ISSN 2443-9606

European Commission

European equality law review

European network of legal experts in gender equality and non-discrimination

2017/1

IN THIS ISSUE

Justice and Consumers

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Gender equality
Unit JUST/D2

European Commission
B-1049 Brussels

EUROPEAN COMMISSION

European equality law review

Issue 1 / 2017

Directorate-General for Justice and Consumers

2017

To receive hardcopies of the European equality law review and be added to our mailing list to automatically receive future issues, please visit the Network's website: http://www.equalitylaw.eu/publications/order.

Europe Direct is a service to help you find answers to your questions about the European Union.

Freephone number (*):

00 800 6 7 8 9 10 11

(*)The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Luxembourg: Publications Office of the European Union, 2017

Print	ISSN 2443-9592	DS-AY-17-001-EN-C
PDF	ISSN 2443-9606	DS-AY-17-001-EN-N

Contents

Introduction on the state of play

This is the fifth issue of the biannual European equality law review, produced by the European network of legal experts in gender equality and non-discrimination (EELN). This issue provides an overview of legal and policy developments across Europe, and as far as possible reflects the state of affairs from 1 July to 31 December 2016. The aim of the EELN is to provide the European Commission and the general public with independent information regarding gender equality and non-discrimination law, and more specifically the transposition and implementation of the EU equality and non-discrimination directives.

In this issue

This law review contains a section relating to the most recent case law of the Court of Justice of the European Union and of the European Court of Human Rights, and a section detailing the most recent developments in legislation, case law and policy on the national level.[1] It also contains four in-depth analytical articles. In the field of non-discrimination law, Nathalie Ferré from the Institute for Interdisciplinary Research on Social Issues (France) contributes an article on the landmark decisions of the French Court of Cassation that found in 2016 that the French State was liable for racial profiling through the activities of the police. In the field of gender equality Elisabeth Holzleithner from the University of Vienna analyses physical requirements in the context of employment. An EU-external perspective is provided through an article authored by Adnan Kadribasic from the University of Sarajevo on the development and current state of gender equality and non-discrimination law in Bosnia and Herzegovina. Finally, in the field of gender equality, Rachel Horton from the University of Reading investigates the right to request flexible working in the UK.

Recent developments at the European Level[2]

During the past reporting period, the European Commission underwent some internal restructuring, resulting in three different units being directly involved in the work of the Network: within DG Justice, the units for Gender equality and for Non-discrimination and Roma coordination, and, within DG Employment, Social Affairs and Inclusion, the unit for Disability and inclusion.

In September 2016, the European Parliament adopted a resolution on the application of the Employment Equality Directive, welcoming some positive developments but also noting a wide array of troublesome issues across the different grounds and making a number of recommendations for the Member States and the Commission.[3] In addition to the specific issues raised with regard to the different grounds covered by the Directive, the resolution lists a large number of 'horizontal' aspects and recommendations. These concern issues such as a lack of legal clarity; a lack of objective, comparable and disaggregated equality data; limited access to justice in many cases of discrimination; and the need for enhanced support for equality bodies and civil society organisations which are active in the field. The resolution also contains several recommendations that go beyond the scope of the Directive, in particular related to gender equality but also the situation of Roma. The Parliament finally calls for civil and human rights education

1 On the basis of information provided by the national experts, Franka van Hoof from Utrecht University drafted the sections regarding gender equality while Catharina Germaine from the Migration Policy Group drafted those regarding anti-discrimination and made the final compilation.

2 This section, as the rest of the Review, covers the period of 1 July to 31 December 2016.

3 European Parliament resolution of 15 September 2016 on application of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive') (2015/2116(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0360.

and training, and encourages the Commission to adopt a European framework for national strategies to combat anti-Semitism, Islamophobia and other forms of racism. The Parliament also adopted another resolution in September 2016, on creating labour market conditions that are favourable for work-life balance.[4] The resolution focuses on issues such as ensuring that women and men are 'equal earners and equal carers', family- and care related types of leave, care for dependants, quality employment and quality of life.

In October 2016, the European Commission published a report on good practices for promoting LGBTI inclusion in the workplace entitled 'The Business Case for Diversity in the Workplace: Sexual Orientation and Gender Identity.'[5] The report is published as one of the initiatives envisaged by the List of Actions by the Commission to Advance LGBTI Equality launched in December 2015, and aims at providing knowledge and inspiration to companies across Europe to enable them to adopt LGBTI inclusive policies.

3 November 2016 was European Equal Pay Day. This date represents a day in the year when women stop being paid due to the gender pay gap. On average, women in Europe earn 16.7% less per hour than men. In a joint statement, First Vice-President Timmermans and Commissioners Thyssen and Jourová denounced the fact that – at the current pace – the pay gap is declining so slowly that it will take until 2086 before women are paid as much as men.[6]

On 24 November 2016, the International Day for the Elimination of Violence against Women took place. On this occasion, the European Parliament adopted a resolution on the EU accession to the Istanbul Convention on preventing and combating violence against women.[7] The resolution calls upon the Commission and the Council to speed up negotiations in view of the signing and conclusion of the Convention. The resolution further urges Member States that have not yet ratified the Convention to do so, and urges those that have to ensure proper enforcement of the Convention, including through the allocation of adequate resources and the collection of relevant data. On the same date, the European Commission published a joint statement expressing its commitment to end violence against women and girls.[8] The Commission announced a series of actions to be launched in 2017, allocating € 10 million to support grassroots efforts to prevent gender-based violence and to support victims in the EU.

Network publications and activities

During the past reporting period, the Network organised its annual legal seminar in November 2016, including a highly appreciated keynote speech delivered by Justice Susanne Baer of the German Federal Constitutional Court as well as thematic workshops.

The Network has recently published four thematic reports. The first report was authored by Oliver de Schutter as an update of a previous thematic report and provides an analysis of the links between migration and discrimination. The second thematic report, authored by Lisa Waddington and Mark Bell, aims at providing an overview of the ways in which the Employment Equality Directive can contribute to supporting those who have a psychosocial disability in participating in employment. Lilla Farkas authored the third report examining the meaning of racial and ethnic origin in EU law. Finally, Albertine Veldman wrote a report on pay transparency in the EU, regarding the national pay transparency measures

4 European Parliament resolution of 13 September 2016 on creating labour market conditions favourable for work-life balance (2016/2017(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0338&language=EN&ring=A8-2016-0253.

5 *The Business Case for Diversity in the Workplace: sexual orientation and gender identity - Report on good practices*, European Commission, Brussels, September 2016. Available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=35768.

6 http://europa.eu/rapid/press-release_STATEMENT-16-3578_en.htm.

7 European Parliament resolution of 24 November 2016 on the EU accession to the Istanbul Convention on preventing and combating violence against women (2016/2966(RSP)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0451+0+DOC+PDF+V0//EN.

8 http://europa.eu/rapid/press-release_STATEMENT-16-3945_en.htm.

implementing the Commission's Recommendation on this topic in view of strengthening the principle of equal pay between men and women. In addition, two comparative reports were recently published, providing an updated analysis of the state of gender equality and non-discrimination respectively, across the Member States, candidate countries and EEA countries. As always, please check the Network's website – http://www.equalitylaw.eu/ – for the full text of all reports.

Isabelle Chopin
Migration Policy Group

Alexandra Timmer
Utrecht University

Marcel Zwamborn
Human European Consultancy

Members of the European network of legal experts in gender equality and non-discrimination

Management team

General coordinator	Marcel Zwamborn	Human European Consultancy
Specialist coordinator gender equality law	Susanne Burri	Utrecht University
Acting specialist coordinator gender equality law	Alexandra Timmer	Utrecht University
Specialist coordinator non-discrimination law	Isabelle Chopin	Migration Policy Group
Project management assistants	Ivette Groenendijk Michelle Troost-Termeer	Human European Consultancy Human European Consultancy
Gender equality assistant and research editor	Franka van Hoof	Utrecht University
Non-discrimination assistant and research editor	Catharina Germaine	Migration Policy Group

Senior experts

Senior expert on racial or ethnic origin	Lilla Farkas
Senior expert on age	Mark Freedland
Senior expert on EU and human rights law	Christopher McCrudden
Senior expert on social security	Frans Pennings
Senior expert on religion or belief	Isabelle Rorive
Senior expert on gender equality law	Linda Senden
Senior expert on sexual orientation	Krzysztof Smiszek
Senior expert on EU law, sex, gender identity and gender expression in relation to trans and intersex people	Christa Tobler
Senior expert on disability	Lisa Waddington

National experts

	Non-discrimination	Gender
Austria	Dieter Schindlauer	Martina Thomasberger
Belgium	Emmanuelle Bribosia	Jean Jacqmain
Bulgaria	Margarita Ilieva	Genoveva Tisheva
Croatia	Ines Bojic	Nada Bodiroga-Vukobrat
Cyprus	Corina Demetriou	Evangelia Lia Efstratiou-Georgiades
Czech Republic	David Zahumenský	Kristina Koldinská
Denmark	Pia Justesen	Christina D. Tvarnø
Estonia	Vadim Poleshchuk	Anu Laas
Finland	Rainer Hiltunen	Kevät Nousiainen
FYR of Macedonia	Biljana Kotevska	Mirjana Najcevska
France	Sophie Latraverse	Sylvaine Laulom
Germany	Matthias Mahlmann	Ulrike Lembke
Greece	Athanasios Theodoridis	Sophia Koukoulis-Spiliotopoulos
Hungary	Andras Kadar	Beáta Nacsa
Iceland	Gudrun D. Gudmundsdottir	Herdís Thorgeirsdóttir
Ireland	Judy Walsh*	Frances Meenan
Italy	Chiara Favilli	Simonetta Renga
Latvia	Anhelita Kamenska	Kristīne Dupate
Liechtenstein	Wilfried Marxer	Nicole Mathé
Lithuania	Gediminas Andriukaitis	Tomas Davulis
Luxembourg	Tania Hoffmann	Anik Raskin
Malta	Tonio Ellul	Romina Bartolo
Montenegro	Nenad Koprivica	Ivana Jelic
Netherlands	Titia Loenen	Marlies Vegter
Norway	Else Leona McClimans	Helga Aune
Poland	Lukasz Bojarski	Eleonora Zielinska
Portugal	Ana Maria Guerra Martins	Maria do Rosário Palma Ramalho
Romania	Romanita Iordache	lustina Ionescu
Serbia	Ivana Krstic	Ivana Krstic
Slovakia	Vanda Durbáková	Zuzana Magurová
Slovenia	Neža Kogovšek Šalamon	Tanja Koderman Sever
Spain	Lorenzo Cachón	María-Amparo Ballester-Pastor
Sweden	Per Norberg	Jenny Julen Votinius
Turkey	Dilek Kurban	Nurhan Süral
United Kingdom	Lucy Vickers	Grace James

* Please note that the previous non-discrimination expert for Ireland, Orlagh O'Farrell, contributed to this issue.

‘Ethnic profiling in identity checks’: a return to overly permissive regulations

Nathalie Ferré[1]

After being repeatedly subjected in their neighbourhood to identity checks which never resulted in any kind of legal proceedings, 13 young people of Black and Arab origin decided to bring a case to court in Paris. They brought their action against the State and, in addition to their individual cases, they sought to expose police practices and the way certain groups of the population are disproportionately subjected to these frustrating checks. The national equality body, the Defender of Rights, was involved as a voluntary party to the dispute. On 2 October 2013, the court gave its ruling, rejecting all the claims. This decision was appealed by all the claimants.

In June 2015,[2] in response to these appeals, for the first time ever a French court (Paris Court of Appeal) ordered the State to pay damages to the claimants as victims of what were ruled to be discriminatory identity checks. These decisions were handed down in a specific context in which several organisations were involved in speaking out against stops carried out on the basis of illegal criteria.

This tendency in police practice is not new and neither is condemnation of it. However, it has certainly become increasingly unacceptable at a time of growing tensions between the police and the public, and when those who still believe in the value of integration and the rule of law are questioning the rejection, alienation and stigmatisation of particular groups.

The existence of discriminatory identity checks was corroborated by the results of a widely-commented survey commissioned by the Open Society Institute, which showed that individuals perceived as ‘Black’ or ‘Arab’ are more likely to be subjected to identity checks than people perceived to be ‘White’.[3] This study highlights checks being carried out on people who live in or regularly visit certain areas, and whom the police officers generally already know. The check then functions like a ‘degradation ceremony’,[4] indicating to the individual that they are not full members of French society. At best, it represents a means of initiating contact with this section of the population, but this bears no relation to the actual purpose of identity checks.[5] Conducting an identity check does not generally lead to the institution of any kind of legal proceedings, because in the majority of cases it does not reveal that any offence has

1 Nathalie Ferré is a Professor at Université Paris 13, and is the deputy director of the Institute for Interdisciplinary Research on Social Issues (*Institut de recherche interdisciplinaire sur les enjeux sociaux – IRIS*).

2 CA Paris [Paris Court of Appeal], 24 June 2015, nos. 13/24255, 13/24261, 13/24262, 13/24265, 13/24267, 13/24269, 13/24274, 13/24277, 13/24284, 13/24286, 13/24299, 13/24300 and 13/24303.

3 Goris, I., Jobard, F. and Levy, R. (2009) ‘Profiling ethnic minorities: a study of stop-and-search practices in Paris’, Open Society Institute. According to the report, ‘Blacks’ were between 3.3 and 11.5 times more likely and ‘Arabs’ on average seven times more likely than ‘Whites’ to be stopped by the police. In addition to skin colour, another risk factor for being stopped was style of clothing. See also: ‘The root of humiliation: abusive identity checks in France’, Human Rights Watch, January 2012.

4 In the words of Emmanuel Blanchard, in ‘Contrôles au faciès: une cérémonie de dégradation’ [‘Ethnic profiling: a degradation ceremony’], in *Plein droit*, no. 103, December 2014.

5 This is the case, for example, when the police intervene in response to a request from residents because young people are talking too loudly in the vicinity of an apartment building.

been committed. The other point about identity checks is the role they play in detecting undocumented migration. They are used as a means of combating illegal migration and thus constitute one of the stages in the process of enforced removal.

The relevant legal framework here is therefore based around these two types of police activity. A re-examination of the legal framework provides a clearer picture of the challenges and demonstrates how the legislator, disregarding fundamental rights, has progressively extended the power to act of law enforcement officers, who have sought a degree of operational freedom in this area (I). Such aims, including this greater scope for action, foster discriminatory practices (II). Admittedly, judges can exert some control but they suffer from a lack of effectiveness which the decisions by the Paris Court of Appeal, as upheld by the Court of Cassation in its judgements of 9 November 2016,[6] can only to some extent correct. The only way to provide adequate clarification in this matter would be the institution of a far-reaching reform of the legislation pertaining to identity checks.

I Development of legal provisions with little respect for fundamental rights

It was not until the end of the 1970s that France developed regulations relating specifically to identity checks. Although they did not enjoy the same scope for action as the *Gendarmerie*,[7, 8] this did not mean that the National Police were unable to stop individuals and ask them to prove their identity.[9] However, according to the provisions of the Criminal Procedure Code, the only circumstances in which the police could undertake checks was if an offence was discovered as it was being committed or during preliminary police investigations. The Code did not allow police officers to carry out preventive operations and individuals could only be taken to a police station if there was reason to believe that the individual stopped had committed an offence.[10] The police pressed strongly for provisions to legalise identity checks and identity verification,[11] since they believed that the absence of a legal framework in this area impeded their effectiveness and exposed them to prosecution for unlawful detention.[12]

A The advent of 'preventive' identity checks

The Security and Liberty Law of 2 February 1981[13] established the current legal framework for identity checks, incorporated them into the Criminal Procedure Code.[14] The intention was to allow police officers and *gendarmes* to stop individuals in a public place and request them to prove their identity by any means, regardless of whether or not they had committed or were preparing to commit an offence,

6 Cass. civ. 1ière [Court of Cassation, 1st Civil Division] 9 November 2016, appeal nos. 15-24207, 15-24208, 15-24209, 15-24210, 15-24211, 15-24212, 15-24213, 15-24214, 15-25872, 15-24873, 15-25875, 15-25876 and 15-25877.

7 France has two national police forces. The *Police nationale* is the main civil law enforcement agency and is responsible for security operations and investigating crime in cities and large towns. The *Gendarmerie nationale* is part of the French armed forces and is a military police force mainly covering small towns and rural areas. Military and defence missions also form part of its remit.

8 The *Gendarmerie* can cite a regulatory provision, based on a decree from 20 May 1903, which authorises them to check the identity of anyone on the move 'within France'.

9 Despite the fact that it was not compulsory to possess, much less carry, an identity card.

10 Cass. crim. [Court of Cassation, Criminal Division] 5 January 1973, Friedel, appeal no. 72-90278: although the police can check an individual's identity in specific circumstances, they cannot detain them.

11 Different levels of identity check exist in France. A *contrôle d'identité* involves an individual being stopped and asked to produce identity documents. If they are unable to do this or their identity documents are not thought to be legitimate, they may be briefly detained in police custody while their identity is ascertained (*vérification d'identité*).

12 It is of relevance here to mention the 'Dôle affair', when a prosecutor decided to investigate a police superintendent for illegal arrest and detention after he took four passengers by force from a car to the police station when they refused to identify themselves. The police superintendents' union subsequently called on all police officers to expose this gap in the law by ceasing to carry out identity checks (*Le Monde*, 10 April 1980).

13 France, Law no. 81-82 strengthening security and protecting individual liberty (*Loi n° 81-82 renforçant la sécurité et protégeant la liberté des personnes*).

14 Articles 78-1 to 78-7 of the Criminal Procedure Code.

'to prevent a breach of the peace and, in particular, any act which may endanger the safety of people or property'. The wording is somewhat opaque and it has not really been clarified by case-law. Left-wing parliamentarians, in opposition, were extremely critical of the bill, believing that it undermined individual freedoms and introduced 'the crime of being black, dark-skinned or having hair that is too long'.[15]

These same parliamentarians brought the matter before the Constitutional Council which held that the provisions were not unconstitutional on the basis of the safeguards provided by the law: *'In order to prevent abuse, the legislator has instituted a number of safeguards to the procedure of identity checks and verification of identity'*.[16] It should be noted that the 'safeguards' provided by the new legislation in fact only applied to the 'identity verification' process and not to the initial identity check. The Council could not have been expected to question (in the place of the legislator) the extent to which identity checks could uphold public order where it is under threat when a simple police presence would appear to be adequate and so this question remains unanswered. 'Preventive' checks (*contrôles d'identité administratifs*) were set to remain on the statute book. The provisions on identity checks as part of a criminal investigation (*contrôles d'identité judiciaires*) were revised so that, in order to act, the police would have to provide evidence of a link between the person stopped and an offence.[17]

Thus, preventive identity checks did not disappear, despite the promise made by François Mitterrand during his presidential candidacy to repeal the Security and Liberty Law[18] and the opinion of the Minister of Justice[19] in Mitterrand's first government. The Law of 10 June 1983 introduced specific conditions and time limits for identity checks undertaken with the aim of maintaining public order: *'identity checks may be carried out on any individual, in accordance with these provisions, in particular locations where the safety of people and property is under immediate threat'.* The Court of Cassation later opined, in its much-debated decision on the Kande appeal,[20] that this legal framework did not entitle the police to undertake checks of people on the metro regardless of the circumstances; instead it considered that police officers must specify how the security of people and property was under immediate threat in the location where the checks were being conducted (in this case the Stalingrad metro station).

The 1983 law was accompanied by a number of safeguards which are still in place: the scope of authority of police officers, the rule allowing identity to be proved by any means, the (potential) involvement of the public prosecutor, a limit to the duration of detention for identity verification (four hours maximum) and the requirement to produce a written record if the individual is taken to a police station for a more thorough check. However, none of these safeguards concern the actual act of stopping someone in a public place and asking them to prove their identity.

The issue of police identity checks in relation to foreign nationals first made its appearance on the political scene during the debates which preceded the adoption of the 1983 Law.

B The relationship between identity checks and residence permit checks

During the debates on the Security and Liberty bill in 1981 there was no discussion of foreign nationals or immigration. Even though France had officially closed its borders to labour migration in July 1974, the time of numerical targets for forced removals and deportations had not yet come. Instead, the

15 *Journal officiel Débats Assemblée nationale 19 décembre 1980 et 22 juin 1980* [Official Journal, parliamentary debates, National Assembly, 19 December 1980 and 22 June 1980].

16 DC no. 80-127, 20 January 1981.

17 A distinction is being made here between 'contrôles administratifs' and 'contrôles judiciaires'. 'Controles administratifs' may also be described as 'preventive checks', as they are carried out in situations where there is no link to any offence. 'Contrôles judiciaires' are effectively carried out as part of a criminal investigation, where it is suspected that an offence has been committed.

18 The repeal of this law was one of Mitterrand's 110 presidential election promises.

19 Robert Badinter, then Minister of Justice, wished to put an end to administrative checks, unlike the Minister of the Interior.

20 Cass. Crim. [Court of Cassation, Criminal Division] 4 October 1984, Kande, appeal no. 83-94341; Bull. Crim. [Official report of decisions by the Court of Cassation Criminal Division] No. 287.

Badinter Bill, which would become the Law of 10 June 1983, contained a notable provision which gave rise to some lively parliamentary exchanges. This provision linked identity checks (both those forming part of criminal investigations and 'preventive' checks) with obligations for individuals *'to hold certain documents relating to their status or employment... or face criminal sanctions'*. This rather anodyne wording, which did not in fact apply exclusively to foreign nationals, contained the germs of specific legislation based on the criterion of nationality.[21] One of the aims of the Badinter Bill was to link identity checks and residence permit checks – two operations which were legally distinct: unlike French nationals or EU, EEA or Swiss nationals, foreign nationals were required to be able to prove their right to reside in France at any time.[22] There was therefore a need to be able to link these two operations – unless it were to be made possible to ask an individual directly to produce their residence permit without having to comply with the legal framework governing identity checks. Although this provision was eventually withdrawn from the bill, it seemed likely that this issue around linking identity checks and residence permit checks would resurface before the courts and the legislator, given the significance of such checks in the enforced removal procedure.

In the well-known Bogdan and Vukovic decisions,[23] the Court of Cassation took a controversial position by stating that the police could make a direct request to an individual to show their residence permit if an objective and external characteristic gave them reason to assume the individual was a foreign national. In 1986 the legislator[24] then sanctioned the different treatment of French and foreign nationals during identity checks, enshrining it in the Code of Entry and Residence of Foreigners and the Right of Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile – CESEDA*): *'Apart from identity checks, if requested by a police officer foreign nationals must be able to present papers or documents entitling them to travel or reside in France...'*.[25]

The Constitutional Council, ruling on the constitutionality of this specific regulation, expressed an 'interpretive reservation', which included the requirements imposed by the Court of Cassation: *'Identity checks carried out in accordance with the law by the police must be undertaken solely on the basis of objective criteria and, in strict conformity with constitutional principles and rules, must not involve any discrimination of any kind'*.[26] In other words, the police could not use someone's skin colour, their style of clothing or the fact of them speaking in a foreign language as reasons to presume them to be a foreign national and to ask to see their residence permit.

Circulars were issued which sought to illustrate this concept of 'external signs of foreignness': reading a foreign-language newspaper or book, playing a foreign folk instrument in a public place or even travelling in a vehicle with a foreign number plate... Clearly, applying such measures to foreign nationals or those presumed to be foreign nationals was likely to encourage discrimination, but in practice it was very rarely used as a justification (in the event of a check actually leading to legal proceedings). The use of the general regime of identity checks was more practical and less likely to risk being questioned by the courts. It allowed the police to go on to ask to see an individual's residence permit once their status as a foreign national had been established or assumed (for example, if the individual produced a foreign identity document or, more usually, 'spontaneously' volunteered that they were born outside France).

21 Ferré, N. (2009) 'Contrôles d'identité: la discrimination légale' ['Identity checks: legal discrimination'], in *Plein droit*, no. 82, October 2009.

22 Initially pursuant to decrees dating from 1946. This requirement was henceforth included in the Code of Entry and Residence of Foreigners and of the Right of Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile – CESEDA*).

23 Cass. Crim. [Court of Cassation, Criminal Division] 25 April 1985, appeal nos. 85-91324 and 84-92916; Bull. Crim. [Official report of decisions by the Court of Cassation Criminal Division] No. 159: *'In order for officers to be able to ask foreign nationals to show the documents entitling them to reside in France, there must be objective factors inferred from circumstances external to the individual himself or herself which allow officers to presume them to be foreign'*.

24 Primarily through Law no. 86-1004 of 3 September 1986 on identity checks and identity verification (*Loi n° 86-1004 du 3 septembre 1986 relative aux contrôles et aux vérifications d'identité*).

25 Article L. 611-1.

26 DC no. 93-325, 13 August 1993 (concerning the Law of 24 August 1993 withdrawing the provision on the link between identity checks and residence permit checks from the Criminal Procedure Code in order to enshrine it in the CESEDA).

C Fragmented legal frameworks

The last substantial reform concerning identity checks was introduced by the Law of 10 August 1993:[27] Article 78-2 of the Criminal Procedure Code was amended to extend the scope of action of the police. Since then there have been further interventions by the legislator, some more subtle than others, guided by relevant case-law, the context (of recent terrorist attacks) and policy positions, against the background of the security debate. Similarly, the number of officers authorised to carry out identity checks has been increased. All this results in a disparate and complex landscape likely to provide a fertile breeding ground for abuses.

To return to the general regime of identity checks which is of primary relevance here, the above-mentioned Article 78-2 of the Criminal Procedure Code sets out four examples of identity checks (*contrôles d'identité judiciaires*) which require there to be a link between the individual being stopped and an offence. In such cases, the police take action because they have one or more reason to suspect that the individual: has committed or attempted to commit an offence; is likely to provide useful information in the investigation of a crime or an offence; is the subject of an investigation ordered by a judicial authority; or is preparing to commit a crime or offence. The last of these is rather more vague than the others, since 'preparing to commit an offence' is open to different interpretations and is more subjective. Practice shows that it comes down to behaviour by an individual which is considered to be suspicious, such as 'hanging around' or 'loitering' near vehicles or shops without any obvious reason, stalking or staring at someone.

With regard to 'preventive' identity checks, the place and time conditions were removed to return to the original wording of *'to prevent a breach of the peace'*.[28] This was in response to the Kande decision[29] which was considered to be too restrictive. Later, as a result of another decision by the Court of Cassation, the phrase 'regardless of (their) behaviour' was added.[30] The Court of Cassation judges, interpreting the wording 'to prevent a breach of the peace' for the first time, made a poor decision by saying that the legality of the identity check involved reporting an element which could be *'directly linked to the behaviour of the individual undergoing the identity check'*.[31]

The Constitutional Council found that *'the practice of widespread and discretionary identity checks would be incompatible with respect for individual liberty'*; therefore an identity check did not have to be linked to an individual's behaviour. Nevertheless, for an identity check to be legal, the police would have to demonstrate in every case that there were specific circumstances which represented a potential breach of the peace and that this was the reason for undertaking an identity check. Thus, according to the Council, *'it is only with this interpretive reservation that the legislator can be seen as not having removed legal safeguards from the exercise of constitutionally guaranteed freedoms*'.[32] In order to carry out a legally compliant 'preventive' identity check, the police must highlight the potential breach of the peace, whether this potential stems from the individual or from the specific circumstances in terms of the time and location.

Since the adoption of the 1993 Law the police have been able to act on the basis of orders issued by the public prosecutor: *'In response to written orders from the public prosecutor for the purpose of detecting and prosecuting specific offences, identity checks may be carried out on any individual, in accordance with these provisions, in particular locations and for a period of time determined by the prosecutor'*. Police

27 France, Law no. 93-992 of 10 August 1993 on identity checks and identity verification (*Loi n° 93-992 de 10 août 1993 relative aux contrôles et aux vérifications d'identité*).
28 From the above-mentioned Law of 3 September 1986.
29 Cass. Crim. [Court of Cassation, Criminal Division] 4 October 1984, Kande, appeal no. 83-94341; Bull. Crim. [Official report of decisions by the Court of Cassation Criminal Division] No. 287.
30 Above-mentioned Law of 10 August 1993.
31 Cass. Crim. [Court of Cassation, Criminal Division] 10 November 1992, Bassilika, appeal no. 92-83352.
32 DC no. 93-323 of 5 August 1993.

officers do not have to justify their intervention and say how they select people within these parameters; they merely have to respect the time and location conditions set out in the order from the prosecutor.

When the Constitutional Council examined this provision, it considered that it did not contradict Article 66 of the Constitution which establishes the Judicial Authority as guardian of the freedom of the individual. State prosecutors in regional courts (who in France enjoy the same status as judges) are responsible *'for precisely defining the conditions under which the stipulated identity checks and verification of identity are carried out'*.[33] There are two points to note here: first, the state prosecutors are not independent and, secondly, the offences which justify the orders often effectively act as an alibi, allowing police operations to be carried out over an extended geographical area.

This 1993 law also introduced checks in border areas, as provided for in Article 78-2, paragraph 4,[34] in order to compensate for the gradual abolition of shared (and therefore controlled) borders between the States party to the Schengen Convention of 19 June 1990: *'In an area between the land border of France with the States party to the Convention signed at Schengen on 19 June 1990 and a line drawn 20 kilometres inside that border, and in the publicly accessible areas in ports, airports and railway or bus stations open to international traffic, designated by order, the identity of any person may also be checked, in accordance with the rules provided for in the first paragraph, in order to ascertain whether the obligations laid down by law to hold, carry and produce documents and papers are fulfilled'*.

The aim of this was to combat cross-border criminality and illegal border crossing. The provision allows police (and customs) officers, on the basis of their first impressions of individuals, to conduct identity checks and, if necessary, checks on residence permits within an area within 20km of the land border between France and adjoining states (which are party to the Schengen Agreement) and in all railway and bus stations, ports, airports and terminals open to international traffic.[35] These border zone arrangements, the establishment of which surmounted the hurdle of the Constitutional Council,[36] also apply in France's overseas territories, even though they are not covered by the Schengen Agreement. On several occasions, the Court of Cassation has stated that the checks carried out in these border zones or in transport hubs open to international traffic (in particular large bus and railway stations) are not subject to any substantive conditions or requirements linked to the specific behaviour of those affected.[37]

II Discriminatory practices and their exposure

Our analysis of the regulatory framework has revealed both its complexity (and we deliberately excluded certain measures and other exceptional procedures set out in the Criminal Procedure Code)[38] and the extent of the scope granted to law enforcement officers. This is what might be described as a 'very French position'; the legislator should, instead, adopt a restrictive legal framework which would protect individual rights and freedoms. To those who are subjected to them, identity checks are stigmatising and frustrating. Worse still, they may result in people forming 'a negative view of their individuality and difference'.[39] Their dignity is undermined because when they are subjected to racial profiling they

33 DC no. 93-323 of 5 August 1993.
34 Or paragraph 8, depending on how the paragraphs are counted.
35 The list of these railway and bus stations, ports and airports was designated by an order of 22 March 2012.
36 Above-mentioned decision no. 93-323: however, the Council removed the possibility of extending this area by an additional 20km through a simple ministerial decree.
37 Cass. Civ. 2ième [Court of Cassation, 2nd Civil Division] 23 May 2010, appeal no. 00-50045; civ. 1ière [Court of Cassation, 1st Civil Division] 25 March 2009, appeal no. 08-11587; Bull. Civ. [Official report of decisions by the Court of Cassation Civil Division] No. 68.
38 Procedures relating to serious crime, terrorist threats and workplaces.
39 Picard, E. (1994) 'Les contrôles d'identité au regard des droits fondamentaux: des régimes inutilement hétéroclites' ['Identity checks and fundamental rights: unnecessarily heterogeneous regimes'], in *RFDA [French Review of Administrative Law]*, p. 959.

are not being treated like other people.[40] As we noted in the introduction, two groups are affected here: the young and not so young who are from poorer areas or who frequently visit certain places and who are stopped on the basis of their origin (real or assumed) and foreign nationals or those assumed to be foreign nationals stopped during operations to detect undocumented migrants.

The law as it relates to identity checks allows and even encourages these discriminatory practices. It even has political backing in terms of the place of identity checks in the policing of foreign nationals. This is evidenced by the existence of ministerial circulars, such as the one dated 21 February 2006 from the Minister of the Interior and the Minister of Justice on the conditions for apprehending illegally resident foreign nationals. In particular, it asks prosecutors to *'organise targeted identity checking operations, for example in the vicinity of shelters and accommodation centres or in areas in which undocumented migrants are known to reside'*. Individuals within the authorised area are then chosen for identity checks on the basis of their physical appearance.[41] The use of written orders to apprehend people without a legal residence permit was contradicted by the decriminalisation of illegal residence[42] imposed by EU law. However, in practice the public prosecutor can achieve its objective simply by referring to the prosecution of other ordinary offences or offences contained in the law pertaining to foreign nationals, such as facilitating illegal residence.

For all the reasons outlined here, the French legal framework is monitored, contested and questioned, leading to a range of different responses. However, no government has yet dared to go against the police trade unions to tackle the process of reform head-on.

A Identity checks and the view of the courts

Before looking at some significant pieces of case-law, it should be noted that the majority of identity checks never come to the notice of the courts. When they don't lead to any kind of legal or administrative proceedings, they 'vanish' without ever being contested. An identity check leaves no written trace; it is only the process known as an 'identity verification' which, in principle, involves a police report being produced.[43] Thus there had never been any disputes which could have exposed 'ethnic profiling' until the cases ruled on by the Paris Court of Appeal in June 2015.

In contrast, the question of the legality of identity checks has constituted a defence when they have been followed by criminal proceedings or an enforced removal from France. Looking at case-law[44] and practice, the possible illegality of an identity check is most frequently invoked in cases of foreign nationals being removed from the country. It can only be raised before judges with jurisdiction over freedom of the person (*juge des libertés et de la detention*) when they are asked to rule on extended detention;[45] the judge presiding over an administrative court, whose role is to examine the legality of the removal measures, is not competent to do this.[46] The result is that, although an identity check may be acknowledged to have been carried out illegally, this has no influence on the internal legality of a decision requiring a foreign national to leave France. The *juge des libertés et de la detention* would nevertheless terminate the detention of the individual in this scenario.

As we have seen, the Constitutional Council has largely upheld the decisions taken by the legislator in relation to identity checks on the grounds that the identity verification procedure contains safeguards and such operations take place under the supervision of the public prosecutor. Attempts to query the Council

40 Mutelet, V. (2015) 'La dignité et le droit des étrangers' ['Dignity and the law on foreign nationals'], in *RFDA [French Review of Administrative Law]*, p. 1088.
41 Circulaire Interministérielle [Interministerial circular] CRIM. 06.5/E1, 21 February 2006.
42 Since the Law of 31 December 2012, illegal residence on its own is no longer an offence.
43 Article 78-3 of the Criminal Procedure Code.
44 Virtually all the case-law relating to identity checks is found in disputes concerning the removal of foreign nationals.
45 Since the Bechta decision of 28 June 1995, Cass. civ. 2ième [Court of Cassation, 2nd Civil Division], appeal no. 94-50002.
46 CE [Council of State] 23 February 1990, Sioui, no. 92973.

on its decisions by means of applications for a priority preliminary ruling on the issue of constitutionality (*question prioritaire de constitutionnalité*) in relation to Article 78-2 and to individual cases have been unsuccessful. The Court of Cassation did not view these applications as serious issues, since the Council had already examined the constitutionality of the provisions.[47]

The Court of Cassation has issued some decisions which are of interest in relation to its role of interpreting the law and seeking to ensure that the specific conditions of the different types of intervention are scrupulously respected by law enforcement officers.[48] It cannot make a *contra legem* decision. However, at the instigation of the Court of Justice of the European Union (CJEU), it has issued decisions questioning both the retention in French law of border controls and the specific provisions on verifying legal residence.

Thus, according to the CJEU, EU law precludes *'national legislation which grants to the police authorities of the Member State in question the power to check [within this area] the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks'*.[49] Consequently, the Court of Cassation ruled illegal identity checks carried out within this framework without any other specific conditions except that they were undertaken within the 20km zone or in railway and bus stations, ports and airports open to international traffic.[50]

However, no time was wasted in resuming these 'border checks', with the legislator hurrying to revise the disputed paragraph. Through the Law of 14 March 2011[51] two amendments were added which were unlikely to change practice: operations carried out in the locations in question must not last for more than six hours; checks must be random rather than systematic. The fact that the checks are targeted in terms of time and location (for instance, a railway station or part of a railway station) was considered to be adequate to guarantee that they would be random.[52] However, this would not be likely to prevent discriminatory checks – quite the opposite, in fact.

This was a wasted opportunity to assess the value of these checks and, especially, their consequences. Any questioning of the regime of identity checks is seen as hampering action by the police. This is even more striking in relation to checks carried out on the basis of the CESEDA. The Court of Cassation considered still to be contrary to EU law the fact that the police may demand, throughout France and aside from any identity checks, the presentation of documents entitling a foreign national to reside in France, irrespective of their behaviour or of specific circumstances giving rise to a risk of a breach of public order:[53] because the provision is not accompanied by any safeguard or supervisory framework, the effect of the use of this power is equivalent to border checks. Even though this provision is, in effect, legally established discrimination and its use is of little value to the police, the legislator[54] chose to keep it. The article in question contains the requirement for external and objective factors by which the individual may be established or presumed to be a foreign national and includes conditions envisaged for border checks (i.e. length of operation, checks not to be undertaken in a systematic manner).

47 QPC [application for a priority preliminary ruling on the issue of constitutionality], 17 August 2011, no 11-90063.
48 The Court of Cassation has also condemned misuse of procedures and unfair practices (in particular in relation to identity checks being carried out on people as they visit offices of the *Préfet*).
49 CJEU, 22 June 2010, Case C-188/10, Melki. Paragraph 4 of Article 78-2 is contrary, in particular, to Article 67 of the Treaty on the Functioning of the European Union (TFEU) and to Articles 20 and 21 of Regulation no. 562/2006 of 15 March 2006.
50 Cass. QPC, 29 June 2010, appeal no. 10-40001; Cass. Civ. 1ière [Court of Cassation, 1st Civil Division] 23 February 2011, appeal no. 09-70462.
51 Law no. 2011-267 on internal security (*Loi n° 2011-267 d'orientation et de programmation pour la sécurité intérieure*).
52 This is what the Court of Cassation said (Cass. Civ. 1ière [Court of Cassation, 1st Civil Division], 25 May 2016, appeal no. 15-50063).
53 Cass. Civ. 1ière [Court of Cassation, 1st Civil Division], 6 June 2012, appeal no. 10-25233.
54 France, Law no. 2012-1560 of 31 December 2012 on detention for the purpose of verifying right to reside (*Loi n° 2012-1560 du 31 décembre 2012 relative à la retenue pour vérification du droit au séjour*).

Until 2015, no French court had been able to establish State liability for ethnic profiling. This is why the decisions handed down by the Paris Court of Appeal have had such an impact: in five cases (out of the total of 13), the State was ordered to pay damages to the victims of the identity checks which were ruled to be discriminatory. The individuals sought to expose the practice of identity checks to which they were regularly subjected, even though these stigmatising and humiliating actions did not lead to prosecutions or legal proceedings.

The Court stated that identity checks are subject to the non-discrimination principle: an identity check *'beyond any question of its legality, must be carried out in a way which respects the individual's fundamental rights and, thus, the principle of equal treatment of people irrespective of race, physical appearance or origin'*.[55] Despite the ambiguity of how this is worded,[56] it is clear what the Court sought to confirm: the fact that an identity check was conducted in accordance with the law (the famous Article 78-2) does not mean it escapes censure for discrimination in relation to how the people to be checked are selected. In its decision, the Court referred to national and international sources[57] of the non-discrimination principle.

In addition, it is then necessary to be able to hold the State liable and establish its gross negligence.[58] The Court considered that operating checks on the basis of ethnic profiling, in a State where everyone expects the public services to uphold the principle of equal treatment, constitutes gross negligence. And it reached this conclusion before it had even examined whether or not the police operation was discriminatory.[59] The difficulty in this context is clearly in bringing evidence. In this respect the Court highlighted the non-traceability of the identity check which contradicts Article 13 of the European Convention on Human Rights and the case-law of the European Court of Human Rights (ECtHR) with regard to the right to effective remedy.[60] For this reason, the appeal judges adjusted the system of evidence and accepted a combination of statistical evidence and personal statements.[61]

Thus, according to the Court, *'the remedy (...) consequently requires that the evidence of the violation of the individual's rights and the principle of equal treatment must be able to be proved by a number of serious, specific and corroborating circumstances, the public authorities then being required to demonstrate justification for this difference in treatment'*. The wording is derived from ECtHR case-law and disregards the law on evidence of discrimination as construed by the Court of Justice of the EU in relation to the professional equality of women and men taken up by the EU legislator and then established by the French legislator. It is thus not sufficient for the petitioner to provide *prima facie* evidence – one or more elements allowing the existence of discrimination to be presumed – shifting the burden of proof to lie with the defendant. In doing this, the Court of Appeal appeared to forget the alignment effected by the ECtHR towards a form of proof which facilitates action by victims.

The signal given by the Court of Appeal is clear: the regulations governing identity checks result in discriminatory treatment which, where it is established, must be compensated. However, contrary to the

55 CA Paris [Paris Court of Appeal], 24 June 2015, nos. 13/24255, 13/24261, 13/24262, 13/24265, 13/24267, 13/24269, 13/24274, 13/24277, 13/24284, 13/24286, 13/24299, 13/24300 and 13/24303.

56 Camguilhem, B. (2015) 'L'engagement de la responsabilité de l'État du fait des contrôles au faciès' ['Establishing the liability of the State for ethnic profiling'], *AJDA* 2015 p. 1813.

57 In particular, the International Convention on the Elimination of all Forms of Racial Discrimination of 21 December 1965, the International Covenant on Civil and Political Rights of 16 December 1966, the Charter of Fundamental Rights of the European Union of 7 November 2000, and the European Convention on Human Rights of 4 November 1950, as amended.

58 The liability of the State is foreseen on the basis of Article L. 141-1 of the Code of Judicial Organisation – failure of the justice service to function adequately.

59 It should be noted that the court of first instance had argued otherwise by questioning previously whether or not the discrimination had been proved. Dumortier, T. (2015) 'Les contrôles au faciès saisis par la justice' ['Ethnic profiling in the dock'], La Revue des Droits de l'Homme, Actualités Droits-Libertés, published online, 10 September 2015.

60 European Court of Human Rights, 12 January 2010, Application no. 4159/05, *Gillan and Quinton v the United Kingdom*; 19 May 2004, Application no. 70276/01, *Gusinskiy v Russia*.

61 However, it should be noted that in eight cases the petitioners were disallowed. In some instances, this was evidence-related and there was no discussion (poorly drafted statements...); in others the grounds were biased, the implication being that the geographical areas in question were dangerous at all times, thereby justifying identity checks being carried out at any time on the people living there.

position of the Ministry of Justice, which intended not to contest the decisions in favour of the petitioners, the State decided, instead, in October 2015 to mount an appeal with the Court of Cassation against the five rulings which had been issued against it. The position of the Court of Cassation was as expected. On 9 November 2016, the Court upheld the line taken by the Paris Court of Appeal.

First, it stated clearly that the action of the police is subject to the legal framework for combating discrimination. Like the appeal judges, it considered that the State was liable for gross negligence for carrying out discriminatory identity checks, that is checks undertaken, *'in accordance with criteria based on physical characteristics linked to the real or presumed origin of the individual, without any prior objective justification*'.[62] Secondly, the Court of Cassation was more clear-cut in its adoption of a system of evidence which benefits individuals who consider themselves to have been victims, without making reference to the legal basis[63]: 'the individual who claims to be a victim must present *facts likely to convey a difference in treatment and which give rise to a presumption of the existence of discrimination and, where appropriate, the authorities must demonstrate either that there was no difference in treatment or that this difference in treatment is justified by objective, non-discriminatory factors*'. Statistical and sociological evidence is admissible but is not sufficient for a presumption of unlawful difference in treatment. The outcome of these proceedings thus depended on the quality of the statements presented as *prima facie* evidence.

The impact of this case-law is not yet known. However, it does imply a call by the courts for a reformation of the legislation on identity checks.

B Strong incentives to review the regulations

A number of agencies with the expertise and authority to examine police practices in relation to identity checks have repeatedly condemned racial profiling and targeting of foreign nationals. We shall look again here at the positions taken by the national equality body, the Defender of Rights (*Défenseur des droits – DDD*),[64] and the European Commission against Racism and Intolerance (ECRI).[65]

In October 2012, the Defender of Rights published a report on relations between the police and the public with regard to identity checks. It recommended various measures, such as a requirement for officers carrying out checks to be identified and the establishment of a supervisory framework for stop and search operations. With regard to the idea of setting up a system to regulate identity checks by means of the police issuing written receipts to those stopped, the report suggested running a pilot scheme. Even if the existence of a receipt might not in itself be sufficient to combat discrimination, the report noted that it would be likely to reduce the number of checks. The aim of this report was to guide government policy on identity checks.

When presenting its observations to the Paris Court of Appeal in the above-mentioned 'ethnic profiling case', the Defender of Rights clearly condemned the French legal framework on stop and search operations. In so doing it echoes the ECtHR case-law. In its decision in the case of *Timishev v Russia*,[66] the ECtHR sought to strengthen protection against racial discrimination: after concluding that discrimination on the grounds of real or presumed ethnic origin is a form of racial discrimination, it declared that this was a 'particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction'. This was a distinct type of discrimination

62 Cass. civ. 1ière [Court of Cassation, 1st Civil Division] 9 November 2016, appeal nos. 15-24207, 15-24208, 15-24209, 15-24210, 15-24211, 15-24212, 15-24213, 15-24214, 15-25872, 15-24873, 15-25875, 15-25876 and 15-25877.

63 The Court of Cassation applied the provisions on the burden of proof as established in EU law and transposed into French law (see Law no. 2008-496 of 27 May 2008).

64 An independent agency established by Organic Law no. 2011-333, 29 March 2011.

65 The ECRI is a human rights body of the Council of Europe, which monitors problems of racism, xenophobia, anti-Semitism, intolerance and discrimination.

66 Decision Nos. 55762/00 and 55974/00.

which could not be justified, since the sole reason for the measure was race or ethnic origin.[67] The existence of numerous discriminatory practices requires the adoption of *'strong, concrete measures in order to prevent these types of actions*'.[68] In addition to establishing a mechanism to make identity checking operations traceable, it should also be possible to ascertain *a priori* the use of interventions in response to written orders from the public prosecutor; to enable proper monitoring *a posteriori* of identity checks and identity verification; and to adjust the burden of proof in relation to discriminatory treatment.

The Defender of Rights was equally firm in its position on legislation relating to foreign nationals, where there was general acceptance of the usefulness of identity checks to apprehend individuals without residence permits. Nationality as a ground for different treatment occupies a distinct place in the legal corpus relating to discrimination. The fact that foreign nationals may be deprived of the right to enter and reside in France requires specific measures but these must nevertheless be consistent with foreign nationals' rights and freedoms.[69]

After condemning the abusive and discriminatory identity checks to which migrants were subjected in Calais,[70] in May 2016 the Defender of Rights published a major report on *The fundamental rights of foreign nationals in France*. It is critical, in particular, of checks carried out on the basis of written orders from the public prosecutor which are targeted more at certain groups rather than detecting offences. Curiously, no evaluation has ever been undertaken of the use of these orders and the results they produce. The Defender of Rights repeated its recommendations on *'the requirement to produce a written statement, record or receipt to ensure that identity checks are traceable, which is an essential element in the success of effective legal supervision'* and on *'the implementation of an adjustment to the burden of proof in the context of disputes about potentially discriminatory identity checks'*. It suggests the same principles of traceability should be applied to checks which are aimed mainly or exclusively at foreign nationals, but does not actually recommend that these should be abolished.

In its report on France (2010), the ECRI urged *'the French authorities to take measures to combat all forms of discriminatory conduct by law enforcement officials, including racial profiling in particular by clearly defining and prohibiting racial profiling by law, carrying out research on racial profiling and monitoring police activities to identify racial profiling practices*'. This profiling gives rise to serious problems with identity checks. Racial profiling consists of *'the use by the police, with no objective or reasonable justification, of grounds such as race, skin colour, language, religion, nationality or national or ethnic origin when carrying out control, surveillance or investigation activities'*. In response to this report the French government stated that the action of the police was *'based on a reasonable analysis of crime'*. In its 2016 report the ECRI noted the efforts made by the French authorities but considered them to be inadequate: the report calls on France to follow the recommendations of the Defender of Rights and the National Consultative Commission for Human Rights by introducing an identity check receipt bearing the name of the officer who conducts it.

C The need for fundamental reform

One of the 60 commitments made during François Hollande's election campaign was to combat *'facial discrimination in identity checks with a procedure which respects people's dignity'*. This commitment has clearly not been fulfilled. Following a report published by the Defender of Rights in 2012, discussions were initiated within government but this gateway to a fundamental reform of the legislation, to move away from a position of what might be described as 'French exceptionalism', was quickly blocked by the Ministry of the Interior.

67 The *Timishev v Russia* case was influential in the decisions reached by the Paris Court of Appeal.
68 Defender of Rights, Decision of 3 February 2015, no. MSP/MDS/MLD 2015-021.
69 Decision by the Constitutional Council, DC no. 93-325 of 13 August 1993.
70 Decision No. MDS 2011-113 of 13 November 2012.

By way of reform, the code of ethics for the National Police and the Gendarmerie was amended.[71] It introduced the principle of police officers being identified by means of a visible registration number. The code also contains a provision specifically relating to identity checks: *'when legally authorised identity checks are being carried out, police officers should not base their selection of individuals to be stopped on any physical characteristic or other distinctive feature, unless the check is due to the existence of a description. Identity checks must be carried out in a way which protects the dignity of the subjects of the checks'*.[72] The same provision also states that any searches conducted must be 'necessary'.

It seems obvious to the informed observer that the measures taken by the government are not likely to put an end to discriminatory practices and disparities observed in the sphere of identity checks.

Since 2012, a number of organisations[73] have come forward to condemn ethnic profiling, highlighting the collateral damage which results from the practice: a violation of social cohesion, denial of the recognition of full citizenship for a section of the population, a deterioration of relations with the police and, at the same time, of working conditions for police officers and gendarmes. Because French law in this area and the practices which result from it violate the principle of equality, the freedom to come and go, respect for private life and the right to effective remedy, these organisations are calling for a better framework for these identity check and stop and search operations, the issuing of a receipt detailing the reason for the check (failing which it would be invalid) and better training for the police in the area of discrimination. With regard to the first point, it is proposed that Article 78 should be completely rewritten, with the removal of 'preventive' identity checks, operations carried out on the basis of orders from the state prosecutor and border checks. What would then remain, as in most neighbouring countries, would be identity checks carried out on the basis of 'objective and individualised reasons' and linked to an offence.

However, far from wanting to let go, the government, admittedly facing turbulent times, has actually extended the powers of stop and search and the numbers of officers involved – on public transport, for example.[74] There is an element of political continuity in this: one just needs to look at how the legislator has reacted in the past to legal decisions it didn't like. It has never taken the helping hand the judge has held out. Similarly, it lodged an appeal against the decisions by the Paris Court of Appeal of June 2016, asserting that it was 'legal' to carry out routine identity checks on people perceived to be Black or Arab for the purpose of finding undocumented migrants and/or their presence in so-called 'sensitive areas'.

The question remains of how long France can continue to resist a reform which could rehabilitate the status of the police with a section of the population.[75]

71 Decision no. 2013-113, 4 December 2013.

72 Article R. 434-16 of the Internal Security Code.

73 Including the Open Society Institute, Human Rights Watch, the French Human Rights League (*Ligue des droits de l'homme*), the trade union of the national legal service (*Syndicat de la magistrature*), the Group of Information and Support for Immigrants (*Groupe d'information de soutien des immigrés – GISTI*) and the Union of French Lawyers (*Syndicat des avocats de France*).

74 France, Law no. 2016-339 of 22 March 2016 on the prevention and combating of 'quality of life offences', breaches of public security and acts of terrorism and strengthening the powers of the police and SNCF and RATP security officers (*Loi n° 2016-339 du 22 mars 2016 relative à la prévention et à la lutte contre les incivilités, contre les atteintes à la sécurité publique et contre les actes terroristes entend renforcer les pouvoirs de police des agents de sécurité de la SNCF et de la RATP*).

75 It could have been compelled: the Court of Cassation issued two high-priority constitutional questions on identity checks and residence checks carried out within the framework of orders from the state prosecutor (QPC 18 October 2016, appeal nos. 16-90022 and 16-90023). However, the Constitutional Council, in its decision of 24 January 2017 (no. 2016-606/607), considered that the regulation was not contrary to Constitutional law or to its principles. It put forward interpretative reservations, but with limited practical scope.

Gender equality and physical requirements in employment

Elisabeth Holzleithner[1]

1 Introduction

Physical requirements play a prominent role in employment. Generally speaking, physical requirements are demands that somebody meets certain physical characteristics as a precondition for a job. They can take the form of facially neutral demands concerning qualities of the body, like height, weight or BMI,[2] but also concerning a person's physical fitness, in physically demanding professions such as the police, the military, the rescue services or coal mining.[3] Typically, it is more difficult for women to meet such requirements than it is for men – that is, they have gender-specific effects. But physical requirements may also be explicitly sex-based. They may take the form of what in US law is called a 'bona fide occupational requirement,'[4] when only a man or only a woman is considered for a certain job. Finally, physical requirements may also refer to certain cultural expectations concerning how a person 'performs' masculinity or femininity, for example by institutionalizing gender-specific clothing regulations or by banning specific items of clothing that are typical for one gender or the other, such as headscarves worn by some Muslim women.

The focus of this paper is on exploring the various dimensions of physical requirements in the labour market and on the tensions that exist between physical requirements and the principle of gender equality as enshrined in EU law. It will first deal with differential treatment based on a characteristic directly related to sex, to be followed by the exploration of facially neutral physical requirements that have different effects on men and women. Finally, the paper will turn to the issue of clothing regulations as a specific form of physical requirements that may target the genders directly or indirectly, and often in intersectional ways, that is, in a combination of several grounds of discrimination, such as ethnicity, religion or sexual orientation. All of these issues will be considered in the light of EU law, particularly the case law of the Court of Justice of the European Union (CJEU)[5] based on the old Equal Treatment Directive of 1976,[6] now no longer in force, and the Gender 'Recast' Directive of 2004.[7]

1 Elisabeth Holzleithner is Professor of Legal Philosophy and Legal Gender Studies at the Law Faculty, University of Vienna, Austria. The author owes great thanks to Alexandra Timmer for her kind patience and her insightful comments on this article.

2 See e.g. http://www.royalnavy.mod.uk/careers/joining/get-ready-to-join/royal-marines-commando/am-i-eligible; see tab 'Medical'.

3 See e.g. http://www.polizei.gv.at/wien/beruf/Berufsinformation/3/6/beurteilung.aspx.

4 See 29 CFR 1604.2 – Sex as a bona fide occupational qualification. For an overview of U.S. case law see Manley, K. (2009), 'The BFOQ Defense: Title VII's Concession to Gender Discrimination", *Duke Journal of Gender Law and Policy*, Vol. 16, pp. 169-210 and Cavic, F.J., Mijtaba, B.G., 'The Bona Fide Occupational Qualification (BFOQ) Defense in Employment Discrimination: A Narrow and Limited Justification Exception', *Journal of Business Studies Quarterly*, Vol. 7(4), pp. 15-29.

5 In this article the term CJEU also includes the European Court of Justice.

6 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, p. 40–42.

7 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23–36.

2 Access to certain professions: the issue of gender stereotyping and physical requirements directly tied to gender

The practice of keeping women from occupying certain professions has a long history. One only has to remember that women in Western countries were not allowed to study at universities until just a little more than a century ago, thereby excluding them from being lawyers, medical doctors, engineers, etc. Little is left from this blatant discrimination, but gender equality law still contains a loophole for differences in treatment 'based on a characteristic related to sex' that makes it possible to reserve access to particular jobs to the members of one gender or the other. Such practices are not considered discriminatory if they constitute a 'genuine and determining occupational requirement,' and provided that their objective is legitimate and the requirement is proportionate.[8]

Why this derogation from the principle of non-discrimination? Legitimating reasons typically refer to authenticity, privacy, safety and protection. *Authenticity* is invoked in the field of arts, when casting an opera singer, an actor or an actress. Artistic freedom may mean to cast a woman in a conventional woman's role, but also to cast a woman in a classical man's role in order to make a point by 'gender switching'.[9] The same rationale extends to modelling. And of course, what is considered legitimate now may in the future be regarded as old-fashioned and discriminatory, as society's thinking about gender evolves (albeit slowly) – the reader may be reminded that in Elizabethan times, all roles in the theatre were played by men since women were not allowed to act on the stage.

As to *privacy*, the presence of a person of the same sex may be seen as necessary during intrusive situations when patients or clients are fully or partially unclothed or intimately cared for. By extension, to employ only women in a battered women's shelter may be considered legitimate policy. The CJEU had to deal with one privacy case in the 1980s when it upheld the exclusion of midwives from the UK Sex Discrimination Act 1975.[10] This (transitional) exclusion, which was already about to be lifted at the time, targeted *male* midwives, who could train for this occupation at two centres only and who were employed in only four designated hospitals. The physical requirement of being female, the UK Government argued, arose from the specific quality of the midwife/patient relationship. Referring to 'personal sensitivities' which 'may play an important role in relations between midwife and patient'[11] the CJEU allowed the provision to stand, at least for the time being. It is doubtful, however, that such an exception from equal treatment would be accepted nowadays.

Turning to the third rationale, *safety*, it used to be relatively common to exclude women from certain occupations in the realm of defence, the military, public security, and the police. In diverse cases before the CJEU, this was argued to be necessary in order to protect external and internal security. The respective arguments focused on women's physique as well as their socio-cultural role.

One case in point was the exclusion of female officers in the Royal Ulster Constabulary from firearms training, which led to the non-renewal of their contracts of employment in the 1980s, when the Troubles in Northern Ireland were escalating.[12] The CJEU did not accept that this was a necessary measure for the protection of women.[13] However, and even though it held that as a derogation from the individual

8 Article 14(2) Gender 'Recast' Directive. This provision is the heir to Article 2 (2) of the Equal Treatment Directive (ETD) from 1976, which did not explicitly mention the principle of proportionality; that it had to be invoked was developed in the CJEU's case law.

9 On the example of acting from an intersectional perspective see Chege, V. (2012), 'The European Union anti-discrimination directives and European Union equality law: the case of multi-dimensional discrimination', *ERA Forum*, Vol. 13, pp. 275-293 at 280.

10 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, Judgment of the Court of 8 November 1983, ECLI:EU:C:1983:311.

11 *Commission v UK* [1983] ECR 3431, at 3449.

12 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, Judgment of the Court of 15 May 1986, ECLI:EU:C:1986:206.

13 According to Article 2(3) ETD.

right to equality, the respective provision[14] had to be interpreted strictly, it showed sympathy for the arguments of the Chief Constable concerning the dangers that women police officers carrying firearms might face. Referring to the special conditions in Northern Ireland, the CJEU recognized 'that in a situation characterized by serious internal disturbances the carrying of fire-arms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety.'[15] Ultimately, the CJEU left this decision to the national courts, but not without holding that the principle of proportionality had to be taken into account.

This principle was also brought to use in the cases that followed, which dealt with women's opportunities for serving in the military. After establishing in the first respective case, *Sirdar v Army Board and Secretary State for Defence*, that, in principle, the Equal Treatment Directive is also applicable in this sphere as far as it is a working environment,[16] the Court took a close look at the specific reasons for excluding women from certain fields of service. In *Sirdar*, the question was whether the Royal Marines, a small elite troupe designed as 'the point of the arrow head'[17] in combat situations, may be organized as a male-only force. The policy of excluding women was due to the Marines' organizational principle of 'interoperability', that is, 'the need for every Marine, irrespective of his specialisation, to be capable of fighting in a commando unit.'[18]

The Court allowed this exception to stand. It was taken for granted that women are unable to fight on a par with their male comrades, but no specific argument found its way into the text of the judgment. A range of reasons can only be found in the opinion of La Pergola AG. He recounted that the Marines' commander had referred to 'negative effects which the presence of any female element might have on the operational cohesion of a commando unit, resulting from the foreseeable preoccupation of infanteers to protect women, quite apart from the latter's (as yet untested) physical suitability for difficult offensive operations involving hand-to-hand combat for which the Marines are trained.'[19] Against this background, the Court did 'not even question that combat effectiveness requires marines to be male.'[20] The amount of gender stereotyping at work in this decision is quite astounding: Women are considered an unruly element, they are not supposed to fight. Women are those protected, not those who protect, at least when it comes to the frontline.[21] It seems quite obvious that the Court was not inclined to interfere with the UK's defence policy in a field that seemed rather delicate.

The line was seen as having been crossed, however, in the case of Germany's barring women from all military posts 'involving the use of arms,' allowing "them access only to the medical and military-music services.'[22] This exception was considered to be too broad; it could not 'be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out.'[23] Thus the regulation did not meet the requirements of the principle of proportionality.

The stereotyping characteristic of *Sirdar* once again reared its head in the final case concerning the military to date. Alexander Dory, a German citizen, had protested that being obligatorily drafted as a man, but not as a woman, according to German law amounted to sex discrimination.[24] Being aware that the issue of the draft is a core question of public safety and not one of the labour market, he argued

14 Article 2(2) ETD.
15 *Johnston v Chief Constable of the Royal Ulster Constabulary*, para. 36.
16 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, Judgment of the Court of 26 October 1999, para. 16.
17 Opinion of La Pergola AG, in *Sirdar v The Army Board*, delivered on 18 May 1999, ECLI:EU:C:1999:246, para. 5.
18 *Sirdar v The Army Board*, para. 7.
19 La Pergola AG, in *Sirdar v The Army Board*, para. 33.
20 Timmer, A. (2016), 'Gender Stereotyping in the case law of the EU Court of Justice', *European Equality Law Review*, Issue 1, pp. 37-46 at 44.
21 On the motif of male protectors v. female protected see Kronsell, A. (2016), 'Sexed Bodies and Military Masculinities: Gender Path Dependence in EU's Common Security and Defense Policy', *Men and Masculinities*, Vol. 19(3) 311-336.
22 *Tanja Kreil v Bundesrepublik Deutschland*, Judgment of the Court of 11 January 2000, ECLI:EU:C:2000:2, para. 10.
23 *Kreil v Bundesrepublik Deutschland*, para. 27.
24 *Alexander Dory v Bundesrepublik Deutschland*, Judgment of the Court of 11 March 2003, ECLI:EU:C:2003:146.

that it was still discriminatory in the light of the Equal Treatment Directive because his entrance into the job market was being delayed.[25] As a connection to working life, however, this was not sufficient for the CJEU, and it allowed male-only compulsory military service to stand. And it added a few thoughts on the legitimacy of this institution, referring to values such as the 'democratic transparency of the military, national integration, the link between the armed forces and the population, and the mobilisation of the manpower needed by the armed forces in the event of a conflict.'[26] That this choice of organisation worked 'to the detriment of access of young people to the labour market'[27] was seen as a mere side-effect. Note that all the objectives of the policies the Court mentioned have nothing at all to do with gender or gender-based physical requirements. The Court even obfuscated who is burdened by the draft when it refers to the work prospects of 'young *people'* and not of young *men*, as would have been to the point. The precedent still stands.[28] Germany has, however, despite its fervour at the time, in the meantime abolished compulsory military service[29] – and the Royal Marines have started admitting women.[30]

What can be learned from this succession of judgments concerning the rationale of safety? The argumentative hurdle to overcome when excluding women because of physical requirements is quite high due to the weight accorded to the principle of proportionality, but the Court was not completely immune to the temptations of gender stereotyping – rather, gender stereotypes informed its proportionality assessments.[31] The Court relied on images of women, on ascriptions concerning their physical abilities, but also on stereotypes as to how others perceive women doing certain jobs – such as when the fear prevailed that female police officers carrying guns would be easy targets for assassinations or that female soldiers would be the objects of their comrades' chivalrous attitude, thereby adversely affecting the effectiveness of the troupe. And the double standard should not be overlooked: a male soldier who tries to rescue a female comrade is considered a cavalier, whereas when he tries to rescue a male comrade, he is a hero.[32] The stereotypical notions invoked by the CJEU were false[33] – they had nothing to do with the real abilities of those individual women who might have wanted one of the positions they were denied.

In a case decided in the early 2000s concerning the final rationale of *protecting* women from doing certain jobs, by contrast, the Court was unyielding: *Commission v Austria*[34] directly concerned women's physique, namely the question of whether women are fit to work in underground mines and in high-pressure environments. Austrian law contained provisions that barred women from such occupations, and the Austrian government, relying on 'statistical stereotypes',[35] defended them on the ground of women's different, that is, weaker physical constitution; women as a group allegedly did not meet the physical requirements. The Austrian government described in detail the massive strains of these kinds of

25 *Dory* referred to *Julia Schnorbus v Land Hessen*, Judgment of the Court (Sixth Chamber) of 7 December 2000, ECLI:EU:C:2000:676.

26 *Dory v Bundesrepublik Deutschland,* para. 37.

27 *Dory v Bundesrepublik Deutschland,* para. 38.

28 On the relation between *Kreil* and *Dory* see Raible, K. (2003), 'Compulsory Military Service and Equal Treatment of Men and Women – Recent Decisions of the Federal Constitutional Court and the European Court of Justice (*Alexander Dory v. Germany*)', *German Law Journal*, Vol. 4(4), pp. 299-308. On gender stereotyping in these decisions see Cook, R., Weiss, C. (2016), 'Gender Stereotyping in the Military. Insights from Court Cases' in: Brems, E., Timmer, A. (eds.), Stereotypes and Human Rights Law, Intersentia, p. 157.

29 http://www.nytimes.com/2011/07/01/world/europe/01germany.html.

30 http://www.royalnavy.mod.uk/royalmarines/women.

31 I am indebted to Alexandra Timmer for explicitly pointing this out.

32 'So when a man tries to rescue another man, he is a hero, but he tries to rescue a woman, he's just going soft.' Lieutnant Jordan O'Neil in the film 'G.I. Jane', Buena Vista Pictures 1997.

33 See Timmer, A. (2016), 'Gender Stereotyping in the case law of the EU Court of Justice', *European Equality Law Review*, Issue 1, pp. 37-46 at 38. Aside from false stereotypes, which rely solely on prejudices, the author distinguishes 'role-typing stereotypes', containing expectations as to the proper roles of groups of people, 'statistical stereotypes' reflecting 'a statistical truth about a group as a whole, but which does not necessarily accurately reflect the situation of the individual', and 'prescriptive stereotypes' encompassing standards of behaviour and appearance for certain groups of people.

34 *Commission of the European Communities v Republic of Austria,* Judgment of the Court (Grand Chamber), 1 February 2005, ECLI:EU:C:2005:76.

35 Timmer, A. (2016), 'Gender Stereotyping in the case law of the EU Court of Justice', *European Equality Law Review*, Issue 1, pp. 37-46 at 38.

work on the human body,[36] and it pointed out the additional risks for women because of 'morphological differences':[37] 'On average, mass and muscular strength, vital capacity, absorption of oxygen, blood volume and the number of red blood cells are less in women than they are in men. Women bearing strong physical stresses in their place of work would be exposed to higher risks of abortion and also of osteoporosis when menopausal and would suffer more migraines.'[38] However, as the Commission argued, the Austrian government itself had already admitted 'in the pre-litigation procedure that "the range of energy variables is wide, there are considerable areas of overlap with values for men and an individual assessment ought to be carried out".'[39]

On this basis, the Court held that women may not 'be excluded from a certain type of employment solely because they are on average smaller and less strong than average men, while men with similar physical features are accepted for that employment.'[40] So the holding is clear, and it has a bearing on all such cases: Women must not be excluded from occupations because the average woman has less physical capacities than the average man. A person's capabilities must always be assessed individually. The derogation now enshrined in Article 14(2) Gender 'Recast' Directive was narrowed by the Court yet again, and it seems that nowadays the rationale of protection would hardly be of use.

3 The effects of effort: physical requirements indirectly tied to gender

The fields explored so far, the police, the military and other high physical demand jobs such as underground mining, and also the rescue services, have been opened for women, but they are still highly gendered. Women are represented in markedly low numbers. Accordingly, these working environments are characterized by a deeply ingrained masculinity[41] – a 'gender subtext'[42] that excludes and marginalizes women. Men are assumed to be the norm, both materially and ideologically. The assumption of men as the norm has material consequences, as the inclusion of women is seen as posing huge organizational difficulties, including 'the requirement for changing rooms for both men and women, and equipment that is adjusted for both genders.'[43] Besides, women tend not to be trusted as capable co-workers, for physical as well as for social reasons, and they are often seen as a nuisance factor perturbing the atmosphere of male camaraderie.[44]

Of course, there is yet another problematic, and it contributes to women's underrepresentation in these fields: The physical ability tests used in order to screen for those who are able to perform in these occupations typically produce large differences between men and women; they tend to favour male over female candidates.[45] It should be added that some such tests, like the German regulations for the police

36 *Commission v Austria*, 1 February 2005, ECLI :EU :C :2005:para. 37.
37 *Commission v Austria,* para. 40.
38 *Commission v Austria,* para. 38.
39 *Commission v Austria,* para. 41.
40 *Commission v Austria,* para. 46. That the action regarding underground mining was dismissed because Austria was still bound by an I.L.O. Convention does not change the content of the decision.
41 See Kronsell, A. (2016), 'Sexed Bodies and Military Masculinities: Gender Path Dependence in EU's Common Security and Defense Policy', *Men and Masculinities*, Vol. 19, pp. 311-336.
42 Benschop, Y., Doorewaard, H. (2012), 'Gender subtext revisited', *Equality, Diversity and Inclusion: An International Journal*, Vol. 31(3), pp. 225-235. See also Acker, J. (2012), 'Gendered organizations and intersectionality: problems and possibilities', *Equality, Diversity and Inclusion: An International Journal*, Vol. 31(3), pp. 214-224.
43 Grip, L., Engström, L.-G., Krekula, C., Karlsson, S. (2016), 'The woman as problem and solution – analysis of a gender equality initiative within the Swedish Rescue Services', *NORA – Nordic Journal of Feminist and Gender Research* Vol 24(2), pp. 95-109 at 101. The authors rightly point out that '[t]he norm here also implies that there is just one kind of men and that they all fit the material conditions.'
44 In Season 2 of the television series "Rescue Me" such an attitude can be seen on display when firefighter Laura Miles joins the team (FX, 2005).
45 Courtright, S.H., McCormick, B.W., Postlethwaite, B.E., Reeves, C.J., Mount, M.K. (2013), 'A Meta-Analysis of Sex Differences in Physical Ability: Revised Estimates and Strategies for Reducing Differences in Selection Contexts', *Journal of Applied Psychology*, Vol. 96(4), pp. 623-641.

and firefighters, also contain provisions that discriminate against transgender and intergender people by prescribing that a candidate must possess a functioning andrological or gynaecological hormone system.[46]

The differential impact of physical ability tests must be considered in the light of the provision against indirect discrimination. Indirect discrimination occurs 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex.' They are only legitimate if 'objectively justified by a legitimate aim,' when 'the means of achieving that aim are appropriate and necessary.'[47] In this light, the question arises whether such tests are adequate for selecting job candidates or whether their criteria unjustly favour male candidates. Thus far, the CJEU did not have to decide a case challenging such physical ability tests – neither those that do not differentiate between men and women nor those that do differentiate between the sexes, using less demanding criteria for men than for women.[48] They would have to be considered in light of the experience that 'workers who fail to meet job-related physical demands have lower performances, more injuries, more absenteeism, and higher mortality rates.'[49] Accordingly, physical ability tests may well be legitimate if they constitute a suitable selection system for the respective occupation. The Court would have to decide such an issue with regard to the principle of proportionality enshrined in the provision on indirect discrimination.

Heretofore, the CJEU only had to deal with a related issue, namely the legitimacy of a job classification system determining the value of work and the respective pay with regard to *physical effort*. In *Rummler v Dato-Druck GmbH*,[50] a nationally agreed upon pay scale came under scrutiny because of its allegedly discriminatory effects on women. The pay scale provided for several wage groups, 'determined according to the degree of knowledge, concentration, muscular demand or effort and responsibility.'[51] The referring court fundamentally asked whether a job classification system may take muscular effort into account at all in the light of the principle of equal pay for equal work. The court further wanted to know whether it had to be taken into account that a woman's effort doing hard work may be higher than that of a man – there is a difference, it was alleged, whether a woman lifts a weight of 20 kilos or whether a man does. Accordingly, a woman might have to be remunerated more for the same work due to her higher strain.[52]

Tackling this issue, the CJEU resorted to the notion of objectivity; it declared admissible criteria 'based on the degree of muscular effort objectively required by a specific job or the objective degree of heaviness of the job.'[53] While this seems an adequate approach, in the words of Ellis and Watson, 'the concept of the "objective" measurement of the amount of physical effort demanded by a particular job is an obscure one.'[54] It might be said to postulate a gender-neutral person, who simply does not exist. All in all, however, the CJEU tries to find a balance that takes into account the typical abilities of both genders: 'A system is not necessarily discriminatory simply because one of its criteria makes reference to attributes more characteristic of men.'[55] But the system as a whole must not discriminate on the ground of gender,

46 Schriftliche Anfrage des Abgeordneten Tom Schreiber (SPD) vom 12. November 2015 (…) und Antwort: Trans- und Intersexuelle bei der Polizei und Feuerwehr, Abgeordnetenhaus Berlin, 17. Wahlperiode, Drucksache 17/17 414, at 3. For a respective case see the joint contribution by ILGA-Europe and Transgender Europe towards the European Commission's monitoring of the implementation of the Gender Goods and Services Directive (Dir. 2004/113/EC) and the Gender 'Recast' Directive (Dir. 2006/54/EC) in the EU Member States, June 2011, at 17.

47 Article 2(1) b Gender 'Recast' Directive.

48 As an example for differentiated tests the US Marines may be mentioned. See Brownson, C. (2014), 'The Battle for Equivalency: Female US Marines Discuss Sexuality, Physical Fitness, and Military Leadership', *Armed Forces & Society*, Vol. 40(4), pp. 765-788.

49 Courtright, S.H., McCormick, B.W., Postlethwaite, B.E., Reeves, C.J., Mount, M.K. (2013), 'A Meta-Analysis of Sex Differences in Physical Ability: Revised Estimates and Strategies for Reducing Differences in Selection Contexts', *Journal of Applied Psychology*, Vol. 96(4), pp. 623-641, at 623.

50 Judgment of the Court (Fifth Chamber) of 1 July 1986, ECLI:EU:C:1986:277.

51 *Rummler v Dato-Druck GmbH,* Judgment of the Court (Fifth Chamber) of 1 July 1986, ECLI:EU:C:1986:277, para. 3.

52 Ellis, E., Watson, P. (2014), *EU Anti-Discrimination Law*, Second Edition, Oxford EU Library, pp. 264-265.

53 *Rummler v Dato-Druck GmbH,* Jpara. 22.

54 Ellis, E., Watson, P. (2014), *EU Anti-Discrimination Law*, Second Edition, Oxford EU Library, p. 266.

55 *Rummler v Dato-Druck GmbH*, para. 15.

particularly by including other criteria concerning the quality of work that do not disadvantage women.[56] So 'in order for a job classification system not to be discriminatory as a whole, it must, in so far as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show particular aptitude.'[57]

Certainly this notion included the UK's suggestion taken up in the early part of the judgment, that when muscular effort is a criterion, the 'movements of small muscle groups characteristic of manual dexterity,'[58] a criterion that might be said to favour women, must not be ignored. Everything will depend on the overall make-up of the system. Of course, complex issues will arise in every single case. At any rate, following the CJEU's decision, 'the German Federal Labour Court ruled that classifying jobs based on physical strength was no longer permissible and that all forms of effort must be included.'[59] And as to 'physical effort' in general, which 'is related to physical demands on the body or the energy required to perform tasks such as standing, walking, lifting, typing or remaining in one position for long periods," a Commission Report from 2013 states the obvious when it warns that '[o]ne should be careful when applying this sub-factor to avoid indirect discrimination.'[60]

4 Clothing regulations: gender performance and intersectionality

The last section of this paper turns from bodies and their abilities in the strict sense to gender performance in the broader sense. Clothing regulations set the standards for physical appearance in the job. Such standards constitute a sub-group of physical requirements. They have become quite common in the business world, be it in order to assure standards of hygiene and safety on the job, or in order to have employees incorporate a brand – not rarely in a way that is deemed 'attractive'.[61] Businesses express their identity in uniforms that typically come in gendered variants in order to ensure a certain standard of appearance. Of course, the way employees present themselves reflects back on an employer's image. It is recognized by law that businesses may set rules for their employees' appearance, but how far may regulations go in constraining a person's gendered self-expression?

As all other provisions, clothing regulations must not be discriminatory on the ground of gender, neither directly nor indirectly. But also other grounds of discrimination can come into play, such as ethnicity,[62] religion or sexual orientation.[63] What is at stake can first be discussed with reference to the headscarf issue. The headscarf, even more so the niqab or the burqa, is a contested piece of clothing. Wearing a headscarf is often the cause of a disadvantage in the labour market; there is an abundance of cases where job applicants were told that they would be employed if only they removed the headscarf.[64] In order to conclude that Muslim women wearing the headscarf are discriminated against unlawfully at all,

56 *Rummler v Dato-Druck GmbH*, para. 17.
57 *Rummler v Dato-Druck GmbH*, para. 15.
58 *Rummler v Dato-Druck GmbH*, para. 9.
59 Van der Vleuten, A. (2005), 'Pincers and Prestige: Explaining the Implementation of EU Gender Equality Legislation', *Comparative European Politics*, Vol. 3, 464–488, 480.
60 Report from the Commission to the Council and the European Parliament on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (SWD(2013) 512 final) – Annex 1: Gender Neutral Job Evaluation and Classification Systems, p., at http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/swd-2013-_512-final_en.pdf.
61 On this problematic see Rhode, D. (2010), *The Beauty Bias. The Injustice of Appearance in Life and Law*, Oxford University Press.
62 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L 180, 19/07/2000 P. 0022 – 0026.
63 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O.J. L 303, 02/12/2000 P. 0016 – 0022.
64 For cases decided by the Austrian Equal Treatment Commission see Holzleithner, E. (2015), 'Die Situation von Muslimen, insbesondere von muslimischen Frauen in Österreich', in: ÖJK (ed.), *Diskriminierung in der Schweiz und in Österreich*, Linde Verlag, pp. 91-100.

an intersectional perspective has to be adopted.[65] Otherwise it could be argued that an employer who does not want to employ a woman wearing a headscarf for religious reasons neither discriminates on the ground of religion, if Muslim men and Muslim women not wearing the headscarf are employed, nor on the ground of gender, if women are employed at all.[66] An intersectional perspective is necessary to regard the subgroup of Muslim women wearing a headscarf as unlawfully discriminated against. And since both categories are in play – gender and religion – this very point of intersection should be taken seriously, and banning the headscarf should be regarded as a case of discrimination on both grounds: gender and religion, often also on the ground of ethnicity, insofar as women from ethnic minorities are concerned.

Recently, on March 14, 2017, the CJEU decided two headscarf cases: *G4S Secure Solutions*[67] and *Bougnaoui and ADDH*.[68] It considered these cases solely in the light of religious freedom, blinding out the gender dimension. In *G4S Secure Solutions*, the headscarf ban had to be considered in the light of a general rule that prohibited workers 'from visibly wearing signs of political, philosophical or religious beliefs'[69] when in contact with customers. Such 'a policy of political, philosophical or religious neutrality' was considered 'legitimate'[70] by the CJEU in light of 'the freedom to conduct a business' as recognized in Article 16 of the Charter of Fundamental Rights of the European Union. That workers are thus banned from dressing according to their religious beliefs is seen (only, but still) as a case of *indirect* discrimination. And as long as only workers are concerned who interact with customers, the ban does not exceed what is necessary, and the principle of proportionality, according to the CJEU, is maintained.[71]

In *Bougnaoui and ADDH*, the constellation was different: Wearing the headscarf was specifically prohibited by the employer due to the wishes of a customer, whose employees had been 'upset' by such a sight. When Ms Bougnaoui, a design engineer, did not want to comply, she was given her notice. This direct restriction on her religious freedom was considered in the light of the Framework Directive, which contains a provision justifying restrictions on religious freedom 'by reason of the nature of the particular occupational activities concerned or the context in which they are carried out' when 'such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'[72] Since wearing a headscarf did not in any way interfere with Ms Bougnaoui's work as a design engineer, the Court did not consider this provision to have been fulfilled. It particularly cannot, the Court held, 'cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.'[73] Indeed, such customer preferences 'generally reflect and reinforce precisely the attitudes that society is seeking to eliminate.'[74] Allowing them to hold the upper hand would amount to nullifying equality law.

65 As to intersectional approaches in EU Law, see Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, Luxembourg, Publications office of the European Union; see also the contributions in Schiek, D., Chege, V. (eds.) (2009), *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law*, Routledge-Cavendish.

66 Holzleithner, E. (2008), 'Intersecting Grounds of Discrimination: Women, Headscarves and Other Variants of Gender Performance', *Juridikum*, Issue 1, pp. 33-36 at 34, with reference to Crenshaw, K. (1989) 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics', *University of Chicago Legal Forum*, Issue 1, pp. 139-167 at 149.

67 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, Judgment of the Court (Grand Chamber) of 14 March 2017, ECLI:EU:C:2017:203.

68 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, Judgment of the Court (Grand Chamber) of 14 March 2017, ECLI:EU:C:2017:204.

69 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrjding v G4S Secure Solutions NV*, Judgment of the Court (Grand Chamber) of 14 March 2017, ECLI:EU:C:2017:203, para. 40.

70 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, para. 37.

71 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, para. 42.

72 Article 4(1) Directive 2000/78.

73 *Asma Bougnaoui and ADDH v Micropole SA*, Judgment of the Court (Grand Chamber) of 14 March 2017, ECLI:EU:C:2017:204, para. 40.

74 Rhode, D. (2010), *The Beauty Bias. The Injustice of Appearance in Life and Law*, Oxford University Press, p. 106.

While the gender dimension of the headscarf ban is ignored in both Court decisions, it is tackled in Sharpston AG's Opinion in *Bougnaoui and ADDH.* She held that many views exist on why religious women wear a headscarf: Many believe that the headscarf is a symbol of oppression, whereas others 'perceive wearing a headscarf as a feminist statement, as it represents a woman's right to assert her choice and her religious freedom to be a Muslim who wishes to manifest her faith in that way.'[75] Sharpston AG did not want to base her view on either of these opinions, since both might be valid in specific circumstances. The CJEU, she held, should adopt neither view, it should rather eschew the gender issue altogether and focus only on religion: 'the matter is best understood as an expression of cultural and religious freedom.'[76]

From the point of view of the intersecting gender dimension, this position falls short. Why a headscarf is worn is beside the point, and there are indeed many reasons to wear it.[77] Even if wearing the headscarf is forced, this would not remove the injury of being discriminated against as a religious *woman* in the labour market, quite the contrary. Being forced to wear a headscarf and also being discriminated against on the labour market would simply add insult to injury. As Roseberry rightly remarks: 'Prohibiting head-scarves at work makes women pay the price – again – for their own oppression and thus fails to address the conditions that constrain their choices and construct their sex inequality.'[78] Accordingly, the gender dimension cannot be waived with reference to (alleged) motifs of the women wearing a headscarf. But it must be pointed out that in a way the CJEU already accepts an intersectional perspective by accepting that women wearing headscarves for religious reasons are a group whose protection by EU Equality Law must be ensured.

Arguments of the intersectional kind concerning clothing regulations can be generalized. As was already mentioned, in-house dress codes, be they formalized or rather informally institutionalized via (peer) pressure, quite often intend to ensure the performance of 'attractive' femininity according to common Western standards.[79] This may encompass the duty of wearing tight skirts, high heels or make-up. The difference between the two cases is evident: While in the case of the headscarf 'too much' (culturally deviating) femininity is the problem, a woman who does not comply with conventional rules of feminine attractiveness allegedly shows 'too little'. But the logic remains the same: Women are supposed to remain on the ground of culturally familiar conventions of (attractive) femininity. More than two decades ago, the US Supreme Court recognized the respective need for protection in the case of a woman who had been denied partnership in a law firm because her behaviour had not been feminine enough.[80] It particularly argued that women who aspire to be partners in big law firms are caught in a sinister catch 22 situation: If they abide by the rules of femininity, they will most probably not be considered aggressive enough, but if they display the qualities needed in order to be successful, they will be regarded as too masculine, which will also keep them from success.[81]

In the spirit of this decision, I would argue that putting women or men in employment at a disadvantage for deviating from conventions of gendered performance has to be seen as direct discrimination on the ground of gender. In that way anti-discrimination law can be made to work for men and women who deviate from stereotypical expectations concerning gender performance, be they religiously conservative or of the gender bending variety – it must not be forgotten that gendered clothing regulations may be

75 Sharpston AG, 13 July 2016, Case C-188/15, para. 75.
76 Sharpston AG, 13 July 2016, Case C-188/15, para. 75.
77 See e.g. Howard, E. (2012), 'Banning Islamic veils: Is gender equality a valid argument?' *International Journal of Discrimination and Gender*, Vol. 12(3), pp. 147-165 at 153-156.
78 Roseberry, L. (2009), Religion, ethnicity and gender in the Danish headscarf debate, in: Schiek, D., Chege, V. (eds.), *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law*, Routledge-Cavendish, pp. 329-352, at 344.
79 On the issue, see Caven, V., Lawley, S. (2013), 'Performance, gender and sexualized work. Beyond management control, beyond legislation? A case study of work in a recruitment company', *Equality, Diversity and Inclusion: An International Journal*, Vol. 32(5), pp. 475-490.
80 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
81 Id at 251.

particularly problematic for transgender persons.[82] According to this approach, any norms of gender performance may only be enforced if, in the terms of EU anti-discrimination law, they show a characteristic which 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, [...] constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'[83] The margin for such exceptions should – in accordance with the current case law of the CJEU – be narrow.[84] The CJEU did not have to take a stand on this specific issue yet.

5 Conclusion

As could be shown in this paper, all physical requirements are in some way in a relationship of tension or even downright at odds with the principle of gender equality. Reserving certain occupations to members of only one gender is a practice with a shameful history of excluding women. Even though the CJEU has consistently insisted that the respective derogation from non-discrimination has to be construed narrowly and in accordance with the principle of proportionality, its case law still fell prey to the lure of gender stereotyping and double standards for men and women. This danger also looms when it comes to legitimizing facially neutral physical requirements that have detrimental effects on women. In this field, there is hardly any CJEU case law to deal with; in the case of *Rummler*, the Court was aware of the challenge and avoided the trap, even though the notion of objectivity when it comes to strength criteria in job evaluations is problematic with regard to gender equality. The field most open to justifications impacted by gender stereotypes is that of physical requirements in the form of clothing regulations. So far, the CJEU has not had to deal with the general issue; in the headscarf cases it has ignored the gender dimension – to the detriment of the recognition of what is truly at stake: the equal freedom of those Muslim *women* who wear the veil for whatever reason. It should have been the task of the CJEU to take the gender dimension of such regulations more seriously.

Any justification of gendered clothing regulations must adhere to the strict standards of necessity and proportionality enshrined in the EU Equality Directives. Hopefully if a case comes before the CJEU, the Court will live up to the challenge with sensitivity to the intersectional positions of men, women, transgender and intergender people from various backgrounds in terms of ethnicity, religion, age and sexual orientation.

82 See Jones, J. (2013), 'Trans dressing in the workplace', *Equality, Diversity and Inclusion: An International Journal*, Vol. 32(5), pp. 503-514 and Brower, T. (2013), 'What's in the closet: dress and appearance codes and lessons from sexual orientation', *Equality, Diversity and Inclusion: An International Journal*, Vol. 32(5), pp. 491-502.

83 Art. 14(2) Dir 2006/54/EC; analogous provisions can be found in Art. 4 Dir. 2000/43/EC and Art. 4(1) Dir. 2000/78/EC.

84 See already *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, Judgment of the Court of 15 May 1986, ECLI:EU:C:1986:206.

Legislating for equality in Bosnia and Herzegovina: key developments and remaining challenges

Adnan Kadribašić[1]

1 Introduction

Bosnia and Herzegovina (BaH) has a particularly complex government system, which is a result of the war in 1992 – 1995. This war ended with the signing of the 1995 General Framework Agreement for Peace in BaH.[2] This Peace Agreement terminated the war and created a new Constitution (annexed to the Peace Agreement) as well as establishing the new organizational structure of BaH.

The Constitution of Bosnia and Herzegovina states that Bosnia and Hercegovina is a state of three 'constituent peoples' – Bosniaks, Croats, and Serbs – as well as 'Others' and stipulated in this way a clear reference is made to the collective rights of the main ethnic groups but not to the rights of individuals. According to the BaH Constitution, the Head of the BaH Presidency (see below) must come from one of the three constituent ethnic groups; furthermore, the upper house of the BaH Parliament, the House of Delegates, is composed of five delegates from each of the constituent ethnic groups. Based on several rulings by the European Court of Human Rights (ECtHR)[3] the Constitution of Bosnia and Herzegovina has been found to be discriminatory as these power-sharing mechanisms favour the 'constituent peoples' and exclude all other groups which exist in the country.

Bosnia and Herzegovina is a parliamentary democracy with a bicameral Parliamentary Assembly and a Presidency of three members at the central level of government. However, the country is highly decentralized and the state government has limited competences. Most of the competences are in the hands of the two regional governments called the 'entities' and in one of these entities they are decentralised even further to sub-regional governments called cantons.

A total of 14 governments exist in BaH and this structure creates 14 different legal systems in some parts of the country. This leads to a different regulation of certain rights and in some cases a duplication and a lack of harmonisation which is a challenge in establishing a human rights system in Bosnia and Herzegovina. Namely, in the area of social protection 13 governments (except for the state level) had to adopt laws to regulate the rights of persons in need of social protection and, in some cases, there are 13 different approaches to the regulation and realization of these rights.

1 Adnan Kadribašić MA is a human rights lawyer in Bosnia and Herzegovina. In his capacity as a legal advisor at the Agency for Gender Equality of Bosnia and Herzegovina and later as the legal advisor at the OSCE Mission to BaH he was one of the key experts when drafting the non-discrimination and equality law in Bosnia and Herzegovina and has extensive research experience in the area of anti-discrimination and gender equality policies and human rights in BaH. He has published commentaries and research, drafted new policies, conducted training programmes and provided consultancy services on equality and anti-discrimination law.

2 Dayton Peace Agreement documents initialled in Dayton, Ohio on 21 November 1995 and signed in Paris on 14 December 1995.

3 *Sejdić and Finci v. Bosnia and Herzegovina* ([GC], (nos. 27996/06 and 34836/06), ECHR 2009, *Zornić v. Bosnia and Herzegovina* (no. 3681/06), ECHR 2014, *Slaku v. Bosnia and Herzegovina* (Application no. 56666/12), ECHR 2016.

There is a general consensus that equality and non-discrimination law should be regulated at the state level. This process started in 2003 with the adoption of the Law on Gender Equality in Bosnia and Herzegovina and was reformed with the adoption of the Law on the Prohibition of Discrimination in 2009, which was further developed in 2016.

The main aim of this article will be to analyse the existing anti–discrimination legal framework of BaH with a strong focus on the Law on Gender Equality of Bosnia and Herzegovina and the Law on the Prohibition of Discrimination. It will 1) provide an overview of anti-discrimination and gender equality law in BaH, and 2) assess to what extent the law complies with or differs from EU equality/non-discrimination law.

2 Constitutional provisions on equality and non-discrimination

The Constitution of Bosnia and Herzegovina has included respect for human rights as one of its central pillars. The preamble to the Constitution declares that BaH will be based on respect for human dignity, liberty and equality, peace, justice, tolerance, and reconciliation and that its creation was inspired by international human rights instruments. According to the Constitution, the European Convention on the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR)[4] shall apply directly. The Constitution also defines a list of human rights which are largely inspired by the rights and freedoms enshrined in the ECHR.[5] Additionally, Annex I to the BaH Constitution specifies a list of additional human rights agreements to be applied in BaH.

Article II/4 of the Constitution

The central article of the Constitution which defines non-discrimination is Article II/4. It states:

> 'The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in BaH without 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.'

This definition seems to be largely inspired by Article 14 of the ECHR and Protocol 12. It provides protection from discrimination on 'any ground' meaning that, as is the case for Article 14 ECHR, the list of protected grounds is open rather than closed. Although largely inspired by Article 14, which can also be seen by its accessory nature, Article II.4 of the BaH Constitution provides for a wider scope of protection than Article 14 of the ECHR since it provides protection against discrimination not only in respect of the rights or freedoms protected by the ECHR, but also with regard to the other rights or freedoms safeguarded by the BaH Constitution (Article II.3), including the instruments contained in Annex I to the BaH Constitution. This has been confirmed by the Constitutional Court in its case law when the Court concluded that 'Article II.4 of the Constitution provides more extensive protection from discrimination than Article 14 of the European Convention.'"[6]

4 Article II.2 of the Constitution reads: 'The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.'

5 This list includes 'the right to life, the right not to be subjected to torture or to inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude or to perform forced or compulsory labour, the rights to liberty and security of person, the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings, the right to private and family life, the home, and correspondence, freedom of thought, conscience, and religion, freedom of expression and freedom of peaceful assembly and freedom of association with others') but also rights from Protocol I to the ECHR ('the right to property and the right to education') and Protocol IV ('the right to liberty of movement and residence').

6 Constitutional Court of BaH, Appellant Sejfudin Tokic, U 44/01 -1, paragraph 45.

The Constitutional Court of Bosnia and Herzegovina, which has been established by the BaH Constitution, has appellate jurisdiction[7] over issues arising from the Constitution or a judgment by any court in BaH.

In defining what discrimination represents in Article II/4 and what forms it takes, the BaH Constitutional Court often refers to the jurisprudence of the ECtHR in its interpretation of Article 14 ECHR. The Constitutional Court of BaH has significant jurisprudence in discrimination cases and, for the most part, this jurisprudence has mirrored the developments at the ECtHR concerning the application of Article 14 and Protocol 12. To date, the Constitutional Court of BaH has considered cases of direct[8] and indirect discrimination,[9] has expanded the list of prohibited grounds to include grounds such as sexual orientation,[10] has considered cases which fall outside the scope of the ECHR,[11] and has found that the ordinary courts' failure to shift the burden of proof in cases of discrimination represents a violation of Article 6.1 of the ECHR.[12]

3 Developing specific equality and anti-discrimination legislation

Protection from discrimination is one of the key principles of the laws of BaH and is part of many pieces of legislation which guarantee that certain rights also include the general prohibition of discrimination. There are a number of separate pieces of legislation which include provisions aimed at ensuring equality and/or privileges for particular vulnerable groups in society, most notably the three constituent peoples but also women, minorities, veterans and veterans' families. It should be noted that prior to the development of equality law no law defined different forms of discrimination or regulated enforcement mechanisms and/or remedies as the anti–discrimination laws have done.

3.1 Law on Gender Equality in Bosnia and Herzegovina from 2003

The Law on Gender Equality in BaH[13] (GEL) was adopted in 2003 and was the first law which focused on equality in BaH. The Amendments to the Law on Gender Equality in BaH were adopted in 2009 and in 2010 an official unified version of the Law was published. This Law was also the first law which defined different forms of discrimination in the legal system of BaH although at that time discrimination was already prohibited by other laws[14] in the country. Concerning its structure, GEL is mainly based on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The main aim of GEL is to regulate, promote and protect substantive gender equality and to guarantee equal opportunities to all citizens, both in public as well as private life. GEL also prohibits discrimination based on sex, gender and sexual orientation[15] and defines different forms of discrimination (which will be explained below).

The Law covers both sex which is defined as 'biological and psychological features that differentiate human beings into persons of the male and female sex' and gender which is defined as the 'sociologically and culturally conditioned difference between persons of the male and female sex, and is related to all roles and features that are not conditioned or determined exclusively by natural or biological factors, but are the product of norms, practice, customs and tradition and are changeable through time.'

7 This appellate jurisdiction represents a novelty in the system of the constitutional judiciary in BaH, and implies the introduction of individual constitutional action, i.e. an opportunity to review legal acts and decisions if they are in violation of the appellant's rights and freedoms.
8 Constitutional Court of Bosnia and Herzegovina, Case no. AP 369/10, 24 May 2013.
9 Constitutional Court of Bosnia and Herzegovina, Case no. U 12/09, 28 May 2010.
10 Constitutional Court of Bosnia and Herzegovina, Case no. AP 1020/11, 25 September 2014.
11 Constitutional Court of Bosnia and Herzegovina, Case no. U 38/02, 19 December 2003.
12 Constitutional Court of Bosnia and Herzegovina, Case no. AP 1093/07, 25 September 2009
13 Law on Gender Equality in Bosnia and Herzegovina – consolidated version (Official Gazette of BaH, No. 32/10), available at: http://arsbih.gov.ba/wp-content/uploads/2014/02/GEL_32_10_E.pdf, accessed 15 February 2017.
14 E.g. legislation in the area of labour, education, elections etc.
15 It should be noted that GEL only mentions sexual orientation in Article 2 (3) in relation to the general prohibition of discrimination. The remainder of the Law and even the definitions of forms of discrimination use only sex and gender.

The Law contains 33 articles that include definitions of the different forms of discrimination based on sex[16] and gender, and contain references to specific manifestations of discrimination in the fields of education, work and employment, social and health protection, sport and culture, public life and the media. The Law also regulates the prohibition of violence, compensation for damage, the obligations of the authorities in terms of gender mainstreaming, monitoring and supervising the implementation of the law, penal provisions, as well as interim and final provisions. The Law will be analysed in detail below.

3.2 Reform of equality law in 2009 and in 2016

In 2008, many professionals were of the opinion that BaH needed to reform its approach to equality law. A civil society network actively advocated the adoption of a single anti-discrimination law. This group of over 100 NGOs led by the Helsinki Committee for Human Rights was greatly inspired by the European-wide Starting line group's work to improve anti-discrimination protection and it conducted nationwide consultations on the content and the scope of the future draft law. This initiative produced a draft law.

Following this advocacy, the Ministry for Human Rights and Refugees of BaH established an expert working group for the purpose of preparing the draft law. The main approach of the working group was to draft this law and to harmonize it with the EU Equality Directives and it also aimed to incorporate other international legal provisions in the legal system of BaH. This focus on the directives was the result of the conditions that the EU had set for Bosnia and Herzegovina, meaning that in order to gain visa-free access to the EU for its citizens, BaH had to adopt anti-discrimination legislation.[17]

The Parliamentary debate on the draft law in 2009 was strongly influenced by this EU condition especially because the adoption of an anti-discrimination law was one of the last two remaining conditions for visa-free access. At the same time, some groups, especially religious communities,[18] advocated against what they perceived to be an attack against the traditional values of the country especially vis-a-vis the inclusion of sexual orientation as a protected ground, regardless of the fact that sexual orientation was already a protected ground in the GEL.[19] After many discussions and an exhaustive Parliamentary debate, the Law on the Prohibition of Discrimination was adopted in July 2009.[20]

Parallel to the process of the development of LPD a separate working group was established to amend the Law on Gender Equality in BaH as a response to the shortcomings identified in practice and to ensure that key anti-discrimination laws are harmonised. The Law was significantly amended[21] and parts of the Law focusing on discrimination as well as parts focusing on gender equality and the obligations of responsible institutions towards mainstream gender equality in their work were also amended.

A few years after the adoption of LPD evidence of shortcomings in legal guarantees was growing and voices calling for amendments to the Law became louder.[22] Several judgments with problematic

16 GEL, Article 9 (1) a).

17 Roadmap Towards a Visa-Free Regime with Bosnia and Herzegovina, available at: http://www.esiweb.org/pdf/White%20List%20Project%20Paper%20-%20Roadmap%20Bosnia.pdf accessed 13 February 2017.

18 A representative of the Inter-religious Council was a member of the working group which prepared the draft Law.

19 The Parliamentary debate was documented in Kadribašić, A. (2013), 'Developing Equality Legislation in Divided Societies: the Case of Bosnia and Herzegovina' in *The Equal Rights Review* 10, p. 59–79 available at http://www.equalrightstrust.org/ertdocumentbank/ERR10_art3.pdf.

20 Law on the Prohibition of Discrimination (Official Gazette of BaH, No. 59/09), Unofficial translation available at: http://arsbih.gov.ba/wp-content/uploads/2014/02/002-Anti-Discrimination-Law-.pdf, accessed 10 February 2017.

21 Law on changes and amendments to the Law on Gender Equality in Bosnia and Herzegovina (Official Gazette of BaH, No. 102/09).

22 Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics, Minutes from the 19th Session held on 17 January 2013 (http://static.parlament.ba/doc/27650_19%20sj-B%20(3).pdf); Hanusic, A. (2013), *Judicial Protection from Discrimination in Bosnia and Herzegovina: Analysis of Laws and Practice Based on Initial Cases in This Field*, 'Analitika – Center for Social Research, Sarajevo (http://www.analitika.ba/sites/default/files/publikacije/analitika_-_report-_judicial_protection_from_discrimination_4june2013_eng.pdf) , Simonović Einwalter, T., Selanec, G. (2015), *Alignment of the Law on Prohibition of Discrimination with the EU acquis - Expert Analysis on Alignment*, Sarajevski

reasoning based on the Law prohibiting discrimination pointed to some uncertainties in the Law.[23] To some extent these uncertainties seem to have been based on the shortcomings of the provisions in the Law and in some cases they were based on misinterpretations of the otherwise clear provisions.

At the same time, the negotiations between the EU and BaH regarding a potential application for membership started to progress after having stalled for several years. As part of the Structured Dialogue on Justice and Additional Rule of Law Matters between the European Union and Bosnia Herzegovina the Law on the Prohibition of Discrimination was discussed and the EU noted the need to 'consider the inclusion of more substantial amendments to further harmonise the law with the EU acquis, particularly looking at disabilities and age as grounds of discrimination, as well as including a definition of sexual orientation and gender identity in line with internationally agreed terminology.'[24] This conclusion was subsequently repeated in the European Commission Progress Report on Bosnia and Herzegovina in 2015.[25]

All these developments triggered the Ministry for Human Rights and Refugees of BaH, supported by the OSCE Mission to BaH, to start work on an amendment to the Law in late 2015. The new Law was finally adopted in August 2016.[26] The amendments were later hailed as progress by the 2016 Progress Report, especially the inclusion of age, sexual orientation, gender identity and disability as grounds of discrimination.[27]

4 Equality law in Bosnia and Herzegovina today

Equality law in BaH today includes a number of laws which define aspects of equal opportunities and equal treatment as defined by European equality law. There is a consensus that gender equality and anti-discrimination shall be regulated on the State level through the Law on Gender Equality in BaH and the Law on the Prohibition of Discrimination, and that all other pieces of legislation shall be harmonised with these two laws.[28]

However, when it comes to *what* is regulated by LPD and GEL these two main pillars of equality law are significantly different. In its Article 1 LPD has indicated that it will regulate a 'framework for the implementation of equal rights and opportunities to all persons in BaH' and that it will 'define a system of protection from discrimination.' An analysis of the remainder of the LPD shows that this Law focuses on *equal treatment* and a *system of protection mechanisms against discrimination* and equal opportunities. To this end LPD follows the approach of the EU Equality Directives.

Article 1 of GEL indicates that this law 'shall regulate, promote and protect gender equality, guarantee equal opportunities and equal treatment of all persons regardless of gender in the public and private sphere of society' and that it will 'regulate protection from discrimination on grounds of gender' and sexual orientation (Article 2(3)). An analysis shows that this Law focuses more on gender equality and less on

otvoreni centar http://soc.ba/site/wp-content/uploads/2015/03/DISKRIMINATION_HRP-9_eng_01_27.04.2015_WEB.pdf , all accessed 15 February 2017.

23 See: Ivankovic, A. (2015), *Mistaken Logic in Proving of Anti-Discrimination Proceedings: The Case of the Supreme Court of FBiH*, Analitika – Centre for Social Research, available at: http://www.analitika.ba/en/publications/mistaken-logic-proving-anti-discrimination-proceedings-case-supreme-court-fbih, accessed 13 February 2017.

24 Plenary meeting of the 'Structured Dialogue on Justice and Additional Rule of Law Matters between the European Union and Bosnia Herzegovina', Sarajevo, Bosnia and Herzegovina (13-14 May 2014) Recommendations by the European Commission http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2014052111090188eng.pdf accessed 10 February 2017.

25 Commission Staff Working Document Bosnia and Herzegovina 2015 Report, available at: http://europa.ba/wp-content/uploads/2015/11/20151110_report_bosnia_and_herzegovina.pdf accessed 10 February 2017.

26 Law on changes and amendments to the Law on the Prohibition of Discrimination, BaH Official Gazette No. 66/16.

27 Commission Staff Working Document Bosnia and Herzegovina 2016 Report, available at: http://europa.ba/wp-content/uploads/2016/11/20161109_report_bosnia_and_herzegovina.pdf accessed 10 February 2017.

28 GEL Article 32, LPD Article 24.

protection from discrimination, i.e. it prohibits discrimination based on sex/gender and sexual orientation and defines different forms of discrimination but does not regulate any enforcement mechanisms. The forms of discrimination in GEL were additionally amended in 2009 as part of the overall reform of the equality law in 2009.[29]

4.1 Protected grounds

The Law on the Prohibition of Discrimination contains an open-ended, non-exhaustive list of protected grounds[30] mirroring the approach of Article 14 of the ECHR.[31] Given the status of the ECHR in the constitutional order of the country, an open-ended list was the only option for BaH. This list of protected grounds is wide and goes beyond the grounds which can be found in the directives, Article 21 of the EU Charter of Fundamental Rights and even the enumerated grounds in Article 14 of the ECHR. It includes all the grounds covered by the Equality and Non-Discrimination Directives (sex, sexual orientation, disability, age, religion or belief, racial or ethnic origin) as well as further grounds covered by the Fundamental Rights Charter (colour, social origin, language, political or any other opinion, membership of a national minority, property). The Law does not explicitly list birth and genetic features as listed in Article 21 of the Charter but since the list is open-ended, birth and genetic features can be considered to be protected grounds. At the same time, these grounds are already identified as being protected grounds in the legal system of BaH, as genetic heritage is covered by the Law on rights, obligations and responsibilities of patients[32] and birth is covered by the Labour Law.[33]

The list includes additional grounds such as: gender identity, sexual characteristics, education and membership of a trade union or any other organization. The law also highlights that discrimination can also be based on perception and association.[34] The Law on Gender Equality in BaH, which has a narrower scope than the LPD, as already mentioned, includes sex, gender[35] and pregnancy[36] as protected grounds.

4.2 Prohibited forms of discrimination

The 2009 reform of equality law in BaH and the 2016 amendments to LPD aimed to define direct and indirect discrimination, harassment, sexual harassment and an instruction to discriminate in accordance with EU equality law. Although LPD and GEL to some extent use different formulations, in substance all of the provisions contain the same elements.

According to both Laws, direct discrimination[37] is defined as any different treatment that exists when one person or a group of persons has been treated, is treated or would be treated less favourably in comparison with other persons or groups of persons (on any ground)[38] in the same or a similar situation. Similarly, indirect discrimination is defined as a situation where an apparently neutral norm, criteria or practice has or would have the effect of putting a person or a group of persons (with regard to any ground) in an unfavourable or less favourable position compared to other persons. As already indicated

29 Article 23 (1): Every person who considers himself/herself to be the victim of discrimination or finds that a certain right has been violated due to discrimination shall be able to seek the protection of that right in the procedure in which this right shall be decided as a main issue, and shall be able to seek protection in special proceedings for protection from discrimination in compliance with the Law on the Prohibition of Discrimination (Official Gazette of Bosnia and Herzegovina, No. 59/09).
30 Article 2 LPD.
31 As already indicated Article II/4 also contains an open-ended list which mirrors Article 14 of the ECHR verbatim.
32 Article 3 of the Law on the rights, obligations and responsibilities of patients, Federation of FB&H.
33 Article 6 of the Labour Law in institutions of BaH and Article 8 Labour Law of FB&H.
34 Article 2 LPD.
35 Article 9 of the law even defines the terms 'sex' and 'gender'.
36 Article 13.
37 GEL Article 3 (1), LPD Article 3 (1).
38 LPD makes a reference to Article 2 of LPD while GEL lists gender.

the general justification provision for discrimination also contains elements which are found in non-discrimination directives.

Although these definitions follow those of the non-discrimination directives, there are substantial differences between national law and the directives as regards the possibilities for justification. Namely, both define conditions under which different treatment[39] can be justified. These conditions are the same as the ones for indirect discrimination in the non-discrimination directives defining that 'norms, criteria or practice' can be justified when they aim to achieve a legitimate and objectively justified goal, and when they are proportionate and necessary. However, the wide scope of both laws does not only link the possibility for a justification to indirect discrimination but also to direct discrimination which could be comparable to the approach of the ECtHR's case law.

Harassment in both laws[40] also contains elements which are found in the non-discrimination directives. It is defined as unwanted behaviour (related to any ground) with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or insulting environment. Sexual harassment[41] is similarly defined in both laws as every form of unwanted verbal, non-verbal or physical behaviour of a sexual nature which aims at or has the effect of harming the dignity of a person, especially when it creates an intimidating, hostile, degrading, humiliating or offensive environment. Finally, an instruction to discriminate is defined as a form of discrimination.[42] It should be noted that GEL states that only in cases where an instruction to discriminate is committed intentionally can it be considered to be discrimination (which is not the case with the definition in LPD). This condition is not defined in the non-discrimination directives and it is not clear why it was introduced as such.

Additionally, both LPD and GEL define several other forms of discrimination. Some are connected to EU equality law (such as multiple discrimination and victimisation), while some are not (gender-based violence, mobbing, repeated and extended discrimination).

Multiple discrimination is specifically defined as a *severe* form of discrimination together with repeated and extended discrimination.[43] LPD does not define any additional consequences for severe forms of discrimination and since these forms were introduced by the 2016 amendments only time will tell how the judiciary will respond to this challenge in its case law.

LPD defines that segregation and mobbing are also forms of discrimination. Whereas segregation as a form of discrimination can be found in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[44] mobbing does not appear to be contained in any of the international documents that BaH has signed. It is defined as 'every form of non-physical harassment at the workplace with repetitive actions that have a humiliating effect on a victim with the purpose or the consequence of a degradation of the working conditions or professional status of an employee.' However, mobbing is not based on any protected ground and many professionals have argued that it should not be regulated by the LPD, notwithstanding that mobbing as defined in the LPD is an issue that employees have to deal with in the labour market and that it should be regulated by labour legislation.

GEL defines gender-based violence as a form of discrimination following the reasoning of CEDAW General Recommendation No. 19[45] and it continues by defining it as 'every action that causes or may

39 LPD Article 5(1), GEL Article 2 (5).
40 LPD Article 4 (1), GEL Article 5 (1).
41 LPD Article 4 (2), GEL Article 5 (2).
42 LPD Article 4 (5), GEL Article 5 (3).
43 LPD Article 4 (6).
44 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations Treaty Series, vol. 660, p. 195, available at: http://www.refworld.org/docid/3ae6b3940.html accessed 13 February 2017.
45 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992, available at: http://www.refworld.org/docid/52d920c54.html accessed 13 February 2017.

cause physical, mental, sexual or economic damage or suffering, as well as the threat of such action which prevents this person or group of persons from enjoying their human rights and freedoms in the public and private sphere of life."[46] Different forms of gender-based violence[47] are extensively defined in the Criminal Codes of BaH.

It is also important to note that both LPD and GEL regulate victimisation as a form of discrimination. The definitions in both Laws[48] are wide enough to include any situation when a person rejects an instruction to discriminate, reports discrimination, testifies in a procedure on protection from discrimination or if this person has been in any way involved in a procedure initiated due to discrimination. Stipulated in this way, they provide the same protection mechanisms concerning adverse treatment and therefore they correspond with the obligation envisioned in the non-discrimination directives.

4.3 Scope and exceptions

The equality law in BaH provides for protection against discrimination (as well as equality) and this has a wide scope.

4.3.1 Scope of and the exceptions contained in LPD

LPD has mirrored the approach of Protocol 12 to the ECHR[49] prohibiting discrimination in the 'recognition, enjoyment or realization of rights and freedoms in all areas of public life."[50] This approach significantly reflects the wide protection provided in the BaH Constitution.[51] Additionally, Article 6 reiterates this wide protection concerning its personal scope by specifying that 'this Law shall apply to the actions of all public bodies at the level of the state, entity, canton and the Brcko District of BaH, municipal institutions and bodies, and legal persons with public authorities, as well as to the actions of all legal and natural persons' and its wide material scope will apply 'in all spheres of life'. This provision continues *with an* open-ended list of areas in which LPD applies. This list is also quite wide in listing a number of areas that are also covered by EU equality law. Concerning its application, the courts and other institutions will have to widely interpret the LPD and this will include areas in which the directives also apply.

In its Article 5 LPD contains a list of exceptions to its material scope (entitled 'Exceptions to the Principle of Equal Treatment'). Generally, Article 5 is considered to be the weakest part of LPD since the list is vague and it conceptually differs from the exceptions to discrimination as envisioned by EU equality law. However, Article 5 was not affected by the amendments of 2016. Some of these exceptions may be considered to have been inspired by EU equality law, such as: citizenship, a genuine occupational requirement, minimum and maximum age requirements for employment and retirement, respectively, requirements for employment and membership of religious communities. Other exceptions (some of which will be explained below) cannot be considered to have been inspired by EU equality law. Article 5 was originally modified in the parliamentary procedures by amendments proposed by MPs, which explains why it differs from the draft prepared by the expert working group.

Article 5 in its entirety contains deficiencies and several concepts have been combined in one article. Even the exceptions which could be considered to be grounded on EU equality law can be considered problematic. This is particularly the case with the exception relating to religious organizations or public or private institutions whose activities are based on religion or religious beliefs. The problematic part of this exception is that the different treatment of a person in access to employment in religious communities

46 GEL Article 6.
47 Such as: rape, domestic violence etc.
48 LPD Article 18, GEL Article 7.
49 BaH ratified Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms on 29 July 2003.
50 Article 2.1 LPD.
51 See the analysis above.

and religious institutions can be accepted solely on the basis of the religion or religious beliefs of candidates without any reference to the fact that this different treatment has to represent a 'genuine, legitimate and justified occupational requirement' for employment. Additionally, this exception is not limited to different treatment on the grounds of religion or religious beliefs but can be based on any protected ground.

Another problematic exception can be seen in sub-paragraph g). This sub-paragraph was added at the parliamentary stage which was fuelled by an open letter addressed to the members of the Parliamentary Assembly by the BaH Inter-Religious Council which stipulated:

> 'If the Law is adopted in both Houses of Parliament in a second reading without amendments, it will enable homosexual couples to legally marry and adopt children.'[52]

Although the intention behind the LPD was never to regulate marriage or adoption, this open letter was aimed at excluding sexual orientation from the list of protected grounds. This ground had indeed been included despite strong opposition from the working group members of the Inter-Religious Council. Sub-paragraph g) was proposed as an amendment, together with a proposal to exclude sexual orientation from the list of protected grounds by the Croat Democratic Union political party[53] as a result of a debate in between the two readings. Although sexual orientation was finally retained as a protected ground, sub-paragraph g) was included in Article 5.

The wording of the sub-paragraph[54] excludes the application of the principle of non-discrimination in access to rights which arise from family laws on any ground. This creates additional problems since this wording gives supremacy to the Family Codes over the central non-discrimination law and prevents litigation in potential cases based on the Family Codes and under the LPD.

Additionally, instead of defining positive action as 'measures for achieving full equality'[55] and reasonable accommodation as 'measures to guarantee compliance with the principle of equal treatment,[56] the LPD defines them as exceptions 'to the principle of equal treatment. As will be seen below under 4.4, the GEL has adopted a different approach which better corresponds with that of EU law.

4.3.2 Scope of GEL

GEL also has a wide material scope. Article 2 of the Law provides that 'full gender equality shall be guaranteed in all spheres of society including but not limited to education, the economy, employment and labour, social and health protection, sport, culture, public life and media, regardless of marital and family st*atus.'* It is clear that this law applies in all spheres of society, but it stresses certain areas in which gender inequalities existed at the time of the drafting of the Law.

The standards for gender equality and the prohibition of discrimination are defined in each area and are regulated in parts IV to X. The articles in these parts follow the structure of Directive 2006/54/EC Title II since they also provide examples of what shall constitute discrimination. For example, in the area of equal pay (a 'failure to pay equal wages and other benefits for the same work or work of equal value'),[57]

52 Balkan Insight, Bosnia's Religions Unite Against Gay Marriages, June 3, 2009, http://www.loc.gov/law/foreign-news/article/bosnia-herzegovina-draft-anti-discrimination-law-creates-controversy-over-gay-marriage-rights/ accessed 11 February 2017.

53 Amendments proposed by members of the Croat Democratic Party of BaH (HDZ BaH) to the House of Representatives, the Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics and the Constitutional Committee of the House of Representatives of the Parliamentary Assembly of BaH on 10 June 2009.

54 LPD Article 6 (1) g).

55 I.e. Article 7, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 P. 0022 – 0026.

56 I.e. Article 5, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 P. 0016 – 0022.

57 Article 13 (1), a).

employment ("everyone shall be equal on the basis of gender in the employment process,'[58] a 'failure to provide equal opportunities for education, training and professional qualifications'[59]), occupational social security schemes ('different treatment for men and women with regard to deciding how to take maternity leave following the birth of a child'[60]) and more generally in access to social security schemes (the 'relevant authorities shall ensure that laws and other regulations and the mechanisms relating to access to and the enjoyment of social welfare are non-discriminatory on the grounds of gender, both directly or indirectly').[61]

4.4 Positive action: measures to prevent and correct situations of inequality or exceptions to the principle of equal treatment?

As already noted, LPD has defined positive action as an exception to the principle of equal treatment**.** The difference in approach between the two Laws again reiterates the dichotomy that LPD is an anti-discrimination law and GEL is an(a) (gender) equality law.

GEL has taken a different approach by stating that the adoption and implementation of temporary special measures aims at removing existing inequalities, promoting equality and protecting gender equality. Article 8 of GEL further elaborates that these measures should aim at substantive gender equality:

'Special measures shall be introduced temporarily in order to accomplish substantive gender equality and shall not be considered discriminatory, including norms, criteria or practices that can possibly be justified by a legitimate goal, and have to be proportionate, appropriate and necessary.'

GEL even defines a standard for the equal representation of women and men which according to the Law 'shall exist when one of the sexes is represented by at least 40 %'[62] and there is an obligation for the competent authorities to adopt temporary special measures if this threshold is not met.[63] This Article was the basis for a number of temporary special measures such as regulating elections,[64] the appointment of judges and prosecutors etc.

As already indicted, GEL provides for gender mainstreaming as a policy to achieve gender equality. Gender mainstreaming lies at the heart of GEL but it is mostly visible in Article 24 which regulates the obligation of all competent authorities 'to take all appropriate and necessary measures in order to implement provisions prescribed by this Law and not limited to: Introducing programmes of measures for achieving gender equality in all spheres and at all levels of the authorities.'[65]

Although LPD defines positive action in the article regulating exceptions it does however provide a standard of reasonable accommodation for persons with disabilities which could be considered to be aligned with Article 5 of the Employment Equality Directive. According to Article 5.1.f) measures shall not be considered to be discriminatory if they realize a legitimate goal and if there is a reasonable ratio of proportionality between the means used and the goals to be achieved and when 'they are based on the realisation of reasonable accommodation aiming to ensure the principle of equal treatment in relation to persons with disabilities.'. In the next sentence this sub-paragraph continues to lay down a positive obligation: 'Employers shall, based on the needs in a concrete case, take appropriate measures in order

58 Article 13 (1), b).
59 Article 13 (1), c).
60 Article 13 (1), f).
61 Article 17.
62 Article 20, (2).
63 Article 20, (4).
64 Article 4.19, Election Law of Bosnia and Herzegovina. For additional information on how this standard is translated in other relevant legislation, see Kadribasic, A. (2013), 'A critical analysis of the level of substantive representation of women achieved with quotas,' Open Society Foundation Sarajevo, available at: http://www.osfbih.org.ba/images/Prog_docs/PDFP/pdfp_13/ENG_S_76_Adnan_Kadribasic.pdf accessed 11 February 2017.
65 GEL, Article 24.(1).a).

to enable a person with a disability to access, participate or to be promoted, i.e. to participate in training, if such measures do not represent an unreasonable burden for the employer.'[66]

In relation to positive action and reasonable accommodation it should be noted that both LPD and GEL only set out the principles while other legislation in the legal system of BaH regulates further legal and policy measures. Although a number of these measures exist, a comprehensive study has never been produced. For example, the Election Law of BaH[67] regulates a mandatory candidate list quota of 40 % with a zipper system aiming at gender equality, while the Law on the professional rehabilitation and employment of persons with disabilities[68] provides an obligation to ensure the proportional employment of persons with disabilities in public administration and public companies, with financial sanctions being in place for a failure to do so.

The major contribution of LPD and GEL is the fact that they define legal standards for the assessment of any justification for any measure to be introduced and define standards for a judicial review. Prior to the 2009 reform, these standards were generally lacking in the country's legal system and the only review mechanism was the Constitutional Court. Regardless of the fact that the BaH Constitutional Court has a significant body of case law, this review mechanism cannot be considered to be effective since the Constitutional Court may only hear an appeal in cases where all the effective legal remedies which are available under the law against the judgment or decision challenged by the appeal have been exhausted.[69]

4.5 Remedies and enforcement

LPD has created specific enforcement procedures which include many of the standards in EU equality law. Such a procedure to combat discrimination was largely lacking in the legal system prior to 2009 as GEL did not contain an enforcement mechanism and any attempt to find a remedy against discrimination was based on existing remedies in administrative and judicial proceedings. As already indicated, during the 2009 equality law reform GEL referred to the use of the enforcement procedures created by LDP.

In 2009 LPD introduced specific enforcement mechanisms in already existing civil and administrative procedures together with important regulations such as the burden of proof, longer deadlines, collective complaints and the use of statistical data in order to accommodate the special nature of discrimination proceedings. During the 2016 reform these regulations were elaborated upon, with the aim being to create legal preconditions for effective protection against discrimination.

Although the LPD largely relies on all existing procedures by stating that 'every person or group of persons who consider himself/herself/themselves to be discriminated against shall be able to seek the protection of his/her/their rights through existing judicial and administrative proceedings', it puts special emphasis on a specific litigation procedure which can be filed according to the rules of LPD. This specific litigation procedure is based on specific rules of the Codes of Civil Procedure.

This special litigation procedure is initiated by filing a lawsuit for protection from discrimination as regulated in Article 12 of LPD. A lawsuit can be filed by an individual, by a group of persons or by

66 LPD, Article 5. (1) b).

67 Article 4.19 paragraph 4 of the Election Law of Bosnia and Herzegovina reads: Every candidates list shall include candidates of the male and female gender, which shall be equitably represented. Equitable representation of both genders shall mean that one of the genders makes up at least 40 % of the total number of candidates on the list. The minority gender candidates shall be distributed on the candidates list in the following manner: at least one minority gender candidate amongst the first two candidates, two minority gender candidates amongst the first five candidates, and three minority gender candidates amongst the first eight candidates et seq.

68 Article 18.

69 Article 16(1) of the Rules of the Constitutional Court.

associations or other organizations established in accordance with the law dealing with the protection of human rights or the rights of certain groups.[70]

The lawsuit is filed to a competent civil court and the law regulates that the jurisdiction is elective making sure that the claimant can opt for the closest court. Under the 2009 LPD the statute of limitations was considered to be too restrictive and therefore in 2016 it was extended from three years from the day of the acknowledgement of a violation of a right, to a maximum of five years from the day of perpetrating the violation. A revision as a third instance review procedure can be initiated three months after the second instance decision and in cases of discrimination this is always permissible.[71]

Article 15 of LPD lays down specific rules on the burden of proof, stating as follows: 'When a person or a group of persons in all procedures envisaged by this Law, based on the evidence available to them, have made probable that discrimination has taken place, the burden of proof that there was no discrimination lies on the opposite party.'

According to the standard rules of procedural law (civil and administrative) in BaH, complainants have to provide evidence to establish facts on each aspect of the case and if they fail the courts will rule that the facts which have not been substantiated by evidence do not exit. Article 15 introduces a specific standard of proof which only applies to cases of discrimination[72] under which if the complainant provides enough evidence to establish a *probability* that discrimination has taken place the burden will shift to the respondent. This reasoning is in line with the respective Articles found in the Equality Directives but a 'probability' seems to be a higher standard than a 'presumption' which is contained in the directives. The working group decided to use probability as a standard since this standard can also be found in the legal system of BaH, while a presumption is not. At this point in time, it is not possible to predict how the judiciary will respond to this challenge since a general rule on the standard of probability is not defined by law.

The cases which were analysed in the preparation of this article demonstrated that, in applying the previous version of Article 15 which contained no reference to the applicable standard,[73] the judiciary faced challenges in that only in some cases did they apply this standard in line with the directives. However, this is not very indicative since the amended Article 15 states that probability will be used as the relevant standard.

At the same time it is important to note that the BaH Constitutional Court has already established in its case law 'that the appellant, who complains of discrimination, has to present the facts before the court from which it may be presumed that she/he has been discriminated against and, as of that moment, it is up to the respondent to prove the contrary.'[74] In cases in which the courts fail to apply the standard of proof based on a presumption the BaH Constitutional Court will find a violation of the right to a fair trial under Article II(3)(e) of the Constitution and Article 6(1) of the European Convention.

Two additional standards are also included in Article 15. According to paragraph 2 of the same Article statistical data can be used to shift the burden of proof and according to paragraph 3 in cases of a failure to provide reasonable accommodation, the burden of proof lies with the respondent.

70 The collective complaints mechanism will be elaborated below.

71 According to the Codes of Civil Procedure the statute of limitations for a revision is 30 days and is only possible in cases where the judgment refers to a material threshold of over EUR 15 000 or in other exceptional circumstances.

72 Article 15 (8) excludes the application of this rule in criminal and misdemeanour cases.

73 Article 15, LPD 2009 'In cases where a person or group of persons provide facts in proceedings from Article 12 of this Law corroborating allegations that the prohibition of discrimination has been violated, the alleged transgressor shall have the duty to prove that the principle of equal treatment or the prohibition of discrimination has not been breached.'

74 Constitutional Court of BaH, Decision in Case No. AP-1093/07, 25 September 2009, paragraph 27, page 16, available at http://www.ustavnisud.ba/dokumenti/_en/AP-1093-07-290460.pdf accessed 11 February 2017.

The 2016 amendments added situational testing to this Article as a new institution in proving cases of discrimination.[75] However, this new institution still has to be put to the test but it also opens important new possibilities for the enforcement of this LPD.

Article 16 of the LPD allows organisations to provide support for the complainant and the general rules of the Codes of Civil and Administrative Procedure allow these organisations to act on behalf of the complainant which is in line with the directives. Article 17 of LPD goes even beyond what is required by the EU Equality Directives and has laid down that organisations may file suit and act on behalf of unidentifiable victims which is comparable to the reasoning of the ECJ in the Feryn case.[76] Under this Article organisations which deal with the protection of human rights or the rights of certain groups of persons may file a lawsuit against a person who has violated the right to equal treatment of a large number of persons who belong to a group whose rights are protected by a complainant. This only applies in cases of discrimination and a number of important cases have already been initiated and finalized under Article 17. Some of these cases have addressed some of the most problematic practices which, prior to LPD, were not able to be heard.[77] At the same time, in several other cases the courts have shown their unwillingness to accept this possibility[78] which has had to be overturned by second or third instance courts.

GEL lays down criminal liability for gender-based violence, harassment on the grounds of gender/sex and for sexual harassment. According to Article 29 of GEL these forms of discrimination are defined as criminal acts and are punishable by a custodial sentence of from six months to five years. Whereas other specific forms of gender-based violence are also defined in the Criminal Codes, harassment on the grounds of gender/sex and sexual harassment are only defined as criminal acts in GEL. Although many criminal acts are not defined in the Criminal Codes the judiciary seems to interpret this Article correctly. According to a report by the Agency for Gender Equality of BaH in 2014 a total of eight cases with seven judgments had found a case of sexual harassment. Still, it is not entirely clear why some other forms of harassment are not defined as criminal acts since their effects are the same.[79]

4.6 Equality bodies

According to Article 7 of LPD the role of an equality body was assigned to the already existing Ombudsman for Human Rights of Bosnia and Herzegovina. Although this Article defines the Ombudsman as the 'Central Institution for the Prevention of Discrimination' a further analysis of Article 7 shows that the competences of the Ombudsman respond to the requirements of an equality body as defined by the Equality Directives.

Moreover, the Ombudsman as defined by Law[80] is a national human rights institution as defined by the Paris Principles[81] and plays a much wider role than being (merely) an equality body. Article 7 reiterates all the competences of the Ombudsman in relation to discrimination, including the possibility to receive individual and group complaints, and providing independent assistance to victims of discrimination in pursuing their complaints of discrimination in domestic or international fora. This Institution issues

75 LPD Article 15 (7).

76 Judgment of the Court (Second Chamber) of 10 July 2008. *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, ECLI identifier: ECLI:EU:C:2008:397.

77 Such as the phenomenon of 'Two schools under one roof'. For more information see http://jtl.columbia.edu/two-schools-under-one-roof-school-segregation-in-bosnia-and-herzegovina/ accessed 11 February 2017.

78 See for example Ivankovic, A. (2013), *Commentary on Negative Court Ruling in Two Schools under One Roof Case*, Analitika Center for Social Research, http://www.analitika.ba/sites/default/files/publikacije/analitika_two_schools_decision_commentary_august_2013.pdf accessed 11 February 2017.

79 Article 40 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series – No. 210 to which BaH is a party, includes an obligation to ensure that sexual harassment 'is subject to criminal or other legal sanction'.

80 Law on the Ombudsman for Human Rights of Bosnia and Herzegovina ("Official Gazette of BaH" nos. 19/02 and 32/06).

81 General Assembly of the United Nations, Principles relating to the Status of National Institutions (the Paris Principles), Resolution 48/134 of 20 December 1993.

recommendations following an investigation of individual complaints or in ex officio cases, conducts surveys in the field of discrimination, publishes independent reports and makes recommendations on any issue relating to discrimination, conducts awareness-raising campaigns etc.

The Ombudsman Institution has started to publish a yearly report on manifestations of discrimination[82] which is mainly based on its work concerning individual and group complaints and several topically specific reports such as the Special Report on the Accessibility of Premises of the Legislative Bodies in Bosnia and Herzegovina to Persons with Disabilities,[83] the Special Report on the rights of LGBT persons in Bosnia and Herzegovina,[84] the Special Report on the state of protection for mothers and motherhood in FBaH,[85] the Special Report on the situation of Roma in Bosnia and Herzegovina[86] etc.

The Ministry for Human Rights and Refugees has also been tasked with collecting data on discrimination and preparing yearly reports on occurrences of discrimination,[87] a task which to some extent overlaps with the Ombudsman's reporting obligations. However, to date, its database has not yet been set up and the first report produced by the Ministry only appeared in 2016; this report is also poor in quality and cannot be considered to be reliable.[88]

In the area of gender equality, in its Article 26 GEL defines the Agency for Gender Equality as having the role of an equality body. The Agency has very similar competences to those of the Ombudsman including the possibility to receive individual complaints, to report on and to promote gender equality and many other competences obviously overlap with those of the Ombudsman. However, the Agency is part of the Ministry for Human Rights and Refugees of BaH and as such is not an independent institution as is the case with the Ombudsman; the Agency is therefore a governmental body. This position gives the Agency additional roles which include the drafting of the Gender Action Plan of BaH which has been adopted as the official governmental public policy on gender equality by the Council of Ministers and the Agency also has the role of the coordinator of the overall gender-mainstreaming efforts under GEL in other governmental institutions.

This institutional setting of the Agency provides it with authority *vis-à-vis* governmental actions in the area of gender equality in terms of legislation, policy and other gender-mainstreaming efforts. The Agency (together with gender centres) is recognised as a key institution working on gender equality issues through policies which include the second Gender Action Plan of BaH 2013-2017, the second Action Plan on the Implementation of UN Security Council Resolution 1325 'Women, Peace and Security' (2014-2017), the Framework Strategy to Implement the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (2015-2018) and many others.

82 All are available in English at: http://www.ombudsmen.gov.ba/Dokumenti.aspx?id=27&tip=1&lang=EN accessed 19 February 2017.

83 Ombudsman for Human Rights (2014), Special Report on the Accessibility of Premises of the Legislative Bodies in Bosnia and Herzegovina to Persons with Disabilities, available in English at http://www.ombudsmen.gov.ba/documents/obmudsmen_doc2017020310323764eng.pdf accessed 19 February 2017.

84 Ombudsman for Human Rights (2015), Special Report on the rights of LGBT persons in Bosnia and Herzegovina, available only in the national language http://www.ombudsmen.gov.ba/documents/obmudsmen_doc2016110413333704eng.pdf accessed 19 February 2017.

85 Ombudsman for Human Rights (2015), Special Report on the state of protection for mothers and motherhood in FBaH, available only in the national language http://www.ombudsmen.gov.ba/documents/obmudsmen_doc2015102111102085eng.pdf accessed 19 February 2017.

86 Ombudsman for Human Rights (2013), Special Report on the situation of Roma in Bosnia and Herzegovina, available in English at http://www.ombudsmen.gov.ba/documents/obmudsmen_doc2013121011144464eng.pdf accessed 19 February 2017.

87 LPD, Article 8.

88 Without any data, the Ministry relied on the reports of the Ombudsman. An interpretation of the data presented clearly demonstrates the Ministry's lack of capacity.

5 Lessons learned and challenges in the implementation of equality law

Contemporary equality laws in Bosnia and Herzegovina provide a solid legal foundation for equality and protection against discrimination. This has changed the paradigm of protection against discrimination. These laws have defined the various forms of discrimination and have introduced legal instruments which are new in BaH's legal system and have placed a strong emphasis on the judiciary which previously did not hear cases of discrimination. Hearing cases of discrimination, as previously discussed, was almost the exclusive competence of the Constitutional Court of BaH and this presents a new challenge for the judiciary.

Since 2009 a number of significant cases have been decided by the judiciary, most of which could not have been decided with such effect without the enforcement standards and the available remedies under the LPD and GEL. The response of the judiciary has been ambivalent. On the one hand, the judiciary has provided protection in cases related to the segregation of children in schools based on ethnicity, the discrimination of children with disabilities in access to inclusive education, the discrimination of pregnant women in employment, discrimination based on political beliefs and many others when applying the burden of proof, and in deciding on deadlines and accepting collective complaints. On the other hand, major misinterpretations have arisen in several cases where the judges used a logic which was not based on equality law. In one case the court failed to use a hypothetical comparator since the complainant,[89] although she had been clearly rejected from employment because of her religious beliefs, was the only candidate, or in another case where the court reached a decision based on the general standard of proof and not on the one laid down in Article 15. Some of these errors have already been overturned by a higher instance court while others are still to be decided by the Constitutional Court of BaH.

It is obvious that the adoption of equality law represents merely a step forward in the process of creating an effective system of equality and protection against discrimination. Other actions which are not based on enforcement are already being implemented including research, training, information sharing etc., but they remain poorly coordinated, are uneven and achieve only a limited impact. The current institutional framework is weak and it is obvious that only in the area of gender equality is an institutional structure apparently in place. The Ministry for Human Rights and Refugees has failed to implement its basic obligations such as data collection and reporting and it cannot be expected that it will be able to start proposing measures for full equality at any time soon.

In the EU integration process Bosnia and Herzegovina remains subject to EU conditions and other integration instruments. One of the latest conditions refers to an Anti-discrimination Strategy which might catalyse and coordinate future efforts by Bosnia and Herzegovina.

89 *Janja Martina Katovic* vs *Municipality of Glamoc*, Supreme Court of FBIH, 2014.

The right to request flexible working in the UK

Rachel Horton[1]

Introduction

Flexible working rights have a fundamental role to play in work-family reconciliation, particularly for parents and carers who need to provide care on an ongoing basis and for whom periods of leave alone are unlikely to provide an adequate solution to their work-care needs. From a gender equality perspective, flexible working rights, normally available as 'gender neutral' rights available equally to both parents as well as a wider group of carers and others, have the potential to help contribute to reducing gender inequality at work and in the home by facilitating and encouraging increased participation by men in care.[2] As the European Commission noted in its recent proposal for a Directive on work-life balance, the availability of flexible working, as well as of leave 'has been shown to strongly mitigate the effect of caring responsibilities on women's employment outcomes.'[3]

The right to request flexible working was first introduced in the UK in 2003, not witho1
ut controversy,[4] as part of a wider package of rights designed to improve 'fairness at work' and has been amended a number of times since.[5] This article will outline the existing legal provisions and their development and impact; and will outline a number of difficulties with the existing legislation which, it will be argued, may undermine its ability to effect substantive improvement to the ability of *all* workers to access the right kind of flexibility in the workplace and, consequently, its ability to make a more significant contribution to improving gender equality at work and at home.

The Legal Framework

The right to request flexible working was first introduced in the Employment Act 2002. Initially reserved for parents with children under the age of six (or eighteen when the child was disabled) the right was extended to carers of adults in 2007, to parents of children under 17 in 2009 and finally to all employees under the Work and Families Act 2014. In order to be eligible for this right, employees must have been continuously employed for at least 26 weeks.

1 Dr. Rachel Horton is lecturer at the University of Reading.
2 See, generally, Fredman, S. (2014), 'Reversing Roles: bringing men into the frame' *International Journal of Law in Context* 10(4) pp. 442-459; Caracciolo di Torella, E. and Masselot, A. (2010), *Reconciling Work and Family Life in EU Law and Policy* (New York, Palgrave Macmillan).
3 Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU COM 2017 (253).
4 See Anderson, L. (2003)'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working 'Rights' for Parents' *Industrial Law Journal* 32(1) pp. 37-42.
5 By the Work and Families Act 2006, the Flexible Working (Eligibility, Complaints and Remedies (Amendment) Regulations 2009 and the Work and Families Act 2014.

The legislation gives eligible employees a right to request a change to their terms and conditions in respect of the number of hours they work, or to the time or place when or where the work is done.[6] As will discussed in more detail below, it remains unclear whether this includes a right to request a temporary rather than a permanent change in terms and conditions or a right to request an increase rather than a decrease in working hours. Only one statutory request can be made within a 12-month period.[7] The request must be in writing and employees are required, among other details, to specify the change to their terms and conditions they are seeking; what effect they anticipate the requested change would have on the employer/the running of the business; and how they anticipate the employer may be able to deal with any such effect.[8] The onus is therefore on the employee, rather than the employer, to propose solutions to any difficulties the proposed flexible working pattern is likely to create.

Having received a request the employer is then under an obligation to deal with the application in a reasonable manner and may only refuse a request for one of a number of business reasons specified in the legislation. These include an unacceptable burden of costs; an inability to reorganise work among existing staff or an inability to recruit more staff; if the employer considers the change would have a detrimental impact on quality or performance or on the ability to meet customer demand; where there is insufficient work during the period the employee proposes to work; or if proposed structural changes to the business mean that the new proposed work patterns are unlikely to fit in with new arrangements.[9] A statutory code of practice sets out the steps employers will normally be required to take in order to handle requests in a reasonable manner: employers should consider the benefits of the request for both employee and business and weigh them against any adverse impact on the business by reference to the reasons set out above; they should discuss the request with the employee (unless in the case of straightforward acceptance of the request); and they should deal with requests promptly.[10] Employees who are dismissed or subject to a detriment as a result of having exercised their legal right to request flexible working are entitled to remedies under the legislation.[11]

Impact

On the one hand research suggests that the introduction of the right has had a significant and positive impact on the availability and accessibility of a range of flexible working practices. The Fourth Work Life Balance Survey conducted by the (then) Department of Business Innovation and Skills in 2014 charts a very significant increase in the availability of a range of flexible working practices since 2003, when the right to request was first made available, with the greatest increase taking place prior to 2007 something the authors of the survey associate with the introduction of the right to ask.[12] The survey also found that the majority (79%) of employees who had made requests under the legislation had had these accepted.[13]

On the other hand, evidence indicates that there is still a marked variation in the availability of flexible working across different workplaces. The greatest availability is associated with workplaces where there is a recognised trade union, the public and voluntary sectors, larger workplaces and those with a higher proportion of women among the workforce. Availability of flexible working is also strongly associated with seniority, with flexible working more likely to be available in senior and managerial roles than in

6 Employment Rights Act 1996 Section 80F(1)(a).
7 Employment Rights Act 1996 Section 80F(4).
8 Flexible Working Regulations 2015 Regulation 4; Employment Rights Act 1996 Section 80F(2).
9 Employment Rights Act 1996 Section 80G.
10 ACAS (June 2014) Handling in a reasonable manner requests to work flexibly Code of Practice 5 (TSO, Norwich).
11 Employment Rights Act 1996 Section 47E and Section 104C.
12 Department for Business, Innovation and Skills ('BIS') (December 2014), *The Fourth Work-Life Balance Employer Survey 2013* (London, BIS).
13 Department for Business, Innovation and Skills ('BIS') (December 2014), *The Fourth Work-Life Balance Employer Survey 2013* (London, BIS). See also Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.

secretarial and administrative ones.[14] From a gender equality perspective there is also cause for concern. Men and women tend to ask for different kinds of flexibility: women who work flexibly are most likely to work part time;[15] men who work flexibly are most likely to work remotely[16] and may use flexible work arrangements to increase rather than decrease working time.[17] Male employees were less likely to make requests and more likely to have their requests rejected.[18] There is also evidence that almost half of male employees feel uncomfortable raising the issue of workload with their employers,[19] largely because of a perception that access will be difficult because of managerial assumptions about men as breadwinners.[20] It seems therefore that there is some way to go to achieve a working culture which offers genuinely equal opportunities for all workers, and for women and men, to use flexible working to manage work-family needs. As Working Families note, 'despite legislative and employer efforts to provide work-life balance opportunities through measures such as flexible working, the way that work is organised and prevailing workplace cultures and attitudes remain significant barriers.'[21] The rest of this article will consider a number of features of this right which may hinder further progress in this regard. These are, in particular, its scope, its (in)ability to accommodate temporary changes in working time and the weakness of the obligations it puts on the employer in dealing with requests.

Issues

(a) Scope

The current right to request flexible working extends only to employees who have accrued a period of twenty six weeks of continuous employment. There are two important consequences of this qualification requirement. First, it means that the right is not available to the large and growing cohort of workers who do not qualify as 'employees' under the current legal tests for employment status in the UK. This includes many of those engaged in non-standard forms of work, including agency workers (other than those returning from parental leave for whom special provision to request flexible working applies under The Parental Leave (EU Directive) Regulations 2013),[22] casual workers, zero-hours contract workers, and the growing army of 'self-employed' workers clustered in low-paid, low-status occupations. The rights of this cohort of workers are generally a subject of concern and the Government has recently commissioned a review of their employment status. This will consider, among other things, whether the growth in these non-standard forms of employment undermines the effectiveness of work- family reconciliation employment rights and whether the scope of these rights should be extended.[23] For the time being, however, a large cohort of workers remain excluded from the legal right to request.

14 Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.

15 Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.

16 Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.

17 Hofacker, D. and Konig, S. (2013), 'Flexibility and Work-life conflict in a time of crisis: a gender perspective *International Journal of Sociology and Social Policy* 33(9) pp. 613-635.

18 *Department for Business, Innovation and Skills ('BIS') (December 2014), The Fourth Work-Life Balance Employer Survey 2013 (London, BIS)* at p. 48. See below, and footnote 55, for discussion of evidence that women are also deterred from making requests.

19 Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, at p. 29. Available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.

20 *The Modern Families Index 2017*, note 5 above. See also Gatrell, C., Burnett, S., Cooper, C. and Sparrow, P. (2014) 'Parents, perceptions and belonging: exploring flexible working among UK fathers and mothers' *British Journal of Management* Vol. 25 pp. 473-87.

21 Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, at p. 19. Available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.

22 The Parental Leave (EU Directive) Regulations 2013 No. 283.

23 Department for Business, Innovation and Skills (2017) *Employment Status Review: December* 2015(London, Department for Business, Energy and Industrial Strategy).

Of course, such work is often characterised as 'flexible' because of the lack of legal obligation on either party to provide or carry out work on an ongoing basis. It is sometimes promoted as being good not only for business but also for employees on this basis. For example Recital 11 of the Temporary Agency Work Directive[24] notes that 'agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives.' There is evidence that some of those engaging in this type of work are indeed attracted by the flexibility it appears to provide.[25] Research suggests however that where flexibility is equated with insecure work it is more likely to have a detrimental than a positive impact on the ability of workers to manage work-life conflict because of the lack of autonomy afforded to the employee, making working time difficult to plan; and because low pay and insecurity mean those undertaking this kind of work may need to work several 'flexible' jobs in order to make ends meet, increasing working hours.[26] Thus Masselot notes that when flexible working 'is used as a tool for employers to enhance business in an increasingly globalised economic competition' it may lead to increased work-life conflict for employees.[27]

A second consequence of the eligibility requirement is that there is no right to request flexible work at the point of entry into the workforce or on changing to a new job with a new employer. There is therefore no legal framework to encourage or require employers to consider the opportunities for flexible work options when advertising a new post and therefore assist those seeking to enter or re-enter the labour market on a flexible basis.[28] One of the issues facing carers seeking to enter the labour market is that while part-time work is widely available, thus satisfying the need of many carers for time-based flexibility, the part-time work is often low paid, low status and insecure.[29] Very few 'quality' job vacancies are advertised as being open to some kind of flexibility.[30] The consequence is that where reduced or flexible hours in the right role are not available, workers who require flexibility will need to take on alternative lower-paid and lower-skilled jobs in exchange for the opportunity to work part time. Thus, evidence suggests that almost half of working mothers take on a lower-skilled part-time job on their return to work after having children.[31] Carers who chose to work part time therefore often suffer a financial penalty above and beyond the reduction in earnings caused by a cut in hours, a factor identified as an important contributor in perpetuating the gender pay gap and with potentially serious detrimental consequences for pension provision.[32] In relation to improving the availability of *quality* part-time (or other flexible) work, the right to request flexible working is only beneficial to those employees already employed in the role under other (more likely full-time) terms and conditions. In addition to the difficulties of finding flexible work when entering the labour market, a further consequence of the lack of availability of flexible work at the point

24 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work OJ L 327, 5.12.2008, pp. 9–14.

25 Department for Business, Innovation and Skills (2017) *Employment Status Review: December* 2015 (London, Department for Business, Energy and Industrial Strategy) at Paragraph 56.

26 Hofacker, D. and Konig, S. 'Flexibility and Work-life conflict in a time of crisis: a gender perspective (2013), *International Journal of Sociology and Social Policy* 33(9) pp. 613-635; see also Fredman, S. (2004), 'Women at Work: The Broken Promise of Flexicurity' *Industrial Law Journal* 33(4) pp. 299-319.

27 Masselot, A. (2015), 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' *New Zealand Journal of Employment Relations* 39(3) pp. 59-71 at p. 68.

28 A refusal to consider flexible working at any stage may give rise to a prima facie claim of indirect sex discrimination under the Equality Act 2010 where the refusal amounts to a 'policy, criterion or practice' and where it cannot be justified as being a 'proportionate means of achieving a legitimate aim.' (Equality Act Section 19). This is likely to impose a higher standard on employers than the requirement to deal with the application in a reasonable manner. There are no reported cases raising indirect sex discrimination in relation to the statutory right to request but for relevant cases pre-dating the right see, for example, *British Airways Plc v Starmer* [2005] IRLR 862 and *London Underground Limited v Edwards (No. 2)* [1998] IRLR 364.

29 Lyonette, C., Baldauf, B., and Behle, H. (2010), *Quality Part-time Work: A Review of the Evidence* (London, GEO).

30 The *Timewise Flexible Jobs Index 2016* (London, Timewise Foundation) found that only 8.7% of jobs paying over £20,000 full-time equivalent were advertised as being open to flexible working (an increase from 6.2% in 2015). Available at: http://timewise.co.uk/wp-content/uploads/2016/05/Timewise_Flexible_Index_2016.pdf.

31 Resolution Foundation (2012) *The price of motherhood: women and part-time work* (London, Resolution Foundation) available at: http://www.resolutionfoundation.org/publications/price-motherhood-women-part-time-work/.

32 Women and Equalities Committee (2016) *Gender Pay Gap: Second Report of Session 2015-6* (House of Commons, HC584) at Paragraph 97.

of recruitment is that women who currently work flexibly may feel trapped in their current role,[33] again creating barriers to career progression with a consequent impact on pay.

It is not clear whether making the right to request a right which is available from the first day of employment would be effective. It was one of the issues on which the Government consulted when proposing making a number of amendments to the right in 2011. While acknowledging the view that the lack of jobs advertised flexibly may act as a barrier for those seeking to enter the workforce, the Government decided that removal of the eligibility rights would be ineffective in improving the situation. This was because the right, as currently structured, requires the requesting employee to indicate what the impact of the proposed arrangement on the business may be and how this may be accommodated. Without knowledge and experience of the organisation, it was argued, those seeking to persuade the employer to allow them to work flexibly would be at a disadvantage and it would be too easy for employers to reject requests in consequence.[34] Thus for as long as the onus remains on the employee to seek to convince the employer that the proposed working pattern would not harm the business, the extension of the right to job applicants may be an inadequate solution in practice. An alternative option would, of course, be to put the initial onus on the employer rather than the employee to consider whether, and how, any proposed new post could be adapted to fit different flexible working patterns. Indeed a number of organisations have suggested that reform needs to go much further than simple removal of the qualifying period, the Women and Equalities Committee recommending for example that 'all jobs should be available to work flexibly unless an employer can demonstrate an immediate and continuing business case against doing so.'[35]

A right for carers or for all employees?

There is room for debate as to whether the recent extension of the right from carers to all employees under the Work and Families Act 2014 is helpful from a work-family reconciliation and gender equality perspective. On the one hand the extension of the right in this way was intended to allay concerns about perceptions by employers and co-workers that access to flexible working was a privilege reserved for parents or parents and carers and the consequent resentment and discrimination that may follow;[36] there is certainly evidence that such concerns are real. The Equality and Human Rights Commission report on pregnancy and maternity discrimination found that around half of mothers reported that they had experienced unfavourable treatment as a result of having their flexible working request approved. Such unfavourable treatment included feeling uncomfortable asking for extra time off, being given fewer opportunities than other colleagues at the same level of seniority; and receiving negative comments from management or colleagues. Around one in four mothers were put off from making a request because they were concerned about the reaction of their colleagues; those that did make a request regarded an uncomfortable working environment as 'a price to pay' for working flexibly.[37] There is also evidence that, because of similar concerns, compounded by a culture which is still more accepting of women's flexible working than of men's, men are more likely to be deterred from making formal requests for flexible working and more likely to lie about their reasons for taking time away from the workplace to accommodate family responsibilities.[38] While the legislation includes protections from detriment or

33 Timewise Foundation research suggests up to 77% workers feel trapped for this reason: Timewise Foundation (2013) *The Flexibility Trap – a report on how flexible working helps career progression* (London, Timewise Foundation) available at: http://timewisefoundation.org.uk/wp-content/uploads/2013/07/Flexibility_Trap_-report.pdf.

34 HM Government (2012) *Consultation on Modern Workplaces: Modern Workplaces Consultation - Government Response on Flexible Working* (HMSO, London) p. 18.

35 Women and Equalities Committee, note 22 above at Paragraph 134 and see discussion of evidence presented to the Committee on this issue at Paragraphs 98-111. See also similar recommendations by the Timewise Foundation in *The Timewise Flexible Jobs Index 2016*, note 20 above.

36 Government Department of Business, Innovation and Skills (2012) *Consultation on Modern Workplaces: Modern Workplaces Consultation - Government Response on Flexible Working: Impact Assessment* (BIS/12/1270, London).

37 Department of Business, Innovation and Skills and Equality and Human Rights Commission 2016), *Pregnancy and Maternity Related Discrimination and Disadvantage: Experiences of Mothers* (London, BIS).

38 Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, at p. 20. Available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.

dismissal as a result of a formal request to work flexibly, this has clearly not provided an adequate guarantee of protection.[39]

To address these difficulties, the consultation preceding the extension of flexible working to all employees made clear that cultural change was one of the main aims of the policy initiative. It was anticipated that sending a message that flexible working was for everybody would remove the 'stigma' of working flexibly and address 'current perceptions that flexible working is a concession for parents who are no longer focussed on their careers' with the consequent detrimental effects on career progression and organisational standing.[40] In particular it was hoped that the removal of stigma may, in time, encourage men to be more open about their reasons for taking time off to work flexibly.[41] Given the evidence that there is a marked gender difference in the numbers of those choosing to work flexibly for reasons other than care with men twice as likely to seek a change in working patterns to pursue hobbies or other interests,[42] it is certainly possible that the change will see an increase in the perception that flexible working is something for men too.

On the other hand, others have raised a concern that the extension of the right to all employees may undermine policy focus on the particular needs and challenges faced by parents and caregivers in the workplace. This is, perhaps, an inevitable consequence of any attempt to erode the stigma attached to flexible working identified in the previous paragraphs. The government consultation attempted to present flexible working as something that was very much in the interests of all employees and its extension as a positive change for business. Thus, it was noted, extending the right to all employees would 'give all employees the opportunity to contribute more widely to society, whether as carers, disabled people, volunteers or simply as citizens. It will also help employers to recruit, motivate and retain their workforces, and so build successful businesses as well as increasing productivity.' [43] Care and other activities outside paid employment are placed on the same footing here. Within the legislation itself there is no scope for determining priorities between competing flexible working requests based on the reason for the request; employers are neither required nor encouraged to prioritise requests made by those with caring responsibilities over those made for other reasons – something which is understandable if the policy priority is to erode the perception of a two-tier system in which carers are privileged above other employees. However, it is argued that the consequence of this may be to undervalue the contribution made by unpaid care and to ignore the gender equality dimension of flexible working. For example Masselot, discussing the right to flexible working in New Zealand which was similarly extended to all employees in 2013, notes that the amendments 'completely obliterate the caregiving focus of the legislation' and 'underscores the fact that there is, in New Zealand, a disconnection between production, which is valued, and reproduction, which is not.'[44]

(b) Temporary changes in working time

Once an employer agrees to a request to work flexibly the result is normally a permanent change to the employee's contract. The employee is permitted to make another request to change, but not within twelve months of a previous request (whether or not that was successful). It is not clear whether the right to request flexible working includes the right to request a temporary rather than a permanent change in terms and conditions at the outset (such as, for example, a reduction in hours over a three-month period); it is also unclear whether it includes the right to request to increase hours of work (so that, for example,

39 Employment Rights Act Sections 47E and 104C.
40 Department of Business, Innovation and Skills (2012) *Consultation on Modern Workplaces: Modern Workplaces Consultation - Government Response on Flexible Working: Impact Assessment* (London, BIS) at p. 9.
41 Department of Business, Innovation and Skills (2012) *Consultation on Modern Workplaces: Modern Workplaces Consultation - Government Response on Flexible Working: Impact Assessment* (London, BIS) at p. 16.
42 Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, at p.14. Available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.
43 Department of Business, Innovation and Skills (2011) *Consultation on Modern Workplaces* (London, BIS) p. 2.
44 Masselot, A. (2015), 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' *New Zealand Journal of Employment Relations* 39(3) pp. 59-71 at pp. 67-68.

an employee who has previously requested a change from full to part-time work, or who has entered the workforce on a part-time basis, can subsequently request an increase to full-time hours within the legislative framework.) These options are potentially crucial both to help employees manage temporary or unpredictable demands for care and to avoid becoming 'trapped' in part-time or other flexible work patterns with no guarantee that they will be able to later return to longer working hours and with the consequent impact on earnings across the life course which this may entail.

The Government consulted in 2011-2012 on the possibility of allowing more than one request to be made in a twelve-month period but decided that the limitation should remain as it is. While acknowledging that a right to a temporary change may be important for individuals in a number of situations – including, for example, the need to care for a terminally ill relative – it was decided that legislative change was unnecessary because '[w]e understand that most employers would accommodate temporary changes in response to the difficult situations described and that the current regulations already provide the facility for employers and employees to agree non-permanent changes.'[45] While the latter may be true, the legislation is silent on the issue of whether the right to request a temporary change is included in the right to request framework leaving this issue uncertain; and, in the event the courts should decide that it is not included, reliance on the goodwill of employers in these circumstances clearly falls some way short of a legal duty to consider a request.

In relation to the opportunity to request an increase in hours (whether following a successful statutory request to reduce hours or otherwise) the Women and Equalities Committee, in their 2016 enquiry into the gender pay gap, noted that the uncertainty about the scope of the legislation may result in women working for fewer hours than they would choose should they have a statutory right to request an increase, or a right to return to a previously higher level. They therefore recommended that the legislation be amended to allow those working less than full-time hours to request the opportunity to work more.[46]

At best, therefore, there is a lack of clarity as to the scope of the legislation in these respects. This gives rise to concern that the right as it is currently framed is not, or is not perceived to be, a helpful right for those for whom the demands of care may require temporary or fluctuating changes to normal working patterns; where, for example, a sick dependant may require short-term but intensive care; or time out during the day to attend hospital appointments for a period of time. When this is combined with the fairly basic conception of flexibility within the legislation (where changes must relate to the hours, time or place of work) this may limit the potential of the right to provide real opportunities for those with unpredictable or uneven care demands to minimise work-care conflicts. This may be particularly problematic for carers of adult dependants whose care needs may follow a less predictable trajectory than those of children without any additional needs. As James and Spruce observe, the right was introduced and thus shaped around perceived needs of working parents and was not amended in other respects when extended to carers. In consequence 'the particular needs of those who care for elderly dependants seem to have been lost in this construction.'[47]

Further, while there is no research specifically addressed to the consequences of this uncertainty for the willingness of employees to request and employers to agree to such changes, it would be unsurprising if perceptions or misconceptions about the permanent nature of changes made pursuant to the right were a deterrent in particular to male employees. Part-time working remains the predominant form of flexible working arrangement offered by organisations[48] and women are already overwhelmingly more

45 Government Department of Business, Innovation and Skills (2012) *Consultation on Modern Workplaces: Modern Workplaces Consultation - Government Response on Flexible Working* (London, BIS) at p. 20.

46 Women and Equalities Committee (2016), *Gender Pay Gap: Second Report of Session 2015-6* (House of Commons, HC584) at p. 40.

47 James, G. and Spruce, E. (2015) 'Workers with elderly dependants: employment law's response to the latest care-giving conundrum'. *Legal Studies* 35 (3). pp. 463-479.

48 Women and Equalities Committee (2016) *Gender Pay Gap: Second Report of Session 2015-6* (House of Commons, HC584) at 77; see also Department for Business, Innovation and Skills ('BIS') (2014) *The Fourth Work-Life Balance Employer Survey 2013* (December 2014) (London, BIS).

likely to work part time than men.[49] Any concern that a negotiated reduction in hours may turn out to be permanent is only likely to increase anxiety about opting for this form of flexibility.

(c) The obligations on the employer to consider the request in a reasonable manner

Perhaps the chief limitation of the legislation, of course, is that it remains a right to request rather than a right to have. The strength of the employer's obligations in considering the request is therefore crucial to an assessment of the value of the right. These obligations are limited to two main requirements (in addition to a number of specific requirements relating to timing and form): the requirement to reject the request only for one of the reasons set out in the legislation; and the requirement to consider the request in a reasonable manner.

In relation to the first requirement, it appears that tribunals are not able to review whether the employer acted fairly or reasonably in rejecting the request on the stated ground, they only have power to review whether the facts on which the employer based their decision were correct.[50] While this was established in case law pre-dating the introduction of the second requirement in 2014, there is no reason to think that the position has changed significantly as a result (although we await further case law in this area.)

The ACAS Code of Practice, introduced to provide guidance on the obligation to consider requests in a reasonable manner, states that in order to act reasonably the employer 'should consider the request carefully looking at the benefits of the requested changes in working conditions for the employee and your business and weighing these against any adverse business impact of implementing the changes.'[51] The reasonableness obligation relates to the manner in which the employer deals with the request rather than establishing a standard for reviewing the fairness of the decision. There is, for example, no obligation on the employer to act proportionately in the assessment of the benefits and potential impacts. This means that there does not appear to be any scope for an employment tribunal to find unreasonable a rejection of a request where the detrimental impact on the business of accepting would be minor but rejection would require the employee to leave employment.[52] When set against current institutional barriers to enforcing employment rights in general (in particular the introduction of employment tribunal fees in 2013 which has seen a 75% reduction in claims), it is difficult to see why employers who are not alert to the benefits of flexible working and are otherwise sympathetic and imaginative would have any incentive to accept requests that are made.

Despite the weaknesses of the right in this respect, evidence suggests that a significant majority of requests made under the legislation are successful.[53] However, it is also clear that access to flexible working varies significantly between different types of organisations and different categories of employees within organisations.[54] Of particular note in this context is evidence that flexible working (and in particular working from home) is most likely to be associated with senior and managerial roles[55] because it is in these type of roles, one imagines, that workers have both more autonomy and more

49 42% of women work part time, compared to 12% of men: ONS Annual Population Survey (November 2015).

50 *Commotion Ltd v Rutty* [2006] IRLR 171 EAT.

51 ACAS (June 2014) *Handling in a reasonable manner requests to work flexibly* Code of Practice 5 (TSO, Norwich).

52 It is important to note, however, that where the rejection of a request may amount to prima facie indirect sex discrimination, the employer would of course only be able to justify the rejection where it amounted to a proportionate means of achieving a legitimate aim under Equality Act 2010 Section 19.

53 Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.

54 For detailed evidence see Department for Business, Innovation and Skills ('BIS') (2014) *The Fourth Work-Life Balance Employer Survey 2013* (December 2014) (London, BIS); and *Modern Families Index 2017*, note 5 above.

55 Women and Equalities Committee (2016) *Gender Pay Gap: Second Report of Session 2015-6* (House of Commons, HC584)at Paragraph 76; see also Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf; Department for Business, Innovation and Skills ('BIS') (December 2014), *The Fourth Work-Life Balance Employer Survey 2013* (London, BIS).

access to the type of experience and information which may be needed to put a persuasive case to the employer. The weakness of the obligation on the employer, combined with the initial responsibility of the employee to outline the requests mean that employees in roles with less status and autonomy may be more likely to face a difficult task in persuading an otherwise unsympathetic employer to accede to a request.

The high success rate of applications should not mask the fact that a significant number of employees eligible to apply for flexible working do not do so. The Equality and Human Rights Commission, for example, found that nearly two in five mothers did not request a type of flexible working they wanted.[56] Among the reasons given for not making a request, the most common were that they did not think it would be approved or because of a concern that the request would be viewed negatively.[57] The culture of the organisation and the (real or perceived) attitude of the employer to flexible working practices is of course likely to influence the likelihood that requests will be made in the first place. The ease with which employers may reject applications means that there is unlikely to be much impetus for organisational change among employers resistant to the idea of flexible working.

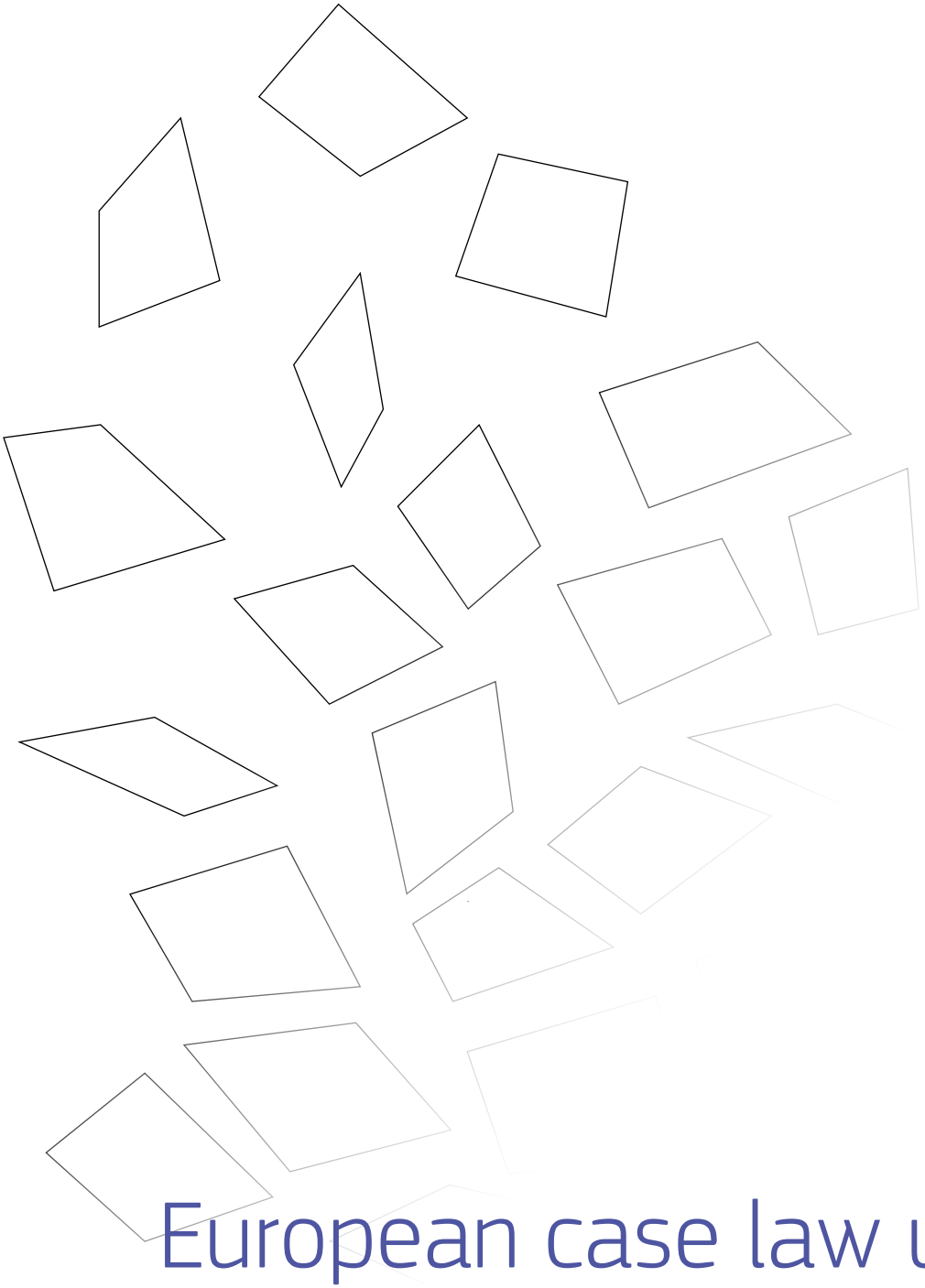
Conclusion

While there has undoubtedly been progress in relation to the availability and acceptability of flexible working, there remains some way to go before the right to request can serve as a means for *all* employees to resolve work-family conflicts and/or improve work-life balance. Access to and take-up of flexible working remains unequal and gendered; and of particular concern is the evidence of negative attitudes to flexible working among employers and colleagues, even where requests are granted, which serves as a deterrent to some and is experienced as detrimental treatment by others. As Working Families have argued, what appears to still be needed is a change in culture into one in which flexible working is normalised rather than seen as a concession or a privilege; and one in which employers are significantly more proactive in promoting flexible working rather than a reactive culture in which individual employees are made responsible for their own work-life 'problem'.[58] Of course legal regulation can only be one part of this culture shift; it remains to be seen whether the extension of the right to all employees will have the desired impact.

56 Department of Business, Innovation and Skills and Equality and Human Rights Commission 2016), *Pregnancy and Maternity Related Discrimination and Disadvantage: Experiences of Mothers* (London, BIS). See also Department for Business, Innovation and Skills ('BIS') (December 2014), *The Fourth Work-Life Balance Employer Survey 2013* (London, BIS) which notes that men are even less likely than women to make a formal flexible working request.

57 Department of Business, Innovation and Skills and Equality and Human Rights Commission 2016), *Pregnancy and Maternity Related Discrimination and Disadvantage: Experiences of Mothers* (London, BIS). See also Working Families and Bright Horizons (2017) *The Modern Families Index 2017*, which found that less than a fifth of employees who did not work flexibly did not do so because they did not want to. Available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.

58 Working Families and Bright Horizons (2017) *The Modern Families Index 2017* at p. 19, available at: https://www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index_Full-Report.pdf.



European case law update

This section provides an overview of the main latest developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 July to 31 December 2016.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Case C-443/15, *Dr David L. Parris v. Trinity College Dublin and Others*, Opinion of Advocate General Kokott, delivered on 30 June 2016, ECLI:EU:C:2016:493

This reference for a preliminary ruling was submitted by the Labour Court in Ireland, and concerned the interpretation of the Employment Equality Directive with regard to the prohibition of discrimination on the grounds of age and sexual orientation in the employment field. The claimant in the proceedings before the referring court was a retired university lecturer who had entered into a civil partnership with his long-standing male partner in the United Kingdom in 2005, which had not been recognised in Ireland until 2011, when legislation to that effect entered into force in Ireland. His occupational pension scheme denied his partner a survivor's pension, due to the fact that the couple had formalised their partnership too late, i.e. after the claimant had reached the age of 60. By the time Irish law recognised same-sex registered partnerships however, the claimant had already reached the age of 65. On this basis, the claimant argued that the denial of a survivor's pension for his partner amounted to discrimination on the ground of sexual orientation and age.

The claimant's action before the referring court was directed, on the one hand, against his former employer Trinity College Dublin, and, on the other hand, against the Higher Education Authority, the Department of Public Expenditure and Reform and the Department of Education and Skills ('the respondent authorities').

The AG first noted the importance of examining the combination of the two grounds of alleged discrimination in this case, rather than examining each of them individually, thus bringing the attention of the Court to the intersectional dimension of the case. The three questions referred by the Labour Court invited the CJEU to examine the case from the perspectives of discrimination on the ground of sexual orientation, on the ground of age and on the combination of both grounds, respectively. After swiftly discussing the issues of material and temporal scope of the Directive, the AG examined the three questions.

AG Kokott found that the relevant regulation of the occupational pension scheme did not amount to direct discrimination on the ground of sexual orientation. She then noted that although the regulation at hand was neutral in that it did not target persons with same-sex partners directly, it did affect them 'more severely and more deleteriously than their heterosexual colleagues' (para 57). The regulation therefore resulted in indirect difference of treatment on the ground of sexual orientation, and the AG examined whether it could be objectively justified by a legitimate aim. An analysis of the relevant regulation led the AG to the conclusion that it was not necessary to achieve the legitimate aim of 'prevent[ing] abusive behaviour detrimental to the financial stability of the pension scheme' (para 73), as more lenient but equally appropriate measures could be envisaged. Further, the measure leads to 'excessive adverse effects on the legitimate interests of employees' and therefore does not pass the proportionality test. This amounts to indirect discrimination on the ground of sexual orientation. The AG rejected an argument advanced by Trinity College, the respondent authorities, the United Kingdom Government and the Commission based on Recital 22 of the Directive as her interpretation does not in any way impose a change of legislation or policy in Ireland as regards the marital status of same-sex partners. In fact, the claimant and his partner are simply requesting a benefit to which their current marital status gives access.

As regards discrimination on the ground of age, the AG noted that the measure at hand amounted to unfavourable treatment on the ground of age, potentially constituting direct discrimination. She then examined the possible justification of such a measure, based on both Article 6(1) and 6(2) of the Directive. The AG first examined Article 6(2) of the Directive, noting that it permits 'precisely three types of derogation from the prohibition on age discrimination under Article 2(1) in conjunction with Article 2(2) of the Directive: first, the fixing of age limits as a condition of membership of an occupational social security scheme; secondly, the fixing of age limits for entitlement to retirement or invalidity benefits; and thirdly, the use of age limits in actuarial calculations.' Concluding that the measure at hand cannot be directly classified under any of these categories, the AG also examined whether an analogous reading of Article 6(2) could provide a justification for the contested provision of the national occupational pension scheme. She concluded in the negative however, interpreting the exceptions strictly in accordance with long-standing case law.

Examining Article 6(1) of the Directive then, the AG concluded that the contested provision could not be found to pursue a legitimate aim of a social-policy nature, and could therefore not be justified on the basis of this article.

Finally, as regards discrimination based on a combination of both sexual orientation and age, the Opinion calls for an interpretation of the Directive which leaves the option of finding indirect discrimination on the basis of a combination of grounds, where no direct or indirect discrimination can be found on the basis of one ground alone. In the case at hand, it was the specific group of homosexual members of the pension scheme born before 1951 who were put at a particular disadvantage by the contested measure, due to the combination of their sexual orientation and their age.

Case C-188/15, *Asma Bougnaoui Association de défense des droits de l'homme (ADDH) v. Micropole SA*, Opinion of Advocate General Sharpston, delivered on 13 July 2016, ECLI:EU:C:2016:553

Together with Case C-157/15,[1] this case is expected to become one of the landmark decisions of the Court.

Ms Bougnaoui was a design engineer at Micropole SA. After having worked on an assignment for a client at their site, the client requested her not to wear her headscarf the following time, as it embarrassed a number of its employees. As she did not accept having to take off her headscarf, her employment contract was terminated one week after an interview preliminary to possible dismissal.

The question referred provided only limited information about the facts of the case, which includes the dismissal letter, but no further clarification, for example, about the existence of a prescribed dress code at the company or if there were any proposed measures to find a balance between the company's and Ms Bougnaoui's interests.

AG Sharpston presented some preliminary remarks, before turning to the assessment of the case. The AG pointed out that the issue arises in a context where views and practice are widely different across the EU. Then, the AG presented the panorama in EU Member States concerning general attitudes and specific legislation and case law relating to the wearing of religious apparel. The AG also briefly summed up the main trends and conclusions from the ECtHR's case law and then pointed out the critical difference between the restrictions-based approach, adopted by the ECtHR, and the discrimination-based one, including the distinction between direct and indirect discrimination as a fundamental element of the EU anti-discrimination legislation. After providing a brief overview of the history and development of

1 See the Opinion of AG Kokott delivered on 31 May 2016, ECLI:EU:C:2016:382. See also *European equality law review*, Issue 2016/2, pp. 62-65.

the prohibition of discrimination in EU law, the AG underlined that there is a clear distinction between the freedom to manifest one's religion and proselytising on behalf of one's religion, as well as between legitimately declared company rules that describe desired or unpermitted forms of conduct and rules that intrude on the personal rights of a particular group of employees on the basis of a prohibited characteristic. Finally, the preliminary remarks were concluded by a brief reference to the diverging opinions on the wearing of the headscarf in the context of gender equality. However, the AG adopted the approach of the ECtHR and put forward that 'the matter is best understood as an expression of cultural and religious freedom'.

The objective of the question referred was to determine whether a customer's wish expressed to an employer to no longer have its services provided by an employee wearing an Islamic headscarf may constitute a 'genuine and determining occupational requirement' within the meaning of Article 4(1) of Directive 2000/78. The AG underlined that the assessment provided in the present case is restricted in its scope to the private sector.

The question referred did not include detailed information about the prohibition that applied to Ms Bougnaoui and it is not clear if there was a general ban applying to the wearing of apparel of all religions and beliefs, or if that only applied when in contact with customers. However, it is clear from the dismissal letter that her dismissal was linked to Micropole's dress code prohibiting the wearing of religious apparel and it stemmed from her manifestation of religion. Even though Directive 2000/78 is silent on this issue, the right to freedom of religion includes the right to manifest it. Therefore, the AG concluded that Ms Bougnaoui was treated less favourably on the ground of her religion than another person would have been treated in a comparable situation and the dismissal amounted to direct discrimination.

Thus, the dismissal would only have been lawful, if one of the derogations in Directive 2000/78 were to have applied. The AG started the assessment with the provisions under Article 4(1). This Article does not apply automatically, but the French Labour Code has a corresponding article giving effect to Article 4(1). The rule in the present case, which prohibits the wearing of the Islamic headscarf, is clearly capable of constituting a 'characteristic related to' religion or belief. The AG underlined that as a derogation, Article 4(1) must be interpreted strictly, applied in a way that is specific and limited to matters that are absolutely necessary in order to undertake a specific professional activity. The AG made reference to the application of this provision in the context of age discrimination and of the analogous derogation under Directive 76/207 from the principle of equal treatment on grounds of sex, before turning to the possible obvious application of this derogation on the ground of religion and belief for example in the area of health and safety at work. However, the commercial interest of Micropole's business cannot justify the application of the derogation in Article 4(1). The AG pointed out that the Court had already held that direct discrimination cannot be justified on the ground of the financial loss that might be caused to the employer and that the freedom to conduct business is one of the general principles of EU law, but it is not an absolute one and limitations may be imposed. This was the case for example in relation to safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media, and the same reasoning must apply to the right not to be discriminated against. There is no information in the question referred that would suggest that Ms Bougnaoui was unable to perform her duties as a design engineer because she wore an Islamic headscarf. The AG therefore concluded that the requirement applying to her could not be a 'genuine and determining occupational requirement'.

The AG then considered the remaining derogations under Directive 2000/78. Article 2(5) cannot apply, as there is no corresponding national legislation that would give effect to this derogation and even if there were, the prohibition in this present case cannot be seen as necessary 'for the protection of individual rights and freedoms which are necessary for the functioning of a democratic society'. Article 4(2) cannot apply, as Micropole's activities are clearly beyond its scope. Article 6 refers to justifications of differences of treatment on the ground of age, while Article 7 is linked to positive action, and clearly none of these are relevant to the present case.

Thus, the AG concluded that the prohibition in question involves direct discrimination on grounds of religion or belief, to which none of the derogations under Directive 2000/78 apply.

Even though this should be sufficient to answer the referring court's question, the AG continued the analysis assuming that there is a hypothetical company rule imposing a neutral dress code on all employees, which could then involve indirect discrimination. In this case, derogation is permitted if it is 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. The AG considered that both the protection of the rights and freedoms of others and the interest of the employer's business constitute legitimate aims. The AG again emphasised that the freedom to carry on a business is not an absolute principle and that religious identity is an integral part of a person's very being and pointed out that the present case is a classic example of two protected rights potentially in conflict with one another. After a reference to the Court's and the ECtHR's case law on the issue of proportionality, the AG made some specific observations regarding the present case, in which she pointed out the importance of eye contact in Western society in face-to-face communication between business representatives and customers. Additionally, the small amount of working time during which the specific prohibition applies cannot justify the proportionality of the restriction, as this line of argument misses the point of why Ms Bougnaoui was seeking to wear religious apparel. The AG clarified that it is ultimately the task of the national court to reach a final decision, and other matters may arise that are relevant to the issue of proportionality. However, she presented the final observation that:

> 'It seems to me that in the vast majority of cases it will be possible, on the basis of a sensible discussion between the employer and the employee, to reach an accommodation that reconciles adequately the competing rights of the employee to manifest his or her religion and the employer to conduct his business. Occasionally, however, that may not be possible. In the last resort, the business interest in generating maximum profit should then in my view give way to the right of the individual employee to manifest his religious convictions. (...) Directive 2000/78 is intended to confer protection in employment against adverse treatment (i.e. discrimination) on the basis of one of the prohibited factors. It is not about losing one's job in order to help the employer's profit line' (para 133).

Thus, the AG concluded that where there is indirect discrimination on grounds of religion or belief, the interests of the employer's business will constitute a legitimate aim for the purposes of Article 2(2)(b)(i) of Directive 2000/78, but such discrimination is justified only if it is proportionate to this aim.

Case C-258/15 *Gorka Salaberria Sorondo v. Academia Vasca de Policía y Emergencias*, Opinion of Advocate General Mengozzi, delivered on 21 July 2016, ECLI:EU:C:2016:588

This reference for a preliminary ruling was submitted by the High Court of Justice of the Autonomous Community of the Basque Country in Spain, and concerned the interpretation of the Employment Equality Directive with regard to the prohibition of discrimination on the ground of age. The claimant in the proceedings before the national court had been excluded from the selection process for recruitment to the post of officer in the lowest rank of the police force of the Basque Country, due to an age limit indicating that candidates must be aged between 18 and 35 at the time of application. The claimant was older than 35, and brought an administrative action against the decision announcing the selection process.

The High Court of Justice referred the following question to the CJEU: 'Is the setting of a maximum age of 35 as a condition for participation in the selection process for recruitment to the post of officer of the police force of the Autonomous Community of the Basque Country compatible with the interpretation of Article 2(2), Article 4(1) and Article 6(1)(c) of Directive 2000/78?'. The referring court as well as the AG before the CJEU pointed out the resemblance of this question to that referred to the Court in the case

of *Vital Pérez*,[2] although the duties of the police forces concerned in the two cases were significantly different, as were the specific age limits.

The AG initially noted that the Court's judgment in *Vital Pérez* had already resolved a number of preliminary issues, such as the applicability of the Directive to the situation concerned and the existence of a difference of treatment based directly on age. The Opinion then went on to examine the remaining question of the justifiability of that difference of treatment under Article 4(1) or Article 6(1) of the Directive.

Examining whether the contested age limit may constitute a genuine and determining occupational requirement, the AG looked at the general duties of the police force of the Basque Country to conclude that the possession of particularly significant physical capacities constituted such an occupational requirement for that occupation. He further concluded that the objective pursued by the contested measure, i.e. to 'ensure the operational capacity and proper functioning of police services, by ensuring that newly-recruited officers are able to perform the more physically demanding tasks for a relatively long period of their career', must be found to be legitimate.

The AG then went on to examine the proportionality of setting the age limit specifically at the age of 35. In this regard, he noted that officers of the lowest rank are, at the time of their recruitment, expected to be able to carry out any task characteristic of their profession. Their duties are essentially operational, and they are expected to carry out the physically demanding aspects of the profession. The AG further noted that the police force of the Basque Country is objectively facing a significant increase in the age of its workforce, with projections showing that more than 50% of the workforce will be aged between 55 and 65 by the year 2025. Finally, he cited the reports produced by the police force of the Basque Country showing that officers aged above 55 cannot be regarded as being in full possession of the physical and mental capacities required to carry out their job properly without incurring any risks either to themselves or to others. The AG concluded that the duties performed by the police force of the Basque Country, in contrast to those performed by the police force at hand in the *Vital Pérez* case, 'genuinely appear to require a high level of physical fitness in order to cope with all the physical challenges that a police officer faces in carrying out all his duties'. He thus further concluded that the current make-up of the workforce required measures to be taken now to restore balance between the more active and the less active police officers, and that physical endurance tests as part of the recruitment process would not be capable of ensuring such a balance in the long term or at least the medium term. The AG therefore recommended the Court to conclude that Article 4(1) of the Directive does not preclude a national provision such as that at hand.

Following his conclusion regarding Article 4(1) of the Directive, the AG made some general comments regarding Article 6(1) of the Directive, examining the different objectives pursued by the measure. On the basis of the very limited documentation available to the Court regarding justification on the basis of Article 6(1), he concluded that it would be difficult to consider that the specific age limit constituted an appropriate and necessary means to achieve a legitimate objective.

Case C-668/15, *Jyske Finans A/S v. Ligebehandlingsnævnet, acting on behalf of Ismar Huskic*, Opinion of Advocate General Wahl delivered on 1 December 2016, ECLI:EU:C:2016:914

This reference for a preliminary ruling was submitted by the Court of Appeal of Western Denmark, and concerned the interpretation of the Racial Equality Directive in the field of access to goods and services. The claimant in the proceedings before the referring court was a naturalised Danish citizen who was born in Bosnia and Herzegovina and whose driving license indicated his place of birth. On the basis of

2 CJEU, Case C-416/13, *Mario Vital Pérez v. Ayuntamiento de Oviedo*, Judgment of 13 November 2014, ECLI:EU:C:2014:2371, see also *European equality law review* Issue 2015/1, p. 63.

that indication on the driving licence, a lending credit institution ('the respondent company') asked the claimant, who was applying for a loan to buy a car together with his partner, to produce a passport of an EU or EFTA country or, failing that, a passport of a third country and a valid residence permit. The claimant brought a complaint with the Equal Treatment Board against the respondent company, claiming discrimination on the ground of ethnic origin. The Board found that the contested practice amounted to indirect discrimination and ordered the respondent company to pay compensation. On appeal, following the refusal of the respondent company to comply with the decision, the case was brought before the referring court.

The referring court asked whether the contested practice amounted to direct discrimination under Directive 2000/43 or indirect discrimination under the same Directive unless objectively justified and proportionate. In its third question, the referring court asked whether the prevention of money laundering may constitute a ground for justification of the practice at issue if, on the face of it, it is to be considered to be indirectly discriminatory.

The AG first presented some general remarks, regarding in particular the grounds protected by the Directive, 'racial or ethnic origin'. Noting first that it is necessary to define the concept of 'race' in order to prevent and combat racism, the AG then held that it has been 'increasingly unacceptable in modern societies' to do so, and therefore focused his Opinion on the concept of 'ethnic origin'. Underlining the difficulty of determining the meaning of this concept, he cited the Court's judgment in *CHEZ Razpredelenie Bulgaria*, which referred to 'the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds'. He then pointed out that this definition is in no way based on the place of birth, and further held that nothing in the Directive indicates that a person's place of birth conditions his or her ethnic origin. Although a person's place of birth can be a relevant factor in determining whether he or she belongs to an ethnic group, the AG concluded that 'discrimination on grounds of ethnic origin cannot be established solely by reference to a person's place of birth' (para 44).

On the basis of this interpretation, the AG further concluded that the contested practice did not amount to direct discrimination on the ground of ethnic origin, and went on to examine whether it could amount to indirect discrimination. In this regard, the AG noted that Article 2(2)(b) of the Directive can only be triggered where *a particular* ethnic origin is identified as being targeted by the discriminatory measure, which cannot be the case with the contested practice at hand as it targets any person who is not born in an EU Member State or an EFTA country. He therefore concluded that the practice at hand neither amounted to direct nor to indirect discrimination on grounds of ethnic origin.

Finally, for the sake of completeness, the AG examined whether the practice at hand, had it been found to amount to indirect discrimination, could be justified on the basis of Article 13 of Directive 2005/60. The respondent before the referring court argued that compliance with the rules on the prevention of money laundering and the financing of terrorism is a legitimate aim which justifies the practice at issue. The AG first noted that such an objective could indeed, in principle, justify an indirectly discriminatory measure, and then considered whether that was true for the practice at hand, and whether it was appropriate and necessary to achieve that aim. In this regard, he noted that the appropriate assessment of the existence and risk of money laundering or terrorist financing is highly relevant. However, the question of the referring court was phrased in such a way as to assess whether the practice of the respondent company in general was lawful rather than its specific application in the present case. Under these circumstances, the AG concluded that it appeared that the practice at hand could be justified under Article 2(2)(b) of the Directive, noting however the importance of strictly interpreting the concept of 'objective justification' in the presence of a prima facie case of indirect discrimination on the grounds of racial or ethnic origin. Leaving the final assessment of the practice at hand to the referring court, the AG concluded that if the Court were to find that the practice amounted to indirect discrimination, it should be considered neither appropriate nor necessary to achieve the aim of preventing money laundering and the financing of terrorism.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Case C-335/15, *Maria Cristina Elisabetta Ornano v. Ministero della Giustizia, Direzione Generale dei Magistrati del Ministero*, Judgment of 14 July 2016, ECLI:EU:C:2016:564

The request for a preliminary ruling concerns the interpretation of Article 119 of the EC Treaty (subsequently Article 141 EC), Article 120 of the EC Treaty (subsequently Article 142 EC), Article 23 of the Charter of Fundamental Rights of the European Union, Article 11 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1), and Articles 2, 14 and 15 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Ms Ornano had made a request to the Ministry of Justice for the payment of, inter alia, the special judicial allowance in respect of two periods of compulsory maternity leave which she had taken during the years 1997/1998 and 2000/2001. By a decision of 30 March 2007, the Ministry of Justice rejected Ms Ornano's request on the ground that the two periods of maternity leave predated the date of entry into force of the amended version of Article 3(1) of Law No. 27/81, namely 1 January 2005, and that that amendment was not retroactive. On 9 October 2007, the Ministry of Justice ruled out the retroactive application of the amended version of Article 3(1) of Law No. 27/81. It noted that the Consiglio di Stato (Council of State) had raised the question of the constitutionality of that amended version and that, on several occasions, in particular in an order of 13 April 2007, the Corte Costituzionale (Constitutional Court of Italy) had held that that provision was not contrary to the Italian Constitution. According to the Consiglio di Stato (Council of State) there remains the issue of whether the initial version of Article 3(1) of Law No. 27/81 is compatible with EU law as contained in the various provisions designed to protect maternity and to ensure non-discrimination between the sexes, in particular as regards the remuneration of workers. In that regard, the referring court observed that the case law of the Court of Justice seeks to ensure that maternity does not place the female workers concerned in a position which is less favourable than that of their male colleagues in the context of the employment relationship.

As was noted by the CJEU, by its question the referring court asked, in essence, whether EU law must be interpreted as precluding a national law, which, in the case of a period of compulsory maternity leave prior to 1 January 2005, excludes an ordinary magistrate from entitlement to an allowance in respect of expenses that ordinary magistrates incur in the performance of their professional functions.

First of all, the CJEU concluded that in the case of maternity leave, the maintenance of a payment to and/or entitlement to an adequate allowance for workers must be ensured. Article 11(3) of Directive 92/85 provides that the allowance referred to in paragraph 2(b) is to be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation.

Relying on the *Gillespie and Others* and *Boyle and Others* judgments, the CJEU stressed that since they are based on the employment relationship, the benefits which the employer pays, whether under legislative provisions or an employment contract, to a worker on maternity leave constitute pay within the meaning of Article 119 of the EC Treaty (subsequently Article 141 EC) and Article 1 of Directive 75/117.

Again recalling the *Gillespie and Others* judgment, the CJEU argued that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations. However, women taking maternity leave provided for by national legislation are in a special

position which requires them to be afforded special protection, but which is not comparable either to that of a man or to that of a woman actually at work. Therefore, the principle of equal pay between men and women laid down in Article 119 of the EC Treaty (subsequently Article 141 EC) and set out in detail in Directive 75/117 neither requires that women should continue to receive full pay during their maternity leave nor lays down specific criteria for determining the amount of benefit payable to them during that period, provided that the amount is not set so low as to jeopardise the purpose of maternity leave.

Based on the *Gillespie and Others* judgment, the CJEU ruled that the mere fact that an ordinary magistrate was not entitled to the special judicial allowance during a period of compulsory maternity leave, unlike her male colleagues who were working, does not constitute discrimination on the grounds of sex within the meaning of Article 119 of the EC Treaty (subsequently Article 141 EC) and Article 1 of Directive 75/117.

Having regard to the foregoing considerations, the CJEU's answer to the question referred was that Article 119 of the EC Treaty (subsequently Article 141 EC), Article 1 of Directive 75/117, and Article 11(2)(b) and 11(3) of Directive 92/85 must be interpreted, in a situation where the Member State concerned did not provide for the maintenance of all the elements of pay to which an ordinary magistrate was entitled before her maternity leave, as not precluding a national law, such as that at issue in the main proceedings, under which, in the case of a period of compulsory maternity leave taken prior to 1 January 2005, an ordinary magistrate is not entitled to receive an allowance in respect of costs that ordinary magistrates incur in the performance of their professional functions, provided that that worker received, during that period, an income which was at least equivalent to that of the benefit provided for under national social security legislation which she would have received in the event of a break in her activities on grounds connected with her state of health, this being a matter for the national court to determine.

Case C-423/15, *Nils-Johannes Kratzer v. R+V Allgemeine Versicherung AG*, Judgment of 28 July 2016, ECLI:EU:C:2016:604

The claimant in the proceedings before the referring court had submitted an application for a legal trainee position for which he could be considered to be over-qualified. When his application was rejected, he submitted a claim for compensation of damage due to discrimination on the grounds of age. The respondent employer then invited him to an interview, explaining that the rejection of his application had been a mistake. The claimant declined the invitation and responded that he was willing to discuss his potential future with the company once his claim for compensation had been satisfied. The claimant brought an action against the respondent seeking compensation for age discrimination and adding, when he discovered that all four selected applicants were women, a claim of discrimination on the grounds of sex. The action was dismissed at first and second instance before being brought to the Federal Labour Court, which referred questions to the Court of Justice for preliminary ruling.

By its questions, the referring court sought to clarify 'whether Article 3(1)(a) of Directive 2000/78 and Article 14(1)(a) of Directive 2006/54 must be interpreted as meaning that a situation in which a person who, by presenting his application for a post, seeks to obtain not that post but only the formal status of applicant with the sole purpose of claiming compensation, falls within the concept of 'access to employment, to self-employment or to occupation', within the meaning of those provisions, and whether, under EU law, such a situation may be considered to be an abuse of rights' (para 26).

The Court first underlined the separation of tasks between, on the one hand, the national courts – finding and assessing the relevant facts in the case in the main proceedings – and, on the other hand, the Court of Justice – ruling on the interpretation and validity of EU law in light of the factual and legal situation as described by the referring court. In this regard, the Court noted that it was apparent from the national court's referral that the claimant's application 'was not submitted with a view to obtaining [the trainee] position but only with a view to obtaining the formal status of an applicant with the sole purpose of claiming compensation on the basis of Directives 2000/78 and 2006/54' (para 29). The Court went on

to clarify that such a situation falls outside the scope of both Directives concerned, to the extent that they cover the areas of 'employment and occupation'. The claimant therefore could not benefit from the protection offered by these Directives, and could not be regarded as a 'victim' within their meaning.

The Court further examined under what circumstances an application such as that of the claimant before the referring court could be found to constitute an abuse of rights granted by EU law, noting that both subjective and objective elements are necessary for such a finding. Citing its standing case law on the matter, the Court noted that it was for the referring court to examine whether the elements constituting an abusive practice are present.

The Court therefore concluded that a situation where an applicant does not seek the post advertised but seeks the formal status of applicant to seek compensation 'does not fall within the definition of 'access to employment, to self-employment or to occupation', within the meaning of [the relevant] provisions, and may, if the requisite conditions under EU law are met, be considered to be an abuse of rights' (para 44).

Case C-548/15, *J.J. de Lange v. Staatssecretaris van Financiën*, Judgment of 10 November 2016, ECLI:EU:C:2016:850

This case focused on the material scope of Directive 2000/78 and the exceptions defined in this Directive relating to discrimination on the ground of age.

The claimant in the proceedings before the referring court started training as a commercial airline pilot in 2008 at the age of 32. In his following tax declaration, he included the overall costs of the training, EUR 44 507, as a personal deduction. However, under the Dutch Income Tax Act, although persons under 30 could deduct the full costs of vocational training, after that age, he was only entitled to a flat-rate deduction of EUR 15 000.

The case ultimately ended up on appeal before the Supreme Court of the Netherlands, who decided to refer four questions to the Court:

1) Does such a taxation scheme fall under the material scope of Directive 2000/78?
2) If not, would the principle of non-discrimination on grounds of age, as a general principle of EU law, apply?
3) Can such a difference in treatment in the taxation scheme be justified in line with Directive 2000/78?
4) Can the exceptions defined in this Directive relating to discrimination on the ground of age and/or the principle of non-discrimination on grounds of age justify a difference in treatment, if age relates to only some of the cases affected by the distinction?

The Court firstly referred to its settled case law and recalled that the purpose of Directive 2000/78 is to offer effective protection against discrimination on any of the listed grounds (including age) and to guarantee equal treatment in employment and occupation for everyone. The Directive specifically applies to access to all types and levels of vocational training.

The tax deduction scheme in this case is not a precondition, as such, for accessing vocational training, but its financial consequences may affect access to training. The Dutch Government also argued that the objective of the scheme is to promote young people's training and improve their labour market position. This means that such a taxation scheme can be regarded as relating to the access to vocational training and the Directive's material scope covers this type of tax measure.

As the answer to the first question is affirmative, the Court did not need to answer the second question.

The third and fourth questions were examined together. Can this specific Dutch taxation scheme be objectively and reasonably justified by a legitimate objective, are the means to attain that objective appropriate and do they not go beyond the necessary to attain that objective?

Article 6(1)(a) of Directive 2000/78 itself specifies that the differences in treatment may include the setting of special conditions on the access to employment and vocational training for young people, in order to promote their vocational integration or ensure protection. Hence, the objective of the taxation scheme can be regarded as legitimate.

The taxation scheme also seems appropriate as it seems to be capable of improving the position of young people on the labour market, but it is ultimately the task of the national court to determine whether this really applies here.

Based on the observations of the Dutch Government, the Court found that the contested taxation scheme also seems to be strictly necessary and that it seems that the Netherlands did not go beyond what is necessary to attain the objective of improving young people's position on the labour market. Full deduction may be reserved for persons under 30, but persons over that age are not excessively disadvantaged by this scheme. The yearly average amount of training is EUR 15 000. Above 30, the right to deduction can be used without any time limitation, while under the age of 30, there is a restriction to 16 calendar quarters. Finally, persons above 30 have typically already gone through training or gained some professional experience, they are generally in a better financial position than young people, who have just left the school system, and they can therefore at least partially take on the financial burden of a new training.

Case C-258/15, *Gorka Salaberria Sorondo v. Academia Vasca de Policía y Emergencias*, Grand Chamber Judgment of 15 November 2016, ECLI:EU:C:2016:873

The case before the referring court concerned the interpretation of the Employment Equality Directive with regard to an age limit of 35 for the recruitment of police officers in the police force of the Autonomous Community of the Basque Country.[3]

Similarly to Advocate General Mengozzi in his Opinion, the Court swiftly concluded that the situation at hand fell within the scope of the Directive and that it amounted to different treatment based directly on age. The Court then examined the case in light of Article 4(1) of the Directive, to determine whether the age limit could be regarded as a genuine and determining occupational requirement for the relevant position. Citing its own case law, the Court recalled that 'the possession of particular physical capacities is one characteristic relating to age and the duties relating to protection of people and property, the arrest and guarding of offenders and preventive patrolling may require the use of physical force' (para 34). It could therefore conclude that 'the possession of particular physical capacities in order to be able to perform the three essential duties of the police of the Autonomous Community of the Basque Country [...], may be considered to be a genuine and determining occupational requirement' (para 36).

The Court then noted that the aim pursued by the relevant decree was to 'preserve the operational capacity of [the] police service and [...] to ensure that it functions properly, by ensuring that newly recruited officials are capable of carrying out the most physically demanding tasks over a relatively long period of their careers' (para 37). Citing its own judgment in the similar *Vital Pérez* case, the Court noted that this aim may be considered to be a legitimate objective. Comparing the present case with the *Vital Pérez* case, the Court then noted that the legislation which imposed an age limit of 30 was found to be disproportionate in *Vital Pérez*, but that the duties performed by the respective police forces in the two

3 For a detailed summary of the facts of the case, of the questions referred by the national court and of the Opinion of the Advocate General, please see p. 51 above.

cases were different and required different levels of physical capacities. Following the same reasoning as the Advocate General, the Court finally considered the data submitted regarding the current age structure of the police force and the general level of mental and physical capacities of police officers after a certain age. The Court concluded that the difference of treatment on the ground of age did not constitute discrimination under Article 4(1) of the Directive, and therefore saw no reason to examine the case under Article 6(1).

Case C-443/15, *David L. Parris v. Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills*, Judgment of 24 November 2016, ECLI:EU:C:2016:897

The request for a preliminary ruling concerned the interpretation of the Employment Equality Directive as regards the prohibition of discrimination on the grounds of sexual orientation and age, taken alone or in combination. The claimant before the referring court argued that the provision of his occupational pension scheme which limited the benefits of a survivor's pension to those spouses who had married before the member of the scheme reached the age of 60 amounted to discrimination, as Irish law did not allow him to marry or enter into a civil partnership with his long-standing (same-sex) partner until after he reached the age of 60.[4]

The Court first concluded that the relevant provision of the occupational pension scheme fell within the scope of the Directive, citing its own settled case law regarding the conditions necessary to consider that payments in an occupational pension scheme of a survivor's benefit amount to 'pay' within the meaning of the Directive. The Court then went on to consider whether the contested provision amounted to discrimination on the ground of sexual orientation. Having concluded that the provision, which is neutral with regard to the sexual orientation of the members of the pension scheme, does not amount to direct discrimination on this ground, the Court examined whether this provision amounted to indirect discrimination. In this regard, the Court recalled Recital 22 of the Directive which expressly states that the Directive 'is without prejudice to national laws on marital status and the benefits dependent thereon'. It noted therefore that EU law does not require its Member States to provide for marriage or a similar form of registered partnership for same-sex couples. At the date of his retirement on 31 December 2010, when his pension rights were acquired, the claimant therefore could not register the survivor's pension for his partner. The Court therefore concluded that the provision at hand did not amount to indirect discrimination on the grounds of sexual orientation.

Secondly, with regard to discrimination on the ground of age, the Court noted that the contested provision contained an age limit and therefore amounted to a difference of treatment based directly on age. Examining whether the provision can be justified on the basis of Article 6(2) of the Directive, the Court found that the provision simply fixed an age for entitlement to an old-age benefit, and was therefore covered by Article 6(2). The Court therefore concluded that the provision did not amount to discrimination on the ground of age, adding that the legal impossibility for the member of the scheme to enter into a civil partnership before reaching the age limit was inconsequential in this regard, as this impossibility was based on the state of Irish law, which EU law did not preclude.

Finally, regarding the third question referred to the Court, regarding discrimination on the basis of a combination of the two grounds, the Court noted the following:

> 'While discrimination may indeed be based on several of the grounds set out in Article 1 of Directive 2000/78, there is, however, no new category of discrimination resulting from the combination of

4 For a detailed summary of the facts of the case, of the questions referred by the national court and of the Opinion of the Advocate General, please see p. 48 above.

more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established.'

The Court therefore answered all three questions referred in the negative, finding that the relevant provision of the occupational pension scheme did not amount to discrimination.

Case C-395/15, *Mohamed Daouidi v. Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal*, Judgment of 1 December 2016, ECLI:EU:C:2016:917

The case before the referring court concerned the dismissal of the claimant while he was temporarily unable to work due to a work-related accident. The claimant argued that the dismissal amounted to discrimination on the ground of disability, and requested the referring court to declare that it was null and void. Although the dismissal had the appearance and form of a dismissal on disciplinary grounds, the referring court pointed out that there was sufficient evidence to believe that the true reason for the dismissal was the claimant's inability to work for an indeterminate period of time. However, the long-standing case law in Spain clearly establishes that dismissal due to illness or temporary inability to work due to a work accident is not discriminatory. The referring court, being unsure whether such a dismissal is not contrary to EU law and, in particular, the principle of non-discrimination on grounds of disability, therefore referred the case to the CJEU for a preliminary ruling on the interpretation of the EU Charter of Fundamental Rights and of the Employment Equality Directive.

Inversing the order of the questions referred, the CJEU first examined whether the inability to work, during an indeterminate period of time, due to a work-related accident in itself amounts to a limitation of capacity which can be defined as 'long-term' within the meaning of 'disability' under the Directive. It was indeed not disputed that the claimant suffered from a limitation to his capacity to exercise his profession, resulting from physical injury. It was also undisputed that the limitation was reversible, although it was not possible at the time of the dismissal to determine its specific duration. The Court noted the need to examine the 'long-term' nature of the limitation 'in relation to the condition of incapacity, as such, of the persons concerned at the time of the alleged discriminatory act' (para 53).

While it is for the referring court to determine whether the limitation of the claimant's capacity in the case before it was 'long-term', the Court provided some guidance in view of this evaluation. Evidence of such a long-term limitation 'includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or [...], the fact that that incapacity is likely to be significantly prolonged before that person has recovered.' Finally, the Court also noted that, in this regard, 'the referring court must base its decision on all of the objective evidence before it, in particular on documents and certificates relating to [the claimant's] condition, established on the basis of current medical and scientific knowledge and data' (paras 56-57).

The Court then finally examined the first four questions of the referring court, by which it requested an interpretation of the EU Charter of Fundamental Rights. In this regard, however, the Court noted that the question of whether the legal situation at hand in the case before the referring court falls within the scope of EU law – and therefore within the scope of applicability of the Charter – depends on the legal assessment of the referring court on the basis of the CJEU's decision. Therefore, the Court concluded that it was 'not necessary [at this stage] to find that the situation at issue in the main proceedings comes within the scope of EU law' (para 67). For this reason, the Court refrained from answering the first four questions referred.[5]

5 For a summary of the referring court's decision in the main proceedings, following the judgment of the CJEU, please see p. 134 below.

Case C-539/15, *Daniel Bowman v. Pensionsversicherungsanstalt*, Judgment of 21 December 2016, ECLI:EU:C:2016:977

Mr Bowman had been employed by the Austrian Pension Insurance Institution (the Administration) since 1988. His employment contract was governed by a collective agreement. At his recruitment, his classification did not consider his completed periods of school education, in line with the provisions of the collective agreement. His remuneration was calculated based on this classification, and since then, he had progressed every two years to the next step and received the corresponding increase in remuneration.

The collective agreement was later amended and the rules for classification were changed. According to the new rules, the periods of school education could be taken into account, but at the same time, the period between step 1 and step 2 of the salary classification was increased from 2 to 5 years. The period between the steps remained 2 years. Therefore, Mr Bowman submitted a request for recalculation of the periods preceding his entry into service. The Administration decided that his length of service could be increased by a maximum of three years, but his salary classification and advancement date should not be modified.

The case arrived at the Supreme Court of Austria on appeal, which referred the question for preliminary ruling, concerning the interpretation of the articles in Directive 2000/78 on the definition of direct and indirect discrimination and exceptions related to discrimination on the ground of age.

The Court first pointed out, that the advancement in the salary scheme was still based on completed years of service and therefore did not lead to a difference in treatment on grounds of age.

The introduction of a longer period between salary step 1. and salary step 2. mainly concerned newly recruited, younger workers and it might therefore be a disadvantage for them in terms of their salary. However, the Court pointed out that indirect discrimination cannot be found solely based on this fact in the present case. The classification also depended on completed periods of school education, which was a criterion that is neither inextricably, nor indirectly linked to the age of the employees.

Furthermore, both a younger worker, who asked for his periods of school education to be taken into account for his salary classification, and Mr Bowman, an older worker making the same request, would be subject to the same extension between salary step 1. and salary step 2., on the same grounds. Therefore, the inclusion of periods of school education and the specific extension in the first step of the salary scheme applies in the same way to all workers, who request the inclusion, and the amendment of the collective agreement did not lead to a difference in treatment indirectly based on age.

European Court of Human Rights

British Gurkha Welfare Society and others v. The United Kingdom, **application no. 44818/11, Judgment of 15 September 2016**

The applicants complained that the lower pension entitlement of Gurkha soldiers who retired or served before 1 July 1997 (when the Gurkhas' home base was transferred to the UK)[6] amounted to a difference in treatment on the grounds of nationality, race and age, which could not be justified. They initiated domestic proceedings before the High Court on these three grounds, which was followed by an appeal to the Court of Appeal on grounds of nationality and age, before the case arrived to the Court.

The Court found the race discrimination claim inadmissible, as the applicants had failed to exhaust domestic remedies. The grounds of 'race' and 'national origin' are two distinct grounds of discrimination, and although they might be strongly connected in some cases, this 'cannot absolve an applicant from raising each separately before the domestic courts'.

The Court then turned to examine the merits of the nationality claim first. In the present case, it was clear that Gurkha soldiers were treated differently from other British Army soldiers regarding their pension entitlement, as their pension scheme had different terms and conditions before 1997. The Government Actuarial Department (GAD) drafted a report which accepted that Gurkha soldiers of officer rank or above would have been in a significantly better financial position, if they had been able to transfer their service years on a year-for-year basis to the Armed Forces Pensions Scheme (AFPS), applicable to non-Gurkha soldiers retiring from the British Army. Additionally, the Review of the Gurkha Pension Scheme in 2004 stated that Gurkhas had clearly been wronged. This meant that Gurkhas were not only treated differently, but also less favourably.

The historical situation of Gurkhas might have been different from other British Army soldiers, but later developments brought Gurkhas in a 'relevantly similar situation' as other British Army Soldiers by 2007, when the UK formulated the Gurkha Offer to Transfer (GOTT). Their home base was moved to the UK, and the Immigration Rules were amended to allow them to settle in the UK in certain conditions and reunite with their wives and children.

The Court then pointed out that:

> 'It is common ground that where an alleged difference in treatment was on grounds of nationality (...), very weighty reasons have to be put forward before it can be regarded as compatible with the Convention (...). However, in considering whether such 'very weighty reasons' exist, the Court must be mindful of the wide margin usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. That is particularly so where an alleged difference in treatment resulted from a transitional measure forming part of a scheme for the enhancement of a benefit which was carried out in good faith in order to correct an inequality.'

In the present case, the UK Government decided to bring Gurkhas' pensions in line with that of other British Army soldiers, as the previous scheme could no longer be legally and morally justified. The authorities had different options regarding how to allow this transfer, and they opted for an approach that justified the difference in treatment based on a carefully selected cut-off point, representing the

6 Nepalese Gurkha soldiers have served the British Army since 1815, initially in (British) India and then, following Indian independence in 1947, as an integral but separate part of the British Army. Only Nepali nationals are eligible for service in the Brigade of the Gurkhas.

transfer of Gurkhas' home base to the UK. Gurkhas who retired before this point had no ties with the UK and did not have the right to settle in the UK at the time of GOTT, and were therefore covered by the previous pension scheme. The pension entitlements of Gurkhas who retired between 1 July 1997 and 2007 were transferred into the AFPS scheme on a year-for-year of service basis after 1 July 1997, while service prior to this date was counted proportionately depending on the rank.

For this reason, the Court found that there was no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 regarding the discrimination claim on grounds of nationality.

Regarding the discrimination claim based on grounds of age, the Court pointed out that even if older Gurkhas were treated less favourably than younger ones, this difference in treatment was to be regarded as objectively and reasonably justified, based on the reasons brought up under the nationality discrimination claim.

For this reason, the Court concluded that there was no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 regarding the discrimination claim on grounds of age either.

Dubská and Krejzová v. the Czech Republic, application nos. 28859/11 and 28473/12, Judgment of 15 November 2016

While pregnant with her second child in 2010, Ms Dubská, the first applicant, decided to give birth at home given the stressful experience she had had during the birth of her first child in a hospital in 2007. On making enquiries, she was informed that Czech legislation did not provide for the possibility of public health insurance to cover the costs of a birth at home and that midwives were only allowed to assist at births in premises with the technical equipment required by law. Ms Dubská eventually gave birth to her second child at home alone in May 2011. In February 2012, the Czech Constitutional Court dismissed her complaint about being denied the possibility of giving birth at home with the assistance of a midwife on the basis that she had not exhausted all the available remedies.

Ms Krejzová, the second applicant, gave birth to her first two children at home, in 2008 and 2010, with the assistance of midwives who attended the births without any authorisation from the State. At the time of lodging her application with the ECtHR, she was pregnant with her third child but was unable to find a midwife because under new legislation, in force from 1 April 2012, midwives risked heavy fines for providing medical services without authorisation. She ended up giving birth in May 2012, 140 km from her home in a hospital with a reputation for respecting the wishes of mothers during delivery.
Relying on Article 8 (the right to respect for private and family life) of the European Convention on Human Rights, both applicants complained that mothers have no choice but to give birth in a hospital if they wish to be assisted by a midwife. The case was lodged in two applications by Ms Dubská and Ms Kerjzová, on 4 May 2011 and 7 May 2012 respectively. In its judgment of 11 December 2014, the Chamber held that there had been no violation of Article 8 of the Convention. On 1 June 2015, the case was referred to the Grand Chamber at the request of the applicants.

The Court found that a mother's choice of where she gives birth was fundamentally linked to her private life and therefore falls within the scope of Article 8 of the Convention. The Court considered that the different legislative provisions in force at the time Ms Dubská gave birth to her second child and Ms Krejzová gave birth to her third child constituted an interference with the applicants' right to avail themselves of the assistance of midwives when giving birth at home. Although the law did not prohibit home births as such, Ms Dubská and Ms Krejzová had been able to foresee that their homes were not equipped for giving birth as required under the relevant secondary legislation and therefore that the provisions in question prevented midwives from assisting with a planned home birth in practice.

The interference pursued a legitimate aim, namely the protection of health and of the rights of others within the meaning of Article 8 §2 of the Convention.

The Court held that national authorities are to be afforded a wide margin of appreciation in relation to the initial assessment as to where the fair balance lies between, on the one hand, the applicants' right to respect for their private life under Article 8 and, on the other, the interest of the State in protecting the health and safety of the child during and after delivery and that of the mother. The Court further argued that the regulation of births touches upon an important public interest in the area of public health and that the responsibility in this field necessarily implies a broader boundary for the State's power to lay down rules for the functioning of the healthcare system. The Court also noted that there is no consensus capable of narrowing the State's margin of appreciation in favour of allowing home births.

The Court recognized that the applicants were put in a situation which had a serious impact on their freedom of choice. However, the Court noted that the risk for mothers and newborns is higher in the case of home births than in the case of births in maternity hospitals, even in the case of a 'low-risk' pregnancy, and that the applicants could have opted to give birth in one of the local maternity hospitals, where their wishes would in principle have been satisfied. The Court therefore held that the authorities struck a fair balance between the competing interests.

Having regard to the State's margin of appreciation, the Court was of the view that the interference with the applicants' right to respect for their private life was not disproportionate, as a fair balance was struck. Therefore, the Court concluded that there had been no violation of Article 8 of the Convention.

Five judges (Sajó, Karakaş, Nicolaou, Laffranque and Keller) expressed a separate opinion, stating that the relevant Czech legislation renders home births *de facto* impossible given that it creates excessively rigid requirements for the equipment needed for a birth, which can only be met in hospitals. This would therefore constitute an interference with mothers' freedom of choice that is not proportionate in a democratic society.

Key developments at national level in legislation, case law and policy

This section provides an overview of the main latest developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey, from 1 July to 31 December 2016.

AT Austria

LEGAL DEVELOPMENT

New legislation introducing Paternity Leave and systematic changes to the 'Small Children's Benefit'

Gender

In the autumn of 2015, the Federal Ministry for Family and Youth ('the Ministry') presented a policy initiative introducing systematic changes to the Small Children's Benefit as well as regulations for paternity leave. This policy became a legislative initiative in February 2016, which passed a committee hearing, and both chambers of the parliamentary plenum. It was published in the official legislative bulletin on 8 July 2016. The new legislation entered into effect on 1 March 2017 and is applicable to births from this date onwards without a transition period.

The legislation contains two significant new policies. First, it introduces a paternity leave period of up to 31 days for fathers of newborn babies in combination with a benefit of EUR 22.60 per day. Second, the system of lump-sum entitlements for the Small Children's Benefit is being changed to an 'account system'. Parents of newborn babies are thus entitled to 365 days of Small Children's Benefit at a rate of EUR 33.88 per day from the date of the birth, reduced by the days for which maternity or paternity benefits are collected. The new legislation gives parents the possibility to extend the duration of the benefit for up to 851 days, which leads to a proportionately lower benefit rate per day. In cases where parents have decided to divide the benefit periods on an equal basis, which may amount to a maximum of 365 days in total, they can claim an additional 'partnership bonus' of EUR 500. However, this is deducted from the overall benefit sum.

For several years, political discussions stressed the necessity to introduce paternity leave for male employees and leave for partners in same-sex registered partnerships. Not only to promote gender equality, but also to be in accordance with EU policies. Thus, the previous legislation was implementing a progressive policy. However, it is uncertain if the introduced paternity leave meets the requirements of current EU legislation. Under the new legislation, the paternity leave period has to be based on an explicit agreement between fathers and their employers. This differs from maternity leave and parental leave, where employees are entitled to their leave periods simply by notifying their employers.

Another difference concerns the protection against dismissal. By law, employees on parental leave have effectively the same level of protection against dismissal as pregnant workers (no legal dismissal without prior consent by the competent labour courts). However, fathers benefiting from paternity leave are only granted the right to appeal against any dismissal that can be demonstrated to have a direct connection to the use of the paternity leave agreed upon (employees would have to demonstrate a connection between the dismissal and the paternity leave and employers could demonstrate that the dismissal was based on other valid grounds). This differentiation seems to be in conflict with Article 16 of Directive 2006/54, which requires Member States that decide to introduce paternity leave periods to grant the same level of protection as that which applies to maternity and parental leave.

Additionally, the proposed 'Family Time Bonus' (*Familienzeitbonus*) for fathers on paternity leave, which includes annexed free statutory health insurance, is deducted from the overall sum of the Small Children's Benefit, which will accordingly be reduced by the proportionate amount of daily payments. These measures make it much riskier and more economically difficult for men to exert their claim to paternity leave than taking maternity leave is for women.

Internet sources:
https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00181/index.shtml, accessed 5 September 2016
https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_I_53/BGBLA_2016_I_53.pdf, accessed 5 September 2016.

CASE LAW

Supreme Court decision on dismissal of employee wearing full-face veil (niqab)

Religion or belief

The claimant had been employed by a notary for several years when she converted to Islam and slowly started changing the way she dressed at work. Originally, the employer mildly opposed her wearing of a headscarf (hijab) and also her later wearing of the abaya (a full-length, sleeveless outer garment worn by some Muslim women). Although the employer maintained the claimant's contract, he decreased her moments of contact with clients and mostly assigned her to 'foreign-born' clients. When the claimant started to wear a full-face veil (niqab) she was warned that this would not be tolerated. She refused to abide by the employer's order and was dismissed. The claim concerned unfair, discriminatory dismissal on the basis of religion as well as discrimination on the basis of religion in relation to working conditions.

The Supreme Court, deciding on the substance matter after two contradicting judgments in the first and second instances, ruled that the dismissal was not discriminatory as it was covered by the exception for genuine and determining occupational requirements (Article 4(1) of Directive 2000/78/EC, as transposed in § 20/1 Austrian Equal Treatment Act).[1]

The Supreme Court ruling contains two main findings. Firstly, regarding the niqab, the Court clarified that discrimination by prohibition of religious clothing constitutes direct discrimination. It then argued that the prohibition of wearing the niqab also interferes with Article 8 of the European Convention on Human Rights and, therefore, needs an additionally sound justification. Regarding the justification, the Court referred to the judgment of the European Court of Human Rights in *SAS v France* and the importance of such a prohibition on communication in society at large and on interpersonal relationships.[2] It then transposed the situation of public spaces in France in that case to the Austrian workplace relationship of the claimant and the respondent. It concluded that 'The non-veiling of her face constitutes – by reason of the nature of the particular occupational activities of the claimant as being an employee of a notary, and of the context in which they are carried out, a genuine and determining occupational requirement.' The Court's main argument was that 'it is among the undisputed basic rules of interpersonal communication in Austria to not cover one's face'; and that, therefore, wearing a niqab at the office heavily impairs communication with society, clients, colleagues and employer.

The Court rejected the additional claim based on indirect discrimination on the basis of gender, as the dismissal was based on an individual order directly targeting a religious piece of clothing and there was no provision, criterion or practice that even appeared neutral in that context and would leave room for a test of indirect discrimination.

Secondly, regarding the period of time when the claimant was wearing the hijab and later the abaya, the Court found clear, direct discrimination based on religion of the claimant in the field of working conditions, due to the severely restricted client contact allowed by the employer during this period.

In this judgment therefore, the Supreme Court drew a very distinctive line between the wearing of a hijab and of a niqab. While the Court did not accept any explanation of the respondent such as 'my clients would be alienated' or 'my reputation as being impartial would suffer' regarding the time when

1 Supreme Court Decision No. 9ObA117/15v, *U v. Dr. M.*, 25 May 2016 (published 4 July 2016).
2 ECtHR, Case of *S.A.S. v France* (application No. 43835/11), judgment of 1 July 2014.

the claimant was only wearing religious items that do not cover the face, the Court clearly allowed a ban of the niqab in a workplace. According to the reasoning of the judgment, the specificities of the job in question do not seem particularly important, as, in jobs different from the one at stake here, even in those without client contact, communication with society, colleagues and the employer remains a requirement. This seems to be rather narrow in terms of compliance with the Directive, as in this case the claimant had offered to remove the veil during moments of client contact. It could amount to a de-facto general ban on the niqab in the workplace, which would appear to be in possible conflict with the aim of the European Directive.

Internet source (in German):
https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20160525_OGH0002_009OBA00117_15V0000_000&ResultFunctionToken=eaf4d4d6-fcbb-4fb8-8fab-4f5e19d0833e&Position=1&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=False&SucheNachText=True&GZ=9ObA117%2f15v&VonDatum=&BisDatum=04.07.2016&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte.

BG Bulgaria

LEGISLATIVE DEVELOPMENT

Legislation banning face-covering clothing in public places

Religion or belief

On 30 September 2016, the Bulgarian Parliament adopted a law banning the wearing of any piece of clothing that fully or partially covers the face in public places. A 'public place' is defined as 'any publicly accessible place on the territory of Bulgaria'. The ban covers any piece of clothing which fully or partially covers the face, defined as 'thick or semi-transparent clothes, cloaks, shrouds, netted yokes, masks or other similar elements which partially cover or fully hide the face'. The Act defines a partially covered face as one where the mouth, nose or eyes are concealed. The exceptions to the ban are exhaustively listed: if wearing the piece of clothing is imperative for health reasons, or because of the nature of one's profession, or within the frameworks of sports, cultural, educational or other similar events where it is worn by participants in those events and is temporary; in prayer houses of registered religions; and where a law provides otherwise. Breaking the ban results in the imposition of fines ranging from approx. EUR 100 (BGN 200) to approx. EUR 1000 (BGN 2000). The same fines are imposed on those who incite another to break the ban, or who fail to hinder them from doing so.

While neutrally phrased, the sweeping ban risks disproportionately affecting Muslim women wearing religious clothing, while the wide definition of 'public place' may have the effect of isolating them to private places and mosques. The law is, furthermore, a factor of radicalisation because it is bound to promote anti-Muslim feeling and a feeling of marginalisation and oppression among Muslims.

Internet source:
http://dv.parliament.bg/DVWeb/showMaterialDV.jsp;jsessionid=CE27CCC8DD4D2A5BD85C11BD9A09A092?idMat=108010 (the State Gazette).

Amendments to definitions of 'indirect discrimination' and 'unfavourable treatment'

On 30 December 2016, Parliament adopted a law amending the Protection against Discrimination Act (PADA).[3] The law introduced new definitions of indirect discrimination and of unfavourable treatment.

All grounds

The new definition of indirect discrimination is as follows: 'Indirect discrimination shall be placing a person or persons who have a [protected] characteristic, or, who without having such a characteristic, together with the former suffer less favourable treatment, or are placed at a particular disadvantage deriving from an apparently neutral provision, criterion, or practice, unless the provision, criterion, or practice are objectively justified with a view to a legitimate aim and the means to achieving that aim are appropriate and necessary.'[4]

The new definition for unfavourable treatment is as follows: 'Unfavourable treatment shall be any act, action or omission that results in less favourable treatment of a person compared to another on [protected] grounds, or that may place a person or persons who have a [protected] characteristic at a particular disadvantage compared to other persons.'[5]

The amendments were introduced as a follow-up to the ruling of the Court of Justice of the European Union in case C-83/14 (the 'CHEZ' case), and seek to clarify that indirect discrimination by association is banned, and that less favourable treatment is not restricted to rights provided for by law.

Internet source:
http://www.parliament.bg/bg/bills/ID/42259/.

CASE LAW

Supreme Court confirms media company's liability for website users' hate comments

Racial or ethnic origin

The case was originally brought as an *actio popularis* before the equality body by a Roma NGO, and concerned the failure of a national TV broadcasting company to moderate anti-Roma hate comments by anonymous users in relation to a news piece on its website. The equality body had held that the comments amounted to harassment under the Protection against Discrimination Act (PADA), and that the broadcasting company was responsible for their content as it acquired the related rights when they were published on its website. Moreover, the company's own General Terms included a duty for the company to erase or edit user comments containing ethnic discrimination or insults to minorities. The equality body had ordered the respondent company to pay a fine of approx. EUR 1250 (BGN 2500) and to publish the ruling on its website.[6]

On appeal, the Sofia City Administrative Court (SCAC) had confirmed the finding of the equality body but repealed both the financial and the injunctive sanction. As regards the financial sanction, the SCAC followed a controversial set of case law by the Supreme Administrative Court (SAC) in 2015, finding that the sanction was not properly based on the PADA as legal persons can only be sanctioned where they

3 Protection against Discrimination Amendment Act, adopted on 22 December 2016, promulgated in the State Gazette, Issue 105 of 30 December 2016, available at: http://www.parliament.bg/bg/laws/ID/42259 (in BG), accessed 9 January 2017.

4 The former definition was as follows: 'Indirect discrimination shall be placing a person on [protected] grounds in a less favourable situation compared to other persons through an apparently neutral provision, criterion, or practice, unless that provision, criterion, or practice is objectively justified with a view to a legitimate aim and the means to achieving that aim are appropriate and necessary.'

5 The previous definition was as follows: 'Unfavourable treatment shall be any act, action or omission that directly or indirectly affects rights or legitimate interests.'

6 Decision No. 283 of 22 August 2014 in case No. 126/ 2013.

failed to comply with a specific duty deriving from PADA.[7] The equality body had not specified such a duty in its ruling, but had held that the respondent company had committed discrimination. The SCAC therefore ruled that only natural persons could be fined for committing discrimination. As regards the injunction to publish the equality body's ruling, the SCAC held that there was no basis in the PADA for such an injunction and repealed this sanction also.

In December 2016, the Supreme Administrative Court delivered its ruling in this case, confirming the findings of the lower court on all points.[8] In addition, the SAC found that the impugned comments contained incitement to violence against the Roma community, creating a hostile, degrading and offensive environment. The Court expressly held that it was irrelevant whether the company had the intent of producing such a result by omitting to erase or edit the impugned comments, as the result itself was sufficient. SAC invoked the European Court of Human Rights' Grand Chamber judgment in the case of *Delfi AS v. Estonia*[9] to the effect that the media are liable for publications on their news forums that insult and incite to hatred. Confirming the ruling of the SCAC however, the Court did not impose any sanction.

Overall, the rulings in this case are positive precedents adequately responding to an endemic problem of radical hate speech on news forums, although the lack of sanctions, in particular the ruling that legal persons cannot be fined for acts of discrimination, is problematic.

Internet source:
http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/e3288bd03c9de31cc225808400393d56?OpenDocument.

Supreme Court validates medical approach to disability

Disability

In November 2016, the Supreme Administrative Court (SAC) ruled that an employer had lawfully denied a job applicant with a disability (diabetes and related conditions) and a 61% medically certified long-term inability to work, who applied for a position in a food store.[10] The SAC upheld a ruling by the lower court against the job applicant which in turn confirmed the equality body's decision against her. The employer requested an opinion from the medical authorities stating whether the applicant would be able to carry out the work which it said involved psychological stress, long hours of standing and heavy lifting. The medical authorities gave a negative opinion, and the employer refused the application. The SAC held that this refusal was necessary in order to protect the applicant's health, and that an employer was not free to hire a person with a disability in contravention of medical authorities' recommendations.

The SAC and the lower instances endorsed a strictly formalistic medical approach to disability employment rights, ignoring the applicant's own perception of her ability to do the job, as well as the issue of potential reasonable accommodation. The SAC's reasoning that an employer could not 'at their own risk' disregard a negative medical opinion regarding a potential employee, effectively transfers employment decisions to medical professionals who are not bound by the reasonable accommodation duty under equality law.

Internet source:
http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/7b33b15440c2e64fc2258073003d6a9a?OpenDocument.

7 Decision No. 4180 of 16 June 2015 in case No. 9385/ 2014.
8 Decision No. 13542 of 12 December 2016 in case No. 10756/ 2015.
9 ECtHR, 16 June 2015, application No. 64569/09.
10 Decision No. 12783 of 25 November 2016 in case No. 11712/2015.

POLICY DEVELOPMENT

Political crisis and stagnation of legislative and policy processes

Gender

Since the presidential elections in November 2016, Bulgaria has found itself in a political crisis. The leading political party in Parliament and Government decided to withdraw. Subsequently, the National Assembly was dissolved and an interim government was appointed by the new President. The main task of the interim government was to organise the national elections at the end of March 2017. Consequently, no substantial legislative and policy changes have been made in any field, including the fields of anti-discrimination and gender equality.

There have been no further developments or follow-up in relation to the Law on Equality of Women and Men that was adopted in April 2016. The procedural and institutional guarantees for gender equality provided in the new law have not been put in place, and the law has not been implemented. The Strategy for Promoting Gender Equality for the period 2016-2020 was adopted on 14 November 2016 in Decree No. 967/2016 of the Council of Ministers, but no action plan has been adopted for 2016 or 2017.

In May 2016, Bulgaria signed the Istanbul Convention, but so far it has not ratified it yet due to a lack of political and the resignation of the Government in November 2016. A working group at the Ministry of Justice has been established and assigned with the task to make recommendations for legislative changes in order to comply with the Istanbul Convention. The results of the upcoming elections are expected to determine the follow-up process, the eventual ratification and the approach on how to ensure compliance with the Convention.

Internet sources
http://www.government.bg.

Cyprus CY

CASE LAW

Directly discriminatory age criterion in a job advertisement published by a municipality

Age

In April 2015, the Nicosia Municipality advertised 11 vacancies, stating that applicants would be assessed firstly based on their academic qualifications and experience in related duties, and secondly based on age with a preference for younger applicants. The equality body received a complaint of age discrimination in access to employment, and investigated the case. The Municipality argued that the age criterion would be applied only where the applicants had scored equally on the first two criteria, adding that the same system applies to promotions in the public sector. It further argued that in practice they did not have to resort to the age criterion because the applicants did not score equally on the first two criteria.

The Equality Body noted that differential treatment based on age can only be justified if the conditions set in the law with regard to proportionality and legitimacy of the aim have been met. The Municipality was therefore obliged to prove that there was no better way of achieving its aim with less impact on the right to equal treatment, and that the aim had significant benefits which justified the negative impact. With references to the CJEU ruling in the case of *Hütter*,[11] the Equality Body found that the criteria

11 CJEU, Case C-88/08, judgment of 18 June 2009, ECLI: EU:C:2009:381.

set by the Directive and by the transposing legislation must apply in addition to the criteria set by the advertisement.

The Equality Body concluded that the aim behind the age criterion in this case was not legitimate, as it merely sought to address the dilemma of candidates scoring equally on the first two criteria.[12] The aim was not directly or indirectly connected to employment policy nor could it otherwise be justified within the remit of the Directive. By introducing the age criterion, the Municipality expressed its preference for younger candidates without justifying this preference on the basis of any of the exceptions foreseen in the Directive. If the age criterion had been applied, it would have resulted in less favourable treatment of older candidates scoring equally on all other criteria. Generally, employers tend to justify the age criterion in favour of younger employees using the inaccurate and stereotyped perception that older persons do not have the same willingness, readiness and capacity to respond to job requirements and cannot adapt to developments and new needs. In law however, the age criterion can only be justified if it meets the requirements of the principle of proportionality. The Equality Body concluded that the age criterion amounted to unlawful direct discrimination and recommended that in the future the possibility of a candidate scoring equally be addressed through other means and not through age. No sanctions were imposed.

Internet source:
http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/AD1A8BF2BBDAFC1FC2257FFD001D498C/$file/AKI182015_06072016.doc?OpenElement.

Equality Body finds that restrictions imposed on asylum seekers as regards access to labour market are discriminatory on multiple grounds

Racial or ethnic origin

In October 2016, the Equality Body received a complaint from the NGO Caritas-Cyprus regarding the situation of 18 young African women seeking asylum in Cyprus whose welfare grants were interrupted by the Social Welfare Services because they were classified as voluntarily unemployed. Ten of these women were aged under 20, six were mothers of infants, one was a mother of an infant and also pregnant and two were pregnant. The women had tried to find work through the Department of Labour but were informed that they would be referred for work in agriculture or livestock farms, where they would have to reside on the farm possibly in the same accommodation with men. The prospective employers had confirmed that the conditions in these farms were unsuitable for pregnant women and babies and there was no provision for childcare when the women were at work, and had expressed their surprise regarding the referral. The claimant NGO had repeatedly applied to the authorities asking for the payment of welfare benefits to the women without requiring prior registration in the record of unemployed persons given their special circumstances, their vulnerable situation and the absence of any family or other social support network. All these requests were turned down. The policy framework as regards reception conditions, which relies on a decision of the Council of Ministers in 2013, provides that welfare grants to asylum seekers are terminated when they twice refuse an offer for work for reasons which are deemed objectively unacceptable and unjustified, but does not set out any criteria for assessing the reasons for refusing a job offer nor is there any provision for vulnerable groups. A previous decision of the Council of Ministers in 2008 provided that asylum seekers acquired the right to work six months from filing an asylum application and thereafter for work permits to be granted only for work in industries where there is low demand by Cypriots: agriculture, livestock, fisheries, cleaners, petrol station attendants, waste management etc.

The Equality Body's investigation revealed that the authorities were unwilling or unable to sidestep official policy, which requires all asylum seekers to register as unemployed and to accept any employment offered, or lose reception conditions. The only exception made is for those asylum seekers who can

12 Report of the Equality Authority regarding unlawful direct discrimination on the ground of age in the announcement of vacancies by the Nicosia Municipality for 11 fixed-term employees, 6 September 2016, File No. A.K.I. 18/2015.

present medical evidence that they are incapable of working. Technically, the authorities had no means of assessing whether the policy is cost effective and whether the terms of work offered are such as to avoid reliance on public benefits.

The report found that asylum seekers, like other third-country nationals living in a foreign country are, by presumption, in a weak and vulnerable position, because of their excessive reliance on government agencies, where they are often confronted with racism and discrimination. The labour market restrictions applied in the case of asylum seekers and the inferior working conditions widespread in the industries to which they are referred for work, although primarily aimed at discouraging bogus asylum applications and avoiding high inflows of refugees, raise issues of disproportionately differential treatment leading to unlawful racial discrimination. This is also true for the absence of any procedure for individual assessment of the personal circumstances and individual skills of asylum seekers in search for work, which essentially forces asylum seekers to seek informal work, exposing them to the risk of exploitation. In the case at hand, the authorities failed to examine the vulnerable condition of the young African women, who were called on to accept employment in spite of the practical, linguistic, cultural or religious difficulties posed by the harsh working conditions, as a result of their origin, age, gender and health situation. The policy framework was obviously designed having in mind the model of a single male person with no children, without taking into account any special characteristics or difficulties which asylum seekers may face as a result of their gender, combined with their ethnic origin, culture, religion, family or personal situation, the age of their children and the grounds of persecution in their country of origin. In conclusion, the report held that the current policy framework leads to indirect discrimination on multiple grounds including gender and proposed:

- the restructuring of the assessment procedure and the adoption of an individual assessment of personal, family, social and other circumstances in order to determine to what extent each individual asylum seeker may be referred for work as a precondition for reception conditions and the nature and conditions of the work;
- the disconnection of access to welfare from the procedure of finding employment in the case of persons with 'established vulnerability'; and
- the adoption of measures to avoid discrimination at work and to promote labour integration of female asylum seekers through the provision of accommodation and support structures for childcare in safe and hygienic conditions.

The report invited the Ministry of Labour to a consultation to discuss the problem faced by the complainants as well as the adoption of its recommendations at policy level.

The report highlights the weaknesses of the concept of 'voluntarily unemployed' which is increasingly invoked by governments throughout the EU in order to deny welfare benefits. The issue becomes of crucial significance in the fight against discrimination, in light of the refugee crisis and the economic crisis. The Equality Body's position reaches beyond the grounds of the Directive to protect conditions of vulnerability of individuals finding themselves in the position of stranger in a new environment: culture, absence of support networks, marital status, having children, age of the children, etc. all of which resonate around gender and race.

Internet source:
http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/76DC695A60333E16C225807D0023C731/$file/1799_2016_11112016.doc?OpenElement.

A report with a focus on the gender equality aspect of this case has been published on the website of the European network of legal experts in gender equality and non-discrimination. For the full report please visit:

http://www.equalitylaw.eu/downloads/4010-cyprus-the-decision-of-the-ombudsman-equality-body-finds-that-the-restrictions-imposed-on-asylum-seekers-especially-women-regarding-access-to-the-labour-market-amount-to-discrimination-based-on-multiple-grounds-pdf-123-kb.

Direct discrimination and harassment of TV presenter by a work colleague's posts on Facebook

Racial or ethnic origin

Gender

In September 2015, the Equality Body received a complaint from a female TV presenter of Bulgarian origin employed at state TV channel CyBC against one of her work colleagues who was posting insulting comments about her on social media (Facebook) with references to her gender and her national origin. The claimant had repeatedly complained to the board of the TV channel (hereafter 'the Board') about the degrading comments and the board had initially started a disciplinary procedure against the perpetrator. During this procedure, the Director of the board was changed and the procedure was dropped. The Board stated that the perpetrator had received a warning letter, demanding that he remove from Facebook the insulting comments, which he had complied with. The Board added that, in her repeated complaints to the Board, the claimant had not raised the issue of her national origin being the reason of harassment. When asked by the Equality Body to explain the reasons for the termination of the disciplinary procedure, the Board merely stated that it fell within the Director's discretion.

The Equality Body examined the complaint from the perspective of workplace harassment and that of discrimination on the ground of gender and ethnic origin, using the terms 'ethnic' and 'national' [origin] interchangeably. Citing Directive 2002/73 instead of the Racial Equality Directive, the Equality Body defined harassment as 'conduct which may include psychological violence consisting of either isolated incidents or systematic patterns of behaviour manifested by persons in a hierarchically higher position than the victim at the workplace'. Such behaviour may range from simple expressions denoting disrespect to acts amounting to a crime.

The Equality Body questioned the Board's statement that the claimant had failed to cite her national origin as a ground for the harassment, pointing out that the insulting comments clearly referred to her national origin. The Equality Body found that the Board's failure to investigate the complaint amounted to direct discrimination prohibited by law on the ground of gender and national origin, rendering the employer equally liable, with the perpetrator, for the unlawful discrimination.[13] The employer had a duty to adopt effective measures and policies to combat discrimination and harassment at the workplace irrespectively of the hierarchical position of the persons involved and to introduce a code for the prevention and combating of harassment including sexual harassment. The Equality Body called upon the Board to introduce such a code within the next three months.

Internet source:
http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/0A52E0036CDFD812C2258060003466A9/$file/%CE%91%CE%9A%CE%9945_2015_12102016.doc?OpenElement.

A report with a focus on the gender equality aspect of this case has been published on the website of the European network of legal experts in gender equality and non-discrimination. For the full report please visit: http://www.equalitylaw.eu/downloads/3999-cyprus-complaint-of-an-employee-to-the-equality-authority-for-harassment-in-employment-and-discrimination-on-the-grounds-of-sex-and-national-origin-pdf-117-kb.

13 Report of the Equality Authority regarding a complaint regarding harassment at work and for discrimination on the ground of gender and national origin of an employee at the Cyprus Broadcasting Corporation, File No. A.K.I. 45/2015, 12 October 2016.

POLICY DEVELOPMENT

Report of the Ombudsman on the need to guarantee paternity leave in national legislation

Gender

The Equality Authority of the Commissioner for Administration and Human Rights (Ombudsman), published a report in September 2016 regarding the right to care for a new-born child, and the need to guarantee paternity leave in national legislation as a measure to promote the reconciliation of family and working life.

The subject of the report came to the attention of the Ombudsman in response to the complaint submitted by Mr K.S ('K.Σ'). Mr K.S is a teacher and father of four children who claimed that there are no equal rights for men and women to care for a new-born child. The complainant claimed that the Ministry of Education and Culture does not have any regulations for men to take care of a new-born child up to the age of nine months, while at the same time, women do enjoy such rights. Consequently, the complainant argued that there was discrimination on the ground of sex against male caregivers.

The investigation of the complaint has led to the conclusion that the circular of the Ministry of Education and Culture does not provide women a new separate right, but rather establishes procedures for exercising the right to facilities for breastfeeding and to increased childcare needs by mothers, enshrined in Article 5 of the Maternity Protection Law as amended,[14] for all women working either in the public or in the private sector.

The investigation was extended after the case of K.S ('K.Σ') for shared/equal/same responsibility of parents to care for their children. Accordingly, the report of the Ombudsman considered the possibility of having to provide the relevant facilities not only to female workers but also to male workers, as European law provides. The lack of any provisions in national legislation providing for paternity leave in Cyprus was also highlighted.

In Cyprus, there is no provision for paid paternity leave, nor any provision for paid care leave. Provisions only exist for unpaid parental leave; however, this is mostly used by women. This gap in the law does not help to combat the traditional gender-division roles between men and women, and taking into account that the promotion of paternity leave is an EU policy, it should constitute a new legal measure in Cyprus.

The report was submitted to the Ministry of Labour, Welfare and Social Insurance in order to promote the necessary changes in legislation.

Internet source:
The report of the Equality Authority of the Commissioner for Administration and Human Rights can be found at: http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/index_new/index_new?OpenForm.

14 The Maternity Protection Law of 1997 as amended (Law No. 100 (I) / 1997 as amended) http://www.cylaw.org/nomoi/enop/non-ind/1997_1_100/full.html.

DK Denmark

CASE LAW

Unjustified language requirement amounting to indirect ethnic discrimination in access to employment

Racial or ethnic origin

The claimant was an organ player who was born and raised in Taiwan and who had obtained degrees from both the academy of music in Vienna and the Danish church music school of Zealand. She had lived in Denmark since 2006, and had passed the official Danish language test.

The claimant applied for a position as an organ player in a church, where the position included the task to set up and run a children's choir. She obtained a job interview but later received an e-mail from the parochial church council rejecting her application and stating that they had noted a 'language barrier', which they explicitly recommended her to address if she wanted to apply for a similar position in the future.

When the claimant later found that the church did not establish a children's choir after appointing another organ player in the position, she filed a complaint with the Board of Equal Treatment for discrimination because of ethnic origin.

The Board stated that the requirement of special Danish language capabilities could constitute indirect discrimination based on ethnic origin if the requirements are unjustified with reference to the nature of the position in question. According to the Board, the church had rejected the claimant because of her lack of Danish language skills. She had thus established facts of possible discrimination, while the church could not prove that a language barrier was a hindrance to the execution of the tasks of an organ player.

The Board decided in favour of the claimant, concluding that she had been indirectly discriminated against because of ethnic origin in violation of the Act on Prohibition of Discrimination in the Labour Market etc. The Board awarded compensation of approx. EUR 3360 (DKK 25 000).[15]

Internet source:
https://www.retsinformation.dk/Forms/R0710.aspx?id=181882.

Requirement for claimant to establish existence of a medically diagnosed illness causing a disability

Disability

The claimant experienced dizziness and visual disorders after a knee surgery during which she had an epidural. The specific causes of her symptoms were unknown but they caused partial sick leave during six months, before she was dismissed. The employer argued that she had behaved inappropriately during a meeting dealing with her sick leave in which colleagues, representatives from the local municipality as well as her employer had participated.

The claimant argued that she had experienced discrimination because of her disability.

The Court recalled the concept of disability as defined by the CJEU, and stated that for the employer to be under the obligation to establish reasonable accommodation it must be documented that at the time of the dismissal, the employee had an illness causing a disability and that the employer knew about this disability.[16] In this case, the Court concluded that although the claimant's symptoms had

15 Board of Equal Treatment, decision No. 9505 delivered on 6 May 2016.
16 Eastern High Court, ruling in case No. B-523-15 delivered on 31 May 2016.

been mentioned in several medical records, she had not established that her condition was caused by a medically diagnosed illness. This meant that she had not documented that she had a disability at the time of dismissal, and the employer was therefore acquitted.

The ruling illustrates that the burden to prove that the condition is caused by a medically diagnosed illness existing at the time of dismissal rests with the employee. It is therefore questionable whether discrimination because of perceived or assumed disability is illegal according to Danish non-discrimination law.

Disability requiring reduced working hours as reasonable accommodation

Disability

The claimant had undergone serious brain surgery, following which she experienced abnormal tiredness and was on full sick leave for about two months and then partial sick leave for eight months. She wanted to go back to her full-time position at the bank where she had been employed for 18 years, but could not work for more than 12-18 hours per week due to extreme fatigue. The hospital had recommended a 'flexible job' with reduced working hours but the employer rejected this. The claimant called in sick again and was dismissed 3 weeks thereafter.

The claimant argued that her tiredness constituted a disability and that her dismissal was discriminatory. The employer argued that due to her substantial sickness absence since the surgery, the claimant could not be expected to perform the job she was appointed to do and therefore had to be dismissed.

The court held that based on the medical records of the claimant there were no prospects for her getting back to a full-time position at the bank as she was suffering from a 'diagnosed disabling fatigue'. The Court concluded that the impairment at the time of the dismissal could be characterized as long term and that it constituted a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc.

The court further noted that the employer knew about the disability and therefore had an obligation to provide reasonable accommodation. Considering that the employer had refused the claimant a 'flexible job' without examining the options more closely, the court concluded that the employer had not provided reasonable accommodation and thus that the dismissal constituted discrimination based on disability.

The court awarded EUR 67,550 (DKK 503,000) in compensation, corresponding to 12 months of salary. The court referred to the claimant's long employment as well as the seriousness of the violation when determining the amount of compensation.[17]

Whether diabetes and sequelae to diabetes constitute a disability

Disability

The claimant was a cleaner at a public hospital who had been diagnosed with type-two diabetes in 1998/99. Because of various sequelae to her diabetes she was on sick leave on several occasions between 2010 and 2014. In January 2014, she had been absent for about four months due to diabetic Charcot foot, and was dismissed after 17 years of employment. At the time of dismissal, the doctor's prognosis stated that she would be fit for duty in another three months.

The claimant argued that she had been dismissed because of her disability and claimed compensation from the employer.

The Court stated that diabetes by itself does not constitute a disability. It further argued that because of the nature and the variations of the diverse complications related to diabetes, they did not constitute an overall course of an illness, but had to be considered individually. The Court also argued that because of

17 Eastern High Court, ruling in case No. B-477-15 delivered on 30 June 2016.

the prognosis from the claimant's doctor that she could be back at her workplace in three months, the illness at the time of dismissal did not constitute a disability.[18] The Court concluded that the claimant had not been discriminated against because of disability and the employer was acquitted.

Supreme Court ruling on (lack of) supremacy of EU principle prohibiting age discrimination

Age

The claimant resigned from his employment and sought a severance allowance from his employer, although Danish law in force at the time held that no severance allowance should be paid, as the employee would receive an old-age pension from the employer and had joined the pension scheme before reaching the age of 50.[19] The employee claimed that he was entitled to severance allowance according to EU law prohibiting discrimination on the grounds of age, notwithstanding the limitation in Danish law.

The case was brought before the Danish Supreme Court, which referred several questions to the Court of Justice of the EU. In Case C-441/14,[20] the CJEU gave its preliminary ruling, leaving the Danish Supreme Court with two options; (1) apply national law in a manner that is consistent with the Employment Equality Directive or (2) disapply any provision of national law that is contrary to EU law.

Regarding the first option, the Supreme Court argued that the meaning of the relevant provision of Danish law was clear and that therefore it (the Court) could not change this legal position by using methods of interpretation. An interpretation consistent with EU law would therefore be 'contra legem'.[21]

Regarding the second option, the Supreme Court concluded that it could not set aside national law since the Danish EU Accession Act did not confer sovereignty to the extent required for the unwritten EU principle prohibiting discrimination on the grounds of age to take precedence over national law. The Court finally stated that if it were to set aside national law it would be acting beyond constitutional limits to the judiciary.

The judgment therefore demonstrates that employees on the Danish labour market cannot base a claim on general unwritten EU principles if there is a clear legal position in Danish law, which makes it impossible to interpret national law in conformity with EU law.

Internet source:
http://domstol.fe1.tangora.com/page31478.aspx?recordid31478=1318.

EE Estonia

POLICY DEVELOPMENT

All grounds

On 30 June 2016, after two years of preparation, the Estonian Government approved the Social Welfare Development Plan for 2016–2023.[22] The plan aims at facilitating, through common policy measures, the fight against poverty, social inequality and unemployment, and is accompanied by an 'Implementation Plan 2016-2020'.

18 Eastern High Court, judgment delivered on 6 December 2016 in case B-2828-15.
19 Section 2a(3) of the Salaried Employees Act was revoked by Act No. 52 of 27 January 2015.
20 C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen,* Grand Chamber Judgment of 19 April 2016.
21 Supreme Court, judgment delivered on 6 December 2016 in Case HR-15/2014.
22 Riigi Teataja III, 5 July 2016, 18.

The Development Plan highlights concerns in the area of equality and non-discrimination: widespread negative stereotypes and negative attitudes, especially towards ethnic, racial, religious and cultural minority groups as well as LGBTI people; an insufficient system of rights protection, especially due to a low level of awareness; limited opportunities for minority representation; a low level of awareness and a lack of relevant data for public institutions; limited accessibility (for disabled people), etc.

The Development Plan also lists several relevant political instruments, including awareness-raising initiatives and improved institutional capacity of public bodies in order to guarantee equal treatment and accessibility, also through improved data collection and building new competences. The Plan supports the idea of legislative changes to unify the scope of application of the prohibition to discriminate on the grounds of ethnic origin, race, and colour, as well as religion or other beliefs, age, disability or sexual orientation.

Unfortunately, the Plan only covers fields that fall within the responsibility of the Ministry of Social Affairs and does not deal with equality and non-discrimination in other areas of life such as education. Although the Government has stated that the Plan contains a gender equality strategy, it has been criticised notably by the national equality bodies, as it places gender equality in a narrow context as part of social welfare only.

Internet sources:
Approval of the Social Welfare Development Plan for 2016–2023 and related Action Plan for 2016-2020, 30 June 2016, Riigi Teataja III, 5 July 2016, 18, at:
https://www.riigiteataja.ee/akt/305072016018 (in Estonian).

Social Welfare Development Plan for 2016–2023, at:
https://valitsus.ee/sites/default/files/content-editors/arengukavad/heaolu_arengukava_2016-2023.pdf (in Estonian).

Action Plan of Social Welfare Development Plan for 2016–2023, at:
http://www.sm.ee/sites/default/files/content-editors/eesmargid_ja_tegevused/Sotsiaalse_turvalisuse_kaasatuse_ja_vordsete_voimaluste_arengukava_2016_2023/rakendusplaan_0.xls (in Estonian).

Proposals and recommendations of the Gender Equality and Equal Treatment Commissioner of 2014, 2015 and 2016 available in Estonian at: http://www.vordoigusvolinik.ee/wp-content/uploads/2016/01/vordoigusvoliniku-kommentaarid-heaolu-arengukava-27.01.2016.pdf;
http://www.vordoigusvolinik.ee/wp-content/uploads/2016/01/Ettepanekute-edastamine-heaolu-arengukavasse_5.11.15.pdf;
http://www.vordoigusvolinik.ee/wp-content/uploads/2015/01/Voliniku-seisukoht-sotsiaalse-turvalisuse-kaasatuse-ja-vordsete-voimaluste-arengukava-kohta-16_06_2014.pdf.

Finland

FI

CASE LAW

Discrimination on the ground of sexual orientation in assisted reproductive treatment

Sexual orientation

The Non-Discrimination Ombudsman requested the National Non-Discrimination and Equality Tribunal to examine whether a client of the healthcare services was discriminated against when she was denied the possibility to have assisted reproductive treatment in public healthcare. Further, the Ombudsman requested the Tribunal to examine whether the medical directors of hospital districts had displayed

discriminatory conduct prohibited in the Non-Discrimination Act by issuing an order to their respective hospital districts based on which certain groups of patients such as single women and female same-sex couples had been completely excluded from the assisted reproductive treatments provided for by the public healthcare services.

The National Non-Discrimination and Equality Tribunal ruled that the medical directors of the hospital districts must in their activities comply with the Non-Discrimination Act which explicitly prohibits discrimination on the ground of sexual orientation in both the public and the private sector in e.g. providing goods and services and when providing healthcare.

The Tribunal ruled that the medical directors of hospital districts had given their respective hospital districts discriminatory orders, and prohibited them from continuing this discrimination. The Tribunal also ruled that the person who had contacted the Non-Discrimination Ombudsman had been discriminated against because of her sexual orientation when she was completely denied assisted reproductive treatment in public healthcare. In addition, the Tribunal ruled that the medical directors of hospital districts had neglected their duty to promote equality as stipulated in Section 5 Chapter 1 of the Non-Discrimination Act.

The Tribunal imposed a conditional fine of EUR 30 000 on the medical directors who had issued the discriminatory order to their hospital districts to enforce compliance with its injunction.[23]

Internet sources:
http://www.yvtltk.fi/material/attachments/ytaltk/tapausselosteet/L8kc38yv9/Tapausseloste_Dnro_80_2015.pdf.
http://www.yvtltk.fi/material/attachments/ytaltk/tiedotteet/D6Uldqs7L/yvtLTK-tiedote-8-2016_en.pdf.

MK Former Yugoslav Republic of Macedonia

CASE LAW

Court decision on discrimination due to pregnancy

Gender

A woman filed a complaint claiming to be the victim of discrimination based on pregnancy. The complainant worked for an employer based on a temporary employment contract for six months, after which the contract was extended for another year. During her second contract, she got pregnant and took pregnancy leave. Although the employer first claimed that she could come back to work after her pregnancy leave and she would only temporarily be substituted, two weeks after the start of her pregnancy leave, he started the procedure to fire her.

The First Level Civic Court of Skopje II gave a verdict (No. 3 RO-144/16, 27 October 2016), concluding that this constituted discrimination based on social status/pregnancy, and decided that the procedural expenses should be paid by the employer. However, the Court did not order that she be rehired.

The Court's verdict clearly includes an attempt to comprehensively cover all relevant issues, basing it not only on the Law on Prevention and Protection from Discrimination and the Law on Labour Relations as national law *strictu sensu*, but also on the European Convention on Human Rights and its Protocol No. 12 regarding discrimination.

23 Non-Discrimination and Equality Tribunal decision 80/2015, 9 December 2016.

Internet sources:
Academic article:
http://www.akademik.mk/donesena-e-prvata-presuda-so-koja-se-utvrduva-diskriminatsija-vrz-osnova-na-lichen-status-bremenost/.
Explanation of the court decision:
http://www.akademik.mk/samohrana-majka-koja-poradi-bremenosta-bila-diskriminirana-na-rabotnoto-mesto-ja-dobi-pravdata-na-sud/, accessed 22 December 2016.

POLICY DEVELOPMENT

Allegations of abuse of competences by President of the Equality Body

All grounds

Throughout January and February 2016, a TV host (Nedelkovski) was broadcasted on a number of occasions while speaking in a pejorative and vulgar manner of one man's alleged 'homosexuality' and one woman's alleged 'lesbianism'. The Agency for Audio-Visual Media ('the Agency'), is the competent state body to, inter alia, monitor the media and take action against discriminatory speech, hate crime and hate speech. It published a report regarding Nedelkovski's discriminatory speech and submitted a claim to the Commission for Protection against Discrimination (CPAD), for discriminatory speech on grounds of sexual orientation. In its claim to the CPAD, the Agency correctly invoked national legislation, and further based its claim on three judgments of the European Court of Human Rights and on the Council of Europe Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity.[24]

As a response, the Agency received a letter signed by the President of the CPAD (Dashtevski), implying that the CPAD had considered the claim and rejected it.[25] It would therefore seem that this letter was intended to serve as an opinion issued by the Equality Body when it decides to consider a submitted claim, although it did not fulfil all procedural requirements of such an opinion.

The Agency published this letter on their website, causing the Network for protection against discrimination, a network of CSOs working on equality and non-discrimination issues (the Network), to issue a public reaction because of the above-mentioned formal deficiencies. They added that the letter raised concerns regarding the understanding and reading by the CPAD of basic aspects of the Macedonian legal framework, including how basic law and institutions operate in the country and how the European Convention of Human Rights (ECHR) system operates. Some of the claims concerned the following:

- The letter claims that the European Court of Human Rights' (ECtHR) decisions are not relevant for the CPAD due to the difference in status (the ECtHR being a judicial institution, whereas the CPAD is a quasi-judicial one). This claim is contrary to the Constitution, the national laws and the practice of the CPAD itself.
- The letter states that the discriminator needs to be in a superior position to the victim (which was not the case in the considered case). No such criterion is provided by any anti-discrimination provision.
- The letter further states that Article 4 of the Anti-Discrimination Law limits the liability of discrimination by the media to media outlets as legal persons. It adds that the acts of individual journalists cannot be attributed to the media and fall under 'free speech'. In reality, the cited provision simply prescribes the fields of implementation of the law, and does not limit the application to natural or legal persons. In fact, before enumerating the fields of application, Article 4 explicitly states that it applies to both natural and legal persons, as does Article 2.

24 http://www.coe.int/en/web/sogi/rec-2010-5.
25 The letter can be accessed here: http://www.avmu.mk/images/Izvestuvanje_od_Komisija_za_zastita_od_diskriminacija.pdf.

Following the reaction by the Network, one of the seven Commissioners on the CPAD (Professor Kadriu), also issued a 'dissenting opinion', stating that the letter at hand is not a position of the Commission, as it does not take the form of any of the official positions available to it (decisions, opinions and conclusions) and it was not adopted at one of its meetings. Therefore, it represents an expression of the personal will of the President. The dissenting opinion further states that '[c]losing the proceedings upon a submitted discrimination claim in such a manner, without a joint decision of the collective body, represents a clear abuse of the position of the President and of the competences of the Commission.' Regarding the content of the letter, the Commissioner further states that he disagrees with large parts of it and that he will 'officially file a dissenting opinion' if the letter remains as a position of the equality body.[26]

No further reactions have been issued thus far.

It is important to note the Agency's commendable attempt to react effectively against discriminatory and hate speech on grounds of sexual orientation, and to use international legal standards as grounds for their action.

Internet sources:
The Commission for Protection against Discrimination does not recognise the discriminatory speech of Milenko Nedelkovski (*Комисијата заштита од дискриминација не го препознава дискриминирачкиот говор на Миленко Неделковски*). LGBT Center Website. http://lgbti.mk/po-mislenjeto-na-komisijata-za-zashtita-od-diskriminacija-za-milenko-nedelkovski-bekim-kadriu-se-distancirashe/. All hyperlinks accessed 12 December 2016.

Distancing of Prof. Dr. Bekim Kadriu, Commissioner in the Commission for Protection against Discrimination on the opinion on Milenko Nedelkovski (*Дистанцирање на проф. д-р Беким Кадриу, член на Комисијата за заштита од дискриминација од мислењето за Миленко Неделковски*). Helsinki Committee in the Republic of Macedonia. http://mhc.org.mk/announcements/499#.

Reply from the Commission against Discrimination to the Request of the Agency against Channel 5 for several editions of 'Milenko Nedelkovski Show' (*Одговор на Комисијата за заштита од дискриминација на барањето за постапување од Агенцијата против Канал 5 за неколку изданија на емисијата „Миленко Неделковски Шоу'*).
http://www.avmu.mk/index.php?option=com_content&view=article&id=2949%3A-5-&catid=103%3Astari-info-srd-srd&lang=mk.

Communication from the CPAD to the Agency for Audio-visual Media, http://www.avmu.mk/images/Izvestuvanje_od_Komisija_za_zastita_od_diskriminacija.pdf.

FR France

LEGISLATIVE DEVELOPMENT

Reform of the justice system creating option for class action in matters of discrimination

All grounds

On 12 October 2016, the National Assembly adopted the bill on the 'Modernisation of the Justice system of the 21st century', which aims at introducing measures of simplification of the justice system.[27]

26 *Dissenting opinion of Prof. Dr. Bekim Kadriu, Commissioner in the Commission for Protection against Discrimination on the opinion on Milenko Nedelkovski*, available on the website of the Helsinki Committee in the Republic of Macedonia: http://mhc.org.mk/announcements/499#.

27 The Law n° 2016-1547 of 18 November 2016 of Modernisation of the Justice System of the XXIst Century.

This law covers a number of matters, among which the implementation of a mediation procedure before administrative courts with the participation of the Equality Body and the Defender of Rights; the unification of the legal protection against discrimination on all grounds covered by French law; and the creation of a class action in matters of discrimination.

Before the development of the protection against discrimination, Law 2008-496 of 27 May 2008 only afforded civil protection against direct and indirect discrimination in access to goods and services, social protection, social benefits and education for the grounds provided by EU Law, i.e. sex, race and ethnic origin. In addition, the list of prohibited grounds covered was drafted differently in the Labour Code, in Law n° 2008-496 of 27 May 2008 and in the Penal Code.

Article 86 of the new law amends Articles 1 and 2 of Law n° 2008-496 of 27 May 2008 by providing that all discrimination grounds enumerated in Article 225-1 of the Penal Code are afforded the same protection regarding discrimination in employment, access to goods and services, social protection, social benefits, education and health. By selecting the list of protected grounds as contained in the Penal Code, the legislator has deleted the previous ground of 'convictions', and has changed the ground of 'religion' to [a] 'specific religion' (*religion déterminée*).

In addition, the new law has created two new grounds: gender identity, replacing sexual identity, and the capacity to express oneself in a language other than French (a ground intended to protect persons speaking a minority language in France).

As far as the class action procedure is concerned, it must be preceded by a formal letter of demand requesting correction of the discrimination. It can be initiated to request interruption of the discriminatory measure and/or an action of liability with a request for damages to the benefit of all members of the group (Article 62). In matters of discrimination in general, it must be initiated by an NGO having acted in the area of disability or discrimination for at least five years, while it must be initiated by a trade union in matters of employment. This limitation of the new procedure has been criticised by actors such as lawyers' associations, the Bar Association and the Defender of Rights as well as many representatives of discriminated groups, as it is considered to potentially jeopardise its effectiveness.

The procedure does not separate judgment on the merits from the decision determining whether the situation is representative of a collective situation allowing for a class action. At the time of enforcement of the judgment and determination of damages, members of the group may give a mandate to the association or the trade union to represent them, although victims also have the possibility to pursue a separate action if they do not wish to be represented by the group.

Internet source:
https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo.

Introduction of the possibility to limit expression of religious freedom by way of employers' in-house regulations

Religion or belief

On 20 July 2016, new legislation was adopted by Parliament to explicitly authorize employers to adopt in-house regulations prescribing the principle of neutrality as a rule and stipulating restrictions on employees' religious freedom if they are justified by the exercise of other fundamental rights and liberties or by the necessities of the good functioning of the service, as long as they are proportionate to the objective pursued.[28]

28 Law n° 2016-1088 of 8 August 2016 relating to Employment, Modernisation of Social Dialogue and Protection of Professional Careers, Article 2 amending the Labour Code to create Article L 1321-2-1.

The debate as to whether or not employers can unilaterally impose such restrictions on the basis of the exception for genuine and determining occupational requirements has been at the centre of a long jurisprudential controversy which has led the Supreme Court to address a referral to the CJEU, raising the issue of whether private clients' desire not to be served by persons wearing an Islamic veil qualifies as a determining occupational requirement related to the nature or the conditions of performance of the working contract.[29]

The Supreme Court had determined in the *Baby Loup* case in 2014 that the principle of secularity affirmed in Article 1 of the Constitution was not applicable to employees of the private sector that are not in a position of managing a public service.[30] The Court however had already ruled that restrictions to fundamental rights and freedoms such as freedom of religion, authorised by Article L1121-1 of the Labour Code, must be justified by the nature of the particular occupational activities concerned or of the context in which they are carried out, and which constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Without waiting for the decision of the CJEU, all Members of the Senate of all political orientations except the Communists voted in favour of this amendment with the support of the Government, without discussing the conformity of the text to the Constitution or to EU directives as regards the protection of the principle of freedom of religion or the principle of non-discrimination on the ground of religion in employment.

While commentators raised the question of the conformity of this provision to the Constitution, it was not raised before the Constitutional Council, which could have raised this issue unilaterally but did not discuss the constitutionality of the provision at all.[31]

Internet source:
https://www.legifrance.gouv.fr/eli/loi/2016/8/8/2016-1088/jo/texte.

CASE LAW

Legality of municipal by-laws forbidding Islamic swimwear on the beach

Religion or belief

During the summer of 2016, 31 seaside municipalities adopted by-laws forbidding women at the beach from wearing Islamic scarfs and clothing covering their bodies, such as 'burkinis'. A number of persons were fined and/or requested by the police to leave the beach, which led to significant media coverage and indignation throughout the world.

The NGOs Human Rights League (*Ligue des droits de l'Homme*) and the Coalition against Islamophobia in France (*Collectif contre l'islamophobie en France*) initiated a petition to request that the by-law adopted by the town of Villeneuve-Loubet on 5 August 2016 on the basis of the Mayor's competence to secure beaches and protect public order, be quashed before the Administrative Court of Nice. The claimant organisations argued that the by-law had no legal basis and was manifestly illegal as it constituted a grave violation of, inter alia, the right to manifest one's religion and freedom of movement. They argued that such violations are not justified by specific local circumstances requiring that measures be taken in order to protect public order.

Their petition was dismissed by the Administrative Court of Nice on 22 August 2016[32] and they appealed before the Supreme Administrative Court on 23 and 25 August 2016.

29 C-188-15, *Bougnaoui*. See further information above on p. 49.
30 See *European equality law review*, Issue 2015/1, pp. 105-106.
31 Constitutional Council Decision No. 2016-736 DC of 4 August 2016.
32 Nice Administrative Court, decisions Nos 1603508 and 1603523, of 22 August 2016.

On 26 August 2016, the Supreme Administrative Court reaffirmed that mayors have the power to adopt by-laws of municipal police. However, they must implement their prerogatives in compliance with the requirements of fundamental rights guaranteed by law.[33] The policing measures that the mayor of a seaside town can adopt in order to regulate access to beaches must be adapted, necessary and proportionate in consideration of the sole demands of public order, as they result from the geographic and timely context, and the requirements necessary to ensure proper access to the seaside, the safety of bathing, hygiene and decency at the beach. Mayors have no competence to take other factors into consideration and the restrictions they impose on rights and freedoms must be justified by averted risks of violations to public order.

In the case at hand, the Court stressed that no element had been demonstrated that would establish that risks to public order had resulted from the way some persons had dressed at the beaches of Villeneuve-Loubet. The emotion and worry resulting from recent terrorist attacks were not sufficient to legally justify the measure under scrutiny. In such conditions, the Mayor could not adopt a by-law forbidding access to the beach and the sea on grounds that are not based on averted risk of violations to public order or of hygiene or decency. Therefore, the by-law adopted was declared null and void as it constituted a grave violation of fundamental freedoms of worship, of movement and personal freedom, and was therefore manifestly illegal.

This decision triggered considerable hostile reactions on the part of national political actors of all political orientations (except the Green Party, which was the only party to welcome the decision) and of the Prime Minister in particular, asserting that religious neutrality is part of French identity and should to some degree be imposed in the public space by way of legislation.

Internet source:
http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-ordonnance-du-26-aout-2016-Ligue-des-droits-de-l-homme-et-autres-association-de-defense-des-droits-de-l-homme-collectif-contre-l-islamophobie-en-France.

Liability of the State for racial profiling

Racial or ethnic origin

Article 78 paragraph 2 of the Code of Penal Procedure allows police forces to perform identity checks without cause when a public prosecutor issues an order allowing controls on a specific day in a designated area or, in application of paragraph 3, in order to prevent the perpetration of a crime. These provisions are widely used to control illegal immigrants or persons living in unsecure areas, and are held to give rise to racial profiling. In the absence of arrest, there is no procedure to trace individual police controls and the penal procedure does not explicitly provide for a remedy.

The 13 claimants had been subjected to identity controls and searches without being arrested. Their lawyers requested from the police justification of the controls and received no answer. On this basis, they sued the State demanding civil damages for liability for racial profiling in application of Article L141-1 of the Code of Judicial Organisation. Civil liability of the State requires that intentional individual characteristic fault be established.

The 13 cases were dismissed by the first instance court on the basis that the actions of the police officers acting within the parameters of the law, could not give rise to liability of the State.

The Defender of Rights presented observations before the Court of Appeal arguing that the State had a positive obligation to take action to prevent police controls based on racial grounds and ensure an

33 Conseil d'Etat, 26 August 2016, Nos 402742, 402777.

effective recourse in application of the Constitution and of Articles 5, 8, 13 and 15 of the European Convention on Human Rights.

In five of the cases, the Court of Appeal followed the Defender of Rights' observations and admitted the appeals, although the identity checks in these five cases, as in the remaining eight, were all technically legal and made under the authority of a public prosecutor's order.

The Court held that police controls must be implemented in the respect of fundamental rights and of the principle of equal treatment, which cannot allow police controls operated on the basis of racial criteria, physical appearance or origin. The State must not only refrain from discrimination but must take all necessary measures to prevent its occurrence.

It held that the shift in the burden of proof provided by Law No. 2008-476 of 27 May 2008 applied and that once the claimants had provided evidence of differential treatment, the police had the burden to establish that its control was justified. The Court of Appeal accepted justifications of the police where the controls were based on the search for a person of North African origin who had just committed a robbery, where the person controlled was in an insecure neighbourhood running and hiding his face with the hood of his sweatshirt, and controls in a place known for massive violence and drug dealing.

The eight claimants who did not succeed before the Court of Appeal brought their claim before the Court of Cassation, and argued that the Court of Appeal had imposed too heavy a burden on claimants which did not comply with the right to an effective recourse.

The State also challenged the decision of the Court of Appeal before the Court of Cassation and argued: first that the shift in the burden of proof provided by civil law in matters of discrimination did not apply to police controls and that the State did not have to justify controls which were entirely discretionary; and, second, that when proceeding to perform police controls in application of a magistrate order invoking repression of illegal immigration, the police was justified in controlling black and North African persons based on their appearance of being foreign.

In response to the State's arguments, the claimants and the Defender of Rights reiterated the enforceability of the shift of the burden of proof provided by Law n°2008-496 as regards access to goods and services on the ground of ethnic origin and race, and its necessary application to ensure compliance with the obligation of the State to provide effective remedy.

As regards the discretionary right of the police to proceed with racial profiling, the Defender of Rights argued that racial profiling was illegal and that the law had to be interpreted in such a way as to respect guarantees provided by the ECHR. Thus, the choice of the State to invoke the necessity to take appearances into consideration in order to identify foreign persons was in itself discriminatory in that physical appearance cannot be an indication of nationality considering many French citizens are of African or North African descent.

The Court of Cassation delivered its ruling on 9 November 2016. In two cases, the Court reversed the finding of the Court of Appeal; in one case due to a procedural issue not related to arguments on the merits, and in the second case, due to an error of appreciation, concluding that the Court of Appeal had not enquired whether the police had proper justification to proceed with the controls. These cases will be adjudicated again by the Court of Appeal. In eight cases, the Court of Cassation dismissed the claims of the claimants alleging that the Court of Appeal had not properly implemented the burden of proof. In three cases, it dismissed the claim of the State.

The Court of Cassation followed the observations of the Defender of Rights and concluded that persons who deem to have been victims of racial profiling, can pursue the liability of the State by filing a claim on the basis of Article 141-1 of the Code of Judiciary Organization. As regards evidence of racial profiling,

the Court, implicitly recognizing the absence of traces of the controls and the necessity to give access to effective remedy in the sense of Article 13 of the ECHR, confirmed applicability of the shift in the burden of proof provided in civil claims for discrimination.[34]

According to the Court, even when controlling persons in relation to their potential illegal presence on the territory, a police control is discriminatory if, in the absence of pre-existing objective reasons related to the context of the control or the behaviour of the person, it is enforced in relation to physical characteristics subjectively associated with the real or deemed origin of the person.

This case is deemed to be a very important precedent for the protection against racial discrimination, in a judicial context where police controls have never been challenged before the courts, and have always been considered to be discretionary.

In addition it took to a higher judicial level the recognition of the principle which was argued by the Defender of Rights that, in the continuity of the European Court of Human Rights' case law, there is a positive obligation of the State to take positive steps to prevent the police from committing racial discrimination, therefore justifying that the burden of proof imposed on the claimant be facilitated and that liability be triggered without requiring proof of intentional characteristic fault.

As regards the finding of the Court in relation to physical characteristics associated with the real or deemed origin of a person, the finding of the Court affirms that in a country where French citizens can originate from overseas departments and where millions of French citizens have an African, North African or Asian origin, there can be no physical characteristic of being foreign, and such a reasoning necessarily is the result of a stereotype.

Internet sources:
http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/decision-msp-mds-mld-2015-021-du-3-fevrier-2015;
http://www.defenseurdesdroits.fr/actions/protection-des-droits-libertes/decision/decision-mds-2016-132-du-29-avril-2016-relative-des;
https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/relatifs_contr_35473.html.

Germany DE

LEGISLATIVE DEVELOPMENTS

Prosecution of non-consensual sexual acts

Gender

In November 2016, amendments to the Penal Code concerning sexual assault and sexual harassment entered into force, implementing Article 36 of the Council of European Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

The Istanbul Convention, which Germany has not yet ratified, obliges States Parties to criminalise, without further requirements, engagement in non-consensual sexual acts. The former criminal law on sexual assault in Germany required, in addition to the absence of mutual consent, the use of force, serious threat, or an especially vulnerable situation of the victim. Only 5-10 % of all sexual assaults were reported, attrition rates continued to rise and only 8 % of all investigation procedures led to a conviction. But the

34 Court of Cassation, First Civil Chamber, 9 November 2016, nos 15-24.207 to 15-25.877 regarding the liability of the State for racial profiling in police controls.

Federal Ministry of Justice denied the necessity of amendments, several judges actively campaigned against the prosecution of non-consensual sexual acts without further requirements, and politicians from all parties expressed their concerns about over-regulation.

It was not until the sexual harassment and assault of many women in Cologne on New Year's Eve 2016 that politicians surprisingly agreed upon the urgent need for amendments to the Penal Code. As the suspected perpetrators were North African refugees and Arabic young men, the discussion about protection against sexual violence was at least partially based upon prejudiced assumptions and sometimes developed into public agitation against refugees and Muslims.

On 7 July 2016, the Federal Parliament adopted several amendments to the criminal law implementing the 'no means no' principle. Sexual harassment became a criminal offence and sexual actions without the consent of the other person are punishable without further requirements. The use of force or threat or the exploitation of an especially vulnerable situation of the victim are no longer essential elements for a conviction of the crime, but regarded as aggravating circumstances. Although the necessary implementation of the Istanbul Convention, as well as the problem of deficient prosecution of sexual assault in Germany, were the reasons for the amendments, the parliamentary group of the Christian Democratic Party suggested amendments to the law of asylum and residence. They introduced the possibility of expulsion and deportation of a person even if life, health and freedom are endangered in the country of origin after committing a non-consensual sexual act. Moreover, the Penal Code was amended by a complex and, in the end, unintelligible section on sexual assaults committed in a group, which legal experts consider to be incompatible with the Constitution.

The Council of the European Convention on preventing and combating violence against women and domestic violence, obliges States Parties to criminalize, without further requirements, non-consensual sexual acts. After some discussion, the Penal Code was amended accordingly. It remains to be seen whether reluctant courts will put the legislative amendments into practice.

Internet sources:
Amendments to the Penal Code – Improvement of the protection of sexual self-determination of 4 November 2016, Bundesgesetzblatt, https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl116s2460.pdf%27%5D__1489010971052.
Demanding amendments of the Penal Code to implement the Council of Europe Convention: the Federal Association of Women's Advice Centres and the Women's Emergency Hotlines, https://www.frauen-gegen-gewalt.de/vergewaltigung-verurteilen.html, the German Women Lawyers Association, https://www.djb.de/Kom-u-AS/K3/st14-07/, the Greens, http://dip21.bundestag.de/dip21/btd/18/019/1801969.pdf, the German Institute for Human Rights, http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Policy_Paper_24_Schutzluecken_bei_der_Strafverfolgung_von_Vergewaltigungen.pdf, and the expertise by Prof. Hörnle, http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Menschenrechtliche_Verpflichtungen_aus_der_Istanbul_Konvention_Ein_Gutachten_zur_Reform_des_Paragraf_177_StGB.pdf.

Amendments to the Penal Code concerning the prosecution of stalking

Gender

In the summer of 2016, the Federal Ministry for Justice presented a draft law on amendments to the criminal law against stalking. Until then, the relevant Section 238 of the Penal Code required, among other things, that the personal life of the victim was seriously impaired, e.g. that the victim felt compelled to move to a new house or change jobs. Moreover, the prosecution of stalking was at the discretion of the state attorney. The Federal Ministry argued that these requirements severely hampered the prosecution of stalking, especially to the disadvantage of victims who resisted the pressure to change their lives. Under the proposed amendment to Section 238 of the Penal Code, the requirement of serious impairment of a victim's life and the need for drastic lifestyle changes are no longer applicable, rather the general

impairment of a victim's life as a result of stalking is sufficient to prosecute a stalker. Moreover, the proposed amendment to the Criminal Procedure Code obliges state attorneys to prosecute when stalking is reported. The first reading of the draft took place in October 2016.[35]

Internet sources:
The Federal Minister for Justice on the draft law on amendments to the Penal Code regarding the prosecution of stalking, https://www.tagesschau.de/inland/stalking-109.html.
First reading of the draft in the Federal Parliament, http://www.bmjv.de/SharedDocs/Mediathek/DE/Videos/DE/VideoDoc/20161020_Anti_Stalking_Bundestag.html.

Adoption of legislation on inclusion of persons with disabilities

Disability

In December 2016, both Houses of the German Parliament passed a Law on the improvement of inclusion and self-determination of persons with disabilities.[36] The law aims at implementing the requirement of the Convention on the Rights of Persons with Disabilities to provide for effective inclusion of persons with disabilities in society. Article 1 of the Convention states in this respect that 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. The legislation aims at diminishing the effects of such barriers, thus preventing discrimination on the ground of disability.

It encompasses measures to prevent incapacity for employment, to facilitate the procedure for measures of rehabilitation, to improve structures of advice for persons with a disability, to improve financial aid and to expand the rights of representative bodies of persons with disabilities in employment provided for by the current law. The financial support will no longer be granted as part of social aid, which means that persons with disabilities will be allowed to have a higher income and financial assets without losing the right to receive financial support. In addition, the assets of spouses will not be considered when determining the assets of the person claiming financial support. Finally, employers will be able to claim subsidies of up to 75% of the salaries of employees with disabilities. The law entered into force on 1 January 2017.

Internet source:
https://www.bundestag.de/dokumente/textarchiv/2016/kw48-de-bundesteilhabegesetz/481812.

CASE LAW

Damages for loss of earnings due to the failure to provide public childcare

Gender

On 20 October 2016, the Federal Court of Justice decided on damages for loss of earnings due to the inability of the responsible local authority to offer sufficient and appropriate public childcare.

Three full-time working women had taken twelve months of parental leave after giving birth. They had announced, shortly after giving birth, their need for public childcare with regard to the statutory entitlement to public childcare for children under the age of three. But the responsible local authority informed them that too many parents were demanding public childcare, and did not offer them a place at a nursery school or any equivalent alternative. After some research, the three mothers found another solution for their childcare problem, but as this took some time, they could not return to work directly after the end of their parental-leave period of twelve months. Therefore, they demanded damages for

35 The law was adopted on 10 March 2017, after the cut-off date of this report.
36 Law on the improvement of inclusion and self-determination of persons with disabilities (*Gesetz zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen*, Bt. Drs. 18/9522, 18/9954, 18/10102 Nr. 16), 1 December 2016.

loss of earnings from the end of their parental leave until their return to work and they sued the local responsible authority.

The Federal Court of Justice decided that parents who cannot return to work after their parental leave due to the lack of sufficient and appropriate public childcare can claim damages for loss of earnings from the local responsible authority. Since August 2013, children under the age of three are entitled to public childcare under Section 24(2) of the Social Code No. 8. The local authorities are obliged to offer sufficient and appropriate public childcare through nurseries, kindergartens or so-called day-care mothers. The court of first instance had found that the obligation of the local authorities to offer childcare was exclusively in favour of the children cared for, and therefore did not produce any legal effects in favour of the parents. The Federal Court of Justice decided that the entitlement to public day care should not only favour the children cared for, but also their parents, especially those wanting to return to work, and that therefore a culpable violation of the obligation to offer public childcare would lead to liability of the local responsible authority for damages for the loss of earnings suffered by any parent. The local authority can exonerate itself by proving that the lack of sufficient public childcare could not be avoided (e.g. if the building contractor for childcare facilities or the operator of a kindergarten or nursery has been declared bankrupt), while the mere referral to lack of capacity does not limit the liability. The Federal Court of Justice profoundly strengthened the effectiveness of measures to further the reconciliation of work and family life, by offering sufficient and appropriate public childcare. Local authorities can no longer refer to a lack of capacity or financial means when parents, mostly mothers, want to make use of the entitlement to childcare with the aim to return to work after one year of parental leave. The federal level and the states have invested billions in the construction and operation of childcare facilities to guarantee nationwide access to childcare.

Internet sources:
Federal Labour Court, judgment of 20 October 2016, III ZR 278/15 (the action was brought before the court by three mothers), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=56b0f500ea62fb565a92815414d26850&nr=76566&pos=7&anz=20.
Comprehensively on the new entitlement and its enforcement see the contributions by Schettler, A., Meiner-Teubner, C. and Möller, V. 'Ausbau der Kinderbetreuung für Unter-Dreijährige' *Zeitschrift des Deutschen Juristinnenbundes* 4/2016, pp. 155ff, 161ff, 167ff, 171f, accessible for download under https://www.djb.de/publikationen/zeitschrift/djbZ-2016-4/.

Dispensation from swimming lessons on ground of religious beliefs

Religion or belief

The claimant was enrolled in a public school and demanded dispensation from swimming lessons because of prescriptions stemming from her Muslim faith to hide her body from men. Although the school allows for the use of so-called burkinis, this option was not regarded as sufficient by the claimant.

The court regarded the complaint as inadmissible. The claimant did not show that the option of wearing a burkini was insufficient to comply with religious rules on the concealment of the body, and this option was considered to be a sufficient accommodation of the claimant's beliefs. The fact that the claimant was exposed to the sight of male bodies in swimsuits was not sufficient to justify a dispensation.[37]

Internet source:
http://www.bverfg.de/e/rk20161108_1bvr323713.html.

37 Federal German Constitutional Court, 1 BvR 3237/13, 8 November 2016.

Permissibility of headscarf, worn by kindergarten teacher

Religion or belief

The claimant was a kindergarten teacher employed by a public authority who was reprimanded by this authority because she wore an Islamic headscarf at work. The Federal Constitutional Court decided that the basic right to freedom of religion entitled the teacher to wear such a headscarf. Provisions of anti-discrimination law do not provide legal rights to the claimant beyond those derived from freedom of religion however. The Court underlined that such a garment is now common in Germany and a necessary consequence of a pluralist society.[38]

The Court thus confirmed its standing case law regarding headscarves worn by teachers in public education[39] and extended it to the sphere of pre-school education.

Internet source:
http://www.bverfg.de/e/rk20161018_1bvr035411.html.

Greece

EL

LEGISLATIVE DEVELOPMENT

Introduction of new anti-discrimination legislation in Greece[40]

All grounds

On 2 December 2016, the Greek Parliament voted on a new anti-discrimination law replacing the main Greek anti-discrimination legislation (Law 3304/2005). The new law introduces additional protected grounds such as chronic illness, descent, family or social status and gender identity or characteristics. Especially, the introduction of the ground of family status in the field of discrimination in workplaces is regarded as an expansion of the rights of same-sex couples who have signed a civil partnership. The law also introduces new definitions, such as Article 2 which defines discrimination by association as 'less favourable treatment of a person due to his/her close association to a person or persons who bear certain characteristics connected to the aforementioned grounds of discrimination.'

'Discrimination based on perception' is defined as less favourable treatment of a person who is perceived to have certain characteristics linked to the aforementioned grounds of discrimination. The new law explicitly defines 'denial of reasonable accommodation' for people with disabilities or chronic illness as a form of discrimination, while reasonable accommodation is defined as the necessary and appropriate modifications, provisions and measures which should be adopted to ensure equal treatment for people with disabilities or chronic illness, on the condition that none of these measures create an excessive or unjustified burden for the employer. The law does not specify however whether these are individual measures, as stipulated by the Employment Equality Directive, or measures of a more general character. Finally, multiple discrimination is defined as discrimination, exclusion or restriction of a person based on multiple grounds of discrimination. As for the promotion of the principle of equal treatment, Article 12 clearly stipulates that during the drafting and application of legislative, regulatory and administrative orders or acts, policies and actions in the areas covered by the present law, equal treatment shall be given due consideration.

The most important feature of the new provisions is the extension of the competences of one of the equality bodies, the Ombudsman, to deal with monitoring and promotion of equal treatment in not

38 Federal German Constitutional Court, 1 BvR 354/11, 18 October 2016.
39 Federal German Constitutional Court, BVerfGE 138, 296.
40 Law 4443/2016 (OJ 232 A / 09.12.2016).

only the public sector but also the private sector. Consequently, the Committee for Equal Treatment, a government service which was previously competent in the private sector will be abolished. Within the Ombudsman's office, 10 additional staff positions for legal officers will be created to cover the extended scope of the work. The General Secretariat for Transparency and Human Rights of the Ministry of Justice, within the framework of its jurisdiction for the protection of human rights and combatting all forms of discrimination, will be competent for the promotion of equal treatment. The Social Protection Directorate of the Ministry of Labour will, *inter alia*, monitor the application of anti-discrimination policies in the field of labour and employment, inform employees and employers on issues related to discrimination in the field of employment and raise awareness, and will scientifically support the Labour Inspectorate Body, which will continue to exist but will no longer exercise equality body functions.

Article 16 of the new law requires all these authorities to cooperate, with each other as well as with the Economic and Social Committee, the higher union organisations in the private and public sector, the National Social Solidarity Centre, the National Centre for Social Research, the Centre for Equality Research, the Centre for Disease Control and Prevention, the Central Union of Greek Municipalities, as well as with civil society organisations with expertise on anti-discrimination.

Regarding awareness raising and dissemination of information, Article 17 stipulates that employers, as well as those in charge of vocational training, shall ensure the application of anti-discrimination provisions and provide the Equality Body with all information necessary for the promotion of equal treatment, as per their mandate. The trade unions shall inform their members of the content of anti-discrimination provisions, as well as the measures that are carried out for the application and promotion of equal treatment.

Internet source:
http://www.parliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=246e2286-a8e1-4283-95c0-a6b901169a95.

A report with a focus on the gender equality aspect of these legislative changes has been published on the website of the European network of legal experts in gender equality and non-discrimination. For the full report please visit: http://www.equalitylaw.eu/downloads/4076-greece-re-transposition-of-directives-2000-43-ec-2000-78-ec-and-transposition-of-directive-2014-54-eu-pdf-190-kb.

CASE LAW

Gender

Adverse treatment after returning from maternity leave

A woman complained to the Ombudsman that upon her return from maternity leave she found that the pharmacy where she had been employed for 17 years had been transferred to a new employer. The new employer (transferee) told her that the pharmacy in question had been moved to another location where she would have to work. The woman lodged a complaint with the Ombudsman and the Labour Inspector (LI), alleging that the transferee violated his obligation to employ her in the same job. She also served a letter to the transferee declaring that she was offering him her services in the same pharmacy where she had worked for 17 years.

The Ombudsman, in collaboration with the competent LI, found that the pharmacy had not been moved but had been transferred to the transferee. The transferee insisted that this was a 'newly established' pharmacy and that he had no obligation to employ the applicant. The LI, at the recommendation of the Ombudsman, imposed a fine for violation of the provisions on workers' rights in the event of transfer of

an undertaking and on the right of women returning from maternity leave to be employed in the same or an equivalent job.[41]

The Ombudsman often reports on cases of adverse treatment of women returning from maternity leave in the private sector, which are increasingly being registered since the onset of the economic crisis. The right of the woman to return to her previous or an equivalent job arises from Directive 2001/23/EC[42] in conjunction with Directive 2006/54/EC.[43] Relevant Greek legislation also embodies the abovementioned right of women to return to the same job after maternity leave. Article 3(1) of Directive 2001/23 requires that the transferee comply with the obligations arising from the contract of employment existing on the date of the transfer. This requirement is embodied in Article 4(1) of PD 178/2002[44] transposing Directive 98/50/EC.[45] Moreover, Article 15 of Directive 2006/54 entitles a woman, after the end of her maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her. This entitlement is contained in Article 16 of Act 3896/2010 transposing Directive 2006/54.[46]

The Ombudsman informed the transferee in writing of the provisions regarding the workers' protection in the event of transfers of undertakings and the right of women to return to the same or an equivalent job at the end of their maternity leave. The Ombudsman also stated that there was no proof that the applicant had been informed of the pharmacy moving. The pharmacy continued its operation at the same premises, with the same clients. This, in conjunction with other data (e.g. a document of the Ministry of Health referring to the continuation of the operation of the same pharmacy) in the Ombudsman's opinion proved the transfer. In addition to the fine imposed by the LI, the Ombudsman invited the transferee to employ the applicant and warned him that he would be liable to administrative sanctions if he did not comply.

This is a characteristic example of the adverse treatment of women returning from maternity leave often occurring in the private sector, and repeatedly reported by the Ombudsman. Private employers often impose on these women disadvantageous modifications of working conditions (e.g. modification of working time, change of workplace) or part-time or rotation work, mainly with a view to compelling them to resign. Moreover, they may dismiss them, without notifying them of the dismissal, while they declare to the Ministry of Labour and the Agency of Manpower Employment (OAED) (competent for the registering of the unemployed and paying unemployment benefits) that they resigned of their own free will. The Ombudsman notes that complaints of such treatment mostly come from female employees of small and medium-sized companies (i.e. those employing up to ten workers). Due to the fact that these companies have been heavily hit by the economic crisis, they see maternity rights as an additional burden. Quite often employers admit that they give priority to their tax payments and other financial obligations, while they consider maternity protection of lesser importance.[47] However, the Ombudsman only sees

41 See Ombudsman 'Summary of mediation', August 2016: available at: http://www.synigoros.gr/?i=isotita-ton-fylon.el (in Greek), accessed 5 September 2016.

42 Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82/22.03.2001 pp. 16-20.

43 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204/26.07.2006, pp. 23-36.

44 OJ A 162/12.07.2002.

45 Council Directive 98/50/EC amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 201/17.07.1998, pp. 88-92. Directive 2001/23/EC constitutes a codification of Directive 77/187 as amended by Directive 98/50, in light of the Court's case law.

46 Act 3896/2010, 'Implementation of the Principle of Equal Treatment of Men and Women in Matters of Employment and Occupation. Harmonisation of Existing Legislation with Directive 2006/54/EC of the European Parliament and the Council,' OJ A 207/08.12.2010.

47 See Ombudsman Annual Report 2014 (Special Report '*Gender and Employment Relationships')*, pp. 138-141. Available at: http://www.synigoros.gr/resources/docs/ee2014-13-fylo.pdf; Ombudsman Annual Report 2015 (Special Report '*Gender and Employment Relationships')*, pp. 117-121: available at: http://www.synigoros.gr/?i=isotita-ton-fylon.el.files.366798, both accessed 30 August 2016.

the tip of the iceberg. Moreover, such cases do not seem to reach the courts, as they are very difficult to prove. The EU rule on the burden of proof, although transposed into Greek law, remains unknown to litigants and courts, as it has not been incorporated into the procedural codes, while the prospect of unemployment, which looms larger for women than for men, in conjunction with rising litigation costs, deters women from claiming their rights. Moreover, the possibility for legal entities to support wronged workers by engaging in litigation in their favour is limited, as the EU rule on the standing of entities has been incorrectly transposed, and also remains outside of the procedural codes.

Internet source:
Ombudsman 'Summary of mediation', August 2016: available at: http://www.synigoros.gr/?i=isotita-ton-fylon.el (in Greek), accessed 5 September 2016.
Presidential Decree 178/2002, 'Measures regarding the protection of employees in the event of transfers of undertakings, businesses or parts of businesses, in compliance with Council Directive 98/50/EC', OJ A 162/12.07.2002, via Official Journal website (in Greek) at: http://www.et.gr, accessed 5 September 2016.
Act 3896/2010, 'Implementation of the Principle of Equal Treatment of Men and Women in Matters of Employment and Occupation. Harmonisation of Existing Legislation with Directive 2006/54/EC of the European Parliament and the Council,' OJ A 207/08.12.2010, via Official Journal website (in Greek) at: http://www.et.gr, accessed 5 September 2016.

Recognition of gender identity without gender-reassignment surgery

Gender

The applicant was registered in the public registry as a 'girl', under a female name. From early childhood, the applicant showed symptoms of gender identity disorder. She was treated by a sexologist and a psychiatrist in accordance with the W.P.A.T.H. 'Standards of care for gender identity disorders'. In particular, she was encouraged to live like a boy, while she underwent hormone therapy (testosterone injections) and a double mastectomy. The applicant did not undergo gender-reassignment surgery. However, her whole appearance was that of a male and, according to her psychiatrist, she lives very successfully as a man. Furthermore, the prospect that she will later change her mind is limited.

By Decision No. 418/2016, the Athens Justice of Peace accepted the petition of the woman who sought, in accordance with the ex parte procedure provided by the Code of Civil Procedure, the confirmation of her male sex and the modification of the female name under which she was registered in the public registry into a male name, following the double mastectomy and hormone therapy. The Court held that the fact that the applicant had not undergone gender-reassignment surgery was not a problem regarding the modification of her sex and name in the public registry. It considered that the requirement to undergo such surgery in order for a transsexual's change of sex to be recognised would be excessive and would violate Article 8 ECHR, which guarantees the right to respect for personal and family life, as well as Articles 2 and 26 ICCPR, which prohibit discrimination on any ground, including sex. The Court concluded that, in the applicant's case, the male sex definitely prevailed. Moreover, as the male sex and the male name are fundamental features of the applicant's personality, they must appear in the public registry and therefore the existing entry must accordingly be modified.

The Court did not refer to EU law and did not explicitly deal with the case under the gender equality principle. However, by invoking Articles 2 and 26 ICCPR, which prohibit discrimination on any ground, including sex, it implied that a refusal to confirm the applicant's transsexuality would violate her right to non-discrimination. Moreover, as it relied on the applicant's transsexual feelings, the Court implicitly adopted the CJEU definition of a 'transsexual'. Indeed, the CJEU has held, in agreement with the European Court of Human Rights (ECtHR) that 'the term "transsexual" is usually applied to those who, whilst belonging physically to one sex, feel that they belong to the other'.[48]

48 CJEU Case C-13/94 *P* v. *S* [1996] ECR I-2159, Paragraph 16.

The Court did not refer to EU law nor did it examine whether the refusal to modify the applicant's sex and name in the public registry would constitute gender discrimination. However, its decision is in accordance with EU law and CJEU case law. According to Paragraph 3 of the Preamble to Directive 2006/54/EC,[49] 'the Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex.[50] In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person'. In the same vein, Article 3(2)(b) of Act 3896/2010 transposing Directive 2006/54/EC,[51] reads: 'Any less favourable treatment of a person related to gender reassignment also constitutes discrimination on the ground of sex'.

Internet source:
Athens Justice of Peace Decision No. 418/2016: http://elawyer.blogspot.gr/2016/06/blog-post_30.html (in Greek), accessed 22 September 2016.
Act 3896/2010, 'Implementation of the Principle of Equal Treatment of Men and Women in Matters of Employment and Occupation. Harmonisation of Existing Legislation with Directive 2006/54/EC of the European Parliament and the Council,' OJ A 207/08.12.2010, accessed 22 September 2016.

Council of State finds that a Draft Presidential Decree amounts to discrimination on the ground of national origin

Racial or ethnic origin

A draft Presidential Decree was submitted to the Council of State, which is the Supreme Administrative Court in Greece, for a preliminary legal examination of the qualifications, conditions and procedure for enrolment in the Officers' School of the Fire Brigade Academy for graduates of Higher Education and Technological Institutes. The Council of State found that one provision of the draft Decree was unlawful and amounted to discrimination on the ground of national origin, as it restricted enrolment in the Officers' School to Greek citizens of Greek origin and those of foreign origin who had acquired Greek citizenship at least one year before the enrolment. As such, it violated Article 4, paragraph 1 of the Greek Constitution which stipulates that all Greek citizens are equal before the law. The Council of State underlined that Greek citizens must be treated equally, independently of their national origins, and ordered the removal of the provision.[52]

Internet source:
http://policenet.gr/article/%CE%B1%CE%BB%CE%BB%CE%B1%CE%B3%CE%AE-%CF%83%CF%84%CE%B9%CF%82-%CF%80%CF%81%CE%BF%CF%8B%CF%80%CE%BF%CE%B8%CE%AD%CF%83%CE%B5%CE%B9%CF%82-%CF%84%CF%89%CE%BD-%CF%83%CF%84%CF%81%CE%B1%CF%84%CE%B9%CF%89%CF%84%CE%B9%CE%BA%CF%8E%CE%BD-%CF%83%CF%87%CE%BF%CE%BB%CF%8E%CE%BD-%CF%83%CF%87%CE%B5%CF%84%CE%B9%CE%BA%CE%AC-%CE%BC%CE%B5-%CF%84%CE%B7%CE%BD-%CE%B5%CE%BB%CE%BB%CE%B7%CE%BD%CE%B9%CE%BA%CE%AE-%CE%B9%CE%B8%CE%B1%CE%B3%CE%AD%CE%BD%CE%B5%CE%B9%CE%B1.

Name and sex change on university degree after gender-reassignment surgery

Gender

A man who had undergone gender-reassignment surgery lodged an application with the competent Greek court for a modification of her registered name and sex. This application was granted, the requested modification was registered with the competent registry office and the transperson obtained a new

49 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204/26.07.2006, pp. 23-36.
50 See e.g. CJEU Case C-423/04 *Richards* [2006] ECR I-3602, Paragraph 24; Case C-13/94 *P/S* [1996] ECR I-2143, Paragraphs 19-21.
51 Act 3896/2010, 'Implementation of the Principle of Equal Treatment of Men and Women in Matters of Employment and Occupation. Harmonisation of Existing Legislation with Directive 2006/54/EC of the European Parliament and the Council,' OJ A 207/08.12.2010.
52 Council of State, Department E, Opinion No. 205/2016.

identity card under her new (female) sex and name. She then requested that a degree, obtained prior to the surgery, also be modified accordingly. The competent service of the Ministry of Education sought the opinion of the State Legal Council on this question. In its Opinion No. 180/2015, the SLC noted that under Greek legislation there was no possibility to issue a new degree. However, a certificate bearing the transperson's new (female) personal details and stating that a degree had already been issued for this same person could be delivered. This certificate should not mention that the personal details had changed following gender-reassignment surgery, as this would constitute a revelation of sensitive personal data, and therefore an interference with private life contrary to Article 8 ECHR.[53]

The SLC relied on Article 8 ECHR, and on Articles 9 and 9A of the Constitution, which require the protection of private and family life and the protection of personal data, respectively. Furthermore, the SLC relied on Article 19(3) of Presidential Decree (PD) 323/2003,[54] which stipulates that vocational training degrees 'are only issued once and may not be modified'. It noted that there is no provision regarding the replacement of a degree in case of a change of personal details. There was therefore no possibility to issue a new degree. However, a certificate could be issued, which would bear the transperson's new details and would state that this same person had already obtained a degree, with a reference to the registration number of that degree. The SLG did not refer to EU law and did not deal with the issue under the gender equality principle.

The SLC gives opinions at the request of public authorities which are not binding, unless the competent Minister endorses them.[55] It is not clear whether the Minister of Education, whose services sought the above opinion, has accepted the opinion. Meanwhile, in February 2016, several Members of Parliament tabled a parliamentary question to the Minister of Justice regarding this opinion. The Minister of Justice replied that the legal recognition of gender identity would soon be introduced by virtue of a bill being elaborated.[56] Moreover, on 6 June 2016, the General Secretariat for Transparency and Human Rights of the Ministry of Justice issued a 'Press release regarding the legal recognition of gender identity' stressing that the introduction of legislation for the recognition of gender identity constitutes a government priority. A Law Commission is intensively working on a bill to this effect, to be introduced in Parliament in the coming months. Members of this Commission together with a competent Ministry of Justice official visited Malta, with the assistance of the Council of Europe, in order to exchange relevant best practices. This bill will ensure the fundamental rights of a section of our society, in accordance with the recommendations of international organisations. Moreover, it is necessary to sensitise public opinion to the need to respect differences.[57]

The SLC did not refer to EU law nor did it examine whether the refusal to modify the degree would constitute gender discrimination. However, according to Paragraph 3 of the Preamble to Directive 2006/54/EC,[58] 'the Court of Justice has held[59] that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also

53 SLC Opinion 180/2015, issued on 27 July 2015, available at: http://www.nsk.gr/web/nsk/anazitisi-gnomodoteseon?p_p_id=nskconsulatories_WAR_nskplatformportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-4&p_p_col_pos=2&p_p_col_count=3 (in Greek), accessed 24 August 2016.

54 OJ A 272/2003.

55 Articles 2 and 7(4) of Act 3086/2002 'Organisation of the State Legal Council and status of officers and employees thereof', OJ A 324/23.12.2002.

56 See the reply of the Minister of Justice, dated 9 February 2016: available at: http://www.hellenicparliament.gr/Koinovouleftikos-Elenchos/Mesa-Koinovouleutikou-Elegxou?pcm_id=f0796b7b-32e3-4a3f-a9c7-a5980135921d, accessed 20 July 2016.

57 Ministry of Justice, General Secretariat for Transparency and Human Rights 'Press release regarding the legal recognition of gender identity': available at: http://www.ministryofjustice.gr/site/el/%CE%91%CE%A1%CE%A7%CE%99%CE%9A%CE%97/tabid/64/ctl/details/itemid/2545/mid/797/.aspx, accessed 25 July 2016.

58 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26/07/2006, pp. 23-36.

59 See e.g. CJEU Case C-423/04 *Richards* [2006] ECR I-3602, Paragraph 24; Case C-13/94 *P/S* [1996] ECR I-2143, Paragraphs 19-21.

applies to discrimination arising from the gender reassignment of a person'. In the same vein, Article 3(2)(b) of Act 3896/2010 transposing Directive 2006/54/EC,[60] reads: 'Any less favourable treatment of a person related to gender reassignment also constitutes discrimination on the ground of sex'.

As the issue at stake is related to vocational training, it falls within the scope of Directive 2006/54. Moreover, as this Directive constitutes a particular expression, in the field of employment and occupation, of the general principle of gender equality which is embodied in Article 23 of the EU Charter of Fundamental Rights (Charter), the case also falls within the scope of this Charter Article. Furthermore, it falls within the scope of Articles 7 and 8 of the Charter, which proclaim the right to respect for private and family life and the right to the protection of personal data, respectively.

A refusal to modify the sex and name written on a degree issued prior to gender reassignment surgery can create confusion regarding a transsexual's identity, seriously affect his/her dignity,[61] and cause serious inconvenience to him/her at administrative, professional and private levels. This issue therefore also falls within the scope of Article 1 of the Charter which requires the respect and protection of human dignity. This is more so in the present case, as the official documents certifying the transsexual's identity (public registry documents, identity card) bear her new sex and name. All the aforementioned provisions of the Charter embody general principles of EU law recognised by CJEU case law predating the Charter.

Since the above refusal to modify the sex and name can concern transsexuals only, it would constitute direct discrimination on the ground of gender reassignment, i.e. direct discrimination on the ground of sex in matters of vocational training, which is prohibited by EU law.[62]

The solution recommended by the SLC does not establish equality and does not serve the purpose invoked by the SLC, i.e. the protection of the transsexual's private life and personal data, since the certificate to be issued will contain an exact reference to the original degree (by mentioning its registration number).

Internet sources:
State Legal Council (SLC) Opinion No. 180/2015, issued on 27 July 2015, available at: http://www.nsk.gr/web/nsk/anazitisi-gnomodoteseon?p_p_id=nskconsulatories_WAR_nskplatformportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-4&p_p_col_pos=2&p_p_col_count=3 (in Greek), accessed 1 September 2016.
Act 3086/2002 'Organisation of the State Legal Council and status of officers and employees thereof', OJ A 324/23.12.2002, via Official Journal website (in Greek) at: http://www.et.gr, accessed 1 September 2016.
Presidential Decree (PD) 323/2003, OJ A 272/2003, via Official Journal website (in Greek) at: http://www.et.gr, accessed 1 September 2016.
Greek Constitution: available in Greek, English, French and German on the Parliament's website:http://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma/, accessed 1 September 2016.

60 Act 3896/2010, 'Implementation of the Principle of Equal Treatment of Men and Women in Matters of Employment and Occupation. Harmonisation of Existing Legislation with Directive 2006/54/EC of the European Parliament and the Council,' OJ A 207/08.12.2010.
61 Cf. *mutatis mutandis* CJEU Case C-13/94 *P/S* [1996] ECR I-2143, Paragraph 22.
62 Cf. by analogy CJEU Case C-177/88 *Dekker* [1990] ECR I-3941, Paragraph 12; Case 42/92 *Habermann-Beltermann* [1994] ECR I-1668, Paragraph 15.

HU Hungary

CASE LAW

Ombudsperson's report on practice of forbidding Roma passengers to board airplanes to Canada

Racial or ethnic origin

Beginning in the summer of 2015, a large number of Roma families brought complaints to the Deputy Commissioner for Fundamental Rights Responsible for the Protection of Minorities Living in Hungary (hereafter Deputy Ombudsperson), the Equal Treatment Authority and/or the NGO Legal Defence Bureau for National and Ethnic Minorities (NEKI), regarding similar facts. All claimants had been refused boarding flights with destination Canada, despite having valid tickets and identity papers. They were generally approached by unidentified airport staff who checked their documents and asked about their circumstances in Hungary and the aim of their journey to Canada. They were then told that they could not board the plane, without receiving any information about the formal reasons or about where and how they could seek remedies.

Although the Deputy Ombudsperson's investigation found that she was not competent to take direct measures in this case,[63] she decided to make a statement on 15 July 2016, due to the systemic nature of the injurious practice and the fact that similar complaints emerged again in the summer of 2016. She noted that, based on a contract with the airline, the security company of the airport undertook to screen and identify passengers whose entry into Canada was likely to be denied by the Canadian Border Service Agency (CBSA) due to the lack of appropriate documents, as in such cases the airline is obliged to transfer the passenger back to the place of departure and pay a fine. However, the screening extended beyond the checking of documents to include the passengers' employment, income and real estate in Hungary, their family relations in Hungary and Canada as well as the financial resources saved for the journey. The employees of the security company tried to assess not only whether the passengers' documents were in order, but also whether the passengers had any intention to stay in Canada and not return to Hungary. They then communicated their conclusions to the airline, and the final decision to deny boarding was made by the airline.

In her statement, the Deputy Ombudsperson established several violations:

- The screening extended to the personal circumstances of the passengers without any legal basis in either Canadian or Hungarian law.
- The persons carrying out the screenings did not identify themselves and did not adequately inform the passengers about the legal basis for their actions, the potential consequences of the screening or about the applicable remedies.
- No written decision was delivered to the passengers about the refusal.

The Deputy Ombudsperson concluded that due to these factors the practice violated the concerned passengers' dignity, right to a fair procedure and remedy and their freedom of movement, and recommended the remedying of the problems listed. Based on the evidence at her disposal, the Deputy Ombudsperson could not establish beyond any doubt that the practice was disproportionately targeting Roma persons, but emphasised that if such a screening must be put into place, it must concern all passengers and be carried out in a manner that does not raise the suspicion of discrimination and arbitrariness.

63 The injurious practice had been performed by domestic and foreign organisations that do not qualify as either 'authorities' or 'public service providers' under the Ombudsperson Act, therefore excluding the Deputy Ombudsperson's competence *ratione personae*.

Internet source:
https://www.ajbh.hu/-/a-magyarorszagon-elo-nemzetisegek-jogainak-vedelmet-ellato-ombudsman helyettes-elvi-allasfoglalasa-a-nemzetkozi-legijaratok-utasainak-beszallast-megelo.

Court confirms that refusal by school to admit pupils raised by a lesbian couple amounts to discrimination and awards damages

Sexual orientation

The case concerned the mothers of a 13-year old boy who decided to find a new school for their son. The boy's interview with the future form master went well, and a trial week was agreed on. At the end of the interview, the mother told the teacher that she was raising the child together with her same-sex registered partner. The teacher did not react in person, but the next day she sent an email stating that the boy could not be enrolled in her class 'due to their family status'. When the leadership of the school confirmed that the teacher's decision was final, the mother initiated a legal action against the school before the Equal Treatment Authority with the help of the NGO Háttér Society. The Authority concluded that discrimination had taken place and imposed a fine of EUR 160 (HUF 50,000) on the school. However, the parents felt that the fine was not proportionate to the severity of the violation, so they decided to also sue the school for damages.

The Metropolitan Court of Budapest found that the boy had been refused admittance to the school due to his mother's sexual orientation, which amounted to a violation of the mother's inherent personal right to non-discrimination.[64] In response to the school's argument that the rejection was aimed at protecting the child from bullying and was therefore in his best interest, the Court stated that '[a]ny educational institution and their teachers are expected [...] to use the necessary pedagogical tools to prevent bullying of students who differ from their classmates in whatever respect. Students with such characteristics diverging from the majority cannot suffer a disadvantage because an educational institution or a form master is not willing or able to take into consideration their special needs and facilitate their integration to the community of students.' The Court awarded the mother EUR 1,100 (HUF 350,000) in non-pecuniary damages, and ordered the school to cover the interests and legal fees.

Internet source:
http://en.hatter.hu/news/hungarian-court-awards-compensation-to-lesbian-mother-whose-child-was-rejected-by-a-school.

Mayor found to have committed harassment when calling on local residents not to sell real estate to Roma people

Racial or ethnic origin

In July 2015, the Mayor of Mezőkeresztes (North-East Hungary) published in the municipal council's newspaper an open letter (entitled 'Let us stop the decrease of real estate prices') to the town's residents, in which he encouraged the residents to sell their real estate to companies or private persons with a regular income, who are capable of accumulating savings or start viable enterprises. The Mayor also asked the residents to 'if they can [...] refrain from selling their real estates to Roma people coming from other settlements'. The open letter was also published on the council's website. The Hungarian Civil Liberties Union started an *actio popularis* before the Equal Treatment Authority, claiming that the Mayor had committed harassment based on ethnicity. The Mayor failed to make a statement in these proceedings.

In its decision of 8 November 2016, the Authority concluded the following: it can be established beyond any doubt that in the open letter addressed to the public, the Mayor suggested that Roma people moving

64 Decision 31.P.25.499/2015/16/1. of the Metropolitan Court of Budapest delivered on 24 June 2016 (the claimant was notified of the judgment becoming final and binding in October 2016, and the case was reported by the NGO representing the claimant on 26 October 2016).

in from other settlements cannot be private persons with regular income, nor can they be capable of accumulating savings or start viable enterprises, and if they buy the real estate with an instalment plan, they are unlikely to fully pay the price and the owner must be prepared to enter into long legal disputes with them.[65] The Authority held that it violated in itself the dignity of Roma people when the Mayor called on the population to refrain from selling their real estate to them. Examined in its context, the open letter was undoubtedly capable of creating a hostile, humiliating or offensive environment vis-à-vis the Roma people, and thus amounted to harassment. The Authority ordered the Mayor to remove the open letter from the municipal council's website and to publish the Authority's decision in the following issue of the council's newspaper and on the municipal council's website (for 30 days). Finally, the Authority imposed a fine of EUR 320 (HUF 100,000) on the Mayor.

Contrary to this decision of the Equality Body, the standing case law of Hungarian courts limits the liability of mayors under the Equal Treatment Act to actions directed at the local residents or other persons with regard to whom a mayor has legal obligations or executes functions specifically set out in law. The decision was not appealed and the courts were therefore not called upon to decide whether or not to extend the applicability of the Equal Treatment Act to also cover actions of mayors directed at prospective future residents.

Internet sources:
http://www.egyenlobanasmod.hu/article/view/ebh-549-2016, and
http://index.hu/belfold/2016/11/16/nem_akart_cigany_lakokat_a_polgarmester_birsagot_kapott/#.

Ombudsman challenges before the Constitutional Court a local decree banning the wearing of burqas, chadris, niqabs and other similar clothing as well as any activity questioning that marriage is only possible between a woman and a man

Religion or belief

Sexual orientation

The Mayor of Ásotthalom (a village with a population of 5,000) is a well-known right-wing extremist. On 23 November 2016, the municipal council adopted Decree 25/2016 (XI.23.) amending the Rules of Communal Cohabitation.[66] The amendment introduced the following provision:

> It is forbidden in public premises to
> a) perform calls for prayer, because it is capable of disturbing public peace and causing fear, alarm and indignation among local residents;
> b) wear burqas, chadris, niqabs covering the whole body, head and the whole face or part of it as well as bathing suits covering the whole body, including the so-called burkini;
> c) carry out any type of propaganda activity that presents marriage as anything different from a life partnership between a man and a woman as stipulated in the Fundamental Law, including any type of activity in public premises, with special regard to performances, demonstrations, billboards, leaflets and audio advertisements;
> d) carry out any type of propaganda activity that violates the Fundamental Law by acknowledging as the basis of a family, any relation other than marriage or the relationship between parent and child, including any type of activity in public premises, with special regard to performances, demonstrations, billboards, leaflets and audio advertisements.

It is clear from the Mayor's statements that the ban on the call for prayer and Muslim religious clothing aims at deterring migrants – most of whom are Muslims – while the second part of the decree is aimed against 'homosexual propaganda' and is based on the Russian example.

65 Decision EBH/549/2016 of the Equal Treatment Authority, delivered on 8 November 2016.
66 Under Article 143 of Act CLXXXIX of 2011 on the Municipal Councils of Hungary, municipal councils are entitled to adopt decrees on the fundamental norms of communal cohabitation and the sanctions of behaviours violating such norms.

On 20 December, the Commissioner for Fundamental Rights (the Ombudsman) filed a petition with the Constitutional Court (CC), requesting that the amendment be declared null and void as it contradicts the Fundamental Law. The Ombudsman argued that the amendment severely restricts the fundamental rights to freedom of religion and expression although, according to the Fundamental Law, such rights may only be restricted through an Act of Parliament and not in a municipal decree. Furthermore, the provision violates the requirement of equal treatment by only banning the external manifestations of one particular religion, whereas no similar ban is prescribed for any other religion. The Ombudsman also emphasised that the bans on religious manifestations amount to such a severe limitation of the freedom of religion that they could even in principle only be allowed under very extreme circumstances.

As to the ban on 'propaganda activities', the Ombudsman held that it violates the freedom of expression on issues (the concept of marriage and the family) that are subjects of intensive societal discussions. Furthermore, the ban is targeted against one particular view in this debate, so it interferes with the freedom of expression on a basis of content, which is clearly unconstitutional, especially because the views concerned are closely related to human dignity, the requirement of equal treatment and the right to private and family life.

Internet source:
http://www.njt.hu/njtonkorm.php?njtcp=eh2eg7ed8dr1eo8dt9ee4em3cj2bx1cf8cb3bz2bw7ca8d;
http://index.hu/belfold/2016/11/24/betiltottak_a_muszlim_vallast_es_a_melegseget_egy_magyar_kozsegben/;
http://www.ajbh.hu/kozlemenyek/-/content/10180/1/az-ombudsman-az-alkotmanybirosagtol-keri-az-asotthalmi-onkormanyzat-alapjogserto-rendeletenek-megsemmisiteset.

POLICY DEVELOPMENTS

Consequences of desegregation of Roma school

Racial or ethnic origin

Csobánka is a small town of 3000 not far from Budapest. The number of school-aged children is over 300, but parents who had the means to do so, started to enrol their children at other schools in neighbouring villages in the 1990s. As a result, only children of marginalised, disadvantaged, almost exclusively Roma families remained in the town's only school. The school regularly achieved worse than the national average scores at competence tests and the physical conditions had severely deteriorated in the past years. In May 2016, it was decided that the school be closed at the end of the 2015/16 academic year. There are plans to open a denominational school in the town, but that will not start to admit children before September 2017.

This development put the 37 children still going to the Csobánka school in a very difficult situation, due to the strong political resistance from the local council of the neighbouring town Pomáz to their placement into any of its three schools. They argued that the high proportion of disadvantaged pupils could cause problems to the children in Pomáz, and that it would be unfair to use the taxes of those residing in Pomáz to ensure the education of the children from the neighbouring town. 2500 Pomáz residents also signed a letter of protest against the placement of the children from Csobánka in the town's schools. Csobánka parents expressed their suspicion that anti-Roma sentiments also played a role in the protests, and they were afraid that they would not be able to find a school for their children, and worried that even if they could, they would not be able to pay the costs of taking their children to school in neighbouring towns. In such situations, it is the task of KLIK – the central state agency responsible for the operation of schools – to decide about the placement of the pupils.

In July, KLIK issued a press release stating that all 37 pupils would be placed in due time, and the additional transportation costs would be paid by KLIK. In August, the municipal council sent an open letter to the head of KLIK, expressing the council's protest against the fact that despite previous promises

Csobánka children would be placed in Pomáz schools. According to information from Csobánka parents, this letter caused KLIK to place only 6 of the 37 children at schools in Pomáz. The remaining children were placed at schools in another municipality, further away, causing extensive problems of transportation for the parents.

Internet sources:
http://abcug.hu/senkinek-nem-kellenek-csobankai-maradek-gyerekek-2/ and
http://abcug.hu/az-en-gyerekem-majd-elsejen-beesik-az-iskolapadba/.

Increase in sanctions applied by the Equal Treatment Authority in gender equality cases

Gender

In 2016, the Equal Treatment Authority (ETA), which is the primary administrative state organ dedicated to the mission of implementing the Equality Act in Hungary, increased the severity of the sanctions which it applies.

The ETA has been widely criticised for its weak sanctioning practice. However, in 2016 the fines imposed by the ETA increased significantly in several gender equality cases (from the usually imposed EUR 322 to EUR 485 in 2015, and from EUR 1 630 to EUR 3 260 in 2016). Higher fines were mainly imposed in cases where pregnant women were dismissed during their trial period. It seems to be consistent practice by many employers to dismiss pregnant women once the pregnancy is reported to the employer during the trial period. Employers often attempt to take advantage of the fact that the Labour Code does not oblige them to give a reason for any dismissal during the trial period. However, the recent case law of the national courts and the ETA points out that the reason for a dismissal may never be discriminatory in nature, despite the fact that there is no obligation to justify a dismissal during the trial period.

It is also noteworthy that in the EBH/182/2016 case, the ETA referred to two European Court Cases: Carole Louise Webb [C-32/93, European Court Reports 1994 I-03567] and Tele Danmark [C 109/00, European Court Reports 2001, I6993], in order to support its interpretation of the Labour Code in favour of pregnant women. This underlines the fact that a dismissal based on discriminatory motives is prohibited under all circumstances, also in cases where there is no obligation to give a reason for the dismissal.

The significant increase in the fines imposed may have a stronger deterrent effect in the future. On the other hand, claimants still have to take legal action against their employers in the courts in order to obtain monetary compensation for the damages they have suffered. The ETA is not authorised to adjudicate these types of claims. Nevertheless, winning a case before the ETA obviously helps to establish a successful case in court.

Internet source:
http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/ed69449a559cb2d9f48afbf5fef9a840/%C3%BCgyf_2015_v_0_3.pdf (the data refers to the year 2015. There is, as yet, no available data for 2016).
http://www.egyenlobanasmod.hu/article/view/ebh-415-2016 (publication of the decision + a fine of EUR 1 630), http://www.egyenlobanasmod.hu/article/view/ebh-182-2016 (a fine of EUR 3 260).

Ireland

CASE LAW

Wessel v. Aer Lingus Ltd.; Pension contribution during maternity leave

The claimant maintained that she had been discriminated against by the respondent (Aer Lingus) on the grounds of her family status inter alia contrary to Section 80 of the Pensions Acts in relation to conditions of employment. The claimant commenced employment with the respondent in 2006 and was a member of the airline's cabin crew. The background to the claim lies in changes to the company's pension scheme. The scheme was facing a deficit of EUR 700 million. The company's defined benefit scheme closed in January 2015. Employees were then transferred to a new defined contribution scheme. There was a dispute in relation to the restructuring of the pension scheme culminating in, in addition to a company once-off additional payment, a defined three-year period in which each member of the scheme would receive a payment to their benefit by reference to their variable pay earnings (premium pay etc.) based on their actual earnings (in a defined three-year period). These proposals were put to a vote by the Irish Congress of Trade Unions and accepted. During the said three-year period, the claimant was absent on maternity and protective leave. As a consequence, the formula produced an amount which was less than she would have received if she had been at work for the entire period of the reckonable period. The duration of her absence was not in dispute.

The claimant maintained that this was a matter of discrimination on the family status ground, and that she had been less favourably treated than a male or female colleague who did not take maternity leave. If the claimant had not been on maternity leave and protective leave, she would have been eligible for the premium pay earnings. In short, the respondent stated that the formula was applied to all employees on the basis of equality and that where they had premium pay earnings, the actual earnings were reckoned according to the formula. Where an employee was absent for any reason due to sick leave, career breaks etc. and did not have reckonable earnings, their share was reduced accordingly as it had been in the case of the claimant. The respondent submitted that the family status ground could not cover the entire period of the claimant's absence. If her family status changed in the course of her absence she could not argue that any less favourable treatment was due to her family status. Further, the law did not require payment by the employer to a woman on maternity leave and the claimant was seeking to have what was in effect a payment of wages reckoned for the purposes of her complaint as if it had been paid and then thereafter a calculation of her entitlement under the formula but in circumstances where no payment was actually made. In other words, the claimant was seeking to be paid for a period during which she was not eligible for payment of wages and in respect of which the non-payment of such wages is not discriminatory. In addition, the claimant had accepted part of this deal in respect of the so-called stabilisation payment and she was therefore estopped from making any further claim. This was not simply on the grounds of her being bound by the collective agreement but because she accepted the arrangement in contract.

The Equality Officer stated that the burden of proof was on the claimant and that she had set out a prima facie case. The Equality Officer considered that the purpose of protective leave is to ensure that a woman who leaves the workplace in order to have her baby is placed at no disadvantage, primarily in respect of her return to work to her own or an acceptable position when she is ready to do so.[67]

Consideration was given to the payment or the non-payment of an employee when she was absent on maternity leave and the Equality Officer confirmed that an employee on maternity leave is not entitled to pay. The Equality Officer referred to *Gillespie v Northern Health and Social Services*, Case C-342/93,

67 Workplace Relations Commission, Decision No DEC-E2016-124, *Marjolijn Wessel v. Aer Lingus Limited*, 8 September 2016.

where the claimants were paid a proportion of their wages which declined as they went through the course of the pregnancy but which was obviously related to the then-current obtaining pay rates. The ECJ reiterated that Directive 92/85/EEC does not require payment of full pay during maternity-leave absence, where sick-pay rates have been adjusted to reflect pay rises awarded after the commencement of the maternity leave and to be reflected in the rates paid to the women involved.

The Equality Officer considered that *Gillespie* was clear and easily distinguishable from the current complaint where for the disputed period nothing was paid to the claimant but for her case to succeed she would have to succeed, in a broader argument that she should have been paid or in some way remunerated for the purposes of calculating her benefit under the deal. Critically for her case, the Equality Officer could not see how it represented less favourable treatment on the grounds of pregnancy or family status. The only possible comparator, in terms of someone who was more favourably treated, would be a person who actually worked for a greater period than she did and was paid for so doing in the normal way. The claim was dismissed.

This is a useful case, as it shows that employers are not required to pay pension contributions to an employee whilst on maternity leave. Like many other defined benefit pension schemes, the Aer Lingus scheme had significant liabilities and was therefore discontinued.

Internet source:
https://www.workplacerelations.ie/en/Cases/2016/September/DEC-E2016-124.html, accessed 23 December 2016.

Dismissal on the ground of incapacity held to be discriminatory for lack of reasonable accommodation

Disability

The complainant was employed by a large wholesale book company based in the UK as a regional account manager in April 2013, being the company's sole employee in Ireland. He was ultimately dismissed in June 2013, ostensibly for performance and disciplinary issues, while still on probation with the company. The complainant brought a claim to the Workplace Relations Commission (WRC) on the basis that he had been subjected to discriminatory dismissal on the grounds of disability.

The complainant went on sick leave a month into his employment with the company, and provided a medical certificate indicating that he was suffering from stress. He returned to work after a week. The company did not have him medically assessed on his return. After the company learned that the complainant was suffering from depression and that he had been prescribed an anti-depressant, its attitude to and treatment of the complainant changed. After raising some relatively minor performance issues with the complainant and carrying out perfunctory and inadequate disciplinary proceedings, the complainant was dismissed over the phone. The complainant appealed his dismissal internally and the appeal was heard over Skype some two months after his dismissal. He informed the manager hearing the appeal that he considered the company's attitude to him had changed following his period of sick leave. His appeal was unsuccessful.

Although the company did not in any manner mention incapacity or relate the complainant's dismissal to incapacity, the WRC stated that the reality indicated that this certainly played a role. While the complainant's sick leave and depression were not the only reason for his dismissal, his disability was nevertheless a significant factor in his dismissal.[68]

The WRC noted that an individual may suffer discrimination not because they are disabled *per se*, but rather because they are perceived to be less capable or dependable than a person without a disability, because

68 Workplace Relations Commission, Decision DEC – E2016-131, *A Sales Representative v. A Books Wholesaler*, 20 September 2016.

of their disability, and as such it was important to always be alert to the possibility of 'unconscious or inadvertent discrimination.' The WRC acknowledged that Section s.16(1) of the Employment Equality Acts 1998 – 2011 provides that an employer is not obliged to retain an employee who is not fully competent and capable of doing the job he or she is required to do. However, this has to be read in conjunction with s.16(3) where it must be considered whether the person would be fully competent and capable if reasonable accommodation is provided for them. As such, there was an onus on the company to make full enquiries regarding all the material facts concerning the complainant's condition, and he should have been given fair notice that his dismissal for incapacity was being considered. Consideration should also have been given to any reasonable accommodation that could have been made available to help the complainant become fully capable. The company did not seek a report from the complainant's doctor or send him to an Occupational Health Specialist, even though they were on notice that he was suffering from a psychiatric illness. No consideration was given to what accommodations could be provided – the WRC cited extending his probation as one possible option.

The WRC awarded the complainant the sum of EUR 18 000, equivalent to six months' wages.

Internet source:
https://www.workplacerelations.ie/en/Cases/2016/September/DEC-E2016-131.html.

Italy IT

LEGISLATIVE DEVELOPMENT

Legislative changes affecting paternity leave and financial aid for childcare

Gender

The draft Budget Act for 2017 (Act No. 232 of 11 December 2016) was quickly approved after a government crisis which followed the results of a referendum on the reform of the Constitution. On the whole, no substantial changes are to be recorded compared to the measures already in force in recent years, apart from a small but progressive increase in paternity leave. Nevertheless, funds will be remarkably increased, from EUR 23 million to EUR 50 million for childcare expenses.

Compulsory paternity leave, which was set at two days for 2017, will be raised to four days in 2018. The additional two days of optional leave that fathers are entitled to, instead of the mother in the first five months after childbirth, will be increased to three days in 2018. Both measures are temporary.

The Budget Act confirms the extension of paid vouchers for childcare expenses (for a total amount of EUR 3600 to be used for a maximum of six months) to 2017 and 2018. These will be made available at the end of the compulsory maternity leave for a period of 11 months as an alternative to parental leave. The same (for a total amount of EUR 1800 and a maximum of three months) applies to employed and self-employed workers.

The text, which was approved by Parliament on 7 December 2016, also includes the possibility to increase funds for Equal Opportunities to EUR 20 million.

All of these measures are temporary, whereas it is most likely that only long-term policies could have real impact on gender equality matters.

Internet sources:
Act No. 232 of 11 December 2016, published in Official Journal No. 297 of 21 December 2016, Ordinary Supplement No. 57, http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2016-12-21&atto.codiceRedazionale=16G00242&isAnonimo=false&normativi=false&tipoVigenza=originario&tipoSerie=serie_generale&currentPage=1.
Draft Budget Act for 2017, http://flpdifesa.org/wp-content/uploads/2016/10/Testo-bollinato-DDL-di-bilancio-2017.pdf, accessed 21 December 2016.

CASE LAW

Supreme Court decision on applicability of general employment regulations to special contracts for persons with disability

Disability

The claimant was employed on a short-term contract with a private employer under an agreement signed with a municipality according to a special Law No 68/1999 aiming to foster the integration of persons with disability in the job market. Believing that Law No. 68/1999 had a special nature compared to the general nature of Legislative Decree No 368/2001, which requires an express reason to conclude a contract of a limited length, the employer had not provided for reasons to conclude fixed-term contracts with disabled employees. When the claimant's contract ended, the employer aimed to conclude new short-term contracts with other disabled workers for the same job, with the practical effect of excluding workers with disability from the possibility to conclude long-term contracts. The claimant brought the case to court, and on appeal it reached the Supreme Court.

In September 2016, the Supreme Court noted that Law No 68/1999 provided for incentives in order to foster the integration of workers with disability and held that there was no reason to apply implicitly another derogation that is the exclusion of motivation in case of fixed-term contracts. Saying the contrary would amount to discrimination against workers with disability in breach of Directive 2000/78/EC and UNCRPD. The Supreme Court did not explore the nature of the discrimination (direct or indirect) but examined the potential application of the duty to provide reasonable accommodation for workers with disability. According to the Court, this duty upon employers aims to respect the principle of equal treatment and not to allow derogations to the application of a law on fixed-term contracts for workers with disability. The Supreme Court concluded to the discriminatory conduct of the employer and ordered it to provide for a specific reason to fixed-term contracts, also when they are concluded with persons with disability.[69]

Internet source: http://www.europeanrights.eu/public/sentenze/Corte_di_Cassazione_17867_discriminazione_contratti_a_termine_disabilit.pdf

69 Supreme Court Judgment, no. 17867/2016 of 9 September 2016.

Latvia LV

LEGISLATIVE DEVELOPMENTS

Legislative initiative on face-covering ban

Gender

Racial or ethnic origin

On 22 September 2016, the Ministry of Justice led by the Minister from the National Alliance (*National Alliance 'All for Latvia!' – 'For Fatherland and Freedom/LNNK'*), unifying three right-wing parties, announced at the meeting of the State Secretaries[70] a draft law on Face-Covering Clothing Restrictions.

The Law envisages the prohibition of face covering in public places except in the following situations: (1) the face covering is prescribed by the law; (2) it is necessary for the performance of professional tasks; (3) it is necessary for the participants of sports events or competitions; (4) it is necessary for the participants of an arts event; (5) it is necessary for the participants of state or national celebrations and cultural events; (6) it is necessary because of weather conditions; (7) it is necessary because of health reasons. Non-compliance with such prohibition will lead to administrative liability.

There have been no further developments since 22 September 2016. However, this does not mean that this draft law will not be 'activated' in the future, taking into account the proximity of municipal elections on 3 June 2017 and the populist character of the draft law.

This is the second most intensely discussed proposal of the current Minister of Justice after his spring proposal to refrain from signing and ratifying the Istanbul Convention because it discriminates against and humiliates men, and distinguishes sex from gender.

Regarding the legislative proposal in question, the most intensely discussed topic concerns what the real aim is behind such a draft proposal. The Explanatory Report of the draft proposal states that it is aimed at the proper integration of immigrants in Latvian society. It also states that the prohibition of covering the face is necessary for the protection of the welfare and morality of others.

The first argument can be considered void when taking into account the fact that according to Muslim religious organisations, there are only Latvian women who cover their faces. The argument of the necessity to integrate immigrants therefore seems invalid because Latvian women are already integrated, have grown up in Latvia and know the Latvian language.

Furthermore, the legitimate aim – protection of the welfare and morality of others – and the proportionality of such a measure does not comply with the requirements for the restriction of the rights under ECHR as interpreted by the ECtHR, especially in the case *S.A.S. v. France*. First, with regard to the restrictions to the demonstration of one's religious beliefs, the specific context in each State must be taken into account. In particular, the relationship between the State and religion must be taken into account. In the Latvian context, although it is a secular State, it still has special regulations concerning the relationship between certain religious organisations, such as Lutheran and Catholics churches (regulated by law and international agreement). Politicians in Latvia cannot invoke absolute state neutrality in religious matters as is the case, for example, in France. Second, the arguments presented for the justification and proof of proportionality of the restriction in question are mere generalisations referring to Latvian Christian and pagan traditions that have to be preserved. Third, as to the benefit that society would enjoy as a result of the restriction of the right – as provided by the Muslim parishes in Latvia – there are around five women who cover their face and, as mentioned above, they are all Latvians.

70 The first of the three stages before approval of the law by the Government.

Therefore, in the view of the Latvian legal gender expert, the proposed face covering restriction is not sufficiently justified in the Latvian context.

Internet source:
The draft Face-Covering Restriction Law and its explanatory note, available in Latvian at, http://tap.mk.gov.lv/lv/mk/tap/?pid=40399697, accessed on 20 December 2016.

Implementation of the Istanbul Convention

Gender

On 13 December 2016, the Cabinet of Ministers accepted draft proposals for amendments of the Criminal Law for submission to Parliament. The draft proposal envisages more complete implementation of the obligations under the Istanbul Convention.

Although Latvia has not yet ratified the Istanbul Convention, its provisions have already largely been implemented in national law. The draft proposals in question envisage a number of amendments to criminal legislation strengthening the protection against domestic and gender-based violence. In particular, the draft amendments (1) extend the list of aggravating circumstances; (2) prolong the period of lapse of time, allowing the initiation of criminal procedure if a victim is a minor until reaching his/her full age; (3) introduces a new type of criminal offence: stalking; and (4) provides more precise and amended legal regulation on heavy, average and light bodily injury.

The draft proposal defines as aggravating circumstance, the commitment of the crime in the presence of a minor. It introduces genital mutilation as new type of bodily injury and recognizes as special circumstances the causing of bodily injury to a spouse, ex-spouse, unregistered partner or a person residing in a common household.

Although there has been resistance on the part of the current Minister of Justice regarding the ratification of the Istanbul Convention, the Ministry of Justice has not stopped working on the substantial implementation of the obligations under the Istanbul Convention. The draft amendments are especially important since they envisage implementing a new type of criminal offence: stalking. This is a result of the fact that the police have been confronted with a number of stalking cases over the past years. However, it has so far lacked legal instruments to combat stalking and protect victims properly.

Internet source:
The draft proposal 'Amendments to the Criminal Law', available in Latvian at http://tap.mk.gov.lv/lv/mk/tap/?pid=40395922&mode=mk&date=2016-12-13, accessed on 18 January 2017.

LI Liechtenstein

LEGISLATIVE DEVELOPMENT

Gender

Signing of the Istanbul Convention

Liechtenstein signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) on 10 November 2016 in Strasbourg. The Istanbul Convention is the first legally binding pan-European instrument aiming to protect especially women and girls from any form of violence, and particularly from domestic violence. With the signing of the Convention, which was formally decided on by the Government on 5 October 2016, Liechtenstein has given a clear sign of supporting the aim of the Convention. A working group nominated by the

Government in March 2016 examined the prevailing legal norms regarding the requirements of the Convention. In its final report, the working group concluded that Liechtenstein already largely fulfils the standards of the Istanbul Convention.

According to practice in Liechtenstein, international agreements are only ratified when the national norms fully correspond to the requirements of the Convention. For a possible ratification of the Istanbul Convention, Liechtenstein should have to make a reservation to the provisions concerning the residence permit status of victims. Additionally, there are some marginal gaps in the fields of jurisdiction, grounds for increase in penalty and criminal law regarding norms against forced marriages. These gaps are likely to be closed by the autonomous adaptation of parts of the revised Austrian Criminal Code.

The next step should be to ratify the Istanbul Convention in the near future.

Internet source:
Press release of the Government of Liechtenstein
http://www.llv.li/#/41/medienmitteilungen, accessed 22 December 2016.

Lithuania LT

LEGISLATIVE DEVELOPMENTS

Amendments to the national anti-discrimination legislation adopted by Parliament

On 8 November 2016, the *Seimas* (Parliament) adopted amendments to the Law on Equal Treatment[71] and the Law on Equal Opportunities for Women and Men.[72] Having entered into force on 1 January 2017, the amendments make significant structural changes to both laws, with the main purpose to increase legal certainty and clarify the structure of current national anti-discrimination legislation.[73]

All grounds

As regards content, most of the amendments are related to the independence and qualifications of the Equal Opportunities Ombudsperson. The new provisions raise the requirements for educational background and professional legal experience to become Equal Opportunities Ombudsperson, and set a limit of two consecutive terms of five years. The amendments also introduce an explicit provision which forbids the Ombudsperson from being a member of a political party, and remove the existing provision allowing Parliament to dismiss the Ombudsperson from the post, via confidence vote.

Regarding the mandate of the Ombudsperson, the new legislation formally adds the competence to undertake activities in which the body has been involved for many years without having an explicit mandate to do so: awareness raising, preventive and educational work. In addition, the amendments remove the Ombudsperson's capacity to halt any advertising activities temporarily if there is sufficient evidence indicating that an advertising campaign may incite hatred or encourage discrimination. The

71 Lithuania / Amendment to the Law on Equal Treatment (to enter into force on 1 January 2017). Lietuvos Respublikos lygių galimybių įstatymo Nr. IX-1826 pakeitimo įstatymas. Available at: https://www.e-tar.lt/portal/lt/legalAct/0dfc3020ac9311e6b844f0f29024f5ac.

72 Lithuania / Amendment to the Law on Equal Opportunities for Women and Men (to enter into force on 1 January 2017). Lietuvos Respublikos moterų ir vyrų lygių galimybių įstatymo Nr. VIII-947 pakeitimo įstatymas. Available at: https://www.e-tar.lt/portal/lt/legalAct/35656920ac9211e6b844f0f29024f5ac. For further details regarding the amendments to this Act, please see immediately below.

73 Lithuania / Explanatory note for the proposed legislation, Lietuvos respublikos moterų ir vyrų lygių galimybių įstatymo nr. viii-947 pakeitimo įstatymo ir Lietuvos Respublikos lygių galimybių įstatymo nr. ix-1826 pakeitimo įstatymo projektų aiškinamasis raštas. Available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/f3adbea0182711e6aa14e8b63147ee94?jfwid=-wd7z8bi1o.

legislation also adds a new capacity to the formal mandate, explicitly allowing the Ombudsperson to apply to an administrative court with an enquiry to assess whether a certain administrative act is in line with the anti-discrimination laws. Some procedural amendments were also introduced, notably regarding the time limits for responding to and investigating complaints.

The amendments were initiated by the Ombudsperson and can generally be considered as a positive step, adding clarity to the national legal framework and strengthening the Ombudsperson institution. However, a few pressing issues – such as the lack of effective, dissuasive and proportionate sanctions, etc. – have not been addressed.

Internet sources:
Explanatory note regarding the proposed legislation:
https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/f3adbea0182711e6aa14e8b63147ee94?jfwid=-wd7z8bi1o;
Amendment to the Law on Equal Treatment:
https://www.e-tar.lt/portal/lt/legalAct/0dfc3020ac9311e6b844f0f29024f5ac.

Amendments to the Equal Opportunities Act for Women and Men

Gender

In the period between July and December 2016, the Lithuanian legislator introduced some changes to the regulatory framework of equal treatment of men and women:

The Law of 16 June 2016 XII-2431[74] changed the Equal Opportunities Act for Women and Men (EOAWM). The changes introduced the following novelties:

- A duty is imposed on employers to protect employees from harassment on the ground of gender, not to only protect them from sexual harassment (Article 6(1) p. 5);
- Discrimination in the area of the sale of goods and the supply of services on the ground of sex will include pregnancy, birth and breastfeeding (Article 5(1) p. 3).
- Unequal treatment with regard to sex is expressly prohibited in the area of the sale of goods or the supply of services (Article 7(1) p.3); not only shall payment conditions be equal but also conditions to receive services or goods shall be without discrimination based on sex
- In response to the *Test-Achats* ruling, the law expressly prohibits any differences in social security benefits, if they are based on different life expectancy figures for men and women (Article 7(3) p. 8);
- Directive 2014/54/EU has been included in the Annex of the EOAWM, meaning that the current EOAWM shall be considered as an Act transposing (part) of this Directive.[75]

The Law of 3 November 2016[76] amended the provision of Article 24 p. 3 to bring the EOAWM into line with the new Code of Administrative Violations which entered into force on 1 January 2017. Since 1 January the Ombudsperson shall have the right to initiate 'the procedure of investigation of administrative violations', but the essence of the mandate and competence of the Ombudsperson will remain the same.

The Law of 11 November 2016[77] introduced the new version of the EOAWM. It changed the enumeration of the Act, and also:

74 The Law of 16 June 2016 XII-2431, Registry of Legal Acts, 2016, No. 17706.
75 Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. Text with EEA relevance. OJ L 128/30. o4.2014, p. 8.
76 Law No. XII-2729 of 3 November 2016. Registry of Legal Acts, 2006, No. 26509.
77 Law No. XII-2767 of 8 November 2016. Registry of Legal Acts, 2016, No. 26966.

a. transferred the provisions on the legal status of the Equal Opportunities Ombudsperson from the EOAWM to Equal Opportunities Act, making the latter Act a single coherent place for those institutional provisions. The Equal Opportunities Act was changed accordingly;[78]
b. by transferring part of the legislation from the EOAWM, the status of Equal Opportunities Ombudsperson was brought into line with that of other Ombudspersons of Parliament and extensively supplemented. In particular, new provisions on appointment and dismissal procedures, remuneration and social guarantees were added. The procedure of dealing with complaints was extended. The maximum term of investigation of a complaint by the Ombudsperson was prolonged from 1 to 3 months.[79] The Ombudsperson received a statutory right to submit the application to an administrative court to decide whether the administrative act is in conformity with equality legislation (Article 29(2) p. 8).

Merging the two pieces of legislation (the EOAWM and general anti-discrimination legislation – the Equal Opportunities Act) was cautiously discussed by a small working group established by the Ombudswoman. However, no decision was taken on the consolidation of the two different acts. Instead, the transfer of the 'institutional' provisions from the EOAWM to the Act of general application were proposed to introduce greater clarity. The changes to the institutional provisions such as the requirements for the post, its mandate and the term of the Ombudsperson as well as the time limit for investigation of the complaints should help to resolve routine questions of the Ombudsperson more easily.

Internet source:
https://www.e-tar.lt/portal/lt/legalAct/24e3db403c5811e6bcc5c96b48152012,
https://www.e-tar.lt/portal/lt/legalAct/b36eb650a68411e69ad4c8713b612d0f,
https://www.e-tar.lt/portal/lt/legalAct/35656920ac9211e6b844f0f29024f5ac
(all in Lithuanian).

Montenegro ME

LEGISLATIVE DEVELOPMENT

Process of amending the Law on the Prohibition of Discrimination

All grounds

On 4 August 2016, the Ministry for Human and Minority Rights published a report on the public discussion which had been taking place until 25 July on possible amendments to the Law on the Prohibition of Discrimination (LPD). The main reason for amending this law is to ensure compliance with the European and international standards on protection against discrimination. However, the Protector for Human Rights and Freedoms highlighted in his Report for 2015 the inadmissibility of the frequent changes of legislation in the area of protection against discrimination and emphasized that the existing LPD should go through a complete overhaul and be replaced by new legislation. The Protector has also stressed that amending the provisions on sanctions and remedies, which is one of the key aims of the planned amendments, would not have any concrete impact as the limited financial resources of many legal entities mean that in practice they will not be convicted for discriminatory acts.

The amendments to the LPD should eliminate earlier potential breaches of the Directives, provide missing definitions and especially improve the penal provisions by defining the offence by a natural person who commits discrimination as well as increase sentences for discrimination committed.

78 Law No. XII-2768 of 8 November 2016, Registry of Legal Acts, 2016, No. 26967.
79 The three-month time limit was also possible before the recast directive, but required a procedural decision of the Ombudsperson him/herself.

Internet source:
http://www.minmanj.gov.me/vijesti/162055/Javni-poziv-za.html.

POLICY DEVELOPMENTS

Adopting Strategy for Integration of Persons with Disabilities 2016 – 2020

Disability

In April 2016, a working group consisting of representatives of relevant ministries (Ministry of Labour and Social Care, Ministry of Minority and Human Rights, Ministry of Education, and Ministry of Health) and NGOs dealing with inclusion of persons with disabilities was established in order to draft the new Strategy for Integration of Persons with Disabilities (SIPD). Bearing in mind the commitment of Montenegro's accession to the EU, this strategy follows the fields of action and timeframe defined by the European Strategy for Persons with Disabilities 2010-2020. The key areas that relate to the status of persons with disabilities are: accessibility, participation, equality, employment, education and training, social protection and healthcare. After public discussions where the draft of the strategy was presented to interested citizens and organizations, the new strategy was finally adopted in September 2016.

The general objectives of the adopted Strategy are: to protect and promote the rights of persons with disabilities; to develop an efficient system of legal protection; to provide conditions for full and active participation of persons with disabilities in all areas of social life on an equal basis, through development and implementation of a policy of equal opportunities, particularly in the areas of employment, labour, education, culture and housing; to provide social, health and other services for persons with disabilities in accordance with their real needs, and in accordance with international standards; to ensure adequate standards for living and social safety of persons with disabilities.

Internet source:
http://www.minradiss.gov.me/biblioteka/strategije?alphabet=lat&pagerIndex=1.

Reduction of life-long pension fees for mothers of three or more children

Gender

The Law on Amendments to the Law on Social and Child Protection of July 2015 (Articles 54a and 54b), established that life-long pension fees are to be paid to mothers of three children after 25 years of employment, or to mothers of four and more children after 15 years of employment. The amount of the fee was 70 % of the average net salary in Montenegro. Although the implementation was problematic due to the financial crisis, and the law had to be enforced in an equal and non-discriminatory manner, the fees were paid to the beneficiaries during 2016.

On 18 December 2016, the Government of Montenegro adopted the budget for 2017, in which the abovementioned pension fees were reduced by 25 %. Concretely, the fees of EUR 336 were reduced to EUR 264 and those of EUR 192 were reduced to EUR 144. The Government justified these measures, as well as other measures such as one reducing the salaries of high public officers, by financial restrictions and the need for financial rationalization. This decision caused strong protests by affected mothers, and sparked public debate.

A complaint was filed by affected civilians, arguing that the legislative changes are discriminatory and therefore unconstitutional. The decision of the Constitutional Court of Montenegro concerning the Initiative to review the constitutionality of the provisions of Articles 54a and 54b of the Law on Amendments to the Law on Social and Child Protection (the case was registered by the Constitutional Court as case No. *U-I br. 6/16.*) is still pending. The decision is expected as soon as Parliament submits its statement on the matter, as was announced by the Court.

In addition, new initiatives questioning the constitutionality of the Government's decision have been announced with respect to the issue of acquired rights and the retroactive effect of the decision to reduce fees for mothers who had previously received the decisions on their life-long pensions by the Ministry of Labour and Social Care, according to the valid Law on Social and Child Protection.

Internet sources:
https://www.youtube.com/watch?v=mx5CuW2_KMY,
http://www.pcnen.com/portal/2017/01/18/usscg-neustavno-umanjivanje-naknade-za-majke/,
http://www.vijesti.me/vijesti/smanjuju-naknade-za-majke-i-plate-funkcionera-nove-akcize-za-gorivo-916856,
http://www.vijesti.me/vijesti/majke-iz-bijelog-polja-vlada-ugrozava-najugrozenije-u-crnoj-gori-918633,
http://volimpodgoricu.me/2016/12/21/majke-ogorcene-zbog-smanjenja-naknada-protesti-ispred-vlade/,
http://rs.n1info.com/a215431/Svet/Region/Smanjene-naknade-za-majke-sa-troje-i-vise-dece-u-Crnoj-Gori.html,
http://www.dan.co.me/?nivo=3&rubrika=Vijest%20dana&datum=2016-12-22&clanak=578712,
all accessed 25 January 2017.
http://un.org.me/love-and-violence-16-days-of-activism-against-violence-against-women/.

The Netherlands NL

LEGISLATIVE DEVELOPMENT

Extension of the material scope of the Discrimination Disability Act to goods and services

In 2016, the Netherlands ratified the International Convention on the Rights of Persons with Disabilities (UNCRPD). To ensure the full compatibility of Dutch law with the Convention, a bill has been adopted by Parliament to amend the material scope of the Disability Discrimination Act.[80]

Disability

A new first article will be included (Article 01), which provides:
Every human being must be enabled, corresponding to his own potential, to be autonomous.[81]

As regards the material scope of the Act, the amended Article 5b provides:

Distinction is now forbidden in the supply of or access to goods or services and in concluding, performing or terminating contracts to this end, as well as in the provision of career orientation and guidance and advice or information regarding the choice of an educational institution or career, if this is done:

a) in the course of exercising a profession or running a business;
b) by a public service;
c) by institutions active in the field of public housing, social services, healthcare, cultural affairs or education, or
d) by private persons not engaged in running a business or exercising a profession insofar as the offer is made publicly.

80 Act of 14 April 2016 regarding the implementation of the International Convention on the Rights of Persons with Disabilities as agreed in New York on 13 December 2006 (Treaties Gazette 2007, 169), Staatsblad 2016, 215, issued on 13 June 2016.
81 All translations are by the non-discrimination expert for the Netherlands.

Internet source:
https://zoek.officielebekendmakingen.nl/stb-2016-215.html.

Bill to extend paid birth leave for the mother's partner (father) submitted to Parliament

Gender

On 25 November 2016, the Government submitted a bill to Parliament that aims to extend the paid birth leave for fathers from two to five days. At present fathers are entitled to two days of paid birth leave. If the bill is adopted, they will receive three more days. Not only fathers are entitled to the extended leave, but any partner of the mother, i.e. a person the mother is married to, a registered partner, a person she has been living together with on a long-term basis, and a person who has acknowledged parenthood of the child. The purpose of the extended paid leave is to strengthen the bond between the partner/father and the child. The three extra days will be paid from collective funds. The partner/father can apply, through their employer, for an allowance during these days. Only employees are entitled to the leave.

The three extra days are to be granted as of 1 January 2019, as the administrative process behind the payment is rather complex. Due to this complexity, the Social Economic Council and the Council of State opposed the bill. However, the Government persisted and has submitted the bill to Parliament.

The birth leave of two days was introduced on 1 January 2002. The motive behind the wish to extend the leave is the hope that it will contribute to a better division of tasks between men and women, and in that way create a better work-life balance for both. Currently, women still perform most of the tasks at home and invest more time in taking care of the children than men do. In interviews, fathers have stated that they are willing to work less and spend more time with their children but have also pointed out that the family income would become too low if they did and that their employer is not in favour of part-time work. The idea behind the bill is that when fathers are more involved in the care for their child right from the beginning, they might continue to be involved in later years. Whether an extension of the paid birth leave by three days will have such a great effect is doubtful. For this reason, the Government wishes to take further steps to improve the work-life balance. However, it has first requested recommendations on the topic from the Social and Economic Council.

Internet source:
https://www.rijksoverheid.nl/documenten/kamerstukken/2016/11/25/wetsvoorstel-uitbreiding-kraamverlof-inclusief-memorie-van-toelichting, accessed 20 December 2016.

CASE LAW

Administrative Court rules that the State has violated the UN Convention on Women's Rights by not granting maternity benefits to self-employed women

Gender

On 23 September 2016, the Administrative Court Mid-Netherlands ruled that the State had violated the UN Convention on Women's Rights by abolishing the right to maternity benefits for self-employed women in 2004 and re-introducing the same right in 2008 without creating an arrangement for women who gave birth between 2004 and 2008. The Court ruled that the social security authorities have to compensate the women for the lack of maternity benefits.

The claimant, and five other self-employed women, have been involved in litigation about their right to maternity benefits for approximately ten years, with the support of trade union 'FNV self-employed', the Association for Women and Law, and the Clara Wichmann Fund for test cases. Proceedings in the Netherlands, up to the Dutch Supreme Court, failed to yield any results. In the complaints procedure before the CEDAW Committee, the Committee ruled in plain language that the women were entitled to maternity benefits and that the State had violated the Convention on Women's Rights by not creating

an arrangement for them. Even this ruling did not induce the State to set things right. The women then started new proceedings, in which they asked the social security authorities to grant them the benefits. On 18 July 2016, the Amsterdam Administrative Court dismissed the claim of two of the claimants. The Administrative Court Mid-Netherlands has now allowed the claim of one of the other women.

What is important is that the Court explicitly states that it follows the 'authoritative opinion' by CEDAW as 'an international committee in the field of women's rights'. The Court rejects the point of view taken by the social security authorities (and by the Government as well) that Article 11(2)(b) does not concern self-employed women. In addition, the Court makes it clear that this article can be invoked directly. The claimant is therefore entitled to either benefits or compensation.

The two women who lost the case will appeal against the ruling with the *Centrale Raad van Beroep*, the Appeal Court in administrative cases. It is expected that the social security authorities will also appeal against the ruling of the Court of the Mid-Netherlands. The long chain of proceedings therefore has not ended yet.

The judgment is relevant because 1) the authority of CEDAW is explicitly recognized, 2) it confirms that Article 11(2)(b) can be invoked directly, and 3) the Court ruled that Article 11(2)(b) also relates to self-employed women. Although CEDAW has been clear on points 2 and 3, the Dutch Government has continued to stick to the opposite point of view and so far has not been willing to follow the opinion of CEDAW, although the Netherlands has ratified the protocol which made individual complaints possible. It is to be hoped that the Appeal Court in administrative cases will uphold the judgment by the Court Mid-Netherlands and not the judgments by the Amsterdam Courts, as this will hopefully finally pave the way for a more extensive explanation of Article 11.

Internet source:
http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2016:5113, accessed 2 November 2016.

Wilders found guilty of insulting a group and inciting discrimination on grounds of race

In March 2014, Geert Wilders, Member of Parliament and chairman of the 'Party for Freedom' (PVV) asked his followers at a party event whether they wanted 'more or less Moroccans' in their own city and in the Netherlands. When the crowd chanted 'less, less, less!' he responded: 'Then we will arrange it'.

Racial or ethnic origin

The Public Prosecutor initiated criminal proceedings against Wilders on the basis of Article 137c of the Criminal Code, which prohibits insulting a group of people on grounds of, among other things, their race, and Article 137d, which covers incitement to hatred and discrimination on that ground. The penalty requested was a 5000 Euro fine.

On 9 December 2016, the District Court of The Hague found Wilders guilty of insulting a group based on grounds of race and of inciting discrimination on this ground.[82] The Court first noted that according to established Dutch case law, the legal definition of 'race' is to be interpreted in light of the broad definition of racial discrimination contained in the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and thus includes 'race', 'colour', 'descent' and 'ethnic origin'. According to the Court, when Wilders used the term 'Moroccans', which may technically be perceived as nationality, he used it as an ethnic designation, referring to their common origin. The Court then considered that Wilders had singled out an entire group of citizens, which he considers to have fewer rights to reside in the Netherlands. This is insulting to the entire group. In addition, the Court held that the deliberate, inflammatory character of the way in which Wilders made his statements and their context incited others

82 District Court of The Hague, 9 December 2016, ECLI:NL:RBDHA:2016:15014.

to discriminate against people of Moroccan origin. However, the Court found insufficient evidence for incitement to hatred against Moroccans.

The Court rejected the claim that a conviction would violate the right to freedom of expression (Article 10 ECHR) as this freedom is not absolute and was justifiably restricted in the case at hand. The Court did not impose a fine.

Finally, the Court considered that it was most important to highlight that Wilders had crossed a line, and that justice was therefore done by the judgment as such. Consequently, no fine was imposed. Both Wilders and the Public Prosecutor have appealed the verdict.

Internet source:
https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014.

Civil-law notary discriminates by charging additional costs to hearing-impaired client

Disability

A hearing-impaired woman was charged with additional costs by a civil-law notary firm when she indicated she would bring along a writing interpreter to help her conduct business with the civil-law notary. The woman provided for the interpreter herself, but the firm argued that doing business with her would be more time-consuming. The woman subsequently complained to the Dutch equality body, the Netherlands Institute for Human Rights (NIHR). She invoked the Act on Equal Treatment on Grounds of Disability and Chronic Illness (DDA), the scope of which was extended to include the field of Goods and Services in June 2016 in parallel with the ratification of the Convention on the Rights of Persons with Disabilities (see above).

The NIHR found that the civil-law notary firm had violated the duty of reasonable accommodation of the DDA, which was extended to include the field of goods and services. It held that there was no sufficient evidence that the additional time needed would pose a disproportionate burden on the firm.[83]

Internet source:
https://mensenrechten.nl/publicaties/oordelen/2016-136/detail.

POLICY DEVELOPMENTS

The Netherlands Ombudsman for Children considers Black Pete to contribute to discrimination

Racial or ethnic origin

In response to several complaints, the Netherlands' Ombudsman for Children issued a report regarding the alleged discriminatory and stereotypical features of the figure of Black Pete, who is part of the traditional Saint Nicholas (*Sinterklaas*) festivities. These child-focused festivities are perceived to belong to the core of Dutch national identity. Traditionally, Black Pete has a black face, thick red lips and curly hair. This representation has met with increasing criticism as lacking proper respect for minority groups of non-Dutch ethnic origin and as enhancing discrimination against these groups.

In September 2016, the Netherlands Ombudsman for Children released a report endorsing this criticism by stating that Black Pete represents a caricature and provides a basis for exclusion and discrimination of coloured children. As such it is incompatible with the right to equal treatment and protection against discrimination as guaranteed by the Convention on the Rights of the Child. The Children's Ombudsman concluded that the figure of Black Pete must be adjusted to ensure coloured children do not experience

83 NIHR Opinion 2016-136 of 9 December 2016.

such negative effects and to guarantee that all children feel safe and comfortable in celebrating *Sinterklaas*. To facilitate this the Ombudsman specifically called on parents and schools to work together for change and to include children in this endeavour.

The report fuelled the fierce debate on the figure of Black Pete that has been on-going in the Netherlands for several years, and caused the Ombudsman for Children to receive many hate mails and even serious threats to her life. It is reported that she will file charges with the relevant criminal authorities.

Internet source:
The report 'Kinderombudsman: Zwarte Piet vraagt om aanpassing' (Children's Ombudsman: Black Pete requires adjustment', can be found at:
https://www.dekinderombudsman.nl/70/ouders-professionals/nieuws/kinderombudsman-zwarte-piet-vraagt-om-aanpassing/?id=667.
(last accessed 4 October 2016).

CEDAW urges the Netherlands to improve the position of working women

Following the meeting between the UN Committee on the elimination of discrimination against women (CEDAW) and the Minister of Education (gender equality is a task of the Ministry of Education) on 10 November 2016, CEDAW presented a number of recommendations to the Dutch Government.

CEDAW positively evaluated the National Action Programme against discrimination, the ratification of the Istanbul Convention and the conference the Government organised together with NGOs about the follow-up on CEDAW's recommendations. CEDAW is worried, however, about the underrepresentation of women in decision-making in politics, business and academics. Furthermore, CEDAW asked the Dutch Government to revise the Media Act in order to abolish stereotypes about women and to finance awareness programmes in this respect.

More specifically, CEDAW urged the Netherlands to grant a benefit to all self-employed women who did not receive maternity benefits in the period between August 2004 and June 2008. The Government has refused to do so until now, despite earlier recommendations by CEDAW in this respect. The social securities authorities have decided to appeal a judgment by the Administrative Court Mid-Netherlands in which the Court ruled that the State had violated the UN Convention on women's rights by not granting these maternity benefits. CEDAW once again asked the Dutch Government to take a different stance on this matter.

With respect to violence against women, CEDAW recommended training the police and prosecution officers to identify, examine and prosecute gender-related violence. CEDAW also expressed the wish to receive specific information about the situation in the Caribbean part of the Netherlands. In addition, the Committee asked the Government to evaluate victim support and to provide free legal aid to victims of domestic violence.

In the field of education, a point of concern is the fact that stereotyping and structural limitations may withhold girls from choosing technical studies. Attention is also needed for women who try to combine education with taking care of children.

In order to create equal opportunities for women in the labour market, CEDAW asked the Government to address the causes of the decrease in the use of childcare. Furthermore, men should be encouraged to take parental leave and to take part, on an equal footing with women, in household tasks and the care of children. CEDAW specifically requested information about the participation in employment of migrant women and asked the Government to report within two years on its efforts to examine, prosecute and penalize pregnancy discrimination.

Following the CEDAW recommendations, Members of Parliament asked questions about the refusal of the Government to grant maternity benefits to self-employed women and about the approach to domestic violence in the Caribbean part of the Netherlands. In February 2017, a conference was organised by the Ministry of Education about the recommendations.

In many respects CEDAW is positive about the Netherlands, but there are also areas of concern. Specific attention was paid to the matter of the self-employed women who did not receive maternity benefits between August 2004 and June 2008. This matter is important for CEDAW as earlier recommendations by the Committee were ignored by the Dutch Government, which naturally is not very respectful towards CEDAW. Rather, it shows that the Government does not attach much importance to CEDAW's recommendations if they do not fit with its own point of view.

Other subjects, such as the underrepresentation of women in decision making and the work-life balance of male and female employees are already on the Government's agenda, but the questions by CEDAW may help to keep them there. In other fields, such as the combination of education and taking care of children, legal aid for victims of domestic violence and the decreasing use of childcare, the Government is not very active, so it is to be hoped that CEDAW's comments can be a catalyst for action.

Internet sources:
https://www.mensenrechten.nl/berichten/vn-vrouwenrechtencomit-nederland-moet-de-positie-van-vrouwen-verbeteren, accessed 20 December 2016.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1027&Lang=en, accessed 20 December 2016.

NO Norway

CASE LAW

Discrimination of pregnant employee

Gender

An employee on an expat contract was 'forced' back to a permanent contract in Norway whilst she was pregnant. The employee suffered an economic loss due to the transformation of the contract. A unanimous Tribunal found that she had been the victim of direct discrimination in violation of the Gender Equality Act (1978) Section 3 because of pregnancy. The Tribunal found no evidence for reasons other than the pregnancy that the employee had had her expat contract withdrawn. There was therefore no doubt that the woman had been placed in a less favourable position than if she had not been pregnant, see Section 3 of the Gender Equality Act.

The employee had been employed by a Norwegian company (belonging to a very large international group) in June 2007, working abroad on an expat contract. She returned after her first parental leave in June 2010. In December 2010, she informed her employer that she was pregnant again with her due date in late June 2011. In February 2011, she received a notice of termination of her expat contract and at the same time she received a job offer for a permanent position in Norway and under Norwegian terms starting from 1 May 2011.

The decision highlights the important principle that a pregnant employee should not be treated less favourably than a non-pregnant employee. The Tribunal cannot award any damages under current legislation, but a decision by the Tribunal often helps in negotiations with the employer.

Internet source:
http://www.diskrimineringsnemnda.no/media/1794/endelig-vedtak-i-sak-6-2015-2.pdf,
accessed 14 February 2017.

First court case penalising a refusal to provide services because of religion

In October 2015, the claimant was refused service by a hairdresser because she was wearing a hijab. The parties disagreed as to exactly what was said, but the service was refused and the hairdresser was ordered by the police to pay a fine of approximately EUR 870 (NOK 8 000). As the respondent refused to pay the fine, the case was taken to court by the public prosecutor. The court of first instance found that the respondent had discriminated on the ground of religion, and ordered the payment of a fine of approximately EUR 1087 (NOK 10 000) and of approximately EUR 543 (NOK 5 000) in legal costs to the State.[84]

Religion or belief

This is the first court case in which a fine was imposed for discriminatory denial of services because of religion. The case received wide media coverage nationally, and was effectively posted through social media, and has as such been effective in raising awareness among a wider audience on the existence of the non-discrimination clause with regard to the provision of goods and services.

POLICY DEVELOPMENTS

Government proposal for re-organisation of Equality Ombud and Equality Tribunal

The Minister of Children and Family affairs initiated in 2015 an assessment of the current set-up and structure of the national equality bodies – the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal, as regulated in the specific act governing these bodies. A new legal proposal was sent for public hearing on 19 October 2016 in which a number of changes to this act is proposed.

All grounds

A key feature of the revised act is the reorganisation of the roles of the Equality Ombud and the Equality Tribunal. The proposal suggests the transfer of the individual complaint mechanism from the Equality Ombud to the Equality Tribunal, so that individual complaints would be handled by the Tribunal only. The Ombud would maintain its current role of proactively promoting equality and combating discrimination, by producing independent surveys, reports and recommendations. The Ombud would also continue to monitor that Norwegian law and administrative practice are in accordance with Norway's obligations pursuant to the CEDAW, CERD and CRPD. The Ombud would also continue to have legal standing to bring discrimination complaints to court on behalf of identified victim(s) or to intervene in legal cases concerning discrimination, as co-counsel or amicus curiae.

The Equality Tribunal would continue to handle individual complaints, but would be the only administrative complaint mechanism. The Tribunal would be given powers to award redress/compensation for non-monetary damage in cases of discrimination. With the aim of avoiding unjustified or unnecessary complaints, the proposed law would introduce a fee for all claimants of approximately EUR 55 for the Tribunal to handle the case. A practical new proposal is that a complaint to the Equality Tribunal would interrupt limitation periods for claims, and that decisions of the Tribunal would be directly enforceable in cases where compensation has been awarded. Despite these positive changes, it is unfortunate that the proposal does not include the appointing of full-time judges to lead the work of the Tribunal, which will remain to exist as a collegiate part-time body, assisted by full-time staff.

84 Judgment of 9 September 2016, Jæren tingrett (court of first instance) between the prosecutor and A in case number 16-096260-MED-JARE.

Internet source:
https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf (accessed 22 October 2016).

First government strategy against hate speech 2016-2020

Racial or ethnic origin

Religion or belief

Disability

Sexual orientation

The first government strategy against hate speech for the period 2016-2020 was presented on 21 November 2016, following two years of dialogue with civil society. The strategy aims to create arenas for dialogue, tolerance and awareness about the consequences of hate speech to make sure that everyone may participate in the public dialogue and move freely in public spaces without being subjected to hate speech.

The strategy partly builds on three reports provided by the Norwegian Institute for Social Research: 1) on the extent of hate speech on the Internet; which groups in society are particularly vulnerable to hate speech on the Internet; what media/platforms are used to promote hate speech; 2) research about hate and discrimination; and 3) the demarcation between the liberty of free speech and the penal protection against hate speech. A research report on the nature, extent and consequences of hate speech against people with disabilities is forthcoming.

The strategy contains 23 concrete activities, among them to facilitate increased attention by the police and judiciary by ensuring that hate speech be addressed, investigated and brought before courts. National guidelines will be produced to ensure that the police records and publishes statistics on hate speech. The Government will also consider how the correspondence between the penal protection against discrimination and legislation prohibiting discrimination regarding gender, gender identity and gender expression may be improved.[85]

Internet source:
https://www.regjeringen.no/contentassets/72293ca5195642249029bf6905ff08be/hatefulleytringer_web.pdf and https://www.regjeringen.no/no/aktuelt/oker-innsatsen-mot-hatefulle-ytringer/id2520887/ (accessed on 1 December 2016).

PL Poland

LEGISLATIVE DEVELOPMENTS

New 'pro-life law' provides benefits for mothers of disabled children

Gender

Disability

On 4 November 2016, the new 'pro-life law' was adopted by Parliament. It introduces special rights for pregnant women with regard to access to medical care services, as well as several other instruments of family policy. In particular, it guarantees a one-off benefit of approximately EUR 900 (PLN 4 000), regardless of income, for every woman who gives birth to a child diagnosed with severe, irreversible disability, or an incurable disease endangering the child's life, which was caused in the prenatal phase or during delivery. The benefits will be granted to the parents or care-givers of the child, if a specialist doctor (gynaecologist, obstetrician, neonatologist, perinatologist) has diagnosed such disability or disease.

In addition, pregnant women and children up to the age of 18, with such diagnosed disabilities or diseases, will be entitled to use medical services under privileged conditions. These privileged provisions include exemptions from waiting lists and access services such as; prenatal diagnosis; specialist care;

85 Gender, gender identities, gender expression and age are not covered by the criminal protection in the criminal code.

hospital treatment; therapeutic rehabilitation; supply of medical devices; palliative and hospice care; and lactation support, especially with regard to mothers of premature children. Special family assistants are available to guide eligible patients through the entire support system. They will be responsible for the coordination of the available means of support.

The proposed changes could be assessed positively, as a first step towards the improvement of the situation of disabled children and their families, if it were not for the political context in which the new law was adopted. However, it raises justified fears that this law constitutes the first step towards stronger restrictions of the abortion law, especially by abolishing embryo-pathological indications for legal termination of a pregnancy. These concerns are confirmed by the fact that the drafters of the law failed to provide for any support for children in cases where the disability has been diagnosed after the prenatal phase or directly after birth.

The idea of a one-off benefit, without any announcement of plans to increase the regular periodical benefits for persons taking care of sick and disabled children, which in Poland are very low, should be assessed negatively. The new law also lacks systematic solutions, which have been requested for a long time, enabling parents of disabled children to reconcile work and care for their children.

Internet source:
http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=968.
http://wyborcza.pl/7,75398,20922298,rzad-cztery-tysiace-zlotych-kiedy-dziecko-urodzi-sie-z-uposledzeniem.html?disableRedirects=true, accessed 12 December 2016.

Reinstating different retirement ages for men and women

The Law of 16 November 2016 on the amendment of the Law of 17 December 1998 on retirement and disabilities benefits from the Social Security Fund[86] and certain other laws[87] includes regulations aiming to return to the former retirement age scheme in the public social security system – 60 for women and 65 for men (Article 24 item 1). It also introduces an analogical change of the retirement age for farmers, as well as a change of the retirement age of state prosecutors and judges (it is currently 67 years, both for women and men, and is now to be reduced by the draft law to 65 years). The law also introduces other changes, which are inseparably linked to the implementation of this regulation, e.g. regarding contribution periods (contribution and non-contribution periods amounting to 20 years for women and 25 years for men). It also provided for the abolishment of partial retirement. The new law will enter into force on 1 October 2017.

Gender

In the Polish retirement system, for many decades the retirement age was differentiated with regard to sex, at 60 for women and 65 for men. According to the Law of 11 May 2012, which is an amendment of the Law on retirement and disabilities benefits from the Social Security Fund and certain other laws, the higher retirement age, equal for women and men, was supposed to be introduced in successive steps. The final retirement age of 67 would be introduced on 1 October 2040 for women, and 1 October 2020 for men. The change of the retirement age in 2012 raised constitutional concerns. However, Article 67 Section 1 of the Constitution does not provide any provisions regarding the retirement age, which means that it may be specified in a regular law. This was already confirmed by the Constitutional Court in its ruling of 7 May 2014, case No. K 43/12. In another ruling, of 15 July 2010, case No. K 63/07, the Constitutional Tribunal noted that in constitutional case law the different retirement ages for women and men are considered as so-called privileging compensation (affirmative action), aiming at reducing actual inequalities with regard to sex. It has to be noted that current retirement scheme is based on the ground rule that the amount of the future benefits is the direct derivative of the amount of contributions paid. Therefore, the lowering of the retirement age will significantly influence the amount of the future

86 Unified text: JoL of 2016 Item 887.
87 The Law of 16 November 2016 published: JoL 2017 Item 38.

monthly benefits because it will cause a reduction of the sum of aggregated contributions, additionally increased by the extension of life expectancy of retired persons. This was one of the reasons that the European Commission recommended in 2014 to change the retirement age, according to the longer life expectancy, equalisation of the retirement age for women and men, and the reduction of the possibilities for an earlier exit from the labour market towards the benefits sphere. The introduced amendment ignores these recommendations. and actually contradicts them. Therefore, in its recommendation of 22 May 2017, the Commission stresses that 'a higher effective retirement age is crucial for economic growth, the adequacy of future pensions and the fiscal sustainability of the pension system' (motive 11 of the preamble). This suggests that the Council recommends Poland to 'Ensure the sustainability and adequacy of the pension system by taking measures to increase the effective retirement age and by starting to reform the preferential pension arrangements' (Recommendation No. 2)[88].

Internet sources:
http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=62,
Opinia prawna sprawie prezydenckiego projektu ustawy o zmianie ustawy o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych oraz niektórych innych ustaw [Legal opinion on the presidential draft law amending the law on retirement and disabilities benefits from the Social Security Fund and certain other laws]. BAS-WAL-184/15.
http://orka.sejm.gov.pl/rexdomk8.nsf/Opdodr?OpenPage&nr=62, accessed 16 December 2016.

RO Romania

LEGISLATIVE DEVELOPMENT

Ministry of Education takes action to put an end to Roma segregation in schools

Racial or ethnic origin

On 22 December 2016, the Ministry of National Education and Scientific Research issued an order adopting an Action Plan on school desegregation, and a Framework Order for prohibiting school segregation in primary and secondary education. Both documents cover the following protected grounds: ethnic origin, mother tongue, disability and/or special educational needs, socio-economic status of the families, residential environment or educational achievement of the beneficiaries.

The current Law No. 1/2011 on National Education does not contain a definition of segregation, contrary to the previous Education Law. Cases of alleged school segregation are regularly brought before and examined by the national equality body, the most recent case dating from December 2016.[89]

The focus lies on ensuring both equal access to all forms of education and quality of education for all children. Segregation is prohibited on all listed grounds and defined as a serious form of discrimination resulting in 'unequal access of children to quality education, an infringement of the exercise in equal conditions of the right to education as well as of human dignity.'

Segregation in education on grounds of ethnic origin is defined in Article 4 of the Framework Order as 'physical separation of kindergarten children, pre-schoolers or pupils (in primary and secondary education) belonging to an ethnic group in the educational unit/group/classroom/ building/last two rows/other facilities, so that the percentage of the kindergarten children, pre-schoolers or pupils belonging to the

88 European Commission, Brussels, 22.5.2017 COM(2017) 520 final, https://ec.europa.eu/info/sites/info/files/2017-european-semester-country-specific-recommendations-commission-recommendations_-_poland.pdf.

89 NCCD decision in case *Centrul de Advocacy şi Drepturile Omului v. Şcoala 'Bogdan Petriceicu Haşdeu' şi Inspectoratul Şcolar Judeţean (IŞJ) Iaşi*, finding that Roma pupils were placed in a different building, and imposing the school with a fine of EUR 668 (RON 3,000) and the school inspectorate Iasi a fine of EUR 1113 (RON 5,000).

ethnic group from the total of the pupils [...], is disproportionate when compared to the percentage of the children belonging to that ethnic group in the total population of that specific age in the educational cycle in that specific administrative-territorial unit.' As an exception to the prohibition of ethnic segregation, the Framework Order allows for groups, classes, educational units (schools) enrolling 'mostly or only' children belonging to an ethnic group, 'with the purpose of teaching in the mother tongue of that group or in a bilingual system.' The Framework Order defines in similar terms in Article 6 segregation on grounds of disability and/or special educational needs (allowing as an exception special education units, groups or classes). Segregation is similarly defined on the other grounds.

A National Commission for Desegregation and Educational Inclusion is supposed to be established with specific tasks and the Framework Order also covers specific tasks for the county-level school inspectorate. Specific competences are established for a 'school commission for preventing and eliminating violence, corruption and discrimination in the educational environment and for promoting interculturality in the field of preventing and eliminating any form of school segregation.' More specific measures are provided in the Action Plan including: amending the legal framework, increasing the quality of the educational services of pre-university units in Romania, professional training of human resources, developing a system of stimulating human resources from segregated educational units, developing complementary measures to prevent and combat discrimination and school segregation, increasing the quality of educational services by ensuring the ethnic relevance and a positive self-image of Roma children.

Failure to observe the provisions of the Framework Order 'leads to disciplinary and patrimonial liability', although no specific sanctions are indicated. The refusal of a school to monitor segregation or to report required data and progress, or the refusal to elaborate or implement a desegregation plan triggers 'disciplinary, administrative, civil or criminal liability.'

Although it lacks the methodology which would allow the operationalization of the Action Plan and the actual enforcement of the Framework Order, the two documents respond to legislative and actual needs. Further clarification is needed, particularly in relation to the exceptions embedded in the prohibition of segregation and the additional protected grounds of 'socio-economic status of the families, residential environment or educational achievement of the beneficiaries'.

Internet source:
http://edu.ro/politici-publice-%C3%AEn-educa%C8%9Bie-pentru-prevenirea-combaterea-%C8%99i-interzicerea-segreg%C4%83rii-%C8%99colare (accessed 10 January 2017).

CASE LAW

National equality body decision on social housing criteria in Bucharest

The National Council for Combating Discrimination (NCCD) initiated an ex-officio investigation against the institution of Mayor of Bucharest and the Bucharest Municipal Council, looking into the criteria for social housing. The criteria are based on the allocation of points for different categories of people, such as four points for persons with disabilities compared to 10 points for persons with higher education and 15 points for veterans and war widows, revolutionaries (persons who fought in December 1989) and former political detainees.

Disability

The NCCD found that the social housing criteria represent a de-facto limitation of the access of persons with disabilities to public housing.[90] Specifically comparing the legal duties of the municipal authorities with regard to persons with disabilities on the one hand and persons who fought in December 1989,

90 NCCD decision No. 349 of 4 May 2016.

war veterans and war widows on the other, the NCCD concluded that the criteria amounted to direct discrimination on the ground of disability.

The NCCD underlined that the respondents did not provide any legitimate aim in order to justify the selection of the criteria and the number of points assigned for each category and thus failed to reverse the burden of proof. Given the failure of the local authorities to provide information on the number of decisions regarding social housing allocations since 2014, the NCCD also found that the discrimination has continued.

The institution of Mayor of Bucharest was ordered to pay a fine of approximately EUR 2 500 (RON 10 000) and to publish the decision in the media. The NCCD also recommended the respondent to revise the relevant documentation and decided to monitor the situation for six months.

High Court of Cassation and Justice provides interpretation regarding material competence for court actions seeking remedies for alleged discrimination

All grounds

An appeal was brought before the High Court of Cassation and Justice to interpret issues of law regarding the material competence for court actions regarding reparation of damages sought by victims of discrimination. The material competence to examine such actions had been interpreted in three different ways by the courts: as belonging to the first-instance courts dealing with general civil law; to the tribunals; or to the level and type of jurisdiction linked to the specificity of the contract, i.e. labour or administrative courts for cases of discrimination in employment etc. These diverging decisions justified the intervention of the High Court of Cassation and Justice.

The Court concluded that the competent courts for actions regarding reparation of damages in cases of discrimination are the civil courts (court of first instance or tribunal, depending on the subject and the value of the litigation based on Articles 94, 95 and 99 of the Civil Procedure Code). Exceptionally, in cases of legal relations regulated by special legislation such as labour, administrative or competition law, special jurisdictions as provided by the relevant legislation will be competent.[91]

Internet source:
http://lege5.ro/en/Gratuit/gezdgmrygeyq/decizia-nr-10-2016-privind-examinarea-recursului-in-interesul-legii-formulat-de-colegiul-de-conducere-al-curtii-de-apel-brasov-cu-privire-la-interpretarea-si-aplicarea-unitara-a-dispozitiilor-art-27-a.

Equality body sanctions Sibiu City Hall Office for proposal to relocate Roma

Racial or ethnic origin

In 2014, the Prefect Office initiated correspondence with Sibiu City Hall to find a solution to improve living conditions for Roma in illegal housing in a certain area (Zăvoi – Câmpșor). The correspondence continued for two years without any concrete measures being taken. On 3 March 2015, Sibiu City Hall proposed the relocation of Roma into rural areas explaining that in this way 'each could start a household and benefit from the results of their labour.' The Sibiu Prefect notified, on 3 March 2016, the National Council for Combating Discrimination (NCCD). The complaint of the Prefect was joined with a case initiated ex officio by the NCCD based on media reports.

The NCCD found that Sibiu City Hall's proposal to relocate Roma families to rural areas was aimed at modifying the ethnic composition of the area and therefore amounted to racial discrimination.[92] Sibiu City Hall argued in its defence that they had made various efforts to assist the Roma and accommodate their

91 High Court of Cassation and Justice, Interpretation decision No. 10 of 23 May 2016 – appeal on points of law.
92 Decision No. 419 of 15 June 2016 in file No. 171/2016, 4A/2016, *Instituția Prefectului Sibiu, Consiliul Național pentru Combaterea Discriminării v. Instituția Primarului Sibiu*.

situation. These efforts included assistance in obtaining ID cards, social benefits, and the organisation of cultural events for the promotion of Roma culture. In addition, City Hall argued that nothing had been decided on the basis of the allegedly discriminatory proposal, and that the complaint was only filed one year after the statement was made. City Hall further argued that they had received complaints from citizens about the 'uncivilized behaviour of Roma'; that 95% of Roma do not work with legal contracts; and that no one had been forced to leave their house. NCCD however ordered Sibiu City Hall to pay a fine of approximately EUR 1200 (RON 5 000). The decision was contested in court by Sibiu City Hall and a decision is pending.

POLICY DEVELOPMENTS

Report of the Special Rapporteur on extreme poverty and human rights on visit to Romania

Racial or ethnic origin

Age

Disability

In July 2016, the UN Special Rapporteur on extreme poverty and human rights communicated a report based on his visit in Romania in November 2015, to the Romanian authorities. The report highlights 'systemic and deep-rooted discrimination against the extremely poor, particularly the Roma' as well as against children and adults with disabilities. It is highly critical and challenges 'the official state of denial about poverty and inequality' while encouraging a paradigm shift in looking at social protection not as charity but as a right. The UN Special Rapporteur focuses on three of the most vulnerable categories of the population: the Roma, children and persons with disabilities. The report is an in-depth analysis of housing, education, including 'special education', access to employment, the 'social safety net' and the conditions for access to cash transfers and social services.

The recommendations made to the Romanian authorities regard acknowledging the severe discrimination against Roma and taking 'special measures to assist the Roma population… in areas such as education, health care, employment and housing', collecting equality data, providing adequate procedural safeguards against forced evictions, and including Roma as a category of priority beneficiaries in the allocation of social housing. With regard to persons with disabilities, the report recommends adopting a definition of 'person with disabilities' harmonized with the UNCRPD, to encourage inclusive education 'and ensure that special schools are used only as a last resort.'

Internet source:
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/31/Add.2.

National Strategy for 2016-2020 and Operational Plan on disability

Disability

After more than three years of debates and delays, and significant criticism from relevant NGOs, on 14 September 2016, the Romanian Government adopted Government Decision No. 655 for the approval of the National Strategy 'A Society without Barriers for Persons with Disabilities' 2016-2020 and the Operational Plan for the Implementation of the Strategy.[93]

The Strategy declares that it aims to ensure the implementation of the UNCRPD and defines disability as 'a generic term for deficiencies/impairments, limitations of the activity and restrictions in participation. The concept reflects the negative aspects of the interaction between the individual, who has a health problem, and environment and personal factors the person is living in.' Persons with disabilities are defined as 'the persons with physical, mental, intellectual or sensorial deficiencies which are long lasting, deficiencies which, in interaction with various barriers, might limit full and effective participation of the persons in the society, in equal conditions with others.'

93 Government Decision 655 for the approval of the National Strategy 'A Society without Barriers for Persons with Disabilities' 2016-2020 and the Operational Plan for the Implementation of the Strategy of 14 September 2016.

The general objectives of the Strategy include: promoting accessibility in all areas; ensuring full participation of persons with disabilities; eliminating discrimination and ensuring equality; ensuring access to a work environment which is open, inclusive and accessible; promoting education and professional training; promotion and protection of the right of persons with disabilities to live in decent conditions; equitable access to services and health facilities, with a particular attention to gender aspects; and developing policies for persons with disabilities based on statistical data. The proposed measures and specific indicators are listed in the Operational Plan for the Implementation of the Strategy.

The funding of the objectives included in the Strategy will be provided from the state budget although the Operational Plan for the Implementation of the Strategy mentions 'European funds' as the primary source for most measures.

The Ministry of Labour is supposed to issue an order within 120 days of the entry into force of the Strategy (22 September 2016), providing for the monitoring instrument of the Strategy. The National Authority for Persons with Disabilities is supposed to publish an annual report on the implementation, a first report having been planned for the end of 2017.

Internet source:
http://anpd.gov.ro/web/strategia-nationala-o-societate-fara-bariere-pentru-persoanele-cu-dizabilitati-2016-2020-si-planul-operational-privind-implementarea-strategiei-nationale/.

RS Serbia

LEGISLATIVE DEVELOPMENT

Law on combatting domestic violence

Gender

In its progress report for Serbia for 2016, the European Commission established that the CoE Istanbul Convention needs to be adequately implemented, and the protection of women against all forms of violence needs to be strengthened.[94] In order to fulfil its international obligations, as well as to protect women from domestic violence, on 23 November 2016, the National Assembly adopted the first Law on the Prevention of Domestic Violence. Its purpose is to secure effective prevention of domestic violence and to provide urgent, adequate and effective protection and support to victims of domestic violence. Domestic violence is broadly defined to include physical, sexual, psychological, or economic violence. Victims of domestic violence have the right to information, the right to free legal aid, and the right to an individual plan of protection and support. The Law also regulates data records on cases of domestic violence and data protection.

The Law prescribes that the following state authorities and institutions are in charge of the prevention of domestic violence and of providing support for victims: the police, public prosecutors, courts, and centres for social work. The role of each authority is stipulated in more detail, but it is important to emphasize that pubic officers working in these institutions need specialised training, to be prepared and carried out by the judicial academy. They all have an obligation to appoint a liaison officer who communicates with other officers to exchange data and other relevant information.

The Law regulates the procedure for protecting victims of domestic violence, including risk recognition and risk assessment. The Law includes an important provision, Article 6, prescribing that if judges or

94 European Commission, Serbia 2016 Report, SWD (2016) 361 final, 9 November 2016, p. 63, available at http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_serbia.pdf.

public prosecutors do not act within the time limit stipulated by the law, this lack of action will constitute a disciplinary offence. However, the most important provision is Article 17 which stipulates that the police have the authority to handle urgent matters including temporary removal from the home, and enforce a temporary restraining order prohibiting the offender from contacting or approaching the victim. This urgent measure can be issued for 48 hours, while the court can extend it for an additional 30 days.

Public authorities are obliged to act in a timely manner, and to provide legal aid, psychosocial and other support for recovery, empowerment and self-reliance for each victim. Also, relevant information and help is provided by other institutions dealing with childcare, social protection, education and health, as well as local bodies for gender equality. In addition, a coordination and support body has to be established for each of the 58 basic prosecution offices which cover a territorial area, with the aim to prepare an individual plan of protection and victim support. The implementation of the Law is monitored by the Council for the Prevention of Domestic Violence, which is a government body, whose composition and methods of work will be further prescribed by by-laws.

The Law will enter into force eight days after its publication in the Official Gazette of the Republic of Serbia, but will be implemented from 1 June 2017.

Internet source:
http://www.parlament.rs/upload/archive/files/cir/pdf/zakoni/2016/2675-16.pdf.

POLICY DEVELOPMENT

Regional cooperation established by equality bodies in South East Europe

On 16 November 2016, the Serbian Commissioner for the Protection of Equality organised 'The First Regional Forum of South-East Europe Equality Bodies', with the aim to establish an effective model of regional cooperation between equality bodies of South East European (SEE) countries, in order to promote activities aimed at human rights protection and equality.

All grounds

A Statement on cooperation was signed during the conference between the following independent bodies: the Commissioner for the Protection of Equality (Serbia), the Commissioner for the Protection from Discrimination (Albania), the Ombudsman for Human Rights (Bosnia and Herzegovina), the Ombudsperson for Gender Equality (Croatia), the Ombudsperson for Children (Croatia), the Ombudsperson for Persons with Disabilities (Croatia), the Ombudsman (Croatia), the Commission for Protection against Discrimination (FYR of Macedonia), and the Protector of Human Rights and Freedoms (Montenegro). They all agreed that better regional cooperation among equality bodies is necessary to build more tolerant societies and more efficient mechanisms for protection from discrimination in the region.

The representatives of equality bodies particularly emphasised that it is necessary to work on improving the visibility of equality bodies and on further strengthening their capacities, through dialogue and exchanging experiences. They agreed that priorities in joint actions and cooperation will be given to the suppression of discrimination and the promotion of and support to equality of all people.

Internet source:
http://www.equineteurope.org/The-First-Regional-Forum-of-South-East-Europe-Equality-Bodies.

Perception of citizens regarding discrimination in Serbia

All grounds

The Commissioner for the Protection of Equality (CPE) ordered a report to be written on the perception of citizens regarding discrimination. This was the third time this type of research was performed on discrimination (the first study was conducted in 2010, and the second in 2013). The study was carried out by the Agency Factor Plus in June 2016, using a sample population of 1200 citizens and covered the whole territory of the Republic of Serbia.[95] The report was presented to the public on 21 December 2016.

The study shows that only 25 % of the respondents understand the meaning of discrimination considering it to be unequal treatment based on personal characteristics. Among those who did not answer correctly what is considered to be discrimination, 6 % link it to the inability to exercise some of the rights, and 8 % link it to violence, regardless of personal characteristics. Around 66 % of citizens are aware that discrimination is prohibited by law, while 51 % are aware that there is a specialized institution dealing with discrimination. A total of 41 % of the respondents know the exact name of the institution and the current Commissioner, which demonstrates a great increase in visibility of the institution which was established in 2010. However, awareness of the existence of the CPE is the lowest among citizens aged 15 to 19 (only 37 %), compared to 62 % for the group aged 50 to 59.

In 2013, 16 % of citizens answered that they believed to have been the victim of discrimination, in 2016 this was only 13 %. The greatest number of those that believe to have been the victim of discrimination are among the LGBT population (50 %), and members of national minorities (36 %). The number of citizens ready to report a case of discrimination increased compared to 2013, from 32 % to 63 % in 2016. In 2013, only 2 % were ready to report their case to the CPE and 10 % to the police. This number grew in 2016, where 18 % are ready to submit complaints to the CPE, and even 21 % to the police. Distrust of citizens in public institutions had reduced in 2016: where 29 % of citizens reported this to be the reason for not taking action in 2013, in 2016 this was 21 %. However, the greatest distrust has been identified among the elderly, who in 70 % of the cases will not take their case to public institutions. Education is also a relevant factor. Higher educated citizens more often mention the problem of complex procedures as a reason for not taking action, while less educated citizens tend to have a feeling of shame because of their exposure to discrimination.

The majority of citizens (43.5 %) believe that the presence of discrimination is at the same level as in 2013, while 62 % even believe that it is very much present or present.

Respondents believe that the most discriminated groups in Serbia are: Roma (23 %), LGBT (12 %), women (9 %), poor people (6 %) and national minorities (4 %). It is interesting to note that citizens with a lower income more frequently perceive women as particularly discriminated against, while citizens with a higher income have that perception of LGBTs.

The great majority of citizens believe that discrimination is very much present in the workforce (72.4 %), in the area of social protection (30.5 %), healthcare (25.2 %), education (23.2 %), the judiciary (17.7 %), and the media (11.5 %).

While citizens recognize hate speech in statements related to nationality, only 76 % recognized the following statement as hate speech: 'Homosexuals are barren trees that must be cut off and thrown into the fire'. Also, social distance is still very much present towards the LGBT population, as 27 % does not want to have LGBT co-workers, 34 % does not want to be friends with them, 47 % do not want to have LGBT teachers and 63 % LGBT partners. However, social distance is less present compared to 2012 in relation to acceptance of same-sex marriage (19 %) and a very close friendship with LGBT persons

95 Commissioner for the Protection of Equality, Report on survey: Attitude of citizens towards discrimination in Serbia (*Odnos građana i građanki prema diskriminaciji u Srbiji*), Belgrade, December 2016.

(12 %). On the other hand, social distance has increased in relation to migrants. While in 2013 almost 20 % did not accept migrants as Serbian citizens, in 2016 that number had increased to 31 %.

A total of 96 % of citizens believe that all public institutions must be accessible for persons with disabilities. Nevertheless, it is interesting to mention that lower educated people accept special measures, defined as supporting measures in the field of employment and education for members of groups that are in substantially unequal position compared to other citizens, in greater numbers (48 %) than those with a higher education (38 %).

The report contains a very comprehensive list of conclusions and recommendations that serve as a guide for the CPE in shaping future activities, as well as a proposed list of research that should be conducted in order to cast light on some of the research results.

Internet source:
http://ravnopravnost.gov.rs/izvestaj-o-istrazivanju-javnog-mnjenja/.

Slovakia SK

CASE LAW

District Court ruling finding that education of Roma children in a segregated Roma school does not constitute discrimination

Racial or ethnic origin

The City of Stara Lubovna operates a primary school in the city area Podsadek which has long been attended solely by socially disadvantaged Roma children from the nearby socially excluded Roma community. Non-Roma children living in this local area attend the other primary schools in the city. Due to insufficient capacity, the City Council and the Ministry of Education expanded the capacity of the school in Podsadek by adding a new modular building – a low-cost annex to the school consisting of metal containers.

The lawsuit was filed by the NGO Centre for Civil and Human Rights as an '*actio popularis* claim' against the State represented by the Ministry of Education and the city of Stara Lubovna. The claimant NGO argued that by failing to adopt effective measures to eliminate the segregation in the relevant primary school, the respondents violated domestic and international anti-discrimination legislation. Instead of adopting remedial measures to eliminate discrimination, they expanded the capacity of this primary school by adding a new modular building. According to the claimant NGO, this measure was inappropriate and maintained the segregation of Roma children.

The claimant requested the Court (i) to rule that the respondents violated the principle of equal treatment by not adopting sufficient preventive measures for the protection from discrimination; (2) to oblige the respondents to elaborate a desegregation plan within three months and to implement the desegregation measures within three years.

In October 2016, the District Court of Bratislava III dismissed the lawsuit, holding that the claimant NGO had not borne its burden of proof as it failed to present facts that could give rise to the assumption that the principle of equal treatment was violated. The Court stated that Roma children were not segregated in the school as they were enrolled there based on their residence in the relevant school district and not based on their ethnic origin. According to the Court, the claimant had not proved that education of Roma children in the given school was carried out on the ground of their ethnic origin and had not sufficiently specified the preventive measures that should be taken by the respondents. This could however be

explained by the lack of any possible preventive measures within the legal powers of the respondents which could influence the ethnic composition of the given area. In this respect, the Court concluded that ethnic diversity in schools cannot be guaranteed and influenced by state intervention.[96] The claimant NGO has filed an appeal.

Internet source:
https://www.poradna-prava.sk/sk/dokumenty/rozhodnutie-okresneho-sudu-v-pripade-v-pripade-verejnej-zaloby-proti-segregacii-romskych-deti-na-skole-v-starej-lubovni/.

Liability for discriminatory treatment in access to services

Racial or ethnic origin

The claimant was requested to provide confirmation that he was employed when he was trying to buy a fixed-price phone service from a mobile telephone operating company, while non-Roma customers in a comparable situation were not requested to do so. The evidence in this case was gathered via situation testing in cooperation with the NGO Centre for Civil and Human Rights.

The claimant filed a lawsuit with the District Court in Spišská Nová Ves against the mobile telephone operating company and also the company which provided the mobile telephone company's services under an agency contract at the relevant time. The claimant requested that the Court rule that there had been a violation of the equal treatment principle in his case, order the respondent to send him an apology and pay compensation for non-pecuniary damages caused by discriminatory treatment in the amount of EUR 3 319.39.

The District Court found that there had been discrimination on the ground of the claimant's Roma ethnic origin and ordered the respondents to provide an apology but dismissed the claim for non-pecuniary damages.[97] The respondents and the claimant appealed the decision, and the Regional Court in Kosice quashed the first-instance court decision by dismissing the claimant's claim. The Regional Court held that neither respondent could be held liable for the alleged discriminatory treatment, as it was an employee of the service provider who was responsible, but this service provider no longer has a contract with the mobile telephone operator. Its successor cannot be found responsible as the rights to human dignity and to protection from discrimination are personal rights. The mobile telephone operator did not have any direct contact with the claimant and could therefore not be held liable either.

In December 2016, the Supreme Court ruled on the claimant's extraordinary measure for review.[98] The claim was dismissed, as the Supreme Court followed the same legal opinion as the regional court regarding liability for discriminatory treatment. In addition to the Regional Court's reasoning, the Supreme Court noted that a violation of the principle of equal treatment has a personal nature and the employee of the company which provides services under a contract with the mobile telephone operator has an obligation to refuse to act in accordance with possible discriminatory instructions of the mobile telephone operator, which is why the mobile telephone operator could not be held liable. The Supreme Court also concluded that it did not agree with the legal opinion set by another regional court in a similar case in 2009, where a mobile telephone operator was held liable for discriminatory treatment.[99]

The claimant has submitted a complaint to the Slovak Constitutional Court, which has a right to quash the Supreme Court's decision.

96 District Court Bratislava III, *Centre for Civil and Human Rights against the Slovak Republic represented by the Ministry of Education and the city of Stara Lubovna*, 6 October 2016, File No. 11C/351/2015-387 (delivered on 12 December 2016). A summary of the case in English is available here: https://www.poradna-prava.sk/en/news/the-court-s-decision-in-a-case-of-school-segregation-of-roma-children-in-stara-lubovna-violates-the-international-law/.

97 District Court of Spišská Nová Ves of 17 May 2012, File No. 5 C 226/2005 – 544.

98 Supreme Court of the Slovak republic, I.H. against 1. XY Mobile operator company and 2. XZ Mobile company's service provider, of 8 December 2016, File No. 3 Cdo 405/2015 – 773 (delivered on 28 December 2016).

99 Regional Court in Presov of 25 August 2009, File No. 11 Co 90/2008.

Internet source:
http://www.supcourt.gov.sk/data/att/59378_subor.pdf.

Regional court dismisses appeal of Roma women claiming direct discrimination, harassment and victimisation in employment

Racial or ethnic origin

The claimant was employed in the administration of the municipal housing company. She claimed to have been discriminated against at her workplace on the ground of her Roma ethnic origin in March 2009 when – unlike non-Roma employees in comparable working positions – she was transferred to an inconvenient office room located in the basement, which caused her health problems. Later in 2010 her workplace was transferred to the segregated Roma ghetto where she was again placed in an inconvenient office room negatively impacting on her health. She also claimed that the employer did not grant her any bonuses and was harassing her, and that she suffered victimisation after she repeatedly complained to the employer about how she was treated.

The claimant filed a lawsuit with the District Court in Košice requesting the Court to order the respondent to refrain from discrimination, send a written apology, advertise the written apology in a local newspaper and pay compensation for non-pecuniary damages for discrimination in the amount of EUR 10 000. The District Court dismissed the claim[100] and the claimant appealed to the Regional Court.

On 13 December 2016, the Regional Court upheld the first-instance court judgment, concluding that the respondent had met its burden of proof and established that there was no violation of equal treatment.[101] The Regional Court rejected the claimant's argument regarding the comparator used by the first-instance court when assessing the alleged direct discrimination (non-Roma, working in a different position in the company). It also concluded that it had not been established that the claimant's health problems resulted from her having been transferred to a different office space, and that less favourable working conditions in these rooms were irrelevant for assessing the alleged discrimination.

In her appeal, the claimant had requested the Regional Court to refer the case to the CJEU for a preliminary ruling due to the first-instance court's dismissal of the claim alleging harassment due to the lack of a relevant comparator. The claimant found the identification of a comparator when assessing harassment clearly impossible and legally groundless as the Court should essentially consider the subjective perception of the victim and the direct impact on her. The Regional Court rejected the request for a referral to the CJEU reasoning that it was not necessary to resolve the issue of the requirement to identify a comparator when assessing harassment, because the evidence provided in this case by the respondent sufficiently disproved the alleged harassment.

Regarding the alleged victimisation, the Regional Court accepted the respondent's explanation that the claimant did not receive any bonus due to her long sick leave and not as a result of alleged victimisation.

The claimant has submitted a complaint to the Slovak Constitutional Court which is competent to overturn the Regional Court's decision.

100 District court in Košice, judgment No. 20C68/2012-350 of 8 September 2015.
101 M.V. against Municipal housing company of Košice from 13 December 2016 delivered on 10 February 2017, No. 2Co/657/2015-379.

SI Slovenia

POLICY DEVELOPMENT

New Equality Body Established and New Advocate Appointed

All grounds

Following the adoption of the new Protection against Discrimination Act passed on 21 April 2016, a new Advocate of the Principle of Equality (Mr. Miha Lobnik) was appointed at the National Assembly of Slovenia on 25 October 2016.[102] Since then the new Advocate has engaged in establishing the legal personality of the new independent body, setting up an organisational structure, hiring personnel, arranging for premises where the new body will work, and carrying out all other necessary tasks for the new body to be established. The budget of the new body is EUR 200 000 for 2017 (EUR 130 000 for human resources) and EUR 180 000 EUR for 2018.

The establishment of the new equality body was one of the main objectives of the 2016 Protection against Discrimination Act. The previous equality body consisted of only one civil servant who was employed at the Ministry of Labour, Family, Social Affairs and Equal Opportunities, which raised doubts regarding its independence and about sufficient institutional capacity to address all tasks as required by the Racial Equality Directive.

Internet source:
http://www.zagovornik.gov.si/si/informacije/osvescanje/novice/novica/date/2016/10/27/novi-zagovornik-nacela-enakosti/index.html.

ES Spain

LEGISLATIVE DEVELOPMENT

Extension of paternity leave from thirteen days to four weeks

Gender

Almost ten years after first establishing paternity leave in Spain, paternity leave has been extended from thirteen days to four weeks as of 1 January 2017.

When the Organic Law on Effective Equality, Law 3/2007 of 22 September 2007, first established a paternity leave of 13 fully paid days, it also established that this leave should be extended to four weeks within the following six years. However, the promised extension of paternity leave was repeatedly postponed due to the financial crisis. The extension of paternity leave has now been implemented in 2017, because the State Budget Act for 2017 did not receive approval at the end of 2016 due to a lack of parliamentary support. This meant that the previously proposed suspension of the entry into force of the extension of paternity leave, established in the State Budget Act for 2016, lost effect.

This unexpected entry into force of the four-week paternity leave raises many questions since it is unknown whether the regulation of paternity leave will be kept as it is, or whether it will change in any way. Current legislation (Article 48.7 of the Workers' Statute and Articles 22 to 30 of the Royal Decree 295/2009 of 6 of March 2009) establishes that paternity leave, independent of whether maternity leave is shared with the mother, applies in the case of birth, adoption or fostering, with the right to

102 Decision of the National Assembly of the Republic of Slovenia of 25 October 2016.

100 % of the previous contribution base (a reference that is used in the Spanish social security system which is usually equivalent to the worker's monthly salary). Paternity leave can be taken part time if so established by collective agreement, or if the employer accepts it. In the case of part-time paternity leave, the employee has to reduce his previous working hours by at least half. Although this leave is intended for the father, the provision is drafted in neutral terms, so as to be compatible with family structures where both parents are of the same sex. A minimum period of previous working time is required in order to have access to the related social security compensation: 180 days during the previous seven years or 360 days at any time.

Internet source:
Article 48.7 of the Workers' Statute, approved by Royal Legislative Decree 2/2015, of23 October 2015, https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430, accessed 25 January 2017.
Articles 22 to 30 of the Royal Decree 295/2009, of 6 March 2009 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2009-4724, accessed 25 January 2017.

CASE LAW

Supreme Court recognizes the right to maternity leave to a father who had a baby through a surrogacy arrangement

In its judgment of 19 October 2016 (Appeal Number 1650/2015), the Supreme Court confirmed the judgment of the Superior Court of Justice of Catalonia of 9 March 2015 (Appeal Number 126/2015),[103] which recognized the right to maternity leave of the father of a child who was born in a surrogacy agreement. Spanish law recognizes the right to maternity leave in the case of childbirth and in the case of adoption,[104] but does not expressly recognize the right to maternity leave in case of a surrogacy agreement. In fact, in Spain surrogacy arrangements constitute an unlawful activity. In the Spanish system, maternity leave is recognized to the mother in the case of childbirth, although she can transfer part of it to the father. In the case of adoption or foster care, either the mother or the father can qualify for maternity leave.

The event that gave rise to the judgment of the Supreme Court of 19 October 2016, was the surrogacy agreement between the complainant and his partner (both men), and a female North American citizen (the biological mother). The baby was born in the United States and it was registered in the Consulate of Spain as the son of both Spanish fathers, without any reference to the identity of the biological mother. The National Institute of Social Security refused to pay maternity-leave benefits since the case was not included in any of the two situations that give a right to it in Spain, which are childbirth (in which case the mother had to be identified) or adoption.[105] The judgment of the Superior Court of Justice of Catalonia of 9 March 2015, ruled that although maternity leave was not expressly recognized in Spanish legislation in the event of surrogacy agreements, the situation was similar to maternity leave in the case of adoption, which is recognized by Spanish legislation.

The National Institute of Social Security appealed to the Supreme Court on the grounds that the judgment of the Superior Court of Justice of Catalonia of 9 March 2015 was contrary to the Judgment of the CJEU of 18 March 2014, C-167/12, case *C.D. v. S.T.* The appellant argued that the CJEU ruled in this case that there was no obligation for the Member States to recognize the right to maternity leave in the case of

103 http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7357012&links=&optimize=20150424&publicinterface=true, accessed 27 November 2016.
104 Article 48.4 and 48.5 of the Worker´s Statute (Royal Legislative Decree 2/2015, of 23 October 2016). http://noticias.juridicas.com/base_datos/Laboral/561075-rdleg-2-2015-de-23-oct-aprueba-el-texto-refundido-de-la-ley-del-estatuto.html#a48, accessed 27 November 2016.
105 Article 117 of General Law of Social Security (Royal Legislative Decree 8/2015, of 30 October 2015). http://www.seg-social.es/Internet_1/Normativa/095093?ssSourceNodeId=1139#A177, accessed 27 November 2016.

commissioning mothers or fathers. The Supreme Court, however, confirmed the judgment of the Superior Court of Justice of Catalonia and recognized the right to maternity leave to a commissioning father who had a baby through a surrogacy arrangement. The Supreme Court established that, according to the CJEU, Directive 92/85 does not in any way preclude Member States from applying or introducing laws, regulations or administrative provisions more favourable to the protection of the safety and health of commissioning mothers or fathers who have had babies through a surrogacy arrangement by allowing them to take maternity leave as a result of the birth of the child.

By confirming the judgment of the Superior Court of Justice of Catalonia of 9 March 2015, the Supreme Court has extended the right to maternity leave to a commissioning father who has had a baby through a surrogacy arrangement, even though maternity leave is not expressly recognized in these cases by Spanish legislation. The judgment of the Supreme Court and the previous judgment of the Superior Court of Justice considered that fathers who have had babies through a surrogacy arrangement deserve the same right to maternity leave as the parents of an adopted or foster child, who in Spanish legislation are expressly given the right to maternity leave.

Internet source:
Judgment of the Superior Court of Justice of Catalonia of 9 March 2015 (Appeal Number 126/2015), http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7357012&links=&optimize=20150424&publicinterface=true (the judgment of the Supreme Court of 19 October 2016 has not been published yet).

Temporary incapacity for work as disability

Disability

The claimant was dismissed by his employer when he had been on leave for more than a month due to 'temporary incapacity caused by a work accident'. The employer argued that the claimant was dismissed because he 'did not meet the expectations of the undertaking or perform at the level the undertaking considers appropriate or suitable for the discharge of [his] duties in the workplace'.

The claimant brought an action against the employer before Social Court No. 33 of Barcelona, seeking a declaration that his dismissal was null and void due to discrimination on the ground of disability. He argued that the real reason for the dismissal was his temporary inability to work due to his work accident and that he was therefore covered by the concept of 'disability', within the meaning of Directive 2000/78. The Court found that there was sufficient evidence that the reason for the dismissal was indeed the claimant's temporary inability to work. The Court then referred the case to the CJEU for a preliminary ruling regarding the possible qualification of such an incapacity as a disability within the meaning of the Employment Equality Directive. On 1 December 2016, the CJEU delivered its judgment on this case.[106]

Following the judgment delivered by the CJEU, the Social Court issued its judgment on 23 December 2016 and declared the claimant's dismissal null and void for discrimination on the ground of disability.[107] The Court ruled that, at the time of the allegedly discriminatory act (the date of dismissal), the claimant's incapacity did not display a clearly defined prognosis as regards short-term progress and thus constituted a long-term limitation. Therefore, his 'temporary incapacity' must be regarded as a disability protected by Directive 2000/78. After examining the facts presented before it, the Court considered that the claimant had been dismissed due to his disability and, therefore, must be declared null due to discrimination.

106 For a detailed summary of the questions referred and of the judgment of the Court of Justice, please see p. 59 above.
107 Social Court No. 33 of Barcelona, judgment of 23 December 2016, case No. 1219/2014.

Sweden SE

LEGISLATIVE DEVELOPMENT

Revised regulation of active duties to ensure equality

On 12 July 2016, the Swedish Parliament adopted new legislation amending the Discrimination Act as regards the active measures to ensure equality, entering into force on 1 January 2017.[108]

All grounds

The previous 'active measures' differed between the addressees: employers had a duty to take measures covering the grounds of ethnicity, religion and sex, while education providers had a duty to take measures covering these grounds in addition to disability and sexual orientation. The amended provisions require both groups of addressees to take measures covering all seven grounds of discrimination protected by the Discrimination Act.[109]

The amendments also concern the nature of the measures. Employers were previously required to do 'goal-oriented work', which implied establishing equality plans. Employers with 25 or more employees were required to report every three years on their work with active measures. On the other hand, education providers were required to set up equality plans to be evaluated annually.

As of 1 January 2017, the central requirements to work on active measures will be the same for both categories of addressees, as provided by Chapter 3 Section 2 of the Discrimination Act, as amended:

> The work with active measures requires taking preventive and promotional action by
> 1. investigating whether there is a risk of discrimination or victimisation or if there are other obstacles for equality of rights and opportunities of individuals within the activities;
> 2. analysing the causes of any risks or obstacles discovered;
> 3. adopting the preventive and promotional measures which may reasonably be required and;
> 4. ensuring follow-up and evaluation of the work according to points 1-3.
>
> The work with active measures is implemented continuously.
> Measures are planned and implemented as soon as possible.

The Discrimination Act is also amended from requiring employers and education providers to 'prevent and hinder' harassment, sexual harassment and victimisation, to requiring that they have 'guidelines and routines in order to prevent and hinder' such occurrences, and that these guidelines and routines are followed up and evaluated.

All employers and education providers are required to document their work on active measures, although there are no detailed rules for employers with less than 10 employees. Chapter 3, Sections 13 and 14 impose a list of four qualitative requirements relating to wage surveys on employers with 10-24 employees and an additional three criteria relating to general active duties on employers with 25 or more employees. This documentation shall take place continuously throughout the year, while education providers are required to document their work on active measures with regard to pupils/students annually.

The rules on enforcement remain the same. If the employer or the educational provider is insufficiently active, the Equality Ombudsman may ask the Board against Discrimination to order the employer to fulfil his or her duty in the future subject to a financial penalty. In the field of working life, central employees'

108 Act 2016:828 amending the Discrimination Act (2008:567), adopted 12 July 2016.
109 The protected grounds are gender, gender identity or expression, ethnicity, religion or belief, disability, sexual orientation and age.

organisations that have a collective agreement can ask for such an order, if the Ombudsman declines to do so. The financial penalty gains legal force only after a district court has ordered the payment. The legality of the order itself, as well as the reasonableness of the amount, can be decided on by the district court.

Internet sources:
https://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/20080567.htm;
https://data.riksdagen.se/fil/395A407D-5AD1-4B64-BE1F-5E13C2A85F00.

White Paper proposing legislative amendments to increase protection from discrimination

In January 2014, the Government commissioned an inquiry to suggest improvements to the organisation of anti-discrimination work. Six concrete issues were targeted:

All grounds

- review of the role and responsibilities of the Equality Ombudsman;
- review of the organisation of efforts to combat discrimination at regional and local level;
- analysis of whether a procedure different from the one currently used for monitoring and promoting equal treatment may help to ensure effective action to combat discrimination;
- analysis of the rules on the burden of proof under the Discrimination Act;
- analysis of competences for monitoring action to combat discrimination in schools (the Equality Ombudsman or the School Inspectorate); and
- analysis of whether the regulations on protection against discrimination in public-sector activities need to be amended.

The results of this inquiry were presented on 14 December 2016 in the Government White Paper (SOU) 2016:87, containing only proposals for minor adjustments. These proposals concern how the Equality Ombudsman should handle individual complaints, how local anti-discrimination bureaus should report back to the Government and how county councils should have a duty to work with antidiscrimination issues in a general way.

With regard to the burden of proof, the White Paper proposes an amended wording of the relevant provision, to clarify the separation between the two steps of the process of shifting the burden of proof (the establishment by the claimant of a presumption of discrimination and the disproval by the respondent of that presumption).

Regarding the competence for examining and dealing with complaints of bullying in schools, the White Paper proposes that the School Inspectorate should be given sole responsibility, even when it is related to a discrimination ground. Currently, the responsibility falls upon both authorities when the case is related to a discrimination ground, although claimants are informally directed towards the School Inspectorate.

Finally, the White Paper describes some general principles for the creation of a new Anti-Discrimination Board, without however submitting any concrete legislative proposal to this end. If created, such a Board could follow the example of existing Boards in other areas and have the possibility to adopt binding decisions and award discrimination awards above the threshold of EUR 2250 Euro (SEK 22 500 SEK) without the claimant bearing the risk of having to pay the opposite party's legal costs.

Internet source:
http://www.regeringen.se/4af295/contentassets/b42c019548304be987083fb37f73d74f/battre-skydd-mot-diskriminering-sou-201687.

Turkey

LEGISLATIVE DEVELOPMENT

Part-time work after maternity leave

The By-Law on Part-Time Work following Maternity Leave or Unpaid Leave is a regulation for female workers who want to benefit from part-time work following their maternity or unpaid leave. It was issued by the Ministry of Labour and Social Security, and published in the Official Gazette of 8 November 2016. It became effective on its publication date.

In Turkey, maternity leave is 16 weeks and 2 additional weeks are to be added to the ante-natal period in case of a multiple pregnancy. The total period of maternity leave is compulsory. The ante-natal resting period of eight weeks may be reduced to three weeks at the request of the worker and by approval of a doctor. The unused period is to be added to the post-natal resting period. If there is early delivery, again the unused period is to be added to the post-natal resting period. The worker, if she so requests, has to be granted unpaid leave for up to six months following the post-natal period. For an employee who has adopted a child, if the adopted child is younger than 3, there will be an eight-week leave (the same as post-natal leave) followed by a possible six-month unpaid leave upon request. Law No. 6663 amending the Income Tax Law and Some Other Laws that became effective with its publication in the Official Gazette of 10 February 2016 amended the Labour Law, envisaging part-time work as an option for the worker after childbirth and also adoption. The By-Law on Part-Time Work following Maternity Leave or Unpaid Leave provides details on the issue of part-time work.

A mother may opt for 'half-time work' (half of the statutory working time, which is 45 hours per week) following the end of maternity leave (or adoption leave). This will be 60 days for the first child, 120 days for the second child, and 180 days for the third child. The duration of 'half-time work' will be longer in case of multiple births (the specified period plus 30 days) or if the child is disabled (360 days) (By-Law, Art. 6). If a parent opts for a time reduction of 50 %, half of the regular wage will be paid by the employer. For the remaining period she will be paid from the Unemployment Fund. The daily amount of this payment (allowance) will be 80 % of the daily gross minimum wage (Law No. 4447, Art. 53B/g, Additional Art. 5). A female employee using this option is not entitled to nursing breaks (By-Law, Art. 6/4).

A mother or father also has the option of working part time until the first day of the month following the compulsory schooling age (completion of 66 months of age at the latest at the end of September of the registration year, but it is also possible for a child of 60-66 months to start with the written approval of the parent(s)). The worker will be paid half of her/his regular wage if she/he opts for a time reduction of 50 % (By-Law, Art. 8/1). The employer has to be informed in writing at least one month before starting part-time work (By-Law, Art. 8/3). It will be the employer's duty to prepare a timetable by considering the nature of work and the worker's requests (By-Law, Art. 15/1). A request to use this option will not constitute a valid reason for an employer to terminate his/her contract (By-Law, Art. 11/4). If one of the parents is not employed, the other spouse (worker) cannot benefit from this option unless the other spouse is suffering from an illness requiring constant care, if the requesting worker is the sole parent with parental authority, or if the requesting worker is the sole adoptive parent (By-Law, Art. 10). The part-time work schedule will start following the maternity leave, following the 60/120/180 days of 'half-time work,' or following a six-month period of unpaid leave (By-Law, Art. 8/1).

A female employee using her six-month unpaid leave may ask for its termination and start working part-time (By-Law, Art. 8/2). The employer's approval will be required if the requesting worker is: a) employed in the health sector in particular jobs such as responsible director, responsible doctor, responsible at a medical lab, or in a position requiring permanent employment; b) employed in seasonal or campaign

work with a duration of less than one year; c) employed in industrial shift work necessitating indivisibility; or d) if the work performed cannot be divided into workdays due to its nature (By-Law, Art. 12). These limitations are not imperative (absolutely binding) and the social partners are free to define work in which part-time work is possible through collective agreements (By-Law, Art. 13). A worker who has opted for part-time work may return to full-time work by informing the employer at least a month in advance. This decision cannot be reversed later. If a temporary worker has been employed for the remaining period of this job, the temporary worker's employment ends automatically. If a worker using the part-time option decides to leave work, with the temporary worker's approval, the temporary worker's employment will automatically be converted into full-time employment with an indefinite duration (By-Law, Art. 14).

These measures are taken to reconcile work and family obligations, and also to encourage women to continue working after giving birth.

Internet source:
Official Gazette website: http://www.resmigazete.gov.tr), accessed 20 December 2016.

UK United Kingdom

CASE LAW

Discrimination on the ground of sexual orientation in access to goods and services: the 'gay cake' case

Sexual orientation

This case concerned an appeal from the County Court in Northern Ireland which had ruled that the respondent bakery had discriminated on grounds of sexual orientation, religious belief and political opinion when it refused to bake a cake at the request of the claimant, because the cake was to bear the slogan 'Support Gay Marriage'.

In October 2016, the Court of Appeal in Northern Ireland upheld the ruling of the County Court that the bakery had discriminated unlawfully on grounds of sexual orientation when refusing to bake the cake.[110] Even though both homosexual and heterosexual people can support gay marriage, support for gay marriage is indissociable from sexual orientation, and so discrimination on this ground is covered by the non-discrimination regulations by way of discrimination by association. The Court found that such a holding was not incompatible with freedom of expression rights under the ECHR because the bakery was not required to promote or support gay marriage itself. In any event, the non-discrimination rules would provide a proportionate limitation on freedom of expression.

The Court held that the baker's freedom of religion is adequately protected by Regulation 16 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 which allows limits to the provision of services by religious organisations in the non-commercial sphere. In the commercial sphere, the balance has been struck by Parliament in providing the protection against discrimination on grounds of sexual orientation.

Internet source:
http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/Pages/default.aspx.

110 Court of Appeal in Northern Ireland, decision of 24 October 2016.

Whether the reasonable accommodation duty includes payment at higher rate for work usually paid at lower rate

Disability

The claimant became disabled through a back injury and was moved to a new role. His pay was kept the same even though the usual pay for the new role would usually be lower. The claimant believed that the offer of this role was long-term, but the next year the employer notified the claimant that continued employment would be at a lower rate of pay. The claimant was dismissed after he refused to accept this. The Employment Tribunal found that this amounted to discrimination on grounds of disability, and that a reasonable adjustment would be to continue to pay the employee at the higher rate.

The Employment Appeals Tribunal upheld this finding, dismissing the employer's argument that other workers would be unhappy if the employer continued to pay the claimant a higher fee.[111] The EAT acknowledged that this decision involves an element of positive discrimination as the claimant was treated more favourably than others by being paid at a higher rate than the job would usually warrant. However, the additional pay was easily affordable for the company.

Internet source:
http://www.bailii.org/uk/cases/UKEAT/2016/0243_15_2608.html.

Same-sex marriage and clergy; *Pemberton v Inwood, Acting Bishop of Southwell and Nottingham*

Sexual orientation

The claimant is an ordained clergyman in the Church of England who entered into a same-sex marriage with his long-term partner, contrary to the current doctrines of the Church of England regarding clergy. As a result, his Bishop revoked his Permission to Officiate and the relevant ministry licence. The licence and permission were needed to enable him to take up a post as a hospital Chaplain in a National Health Service (NHS) hospital trust. The Court had to decide whether the action of the bishop amounted to sexual orientation discrimination, or whether exceptions allowing such discrimination in relation to employment for the purposes of religion or belief would apply.

Although the employer was to have been the NHS Trust and not the Church, nonetheless the employment was for the purposes of an organised religion, and the Employment Appeal Tribunal therefore found that the exception to the non-discrimination principle contained in Schedule 9 Equality Act 2010 applied.[112] This exception allows employers to impose requirements related to sex or sexual orientation where employment is for the purposes of an organised religion and the requirement is required to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. The exception is narrower than the exception for other religious ethos employers, and effectively only applies to the employment of clergy or their equivalents. However, this case shows that it can apply where the employer is not the church.

Permission was given for appeal to the Court of Appeal.

Internet source:
http://www.bailii.org/uk/cases/UKEAT/2016/0072_16_0712.html.

111 Employment Appeal Tribunal, Judgment of 26 August 2016, *G4S Cash Solutions Ltd v. Powell*.
112 Employment Appeal Tribunal, Judgment of 7 December 2016, *The Reverend Canon J C Pemberton v. The Right Reverend Richard Inwood, former acting bishop of Southwell and Nottingham*.

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
  via EU Bookshop (http://bookshop.europa.eu);
- more than one copy or posters/maps:
  from the European Union's representations (http://ec.europa.eu/represent_en.htm);
  from the delegations in non-EU countries (http://eeas.europa.eu/delegations/index_en.htm);
  by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm) or
  calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (http://bookshop.europa.eu).

DS-AY-17-001-EN-N

Publications Office