

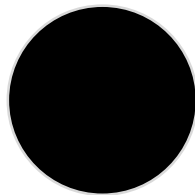


# *The relation between the ECJ's and the ECtHR's approaches to non-discrimination law*

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States



## Conventional wisdom (1)



**ECtHR** is a forerunner in developing fundamental rights doctrine



... but lags behind where non-discrimination is concerned

## Conventional wisdom (2)



**ECHR** is a forerunner in developing fundamental rights doctrine

**ECJ** lags behind in developing fundamental rights doctrine



... but lags behind where non-discrimination is concerned

... but is a forerunner where non-discrimination is concerned



## Correct...?



ECHR is a forerunner in developing fundamental rights doctrine

ECJ lags behind in developing fundamental rights doctrine



... but lags behind where non-discrimination is concerned

... but is a forerunner where non-discrimination is concerned





## Indirect discrimination and the ECJ

- Original objective: removing impediments to free trade
- Soon applied in other policy fields  
E.g. equal treatment of men and women
- Strong development of related doctrines  
E.g. burden of proof, objective justification

## Indirect discrimination and the ECtHR

- Article 14 ECHR: non-exhaustive list of grounds
- No need to show indirect discrimination on protected ground
- Development of 'very weighty reasons' doctrine
- 2007: recognition of concept of indirect discrimination  
*D.H. v. the Czech Republic* (ECtHR, no. 57325/00)



ECJ is forerunner in developing indirect discrimination doctrine

ECtHR only follows suit



ECJ is forerunner in developing indirect discrimination doctrine

ECtHR only follows suit



### *Jyske Finans (ECJ 2017, C-668/15)*

- Proof of identity of non-Danish citizens required
- Indirect discrimination based on ethnic origin?
- ECJ: no!

### *Jyske Finans (ECJ 2017, C-668/15)*

31. ... the concept of 'indirect discrimination' ... is applicable only if the allegedly discriminatory measure has the effect of placing **a person of a particular ethnic origin** at a disadvantage.

33. ... the argument that the use of the neutral criterion at issue in the main proceedings, namely a person's country of birth, is generally more likely to affect persons of a 'given ethnicity' than 'other persons' cannot be accepted.

### ***Biao (ECtHR 2016, no 38590/10)***

- Danish statute for family reunion: no stronger ties with another country than Denmark
- Exception: person has been a Danish citizen or lived in Denmark for more than 28 years ('28-year rule')
- Indirect discrimination based on ethnic origin?
- ECtHR: yes!

### ***Biao (ECtHR 2016, no 38590/10)***

'112. The Court ... considers that it can reasonably be assumed that at least the vast majority of ... Danish expatriates and ... Danish nationals born and resident in Denmark, who could benefit from the 28-year rule, would usually be of Danish ethnic origin whereas ... persons acquiring Danish citizenship at a later point in their life, like Mr Biao, who would not benefit from the 28-year rule, **would generally be of foreign ethnic origin. ....**



## *Jyske Finans* (ECJ)

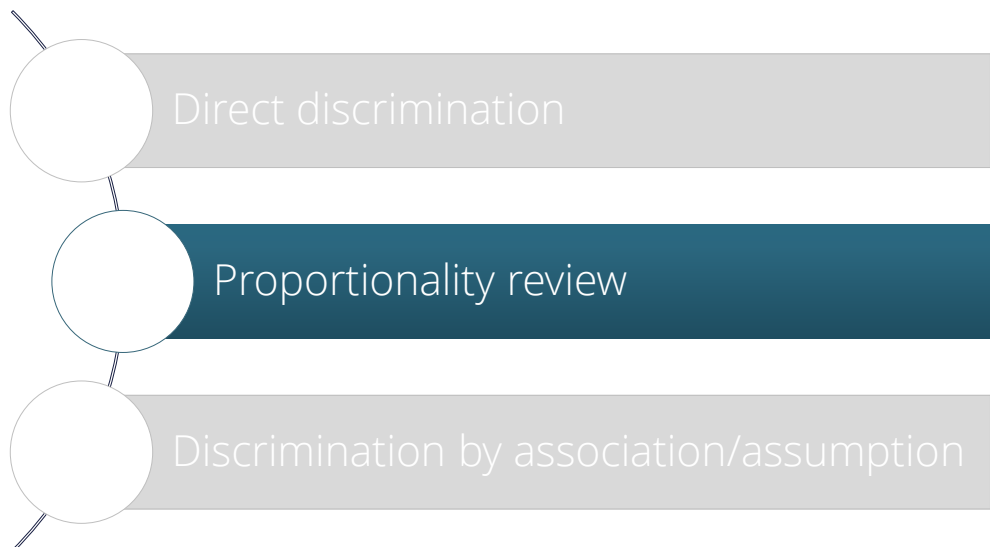
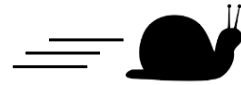
Required that a person is of a 'particular ethnic origin'; birth in a different country is not enough

→ Indirect discrimination difficult to demonstrate

## *Biao* (ECtHR)

Assumption that birth in a different country disproportionately affects persons of 'foreign ethnic origin'

→ Indirect discrimination easy to demonstrate



***Achbita* (ECJ 2017,  
C-157/15)**

***Eweida* (ECtHR 2013, no  
48420/10)**

- Prohibition of wearing visible religious symbols in the workplace
- Aim: neutral image for company

***Eweida* (ECtHR 2013, no 48420/10)**

'77. The Court has reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was Ms Eweida's desire to manifest her religious belief. ... [T]his is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. ...'

### ***Eweida (ECtHR 2013, no 48420/10) – continued***

'... On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other ... items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. ...'

### **ECtHR – approach and rationale**

- Open balancing review – test of strict proportionality
- Reference to underlying values of the Convention
  - pluralism
  - democracy
  - individual autonomy
  - identity

### *Achbita (ECJ 2017, C-157/15)*

40. ... [T]he 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

### *Achbita (ECJ 2017, C-157/15) – continued*

40. ... [T]he 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 ...

42. ... [W]hat must be ascertained is whether the prohibition ... 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.

## ECJ – approach and rationale

- (Implicit) reference to underlying values of EU law
  - freedom to conduct a business
  - economic co-operation, economic freedom
- Emphasis on appropriateness/necessity – no open balancing review

## ECJ

### *Raison d'être*

Economic co-operation  
Business freedom

### *Approach*

Instrumentality review

## ECtHR

### *Raison d'être*

Human rights  
Fundamental values

### *Approach*

Balancing review



## **Discrimination by association and assumption**

**Discrimination by assumption:** based on characteristics that someone is *thought* to have

**Discrimination by association:** based on association with someone who has a particular characteristic

## Acceptance of discrimination by association



- *Coleman* (ECJ 2008, C-303/06)

- *Guberina* (ECtHR 2016, no 23682/13)



## Acceptance of discrimination by association



- *Coleman* (ECJ 2008, C-303/06)

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## Acceptance of discrimination by assumption?

***Timishev (ECtHR 2005, nos 55762/00 and 55974/00)***

54. ... the order barred the passage not only of any person who actually was of Chechen ethnicity, but also of those **who were merely perceived as belonging to that ethnic group**. It has not been claimed that representatives of other ethnic groups were subject to similar restrictions .... In the Court's view, **this represented a clear inequality of treatment** in the enjoyment of the right to liberty of movement on account of one's ethnic origin.

***Kaltoft (ECJ 2014, C-354/13)***

59. ... [I]n the event that ... the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78 ...



## *Kaltoft (ECJ 2014, C-354/13) – continued*

60. Such would be the case, in particular, if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.

### ECJ



*Discrimination by association*

Takes the lead



*Discrimination by assumption*

Not yet recognised

### ECtHR

*Discrimination by association*

Follows ECJ

*Discrimination by assumption*

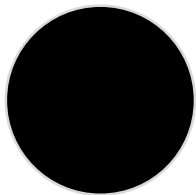
Takes the lead



## Conclusions?

1. ECtHR has generally caught up with ECJ in terms of doctrinal development and is sometimes even offering more protection against discrimination
2. Continuing risk for divergence of case-law approaches because of different rationales

European Court of  
Human Rights



European Court of  
Justice



States



## *Questions? Comments?*

More questions and comments?  
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