

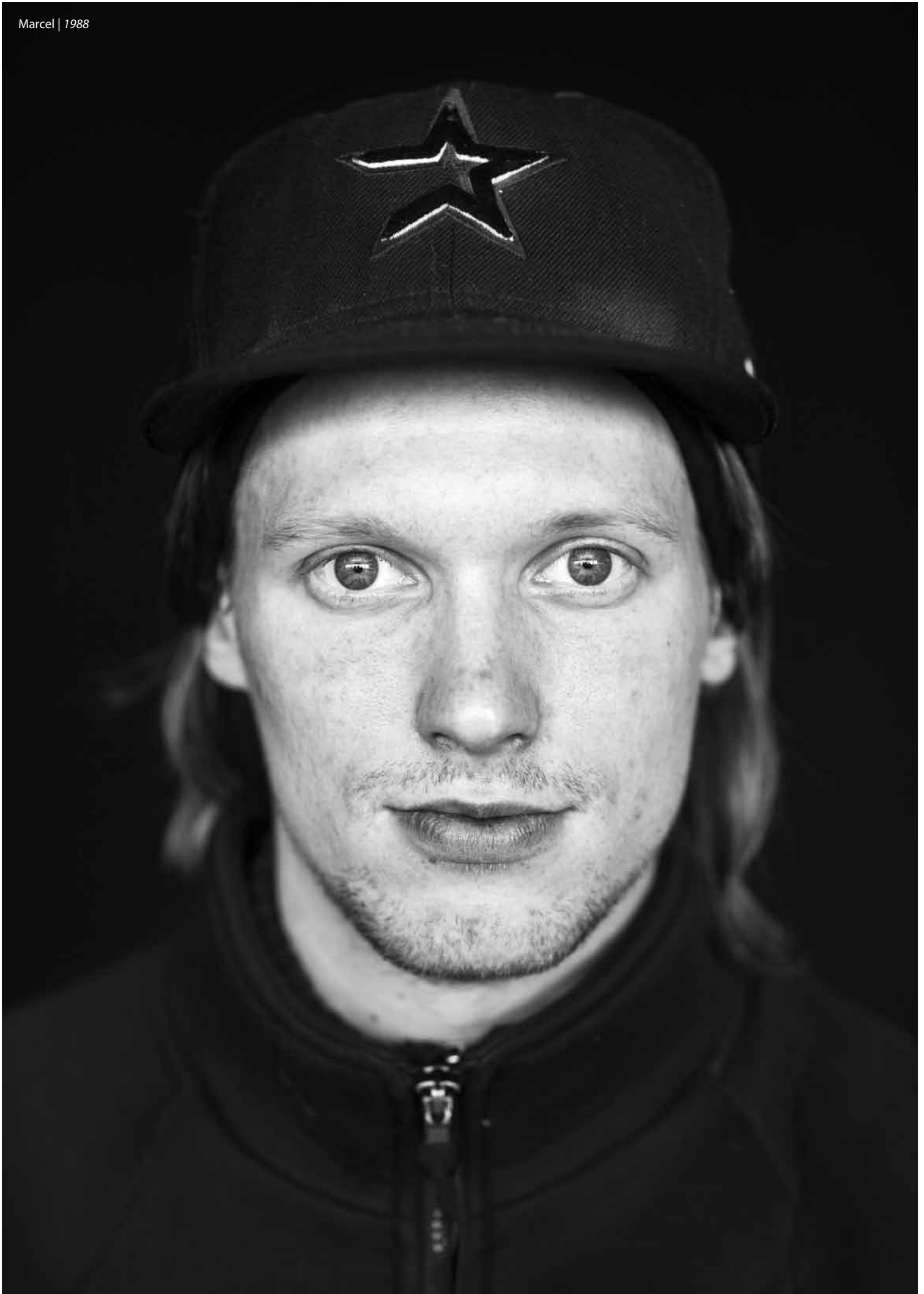
## In this Issue:

- Roma and Legal Culture: Roots and Old and New Faces of a Complex Equality Issue
- Multiple and intersectional discrimination in EU law
- European Legal Policy Update
- ECJ/ECtHR Case Law Update
- European Committee of Social Rights Update
- National Legal Developments



# European Anti-discrimination Law Review

No. 13 - 2011



Legal Review prepared by the European Network of Legal Experts in  
the non-discrimination field (on the grounds of Racial or Ethnic Origin,  
Religion or Belief, Disability, Age and Sexual Orientation)

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The information contained in this thirteenth issue of the review reflects, as far as possible, the state of affairs on 15 June 2011.

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Michael | 1987



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Anne | 1946



Marlisa | 2008





# Introduction

The European Network of Legal Experts in the non-discrimination field has been managed by Human European Consultancy and the Migration Policy Group (MPG) since 2004. This network is composed of one national expert per EU Member State, as well as senior researchers and ground coordinators. In addition to the EU Member States, the candidate countries, Croatia, the Former Yugoslav Republic of Macedonia and Turkey have been part of the Network since December 2009. The aim of the Network is to monitor the transposition of the two Anti-discrimination directives<sup>1</sup> at the national level and to provide the European Commission with independent advice and information. It also produces the European Anti-discrimination Law Review and various Thematic Reports. Full information about the Network, its reports, publications and activities can be found on its website: [www.non-discrimination.net](http://www.non-discrimination.net).

This is the thirteenth issue of the *European Anti-discrimination Law Review* produced by the European Network of Legal Experts in the non-discrimination field. The Law Review provides an overview of the latest developments in European anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 15 June 2011). Alessandro Simoni, Professor of Comparative Law at the University of Florence, contributes with an article on Roma, in particular the roots and the many faces of this complex issue. Karon Monaghan QC of Matrix Chambers in the United Kingdom authors an article on multiple and intersectional discrimination. In addition, there are updates on legal policy developments at the European level and updates from the case law of the Court of Justice of the European Union. At the national level, the latest developments in non-discrimination law in the EU Member States and the three accession candidate countries can be found in the section on News from the Member States. These four sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Thien Uyen Do) on the basis of the information provided by the national experts and their own research in the European sections.

In 2011 the fifth edition of the comparative analysis, *Developing anti-discrimination law in Europe - The 27 Member States, Croatia, the Former Yugoslav Republic of Macedonia and Turkey compared*, was released. In addition, a thematic report on age authored by Declan O'Dempsey and Anna Beale as well as a handbook on how to bring a case to court, written by Lilla Farkas, were published. A thematic report on transgender by Silvan Agius and Christa Tobler, a thematic report on the possibilities for interested organisations to legally fight discrimination prepared by Margarita Ilieva, a thematic report on the situation of legislation outside the EU covering the US, Canada, South Africa and India by Sandra Fredman, an update on the prohibition of discrimination under the European Human Rights Law by Olivier De Schutter and the update of the comparative analysis are in the pipeline for early 2012.

In October 2011 the Network together with the European Network of Legal Experts in the field of gender equality, organised a legal seminar on the approaches to equality and non-discrimination legislation inside and outside the EU in Brussels for representatives of the Member States, Equality bodies and its own members. The legal seminar dealt with the six grounds of discrimination protected at the EU level and involved approximately 200 participants.

Isabelle Chopin  
Piet Leunis

<sup>1</sup> Directives 2000/43/EC and 2000/78/EC.

Meet ordinary people in this Review,  
facing discrimination.

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# Roma and Legal Culture: Roots and Old and New Faces of a Complex Equality Issue

**Alessandro Simoni<sup>2</sup>**

## **Introduction**

The visibility of the Roma<sup>3</sup> within legal literature has decidedly increased in recent times. Although a few years ago it was extremely difficult to find works devoted to the Roma in 'mainstream' legal journals and standard law libraries almost anywhere in Europe, these are now relatively common. The legal status of the Roma is now a respectable topic within very traditional academic contexts. This development, which has largely been a by-product of the extensive space that the Roma have achieved within national and international political discourse and media, is promising and potentially positive.

This notwithstanding, the overall relationship between the Roma and legal culture remains complex, and several mechanisms reinforcing discrimination towards the former still flourish in the interstices of the latter. Particularly in civil law countries, the attitudes and priorities of judges are significantly influenced by academic literature, and legal scholars represent an elite which can steer government policies. When it comes to the Roma, one can observe that recent debates have not yet been able to interrupt the circulation of age-old stereotypes of 'Gypsies', which in the minds of many scholars, judges and prosecutors are simply transferred to the 'Roma' or 'nomads'.

This does not mean that legal professionals are on average more negatively oriented against Roma than other social groups. It is rather the effect of their difficulty in accepting the radical revisitation of the view of 'Romani culture' that has taken place within contemporary sociology and anthropology. This generates, within institutions that otherwise perceive themselves as absolutely impartial, discriminatory practices that can multiply the effects of the 'racial profiling' observed and discussed with regard to policing. Such practices can be avoided only by making the legal community aware of the need for a critical assessment of how Romani identity has been and is constructed in legal contexts, which in turn is possible only through an intensified dialogue with the other social sciences.

While we feel that these problems and needs occur in the majority of European Union Member States, points of detail can vary from country to country because of differences in institutional arrangements. In the following pages we will try to provide an introductory analysis of past developments and future perspectives relying on national contexts where the reproduction and survival of the old stereotype of the 'Gypsy' within core legal and judicial culture appears most strikingly.

## **The long life of the 'Gypsies' in legal literature**

### *Positivist views of Gypsies*

Let us step back in time for a moment and recall the shared perception of the Roma (labelled 'Gypsies') in the legal literature of continental Europe after the revolutions that revoked with a stroke of the pen the laws meting out special punishments to Gypsies. While a leading French treatise on criminal law pub-

<sup>2</sup> Professor of Comparative Law at the University of Florence.

<sup>3</sup> In the context of this article the term 'Roma' is used as an umbrella term covering all those groups (Roma, Sinti, etc.) that in the past were labelled using the term 'Gypsies' or similar terms in different national languages.

lished just before the revolution still contains a chapter on punishments for *Bohémiens* and *Egyptiens*,<sup>4</sup> the codification of laws with the related use of the overarching concept of 'citizen' suddenly made Gypsies disappear as a formal legal category. Historical records do indicate that harsh treatment of those perceived as Gypsies continued through the enforcement of formally 'ethnic blind' provisions, like those against begging and vagrancy (against which the Napoleonic Code and its followers included extensive provisions and heavy penalties),<sup>5</sup> but this represented merely one of the many instances in which legal machinery portrayed as impartial and impersonal acted in an oppressive manner against weaker social groups, and was not supported, in France and in countries inspired by the French legal tradition, by a precise construction of the 'Gypsy' in legal culture.

A well-structured vision of 'who the Gypsies are' developed instead through the rise of criminological positivism with its efforts to identify characteristics revealing an individual's propensity towards crime, primarily in order to design a legal system oriented towards preventing crime rather than solely focusing on punishment. Criminological positivism, of which the Italians Cesare Lombroso and Enrico Ferri were the most famous representatives, had a strong influence in Europe (and also overseas) between the 19th and 20th centuries. Gypsies were not as central as one might perhaps expect within the enormous and complex mass of materials bequeathed to us by positivist criminologists, but they certainly had a clear-cut position, i.e. a well-defined ethnic group with precise and unique characteristics, including an itinerant lifestyle, a bent for music, a language of their own, and a propensity towards crime. The view which dominated the legal environment is neatly summarised by the title of a pamphlet-like book published by an Italian judge, Alfredo Capobianco, in 1914, *The problem of a vagrant people struggling against the law*,<sup>6</sup> which was well received in contemporary legal journals. The author proceeded from a description of the lifestyle and alleged criminal activity of the 'Gypsies' to propose the introduction of a system to identify them and control their movements. In his view, Gypsies were a strictly nomadic people, to whom theft and fraud were second nature, with no moral system and a poor sense of religion.

While stressing the many weaknesses of the book, reviewers from the leading criminal law journals in Italy (at that time considered a leading country in criminal legal thinking) did not challenge his view of the Gypsies, which is described as a 'valuable factual contribution that the author wished to bring to social criminology'.<sup>7</sup>

Capobianco was far from being an original thinker, and precisely for this reason his work is a good indicator of the dominant attitude of his time. It must be stressed, however, that the view of the Gypsies developed by the founding fathers of criminological positivism was not an original scientific product primarily based on first-hand observations. Scholars simply referred to the already existing extensive literature on Gypsies, merely transplanting its content into a legal setting. The idea of a well-defined social group characterised by behaviours incompatible with the legal order of modern nation states was already solidly entrenched in the general culture of the time albeit presented with a variety of nuances, some of which tended to romanticise their supposed propensity towards crime. The early 'Gypsiologists' were remarkably consistent in believing 'Gypsiness' to have a precise set of racial/ethnic characteristics and in classifying groups that did not fit the picture as examples of groups that were not (or no longer) 'real Gypsies'. The persistence of this view is clear from the chapter on Gypsies ('The wandering instinct of the Gypsies') contained in the dissertation written roughly 20 years later by the Finnish anthropologist

<sup>4</sup> Muryart de Vouglans, *Les lois criminelles de France dans leur ordre naturel*, Paris, 1783.

<sup>5</sup> J.R. Cubero, *Histoire du vagabondage: du Moyen Age à nos jours*, Paris, 1998, pp. 261 ff.

<sup>6</sup> A. Capobianco, *Il problema di una gente vagabonda in lotta con le leggi*, Naples, 1914. This book is analysed against the backdrop of the legal culture of its time in A. Simoni, 'I giuristi e il "problema di una gente vagabonda"' in L. Piasere and S. Pontrandolfo, *Italia romani*, vol. III, Rome, 2002, pp. 265 ff.

<sup>7</sup> *Rivista di diritto e Procedura Penale*, VI (1915), part I, p. 246.

and future diplomat Ragnar Numelin: 'Roving about is a social custom common to all. It is an elementary concern of the whole people'.<sup>8</sup>

### *Impact on legislative reforms*

The representation of the Gypsies as a homogenous and itinerant group with a criminal lifestyle also had a crucial role in the introduction of exceptions to equal treatment in legal systems that were ordinarily reluctant to introduce rules specifically targeting particular groups. The most striking historical example is beyond doubt that of France, which in 1912 introduced a law on 'itinerant professions' that included a section on 'nomads' (*nomades*) obliging those who were so classified to have a *carnet anthropométrique* which had to be stamped by local police authorities every time the bearer moved to a new location, together with a number of other vexatious prescripts. Violation of the rules carried harsh sentences.<sup>9</sup> This system remained in force until 1969 when the current system providing special rules for so-called *gens du voyage* was introduced. France was not alone at the beginning of the 20th century in considering the introduction of legislative rules to control 'Gypsies'. In his 1914 work, Capobianco also proposed the introduction in Italy of a system which would have been a mere cut-and-paste of the French law, and in 1914 Sweden formally prohibited the immigration of foreign *zigenare*.<sup>10</sup>

Here is not the place to go back to the historical roots of the French 1912 law, which must be understood in the context of the development of modern police techniques and of fear of those (not only Gypsies) who might escape state control. What is relevant here is the further insight that the law gives us into the view of the Gypsies prevailing within legal circles of the time. While the formal category ('nomads') used by the legislative could be perceived as referring not to ethnic identity but simply to an 'itinerant lifestyle', the *travaux préparatoires* and the initial comments of scholars leave no doubt about which group was covered by the new control system and how this was unanimously perceived. It is enough to look at three doctoral dissertations submitted shortly after the law's entry into force. Here also we are dealing with authors that are unlikely to say anything that is not 'mainstream' within their academic milieu. The future doctors have little doubts about the meaning of the word 'nomad'. 'The nomad is the [...] *Bohémien*, *romanichel* or *tzigane*. His wrongdoings brought about the enactment of the law. This point is clear. When you study the *travaux préparatoires* you see that it is him and only him that comes into question as a "nomad";<sup>11</sup> 'This category includes [...] the *romanichels*, the *bohémiens* and the *tziganes*';<sup>12</sup> 'We will thus consider as nomads all the individuals that we usually call with the name of *Bohémiens*'.<sup>13</sup> These authors are equally straightforward when it comes to the characteristics of this group. 'Apart from a few rare exceptions these are dangerous criminals against whom society will never be able to adopt sufficient safeguards';<sup>14</sup> 'particularly dangerous, their movement is a real plague for the countryside';<sup>15</sup> 'sometimes murderer, always or almost always thief, this is the *Bohémien*'.<sup>16</sup> Looking at the footnotes of these dissertations, which abound in references to Italian positivist criminologists, one receives the impression of an assumption shared by scholars across Europe which identified the Gypsies as a major danger for society on the basis of constant reproduction of stereotypes that originated in the works of the early 'Gypsiologists'.

<sup>8</sup> R. Numelin, *The Wandering Spirit. A Study of Human Migration*, Copenhagen and London, 1936, p. 266 ff.

<sup>9</sup> *Loi du 16 juillet 1912 sur l'exercice des professions ambulantes et la réglementation de la circulation des nomades*, in *Journal Officiel*, 19 July 1912.

<sup>10</sup> *Lag 1914:196 angående förbud för vissa utlänningar att här i riket vistas*, §§ 1 and 6.

<sup>11</sup> F. Challier, *La nouvelle loi sur la circulation des nomades. Loi du 16 juillet 1912*, Paris, 1913.

<sup>12</sup> G. Torlet, *Le régime administratif applicable aux nomades et marchands forains*, Paris, 1913.

<sup>13</sup> P. Girard de Coëhorn, *Les nomades et la loi pénale*, Montpellier, 1914.

<sup>14</sup> Challier, op. cit., p. 342.

<sup>15</sup> Torlet, op. cit.

<sup>16</sup> Girard de Coëhorn, op. cit., p. 115.

### *The importance of handbooks for practitioners*

These stereotypes reached not only academia but also practising lawyers thanks to the wealth of information on 'Gypsies' contained in handbooks for judges and lawyers that were designed as practical tools for investigating and adjudicating criminal cases and also heavily relied on positivist criminology. The most famous and influential of these was the *Handbook for the Investigating Judge* (*Handbuch für die Untersuchungsrichter*, first edition 1893), published by Hans Gross, professor in Graz and founder of the local school of criminology. His book, which is intended as a criminological text on investigation techniques, was translated into the major European languages and had an enormous influence. Its Italian and French translations were the standard references for lawyers writing about Gypsies. In its extensive sections on the Gypsies, Gross also essentially used information provided by the early Gypsiologists to prove that the Gypsies were a separate group that were nomadic, lawbreaking and extremely dangerous for the modern state.

Gross's work was widely circulated, and it is probably the single most effective piece of writing in the construction of legal 'anti-gypsyism' in Italy, France, Austria and Germany. Praised as 'most valuable' reading by reviewers from top end legal journals,<sup>17</sup> abstracts from it were the basis for standard sections on Gypsies in pocket books for practitioners. According to an Italian pocket guide, *Guide to the investigation of criminal cases* that was published in 1911 and simply reproduces passages of Gross, 'The police must deal with Gypsies, who have a special kind of criminality. They do not expose themselves to danger, but rather act by poison or ambush. They do not usually rob a person unless they have killed him. [...] The Gypsy wanders continuously in the manner of the most ancient peoples. He desires goods and enjoys idleness and sensual love. He is accustomed to any kind of weather, does not tolerate orders, and often lives from theft. [...] Gypsies have great agility and rapidly recover from extremely severe wounds without the help of science.'<sup>18</sup>

### *Later developments and the survival of stereotypes*

These old sources are relevant today as they influenced the development of criminal legal thinking in continental Europe over the next century. The positivist criminology which gave official status to the 'race of criminals' stereotype within legal science was certainly intrinsically flawed, and its constructions went hand in hand with contemporary racist and eugenic theories. However, despite all its weaknesses (which must be assessed against the backdrop of scientific knowledge of its time) it represented an effort to modernise legal thinking in criminal law as well as a channel of communication with the findings of other sciences. Judges and prosecutors were supposed to possess competences that were not limited to the simple abstract interpretation of legal rules, but also extended to the specific social and human dimension within which the criminal action originated. Stereotypes about Gypsies were simply the effects, albeit perverse, of such communication, which kept legal culture aligned with general popular prejudices.

Positivist criminology *à la* Lombroso started to progressively lose its influence in the 20th century. It was not, however, replaced by a renewed effort to merge criminal law and other sciences but rather by a formal approach, where criminal adjudication was a purely technical exercise and criminology developed separated from criminal law, with working methods that were more linked to sociology than to anthropology. The principles of equality before the law enshrined in modern constitutions also made open debate on the possible connection between a crime and the ethnicity of the defendant less acceptable.

<sup>17</sup> The reviewer in *Scuola Positiva*, XVI (1906), p. 494, says he read it 'almost with a sense of anxiety, considering all the specific expertise which a criminal judge should have while thinking about the absolute lack of it in our country'.

<sup>18</sup> C. Baldi, *Guida delle istruttorie penali. Manuale pratico alfabetico*, Turin, 1911, p. 634.



The loss of interest in the personal characteristics of the defendant, and in the sciences that could provide corroboration in this regard, led to knowledge about Gypsies in the legal field becoming 'frozen'. Without further input, lawyers tended either to stick to the old sources or to rely on popular stereotype of Gypsies, which also had notoriously strong negative connotations. This facilitated the creation of long chains of transmission of stereotypes that spanned the centuries. We can find a good example in this sense in a 1973 entry in the Italian *Enciclopedia del diritto*, the country's most authoritative legal encyclopaedia. The entry on begging (until 1995 a crime) considers Gypsies (not yet Roma) as paradigmatic beggars, and refers the reader to a section on 'Gypsies' in a major criminology reference work published in 1943 for 'useful information'.<sup>19</sup> The 1943 entry is a compilation of passages from Gross and other authors, with some that can be traced back to a famous book (*Die Zigeuner*) by the early Gypsiologist Heinrich Grellmann published at the end of the 18th century. While the lack of independent judgment is certainly indisputable (the 1943 entry contains some of the most virulent stereotypes of the Gypsies), the author was faced with the hard fact of the absence in his country of any presentation whatsoever of Gypsies in a publication addressed to a legal audience.

### **Still looking at the Roma through the old 'Gypsy' lens?**

#### *From an ethnic low profile to the new centrality of the Roma*

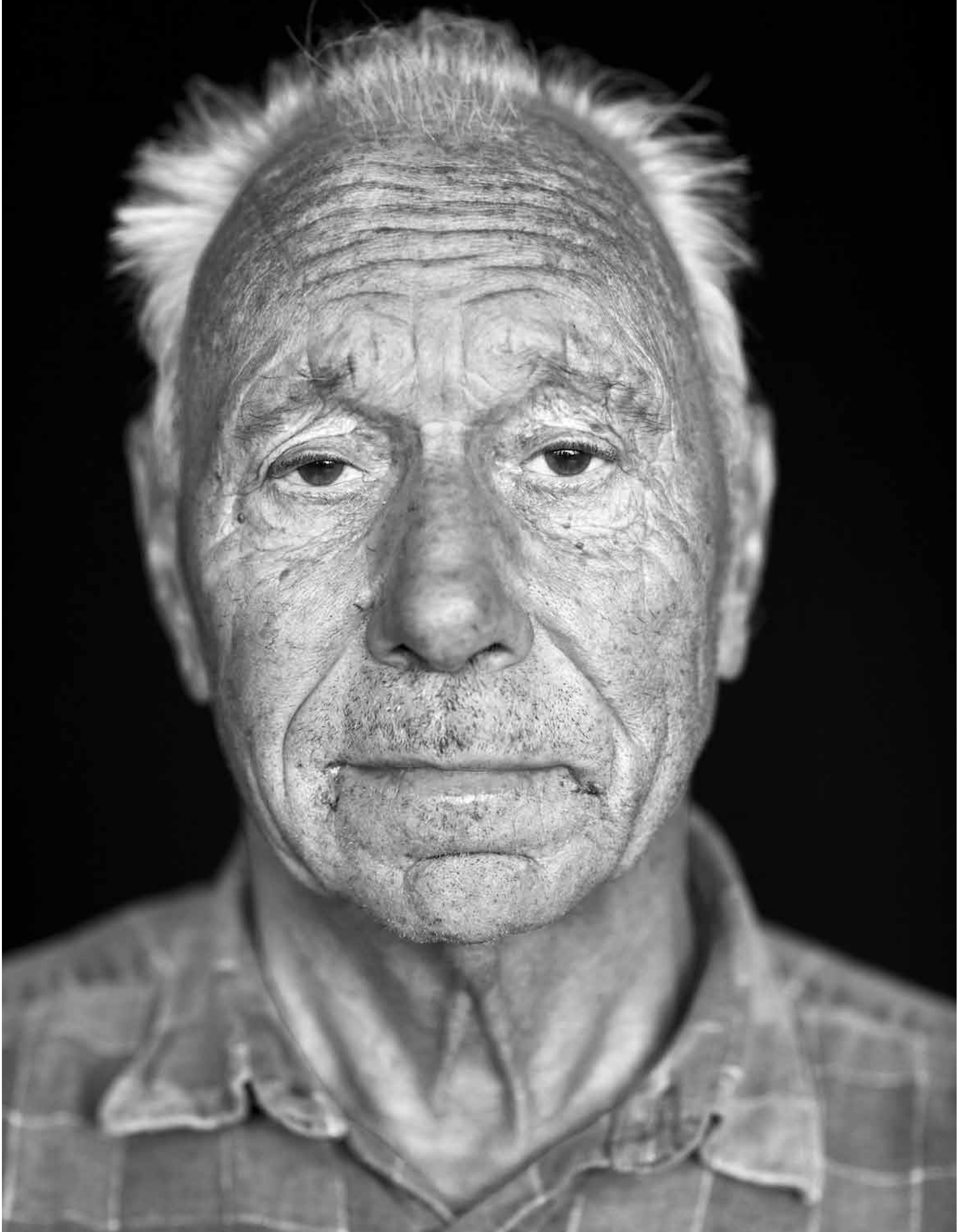
The persistent absence of a critical reading of old views of 'Gypsies' was also made possible by the scant attention paid until recently to Romani identity in court cases involving Roma. In most countries, when courts heard cases arising from tensions linked to the Romani presence, they neglected (and they were not requested to consider) the ethnicity of the parties involved. This phenomenon of the 'legal invisibility of the Roma' (which was specific to the continent, with the UK evidencing different patterns) was also due to the low political visibility of the Roma, and was predominantly used against them to cover up the selective and targeted enforcement of criminal law provisions. However, formally ethnic-blind adjudication could in specific cases also lead to the promotion of equality. An example in this respect is the 1995 Italian Constitutional Court decision which declared the punishment of begging under criminal law unconstitutional. Although originated by a series of cases that without exception concerned Roma, this decision does not make any reference to the ethnicity of the defendants.<sup>20</sup>

Nowadays, courts and legal systems in every country increasingly regulate and decide Roma-related issues in ways that mean their ethnicity is openly discussed. Legal culture is hence, after the demise of criminological positivism, called once more to deal with Romani identity, albeit in a completely different context. One difference is the development of 'Romani studies', which has taken the place of the old 'Gypsiology' and in the last 20 years has witnessed an impressive advancement of research on Romani culture and on the history of relationships between Roma and non-Romani societies. Particularly impressive in this respect are the growth of anthropological fieldwork, which offers accurate insights into the culture of specific groups, and the emergence of 'Romani voices', with individuals and organisations seeking to deconstruct the stereotype of the 'Gypsy' and offering their own views on the roots of marginalisation and discrimination. The shift has been not only qualitative but also quantitative, creating increased difficulty for non-specialists trying to find their way through the maze of books and articles, with new studies appearing together with reprints of old outdated general descriptions that attempt to exploit the general public's interest in the Roma.

Considering the centrality of legal systems in the Roma's struggle for equality, it is relevant to inquire about what has taken the place of the old construction of the 'nomadic lawbreaker' as the dominant view in legal culture. The answer is far from simple, and the situation is in constant flux.

<sup>19</sup> T. Galimberti, *Zingari*, in Florian E., Niceforo A., Pende N. (eds.), *Dizionario di criminologia*, vol. II, Milano, 1943, pp. 1050 ff.

<sup>20</sup> *Corte costituzionale*, Decision 519/1995.



Indications from recent academic literature and court cases are quite deceiving. While the most extreme stereotypes are no longer used, there is now a deep gulf between Romani studies and legal scholars. The most striking aspect is that legal literature sticks to a vision of the Romani world as a consistent homogenous entity with well-defined cultural traits and a transnational nature. Distinctions internal to the Romani world are minimised, and the connection of groups to a specific state completely neglected. The factors underlying such simplifications can to some extent be understood. The fresh perception of the Romani world within the social sciences is, as we have said, primarily due to the contribution of social and cultural anthropologists, who usually analyse a specific group in detailed monographs based on field work. These monographs are barely accessible without a modicum of background knowledge and an ability to navigate thematic bibliographies, which cannot be expected to form part of the general education of legal professionals. At the same time, judges and legal scholars – like other observers – are jammed between the fragmentation of Romani identity (or to put it better, the multiplication of Romani identities) deriving from anthropology and the quest for unity pursued by increasingly visible Romani organisations, which can often have legitimate political agendas that are not compatible with emphasising differences. The general substitution of the term ‘Gypsies’ with ‘Roma’ does not facilitate a change of perspective since it conceals the fact that characteristics ordinarily attributed to Gypsies/Roma are historically contingent external attributions that convey the perception of a consistent and stable Romani culture.<sup>21</sup>

#### *Old attitudes under cover*

Let us look at some examples of this reproduction of old attitudes in a different stylistic packaging and its implications in terms of promotion of equal treatment.

One recurring theme where the issue of Romani identity has come back into the realm of law is that of ‘culturally motivated crimes’ and the related possibility of ‘cultural defences’. Roma are in many countries a recurring case study on this point. Again using a ‘mainstream’ authoritative scholarly work as example, it is possible to show the risks implied. In a recent much-praised Italian book on ‘cultural crimes’, the author writes: ‘The Roma have a “flexible” lifestyle, they do not stay in a fixed territory, and they are a people of migrants; mobility is one of the reasons for their historical non-acquisition of rights over land that they have occupied for years or centuries; to this “itinerant” lifestyle are also due the difficulties in their relations with sedentary populations and the suspicious and hostile attitudes held by indigenous populations towards them.’<sup>22</sup> [...] As has been demonstrated, the crimes that can be linked to Romani culture are theft and the use of minors in begging.<sup>23</sup>

Such sweeping statements (which, by the way, are not used in the book to construct any specific policies on dealing with alleged ‘Romani crimes’) clearly consolidate and corroborate traditional views on the ‘Gypsies’, simply moving the bar a bit lower when it comes to the severity of the crimes allegedly typical of the Roma. That begging, and particularly begging by minors, is a cultural trait of the Roma (note: *all* Roma) is an idea that has also emerged in judicial decisions, as in a 2008 Court of Cassation case, where the judges quashed a court of appeal decision that had convicted a Romani woman begging with her children of ‘reduction into servitude’. The court mentioned the alleged ‘culture of begging’ among the Roma in an *obiter dictum* (‘it is necessary to pay attention to actual situations so as to avoid criminalising

<sup>21</sup> It is interesting that legal scholars, at least in France and Italy, seem to completely neglect works like that of L. Lucassen, W. Willems and A. Cottaar, *Gypsies and Other Itinerant Groups. A Socio-Historical Approach*, London-New York, 1998, that stress the importance of external categorisation, stigmatisation, and labelling in the construction of the identity of these groups.

<sup>22</sup> C. de Maglie, *I reati culturalmente motivati. Ideologie e modelli penali*, Pisa, 2010, p. 51.

<sup>23</sup> *Ibid*, p. 53.

behaviours that are part of the cultural tradition of a people') which inflamed political debate but that did not have any impact on the outcome of the case.<sup>24</sup>

This quotation is interesting since it shows that the construction of a unified Romani culture characterised by begging was made not in view of further repression, but rather to stop the trend towards more or less automatically considering any use of minors in begging (which is already *per se* a crime) as a form of reduction into servitude without regard to the actual conditions. The statement of the court is paradigmatic of an approach which is flawed in its premises rather than its conclusions. While it would be in principle possible to discuss the cultural and economic role of begging within specific Romani groups, to say that any act of begging by a Roma is caused by a shared culture implies proceeding from a factor (a general 'Romani culture') which is either non-existent or so generally described that it cannot be used to adjudicate specific cases.

### *The risks of misreading Romani culture and contexts*

The persistence within legal culture of a monistic view of Romani culture that bears no relation to the more pluralistic and nuanced view now firmly established in modern academic literature has a manifold negative impact. This includes the perception that the Roma are particularly prone to committing crime. In the first place, this gives further momentum to the stereotyping which in some countries prevails within governmental institutions. When legal culture is not able to formulate an articulate, realistic and nuanced view of Romani societies, this inevitably facilitates use of stereotypes in the lawmaking process and government policy. Even a cursory reading of the preparatory documents for the 2008 Italian '*pacchetto sicurezza*' (a package of public security provisions that included measures to control immigration) and of some related private member bills advanced in the same period reveals, for example, recurrent use of stereotyping which had a clear influence on the outcome of the legislative process.<sup>25</sup> Although the term 'Gypsies' is usually not used (replaced by 'Roma' or 'nomads'), the key actors in the legislative process (most often professional lawyers) use nomadic/lawbreaker stereotyping which half a century back would have been considered mainstream.<sup>26</sup> The vacuum left by a legal culture that is not able to select between the available sources in order to build a realistic view of the Roma in its own fora inevitably leaves more space for the political exploitation of anti-Gypsyism.

This vacuum can also lead to other forms of state policy that may be prejudicial to equal treatment owing to mechanisms that can easily go unnoticed without scrutiny by qualified researchers.

The relevant examples here also come from Italy and are the subject of two recent methodologically path-breaking studies that respectively concerned legal proceedings against Romani women accused of kidnapping non-Romani children<sup>27</sup> and the practice of courts dealing with Romani children in the context of decisions on adoption (cutting all ties with their families of origin).<sup>28</sup>

The first study shows that no Roma have ever been found guilty of kidnapping and that the few instances where Roma have been convicted of attempted kidnapping are clearly out of proportion to the massive media visibility of the 'Romani kidnapper' (the study's starting point is press releases mentioning alleged kidnapping over a 20-year period). It also reveals that due process for the Roma is jeopardised by popular

<sup>24</sup> *Corte di Cassazione*, n. 44516 del 17.9/28.11.2008.

<sup>25</sup> For a detailed analysis, see A. Simoni, '*Appunti per una lettura romani del «pacchetto sicurezza»*', in *Diritto, Immigrazione e Cittadinanza*, XI, 4-2009, pp. 217 ff.

<sup>26</sup> See, for instance, the statements in the proposal for the establishment of a parliamentary commission on the situation of women and minors within Romani communities: *Camera dei deputati, XVI legislatura, proposta di legge n. 1052 (Santelli)*.

<sup>27</sup> S. Tosi Cambini, *La zingara rapitrice. Racconti, denunce, sentenze (1986-2007)*, Rome, 2008.

<sup>28</sup> C. Saletti Salza, *Dalla tutela al genocidio? Le adozioni dei minori rom e sinti in Italia (1985-2005)*, Rome, 2010.

fear of the 'Gypsy kidnapper', which creates a situation where the mere physical proximity of a Romani woman to a child is perceived by witnesses as a precursor to kidnapping and the presumption of innocence is weakened for the Roma by a variety of factors relating not only to the culture of the Roma but also to the internal culture of the judiciary.

The second study is based on case files on the adoption of Romani children in seven juvenile courts between 1985 and 2005. In this case the starting point is also quantitative, with worrying data showing that a Romani child is much more likely to be given in adoption than a non-Romani child. But the most impressive sections are those which show an almost complete lack of understanding during adoption proceedings of the social and cultural context from which the children come, replaced by a stereotyped perception of Romani families as 'less fit for parenthood', with a lack of attachment and parental commitment being asserted on countless occasions on the basis of plain misunderstandings, with serious consequences for those involved.

# Multiple and intersectional discrimination in EU law

**Karon Monaghan QC**

A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.<sup>29</sup>

## Introduction

EU law adopts a singular grounds-based approach to addressing discrimination, this notwithstanding the expansion of the grounds protected and the recognition that they will frequently overlap. As such, the EU legal measures addressing discrimination and inequality compel victims of discrimination to choose the ground or grounds, sometimes in the alternative or in addition, upon which they rely in pursuing any claim of discrimination. This does not always reflect the inequality experienced. As has been observed, 'this single-axis framework' erases the experiences of those with multiple identities that contribute to the experience of social disadvantage and marginalisation.<sup>30</sup>

All of us have multiple identities and many groups experience discrimination and social disadvantage for reasons which are multi-faceted, complex and dynamic, and many experts consider that the present legal framework does not adequately address this. Importantly, these forms of discrimination are not merely theoretical. The EU has long since recognised the experience of multiple discrimination. The decision of the European Parliament establishing the European Year of Equal Opportunities for All in 2007 'towards a just society'<sup>31</sup> identified as the first of the objectives of the European Year of Equal Opportunities for All the raising of awareness of the right to equality and non-discrimination 'and of the problem of multiple discrimination'.<sup>32</sup> Many groups across the EU Member States experience high levels of discrimination in circumstances where the European anti-discrimination model provides limited protection. In the United Kingdom for example, Black African women who are asylum seekers are estimated to have a mortality rate seven times higher than for White women.<sup>33</sup> Ethnic minorities are substantially over-represented in the custodial system and many have disabilities (mental health issues and learning disabilities, in particular).<sup>34</sup> Pakistani and Bangladeshi women are at very high risk of disadvantage in the work place experiencing a more significant pay gap<sup>35</sup> than other women and higher levels of unemployment, placing them in a

<sup>29</sup> Per Sachs J, *Minister of Home Affairs and Others v Fourie & Bonthuys; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (2005), Cases CCT 60/04 and 10/05, paragraph 60.

<sup>30</sup> Kimberlé Crenshaw, 'Demarginalising the Intersection of Race and Sex; A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist politics', in C McCrudden (ed), *Anti-discrimination Law* (2004, Ashgate) pp. 4, 479, 480.

<sup>31</sup> Decision No. 771/2006/EC of the European Parliament and of the Council of 17 May 2006.

<sup>32</sup> Article 2(A).

<sup>33</sup> *How Fair is Britain? Equality, Human Rights and Good Relations in 2010; The First Triennial Review* (2010, EHRC), p. 638.

<sup>34</sup> *How Fair is Britain? Equality, Human Rights and Good Relations in 2010; The First Triennial Review* (2010, EHRC), p. 641.

<sup>35</sup> *Fairness and Freedom: The Final Report of the Equalities Review* (2007), pp. 66, 68-9.

different position to other women. This is attributable at least in the main to discrimination in the labour market experienced differently by Pakistani and Bangladeshi women as compared to other women and as compared to Pakistani and Bangladeshi men.<sup>36</sup> And it is not explained, as is sometimes suggested,<sup>37</sup> by the fact that such women are new to the United Kingdom labour market. Far from it, the employment penalty associated with being a Pakistani or Bangladeshi women has been persistent, documented for over 30 years,<sup>38</sup> and not mitigated by being born and brought up in the United Kingdom. Instead, '[a] larmingly, there is little sign that employment penalties are reduced in the second generation'.<sup>39</sup> Further, research confirms that Black boys – that is, Black African/Caribbean boys – continue to suffer educational disadvantage and discrimination not experienced by Black girls and other ethnic groups.<sup>40</sup> Boys and children from some ethnic minority groups (compounding the experience of those children with both sets of characteristics) perform less well at school as early as five years old.<sup>41</sup> Of great importance too across Europe is the experience of discrimination that comes from being a Muslim man and a Muslim woman, which is often very different from each other. Research shows that the perception of Muslims who experience official policies banning women wearing the headscarf is that these policies militate against integration and legitimise discrimination in other areas such as employment, as well as stimulating more aggressive anti-headscarf reactions in both discourse and incidents on the street, making Muslim women especially vulnerable.<sup>42</sup> Roma men and boys too experience serious violence at the hands of the State in certain EU Member States.<sup>43</sup> And there are many other such examples of multiple or intersectional forms of discrimination.

There is, then, in my view a real imperative for prohibiting these forms of discrimination and such requires an understanding of the limits of the existing legal framework and action taken to address those limitations.

## EU law

The Treaty on the Functioning of the European Union (TFEU)<sup>44</sup> contains wide powers providing the EU with competence to legislate against discrimination connected to sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation,<sup>45</sup> broadly reflecting those powers introduced by the Treaty of Amsterdam.<sup>46</sup> The Charter of Fundamental Rights of the European Union<sup>47</sup> contains important dignity and non-discrimination rights.<sup>48</sup> There is no obvious restriction on the enactment of legislation, within the scope of the EU's powers, addressing discrimination connected to more than one protected charac-

<sup>36</sup> *Ethnic Minorities and the Labour Market: Final Report*, Cabinet Office, March 2003.

<sup>37</sup> *Fairness and Freedom: The Final Report of the Equalities Review* (2007), p. 68.

<sup>38</sup> *Fairness and Freedom: The Final Report of the Equalities Review* (2007), p. 69.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Fairness and Freedom: The Final Report of the Equalities Review* (2007).

<sup>41</sup> *How Fair is Britain? Equality, Human Rights and Good relations in 2010; The First Triennial Review* (2010, EHRC), p. 645

<sup>42</sup> *Perceptions of Discrimination and Islamophobia Voices from Members of Muslim Communities in the European Union* (2006) EUMC.

<sup>43</sup> Examples from the case law include: *Assenov v Bulgaria*, Application No. 90/1997/874/1086, 28 October 1998; *Velikova v Bulgaria*, Application No. 41488/98, 18 May 2000; *Anguelova v Bulgaria*, Application Nos. 43577/98 and 43579/98, 13 June 2002; *Balogh v Hungary*, Application No. 47940/99; 20 July 2004; *Nachova and others v Bulgaria*, Application Nos. 43577/98, 6 July 2005.

<sup>44</sup> [2010] OJ C83/47.

<sup>45</sup> Article 19.

<sup>46</sup> Article 6A: [1997] OJ C340/1, inserting Article 13 EC Treaty. Article 19 TFEU now requires the consent of the European Parliament in accordance with a special legislative procedure.

<sup>47</sup> [2010] OJ C83/389.

<sup>48</sup> Articles 1, 20-23, 26.

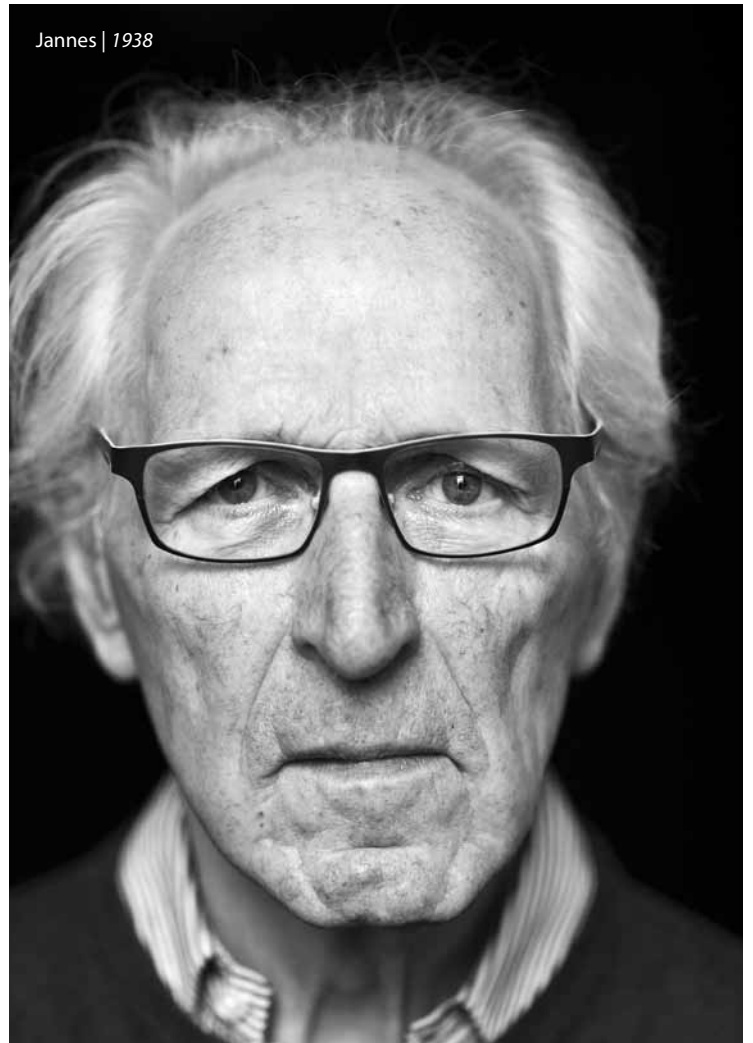
Elizah | 1990



Audrey | 1959



Jannes | 1938





teristic, and the focus on dignity as an inviolable right<sup>49</sup> would support a prohibition on discrimination against people in all their diversity.

As to the legal measures addressing equality and discrimination that have been enacted, firstly Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive')<sup>50</sup> addresses discrimination connected to racial or ethnic origin in employment, education, social protection including social security and healthcare, social advantages and access to and supply of goods and services. Secondly, Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')<sup>51</sup> regulates discrimination on the grounds of religion or belief, disability, age and sexual orientation in the employment sphere. The third directive regulates gender discrimination in the provision of good and services: Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services ('the Gender Goods and Services Directive').<sup>52</sup> Finally, Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment on men and women in matters of employment and occupation regulates gender discrimination in the labour market ('the Recast Directive').<sup>53</sup>

The Recitals to those Directives make clear that EU action is no longer driven by market integration alone but that discrimination undermines the achievement of the objectives of the EU, including the attainment of economic and social cohesion, solidarity and the development of the EU as an area of freedom, security and justice.<sup>54</sup> Further and more especially, all four Directives recognise equality as a fundamental principle underpinning EU discrimination law.<sup>55</sup> It is increasingly recognised too that the principle of equal treatment underpinning the Directives is found 'in the various international instruments and in the constitutional traditions common to the Member States'.<sup>56</sup> Accordingly, the Race Directive, Framework Directive and Gender Goods and Services Directive all refer to the main United Nations instruments addressing discrimination (the Convention on the Elimination of Discrimination; the Convention on the Elimination of Discrimination against Women; and the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights).<sup>57</sup> The Gender Goods and Services Directive, for example, provides at Recital 2 that: 'The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories'. The United Nations supervisory bodies do recognise intersectional discrimination so that, for example, the Committee on the Elimination of Discrimination against Women acknowledges that women are a disadvantaged group and that their vulnerability to discrimination is increased when they belong to a racial or

<sup>49</sup> Article 1, Charter of Fundamental Rights of the European Union.

<sup>50</sup> [2000] OJ L 180/22.

<sup>51</sup> [2000] OJ L303/16.

<sup>52</sup> [2004] OJ L373/37.

<sup>53</sup> [2006] OJ L204/23.

<sup>54</sup> Racial Equality Directive, Recital 9 and see, Employment Equality Directive, Recital 11 and Gender Goods and Services Directive, Recital 9.

<sup>55</sup> Racial Equality Directive, Recitals 2 and 3; Employment Equality Directive, Recitals 1 and 2; Gender Goods and Services Directive, Recital 4 and Recast Directive, Recital 2.

<sup>56</sup> Case C-144/04 *Mangold v Helm* [2005], para 74.

<sup>57</sup> And see, Recast Directive, Recital 2.

ethnic minority group,<sup>58</sup> recognising therefore intersectional and multiple discrimination.<sup>59</sup> Importantly, the Committee has expressed concern at the disadvantaged situation of women belonging to ethnic minorities, particularly in the context of unemployment, lower levels of education and training, lower wages and salaries and fewer benefits, as compared to White women. It has recommended that steps be taken to ensure the elimination of direct and indirect discrimination against ethnic minority women, including through positive action in recruitment, awareness campaigns and targeted training, education, employment and health-care strategies. The Committee has also expressed concern, in the context of the United Kingdom, about the fact that 'ethnic and minority communities, including Traveller communities, continue to suffer from multiple discrimination, particularly in access to education, employment and health care (...) and that ethnic and minority women are underrepresented in all areas of the labour market, in particular in senior or decision-making positions'.<sup>60</sup>

The Directives themselves recognise that different grounds may intersect, sometimes in a context in which there is a conflict of rights (hence specific provision allowing for exemptions in such circumstances<sup>61</sup>) and sometimes in a way which causes very specific disadvantage or intersectional discrimination. Accordingly, Recital 14 of the Racial Equality Directive provides that: 'In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination'. Moreover it is clear that the purpose of the Employment Equality Directive (2000/78/EC) as set out in its Article 1 contemplates that all forms of discrimination on the protected grounds must be prohibited. Accordingly, its Recital 3 provides that: 'In implementing the principle of equal treatment, the Community should (...) aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination'. Further, its substantive provisions identify its purpose as laying 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',<sup>62</sup> and 'the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1'.<sup>63</sup>

However, the operative parts of the Directives do not unequivocally oblige Member States to outlaw intersectional discrimination. The Racial Equality Directive, in its operative parts, refers to discrimination based on 'racial or ethnic origin' only (Article 1); the Employment Equality Directive refers to 'religion or belief, disability, age or sexual orientation' (Article 1) and the Gender Goods and Services Directive and Recast Directive refer to discrimination based on 'sex' only (Articles 1 and 2). The implementation of these Directives will always allow challenges to multiple discrimination which is based on additive grounds; that is, discrimination that is connected to treatment based separately on race and gender or on more than one of the other protected characteristics. However, such is not unequivocally true of intersectional

<sup>58</sup> See for example, the Concluding Comments of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland. 01/07/99. A/54/38, paras 278-318.

<sup>59</sup> See too, Concluding Observations of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland 10/7/2008 A/63/38, paras 292 and 295; Concluding Comments of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland. 01/07/99. A/54/38, paras 278-318. (Concluding Observations/Comments) and Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women Sixth periodic report of States parties United Kingdom of Great Britain and Northern Ireland (2007) CEDAW/C/UK/6.

<sup>60</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland 10/7/2008 A/63/38, para 292.

<sup>61</sup> Article 4, Employment Equality Directive.

<sup>62</sup> Article 1.

<sup>63</sup> Article 2(1).

discrimination, explored further below. Giving adequate effect to the principle of equal treatment will mean ensuring that if any of the protected characteristics separately or intersectionally are a cause or reason for adverse treatment, such is outlawed.

### **The challenge in legislating for multiple and intersectional forms of discrimination in EU law**

The first difficulty faced in the formulation of protection against multiple forms of discrimination arises from their conceptualisation in law. Multiple discrimination has been described as:

A situation where discrimination takes place on the basis of more than one ground, it can be characterised as either:

- **Additive** where the role of the different grounds can be distinguished, for instance, when an elderly woman faces workplace discrimination because of her sex and age discrimination when accessing healthcare;
- Or **intersectional**, where the discrimination is based on a combination (or intersection) of two or more grounds. For example, a Romany woman with an intellectual disability may face full sterilisation. This discriminatory treatment is based not just on her sex (since not all women face this treatment), but neither is it based solely on her ethnic origin (since men of that same ethnic group may not face this treatment). The discriminatory treatment is based specifically on the combination of sex and ethnic origin: because she is a Roma woman.<sup>64</sup>

The ‘additive’ forms of discrimination present little difficulty under the present legal formulations in EU law. Such assumes and addresses multiple forms of discrimination on the basis that each act of discrimination can be identified as grounded in a discrete protected characteristic, singularly defined, on more than one occasion or on the same occasion but for separate reasons (for example, a Black woman subject to differential treatment because she is Black and in addition because she is a woman). However, the ‘single-axis’ approach to addressing discrimination in EU law, characterised by the Directives described above, coupled with the presently prescribed comparator-based model upon which the concepts of discrimination in the Directives depend, makes addressing intersectional discrimination somewhat more problematic.

The Directives cover both direct discrimination<sup>65</sup> (taken to occur when a person is treated less favourably than another is, has been or would be treated on the prohibited ground) and indirect discrimination<sup>66</sup> (taken to occur where an apparently neutral provision, criteria or practice would put a person having a particular relevant characteristic at a particular disadvantage compared with other persons unless that provision, criteria or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary). Both concepts require that a comparator or comparator group be identified and that comparator should be a person not possessing the particular characteristic on which the discrimination is alleged to be grounded. This makes proving intersectional discrimination difficult. A Muslim woman’s claim of discrimination, based on the intersection of her ethnicity and gender, may be defeated under this model by identifying as a comparator a Muslim man in the case of her race complaint and a non-Muslim woman in the case of her sex claim,<sup>67</sup> both concealing the true nature of her disadvantage and the discrimination suffered.

<sup>64</sup> *Inequalities and multiple discrimination in access to healthcare*, European Union Agency for Fundamental Rights, [http://fra.europa.eu/fraWebsite/attachments/Multiple-discrimination\\_Factsheet\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/Multiple-discrimination_Factsheet_EN.pdf) [accessed 10 August 2011].

<sup>65</sup> Racial Equality Directive, Article 2(2)(a); Employment Equality Directive, Article 2(2)(a).

<sup>66</sup> Racial Equality Directive, Article 2(2)(b); Employment Equality Directive, Article 2(2)(b).

<sup>67</sup> See, the discussion in *Bahl v The Law Society and others* [2004] EWCA Civ 1070; [2004] IRLR 799.

Further, the fact of discreet legislative measures addressing separate grounds means that in general the law drives an adjudicator to look for a comparator in respect of each ground. Furthermore, the *scope* of each of the Directives is different so that protection against discrimination on the grounds of religion or belief, disability, age and sexual orientation arises only in the field of employment and occupation;<sup>68</sup> whilst protection against discrimination on the grounds of racial or ethnic origin extends to employment and occupation, social protection, including social security and healthcare; social advantages; education and access to and supply of goods and services which are available to the public, including housing;<sup>69</sup> and protection against discrimination connected to gender arises in the sphere of employment and occupation<sup>70</sup> and in the provision of goods and services which are available to the public, in both the public and private sectors, (but excluding the content of media, advertising and education).<sup>71</sup> Without harmonised protection across the grounds falling within the scope of Article 19 Treaty on Functioning of the European Union (TFEU),<sup>72</sup> protection against multiple and intersectional forms of discrimination across those grounds will be problematic – at least outside the sphere of employment and occupation where protection is secured across all protected characteristics.

However, protection could be formulated relatively easily. The comparator-based models adopted in the definitions of discrimination in EU law, whilst they present some difficulties as they are now constructed, are not conceptually insurmountable. Just as direct discrimination requires that a person is treated ‘less favourably than another is’ on the protected grounds,<sup>73</sup> so any protection against multiple discrimination might require that that ‘other’ is a person without each of the characteristics in issue, separately (in the case of discrimination brought by a Black woman on the grounds of her race and her gender separately, a non-Black person in the first case and a man in the second) and protection against intersectional discrimination might require that that ‘other’ be a person who does not have any one of those characteristics (in a claim by a Black woman, such a comparator could be a White man, a Black man, or a White woman – in other words, someone other than a Black woman).

Further, and as to proof, as the United Kingdom courts have recognised, the forensic analysis necessitated by the concept of direct discrimination, in appropriate cases (particularly where reliance is placed on a hypothetical comparator, making an actual comparison unnecessary), might be undertaken by simply asking ‘why’ the alleged discriminator acted as he did toward the victim.<sup>74</sup> This avoids ‘arid and confusing’ disputes about the identity of the comparator and may be particularly beneficial as a tool in adjudicating on intersectional discrimination claims, even under the present direct discrimination model suitably adapted.

<sup>68</sup> Council Directive 2000/78/EC.

<sup>69</sup> Directive 2000/43/EC, Article 3.

<sup>70</sup> 2006/54/EC, Article 4 and Articles 14 to 16.

<sup>71</sup> Directive 2004/113/EC, Article 3.

<sup>72</sup> Ex-Article 13 TEC.

<sup>73</sup> Directive 2000/43/EC, Article 2(2)(a); Directive 2000/78/EC, Article 2(2)(a); Directive 2006/54/EC, Article 2(1)(a) and Directive 2004/113/EC, Article 2(A).

<sup>74</sup> *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL11; [2003] ICR 337, ‘...employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.’ para 11 per Lord Nicholls.

Again, the definition of indirect discrimination adopted by the EU Directives<sup>75</sup> should not operate as a deterrent to protection against multiple or intersectional forms of discrimination since the requirement that an apparently neutral provision, criterion or practice puts persons with one or other of the protected characteristics at a 'particular disadvantage' compared with persons without those protected characteristics could be adapted to cover persons with more than one of the protected characteristics with the comparator group being persons without any of those protected characteristics.

The provisions in each of the Directives providing for a shift in the burden of proof<sup>76</sup> ought to assist in establishing such claims, placing as it does the burden on the alleged discriminator to prove that there has been no breach of the principle of equal treatment in cases where a victim establishes 'facts from which it may be presumed that there has been direct or indirect discrimination'. The operation of the provisions addressing a shift in the burden of proof, however, has been frustrated by the absence of any correlative duty on Member States to collect statistical data which would illustrate the disproportionate impact of certain acts or measures on protected groups.<sup>77</sup>

### Other legal schemes

The approach adopted by the Directives is not adopted in the Convention for the Protection of Human Rights and Fundamental Freedoms which in its Article 14 provides that: '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'. And its Protocol No. 12<sup>78</sup> (opened for signature by the member states of the Council of Europe on 4 November 2000) provides that: '1. The enjoyment of any right set forth by law 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. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.' This fluid and open-ended approach to addressing the grounds of discrimination permits claims on intersecting grounds. Both the United Nations Covenants<sup>79</sup> adopt the same approach.

Other jurisdictions too adopt a similar approach and address intersectional discrimination in consequence, apparently without difficulty. The South African Constitution provides in its Bill of Rights<sup>80</sup> at Article 9(3) of the Constitution: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.' This provides

<sup>75</sup> Directive 2000/43/EC, Article 2(2)(b); Directive 2000/78/EC, Article 2(2)(b); Directive 2004/113/EC, Article 2(b) and Directive 2006/54/EC, Article 2(1)(b).

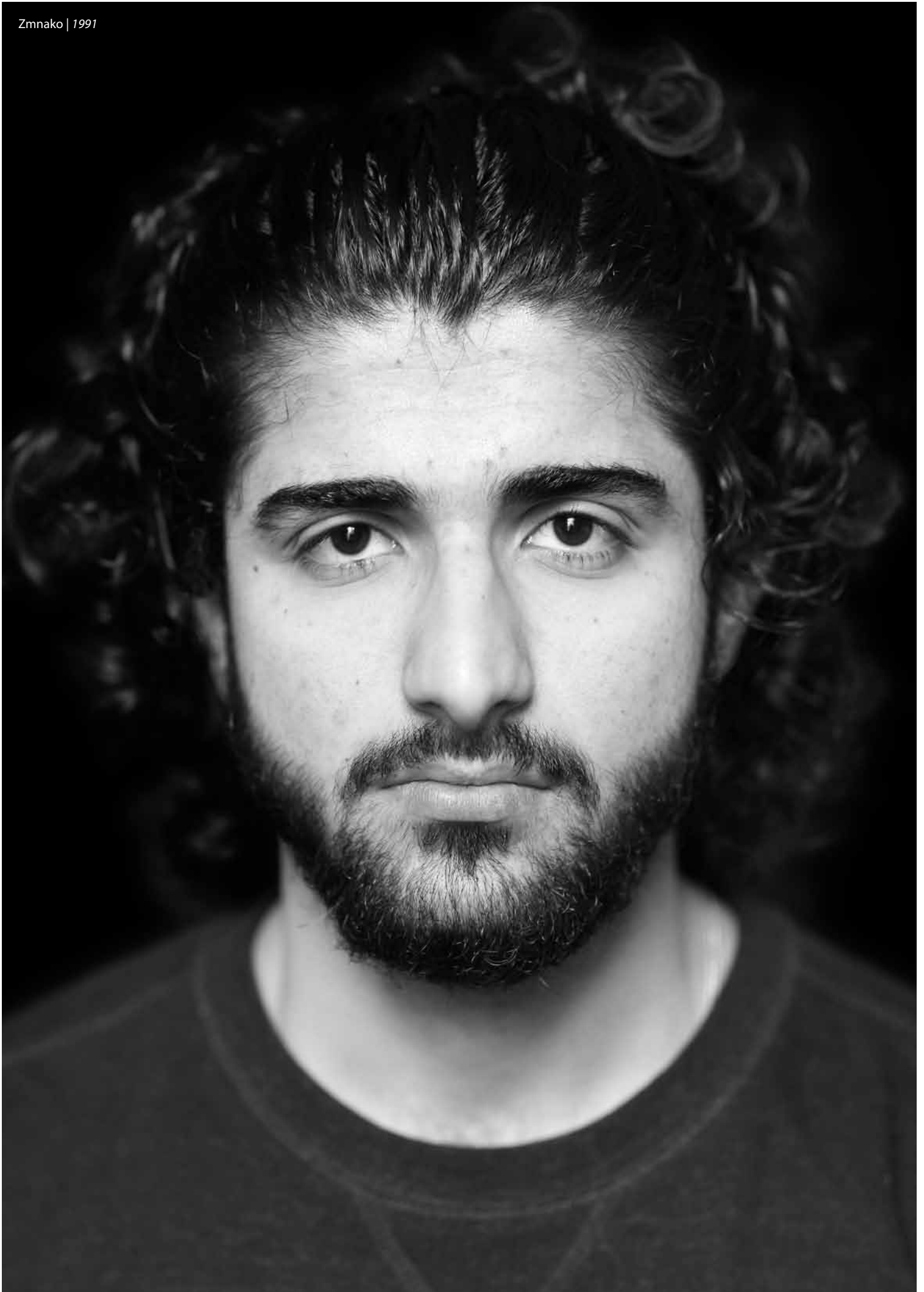
<sup>76</sup> Directive 2000/43/EC, Article 8; Directive 2000/78/EC, Article 10; Directive 2004/113/EC, Article 9 and Directive 2006/54/EC, Article 19.

<sup>77</sup> 'Recognition of the rights of minorities and the EU's Equal Opportunities Agenda', Olivier De Schutter, *European Anti-Discrimination Law Review*, Vol 11, pp. 23, 26.

<sup>78</sup> <http://conventions.coe.int/Treaty/en/Treaties/Html/177.htm>.

<sup>79</sup> International Covenant on Civil and Political Rights (Article 26) and International Covenant on Economic, Cultural and Social Rights (Article 2(2)).

<sup>80</sup> At chapter 2 of the Constitution.



for enumerated but inclusive<sup>81</sup> grounds whilst providing expressly for the possibility of addressing discrimination on multiple grounds and providing sufficient flexibility for addressing intersectional discrimination. The South African Constitutional Court adopts a substantive approach to addressing inequality. This means that in deciding whether a breach of Article 9(3) has occurred, the context of any difference in treatment and its impact (whether it promotes or ameliorates disadvantage) is had regard to. This approach is also used to determine whether Article 9(3) protects the 'ground' for any distinction and as such South African equality law is able to accommodate 'intersecting' and 'multiple' discrimination. The Constitutional Court has made observations on intersectional or multiple discrimination confirming that this is so,<sup>82</sup> noting, for example that: 'There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2)<sup>83</sup> seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.'<sup>84</sup> South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act 2000<sup>85</sup> prohibits discrimination on the constitutionally listed grounds, but also on any other ground that causes or perpetuates systemic disadvantage. Its section 1(1) (xxii) defines the 'prohibited grounds' as '(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or (b) any other ground where discrimination based on that other ground— (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).'<sup>86</sup> This focus on substantive inequality, the breadth of the grounds protected and the quasi-generalised approach reflects the approach of the Constitutional Court in its case law under Article 9(3) and makes tackling multiple and intersectional discrimination more likely.

Canada too in its Charter of Rights and Freedoms<sup>87</sup> contains an express open-ended equality guarantee in<sup>88</sup> its section 15 which provides: '(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'. In determining whether any non-enumerated ground is protected, the court will ask whether the ground

<sup>81</sup> See the 'analogous grounds' protected under Article 9, for example, *Larbi-Odam v Member of the Executive Council for Education (North West Province) and Anr* [1998] (1) SA 745 (CC) (differentiation on the basis of citizenship under an employment statute held to constitute unfair discrimination under Article 9) and *Hoffmann v South African Airways* (2000) 21 ILJ 2357 (CC) (discriminating against employees on the ground of HIV status held to constitute discrimination; HIV status being an analogous ground of discrimination and discrimination on the basis of such deemed an affront to human dignity).

<sup>82</sup> *Brink v Kitshoff* [1996] (4) SA 197 (CC) at paragraph 44, per O'Regan, J; *National Coalition for Gay and Lesbian Equality and Anr v Minister of Justice and Others* (1998) (12) BCLR 1517, paragraph 113, per Sachs J.

<sup>83</sup> Of the Interim Constitution which defined the grounds protected as 'one or more' of a fewer number of enumerated grounds than those found in Article 9 of the final Constitution but again described inclusively.

<sup>84</sup> *Harksen v Lane* 1997, paragraph 49.

<sup>85</sup> The Act is intended to prevent and prohibit unfair discrimination, harassment, and hate speech and to promote equality, and refers to South Africa's historical patterns of discrimination, and has a particularly important role in addressing past disadvantage and promoting equality.

<sup>86</sup> The content of some of the prohibited grounds is also expanded upon; ss. 7- 8.

<sup>87</sup> Adopted in 1982 as a constitutionally entrenched 'Bill of Rights' forming part of the Constitution of Canada; Part 1 of the Constitution Act 1982.

<sup>88</sup> Other provisions relevant to equality include sections 27 and 28.

sought to be protected is an ‘analogous ground’<sup>89</sup> to those enumerated in section 15. The Supreme Court has adopted a wide approach to the grounds protected by section 15 so that ‘[b]oth the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a ‘continuing framework for the legitimate exercise of governmental power’ and, at the same time, for ‘the unremitting protection’ of equality rights.’<sup>90</sup> This recognises the value in a framework that has sufficient flexibility as to accommodate societal changes, something not readily available in the EU’s anti-discrimination scheme. The Canadian Supreme Court has, like South Africa, taken an explicitly contextual approach to developing the law under section 15, including in the identification of the grounds protected. In *R v Turpin*<sup>91</sup> the court reiterated the importance of determining what constitutes an analogous ground by examining not only the context of the law subject to the claim but also the ‘context of the place of the group in the entire social, political and legal fabric of our society.’<sup>92</sup> If the larger context is not examined, the section 15 analysis may become ‘a mechanical and sterile categorization process.’<sup>93</sup> In addition, the court has noted that ‘it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.’<sup>94</sup> Whilst the Canadian Supreme Court has not yet issued authoritative guidance on intersectional discrimination, the dissenting judgments of some members of the Supreme Court evince a growing recognition of this form of discrimination. Most notably L’Heureux-Dubé J has observed that: ‘It is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. (...) Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect.’<sup>95</sup>

### The position in Member States

As to the position in Member States, very few Member States have explicit legislative measures addressing multiple or intersectional forms of discrimination<sup>96</sup> and such case law as there is, is underdeveloped and lacks any real analysis of the peculiar issues raised by these forms of discrimination. This reflects the apparently limited awareness in the courts and other state agencies of the phenomena of multiple and intersectional discrimination.<sup>97</sup> The absence of explicit provision is aggravated in some Member States

<sup>89</sup> *R v Swain* [1991] 1 S.C.R. 933.

<sup>90</sup> In *Andrews v The Law Society of British Columbia* [1989] 1 S.C.R. 143, 175. The decision on discrimination was not unanimous, with McIntyre J being in the minority with Lamer J. However, the opinion on the approach to section 15 was unanimous (see too quoted citations therein, from *Hunter v Southam Inc.* [1984] 2 S.C.R. 145, 155). See too, Wilson J in *Andrews*, *supra*, 152.

<sup>91</sup> [1989] 1 S.C.R. 1296.

<sup>92</sup> *Andrews v The Law Society of British Columbia* [1989] 1 S.C.R. 143, 152.

<sup>93</sup> *R v Turpin* 1989] 1 S.C.R. 1296, 1332, per Wilson J.

<sup>94</sup> *R v Turpin* 1989] 1 S.C.R. 1296, 1331-2, per Wilson J.

<sup>95</sup> *Canada (Attorney General) v Mossop* [1993] 1 S.C.R. 554, 645 - 646. And see Ibachicchio J, speaking for the court in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497: ‘[There] is no reason in principle, therefore, why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15 (1)’ (para 94). See too, *Corbière v Canada* [1999] 2 S.C.R. 203.

<sup>96</sup> Bulgaria and Germany being exceptions; 2010 Country Reports (State of Affairs 1 January 2011), European Network of Legal Experts in the Non-discrimination Field.

<sup>97</sup> 2010 Country Reports (State of Affairs 1 January 2011), European Network of Legal Experts in the Non-discrimination Field.



by division of the grounds protected into different equality bodies, making the identification and the tackling of these forms of discrimination more difficult and creating institutional obstacles to the same.<sup>98</sup> Further, such efforts are further frustrated by the differing scope of the legislation in some Member States (reflecting, no doubt, the obligations in EU law).<sup>99</sup>

Case law in the United Kingdom indicates that though multiple and intersectional discrimination is not explicitly covered in law,<sup>100</sup> some forms of multiple and intersectional discrimination are covered by the indirect discrimination provisions addressing discreet forms of such discrimination.<sup>101</sup> In Great Britain's Equality Act 2010, provision was made addressing 'combined discrimination; dual characteristics';<sup>102</sup> explicitly permitting claims based on 'a combination of two relevant protected characteristics'.<sup>103</sup> This would have permitted claims of direct discrimination founded in the experience of multiple or intersectional forms of discrimination, but limited in reliance on only two protected characteristics and then to direct discrimination only. It did, however, acknowledge the experience of intersectional discrimination in a way which is not seen in EU law by providing that a victim need not show that the discriminator's treatment of her 'is direct discrimination because of each of the characteristics in the combination (taken separately)'.<sup>104</sup> Regrettably, these provisions are not to be brought into force.<sup>105</sup>

Some Member States do treat discrimination connected with multiple grounds as an aggravated feature for the purposes of non-pecuniary damages<sup>106</sup> and, importantly, there is widespread support amongst experts for further legislative measures explicitly addressing multiple and intersectional discrimination in EU law.<sup>107</sup>

## Conclusion

Addressing discrimination adequately in all its manifestations in a modern Europe requires a more sophisticated legislative scheme than that seen in many countries including my own. Intersectional discrimination must be recognised, treated with the seriousness it merits and outlawed. The EU has an obvious role in ensuring this happens.

In the meantime, many Member States including the United Kingdom continue to address discrimination in an atomised way on the assumption that persons and groups covered should be described mono-characteristically. This assumes homogeneity within groups and can often obscure 'intersectional'

<sup>98</sup> Belgium; 2010 Country Reports (State of Affairs 1 January 2011), European Network of Legal Experts in the Non-discrimination Field.

<sup>99</sup> So that, for example, the Racial Equality Directive requires Member States to prohibit discrimination connected to racial or ethnic origin across a wide range of activities whereas the Employment Equality Directive requires Member States to prohibit discrimination connected to age, disability, religion or belief and sexual orientation covering employment and occupation only. See, Finland; 2010 Country Reports (State of Affairs 1 January 2011), European Network of Legal Experts in the Non-discrimination Field.

<sup>100</sup> Though see, the Equality Act 2010 described below.

<sup>101</sup> *DeBique v Ministry of Defence* [2010] IRLR 471 and see, *Azmi v Kirklees MBC* [2007] IRLR 484 which though unsuccessful on its facts appeared to contemplate a pool comprising Muslim women. Though in *Bahl v The Law Society and others* [2004] EWCA Civ 1070; [2004] IRLR 799, the Court of Appeal of England and Wales suggested that such is not so in the case of direct discrimination when additive discrimination is covered but not intersectionality.

<sup>102</sup> Section 14, Equality Act 2010.

<sup>103</sup> Section 14(1), Equality Act 2010.

<sup>104</sup> Section 14(3), Equality Act 2010.

<sup>105</sup> <http://www.homeoffice.gov.uk/equalities/equality-act/commencement> [accessed 10 August 2011].

<sup>106</sup> See, for example, Bulgaria, Romania and Slovakia; 2010 Country Reports (State of Affairs 1 January 2011), European Network of Legal Experts in the Non-discrimination Field.

<sup>107</sup> 2010 Country Reports (State of Affairs 1 January 2011), European Network of Legal Experts in the Non-discrimination Field.

discrimination. As mentioned, this makes addressing the real experiences of certain minority groups problematic.

Any legislative intervention by the EU in the field of multiple and intersectional discrimination will require the development of more nuanced concepts of discrimination; a move away from a strict singular-comparator based model to one which focuses on the achievement of substantive equality and the amelioration of disadvantage. It will also require harmonisation of the legal measures protecting against discrimination, across the protected characteristics.

# European Legal Policy Update

## **Racial equality rules: case closed for Poland<sup>108</sup>**

On 4 May 2010, the European Commission referred Poland to the Court of Justice of the European Union for incorrectly implementing Directive 2000/43/EC prohibiting discrimination on grounds of racial or ethnic origin. In particular, the Commission pointed out that Poland failed to transpose the Directive outside the field of employment and that provisions on victimisation were limited to employment only.

On 14 March 2011, the Commission decided to close infringement proceedings against Poland following the successful adoption of its new anti-discrimination law on December 2010 complying with EU law. Simultaneously, the Commission closed two other infringement procedures relating to gender equality.

*Internet source:*

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/311&format=HTML&aged=0&language=EN&guiLanguage=en>

## **The European Ombudsman asks the Commission to refute alleged discriminatory behaviour**

A successful Dutch candidate to an EU selection competition for assistants brought a complaint to the European Ombudsman claiming discrimination on grounds of age. She alleged that, although she was performing tasks falling within EU officials' competences on one-week contracts, she was told not to expect any offer of a post as an EU official as she was aged 63 at the date of the competition. In addition, she stated that procedures concerning her possible recruitment suddenly ceased without any explanation. In response, the Commission claimed that there was no obligation to recruit successful candidates put on reserve lists. The European Ombudsman asked the Commission to submit a detailed opinion before 30 June 2011, recalling that the EU Treaties and the Charter of Fundamental Rights prohibit discrimination based on age and establish a shift of burden of proof to the respondent in discrimination cases.

*Internet source:*

<http://europa.eu/rapid/pressReleasesAction.do?reference=EO/11/7&format=HTML&aged=0&language=EN&guiLanguage=en>

## **Commission develops guidance on fundamental rights in impact assessments**

On 6 May 2011, the European Commission issued a staff working paper entitled *Operational Guidance on Fundamental Rights in Commission Impact Assessments* which aims to give effect to fundamental rights guaranteed in the European Union Charter and ensure that the EU's approach to legislation takes full account of these rights at all stages of the decision-making process. The document details how the potential impacts of EU legislative proposals on fundamental rights must be assessed. The rights included in the Charter, including protection against discrimination, are of relevance to all Commission activities and EU policies.

*Internet source:*

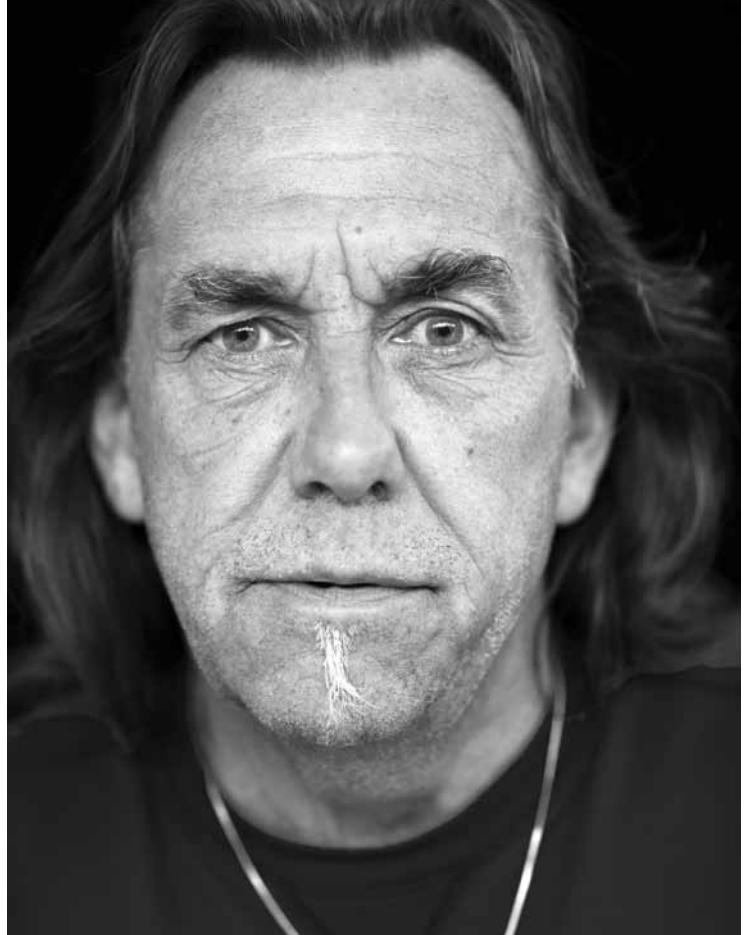
[http://ec.europa.eu/governance/impact/key\\_docs/docs/sec\\_2011\\_0567\\_en.pdf](http://ec.europa.eu/governance/impact/key_docs/docs/sec_2011_0567_en.pdf)

<sup>108</sup> See *European Anti-Discrimination Law Review* (EADLR), issue 6/7, p. 53 *et seq.*

Hermina | 1973



Jaap | 1954



Elijah | 2011



Lex | 1988



# Court of Justice of the European Union Case Law Update

## References for preliminary rulings – Applications

*Case C-571/10 Reference for a preliminary ruling in the case of Kamberaj Servet v Istituto Per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES), Giunta della Provincia Autonoma di Bolzano, Provincia Autonoma di Bolzano, lodged on 7 December 2010*

OJ C 46, 12.2.2011, p. 7–8

Reference for a preliminary ruling has been made to the Court of Justice by the Court of Bolzano (*Tribunale di Bolzano*) in a case where provisions of domestic law, adopted in accordance with fundamental principles of the Italian constitutional system, are in conflict with EU law.

Moreover, since Article 6 TEU directly refers to Articles 14 of the ECHR and 1 of Additional Protocol No. 12, the national judge is asking whether, in case of conflict between national law and the ECHR, the principle of direct effect applies to the ECHR.

Concerning the facts of the case, the referring court is also asking whether Articles 2 and 6 TEU, Articles 21 and 34 of the Charter of Fundamental Rights of the European Union and Directive 2000/43/EC and 2003/109/EC preclude a national provision requiring an EU national to make a declaration that they ethnically belong to or intend to join one of the three linguistic groups of the Alto Adige/Südtirol in order to be eligible for housing benefit.

*Internet source:*

[http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/) (search term: C-571/10)

*Case C-132/11 Reference for a preliminary ruling in the case of Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH, lodged on 18 March 2011*

OJ C 186, 25.6.2011, p. 11

The referring court is seeking to establish whether a national collective agreement which only takes into account for the purpose of grade classifications skills and knowledge acquired as air stewards or stewardesses with one airline excluding the skills and knowledge acquired with another airline within the same group discriminates indirectly against older workers. The second question referred concerns the principle of the horizontal direct effect of fundamental rights of the EU developed by the Court of Justice in the field of antitrust and has possible implications with regard to the general principle relating to the prohibition of age discrimination.

*Internet source:*

[http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/) (search term: C-132/11)

*Case C-141/11 Reference for a preliminary ruling in the case of Torsten Hörnfeldt v Posten Meddelande AB, lodged on 21 March 2011*

OJ C 152 from 21.05.2011, p.16

A reference for a preliminary ruling regarding the interpretation of the general principle of law on the prohibition of age discrimination and of Article 6 of Directive 2000/78/EC has been made to the Court of Justice. The referring court (*Södertörn District Court, Södertörns Tingsrätt*) asked whether national law providing for a difference in treatment on grounds of age without any justification and exception is law-

ful. In particular, the 67-year retirement provision is questioned in the light of the appropriateness and necessity test.

*Internet source:*

[http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/) (search term: C-141/11)

*Case C-152/11 Reference for a preliminary ruling in the case of Johann Odar v Baxter Deutschland GmbH, lodged on 28 March 2011*

OJ C 204, 9.7.2011, p. 13

Reference for a preliminary ruling has been made by the Munich Labour Court (*Arbeitsgericht München*) to the CJEU regarding the lawfulness of an exception to the prohibition of discrimination on the ground of age and disability as laid down in Directive 2000/78/EC. In the framework of an occupational social security scheme, the management and works council excluded from social plan benefits employees who were financially secure because they were entitled to a pension after, as the case may be, drawing unemployment benefit. Furthermore, the national judge is asking the Court to rule on the conformity of an alternative calculation for compensation in the case of employees older than 54 years who are made redundant on operational grounds, with the prohibition of discrimination on the grounds of age and disability.

*Internet source:*

[http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/) (search term: C-152/11)

## **References for preliminary rulings – Judgments**

*Case C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg, Judgement of 10 May 2011*<sup>109</sup>

OJ C 194, 2.7.2011, p. 2–3

The dispute arose regarding the amount of pension that Mr Römer, an administrative employee of the City of Hamburg, was entitled to claim. Although he entered into a registered life partnership with his same-sex companion in 2001, the City of Hamburg rejected Mr Römer's request to recalculate his supplementary retirement pension on the ground that only married, not permanently separated, pensioners and pensioners entitled to claim child benefit or an equivalent benefit were entitled to benefit from a more favourable regime pursuant to the Law of the *Land* of Hamburg on supplementary retirement and survivors' pensions for employees of the *Freie und Hansestadt Hamburg*.<sup>110</sup> In court, Mr Römer alleged that he should be treated in the same manner as a married, not permanently separated, pensioner. The Labour Court of Hamburg referred the case to the Court of Justice asking in essence whether such supplementary retirement pension provision constituted direct or indirect discrimination on grounds of sexual orientation.

The Court first examined whether such benefits constituted pay within the meaning of EU law and concluded that supplementary retirement pensions such as those paid to former employees of the City of Hamburg were not payments of any kind made by State schemes falling outside the material scope of Directive 2000/78/EC.

The Court observed that the adoption of the Law on Registered Life Partnerships had for effect to align the status of same-sex partners registered in a partnership to that of married spouses.<sup>111</sup> However, marriage is still reserved to persons of different gender in Germany whereas registered partnerships exist for persons of the same gender. It furthermore noted that if Mr Römer had married a woman instead of

<sup>109</sup> See *European Anti-Discrimination Law Review* (EADLR), issue 12, p. 35.

<sup>110</sup> *Erstes Ruhegeldgesetz der Freien und Hansestadt Hamburg*.

<sup>111</sup> *Gesetz über die Eingetragene Lebenspartnerschaft*.

entering into a partnership with a man he would be entitled to the supplementary retirement pension in dispute. In the light of these observations, the Court concluded that it is for the national courts to assess comparability and whether there was direct discrimination on the ground of sexual orientation because the life partner is in a legal and factual situation comparable to that of a married person as regards that pension. To determine the existence of unequal treatment, the Court emphasised that they should in particular focus on the respective rights and obligations of spouses and persons in a registered life partnership to assess the purpose and conditions for the grant of the benefit in question.

Finally, the Court answered the question related to the temporal effects, i.e. whether direct discrimination could be recognised at the national level when a dispute arose prior to the expiry of the period allowed to Member States to transpose Directive 2000/78/EC. It recalled that the principle of equal treatment enshrined in Directive 2000/78/EC also derived from various international agreements and the constitutional traditions common to the Member States. However, the principle of non-discrimination could not be directly invoked on the basis of Article 13 EC or Directive 2000/78/EC for the period prior to the time-limit for transposing the Directive. Therefore, the right to equal treatment could be claimed by the victim only for the period after the expiry of the time-limit, namely 3 December 2003, without necessarily waiting for national legislation to be brought in compliance with EU law.

*Internet source:*

[http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/) (search terms: C-147/08)

# European Court of Human Rights Case Law Update

## Judgments

*Lautsi and others v. Italy (no. 30814/06), Grand Chamber Judgment of 18 March 2011*

In 2006, Mrs Lautsi and her two sons brought a complaint alleging a violation of the principle of secularism by the directors of the boys' school, who decided to fix crucifixes onto classroom walls. On 3 November 2009, a Chamber of the Second Section of the European Court of Human Rights held that this practice infringed Article 2 of Protocol No. 1 on the right to education taken together with Article 9 of the Convention on the right to freedom of thought, conscience and religion. The Chamber argued that all Contracting States to the European Convention on Human Rights (the 'Convention') are under the obligation to refrain from imposing beliefs, even indirectly, in places where persons are dependent or particularly vulnerable, such as education. In the light of these observations, the presence of crucifixes in classrooms was in conflict with the principle of secularism and could be emotionally disturbing for pupils of non-Christian religions. According to the Chamber, negative freedom of religion entailed the absence of religious services and education and also of religious practices and symbols expressing a belief, a religion or atheism.

At the request of Italy, the case was referred to the Grand Chamber ('the Court'). On March 2011, it overruled the Chamber's judgment stating that the presence of crucifixes in classrooms did not constitute a violation of the Convention. The Court based its reasoning on the margin of appreciation given to each Contracting State to ensure the exercise of various religions, faiths and beliefs in compliance with the right to education enshrined in Article 2 of Protocol No. 1 and the principle of neutrality. In response to the government's argument that the practice of fixing crucifixes to the wall of classrooms reflected Italy's historical development and symbolised western civilisation and democratic values, the Court held that the decision to perpetuate such a tradition fell under the margin of appreciation of the State and that it could not enter the domestic debate among national courts relating to the religious meaning and connotation of the crucifix. In addition, crucifixes being passive symbols, they neither have an influence on pupils nor indoctrinate them in the same way as active religious education or activities. The Court concluded by observing that parents retained their rights to enlighten and advise their children in accordance with their philosophical or religious convictions. Since a violation of Article 2 of Protocol No. 1 was not found, the Court considered that there was no further need to examine the case under Article 9 of the Convention on freedom of thought, conscience and religion and Article 14 of the Convention, which is the general non-discrimination clause.



# European Committee of Social Rights Update

*No. 64/2011 European Roma and Travellers Forum (ERTF) v. France*

The complaint was registered on 28 January 2011. According to the European Roma and Travellers Forum the French government continues to forcibly evict Roma without providing suitable alternative accommodation and Roma in France continue to suffer discrimination in access to housing, in violation of Article 16 (right of the family to social, legal and economic protection), Article 19 §8 (guarantees concerning expulsion), Article 30 (right to protection against poverty and social exclusion) and Article 31 (right to housing) of the Revised European Social Charter, read alone or in conjunction with the non-discrimination clause in Article E.



# News from the EU Member States, Croatia, the FYR of Macedonia and Turkey

More information can be found at <http://www.non-discrimination.net>

# Austria

## Legislative developments

### New amendment to the Equal Treatment Act enters into force

Recent amendments to the Federal Equal Treatment Act introduced protection against harassment and discrimination by association for all grounds (§§5/4, 19/4 and 21/4). Similar adjustments were made for disability (§7b/5 Act on the Employment of People with Disabilities, §4/2 Federal Disability Equality Act). The minimum level of compensation for harassment was raised to EUR 1 000. Finally, the Equal Treatment Act now prohibits discriminatory advertising of accommodation (§36 Equal Treatment Act). The new provisions published on 15 February 2011 entered into force on 1 March 2011.

#### Internet source:

[http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2011\\_I\\_7/BGBLA\\_2011\\_I\\_7.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_I_7/BGBLA_2011_I_7.pdf)  
[http://www.parlinkom.gv.at/PAKT/VHG/XXIV/I/I\\_01047/fnameorig\\_204021.html](http://www.parlinkom.gv.at/PAKT/VHG/XXIV/I/I_01047/fnameorig_204021.html)

# Belgium

## Legislative developments

### Law adopted prohibiting the wearing of any clothes totally or partially covering an individual's face in public spaces

On 31 March 2010, the Commission of the Interior of the Federal Parliament unanimously passed a legislative proposal modifying the Penal Code.<sup>112</sup> The proposal criminalised any total or partial head covering that masks or hides the face with the effect that individuals are no longer identifiable in areas accessible to the public.<sup>113</sup> The bill did not proceed further due to the institutional paralysis caused by the federal government's resignation and the current political crisis in Belgium.

On 28 September 2010, a new bill, similarly worded, was submitted to the federal parliament by the French-speaking right wing party (*Mouvement Réformateur*, MR). The bill was adopted almost unanimously by the lower house on 28 April 2011 (except for one member of the green party *Ecolo-Groen!*, who voted against). The upper house had 15 days to invoke its right to debate the proposal, but did not do so. Consequently, the bill was passed and referred to the King for assent (merely a formal procedure) before it enters into force.

Public spaces are defined as streets, parks, public gardens, playgrounds, cultural places and places where a service is available to the public (such as shops or hotels). Exceptions to the prohibition are possible for motorcyclists or for specific professions such as fire fighting. Municipalities are also allowed to provide for exceptions in limited cases such as occasional or festive activities (e.g. carnivals or fairs). Criminal penalties as well as administrative penalties are specified in the law.

#### Internet source:

[www.lachambre.be](http://www.lachambre.be)

<sup>112</sup> *Documents parlementaires*, DOC 52-2289/001-004.

<sup>113</sup> See *European Anti-Discrimination Law Review* (EADLR), issue 11, p. 48.

## General ban on the wearing of religious or philosophical symbols at school deemed lawful

The Flemish Education Council<sup>114</sup> decided on 11 September 2009 to prohibit the wearing of religious or philosophical symbols at school. The prohibition targeted staff members, teachers and students and applied to primary and secondary schools. Exceptions were permitted for religious or philosophical education classes. For schools which had not already prohibited the wearing of religious symbols within their premises, the prohibition entered into force in September 2010.



A Muslim student challenged the decision of the Flemish Education Council before the Supreme Administrative Court (*Conseil d'Etat*), which ordered its suspension on 18 March 2010.<sup>115</sup> In addition, the Supreme Court referred to the Constitutional Court for a preliminary ruling on the constitutional validity of the Flemish Special Decree of 14 July 1998 on Community Education giving the Flemish Education Council the power to adopt such a general ban.

First, the Constitutional Court considered that a general ban on religious and philosophical symbols at school gave a new interpretation to the concept of neutrality not incompatible with Article 24 of the Constitution. On the one hand, the Special Decree of 14 July 1998 aimed to entirely transfer to the Flemish Education Council the competence to give content to the notion of neutrality enshrined in the Constitution and, on the other hand, such a transfer was not excluded provided the substance of the concept of neutrality was respected. According to the Constitutional Court, the Flemish Education Council was not vested with legislative powers, and the adoption of a general ban instead constituted an 'internal regulation' which was lawful.

*Internet source:*

[www.const-court.be](http://www.const-court.be)

## Bulgaria

BG

### Case law

#### Supreme Administrative Court asked university to reopen recruitment competition without imposing any age limitation

On 18 October 2010, the Supreme Administrative Court upheld the decision issued by the equality body asking a university to re-organise a recruitment competition for professorial positions without setting an age limit, regardless of the Scientific Degrees and Scientific Titles Act that provides for a maximum age limit.<sup>116</sup> The Court found discrimination on the ground of age as prohibited by Directive 2000/78/EC and applied the principle of supremacy of EU law, which allows judges to set aside conflicting national legislation. It also invited the university to abstain from imposing age limits in access to employment in future.



#### Pre-trial detention conditions found to breach provisions on accessibility

On 3 December 2010, the Commission for Protection against Discrimination ruled that the absence of access to various areas of a pre-trial detention centre, including lavatories, constituted less favourable treatment on grounds of disability.<sup>117</sup> The public authorities in charge of the centre were consequently



<sup>114</sup> The Flemish Education Council is an administrative authority running 700 state primary and secondary schools.

<sup>115</sup> Ruling no. 202.039.

<sup>116</sup> National Supreme Court Decision No 5381/2010.

<sup>117</sup> National equality body Decision No 16/2010.

held liable for direct discrimination against a detainee using a wheel-chair and were asked to transfer him to suitable facilities.

## Cyprus

### *Political developments*

#### **Opinion on Cyprus of the Advisory Committee on the Framework Convention for the Protection of National Minorities released**



On 9 October 2010 the Third Opinion on Cyprus of the Advisory Committee on the Framework Convention for the Protection of National Minorities was released. The Opinion welcomes the extension of the protection provided by the Framework Convention to the Cypriot Roma<sup>118</sup> as a positive development.<sup>119</sup> The Opinion further referred to the continuing non-resolution of the Cyprus problem as negatively impacting not only the climate of dialogue and understanding but also state policy on minority protection and human rights, especially in respect of the right of self-identification of the three recognised minorities, the Armenians, the Latins and the Maronites. The governmental report rejected this statement, stating that this is 'far from being the case as, despite being impeded, the Government continues consistently with policy making in conformity with its international obligations.' Nevertheless the Government stated that 'the issue of affiliation [of the three recognised minorities to the Greek Cypriot community] cannot be a priority at present, but it could be examined in any future revision of the Constitution.'<sup>120</sup> Responding to the Advisory Committee's criticisms that the recognised minorities are forced by law to vote in order to elect their representatives, the Government responded that here have been no related prosecutions since 2001 but rejected assertions that the statutory obligation to vote was to be revised.

The Advisory Committee's report further states that in view of the growing number of discrimination complaints, awareness-raising efforts should be intensified and the institutional framework for combating discrimination needs to be strengthened, whilst the competent authorities must be provided with more adequate resources. The governmental report set out a number of laws forming part of the anti-discrimination legal framework but was silent on the issue of directing resources towards the equality body.

With regard to the three recognised minorities, the Opinion states that, although some cultural activities of the three groups were supported by the Government, support should be adapted to the existing needs of these groups and more transparent procedures for accessing public subsidies should be established. The Opinion adds that the lack of suitable educational material and qualified teachers remains a source of concern. In response, the governmental report referred to a new initiative launched for the academic year 2010-11 to provide in-service training for the Armenian language teachers working at the Armenian school 'Nareg'. In addition, with regard to the teaching of Cypriot Maronite Arabic, the Government reported that the Ministry of Education is in the process of formulating a new policy in collaboration with

<sup>118</sup> Third Periodic Report submitted by Cyprus pursuant to Article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities, received on 30.04.2009, p. 23.

<sup>119</sup> The extension of the Framework Convention to cover the Roma is a deviation from previous policy, which did not recognise the Roma as a separate community; indeed the Roma are not mentioned in the Constitution anywhere and were deemed to belong to the Turkish Cypriot community, due to their (presumed) common language and religion.

<sup>120</sup> Comments of the Government of Cyprus on the Third Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities by Cyprus (received on 8 October 2010), available at [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_Com\\_Cyprus\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_Com_Cyprus_en.pdf) (12.10.2010).

representatives of the Maronite community on teacher training and the production of teaching material. The governmental report is silent on the Advisory Committee's recommendation that the participation of the Armenians, the Latins and the Maronites in decision-making on issues concerning them, in particular in Parliament, should be made more effective.

The Opinion states that despite support measures, the Roma still face serious prejudice and difficulties in many fields, such as employment, housing, education and access to health services, whilst the establishment of a dialogue between the Government and the Roma remains problematic. The Committee urged the Government to identify ways to establish a structured dialogue with the Roma and to obtain up-to-date information regarding their ethnic, linguistic and religious affiliation. The Government responded by stating that 'issues regarding the Cyprus Roma are part of the overall policy planning of the Government' without indicating any specific policies to address the problems highlighted. On the issue of affiliation, the Government stated that it expects to have up-to-date information upon completion of the 2011 census.

The Opinion further states that shortcomings continue to be reported regarding the effective participation of Turkish Cypriots in social, economic and cultural life and public affairs and that intercultural dialogue remains problematic. The governmental response went into great lengths to stress that the Turkish Cypriots are not a minority and are thus not covered by the Framework Convention. Nevertheless, the government report states that 'Turkish Cypriot citizens enjoy specifically designed or privileged access to all government services, irrespective of their area of residence. This can involve priority access e.g. to public medical services (including treatment abroad) or to services dealing with welfare or regarding their civic status.'

The Opinion finally states that the growing diversity of Cypriot society remains a challenge for the Government, as persons belonging to certain groups, and in particular immigrants, are confronted with discrimination and intolerance, often fuelled by the media, referring in particular to incidents of racially-motivated insults and acts, as well as police misconduct. The report notes that measures taken in recent years to combat such incidents appear to be insufficient and must be intensified. The Government responded to this by referring to one such measure introduced in 2006, namely the setting up of the Independent Authority for the Investigation of Complaints and Allegations against the Police.

The governmental report goes to great lengths to manifest its resentment at the terminology employed by the Advisory Committee<sup>121</sup> when referring to Cypriot territories, inevitably raising the relevance of the 'Cyprus problem' to the issue of the protection of minority rights. Additionally, the government report accuses the Advisory Committee of ignoring some of its views communicated to the Secretariat on time and of attributing to Cyprus ('the occupied country') acts and problems which should be attributed to Turkey ('the occupying power'). In general, the governmental report attempts to politicise the issues involved and is ridden with sensitivities deriving from the Cyprus problem.

*Internet source:*

[www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_OP\\_Cyprus\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_Cyprus_en.pdf)

<sup>121</sup> The Government objected to the use of the terms 'territory not under government control'; 'two territories'; 'in the course of the conflict'; 'settlement of the conflict'; 'once the conflict is settled'; 'villages...are... inaccessible'. It suggested that the terms that should be used instead are 'occupied areas' or 'areas not under the effective control of the Government'.

## Case law

### Discriminatory public scheme for recruitment of prison guards



An unsuccessful job applicant filed a claim against the Republic of Cyprus challenging a public service scheme which requires prison guards to be aged between 20 and 30 years. The scheme also stipulated that persons aged between 30 and 40 were eligible provided they had previously served as prison guards for at least one year on a temporary basis. The claimant's application for such a position was rejected on the ground that he was over 30 and that according to the Attorney General his previous service as a prison guard was not relevant as it had not been on a temporary contract as required by the scheme. The claimant argued there was a violation of Article 28 of the Constitution, which prohibits discrimination on all grounds, as well as a violation of the Law on Combating Racial and Other Forms of Discrimination (Commissioner) N.42 (I)/2004<sup>122</sup> and the Law on Equal Treatment in Employment and Occupation N.58(I)/2004,<sup>123</sup> which prohibits fixing an age limit in job advertisements. The respondent (the Republic) argued that the age limit did not amount to discrimination as it was connected to the nature of the duties of a prison guard.

On 13 April 2011<sup>124</sup> the Supreme Court declared the application admissible and annulled the administrative decision by which the claimant's job application was rejected. In its reasoning, the Court stated the following: Article 28 of the Constitution prohibits discrimination and this constitutes a criterion through which any other legislative or other provisions should be viewed; Article 28 and the right to equality do not prohibit differential treatment premised upon an objective assessment of essentially different situations and based on public interest (citing a case of 1988); the principle of equality is breached when differentiation is not based on objective and reasonable discrimination (citing a case of 1969); in the case under examination, the differentiation between persons applying for a temporary position as opposed to those applying for a permanent position was not objective and cannot be justified; the respondent's argument that an age problem existed in the case of persons over 30 who had previously served on a temporary contract as opposed to those having served in a permanent position was very weak and amounted to discrimination between temporary and permanent employees.

EE

## Estonia

## Case law

### Sickness benefits granted to a 67-year-old pensioner



The case concerned I., a 67-year-old pensioner who was still working. According to Article 5(2)1 of the Health Insurance Act, persons who work on the basis of a contract of employment and for whom the employer is required to pay social tax are insured persons. Article 57(5) says that an insured person has the right to receive sickness benefit for not more than a total of 250 calendar days per calendar year. However, insured persons who are over 65 years of age have the right to receive sickness benefit in the event of an illness and injury for up to 60 consecutive calendar days for one illness but not for more than a total of 90 calendar days per calendar year (Article 57(6)). Due to these provisions I. did not receive

<sup>122</sup> This law appoints the Ombudsman as the equality body and sets out its mandate.

<sup>123</sup> This law roughly transposes Council Directive 2000/78/EC.

<sup>124</sup> Application No. 135/07, *Tassos Tratonikola v. The Republic of Cyprus through the Director of the Prisons Department and the Ministry of Justice*.



his sickness benefit in full and filed a complaint with a court. A constitutionality control procedure was initiated by a second instance court.<sup>125</sup>

The Supreme Court *en banc* (i.e. a chamber comprised of all justices of the Supreme Court) came to the conclusion that special provisions regarding sickness benefits for people aged 65 and older violated Article 12(1) of the Constitution (equality before law; ban on discrimination). The limitations at issue were recognised as suitable and necessary but not proportionate. Article 57(6) of the Health Insurance Act was claimed unconstitutional as regards limitations for people who are over 65 years of age.

In this case the Supreme Court used the proportionality test developed in its own practice. The principle of proportionality derives from the second sentence of Article 11 of the Constitution (restrictions of rights and freedoms 'may be implemented only so far as necessary in a democratic society and must not distort the nature of the rights and freedoms restricted'). The Supreme Court reviewed the conformity of the restriction with the proportionality principle in the light of the three characteristics thereof – suitability, necessity and proportionality in the narrowest sense.

The Court rejected the argument that the limitations at issue were established in the interests of health protection of people aged 65 and over considering that they in no way fostered the achievement of such a goal. However, the goal to save the health insurance fund's financial resources was recognised as both suitable and necessary (because it was not possible to achieve it by other measures which were less burdensome on a person but which were at least as effective as the former). The Court argued that in order to decide on the proportionality of a measure in the narrowest sense, the extent and intensity of interference with a fundamental right on the one hand and the importance of the aim on the other hand had to be weighed up. The Court came to conclusion that setting limits for those of 65 years of age and above was intensive interference with a fundamental right provided in Article 12(1) of the Constitution (equality before the law; ban on discrimination). In the context of proportionality, the age limits at issue were claimed unjustified. Furthermore, the argument that people of this age group were in any event entitled to receive old age pensions was dismissed as irrelevant.

*Internet source:*

<http://www.nc.ee/?id=11&tekst=222535250&print=1>

## France

FR

### *Legislative developments*

#### **Adoption of the law incorporating the Equal Opportunities and Anti-Discrimination Commission (HALDE) within a new public institution<sup>126</sup>**

In June 2010, the upper house of Parliament (*Sénat*) discussed a proposal relating to the 'Defender of Rights',<sup>127</sup> a new institution envisaged after the revision of Article 71-1 of the Constitution.<sup>128</sup> On 18 January 2011, the National Assembly confirmed the amendments brought forward by the Senate and passed the bill on the Defender of Rights and the institutional act (*loi organique*) setting up the new institution. Its role will be to ensure that the State and bodies exercising state prerogatives respect individual rights and liberties. The Defender of Rights will integrate the Equal Opportunities and Anti-Discrimination Com-

<sup>125</sup> Decision of the Supreme Court 3-4-1-12-10 of 7 June 2010.

<sup>126</sup> See *European Anti-Discrimination Law Review* (EADLR), issue 12, p.53.

<sup>127</sup> Draft proposal no.610 on the Defender of Rights of 9 September 2009.

<sup>128</sup> See *European Anti-Discrimination Law Review* (EADLR), issue 11, p. 55.

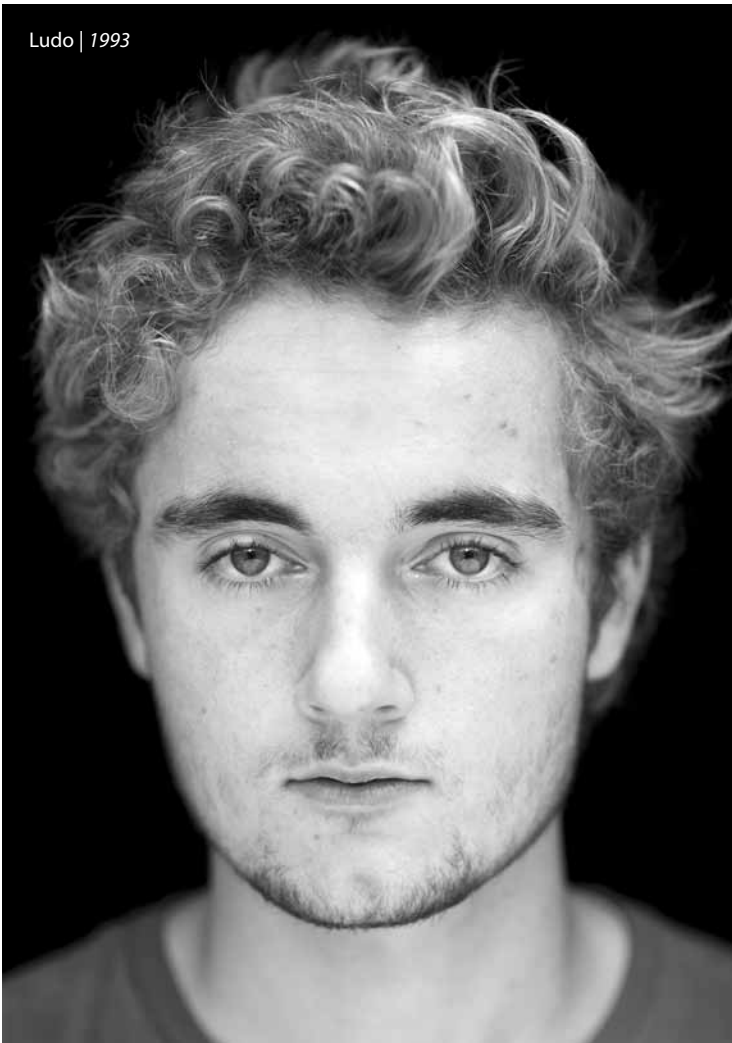
Stephanie | 1979



Lennard | 1987



Ludo | 1993



Ineke | 1956



mission (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité*, HALDE) within its structure, which means that HALDE's competences and staff will be merged into the new institution.

The rapporteur, Mr Pierre Morel à L'Huissier, proceeded to conduct thorough consultations and prepared an entire new version of the text which was then submitted again to the upper house. The final text was passed at second reading on 1 February 2011 and passed in turn by the lower house (*Assemblée Nationale*) on 4 March 2011. The joint commission of both houses negotiated and adopted the final amendments on 16 March 2011.

The integration of all bodies became effective one month after promulgation of the laws, except for the Ombudsman (*Médiateur*), which integrated the new institution immediately.

*Internet source:*

[http://www.assemblee-nationale.fr/13/dossiers/defenseur\\_droits.asp](http://www.assemblee-nationale.fr/13/dossiers/defenseur_droits.asp)

### **Prime Minister issues instructions for the implementation of the law prohibiting the concealment of an individual's face in public spaces<sup>129</sup>**

Further to the adoption of the law prohibiting the concealment of an individual's face in public spaces in September 2011, the Prime Minister issued instructions on the implementation of the law to public authorities. The official guidelines first recalled the grounds justifying the adoption of the law and reaffirmed the principle of secularism in France.<sup>130</sup> The Prime Minister announced the intention to initiate a public communication campaign and clearly notified all official authorities of the penalties applicable for concealing the face in public spaces in a manner that prevents an individual's identification. Public places are defined as public areas which are freely accessible even if conditional on the payment of an entrance fee, shops, airports, train stations, public transport and public service buildings or premises where public services are offered. There is an exception for places of worship.

According to the instructions, the authorities may only ask an individual to remove a face covering for identification purposes. The ministerial guidelines detail how public officials should enforce the prohibition. They are advised to invite the person to remove the garment and uncover his or her face, but cannot force the person to take either action. Officials must instead call for the assistance of the police force, which will record the violation and undertake all measures necessary to ensure that the individual leaves the premises.

*Internet source:*

[http://www.circulaires.gouv.fr/pdf/2011/03/cir\\_32650.pdf](http://www.circulaires.gouv.fr/pdf/2011/03/cir_32650.pdf)

*Case law*

### **Supreme Court finds ministerial instructions targeting Roma camps unlawful**

On 5 August 2010, the Minister of the Interior addressed specific instructions to prefects (representatives of national government at local level), prefects of police and directors of the national police to evacuate illegal stopping sites on private land and land belonging to the State. The instructions followed the President of the Republic's announcement on 30 July 2010 that 300 sites were to be evacuated within three months, with Roma settlements as priority. Prefects and directors of the national police were urged to mobilise police services primarily against Roma and to take all measures necessary to cooperate with

<sup>129</sup> See *European Anti-Discrimination Law Review* (EADLR), issue 12, p. 54.

<sup>130</sup> 'Covering one's face is a violation of the minimal requirements of life in society which puts the individual in a situation of exclusion and inferiority incompatible with the principles of freedom, equality and human dignity as guaranteed by the French Republic.'

racial  
or ethnic  
origin

religion  
or belief

racial  
or ethnic  
origin

border authorities and the French agency for immigration and promoting integration (*Office Français de l'Immigration et de l'Intégration*) so as to organise the removal and return to Romania and Bulgaria of those who could not legally justify their presence on French territory. It further instructed that one Roma settlement per week be removed.

On 13 September 2010, new instructions were issued with no more reference to specifically targeting Roma. The Minister of Interior limited the directives to the evacuation of illegal camps.

SOS Racism petitioned the Supreme Administrative Court (*Conseil d'Etat*) to annul both ministerial instructions on ground that they were discriminatory against the Roma.

The Court held that the wording of the ministerial instructions of 5 August 2010, although aiming to promote respect of public order and the protection of private land, could not specifically target individuals on the grounds of their ethnic origin without disregarding the principle of equality as protected by the Constitution.<sup>131</sup> The instructions were therefore considered as illegal and void.

However, allegations that the ministerial instructions of 13 September 2010 were unlawful were dismissed as only the dismantling and removal of illegal stopping sites on private land or land belonging to the State was concerned.

*Internet source:*

<http://www.conseil-etat.fr/cde/node.php?articleid=2278>

### **State obligation to provide special needs assistance to disabled children**



*Département* (county) Commissions for the Rights and Autonomy of Disabled Persons are the local authorities competent for educational guidance and support to disabled children under Article L351-3 of the Education Code. Article L916-1 of the Education Code provides that a person providing special needs assistance in the framework of state education can also intervene outside school hours. The *Maison Départementale des Personnes Handicapées* (a one-stop-shop for disabled people and their families to access support services) of Finistère (west Brittany) therefore satisfied the request of two families for special needs assistance that included six hours of assistance outside school hours. The *département* representative of the Ministry of Education (*inspecteur académique*) refused to implement the measure arguing that the State's obligations in the field of education did not cover out-of-school support. In emergency injunction proceedings, an administrative court ordered the State to bear the cost of such support, stating that the representative could not invoke budgetary reasons to limit the scope of a provision that explicitly applies to out-of-school support. The Ministry of Education challenged this decision before the Supreme Administrative Court (*Conseil d'Etat*).

On 20 April 2011, the Supreme Court established that, by virtue of the general duty enshrined in Article L112-1 of the Education Code, the State is under the obligation to organise state education and to take all measures and allocate all means necessary to ensure the effectiveness of the right to education of disabled children. Therefore, whenever the *Département* Commission for the Rights and Autonomy of Disabled Persons concludes that special needs assistance must be provided outside school hours, the Ministry of Education must bear the costs.

*Internet source:*

<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023248217&fastReqId=1516890910&fastPos=1>

<sup>131</sup> *Conseil d'Etat* (Supreme Court) no 343387, 7 April 2011.

<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023897748&fastReqId=226337522&fastPos=1> ; <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023897749&fastReqId=2114160908&fastPos=1>

## FYR of Macedonia

MK

### *Legislative developments*

#### **Commission for Protection against Discrimination holds its founding session**

On 17 January 2011, the seven newly appointed members of the Commission for Protection against Discrimination held the founding session of the equality body.

The Commission elected a president with a one year term of office and pledged to promptly complete all procedures and adopt all documents necessary to its effective functioning. The media reported that the first case on the ground of ethnicity had been filed to the Commission, and that it concerned the field of employment. However, concerns persisted about the independence of the new institution. These stemmed from the fact that the Commission has been given premises in a building where sections of several ministries operate (including the Ministry of the Interior), as well as the fact that the funds awarded to the Commission from the 2011 state budget<sup>132</sup> are barely sufficient to cover the basic monthly remuneration of the seven members.<sup>133</sup>

### *Political developments*

#### **Ombudsman publishes its 2010 Annual Report**

The Law on the Ombudsman specifies that the Ombudsman is the body whose task is to protect the constitutional and legal rights of citizens and all other persons when these are infringed by acts, actions and omissions by state administrative bodies and by other bodies and organisations that have public authority. It is to undertake actions and measures for the protection of the principle of non-discrimination and adequate and equitable representation of community members in state administrative bodies, local units of self-government and public institutions and agencies (Article 2). The law obliges the Ombudsman to report to the Assembly (parliament) (Article 36). Consequently, the Ombudsman reported on its activities on March 2011. Its report contains statistics on the cases dealt with in 2010 as well as information on other activities undertaken in 2010.

A positive trend was noticeable in relation to the overall work of the Ombudsman: there was an increase in the number of cases filed. In 2009, 3632 cases were filed. In 2010 this number rose to 4043. The biggest increase was in the field of consumer rights.

However, the situation in relation to non-discrimination remained unchanged. The number of cases filed on discrimination was still one of the lowest, accounting for only 0.40 per cent of the total caseload. Moreover, 20 cases were handled in 2009, dropping to 16 cases in 2010. There was a case backlog from

<sup>132</sup> Under Article 16, paragraph 3 of the Anti-discrimination Law, the Commission can fund itself from other sources.

<sup>133</sup> Article 21 of the Anti-discrimination Law specifies that Members of the Commission will receive monthly remuneration of two average monthly salaries. As explained in the previous flash report, this can clearly not be accomplished with the amount allocated in the budget.

2009 of 10 cases, making a total of 26 cases underway in 2010. At the end of 2010, eight of these cases were transferred to 2011.

In particular, the Ombudsman highlighted a case of direct discrimination in relation to an event organised by a bikers' club, organisation of which was sponsored by the City of Skopje. The advertisements for the event contained hate speech and discriminatory statements against homosexuals. Neither the City of Skopje nor any other public authority reacted to the advertisements. Only after a press conference denouncing hate speech and discrimination by a group of NGOs and some media was held, the City of Skopje issued a statement that the authorities were not aware of the content of the promotional material and requested that the discriminatory statements be deleted.

Neither the grounds nor fields of discrimination covered in the cases filed can be easily distinguished when reading the report as the statistics presented are mixed. In particular, the report states that the overall number of cases is divided as follows: 25% of cases filed for employment, 56.25% of cases on ethnic affiliation, and 18.75% of cases on other grounds. In the narrative it states that the dominant fields were employment, health, education and public administration, as well as cases of discrimination in the functioning and work of the courts. Marginalised groups were most affected. The report notes gender, nationality, religion, and political affiliation as the most common grounds, with political affiliation giving rise to the most serious cases.

The Ombudsman restated that, in its opinion, the number of cases filed did not present a realistic picture of the situation in the country. It attributes the low number of cases to misinformation or lack of information as well as fear of filing complaints. The report also notes that people who consider themselves wronged by failure to apply the principle of equal treatment show a tendency to file cases in relation to a specific area or breach of a right spelled out in a legal provision rather than on a specific ground of discrimination.

*Internet source:*

<http://ombudsman.mk/upload/documents/lzvestaj%202010-Ang.pdf>

DE

## Germany

### *Legislative developments*

#### **Prohibition on wearing the burka in the public sector**

The government of the Hessen *Land* adopted an act prohibiting the wearing of the burka in the public service after a civil servant returning to work after leave decided to wear the burka. The *Land* law on public service in Hessen prohibits the wearing of symbols that violate the neutrality of the State.

This decision found support with the political opposition in Hessen and the Central Council of Muslims in Germany.

*Internet source:*

[http://www.hmdi.hessen.de/irj/HMdl\\_Internet?rid=HMdl\\_15/HMdl\\_Internet/nav/55b/55b309a2-f163-a401-e76c-d1505eb31b65,98930f95-0544-ed21-f012-f31e2389e481,,,11111111-2222-3333-4444-100000005004%26\\_ic\\_uCon\\_zentral=98930f95-0544-ed21-f012-f31e2389e481%26overview=true.htm&uid=55b309a2-f163-a401-e76c-d1505eb31b65](http://www.hmdi.hessen.de/irj/HMdl_Internet?rid=HMdl_15/HMdl_Internet/nav/55b/55b309a2-f163-a401-e76c-d1505eb31b65,98930f95-0544-ed21-f012-f31e2389e481,,,11111111-2222-3333-4444-100000005004%26_ic_uCon_zentral=98930f95-0544-ed21-f012-f31e2389e481%26overview=true.htm&uid=55b309a2-f163-a401-e76c-d1505eb31b65)



## Case law

### No discrimination on the ground of religion found in a case involving an ethos-based organisation

The Federal Labour Court held that there was no discrimination in a case involving a Muslim woman who applied for a position at the Diakonie, a charitable organisation of the Protestant church in Germany.<sup>134</sup> The announcement for a vacant position required, among other conditions, a university degree and membership of a Christian church as preconditions for employment. The applicant was told on the phone by an employee of the Diakonie that her application was 'very interesting'. However, she refused to join a Christian church and did not get the job.



The Court justified the absence of discrimination not from the angle of unequal treatment on the ground of religion but on the basis that the applicant was not put in a comparable situation with the other applicants because she had no university degree, hence could not qualify for the position anyway. The oral statement of the employee was considered as irrelevant as the person was not responsible for taking the final decision on employment. At the time of writing, the plaintiff was preparing a constitutional complaint against the decision.

*Internet source:*

<http://www.bundesarbeitsgericht.de/>

## Greece

EL

### Legislative developments

#### Deputy Chief Prosecutor enacts official instructions to address educational exclusion and discrimination of Roma children

On 16 February 2011, the organisation Coordinated Organisations and Communities for Roma Human Rights in Greece (SOKADRE) urged the Deputy Chief Prosecutor of the Greek Supreme Court to investigate cases of educational exclusion and segregation of Roma children into 'ghetto schools'. On 22 February, the Deputy Chief Prosecutor issued an urgent written order addressed to all local prosecutors in Greece asking them to tackle exclusion of Roma children from the public educational system and to ensure their integration.<sup>135</sup> The order constitutes interpretative instructions in the same way as a circular.



*Internet source:*

<http://cm.greekhelsinki.gr/index.php?sec=192&cid=3741>

<sup>134</sup> Federal Labour Court (*Bundesarbeitsgericht*), 19 August 2010, 8 AZR 466/09.

<sup>135</sup> Protocol Number 720 /22-02-2011.





### **Greek National Commission on Human Rights issues a consultative opinion on protection from discrimination against HIV/AIDS carriers**

On 27 January 2011, the National Commission on Human Rights<sup>136</sup> issued a non-binding opinion on the protection of rights of persons who suffer from HIV/AIDS. Discrimination on the ground of disability was one of the issues that was examined, discussed and included in the decision of the NCHR.



The decision analysed thoroughly all issues related to the existence of extreme prejudices against persons who suffer from HIV/AIDS. The Commission admitted that HIV/AIDS was not explicitly regarded as a ground of discrimination in any international or European legal instrument, and that Greek Law No. 3304/2005 on discrimination did not refer to this specific condition. However, it pointed out that, according to Resolutions of the UN Commission on Human Rights, the term 'condition', to which several legal conventions refer, should be interpreted in a way that includes health condition. Furthermore, the UN Commission on Economic, Social and Cultural Rights had already interpreted the term 'other condition', included in Article 2 of the Covenant, as related to a person's health condition, and used HIV/AIDS as examples.

According to the NCHR, since the notion of 'disability' is not explicitly and clearly described in the Greek legal framework, it is legally possible to interpret this term in a broad way that could include 'sickness from HIV/AIDS'. Such interpretation could be based on ILO Convention no.111 (Article 1), according to which legal protection can be extended to 'any other discrimination, exclusion or preference resulting in abolition or differentiation of equality of chances and treatment in the field of employment'.

Furthermore, the NCHR referred to the International Recommendation on Labour No 200/2010 regarding HIV/AIDS, which also emphasises that according to ILO Convention no.111 (Article 1) interpretation of the term discrimination should be broad. The above Recommendation clearly mentions that 'real or possible sickness from HIV/AIDS cannot constitute a reasonable basis for discrimination that would deter such real or possible patients from being hired or continuing their working life'.

Moreover, according to the NCHR, the definition of 'disability' as described in the text of the UN Convention on the Rights of Persons with Disabilities (Article 1) includes 'all diseases of long duration of time'. Finally, the NCHR highlighted Ministerial Decision Φ21/2361 (ΦΕΚ Β' 819/1993) stating that HIV/AIDS patients fall within the category of disabled persons.

*Internet source:*

[http://www.nchr.gr/document.php?category\\_id=164&document\\_id=1342](http://www.nchr.gr/document.php?category_id=164&document_id=1342)

<sup>136</sup> In accordance with the 1993 Paris Principles, the National Commission on Human Rights is a statutory National Human Rights Institution having a consultative status with the Greek State on issues pertaining to human rights protection and promotion.

# Ireland

## Case law

### Successful tenancy age discrimination case of 73-year-old returned migrant



The Equality Authority welcomed the successful outcome of an Equal Status Act case filed to the Equality Tribunal on the provision of housing for an older man.<sup>137</sup> The Equality Authority represented the claimant Mr McGreal, a tenant of Cluid Housing, Tuam, who successfully proved he was discriminated against on the grounds of his age when the housing association terminated his tenancy. The Equality Officer awarded the maximum compensation allowed under the Equal Status Acts of €6 349 in recognition of the seriousness of the subject matter of the complaint.

Mr McGreal had raised concerns about fire safety, security and resident committee accounts from 2004 to 2009 and subsequently Cluid sought to evict Mr McGreal.

A crucial consideration was the testimony of expert witness Dr Padraic Kenna (NUIG) who 'had never in his entire career seen an elderly tenant, over 70 years of age, being pursued for ejection without any investigative procedure whatsoever or without any normal cause'. Dr Kenna also noted that 'The impact of an eviction on a man of the complainant's age would be extremely severe in comparison with a younger person'.

The Equality Officer found that the respondent did discriminate against the complainant on the grounds of age, in terms of their decision to issue him with a notice to quit and in terms of their ongoing treatment of him in this matter. She further ordered that Cluid 'conduct a review of its policies and procedures to ensure that they are in compliance with the Equal Status Acts 2000-2008'.

*Internet source:*

<http://www.equalitytribunal.ie/Database-of-Decisions/2011/Equal-Status-Decisions/DEC-S2011-004-Full-Case-Report.html>

### Large compensation awarded by Equality Tribunal for racial harassment and discriminatory treatment



The complainant, a black Zimbabwean national, was employed by the respondent as a security operative between December 2002 and June 2007. He complained of racial harassment over the period. He said that only once did he work with a white employee. He added that this employee handed him his mobile phone and showed him the contents of a text he had received. The text was from the respondent (the complainant recognised his number) and read 'Remember you are working with a black guy, you will have to watch him.' The complainant stated that the long working hour regimes were exclusively assigned to the black Zimbabwean employees. The respondent failed to attend.

The Equality Officer recalled his obligation under the jurisprudence of the Court of Justice of the European Union to ensure that the remedies in discrimination cases are 'proportionate, effective and dissuasive'. He awarded €25 000 by way of compensation for the distress suffered by the complainant as a result of discrimination in working conditions and harassment.<sup>138</sup>

<sup>137</sup> Equality Tribunal, ES/2009/90 and ES/2010/32 of 20 January 2011.

<sup>138</sup> Equality Tribunal DEC-E2011-016.

Internet source:

<http://www.equalitytribunal.ie/Database-of-Decisions/2011/Employment-Equality-Decisions/DEC-E2011-016-Full-Case-Report.html>

### **Traveller women win discrimination case against hotel in Circuit Court**

The Law Centre of the Irish Traveller Movement on behalf of five Traveller women was successful in its appeal against the owners of the Osprey Hotel, Naas, County Kildare in a case where the women and their colleagues were refused service (mid-morning light refreshments) at the hotel.



The initial case taken by the women in the District Court in November 2009 against the owner was unsuccessful. But the women believed their experience was a blatant incident of discrimination against them as Travellers and despite the potential costs involved appealed the decision to the Circuit Court.

Representing the family in court, the solicitor for the Irish Traveller Movement Law Centre said: 'Incidents of alleged discrimination by licensed premises came previously under the remit of the Equality Tribunal. However the introduction of the Intoxicating Liquor Act 2003 – following a campaign by the owners of licensed premises – has changed the venue for such cases to the District Court. This has had a profound impact on the Traveller Community in that one must employ the services of a solicitor to be adequately represented in court and because of the obvious implications of a cost award. Further to this there seems to be a general reluctance on the part of the Legal Aid Board to fund such applications. These hurdles have proved insurmountable for many.'

The judge was satisfied that the women had successfully proved a *prima facie* case of discrimination by the Osprey Hotel against the group and that they were treated in a manner that the settled community would never have been. She acknowledged the hurt and the embarrassment that each of the women felt having being refused something as simple as tea and scones. The hotel was ordered to pay €250 each to the five complainants (€1 250 in total).

Internet source:

<http://www.irishexaminer.ie/ireland/hotel-discriminated-against-group-including-travellers-151532.html>

## Lithuania

LT

### *Political developments*

#### **The Equal Opportunities Ombudsperson publishes its 2010 Annual report**

On 15 March the national equality body of Lithuania – the Equal Opportunities Ombudsperson – published its annual report covering all activities implemented in 2010. In this yearly obligatory report, also submitted to the Parliament, the Ombudsperson emphasised the continuous negative effects of the financial downturn.

The report highlighted a reduction in the total amount of complaints lodged in 2010 (218 in 2008, 165 in 2009 and only 148 in 2010), which was, according to the Ombudsperson, the result of fear of victimisation. However, despite this general trend, complaints in the field of employment had grown slightly, especially on the grounds of age and disability (25 complaints on the ground of age and 22 complaints on the ground of disability), which could be explained by the situation in the labour market where employers

tend to increase efficiency by hiring younger and healthier employees for lower wages. In addition, fewer disabled workers were hired due to decreased governmental support for the integration of disabled people.

The report also stressed the drastic budget cuts that significantly affected national anti-discrimination policy in 2010 as illustrated by the following examples: the National Anti-discrimination Programme 2009-2011 received no financing in 2010, the Department of National Minorities under the Government of Lithuania was shut down, the Ministry of Social Affairs and Labour was restructured (the Department of Equal Opportunities was reorganised in 2010 and now the Equal Opportunities Division of the Social Inclusion and Communities Department is responsible for equal opportunities within the Ministry) and the Special Investigation Department of the General Prosecution Service, which was mainly responsible for investigating hate or criminal discrimination cases, was also closed down.

In addition, the Ombudsperson also highlighted the need to amend the Law on Equal Treatment so as to expand the scope of personal liability. Under current legislation employees cannot be held liable for discrimination (nor are service providers or employers for actions of their employees or third parties), and, according to the Ombudsperson, the Law on Equal Treatment should set out explicit rules on this matter.

*Internet source:*

<http://www.lygybe.lt/?pageid=7>

*Case law*

### **Applicant for a position as a lecturer claims discrimination on grounds of sexual orientation and social status**



In June 2009, Vilnius College held a competition for the position of lecturer. The applicant (A.Z.) alleged that he was discriminated against during the selection procedure on grounds of sexual orientation and social status. The applicant claimed that the selection commission did not take into account his qualifications, which were better than other candidates. He also pointed out that he had experienced irrelevant comments about his personality as he did not hide his homosexual orientation and about his field of research as he had shown a list of publications on homophobia.

The Vilnius City 2<sup>nd</sup> District Court dismissed the claim of discrimination on the ground of sexual orientation as there was insufficient evidence that recruitment committee members were aware of the applicant's sexual orientation.<sup>139</sup> Belonging to a particular group does not *per se* constitute discrimination according to the Court. However, the Court held that the applicant faced discrimination as another candidate, who also participated in the competition, was employed by the College at the time of the competition and even took part in the first stage of the selection procedure as a member of the College's Sociology and Law Department by providing recommendations on candidates, which created a difference in treatment against the victim on the ground of social status.

The Court ruled that A.Z. experienced both direct and indirect discrimination on the ground of social status and ordered Vilnius College to pay the applicant LT 26 940 (EUR 7 802) as compensation for non-pecuniary damages suffered and to hold a new competition for the same post, where all candidates, including A.Z., would participate on an equal basis.

<sup>139</sup> Decision of 31 March 2011 No.2-101-294/2011.

# Luxembourg

LU

## Case law

### First significant discrimination reference in court

On 27 October 2010 the Social Insurance Appeal Court issued a judgment referring to indirect discrimination. This was the first time that a court made use of the definition provided by EU law.

The case concerned alleged discrimination based mainly on gender but also possibly on age. Article 196 of the Social Insurance Code states that an old-age pension is paid to the surviving spouse/registered partner, unless, among other exceptions, the deceased beneficiary of the pension was more than 15 years older than the surviving spouse/partner.

The claimant argued that very few women could benefit from such a pension as they were often younger than their male partners. Therefore women were subject to indirect discrimination as they were much more frequently excluded by the law from receiving such a pension.

The Court found that there was no discrimination in this case as the provisions of the Code were gender-neutral. To that effect, the Court extracted the definition of indirect discrimination provided by the Bilka case of the CJEU of 13 May 1986 and applied it to the legal basis of the present case, namely Article 10bis of the Constitution, which states that 'all Luxembourgers are equal before the law.'

Although the Constitutional Court had often ruled on Article 10 of the Constitution and the principle of equality, it was the first time that a court applied the notion of indirect discrimination in relation to it. It is also the first time that statistics were used as a means of evidence in support of a claim of alleged discrimination. However, these statistics were found not to be conclusive.

# The Netherlands

NL

## Case law

### Prohibition on wearing the headscarf in a Catholic school found to be unlawful

A Catholic secondary school enacted new rules at the beginning of the academic year to add the Islamic headscarf to the list of head coverings already prohibited within the school's premises (such as caps and hats). Further to a complaint brought by a Muslim pupil against the school board, the Equal Treatment Commission (ETC) found the prohibition to constitute direct discrimination on the ground of religion.<sup>140</sup> The school, however, invoked Article 7(2) of the General Equal Treatment Act, which allows exceptions to protection against discrimination for organisations with an ethos based on religion or belief. The ETC considered this argument to be insufficient to prove the necessity of maintaining the school's Catholic character as the measure was part of a general policy prohibiting various types of head covering.

*Internet source:*

[www.cgb.nl](http://www.cgb.nl) (search term: 2011-02)



<sup>140</sup> Equal Treatment Commission Opinion 2011-2 of 7 January 2011.

## **Wearing a headscarf in the workplace constitutes a health and safety risk**

religion  
or belief

Discrimination on the ground of religion is forbidden during job placement according to the General Equal Treatment Act, including during discussions with possible employers. In a case where an employment agency was asked to find a suitable job for a Muslim woman, a cleaning company relied on the health and safety rules in force in the cleaning sector<sup>141</sup> to reject the candidate as she was wearing a long and loose-fitting headscarf to cover her hair, neck, shoulders, back and breasts. The recruitment agency suggested wearing the headscarf under a loose-fitting T-shirt and later tried to place the woman in another sector before stopping its attempts to place her. In consequence, the local government stopped paying the social benefits to which she was entitled as she had the duty to take all measures to find a paid job.

The ETC first concluded that the complainant presented enough facts to presume that the employment agency made a direct distinction on grounds of religion because the (neutral) health and safety rules as such were not the real reason for stopping its job search on her behalf, but the fact that she was wearing this particular long and wide headscarf for religious reasons. Then the ETC shifted the burden of proof and the agency had to prove that the reason for stopping its attempts to place the woman was not her religion. In response to the respondent's justifications, the Commission concluded that the employment agency had done everything possible to find a job for the woman, first in the cleaning sector and later in another sector. Health and safety rules prevented any employer from giving her a job. This could not be blamed on the recruitment agency, who therefore did not make a direct distinction on the ground of religion but made this decision on the basis of its experience that the woman was 'unemployable'.

*Internet source:*

[www.cgb.nl](http://www.cgb.nl) (search term: 2011-19)

## **Refusal to hire a woman suffering from obesity constitutes discrimination on the ground of chronic disease**

disability

An obese woman applied for a job as a 'postman' with a post company. Postmen are required to deliver mail (approximately 40 kilograms for each delivery) by bicycle. After she filed an application form online, providing her CV and information about her state of health, she was invited for an interview on the basis of a high test score. After she took the interview with a HR manager, it was made clear that she would not be appointed because of her excess weight.

The ETC first investigated whether excess weight or obesity fell under the scope of the Disability Discrimination Act (DDA), which covers disability and chronic diseases.<sup>142</sup> Neither concept is defined in the DDA. The UN World Health Organization (WHO) has established that adults with a Body Mass Index (BMI) of 25-30 are overweight, and people with a BMI higher than 30 are considered obese. There are three levels of obesity: BMI 30-35 (obesity), 35-40 (serious obesity) and 40 and above (morbid obesity). All forms of obesity are considered as a chronic disease by the WHO. The applicant had a BMI of more than 40. For this reason, she fell under the scope of the DDA.

A person who, as a consequence of a disability or chronic disease, cannot perform the essential tasks or functions of a job, cannot rely on the DDA unless reasonable accommodations are possible. In this case, the ETC concluded that the post company based its decision not to hire the woman on general observations and previous experience, and that it did not really investigate whether this particular person would or would not be able to perform the essential tasks or functions of her job. Furthermore, the company

<sup>141</sup> Rules based on the Working Conditions Act (*Arbeidsomstandighedenwet*) regulating health and safety issues at the national level.

<sup>142</sup> Equal Treatment Commission Opinion 2011-78 of 13 May 2011.

did not look into possibilities for reasonable accommodation (e.g. delivering the mail by foot or car). One function of the DDA is to prevent discrimination based on general assumptions or prejudices (stereotypes). The ETC consequently noted that the HR manager based her decision on general assumptions related to the poor physical condition of seriously overweight people. The post company had therefore discriminated against the woman on the ground of chronic disease.

*Internet source:*

<http://www.cgb.nl/oordelen/oordeel/221965/volledig>

### **Refusal to grant an internship to a 52-year-old student constitutes direct discrimination on the ground of age**

A medical student was required to do an internship in a hospital in order to finish his education and obtain his diploma to become a doctor's assistant. He applied for a position in Amsterdam and although he was more or less promised a place by the internships coordinator, he received an e-mail at the very last moment stating that he could not take the internship because of his age and his lack of experience in the care sector. Other arguments were later also brought forward by the hospital, such as the fact that the candidate did not fit into the team and that there was soon due to be a vacancy that would have to be filled by someone of a younger age (preferably a woman) because the existing team had already a number of doctor's assistants aged above 40. Another reason for refusing the internship was that the hospital had a regulation granting employees above the age of 55 100 hours' extra holiday per year. The department, however, needed a full-time doctor's assistant.



The ETC admitted that in such circumstances it might have been difficult to place the intern in the department in question, but the hospital failed to further investigate the possibilities for the intern to carry out his obligatory internship in other departments. The ETC concluded that this was a clear case of direct discrimination on the ground of age for which it is in principle admissible to bring forward objective justifications, but since the hospital board denied the existence of such discrimination, it did not bring forward any argument that could justify it. The board also claimed that it could not be held responsible for the e-mail sent by the coordinator, but that argument was rejected by the ECT as the employer is liable for all professional acts of employees.<sup>143</sup>

*Internet source:*

<http://www.cgb.nl/oordelen/oordeel/222017/volledig>

## Poland

PL

### *Legislative developments*

#### **New anti-discrimination law adopted and new equality body established**

The Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment was finally passed by the *Sejm* (lower house of Parliament) on 3 December 2010 and entered into force on 1 January 2011.<sup>144</sup>

Thus far Poland had transposed the EU anti-discrimination directives only in the employment field. There were still a number of significant gaps, including the implementation of the Racial Equality Directive

<sup>143</sup> Equal Treatment Commission Opinion 2011-83 of 25 May 2011.

<sup>144</sup> *Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania; Dz.U. 2010 nr 254 poz. 1700.*

Robert | 1987



Claudia | 1983



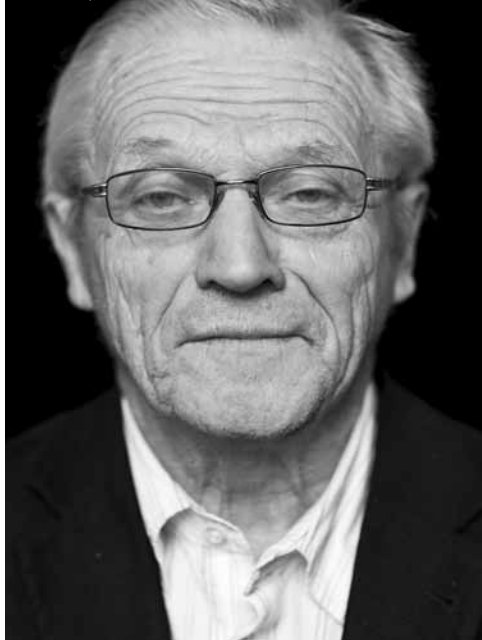
Jolande | 1986



Danielle | 1992



Jacob | 1938



Tirza | 1982



Jaap | 1980



Elisa | 1987



Jan Jaap | 1992





beyond employment and the absence of an equality body, which led to a number of enforcement actions by the Commission.

The new law provides protection against discrimination on the grounds of race, ethnic origin and nationality in all fields beyond employment. The Act also designates the existing Office of the Ombudsperson<sup>145</sup> as the equality body. The law adequately amends the existing Ombudsperson Act so to establish the new competences. The law has been in place for six months and now raises two major issues that need to be tackled if the Ombudsperson is to effectively take up its responsibilities as the equality body.

The first problem relates to the competences of the Ombudsperson. The relevant EC directives provide that the equality body should give 'independent assistance to victims of discrimination in pursuing their complaints about discrimination'. Although this is clear for discrimination cases against public authorities, the situation remains unclear when the complaint concerns private entities as, pursuant to Article 80 of the Constitution, the Ombudsperson deals only with relations between state bodies and individuals. The new Ombudsperson Act (Article 11, paragraphs 1.2 and 2) stipulates that 'in the implementation of the principle of equal treatment between private parties the Ombudsperson may take measures (...) limited to pointing out to the applicant possible means of action'. As argued on several occasions the extension of the Ombudsperson's competences to matters between private parties would be in breach of the law and the Constitution.<sup>146</sup> Therefore, the Ombudsperson may only refer the applicant to other institutions and cannot provide any concrete assistance. In addition, according to Article 11 the Ombudsperson is not obliged to provide any assistance even in the case of a complaint concerning a public authority. In the Polish system the Ombudsperson has full discretion in deciding whether or not to take up the complaint. Consequently, these provisions undermine the declaration made that the new Act fully implements the relevant EC directives.

The second problem is even more evident as the new law imposes on the Ombudsperson a number of competences such as conducting independent research and producing independent reports and recommendations. No additional resources or funding to fulfil these tasks has been provided. The explanatory memorandum of the draft law, prepared by the Government, explains that the Ombudsperson's office can perform the new competences within the existing structure and budget, hence the decision not to allocate additional funding.

*Internet source:*

<http://orka.sejm.gov.pl/SQL.nsf/Main6?OpenForm&SPC>

## Portugal

PT

*Case law*

### **Statements against immigration do not constitute discrimination**

The Nationalist Party (*Partido Nacionalista Renovador*) placed a sign on its premises in a Lisbon square with the following message: 'IMMIGRATION? We say NO! Enough abuses: open borders, dependence on benefits, low wages, criminality and multiculturalism. Portugal back to the Portuguese.' In addition, a picture showed a white lamb, as a symbol for Portuguese nationals, expelling black lambs, standing for migrants, from the country.



<sup>145</sup> Commissioner for Civil Rights Protection – *Rzecznik Praw Obywatelskich*.

<sup>146</sup> See, for instance, a memorandum of the *Senat* (the upper house of Parliament), *Druk nr 3632*, 25 November 2010.

The President of the Nationalist Party, Mr José Coelho, argued in court that there was no intention to use racist or xenophobic language and that, in any event, he had the right to freedom of expression.

The first instance criminal court (*1st Juízo do Tribunal de Instrução Criminal de Lisboa*) dismissed the Public Prosecutor's claim that the statements constituted racist acts against migrants on the ground that they were directed towards immigrants in general, without any race or ethnic origin being specified.

The Public Prosecutor lodged an appeal before the Lisbon Court of Appeal (*Tribunal da Relação de Lisboa*) alleging that Mr Coelho's action fell within the scope of Article 240 (2)(b) of the Criminal Code on discrimination on grounds of race, religion or sexual orientation which states that the following people must be punished:

- (a) anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, provokes acts of violence against an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, gender or sexual orientation with the intention of inciting to or encouraging racial or religious discrimination.
- (b) anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, defames or insults an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, gender and sexual orientation.

The Court recalled the International Convention on the Elimination of All Forms of Racial Discrimination in which the term 'racial discrimination' means 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 (Article 1).

By signing the Convention Portugal as a State Party must condemn propaganda and punish organisations which are based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination. However, the Court upheld the first instance decision and held that in this case incitement to racial discrimination was not proved as there were no explicit threats against migrants or offensive statements encouraging racial discrimination.<sup>147</sup>

## Romania

### *Legislative developments*

#### **Draft law imposing use of the term 'Gypsy' instead of 'Roma' endorsed by the Human Rights and Equal Opportunities Committees of the Senate**

In September 2010, a draft law prohibiting use of the term 'Roma' in official documents and imposing the use of the exonym 'Țigan' was submitted to the Romanian Chamber of Deputies as decisional chamber by Senator Prigoană (Democrat Liberal Party).<sup>148</sup>



<sup>147</sup> Case 59862/08.7TDLSB.L1, Lisbon Court of Appeal (*Tribunal da Relação de Lisboa*).

<sup>148</sup> The draft law as well as its rationale and reports from various relevant institutions are available at: [http://www.cdep.ro/pls/proiecte/upl\\_pck.proiect?cam=2&idp=11279](http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=11279) (07.12.2010).

Civil society, a large part of the Roma community, the national equality body, the Ministry of Culture, the Ministry of Foreign Affairs and the National Agency for Roma criticised the draft.<sup>149</sup> The Romanian Academy endorsed the proposal in a note heavily criticised for lacking scientific arguments.<sup>150</sup> In spite of these protests, the Government endorsed the draft proposal on 2 December 2010 claiming that the use of 'Roma' led to confusion and invoked the position of the Romanian Academy as support.<sup>151</sup>

On 2 February 2011, the Human Rights Committee and the Equal Opportunities Committee of the Senate decided in a joint session in favour of the draft and issued a positive report with ten votes for and three against.<sup>152</sup> The senators justified their votes with an argument based on misleading linguistic information on the use of the term 'Gypsy' around Europe and invoked the confusion between 'Roma' and 'Romania' for foreigners, which allegedly damages the international image of the country.<sup>153</sup> They also made racist statements.

*Internet source:*

[http://www.cdep.ro/pls/proiecte/upl\\_pck.proiect?cam=2&idp=11279](http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=11279)

### **New Labour Code presented to Parliament and adopted**

On 8 March 2011, the Romanian Government 'assumed responsibility' before Parliament, a process allowing it to circumvent any further parliamentary debate and adopt the new Labour Code (*Codul Muncii*) through a fast-track procedure. This possibility is provided by Article 114<sup>154</sup> of the Romanian Constitution and it is considered in legal literature and jurisprudence to be an exceptional constitutional measure to allow adoption of legislative provisions necessary to ensure the government's programme. The new amendments adopted were published on 31 March and took effect on 1 May 2011.

The new law introduced employment contracts for temporary workers and allows longer fixed term contracts, which can now last up to 36 months. The probation period is extended from 30 days to 90 days for executive positions and to 120 days for management positions. The Labour Code maintains a probation period of 30 calendar days for disabled people. Trade unions and the opposition criticised the new Labour Code for the changes in recruitment and dismissal procedures, particularly as it is now significantly easier to terminate an employment contract. One of the provisions contested is the new Article 49(5) and (6), which allows a contract to be terminated even when the employment relationship is suspended (for example due to maternity or sick leave). Under the new Code, provisions regarding collective dismissals will not apply to employees in public institutions and public authorities.

<sup>149</sup> Media reporting available at: <http://www.hotnews.ro/stiri-esential-8052317-guvernul-analizeaza-oportunitatea-schimbarii-denumirii-denumirii-rom-tigan.htm> (7.12.2010).

<sup>150</sup> Note Nr. 3117 of 26 October 2010 of the Romanian Academy.

<sup>151</sup> Media reporting of the governmental position available at: <http://www.mediafax.ro/social/guvernul-este-de-acord-cu-schimbaria-denumirii-de-rom-in-tigan-7773030> (7.12.2010).

<sup>152</sup> Media reporting of the voting in the joint session of the two parliamentary committees available at: <http://www.hotnews.ro/stiri-politic-8264249-senat-raport-favorabil-pentru-proiectul-legii-inlocuire-termenului-rom-tigan.htm> (3.02.2011).

<sup>153</sup> The Social Democrat Senator Elena Mitrea stated that 'going back to the name *tigan* would redress a mistake, and it is not right for the name "Roma" to be assimilated with Romania.'

<sup>154</sup> Article 114 of the Romanian Constitution provides:

- (1) The Government may assume responsibility before the Chamber of Deputies and the Senate, in joint session, for a programme, a general policy statement, or a bill.
- (2) The Government shall be dismissed if a motion of censure, tabled within three days from the date of presenting the programme, the general policy statement, or the bill, has been passed in accordance with provisions under Article 112.
- (3) If the Government has not been dismissed in accordance with paragraph (2), the bill presented shall be considered as passed, and the programme or the general policy statement become binding on the Government.
- (4) In the event that the President of Romania demands reconsideration of the law passed according to paragraph (3), the debate thereon shall be conducted in a joint session of both Chambers.

Internet source:

<http://www.juridice.ro/wp-content/uploads/2011/03/CM-08-03.doc>

Case law

### **Report on cases of discrimination on grounds of disability reveal that the penalty most commonly issued is an administrative warning**



On 15 April 2011, the NGO the Public Policy Institute (PPI) (*Institutul pentru Politici Publice*) released an analysis based on all the disability-related complaints received by the national equality body, the National Council on Combating Discrimination (NCCD), in the last three years.

The research showed that between 2008 and 2011, 58 petitions on grounds of disability had been received and that the NCCD found that discrimination occurred in only nine. In the remaining cases, the NCCD found that it did not have a legal mandate (16 cases), that the facts complained of did not meet the legal criteria for discrimination (16 cases), or the cases were dismissed due to lack of evidence or for not complying with the statute of limitations (17 cases).

Most complaints concerned access to financial benefits, public transport or other benefits persons with disabilities are legally entitled to, depending on their type of disability. There were also complaints regarding access to employment, access to services (such as banking), lack of access to public spaces and discriminatory statements by public personalities. In particular, complaints were mostly filed against public institutions such as the Ministry of Health, Ministry of Labour and Social Protection, Ministry of Environment, Library of the Romanian Academy, the Mayors of Oradea, Bucharest and Covasna, and the general directorates for social assistance and protection of children in Bacau and Bucharest.

The report found that when the national equality body found that discrimination had occurred, the penalties issued were 'minor and very generous with the perpetrators, i.e. a warning or a recommendation, such that it is unlikely that they would have the desired impact on acts of discrimination against persons with disabilities, which still continue.' It is also found that 'no fine had been issued in any case of discrimination on grounds of disability.'

Internet source:

<http://ipp.ro/pagini/n-ultimii-ani-cazurile-de-discriminare.php>

SK

## Slovakia

Legislative developments

### **Labour Code extends the scope of protected grounds**

As of 1 April 2011, an amendment to the Labour Code,<sup>155</sup> No 48/2011 of 8 February 2011, brought the list of grounds protected against discrimination into line with the Anti-Discrimination Act.<sup>156</sup> Article 1 of the Basic Principles of the Labour Code now contains an explicit reference to sexual orientation as a prohibited ground of discrimination. It also covers a new ground, namely 'genetic features'. Section 13 of the Labour Code was also amended to list the same grounds as the amended Article 1 of the Basic Principles. The Labour Code consequently now enumerates all the grounds that are protected under

<sup>155</sup> Act No 311/2001 Coll. The Labour Code, as amended.

<sup>156</sup> Act No 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination, as amended.

the Anti-Discrimination Act<sup>157</sup> and contains trade union involvement, poor state of health and genetic features as additional grounds.

*Internet source:*

<http://www.zbierka.sk/zz/predpisy/default.aspx?PredpisID=210114&FileName=zz2011-00048-0210114&Rocnik=2011>

### **Statutory selection procedure for judges brought into line with the Directives and the Anti-Discrimination Act**

On 1 May 2011, an amendment to Act No. 385/2000 Coll. on Judges and Lay Judges and on Changing and Supplementing Certain Laws entered into force.<sup>158</sup> The new provisions brought the rules on the selection procedure for new judges into line with Directives 2000/43/EC and 2000/78/EC and the Anti-Discrimination Act.<sup>159</sup> Under Section 28 paragraph 3 of the old version of Act. No. 385/2000 Coll. on Judges and Lay Judges, 'the selection procedure for the position of judge shall be carried out without regard to sex, race, belief, religion, political or other opinion of the applicants, their national or social origin, or affiliation to a nationality or an ethnic group'. Amendment No 33/2011 Coll. now states in Section 28 paragraph 4 that 'the selection procedure shall be carried out in compliance with the principle of equal treatment that is stipulated by a special regulation' and makes a reference to the Anti-Discrimination Act.

*Internet source:*

<http://www.zbierka.sk/zz/predpisy/default.aspx?PredpisID=210099&FileName=zz2011-00033-0210099&Rocnik=2011>

## Slovenia

SI

*Political developments*

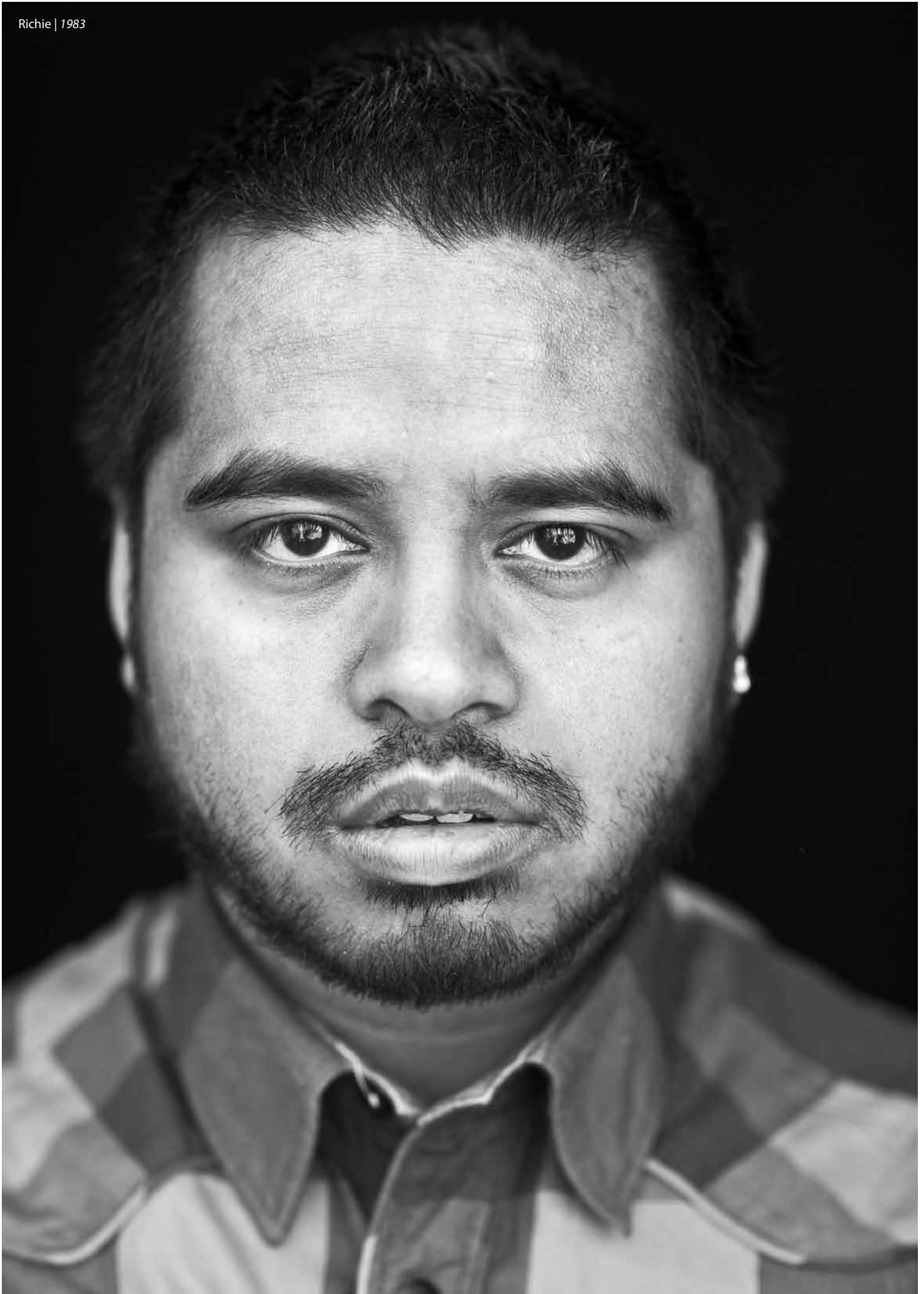
### **Advocate of the Principle of Equality issues its 2010 Annual Report**

The Advocate of the Principle of Equality issued its annual report, which contains information on its work and activities in 2010. However, the report did not only present statistics on complaints and cases dealt with, but also detailed systemic issues of concerns, such as the absence of effective legal protection mechanisms in Slovenia and the institution's lack of power and capacity to address wider issues of discrimination, in particular in the light of the fact that the Advocate is expected to deal with issues of discrimination across all grounds and all fields. The report rated the work of Advocate as unsuccessful based on its achievements since its creation in 2004. It remarked that low public awareness of its existence and record of poor results also resulted in a lack of visibility and credibility in the eyes of experts and key target groups. The document underlined that the current designation of the Advocate as an equality body did not meet the requirements set out in the Racial Equality Directive 2000/43/EC and the UN Convention on the Rights of People with Disabilities. Finally, the report pointed out an absence of political will on the part of the Slovenian government to address the problems described. The report recommended a vision for 2011, which includes, among other factors, the establishment of a genuinely independent equality body which must become a member of Equinet.

<sup>157</sup> As of 2008, the Anti-Discrimination Act lists the following as protected grounds: sex, religion or belief, race, affiliation to a nationality or an ethnic group, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, lineage/gender or other status.

<sup>158</sup> The amendment was introduced by Act No 33/2011 Coll. of 1 February 2011.

<sup>159</sup> Act No 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination, as amended.



Internet source:

[http://www.zagovornik.net/uploads/media/zagovornik\\_lp\\_2010.pdf](http://www.zagovornik.net/uploads/media/zagovornik_lp_2010.pdf)

Case law

### Insurance company held to have discriminated on grounds of disability and state of health

The applicant filed a claim with the Advocate of the Principle of Equality disputing Adriatic Slovenia's policy of refusing offering insurance to people diagnosed with depression.<sup>160</sup> Article 11, §3 of the company's general terms and conditions for accident insurance stated that a person who suffers from damage to the brain's vascular system, epilepsy, alcoholism, drug abuse, intellectual disability, schizophrenia, depression or paranoia is not entitled to insurance coverage as the risk of a health-related accident is higher. Further, the insurance company invoked Article 83, §6 of the Insurance Act which allows, in accordance with the rules of the insurance profession, insurance companies to take into account personal circumstances related to state of health and disability when selecting their customers, assessing risk, calculating insurance premiums and paying insurance claims.



In addition to the issue of discrimination on the grounds of state of health invoked by the applicant, the Advocate of the Principle of Equality also examined the impact of such policies on people with mental disabilities. He found that these policies constituted direct discrimination on grounds of state of health and disability, which could not be objectively justified as the insurance company invoked 'the rules of the insurance profession' without stating legitimate aims other than financial goals to explain the exclusions. The Advocate stated that the general rule could not be that there must necessarily be a causal link between state of health and disability and risk of accidents. The Advocate exhorted the insurance company to send a letter of apology to the applicant, to change Article 11, §3 of its general conditions to comply with the duty of reasonable accommodation and to submit a report on the implementation of these recommendations.

Internet source:

<http://www.zagovornik.net/si/informacije/informacije-javnega-znacaja/praksa/index.html>

## Sweden

SE

Case law

### Labour Court decides age discrimination case

On 15 December 2010 the Labour Court decided a discrimination case involving a 62-year-old woman, A.H., who applied for a vacancy as a job coach<sup>161</sup> within the Public Employment Service.<sup>162</sup> She was not called for an interview, and two women, respectively aged 27 and 36, were eventually hired.



<sup>160</sup> Decision no. 0921-36/2009/6 of 31 January 2011.

<sup>161</sup> A job coach is a career guide who provides assistance to job seekers by looking at their CVs and assessing their competences, organises personality tests and trainings in preparation of job interviews, etc.

<sup>162</sup> Labour Court case 2010/91 of 15 December 2010.

A.H. had equivalent qualifications to the woman ultimately hired and was better qualified than the other one. She was also better qualified than at least two other men who were interviewed and therefore claimed that she was discriminated against on the ground of age and gender.<sup>163</sup>

The employer alleged that A.H. was not suitable for the job because she showed a supercilious attitude and absence of empathy. He based his decision on references provided by two case officers supporting her during her job search. The Labour Court did not call into question what the case officers said about A.H., but it observed that ordinary procedures requiring A.H. to be called for interview and for references to be obtained from former employers were not followed. The employer was therefore held to have discriminated against A.H.<sup>164</sup> However, on the question of damages, it did not take into account multiple discrimination to raise the amount of compensation awarded. The victim received SEK 75 000 (approximately EUR 8 300) while the Equality Ombudsman asked for SEK 300 000 (approximately EUR 33 300).

*Internet source:*

<http://www.do.se/Documents/pdf/forlikningarochdomstolsarenden/91-10.pdf>

## United Kingdom

### *Legislative developments*

#### **Implementation of the Equality Act 2010**

The Equality Act 2010 was passed just prior to the general election of May 2010 that brought about a change of government. Many of the Act's provisions came into force in October 2010, and more have just come into force as of 5 April 2011. These include the provisions permitting fairly broad positive action in the field of employment outside recruitment and promotion (s.158), and positive action in relation to recruitment and promotion within narrower boundaries, but significantly in excess of that legally permitted prior to the Act's implementation (s.159). These measures apply across the protected grounds. So do the new public sector duties which also came into force on 5 April 2011 and which require public authorities to pay due regard to the need to eliminate discrimination and promote equality in connection with race, disability, age, sexual orientation and religion or belief as well as sex. Draft regulations on specific duties designed to support the general duty were published on 17 March 2011 together with a policy review paper.

<sup>163</sup> The Public Employment Agency is a public employer. According to Act (2009:400) on Open Access and Secrecy, any citizen can consult copies of documents.

<sup>164</sup> In Sweden it is very hard to convict an employer of discrimination. The Labour Court always accepts situations where proper procedure is followed and the interviewers find that one applicant is better on the basis of an informal criterion which outweighs formal qualifications. An employer following normal procedures is deemed to have correctly assessed the applicant's merits in almost every case. The decision to employ an applicant is regarded as taken on the applicant's merits only, breaking the causal link to discrimination. But the fact of not calling an obviously well-qualified person to an interview and not asking her previous employers for references regarding her interpersonal skills was a sizeable deviation from the procedures normally followed. The employer was not allowed to assess her interpersonal skills based only on the testimonies of the two case officers. Therefore the employer failed to break the presumed causal link by showing that the decision was based on merit. In this case two elements were decisive against the employer. The first was deviation from normal procedures. The second was that the case officers' comment was the third explanation given by the employer to the Equality Ombudsman, provided only after the Ombudsman had proven the first two explanations to be false.



The new Equality and Human Rights Commission (EHRC) codes of practice on employment and services come into force on 6 April 2011 and replace five existing codes issued by the predecessor bodies to the EHRC. They are designed to reflect the law subsequent to the implementation of the 2010 Act.

On 3 March 2011 the Government announced the start of a consultation on the implementation of the Equality Act's prohibition on age discrimination outside the context of employment.

*Internet source:*

[http://www.equalities.gov.uk/equality\\_act\\_2010.aspx](http://www.equalities.gov.uk/equality_act_2010.aspx)

### **Repeal of default retirement age provisions**

The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, which came into force on 6 April 2011, remove the ability of employers to enforce compulsory retirement ages without risk of unfair dismissal claims by amending the Equality Act 2010. Between 6 April and 1 October 2011, only people who were notified before 6 April, and whose retirement date is before 1 October, may be compulsorily retired using the default retirement age (DRA) and after 1 October, employers will not be able to use the DRA to compulsorily retire employees. All age-related dismissals will have to be justified by the employer.

*Internet source:*

<http://www.legislation.gov.uk/ukdsi/2011/9780111507735/contents>

*Case law*

### **Dismissal of a discrimination claim brought by a volunteer worker on grounds of disability**

The Court of Appeal ruled that a volunteer worker with the Citizens Advice Bureau was not entitled by the Disability Discrimination Act 1995 to claim disability discrimination, and that this was not inconsistent with EU law (Directive 2000/78/EC).<sup>165</sup> The Court took the view that it was by no means clear whether it would be wise to include volunteers within the scope of the employment discrimination legislation, and noted that the Council of the European Union had declined to amend the Directive in draft form to this effect on a proposal by the European Commission. It was, therefore, inconceivable that the draftsman of the Directive would not have dealt specifically with the position of volunteers if the intention had been to include them, given the fact that volunteers were extensively employed throughout Europe. The concept of worker has been restricted to persons who are remunerated for what they do and there was no reason to suppose that the concept of occupation was intended to cover non-remunerated work.

*Internet source:*

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/28.html>



<sup>165</sup> *X v Mid Sussex Citizens Advice Bureau & Ors* [2011] EWCA Civ 28.





