

APPLYING EU ANTI-DISCRIMINATION LAW
Seminar for members of the Judiciary
Academy of European Law
Trier, 8–9 October 2012

**Discrimination on other grounds:
racial or ethnic origin, sexual orientation,
religion or belief**

Geraldine Scullion
geraldinescullion@hotmail.co.uk

EU anti-discrimination law

- ▶ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
 - prohibits discrimination on the grounds of racial or ethnic origin
- ▶ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation
 - prohibits discrimination on grounds of sexual orientation, religion and belief, age and disability

Race Directive scope – employment:

- ▶ conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- ▶ access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- ▶ employment and working conditions, including dismissals and pay;
- ▶ membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;

employment and training

- ▶ all occupations, employees and the self employed; includes:
 - part-time and full-time workers, whatever the form of contract of employment, including fixed term and casual workers
- ▶ access to employment
 - job applicants
- ▶ vocational training
- ▶ employment and working conditions
 - trainees and apprentices
- ▶ dismissals
- ▶ pay
- ▶ worker and employer organisations
 - trade union membership & professional bodies

Race Directive scope: non-employment

- ▶ social protection, including social security and healthcare;
- ▶ social advantages;
- ▶ education;
- ▶ access to and supply of goods and services which are available to the public, including housing

exclusions

- ▶ Article 3(2) excludes difference of treatment based on nationality
 - protection exists under EU free movement legislation
 - the Directive protects 3rd country nationals from discrimination on racial or ethnic grounds
- ▶ Article 5 permits positive action
 - *With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin*

grounds of ethnic origin?

- ▶ no definitions in the Directive
- ▶ UK: essential elements defining an ethnic group include:
 - long shared history of which the group is conscious as distinguishing it from other groups, and memory of which it keeps alive
 - cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance
 - other relevant elements include:
 - either a common geographical origin, or descent from small number of common ancestors
 - common language not necessarily peculiar to the group
 - common literature peculiar to the group
 - common religion different from that of neighbouring groups or the general community surrounding it
 - being a minority or oppressed or dominant group within a larger community

EU sources:

- ▶ Article 21, Charter of Fundamental Rights of European Union 2000:
 - 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 Council's Framework Decision on combating racism and xenophobia, 2008
 - 'race, colour, religion, descent or national or ethnic origin'

COE: racial and ethnic origin

- ▶ ECRI – race, colour, language, religion, nationality or national or ethnic origin, 2002, GPR 7 & 14
- ▶ Social Charter, 1996 – race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status
- ▶ A14, European Convention of Human Rights – race, colour, descent, or national or ethnic origin, birth or other status

ethnicity: Timishev v Russia, ECtHR

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

UN: racial and ethnic origin

- ▶ Article 1, UN CERD :

- *'the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on **race, colour, descent, or national or ethnic origin** which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'*

CJEU Race Directive cases

- ▶ *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, C-54/07, ECJ 2008
 - discriminatory advertisements included within concept of direct discrimination
- ▶ *Galina Meister v Speech Design Carrier Systems GmbH*, Case C-415/10, April 19, 2012
 - disclosure of documents or information not required
 - but failure to disclose may be relevant

potential issues

- ▶ challenges to discrimination against Roma
 - education
 - limited access to education
 - disproportionate numbers of Roma in schools for disabled
 - separate schools or separate classes within mainstream schools
 - successful ECtHR cases –DH v CzR 57325/00, Orsus v Croatia 15766/03, Sampanis v Greece 32526/05
 - housing
 - access to social housing, substandard quality of housing, lack of access to basic utilities, residential segregation
 - ECSR housing complaints upheld re Italy, Portugal, France, Bulgaria
 - healthcare – access to health care and social assistance
 - ECSR complaints upheld re Bulgaria

potential issues

- ▶ multiple discrimination
- ▶ interplay of language, religion and culture with racial and ethnic origin complaints
- ▶ challenges to racism experienced by people of African descent
 - discrimination, stereotyping and prejudice in employment, housing, healthcare, education, access to goods and services

Council Directive 2000/78

- ▶ Article 1: *‘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.’*
- ▶ employment and occupation only
- ▶ goods and services Directive proposed

scope

- ▶ access to employment, self-employment or occupation, including selection criteria and recruitment conditions, including promotion;
- ▶ access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- ▶ employment and working conditions, including dismissals and pay;
- ▶ membership of, and involvement in workers, employers or professional organisations, including the benefits provided for by such organisations

exclusions

- ▶ Article 2(5) national security considerations
- ▶ Article 3 (2) excludes treatment based on nationality
- ▶ Article 3 (3) Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes
- ▶ Article 4(2)
 - particular occupational requirements for employees of churches and organisations with an ethos based on religion or belief, and
 - permissible to require individuals working for them to act in good faith and with loyalty to the organisation's ethos
- ▶ Preamble recital 22: This Directive is without prejudice to national laws on marital status and the benefits dependent thereon

sexual orientation, religion or belief

- ▶ no definitions in the Directive
- ▶ UK law defines sexual orientation as:
 - orientation towards persons of the same sex (lesbians and gay men)
 - orientation towards persons of the opposite sex (heterosexual)
 - orientation towards persons of the same sex and the opposite sex (bisexual)
- ▶ religion or belief – refer to Article 9 ECHR

sexual orientation cases

- ▶ was the benefit ‘pay’?
- ▶ was the difference of treatment on grounds of sex or grounds of sexual orientation?
- ▶ was it relevant to compare legally recognised married couples with civilly partnered couples?
- ▶ direct or indirect discrimination?

sexual orientation cases

- ▶ *Grant v South-West Trains*, C-249/96
- ▶ *K.B. v National Health Service Pensions Agency, Secretary of State for Health*, C-117/01
- ▶ *D and Sweden v Council of the European Union*, C-122/99 P and C-125/99 P
- ▶ *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, C-267/06
- ▶ *Jurgen Romer v Freie und Hansestadt Hamburg*, C - 147/08

potential issues

- ▶ ongoing workplace discrimination faced by LGBT people
- ▶ relevant comparisons where same sex partnerships not legally recognised?
- ▶ clashes between EU and constitutional/national law
 - primacy of EU law over national law
 - disallow discriminatory provisions
 - *Kücükdeveci v Swedex GmbH & Co K, January 19, 2010*

religion: Article 9 ECHR

- ▶ *‘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, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it’*

belief

- ▶ genuinely held
- ▶ weighty and substantial aspect of human life and behaviour
- ▶ attain a certain level of cogency, seriousness, cohesion and importance
- ▶ be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others

religion and belief issues

- ▶ manifestation of religion in the workplace
 - time off for religious observance
 - dress codes
 - Eweida v UK (no.48420/10)
 - Chaplin v UK (no.59842/10)
 - Dahlab v Switzerland (no, 42393/98)
- ▶ interplay of religious beliefs and sexual orientation
 - Ladele v UK (no.51671/10)
 - McFarlane v UK (no.36516/10)