

DISCRIMINATION ON GROUNDS OF RACE, RELIGION AND SEXUAL ORIENTATION: MAIN FEATURES AND RECENT CASE LAW

Robert Wintemute, Professor of Human Rights Law, King's College London

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I. Discrimination on grounds of racial or ethnic origin

A. Distinctive features of Directive 2000/43/EC

1. "Racial or ethnic origin" not defined

- "race" is a matter of social perception (the discriminator's perception), not biological truth (about the victim of discrimination); the law seeks to benefit racial and ethnic minorities, by protecting them against the reality of discrimination in society, not to harm them
- before 2010, Great Britain had three Race Relations Acts (1965, 1968, 1976)
- *Mandla v. Dowell Lee*, [1982] UKHL 7 (House of Lords) (how to identify a "racial group")
- *Timishev v. Russia* (ECtHR, 13 Dec. 2005) (man of Chechen ethnic origin):

55. 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.

2. Broad material scope

- Article 3(1): employment (and related areas), vocational training (including most university education), social protection (including social security and healthcare), social advantages, education, goods and services (including housing)
- but see Case C-391/09, *Runevič-Vardyn* (CJEU, 12 May 2011):

45. Although Art. 3(1)(h) of Directive 2000/43 makes general reference to access to and supply of goods and services which are available to the public, it cannot be held ... that such national rules come within the concept of a 'service' within the meaning of that provision.

46. It should also be borne in mind that the preparatory work relating to Directive 2000/43 ... indicates that the Council was unwilling to take into account an amendment proposed by the European Parliament whereby 'the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions' would be included in the list of activities listed in Article 3(1) of that directive and thus come within its scope.

47. Consequently, ... the scope of Directive 2000/4 ... does not cover national rules such as those at issue in the main proceedings which relate to the manner in which surnames and forenames are entered on certificates of civil status.

- compare *R. v. Entry Clearance Officer, Bombay, ex parte Amin*, [1983] 2 AC 818 (UK House of Lords) (immigration permit not a “service”); overruled with regard to race by the Race Relations (Amendment) Act 2000, and with regard to other grounds by later Acts; see now Equality Act 2010 (Great Britain), s. 29: “A person must not, **in the exercise of a public function** that is not the provision of a service to the public ..., do anything that constitutes discrimination ...”

- Article 3(2): difference of treatment based on nationality not covered; Case C-571/10, *Kamberaj* (CJEU, 24 April 2012):

48. ... it is clear ... that the discrimination of which the applicant ... claims to be victim compared to Italian nationals is based on his status as a third-country national.

50 Accordingly [after citing Article 3(2)] the discrimination claimed by the applicant ... does not fall within the scope of Directive 2000/43 and the fourth question is inadmissible.

63. ... the reference made by Article 6(3) TEU to the EC[on]HR does not require the national court, in case of conflict between a provision of national law and the EC[on]HR, to apply the provisions of that convention directly, disapplying the provision of national law ...

- but even if a difference in treatment between nationals and non-EU non-nationals falls outside the scope of EU law, it must often be justified by “very weighty reasons” under Art. 14 or Protocol No. 12 EConHR: *Gaygusuz v. Austria* (ECtHR, 16 Sept. 1996), para. 42

3. Body for the promotion of equal treatment required

- Article 13 (see also Directive 2006/54/EC, Art. 20, with regard to sex); not required for religion or belief, disability, age, sexual orientation, but many member states have provided one voluntarily, for example, Great Britain’s Equality and Human Rights Commission

B. Relevant case law of the CJEU and the ECtHR on “discrimination”

1. Direct discrimination is often very hard to prove

- direct discrimination cannot be justified (Directive 2000/43, Arts. 4 and 5, permit only “genuine and determining occupational requirements” and “positive action”); even if it could, a claim of justification would rarely succeed: *Timishev v. Russia* (ECtHR, 13 Dec. 2005):

58. ... no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.

- but direct discrimination is often hard to prove; more than 10 years after Directive 2000/43 entered into force, not a single CJEU judgment has found direct racial or ethnic discrimination against a specific victim; Case C-54/07, *Firma Feryn* (CJEU, 10 July 2008):

28 ... the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43, such statements being likely strongly to

dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.

34 ... public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. ...

- is severe under-representation (with no public statements) enough to raise a presumption of direct discrimination? see *Ali v. Trailfinders* (London Central Employment Tribunal, 31 July 2008; his lawyer was Prof. Wintemute) (well-qualified applicant of Pakistani origin rejected after interview; employees were 96.8% white whereas London's population of working age was 69.5% white); *Firma Feryn*, Opinion of Advocate General Poiares Maduro:

23. ... where it is established that an employer has made the kind of public statements ... that are at issue ..., and where, moreover, the actual recruitment practice applied by the employer remains opaque **and no persons with the ethnic background in question have been recruited**, there will be a presumption of discrimination ...

2. Indirect discrimination is an alternative, but might not pinpoint cause of problem

- no CJEU case law on indirect racial or ethnic discrimination; Case C-394/11 *Belov* (CJEU, 31 Jan. 2013) (placing meters to measure electricity consumption at a height of seven metres on posts situated ... in two areas ... mainly inhabited by members of the Roma community; reference inadmissible because Bulgaria's Commission for Protection against Discrimination not a "court or tribunal")

- compare *D.H. v. Czech Republic* (ECtHR, 13 Dec. 2005):

190. ... 56% of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava. Further, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Roma pupils in Ostrava assigned to special schools was 50.3%. ...

- is the over-representation of Roma pupils in special schools the cumulative effect of direct discrimination in individual cases, which is hard to prove? if not, what neutral criteria are causing the particular disadvantage? what needs to be changed?

- the end of de jure racial segregation of US public schools (*Brown v. Board of Education*, 1954) was followed by court-ordered bussing of pupils to reduce de facto racial segregation

- see also *Oršuš v. Croatia* (ECtHR, 16 March 2010); *Sampani v. Greece* (ECtHR, 11 Dec. 2012); *Horváth v. Hungary* (ECtHR, 29 Jan. 2013); *Lavida v. Greece* (ECtHR, 28 May 2013)

II. Discrimination on grounds of religion or belief

A. Distinctive features of Directive 2000/78/EC

1. “Religion or belief” not defined

- http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf (Report of 17 Jan. 2014)

**REPORT FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL
Joint Report on the application of Council Directive 2000/43/EC ...
and of Council Directive 2000/78/EC ...**

- http://ec.europa.eu/justice/discrimination/files/swd_2014_5_en.pdf (Annex II to Report: Summary of case-law, pp. 21-22, and footnote 41):

‘The concept of “belief” was interpreted by the Austrian Supreme Court of Justice [Judgment of 24.2.2009 (9ObA 122/07t)] when it decided that disciplinary measures against a high ranking civil servant at the Federal Asylum Service did not violate the prohibition of discrimination based on “belief”. The Court found that his views about asylum seekers and the government’s asylum policy, expressed in a book he published, did not constitute a “belief” for that purpose.

This is in line with the Commission's reading. The concept of "belief" should be read in the context of "religion or belief". It refers to a belief or a philosophical conviction (like those of atheists or agnostics, for example), which does not need to be of a religious nature, but it doesn't cover political opinion. If the legislator had wanted to cover political opinion, it would have stated so and referred to "political opinion" separately, as in Article 21 of the Charter of Fundamental Rights of the European Union.’

- *Grainger plc v. Nicholson*, [2009] UKEAT 0219_09_0311 (Employment Appeal Tribunal) (a philosophical belief in climate change is potentially a protected “belief”):

28. ... the Attorney General suggested that "support of a political party" might not meet the description of a philosophical belief. That must surely be so, but that does not mean that a belief in a political philosophy ... would not qualify. ... [B]elief in the political philosophies of Socialism, Marxism, Communism or free-market Capitalism might qualify. ... [T]he real concern ... would be ... a political philosophy which could be characterised as objectionable: a racist or homophobic political philosophy for example. ... [T]he way to deal with that would be to conclude that it offended against the requirement ... that the belief ... must be "worthy of respect in a democratic society and not incompatible with human dignity" ...

- Article 9(1) EConHR refers to “conscience and religion” before “religion or belief”; should “religion or belief” be interpreted as “religion [or similar strongly-held conscientious] belief”? compare *Bayatyan v. Armenia* (ECtHR, 7 July 2011) (Jehovah’s Witness had an Art. 9 right to conscientious objection to military service)

2. Narrow material scope

- Article 3(1): employment (and related areas) and vocational training (including most university education) **but not** social protection (including social security and healthcare), social advantages, education (schools until around the age of 16?), goods and services (including housing)

- to come within the broader material scope of Directive 2000/43 (eg, education), a member of a religious minority might argue that their group is also an ethnic minority: *Mandla*, [1982] UKHL 7 (House of Lords) (Sikh and Jewish minorities are also ethnic minorities, because of “descent from a small number of common ancestors”; Roman Catholic, Muslim and Hindu minorities are not)

3. Justification of direct discrimination possible?

- Article 2(5): This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

- Art. 4(2): 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. ...

B. Relevant case law of the CJEU and the ECtHR on “discrimination”

- no CJEU case law on direct or indirect discrimination on grounds of religion or belief

1. ECtHR case law on direct discrimination

- *Vojnity v. Hungary* (ECtHR, 12 Feb. 2013):

36. ... the subject matter of this case is the applicant's **differential treatment** in the context of the total removal of his access rights to his son, and this to a decisive extent **on account of the applicant's religious beliefs**. It considers that, in the light of the importance of the rights enshrined in Article 9 of the Convention in guaranteeing the individual's self-fulfilment, such a treatment **will only be compatible with the Convention if very weighty reasons exist**. The Court has applied a similar approach in the context of differences in treatment on the basis of sex ..., birth status ..., sexual orientation ... and nationality ...

- see also cases decided under Article 9 which arguably involved direct discrimination: *Ivanova v. Bulgaria* (ECtHR, 12 April 2007) (swimming pool manager dismissed because of her Evangelical Christian beliefs); *Eweida v. UK* (ECtHR, 15 Jan. 2013) (Christian woman who worked as British Airways check-in agent wished to wear a visible cross; Jewish skullcaps, Muslim headscarves, and Sikh turbans were permitted)

2. ECtHR case law on indirect discrimination

- the ECtHR permits neutral rules banning all religious clothing or symbols, regardless of the disproportionate impact on religious minorities

- failures to accommodate the religious beliefs of Jehovah's Witnesses and Buddhists, with regard to military service or a vegetarian diet in a prison, have been found to violate Art. 9 ECHR, alone or combined with Art. 14: *Thlimmenos v. Greece* (ECtHR, 6 April 2000); *Bayatyan v. Armenia* (ECtHR, 7 July 2011); *Jakóbski v. Poland* (ECtHR, 7 Dec. 2010)

- failures to accommodate the religious beliefs of Muslim women or Sikh men, in relation to wearing a headscarf or a turban, have not been found to violate the ECHR: *Dahlab v. Switzerland* (ECtHR, 15 Feb. 2001, admissibility decision); *Leyla Şahin v. Turkey* (ECtHR, 11 Nov. 2005); *Dogru v. France* (ECtHR, 4 Dec. 2008); *Mann Singh v. France* (ECtHR, 27 Nov. 2008, admissibility decision)

- compare *Mandla v. Dowell Lee*, [1982] UKHL 7 (House of Lords); *Mann Singh v. France* (UN Human Rights Committee, 26 Sept. 2013), Communication No. 1928/2010

- should the ECtHR reconsider its case law on headscarves and turbans? see R. Wintemute, "Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others", (2014) 77(2) *Modern Law Review* 223 (March 2014 issue)

- neutral ban on covering the face might be justifiable in employment or education, or when the credibility of a witness in court is in issue, but not in the street? *Azmi v. Kirklees Council*, Employment Appeal Tribunal (UK), 30 March 2007 (teaching assistant in school); *R. v. N.S.*, [2012] 3 S.C.R. 726 (Supreme Court of Canada) (witness in court); *S.A.S. v. France* (ECtHR, Grand Chamber hearing held on 27 Nov. 2013) (ban on covering face in street); *Ahmet Arslan v. Turkey* (ECtHR, 23 Feb. 2010) (criminal conviction for wearing religious clothing in the street violated Art. 9 ECHR)

III. Discrimination on grounds of sexual orientation

A. Distinctive features of Directive 2000/78/EC

1. "Sexual orientation" not defined

- widely understood to have the meaning given to the term by Great Britain's Equality Act 2010, s. 12(1): "Sexual orientation means a person's sexual orientation towards – (a) person of the same sex, (b) persons of the opposite sex, or (c) persons of either sex."

2. Narrow material scope (same as II.A.2 above)

3. Justification of direct discrimination possible? (same as II.A.3 above)

- Art. 4(2): ... This difference of treatment [based on a person's religion or belief] ... **should not justify discrimination on another ground** [such as sexual orientation?].

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, ... to require individuals working for them to **act in good faith and with loyalty to the organisation's ethos**.

- compare dismissals of lesbian and gay teachers by Roman Catholic schools in the US when they announce that they intend to marry or have married their same-sex partner:
http://seattletimes.com/html/localnews/2022679789_catholicsgaymarriage.xml.html

B. Relevant case law of the CJEU and the ECtHR on “discrimination”

1. Discrimination against lesbian and gay individuals

- no CJEU case law on a decision not to hire, or to dismiss, a specific lesbian or gay individual

- Case C-81/12, *Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării* (CJEU, 25 April 2013):

35 In those circumstances the Curtea de Apel București decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) [Does] Article 2(2)(a) of [Directive 2000/78, defining direct discrimination] apply where a shareholder of a football club who presents himself as, and is considered in the mass media as, playing the leading role (or “patron”) of that football club makes a statement to the mass media in the following terms: ...

“Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Maybe he’s not a homosexual. But what if he is? There’s no room for gays in my family, and [FC Steaua] is my family. Rather than having a homosexual ... it would be better to have a junior player. This isn’t discrimination: no one can force me to work with anyone. ... I have the right to work with whoever I choose. ... Even if [player X’s current club] gave him to me for free I wouldn’t have him! He could be the biggest troublemaker, the biggest drinker ... but if he’s a homosexual I don’t want to know about him.”

...

On those grounds, the Court (Third Chamber) hereby rules:

1. Articles 2(2) and 10(1) of ... Directive 2000/78/EC ... must be interpreted as meaning that facts such as those from which the dispute in the main proceedings are capable of amounting to ‘facts from which it may be presumed that there has been ... discrimination’ as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters. ...

- *Smith & Grady v. UK* (ECtHR, 27 Sept. 1999) (dismissal of lesbian and gay members of armed forces violated Article 8 ECHR)

2. Discrimination against same-sex couples

- Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (CJEU, 1 April 2008) (Directive 2000/78 banning sexual orientation discrimination in relation to all aspects of employment, including pay, "preclude[s] legislation ... under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though [if], under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit", despite Recital 22: "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.")

- Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg* (CJEU, 10 May 2011) ("comparable" in *Maruko* does not mean an identical legal situation; it is enough to show that registered partners "have [legal] duties towards each other, to support and care for one another and to contribute adequately to the common needs of the partnership by their work and from their property, as is the case between spouses")

- Case C-267/12, *Frédéric Hay v. Crédit agricole mutuel* (CJEU, 12 Dec. 2013):

47 ... Article 2(2)(a) of ... Directive 2000/78/EC ... must be interpreted as precluding a provision in a collective agreement, ... under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules ...do not allow persons of the same sex to marry, in so far as ... that employee is in a comparable situation to an employee who marries.

- *Maruko*, *Römer* and *Hay* were all analysed as direct discrimination, because the same-sex couple was in a "comparable [legal] situation" to a married different-sex couple; in *Hay*, it made no difference that different-sex couples could also conclude a civil solidarity pact, because only same-sex couples were excluded from marriage

- the ECtHR has found direct discrimination against unmarried same-sex couples (compared with unmarried different-sex couples) in *Karner v. Austria* (24 July 2003) (succession to housing), *X & Others v. Austria* (19 Feb. 2013) (second-parent adoption), and *Vallianatos & Others v. Greece* (7 Nov. 2013) (access to alternative registration system)

- both the CJEU and the ECtHR have avoided the broader argument that failure to exempt a same-sex couple from a marriage requirement (in member states like Italy and Poland where no alternative registration system exists) is indirect discrimination, as in *Thlimmenos*

IV. Conflicts between sexual orientation and religion or belief

- like the rights in Arts. 2 and 3 ECHR, the Art. 14 right to be free from discrimination generally prevails over the Art. 9 right to freedom of religion in the event of a conflict: *Eweida & Others (Ladele & McFarlane) v. UK* (ECtHR, 15 Jan. 2013) (Christian employees refused to serve same-sex couples in non-religious context); *Bull v. Hall*, [2013] UKSC 73 (27 Nov. 2013) (Christian hotel owners refused to allow a same-sex couple to stay in a room with a double bed); Wintemute, (2014) 77(2) *Modern Law Review* 223 (March 2014 issue)