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European Anti-discrimination Law Review

No. 14 - 2012



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

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

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

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Website European Network of Legal Experts in the non-discrimination field: www.non-discrimination.net.

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The information contained in this fourteenth issue of the review reflects, as far as possible, the state of affairs on 15 January 2012.

ISBN 2-930399-68-6

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Introduction

The European Network of Legal Experts in the non-discrimination field has been managed by Human European Consultancy and the Migration Policy Group (MPG) since 2004. The Network covers all 27 EU Member States and 3 candidate countries, namely Croatia, the Former Yugoslav Republic of Macedonia and Turkey. There is one national expert per country. The aim of the Network is to monitor the transposition of the two Anti-discrimination directives¹ at the national level and to provide the European Commission with independent advice and information. It also produces annual country reports, a comparative analysis on anti-discrimination law, the European Anti-discrimination Law Review and various Thematic Reports. Full information about the Network, its reports, publications and activities can be found on its website: www.non-discrimination.net.

This is the fourteenth issue of the European Anti-discrimination Law Review produced by the European Network of Legal Experts in the non-discrimination field. The Law Review provides an overview of the latest developments in European anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 15 January 2012). Julie C. Suk, Professor of Law at Benjamin N. Cardozo School of Law – Yeshiva University and visiting Professor at Harvard Law School, authors an article on Criminal and Civil Enforcement of Antidiscrimination Law in Europe, analysing the advantages and disadvantages of the criminal versus civil paths. Nathalie Denies and Ingrid Aendenboom, from the Belgian Centre for Equal Opportunities and Opposition to Racism, contribute with an article on mediation and conciliation as alternative dispute resolution techniques in discrimination cases. In addition, there are updates on legal policy developments at the European level and updates from the case law of the Court of Justice of the European Union and decisions of the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the EU Member States and the three accession candidate countries can be found in the section on News from the Member States, Croatia, the Former Yugoslav Republic of Macedonia and Turkey. These sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Thien Uyen Do) on the basis of the information provided by the national experts and their own research in the European sections.

In 2011 the fifth edition of the comparative analysis, *Developing anti-discrimination law in Europe - The 27 Member States, Croatia, the Former Yugoslav Republic of Macedonia and Turkey compared*, was released and the update will be published in 2012. In addition, a thematic report on age and employment authored by Declan O' Dempsey and Anna Beale as well as a handbook on seeking remedies under the EU non-discrimination directives, written by Lilla Farkas, were published. Early 2012, a thematic report comparing anti-discrimination legislation in the US, Canada, South Africa and India by Sandra Fredman and an update on the prohibition of discrimination under the European Human Rights Law by Olivier De Schutter were issued. A thematic report on transgender by Silvan Agius and Christa Tobler will be published in the course of 2012. Finally, a thematic report on housing discrimination and on the case law of Court of Justice of the European Union regarding the two anti-discrimination directives are in preparation.

In October 2011, the Network together with the European Network of Legal Experts in the field of gender equality, organised a legal seminar on the approaches to equality and non-discrimination legislation inside and outside the EU for representatives of the Member States, Equality bodies and its own members. The theme for the 2012 edition, which will take place in November 2012, will be "Equality law for everyone: challenges ahead". The legal seminar deals with the six grounds of discrimination protected at the EU level and involves approximately 200 participants.

Isabelle Chopin
Piet Leunis

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

Meet ordinary people in this Review,
facing discrimination.

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Criminal and civil enforcement of antidiscrimination law in Europe

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In Europe, antidiscrimination laws are enforced through both criminal and civil proceedings, giving rise to criminal punishment of discriminators as well as civil compensation of victims. From the victim's standpoint, there are distinctive advantages and disadvantages of the criminal versus civil paths. The differences in available sanctions and remedies, access to proof, financial burdens and risks, and the social meanings produced by criminal and civil justice can influence the path chosen by the victim. The practical realities of litigation in particular criminal and civil justice systems are important factors that shape the trajectory of antidiscrimination law.

Punishment, compensation, and deterrence of discrimination

A significant difference between criminal and civil sanctions for discrimination is the social meaning of punishment as compared to compensation. To criminalize an act is to regard it as a harm not only to the victim, but to the state and the society it governs and represents. Criminalization of discrimination thus signals the public nature of the violation, and makes it a matter of public law. When a discriminator is convicted and punished, the state expresses moral condemnation of discrimination. Punishment achieves this expressive function by imposing a stigma on the persons who violate the society's shared legal norms. The stigma is collectively imposed, and therefore reinforces the shared norms embodied in antidiscrimination law.

By contrast, the authorization and pursuit of civil remedies for discrimination treats the same conduct as a dispute between private parties. In a private lawsuit, the state – through its courts or tribunals – acts only as a passive, neutral arbiter rather than the party injured by the fact of discrimination. The awarding of civil remedies for discrimination compensates the victim for his or her injuries. The primary purpose is to make the victim whole. Although a civil remedy might also enable a public legal recognition of the defendant's wrongdoing, the court's focus is on compensation of the plaintiff rather than the condemnation of the defendant. Thus, in civil proceedings, conciliation, mediation, and settlement are important tools, as they allow for compensation and dispute resolution without stigmatising or condemning the alleged discriminator.

In addition to punishment and compensation, legal sanctions for discrimination have another goal: deterrence of future discrimination. Indeed, deterrence may be the most important justification for enforcing antidiscrimination law. The legal reproach – whether it is criminal (fine, imprisonment) or civil (payment of damages) – will induce the discriminator to refrain from discriminating in the future. Furthermore, a well-functioning regime of antidiscrimination enforcement should deter not only those who have been subject to legal proceedings, but all potential violators, from discriminating. The methods of enforcement utilized by any given legal system will tend to deter some forms of discrimination better than others. All enforcement frameworks must be sensitive to mechanisms by which specific discriminatory practices are incentivized or undermined.

Sanctions and remedies

The deterrence perspective would evaluate the sanctions and remedies imposed by criminal and civil enforcement primarily for their effectiveness in reducing discrimination and inequality. The typical sanction attaching to both criminal and civil liability is financial. In most European countries, there are upper limits on the criminal fines,² but no upper limits on civil compensation.³ In practice, average civil compensation awards vary significantly across Europe, ranging from EUR 400 (Hungary) to EUR 18,000 (United Kingdom).⁴ Both a criminal conviction and a civil liability judgment typically require the discriminator to pay a sum of money. Thus, the main difference between criminal and civil fines is not in the amount of money – but in the recipient of the payment and the social meanings that attach to this difference. Criminal fines go to the state and civil damages to the victim. The ability of these financial burdens to deter discrimination will depend on whether the financial burden is significant enough to outweigh the benefits of discriminating to the discriminator. The social meaning of a criminal fine, as compared to a civil damages award, may have a stronger deterrent effect. A criminal fine, even if it is in a comparable sum of money as a civil damages award, carries a public social stigma that most companies and individuals would wish to avoid. In many legal systems, a criminal condemnation for discrimination is accompanied by additional requirements to publicize the condemnation.⁵

In many countries that criminalize discrimination, the penal codes authorize imprisonment as well as fines as punishment.⁶ The maximum imprisonment sentences for discrimination tend to be around 3-5 years. However, imprisonment for discrimination is extremely rare. Even in cases that have resulted in convictions with sentences of imprisonment, the prison sentence is suspended,⁷ which is to say that the convicted discriminator never actually serves time in prison. However, the mere possibility of imprisonment as a punishment for discrimination carries symbolic weight in stigmatizing the criminalized conduct. In so doing, it may play a role in deterring potential discriminators.

In the civil context, a liability judgment or a settlement following a complaint of discrimination can lead to several types of remedies. Monetary damages can include economic as well as noneconomic damages, and in most European jurisdictions, there is no legally prescribed upper limit. In addition, civil liability judgments and settlements of discrimination cases can lead to injunctive forms of relief, such as reintegration of an employee who is wrongfully denied access to a service.⁸ However, some legal systems may restrict the availability of injunctions when pecuniary damages are awarded.⁹ In the US experience, civil discrimination lawsuits traditionally culminated in injunctions requiring public institutions or companies

² For example, in France, the upper limit on criminal fines for discrimination is EUR 45,000, or EUR 75,000 for discrimination in public facilities. See *Code pénal* art. 225-2 (France).

³ See European Commission, *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives*, p. 77 (July 2011).

⁴ See *ibid.*, p. 77-78.

⁵ Such requirements exist in France. See *Code pénal* art. 225-2 (France).

⁶ These countries include Belgium, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Greece, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovenia, and Spain. In Hungary, discrimination is a petty offence leading to criminal fines but not imprisonment.

⁷ See specific section on civil and Criminal Procedures, 2010 Country Report France, European Network of Legal Experts in the Non-Discrimination Field, 1 January 2011, p. 111, available on www.non-discrimination.net.

⁸ For example, a French court ordered the reintegration of a woman who was denied access to an adult education program on the grounds that she was wearing the Islamic headscarf. *Said v. Greta*, Administrative Court of Paris, 27 April 2009, no 0905233/9.

⁹ In Austria, for instance, a victim of discrimination chooses between undoing the act of discrimination or compensation of pecuniary damage. In cases of non-recruitment or non-promotion, only damages are available. In any case, Austrian law permits the option to claim non-pecuniary damage with the injunction. See specific section on civil and criminal procedures, 2010 Country Report Austria, European Network of Legal Experts in the Non-Discrimination Field, p. 4.

to stop discriminating and to adopt particular policies to ensure the future absence of discrimination.¹⁰ In the employment context, these remedies include goals and timetables for the hiring and promotion of women and minorities, diversity or harassment training programs, and the appointment of internal diversity officers.¹¹ Such policy-oriented injunctions have emerged in the European context. In Ireland, for example, some civil judgments in employment cases have included orders requiring the creation of an equal opportunities policy, re-training of staff, and reviewing recruitment procedures.¹²

The varieties of discrimination and the limits of criminal law

In any case, these sanctions and remedies only become available once discrimination – as defined by the law – can be established. But in order to evaluate whether these sanctions and remedies effectively deter discrimination, a clearer articulation of the evolving conduct that constitutes discrimination is needed. What are the social practices that antidiscrimination law is trying to dissuade? There is a wide range of practices that a legal framework would categorise as ‘discrimination’, and any procedural system designed to address those practices must take into account how, as a practical matter, the facts constituting such practices can come to be known.

European Union antidiscrimination law has developed two principal concepts of discrimination: direct and indirect. Direct discrimination occurs where one person is treated less favourably than another is, has, or would be treated in a comparable situation on grounds of the prohibited characteristic¹³ (race, sex, religion, disability, sexual orientation, age). Indirect discrimination occurs where an apparently neutral provision, criterion, or practice would put the persons of a race, sex, religion, disability, sexual orientation, age at a particular disadvantage compared with other persons, unless that provision, criterion, or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹⁴

The concept of direct discrimination corresponds to the most easily understood form of discrimination: intentional adverse actions motivated by racial animus. For example, a Belgian employer refuses to hire non-Belgians because of their customers’ reluctance to be serviced by non-Belgians.¹⁵ A real estate agent declines to sell an apartment to a black woman because she does not want to sell the flat to black people.¹⁶ Or a nightclub bouncer refuses to allow black patrons into the club, purportedly based on their dress, but perhaps covertly because of racial hostility.¹⁷

By contrast, indirect discrimination need not involve any discriminatory intent. As long as disadvantage to the protected persons results from any identifiable practice, the absence of a legitimate justification for that practice will be taken to constitute discrimination. Accordingly, the concept of indirect discrimination can challenge the structural disadvantages experienced by racial minorities and women today. An

¹⁰ See Owen M. Fiss, *The Civil Rights Injunction* 7-37 (1978).

¹¹ For a sampling of terms in recent court-approved class action settlements in the United States, see Seyfarth Shaw, *Annual Workplace Class Action Litigation Report*, 2012 Edition.

¹² See specific section on civil and criminal procedures, 2010 Country Report Ireland, European Network of Legal Experts in the Non-Discrimination Field, p. 168.

¹³ Article 2(2)(a) of the Race Equality and Framework Equality Directives.

¹⁴ Article 2(2)(b) of the Race Equality and Framework Equality Directives.

¹⁵ See CJEU Case C-54/07 *Feryn*.

¹⁶ Brussels First Instance Court (55th Ch.), 31 March 2004, available at http://www.diversite.be/index.php?action=rechtspraak_detail&id=35&select_page=68.

¹⁷ See *The Bar Bar Case*, problem described in European Commission, *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives*, July 2011, p. 56.

example would be a strict language speaking and writing proficiency criterion for jobs that require few or no writing skills.¹⁸

However, criminal law can only punish intentional discrimination, and not indirect discrimination. It is a fundamental principle of the penal law that intent is a necessary element of every punishable crime or criminal infraction. This limits the range of discrimination cases to which criminal punishment could provide a solution. Often, the facts constituting the alleged discrimination do not include any evidence of intent to treat anybody less favourably on the grounds of race or on any grounds whatsoever. In such cases, the defendant cannot be condemned for direct discrimination. Furthermore, in cases where the evidence of the intent to discriminate is weak, criminal punishment is unlikely to be imposed because criminal defendants benefit from the presumption of innocence under Article 6 of the European Convention on Human Rights.

The defendant's presumption of innocence poses barriers to proving any circumstantial case of discrimination. To aid the proof of discrimination through circumstantial, rather than direct evidence, Article 8(1) of the Race Equality Directive requires defendants to prove the absence of discrimination once facts from which discrimination may be presumed have been established.¹⁹ This would mean that, once the disparate treatment of two individuals could be established, the defendant would have to prove that there was no discrimination. But imposing such a burden on defendants would be contrary to the presumption of criminal defendants' innocence. Accordingly, Article 8(3) explicitly provides that the burden-shifting framework shall not apply to criminal procedures.²⁰ Thus, even in factual circumstances that might constitute direct discrimination, the intent to discriminate will generally require stronger evidence to establish in a criminal proceeding as compared to a civil one.

In various countries, the cases resulting in criminal convictions tend to include clear direct evidence of racial animus. The criminal approach tends to succeed only for the most straightforward and egregious cases of direct discrimination. In France, criminal punishment has been imposed on employers who leave paper trails indicating their racial hostility, such as '*Black, Non, Non!*'²¹ or '*BBR*' (*bleu, blanc, rouge*, a French code for white persons of French nationality).²² In Belgium, the aforementioned real estate agent was convicted when she confirmed that she had not wished to sell the flat to black people in writing.²³ But it is difficult to overcome the defendant's presumption of innocence in the absence of such direct evidence. In many cases, the prosecution can easily establish that a black applicant was rejected while a white applicant accepted. This disparity, without more, does not prove that the rejection was based on race. Unless this disparity could shift the burden to the employer to prove an absence of discrimination by way of a non-race-based justification for the decision, the lack of direct evidence of discriminatory intent would be fatal to a criminal case. But the burden shifting cannot be utilized in criminal proceedings.

Thus, criminal law is not effective at addressing subtle or complex cases of direct discrimination, structural discrimination, or indirect discrimination. Accordingly, the tendency of some legal systems to concentrate enforcement on the criminal approach to discrimination effectively marginalizes a very large subset of potential cases, including the very concept of indirect discrimination. Consider, for example, a fact pattern that has arisen in numerous European jurisdictions: a woman is fired or not hired by an

¹⁸ See *ibid.*, p. 36.

¹⁹ Article 8(1) of the Race Equality Directive.

²⁰ Article 8(3) of the Race Equality Directive.

²¹ *Tribunal de grande instance de Paris*, 17e ch., 14 November 2002.

²² *Cour d'appel de Paris*, 11e ch., 6 July 2007.

²³ Brussels First Instance Court (55th Ch. Criminal), 31 March 2004.

employer because she wears the Islamic headscarf.²⁴ This could amount to direct religious or racial discrimination if there is evidence that the employer was motivated by animus against Muslims or Arabs. The same set of facts could amount to indirect discrimination in the absence of intent to treat Muslims or Arabs less favourably, if the action is framed as a neutral workplace dress code that unnecessarily has adverse effects on Muslim women. However, if the case is processed through criminal proceedings, the indirect discrimination theory is unavailable, and the mere fact of disparate treatment of the woman in a headscarf will not shift the burden on the employer to prove a non-discriminatory justification for the decision. Such a consequence inhibits the capacity of antidiscrimination law to address the evolving social realities of discrimination. As public awareness about discrimination increases, the overt and racist forms of direct discrimination will become rarer. Subtle and indirect forms of discrimination should then become the focus of antidiscrimination enforcement. Thus, effective enforcement will need to move beyond the criminal approach to keep up with the evolving social practices that tend to exclude the persons that antidiscrimination law is supposed to protect.

Information asymmetries and the limits of civil procedure

As a result, there has been an increased interest in improving civil liability regimes to remedy discrimination in Europe, including the burden of proof provisions of the Race and Framework Equality Directives. However, any effort to improve civil liability regimes for discrimination must address the unique difficulties faced by civil plaintiffs in proving discrimination. These difficulties vary across legal systems, depending on their discovery procedures. But they stem from a common problem that afflicts the typical fact pattern for a discrimination claim, whether it is a claim of direct or indirect discrimination. That problem is the information asymmetry between plaintiff and defendant. Although this information asymmetry can exist in many different domains of discrimination, it is particularly acute in the realm of employment discrimination. Within the range of employment discrimination cases, the information asymmetry tends to be most salient in failure-to-hire cases.

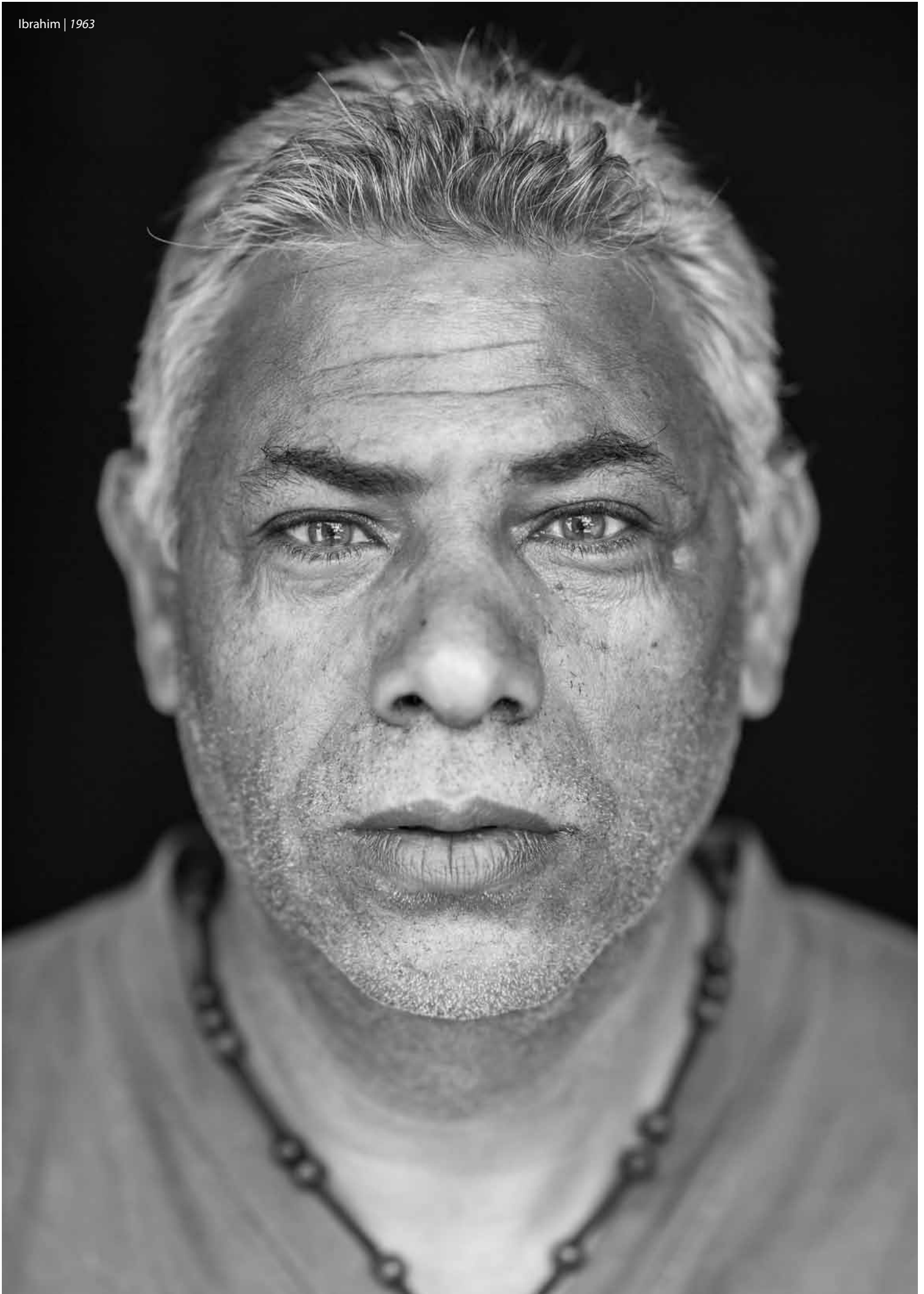
Even a straightforward direct discrimination case, in which an employer refuses to hire nonwhites out of racially discriminatory motives, the less favourable treatment of nonwhites is not easy to establish, because the relevant evidence remains in the hands of the discriminator. Suppose X, a member of a racial minority, applies for and does not receive a job for which he believes he is qualified. X believes he was discriminated against, but the facts known by X, without more, are not sufficient to establish the existence of discrimination. At the very least, X would need additional information about the treatment of other nonwhite and white applicants for the post to determine whether he is being treated less favourably than persons who do not share the prohibited characteristic.

Even in the rare case where there exists direct evidence of discriminatory intent, because the defendant has stated, in writing or orally, that he prefers white candidates, civil procedure would make it challenging for the plaintiff to obtain that evidence. Consider the case in which the employer writes 'BBR' on internal employment files to indicate a preference for white candidates.²⁵ The excluded job candidate would not have access to such files, which remain in the hands of the employer. Any procedural system in which discrimination claims are effectively litigated must authorize the obligatory production and/or use of such evidence in the proceeding. However, a civil litigant's access to evidence belonging to the adversary is not automatic in most civil justice systems in Europe.

One way of overcoming the information asymmetry is to prove discrimination circumstantially, by introducing evidence that members of one group were treated less favourably than members of another

²⁴ See specific section on civil and criminal procedures, 2010 Country Report Austria, European Network of Legal Experts in the Non-discrimination Field, 1 January 2011, p. 6.

²⁵ *Cour d'appel de Paris*, 11e ch., 6 July 2007.



group. Without access to evidence in the hands of the alleged discriminator, many litigants in EU countries have attempted to gather such evidence through situation testing.²⁶ Such testing can be carried out by individuals and their friends. For instance, in one Swedish housing case, an applicant for property rental of immigrant background was not shown an apartment, whereas his nonimmigrant friends subsequently applied and were given a chance to view the apartment. This established less favourable treatment, which ultimately led to a civil judgment for the plaintiff.²⁷ Thus, any procedural system for proving discrimination claims needs to remain open to situation testing.

Comparing civil and criminal procedure

There are many features of civil procedure in the European tradition of private law that make it difficult for the civil litigants to access or use the evidence that would support the inference of discrimination. First, in some systems such as Italy, civil procedure does not traditionally authorize discovery of documents between the parties.²⁸ In France, judges investigate the facts, but they are not accustomed to requiring a defendant to produce evidence needed by the plaintiff to prove his or her claims.²⁹ The 2001 law implementing the Race Directive's burden-shifting provisions included language authorising judges to issue investigatory orders as needed.³⁰ As a result, victims need the assistance of a lawyer or advocate to ask the judge to require the defendant to produce evidence relevant to determining whether the circumstances complained of by the plaintiff actually constitute illegal discrimination. Once a defendant fails to produce documents upon the court's request, a defendant cannot argue that the plaintiff's evidence is inadequate. But a court may not necessarily order the production of all relevant documents, especially if an unrepresented plaintiff does not urge it to do so.

In addition, civil procedure in civil law countries traditionally poses barriers to the use of situation testing evidence. In France, plaintiffs cannot be witnesses in their own cases,³¹ so they need to find some other way of proving that they were treated unfavourably. A video or audio recording of the conversations between the plaintiff and defendant might not be permissible under a civil procedure rule that requires all evidence to be taken lawfully.³² Such rules render inadmissible any video or audio recordings taken without the subject's consent. As a result, even the simple proposition that a plaintiff was treated less favourably than another person of a different race is difficult to prove in civil proceedings. Only when this basic disparity has been established can the burden shift to the defendant to prove that there was no discrimination. When the gathering of information is governed by longstanding civil procedure rules, the unique information asymmetries in discrimination claims are reinforced, to the disadvantage of plaintiffs and victims.

Notwithstanding the *substantive* limits of the penal conception of discrimination, criminal *procedure* in many European countries can overcome the information asymmetries between victim and discriminator. Evidence in the hands of the defendant is more easily revealed in criminal rather than civil proceedings. The European inquisitorial tradition of criminal procedure empowers the judge to take an active role in

²⁶ See generally Isabel Rorive, *Proving Discrimination: The Role of Situation Testing* (Centre for Equal Rights, 2009).

²⁷ European Commission, *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives*, p. 77 (July 2011).

²⁸ *Ibid.* at 51.

²⁹ In France, Article 146 of the Code of Civil Procedure prohibits investigatory measures to fill in the inadequacies of a party in the abduction of evidence. NPCP Art. 146 (France).

³⁰ See C. trav. Art. 1134-1 (France).

³¹ NPCP. Art. 199 (France) provides that the judge can take the testimony of third parties to shed light on the facts in dispute of which the witness has personal knowledge. Since 1959, the *Cour de cassation* has understood this to mean that a party cannot be a witness on his own behalf. Cass. 1e civ., Oct. 12, 1959, Bull. civ., No. 401.

³² NPCP. Art. 9 (France).

investigating all matters relevant to the alleged crime. The judge questions the defendant, and has the power to require the defendant to produce documents and other evidence relevant to the complaint. In addition, the principle of 'free means of proof' in criminal procedure has made it much easier to introduce situation testing evidence in criminal proceedings.³³ In France, audio and video recordings taken without the subjects' consent can be used to establish the fact of discrimination in criminal proceedings.³⁴ Such recordings are important when situation testing is the only means by which the disparate treatment of racial minorities and whites can be established.

Over the last decade, there have been many attempts, both on the EU level and in national legal systems, to overcome the unique information asymmetries of discrimination cases in civil proceedings. In addition to the burden-shifting requirement of the Race Equality Directive, the new equality bodies, required by Article 13 of the Race Equality Directive, have functioned in some countries to assist plaintiffs, particularly in obtaining evidence of discrimination. For example, in Romania and Hungary, the equality bodies can compel employers to produce documents.³⁵ But unless courts and legislatures explicitly authorize discovery and/or the use of situation testing in civil cases, criminal proceedings will continue to be more effective at producing the evidence necessary to prove discrimination, even while the substantive limits of criminal law might render such evidence inadequate to justify the imposition of criminal punishment.

Financial burdens and risks

In addition to the information asymmetry problem, civil proceedings introduce greater financial burdens and risks to victims of discrimination than criminal proceedings. These costs discourage victims from pursuing their civil claims, even when the claims have legal merit. All European civil justice regimes impose some form of 'loser pays' rule. Thus, discrimination victims, by bringing a civil suit, risk having to pay not only their own lawyers' fees and costs, but also those of the defendant in the event that the suit is unsuccessful. In fact, in some jurisdictions, even the successful plaintiff bears significant financial costs under the loser pays regime. In some countries, the 'loser pays' rule requires the plaintiff to pay at least part of the defendant's fees even if she wins, if the recovery awarded is less than the recovery demanded. In Austria, for instance, a harassment plaintiff had demanded EUR 4,000, but ended up winning only EUR 800 in compensation. Since this amounted to a loss of EUR 3,200, the court ordered the plaintiff to pay the full cost of the proceeding.³⁶ In Croatia, if a plaintiff demands EUR 10,000 but the court only awards him EUR 5,000, the plaintiff, despite winning damages, must pay 50 percent of the defendant's costs.³⁷ Under such circumstances, the loser pays rule strongly discourages plaintiffs from bringing suit, and exerts downward pressure on the damages demanded by plaintiffs in their complaints.

By contrast, the victim incurs no significant financial burdens or risks in launching a criminal complaint for discrimination. The only cost to the victim will occur in the countries that allow crime victims to join criminal proceedings as civil parties. By joining a criminal prosecution, a victim of discrimination benefits

³³ See Isabel Rorive, *Proving Discrimination: The Role of Situation Testing* (Centre for Equal Rights, 2009), p. 57-77. In several countries where situation testing is emerging as a permissible means of proving discrimination, such as Belgium, France, Denmark, and the Netherlands, it is initially or primarily in criminal, rather than civil cases.

³⁴ See, e.g., Cass. crim., Jan. 16, 1990, Bull. crim., No. 89-83075.

³⁵ For example, the Romanian anti-discrimination law requires all public and private persons and entities in possession of relevant documents to share them with the equality body or face an administrative fine. In Hungary, the Equal Treatment Authority has similar powers. See *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives*, July 2011, p. 52.

³⁶ See LG for ZRS Wien, Ref. Nr. 35R68/07W (35R104/07i), 30 March 2007 (Austria).

³⁷ See specific section on civil and Criminal Procedures, 2010 Country Report Croatia, European Network of Experts in the Non-discrimination Field, 1 January 2011, p. 33.

from the investigating judge's investigation of the facts.³⁸ In France, the civil party deposits a sum of money with the court, to cover the costs of investigation should the claim turn out to be 'abusive or dilatory'.³⁹ However, this is not as risky as the 'loser pays' rule in civil proceedings, because the victim who becomes a civil party to a criminal proceeding can expect to get the deposit back even if there is no criminal condemnation or civil damage award. She will only forfeit this deposit if the claim is 'abusive or dilatory' beyond being unmeritorious. By contrast, in a civil suit, an unmeritorious claim (even if not abusive or dilatory), will require the plaintiff to lose not only his own litigation costs, but also the costs of the defendant. Thus, in countries that allow victims of discrimination to proceed as civil parties in criminal proceedings, this option reduces the victim's financial burdens and risks relative to those incurred in civil suits.

Towards administrative solutions

For victims of discrimination, the path of a criminal proceeding has two distinct advantages over civil proceedings: access to evidence in the hands of the discriminator, and a state-funded investigation with low financial risks to the victim. The downside, however, is that the criminal proceeding is unlikely to result in a conviction, even if the investigation unearths evidence supporting subtle forms of direct discrimination or structural discrimination constituting indirect discrimination. The informational and financial benefits of the criminal proceeding stem from the public nature of the enforcement regime: the state finances the investigation of the truth when its public norms have been violated. How might the informational and financial benefits of public enforcement be combined with civil liability regimes' broader substantive definitions of discrimination?

Administrative approaches to discrimination can overcome the limits of the existing enforcement frameworks. An administrative approach to discrimination can retain the procedural advantages of criminal justice without embracing the substantive criminal conception of discrimination.

In some European countries, most notably the United Kingdom, specialized employment tribunals follow different procedures from ordinary civil courts. The employment tribunals in the UK provide one model of an alternative framework that blends aspects of criminal and civil proceedings in continental countries. The most significant procedural difference is that employment tribunals enable civil litigation for damages without the operation of the loser pays rule. The employment tribunals hear employment discrimination claims without ordering the unsuccessful party to pay the costs of the winner. As compared to civil courts, the absence of the 'loser pays' rule in the employment tribunals relieves a significant barrier to victims' litigation of employment discrimination claims. Furthermore, in the United Kingdom, there exists a statutory questionnaire that the complainant can use to demand information from the employer. If the employer fails to reply to the questionnaire, the court is free to make any inference from the failure to respond, including the inference of unlawful discrimination.⁴⁰

Nonetheless, even in the absence of a 'loser pays' rule, there remain financial disincentives to victims' pursuit of civil discrimination claims. In proceedings before equality tribunals, litigants pay their own costs. Thus, the more costly it becomes to litigate a discrimination claim, the lower the incentive for the victim. If the case is so complex that it cannot be litigated effectively without a lawyer, a victim is unlikely to proceed, and unlikely to succeed if he proceeds, without access to quality legal services.

³⁸ C. Pr. Pén, art. 85 (France).

³⁹ See C. Pr. Pén. Art. 88-1; art. 177-2 (France).

⁴⁰ See specific section on civil and criminal procedures, 2010 Country Report United Kingdom, European Network of Experts in the Non-discrimination Field, 1 January 2011, p. 337.

In some jurisdictions, the regulatory institutions that enforce labour and employment law provide additional routes for the discovery of evidence of discrimination. In France, the Labour Inspectors can investigate employers for violations of employment law, including the prohibition of discrimination. They can enter the premises, obtain documents or information supporting the alleged facts, conduct interviews, and submit their written observations to the prosecutor.⁴¹ These officers, although there are too few to investigate all potential violations of all labour laws, share at least one function with the equality bodies in Romania and Hungary: requiring defendants to produce evidence relevant to a complaint of discrimination. Under this model, a significant chunk of litigation costs would be borne not by the victim, but by the state.

One solution might lie in legal representation of victims by equality bodies. In Sweden, the Equality Ombudsman has the authority to investigate complaints of discrimination. The Ombudsman then represents the victim in settlement proceedings or before a court of law. Although it is ultimately the court, rather than the Ombudsman, making the determination on whether damages should be awarded, the victim who is represented by the Ombudsman does not have private attorneys' fees to worry about in the event that he loses and must pay his own (as well as the other side's) costs. Thus, the Ombudsman provides another model of an administrative intervention that could mitigate the disincentives associated with the costs of civil litigation.

Another way of mitigating the unique difficulties faced by victims in criminal and civil enforcement of antidiscrimination law is to enable the equality bodies to exercise some quasi-judicial functions as well as investigatory functions. In some countries, the equality bodies have the authority to issue administrative penalties or fines upon a finding of discrimination. In Romania, for example, the National Council for Combating Discrimination (NCCD) has the authority not only to subpoena parties and hold hearings to investigate facts, but also the power to issue administrative sanctions, which can include warnings as well as fines.⁴² The administrative fine issued by the NCCD is not a form of compensation to the victim, so there is no financial incentive for the victim to pursue a complaint with the assistance of the NCCD. At the same time, there is little financial disincentive for the victim, since the NCCD investigates the facts, and a lawyer is not required in these proceedings.

Conclusion

Under the traditional frameworks of criminal and civil proceedings, victims of discrimination confront a criminal-civil catch 22: While criminal proceedings facilitate access to proof and lower financial burdens and risks for the victim as compared to civil proceedings, criminal law can only reach discrimination that is intentional and proceeds from a strong presumption of the defendant's innocence. While statutes authorizing civil discrimination claims define discrimination more broadly to include indirect discrimination, and allow for burden-shifting to ease the plaintiff's burden of proof, civil procedure in European countries traditionally poses significant financial disincentives and risks in addition to the barriers to access to information. The practical reality is that the financial costs and risks of civil litigation, due largely to the longstanding loser pays rule, make civil proceedings inaccessible for many victims. Recent administrative developments on the EU level and in the Member States have begun to alleviate this criminal-civil catch 22. Such innovations should be extended to aid victims in navigating the unique difficulties of remedying the varieties of discrimination through the justice system.

⁴¹ See C. trav. art. L 8113-1 to L 8113-9.

⁴² See specific section on civil and criminal procedures, 2010 Country Report Romania, European Network of Legal Experts in the Non-discrimination Field, 1 January 2011, p. 276-77.

What place for mediation and conciliation/ negotiation in discrimination cases?

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Introduction

In Belgium, as in many other European countries, legal proceedings are expensive, take a long time, can be emotionally stressful, and are uncertain in outcome. It is therefore rather surprising that, at least in Belgium, alternative dispute resolution is so seldom chosen, probably due to a lack of information and knowledge.

Yet alternative dispute resolution can offer a very satisfactory alternative that is quick, cheap and provides a solution for all the parties concerned. The people involved in this kind of dispute resolution are part of the solution and not just spectators to a procedure.⁴³

For this reason, many equality bodies prefer to resolve a high proportion of discrimination cases by alternative dispute resolution, namely mediation or conciliation.

This article first formulates a theoretical approach, then illustrates this with real-life cases dealt with by the Belgian equality body, the Centre for Equal Opportunities and Opposition to Racism.

What's in a name? Conciliation and mediation: two alternative dispute resolution (ADR) techniques

Alternative dispute resolution covers different concepts and practices all over Europe. Here is an overview of two of the most common, conciliation and mediation:

Conciliation

Conciliation “refers to a process of enabling two parties to resolve a dispute via the assistance of an independent third party. (...) the third-party or conciliator is impartial. It is a private but voluntary process, decided upon by both parties in which the outcome is non-binding. (...). Likewise, whilst parties can agree for the outcome to be made into a binding document it is not obligatory to do so”.⁴⁴

“The important point of note here is that the right to seek further redress cannot be compromised in the early stages through pressure to sign a binding document (this is designed to protect both parties’ interests but particularly to protect the rights of vulnerable parties who may need extra time/assistance with the process)”.⁴⁵

⁴³ Pierre-Paul RENSON, ‘Arbitrage, conciliation, médiation et droit collaboratif: comment régler un conflit efficacement et durablement, sans recourir à une procédure judiciaire ou administrative ?’ *Justice en ligne, comprendre et communiquer*, 28 February 2011.

⁴⁴ Alternative dispute resolution in rights-based disputes: mediation in Britain today, in *Dynamic Interpretation - European Anti-Discrimination Law in Practice I*, Equinet (the European Network of Equality Bodies).

⁴⁵ *Ibidem*.

Eduard | 1960



Lennart | 1995



Yaleesa | 1995



“While remaining impartial the conciliator can take an active role in negotiating between parties, either via a shuttle approach over the telephone or in adjacent rooms, face to face or via written submissions somewhat like arbitration”⁴⁶

Conciliation can be used across a number of sectors including discrimination.

Mediation

The term mediation is often used interchangeably with conciliation but they differ both theoretically and in practice. *“Mediation is a multi-stage and structured process of conflict resolution, which was developed in the United States in the 1960s and 1970s and is successfully used today. Generally speaking one could say mediation is working with problems to be able to deal with them in a better way at a later stage”⁴⁷*

On the European level, the Council of Europe offers a general and broad definition: *‘Mediation refers to a dispute resolution process whereby parties negotiate over the issues in dispute in order to reach an agreement with the assistance of one or more mediators’⁴⁸*

It therefore seems appropriate to look first at the definitions of mediation applied within the Member States.

a) Definitions in the Member States

In the UK mediation is defined *“as ‘a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution’⁴⁹*

Another definition, according to which the mediator himself/herself can offer a solution, is found in France: *‘A way of solving conflicts which, for the person selected by the opposing parties (most frequently due to his personal authority), consists in offering a potential solution, without limiting himself to attempts to reconcile the parties’⁵⁰*

In Slovakia, The Mediation Procedures Act defines mediation in *“a general way as ‘an out-of-court process in which parties to a mediation and a mediator negotiate a settlement of a dispute arising from their contractual relations or other legal relations’”⁵¹*

⁴⁶ Alternative dispute resolution in rights-based disputes: mediation in Britain today’, in *Dynamic Interpretation - European Anti-Discrimination Law in Practice I*, Equinet (the European Network of Equality Bodies).

⁴⁷ Mediation as a Tool for Specialised Equality Bodies?’ in *Dynamic Interpretation - European Anti-Discrimination Law in Practice I*, Equinet, July 2006.

⁴⁸ Article 1, Council of Europe Recommendation Rec (2002) 10 of the Committee of Ministers to Member States on mediation in civil matters.

⁴⁹ Mediation as a Tool for Specialised Equality Bodies? *op.cit.*

⁵⁰ ‘Mode de solution des conflits consistant, pour la personne choisie par les antagonistes (en raison le plus souvent de son autorité personnelle), à proposer à ceux-ci un projet de solution, sans se borner à s’efforcer de les rapprocher’, Gérard Cornu in *Vocabulaire juridique*, PUF, Paris, 7th edition, 2005 ; ‘Mediation as a Tool for Specialised Equality Bodies?’, *op.cit.*

⁵¹ Equinet Report: ‘Mediation as a Tool for Specialised Equality Bodies?’, *op.cit.*; Response of the Slovak National Centre for Human Rights, Slovakia, August 21, 2006.

The Austrian Mediation Act defined mediation as *“a process based on the voluntary character of the parties participation in which a trained and neutral mediator promotes communication between the parties using recognised methods and where the parties are responsible for resolving the dispute.”*⁵²

The Complaints Committee for Ethnic Equal Treatment in Denmark, uses another definition: *“Mediation is a voluntary and confidential conflict-solving method, where one or more impartial third persons, through a structured process, assist the parties concerned in such a manner that the parties themselves negotiate and come to a satisfactory solution. Third persons do not make any decisions in the case.”*⁵³

According to the Equinet report on mediation⁵⁴: *“the Latvian National Human Rights Office provides the most general definition of mediation as ‘a confidential out-of-court dispute resolution process, focusing on renewing the dialogue between the parties and getting to a win-win-situation’.*

In Belgium, ‘mediation’ traditionally refers to a structured, voluntary and confidential conflict-management process in which the parties refer to an independent and impartial third party, the mediator. The mediator’s role is to help the parties draw up a fair agreement of their own accord, which takes into account the needs of each of the parties. The mediator’s chief assets are credibility and neutrality with regard to the dispute.⁵⁵

b) Criteria:

A common set of criteria for what constitutes a mediation procedure begins to emerge on the European level:⁵⁶

- the involvement of the mediator as facilitator:

The mediator has a neutral role in evaluating the feasibility of the terms of the agreement reached by the parties and making suggestions or offering guidance.⁵⁷

- the voluntary participation of the parties:

The process is voluntary and private with both parties agreeing the final decision. Like conciliation, the outcome is non-binding although parties can agree for this to be made into a court order called a consent order where proceedings have already been issued.⁵⁸

- the confidentiality of the process:

⁵² See Austrian Mediation Act, *Zivilrechts-Mediations-Gesetz*, BGBl. I Nr. 29/2003 and Austrian Mediation Association, <http://www.oebm.at/wasistmediation/wasistmediation.html>, September 13, 2006.

⁵³ Equinet Report: ‘Mediation as a Tool for Specialised Equality Bodies?’, *op.cit.*; Response of the Danish Institute for Human Rights’ Complaints Committee for Ethnic Equal Treatment, Denmark, August 17, 2006.

⁵⁴ This report is based on responses to the Questionnaire¹ carried out by the Austrian National Equality Body and circulated to the members of Equinet in July 2006.

⁵⁵ G. de Leval, *Éléments de procédure civile*, 2^{ème} édition, Larcier, 2005, Chapitre 3, conciliation et médiation.

⁵⁶ Mediation as a Tool for Specialised Equality Bodies? in *Dynamic Interpretation - European Anti-Discrimination Law in Practice I*, Equinet.

⁵⁷ *Ibidem*.

⁵⁸ Alternative dispute resolution in rights-based disputes: mediation in Britain today’, in *Dynamic Interpretation - European Anti-Discrimination Law in Practice I*, Equinet (the European Network of Equality Bodies).

Mediation is confidential and cannot be used later in court against either party.⁵⁹

- the fact that the solution, at least, is up to the parties:

"A consent order allows either party to apply to a court for enforcement should there be a breach of the agreement. Where proceedings have not been issued, the agreement can be enforced as a contract. However, it should be noted that breaches are rare as the process of mediation itself and the focus on parties brokering their own agreements generally gives the parties ownership of the process, leading to a low breach rate".⁶⁰

Mediation process can take from one day to several weeks or months depending on the sector and issues involved.⁶¹

Mediation and conciliation as a tool for countering discrimination? Legal input.

As an equality body intervening in discrimination cases, it is not always easy to define what we are trying to do. Can we really call it 'mediation', with three parties involved, one of them neutral and facilitator? Or would it be better to use the word 'conciliation', with three parties involved, each trying to achieve a successful outcome without going to court? To answer these questions, an overview of the legislation on mediation, conciliation and discrimination is required.

European legislation

On the European level, the European Parliament and the Council adopted Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (21 May 2008).⁶² This mediation concerns cross-border legal disputes in civil and commercial matters. Its aim is to improve and simplify access to justice and promote the use of mediation, contributing to the proper functioning of the internal market. Courts play an important role as they should draw the parties' attention to the option of mediation whenever this is appropriate. The European Code of Conduct for Mediators aims to guarantee compliance with the correct procedure. This kind of mediation is clearly relevant to the commercial and civil spheres, but it only concerns contracting parties. The parties can avoid lengthy court procedures and obtain a satisfactory commercial result. It is different from what we call 'conciliation' because there is no educational aspect.

The Netherlands

In the Netherlands⁶³ victims or presumed victims of discrimination can contact local anti-discrimination bureaux known as 'Article 1' in a reference to the principle of equality and non-discrimination in the first article of the Constitution. These bureaux conduct an initial interview with the victim, and most of their websites provide reassurance that their intervention will be 'soft'. By this they mean that they will try to find a solution through dialogue and conciliation. If soft intervention is unsuccessful or the outcome would not be satisfactory for the victim, the bureaux make other proposals: contacting the Commission for Equal Treatment (*Commissie Gelijke Behandeling*), going to court or asking for intervention by a mediator. At this stage the bureau's intervention stops, except for the provision of information on the future steps that the victim can take.

⁵⁹ *Ibidem*.

⁶⁰ Alternative dispute resolution in rights-based disputes: mediation in Britain today', in Dynamic Interpretation - European Anti-Discrimination Law in Practice I, Equinet (the European Network of Equality Bodies).

⁶¹ *Ibidem*.

⁶² O.J. 24.5.2008.

⁶³ Information based on: <http://www.conflictbemiddeling.nl/>; <http://www.nmi-mediation.nl>.

The mediation is a 'real' one, with a neutral third party, a written contract between parties, rules about the results and rules of behaviour for the mediator. These rules are defined by the Mediation Institute of the Netherlands (*Nederlands Mediation Instituut*), a national organisation whose membership comprises different kinds of mediation organisations. The objective of the Institute is to ensure the quality of mediation. It provides rules and models, and its list of mediators is accepted by enterprises, public authorities and judges.

Currently an amendment to the law is being discussed to implement the European Directive but extending it to national cases.⁶⁴ The mediation landscape could change significantly over the coming months and years.

France

Acts 2011-333 and 2011-334 of 29 March 2011 stipulate that the *Défenseur des Droits* (Ombudsman), who has replaced the *Haute autorité de lutte contre les discriminations et pour l'égalité* (HALDE, the Equal Opportunities and Anti-Discrimination Commission), 'may amicably resolve disputes brought to his/her attention by mediation. The findings made and statements collected during the mediation process may not be later supplied or invoked before civil or administrative bodies without the consent of the parties concerned, unless the disclosure of the agreement is required for its implementation or is rendered necessary for reasons of public policy.'⁶⁵ Mediation is hence included by the legislation as a remedy.

In practice, the Ombudsman's predecessor, HALDE, had set up a partnership with lawyers under the aegis of France's National Bar Council. It was necessary to identify skilled and trained mediators who would meet the public's expectations, to be known as lawyer-mediators. HALDE organised a free procedure which enabled the parties to meet with a view to reciprocal gain and to creating the conditions required for their relations to continue if that was their wish. For instance, by arranging for an apology or an acknowledgement by one party that the situation was unfair, this type of mediation supplied parties with alternative responses to paying damages. Such mediations also encouraged perpetrators of discrimination to change their behaviour and served an educational aim as in such cases a court sentence often does not suffice.⁶⁶ As HALDE's mission did not include neutrality, it provided mediators who represented the institution and therefore did not play the usual role of a mediator. These mediators were given training and subject to a specific code of ethics that meant that they could not remain neutral with respect to the principle of non-discrimination. They were entitled to reject decisions which appeared to them to be inconsistent with this principle. Nevertheless, the mediators were fully impartial third parties and complied with the rule of confidentiality.

This specific use of mediation to combat discrimination was distinctive in two ways:

- First, it required preparation prior to the mediation process, in the form of a preliminary personal interview with each of the parties. During this interview, the mediation process and its purpose were discussed;
- Second, once agreed, the terms of the agreement had to comply with the principle of non-discrimination.

In most cases, mediation led to an improvement in relations between the parties and even to their ongoing development as it enabled terms to be established for their future relationship.

⁶⁴ Adaptation of Book 3 of the Civil Code and the Code of Civil Procedure to the Directive on certain aspects of mediation / mediation in civil and commercial matters, First Chamber, Session 2011-2012, 32 555, C.

⁶⁵ Article 26.

⁶⁶ Proceedings of the colloquium on '*Mediation et Discriminations - l'exemple de la Halde*', Paris Bar Association, 27 March 2008.

The Ombudsman is revising these mediation methods as this office has also incorporated that of *Médiateur de la République* (Parliamentary Commissioner for Standards) and therefore the various forms of mediation need to be reconciled. The process initiated by HALDE has therefore come to a temporary halt.

United Kingdom

In Britain a distinction is made between conciliation and mediation, but it is a very small one. In both cases there is an intervention by an independent third party. The main difference is the level of involvement of the third party, which in conciliation is more interventionist, and in mediation more facilitative.

The mediation landscape is the result of historical evolution. We can distinguish three important actors in mediation concerning discrimination cases. First there is the Advisory, Conciliation and Arbitration Service (ACAS)⁶⁷ founded in 1975 as a non-departmental body, governed by an independent council. Its mandate consists of promoting good employment relations. It has a legal duty to offer conciliation in most cases when someone has a complaint about their employment rights, even if no formal complaint has been made to an employment tribunal. The mediation is managed by one of their trained panel of mediators or through the organisation's own in-house scheme. In 1995, the Disability Discrimination Act (amended in 1999 by the Disability Rights Commission Act) provided for a conciliation service to be run by the Disability Rights Commission.⁶⁸ This is a contracted service run by a specialist in alternative dispute resolution, Mediation UK. Cases can be brought through the DRC helpline, law centres, citizens advice bureaux or directly via the county court. Since 2005 cases have been prepared for conciliation by the Conciliation Management Unit (part of the DRC). The service only deals with conciliations in disability discrimination cases in the areas of goods and services and education. It is important to note that there is no in-house conciliation or mediation service. Finally, the Equality Act (2006) allows the Commission for Equality and Human Rights⁶⁹ to provide conciliation for cases (other than employment ones) in relation to race, sex, disability, sexual orientation, religion and belief. The Commission funds an independent Equalities Mediation Service. This service can deal with any complaints under the Equality Act that can be brought in a county court (England and Wales) or sheriff court (Scotland). Age-related employment disputes and all employment matters are still managed by ACAS. If a complainant wishes to use this service, they must be referred by the Commission or by any advice agency or law centre that is recognised by the Commission as a third party referrer. Agreeing to participate in the mediation process does not prevent a complainant from pursuing a case through the courts, but if a full settlement is reached through mediation, the claim cannot be pursued in court.

Belgium

a) Civil mediation

Civil mediation is governed by the Belgian Judicial Code,⁷⁰ which stipulates that mediation may take place in all areas where compromise is permissible. A distinction is made between voluntary mediation, which may take place independently of any legal proceedings (prior to, during or after legal proceedings), but which may be ratified by the competent judge, and court-ordered mediation, which is ordered by the judge to whom a case has been referred, either at his/her own initiative or at the request of the parties.⁷¹ In all cases, if the mediation agreement is to bind the parties, the mediator must fulfil a number

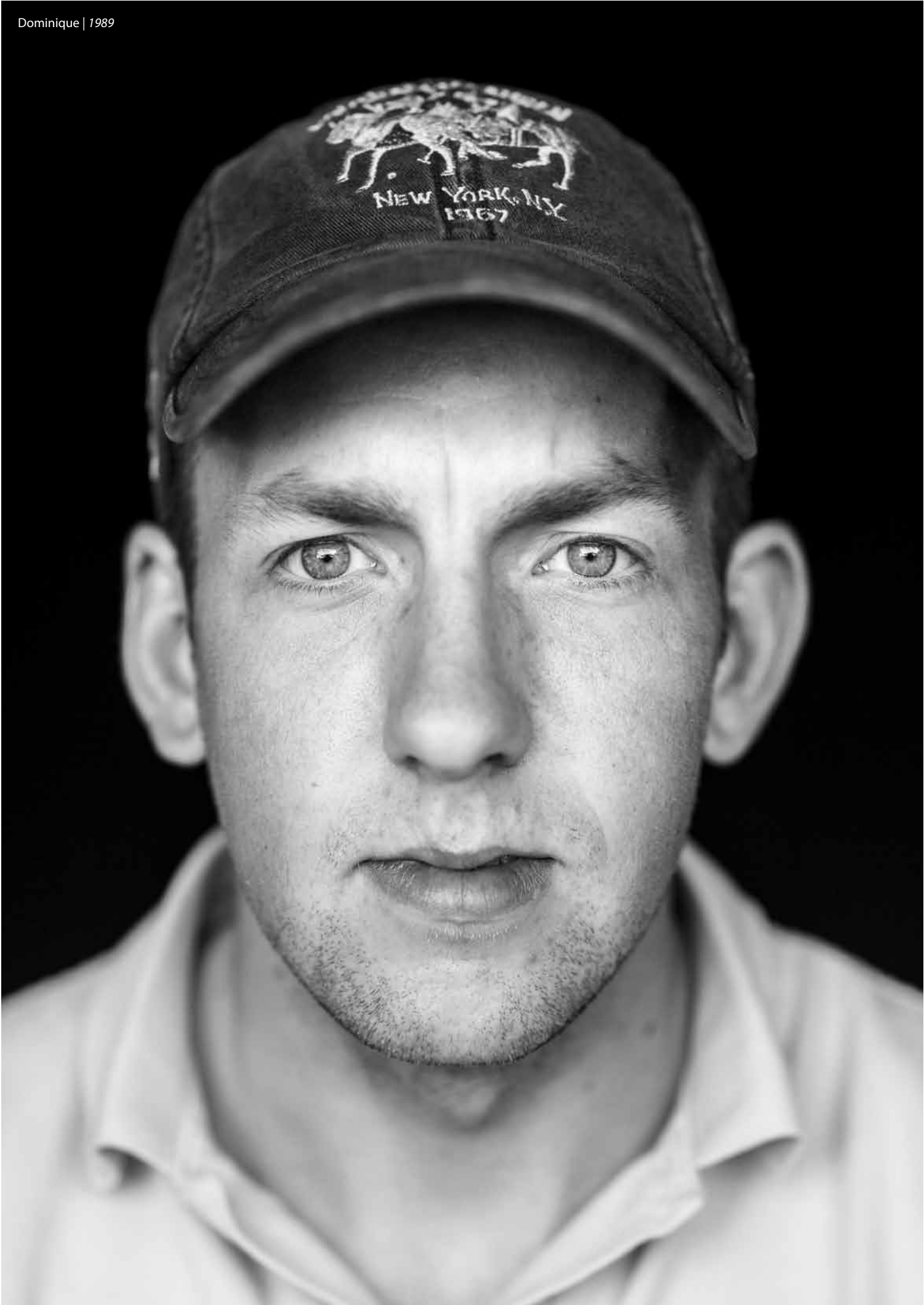
⁶⁷ <http://www.acas.org.uk>.

⁶⁸ 'Alternative dispute resolution in rights-based disputes: mediation in Britain today', in *Dynamic Interpretation - European Anti-Discrimination Law in Practice I*, Equinet.

⁶⁹ <http://www.equalityhumanrights.com/legal-and-policy>; <http://www.justice.gov.uk>.

⁷⁰ Articles 1724 to 1737.

⁷¹ G. de Leval, *Éléments de procédure civile*, 2nd edition, Larcier, 2005, Chapter 3, 'Conciliation et médiation', pp. 84 sqq.



of conditions and be approved by a Federal Mediation Commission. Judges may only refuse to ratify a mediation agreement when it is contrary to public policy.

Besides civil mediation, Belgian law also provides for penal mediation.

b) *Penal mediation*

Penal mediation is a procedure initiated by the Prosecutor's Office with the voluntary cooperation of all parties, aiming to settle the case out of court and to repair harm suffered by victims by means of a settlement between the victim and the perpetrator.

Penal mediation is only used for crimes punishable with imprisonment for less than two years. This procedure cannot therefore be applied in most hate crimes. It is useful when situation concerns a refusal to supply goods and services or 'mild' incitement.⁷²

The Public Prosecutor transfers the case to the official⁷³ who is responsible for penal mediation in the Prosecutor's Office. The official conducts an interview with the perpetrator and the victim. If no agreement is reached, the mediation is stopped and the case is transferred back to the Public Prosecutor for further examination. If an agreement is reached between victim and perpetrator, the Public Prosecutor then organises a mediation hearing, to which the perpetrator and possibly the victim are summoned. During the hearing, the settlement or agreement is registered in an official document, signed by both parties.⁷⁴

Besides the mediation processes, informal conciliation may be used in all sectors and all disputes. Conciliation is a reconciliation process organised by a third-party conciliator who endeavours to bring the parties to a resolution of their dispute and, should difficulties arise, proposes a solution. Unlike a mediator, a conciliator does not need to be specifically trained or approved.⁷⁵ The parties to a conciliation process may agree beforehand to comply with the solution suggested by the conciliator. If the parties reach an agreement, a written agreement is drawn up, which formally ends the dispute. If necessary, a legal writ of execution may be issued further to legal proceedings.

⁷² Christophe Mincke, *De l'utopie à l'aveuglement. La médiation pénale belge face à ses idéaux fondateurs*, FUSL, 2006. <http://tel.archives-ouvertes.fr/docs/00/48/43/53/PDF/THESE.pdf>.

⁷³ "assistant de justice" in French.

⁷⁴ Points on which to focus during the interview:

Circumstances in which facts happened

Causes and motivation

Consequences, expectations and readiness to repair harm

Result of the mediation, among others:

Damages paid or harm repaired

Payment in one or several invoices

Therapy

Obligation to follow a course

⁷⁵ R.P.D.B., v° *Conciliation*; Perrot, 'Rapport général de synthèse' in G.De Leval and J. Hubin (eds) *Espace Judiciaire et social européen*, Larcier, 2003, pp 740 sqq.

c) *The role of the Belgian equality body*

The Act founding the Centre for Equal Opportunities and Opposition to Racism⁷⁶ empowers the latter to 'within the limits of its mission as described in Article 2, hear and process complaints and undertake any mediation process it may deem useful, without prejudice to the powers of the *Collège des médiateurs* [an independent federal body that mediates between the federal administration and citizens]'.⁷⁷

The role played by the Centre for Equal Opportunities varies from case to case, but we always try to explain to victims how we will intervene and do not dwell for very long on the right name. A specific mediator may exist for certain complaints, in which case the Centre may contact him/her with questions. Alternatively, the appropriate ombudsman (for example, the city, railway, bus or insurance ombudsman) may follow up the case. In this event, the Centre likes to be informed of the solution.

In criminal cases, the Centre can request the Prosecutor's Office to take the initiative to mediate. It can then assist or represent the victim and be a party in the penal mediation. The role of the Centre is less important in mediations of this type: it mostly suggests legal remedies that could be applied.-

The Centre has entrusted the Leuven Institute of Criminology (LINC) and the Catholic University of Leuven (KUL) with the task of drawing up an investigative report which analyses from the viewpoint of criminal law the role of different types of alternative dispute resolution in countering discrimination, their advantages, salient points and a variety of examples, and which provides a series of recommendations. The purpose of this report, to be published shortly, is to support a proactive policy of alternative dispute resolution and supply mediation associations and the judiciary with a number of tools to educate perpetrators of discrimination, particularly the young. No such educational measures for offenders exist at the moment. The report also aims to raise awareness among judges and help them formulate a specific approach to discrimination.

When the Centre conducts negotiations between parties, these can be direct and informal, taking the form of sitting around the table with all parties and trying to obtain a satisfactory result.

For example, a homosexual couple wants to lease a pub, but the landlord is reluctant because there has been a negative reaction in the neighbourhood. People are afraid that the homosexual managers will attract a certain group of customers: young, loud and...homosexual. In the end, the parties agree that the couple can lease the pub as long as they promise to strictly respect closing time.

The Centre can also intervene indirectly, for example, by giving information to a victim or collaborating with certain organisations, for example, trade unions. However, it never acts as a mediator or represents the victim during court proceedings.

For the Centre, mediation or negotiation means a great deal of work. It is also difficult work: the Centre must take care that the parties do not burn their bridges when trying to reach an agreement, defend the victim, convince the other party that s/he is legally in the wrong, and collect as much evidence as possible that a judge will accept if the case had to go to court in the end. It is far more intensive than writing a complaint to a prosecutor who will collect evidence and asking a lawyer to follow up the case and defend the Centre and the victim in court. In 2010 the Centre received 3,608 complaints, opened 1,466 files and brought 16 cases to court. Court proceedings are sometimes the only solution, but they can take a long

⁷⁶ Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism, Belgian Official Journal (BOJ), 19.II.1993, amended by the Laws of 13 April 1995 (BOJ, 25 IV 95), 20 January 2003 (BOJ, 12 II 03), 25 February 2003 (BOJ, 17 III 03), 10 August 2005 (BOJ, 2 IX 05), 10 May 2007 (BOJ, 30 V 07).

⁷⁷ Art.3.4bis.

time and provide a poor result for the victim. For example, moral (non-pecuniary) damages of one euro are most frequently awarded. The victim also has to pay a lawyer and bear the stress of the proceedings and the result.

Finding a solution, agreed by both parties, is better most of the time than convicting someone who will not be greatly inclined to respect anti-discrimination law and diversity principles in the future if he believes that he has come off badly as a result of them. The victim will achieve greater satisfaction because in most cases, he receives an apology from the perpetrator (a crucial aspect as the victim's sense of injustice is acknowledged) and/or his rights are recognised or he obtains financial compensation. However, even if the parties do not go to court, the solution will be based on legal provisions and refer to them.

Good practice: the case of Belgium

The Centre for Equal Opportunities and Opposition to Racism will almost always (although never in cases of physical violence) propose conciliation to the victim, while respecting their fundamental rights, of course. Only approximately 2-3% of the cases are brought to court. Conciliation can be used in criminal as well as civil cases (employment, goods and services or education, for example).

In criminal cases, with penal mediation, we can cite the following examples:

- Two boys of sixteen designed a website that contained racist remarks and denied the Holocaust. The police had already intervened. The Centre suggested that the Prosecutor initiate a mediation through a non-profit organisation. Several meetings took place, with and without the boys' parents. Different areas were covered, such as their motivation, the harm caused, their responsibility, and how they could make amends. It was suggested that they should be involved in creating a website for a local office against racism. They agreed and did a good job. The case was closed for the Prosecutor.
- A skinhead repeatedly made racist statements in public, gave a raised-arm salute and was involved in vandalising a mosque. A complaint was lodged with the Prosecutor's Office, which proposed a penal mediation procedure in which the Centre would take part as an expert. In addition to community service (cleaning tasks for an NGO to be performed by the perpetrator), it was agreed that an interview would take place between the Centre and the perpetrator, during which the legal consequences of his racist and Holocaust-denying actions would be explained. The perpetrator would also be required to visit the Breendonk concentration camp and the Deportation Museum in Mechelen, and to set up a blog on his personal experience.

Examples in civil cases, with informal conciliation:

- An employer rejected a job applicant who was Belgian but of Turkish origin. The job consisted of selling security equipment. The situation was obvious and the refusal was written. The employer did not want to change his attitude. After he was convicted, the judge ordered that his decision should be published in several newspapers. However, during the trial the case received a great deal of publicity, and several buyers stopped ordering from the firm. The Centre accepted that the decision should not be published to prevent further damage as the employer undertook to implement a diversity plan for the company.
- A municipal civil servant whose hearing difficulties were worsening and who was losing his ability to perform his professional duties requested adaptations, which were denied. Further to an intervention by the Centre, the Municipal Secretary promised that the following equipment would be supplied: a telephone with an amplifier, an electric-signal detector and an amplifier connected to a hearing aid.

The civil servant applied for funding for the related workplace expenditure from the Walloon Agency for the Integration of the Disabled (AWIPH).

- A 57-year-old man applied for a position as a worker at an SME. He was turned down on the grounds that the manager preferred a younger applicant. The Centre opened talks with the employer, who had obviously let himself be influenced by the idea that an older worker would be less physically fit and would provide less assurance of continuity in the warehouse. In the Centre's view, these reasons were inadequate, and in the end the employer agreed to pay compensation to the rejected applicant. He also undertook to implement a more responsible staff policy in connection with age.
- A clause in a life-insurance policy specified that 'cover shall remain in force should decease occur within 12 months of the date of the accident and the beneficiaries supply proof that the death was directly caused by the accident. This time shall be reduced to 30 days for insured parties aged 75 and over on the date of the accident.' An individual had been unable to make an insurance claim as his/her mother had died at the age of 77 over 30 days after a car accident, despite the fact that there was a causal link between the accident and the death. Further to intervention by the Centre, the insurance company decided to pay the beneficiary the sum specified in the policy. Moreover, the company acknowledged the irrelevance of the statistics underpinning this clause and dropped the age-related distinction from all its policies.
- A man's request for outstanding-balance insurance was denied on medical grounds. In 1999, he had been diagnosed with colon cancer and had been treated immediately with radiotherapy and neoadjuvant chemotherapy as well as surgery. The cancer had not metastasised or caused any further medical problems. After six years, his doctor pronounced him cured. Moreover, according to the scientific literature, the risk of recurrence was only 0.8% after 8 years, i.e. almost the same as the risk that an average Belgian might develop cancer for the first time. Once the Centre had made these arguments known, the insurance company withdrew its decision and the man was offered outstanding-balance insurance with a limited surcharge.
- Due to a disability, an individual was only able to drive vehicles with automatic transmission. Although his/her comprehensive insurance stipulated that he/she would be lent a replacement vehicle in the event of repairs, the garage stated that it could only supply a car with automatic transmission at an extra cost of 20% of the rental price. Further to intervention by the Centre, the garage issued a written undertaking that it would supply the necessary vehicle at no extra cost.
- A woman who had been the target of racist harassment by her direct boss for three years had lodged a formal complaint with the external prevention adviser, who had confirmed that the behaviour was indeed racist. At the victim's request, the Centre contacted the company, which reprimanded the boss and paid the victim three months' gross salary in lieu of compensation.
- A young man applied to join the police. Although he had done well in the physical and psychological tests, he was declared to be medically unfit as he had had a bladder operation. Many interventions by the Centre, supported by expert medical opinions, were required, until finally the applicant was reexamined by the police medical department, which then pronounced him fit.
- A woman signed a contract for a student job as a cleaner with a services company for the month of September. When she arrived at the public institution for which she had been hired, she was asked by one of the employees what she was wearing on her head, then ordered to remove her headscarf immediately if she wished to enter the building and perform her tasks. Further to an intervention by the Centre, the public institution withdrew the order and offered to let the temp wear her headscarf at

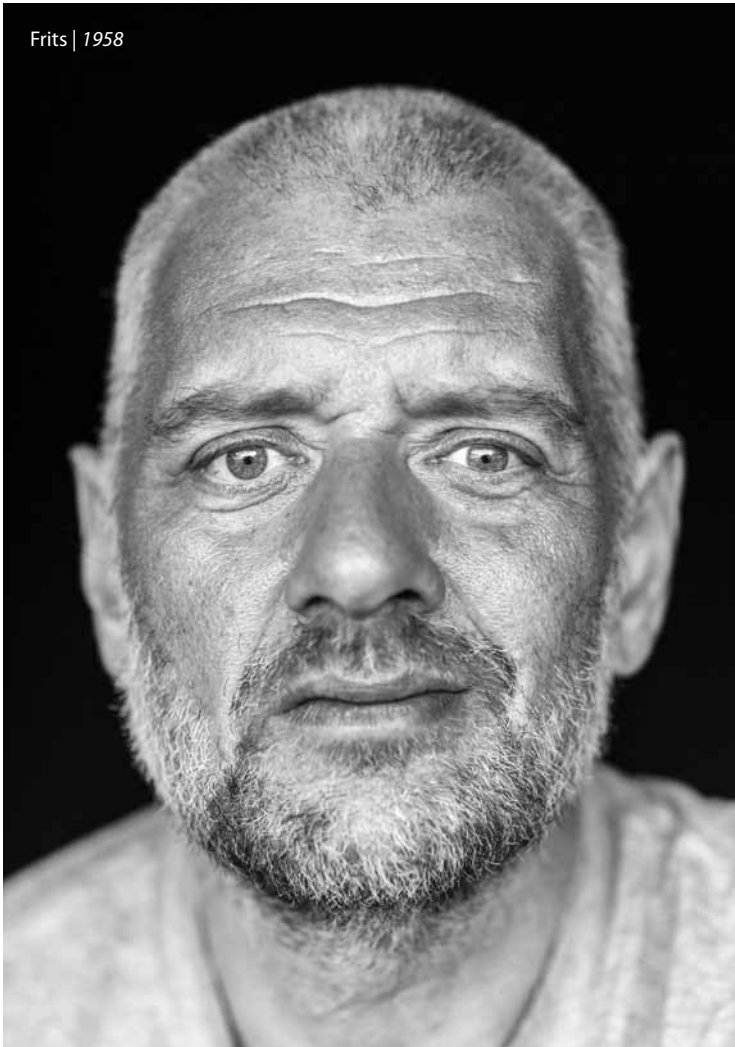
work. Moreover, the services company, which had intended to terminate her contract on the grounds that she had refused to remove her headscarf, offered her a job at another site, at her request and further to another intervention by the Centre.

- The parents of a dyslexic seventh-grade girl contacted the Centre. During talks with the parents, the school had suggested that they transfer their daughter to a technical school in view of her poor academic results. The parents believed that the girl's performance was partly due to the school's failure to reasonably accommodate her requirements. Although specific measures were in place for examinations, the girl's parents believed that not enough accommodation had been made for day-to-day class work. Further to two meetings between the various parties involved (the head teacher, the class teacher, other teachers, psycho-medical-social services, the parents, the student, a psychologist, and the Centre), the school agreed to increase the measures already taken for the examinations and take special measures to meet the student's needs both generally (e.g. note-taking by other students in class) and in certain subjects (e.g. course notes in electronic format, option of taking oral examinations, permission to use a calculator).
- A young female wheelchair user contacted the Centre after seeing on the website of the continuing training institute she had been attending for several years that it could not be accessed by the mobility-impaired. She believed this message was intended to dissuade other disabled persons from enrolling in the institute. The Centre contacted the training institute to explain that it could be inferred from this message that no reasonable accommodation was available to enable mobility-impaired students to access the institute. Such prior refusals to make reasonable accommodation are prohibited by law. The disputed message was removed from the website and a reminder of the law on disability and reasonable accommodation was supplied.

Conclusion

It would seem that ADR is increasingly gaining official recognition as a means of dispute resolution. At the very least, mediation providers are attempting to organise themselves in a manner that strengthens their credibility. However, it is important to distinguish between the contexts in which ADR can take place: commercial cases are very different from discrimination cases. The European approach is essentially commercial. Moreover, guarantees have to be present that the fundamental rights of the parties involved will be respected. A regular analysis and evaluation of different systems in different countries could be interesting. ADR is in fact a parallel system to the courts, and a democratic society should be aware of this. Examples drawn from the work of the Belgian equality body show that success depends on clear-headedness, reasonable expectations and the willingness to change our point of view.

Frits | 1958



Jacolien | 1985



kaylie | 2000



Michael | 1971



European Legal Policy Update

Commission launches public consultation on measures to break down barriers to people with disabilities

On 13 December 2011, the European Commission initiated a public consultation in preparation for the European Accessibility Act, planned for autumn 2012. It sought input from businesses, people with disabilities and the general public on its future proposals for breaking down barriers to people with disabilities. The Act aims to ensure equal access to buildings, transport and information and communication services. It constitutes a follow-up to the strategy to create a barrier-free Europe adopted in November 2010.⁷⁸ One of the key actions envisaged by the strategy is to use standardisation or public procurement rules to make all goods and services accessible to people with disabilities.

Internet source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1533&format=HTML&aged=0&language=EN&guiLanguage=en>

⁷⁸ *European Anti-Discrimination Law Review* (EADLR), issue 12, p. 33.

Court of Justice of the European Union Case Law Update

Infringement proceedings

Case C-312/11 European Commission v Italian Republic, action brought on 20 June 2011

The European Commission has alleged that Italy has failed to fulfil its obligation to implement Article 5 of Directive 2000/78/EC by not placing all employers under the obligation to make reasonable accommodation for individuals with disabilities. The Commission argued that Law No 68/1999, although offering in certain areas a level of assurance and facilitation which goes beyond what is required under Article 5 of Directive 2000/78/EC, does not apply to all persons with disabilities. In addition, these provisions are not enforceable against all employers, do not concern all the various aspects of the employment relationship, or require further implementation measures.

Internet source:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:226:0019:0019:EN:PDF>

References for preliminary rulings – Applications

Case C-266/11 Reference for a preliminary ruling in the case of Dansk Funktionærforbund, Serviceforbundet, acting on behalf of Frank Frandsen v Cimber Air A/S, lodged on 27 May 2011

Reference for a preliminary ruling has been made to the Court of Justice of the European Union by the High Court of Western Denmark (*Vestre Landsret*) in a case where a collective agreement between an airline company and a trade organisation representing the airline company's pilots has been challenged under the age provisions of Directive 2000/78/EC. In essence, the collective agreement provides for the compulsory retirement of pilots who have reached 60 years of age, with the aim of ensuring aviation safety. The agreement does not foresee any individual assessment of the pilot's performance but does, however, allow for rolling one-year renewals of the contract following approval by a specific committee made up of employer and employee representatives.

Internet source:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:311:0015:0016:EN:PDF>

Case C-335/11 Reference for a preliminary ruling in the case of HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab DAB and Case C-337/11 Reference for a preliminary ruling in the case HK Danmark, acting on behalf of Lone Skouboe Werge v Pro Display A/S in liquidation, lodged on 1 July 2011

In both cases, the questions referred to the Court of Justice of the European Union concern the material scope of Directive 2000/78/EC and the concept of disability. It is first asked whether a person who because of physical, mental or psychological injuries cannot or can only to a limited extent carry out his or her work over a period that satisfies the requirement as to duration set out in the *Chacón Navas* case,⁷⁹ falls within the definition of disability. Moreover, the national court seeks in both cases to determine whether a condition caused either by a medically diagnosed incurable illness or by a medically diagnosed temporary illness can be covered by the concept of disability. In the second part of the reference, the national court asks whether a permanent reduction in functional capacity which does not entail a need for special aid or the like and leading to part-time employment may be regarded as disability. The court

⁷⁹ Case C-13/05, [2006] ECR I-6467.

also wonders whether a reduction in working hours can be considered as reasonable accommodation for the purposes of Article 5 of Directive 2000/78/EC. Finally, it is asked whether national law allowing the dismissal with a shortened notice period of employees who have been absent from work for a total of 120 days during a period of 12 consecutive months is valid under EU anti-discrimination law.

Internet source:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:269:0031:0032:EN:PDF>

Case C-394/11 Reference for a preliminary ruling in the case of Valeri Hariev Belov v ChEZ Elektro Balcaria AD and ChEZ Raspredelenie Balcaria AD, lodged on 25 July 2011

A case has been referred to the Court of Justice of the European Union by the Bulgarian Commission for Protection against Discrimination (*Komisija za zashtita ot diskriminatsia*, the Bulgarian equality body). The facts concern the different height at which electricity meters are attached to electricity poles in the street in Roma districts and all other districts of the city. A number of questions relating to the interpretation of the Directive 2000/43/EC have been referred to the Court.

Firstly, the equality body seeks to know what the term ‘treated less favourably’ means for the purposes of Article 2(2)(a) of Directive 2000/43/EC. In particular, it asks whether ‘for less favourable treatment to qualify as direct discrimination, it is absolutely essential for the treatment to be more unfavourable and for it to infringe, directly or indirectly, rights or interests explicitly defined in law, or is it to be understood in the wider sense as any form of being placed in a particular unfavourable/disadvantageous situation.’ The same question applies to the interpretation of indirect discrimination.

In the event that the interpretation based on infringement of rights or interests defined in law is favoured, the equality body asks whether or not the relevant EU directives or the Charter of Fundamental Rights set out a right or interest that would entitle final consumers of electricity to regularly check meters and which could be enforced before the national courts, and whether national legislation or practice allowing the installation of electricity meters which are difficult or impossible for certain consumers to read is compatible with these instruments. The equality body also seeks interpretation of the words ‘to put persons of a racial or ethnic origin at a particular disadvantage’ within the meaning of Article 2(2)(b) of Directive 2000/43/EC.

The last question relates to interpretation of Article 8(1) of Directive 2000/43/EC and the shift in the burden of proof with regard to the facts of the case.

Internet source:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:298:0014:0015:EN:PDF>

Case C-476/11, Reference for a preliminary ruling in the case HK Danmark, acting on behalf of Glennie Kristensen v Experian A/S, lodged on 19 September 2011

The national court requests the interpretation of Article 6(2) of Directive 2000/78/EC concerning age limits for admission to occupational social security schemes. In particular, the Court of Justice of the European Union is asked whether the derogation in Article 6(2) authorises Member States to except occupational social security schemes from the prohibition of direct or indirect discrimination on grounds of age and to maintain a system where employers can pay age-graded pension contributions, in so far as that does not bring about discrimination on grounds of sex.

Internet source:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:340:0011:0012:EN:PDF>

Case C-546/11 Reference for a preliminary ruling in the case Dansk Jurist – og Økonomforbund (DJØF – Danish Union of Jurists and Economists) acting on behalf of Erik Toftgaard v Inderings – og Sundhedsministeriet, lodged on 26 October 2011

The national court requests the interpretation of Article 6(2) of Directive 2000/78/EC concerning age limits for admission to occupational social security schemes. In particular, the Court of Justice of the European Union is asked whether Member States may provide only that the fixing of age limits for access or entitlement to benefits under occupational social security schemes does not constitute discrimination in so far as those social security schemes relate to retirement or invalidity benefits. In addition, the national court also requests interpretation on the 'availability salary' scheme under which a civil servant may, as special protection in the event of redundancy due to the abolition of his post, retain his current salary for three years and continue to be credited for years of pensionable service, provided he remains available for assignment to another suitable post. Finally, the reference asks whether a provision, under which an availability salary is not paid to a civil servant who has reached the age at which the State retirement pension becomes payable if his job has been abolished, is compatible with Directive 2000/78/EC.

Internet source:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:013:0006:0006:EN:PDF>

References for preliminary rulings – Judgments

Case C-310/10, Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafiței and others, Judgment of 7 July 2011

OJ C 269, 10.9.2011, p. 17–17

Romanian judges initiated a legal action before the Bacău District Court (*Tribunalul Bacău*) against that court, the Bacău Appeal Court (*Curtea de Apel Bacău*) and the Ministry of Justice (*Ministerul Justiției și Libertăților Cetățenești*) to challenge differences in their remuneration compared to public prosecutors of the National Anti-Corruption Directorate (*Direcția Națională Anticorupție*) and the Directorate for Investigating Organised Crime and Terrorism (*Direcția de Investigare a Infraacțiunilor de Criminalitate Organizată și Terorism*) owing to their legal status. On 4 April 2008, the Bacău District Court found discrimination on grounds of socio-professional category and place of work and requested the payment of the difference of salary to the plaintiffs pursuant to Legislative Decree No 137/2000 transposing Directives 2000/43/EC and 2000/78/EC into national law. On appeal, the Ministry of Justice argued that the court had exceeded the limits of its jurisdiction by conferring upon itself legislative powers as remuneration of these judges is set by law. The court of appeal consequently decided to refer questions to the Court of Justice of the European Union for a preliminary ruling on the compatibility with Directives 2000/43/EC and 2000/78/EC of national legislation or a judgment of the Constitutional Court (*Curtea Constituțională*) prohibiting the national judicial authorities from awarding compensation to claimants who have been discriminated against as in the present case.

The Court of Justice found the reference for a preliminary ruling inadmissible as it was apparent from the facts of the case that the ground of discrimination did not fall within the material scope of the Directives, which cover racial or ethnic origin, religion or belief, age, disability and sexual orientation. The Court also recalled that Article 19 of the Treaty on the Functioning of the European Union did not refer to discrimination on grounds of socio-professional category or place of work and therefore could not constitute a legal basis for Council measures to combat such discrimination. Since Directives 2000/43/EC and 2000/78/EC have been transposed by Legislative Decree No 137/2000, the Court considered whether it was necessary to provide an interpretation of EU law, due to the circumstances of the case. It concluded that the questions referred sought an interpretation on the principle of primacy of EU law in a situation falling outside the scope of EU law and therefore were inadmissible.

Internet source:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0310:EN:HTML>

Joint cases C-159/10 and C-160/10, Gerhard Fuchs, Peter Köhler v Land Hessen, Judgment of 21 July 2011
OJ C 269, 10.9.2011, p. 14–14

The dispute arose in two similar cases where the applicants, both born in 1944 and State prosecutors, challenged the provisions relating to the general retirement age applicable to civil servants in the *Land* Hessen in Germany. Paragraph 50 of the Civil Service Law of the *Land* Hessen sets the compulsory retirement age for civil servants at the age of 65. In 2009, both applicants reached the age of 65 but applied to continue to work for a further year, pursuant to Paragraph 50(3) of the Civil Service Law which permits civil servants to continue to work until the maximum age of 68, if it is in the interests of the service. The Ministry of Justice of the *Land* Hessen considered that it was not in the interests of the service for them to remain in post and rejected their application. Several legal actions against the Ministry of Justice's decision were initiated and interim measures were requested but in the meantime, the applicants had no longer been able to exercise their professional prerogatives and had been paid a retirement pension. Reasons brought forward for this arrangement related to a reduction in fitness for work after the age of 65 and the promotion of the employment of younger people to ensure an appropriate age structure.

The *Verwaltungsgericht Frankfurt am Main* (Frankfurt am Main Administrative Court), considering that certain measures lacked coherence, referred the cases to the Court of Justice of the European Union, which was requested to examine the validity of the German law under Directive 2000/78/EC. The first question asked whether the compulsory retirement age, subject to a possible extension if the interests of the service require, complied with Directive 2000/78/EC if the aim was to create a favourable age structure, to plan staff departures, to promote civil servants and to prevent disputes or to achieve budgetary savings. The Court immediately observed that such a provision affecting employment and working conditions established a difference in treatment on the ground of age for the purposes of Article 2 of Directive 2000/78/EC. It was therefore necessary to determine whether that provision was justified by a legitimate aim and whether the means to achieve that aim were appropriate and necessary. The law did not clearly state the aim pursued but it could be inferred from the general context. The 'favourable age structure' justification of balancing young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and to prevent possible disputes concerning employees' fitness to work beyond a certain age was found to constitute a legitimate aim of employment and labour market policy serving public interest. The Court then turned to the appropriateness test. The establishment of a balanced age structure between young and older civil servants did not seem unreasonable in the light of the limited access to the profession of prosecutor. Member States enjoy broad discretion in the definition of measures capable of achieving that aim provided that it does not affect the principle of non-discrimination on the ground of age. They must find the right balance between the different interests involved, while ensuring that the means are appropriate and necessary. Referring to the *Palacios de la Villa* and *Rosenbladt* cases, the Court held that the retirement conditions did not go beyond what was necessary to achieve the aim of establishing a balanced age structure, as prosecutors received a full pension equivalent to approximately 72% of their final salary and could work for a further three years if they so requested and if it was in the interests of the service.

The second question sought to establish what information must be produced by the Member State in order to demonstrate the appropriateness and necessity of a measure pursuant to EU law. The Court recalled that the appreciation of the facts to determine discrimination is a matter for national judicial or other competent authorities, in accordance with rules of national law or practice and it is for the national authority to assess the probative value of the evidence adduced, which may include statistical evidence.



The last question addressed the question of coherence of the law, in particular with regard the exception allowing prosecutors to work until they reach the age of 68 in certain cases. The Court observed that such an exception was unlikely to undermine the aim of guaranteeing a balanced age structure and on the contrary could mitigate the rigidity of the law. The *Land Hessen* also indicated that the exception was intended to cover instances where a prosecutor was in charge of a criminal case so as to ensure continuity of proceedings. The intention to gradually raise the retirement age from 65 to 67 did not mean that the law lacked coherence as, according to the Court, changes in the law or differences may occur from one state or one *Land* to another, to take into account of particular regional features and to enable the competent authorities to make the necessary adjustments.

Internet source:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0159:EN:HTML>

Case C-447/09 Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG, Judgement of 13 September 2011

OJ C 319, 29.10.2011, p. 4–4

Mr Prigge, Mr Fromm and Mr Lambach initiated a legal action against their employer, Deutsche Lufthansa AG, for the automatic termination of their employment contracts at the age of 60, pursuant to Article 19(1) of Collective Agreement No 5a. After the first instance courts dismissed their claim, they brought the dispute before the Federal Labour Court (*Bundesarbeitsgericht*). The national court referred the case to the Court of Justice of the European Union, which was requested to examine the compatibility of the clause with Directive 2000/78/EC.

The Court immediately recognised direct discrimination on the ground of age and turned examining the justification of ensuring air traffic safety brought forward by the social partners in the light of the exception laid down in Article 2(5) of Directive 2000/78/EC regarding public security. The Court recognised that ‘measures that aim to avoid aeronautical accidents by monitoring pilot’s aptitude and physical capabilities with the aim of ensuring that human failure does not cause accidents’ contributed to public security. However, national and international legislation considered that it was sufficient to restrict pilots’ activities past the age of 60 instead of creating a total ban. The Court consequently held that the measure was not necessary for the achievement of the objectives pursued relating to public security and the protection of health.

The Court then examined whether possessing particular physical capabilities as an airline pilot could fall within the meaning of Article 4(1) of Directive 2000/78/EC on genuine and determining occupational requirement. It recognised that it is essential that they possess particular physical capabilities in so far as physical defects may have significant consequences and that such capabilities may diminish with age. The objective relating to air traffic safety therefore constituted a legitimate objective within the meaning of Article 4(1) of Directive 2000/78/EC. However, by fixing the age-limit at 60, the social partners imposed a disproportionate requirement as national and international legislation authorised the carrying out of pilots’ activities until the age of 65, under certain conditions.

Finally, the Court proceeded to the justification test under Article 6 of Directive 2000/78/EC and ruled that air traffic safety did not constitute a legitimate aim related to employment policy, labour market and vocational training.

Internet source:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0447:EN:HTML>

European Committee of Social Rights Update

Complaint no. 67/2011, Médecins du Monde – International v France

The complaint was registered on 19 April 2011. According to the organisation *Médecins du Monde* (Doctors of the World), France has infringed the rights of its Roma population with regard to housing, education for their children, social protection and health care, in breach of Articles 11 (right to health), 13 (right to social and medical assistance), 16 (right to appropriate social, legal and economic protection for the family), 17 (right of children and young persons to appropriate social, legal and economic protection), 19§8 (guarantees concerning expulsion), 30 (right to protection against poverty and social exclusion) and 31 (right to housing) of the Revised European Social Charter, read alone or in conjunction with the non-discrimination clause in Article E.

Complaint no. 75/2011, International Federation of Human Rights (FIDH) v Belgium

The complaint was lodged on 13 December 2011. It concerns the situation of highly dependent disabled adults in need of care facilities and accommodation, and their relatives. The International Federation of Human Rights (FIDH) alleges that Belgium has not taken adequate measures to comply with Articles 13 (right to social and medical assistance), 14 (right to benefit from social welfare services), 15 (the right of persons with disabilities), 16 (right to appropriate social, legal and economic protection for the family), taken alone or in combination with Article E (non-discrimination) of the European Social Charter (Revised).

Decision on the merits of Complaint no. 61/2010, European Roma Rights Centre v Portugal

The complaint, registered on 23 April 2010, alleged violation of Articles 16 (right of the family to social, legal and economic protection), 30 (right to protection against poverty and social exclusion) and 31 (right to housing) of the Revised Charter, read alone or in conjunction with Article E (non-discrimination clause) for failure to ensure the provision of adequate and integrated housing solutions for Roma in Portugal. The European Roma Rights Centre (ERRC) considered that re-housing programmes have failed to integrate Roma and have in practice resulted in spatial segregation and inadequately sized dwellings in areas with poor infrastructure and limited or no access to public services. The ERRC recalled the positive obligation of Portugal to improve housing conditions for Roma and considered that the current housing situation was tantamount to indirect discrimination.

The Committee of Social Rights considered that the main issue at stake related to the right to housing of an adequate standard. Firstly, it examined whether the specific disadvantages faced by Roma had been sufficiently taken into consideration and addressed by the authorities in the light of Article E. The Government argued that legislation provided adequate safeguards for the prevention of discrimination. The Committee held that in the case of Roma, merely guaranteeing identical treatment as a means of protection against any discrimination was not sufficient. It also noted that the percentage of Roma living in poor housing conditions was far above the national average and that they were therefore in a different and disadvantaged situation, which compelled the authorities to adequately redress this difference.

With regard to dwellings, access to natural and common resources, namely safe drinking water, electricity, sanitation facilities and waste disposal must be ensured for the purpose of providing adequate housing. The Committee found that minimum standards were not met, in breach of Article E read together with Article 31§1.

Although the Committee noted the various housing and resettlement programmes put in place, it considered that segregated Roma neighbourhoods have to a large extent been created by the actions of municipalities. It pointed to a few examples, such as the construction of a concrete wall or precarious houses lacking electricity, water or sanitation, and concluded Roma segregation in violation of Article E read in conjunction with Article 31§1. In addition, the inability and unwillingness of central authorities to redress the situation and to ensure the effective implementation of housing programmes, leading to segregation and isolation, was in breach of Article E taken in conjunction with Article 30.

Since the allegations raised under Article 31§1 and Article 16 were closely linked, the Committee also recognised a violation of Article E taken in conjunction with Article 16.

The Committee awarded a lump sum of EUR 2,000 to the ERRC as compensation for expenses incurred by the procedure.



News from the EU Member States, Croatia, the FYR of Macedonia and Turkey.

More information can be found at <http://www.non-discrimination.net>

*Legislative developments***Law prohibiting the wearing of any clothes totally or partially covering an individual's face in public spaces enters into force***religion
or belief*

On 23 July 2011, the Federal Act of 1 June 2011 prohibiting the wearing of any clothes totally or partially covering an individual's face in public spaces came into force.⁸⁰ The law criminalises any total or partial head covering that masks or hides the face with the effect that individuals are no longer identifiable in areas accessible to the public. Public spaces are defined as streets, parks, public gardens, playgrounds, cultural places and places where a service is available to the public (such as shops or hotels). Exceptions to the prohibition are possible for motorcyclists or for specific professions such as fire fighting. Municipalities are also allowed to provide for exceptions in limited cases such as occasional or festive activities (e.g. carnivals or fairs). Criminal penalties as well as administrative penalties are specified in the law.

Internet source:

<http://www.ejustice.just.fgov.be/cgi/welcome.pl>

*Case law***Constitutional Court refuses to suspend the law prohibiting the wearing of any clothes totally or partially covering an individual's face in public spaces***religion
or belief*

Two Muslim women occasionally wearing a headscarf totally or partially hiding their face decided on 27 July 2011 to make an application to the Constitutional Court for the annulment and suspension of the Federal Act prohibiting the wearing of any clothes totally or partially covering an individual's face in public spaces, adopted in June 2011 (see above).⁸¹

On 5 October 2011, the Constitutional Court refused to suspend the law, considering that no serious irrevocable damage could be demonstrated by the applicants. The Court added that if the applicants were prosecuted in a criminal court for wearing a headscarf totally or partially hiding their faces, they would then be able to request a preliminary ruling from the Constitutional Court.

Formal exclusion of all employees or prospective employees suffering from diabetes is contrary to the anti-discrimination law*disability*

A stock controller working at the port of Antwerp and suffering from diabetes applied in 2008 for the position of container stock controller. The occupational doctor considered that her health condition made her medically unfit for any function performed at the port of Antwerp. The doctor's opinion relied on internal guidelines, which automatically excluded all employees or prospective employees suffering from type-1 diabetes, irrespective of any individual examination and regardless of the position concerned.

The Labour Court of Antwerp found that such an unconditional and systematic practice was in breach of the Federal Act of 10 May 2007 on opposition to certain forms of discrimination.⁸² Moreover, recent medi-

⁸⁰ *Moniteur belge*, 13 July 2011, No 2011000424, p. 41734. See also *European Anti-Discrimination Law Review* (EADLR), issue 13, p. 42.

⁸¹ Appeal No 5191.

⁸² Labour Court of Appeal of Antwerp, decision of 21 November 2011, A.R. 2010/AA/234.

cal improvements allow 'stabilised diabetics' to perform most professional activities without constituting a threat to their own safety or that of their colleagues. The Court held that an employee's or a prospective employee's ability to carry out a job must be considered on a case-by-case basis in relation to the position concerned, by virtue of the Federal Act of 10 May 2007 on opposition to certain forms of discrimination. The victim was granted compensation equivalent to three months of gross salary and was given the opportunity to apply again for a job at the port of Antwerp.

Internet source:

http://www.diversite.be/index.php?action=artikel_detail&artikel=625

Bulgaria

BG

Legal developments

Police and prosecutors called to take action against hate speech

On 27 September 2011 Prosecutor General Boris Velchev addressed an order to the police force requiring officers to immediately arrest anyone who incites ethnic hatred. Against the background of the current anti-Roma pogroms and demonstrations, Prosecutor General Velchev also asked all prosecutors to immediately open investigations when public speech or publications inciting racial or religious hatred occur. The Prosecutor General urged that such investigations be conducted within the strictest timeframes.

racial
or ethnic
origin

Case law

Supreme Administrative Court rules against far right activist for hate speech against refugees on TV and radio

In a case initiated by human rights activists, the Supreme Administrative Court confirmed on November 2011 a first decision issued by the equality body concerning a nationalist activist convicted of verbal abuse on TV and radio against refugees of African origin.⁸³ The Court held that racist or xenophobic speech was not protected under the constitutional guarantee of freedom of speech. It ruled that such speech constituted harassment and incitement to discrimination for which no actual identification of a specific victim was deemed necessary. The language used on TV and radio was sufficiently clear and insulting to create an offensive environment. The Court also held that direct discrimination did not depend on an individual complaint from a victim alleging that he or she had been personally affected.

racial
or ethnic
origin

The perpetrator was sentenced to a fine of EUR 500 for harassment and another EUR 500 for incitement. He was also required to abstain from repetition.

⁸³ Judicial decision N 14653 in administrative case N 4855/2011.

*Case law***Practice of confession at school examined by the Anti-discrimination Authority**

The conduct of confessional rites within school premises during teaching hours raised concerns as regards respect of freedom of conscience and free expression of religious beliefs. A student's mother brought a complaint to the Anti-discrimination Authority alleging that priests regularly visited secondary schools and offered students aged between 12 and 15 the opportunity to go to confession whereas this practice had no place within an educational ambit. Students were notified in advance of the priest's visit and were asked to enrol without prior informed consent from their parents. Students would go to confession either to the church on school premises or to another designated place, during school hours and under the supervision of school staff members.

The Director of Secondary Education of the Ministry of Education claimed that the practice was in compliance with ministerial guidelines and that it was standard policy for schools to create an environment stimulating physical, spiritual, psychological, aesthetic, artistic, etc. development. A number of activities were therefore encouraged during school time, including excursions, drama and gardening. Similarly, confession constituted a form of spiritual and moral support offered by schools for educational purposes, and also because most pupils did not have the opportunity to confess outside school hours. The absence of prior parental consent was justified by the fact that this would have imposed too large a bureaucratic burden on schools and that sufficient time was left to the students to notify their parents themselves, who could then request an exemption. Refusals to confess were not recorded anywhere to preserve the student's confidentiality.

The Anti-discrimination Authority first recalled that in democratic societies where different religions coexist, the State had the duty to organise and ensure the smooth exercise by everyone of their religion or belief, by remaining neutral and impartial, so as to ensure public order and safety as well as religious diversity and tolerance.⁸⁴ When children are involved, the Constitution and the Convention on the Rights of the Child recognise the right of parents or legal guardians to guide the child in the exercise of religious freedom in a manner that corresponds to his or her development. The Authority's report therefore expressed its reservations as to the voluntary nature of confession at school and pointed to the emotional influence to which students may be subjected at school. In this context, non-participation could reveal the student's convictions and lead to judgements about which pupils are 'good Christians' and which are not. Additionally, schools in Cyprus receive a large number of students from third countries who may well have different religious convictions, hence the need to create a multicultural space where all students can express themselves in an environment of freedom of thought, expression and conscience. The equality body also rejected the justification of aiming to redress the lack of opportunity for some students to confess outside school hours. It recommended the Ministry of Education to explore opportunities for confession to be carried out outside school.

⁸⁴ Ref. AKR 42/2010 of 29 July 2011.

Equality body recommends the Ministry of Finance to grant financial support for mobility of people with mental disabilities

The President of the Association of Parents of Retarded⁸⁵ Persons challenged the refusal of the Ministry of Finance to award public financial support to people with mental disabilities for the following mobility-related needs: (a) journeys related to medical visits, events, entertainment and sport, (b) buying a car, (c) travel to schools, day care centres or workplaces, (d) fuel for journeys. He argued that the non-provision of such grants amounted to unequal treatment between persons with mental disabilities and persons with other types of disability.



The equality body's report first recalled Article 9 of the Constitution, which guarantees the right to dignified living and social security and Article 28 of the Constitution establishing the principle of equality and non-discrimination. It also referred to the Law on Persons with Disabilities N. 127(I)/2000 guaranteeing the right to equal treatment and non-discrimination and the right to independent living, participation in economic and social life, accessible public transport, personal and family life, social, cultural, athletic and other activities and a dignified standard of living.⁸⁶

Finally, it cited Article 21 of the Fundamental Rights Charter, Article 19 of the Treaty on the Functioning of the European Union, the Communication of the European Commission of November 2011 regarding the new European Strategy on disability, the *Coleman* decision by the Court of Justice of the European Union, and the UN Convention on the Rights of Persons with Disabilities. The equality body remarked that persons with mental disabilities constitute a particularly vulnerable group for which obstacles must be removed and supportive measures to develop their autonomy must be adopted. It also noted that assistance should be extended to carers. The report concluded by recommending the inclusion of persons with mental disability and the payment of grants to facilitate transport to schools, day care centres and other places.

Czech Republic

CZ

Policy developments

Government takes note of the report on Roma minorities published in 2010

On 12 October 2011 the Government took due note of a report on Roma minorities acknowledging that conditions in key areas of life such as education, housing and employment did not improve in 2010. Members of the Roma minority are disproportionately represented in schools providing less than standard education and disproportionately affected by segregation in excluded settlements. The report remarked that housing segregation had been fuelled over the last decade by municipal policies.



The report revealed that there could be more than 400 socially excluded Roma localities in the Czech Republic. In fact, some municipalities have created a systematic exclusionary mechanism in housing and social policies, forcing 'non-adaptable' individuals to live on the margins or outside of towns and cities. Roma are frequently categorised as 'non-adaptable' and therefore forced into poverty ghettos. The report also referred to research published by the Sociological Institute where three quarters of the respondents

⁸⁵ Please note that the term 'retarded' is a literal translation of the Greek term 'υστέρηση', which is widely used in Cyprus and in the equality body report in question.

⁸⁶ Equality body report of 24 July 2011, Ref. AKR 95/2009.

Florian | 1982



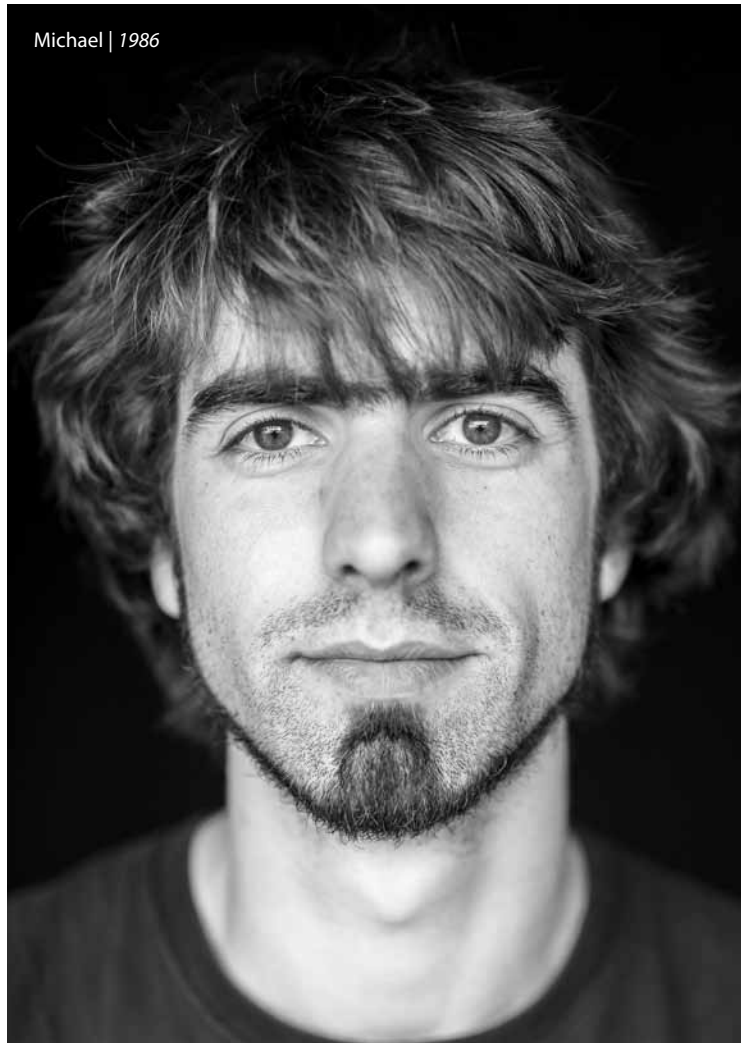
Isa | 2005



Elise | 1992



Michael | 1986



expressed strong dislike of the Roma, and highlighted setbacks to efforts to introduce inclusive education in the Czech Republic.

Internet source:

http://kormoran.vlada.cz/usneseni/usneseni_webtest.nsf/web/cs?Open&2011&10-12

<http://www.vlada.cz/cz/ppov/zalezitosti-romske-komunity/dokumenty/zprava-o-stavu-romske-mensiny-v-ceske-republice-za-rok-2010-88326/>

UN Committee on the Rights of the Child issues concluding observations

On 4 August 2011, the UN Committee on the Rights of the Child issued its concluding observations on the consideration of reports submitted by the Czech Republic under Article 44 of the Convention on the Rights of the Child. It criticised the slow adoption of effective reform measures to facilitate inclusion and integration, and the fact that 'special' schools (although officially abolished by the Education Act 2004) and schools in socially excluded areas were still predominantly attended by children of Roma origin. In addition, they were also placed in separate classes with a reduced syllabus formerly used in special schools. The Committee also noted that no financial support was given to children from socially or financially disadvantaged situations, which resulted in these children being considered as having 'disabilities'. Finally, the procedure for placing children into the Framework Education Programme for Children with Light Mental Disabilities did not include informed parental consent.

Internet source:

<http://www2.ohchr.org/english/bodies/crc/crcs57.htm>

racial
or ethnic
origin

disability

France

FR

Legislative developments

New measures on access to buildings to people with disabilities adopted

In February 2005, the Parliament adopted the Law on Disability, which set out a schedule for implementing universal access to new buildings, public buildings and public transport by 2015. A new amendment, in relation to disability policy, was adopted on 28 June 2011 by the Senate without modification, creating an exemption to the obligation to provide automatic universal access if the constructor demonstrates the technical impossibility of conducting the construction work in question. In such a case, a special decree permitting derogations will be adopted.

Internet source:

<http://www.senat.fr/petite-loi-ameli/2010-2011/644.html>

disability

Case law

Internal regulations of a private day care centre enforcing the duty of neutrality found lawful

The case concerned an assistant director at a crèche financed by local public funds, who returned from parental leave wearing the Islamic veil.⁸⁷ The crèche was open 24 hours a day in a disadvantaged neighbourhood where the majority of the population was of a migrant background. The director asked her to remove her veil, in line with the principle of neutrality laid down in the crèche's internal regulations. The plaintiff claimed that she had always worn her veil, which was challenged by the director. He in turn

religion
or belief

⁸⁷ *Ms Afif v. Association Baby Loup*, Versailles Court of Appeal, 11th Chamber, R.G. No 10/05642, 27 October 2011.

alleged that she became aggressive when asked to remove her veil and created considerable disturbance when she refused to leave the premises.

The plaintiff argued that employees were not bound by the duty of neutrality in the private sector and that to impose such neutrality by way of internal regulations constituted discrimination in breach of Articles L 1132-1, L 1121-1 and 1321-3 of the Labour Code and violated her fundamental rights. In addition, this restriction could not be justified by the nature of her job and tasks and was not proportionate to the objective pursued. In response, the employer argued that due to the nature of the services offered for the social inclusion of disadvantaged groups of various origins, the crèche had to provide a neutral environment.

The Court of Appeal of Versailles confirmed the decision at first instance and observed that neutral garments had been mandatory since the internal regulations were adopted in 1990. In view of the crèche's articles of association, which underlined its mission of supporting disadvantaged children and the social integration of women, neutrality was justified in order to ensure service to all. The principle of freedom of religion protected by Article L 1121-1 of the Labour Code could not undermine respect for the principle of secularity and neutrality imposed on all staff members in the exercise of their duties. The nature of the plaintiff's tasks therefore justified the restriction and the internal regulations adequately complied with Article L 1121-1 and L 1321-3 of the Labour Code. In addition, the plaintiff's aggressive attitude was deemed sufficient to justify her dismissal. The plaintiff's claim was consequently rejected as no discrimination was found.

MK

FYR of Macedonia

Case law

Commission for Protection against Discrimination finds a textbook discriminatory on grounds of sexual orientation



The Coalition on the Sexual and Health Rights of Marginalised Communities (the Coalition) brought a case against the Ministry of Education and Science and a group of authors to the Commission for Protection against Discrimination (CPAD), alleging that a textbook used for third year secondary education contained discriminatory content on grounds of sexual orientation.⁸⁸ The list of approved textbooks is compiled by the National Textbook Commission established by the Government. The Coalition asked the Commission to establish discrimination on grounds of sexual orientation and to urge the Ministry to withdraw and revise the contested textbook and publicly apologise.

The CPAD first observed that Article 3 of the Law on the Prevention of and Protection against Discrimination did not list sexual orientation as a protected ground. However, the provision took the form of an open-ended list which could include sexual orientation, as well as other grounds established by law or as enshrined in international treaties ratified by the FYR of Macedonia. It then established that the book constituted harassment, creating a feeling of humiliation and harming the dignity of a group of individu-

⁸⁸ The subchapter 'The reverse side of sexual life' of the chapter 'Contemporary principles of education' stated that homosexuals and lesbians were 'variations on the sexual urge and its reverse side, which manifest themselves in an inclination towards sexual partners of the same sex. This can appear in both men and women, although it is more unusual in women. There are many neurotics and psychotics among individuals exhibiting this sexual orientation. All the above-mentioned negative consequences [including homosexuality and lesbianism] on sexual life reveal the psychological difficulties and obstacles faced by people with such an abnormal sexual life.'

als. In line with the CPAD's opinion, the Ministry of Education and Science announced that the textbook would be revised.

Germany

DE

Case law

Dismissal on the ground of illness not found to constitute discrimination on the ground of disability

The plaintiff, a disabled man, was dismissed because of repeated periods of absence due to illness and consequently filed an action for unfair dismissal (*Kündigungsschutzklage*). The employer immediately revoked the dismissal following the complaint and the worker asked compensation for non-material damages.



The Federal Labour Court (*Bundesarbeitsgericht*) quashed the appeal court's decision recognising discrimination on the ground of disability.⁸⁹ The Court held that a causal connection must exist to find discrimination. There had been no direct discrimination because there was no evidence that the employer did or would not have taken similar action in the case of repeated and prolonged periods of absence by people without a disability. There had been no indirect discrimination as there was no indication that the periods of absence differed between disabled and non-disabled employees. There was no evidence of an intention to discriminate, and the mere presence of a characteristic on the ground of which discrimination is prohibited was not enough to establish this circumstance. A possible violation of the procedural rules obligatory for all employees did not establish a presumption of discrimination. Consequently, no discrimination had taken place.

Greece

EL

Legislative developments

HIV/AIDS introduced into labour legislation as a ground of discrimination and multiple discrimination

On 5 August 2011, the Parliament passed a law reforming the Labour Inspectorate and other provisions related to social insurance. The new provisions detail the competences and mission of the Labour Inspectorate as an auditor in the field of protection of workers' and employees' rights.



Article 2, paragraph 1(h) of Law 3996/2011 on the reform of the Labour Inspectorate states that [the Labour Inspectorate] shall supervise the implementation of the principle of equal treatment irrespective of racial or ethnic origin, religion or belief, disability, age or sexual orientation, taking into consideration multiple discrimination in accordance with Article 19 of Law 3304/2005. In addition, Article 10 of the new law guarantees compliance with the principle of equal treatment with regard to persons with disabilities, including people living with HIV/AIDS.

⁸⁹ Federal Labour Court (*Bundesarbeitsgericht*), 8 AZR 515/10 of 28 April 2011.

Internet source:

<http://www.kepea.gr/upldsv/File/new/3996%202011.pdf>

Case law

Forced illegal eviction and demolition of housing of a Roma family



On 14 September 2010, the UN Human Rights Committee held that the Georgopoulos family had sufficiently established their allegations of arbitrary and unlawful eviction and demolition of their home affecting their family life and enjoyment of their rights as a minority.⁹⁰ The Committee concluded that the demolition of the Roma family's housing and the prevention of construction of a new home in the Roma Riganokampos settlement amounted to a violation of Article 17 (arbitrary or unlawful interference), Article 23 (family) and Article 27 (minority rights) read alone and in conjunction with Article 2, paragraph 3 (effective remedies) of the International Covenant on Civil and Political Rights.

The Greek State argued that appropriate investigations in the framework of a criminal procedure had been completed pursuant to Decrees Nos. 44/2009 and 56/2009 of the Patras Appeals Prosecutor and therefore it had complied with the requirement to provide effective remedy. On 26 April 2011, the NGO Greek Helsinki Monitor (GHM) filed a request for a re-examination of the case in accordance with the case law of the European Court of Human Rights, which enables cases to be re-opened when there is new information justifying this.⁹¹ The Patras Appeals Prosecutor ordered the Patras First Instance Prosecutor to carry out an urgent complementary preliminary examination, not only because new information had come to light but also because the end of the period in which the alleged offences could be prosecuted was imminent.⁹² The First Instance Prosecutor consequently overturned his previous decisions and held GHM's applications as partly well-founded on the grounds of the prohibition to discriminate and the protection of housing and family. The Prosecutor also charged the mayor and two deputy mayors of Patras with continuous breach of their duty to enforce the law and protect housing and families against the demolition of the homes of eight Romas between 27 July and 15 September 2006.⁹³ At the time of reporting, the trial was scheduled for 27 June 2012.

Lawyer convicted of homophobic speech against a lesbian activist



On 31 October 2011, the Third Three-member Appeal Court of Athens convicted Kostas Plevris of homophobic speech against Andrea Gilbert, spokesperson for 'Athens Pride' and officer at the Greek Helsinki Monitor.⁹⁴ In the course of another lawsuit, Kostas Plevris declared of Andrea Gilbert that she was 'an antisocial element [who] boasts of representing homosexual women, meaning that she is a psychologically defective, sexually perverted person who, as she does not respect her female nature, does not respect the truth either.' Kostas Plevris was sentenced to six months in prison with a three-year suspension. The President of the Court held that homosexuals should be treated in an equal manner with other citizens and therefore the negative terminology used could be regarded as libel or slander under criminal law. He referred to Law 304/2005 transposing the EU Anti-

Discrimination Directives and to Decision 3490/2006 of the Council of State stating that sexual relations between same-sex individuals constituted an existing social reality and therefore their choices should be respected.

⁹⁰ *European Anti-Discrimination Law Review (EADLR)*, issue 12, p. 59.

⁹¹ ECtHR, *Petropoulou-Tsakiris v. Greece*, application No. 44803/04 of 6 December 2007.

⁹² Decree 64/2011 of 6 June 2011.

⁹³ Decree 71/2011 of 17 June 2011.

⁹⁴ Decision 9685/2011 of 31 October 2011.

Internet source:

<http://cm.greekhelsinki.gr/index.php?sec=192&cid=3765>

Hungary

HU

Policy developments

Sexual orientation omitted from the list of protected grounds in the Constitution

The Fundamental Law of Hungary was promulgated on 25 April 2011. Despite many warnings and strong criticism from NGOs, practitioners and academics, and despite the Government's promise that the text of the Constitution would be based to the greatest possible extent on the Charter of Fundamental Rights, the provision on the prohibition of discrimination did not list sexual orientation among the protected grounds.



The text reads as follows: 'Hungary shall provide fundamental rights to everyone without any discrimination, namely discrimination based on race, colour, gender, disability, language, religion or other opinion, national or social origin, financial, birth-related or any other situation.' Although the provision provides an open list of protected grounds where sexual orientation could fall into the category of 'other situations', it has been found problematic by both the Venice Commission and the European Parliament.

The Venice Commission pointed out in an opinion adopted on 20 June 2011 that the new provision of the Fundamental Law 'might create the impression that discrimination on this ground is not considered to be reprehensible.' Further to this opinion, on 5 July 2011 the European Parliament delivered a resolution on the Revised Hungarian Constitution. The resolution stated that '[...] the new Constitution fails to explicitly lay down a number of principles which Hungary, stemming from its legally binding international obligations, is obliged to respect and promote, such as [...] the prohibition on discrimination on the grounds of sexual orientation', and the European Parliament urged the Hungarian authorities to 'guarantee equal protection of the rights of every citizen, no matter which religious, sexual, ethnic or other societal group they belong to, in accordance with Article 21 of the Charter of Fundamental Rights, in the Constitution and its preamble.'

Hungarian officials asserted in reaction that they did not see the need to revise Article XV of the Fundamental Law in the light of European criticism.

Internet source:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+V0//EN>

[http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-E.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf)

Case law

Supreme Court finds segregation in the local council of Jászladány

In 2002, the local council of Jászladány decided to rent part of the local school to a foundation willing to establish a private school, with the intention of separating Roma and non-Roma children. The local council asked the foundation for a symbolic rental fee and provided significant financial support to the private school project, which started in 2003. Most Roma pupils could not enrol in the private school as they could not afford the tuition fee. In 2007, the Chance for Children Foundation (CFCF) launched an





actio popularis claim against the local council and the foundation alleging discrimination and segregation against Roma children. The NGO also required the local council to refrain from any further violation and to restore the situation prevailing before the violation started. All allegations were rejected by both first and second instance courts.

The Supreme Court held that the CFCF's claim was partly substantiated.⁹⁵ The Court ruled that the situation of Roma children attending the local school could not be compared to pupils studying in the private school since the same authority was not in charge of both. The comparability criterion for discrimination could not be found in spite of the fact that the local council provided the private school with significant financial support, that the foundation regularly updated the council on its activities, and that several members of the council were also on the foundation's board.

On the other hand, the Supreme Court found that segregation could be established on the basis that the local council was the owner of the buildings in which both the local school and the private school operated. By renting out part of the local school building to the foundation, the local council contributed to maintaining segregation against Roma pupils.

The CFCF had fulfilled its obligations as the plaintiff with regard to the burden of proof (namely proving the existence of a protected ground and the *prima facie* difference in treatment), whereas the local council could not indicate any legal provision justifying a separation between the two groups of pupils.⁹⁶ The Supreme Court consequently established that the local council had been segregating Roma pupils and found violation of the principle of equal treatment. It urged the local council to refrain from any future violation and referred the part of the complaint relating to the restoration of the original situation back to the first instance court on the basis that the plaintiff's claim was not sufficiently precise on that point to be enforced. Finally, the Supreme Court indicated that a settlement between the parties was desirable but if no such agreement could be reached, the private school had to ultimately move out from the local school's building.

Ireland

IE

Case law

Racial harassment found against a sales representative of South African origin

The plaintiff started employment in July 2005 as a residential sales representative, entailing door-to-door (cold-calling) sales. He alleged racial harassment, including an offensive racist joke and denial of promotion and claimed that he was subjected to consistent verbal harassment on grounds of race by a colleague and the Regional Sales Manager.



In relation to the issue of harassment, the Equality Officer was satisfied on the evidence that such incidents did take place and that the complainant brought these formally to the attention of the company.⁹⁷ The company did investigate the alleged harassment, but the Equality Officer did not find its investigation objective and impartial but rather was of the view that it had set out to prove the complainant wrong. In relation to the promotion aspect, at the hearing the Equality Officer asked for the profile of nationalities

⁹⁵ Decision No. Pfv.IV.20.037/2011/4 of 29 June 2011.

⁹⁶ Under the Equal Treatment Act, the general exemption rule is not applicable in cases of difference in treatment based on ethnicity, whereas separation of groups of students is allowed only if it is specifically permitted by an Act of Parliament.

⁹⁷ DEC-E2011-025.

of field sales representative and of those promoted to Team Coach/Team Leader/Regional Sales Manager. 85% to 90% of approximately 300 Field Sales Representatives were foreign nationals. There had been 19 promotions to team leader since 2007, 16 of these were Irish, one was South African (white), one was Australian and one was British. It was significant that even though foreign nationals made up 85% to 90% of field sales representatives, only 16% of non-Irish nationals were promoted above this level. Regarding length of service before being promoted, the shortest length of service was 7.23 months and the longest was 54.6 months.

The complainant had been working there 48 months before he went on sick leave due to the effects of the harassment. The Equality Officer accepted evidence that employees on the complainant's team did not apply for promotions without the approval of the Area Sales Manager, and that promotional vacancies were filled without the complainant being advised by this person of these vacancies. Therefore, the Equality Officer was satisfied that the complainant had established a *prima facie* case that he was not allowed access to promotion in the same way as Irish Nationals were and the respondent failed to rebut this.

The Equality Officer awarded EUR 5,000 for the effects of harassment and EUR 10,000 for the effects of discrimination regarding access to promotion.

Internet source:

<http://www.equalitytribunal.ie/Database-of-Decisions/2011/Employment-Equality-Decisions/DEC-E2011-025-Full-Case-Report.html>

School wins appeal against Traveller discrimination decision⁹⁸



A County Tipperary secondary school successfully appealed against an Equality Tribunal ruling that it indirectly discriminated against Travellers when it refused a Traveller child admission.

Judge Tom Teehan allowed the appeal by the Christian Brothers College (CBS), Clonmel, against the decision of the Equality Tribunal that it should offer John Stokes a place and review its admission policy to ensure that it did not indirectly discriminate against any child.

John (13), through his mother Mary and instructed by the Irish Traveller Movement Independent Law Centre, lodged the complaint against the school on the grounds that it had breached the Equal Status Act. The court had earlier heard that John had applied in November 2009 to attend CBS High School, having attended a local primary school in Clonmel, but there was over-subscription with 174 applications for 140 available places. The school selected students on the basis of its admission policy based on three criteria – that the child's father or an older sibling had attended the school, that he was Catholic and that he had attended a local primary school. John met the last two criteria, but, as he was the oldest in his family and his father had not attended the school, he was not admitted and instead had to go to school in a neighbouring town.

Ms Stokes unsuccessfully appealed the school's refusal to the Department of Education before appealing to the Equality Tribunal, which found that requiring a parent to have previously attended the school disproportionately affected Travellers. The Clonmel Circuit Court judge allowed the appeal and set aside the order of the Equality Officer.

Judge Teehan said that he was satisfied that the parental rule was discriminatory against Travellers and new immigrants such as Polish and Nigerian applicants whose parents were unlikely to have attended the school previously. In such circumstances, it fell to the school to show that its admissions policy could

⁹⁸ See also *European Anti-discrimination Law Review* (EADLR), issue 12, p. 62.

be justified by some legitimate aim and he found that one of its stated goals of supporting the family ethos within education amounted to such a legitimate aim. He also found the policy was appropriate in that applicant numbers exceeded available places in all but two years in recent times and the parental rule helped strike a balance between admission based on academic results and admission based on exceptional circumstances. Judge Teehan also noted that the High School had highlighted the importance of ties between the school and past pupils in terms of meeting funding shortfalls and he ruled that the parental rule was a necessary step to creating a balanced and proportionate admissions policy.

Ms Mary Stokes, with the assistance of the Irish Traveller Movement Law Centre, is appealing this decision. The Irish Equality Authority has successfully applied to the Irish High Court to intervene in the appeal. The fact of the Equality Authority's intervention is significant, as it is only the third time that the organisation has made such an application. Such *amicus curiae* (friend of the court) applications are still rare in Ireland, compared to other jurisdictions such as England and Wales. At the time of writing there was still no final decision yet.

Internet source:

http://www.itmtrav.ie/uploads/Stokes_Case_-_Judgment_25_July_2011.pdf

<http://www.pila.ie/bulletin/2011/september/21-september-2011/irish-equality-authority-intervenes-in-traveller-school-admissions-case/>

The Netherlands

NL

Legislative developments

Equal treatment legislation amended to comply with EU law

On 1 November 2011, the First Chamber of Parliament (Senate) adopted amendments to the equal treatment laws (the General Equal Treatment Act, the Disability Discrimination Act, the Age Discrimination Act and some provisions of the Civil Code) in order to bring the definitions of direct and indirect discrimination into compliance with the EU Anti-Discrimination Directives.⁹⁹ This change was required by the European Commission, which stated that the wording set out in Dutch legislation provided less protection to victims of discrimination than the EU Directives.¹⁰⁰ The Government had consistently held that this was not the case, but nevertheless tabled amendments reproducing the definitions of the Directives word for word.¹⁰¹

There is, however, one linguistic difference that still remains as the Dutch legislation uses the word 'distinction' instead of the word 'discrimination'. The wording is expected to be changed in the proposed 'Integration Act', which would incorporate all existing laws into one single piece of legislation.

The amendments will also modify the General Equal Treatment Act as regards the exception for employment relations in the private sphere.¹⁰² It will only be possible to rely on the exception when the aim is legitimate and when the means used to achieve that aim are necessary and appropriate. In addition,

⁹⁹ *Wet van 7 November 2011, Staatsblad 2011, 554.*

¹⁰⁰ Letter dated 31 January 2008 (No. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement No. 2006/2444.

¹⁰¹ See *Kamerstukken II*, 2008-2009, 31 832, No. 1-3 and See *Kamerstukken II*, 2009-2010, 31 832, No. 4-8.

¹⁰² The European Commission initiated an infringement procedure pursuant to the EU Treaty, stating that the Dutch exception was too wide and that it incorrectly applied to race in case of access to goods and services.

the exception will no longer apply to the ground of race with respect to access to goods and services available in the private sphere.

Government tables a bill prohibiting the wearing of any garments covering an individual's face



After several attempts to criminalise the wearing of the burka or any other garments covering an individual's face in public spaces,¹⁰³ the current government of the Liberal and Christian Democrat parties announced that it would soon submit a bill to criminalise the wearing of any clothing covering an individual's face. Wearing such clothes would be punishable by a fine of EUR 380.

The Government declared that any garments covering totally or partially an individual's face contravened the principle of equality between men and women. Although they may be justified by religious convictions, the Government held that clothing covering an individual's face was not part of the Islamic dress code but was rather linked to cultural and traditional practices. Even if it were considered as a religious practice, the Government justified the measure as necessary for the protection of public life in the Netherlands.

Public spaces include all public buildings, including educational institutions, health care institutions and public transport.

The proposal is phrased in a neutral manner as it does not explicitly refer to the burka or the niqab. Exemptions to the prohibition are possible for health or safety reasons in the exercise of a profession or sport. Certain festivals, such as Saint Nicholas or Carnival, are also excluded from the prohibition.

Internet source:

<http://www.rijksoverheid.nl/ministeries/bzk/documenten-en-publicaties/persberichten/2011/09/16/ministerraad-stemt-in-met-wetsvoorstel-verbod-gelaatsbedekkende-kleding.html>

Proposal for the establishment of the National Human Rights Institute incorporating the Equal Treatment Commission tabled

On 22 November 2011, the First Chamber of the Parliament (Senate) passed a bill creating the National Human Rights Institute, to comply with the 1993 Paris Principles. The Human Rights Institute will monitor and evaluate human rights in the Netherlands. It will also carry out the general task of promoting human rights and investigating human rights violations. In addition, the existing equality body, the Equal Treatment Commission, will be incorporated into this new institution.¹⁰⁴ The Institute will continue to hear individual complaints of unequal treatment, to give advice and to investigate possible instances of discrimination on its own initiative. Complaints about human rights violations are not admissible before the National Human Rights Institute if they fall beyond the scope of the equal treatment legislation. The Government published a draft decree at the beginning of 2011 on the organisation of equal treatment procedures within the Institute.¹⁰⁵

The advisory board will be composed of representatives of several existing organisations, such as the National Ombud, the Data Protection Authority and the chair of the Council for the Judiciary. In addi-

¹⁰³ See *Tweede Kamer* (2005-2006) 29 754 No. 41 (motion from Geert Wilders, MP for the Freedom Party); *Tweede kamer* (2006-2007), 31 108, No 1-2 (bill from Wilders and Frisma, MPs for the Freedom Party); *Tweede kamer* (2007-2008) 31 331, No 1-2 (bill from Kamp, MP for the Liberal Party).

¹⁰⁴ Besides the ETC, an organisation named 'Art.1' is also a designated equality body whose incorporation into the National Human Rights Institute is not planned.

¹⁰⁵ An internet consultation for this draft decree was opened on 24 January 2011. See <http://www.internetconsultatie.nl/onderzoekgelijkebehandeling> (last consulted on 24 February 2012).

tion to the nine members of the Equal Treatment Commission, three new members will be appointed as commissioners within the new institution. An extension in terms of budget and resources is planned.¹⁰⁶

The Human Rights Institute is planned to become operational in 2012.

Internet source:

<http://www.naarenmensenrechteninstituut.nl/10/home/>

Case law

Equal Treatment Commission accepts recording as means of proof in a discrimination by association case

The case concerned a man employed on a six month-term temporary contract which had been renewed once for a further six months. He later received a positive performance appraisal two weeks before the second term expired. During the same period, he called in sick several times, as a result of stress at home due to the fact that he had to take over his paralysed wife's care and household chores. During a meeting with the company director, he was told that his situation at home had influenced the decision not to renew his contract for a second time. The entire conversation was recorded on the employee's phone, without the director's consent.



Before the Equal Treatment Commission (ETC), the company alleged that the recording was unlawful and that the decision not to renew the contract was based on financial motives, as the company's annual profit had declined by one third compared to the previous year. The ETC held that recordings can be used as proof of discrimination, in particular because collecting proof is generally extremely difficult for victims.¹⁰⁷ In this case, sufficient evidence was brought forward to shift the burden of proof onto the defendant. Disability did not need to constitute the sole motive for dismissal or non-extension of a contract, and other factors, such as financial reasons, could be taken into consideration. The ETC concluded that there was discrimination by association on the ground of disability.

Internet source:

<http://www.cgb.nl/oordelen/oordeel/222056/volledig>

Dismissal of a homosexual teacher from a Protestant school deemed unlawful

The case concerned a homosexual teacher who was dismissed from a fundamentalist Protestant school after he left his wife and children to live together with his male partner. The Cantonal Court of the Hague held that any educational school based on a religious denomination has the right to require from staff members that they become 'identity bearers' by endorsing its religious convictions and maintaining the religious identity of the institution. This right constitutes an exception to the general principle of non-discrimination and is laid down in Article 5(2) of the General Equal Treatment Act. According to this provision, differences in treatment are not permitted if based solely or exclusively on the fact that someone is homosexual. In other words, additional circumstances are necessary for the distinction to be lawful.¹⁰⁸ Directive 2000/78 does not mention any 'additional circumstances' but the examples given by the Government during the parliamentary debates on the General Equal Treatment Act relate these terms to behaviour or circumstances having a close link with the religious ethos of the organisation, which seems to be in conformity with the Directive.



¹⁰⁶ Figures regarding the allocation of budget and staff were not yet available at the time of writing.

¹⁰⁷ Opinion 2011-90 of 15 June 2011.

¹⁰⁸ See *European Anti-Discrimination Law Review* (EADLR), issue 12, p. 65.



For the first time, a court had to decide whether the facts of the case presented such ‘additional circumstances’ or whether the teacher was dismissed solely on the basis of his relationship with his same-sex partner.¹⁰⁹ The judge concluded that the school did not sufficiently investigate whether the teacher’s relationship with his partner would affect his duties as an ‘identity bearer’ and that he was dismissed on that sole fact. The Court observed that the teacher discussed his relationship with pupils and parents and that he made his dismissal public; that could, however, not count as ‘additional circumstances’. Nor was the assumption that the working relationship between the school board and the teacher was seriously damaged could be considered as an additional circumstance. Consequently, the Court concluded that the dismissal was void and that the teacher was entitled to be re-instated in the school.

Internet source:

<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BU3104>

Romania

RO

Legislative developments

President initiates constitutional revision

On 22 November 2009, the Romanian President called a referendum on abolishing the bicameral parliamentary model. Both the referendum and its results were validated by the Constitutional Court.¹¹⁰ Following the referendum, the Prime Minister submitted a proposal for constitutional revision, a process which was announced to have started on 1 June 2011.

Besides establishing a unicameral system and reducing the number of members of Parliament to a maximum of 300, the reform bill tackles other issues such as institutional arrangements that address concerns about the structure of powers and institutional checks and balances (the impeachment procedure, parliamentary immunity, government nomination, budgetary matters, etc.). Limited changes have been brought forward with regard to fundamental rights. Article 26 of the Constitution dealing with the liberty and security of individuals limits arrest to a maximum of 48 hours instead of 24 hours. Article 6 on the right to identity would provide for the consultation of organisations of citizens belonging to national minorities on decisions regarding maintaining, developing and expressing their ethnic, cultural and religious identity by public authorities. The proposal fails to address current discrimination-related issues and does not extend the principle of equality enshrined in Articles 4 and 16 of the Constitution to cover grounds such as disability, sexual orientation and age.

Internet source:

http://www.presidency.ro/static/Proiect_Revizuire_Constitutie.pdf

Policy developments

Report criticises the legal system for encouraging discrimination against Roma in housing

Amnesty International published a report *Romania: Mind the Legal Gap – Roma and the Right to Housing in Romania* on 23 June 2011, where it concluded that the Roma minority lacked legal protection

racial
or ethnic
origin

¹⁰⁹ Judgement of Cantonal Court of the Hague 2-11-2011 BU3104, Sector Kanton Rechtbank's-Gravenhage, 1108007 \ EJ VERZ 11-83676.

¹¹⁰ As confirmed in Decision 37 of 26 November 2011 of the Constitutional Court, 72.31% of the participants voted in favour of adopting a unicameral parliament and 83.31% voted in favour of reducing the number of MPs to less than 300.

against forced eviction, and that Roma families were often left in sub-standard housing with no chance for redress.

The report was based on a number of recent cases from the cities of Baia Mare, Cluj-Napoca, Constanța, Craiova, Mangalia, Miercurea Ciuc, Piatra Neamț, Podari and Tulcea where Roma families were forced out of their homes and sent to 'temporary' housing settlements on the margins of cities, or were left homeless. Roma segregation in city outskirts was deemed to put their lives at risk and to have harmed both their physical and psychological wellbeing.

The report identified gaps in the protection of the right to housing and highlighted that remedies in the event of eviction under the existing legislation were mainly available to tenants or owners and did not adequately cover other groups, such as individuals living on public land. The report further argued that 'the Romanian government has failed so far to introduce an effective system that would hold local authorities accountable for non-compliance with human rights treaties to which Romania is a state party' and concluded that even though courts and the national equality body provide the Roma with means of redress, these systems lack the power to hold the government accountable.

Internet source:

<http://www.amnesty.org/en/news-and-updates/report/romania-legal-system-condemning-roma-poor-housing-2011-06-23>

European Roma Rights Centre reveals failure of Romania to comply with judgments of European Court of Human Rights in Roma pogrom cases



On 19 July 2011 the European Roma Rights Centre issued a report on *The Implementation and State of General Measures in the Judgments of Moldovan and Others v Romania (No. 1, friendly settlement), Moldovan and Others v Romania (No. 2), Kalanyos and Others v Romania (friendly settlement), Gergely v Romania (friendly settlement)*,¹¹¹ concluding that the Romanian State failed to comply with the rulings of the European Court of Human Rights in cases of violence against Roma. The report was submitted under Rule 9§2 of the Rules of the Committee of Ministers of the Council of Europe for the supervision of the execution of judgments and of the terms of friendly settlements. Assessing the situation 20 years after the Roma pogroms leading to the complaints before the Court of Human Rights and more than six years after the first judgment was rendered, the report showed that the Government had failed to reconstruct the affected communities and to address the interethnic tension as prescribed by the court rulings. It also noted that the Action Plan submitted by the Government to the Secretariat of the Committee of Ministers in June 2011 did not contain 'sufficient or adequate content to improve conditions in the community and lacks clear, measurable and comprehensive timelines.'

The European Roma Rights Centre urged the Committee of Ministers to examine these cases under the 'enhanced supervision' procedure, as they were deemed to 'represent major structural and complex problems and are characterised by repeated and serious delays in implementation.'

Internet source:

<http://www.errc.org/cikk.php?cikk=3914>

¹¹¹ Application Nos. 41138/98, 64320/01, 57884/00, 57885/00.

Equality body declares inadmissible a complaint filed against the President alleging lack of territorial jurisdiction

In March 2011, Romani CRISS, a Roma NGO, filed a complaint against the Romanian President Băsescu to the National Council for Combating Discrimination (NCCD), claiming that statements which he made during an official visit in Slovenia concerning nomadic Roma ‘breach their dignity and produce a degrading, humiliating and offensive environment.’¹¹²



The NCCD raised *ex officio* its lack of territorial jurisdiction as the event occurred in Slovenia.¹¹³ It indicated that breaches of the Romanian anti-discrimination law fell under the Code of Civil Procedure, which observes the principle of territoriality, in contrast to criminal cases, which allow extra-territoriality. The NCCD considered that both the allegedly discriminatory act and its immediate results took place in a third country and the fact that Romanian media published the statement could not ‘be considered a constitutive element’. It concluded that civil legislation was not applicable to misdemeanours perpetrated outside areas where the Romanian State exercises its sovereignty. Consequently the equality body denied its jurisdiction to deal with the case.

Slovakia

SK

Policy developments

First report published on the specialised equality body

On 1 June 2011 the Slovak Government approved the *Analytical Report on the Functioning and Status of the Slovak National Centre for Human Rights in the Context of Institutional Protection of Human Rights in the Slovak Republic*. The report, drafted by the Section for Human Rights and Equal Treatment of the Office of Government, monitored and evaluated for the first time the functioning of the National Centre for Human Rights, which also acts as the equality body and deals with discrimination and equal treatment. The Government declared that the report aimed to ensure more efficient and flexible functioning of all institutions and mechanisms relating to the protection of human rights.¹¹⁴

The report was based on a comparison of the Centre’s mandate against the benchmark of EU legal requirements for equality bodies and international standards for human rights institutions. It also examined annual reports and other publications, research studies, the Centre’s budget, an audit carried out by external bodies, the Centre’s articles of association, the career histories of staff, etc. A survey was conducted among staff members, board members and relevant NGOs.

The report pointed out that the Centre lacked powers or that its powers were unclear, undermining the Centre’s position as a human rights institution. In particular, the report mentioned its absence of competence to initiate new law, to amend existing law or to comment on laws, its lack of authority to decide on breaches of the principle of equal treatment or violations of human rights, and the failure to impose sanctions on bodies ignoring or contravening the Centre’s mandate, such as its right to carry

¹¹² See: <http://www.thediplomat.ro/articol.php?id=1617> (16 June 2011).

¹¹³ Decision of the National Council for Combating Discrimination No. 175 of 4 May 2011 in file No. 101/2011.

¹¹⁴ *Programové vyhlásenie vlády Slovenskej republiky na obdobie rokov 2010-2014 (Programmatic Declaration of the Government of the Slovak Republic for the Period 2010-2014)*, Section 3.1, available at <http://www.mod.gov.sk/data/files/553.pdf>.

out investigations. Uncertainties relating to the duty to secure legal aid for victims of discrimination and unresolved issues around the costs of judicial proceedings were highlighted. Very few cases had been brought to court or had been dealt with by the Centre.

Concerning management issues, the report noted the lack of professional and personal capacities, the inefficient use of public resources allocated and the inappropriate structure of the Centre's governing and controlling bodies.

The report reproached the lack of preventive measures in the field of equal treatment and the absence of strategic planning and conceptual approach. The Centre's independence was questioned, as well as the lack of visibility of its activities.

In the light of these observations, the Section of Human Rights and Equal Treatment made recommendations concerning the Centre's functioning. In particular, it suggested establishing the Centre as the equality body and transferring the mandate of human rights institution to the Public Defender of Rights, currently acting as the Ombudsman.

Internet source:

http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-133077?prefixFile=m_

SI

Slovenia

Case law

High Court confirms conviction for homophobic crime



On 25 June 2009, a group of individuals dressed in black hoods, caps and masks, carrying torches, stones and pieces of asphalt went to a bar in Ljubljana which was known as being gay-friendly.¹¹⁵ While they were attacking the place, three of them screamed 'pedri' (faggots). One window was broken and a torch was thrown into the bar, while a man standing outside suffered several bodily injuries. Three of about eight perpetrators were identified and prosecuted, while the others remained unidentified. The District Criminal Court of Ljubljana convicted the three men of public incitement of hatred, violence or intolerance, pursuant to Article 297, paragraphs 1 and 4 of the Criminal Code, read in conjunction with Article 20. The offenders were sentenced to six months or one year of prison.

On appeal, the High Court of Ljubljana upheld the first instance decision on 15 June 2011.¹¹⁶ However, it considered the sanction to be too severe and reduced it to seven months and five months of prison. The Court relied on the absence of previous criminal records, the apologies presented to the victims and the termination of their membership of the football fan club Green Dragons (known for supporting homophobic attitudes) to justify the reduced sentences. In addition, the Court took into consideration the fact that their family and social lives were trouble-free.

¹¹⁵ See *European Anti-discrimination Law Review* (EADLR), issue 12, p. 71.

¹¹⁶ High Court Decision II Kp 5357/2010 of 15 June 2011.

Audio recording admitted as means of proof in civil proceedings

The case concerned a woman alleging gender discrimination in the workplace.¹¹⁷ She submitted in evidence to the District Court of Zvolen an audio recording made during a meeting with her employer where she was notified of her dismissal in the presence of two representatives of the employer and one trade union representative. The employer initiated criminal proceedings alleging that the recording was in breach of 'the confidentiality of oral expression and of other expression of a personal nature', pursuant to Section 377 of the Criminal Code, and requested the suspension of the civil proceedings.

The court of first instance held that the criminal proceedings were irrelevant to reaching a decision in the discrimination case, and therefore refused the suspension. Moreover, the purpose of criminal proceedings was to deal with an offence and its punishment, and not with the legality of evidence submitted in civil proceedings. It was therefore for the first instance court to decide whether evidence submitted could be used or not. This decision was appealed before the Regional Court of Banská Bystrica.

On 28 April 2011 the Regional Court upheld the first instance decision and further stated that 'if a plaintiff has submitted a sound recording as evidence (...) in [civil] proceedings, with which she proves a breach of the principle of equal treatment in an employment relationship, the district court (...) will have to evaluate this evidence with regard to the subject matter of the given proceedings (...). As with regard to other evidence submitted, the district court will evaluate and judge whether it will use this evidence further in the proceedings. Not even a regional court can intervene in this evaluation by the first instance court at this stage in the proceedings.'

At the time of writing, the case was still pending and no final decision at first instance had yet been taken.

Spain

ES

Legislative developments

Spanish legislation brought in line with the International Convention on the Rights of Persons with Disabilities

Spain ratified the International Convention on the Rights of Persons with Disabilities and its Optional Protocol on 21 April 2008. The general principles of the Convention were already reflected in the statements of Law 51/2003 of 2 December on equal opportunities, non-discrimination, and universal accessibility for persons with disabilities. However, the Convention introduced a change to the concept of disability by now considering the issue as a matter of human rights rather than as a concern for social welfare.

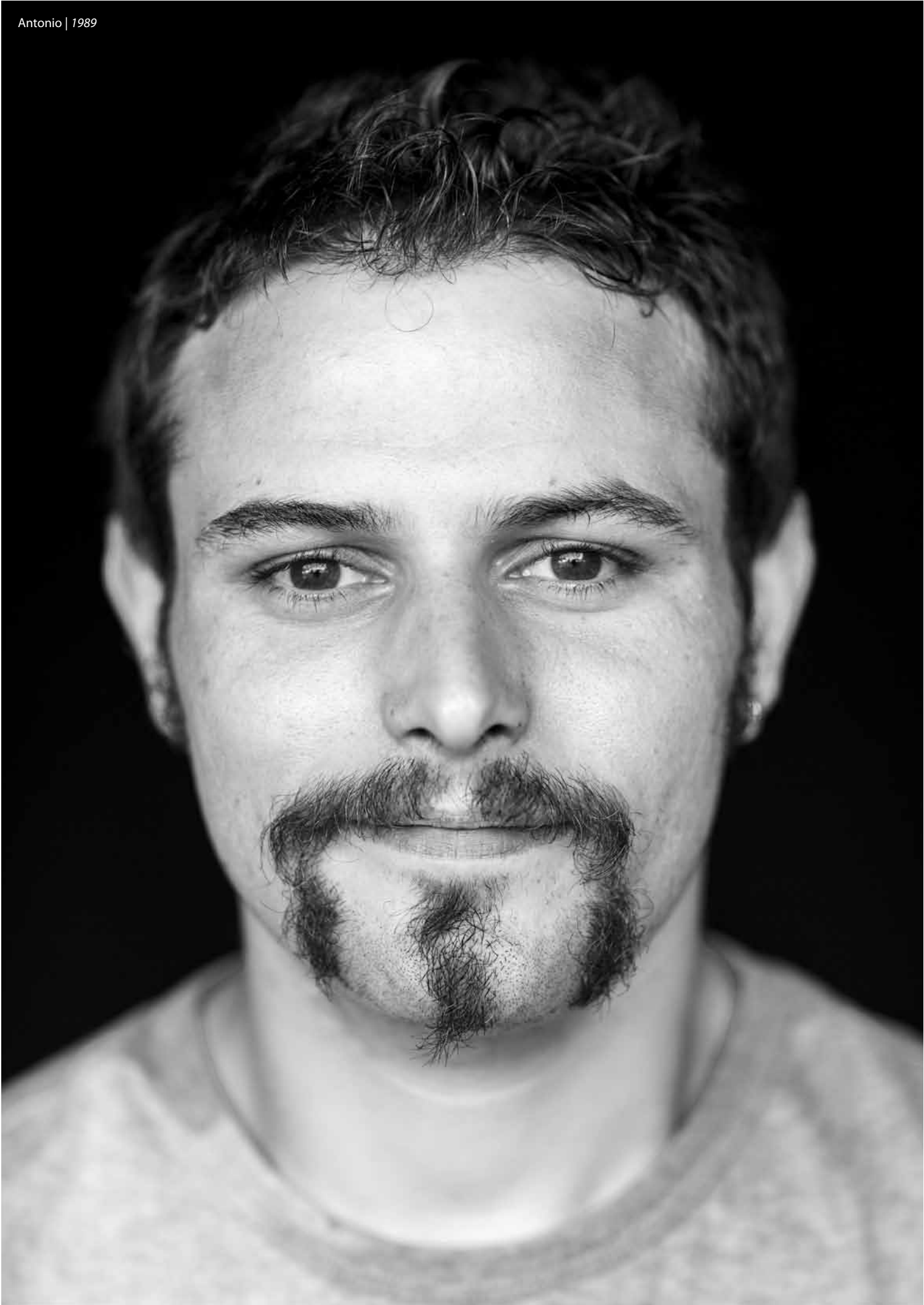


Spain was the first country of all signatory parties to refer to the UN the report on the degree of compliance with this Convention. With the adoption of Law 26/2011 it also became the first country to transpose the Convention into its own legal order.¹¹⁸

Law 26/2011 amends 11 existing laws to give effect to the rights contained in the Convention and updated the legal definition of 'person with disabilities' to comply with the Convention. Now Article 1 of Law

¹¹⁷ File No. 14Co/82/2011, 6710201619.

¹¹⁸ Law 26/2011 of 1 August 2011 (BOE, 2 August 2011).



26/2011 states that ‘persons with disabilities are those subject to 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.’

Law 26/2011 also introduces the reversal of the burden of proof in discrimination claims based on disability. In the public sector, the quota of jobs reserved for people with disabilities has been brought up to a minimum of seven per cent. In addition, a specific quota for people with intellectual disabilities has been created by law for the first time. All transport infrastructure projects with a general interest promoted by the State must ensure general access. Discrimination in the provision of insurance is prohibited. Finally, specific protocols relating to civil protection have been adopted to ensure assistance to persons with disabilities in emergencies.

Internet source:

http://www.boe.es/diario_boe/txt.php?id=BOE-A-2011-13241

Comprehensive bill for equal treatment and non-discrimination withdrawn

In January 2011, the Government presented a new comprehensive anti-discrimination bill, due to be adopted in April 2011.¹¹⁹ The bill aimed to replace existing legislation including various provisions of Law 62/2003 of 30 December 2003 transposing Directives 2000/43 and 2000/78 and establishing a new specialised body.

The bill could have been approved during the current legislature, which was extended until March 2012, but the Prime Minister’s decision to hold early elections on 20 November 2011 suspended the Parliament’s work. Since the conservative Popular Party won the elections by an absolute majority, it is unlikely that a similar proposal will be submitted to the Parliament as equality policies did not figure among their priorities and equal treatment and non-discrimination were not listed in their electoral programme.

Sweden

SE

Case law

Court recognises unfavourable treatment in a case concerning medical treatment of childless same-sex couple

In Sweden, medical assistance to childless adults follows a twofold approach. Basic medical tests¹²⁰ are carried out at the local health care centre, followed by tests to determine the appropriate treatment to be performed by a fertility clinic. *In vitro* fertilisation treatment with donated sperm is the only treatment available to female same-sex couples. In addition, counselling is offered to help them to deal with the imbalance that could occur due to the fact that one only would be the biological mother.



UP and her partner phoned a fertility clinic and were told that they should contact either the local health care centre or a specialist gynaecologic clinic for lesbians and bisexuals. The local clinic in turn declared that they should contact the specialist clinic directly, which would provide better care. UP inquired whether heterosexuals were also turned away and insisted on being treated at the local centre. Although they were eventually accepted, UP felt that she was discriminated against pursuant to Chapter 1, section 4, point 1 of the Discrimination Act. She filed a complaint with the Equality Ombudsman, who decided

¹¹⁹ *European Anti-discrimination Law Review* (EADLR), issue 12, pp. 71-73.

¹²⁰ For instance, tests for HIV, hepatitis and syphilis.

to bring the case to court on her behalf. The Ombudsman alleged a case of unfavourable treatment as the treatment of childless same-sex couples differed from that of heterosexual couples. The fact that the treatment offered in the specialist clinic was objectively as good as the one given to the majority group in local health care centres was irrelevant.

Stockholm County Council (who was responsible for the local clinic) claimed that the specialist clinic did not have longer waiting lists and was geographically closer for UP, and that the simple fact of not satisfying one's preferred choice could not be regarded as unfavourable treatment. However, the local clinic became aware of UP's feeling and ultimately gave her the option of undergoing the medical tests. Moreover, the Council argued that UP could not be considered to be in a comparable situation with heterosexual couples since there were differences in the care services offered to both groups.

The Municipal Court did not follow the County Council's line of argument and agreed with the Equality Ombudsman, considering that the first step of the medical treatment consisted of the basic tests which were the same in both cases and therefore UP was in a comparable situation. The Court concluded that to ask the plaintiff to go to a specialist clinic constituted unfavourable treatment, for which she was awarded SEK 15,000 (EUR 1,650).

Internet source:

<http://www.dagensjuridik.se/2011/10/vardcentral-diskriminade-homosexuell-kvinna>

<http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2011/Dom-i-Stockholms-tingsratt-Vardcentral-diskriminade-lesbisk-kvinna/>

