

Discrimination on grounds of race, religion and sexual orientation main features and recent case law

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Applying EU Antidiscrimination Law
Trier, 8 December, 2014

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- Leading cases – ECtHR
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- Integrated approach: EU/ECHR: Roma segregation in education - *D.H. v. Czech Republic*

Legal Framework EU – Brief overview

- **Race Directive EC/2000/43**
 - race & ethnic origin
 - broad material scope (employment & occupation, social protection and social advantages, goods and services, education)
- **Equal treatment Framework Directive EC/2000/78**
 - religion and belief + sexual orientation (+ disability and age)
 - only employment & occupation
- **2008 draft for Horizontal anti-discrimination directive back on track**
 - religion and belief + sexual orientation (+ disability and age)
 - access to goods and services, education, and access to social benefits

Legal Framework EU – Brief overview – Lisbon Treaty

- **EU Charter of fundamental rights: art. 21, § 1**

“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”
- **EU accession to the ECHR – Work in progress**
(art. 6, § 3 TEU)
- ➔ **Towards an integrated pan-European approach to anti-discrimination law**

[Legal framework – European Convention on Human Rights (ECHR)]

■ Art. 14 ECHR:

- non exhaustive list of protected grounds (religion, race explicitly included)
- Sexual orientation not explicitly mentioned but covered (ECtHR, *Salgueiro Da Silva Mouta* case, 1999, § 28)
- Discrimination is prohibited only in relation to the exercise of another right of the ECHR (Not independent)

■ Protocol 12:

- broader scope of application: « any spheres of applicability of law »
- Entry into force: 2005
- Only ratified by 18 States among which 8 EU Member States

[CJEU Case Law - General trends]

■ Case-law of the CJEU

- Race & ethnic origin → 4 ECJ cases decided so far
- Sexual orientation → 4 ECJ cases decided and 1 Civil servant Tribunal decision (2014)
- Religion & belief → no case referred
- Overwhelming focus on age discrimination in ECJ cases

CJEU Case Law - General trends (cont.)

- **Purposive interpretation** of the AD Directives in line with the **general principle of equal treatment** (ECJ, *Mangold*, 2005 & *Kücükdeveci*, 2010) and the **fundamental right to non discrimination** set out by art. 21 of the Charter (ECJ, *Test-Achats*, 2010)
- Effective and substantive protection against discrimination **across all the grounds**

European Court of Human Rights Case law – General Trends

- Race, religion and sexual orientation = **suspect grounds**
 - « very serious reasons » = justification
 - stricter control
- Nevertheless, in some fields, still important **national margin of appreciation**
- Influence CJEU on ECtHR and vice versa

CJEU Case Law – Race & ethnic
origin – **Leading case « Feryn »**
(C 54/07, 2008)

■ **Facts:**

- Public statement by the boss that the firm will not hire immigrants to install garage doors
- No identified victim
- Action brought by the Belgian Equality Body (CECLR) before the Belgian labour courts → preliminary reference

■ **Findings:**

- No identifiable complainant required
- Public statement = presumption of a directly discriminatory recruitment policy → burden of proof shifts to the employer

- // CJEU, **ACCEPT** (C-81/12, sexual orientation, 2013)
homophobic statements by a leading figure of the football club → shift the burden of proof to the club to prove that their recruitment policy is not discriminatory

CJEU Case Law – Sexual Orientation
– **Leading case « Maruko »**
(C 267/06, 2008)

Maruko (2008) survivor's pension under an occupational pension scheme exclusively granted to spouses and not to same-sex partners in a registered life partnership

// **Römer** (2011) supplementary retirement pension exclusively granted to married couples and not to same-sex partners in a registered life partnership

// **Hay** (2013) special benefits exclusively granted to employees on the occasion of their marriage (exclusion of same-sex employees in a PACS arrangement)

CJEU Case Law – Sexual Orientation

– Leading case « *Maruko* »
(Cont.)

Questions

- Could such a benefit be regarded as pay falling in the material scope of the 2000/78 Directive?
- Would the exclusion of same-sex life-partner from this type of benefit reserved to married couples amount to direct discrimination on the grounds of sexual orientation?

CJEU Case Law – Sexual Orientation

– Leading case « *Maruko* » (Cont.)

Findings:

Broad interpretation of the 2000/78 Directive's **material scope of application**

→ Widower's pension granted under an occupational pension scheme = "pay"

Notwithstanding...

- ❖ **Recital (22)** «This Directive is without prejudice to national laws on marital status and the benefits dependent thereon. »
- ❖ **Art. 3 § 3** «This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes ».

CJEU Case-Law – Sexual Orientation – Leading case *Maruko* (2008) (cont.)

- Direct discrimination on the grounds of sexual orientation as far as « life partnership (or PACs in *Hay*) places persons of the same sex in a situation comparable to that of spouses so far as concerns (the) benefit »

< *Frederik Hay* (2013) § 44 « The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed »

ECtHR Case Law – Sexual Orientation – Leading case *Schalk & Kopf v. Austria* (2010)

- The right to marry (art. 12 ECHR) is gender neutral
- Same-sex relationships are protected under family life (art. 8 ECHR)
- BUT no European consensus regarding same-sex marriage → wide national margin of appreciation
- Neither violation of the right to family life (art. 8 ECHR) nor discrimination (art. 14 ECHR)

ECtHR Case-Law – Religion –

[Leading case *Eweida & al. v. United Kingdom* (2013)]

- *Eweida*:
 - Christian small cross
 - Contradiction with the uniform policy of the private company (British Airways)
- *Chaplin*:
 - Christian small cross
 - Contradiction with the dress code of a public hospital justified by health and safety reasons

ECtHR Case-Law – Religion –

[Leading case *Eweida & al. v. United Kingdom* (Cont.)]

- *Ladele*
 - Civil servant conscientious objection
 - Same-sex registered partnership
 - *Macfarlane*
 - Social worker
 - Conscientious objection
 - Sex therapy and same sex couples counselling
- violation of religious freedom (art. 9 ECHR) and/or discrimination (art. 14 ECHR)?

ECtHR Case-Law – Religion –

[Leading case *Eweida & al. v. United Kingdom* (cont.)]

Findings

The possibility of resigning from the job does not mean that there is no interference with the employee's freedom →
“the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate”

Eweida: breach of the proportionality requirement and of art. 9 ECHR
< the domestic courts gave too much weight to the employer's domestic image

Chaplin: no breach of art. 9 ECHR the protection of health and safety on a hospital ward was inherently of much greater importance than the preservation of corporate image + wide margin of appreciation

ECtHR Case-Law – Religion –

[Leading case *Eweida & al. v. United Kingdom* (cont.)]

■ Findings (cont.)

Given the wide national margin of appreciation, in the *Ladele* & *Macfarlane* cases, the domestic courts have struck the right balance between the different rights and interests at stake

- No accommodation of the religious belief of the Christian claimants because it would have been in breach of the right of others (not to be discriminated against)
- → tricky issue of conflict of rights

Towards an integrated approach of
European AD law – Roma segregation
at school

- ECtHR, *D.H. v. Czech Republic*, 2007
- Infringement procedure against Czech Republic (launched by the Commission in September 2014)
- Importance of strategic litigation and the role of NGOs