

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

Declan O'Dempsey
Cloisters
dod@cloisters.com
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Legal framework – EU & ECHR

- Case Law – General trends
- CJEU & ECtHR
- Leading cases – CJEU
- Race & ethnic origin – **Feryn**
- Sexual Orientation – **Maruko, Römer, Frederik Hay**
- Leading cases – ECtHR - Sexual Orientation – **Schalk & Kopf v. Austria** – Religion- **Eweida & al. v. UK**
- D.H. v. Czech Republic

EU

- **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
- **(Future development? 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

- **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 – Deferred after CJEU Opinion 2/13 of the Court (Full Court) of 18 December 2014 (art. 6, § 3 TEU).

- Can this give rise to integrated pan-European approach to anti-discrimination law?
- Or are there two differing models of discrimination?

European Convention on Human Rights and Fundamental Freedoms

- **Art. 14 ECHR:**
- a 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

Case-law of the CJEU

Race & ethnic origin

Sexual orientation

and 1 Civil servant Tribunal decision (as at 2014)

Religion & belief no case referred

Overwhelming focus on age discrimination in ECJ cases

Disability (Coleman, Kaltoft, Jette Ring)

- **Purposive interpretation** of the 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)

ECHR discrimination

- Effective and substantive protection against discrimination **across all the grounds**
- 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

Use of the Charter

- Explanations of the *praesidium* – co-extensive rights mirrored in the ECHR have the same meaning.
- Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* (“AMS”) – horizontal effect? Advocate General Cruz Villalón “*question of principle*”: the Charter is capable of having horizontal effect.
- Advocate-General Trstenjak: C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique* provisions of the Charter generally ought not to have horizontal direct effect
- As a result of *Kücükdeveci* and *AMS* cases EU Charter provisions which reflect general principles of EU law may have horizontal direct effect.
- However only those which are sufficiently clear and precise.

C 54/07 Feryn

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

Sexual Orientation

- ACCEPT (C-81/12) 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
- **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 an equivalent arrangement)

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 amounts to direct discrimination on the grounds of sexual orientation?

Interpretation of Directive 2000/78

- **Broad interpretation** of the 2000/78 Directive's **material scope** - 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." and 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".

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."

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]

Sexual Orientation in ECHR cases

- *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
- No violation of the rights in ECHR to family life (art. 8) nor discrimination (art. 14)

Eweida v UK

- **Eweida:** Christian small cross contravened the uniform policy of a private company (British Airways)
- **Chaplin:** Christian small cross contravened the dress code of a public hospital (justified by health and safety reasons).
- **Ladele:** Local authority office holder - conscientious objection to registering same-sex partnerships;
- **Macfarlane:** Social worker had a conscientious objection to providing sex therapy counselling to same sex couples.

Questions raised: violation of religious freedom (art. 9 ECHR) and/or discrimination (art. 14 ECHR)?

Traditional answer from ECHR in religion and employment cases:

The possibility of resigning from the job means that there is no interference with the employee's freedom .

REJECTED in favour of

“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

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 claimants because it would have been in breach of the right of others (not to be discriminated against) tricky issue of conflict of rights.

Indirect discrimination – converging test?

- ECtHR, *D.H. v. Czech Republic*, 2007
- **Infringement procedure** against Czech Republic (launched by the Commission in September 2014)

CHEZ

- CHEZ Razpredelenie Bulgaria (Judgment) [2015] EUECJ C-83/14 (16 July 2015)
- Directive 2000/43/EC Urban districts mainly inhabited by Roma — electricity meters at a height of between six and seven metres
- Concepts of ‘direct discrimination’ and ‘indirect discrimination’
- Burden of proof
- Possible justification — Prevention of tampering with electricity meters and of unlawful connections
- Proportionality — Widespread nature of the measure — Offensive and stigmatising effect of the measure.

‘discrimination on the grounds of ethnic origin’ must be interpreted as being intended to apply in circumstances in which, in an urban district mainly lived in by inhabitants of Roma origin, all the electricity meters are placed on pylons forming part of the overhead electricity supply network at a height of between six and seven metres, whereas such meters are placed at a height of less than two metres in the other districts

It applies irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure.

a national provision which lays down that, in order to be able to conclude that there is direct or indirect discrimination the less favourable treatment or the particular disadvantage must consist in prejudice to rights or legitimate interests is incompatible with the Directive.

A measure constitutes direct discrimination if it proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned, .

National law must be set aside if it says that in order for there to be indirect discrimination, the particular disadvantage must have been brought about for reasons of racial or ethnic origin;

an ‘apparently neutral’ provision, criterion or practice means a provision, criterion or practice which is worded or applied, ostensibly, in a neutral manner, that is to say, having regard to factors different from and not equivalent to the protected characteristic;

‘particular disadvantage’ does not refer to serious, obvious or particularly significant cases of inequality, but denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the provision, criterion or practice at issue;

If such a measure, does not amount to direct discrimination such a measure is then, in principle, liable to constitute an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons, within the meaning of Article 2(2)(b);

such a measure would be capable of being objectively justified by the intention to ensure the security of the electricity transmission network and the due recording of electricity consumption only if that measure did not go beyond what is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives thereby pursued. That is not so if it is found, a matter which is for the referring court to determine, either that other appropriate and less restrictive means enabling those aims to be achieved exist or, in the absence of such other means, that that measure prejudices excessively the legitimate interest of the final consumers of electricity inhabiting the district concerned, mainly lived in by inhabitants of Roma origin, in having access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly.

Oliari & Ors v Italy

ECHR

- same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship (see *Schalk and Kopf*, § 99, and *Vallianatos*, §§ 78 and 81) same-sex couples are in need of legal recognition and protection of their relationship.
- cohabitation agreements (private law agreements) cannot be considered as giving recognition and the requisite protection to the applicants' unions.
- No public protection for their union is available – but the state has positive obligations – therefore civil union protection should be provided in order to respect art 8 rights of the parties.
- Margin of appreciation: narrow due to the general need for legal recognition and the core protection of the applicants as same-sex couples. The Court considers the latter to be facets of an individual's existence and identity to which the relevant margin should apply. Italy could not show a community interest outweighing A's rights.
- Italy overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions. Breach : A8

The Future

- Case C-157/15 Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV
 - Should Article 2(2)(a) Directive 2000/78 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?

Future

- C-423/15 Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG concerning article 3(1)(a) does a person who, as is clear from his application, is seeking not recruitment and employment but merely the status of applicant in order to bring claims for compensation also qualify as seeking 'access to employment, to self-employment or to occupation'?

Future

- C-188/15 **Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) c Micropole Univers SA** Article 4(1): Is the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?