in return for remuneration by a profit-making body.<sup>135</sup>

The Racial Equality Directive does not define housing. However, it is suggested that this should be interpreted in the light of international human rights law, in particular the right to respect for one's home under Article 7 of the EU Charter of Fundamental Rights and Article 8 of the ECHR (given that all EU Member States are party and that the EU will join the ECHR at a future date) and the right to adequate housing contained in Article 11 of the International Covenant on Economic Social and Cultural Rights (to which all Member States are party). The ECtHR has construed the right to a home widely to include mobile homes such as caravans or trailers, even in situations

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130 Equal Treatment Authority (Hungary), Case No. 72, April 2008. English summary available at FRA Infoportal, Case 322-1; European Network of Legal Experts on the Non-Discrimination Field, 8 (July 2009) 'European Anti-Discrimination Law Review', p. 49.

131 Sweden, Supreme Court, *Escape Bar and Restaurant v. Ombudsman against Ethnic Discrimination* T-2224-07, 1 October 2008. English summary available at FRA InfoPortal, Case 365-1; European Network of Legal Experts on the Non-Discrimination Field, 8 (July 2009) 'European Anti-Discrimination Law Review', at p. 68.

132 Bezirksgericht Döbling (Austria), GZ 17 C 1597/05f-17, 23 January 2006. English summary available at FRA InfoPortal, Case 1-1. Original text: <http://infoportal.fra.europa.eu/InfoPortal/caselawDownloadFile.do?id=1>.

133 Nîmes Court of Appeal, *Lenormand v. Balenci*, No. 08/00907 of 6 November 2008 and French Court of Cassation Criminal Chamber, No. M 08-88.017 and No. 2074 of 7 April 2009. English summary available at European Network of Legal Experts on the Non-Discrimination Field, 9 (December 2009) 'European Anti-Discrimination Law Review', p. 59.

134 Svea Court of Appeal, *Ombudsman Against Discrimination on Grounds of Sexual Orientation v. A.S.*, Case No. T-3562-06, 11 February 2008. English summary available at European Network of Legal Experts on the Non-Discrimination Field, 8 (July 2009) 'European Anti-Discrimination Law Review', p. 69.

135 ECJ, *Kohll v. Union des Caisses de Maladie*, Case C-158/96, [1998] ECR I-1931, 28 April 1998; ECJ, *Peerbooms v. Stichting CZ Groep Zorgverzekeringen*, Case C-157/99 [2001] ECR I-5473, 12 July 2001; and ECJ, *Müller Fauré v. Onderlinge Waarborgmaatschappij*, Case C-385/99 [2003] ECR I-4509, 13 May 2003.

where they are located illegally.<sup>136</sup> According to the UN Committee on Economic, Social and Cultural Rights, adequate housing must satisfy a range of requirements. In particular it should: be of sufficient quality to ensure protection from the elements; reflect the cultural requirements of inhabitants (and so include vehicles, caravans, encampments and other non-permanent structures); be connected to public utilities and sanitation services; and be connected to public services and allow access to work opportunities through an adequate infrastructure. It should also include adequate protection against forced or summary eviction, and be affordable.<sup>137</sup> This understanding of housing also appears in the approach taken by the European Union Agency for Fundamental Rights (FRA) in its summary report on *The State of Roma and Traveller Housing in the European Union: Steps Towards Equality*.<sup>138</sup>

Adopting this approach, access to housing would include not just ensuring that there is equality of treatment on the part of public or private landlords and estate agents in deciding whether to let or sell properties to particular individuals. It would also include the right to equal treatment in the way that housing is allocated (such as allocation of low-quality or remote housing to particular ethnic groups), maintained (such as failing to upkeep properties inhabited by particular groups) and rented (such as a lack of security of tenure, or higher rental prices or deposits for those belonging to particular groups).

Example: in Belgium, a landlord was convicted under criminal law and fined under civil law for refusing to rent accommodation to persons of Congolese origin. Despite producing satisfactory references from past landlords and evidence of adequate income, the landlord refused to conclude the tenancy agreement on the basis that he had encountered problems in the past with non-nationals in respect of payment.<sup>139</sup>

<sup>136</sup> ECtHR, *Buckley v. UK* (No. 20348/92), 25 September 1996.

<sup>137</sup> UN Committee on Economic Social and Cultural Rights, 'General comment No. 4: The right to adequate housing (Art.11 (1))' UN. Doc. E/1992/23, 13 December 1991.

<sup>138</sup> FRA, *The State of Roma and Traveller Housing in the European Union: Steps Towards Equality*, Summary Report (Vienna, FRA, March 2010).

<sup>139</sup> Correctionele Rechtbank van Antwerpen, Decision of 6 December 2004 (Belgium). English summary available at FRA InfoPortal, Case 15-1, original text on: <http://infoportal.fra.europa.eu/InfoPortal/caselawDownloadFile.do?id=15>.

### 3.4.3.1. The European Convention and the context of goods and services, including housing

The ECtHR has interpreted Article 8 to include cases relating to activities capable of having consequences for private life, including relations of an economic and social character. The ECtHR has also taken a broad approach to the interpretation of the right to respect for the home under Article 8. As noted, this will include less 'conventional' fixed accommodation such as caravans and mobile homes. Where state-provided housing is of particularly bad condition, causing hardship to the residents over a sustained period, the ECtHR has also held that this may constitute inhuman treatment.

Example: in the case of *Moldovan and Others v. Romania (no. 2)*, the applicants had been chased from their homes, which were then demolished in particularly traumatic circumstances.<sup>140</sup> The process of rebuilding their houses was particularly slow, and the accommodation that was granted in the interim was of particularly low quality. The ECtHR stated:

'... the applicants' living conditions in the last ten years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement.'

This finding, among other factors, led the ECtHR to conclude that there had been degrading treatment contrary to Article 3 of the ECHR, though the language used in the above extract suggests that the conditions experienced in the accommodation alone would have been sufficient for this finding.<sup>141</sup>

Example: in the case of *Đokić v. Bosnia and Herzegovina*, the applicant alleged an interference with his right to property.<sup>142</sup> Before the disintegration of the former Yugoslavia, the applicant was a lecturer at a military school and a

<sup>140</sup> ECtHR, *Moldovan and Others v. Romania (no. 2)* (Nos. 41138/98 and 64320/01), 12 July 2005.

<sup>141</sup> Case-law of the ECtHR indicates that, in certain circumstances, discriminatory treatment can amount to degrading treatment. For example, see ECtHR, *Smith and Grady v. UK* (Nos. 33985/96 and 33986/96), 27 September 1999.

<sup>142</sup> ECtHR, *Đokić v. Bosnia and Herzegovina* (No. 6518/04), 27 May 2010.

member of that country's armed forces. He purchased a flat in Sarajevo, but once the war in Bosnia and Herzegovina broke out and his military school moved to today's Serbia the applicant followed, joining the armed forces of today's Serbia. Following the conflict, the authorities refused him restitution of his property because he had served in foreign armed forces. At the national level, this was found to be justified since it was based on the consideration that the applicant was a 'disloyal' citizen for having served in foreign armed forces which had participated in military operations in Bosnia and Herzegovina. Although not expressly considering the case under Article 14 of the ECHR, the ECtHR considered that this decision was taken solely on the basis of the applicant's ethnicity (since service in certain armed forces was indicative of one's ethnic origin), particularly since it could not be shown that the applicant had in fact committed any acts of 'disloyalty' other than formally being a member of those armed forces. In the absence of restitution, the lack of compensation or alternative accommodation amounted to a disproportionate interference with his right to property.

### 3.4.4. Access to justice

While access to justice is not specifically mentioned by the non-discrimination directives among the examples of goods and services, it is conceivable that they fall within this ambit to the extent that the courts system represents a service provided to the public by the State for remuneration. At the very least, the non-discrimination directives require the Member States to establish judicial and/or administrative procedures allowing individuals to enforce their rights under the directives.<sup>143</sup> In addition it is a well-established principle of EU law that individuals should benefit from a 'right to effective judicial protection' of rights derived from EU law.<sup>144</sup> Thus, even if it cannot be said that 'goods and services' includes 'access to justice', it can certainly be said that access to justice exists as a free-standing right (without the requirement to prove discrimination) in relation to enforcing the directives themselves.

143 Article 9(1), Employment Equality Directive; Article 17(1), Gender Equality Directive (Recast); Article 8(1), Gender Goods and Services Directive; Article 7(1), Racial Equality Directive.

144 See, for example, ECJ, *Vassilakis and Others v. Dimos Kerkyras*, Case C-364/07 [2008] ECR I-90, 12 June 2010; ECJ, *Sahlstedt and Others v. Commission*, Case C-362/06 [2009] ECR I-2903, 23 April 2009; ECJ, *Angelidaki and Others v. Organismos Nomarkhiaki Aftodiikisi Rethimnis*, Case C-378/07 [2009] ECR I-3071, 23 April 2009.

### 3.4.4.1. The European Convention and the context of access to justice

A right of access to justice is guaranteed as a free-standing right within the ECHR in the context of the right to a fair trial under Article 6. The ECtHR has dealt with several cases relating to discrimination in access to justice.

Example: in *Paraskeva Todorova v. Bulgaria*, the national court's refusal to suspend the sentence of the applicant, accompanied by remarks that it was necessary to address the culture of impunity prevailing among ethnic minorities, was taken to constitute a violation of Article 6 in conjunction with Article 14.<sup>145</sup>

Example: in the case of *Moldovan and Others v. Romania (no. 2)*, discussed above, it was found that excessive delays in resolving criminal and civil proceedings (taking seven years to deliver a first judgment) amounted to a violation of Article 6.<sup>146</sup> The delays were found to be due to a high number of procedural errors and, taken in conjunction with the pervading discriminatory attitude of the authorities towards the Roma applicants, it was found to amount to a violation of Article 6 in conjunction with Article 14 also.

Example: in the case of *Anakomba Yula v. Belgium*, national law, which made it impossible for the applicant to obtain public assistance with funding a paternity claim on the basis that she was not a Belgian national, was found to amount to a violation of Article 6 in conjunction with Article 14.<sup>147</sup> This is not to suggest that non-nationals have an absolute right to public funding. In the circumstances, the ECtHR was influenced by several factors including that the applicant was barred because she did not have a current valid residence permit, even though at the time she was in the process of having her permit renewed. Furthermore, the ECtHR was also motivated by the fact that a one-year time bar existed in relation to paternity cases, which meant that it was not reasonable to expect the applicant to wait until she had renewed her permit to apply for assistance.

<sup>145</sup> ECtHR, *Paraskeva Todorova v. Bulgaria* (No. 37193/07), 25 March 2010.

<sup>146</sup> ECtHR, *Moldovan and Others v. Romania (no. 2)* (Nos. 41138/98 and 64320/01), 12 July 2005.

<sup>147</sup> ECtHR, *Anakomba Yula v. Belgium* (No. 45413/07), 10 March 2009, discussed in Chapter 4.7.

## 3.5. Application of the Convention beyond EU law

In addition to those cases discussed above, where protection under the ECHR coincides with that under the non-discrimination directives, there are significant areas where the ECHR will afford additional protection.

### 3.5.1. The ‘personal’ sphere: private and family life, adoption, the home and marriage<sup>148</sup>

One particularly significant area is that of family and private life, where the Member States have not given the EU extensive powers to legislate. Cases brought before the ECtHR in this respect have involved consideration of differential treatment in relation to rules on inheritance, access of divorced parents to children, and issues of paternity.

As discussed in the following Chapter and in Chapter 4, the cases of *Mazurek v. France*,<sup>149</sup> *Sommerfeld v. Germany*<sup>150</sup> and *Rasmussen v. Denmark*<sup>151</sup> involved consideration of differential treatment in relation to rules on inheritance, access of divorced parents to children, and issues of paternity. Article 8 will also extend to matters of adoption. The case of *E.B. v. France*, discussed above, also illustrates that adoption may fall within the scope of the ECHR, even though there is no actual right to adopt in the ECHR. In addition, the ECtHR sets out the general reach of Article 8, with reference to past case-law:

*‘... the notion of “private life” within the meaning of Article 8 of the Convention is a broad concept which encompasses, inter alia, the right to establish and develop relationships with other human beings ... the right to “personal development” ... or the right to self-determination as such. It encompasses elements such as names ... gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 ... and the right to respect for both the decisions to have and not to have a child.’<sup>152</sup>*

148 An explanation as to the scope of Article 8 of the ECHR can be found on the CoE Human Rights Education for Legal Professionals website: Kilkelly, *The Right to Respect for Private and Family Life*, Human Rights Handbooks, No. 1, 2001, available at: [www.coehelp.org/mod/resource/view.php?inpopup=true&id=1636](http://www.coehelp.org/mod/resource/view.php?inpopup=true&id=1636).

149 ECtHR, *Mazurek v. France* (No. 34406/97), 1 February 2000.

150 ECtHR, *Sommerfeld v. Germany* [GC] (No. 31871/96), 8 July 2003.

151 ECtHR, *Rasmussen v. Denmark* (No. 8777/79), 28 November 1984.

152 ECtHR, *E.B. v. France* [GC] (No. 43546/02), 22 January 2008, para. 43.

Thus, the ambit of Article 8 is extremely wide. The ECHR also has implications for other areas, such as marriage, which is specifically protected under Article 12.

Example: in the case of *Muñoz Díaz v. Spain*, the applicant concluded a marriage with her spouse in accordance with Roma customs; however, it did not comply with requirements under national law and so was not formally constituted.<sup>153</sup> Nevertheless, the applicant had been treated by the authorities as if she was married in terms of the identity documents they had been issued, benefits paid and the record of their 'family book'. On the death of her spouse, the applicant sought to claim a survivor's pension from the State, but it was refused because she had not been validly married under national law. The ECtHR found that because the State had treated the applicant as if her marriage was valid, she was in a comparable situation to other 'good faith' spouses (those who were not validly married for technical reasons, but believed themselves to be so), who would have been entitled to a survivor's pension. Although the ECtHR found that there was no discrimination in the refusal to recognise the marriage as valid (taking Article 12 with Article 14), there was discrimination in refusing to treat the applicant similarly to other good-faith spouses and accord the pension (taking Article 1 of Protocol 1 with Article 14).

Thus, while protection of the core of human dignity customarily calls for a narrower margin of appreciation by the ECtHR, this had to be balanced against the concerns of protecting others in a position of vulnerability whose rights might be abused.

Example: the case of *Sommerfeld v. Germany* related to German law regulating access of a father to his child.<sup>154</sup> Under national law where the parents of a child were not married the mother was permitted to deny the father access to his child. In this situation the father would then have to apply to a court to override the refusal. The government argued that the law was not discriminatory since typically estranged fathers showed little interest in their children. The ECtHR found that the State's margin of appreciation would be particularly narrow in cases relating to the right of access of parents to their children. In addition, it

<sup>153</sup> ECtHR, *Muñoz Díaz v. Spain* (No. 49151/07), 8 December 2009.

<sup>154</sup> ECtHR, *Sommerfeld v. Germany* [GC] (No. 31871/96), 8 July 2003, para. 93. On very similar facts: ECtHR, *Sahin v. Germany* [GC] (No. 30943/96), 8 July 2003. See also ECtHR, *Mazurek v. France* (No. 34406/97), 1 February 2000, also relating to differential treatment of children born out of wedlock, discussed in Chapter 4 (Protected grounds).

stated that ‘very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of or within wedlock can be regarded as compatible with the [ECHR ...] The same is true for a difference in the treatment of the father of a child born of a relationship where the parties were living together out of wedlock as compared with the father of a child born of a marriage-based relationship.’ It found that the government’s explanation could not justify such differential treatment.

In the above case, the ECtHR considered that the interests of the father went hand in hand with those of the child – that is, it was in the child’s interests to have contact with the father. However, where the child’s interests potentially conflict with those of the father, it will allow the State a wider margin of appreciation in determining how best to protect the child.

Example: in the case of *Rasmussen v. Denmark*, a father complained of a statute of limitations barring him from contesting paternity.<sup>155</sup> The ECtHR found that this did amount to differential treatment on the basis of sex, but was justified. This pursued the legitimate aim of providing the child with security and certainty over their status, by preventing fathers from abusing the possibility of contesting paternity later in life. Since there was little uniformity of approach to this issue among the Member States of the ECHR, the ECtHR accorded the State a wide margin of appreciation, finding the differential treatment was justified.<sup>156</sup>

### 3.5.2. Political participation: freedom of expression, assembly and association, and free elections

One of the main goals of the Council of Europe is the promotion of democracy. This is reflected in many of the rights in the ECHR which facilitate the promotion of political participation. While EU law confers a limited range of rights in this respect (in particular the right for EU nationals to vote in municipal elections and European Parliament elections), the ECHR contains broader guarantees creating not only a right to vote and stand in elections, but also flanking rights of freedom of expression and the right to freedom of assembly and association.

<sup>155</sup> ECtHR, *Rasmussen v. Denmark* (No. 8777/79), 28 November 1984.

<sup>156</sup> ECtHR, *Rasmussen v. Denmark* (No. 8777/79), 28 November 1984, paras. 40-42.

Example: in the case of *Bączkowski and Others v. Poland*, discussed above, the refusal of permission to hold a march to raise awareness about sexual orientation discrimination, coupled with publicly made homophobic remarks of the mayor, amounted to a violation of the right to freedom of assembly (Article 11) together with Article 14.<sup>157</sup>

The right to freedom of association has also been taken to include protection for the formation of political parties, which the ECtHR has accorded a high level of protection against interference.<sup>158</sup> Similarly, as noted in Chapter 4.11., any interference with the right to free speech in the context of political debate is scrutinised very closely.<sup>159</sup>

### 3.5.3. Law enforcement

Further to guaranteeing the substantive right to life (Article 2) and freedom from torture, inhuman or degrading treatment or punishment (Article 3), these Articles also create a duty on the State to investigate circumstances where a loss of life or such treatment has occurred. In the *Nachova and Others* and *Turan Cakir* cases, the ECtHR has stated that this includes a specific duty to carry out an investigation into possible racist motives behind violations of Articles 2 and 3, and that failure to do so would amount to a violation of these Articles in conjunction with Article 14.<sup>160</sup>

Example: in the case of *Turan Cakir v. Belgium*, the applicant complained of police brutality during his arrest causing severe and sustained injuries, accompanied by threats and racist insults.<sup>161</sup> The ECtHR found that the violence inflicted violated the applicant's right to freedom from inhuman and degrading treatment (under Article 3 of the ECHR). They also found that the failure of the State properly to investigate complaints of ill-treatment by the applicant violated the State's procedural obligations under this same Article. In addition, they found that the failure to investigate also amounted to a violation of Article 3 in conjunction with the right to freedom from discrimination since

<sup>157</sup> ECtHR, *Bączkowski and Others v. Poland* (No. 1543/06), 3 May 2007.

<sup>158</sup> For example, ECtHR, *Socialist Party and Others v. Turkey* (No. 21237/93), 25 May 1998.

<sup>159</sup> ECtHR, *Castells v. Spain* (No. 11798/85), 23 April 1992.

<sup>160</sup> ECtHR, *Nachova and Others v. Bulgaria* [GC] (Nos. 43577/98 and 43579/98), 6 July 2005; ECtHR, *Turan Cakir v. Belgium* (No. 44256/06), 10 March 2009; similarly, ECtHR, *Sečić v. Croatia* (No. 40116/02), 31 May 2007.

<sup>161</sup> ECtHR, *Turan Cakir v. Belgium* (No. 44256/06), 10 March 2009.

the State was under a duty not only to investigate allegations of ill-treatment, but also allegations that this ill-treatment was itself discriminatory, being motivated by racism.

Example: the case of *Nachova and Others v. Bulgaria* concerned two Roma men who were shot dead while fleeing from military police who sought to arrest them for being absent without leave.<sup>162</sup> At the time of the incident, the officer who killed the victims shouted 'You damn gypsies' at a neighbour. The ECtHR found that the State had violated the right to life of the victims (under Article 2 of the ECHR), not only substantively, but also procedurally for failing to investigate adequately the deaths. It was found that the failure to investigate also amounted to a violation of Article 2 in conjunction with the right to freedom from discrimination since the State was under a duty to investigate specifically possible discriminatory motives.

While both of these cases involved acts by State personnel, the duty of the State to intervene in order to protect victims of crime and the duty to investigate them later also applies in relation to the acts of private parties.

Example: in the case of *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*,<sup>163</sup> a group of Jehovah's Witnesses were attacked by an ultra Orthodox group. Although notified, the police did not intervene to prevent the violence. The subsequent investigation was discontinued once the police asserted that it was not possible to ascertain the identity of the perpetrators. The ECtHR found that the failure of the police to intervene to protect the victims from racially motivated violence and the subsequent lack of an adequate investigation amounted to a violation of Article 3 (the right to freedom from inhuman and degrading treatment or punishment) and Article 9 (the right to freedom of religion) in conjunction with Article 14 since it was based on religious grounds.

It would appear that EU law might impose similar duties in the context of the Council Framework Decision on combating certain forms and expressions of racism

<sup>162</sup> ECtHR, *Nachova and Others v. Bulgaria* [GC] (Nos. 43577/98 and 43579/98), 6 July 2005.

<sup>163</sup> ECtHR, *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia* (No. 71156/01), 3 May 2007.

and xenophobia by means of criminal law (discussed in Chapter 4.6.).<sup>164</sup> However, the Framework Decision does not impose a specific duty to investigate whether racist motives exist in relation to offences against the person.

### 3.5.4. Criminal law matters

In addition to those matters relating to law enforcement in 3.5.3., the ECHR relates to criminal law matters across a variety of rights, including the right to a fair trial, the right not to be detained arbitrarily, the prohibition on retroactive punishment and double jeopardy, the right to life and the right to freedom from inhuman or degrading treatment or punishment.

Example: in the case of *Opuz v. Turkey*, the ECtHR made a finding of indirect discrimination on the basis of sex, in conjunction with the right to life and freedom from inhuman or degrading treatment since the police and judiciary had failed to enforce adequately the law relating to domestic violence.<sup>165</sup>

Example: in the cases of *D.G. v. Ireland* and *Bouamar v. Belgium* (discussed in Chapter 4.5.), the applicants had been placed in detention by national authorities.<sup>166</sup> Here, the ECtHR considered that, although there had been violations of the right to liberty, there had been no discrimination since the differential treatment had been justified in the interests of protecting minors.

164 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55. It ought to be noted that the ECtHR has accepted that an incitement to discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion is a specific limitation on freedom of expression as protected by the ECHR. See, for example: ECtHR, *Le Pen v. France* (No. 18788/09), 20 April 2010; ECtHR, *Féret v. Belgium* (No. 15615/07), 16 July 2009; ECtHR, *Willem v. France*, (No. 10883/05), 16 July 2009; and ECtHR, *Balsytė-Lideikienė v. Lithuania* (No. 72596/01), 4 November 2008.

165 ECtHR, *Opuz v. Turkey* (No. 33401/02), 9 June 2009.

166 ECtHR, *D.G. v. Ireland* (No. 39474/98), 16 May 2002; ECtHR, *Bouamar v. Belgium* (No. 9106/80), 29 February 1988.

## Key points

- Third-country nationals also enjoy a right to equal treatment across broadly similar areas covered by the EU non-discrimination directives where they qualify as 'long-term residents' under the Third-Country National Directive.
- Where third-country nationals do not qualify as 'long-term residents', they enjoy limited protection under the non-discrimination directives:
  - on grounds of sexual orientation, age, disability or religion or belief in their right of access to vocational training and conditions of work. However, they do not enjoy an equal right of access to employment;
  - under the Gender Goods and Services Directive and the Gender Equality Directive (Recast), third-country nationals enjoy protection from sex discrimination in accessing employment and goods and services.
- Protection from discrimination under the EU non-discrimination directives has a varied scope:
  - race and ethnicity enjoy the widest protection, being protected in relation to accessing employment, the welfare system and goods and services;
  - sex discrimination is prohibited in the context of access to employment, social security (which is more limited than the broader welfare system) and goods and services;
  - sexual orientation, disability, religion or belief and age are currently only protected in the context of access to employment.
- The ECHR contains an open-ended list of protected grounds. Anyone can invoke the ECHR before domestic authorities, courts and, ultimately, the ECtHR.
- When faced with a claim that includes allegations of discrimination the ECtHR may examine the claim under the substantive right relied on solely or in conjunction with Article 14.
- A claim solely under Article 14 cannot be brought, it must be combined with a claim under one of the substantive rights of the ECHR. It will suffice for the complaint to relate broadly to the subject area covered by the right in question.
- Protocol 12 to the ECHR creates a free-standing right to non-discrimination. It will relate to any rights created by or inferable from national law or practice, and the meaning given to 'discrimination' is identical to that under Article 14.
- The approach of the ECJ has been to construe areas of application extremely widely in order to give full effect to the rights of individuals under EU law.
- The scope of the ECHR, both in terms of the substantive rights it contains and the manner that these are interpreted for the purposes of applying Article 14, is particularly wide by comparison to the EU non-discrimination directives.

- Particularly important areas that are beyond the reach of the non-discrimination directives, and largely beyond the competence of the EU (and therefore the reach of the Charter of Fundamental Rights) include matters relating to private and family law, rights associated with political participation and criminal law matters.
- It is particularly important, therefore, for victims of discrimination to **consider carefully whether their claims fall within the scope of the non-discrimination directives or the ECHR** in formulating their approach to litigation.

## Further reading

Bell, 'Beyond European Labour Law? Reflections on the EU Racial Equality Directive', 8 *European Law Journal* (2002) 384.

Boccardo, 'Housing Rights and Racial Discrimination', in European Network of Legal Experts on the Non-Discrimination Field, 8 *European Anti-Discrimination Law Review* (July 2009) 21.

Brosius-Gersdorf, 'Ungleichbehandlung von Imam-Ehe und Zivilehe bei der Gewährung von Sozialversicherungsleistungen in der Türkei aus völkerrechtlicher Sicht: der Fall Şerife Yiğit vor dem Europäischen Gerichtshof für Menschenrechte', *Europäische Grundrechte-Zeitschrift* (2009).

Cousins, 'The European Convention on Human Rights and Social Security law', 10.1 *Human Rights Law Review* (2010) 191.

Edel, *The prohibition of discrimination under the European Convention on Human Rights*, Human Rights Files, No. 22, 2010.

Equinet, *Combating Discrimination in Goods and Services* (Equinet, 2004).

ERRC/Interights/MPG *Strategic Litigation of Race Discrimination in Europe: from Principles to Practice* (Nottingham, Russell Press, 2004), Annex 5.c.

Kapuy, 'Social Security and the European Convention on Human Rights: How an Odd Couple has Become Presentable', 9.3 *European Journal of Social Security* (2007) 221.

Sánchez-Rodas Navarro, 'El Tribunal Europeo de Derechos Humanos y la pensión de viudedad en caso de unión celebrada conforme al rito gitano', *Aranzadi Social* (2009) 18.

Sudre (ed.), *Le droit à la non-discrimination au sens de la Convention européenne des droits de l'homme : actes du colloque des 9 et 10 novembre 2007* (Bruxelles: Bruylant/Nemesis, 2008).



# 4

## Protected grounds

### 4.1. Introduction

The European non-discrimination directives prohibit differential treatment that is based on certain ‘protected grounds’, containing a fixed and limited list of protected grounds, covering sex (Gender Goods and Services Directive, Gender Equality Directive (Recast)), sexual orientation, disability, age or religion or belief (Employment Equality Directive), racial or ethnic origin (Racial Equality Directive). The ECHR, in contrast, contains an open-ended list, which coincides with the directives, but goes beyond them. Article 14 states that there shall be no discrimination ‘on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. The category of ‘other status’ has allowed the ECtHR to include those grounds (among others) that are expressly protected by the non-discrimination directives, namely: disability, age and sexual orientation.

Chapter 1 noted that Article 21 of the EU Charter of Fundamental Rights also contains a prohibition on discrimination. The Charter binds the institutions of the European Union, but will also apply to the Member States when they are interpreting and applying EU law. The Charter provision on discrimination contains a combination of both the grounds of the ECHR and the non-discrimination directives, although it does not contain the open-ended ground of ‘other status’.

A ‘protected ground’ is a characteristic of an individual that should not be considered relevant to the differential treatment or enjoyment of a particular benefit.

## 4.2. Sex

Sex discrimination is relatively self-explanatory, in that it refers to discrimination that is based on the fact that an individual is either a woman or a man. This is the most highly developed aspect of the EU social policy and has long been considered a core right. The development of the protection on this ground served a dual purpose: firstly, it served an economic purpose in that it helped to eliminate competitive distortions in a market that had grown evermore integrated, and; secondly, on a political level, it provided the Community with a facet aimed toward social progress and the improvement of living and working conditions. Consequently, the protection against discrimination on the ground of sex has been, and has remained, a fundamental function of the European Union. The acceptance of the social and economic importance of ensuring equality of treatment was further crystallised by the central position it was given in the Charter of Fundamental Rights. Similarly, under the ECHR protection against discrimination on the ground of sex is well developed.

While cases of sex discrimination typically involve women receiving less favourable treatment than men, this is not exclusively the case.

Example: in the case of *Defrenne v. SABENA*, the applicant complained that she was paid less than her male counterparts, despite undertaking identical employment duties.<sup>167</sup> The ECJ held that this was clearly a case of sex discrimination. In reaching this decision, the ECJ highlighted both the economic and social dimension of the Union, and that non-discrimination assists in progressing the EU towards these objectives.

In the *Bilka* case, discussed above, the ECJ was faced with differential treatment based on management considerations of an employer, which justified excluding part-time workers from an occupational pension scheme by reference to incentivising full-time work to ensure adequate staffing. In this case, the ECJ did not expressly state whether it considered such a measure to be proportionate to the differential enjoyment suffered. However, it was more explicit in the following case.

Example: in the *Hill and Stapleton* case, the government introduced a job-sharing scheme in the civil service, whereby a post could be shared by two

<sup>167</sup> ECJ, *Defrenne v. SABENA*, Case 43/75 [1976] ECR 455, 8 April 1976.

individuals on a temporary basis, working 50% of the hours of the full-time post and receiving 50% of the regular salary.<sup>168</sup> Workers were entitled to then return to their post full time where these posts were available. The rules allowed individuals in full-time employment to advance one increment on the pay scale per year. However, for individuals who were job-sharing the increment was halved, with two years of job-sharing equivalent to one increment. The two complainants in the present case returned to their posts as full-time workers and complained about the means by which the increment was applied to them. The ECJ found this to constitute indirect discrimination on the grounds of sex since it was predominantly women who took part in job-sharing. The government argued that the differential treatment was justified since it was based on the principle of applying the increment in relation to the actual length of service. The ECJ found that this merely amounted to an assertion that was not supported by objective criteria (in that there was no evidence that other individuals' length of service was calculated in terms of actual hours worked). The ECJ then stated 'an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs'.

Thus, it would seem that the ECJ will not readily accept justifications of discriminatory treatment based on the ground of sex that are based simply on the financial or management considerations of employers.

Example: in the case of *Ünal Tekeli v. Turkey*, the applicant complained that national law obliged a woman to bear her husband's name upon marriage.<sup>169</sup> Although the law permitted a woman to retain her maiden name in addition to her husband's name, the ECtHR found that this constituted discrimination on the basis of sex, because national law did not oblige a husband to alter his surname.

Example: in the case of *Zarb Adami v. Malta*, the applicant complained that being called to jury service amounted to discrimination since the practice according to which jury lists were compiled made men inherently more likely to be called.<sup>170</sup>

<sup>168</sup> ECJ, *Hill and Stapleton v. The Revenue Commissioners and Department of Finance*, Case C-243/95 [1998] ECR I-3739, 17 June 1998.

<sup>169</sup> ECtHR, *Ünal Tekeli v. Turkey* (No. 29865/96), 16 November 2004.

<sup>170</sup> ECtHR, *Zarb Adami v. Malta* (No. 17209/02), 20 June 2006.

Statistics showed that over 95% of jurors over a five-year period were men, and the ECtHR found that since men and women were in a comparable situation as regards their civic duties, this amounted to discrimination.

Gender identity refers to ‘each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms’.<sup>171</sup>

The concept of ‘sex’ has also been interpreted to include situations where discriminatory treatment is related to the ‘sex’ of the applicant in a more abstract sense, allowing for some limited protection of gender identity.

Thus, the more broadly accepted definition of gender identity encompasses not only those who undertake gender reassignment surgery (‘transsexuals’), but also choose other means to express their gender, such as transvestism or cross-dressing, or simply adopting a manner of speech or cosmetics normally associated with members of the opposite sex.

Following the *P. v. S. and Cornwall County Council* case, the ground of ‘sex’ under the non-discrimination directives will also encompass discrimination against an individual because he/she ‘intends to undergo, or has undergone, gender reassignment’. It therefore appears that the ground of sex as construed under EU law currently protects gender identity only in a narrow sense.

Example: The case of *K.B. v. NHS Pensions Agency* concerned the refusal of KB’s transsexual partner a widower’s pension.<sup>172</sup> This refusal was because the transsexual couple could not satisfy the requirement of being married; transsexuals were not capable of marrying under English law at the time.

In considering the issue of discrimination, the ECJ held that there was no discrimination on the ground of sex because, in determining who was entitled to the survivor’s pension, there was no less favourable treatment based on being male or female. The ECJ then changed the direction of the consideration,

<sup>171</sup> This widely accepted definition is taken from the ‘Yogyakarta Principles on the Application of International Human Rights law in Relation to Sexual Orientation and Gender Identity’, March 2007, available at: [www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm). The Principles were adopted by an independent body of experts in International Human Rights Law.

<sup>172</sup> ECJ, *K.B. v. NHS Pensions Agency*, Case C-117/01 [2004] ECR I-541, 7 January 2004.

and concentrated on the issue of marriage. It was highlighted that transsexuals were never able to marry, and thus never able to benefit from the survivor's pension, whereas heterosexuals could. Consideration was then given to the ECtHR case of *Christine Goodwin*.<sup>173</sup> Based on these considerations, the ECJ concluded that the British legislation in question was incompatible with the principle of equal treatment as it prevented transsexuals from benefiting from part of their partners pay.

Example: similar considerations arose in the *Richards* case.<sup>174</sup> Richards, who was born a man, underwent gender reassignment surgery. The case surrounded the State pension entitlement in the UK, as at the time women received their State pension at the age of 60 years, while men received their State pension at the age of 65 years. When Richards applied for a State pension at the age of 60 years, she was refused, with an explanation stating that legally she was recognised as a man and therefore she could not apply for a State pension until she reached the age of 65 years. The ECJ held that this was unequal treatment on the grounds of her gender reassignment, and as a consequence this was regarded as discrimination contrary to Article 4(1) of the Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security.<sup>175</sup>

The ECtHR has yet to deliver a decision on whether gender identity is covered as a protected ground under Article 14, and it has yet to indicate whether this would only encompass 'transsexuals' or whether it would interpret gender identity more widely. This is not to say that it has not dealt with the issue of gender identity at all. Thus, the ECtHR has determined that gender identity, like sexual orientation, forms part of the sphere of an individual's private life, and should therefore be free from government interference.

173 ECtHR, *Christine Goodwin v. UK* [GC] (No. 28957/95), 11 July 2002.

174 ECJ, *Richards v. Secretary of State for Work and Pensions*, Case C-423/04 [2006] ECR I-3585, 27 April 2006.

175 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6, p. 24.

Example: the cases of *Christine Goodwin v. UK* and *I. v. UK* concerned very similar facts.<sup>176</sup> The applicants, who had both undergone male-to-female gender reassignment surgery, complained that the government refused to allow amendment of their birth certificates in order to reflect their sex. Although other documents and the applicants' names could be amended, birth certificates were still used for certain purposes where gender became legally relevant, such as the area of employment or retirement, meaning that the applicants would face embarrassment and humiliation where obliged to reveal their legally recognised male gender. The ECtHR (reversing past case-law) decided that this amounted to a violation of the right to respect for private life and the right to marry under Article 12, but it did not go on to consider whether there had been a violation of Article 14.

Example: in the *Van Kück* case, the applicant, who had undergone gender reassignment surgery and hormone treatment, was refused reimbursement of her costs for this from her private medical insurance company.<sup>177</sup> The German Court of Appeal, which heard the applicant's claim against the insurance company, determined that the medical procedures were not 'necessary' as required under the agreement, and therefore that the applicant was not entitled to reimbursement. The ECtHR found that, considering the nature of gender identity and the gravity of a decision to undergo irreversible medical procedures, the national court's approach had not only failed to ensure the applicant received a fair trial, violating Article 6 of the ECHR, but also violated her right to respect for private life guaranteed by Article 8 of the ECHR. However, the ECtHR did not go on to examine compliance with Article 14 since essentially the same facts were at issue.

Generally speaking it appears that the law surrounding the ground of 'gender identity' requires considerable clarification both at the European and national level. Recent studies of national legislation regulating this area show no consistent approach across Europe, with States largely divided between those that address 'gender identity' as part of 'sexual orientation', and those that address it as part of 'sex discrimination'.<sup>178</sup>

176 ECtHR, *Christine Goodwin v. UK* [GC] (No. 28957/95), 11 July 2002; ECtHR, *I. v. UK* [GC] (No. 25680/94), 11 July 2002. Similarly, ECtHR, *L. v. Lithuania* (No. 27527/03), 11 September 2007.

177 ECtHR, *Van Kück v. Germany* (No. 35968/97), 12 June 2003.

178 FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis* (Vienna, FRA, 2009), pp. 129-144; Commissioner for Human Rights, *Human Rights and Gender Identity* (Issue Paper by Thomas Hammarberg, CoE Commissioner for Human Rights, Strasbourg, 29 July 2009), CommDH/IssuePaper(2009)2.

A series of cases relating to differences in treatment on the basis of sex in relation to retirement age show that the ECtHR will afford the State a wide margin of appreciation in matters of fiscal and social policy<sup>179</sup>.

Example: in the case of *Stec and Others v. UK* the applicants complained that as a result of different retirement ages for men and women they had each been disadvantaged by the alteration of benefits payable to them, which had been determined according to pensionable age.<sup>180</sup> The ECtHR found that in principle sex discrimination could only be justified where ‘very weighty reasons’ existed. However, ‘a wide margin is usually allowed to the State under the [ECHR] when it comes to general measures of economic or social strategy ... Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is ... manifestly without reasonable foundation’. The ECtHR found that at their origin the different pensionable ages were actually a form of ‘special measures’ in that they were designed to offset the financial difficulties that women might suffer by reason of their traditional role in the home, which left them without independent monetary income. It was found that the government had begun gradually to make adjustments to equalise the pensionable ages of men and women and that they had not acted beyond their margin of appreciation either in choosing to do this over a number of years, or failing to implement changes sooner.<sup>181</sup>

A similar approach has been adopted by the ECJ in relation to cases of differential treatment justified on the basis of broader employment-policy considerations.

Example: in the *Schnorbus* case, the practice of the Hessian Ministry of Justice to give preference to male candidates who had completed compulsory military or civilian service for practical legal training was held to be indirectly discriminatory

<sup>179</sup> These cases also provide a useful discussion in relation to justification of the differential treatment and thus offer further elucidation of this concept to enhance the discussion on justification earlier in the Handbook.

<sup>180</sup> ECtHR, *Stec and Others v. UK* [GC] (Nos. 65731/01 and 65900/01), 12 April 2006.

<sup>181</sup> Similarly see: ECtHR, *Barrow v. UK* (No. 42735/02), 22 August 2006, paras. 20-24, 37; ECtHR, *Pearson v. UK* (No. 8374/03), 22 August 2006, paras. 12-13, 25; ECtHR, *Walker v. UK* (No. 37212/02), 22 August 2006, paras. 19-20, 37.

on the ground of sex.<sup>182</sup> However, the ECJ found that the practice was objectively justified as it was merely intended to counteract the delaying effects that undertaking the compulsory service had on male applicants' careers.

Example: the *Megner and Scheffel* case concerned German legislation that excluded minor (less than fifteen hours per week) and short-term employment from the compulsory sickness and old-age insurance schemes as well as from the obligation to contribute to the unemployment insurance scheme.<sup>183</sup> The rule was found to be potentially indirectly discriminatory towards women who were inherently more likely to work on a part-time or short-term basis. The ECJ accepted the government's contention that if it were to include minor and short-term employees into the scheme the costs involved would lead to an entire overhaul of the system, since it would no longer be able to be funded on a contributory basis. It also accepted that there was a demand for employees on a short-term and minor basis, which the government could only facilitate by exempting them from the social security scheme. If this approach was not taken it was likely that such jobs would be undertaken in any case but on an illegal basis. The ECJ accepted that the government was pursuing a legitimate social-policy aim, and that the State should be left a 'broad margin of discretion' in choosing what measures were appropriate to implement 'social and employment policy'. Accordingly, the differential treatment was justified.

This can be contrasted with the following case where the ECJ did not find that sex discrimination was justifiable in the context of social policy, despite the significant fiscal implications invoked by the government.

Example: the *De Weerd, née Roks, and Others* case concerned national legislation relating to incapacity benefit.<sup>184</sup> In 1975 national legislation had introduced incapacity benefit for men and unmarried women, irrespective of their income before becoming incapacitated. In 1979 this was amended and the benefit also made available to married women. However, a requirement that

182 ECJ, *Schnorbus v. Land Hessen*, Case C-79/99 [2000] ECR I-10997, 7 December 2000.

183 ECJ, *Megner and Scheffel v. Innungskrankenkasse Vorderpfalz*, Case C-444/93 [1995] ECR I-4741, 14 December 1995. Similarly, ECJ, *Nolte v. Landesversicherungsanstalt Hannover*, Case C-317/93 [1995] ECR I-4625, 14 December 1995.

184 ECJ, *De Weerd, née Roks, and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others*, Case C-343/92 [1994] ECR I-571, 24 February 1994.

the recipient have received a particular level of income during the preceding year was also introduced. The legislation was challenged on the ground (among others) that the income requirement discriminated indirectly against women (who were less likely to earn the required income than men). The State argued that the differential enjoyment was justified out of budgetary considerations, in order to contain national expenditure. The ECJ found that while EU law does not prevent the State from regulating which categories of person benefit from social security benefits it could not do so in a discriminatory manner.

These two cases can be reconciled on their facts, and *De Weerd, née Roks, and Others* should probably be regarded as the 'rule' with *Megner and Scheffel* as the exception. EU law does not oblige Member States to adopt particular social security regimes, but where they do so a court will not allow the exclusion of certain groups simply out of fiscal considerations, since this could severely weaken the principle of equal treatment and be open to abuse. However, differential treatment may be tolerable if it is the only means of preventing the collapse of the entire system of sickness and unemployment insurance schemes – particularly where such a measure would only have forced people into unregulated labour.

### 4.3. Sexual orientation

Typically cases relating to sexual orientation discrimination involve an individual receiving unfavourable treatment because they are homosexual or bisexual, but the ground also prohibits discrimination on the basis of being heterosexual.

Sexual orientation can be understood to refer to 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender'.<sup>185</sup>

Example: in a case before the Swedish Ombudsman against Discrimination on Grounds of Sexual Orientation ('HomO'), a heterosexual woman complained of sexual orientation discrimination when she was turned down for a job with the Swedish national federation for lesbian, gay and transgender rights as a safer sex information officer.<sup>186</sup> The organisation told her that they wished to

<sup>185</sup> This widely accepted definition is taken from the 'Yogyakarta Principles on the Application of International Human Rights law in Relation to Sexual Orientation and Gender Identity', March 2007, available at: [www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

<sup>186</sup> HomO, Decision of 21 June 2006, Dossier No. 262/06.

employ a self-identified homosexual or bisexual man in order to allow for an approach of outreach through peers. It was found either that she could not claim to be in a comparable situation to a homosexual or bisexual man for the purposes of this job (and therefore could not prove less favourable treatment), or that in any event the discrimination was justifiable on the basis of a genuine occupational requirement.

Although Article 14 of the ECHR does not explicitly list 'sexual orientation' as a protected ground, the ECtHR has expressly stated that it is included among the 'other' grounds protected by Article 14 in a series of cases.<sup>187</sup>

Example: in the case of *S.L. v. Austria*, the applicant complained that national law, as it stood, criminalised consensual sexual relations between men where one of the parties was under eighteen.<sup>188</sup> In contrast women were permitted to engage in sexual acts (both of a lesbian or heterosexual nature) from the age of fourteen. The ECtHR found this to constitute discrimination on the basis of sexual orientation.

Example: in the case of *E.B. v. France*, the applicant was refused an application to adopt a child on the basis that there was no male role model in her household.<sup>189</sup> National law did permit single parents to adopt children, and the ECtHR found that the authorities' decision was primarily based on the fact that she was in a relationship and living with another women. Accordingly the ECtHR found that discrimination had occurred on the basis of sexual orientation.

It should be noted that the ECtHR also protects against government interference relating to sexual orientation *per se* under Article 8 of the ECHR on the right to private life. Thus, even if discriminatory treatment based on this ground has occurred, it may be possible simply to claim a violation of Article 8 without needing to argue the existence of discriminatory treatment.

<sup>187</sup> See, for example, ECtHR, *Fretté v. France* (No. 36515/97), 26 February 2002, para. 32.

<sup>188</sup> ECtHR, *S.L. v. Austria* (No. 45330/99), 9 January 2003.

<sup>189</sup> ECtHR, *E.B. v. France* [GC] (No. 43546/02), 22 January 2008.

Example: the case of *Dudgeon v. UK* concerned national legislation, which criminalised consensual homosexual sexual relations between adults.<sup>190</sup> The applicant complained that as a homosexual he therefore ran the risk of prosecution. The ECtHR found that of itself this constituted a violation of his right to respect for his private life, since the latter included one's 'sexual life'. It also found that, while the protection of public morality constituted a legitimate aim, it could be pursued without such a level of interference in private life.

The ECtHR has been particularly keen to ensure protection of individuals where interferences by the State relate to matters that are considered to touch core elements of personal dignity, such as one's sexual life or family life. The following case illustrates that interferences with private life where this relates to sexuality are difficult to justify.

Example: the case of *Karner v. Austria* concerned the interpretation of national legislation (section 14 of the Rent Act), which created a right for a relative or 'life companion' to automatically succeed to a tenancy agreement where the main tenant died.<sup>191</sup> The applicant had been cohabiting with his partner, the main tenant, who died. The national courts interpreted the legislation so as to exclude homosexual couples, even though it could include heterosexual couples that were not married. The government accepted that differential treatment had occurred on the basis of sexual orientation, but argued that this was justified in order to protect those in traditional families from losing their accommodation. The ECtHR found that although protecting the traditional family could constitute a legitimate aim the 'the margin of appreciation ... is narrow ... where there is a difference in treatment based on sex or sexual orientation'. The ECtHR went on to state that 'the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act'. The ECtHR thus made a finding of discrimination, since the State could have employed measures to protect the traditional family without placing homosexual couples at such a disadvantage.

<sup>190</sup> ECtHR, *Dudgeon v. UK* (No. 7525/76), 22 October 1981.

<sup>191</sup> ECtHR, *Karner v. Austria* (No. 40016/98), 24 July 2003, paras. 34-43.

## 4.4. Disability

Neither the ECHR, nor the Employment Equality Directive provides a definition of disability. Because of the nature of the ECJ's role, determinations of what constitutes a disability are frequently made by the national courts and presented as part of the factual background to disputes referred to the ECJ. However, the ECJ has had some opportunity to give limited guidance as to what constitutes a disability in its case-law.

Example: in the *Chacón Navas*<sup>192</sup> case, the ECJ were afforded the opportunity to consider the general scope of the disability discrimination provisions, and indicated that the term "disability" should have a harmonised EU definition. The ECJ indicated that a disability, for the purposes of the Employment Equality Directive, should be taken to refer 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' and it must be 'probable that it will last a long time'. In applying this definition to the *Chacón Navas* case, the applicant was found not to be disabled when she brought an action before the Spanish courts claiming disability discrimination after she had been dismissed for being off sick from work for a period of eight months. The ECJ made it clear that there is a distinction that must be drawn between illness and a disability, with the former not being afforded protection.

Article 1 of the UN CRPD: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

As discussed in Chapter 1, the EU is a party to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), 2006, with the result that the ECJ will most probably be guided by both the Convention itself and the interpretations given by the Committee on the Rights of Persons with Disabilities, charged with its monitoring and interpretation.<sup>193</sup>

Once party to the UN CRPD, the EU and its institutions (and the EU Member States when interpreting and applying EU law) will be obliged to follow this wide and inclusive approach to interpreting the meaning of 'disability'.

<sup>192</sup> ECJ, *Chacón Navas v. Eures Colectividades SA*, Case C-13/05 [2006] ECR I-6467, 11 July 2006.

<sup>193</sup> UN Doc. A/RES/61/611, 13 December 2006.

Although not expressly featuring in the list of protected grounds of the ECHR, disability has been included by the ECtHR in its interpretation of 'other' grounds under Article 14.

Example: in the case of *Glor v. Switzerland*, the ECtHR found that the applicant, who was a diabetic, could be considered as a person with a disability – irrespective of the fact that national law classified this as a 'minor' disability.<sup>194</sup> The applicant was obliged to pay a tax to compensate for failing to complete his military service, which was payable by all those who were eligible for military service. To be exempted from this tax one either had to have a disability reaching a level of '40%' (considered equivalent to the loss of use of one limb), or be a conscientious objector. Conscientious objectors were obliged to perform a 'civil service'. The applicant's disability was such that he was found unfit to serve in the army, but the disability did not reach the severity threshold required in national law to exempt him from the tax. He had offered to perform the 'civil service' but this was refused. The ECtHR found that the State had treated the applicant comparably with those who had failed to complete their military service without valid justification. This constituted discriminatory treatment since the applicant found himself in a different position (as being rejected for military service but willing and able to perform civil service), and as such the State should have created an exception to the current rules.

As with other protected grounds under the ECHR, it is not uncommon for cases to be dealt with under other substantive rights, rather than a cumulative approach of a substantive right and Article 14, prohibiting discrimination.

Example: in the case of *Price v. UK* the applicant was sentenced to prison for a period of seven days. She suffered from physical disabilities due to ingestion of thalidomide by her mother during pregnancy, with the result that she had absent or significantly shortened limbs as well as malfunctioning kidneys.<sup>195</sup> Consequently she relied on a wheelchair for mobility, required assistance to go to the toilet and with cleaning, and needed special sleeping arrangements. During her first night in detention she was placed in a cell that was not adapted for persons with physical disabilities and consequently was unable to sleep adequately, experienced substantial pain and suffered hypothermia.

194 ECtHR, *Glor v. Switzerland* (No. 13444/04), 30 April 2009.

195 ECtHR, *Price v. UK* (No. 33394/96), 10 July 2001.

On transferral to prison she was placed in the hospital wing where some adaptation could be made, but she still experienced similar problems. She was also not permitted to charge her electric wheelchair, which lost power. The ECtHR found that the applicant had been subjected to degrading treatment, in violation of Article 3. Discrimination based on one of the substantive rights of the ECHR under Article 14 was not raised in this case.

Example: in the case of *Pretty v. UK* the applicant, who suffered from a degenerative disease, wished to obtain an assurance from the government that she could undergo assisted suicide without prosecution at some future date when her condition had progressed such that she was unable to carry out the act herself.<sup>196</sup> Under national law, assisting suicide constituted a criminal offence of itself, as well as amounting to murder or manslaughter. Among other things, the applicant argued that her right to make decisions about her own body protected in the context of the right to private life (under Article 8) had been violated in a discriminatory manner since the State had applied a uniform prohibition on assisted suicide, which had a disproportionately negative effect on those who have become incapacitated and are therefore unable to end their lives themselves. The ECtHR found that the refusal to distinguish between those ‘who are and those who are not physically capable of committing suicide’ was justified because introducing exceptions to the law would in practice allow for abuse and undermine the protection of the right to life.

## 4.5. Age

The protected ground of age relates simply to differential treatment or enjoyment that is based on the victim’s age. Although age discrimination *per se* does not fall within the ambit of a particular right in the ECHR (unlike religion, or sexual orientation), issues of age discrimination may arise in the context of various rights. As such the ECtHR has, as in other areas, adjudicated on cases whose facts suggested age discrimination, without actually analysing the case in those terms – in particular in relation to the treatment of children in the criminal-justice system. The ECtHR has found that ‘age’ is included among ‘other status’.<sup>197</sup>

<sup>196</sup> ECtHR, *Pretty v. UK* (No. 2346/02), 29 April 2002.

<sup>197</sup> ECtHR, *Schwizgebel v. Switzerland* (No. 25762/07), 10 June 2010.

Example: in the case of *Schwizgebel v. Switzerland* a 47 year old single mother complained about a refused application to adopt a child.<sup>198</sup> The national authorities based their decision on the age difference between the applicant and the child, and the fact that the adoption would impose a significant financial burden, given that the applicant already had one child. The ECtHR found that she was treated differently from younger women applying for adoption on the basis of her age. However, a lack of uniformity among States over acceptable age limits for adoption allowed the State a large margin of appreciation. In addition the national authorities' consideration of the age difference had not been applied arbitrarily, but was based on consideration of the best interests of the child and the financial burden that a second child might pose for the applicant, which in turn could affect the child's well-being. Accordingly the ECtHR found that the difference in treatment was justifiable.

Example: in the cases of *T. v. UK* and *V. v. UK* two boys had been tried and found guilty of a murder committed when they were 10 years old.<sup>199</sup> The applicants complained, among other things, that they had not been given a fair trial because their age and lack of maturity prevented them from participating effectively in their defence. The ECtHR found that when trying a minor the State should take 'full account of his age, level of maturity and intellectual and emotional capacities' and take steps 'to promote his ability to understand and participate in the proceedings'. The ECtHR found that the State had failed to do this and had accordingly violated Article 6 of the ECHR, without examining the case from the perspective of Article 14.

Example: in the cases of *D.G. v. Ireland* and *Bouamar v. Belgium* the applicants had been placed in detention by national authorities.<sup>200</sup> The ECtHR found that in the circumstances this violated the right not to be detained arbitrarily. In both cases the applicants also claimed that the treatment was discriminatory by comparison to the treatment of adults, since national law did not permit adults to be deprived of their liberty in such circumstances. The ECtHR found that, while there was a difference in treatment as between adults and children, this was justified since the aim behind the deprivation of liberty was to protect minors, which was not a consideration to adults.

<sup>198</sup> Ibid.

<sup>199</sup> ECtHR, *T. v. UK* [GC] (No. 24724/94), 16 December 1999; *V. v. UK* [GC] (No. 24888/94), 16 December 1999.

<sup>200</sup> ECtHR, *D.G. v. Ireland* (No. 39474/98), 16 May 2002; ECtHR, *Bouamar v. Belgium* (No. 9106/80), 29 February 1988.

## 4.6. Race, ethnicity, colour and membership of a national minority

The breadth of the ground of ‘racial and ethnic origin’ appears to differ slightly as between the EU and the ECHR, in that the Racial Equality Directive expressly excludes ‘nationality’ from the concept of race or ethnicity. While the ECHR lists ‘nationality’ or ‘national origin’ as a separate ground, the case-law discussed below shows that nationality can be understood as a constitutive element of ethnicity. This is not because discrimination on the grounds of nationality is permitted in EU law, but because the way that EU law has evolved means that discrimination on the grounds of nationality is regulated in the context of the law relating to free movement of persons. Apart from expressly excluding nationality, the Racial Equality Directive does not itself contain a definition of ‘racial or ethnic origin’. There are a number of other instruments which offer guidance as to how racial and ethnic origin should be understood. Neither ‘colour’, nor membership of a national minority are listed expressly in the Racial Equality Directive, but are listed as separate grounds under the ECHR. These terms appear to be indissociable from the definition of race and/or ethnicity, and so will be considered here.

The EU Council’s Framework Decision on combating racism and xenophobia under the criminal law defines racism and xenophobia to include violence or hatred directed against groups by reference to ‘race, colour, religion, descent or national or ethnic origin’. The CoE Commission Against Racism and Intolerance has also adopted a broad approach to defining ‘racial discrimination’, which includes within itself the grounds of ‘race, colour, language, religion, nationality or national or ethnic origin’.<sup>201</sup> Similarly, Article 1 of the UN Convention on the Elimination of Racial Discrimination, 1966 (to which all the Member States of the European Union and Council of Europe are party) defines racial discrimination to include the grounds of ‘race, colour, descent, or national or ethnic origin’.<sup>202</sup> The Committee on the Elimination of Racial Discrimination, responsible for interpreting and monitoring compliance with the treaty has further stated that unless justification exists to the contrary, determination as to whether an individual is a member of a particular racial or ethnic group, ‘shall ... be based upon self-identification by the individual concerned’.<sup>203</sup>

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201 ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, adopted 13 December 2002, paras. 1(b) and (c).

202 660 UNTS 195.

203 CERD, ‘General Recommendation VIII concerning the interpretation and application of Article 1, paragraphs 1 and 4 of the Convention’.

This prevents the State from excluding from protection any ethnic groups which it does not recognise.

Although EU law does not expressly list language, colour or descent as protected grounds, this does not mean that these characteristics could not be protected as part of race or ethnicity, in so far as language, colour and descent are inherently attached to race and ethnicity. It would also seem that to the extent that factors making up nationality are also relevant to race and ethnicity, this ground may, in appropriate circumstances, also fall under these grounds.

Religion is expressly protected as a separate ground under the Employment Equality Directive. However, an alleged victim of religious discrimination may have an interest in associating religion with the ground of race because, as EU law currently stands, protection from race discrimination is broader in scope than protection from religious discrimination. This is so because the Racial Equality Directive relates to the area of employment, but also access to goods and services, while the Employment Equality Directive only relates to the area of employment.

In explaining the concepts of race and ethnicity, the ECtHR has held that language, religion, nationality and culture may be indissociable from race. In the *Timishev* case, an applicant of Chechen origin was not permitted to pass through a checkpoint, as the guards were under instructions to deny entry to those of Chechen origin. The ECtHR gave the following explanation:

*'Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.'*<sup>204</sup>

Example: the case of *Sejdić and Finci v. Bosnia and Herzegovina* was the first to be decided under Protocol 12. The applicants complained that they were unable to stand in elections.<sup>205</sup> As part of a peace settlement to bring an end to the conflict in the 1990s, a power-sharing agreement between the three main

204 ECtHR, *Timishev v. Russia* (Nos. 55762/00 and 55974/00), 13 December 2005, para. 55.

205 ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC] (Nos. 27996/06 and 34836/06), 22 December 2009.

ethnic groups was reached. This included an arrangement that any candidate standing for election had to declare their affiliation to the Bosniac, Serb or Croat community. The applicants, who were of Jewish and Roma origin, refused to do so and alleged discrimination on the basis of race and ethnicity. The ECtHR repeated its explanation of the relationship between race and ethnicity, above, adding that '[d]iscrimination on account of a person's ethnic origin is a form of racial discrimination'. The ECtHR finding of racial discrimination illustrates the interplay between ethnicity and religion. Furthermore the ECtHR found that despite the delicate terms of the peace agreement this could not justify such discrimination.

Example: in a case before the Austrian Equal Treatment Commission, an individual, who was a Sikh, complained that he had been refused entry to a Viennese court because he would not remove the ceremonial sword carried by members of this religion.<sup>206</sup> The Commission dealt with this as a case of discrimination on the basis of ethnicity. On the facts, it found that the differential treatment was justified on grounds of safety.

The ECtHR has been extremely strict in relation to discrimination based on race or ethnicity stating: '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.'<sup>207</sup>

A useful case study highlighting the considerations that will be taken into account when dealing with a claim of discrimination on the grounds of race under the ECHR can be found on the Council of Europe's Human Rights Education for Legal Professionals website.<sup>208</sup>

206 Equal Treatment Commission, Senate III. English summary available at FRA InfoPortal, Case 5-1. Original text: <http://infoportal.fra.europa.eu/InfoPortal/caselawDownloadFile.do?id=5>.

207 ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC] (Nos. 27996/06 and 34836/06), 22 December 2009, para. 44. Similarly, ECtHR, *Timishev v. Russia* (Nos. 55762/00 and 55974/00), 13 December 2005, para. 58.

208 Case Study 15, Arrest, pre-trial detention, ill-treatment of Roma man accessible at [www.coehelp.org/course/view.php?id=18&topic=1](http://www.coehelp.org/course/view.php?id=18&topic=1).

## 4.7. Nationality or national origin

Article 2(a) of the Council of Europe's Convention on Nationality, 1996, defines it as 'the legal bond between a person and a State'. While this treaty has not received widespread ratification, this definition is based on accepted rules of public international law,<sup>209</sup> and has also been endorsed by the European Commission against Racism and Intolerance.<sup>210</sup> 'National origin' may be taken to denote a person's former nationality, which they may have lost or added to through naturalization, or to refer to the attachment to a 'nation' within a State (such as Scotland in the UK).

Example: the *Chen* case concerned a question as to whether a child had a right to reside in one Member State when they were born in a different Member State, whilst their mother, on whom they depended, was from a non-Member State.<sup>211</sup> The ECJ considered that when a Member State imposes requirements to be met in order to be granted citizenship, and where those were met, it is not open for a different Member State to then challenge that entitlement when they apply for residence.

While the ECHR provides greater protection than EU law on the ground of nationality, it readily accepts that the absence of a legal bond of nationality often runs together with the absence of factual connections to a particular State, which in turn prevents the alleged victim from claiming to be in a comparable position to nationals. The essence of the ECtHR's approach is that the closer the factual bond of an individual to a particular State, particularly in terms of paying taxation, the less likely it is that it will find that differential treatment on the basis of nationality is justified.

Example: in the case of *Zeibek v. Greece*, the applicant was refused a pension entitlement intended for those with 'large families'.<sup>212</sup> While she had the requisite number of children, one of her children did not hold Greek nationality at the time the applicant reached pensionable age. This situation had resulted

209 ICJ, *Nottebohm (Liechtenstein v. Guatemala)* [1955] ICJ Reports, 4, 23, 6 April 1955: 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.'

210 ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, adopted 13 December 2002, p. 6.

211 ECJ, *Chen v. Secretary of State for the Home Department*, Case C-200/02 [2004] ECR I-9925, 19 October 2004.

212 ECtHR, *Zeibek v. Greece* (No. 46368/06), 9 July 2009.

from the government's earlier decision to remove nationality from the applicant's entire family (which itself was tainted with irregularities) and then reissuing nationality only to three of her children (since the fourth was already married). The ECtHR found that a policy of revocation of nationality had been applied in particular to Greek Muslims, and that the refusal of the pension could not be justified on the basis of preserving the Greek nation as this reasoning itself amounted to discrimination on the grounds of national origin.

Example: the case of *Anakomba Yula v. Belgium*, a Congolese national, was unlawfully resident in Belgium.<sup>213</sup> Shortly after giving birth, her residence permit expired and she began the process of applying for a renewal. She was separating from her Congolese husband and both her and the natural father of her child, a Belgian national, wished to establish the child's paternity. To do so the applicant had to bring a claim against her spouse within a year of the birth. The applicant requested legal aid in order to cover the cost of the procedure, as she had insufficient funds. However, this was refused because such funding was only available to nationals of non-Council of Europe States where the claim related to establishing a right of residence. The applicant was advised to complete the renewal of her residence permit and then apply again. The ECtHR found that in these circumstances the applicant had been deprived of her right to a fair trial, and that this was based on her nationality. The State was not justified in differentiating between those who did or did not possess a residence permit in a situation where serious issues of family life were at stake, where there was a short time-limit to establish paternity, and where the individual was in the process of renewing her permit.

As discussed in Chapter 3.2., EU law prohibits nationality discrimination only in the particular context of free movement of persons. In particular, EU law on free movement grants limited rights to third-country nationals. Nevertheless, the ECHR does impose duties on all Member States of the Council of Europe (which includes all the Member States of the EU) to guarantee the rights in the ECHR to all individuals within their jurisdiction (including non-nationals). The ECtHR has maintained a balance between the State's right to control what benefits it may offer those enjoying the legal bond of nationality, against the need to prevent States discriminating against those who have formed substantial factual bonds with the

<sup>213</sup> ECtHR, *Anakomba Yula v. Belgium* (No. 45413/07), 10 March 2009.

State. The ECtHR has applied great scrutiny in matters relating to social security, if individuals can show a strong factual tie to a State.

The entitlement of States to regulate entry and exit of their borders by non-nationals is well established under public international law and accepted by the ECtHR. In this connection, the ECtHR has primarily intervened in complaints relating to deportation of individuals where they face inhuman or degrading treatment or punishment or torture in the destination State (under Article 3),<sup>214</sup> or have formed strong family ties in the host State which will be broken if the individual is forced to leave (under Article 8).<sup>215</sup>

Example: in the cases of *C. v. Belgium* and *Moustaquim v. Belgium* the applicants, who were Moroccan nationals, had been convicted of criminal offences and were to be deported.<sup>216</sup> They complained that this amounted to discrimination on the basis of nationality since neither Belgian nationals, nor non-nationals from other EU Member States, could be deported in similar circumstances. The ECtHR found that the applicants were not in a comparable situation to Belgian nationals, since nationals enjoy a right to remain in their home State, which is specifically enshrined in the ECHR (under Article 3 of Protocol 4). Furthermore, the difference in treatment between third-country nationals and nationals of other EU Member States was justifiable because the EU had created a special legal order as well as EU citizenship.

These cases should be compared to situations where the applicant has developed close factual links to the host State, through a long period of residence or contribution to the State through taxation.

Example: in the case of *Andrejeva v. Latvia* the applicant was formerly a citizen of the former Soviet Union with a right to permanent residence in Latvia.<sup>217</sup> National legislation classified the applicant as having worked outside Latvia for the period prior to independence (despite having been in the same post

<sup>214</sup> See, for example, ECtHR, *Chahal v. UK* (No. 22414/93), 15 November 1996.

<sup>215</sup> Although these cases stand lower chances of success. See, for example, ECtHR, *Abdulaziz, Cabales and Balkandali v. UK* (Nos. 9214/80, 9473/81 and 9474/81), 28 May 1985.

<sup>216</sup> ECtHR, *C. v. Belgium* (No. 21794/93), 7 August 1996; ECtHR, *Moustaquim v. Belgium* (No. 12313/86), 18 February 1991.

<sup>217</sup> ECtHR, *Andrejeva v. Latvia* [GC] (No. 55707/00), 18 February 2009.

within Latvian territory before and after independence) and consequently calculated her pension on the basis of the time spent in the same post after independence. Latvian nationals in the same post, in contrast, were entitled to a pension based on their entire period of service, including work prior to independence. The ECtHR found the applicant to be in a comparable situation to Latvian nationals since she was a 'permanent resident non-citizen' under national law and had contributed taxes on the same basis. It was stated that 'very weighty reasons' would be needed to justify differential treatment based solely on nationality, which it said did not exist in the present case. Although it accepted that the State usually enjoys a wide margin of appreciation in matters of fiscal and social policy, the applicant's situation was factually too close to that of Latvian nationals to justify discrimination on that basis.

Example: in the case of *Gaygusuz v. Austria*, a Turkish national who had been working in Austria was refused unemployment benefit because he did not hold Austrian citizenship.<sup>218</sup> The ECtHR found that he was in a comparable situation to Austrian nationals since he was a permanent resident and had contributed to the social security system through taxation. It found that the absence of a reciprocal social security agreement between Austria and Turkey could not justify the differential treatment, since the applicant's situation was factually too close to that of Austrian nationals.

Example: in the case of *Koua Poirrez v. France* a national of the Ivory Coast applied for a benefit payable to those with disabilities. It was refused on the basis that it was available only to French nationals or nationals from States with which France had a reciprocal social security agreement.<sup>219</sup> The ECtHR found that the applicant was in fact in a similar situation to French nationals since he satisfied all the other statutory criteria for receipt of the benefit, and had been in receipt of other social security benefits that were not dependent on nationality. It stated that 'particularly weighty reasons' would be needed to justify a difference in treatment between the applicant and other nationals. In contrast to the cases examined above, where the State was accorded a wide margin of appreciation in relation to fiscal and social security matters, it was not convinced by France's argument of the necessity to balance State income and expenditure, or of the factual difference that no reciprocal agreement existed between France and the Ivory Coast. Interestingly, the benefit in

<sup>218</sup> ECtHR, *Gaygusuz v. Austria* (No. 17371/90), 16 September 1996.

<sup>219</sup> ECtHR, *Koua Poirrez v. France* (No. 40892/98), 30 September 2003.

question was payable irrespective of whether the recipient had made contributions to the national social security regime (which was the principal reason for not tolerating nationality discrimination in the above cases).

## 4.8. Religion or belief<sup>220</sup>

While EU law contains some limited protection against discrimination on the basis of religion or belief, the ECHR's scope is significantly wider than this, since Article 9 contains a self-contained right to freedom of conscience, religion and belief.

Example: in the case of *Alujer Fernández and Caballero García v. Spain* the applicants complained that, unlike Catholics, they were unable to allocate a proportion of their income tax directly to their Church.<sup>221</sup> The ECtHR found the case inadmissible on the facts since the applicant's Church was not in a comparable position to the Catholic Church in that they had not made any such request to the government, and because the government had a reciprocal arrangement in place with the Holy See.

Example: the case of *Cha'are Shalom Ve Tsedek v. France* involved a Jewish organisation which certified as kosher meat that was sold among its members' restaurants and butcher shops.<sup>222</sup> Since it considered that the meat slaughtered by an existing Jewish organisation no longer conformed to the strict precepts associated with kosher meat, the applicant sought authorisation from the State to conduct its own ritual slaughters. This was refused on the basis that it was not sufficiently representative within the French Jewish community, and that authorised ritual slaughterers already existed. The ECtHR found that in the circumstances there was no actual disadvantage suffered by the organisation since it was still able to obtain meat slaughtered in the required method from other sources.

220 An explanation as to the scope of Article 9 of the ECHR can be found on the CoE Human Rights Education for Legal Professionals website: Murdoch, *Freedom of Thought, Conscience and Religion*, Human Rights Handbooks, No. 2, 2007, available at: [www.coehelp.org/mod/resource/view.php?inpopup=true&id=2122](http://www.coehelp.org/mod/resource/view.php?inpopup=true&id=2122).

221 ECtHR, *Alujer Fernández and Caballero García v. Spain* (dec.) (No. 53072/99), 14 June 2001.

222 ECtHR, *Cha'are Shalom Ve Tsedek v. France* [GC] (No. 27417/95), 27 June 2000.

What actually constitutes a 'religion' or 'belief' qualifying for protection under the Employment Equality Directive or the ECHR has not received extensive consideration by the ECJ or ECtHR, but has been analysed thoroughly before national courts.<sup>223</sup>

Example: in *Islington London Borough Council v. Ladele (Liberty intervening)*, the UK Court of Appeal was asked to consider whether the claimant, who was a registrar of births, marriages and deaths, was discriminated against on the grounds of religion or belief when she was disciplined for refusing to conduct civil partnerships.<sup>224</sup> Her refusal was based on her Christian beliefs. The Court of Appeal held that this was not a case of direct religious discrimination, as the less favourable treatment was not based on her religious beliefs, but by her refusal to comply with a term of her employment. The indirect discrimination claim was also rejected, with the Court of Appeal indicating that it was part of the council's overarching commitment to the promotion of equality and diversity, both within the community and internally, and that such a policy did not intrude on the claimant's right to have such beliefs. The Court of Appeal also considered that to find otherwise would lead to discrimination on a different ground, that of sexual orientation; the court accepted that the individual right of non-discrimination must be balanced against the community's right to non-discrimination.

In a series of cases relating to the substantive right to freedom of religion and belief under the ECHR, the ECtHR has made clear that the State cannot attempt to prescribe what constitutes a religion or belief, and that these notions protect 'atheists, agnostics, sceptics and the unconcerned', thus protecting those who choose 'to hold or not to hold religious beliefs and to practice or not to practice a religion'. These cases also note that religion or belief is essentially personal and subjective, and need not necessarily relate to a faith arranged around institutions.<sup>225</sup>

223 The right to freedom of religion and belief is also protected as a free-standing right in Article 18 of the International Covenant on Civil and Political Rights, 1966 (which all the Member States of the European Union and the Council of Europe have joined). See UN Human Rights Committee, General Comment No. 22: Article 18 (Freedom of thought, conscience or religion).

224 *Islington London Borough Council v. Ladele (Liberty intervening)* [2009] EWCA Civ 1357, UK Court of Appeal, 12 February 2010.

225 ECtHR, *Moscow Branch of the Salvation Army v. Russia* (No. 72881/01), 5 October 2006, paras. 57-58; ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova* (No. 45701/99), 13 December 2001, para. 114; ECtHR, *Hasan and Chaush v. Bulgaria* [GC] (No. 30985/96), 26 October 2000, paras. 60 and 62.

Newer religions, such as Scientology, have also been found to qualify for protection.<sup>226</sup>

The ECtHR has elaborated on the idea of ‘belief’ in the context of the right to education under Article 2 of Protocol 1 to the ECHR, which provides that the State must respect the right of parents to ensure that their child’s education is ‘in conformity with their own religious and philosophical convictions’. The ECtHR stated:

*‘In its ordinary meaning the word “convictions”, taken on its own, is not synonymous with the words “opinions” and “ideas”, such as are utilised in Article 10 ... of the Convention, which guarantees freedom of expression; it is more akin to the term “beliefs” (in the French text: “convictions”) appearing in Article 9 ... which ... denotes views that attain a certain level of cogency, seriousness, cohesion and importance.’<sup>227</sup>*

The ECtHR has recently been faced with cases related to religious freedom in the context of States wishing to maintain secularism and minimise the potentially fragmentary effect of religion on their societies. Here it has placed particular weight on the State’s stated aim of preventing disorder and protecting the rights and freedoms of others.

Example: the case of *Köse and Others v. Turkey* concerned a dress code prohibiting the wearing of headscarves by girls in school, where it was claimed that this constituted discrimination on the basis of religion since wearing the headscarf was a Muslim religious practice.<sup>228</sup> The ECtHR accepted that the rules relating to dress were not connected to issues of affiliation to a particular religion, but were rather designed to preserve neutrality and secularism in schools, which in turn would prevent disorder as well as protect the rights of others to non-interference in their own religious beliefs. The claim was therefore considered to be manifestly ill-founded and inadmissible. A similar approach was taken in a case which related to the dress code for teachers.<sup>229</sup>

<sup>226</sup> ECtHR, *Church of Scientology Moscow v. Russia* (No. 18147/02), 5 April 2007.

<sup>227</sup> ECtHR, *Campbell and Cosans v. UK* (Nos. 7511/76 and 7743/76), 25 February 1982, para 36.

<sup>228</sup> ECtHR, *Köse and Others v. Turkey* (dec.) (No. 26625/02), 24 January 2006.

<sup>229</sup> ECtHR, *Dahlab v. Switzerland* (dec.) (No. 42393/98), 15 February 2001.

## 4.9. Language

It should be noted that both the Council of Europe Framework Convention for the Protection of National Minorities, 1995,<sup>230</sup> (ratified by 39 Member States) and the European Charter for Regional or Minority Languages, 1992,<sup>231</sup> (ratified by 24 Members States) imposes specific duties on States relating to the use of minority languages. However, neither instrument defines the meaning of 'language'. Article 6(3) of the ECHR explicitly provides for certain guarantees in the context of the criminal process, such that everyone enjoys the right to have accusations against them communicated in a language which they understand, as well as the right to an interpreter where they cannot understand or speak the language used in court.

The ground of language does not feature, of itself, as a separate protected ground under the non-discrimination directives, although it does in the ECHR. Nevertheless, it may be protected under the Racial Equality Directive in so far as it can be linked to race or ethnicity, and may also be considered by the ECtHR under this ground. It has also been protected via the ground of nationality by the ECJ in the context of the law relating to free movement of persons.<sup>232</sup>

The principle case before the ECtHR involving language relates to the context of education.

Example: in the *Belgium Linguistic case* a collection of parents complained that national law relating to the provision of education was discriminatory on the basis of language.<sup>233</sup> In view of the French-speaking and Dutch-speaking communities in Belgium, national law stipulated that State-provided or State-subsidised education would be offered in either French or Dutch depending on whether the region was considered French or Dutch. Parents of French-speaking children living in the Dutch-speaking region complained that this prevented, or made it considerably harder, for their children to be educated in French. The ECtHR found that while there was a difference in treatment this was justified. The decision was based around consideration that regions were predominantly

230 CETS No. 157.

231 CETS No. 148.

232 ECJ, *Groener v. Minister for Education and the Dublin Vocational Educational Committee* Case C-379/87 [1989] ECR 3967, 28 November 1989.

233 ECtHR, *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium* (Nos. 1474/62 and others), 23 July 1968.

unilingual. The difference in treatment was therefore justified since it would not be viable to make teaching available in both languages. Furthermore, families were not prohibited from making use of private education in French in Dutch-speaking regions.

For further elucidation as to how the protected ground of language operates in practice it is possible to draw on two cases decided by the UN Human Rights Committee (HRC), responsible for interpreting and monitoring compliance with the International Covenant on Civil and Political Rights (which all EU Member States have joined).

Example: in the case of *Diergaardt v. Namibia* the applicants belonged to a minority group of European descent which had formerly enjoyed political autonomy and now fell within the State of Namibia.<sup>234</sup> The language used by this community was Afrikaans. The applicants complained that during court proceedings they were obliged to use English rather than their mother tongue. They also complained of a State policy to refuse to respond in Afrikaans to any written or oral communications from the applicants even though they had the ability to do so. The HRC found that there had been no violation of the right to a fair trial, since the applicants could not show that they were negatively affected by the use of English during court proceedings. This would suggest that the right to an interpreter during a trial does not extend to situations where the language is simply not the mother tongue of the alleged victim. Rather it must be the case that the victim is not sufficiently able to understand or communicate in that language. The HRC also found that the State's official policy of refusing to communicate in a language other than the official language (English) constituted a violation of the right to equality before the law on the basis of language. While the State may choose its official language, it must allow officials to respond in other languages where they are able to do so.

## 4.10. Social origin, birth and property

It is possible to view these three grounds as interconnected as they relate to a status imputed to an individual by virtue of an inherited social, economic or biological

<sup>234</sup> HRC, *Diergaardt and Others v. Namibia*, Communication No. 760/1997, 6 September 2000.

feature<sup>235</sup>. As such they may also be interrelated with race and ethnicity. Aside from the ground of 'birth', few, if any, cases have been brought before the ECtHR relating to these grounds.

Example: in the case of *Mazurek v. France*, an individual who had been born out of wedlock complained that national law prevented him (as an 'adulterine' child) from inheriting more than one quarter of his mother's estate.<sup>236</sup> The ECtHR found that this difference in treatment, based solely on the fact of being born out of wedlock, could only be justified by particularly 'weighty reasons'. While preserving the traditional family was a legitimate aim it could not be achieved by penalising the child who has no control over the circumstances of their birth.

Example: in the case of *Chassagnou and Others v. France*, the applicants complained that they were not permitted to use their land in accordance with their wishes.<sup>237</sup> Laws within particular regions obliged small landowners to transfer public hunting rights over their land, while large landowners were under no such obligation and could use their land as they wished. The applicants wished to prohibit hunting on their land and use it for the conservation of wildlife. The ECtHR found that this constituted discrimination on the basis of property.

The grounds of social origin, birth and property also feature under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, 1966. The Committee on Economic, Social and Cultural Rights, responsible for monitoring and interpreting the treaty has expanded on their meaning in its General Comment 20.

According to the Committee, 'social origin', 'birth' and 'property' status are interconnected. Social origin 'refers to a person's inherited social status'. It may relate to the position that they have acquired through birth into a particular social class or community (such as those based on ethnicity, religion, or ideology), or from one's social situation such as poverty and homelessness. Additionally, the ground of birth may refer to one's status as born out of wedlock, or being adopted. The ground

<sup>235</sup> The grounds of social origin, birth and property also feature under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, 1966 (to which all the EU Member States are party). See Committee on Economic, Social and Cultural Rights, General Comment No. 20, 'Non-Discrimination in Economic, Social and Cultural Rights', UN Doc. E/C.12/GC/20, 10 June 2009, paras. 24-26, 35.

<sup>236</sup> ECtHR, *Mazurek v. France* (No. 34406/97), 1 February 2000.

<sup>237</sup> ECtHR, *Chassagnou and Others v. France* (Nos. 25088/94, 28331/95 and 28443/95), 29 April 1999.

of property may relate to one's status in relation to land (such as being a tenant, owner, or illegal occupant), or in relation other property.<sup>238</sup>

## 4.11. Political or other opinion

The ECHR expressly lists 'political or other opinion' as a protected ground, although they do not feature among the grounds protected by the EU non-discrimination directives. Presumably, where a particular conviction is held by an individual but it does not satisfy the requirements of being a 'religion or belief' it may still qualify for protection under this ground. This ground has rarely been ruled upon by the ECtHR. As with other areas of the ECHR, 'political or other opinion' is protected in its own right through the right to freedom of expression under Article 10, and from the case-law in this area it is possible to gain an appreciation of what may be covered by this ground. In practice it would seem that where an alleged victim feels that there has been differential treatment on this basis, it is more likely that the ECtHR would simply examine the claim under Article 10.

At a general level, the ECtHR established in the case of *Handyside v. UK* that the right to freedom of expression will protect not only "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population'.<sup>239</sup> While there is extensive case-law in this area this chapter will confine itself to illustrating, through two cases, how political opinion is likely to receive stronger protection than other types of opinion.

Example: in the case of *Steel and Morris v. UK*, the applicants were campaigners who distributed leaflets containing untrue allegations about the company McDonalds.<sup>240</sup> The applicants were sued in an action for defamation before the national courts and ordered to pay damages. The ECtHR found that the action in defamation constituted an interference with freedom of expression, but that this served the legitimate purpose of protecting individuals' reputations. However, it was also found that free speech on matters of public interest deserve strong protection, and given that McDonalds

238 Committee on Economic, Social and Cultural Rights, General Comment 20, 'Non-Discrimination in Economic, Social and Cultural Rights', UN Doc. E/C.12/GC/20, 10 June 2009, paras. 24-26, 35.

239 ECtHR, *Handyside v. UK* (No. 5493/72), 7 December 1976.

240 ECtHR, *Steel and Morris v. UK* (No. 68416/01), 15 February 2005.

was a powerful corporate entity which had not proved that it had suffered harm as the result of the distribution of several thousand leaflets, and that the damages awarded were relatively high compared to the applicants' income, the interference with their freedom of expression was disproportionate.

Example: the case of *Castells v. Spain* concerned a member of parliament who was prosecuted for 'insulting' the government after criticising government inaction in addressing acts of terrorism in the Basque country.<sup>241</sup> The ECtHR underlined the importance of freedom of expression in a political context, particularly given its important role in the proper functioning of a democratic society. As such, the ECtHR found that any interference would call for 'the closest of scrutiny'.

## 4.12. 'Other status'

As can be seen from the above, the ECtHR has developed several grounds under the 'other status' category, many of which coincide with those developed under EU law, such as sexual orientation, age, and disability.

In addition to disability, age, and sexual orientation, the ECtHR has also recognised that the following characteristics are protected grounds under 'other status': fatherhood;<sup>242</sup> marital status;<sup>243</sup> membership of an organisation;<sup>244</sup> military rank;<sup>245</sup> parenthood of a child born out of wedlock;<sup>246</sup> place of residence.<sup>247</sup>

Example: the case of *Petrov v. Bulgaria* concerned the practice in a prison of allowing inmates with spouses to telephone them twice a month. The applicant had lived with his partner for a period of four years and had a child with her before his incarceration. The ECtHR found that, although marriage

241 ECtHR, *Castells v. Spain* (No. 11798/85), 23 April 1992.

242 ECtHR, *Weller v. Hungary* (No. 44399/05), 31 March 2009.

243 ECtHR, *Petrov v. Bulgaria* (No. 15197/02), 22 May 2008.

244 ECtHR, *Danilenkov and Others v. Russia* (No. 67336/01), 30 July 2009 (trade union); ECtHR, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy* (no. 2) (No. 26740/02), 31 May 2007.

245 ECtHR, *Engel and Others v. the Netherlands* (Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72), 8 June 1976.

246 ECtHR, *Sommerfeld v. Germany* [GC] (No. 31871/96), 8 July 2003; ECtHR, *Sahin v. Germany* [GC] (No. 30943/96), 8 July 2003.

247 ECtHR, *Carson and Others v. UK* [GC] (No. 42184/05), 16 March 2010.

has a special status, for the purposes of rules concerning communication via telephone, the applicant, who had established a family with a stable partner, was in a comparable situation to married couples. The ECtHR stated that '[w]hile the Contracting States may be allowed a certain margin of appreciation to treat differently married and unmarried couples in the fields of, for instance, taxation, social security or social policy... it is not readily apparent why married and unmarried partners who have an established family life are to be given disparate treatment as regards the possibility to maintain contact by telephone while one of them is in custody.' The ECtHR accordingly found the discrimination unjustified.

## Key points

- Under the EU non-discrimination directives the protected grounds are expressly fixed to: sex, racial or ethnic origin, age, disability, religion or belief and sexual orientation. Under the ECHR they are open-ended and may be developed on a case-by-case basis.
- Under EU law sex may include gender identity to a limited extent, protecting individuals who intend to undergo or have undergone gender reassignment surgery. Gender identity has also been examined by the ECtHR.
- Elements such as colour, descent, nationality, language, or religion fall under the protected ground of race or ethnicity under the ECHR; however, clarification of the actual scope of this protected ground under EU law is still awaited through jurisprudence of the ECJ.
- Discrimination on the basis of nationality features as a protected ground under the ECHR. Nationality discrimination is only prohibited in EU law in the context of the Law on the free movement of persons.
- The term 'religion' should be relatively widely construed, and not limited to organised or well-established, traditional religions.
- Even in cases where discrimination may have occurred the ECtHR frequently examines complaints only on the basis of substantive Articles of the ECHR. This may alleviate the need to prove differential treatment or find a comparator.

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# 5

## Evidential issues in non-discrimination law

### 5.1. Introduction

Discrimination does not tend to be manifested in an open and easily identifiable manner. Proving direct discrimination is often difficult even though, by definition, the differential treatment is 'openly' based on a characteristic of the victim. As discussed in Chapter 2, the ground of differential treatment is often either not expressed or is superficially related to another factor (such as benefits conditioned on an individual being retired, which are connected to age as a protected ground). In this sense, cases where individuals openly declare their basis for differential treatment as one of the protected grounds are relatively rare. An exception to this may be found in the *Feryn* case, where the owner of a company in Belgium declared, through advertisements and orally, that no 'immigrants' would be recruited to work for him.<sup>248</sup> The ECJ found that this was a clear case of direct discrimination on the basis of race or ethnicity. However, the perpetrators will not always declare that they are treating someone less favourably than others, nor indicate their reason for doing so. A woman may be turned down for a job and told that she is simply 'less qualified' than the male candidate who is offered the job. In this situation the victim may find it difficult to prove that she was directly discriminated against because of her sex.

To address the difficulty of proving that differential treatment was based on a protected ground, European non-discrimination law allows the burden of proof to be shared. Accordingly, once the claimant can show facts from which it can

<sup>248</sup> ECJ, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Case C-54/07 [2008] ECR I-5187, 10 July 2008.

be presumed that discrimination may have occurred, the burden of proof falls on the perpetrator to prove otherwise. This shift in the burden of proof is particularly helpful in claims of indirect discrimination where it is necessary to prove that particular rules or practices have a disproportionate impact on a particular group. In order to raise a presumption of indirect discrimination, a claimant may need to rely on statistical data that proves general patterns of differential treatment. Some national jurisdictions also accept evidence generated through 'situation testing'.

## 5.2. Sharing of the burden of proof

It is normally for the person bringing the claim to convince the deciding body that discrimination has occurred. However, it can be particularly difficult to show that the differential treatment received was on the basis of a particular protected characteristic. This is because the motive behind differential treatment often

Shared burden of proof: the claimant needs to bring sufficient evidence to suggest that discriminatory treatment may have occurred. This will raise a presumption of discrimination, which the alleged perpetrator then has to rebut.

exists only in the mind of the perpetrator. Accordingly, claims of discrimination are most often based on objective inferences related to the rule or practice in question. Put otherwise, the court must be convinced that the only reasonable explanation for the difference in treatment is the protected characteristic of the victim, such as sex or race. The principle applies equally in cases of direct or indirect discrimination.

Because the alleged perpetrator is in possession of the information needed to prove a claim, non-discrimination law allows the burden of proof to be shared with the alleged perpetrator. The principle of the sharing of the burden of proof is well entrenched in the ECHR and the law of the EU.<sup>249</sup>

This has been explained through the ECtHR case-law, which, along with other regional and global human rights protection mechanisms, has adopted the sharing of the burden of proof more generally in relation to proving claims of human rights violations. The practice of the ECtHR is to look at the available evidence as a whole, out of consideration of the fact that it is the State that often has control over much of the information needed to prove a claim. Accordingly, if the facts as presented by

<sup>249</sup> In addition to the cases referred to below, see Racial Equality Directive (Article 8), Employment Equality Directive (Article 10), Gender Equality Directive (Recast) (Article 19), Gender Goods and Services Directive (Article 9). See also case-law of the European Committee of Social Rights: *SUD Travail Affaires Sociales v. France* (Complaint No. 24/2004), 8 November 2005, and *Mental Disability Advocacy Centre (MDAC) v. Bulgaria* (Complaint No. 41/2007), 3 June 2008.

the claimant appear credible and consistent with the available evidence, the ECtHR will accept them as proven, unless the State is able to offer a convincing alternative explanation. In the ECtHR's words it accepts as facts those assertions that are

*'supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions ... [P]roof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the [ECHR] right at stake.'*<sup>250</sup>

Example: in the case of *Timishev v. Russia*, the claimant alleged that he was prevented from passing a checkpoint into a particular region because of his Chechen ethnic origin.<sup>251</sup> The ECtHR found this to be corroborated by official documents, which noted the existence of a policy to restrict the movement of ethnic Chechens. The explanation of the State was found unconvincing because of inconsistencies in its assertion that the victim left voluntarily after being refused priority in the queue. Accordingly, the ECtHR accepted that the claimant had been discriminated against on the basis of his ethnicity.

Example: in the *Brunnhöfer* case, the claimant alleged sex discrimination because she was paid less than a male colleague who was on the same pay grade.<sup>252</sup> The ECJ stated that it was for the claimant to prove, firstly, that she was receiving less pay than her male counterpart and, secondly, that she was performing work of equal value. This would be sufficient to raise a presumption that the differential treatment could only be explained by reference to her sex. It would then fall to the employer to disprove this.

<sup>250</sup> ECtHR, *Nachova and Others v. Bulgaria* [GC] (Nos. 43577/98 and 43579/98), 6 July 2005, para. 147. This is repeated in the case of ECtHR, *Timishev v. Russia* (Nos. 55762/00 and 55974/00), 13 December 2005, para. 39, and ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007, para. 178.

<sup>251</sup> ECtHR, *Timishev v. Russia* (Nos. 55762/00 and 55974/00), 13 December 2005, paras. 40-44.

<sup>252</sup> ECJ, *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG*, Case C-381/99 [2001] ECR I-4961, 26 June 2001, paras. 51-62.

It is important to keep two issues in mind. Firstly, it is national law that will determine what kind of evidence is admissible before national bodies, and this may be stricter than the rules used by the ECtHR or ECJ. Secondly, the rule on the reversal of the burden of proof will not normally apply in cases of criminal law where the State is prosecuting the perpetrator for a crime that was motivated by a racial prejudice, otherwise known as a 'hate crime'. This is partly because a higher standard of proof is needed to establish criminal liability, and partly because it would be difficult to require a perpetrator to prove that they did not hold a racist motive, which is entirely subjective.<sup>253</sup>

The alleged perpetrator can rebut the presumption in two ways. They may either prove that the claimant is not actually in a similar or comparable situation to their 'comparator', as discussed in Chapter 2.2.2., or that the differential treatment is not based on the protected ground, but other objective differences, as discussed in Chapter 2.6. If the perpetrator fails to rebut the presumption they will have to raise a defence of differential treatment, showing that it is an objectively justified and proportionate measure.

Example: in the *Brunnhofer* case, above, the ECJ offered guidance on how the employer might rebut the presumption of discrimination. Firstly, by showing that the male and female employees were not actually in a comparable situation because they performed work which was not of equal value. This might be the case if their jobs involved duties of a substantially different nature. Secondly, by showing that objective factors, unrelated to sex, explained the difference in pay. This might be the case if the male employee's income was being supplemented by travel allowances owed by virtue of him having to commute over a long distance and stay in a hotel during the working week.

Example: in the *Feryn* case, above, the ECJ found that the advertisements and statements made by the perpetrator gave rise to a presumption of direct discrimination. However, the ECJ also said that the alleged perpetrator could rebut this presumption if he could prove that recruitment practices did not actually treat non-Whites differently – for instance, by showing that non-White staff were in fact routinely recruited.

253 For the approach of the ECtHR to the reversal of the burden of proof in the context of racist violence see ECtHR, *Nachova and Others v. Bulgaria* [GC] (Nos. 43577/98 and 43579/98), 6 July 2005, paras. 144-159. EU discrimination legislation does not require the reversal of the burden of proof to be applied in the context of criminal law.

## 5.2.1. Factors not needing to be proven

Certain issues of fact which often accompany examples of discrimination, such as the existence of prejudice, or an intention to discriminate, are not actually of relevance to determining whether the legal test for discrimination has been satisfied. What must be proven in a case of discrimination is simply the existence of differential treatment, on the basis of a prohibited ground, which is not justified. This means that several ancillary facts surrounding situations of discrimination do not need establishing in order to prove a claim.

Firstly, there is no need to prove that the perpetrator is motivated by prejudice – thus, there is no need to prove the perpetrator has ‘racist’ or ‘sexist’ views in order to prove race or sex discrimination. In general law cannot regulate individuals’ attitudes since they are entirely internal. Rather it can only regulate actions through which such attitudes may manifest themselves.

Example: in the *Feryn* case, the owner of the company said that he applied this rule because his customers (rather than he himself) only wanted white Belgians to perform the work. The ECJ did not treat this as relevant to deciding if discrimination had occurred. You will not normally need to prove a discriminatory motive unless you are attempting to prove the commission of a ‘hate crime’, since criminal law has higher thresholds of evidence.

Secondly, it is not necessary to show that the rule or practice in question is intended to result in differential treatment. That is to say, even if a public authority or private individual can point to a well-intentioned or good-faith practice, if the effect of that practice is to disadvantage a particular group, this will amount to discrimination.

Example: in the case of *D.H. and Others v. the Czech Republic*, discussed above, the government argued that the system of ‘special’ schools was established in order to assist in the education of Roma children by overcoming language difficulties and redressing the lack of pre-school education.<sup>254</sup> However, the ECtHR found that it was irrelevant whether the policy in question was aimed at Roma children. In order to prove discrimination it was necessary to show

<sup>254</sup> ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007, para. 79.

that they were disproportionately and negatively affected by comparison to the majority population, not that there existed any intention to discriminate.<sup>255</sup>

Thirdly, in relation to a case on race discrimination, the ECJ found that there was no need to prove that there is actually an identifiable victim, and presumably this has equal application for other grounds of discrimination in similar circumstances. While under EU law there may be no requirement for an identifiable victim, this is not the case for accessing the ECtHR, where such claim would not meet the criteria for admissibility under Article 34 of the ECHR.

Example: in the *Feryn* case it was not possible to show that someone had tried to apply for a job and been turned down, and it was not possible to find someone who said that they had decided not to apply for the job on the basis of the advert. Put in other words, there was no 'identifiable' victim, and the case was brought by Belgium's equality body. The ECJ said that it was not necessary to identify someone who had been discriminated against. This was because it was clear from the wording of the advert that 'non-Whites' would be deterred from applying because they knew in advance that they could not be successful. According to this, it would be possible to prove that legislation or policies were discriminatory, without needing to show an actual victim.

Example: in cases of 'situation testing' (discussed below) individuals often take part in the knowledge or expectation that they will be treated unfavourably. Their main aim is not to actually access the service in question, but to collect evidence. This means that these individuals are not 'victims' in the traditional sense. They are concerned with ensuring enforcement of the law rather than seeking compensation for harm suffered. In a case brought in Sweden, where a group of law students conducted situation testing at nightclubs and restaurants, the Supreme Court found that those involved in testing were still able to bring proceedings for discriminatory treatment. At the same time the damages they were awarded could be reduced to reflect the fact that they had not been denied something that they actually wanted (i.e., entry to particular establishments).<sup>256</sup>

<sup>255</sup> Ibid, paras. 175 and 184.

<sup>256</sup> Sweden, Supreme Court, *Escape Bar and Restaurant v. Ombudsman against Ethnic Discrimination* T-2224-07, 1 October 2008. English summary available at FRA InfoPortal, Case 365-1; European Network of Legal Experts on the Non-Discrimination Field, 8 (July 2009) 'European Anti-Discrimination Law Review', p. 68.

### 5.3. Role of statistics and other data

Statistical data can play an important role in helping a claimant give rise to a presumption of discrimination. It is particularly useful in proving indirect discrimination, because in these situations the rules or practices in question are neutral on the surface. Where this is the case it is necessary to focus on the effects of the rules or practices to show that they are disproportionately unfavourable to specific groups of persons by comparison to others in a similar situation. Production of statistical data works together with the reversal of the burden of proof: where data shows, for example, that women or disabled persons are particularly disadvantaged, it will be for the State to give a convincing alternative explanation of the figures. The ECtHR spelt this out in the case of *Hoogendijk v. the Netherlands*.<sup>257</sup>

*‘[T]he Court considers that where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex.’*

When considering statistical evidence the courts do not appear to have laid down any strict threshold requirement that needs to be evidenced in establishing that indirect discrimination has taken place. The ECJ does emphasise that a substantial figure needs to be achieved. A summary of ECJ case-law is presented in the Opinion of Léger AG in the *Nolte* case where he stated in relation to sex discrimination:

*‘[I]n order to be presumed discriminatory, the measure must affect “a far greater number of women than men” [Rinner-Kühn<sup>258</sup>] or “a considerably lower percentage of men than women” [Nimz<sup>259</sup>, Kowalska<sup>260</sup>] or “far more women than men” [De Weerd, née Roks, and Others<sup>261</sup>].*

*Cases suggest that the proportion of women affected by the measure must be particularly marked. In Rinner-Kühn, the Court inferred the existence of*

257 *Hoogendijk v. the Netherlands* (dec.) (No. 58641/00), 6 January 2005.

258 ECJ, *Rinner-Kühn v. FWW Spezial-Gebäudereinigung*, Case C-171/88 [1989] ECR 2743, 13 July 1989.

259 ECJ, *Nimz v. Freie und Hansestadt Hamburg*, Case C-184/89 [1991] ECR I-297, 7 February 1991.

260 ECJ, *Kowalska v. Freie und Hansestadt Hamburg*, Case C-33/89 [1990] ECR I-2591, 27 June 1990.

261 ECJ, *De Weerd, née Roks, and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others*, Case C-343/92 [1994] ECR I-571, 24 February 1994.

*a discriminatory situation where the percentage of women was 89%. In this instance, per se the figure of 60% ... would therefore probably be quite insufficient to infer the existence of discrimination.*<sup>262</sup>

Example: in the *Schönheit* case a part-time employee alleged that she was discriminated against on the basis of her sex.<sup>263</sup> The difference in payable pensions, which was not based on differences in the time worked, meant that part-time employees were, effectively, paid less than full-time employees. Statistical evidence was brought to show that 87.9% of part-time employees were women. As the measure, although neutral, negatively affected women disproportionately to men, the ECJ accepted that it gave rise to a presumption of indirect discrimination on the basis of sex. Similarly, a disadvantage to part-time workers, where 87% of these were women, was accepted as sufficient in the *Gerster* case.<sup>264</sup>

Example: the *Seymour-Smith* case concerned UK law relating to unfair dismissal, which gave special protection to those who had been working for longer than two years continuously with the particular employer.<sup>265</sup> The complainant alleged that this amounted to indirect discrimination based on sex, since women were less likely than men to satisfy this criterion. This case is interesting because the ECJ suggested that a lower level of disproportion could still prove indirect discrimination 'if it revealed a persistent and relatively constant disparity over a long period between men and women'. However, on the particular facts of this case the ECJ indicated that the statistics that were presented, which indicated that 77.4% of men and 68.9% of women fulfilled the criterion, did not evidence that a considerably smaller percentage of women could comply with the rule.

Example: the case of *D.H. and Others v. the Czech Republic* involved complaints by Roma applicants that their children were excluded from the mainstream education system and placed in 'special' schools intended for those with

262 Opinion of Advocate General Léger of 31 May 1995, paras. 57-58 in ECJ, *Nolte v. Landesversicherungsanstalt Hannover*, Case C-317/93 [1995] ECR I-4625, 14 December 1995.

263 ECJ, *Hilde Schönheit v. Stadt Frankfurt am Main* and *Silvia Becker v. Land Hessen*, Joined Cases C-4/02 and C-5/02 [2003] ECR I-12575, 23 October 2003.

264 ECJ, *Gerster v. Freistaat Bayern*, Case C-1/95 [1997] ECR I-5253, 2 October 1997.

265 ECJ, *R v. Secretary of State for Employment*, ex parte *Seymour-Smith and Perez*, Case C-167/97 [1999] ECR I-623, 9 February 1999.

learning difficulties, on the basis of their Roma ethnicity.<sup>266</sup> The allocation of Roma children to 'special' schools was based on the use of tests designed to test intellectual capacity. Despite this apparently 'neutral' practice, the nature of the tests made it inherently more difficult for Roma children to achieve a satisfactory result and enter the mainstream education system. The ECtHR found this to be proven by reference to statistical evidence showing the particularly high proportion of pupils of Roma origin placed in 'special' schools. The data submitted by the applicants relating to their particular geographical region suggested that 50 to 56% of special-school pupils were Roma, while they only represented around 2% of the total population in education. Data taken from inter-governmental sources suggested between 50% and 90% of Roma attended special schools in the country as a whole. The ECtHR found that while the data was not exact it did reveal that the number of Roma children affected was 'disproportionately high' relative to their composition of the population as a whole.<sup>267</sup>

It seems that it may be possible to prove that a protected group is disproportionately affected even where no statistical data is available, but the available sources are reliable and support this analysis.

Example: the case of *Opuz v. Turkey* involved an individual with a history of domestic violence who had brutalised his wife and her mother on several occasions, eventually murdering the mother.<sup>268</sup> The ECtHR found that the State had failed to protect the applicant and her mother from inhuman and degrading treatment, as well as the latter's life. It also found that the State had discriminated against the applicants because the failure to offer adequate protection was based on the fact that they were women. It came to this conclusion in part based on evidence that victims of domestic violence were predominantly women, and figures illustrating the relatively limited use the national courts had made of powers to grant orders designed to protect victims of violence in the home. Interestingly in this case, there were no statistics presented to the ECtHR showing that victims of domestic violence were predominantly women, and indeed it was noted that Amnesty International stated that there

<sup>266</sup> ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007.

<sup>267</sup> ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007, paras. 18, 196-201.

<sup>268</sup> ECtHR, *Opuz v. Turkey* (No. 33401/02), 9 June 2009.

were no reliable data to this effect. Rather, the ECtHR was prepared to accept the assessment of Amnesty International, a reputable national NGO and the UN's Committee on the Elimination of Discrimination Against Women that violence against women was a significant problem in Turkey.

Note that statistical data may not always be necessary to prove cases of indirect discrimination. Whether statistics are necessary in order to prove a claim will depend on the facts of the case. In particular, proof as to the practices or beliefs of others belonging to the same protected category may be enough.

Example: in the case of *Oršuš and Others v. Croatia* certain schools had established classes which dealt with reduced curricula as compared to normal classes. It was alleged that these classes contained a disproportionately high number of Roma students and therefore amounted to indirect discrimination on the basis of ethnicity. The government contended that these classes were constituted on the basis of competence in Croatian, and that once a student reached adequate language proficiency they were transferred to the mainstream classes. The ECtHR found that, unlike the *D.H.* case, the statistics alone did not give rise to a presumption of discrimination. In one school 44% of pupils were Roma and 73% attended a Roma-only class. In another school 10% were Roma and 36% of them attended a Roma-only class. This confirmed that there was no general policy to automatically place Roma in separate classes. However, the ECtHR went on to state that it was possible to establish a claim of indirect discrimination without relying on statistical data. Here, the fact that the measure of placing children in separate classes on the basis of their insufficient command of Croatian was only applied to Roma students. Accordingly, this gave rise to a presumption of differential treatment.<sup>269</sup>

Example: a case taken before the Slovenian Advocate of the Principle of Equality involved an employer who provided meals for employees that often included products derived from pork meat or fat. A Muslim employee requested the alternative monthly meal allowance in order to purchase their own food, which the employer only issued to employees who could prove the need for alternative eating arrangements for medical reasons.<sup>270</sup> This was a

<sup>269</sup> ECtHR, *Oršuš and Others v. Croatia* [GC] (No. 15766/03), 16 March 2010, paras. 152-153.

<sup>270</sup> Advocate of the Principle of Equality (Slovenia), Decision No. UEM-0921-1/2008-3, 28 August 2008. English summary available at FRA Infoportal, Case 364-1; European Network of Legal Experts on the Non-Discrimination Field, 8 (July 2009) 'European Anti-Discrimination Law Review', at p. 64.

case of indirect discrimination since a practice that was neutral on the surface had an inherently negative impact on Muslims who are not permitted to eat pork. In the circumstances of this case it was not necessary to bring statistical evidence to show that the rule negatively affects Muslims because it is readily ascertainable that Muslims may not eat pork by reference to evidence of their religious practices.

Example: a case taken before the UK courts involved an employer that prohibited the wearing of jewellery (including for religious reasons) on the outside of the employee's uniform.<sup>271</sup> A Christian employee claimed that this amounted to discrimination on the basis of her religion because she was not permitted to wear a cross. During the case and the subsequent appeals the courts were prepared to accept that this could constitute indirect discrimination on religious grounds, if it could be proved that wearing the cross was a requirement of the Christian faith. For this purpose the Employment Tribunal sought evidence from expert witnesses regarding Christian practices, rather than statistical evidence relating to the numbers of Christians who wear religious symbols at work.

## Key points

- The motive behind the less favourable treatment is irrelevant; it is the impact that is important.
- Under EU law there is no need to establish an identifiable victim.
- The initial burden rests with the complainant to establish evidence that suggests that discrimination has taken place.
- Statistical evidence may be used in order to help give rise to a presumption of discrimination.
- The burden then shifts to the alleged perpetrator who must provide evidence that shows that the less favourable treatment was not based on one of the protected grounds.
- The presumption of discrimination can be rebutted by proving: either that the victim is not in a similar situation to their 'comparator'; or that the difference in treatment is based on some objective factor, unconnected to the protected ground. If the perpetrator fails to rebut this presumption they may still attempt to justify the differential treatment.

<sup>271</sup> UK Court of Appeal, *Eweida v. British Airways Plc* [2010] EWCA Civ 80, 12 February 2010.

## Further reading

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FRA InfoPortal	<a href="http://infoportal.fra.europa.eu">http://infoportal.fra.europa.eu</a>
FRA report on <i>The impact of the Racial Equality Directive. Views of trade unions and employers in the European Union</i>	<a href="http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub_racial_equal_directive_en.htm">http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub_racial_equal_directive_en.htm</a>
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