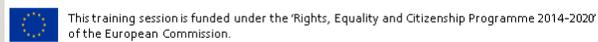


RELIGIOUS DISCRIMINATION IN THE WORKPLACE

ACADEMY OF EUROPEAN LAW - APR 28, 2021

PROFESSOR STEPHANIE HENNETTE VAUCHEZ,
UNIVERSITY PARIS NANTERRE

PLEASE WRITE TO: STEPHANIE.HENNETTE-
VAUCHEZ@PARISNANTERRE.FR



1

OUTLINE: I. FOUNDATIONAL TEXTS II. HOLIDAYS III. SIGNS IV. CONSCIENCE V. RELIGIOUS EMPLOYERS

OBJECTIVES: IDENTIFY FOUNDATIONAL TEXTS (EU / ECHR), CASE LAW ILLUSTRATIONS,
CONCEPTS AND DIFFICULTIES

2

FOUNDATIONAL TEXTS

3

EUROPEAN UNION LAW

- **COUNCIL DIRECTIVE 2000/78/EC of 27 November 2000**
establishing a general framework for equal treatment in employment and occupation
- **Article 1 Purpose :** The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
- Equal treatment: neither direct nor indirect discrimination
- Application in both public and private sectors

4

EU CHARTER OF FUNDAMENTAL FREEDOMS

- **Article 10- Freedom of religion**
 - 1. Everyone has the right to freedom of thought, conscience and religion.
 - This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
 - 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.
- **Article 21 - Non-discrimination**
 - 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.
 - 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

5

- 2. For the purposes of paragraph 1:
- (a) **direct discrimination** shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
- (b) **indirect discrimination** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
 - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
 - (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

DIRECT AND INDIRECT DISCRIMINATION

6

POSSIBLE JUSTIFICATIONS

- **DIRECT DISCRIMINATION:** may be justified in exceptional cases, to be interpreted strictly:
 - Article 2(5) national measures for protection of public interests
 - Article 4(1) genuine and determining occupational qualifications
 - Article 4(2) church autonomy
 - Article 7(1) positive action
- **INDIRECT DISCRIMINATION:** may be justified by an legitimate/objective aim, and the means of achieving that aim are appropriate and necessary (the means-ends relationship is proportional)

7

THE MEANING OF RELIGION

- As regards the meaning of 'religion' in Article 1 of that directive, it should be noted that the directive does not include a definition of that term.
- 28 Nevertheless, the EU legislature referred, in recital 1 of Directive 2000/78, to fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), which provides, in Article 9, that everyone has the right to freedom of thought, conscience and religion, a right which includes, in particular, freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 29 In the same recital, the EU legislature also referred to the constitutional traditions common to the Member States, as general principles of EU law. Among the rights resulting from those common traditions, which have been reaffirmed in the Charter of Fundamental Rights of the European Union ('the Charter'), is the right to freedom of conscience and religion enshrined in Article 10(1) of the Charter. In accordance with that provision, that right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. As is apparent from the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope.
- 30 In so far as the ECHR and, subsequently, the Charter use the term 'religion' in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore **the concept of 'religion' in Article 1 of that directive should be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.**

8

ECHR LAW

- Art. 9 ECHR: **Freedom of thought, conscience and religion**
- 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
- ART 14 ECHR: **Prohibition of discrimination**
- The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

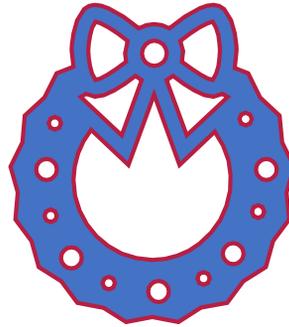
9

- In principle, a strong commitment to religious freedom :
« freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it »

**ECHR 25 MAY
1993,
KOKKINAKIS V.
GREECE, N°
14307/88**

10

HOLIDAYS



11

POSSIBILITIES (V. OBLIGATIONS) TO ACCOMMODATE

- CJEU, 27 Oct 1976, *Vivian Prais v. Council*, C-130/75: a British national had applied for a concours that was being organized for the recruitment of linguistic experts for the EU. When she was notified the date of one of the tests, she informed the Council that it was problematic for her as it conflicted with a major Jewish holiday; she asked an alternative date – request denied. CJEU: « it is desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons and seeks to avoid fixing such dates for tests, nevertheless (...) neither the Staff regulations nor the fundamental rights already referred to can be considered as imposing on the appointing authority a duty to avoid a conflict with a religious requirement of which the authority had not been informed »
- → employers may accommodate, and may indeed be invited to do so but ultimately, organizational logics can prevail.

12

CJEU, 22 JAN 2019,
CRESCO
INVESTIGATIONS V.
ACHATZI, C-193/17

- Facts: Austrian legislation provides for an extra day of holiday leave on Good Friday for members of certain churches (or their right to extra pay if they work on that day)
- LEGAL QUESTION: is that rule (presented by Gvt as positive action) discriminatory on the basis of religion?
- CJEU: national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to a payment in addition to their regular salary for work done on that day, constitutes direct discrimination on grounds of religion

13

CJEU, 22 JAN 2019,
CRESCO
INVESTIGATIONS V.
ACHATZI, C-193/17

- 38: In that context, it is necessary, first, to determine whether the legislation at issue in the main proceedings gives rise to a difference in treatment between employees on the basis of their religion.
- 39 In that regard, Paragraph 7(3) of the ARG establishes the right to a public holiday on Good Friday only for employees who are members of one of the churches (...). It follows that public holiday pay that can be claimed under Paragraph 9(5) of the ARG by an employee who is required to work on a public holiday is payable to employees who work on Good Friday only if they are members of one of those churches.
- 40 Therefore, the legislation at issue in the main proceedings gives rise to a difference in treatment that is directly based on the religion of employees. The test used by the legislation in order to differentiate is based directly on whether an employee belongs to a particular religion.
- 41 Second, it is necessary to examine whether such a difference in treatment relates to categories of employees who are in comparable situations. (...)
- 44 In the present case, Paragraph 7(3) of the ARG grants a continuous rest period of 24 hours on Good Friday only to employees who are members of the churches covered by the ARG. Accordingly, that provision establishes a difference in treatment in respect of the grant of a public holiday between those employees and all other employees.
- 45 In that regard, it is apparent from the documents before the Court that the 24-hour rest period granted on Good Friday to employees who are members of one of the churches covered by the ARG is justified, according to the national competent authorities, by the importance of that day for those religious communities.

14

CJEU, 22 JAN 2019,
CRESCO
INVESTIGATIONS V.
ACHATZI, C-193/17

- 46 However, as is apparent from the order for reference, the grant of a public holiday on Good Friday to an employee who is a member of one of the churches covered by the ARG is not subject to the condition that the employee must perform a particular religious duty during that day, but is subject only to the condition that such an employee must formally belong to one of those churches. Thus, that employee remains free to choose, as he wishes, how to spend his time on that public holiday, and may, for example, use it for rest or leisure purposes.
- 47 The situation of such an employee is no different in that regard from that of other employees who wish to have a rest or leisure period on Good Friday without, however, being entitled to a corresponding public holiday.
- 48 Further, it follows from a reading of Paragraph 7(3), in conjunction with Paragraph 9(5), of the ARG that only employees who are members of one of the churches covered by the ARG are entitled to public holiday pay if they work on Good Friday.
- 49 Having regard to the financial nature of the benefit concerned by such different treatment and the inextricable link between the benefit and the grant of a public holiday on Good Friday, it must also be concluded that, in respect of the grant of such a financial benefit, the situation of employees who are members of one of the churches covered by the ARG is comparable to that of all other employees, regardless of whether or not they have a religion.
- 50 As is apparent from the documents before the Court, the grant of public holiday pay to an employee who is a member of one of those churches and is required to work on Good Friday is dependent only on whether that employee is formally a member of one of those churches. Accordingly, that employee is entitled to such public holiday pay even if he worked on Good Friday without feeling any obligation or need to celebrate that religious festival. Therefore, his situation is no different from that of other employees who worked on Good Friday without receiving such a benefit.
- 51 It follows that the national legislation at issue in the main proceedings has the effect of treating comparable situations differently on the basis of religion. This therefore amounts to direct discrimination on grounds of religion within the meaning of Article 2(2)(a) of Directive 2000/78.

15

THE « FREEDOM
TO RESIGN »
RATIONALE

- Enduring failure to offer a significant protection to religious freedom & belief in the workplace – the shield of freedom of contract (and freedom to terminate employment contract)
- Illustrations: EComHR, 12 March 1981, *X v. UK*, n°8160/78; EComHR, 9 April 1997, *Stedman v. UK*, n°29107/95; EComHR, 3 Dec. 1996, *Kontinnen v. Finland*, n°24949/94
 - → Freedom to resign rationale

16

**ECHR, 13 JULY
2006, KOSTESKI V.
FORMER
YUGOSLAV
REPUBLIC OF
MACEDONIA,
N°55170/00**

- Disciplinary dismissal subsequent to unauthorized absence in order to participate in a religious festival
- ECHR finds no violation of either Article 9 or Article 14
- « there is no right as such under article 9 to have leave from work for particular religious holidays »

17

**ECHR, 2012, SESSA
V. ITALY, N°
28790/08**

- Jewish lawyer alleges that the refusal by the judicial authority to postpone the hearing set down for the date of a religious festival prevented him from taking part in his capacity as the representative of one of the complainants and infringed his right to manifest his religion freely.
- ECHR: interference, but no violation of Article 9 of the Convention; interference justified on grounds of the protection of the rights and freedoms of others – in particular the public's right to the proper administration of justice – and the principle that cases be heard within a reasonable time.

18

RELIGIOUS SIGNS



19

TWO IMPORTANT 2017 GC RULINGS CONVEY A NARROW PROTECTION FOR RELIGIOUS FREEDOM IN THE WORKPLACE

- CJEU, GC, 14 March 2017, *Samira Achbita et Centrum voor gelijkheid van kansen en voor racismebestrijding contre G4S Secure Solutions NV*, C-157/15
 - FACTS: veiled Muslim employee fired for failure to comply with internal policy requiring all personnel to refrain from expressing any convictions (religious, philosophical, political) in the workplace
 - LEGAL QUESTION: is her firing discriminatory?
 - CJEU: LEGALITY OF INTERNAL NEUTRALITY POLICIES
- CJEU, GC, 14 March 2017, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, C-188/15
 - FACTS: veiled Muslim woman fired after company's customer complained about her wearing the hijab
 - LEGAL QUESTION: is her firing discriminatory?
 - CJEU: DECISIONMAKING BASED ON CUSTOMER PREFERENCES INADMISSIBLE

20

OCCUPATIONAL REQUIREMENTS

- I. Article 4: Notwithstanding Article 2(1) and 2, Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
- II. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
- Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

21

CJEU, 2017, BOUGNAOUI

³⁷ That said, it should be borne in mind that the Court has repeatedly held that it is clear from Article 4(1) of Directive 2000/78 that it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement (see judgments of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3, paragraph 35; of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 66; of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 36; and of 15 November 2016, *Salaberria Sorondo*, C-258/15, EU:C:2016:873, paragraph 33).

³⁸ It should, moreover, be pointed out that, in accordance with recital 23 of Directive 2000/78, it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement.

³⁹ It must also be pointed out that, according to the actual wording of Article 4(1) of Directive 2000/78, such a characteristic may constitute such a requirement only 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out'.

⁴⁰ It follows from the information set out above that the concept of a 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.

⁴¹ Consequently, the answer to the question put by the referring court is that Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

22

CJEU, 2017, BOUGNAOUI

34 (...) it is necessary to consider, as this Court is invited to do by the question from the referring court, whether the willingness of an employer to take account of a customer's wish no longer to have services provided by a worker who, like Ms Bougnaoui, has been assigned to that customer by the employer and who wears an Islamic headscarf constitutes a genuine and determining occupational requirement within the meaning of Article 4(1) of Directive 2000/78.

35 According to that provision, Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 of the directive is not to constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

36 Thus, it is for the Member States to stipulate, should they choose to do so, that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 of the directive does not constitute discrimination. That appears to be the case here, under Article L. 1133-1 of the Labour Code, which it is, however, for the referring court to ascertain.

23

CJEU, 2017, ACHBITA

29 It is necessary, in the second place, to determine whether the internal rule at issue in the main proceedings gives rise to a difference in treatment of workers on the basis of their religion or their belief and, if so, whether that difference in treatment constitutes direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78.

30 In the present case, the internal rule at issue in the main proceedings refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, *inter alia*, to dress neutrally, which precludes the wearing of such signs.

31 It is not evident from the material in the file available to the Court that the internal rule at issue in the main proceedings was applied differently to Ms Achbita as compared to any other worker.

32 Accordingly, it must be concluded that an internal rule such as that at issue in the main proceedings does not introduce a difference of treatment that is directly based on religion or belief, for the purposes of Article 2(2)(a) of Directive 2000/78.

24

CJEU, 2017, ACHBITA

33 Nevertheless, according to settled case-law, the fact that the referring court's question refers to certain provisions of EU law does not mean that the Court may not provide the referring court with all the guidance on points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question. It is, in this regard, for the Court of Justice to extract from all the information provided by the referring court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, *inter alia*, judgment of 12 February 2015, *Oil Trading Poland*, C-349/13, EU:C:2015:84, paragraph 45 and the case-law cited).

34 In the present case, it is not inconceivable that the referring court might conclude that the internal rule at issue in the main proceedings introduces a difference of treatment that is indirectly based on religion or belief, for the purposes of Article 2(2)(b) of Directive 2000/78, if it is established — which it is for the referring court to ascertain — that the apparently neutral obligation it encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage.

35 Under Article 2(2)(b)(i) of Directive 2000/78, such a difference of treatment does not, however, amount to indirect discrimination within the meaning of Article 2(2)(b) of the directive if it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

36 In that regard, it must be noted that, although it is ultimately for the national court, which has sole jurisdiction to assess the facts and to determine whether and to what extent the internal rule at issue in the main proceedings meets those requirements, the Court of Justice, which is called on to provide answers that are of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case pending before it.

CJEU, 2017, ACHBITA

37 As regards, in the first place, the condition relating to the existence of a legitimate aim, it should be stated that the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate.

38 An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers.

39 An interpretation to the effect that the pursuit of that aim allows, within certain limits, a restriction to be imposed on the freedom of religion is moreover, borne out by the case-law of the European Court of Human Rights in relation to Article 9 of the ECHR (judgment of the ECtHR of 15 January 2013, *Eweida and Others v. United Kingdom*, CE:ECHR:2013:0115JUD004842010, paragraph 94).

40 As regards, in the second place, the appropriateness of an internal rule such as that at issue in the main proceedings, it must be held that the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner (see, to that effect, judgments of 10 March 2009, *Hartouer*, C-169/07, EU:C:2009:141, paragraph 55, and of 12 January 2010, *Petersen*, C-341/08, EU:C:2010:4, paragraph 53).

CJEU, 2017, ACHBITA

41 In that respect, it is for the referring court to ascertain whether G4S had, prior to Ms Achbita's dismissal, established a general and undifferentiated policy of prohibiting the visible wearing of signs of political, philosophical or religious beliefs in respect of members of its staff who come into contact with its customers.

42 As regards, in the third place, the question whether the prohibition at issue in the main proceedings was necessary, it must be determined whether the prohibition is limited to what is strictly necessary. In the present case, what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.

43 In the present case, so far as concerns the refusal of a worker such as Ms Achbita to give up wearing an Islamic headscarf when carrying out her professional duties for G4S customers, it is for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden, it would have been possible for G4S, faced with such a refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her. It is for the referring court, having regard to all the material in the file, to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary.

27

WEAKNESSES OF ACHBITA - BOUGNAOUI

- REASONING
- Legitimate aim §37-39
- Appropriate §40-41
- Necessary §42-43
- OUTCOME
- Neutrality policies in the workplace today
- Anticipation of discrimination?

28

**PENDING: CJEU,
MH MÜLLER
HANDELS GMBH,
C-341/19**

- SUMMARY OF REQUEST FOR PRELIMINARY RULING
- 2 The defendant is a company established under German law which operates drugstores in Germany. The applicant is a practising Muslim. She has been employed by the defendant as a sales assistant and cashier since 2002.
- 3 After her return from parental leave in 2014, unlike before, she wore a headscarf. She did not comply with the defendant's request for the headscarf to be removed in the workplace. She was thereupon initially no longer employed at all and later entrusted with a different activity for which she did not have to remove her headscarf. However, on 21 June 2016, she was asked to remove the headscarf. Following her refusal to do so, she was sent home. In July 2016, she received the instruction to appear in the workplace without any prominent, large-scale religious, political and other philosophical signs ('the disputed instruction').
- Q1: does only a comprehensive prohibition covering any visible form of religious expression pursue the aim of a corporate neutrality policy (cf. Achbita) or can a prohibition restricted to prominent large-scale signs (as in present case) also qualify as such?
- Q2: if so, can such a prohibition be deemed appropriate and necessary? Should rights conferred by EU Charter, ECHR be included in the examination of whether there is impermissible discrimination on the basis of religion?
- Q3 What about national law provisions?

29

**ECHR 2013
EWEIDA, CHAPLIN,
LADELE AND
MCFARLANE V. UK,
N°48420/10, 59842
/10, 51671/10,
36516/10**

- ECHR, 15 Jan 2013, *Eweida and others v. UK*, n°4820/10, 59842/10: balance of employers' rights and workers' rights to express their religion in the workplace
 - Marketing / image justifications for a ban on religious signs: not admissible
 - Health and safety reasons: admissible
 - Christian official registrar's refusal to register same-sex marriages and counsellor's refusal to assist same-sex couples: no violation of art. 14 combined with art. 9

30

ADMISSIBLE RESTRICTIONS TO REL FREEDOM UNDER ECHR LAW

- However, many restrictions on religious freedom in the workplace continue to be found admissible under the ECHR
- Primary School Teachers: ECHR, 2001, *Dahlab v. Switzerland*, n° 42393/98 : inadmissibility decision
- University Teachers: ECHR, 24 Jan 2006, *Kurtulmus v. Turkey*, n° 65500/01 : inadmissibility decisions
- Social worker in public hospital: ECHR, 2015, *Ebrahimian v. France*, n° 64846/11 : no violation of Art. 9, State margin of appreciation + legitimate aim to preserve the secular character of the State (duty of religious neutrality imposed on all public employees)

31

CONSCIENCE AND WORK

RELIGIOUS EMPLOYERS
EMPLOYEES REFUSING TO
PERFORM SOME TASKS FOR
RELIGIOUS REASONS



32

FAITH-BASED EMPLOYERS

- Article 4(2) of the Framework Equality Directive
- Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, **a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.** This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
- Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

33

CJEU, 17 APRIL
2018,
EGENBERGER, C-
414/16

- Facts: an association connected with Protestant church advertises a position for research and writing that requires membership of the Church
- LEGAL QUESTION: is that requirement a GDOR that falls into Directive 2000/78's art. 4§2?
 - Effective judicial review
 - GDOR covers requirements that are necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. Such requirements must comply with the principle of proportionality.

34

CJEU, 17 APRIL 2018, EGENBERGER, C- 414/16

- 42 the referring court essentially asks whether article 4(2) of Directive 2000/78 must be interpreted as meaning that a church or organization whose ethos is based on religion or belief intending to recruit an employee may itself determine authoritatively the occupational activities for which religion, by reason of the nature of the activity concerned or the context in which it is carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation.
- 43 It should be noted, as a preliminary point, that it is not disputed between the parties to the main proceedings that the rejection of Ms Egenberger's application on the ground that she was of no denomination constitutes a difference of treatment on grounds of religion within the meaning of Article 4(2) of Directive 2000/78 (...).
- 45 As regards, first, the wording of the first subparagraph of Article 4(2) of Directive 2000/78, it follows from that provision that a church or other organisation the ethos of which is based on religion or belief may lay down a requirement related to religion or belief if, having regard to the nature of the activity concerned or the context in which it is carried out, 'religion or belief constitute[s] a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'.
- 46 Clearly, if review of compliance with those criteria were, in the event of doubt as to that compliance, the task not of an independent authority such as a national court but of the church or organisation intending to practise a difference of treatment on grounds of religion or belief, it would be deprived of effect.
- 47 As regards, secondly, the objective of Directive 2000/78 and the context of Article 4(2) of the directive, it must be recalled that that directive's objective, as stated in Article 1, is to lay down a general framework for combating discrimination on the grounds inter alia of religion or belief as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. The directive is thus a specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter (...).

35

CJEU, 17 APRIL 2018, EGENBERGER, C- 414/16

- 50 While Directive 2000/78 thus aims to protect the fundamental right of workers not to be discriminated against on grounds of their religion or belief, the fact remains that, by means of Article 4(2), that directive also aims to take into account the right of autonomy of churches and other public or private organisations whose ethos is based on religion or belief, as recognised by Article 17 TFEU and Article 10 of the Charter, which corresponds to Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.
- 51 The objective of Article 4(2) of Directive 2000/78 is thus to ensure a fair balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of workers, inter alia when they are being recruited, not to be discriminated against on grounds of religion or belief. In situations where those rights may clash.
- 52 To that end, that provision sets out the criteria to be taken into account in the balancing exercise which must be performed in order to ensure a fair balance between those competing fundamental rights.
- 53 In the event of a dispute, however, it must be possible for the balancing exercise to be the subject if need be of review by an independent authority, and ultimately by a national court.
- 54 In this context, the fact that Article 4(2) of Directive 2000/78 refers to national legislation in force at the date of adoption of the directive and national practices existing at that date cannot be interpreted as authorising the Member States to withdraw compliance with the criteria set out in that provision from the scope of effective judicial review.
- 55 In the light of the foregoing, it must be concluded that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment by it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of Directive 2000/78 are satisfied in the particular case.

36

CJEU, 11 SEPT. 2018, *IR V. JQ*, C- 68/17

- **FACTS:** JQ, a Roman Catholic, worked as Head of the Internal Medicine Department of a hospital managed by IR, a limited liability company established under German law subject to the supervision of the Archbishop of Cologne (Germany).
- When IR discovered that, after his divorce from his first wife, to whom he had been married in accordance with the Roman Catholic rite, JQ had married again in a civil ceremony without his first marriage having been annulled, IR dismissed him. In IR's view, by entering into a marriage that is invalid under canon law, JQ had clearly infringed his duty of loyalty arising under his employment contract.
- CJEU: Such dismissal from managerial position due to employee's remarriage after divorce may constitute unlawful discrimination on grounds of religion : requirement that a Catholic doctor in a managerial position respect the Catholic Church's notion of marriage as sacred and indissoluble does not appear to be a genuine, legitimate and justified occupational requirement. However, that is for the German Federal Labour Court to determine in the present case
 - Effective judicial review
 - A difference of treatment, as regards a requirement to act in good faith and with loyalty to that ethos, between employees in managerial positions according to the faith or lack of faith of those employees is consistent with that directive only if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief constitutes an occupational requirement that is genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and is consistent with the principle of proportionality, which is a matter to be determined by the national courts.

37

RELIGIOUS EMPLOYERS – LOYALTY TO ORGANIZATION'S ETHOS

- ECHR, 2010, *Schüth v. Germany* : Dismissal of organist and choirmaster from Catholic parish church for breach of duty of loyalty ('adultery and bigamy'). Violation of Article 8.
- ECHR, 2010, *Obst v. Germany*: Dismissal from position of director for public relations of the Mormon church for breach of duty of loyalty (extramarital life). No violation of Article 8.
- ECHR, 2011, *Siebenhaar v. Germany* : Termination without notice of a kindergarten teacher working in a school run by an evangelical parish because of her active membership in another religious community. No violation of Article 9.
- ECHR, 2012, *Sidicatul Pastoral cel Bun v. Romania*: Refusal to register a union set by members of the clergy and lay members as trade union. No violation of Article 11.
- ECHR, 2014, *Fernandez Martinez v. Spain*: Non renewal of employment contract of ex-priest who publicly advocated the abolition of celibacy requirements. No violation of Article 8.

38

ECHR, 11 FEB.
2020, GRIMMARK V.
SWEDEN,
N° 43726/17

- Midwife denied employment because of her religion-motivated refusal to assist in abortions: *inadmissibility decision*
- There is interference with her Art. 9 rights, but it was prescribed by law: under Swedish law, an employee was under a duty to perform all work duties given to him or her. It had pursued the legitimate aim of protecting the health of women seeking an abortion. It had also been necessary in a democratic society: Sweden provided nationwide abortion services and therefore had a positive obligation to organise its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context did not prevent the provision of such services.
- The requirement that all midwives should be able to perform all duties inherent to the vacant posts was not disproportionate or unjustified.