Dynamic Interpretation
European Anti-Discrimination Law in Practice II

Case Studies 2007

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Equinet
European network
of equality bodies

Non-discrimination

For Diversity
Against Discrimination

Contents

Preface

Equinet's Working Group on Dynamic Interpretation focuses on how to interpret legal concepts and issues in anti-discrimination law with a view to harmonised implementation of EU law in this area in order to secure equality at the highest possible level.

The working group takes a practical approach to dynamic interpretation using real-life cases brought before them to form a basis for a comparative analysis of the application of anti-discrimination law in their respective countries. In 2007, Equinet members were asked to consider three cases based on real cases that had come before certain members, and to apply their national law to the facts of these cases.[1] The three cases concerned 1) religion, gender and the church; 2) race, religion and child custody; and 3) age, recruitment and training.

The cases were selected in order to engage a variety of discrimination grounds and fields and thus enable Equinet members dealing with only one or a few grounds to make a contribution. Those not competent to deal with the issues raised in a case were encouraged to contact the competent national body for assistance. Three members of the working group analysed the cases and contributions and produced a report for each case, highlighting key findings and conclusions. Overall conclusions were drawn up by the working group on the basis of these reports.[2] The final case studies form the three analytical chapters of this volume. The member contributions are published in full in the annexes.

The case studies aim to provide a good overview of the range of practices in the EU. The strength of this report lies in the fact that the analyses are based on the *practices* of equality bodies, on their day-to-day work with the various European equality directives.

One significant finding is that it is not clear according to which European legal rule so many Member States allow an exception to the prohibition of discrimination to be applied to the internal affairs of churches or the employment of preachers. This Equinet report provides further analysis of this question (Chapter 1). Another valuable conclusion is that clear definitions of "social protection" in Directive 2000/43/EC and of "goods and services" in Directive 2004/113/EC (but also used in relation to grounds other than gender in various European countries) are needed in order to be able to determine the scope of these concepts. Equality bodies have hardly any case law or compelling academic insight to fall back on (Chapter 2). Finally, the report indicates that the exception to the prohibition of discrimination for genuine and determining occupational requirements should be interpreted restrictively (Chapter 3).

The individual contributions show that despite the fact that the Member States involved in this exercise have all implemented the various European equality directives, the approach to certain issues and the outcomes of the cases are often very different (Annex 1-3). The analyses show that there are similarities as well as differences in interpreting the directives (Chapter 1-3). The working group hopes that good practices will provide inspiration to other members and contribute to greater harmonisation of the implementation of EU law in this area.

On behalf of the working group on Dynamic Interpretation, I would like to thank all who contributed to this report, especially Alexandra Straznicka, Ingrid Krogius and Margrethe Søbstad, for their time and enthusiasm!

Femke Wegman
Moderator

[1] Members of the working group were required to respond and other Equinet members were asked to participate on a voluntary basis. The cases were completed by experienced employees at the national equality bodies. Whilst the answers cannot be read as official statements of the bodies, all information used in this report was approved by the bodies before publication.
[2] The three reports were discussed by the working group at a meeting in Brussels in November 2007.

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Chapter 1
Case study on religion, gender and the church

This case focuses on gender discrimination and issues arising from the interpretation of Article 4 of the Employment Equality Directive regarding exceptions for occupational activities in churches. The case is based on an actual complaint that came before the Slovak National Centre for Human Rights in 2005.

Case

A woman was an active member of a Church in which men as well as women are allowed to practice as preachers. The woman led various activities for young people in this Church for more than ten years, worked in the administration of this Church and had, with the approval of this Church successfully studied at the theological faculty with the purpose of acting as a preacher in this Church in the future. Having completed her university studies and obtained the relevant qualifications for the above mentioned position, the woman applied in compliance with the internal rules of the Church to be admitted to a selection procedure for a job as a preacher.

The Church rejected her application with a short explanation, that with regard to the understanding of the position of women in the Church resulting from their interpretation of the Bible, the practice of that specific Church is to exclusively appoint men to the position of preacher.

The internal statute of this Church generally requires from a person applying to be a preacher that they are a receiver of the Holy Ghost, that they have been a member of the Church for at least seven years, that they have successfully completed their theological studies, and that they have theoretical and practical experience with the work of the church (e.g. work with youth groups). The internal statutes of the church do not regulate different treatment in relationship to women. At the time the woman applied for the post of preacher three women were working as preachers in this Church.

Questions

Consider the case in the context of your national legislation and jurisprudence, or describe how the case would be considered by the competent authority in your country. In particular, consider the following specific questions:

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not. If a case like this according to your opinion would not arise in your country please explain why not.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

3. Which ground(s) would apply here and why? E.g. religion, gender. If both please explain how you would approach the analysis.

4. Would the refusal to admit the woman constitute direct or indirect discrimination or no discrimination at all and why?

5. If you find that this case leads to direct or indirect discrimination, does an exception as mentioned in Article 4 (1) or 4 (2) of Directive 2000/78/EC, exist in your country and would it/they apply in this case? If both please explain how you would approach the analysis.

*5a. If you find that an exception based on article **4(1)** of the Directive applies, please specifically elaborate on:*
- whether the characteristic constitutes a genuine and determining occupational requirement; and
- whether the objective of the requirement is legitimate and the occupational requirement is proportionate.

*5b.If you find that an exception based on article **4(2)** of the Directive applies, please specifically elaborate on:*
- whether the characteristic constitutes a genuine occupational requirement;
- whether the characteristic constitutes a legitimate and justified occupational requirement;
- whether the difference of treatment does not justify discrimination on another ground.

6. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination?

8. Would you use international standards in your argumentation, e.g. Convention on the Elimination of all Forms of Discrimination against Women? If yes, which provision(s)?

Legislation

Article 4 of Directive 2000/78/EC

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to ***any of the grounds*** *referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a* ***genuine and determining*** *occupational requirement, provided that the* ***objective is legitimate and the requirement is proportionate****.*

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, ***a difference of treatment based on a person's religion or belief*** *shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a* ***genuine, legitimate and justified*** *occupational requirement,* ***having regard to the organisation's ethos****. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and* ***should not justify discrimination on another ground****.*

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Summary of findings

The analysis draws on nine responses, received from the following equality bodies:

- Austrian Ombud for Equal Treatment
- Danish Institute for Human Rights
- GB Equal Opportunities Commission
- Greek Ombudsman
- Hungarian Equal Treatment Authority[3]
- Dutch Equal Treatment Commission
- Norwegian Equality and Anti-discrimination Ombud
- Slovak National Centre for Human Rights.
- Swedish Ombudsman against Ethnic Discrimination

1. Scope of anti-discrimination law

The countries would deal with the case under different kinds of legislation. In most countries religious groups fall outside equal treatment legislation, as their activities even in the employment field are seen as a “spiritual matter” or as an “internal matter”.

In Great Britain, ministers of religion fall outside the protection of employment law for the above mentioned reason. However the House of Lords in the case *Percy v Church of Scotland Board of National Mission* expressed an opinion that ministers of religion could be covered by the definition of employment contained in the Sex Discrimination Act depending on the interpretation of “employment”.

The Norwegian Gender Equality Act covers all areas of society, except church and religious communities' internal affairs. Thus, the main question would be whether the hiring of a preacher is considered to be an internal affair of the church in question, and whether hiring women for such a position is contrary to the practice and religious belief of that church.

In Denmark, discrimination on the ground of gender in employment relations is covered by the Act on Gender Equality, but the specific situation of a church recruiting a priest is exempt from this Act.

[3] The questionnaire was not completed in full.

Hungary responded that this case does not fall under the Equal Treatment Act because its scope does not extend to relationships in ecclesiastical entities that are directly connected to the activities of the religious life of churches.

The case would not fall within the scope of anti-discrimination legislation in the Netherlands, at least not within the scope of the Dutch Equal Treatment Act for which the Equal Treatment Commission is competent. Pursuant to this, the Dutch Equal Treatment Act does not apply to the office of minister of religion based on the principle of the separation of Church and State.

A special situation exists in Austria, where religious groups can be established under various legal forms, from an explicitly acknowledged religious group to a religious group in the form of an association ("Verein"). Explicitly acknowledged religious groups have the right to regulate their internal matters autonomously, i.e. without state interference. From the point of view of the jurisdiction of the Austrian Supreme Court, matters of employment and appointment of clerical staff are considered as internal matters. With regard to the autonomy of the Church this case does not fall under the Austrian Act on Equal Treatment.

In Greece such a case would be principally examined as a case of discrimination on grounds of sex according to Directive 2002/73/EC, which has been implemented by Greece with law Nr. 3488/2006.

The case would also be covered by national anti-discrimination legislation specifically passed to implement EU law in Sweden (Swedish Gender Equality Act) and in Slovakia (Anti-discrimination Act).

2. Competent courts/organisations

In most Member States district courts would be competent in this case, especially labour courts that are specialised in the employment field (Great Britain, Norway, Denmark, Austria, Sweden, the Netherlands, Slovakia). In Hungary there is an ecclesiastical court (synod) and Greece has special tribunals within the Church of Greece.

In addition to the normal courts, specialised equality bodies in some Member States are also entitled to deal with this type of case (Equality and Anti-Discrimination Ombud in Norway, Gender Equality Board in Denmark, Austrian Equal Treatment Commission, and the Slovak National Centre for Human Rights).

In Greece the issue raised a question as to the conditions under which the Greek Ombudsman would be competent to deal with the case. The Orthodox Church of Greece, as well as all other religious public law institutions of any known faith, are specifically exempt from the Greek Ombudsman's mandate. However, the Parliamentary Act Nr. 3488/2006 extended the competence of the Greek Ombudsman in the case of discrimination on grounds of sex to the private sector, but it is not clear from the wording of the Act whether the Act is applicable to a religious public body. If the religious entity in the case were a private law body, the case would certainly fall under the joint jurisdiction of the Ombudsman and the Labour Inspectors. If it were a public law body the case would raise an interpretation issue of the above-cited Act.

3. Grounds of discrimination

All members except Hungary were of the opinion that the woman had been discriminated against on the ground of gender as that was the only decisive and distinguishing factor for refusing her application (Great Britain, Norway, Denmark, Austria, Sweden, Greece, Slovakia). The Hungarian Equal Treatment Authority expressed the opinion that neither religion nor gender would be appropriate grounds in this case.

In Great Britain, in addition to the Sex Discrimination Act, the case might also fall within the scope of the GB Employment Equality (Religion or Belief) Regulations 2003, according to which direct discrimination on grounds of religion or belief is unlawful. What is interesting from the point of view of this regulation, in contrast to the Sex Discrimination Act, is that the religion or belief that is the reason for the less favourable treatment does not have to be the religion or belief of the person who is being treated less favourably. Therefore the woman could

complain of discrimination due to the religion or belief of the church members who rejected her application.

In the Netherlands, equal treatment standards are not applicable to the internal matters of religious communities and comparable organisations, or to religious posts. Thus, none of the protected grounds are applicable in this case according to Dutch legislation.

4. Direct/indirect/no discrimination

The question of whether the refusal to admit the woman would constitute direct or indirect discrimination or no discrimination at all was answered unanimously: direct discrimination on the ground of gender (Great Britain, Norway, Denmark, Austria, Sweden, Greece, Slovakia).

The Austrian Equality Body considered the issue of whether a "job as a preacher" could in fact be considered to constitute a working contract in the first place. With regard to the jurisdiction of the ECJ, some legal experts in Austria are of the opinion that any relationship in which work is carried out in exchange for money or goods necessary to support one's livelihood is to be interpreted as a working contract for the purpose of equal treatment law.

The Greek Ombudsman indicated that the case might be considered as a case of indirect discrimination on grounds of sex rather than religion. The prohibition of female preachers is contrary to the internal rules of the church as well as to its practice, so the refusal to employ the woman was based not on religion but on gender itself.

The Hungarian Equal Treatment Authority was of the opinion that the refusal to employ the woman did not constitute discrimination based on gender at first sight, because the church at the time of the application employed other women as preachers.

The issue of direct or indirect discrimination falls outside the scope of the Dutch Equal Treatment Act, so no form of discrimination is applicable in this case.

5. Interpretation and application of Article 4 (1) or 4 (2) of Directive 2000/78/EC

The Directive contains two genuine occupational requirement exceptions. Art. 4 (1) provides an exception to the duty not to discriminate where, having regard to the occupational activities or their context, being of a particular religion is a genuine and determining occupational requirement of the job, and where there is a legitimate objective for the requirement and the requirement is proportionate.

Art. 4 (2) applies only to churches or other public and private organisations which have an ethos based on religion or belief. Religious ethos organisations may require a person applying for a job in such an organisation to be of a certain religion or belief that is considered a genuine and occupational requirement with regard to the ethos of that organisation.

The members of the working group and other Equinet members who are competent to deal with the case stated in their responses that the exception pursuant to the Directive is not applicable (Sweden, Greece, Slovakia).

In Slovakia the exception concerning genuine and occupational requirements in relation to churches is broader than that provided by Art. 4(2) because it allows religious groups to discriminate on grounds such as sex or sexual orientation, rather than just on religious grounds as provided by the Directive. The present wording of the exception in the Slovakian Anti-discrimination Act is not limited to genuine occupational requirements and would seem to provide a total exception for religious organisations to discriminate in their employment practices, without the need to link the exception to the needs of a practical job. At present, amendments to the relevant provision of the Anti-discrimination Act are being prepared that take into consideration the concept of genuine and occupational requirements in Art. 4(2) of the Directive and restrict the discretion of churches and ecclesiastical communities by applying admissible exceptions to the principle of equal treatment.

Under Great Britain's Employment Equality (Religion or Belief) Regulations 2003, being of a particular religion or belief is a genuine occupational requirement for a job. The circumstances of the case show that while the members of one particular branch of that church do not agree with woman preachers, this does not reflect the views of the wider Church to which she belongs. While an admissible exception exists under the Sex Discrimination Act, where being of a particular gender is a genuine occupational requirement, the scope of its application is limited and not applicable in this case.

Denmark is the only country in which an exception regarding gender would apply. A statutory order from 1978 exempts the employment of priests in the Danish National Lutheran Church and similar employment within religious communities from the scope of the Consolidation Act on Equal Treatment of Men and Women as regards Access to Employment and Maternity Leave. In this Act, the exception appears in article 13 (1) in regard to occupational requirements.

6. Objective justification test

Concerning the objective justification test, most working group members and other Equinet members who are competent to deal with the case answered that direct discrimination on the ground of sex could not be justified (Great Britain, Sweden, Slovakia).

In Norway the objective justification test applies only to cases of indirect discrimination. Direct discrimination cannot be justified in Norway, except in very rare circumstances and in any event not in the case at hand. The exception for religious communities would not, under Norwegian law, be based on an objective justification test but rather on the scope of the Equality Act, which excludes the internal affairs of churches and religious communities.

In Austria the situation varies according to the legal form of the religious group. If an independent religious group within a larger Church has a certain degree of autonomy, a job applicant might be asked to fulfil special requirements. However, if the “specific” group or church is not independent from the rest of the Church, the difference in treatment is not justified.

The response from Greece took into consideration the internal statutes of a specific church, widespread tradition and publicly accessible dogmatic opinions characterising the relevant faith that might justify different treatment of women, for whom access to certain positions within the church may not be allowed, as for example in many versions of the Christian or Muslim faiths. But such justification would not apply in this case where the internal rules and general practice of the church do not prevent women from holding the position of preacher.

7. Balance of conflicting rights

The conflict between religious freedom and gender equality has been the subject of much debate within human rights discourse. The working group members' answers show that there is no consensus regarding this issue. The opinions vary from Member State to Member State, taking into account international human rights law and constitutional principles in domestic law. The freedom of religion appears to take precedence over the prohibition of discrimination in some Member States, such as Austria, the Netherlands, Greece, Norway and Denmark. In Great Britain, Sweden and Slovakia, the right not be discriminated against would have priority. Overall, the responses indicate that achieving a balance of conflicting rights requires proper identification and interpretation of the core of the conflict.

Great Britain and Austria considered the case from the point of view of the freedom of religion according to Art. 9 of the European Convention on Human Rights (ECHR), arguing that this right is not absolute and may be interfered with in compliance with restrictions in par. 2 of the cited Article. Great Britain indicated that weighing up the four tests (prescribed by law, legitimate aim, proportionate and necessary in a democratic society) the Church’s rights to freedom of religion would likely give way to the woman’s rights to protection from discrimination. In Austria the ECHR has the status of a constitutional law. Thus, the interpretation

of Art. 9 ECHR may produce different outcomes for the same case.

Norway considered the case under the Norwegian Constitution and the Human Rights Act that includes the principle of non-discrimination. Since the internal affairs of churches and religious communities are exempt from the Gender Equality Act, freedom of religion will prevail when the prohibition of discrimination is challenged, but only insofar as the issue at hand is considered as being closely related to the right to implement one's religion.

In Sweden, freedom of religion is safeguarded in the constitution. The provisions cover the personal right to believe and, to some extent, to express belief in public, but could not be invoked as a right to discriminate. Legislation prohibiting discrimination in working life prohibits both gender and religious discrimination. In this case it would probably be possible to bring a lawsuit on both grounds, as multiple discrimination.

Greece was of the opinion that any investigation of the case before an equal treatment authority or a court should take into account the fact that the church does not foresee an exclusion of women as preachers. At the same time, Member States should also evaluate practices related to theological principles and views and/or the organisational ethos of a church or religious institution, that lie outside of the scope of the anti discrimination legislation.

The principle of church-state separation is part of the Dutch legislation**.** Pursuant to this demarcation, equal treatment standards are declared not applicable to legal relations within religious communities and comparable organisations and to the office of minister of religion as well as study programmes and qualification requirements for such office.

In Slovakia a Constitutional Court ruling on the balance between the freedom of religion and the prohibition of discrimination states that while churches and religious associations are entitled to exercise their rights independently of state authorities, they must also respect the legal order of the state if the activities in question are performed within the framework of a civil legal relation, an employment relation or other related legal relations.

A major conclusion of this case study is that it is not clear according to which European legal rule so many Member States allow an exception to the prohibition of discrimination to be applied to the internal affairs of a church or the employment of priests.

The following questions and references provide a framework for further analysis.

Additional questions:

Is a general exception according to Art. 4 of the Employment Equality Directive illegal, but an exception in the form of a genuine occupational requirement possible?

Does the term "occupational requirement" mean that churches may in general discriminate, or does it mean that some positions can, because of their religious character, only be filled by men?

Additional references:

a. Preamble of the Employment Equality Directive 2000/78/EC which states in point in 23 and 24:

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the

Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.

b. Declaration No 11 on the status of churches and non-confessional organisations states the following:

The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
The European Union equally respects the status of philosophical and non-confessional organisations.

c. Directive 2002/73/EC of the European Parliament and of the Council, 23 September 2002

The Preamble refers in point 9 to employers in general stating that *in this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of sexual discrimination and, in particular, to take preventive measures against harassment and sexual harassment in the workplace, in accordance with national legislation and practice.*

(Art. 3/1) *Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies.*

(Art. 2/6) *Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.*

d. EU Treaty

(Art. 6/2) *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*

e. Report by Lucy Vickers: Religion and Belief Discrimination in Employment – the EU Law (European network of legal Experts in the non- discrimination field) November 2006, p. 42:

Although exemptions aimed at respecting the autonomy of religious groups may well accord with Article 4 of the Directive, which allows for exceptions for genuine occupational requirements, the total exclusion of such cases from the consideration of the court may leave staff unprotected. Exceptions to the non-discrimination rules are allowed, but only where they are for a legitimate aim and proportionate. It would be preferable, and more compatible with the Directive to require any exceptions that apply to Churches to be subject to review by courts to ensure that they are objective and reasonable. Clearly, in many cases involving the appointment of clergy or others who conduct religious services or teaching, discrimination on grounds of religion is likely to be proportionate. Courts in interpreting the Directive will have regard to the clear case law of the ECHR which protects the rights of religious groups to select their own leaders, as part of the protection due to religious groups. However, it is preferable to provide review of exceptions by the Court using the standard of proportionality rather than exempting religious bodies all together.

8. Application of international standards

Most partners would not use international standards in their argumentation for various reasons.

In Great Britain the woman would have a right under the domestic Sex Discrimination Act, so no international

standards are to be applied. The situation would be the same in Denmark and Sweden. In Norway one would refer to international standards only if there is an ambiguous interpretation of the national law. Greece would take into consideration the theological principles of the church. In the Netherlands there is a reference to the ECJ jurisdiction.

As the ECHR has the status of a constitutional law in Austria, it would be used in the argumentation of the case.

In Slovakia the international standards would be taken into account as an adjunctive argument.

Conclusions and recommendations

This analysis focused on Equinet members' national anti-discrimination legislation in relation to churches and other ecclesiastical communities and the interpretation and application of the exceptions for occupational activities according to Article 4 of the Employment Equality Directive.

In most countries, religious groups fall outside the scope of equal treatment legislation, as their activities even in the employment field are seen as a “spiritual matter” or as an “internal matter”, but it is far from clear what these terms actually mean. Whether hiring a preacher would be considered an internal matter of a church or indeed “work” at all in the meaning of the ECJ and the national courts' jurisdiction depends on interpretation.

Regarding the conflict between religious freedom and gender equality, this case study suggests that there is no consensus among Member States.

There is a lack of consistency concerning the terminology and practice of the Member States in their application of the exception in Art. 4 par. 2 of the Employment Equality Directive to churches.

Some members of the Dynamic Interpretation working group (Denmark, the Netherlands, Slovakia) are of the opinion that the Employment Equality Directive 2000/78/EC is not applicable in the present case because gender as a discrimination ground is not covered by this Directive.

Even the recast Directive 2002/73/EC uses only a general term of “employer”, without any special regard to an employer in the form of a church or a religious group.

Freedom of religion in relation to gender equality is mentioned in point 3 of the Preamble of Council Directive 2004/113/EC, but it is not applicable in the present case because the directive governs the application of the principle of equality between men and women in the access to and supply of goods and services, not in employment.

An analysis of the relevant anti-discrimination legislation in the EU shows that it is not obvious which provision of EC law would allow national legislators to give religious organisations such broad autonomy to regulate their internal affairs without any regard to the principle of equality.

In so far as the EU respects fundamental rights as guaranteed by the European Convention of Human Rights and the jurisdiction of the European Court for Human Rights, it is recommended that the case law of the ECJ, the ECHR and that of the national supreme courts be taken into account when considering whether a church has discriminated in excess of the admissible exception. This case law will provide guidelines for the interpretation and balancing of conflicting rights.

It is further recommended that the exception be interpreted restrictively to avoid the risk of lowering the effectiveness of the protection of victims of discriminatory practices by churches on grounds other than religion or belief.

This case study was prepared by ***Alexandra Strážnická*** *(Lawyer - Slovak National Centre for Human Rights)*

Chapter 2
Case study on race, religion and child custody

This case focuses on a child taken into custody by the social authorities and their refusal to give the parents and the child access to each other, thus denying the child access to her parents and her culture and religion. Questions raised by the case include whether parents with a different ethnic background would have been denied access to their child under the same circumstances and whether a child with a different ethnic background would have been taken into custody on the same grounds. The case is based on an actual complaint that came before the Swedish Ombudsman against Ethnic Discrimination in February 2006.

Case

ZH, a Muslim, moved from Iran to Sweden in 1989. She has a daughter H (aged 4 today). She got divorced from her husband after a difficult marriage, during which her husband periodically harassed and physically abused her.

The pregnancy preceding her daughter's birth was physically challenging. For this reason her physician and she herself suggested, at that time, that she should receive assistance at home from the social authorities. Thus, there was an initial request from ZH to the social authorities to receive their help and support at home.

ZH has an intensive character and has problems with H's eating. ZH's former husband continues to periodically harass and physically abuse her.

The social authorities a few months later declare that they cannot meet the mother's need for support at home and decide instead, under direct threat of taking custody of the child by force, that the mother and daughter shall be placed in a rehabilitation centre (*behandlingshem*) for treatment of ZH's aggression and H's eating disorder.

After 15 months ZH refuses to co-operate because she feels supervised and ethnically harassed by the staff of the centre. She continuously comes into conflict with them.

The social authorities then decide to permanently separate the daughter from her mother by forcibly taking custody of the child on the grounds of H's eating disorder. The mother's right of access to her child is limited to a three-hour meeting once a month under the supervision of the social authorities and one phone call a month, on the grounds that H gets upset as a result of the meetings.

H is placed, concurrently with and ever since the above decision, in an entirely Swedish foster home with no real possibility to come into contact with her mother's culture, mother tongue or religion etc. The social authorities have declared that they, as of today, see no possibility of reuniting H with ZH, as they are still working on separating them.

According to ZH the authorities are clearly attempting to alienate her from her daughter. Swedish norms and values have been repeatedly referred to in conversations with the mother by both the social authorities and the foster home's staff during oral confrontations questioning the mother's capacity to act as custodian and caretaker of her child. The visit is often cancelled by the social authorities because H gets upset by meeting ZH; the foster parents do not speak any other language than Swedish; H has no possibility of practicing her religion in the foster home; the foster parents feed H pork; neither ZH nor the father get to celebrate the special holidays from their culture with H; the foster home continues to harass H when she speaks Farsi with her mother – with no action taken from the authorities. ZH's aggression appears only in contact with the social authorities and not against H. She believes that it is her rather intensive and outspoken character, as a contrast to the rather quiet and reserved "Swedish" character, that makes the social authorities think she is "aggressive". The social authorities refuse to have a psychiatrist examine ZH and H together in order to establish whether there is any psychiatric disorder, and they do not recognize an examination undertaken on ZH's behalf by an independent psychiatrist. There is no medical evidence, nor has there ever been any, that H has ever suffered from an eating disorder in the medical sense.

The situation between ZH and her ex-husband is stabilised today and they have both been granted a limited access to the child.

ZH feels discriminated against because of:

- the decision of the social authorities to threaten ZH to comply with them;
- the decision of the social authorities to take the child into foster care;
- the decision of the social authorities to limit ZH's access to H.

She feels her child has no real possibility of coming into contact with her mother's culture, mother tongue, religion etc.

Questions

Consider the case in the context of your national legislation and jurisprudence or describe how the case would be considered by the competent authority in your country. In particular, consider the following specific questions:

1. Does the case fall within the scope of anti-discrimination law in you country? Please explain how or why not.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

3. Which ground(s) would apply here? Please explain.

4. Would the following decisions constitute direct or indirect discrimination or no discrimination at all?
a. the decision of the social authorities to threaten ZH to comply with them;
b. the decision of the social authorities to take the child in foster care;
c. the decision of the social authorities to limit ZH access to H;

5. If you find it to be discrimination can your organisation act in some way against (or in spite of) courts rulings in this case?

6. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

7. If you find that this case leads to direct or indirect discrimination, would there be an exception under your national legislation? Please explain how you would approach the analysis.

8. Would you use international standards in your argumentation (e.g. UN Charter, UN Conventions or ECHR), if so which and why?

Summary of findings

The analysis draws on 6 responses, received from the following equality bodies:

- Austrian National Equality Body
- Belgian Centre for Equal Opportunities and Opposition to racism (CEOOR)
- Hungarian Equal Treatment Authority
- Dutch Equal Treatment Commission
- Norwegian Equality and Anti-discrimination Ombud
- Swedish Ombudsman against Discrimination[4]

1. Scope of anti-discrimination law

According to the Belgian CEOOR, decisions taken by the Youth Tribunal and/or judicial youth protection agencies fall outside the scope of both Directive 2000/43/EC and Directive 2000/78/EC, as well as Belgian federal anti-discrimination legislation laid down in the 10 May 2007 Anti-discrimination, Anti-racism, and Gender Acts. The youth protection legislation cannot be reduced to a matter of "access to and offering of (public) services" nor "social protection" (in the light of the EC Treaty).

On the other hand, the afore-mentioned acts have been made applicable to "statements in official documents and minutes". Therefore, if for example a report made by a non-judicial youth protection agency or even by the Youth Court's social service contained discriminatory statements, resort to the above-mentioned legislation may be possible (although there is no explicit mention of such statements being made by the social authorities in ZH's case). In addition, the said federal acts penalise *intentional* discrimination by civil servants and public officers.

However, since the matter in this case is governed by the Communities in Belgium, the federal anti-discrimination acts cannot be invoked.

[4] This response was submitted in the form of comments to the draft of the analysis.

In Hungary, the case would fall within the scope of anti-discrimination law. According to Article 4 (1) c.) and h.) of the Equal Treatment Act the principal of equal treatment shall be observed by organisations exercising powers as authorities, as well as persons and institutions providing social care and child protection services and child welfare services. Under Article 24 paragraph a.)-b.) of the Act, the principle of equal treatment shall be enforced in respect of social security, particularly in the course of claiming and ensuring benefits financed by the social security systems, and social benefits, financial and in-kind child protection or personal care. According to Article 8, paragraph b.) and f.) of the same Act all dispositions as a result of which a person or a group is treated or would be treated less favourably than another person or group in a comparable situation because of his/her racial origin, mother tongue, religion or ideological conviction are considered direct discrimination. Since in the present case it is not obvious who has been discriminated against, it is difficult to state the relevant provisions of the Equal Treatment Act, because the ground of discrimination depends on the presumed characteristics of the aggrieved party.

In Austria, the answer would depend on the definition and understanding of the term “goods and services”. Neither the Directive 2000/43/EC nor the Austrian Equal Treatment Act provide a definition of the term "goods and services". Moreover, the scope of Directive 2000/43/EC is much broader than this, covering not only goods and services but also education, social advantages and social protection. Looking at section 3 of Directive 2000/43/EC, it is quite clear that this directive applies also to the public sector, including public bodies. It is nearly impossible to come to a final conclusion about the scope of “goods and services” at this stage as there is hardly any case law on the matter and in-depth and compelling academic arguments are very few.

In Norway the case would fall within the scope of the Anti-Discrimination Act which prohibits discrimination in all areas of society on several the grounds including ethnicity, language and religion.

The Equal Treatment Act in the Netherlands prohibits discrimination on the ground of race in social protection, including social security and social advantages. It is not certain whether the relevant section of this act is broad enough to cover the case in question. The section is relatively new and the legal history of this section indicates that the term "social protection" includes all aspects of welfare. This may imply that the decisions of social authorities fall under the term "social protection", as a result of which the case could be considered under the said section.

In Sweden, the preparatory works of the Act against Discrimination from 2003 clearly defines what social services are. Discrimination on the grounds of ethnic origin and religion is prohibited in connection with all actions that the social authorities can take according to all social legislation. It is clearly stated that the law is applicable to child custody cases as well.

2. Competent courts/organisations

The partners had different approaches to dealing with a complaint of this nature. In Austria, where it was considered that the case would fall within the scope of the Equal Treatment Act, the national equality body would be competent to provide advice, support and information and the Equal Treatment Commission would be able to issue a non-binding decision in matters concerning possible discrimination. Moreover, the case could be brought before a district court.

In Belgium the case would have to be brought before a Youth tribunal if the mother felt that the cultural-religious identity of her child was not being respected by the foster family. In Norway the case could either be brought before a district court (court of first instance) or be considered by the Equality and Anti-Discrimination Ombud. In the Netherlands, assuming the case would fall within the scope of the Equal Treatment Act, the Dutch Equal Treatment Commission would be competent and could give a non-binding opinion on the case. A district court would also be competent and could issue a binding opinion on the case.

In Hungary the Equal Treatment Authority and the Civil Rights' Ombudsman would be competent to deal with this case, but the procedure and decisions would not be examined, only the question of equal treatment. The Equal Treatment Authority is not competent to investigate decisions and measures of public power taken by the Parliament, the President of the Republic, the Constitutional Court, the State Audit Office, and the Parliamentary Commissioner for civil rights, the Parliamentary Commissioner for national and ethnic minority rights, the Parliamentary Commissioner for data protection, the courts and the public prosecution. However, other public bodies' decisions could be supervised by the Authority, though it can only examine compliance with non-discrimination provisions. Investigations of the Authority can only refer to the decisions and the procedure of the child welfare agency when a violation of the principle of equal treatment has been established.

In Sweden the competent courts are the district courts. A discrimination case can be brought before a district court by the complainant with (or without) the assistance of a lawyer. The Ombudsman against Ethnic Discrimination can also bring a case to the district court.

3. Grounds of discrimination

In the Netherlands the applicable ground would be race. It would not be possible to examine whether there is also discrimination on the ground of religion. The section for social protection (including governmental actions) is limited to the grounds of race. The prohibition of discrimination in the sphere of goods and services does not regulate treatment which follows from a purely governmental task.

In Hungary there is protection on ethnic grounds pursuant to which freedom of religion and mother tongue should be respected.

Under Norwegian law the applicable grounds would be ethnicity, language and religion.

In Austria it can be argued that both religion and ethnic belonging apply, although the Equal Treatment Act limits the protection of discrimination to ethnic belonging in the area of goods and services, social protection and social advantages.

In Belgium, race, religion, national or social origin and language may be relevant in the case. In Sweden discrimination is prohibited on grounds of ethnic origin and religious belief.

4. Direct/indirect/no discrimination

4a. decision to threaten ZH to comply with the social authorities

In Belgium the specific anti-discrimination acts would not be applicable. The case would be more likely to fall under the European Convention on Human Rights as an issue of fundamental rights (of which the right not to be discriminated against is one).

In Austria, discrimination against ZH can not be excluded and may also be viewed as taking the form of harassment. If ZH is treated less favourably than a Swedish mother would have been treated in a comparable situation, the decision could be seen as direct discrimination (assuming the case falls within the scope of the equal treatment legislation).

In Norway the actions taken in the case would not be considered to constitute discrimination unless there are circumstances indicating that ZH's ethnicity, religion or language were factors in the decision-making process. The governing rule in cases concerning foster care is to consider what is in the best interest of the child.

In Hungary the case would constitute direct discrimination. If the complainant (ZH) is treated less favourably than another person or group has been or would be treated in a comparable situation - for instance a Swedish mother - because of her ethnicity, religious beliefs and mother tongue the decision could be considered to constitute direct discrimination. According to the Equal Treatment Act the aggrieved party has to prove that he/she possesses a protected characteristic covered by the Act and has

suffered a disadvantage as a result of that characteristic.

In the Netherlands ZH would have to establish facts from which it may be presumed that discrimination has taken place, in this case a relation between the decisions of the social authorities and the race of ZH and her child. The Dutch answer indicates that whether or not the presumption of discrimination can be established would depend on the social authorities' counter arguments, about which the case as presented provides insufficient information. Similarly, were a presumption of discrimination established and the social authorities thus required to prove that the decisions made were not in breach of the Equal Treatment Act, the outcome would depend on the arguments of the social authorities. If the decision was considered to constitute discrimination, it would be indirect discrimination on the ground of race. The decision would only constitute direct discrimination if the social authorities treated ZH or her daughter less favourably because of their origin, which is unlikely to be the case here.

In Sweden ZH has to establish facts from which it may be presumed that she has been treated less favourably because of her ethnic origin and/or religion. If the social authorities or the rehabilitation centre force her to comply with rules such as not speaking her mother-tongue with her child at the rehabilitation centre, and if there is no objective justification for this, the execution of the decision requiring her to stay at this rehabilitation centre could very well constitute discrimination on grounds of ethnic origin.

4b. decision to take the child into foster care

The Netherlands and Austria would approach this question in the same way that they approached question 4a.

In Belgium it is suggested that the case could constitute a violation of, among others, Art. 8 of ECHR on the right to respect for private and family life). This could in turn raise the question of whether a violation of this right would also imply inequality in the enjoyment of the right.

In Sweden, if a child is taken into custody on less severe grounds than usual in custody cases and in the context of an ethnic or religious connection, the case might constitute direct or indirect discrimination.

4c. decision to limit ZH's access to her daughter

The Netherlands and Austria: see approach described under 4a.
Belgium: see approach described under 4a and 4b, and response to question 5.
Hungary: see response to question 5.

In Norway the decision to prevent ZH and H from speaking Farsi together and the refusal to let H exercise her religion and celebrate special holidays might constitute discrimination. While the language aspect of the case may be considered to be direct discrimination, the refusal to make arrangements to give the child the opportunity to exercise her religion and take part in the traditions of her culture may be considered to constitute indirect discrimination.

In Sweden the decision to limit the mother's access to the child may constitute both direct and indirect discrimination.

5. Action against court ruling

In Norway the Equality and Anti-discrimination Ombud cannot act against court rulings. Cases that are brought before a court or that have been through the court system cannot be reviewed by the Ombud.

The Dutch Equal Treatment Commission can give an opinion in cases for which a court ruling already exists, but it is not their practice.

The Austrian National Equality Body is not entitled to act against court rulings. The same applies for the Norwegian Equality and Anti-discrimination Ombud.

In Hungary the Civil Rights Ombudsman does not investigate the executive decisions and measures of courts. The Equal Treatment Authority cannot investigate the decisions and measures of

public power by court. However, in the case at hand the responsibility and actions of other administrative bodies could be examined under certain limited conditions as described in the response to question 2.

In Belgium the CEOOR, as a non-judicial public agency, is in no way entitled to act against court rulings. Nor would it have the means as the case falls outside the scope of the legislation. If the core of the problem lay in the intercultural communication between ZH and the social authorities, CEOOR's Integration Department could attempt to deal with the case from a non-legal perspective. The CEOOR cannot bring a complaint before the ECHR.

In Sweden the Ombudsman against Discrimination may be able to take action against a particular element of a court or authority decision that it considers to be discriminatory but not against the court ruling as such. It is suggested that discrimination in the present case is likely to have taken place before the court ruling and as a result of the social authorities' examination of the case, which may have been less thorough than usual.

6. Objective justification test

In Hungary, if the case concerned an ethnic minority there would be no justification. According to the Equal Treatment Act if there is a breach of basic constitutional rights the justification that could apply is stricter than objective justification. The relevant section of the Equal Treatment Act states that unless this law stipulates otherwise, an action, conduct, omission, requirement, order or practice shall not be deemed to violate the requirement of equal treatment if it restricts the aggrieved party's fundamental right for the sake of the enforcement of another fundamental right, provided that the restriction is absolutely necessary, suitable for achieving the aim and proportionate with the aim, or in cases not falling under the scope of the above mentioned point, it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation.

The above cited rule shall not be applied concerning differentiation based on points b)-e) of Article 8 of the Equal Treatment Act i.e. racial affiliation, colour of skin, nationality (not in the sense of citizenship) and belonging to a national or ethnic minority. Since Directive 2000/43/EC does not allow for objective justification in the case of direct discrimination based on racial or ethnic origin, the Hungarian legislators removed the relevant grounds from the scope of objective justification (Article 7 paragraph (2) of the Equal Treatment Act.)

Belgium argues that the facts in ZH's case should be analysed in the light of fundamental rights provisions and refers to ECHR case law on the possible incompatibility of limiting parents' custodial and access rights on the one hand, and the right to respect for private and family life on the other hand.

Under Norwegian law the objective justification test states that differential treatment necessary to achieve a legitimate aim, and which is proportionate, is not considered to be discrimination under the Anti-Discrimination Act. If the social authorities and foster parents can eliminate or diminish the disadvantages by accessible and inexpensive means, there would be no objective justification. Unless the authorities can prove that it would be contrary to the best interest of H to speak her language with her mother, take part in her traditions and exercise her religion, it would seem that there would be no objective justification for the discrimination in this case.

In Austria the Equal Treatment Act does not provide for justification in the case of direct discrimination in areas outside of employment.

Under Dutch equal treatment legislation the respondent may put forward facts and circumstances which justify indirect discrimination. These must be examined in relation to the specific situation by assessing the aim of the discrimination and the means used to achieve this aim. The intended aim must be legitimate, in the sense that it must be sufficiently important and non-discriminating, and the means used must be appropriate and necessary. A means is appropriate if it is suitable for achieving the intended aim, and necessary if the same aim cannot be

achieved by using other, less discriminating means and if the means are proportionate to the aim. It is only when all these conditions are satisfied that the indirect discrimination does not constitute a violation of equal treatment legislation.

If the present case were found to be one of indirect discrimination on the ground of race, the Dutch Equal Treatment Commission would ask the social authorities to explain the aim of their decisions. While the case does not provide information in this respect, the social authorities are likely to argue that they acted in the best interest of the child. The Dutch Equal Treatment Commission would not be able to weigh this interest, since it lacks the knowledge the social authorities have, and would therefore base its opinion on the information provided by the social authorities. The Dutch Equal Treatment Commission would make use of section 3 of the UN Convention on the Rights of the Child.

In Sweden there is no objective justification in the law prohibiting discrimination. Objective justification only exists in the employment area and in the Act prohibiting discrimination in University Education.

7. Exceptions under national legislation

The Netherlands only has exceptions to direct discrimination under the Equal Treatment Act. In the case of indirect discrimination there could be an objective justification.

In Norway, the Convention on the Rights of the Child and the ECHR are given priority over national legislation. If there were a violation of the Anti-Discrimination Act, the CRC or the EHCR would prevail if there was a conflict of laws. Under anti-discrimination law the only possible exception would be the objective justification rule.

There are no exceptions in Hungary, as described under question 6, nor Sweden.

8. Application of international standards

Hungary would use international standards where appropriate.

For Belgium the case is essentially a fundamental rights issue and the argumentation is based on ECHR.

In Norway CRC would be an important factor, as well as ECHR, but the Ombud does not monitor or enforce these conventions and would give its statement based on anti-discrimination legislation, including the UN Convention on the Elimination of Racial Discrimination and the 2000/43/EC Directive.

Austria would use ECHR in its argumentation, especially Articles 8 and 9.

The Netherlands would refer to the Race Directive and, for the objective justification test, to section 3 of CRC.

Sweden would consider tackling the case with ECHR argumentation as an alternative.

Conclusions and recommendations

The members from different countries have fairly different approaches to the case.

The case would fall under national anti-discrimination legislation in Norway and Hungary.

In Belgium, Austria and The Netherlands the question arises as to whether taking a child into custody falls under the concept of “services”. Austria points out that there is no definition of “services” in Directive 2000/43/EC. Social protection in Austria is understood as covering all legal systems of social protection like health, pension and accident insurance and all benefits from those insurances. In the Netherlands the equal treatment legislation prohibits discrimination on the ground of race in social protection, but it is not clear whether the relevant section is broad enough for the case in question.

This seems to be a somewhat common problem. All countries have fairly new

legislation in this area and this aspect has not yet been decided by any judicial instance.

There are two possible approaches in this case; either to see it as discrimination on the ground of race in connection with social services and, if the scope of that is not broad enough one could argue that it is a service from a local or public authority. Or, on the other hand, to take the view that child custody is not a "service offered to the public".

Regardless of whether or not the decision to take the child into custody is discriminatory, the child should have a right to have access to the parents - and vice versa. The key issue in this case is whether there is a reason for not letting them have access to each other and if this could constitute discrimination in the implementation of the custody decision.

Furthermore, regarding the question of whether this is a discrimination case, it is interesting to note that Belgium sees the case as a fundamental rights issue.

Other countries, such as Austria, come to the conclusion that there is not enough information to determine whether ZH has been treated less favourably than a Swedish mother would have been in a comparable situation. Norway points out that the case cannot be considered a discrimination case unless there are circumstances indicating that ZH's ethnicity, religion or language were factors in the decision-making process. The Netherlands also points out that ZH would have to establish facts from which it may be presumed that discrimination has taken place. There has to be a relation between the decisions of the social authorities and the race of ZH and her child. It is also pointed out that it is not certain that a presumption of discrimination can be established, not knowing what arguments the social authorities have.

A general conclusion in this case is that youth protection should have sufficient safeguards in order to ensure contact between children taken into custody and their parents.

Another important conclusion is that clear definitions of "social protection" in Directive 2000/43/EC and of "goods and services" in Directive 2004/113/EC (but also used in relation to grounds other than gender in various European countries) are needed in order to be able to determine the scope of these concepts. Equality bodies have hardly any case law or compelling academic insight to fall back on.

*This case study was prepared by **Ingrid Krogius** (Legal Officer, Swedish Ombudsman against ethnic Discrimination)*

Chapter 3
Case study on age, recruitment and training

This case focuses on age discrimination and issues arising from the interpretation of Articles 4(1) and 6 of the Employment Equality Directive regarding exceptions for occupational activities and differences in treatment on the ground of age. The case is based on an actual complaint that came before the Norwegian Equality and Anti-Discrimination Ombud in 2007.

Case

The Ministry of Foreign Affairs in Equaliland recruits 15-20 new diplomats each year. The Foreign Service has a three-year training programme for the new diplomats. The training programme consists of a six-week introduction course, 15 months on-the-job training in two different departments in the Ministry of Foreign Affairs, a six-month intensive course, language courses, and one year at an Equalilandish embassy or delegation.

The Ministry of Foreign Affairs advertised its training programme stating that suitable candidates are persons who have:

1. Citizenship of Equaliland;
2. A university degree or equivalent with excellent academic results;
3. High proficiency in English and preferably other languages;
4. Strong interpersonal and intercultural skills;
5. International experience;
6. Adaptability;
7. Age: between 25 and 32 years.

Candidates who have just finished their education as well as candidates with some relevant work experience can apply. The Ministry of Foreign Affairs encourages persons with a multicultural background to apply.

After completing the training programme the new diplomats are, as a general rule, offered permanent positions in the Ministry of Foreign Affairs. These positions are subject to a rotation principle, meaning that the diplomats work at embassies abroad as well as at the Ministry of Foreign Affairs on a 3-year alternate basis.

According to the Ministry of Foreign Affairs the rotation principle shall ensure that all diplomats obtain a broad experience, in order to qualify them as high-level diplomats such as ambassadors and heads of delegations.

Mr. Hansen, age 43, applied for a position in the training programme. Mr. Hansen has a PhD in Political Science and speaks English and French fluently. He has worked as a journalist and has worked abroad as a junior expert for the UN. Mr. Hansen was not invited for an interview. He was told that he was a good candidate, but he did not meet the age requirements.

The retirement age for diplomats in the Foreign Service of Equaliland is 70 years, but the diplomat can choose to retire earlier, at the age of 62 years and up. However, at the age of 67 the diplomats are entitled to their state pension, and this is the common retirement age.

Mr. Hansen argued that he was discriminated against because of his age. Upon completion of the three-year training programme he would be 45 years old. In theory he would have the possibility to work in the Foreign Service for another 25 years, and for 17 years at a minimum. He was very well qualified in all other respects and it would seem that his age was the only reason he was disqualified.

The Ministry of Foreign Affairs states that the age requirement is necessary. It takes a long time to achieve the competence necessary to become a high level diplomat. Furthermore, the Ministry must ensure that it has well qualified personnel at all times. Without the age requirement the resources spent on the training programme cannot be justified[5].

Questions

Consider the case in the context of your national legislation and jurisprudence, or describe how the case would be considered by the competent authority in your country. In particular, consider the following specific questions:

1. Does the case fall within the scope of anti discrimination law in your country? Please explain how or why not. If a case like this according to your opinion would not arise in your country, please explain why not.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system).

3. Would you consider the age requirement to constitute direct or indirect discrimination or no discrimination at all?

[5] Case based on statement 07/33-8

4. If you find that this case leads to direct or indirect discrimination, does an exception as mentioned in Article 4 (1) of Directive 2000/78/EC, exist in your country and would it apply in this case?

If yes, please specifically elaborate on:

- whether the characteristic constitutes a genuine and determining *occupational requirement; and*

- whether the objective of the requirement is legitimate *and the occupational requirement is* proportionate*.*

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Does an exception as mentioned in Article 6 of Directive 2000/78/EC, exist in your country and would it apply in this case? If yes, please elaborate on the objective justification test.

6. Would you use international standards/international instruments in your argumentation? If yes, please explain.

Legislation

Article 4(1) of Directive 2000/78/EC

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Article 6 of Directive 2000/78/EC

Justification of differences of treatment on grounds of age
1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:
(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Summary of findings

The analysis draws on seven responses, received from the following equality bodies[6]:

- Austrian Ombud for Equal Treatment
- Belgian Centre for Equal Opportunities and Opposition to Racism
- Danish Complaints Committee for Ethnic Equal Treatment
- Hungarian Equal Treatment Authority
- Dutch Equal Treatment Commission
- Norwegian Equality and Anti-Discrimination Ombud
- Slovakian National Centre for Human Rights

1. Scope of anti-discrimination law

All equality bodies based their case solutions on national equal treatment legislation. Austria and Belgium are federal states, with anti-discrimination legislation at both federal and provincial level (Austria) or Community/Region level (Belgium). The Ministry of Foreign Affairs is a federal public agency and the recruitment of diplomats would accordingly be considered under federal anti-discrimination legislation, both in Austria and Belgium.

Belgium referred to the 25 April 1956 (updated) Royal Decree on staff regulations for the Ministry of Foreign Affairs, which only determines a *minimum* age requirement (22 years) for diplomat candidates. It is therefore very unlikely that a similar case would arise in Belgium.

2. Competent courts/organisations

The partners had different approaches to dealing with a complaint of this nature.

In Austria the Federal Equal Treatment Commission and the Labour court (judgment on damages) would be competent. The Commissions' statements are legally non-binding.

In Belgium, the CEOOR has a specific non-judicial competence to deal with discrimination cases. As to court competence in Belgium, this case would have to be brought before the Council of State, which is competent to both suspend and annul administrative acts of both a general, regulatory nature (e.g. Royal Decree containing supposedly unlawful age criteria) and an individual nature (e.g. administrative decision to refuse Mr. Hansen's candidature).

Denmark does not yet have an administrative complaints committee for cases of age discrimination. A complaint about age discrimination in Denmark would be dealt with within the traditional court system, starting at city court level.

The Dutch Equal Treatment Commission is the competent authority in the Netherlands, alongside the district courts.

In Hungary and Slovakia, the Equal Treatment Authority and the National Centre for Human Rights would be competent, as well as the labour court and district court respectively and the Labour Inspectorates in both countries.

In Norway, the Equality and Anti-Discrimination Ombud, as well as the district courts would be competent. The Ombud's statements are legally non-binding.

3. Direct/indirect/no discrimination

All partners unanimously agreed that the age requirement constituted direct discrimination. The advertisement referred specifically to an age between 25 and 32 years. Persons outside this age group were excluded automatically. In some countries, including for example Belgium, it is relevant to distinguish the terms distinction and discrimination, the latter being the unlawful distinction. For the sake of simplicity the term discrimination will be used in this analysis.

4. Exceptions under national legislation

All respondents, except the Netherlands, have legislation providing for exceptions with regard to characteristics considered to be "genuine and determining occupational requirements". However,

[6] Sweden did not participate in this case study because it has not yet implemented Directive 2007/78/EC with respect to age discrimination.

none found this exception to be applicable in this case. In Belgium, a possibility exists to establish by Royal Decree a non-exhaustive list of situations in which one of the characteristics is a "genuine and determining occupational requirement". In such case, the Anti-discrimination Act cannot be invoked. The Royal Decree is, however, subject to the Belgian Constitution, EC law or other international standards.

The Dutch Equal Treatment in Employment Act does not explicitly include such an exception with regard to the ground of age (only for the grounds of sex and race). Arguments related to a genuine and determining occupational requirement could in some cases be relevant upon application of the objective justification test.

The alleged justification for the age requirement would in all countries be considered according to Article 6 of Directive 2000/78/EC.

5. Objective justification test

All members have similar exceptions in their national legislation. Denmark was unable to comment more specifically on this question.

Both Belgium and Slovakia were of the opinion that the age requirement was based on a legitimate aim under art. 6(1) c) of the 2000/78/EC Directive ("training requirements"). Belgium argued that the length of the training programme may to some extent justify the use of age criteria. However, the given requirements do not seem appropriate and necessary, bearing in mind the retirement age for diplomats (70/67/62 years). The failure to consider the relevant experience of candidates over 32 years of age stands contrary to the argument of the Ministry of Foreign Affairs that it needs qualified personnel.

The Netherlands noted that the case does not give insight into the aims of the discrimination and that this made it difficult to determine whether or not they were legitimate. If the aim was the need to have high-level diplomats or to ensure well-qualified personnel at all times, these aims would be legitimate since they meet a real need of the Ministry and are not intended to be discriminatory. Norway also agreed on this point. The Netherlands made reference to an actual case that came before the Dutch Equal Treatment Commission in 2005, where discrimination on the ground of age in order to ensure that the results of training exceeded the period of training and the related costs was considered a legitimate aim.

Slovakia pointed out that the legitimate aim may be pursued by less restrictive means. The Netherlands also questioned whether the means (the age requirement) were appropriate and suitable for achieving the aim (to have high-level diplomats or to ensure well-qualified personnel at all times). According to the Ministry, it takes a long time to achieve the competence necessary to become a high-level diplomat. They do not indicate however how long it takes. Mr. Hansen will be 45 years old upon completion of the three-year training programme and will in theory have the possibility to work in the Foreign Service for another 25 years, and for 17 years at a minimum. Furthermore, both Slovakia and the Netherlands stated that it is questionable whether the age policy is an appropriate means to ensure that young diplomats stay in the Foreign Service after completion of the training programme. To give a qualified opinion one would have to have statistical figures on how long diplomats stay in the Foreign Service, as well as the costs of the training.

Austria answered that "a long training period by itself or running through a designated entire diplomatic career cannot be considered as justification for an age limit". Under Austrian law, one would compare the length of the training period with the number of years the employer can be said to benefit from the employee. In the private sector the period of time for which the employer has a legitimate claim to recover the cost of training from the employee is limited to about 5 years. The Ministry of Foreign Affairs would benefit from Mr. Hansen for at least 17 years after the training period of 3 years. Furthermore, economic reasons alone (resources for the training programme) cannot justify such age requirement.

Hungary argued that the age requirement was not a legitimate aim, and stated that it

was not proportionate either, considering that Mr. Hansen would be able to work for 17-25 years in the Ministry of Foreign Affairs' service. His future service could be more than sufficient to build and complete his career as a diplomat.

Norway found the age requirement neither appropriate nor necessary, regardless of the legitimate aim of recovering the costs of the training, obtaining highly qualified personnel, and keeping diplomats in service or benefiting from their service for a reasonable period of time before retirement.

6. Application of international standards

Denmark was unable to answer this question, and Austria left this question unanswered.

In Belgium, a Royal Decree containing such age requirements for diplomat candidates could be challenged before the Council of State on possible non-conformity with the Belgian Constitution, in the light of the duty of the Belgian legislator under Article 16 of the 2000/78/EC Directive to abolish any laws, regulations and administrative provisions contrary to the principle of equal treatment.

Slovakia mentioned that a reference to EC anti-discrimination law would be made, including the Mangold case (C-144/04) and specifically the Court's statement that non-discrimination on the ground of age is a general principle of Community law.

Austria, the Netherlands and Norway would refer to and take into account section 6 (1)(c) of Directive 2000/78/EC (regarding the fixing of a maximum age for recruitment).

Conclusions and recommendations

The overall impression is that the members are in agreement on most answers. The case study was perhaps not designed to give rise to widely conflicting views.

It would seem that the responses to question 4 (on the exception for genuine and determining occupational requirements) are consistent with the understanding that the exception for genuine and determining occupational requirements is to be interpreted restrictively. Section 23 of the preamble of the Directive 2000/78/EC also states that a justification based on genuine and determining occupational requirements is applicable "*in very limited circumstances"*.

Further to question 5 on objective justification, although the *outcome* of the objective justification test was the same for all respondents, the application of the test was performed differently. Austria, Belgium, the Netherlands, Norway and Slovakia argued that recovering the costs and resources spent on the training programme was a legitimate aim.

A review of responses to the objective justification question would suggest that the arguments related to the objective justification test could be both more structured and more extensive. Each element of the test should be specifically identified and considered. For instance, a legitimate aim cannot in itself be discriminatory (Article 6 (1) of Directive 2000/78/EC "…differences of treatment… if they are *objectively and reasonably justified* by a legitimate aim…") so consideration of the legitimacy of the aim needs to be clearly isolated from consideration of other criteria and from the outcome of the test as a whole. Only the Netherlands and Norway approached the objective justification question in this manner.

As already mentioned Denmark does not yet have an administrative complaints committee for cases of age discrimination. There is, however, a proposal to establish such a committee for complaints covering all grounds. There would be many good reasons for establishing such an institution, one of which would be that a centralised forum for documentation and knowledge can give persons being discriminated against equal treatment in these matters, as well as high quality guidance. It is hoped that the proposal will be finalised during 2008.

This case study was prepared by Margrethe Søbstad (Senior Legal Adviser - The Norwegian Equality and Anti-discrimination Ombud)

Annex 1
Country responses to the case on religion, gender and the church

Austria

National Equality Body

Question 1:
The answer to that question depends on the legal status of the church in question. Religious groups can be constituted in various legal forms, from an explicitly acknowledged religious group to a religious group in the form of an association ("Verein").

Explicitly acknowledged religious groups have the right to regulate their internal matters autonomously, i.e. without state interference. Therefore, the state must also abstain from applying its laws to internal matters of explicitly acknowledged religious groups. In a judgement from 1974[7], the Austrian Supreme Court stated that internal matters are matters concerning the inner core of religious activities, such as preaching and exercising the rites, which could not be exercised reasonably in the presence of state interference. The overview of legal texts contained in the judgment by the Supreme Court suggests that matters of employment and appointment of clerical staff are always considered internal matters[8].

Whereas in general, discrimination on grounds of sex and religion in access to employment are within the scope of the Austrian Act on Equal Treatment, the present case does not fall within the scope of the Act on Equal Treatment due to the party involved and the autonomy granted to it.

Another issue concerning the applicability of the Act on Equal Treatment is whether the job as a preacher takes the form of a working contract in the meaning of the Act (see also answers to question 4).

Question 2:
Whether or not state courts or state institutions are competent to hear such a matter at all depends on the legal status of said church.

State courts are not competent to hear cases against explicitly acknowledged religious groups, if the case concerns an internal matter and if internal rules on the matter are in force.

If the acknowledged religious group does not have such internal rules, or if the religious group is not an acknowledged religious group, state courts or the Equal Treatment Commission are competent to hear the case.

The Equal Treatment Commission can issue a (non legally binding) decision in matters of possible discrimination.

The competent court for the present case would be the labour court. Labour courts of first instance are established on the level of a "Landesgericht", which "normally" is the second level of civil law courts; a first level court is called "Bezirksgericht" and mostly deals with small claims (up to EUR 10.000,-) and family law.

Question 3:
The case solely concerns gender discrimination: the church explicitly refuses the woman because it will only consider men as preachers. As the only distinguishing feature is the woman's sex, the case is about gender discrimination.

The woman's religion was not the reason for the unequal treatment, especially since she was not refused due to her religion.

Question 4:
First of all it has to be checked whether the "job as a preacher" constitutes a working contract at all. For example, priests of the Roman Catholic Church do not have a working contract with the Church.[9] For the Protestant Church, the Supreme Court has agreed that priests have a working contract with the Church.[10]

Legal writers, however, suggest that in conformity with general jurisprudence of the ECJ (European Court of Justice), any relationship in which work is carried out in exchange for money or goods necessary to support one's livelihood, is to be interpreted as a working contract for the purpose of equal treatment law.[11]

§ 3 No. 1 of the Equal Treatment Act states that there shall be no direct or indirect discrimination on grounds of sex and family status in the entry into a working relationship.

§ 5 Equal Treatment Act defines direct discrimination on grounds of sex as a situation in which one person is treated less favourably on grounds of sex than another is treated, has been treated or would be treated in a comparable situation.

[7] Judgement of the Supreme Court, 26 November 1976, Case Nr. 4 Ob 41/74.
[8] Confirmed in Judgement of the Supreme Court, 28 February 1996, Case Nr. 9 ObA 12/96.
[9] Judgement of the Supreme Court, 28 February 1996, Case Nr. 9 ObA 12/96.
[10] Judgement of the Supreme Court, 26 November 1976, Case Nr. 4 Ob 41/74.
[11] *Brigitte Schinkele,* „Die Kirchen als Arbeitgeber – Herausforderungen im Zusammenhang mit dem Tendenzschutz, der Nichtdiskriminierung und der Anerkennung von Schul- und Berufsausbildungen", published in the Austrian Archive on Law and Religion (öarr) 2003, page 56.

The woman was refused because of her sex as the specific Church only appoints men as preachers. The treatment is less favourable, because the woman obviously fulfils all demanded qualifications.

As a general rule, unequal treatment on grounds of sex cannot be justified and therefore constitutes (prohibited) discrimination. However, the general principle of equality prohibits treating comparative situations differently, unless the difference in treatment is objectively justified.[12]

Following this, the objective justification of the unequal treatment would have to be based on the right to autonomy that churches and religious groups have.

The specific Church refusing the woman's application relies on its interpretation of the Bible to argue the refusal. However, as there are already three women working as preachers and the internal statutes do not differentiate between the sexes, a certain sex of the preacher is not a precondition for the job.

The sex of the preacher therefore seems not to be in close connection with the annunciation of the messages on salvation and the teachings of the Church. Therefore, unequal treatment on grounds of sex constitutes discrimination, as the unequal treatment of men and women is not justified.

Question 5:
The exception mentioned in Article 4(1) and the one mentioned in Article 4(2) of Directive 2000/78/EC have been transposed into Austrian law. Both exceptions do not apply to the present case, as the case solely concerns discrimination on grounds of sex, which is not covered by Directive 2000/78/EC.

Question 6:
The case speaks of a "specific" Church refusing the application on grounds of sex. This reasoning would be valid if it is an independent religious group within this Church that sees a close connection between the sex of the preacher and the annunciation of the belief. In other words, an independent religious group within a larger Church might also have a certain degree of autonomy.

However, if the "specific" Church is not independent from the rest of the Church, the difference in treatment is not justified (see above, answer to question 4).

Question 7:
The European Convention on Human Rights (ECHR) has the status of a constitutional law in Austria. Art 9 of the ECHR states the following on religion:

Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The right to freedom of religion is also enjoyed by the religious groups themselves. In such cases, a person not willing to be subject to the rules of such group can exercise his/her right to freedom of religion by leaving the religious group.

Limitations on the right to freedom of religion are only possible if they are in the form of a law and necessary in a democratic society for the reasons exhaustively stated in Art 9 para 2 ECHR.

The internal discussion within the Austrian Equality Body led to the following opinion:
The «protection of the rights and freedom of others» might indicate protection from being discriminated against by the religious group, as it is a right not to be discriminated against. Yet in our opinion such protection would violate the religious group's freedom to religion and would go beyond what is necessary in a democratic society, because a person has the possibility of leaving the religious group. In a balance of interests in the present case, we think that the freedom of religion enjoyed by a religious group takes precedent over the right of a member of the group to not be discriminated against by the rules of the group.

Question 8:
As the European Convention on Human Rights has the status of a constitutional law in Austria, we would use it in the argumentation.

[12] ECJ, Case C-313/02, *Wippel*, para. 56.

Denmark

Danish Institute for Human Rights

Question 1:
Discrimination on the ground of gender in employment relations is covered by the Act on Gender Equality (2006-06-28 nr. 734). The act prohibits both direct and indirect discrimination, see section 2, and section 1.

The specific situation where a Church is recruiting priests is however exempt from the Act on Gender Equality. This follows from the Act on the derogation of the act on Gender Equality (BEK no. 350 of 10 July 1978). Gender can on this basis be a legal basis for employing priests.

Question 2:
Board of Gender Equality and the normal courts.

Question 3:
Gender.

Question 4:
Direct discrimination.

Question 5:
As mentioned exceptions exist regarding gender.

Furthermore a general exception relating to for instance requirements of a specific religion in accordance with Directive 2000/78/EC, article 4(1) and (2) does also exist, see the Act on the Prohibitions of Differential Treatment on the Labour Market, section 6 (1) and (2).

Question 5a:
Not relevant as the case would be perceived as gender discrimination.

Question 5b:
Not relevant as the case would be perceived as gender discrimination.

Question 6:
See 1. No objective justification is needed.

Question 7:
Not relevant as the case would be perceived as gender discrimination.

Question 8:
The case would be assessed by the Gender Equality Body on the basis of Danish Law implementing EC legislation.

Great Britain

Equal Opportunities Commission

Question 1:
Until relatively recently, ministers of religion fell outside the protection of employment law. This was because their employment was seen as a "spiritual matter" and therefore not regulated by employment law. However, the House of Lords (Great Britain's most senior appellate court) has held recently in the case of *Percy v Church of Scotland Board of National Mission* [2005] HL 73 that ministers of religion could be covered by the definition of employment contained in the SDA.

If *Percy* were to be followed in this scenario, this case would fall within the scope of Great Britain's Sex Discrimination Act 1975 ("SDA"). It is a case of direct discrimination.

Sections 1 and 2 set out what amounts to discrimination for the purposes of the Sex Discrimination Act. Section 1 (1) of the SDA states that a person discriminates against a woman if on the ground of her sex he treats her less favourably than he treats or would treat a man. Section 2 of the SDA provides that this provision applies equally to men.

Section 6 of the SDA deals specifically with discrimination in the employment field, setting out in what circumstances it is unlawful to discriminate. With regards to discrimination in the context of recruitment, section 6(1) of the SDA provides that it is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman:
- in the arrangements he makes for the purposes of determining who should be offered that employment, or
- in the terms on which he offers her that employment, or
- by refusing or deliberately omitting to offer her that employment.

Question 2:
At first instance, the woman would complain to an Employment Tribunal. This is a specialised tribunal, which deals only with complaints in the employment field. It is equivalent in level to the civil County Court (in England and Wales) or the civil Sheriff Court (in Scotland).

However, the Employment Tribunal enjoys many differences from the County and Sheriff Courts, both of which from part of the traditional civil court structure in Great Britain.

Employment Tribunals are normally presided over by a panel of three persons rather than a single judge. The Chairperson is legally qualified and requires at least 7 years post-

qualification experience. He/she is supported by two lay members (one is normally drawn from a pool of employer representatives and the other from a pool of employee representatives). Each member has an equal vote when determining the case.

Question 3:
The reason for the refusal to employ this woman is her gender. She has been refused employment simply on the basis that she is a woman. Her strongest claim is, therefore, one of sex discrimination.

However, the case might also fall within the scope of Great Britain's Employment Equality (Religion or Belief) Regulations 2003. These Regulations came into force in December 2003 and there is limited case-law to aid understanding of the extent of these Regulations.

The Regulations state that a person ("A") discriminates against another person ("B") if "on grounds of religion or belief" A treats B less favourably than he treats or would treat other persons. This direct discrimination on grounds of religion or belief is unlawful.

Interestingly, under the Regulations, the religion or belief that is at the root of the less favourable treatment does not (apparently) need to be the religion or belief of the person who is being treated less favourably. This should be contrasted with section 1 of the SDA where the less favourable treatment must be on the ground of *her* sex – in other words, that of the woman who is complaining of less favourable treatment.

The Regulations merely state that the less favourable treatment should be on grounds of religion or belief. It would therefore appear arguable for the woman in this case to complain of discrimination due to the religion or belief of those church members who have refused her employment.

Question 4:
Refusal to admit this woman would constitute direct discrimination. This woman has been refused employment simply because she is a woman. This would, therefore, amount to direct discrimination and cannot be justified.

Question 5:
Under the Employment Equality (Religion or Belief) Regulations 2003, Regulation 7 does allow for exceptions to the Regulations where being of a particular religion or belief is a genuine occupational requirement for the job. However, it is difficult to see how this would apply in this scenario. The woman belongs to the same religion as those who are appointing her. While the members of one particular branch of that church do not agree with woman preachers, this does not reflect the views of the wider Church to which she belongs. Crucially, the Church already employs women preachers.

Under the SDA, section 7 provides exceptions to the protection of the SDA where being of a particular gender is a genuine occupational requirement. However, the circumstances in which the genuine occupational requirement can be relied upon are limited. Section 7 states that being of a particular sex is a genuine occupational requirement for a job where:

- The essential nature of the job calls for a person of that sex for reasons of physiology (excluding physical strength or stamina) or,

- In dramatic performances or other entertainment, for reasons of authenticity: ***s.7(2)(a).***

- The job needs to be held by a person of that sex to preserve decency or privacy because of likely physical contact or because people are likely to be in a state of undress or using sanitary facilities: ***s.7(2)(b)****.*

- The job is likely to involve working or living in a private home and objection might reasonably be taken to allowing someone of the opposite sex the degree of physical or social contact with a person living in the home, or the knowledge of intimate details of such a person's life to which the job holder would be likely to have access: ***s.7(2)(b)(a).***

- It is impracticable for the job holder to live other than in the employer's premises, these do not have separate sleeping accommodation and sanitary facilities which could be used in privacy and it is not reasonable to expect the employer to equip the premises with such accommodation or to provide other premises: ***s.7(2)(c).***

- The work is done at a single sex hospital, prison or other establishment for persons requiring special care, supervision or attention and it is reasonable, having regard to the essential character of the establishment, that the job should not be held by a person of the opposite sex: ***s.7(2)(d).***

- The job involves providing personal services to individuals promoting their welfare or education, or similar personal services, which can most effectively be provided by someone of that sex: ***s.7(2)(e).***

- The job needs to be held by someone of that sex because it is likely to involve working outside the UK in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by someone of the opposite sex: ***s.7(2)(g).***

- The job is one of two to be held by a married couple: ***s.7(2)(h).***

Given the limited areas in which the genuine occupational requirement can be triggered under the SDA, it would not apply in this case. It is also unlikely to apply under the Employment Equality (Religion or Belief) Regulations, particularly given that the Church already employs female preachers.

Question 6:
This case amounts to direct discrimination. In Great Britain, direct discrimination on grounds of sex cannot be justified. It is unlawful regardless of intention or motive.

In cases of indirect discrimination, there can be objective justification if it can be shown that the discrimination was a proportionate means of achieving a legitimate aim.

Question 7:
In this scenario, the right of the Church to practice its religion has been invoked as a defence against employing a woman preacher. However the right to freedom of religion under the European Convention on Human Rights is a qualified right. This means that it can be interfered with so long as the interference is:
- Lawful
- For a legitimate purpose
- Proportionate; and
- Necessary in a democratic society.

Assuming that this woman would have a successful claim of sex discrimination in Great Britain, it would be extremely difficult for the Church to rely on a freedom of religion defence under the ECHR (particularly in the context of this scenario where the doctrine of the main Church allows for women preachers). Weighing up the four tests above, and having particular regard to the woman's rights under the SDA, on balance the Church's rights to freedom of religion would likely give way to the woman's rights to protection from discrimination.

If, however, the woman did not enjoy any protection under the SDA, the situation would be quite different. The protection from discrimination contained in Article 14 of the ECHR is a contingent right. This means that it can only be used if it is linked with another right. This is because the British Government has not signed Protocol 12, which would make Article 14 a free-standing right such that it could be relied upon separately.

Even if the woman could link her Article 14 right with another right, it is still arguable that she would not have a remedy using a human rights formulation of her case. This is because the Human Rights Act (Britain's transportation of the ECHR) can only be used against public authorities and the Church may not meet the definition of public authority.

Question 8:
In this scenario, the woman would have a right and remedy under the domestic SDA. It is, therefore, unlikely that international standards would be referred to in practice.

Greece

Greek Ombudsman

Question 1:
Such a case would be principally examined as a case of discrimination on grounds of sex according to Directive 2002/73. The above mentioned Directive has been implemented by Greece with law Nr. 3488/2006.

Question 2:
There is a problem of interpretation in this case because according to the provisions governing its general functioning (art. 3 par. 2 of Law Nr. 3094/2003) the Greek Ombudsman (G.O.) investigates complaints directed solely against state agencies or other public sector institutions. However, the Orthodox Church of Greece, as well as all other religious public law institutions of any known faith, are specifically exempted from the Greek Ombudsman's mandate. Parliamentary act Nr. 3488/2006 has extended the competence of the Greek Ombudsman in the case of discrimination on grounds of sex over the private sector in toto as well, stating that in such cases the G.O. acts jointly with the Body of Labour Inspectors. Yet, the afore-mentioned act failed to deal explicitly with the exemption of religious public bodies from the general competence of our Office. Therefore, while it is clear that, should the religious entity in our example be a private law body, the case would certainly fall under the joint jurisdiction of the Ombudsman and the Labour Inspectors. On the other hand, the eventuality of the religious entity of our example being a public law body would raise the interpretative issue of whether the competence of our Office has been tacitly extended by act 3488/2006, so as to specifically cover discrimination on grounds of sex effected by public bodies normally exempted from our general competence. No such case has occurred yet.

In any event, committees and special tribunals that exist within the Church of Greece or other religious institutions can examine such a case, as well as the Greek courts, whose jurisdiction depends on the legal nature of the case (civil or administrative).

Question 3:
In principle such a case could be considered one of gender discrimination. It would be probably mistaken to consider the case as falling under the concept of discrimination on

grounds of religious belief. The complainant has not been discriminated against on grounds of the religious beliefs she actually holds, since, ex hypothesis here, her credo is deemed of the appropriately orthodox kind. Things would probably be different if she had applied for the job of preacher through advancing a differential interpretation of the religious faith of the group she adheres to. In sum, religious discrimination is at stake, when it refers to the beliefs held by the complainant not the defendant.

Question 4:
According to the facts presented in this case-study, the internal statutes of the specific Church do not exclude women from the position of preachers; in fact three women are actually employed by it as preachers. Therefore, the rejection of a woman's application with the argument that *"the practice of that specific Church is to exclusively appoint men to the position of preacher"*, constitutes direct discrimination on grounds of sex. Yet, one could also construe the case in a different way allowing it to appear as a case of indirect discrimination but still on grounds of sex rather than religion. More specifically, despite the fact that the creed which is evoked by the board refusing the application of the defendant bars women for preacher's posts, it remains a religious argument which only incidentally amounts in practice to gender discrimination. In the case at hand, however, evoking such religious prohibition of female preachers is directly contradicted by the very practice of the said Church if not already by its internal statutes. Therefore one is obliged to assume that the real reasons of the Church's board in turning down the defendant's application were not religious at all but other, e.g. gender itself.

Question 5:
The exception of art. 4 (1&2) of Directive 2000/78 EC has been transferred into Greek law Nr. 3304/2005 (art. 9 par. 1 & 2). The crucial point in this case is that, although there is a provision of exception regarding occupational requirements in general and a special provision in case of occupational activities within churches and public or private organisations, these would be irrelevant to the case since the complainant has not been discriminated against for not being of the appropriate faith but for being a woman and not a man. Yet, if according to the internal statutes of the specific church, widespread tradition and publicly accessible dogmatic opinions characterising the relevant faith, women are barred from the position of preacher, as is the case in many versions of the Christian or Muslim faith (but not in the case of our example where both internal statutes and practice seem to allow women preachers), the gender sensitive occupational requirement should rather be accepted as determining as both genuine and proportionate according to article 2 para. 6 of the 2000/73 Directive since it is not up to the compulsive legislation of a liberal democratic society to impose dogmatic solutions internal to religious faiths. And such an issue will remain internal as long as the complainant insists both in keeping the said faith and in complaining about the practical implications thereof concerning recruitment of preachers.

Question 6:
See answers under 4 and 5.

Question 7:
According to Directive 2000/78 (art. 4 .2)

"in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos" and "should not justify discrimination on another ground".

Moreover, according article 4

"this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos".

The only difference in this case is that the organisational ethos of the specific church does not foresee an exclusion of women as preachers. This aspect should be taken under consideration in the investigation of an institution for equal treatment or a court and the competence of Member States to intervene in such a case. Even in such cases a Member State has to evaluate practices related to theological principles and views and/or the organisational ethos of a church or religious institution, that lie outside of the scope of the anti discrimination legislation.

Question 8:
See answer in question 7.

Hungary

Equal Treatment Authority

Question 1:
This case does not fall under the Equal Treatment Act because the scope of the Equal Treatment Act does not extend to relationships of ecclesiastical entities directly connected with the activities of the religious life of churches.

Question 2:
In this case the ecclesiastical (synod) court would be competent, because in the Republic of Hungary the Church and the State operate in separation (see the Constitution of the Republic of Hungary).

In this case the Act IV of 1990 concerning the freedom of conscience and religion, and concerning churches is relevant, and only the ecclesiastical court has competence.

The Netherlands

Equal Treatment Commission

Question 1:
The case would not fall within the scope of anti-discrimination legislation in the Netherlands, at least not within the scope of the Dutch Equal Treatment Act (ETA) for which the Equal Treatment Commission is competent. Pursuant to section 3, first sentence and para. (b) of the ETA, this Act does not apply to religious posts.

Partly in view of the principle of church-state separation the legislature, by including section 3 of the ETA, has attempted to achieve a balance between the effect of the equal treatment norms embodied in the Act and respect for the freedom of religion, in particular for church autonomy. Pursuant to this demarcation the equal treatment norms are declared not applicable to legal relations within religious communities and comparable organisations (para. (a)) nor to the office of minister of religion and study programmes and qualification requirements for such office (para. (b) and *Parliamentary Papers II* 1990/91, 22 014, No. 3, p. 77 and *Parliamentary Papers II* 1991/92, 22014, No. 10, p. 30). Section 3 of the Act thus embodies a statutory exception to the prohibition on discrimination.

The Equal Treatment Commission interprets exceptions to the prohibition on discrimination restrictively (cf. ECJ 15 May 1986, case 222/84 (*Johnston*), *Jur*. 1986, p. 1651 and ECJ 11 January 2000, case C-285/98 (*Kreil*), *Jur*. 2000, p. I-69, *NJ* 2000, 302). This rule serves to prevent this prohibition from losing its significance in society, also having regard to the underlying aim (preventing exclusion). At the same time the ETA is intended to leave room for multiformity, including religious diversity, and to safeguard the preconditions necessary for such multiformity.

With section 3 of the Act the legislature referred to matters directly related to the creed of the religious or ideological belief (*Parliamentary Papers II* 1990/91, 22 014, No. 3, p. 8). In addition to legal relations within religious communities and their independent sections and bodies and other associations of a religious nature (para. (a)), section 3 pertains to (internal) religious community matters concerning the office of minister of religion, including the qualification requirements for holding such office and the training programmes needed therefore (para. (b)). It follows from this that the equal treatment norms implied in the Equal Treatment Act apply in full to other relations than (internal) religious community relations, as referred to in section 3(a) of the Act, and to other matters than (internal) religious community matters concerning the qualification requirements for holding the office of minister of religion and the training programmes needed therefore, as referred to in section 3(b) of the Act. This is true, for example, in situations in which a community acts in social and economic life on an equal footing with other parties - i.e. outside its own organizational context (*Parliamentary Papers II* 1990/91, No. 3, 22 014, p. 7). In accordance with the legislative history the exception embodied in section 3 of the Act therefore does not apply to the jobs of cleaner, gardener and window-cleaner. It is true that in those cases there is a legal relation *with* a church member, but not a legal relation *within* a religious community (*Parliamentary Papers II* 1991/92, 22014, No. 5, p. 76). So the law leaves no room for such a broad interpretation of the principle of church autonomy, not in the wording of section 2:2(2) of the Dutch Civil Code either (cf. US Court of Appeals of the Third Circuit 24 May 2006, *Petruska v. Gannon Univerisy et al.*, No. 05-1222).

The post of preacher would fall within the exception of section 3 (b) ETA. There would thus be an exception to the prohibition of discrimination in this case and the Equal Treatment Commission would not be competent.

We would like to know the opinion of Equinet's working group on Dynamic Interpretation on whether or not they think that section 3 ETA is in line with Directive 2000/78/EC.

See for an interesting case relating to section 3 of the ETA: Equal treatment Commission 20 July 2006, opinion 2006-154.

In theory, the case could also be dealt with under the general section 1 of the 1983 Dutch Constitution, pursuant to which all persons in the Netherlands should be treated equally in equal circumstances, and discrimination on the grounds of among others religion is prohibited. The Equal Treatment Commission however is not competent to base its opinions on the Dutch Constitution. A judge would be competent to do so but he/she would have to test restrictively. A judge could also base its opinion on international human rights treaties which the Netherlands has signed and ratified as well as on unwritten law.

Question 2:
See under 1. The Dutch Equal Treatment Commission would not be competent. A district court would be competent and could give a binding opinion on this case. For this procedure, legal charges must be paid. In employment cases before a district court a lawyer is not obligatory.

Question 3:
Not applicable

Question 4:
Not applicable

Question 5:
Not applicable.

Question 6:
Not applicable

Question 7:
Partly in view of the principle of church-state separation the legislature, by including section 3 of the ETA, has attempted to achieve a balance between the effect of the equal treatment norms embodied in the Act and respect for the freedom of religion, in particular for church autonomy. Pursuant to this demarcation the equal treatment norms are declared not applicable to legal relations within religious communities and comparable organizations (para. (a)) nor to the office of minister of religion and study programmes and qualification requirements for such office (para. (b)). Section 3 of the Act thus embodies a statutory exception to the prohibition on discrimination.

Question 8:
See under question 1. We would refer to ECJ jurisprudence when explaining that the Equal Treatment Commission interprets exceptions to the prohibition on discrimination restrictively (cf. ECJ 15 May 1986, case 222/84 (*Johnston*), *Jur*. 1986, p. 1651 and ECJ 11 January 2000, case C-285/98 (*Kreil*), *Jur*. 2000, p. I-69, *NJ* 2000, 302).

Norway

Equality and Anti-Discrimination Ombud

Question 1:
The case would on the face of it fall within the scope of the Norwegian Gender Equality Act, which covers all areas of society, except church and religious communities´ internal affairs. Thus, the main question would be if the hiring of a preacher is considered to be internal affairs in this regard, and whether hiring women in that position is contrary to the practice and religious belief of that church.

Anti-discrimination as a human right is a principle of Norwegian law pursuant to the Norwegian Human Rights Act. Furthermore, article 2 of the Norwegian Constitution states that all citizens have the right to freedom of religion.

Norway is not an EU Member State, but has nevertheless implemented Directive 2000/78/EC. However, we would not consider this case under the 2000/78/EC Directive since the woman in this case is discriminated against on the basis of her gender and not her religion, which is one of the discrimination grounds covered by that Directive.

Question 2
The case could either be brought before a district court (court of first instance) or be considered by the Equality and Anti-Discrimination Ombud.

Question 3
The case would be considered according to the Gender Equality Act article 3 as a case of discrimination on the ground of gender. If one should find that gender was the decisive factor for rejecting the woman's application, the next step would be to consider the limited scope of the Gender Equality Act, due to the exception regarding church and religious communities´ internal affairs.

Question 4
The refusal to admit the woman would constitute direct discrimination, because the Church stated that it was the woman's sex that was the reason for not offering her the job.

Question 5
As mentioned above, the Norwegian Gender Equality Act does not cover church and religious communities´ internal affairs. This exception is based upon Article 2 of the Constitution as well as obligations arising from international law such as freedom of religion as a human rights principle. Only activities which are closely related to the exercise of religion are exempted from the Gender Equality Act.

The hiring of a preacher would typically be considered to be internal affairs of a church.

The next step in the analysis of the case would be to determine what the official understanding/interpretation is of the religion in question as regards women as preachers. The court or the Anti-Discrimination Ombud would not give their own interpretation on religious texts, but rather accept the official statements of the church.

Upon considering what the church's view is one would also take into account the practices of the church and its internal statutes. In this case, the church had 3 woman preachers and its internal statutes did not exclude women from service. It would seem that hiring women as preachers is consistent with the beliefs of the church. The exception of the Gender Equality Act would therefore not be applicable. To refuse this woman as a preacher on the basis of her sex would accordingly be considered discriminatory.

Question 6
Pursuant to the Norwegian Gender Equality Act the objective justification test exception applies only to cases of indirect discrimination. Since this is a case of direct discrimination the exception would accordingly not apply. As a general rule the prohibition against direct gender discrimination is absolute.

However, an exception in the form of an objective justification test might still apply, this pursuant to general accepted principles of Norwegian law. It should be emphasized, however, that this exception is generally permitted only on a very restrictive basis.

Question 7
The right to freedom of religion is stated in article 2 of the Norwegian Constitution. Article 110 c of the Constitution states that the authorities have an obligation to respect and secure human rights. The Human Rights Act is given precedence when there is a conflict between different statutes. Antidiscrimination as a human right is a principle of Norwegian law through the Human Rights Act. Since church and religious communities´ internal affairs are exempted from the Gender Equality Act, freedom of religion will prevail when the prohibition of discrimination is challenged, but only insofar as the issue at hand is considered in fact as being closely related to the right to implement one's religion.

The Equality and Anti-Discrimination Ombud is of the opinion that the above-mentioned exemption should be deleted from the Gender Equality Act, in order to subject cases regarding church and religious communities´ internal affairs to an objective justification test. The Ombud has initiated a process in this regard and there may be changes in the Gender Equality Act in the future.

As a general remark to the question of balancing the conflict between different basic human rights, it is our view that the analysis of the problem rests upon the proper identification of the core of the conflict. Bearing in mind that no human right may be used to infringe on other human rights, the outcome of a case might vary depending on the sector of society to which the conflict applies.

Question 8
We would in all probability not resort to the use of international standards in our argumentation in this case.

However, in cases where there were doubts as to how national law should be interpreted, or where national law might not be consistent with international obligations, one would resort to the use of international standards, including the CEDAW.

Slovakia

National Centre for Human Rights

Question 1
This case will fall within the scope of the Slovak anti-discrimination law.

The Constitution of the Slovak Republic represents the framework and basis of all other laws, no law can be in conflict with the Constitution.

The general constitutional principle prohibiting discrimination in the Slovak legal order is at Art. 12 par. 2 of the Constitution. It stipulates:

"Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds."

The freedom of religion and belief is guaranteed by Article 24 of the Constitution.

According to this Article freedom of thought, conscience, religion and belief shall be guaranteed. This right shall include the right to change religion or belief and the right to refrain from a religious affiliation. Everyone shall have the right to express his or her mind publicly. Everyone shall have the right to manifest freely his or her religion or belief either alone or in association with others, privately or publicly, in

worship, religious acts, maintaining ceremonies or to participate in teaching.

With regard to registered churches in Slovakia, churches and ecclesiastical communities shall administer their own affairs themselves; in particular, they shall establish their organisations, appoint clerics, provide for theological education and establish religious orders and other clerical institutions independent of the state authorities.

The exercise of rights under paragraphs 1 to 3 may be restricted only by a law and if it concerns a measure necessary in a democratic society for the protection of public order, health and morals or for the protection of the rights and freedoms of others.

The legal status of churches officially registered in Slovakia is regulated by Act No. 308/1991 Coll. on freedom of religious faith and the position of churches and religious societies as amended by Act No. 394/2000 Coll.

Under this legislation, Fundamental rights and freedoms of citizens (particularly the right to education, right to choose a profession and appropriate training and right to access to information) must not be restricted by a religious confession or belief, (Art 2 of the Act).

According to Art. 6 para. 1 of Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination (hereinafter referred to as "Antidiscrimination Act") in conformity with the principle of equal treatment, any discrimination shall be prohibited in employment relations, similar legal relations and related legal relations on grounds of sex, religion or belief, racial, national or ethnic origin, disability, age and sexual orientation.

Art. 8 para. 2 of the Anti-discrimination Act stipulates in case of registered churches, religious societies[13)] and other legal entities whose activities are based on religion or belief, differences of treatment based on age, sex, religion or belief and ascertainment of sexual orientation shall not constitute discrimination where they are related to employment by or to carrying out activities for such organisations. Registered churches, religious societies and other legal entities whose activities are based on religion or belief may require the individuals who are employed by them or carry out activities for them to act in conformity with their religion or belief and with the principles of their religion or belief.

[13] For instance, Act No. 308/1991 Coll. on freedom of religious faith and the position of churches and religious societies as amended by Act No. 394/2000 Coll.

Art. 13 (paras 1 and 2) Labour Code: In labour relations the employer has the obligation to treat employees in compliance with the principle of equal treatment laid down for the area of employment in the Anti-discrimination Act. In conformity with the principle of equal treatment, any discrimination shall be prohibited also on grounds of marital and family status, colour, language, political and other opinion, trade union involvement, ethnic or social origin, property, lineage or other status.

Question 2
- level of the court: competent district court
- other organisation: Slovak National Centre for Human Rights

Question 3
Gender:
The Church rejected the application with a short explanation, that with regard to the understanding of the position of women in the Church resulting from the concept of the Bible, the practice of the Church is to appoint exclusively men to a position of a preacher.

The rejection was based exclusively on gender, the Church omitted to take into consideration other requirements prescribed for a position of a preacher according to its own internal regulation, such as a completed course of theological study by the woman, her membership in the Church and her theoretical and practical experience of the work of the Church.

Religion:
The Centre's opinion in this case is that there was no conflict on the ground of religion, because both parties of the dispute were members of the same religion and the same Church.

Question 4
The internal statutes of the Church do not regulate different treatment in relation to women. There is no express provision prohibiting a woman from working as a preacher in the Church.

The woman fulfilled all prescribed requirements for a position of preacher according to internal regulations.

The only ground on which she had been refused access to employment was her sex. The conduct in question constitutes direct discrimination.

Question 5
It is important to mention the recent development of admissible different treatment in relation to churches and ecclesiastical communities regulated in the Anti-discrimination Act:

Some Member States have transposed Art. 4(2) of Directive 2000/78/EC in terms that go beyond the Directive, e.g. Slovakia. The Slovakian Anti-discrimination Act provides that in case of churches and organisations whose activities are connected to religion or belief, differences of treatment based on age, sex, religion or belief and sexual orientation do not amount to discrimination where they are related to employment by, or to carrying out activities for such organisations.

This exception is broader than that provided by Art. 4(2) because it allows religious groups to discriminate on grounds such as sex or sexual orientation, rather than just on religious grounds as provided by the Directive. Also the exception is not limited to genuine occupational requirements, but would seem to provide a complete exception to religious organisations to discriminate in their employment practices, without the need to link the exception to the needs of a practical job. (See Lucy Vickers for the Network of Legal Experts in the Non-discrimination Field: Religion and Belief Discrimination in Employment- the EU law, November 2006, p.57-58).

In 2006 the Slovak Republic received an official notice (Reasoned opinion No. 2006/2260) from the European Commission on insufficient implementation of the Race Directive (2000/43/EC) concerning the definition of forms of discrimination, the material and personal scope of application of the Anti-discrimination Act and permissible different treatment with regard to genuine and determining occupational requirements.

A special Committee was set up to consider the preparation of amendments of the Anti-discrimination Act by the Governmental Office composed of representatives of ministries and the Governmental Office was established. The task of the Committee is to prepare amendments to the Act in compliance with the requirements of the Directive as set out in the reasoned opinion of the EC. Representatives of the Centre take part in the meeting of the Committee.

The prepared amendment of Art. 8 para. 2, first sentence of the Antidiscrimination Act takes into consideration the genuine and occupational requirements of Art. 4(2) of the Directive and restricts the discretion of churches and ecclesiastical communities by applying permissible exceptions to the principle of equal treatment.

Question 5a
With regard to the circumstances of the case and the general character of Art. 4 (1) to 4 (2) of the Directive, the Centre was of the opinion that Art. 4 (1) is not applicable in this case.

Question 5b.
According to the wording of Art. 4 (2) Directive

"…a difference of treatment based on a person's religion or belief shall not constitute discrimination… a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos… but should not justify discrimination on another ground."

Religious ethos organisations are entitled to require loyalty to its ethos. This may lead religious employers to impose religious requirements on its employees.

The Directive considers as the decisive fact for exceptions from the non-discrimination principle a person's religion or belief, and simultaneously prohibits discrimination on another ground, e.g. gender.

In this case it was not a problem of the woman's religion or belief, because she was a member of the Church. The Church did not require a religious requirement that would have been in compliance with Art. 4 (2) of the Directive, but discriminated against the woman on the ground of sex breaching its own internal regulations and the organisation's ethos.

The requirement was not legitimate and can not be justified. The exception pursuant to Art. 4 (2) of the Directive is not applicable in this case.

Question 6
For an exception to be in conformity with Art. 4 (2) of the Directive a person's religion or belief must be a genuine, legitimate and justified occupational requirement.

According to the existing wording of Art. 8 (2) of the Anti-discrimination Act, registered churches, religious societies and other legal entities whose activities are based on religion or belief may require the individuals who are employed by them or carry out activities for them to act in conformity with their religion or belief and with the principles of their religion or belief.

In this case sex does not constitute a genuine, legitimate and justified occupational requirement; moreover, the Church acted in conflict with its own internal regulations. Therefore there is no justification for it.

Question 7
Freedom of religion and belief is very important in a democratic society. Religious associations are entitled to take care with regard to the observance of religious and clerical traditions and act independently in conformity with their religion principles.

According to the internal regulation of the Church the preacher function is based on an employment contract regulated in the Labour Code.

Art. 13 of the Labour Code in conjunction with Art. 6 of the Antidiscrimination Act prohibits discrimination on the ground of sex. Both legal norms are part of the legal order of the Slovak Republic respecting obligations resulting from signed and ratified international treaties and the EU law (including Directive 2000/78/EC).

It is generally accepted that where the employer is a religious body, loyalty to the organisation can be required however this does not give grounds for discrimination on other grounds. The woman has a right not to be discriminated against.

In connection with the balance of conflicting basic rights, the Decision of the Constitutional Court of the Slovak Republic Nr. III. ÚS 64/2000 was considered by us to be important in this case.

The Constitutional Court ruled,

"…although the churches and religious associations are entitled to exercise their rights independently from state authorities, concurrently they have to respect the legal order of the state if the activities in question are performed at the framework of a civil legal relation, an employment relation or other related legal relations."

Conclusion:
The Church had to respect a prohibition of discrimination on the ground of sex regulated in the Labour Code and the Antidiscrimination Act.
The Centre concurs in this case with the opinion of the Special Rapporteur on Freedom of Religion appointed by the UN:

"Respect for the human person and equality between men and women take precedence over customs and traditions, whether religious or not" (European Commission: Religion and Belief Discrimination in Employment- the EU law, November 2006, p.48).

Question 8
In the expert opinion published in this case the Centre took into consideration the Convention on Elimination of all Forms of Discrimination against Women (Art. 1, 7, 11), that came into force for the former Czechoslovakia in 1982. The Slovak Republic succeeded to the Convention in 1993.

Sweden

Ombudsman against Ethnic Discrimination

Question 1
Yes, it does fall under the Gender equality act,

Question 2
The labour tribunal

Question 3
Gender, as religion is not a legitimate excuse in this case. A church, as for example the Catholic church, may invoke the mentioned exemption for women as clerics, but then on the other side they will not be admitted into the seminary anyway and thus will not get the right education and fail because of that. But in this case such an excuse seems not to be feasible.

Question 4
Direct, as the church is motivating their rejection with the fact that she has the wrong gender. Religion cannot be invoked as a motivation for not hiring a cleric of a certain gender and there is no apparent neutral rule that should make it harder for women to become clerics in that church, which they invoke.

Question 5

Such an exemption does exist, but is not valid in this case, as it cannot be a genuine and determine requirement to have another gender, whatever religious interpretations one invoke.

Question 5a
Question 5b

Article 4 of Directive 2000/78/EC

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason

of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Question 6
No, as said above. No religious interpretations can be justified in the context of gender in this case, see above.

Question 7
The freedom of religion is very weak in Swedish legislation and only covers the *personal right to believe and to some extent express it in public.* It cannot be invoked as a right to discriminate.

Question 8
No, as international law is not directly applicable in the Swedish courts and hence have no or very limited effect on the court.

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Annex 2

Country responses to the case on race, religion and child custody

Austria

National Equality Body

Question 1
Austria is a federal state. According to the constitution, legislative authority is either held by the federal state or by the Länder (provinces). Austria has an Equal Treatment Act (federal level) and nine Acts of the Länder dealing with equality issues in the fields of their competence.

As a first step one has to check whether the Equal Treatment Act (federal level) or one of the Acts of the Länder is applicable. As to the constitution, youth care falls within the authority of the Länder.

As a second step one has to ask whether the case is covered by the scope of the law. Social protection in Austria is understood as covering all legal systems of social protection like health, pension and accident insurance and all benefits from these insurances. As to the understanding and definition of the term "goods and services" see the following paragraphs.

The Equal Treatment Commission confirmed the applicability of sec 30 no 4 (access to and supply of goods and services) Equal Treatment Act for example in regard to access to a courthouse, to a pastry shop, to the rental of an apartment and in regard to the services of a snack bar. The Equal Treatment Commission on the other hand decided that making a report to the police falls outside the scope of goods and services.

Pursuant to our knowledge, there exists as yet only one judicial case decided in regard to sec 30 no 4 Equal Treatment Act. It concerned a case of direct discrimination and harassment on grounds of ethnic belonging in a clothing store.

The explanatory comments to the relevant provision of the government bill to the Equal Treatment Act are very brief and not at all relevant for the present case.

Due to the fact that neither Directive 2000/43/EC nor the Austrian Equal Treatment Act provides a definition of the term "goods and services" we thought of the following argument in our internal discussion:

Directive 2004/113/EC provides a definition of services by referring to Art 50 EC Treaty. Should this definition be used when interpreting the term "services" in Directive 2000/43/EC? The aim of the directives is not completely the same. Moreover the scope of Directive 2000/43/EC is much broader, covering not only goods and services but also education, social advantages and social protection. Looking at Art 3 of Directive 2000/43/EC it is pretty clear that this directive applies also to the public sector, including public bodies.

To summarise: you could try to argue that "service" in the meaning of Directive 2000/43/EC has to be understood in a broader way and covers "public services" as well.

To keep things short, it is nearly impossible to come to a final conclusion about the scope of "goods and services" at this stage, where there exists hardly any case law and also very few profound convincing academic arguments.

Question 2
The Austrian National Equality Body is competent to provide advice, support and information on equality issues. In the event that one of the laws of a province (Länder) is applicable the National Equality Body transfers the case to the competent institution on provincial level.

The Equal Treatment Commission can issue a (not legally binding) decision in matters of possible discrimination. It can state a violation of the Equal Treatment Act, no violation or declare that the case is not within the scope of the Equal Treatment Act. The Equal Treatment Commission cannot decide cases within the scope of an Anti-discrimination Act of the provinces (Länder).

To sue damages the competent court would be the civil court. Probably it would be the first level court that is called "Bezirksgericht" and mostly deals with small claims (up to EUR 10.000,-). One can appeal to the higher court and again to the highest court.

In Austria parental authority can only be revoked by the court, against which one can appeal.

Question 3
The Equal Treatment Act - in the field of goods and services - prohibits discrimination only on the grounds of ethnic belonging. Some of the Equal Treatment Acts of the Länder also cover discrimination on grounds of religion in goods and services.

The explanatory comments to the relevant provision of the government bill state that the term "ethnic belonging" covers elements like ethnic origin, colour of the skin, language, culture and customs.

To keep H away from religious education could for example be seen as religious discrimination, harassment when speaking her mother tongue could be seen as discrimination on grounds of ethnic belonging (provided that the Equal Treatment Act applies).

To conclude, it can be argued that both grounds - religion and ethnic belonging - apply, although the Equal Treatment Act limits the protection of discrimination to ethnic belonging in the area of goods and services, social protection and social advantages.

Question 4
Based on the information provided, it cannot be excluded that ZH is discriminated against, maybe also in the form of harassment. The preliminary question however is how the social authorities would have acted in the case of a Swedish child with similar circumstances. Would a Swedish mother get assistance at home? Would medical evidence for the eating disorder be a precondition in the case of a Swedish child?

Is there a tendency to take control over ZH and H (and over their values, culture and religion) by placing them in the rehabilitation centre? Does the placing in the rehabilitation centre/ taking in foster care/ limiting access of ZH to H lead to disadvantage/discrimination of ZH and H compared to a Swedish mother and her child in a similar situation?

In the event that ZH and H were treated less favourably than a Swedish mother and her child in a comparable situation would be, on the grounds of their ethnic belonging/religion, this could be seen as direct discrimination (assuming the case falls within the scope of the equal treatment law).

Question 5
The National Equality Body is entitled to provide advice, support and information on equality issues. Moreover we represent and accompany persons feeling discriminated against at preliminary negotiations prior to legal proceedings and also can take a case to the Equal Treatment Commission and provide support throughout.

In addition, we can carry out independent inquiries in equality issues, publish independent reports and make recommendations. But we are not entitled to act against court rulings.

Question 6
The Equal Treatment Act does not provide for justifications in the case of direct discrimination in areas outside of employment.

Question 7
According to the explanatory comments of the government bill and relevant literature this means that different treatment on the grounds of citizenship is in accordance with the law as long as there are objective reasons (and no racially discriminating motivation).

Question 8
As the European Convention on Human Rights (ECHR) has the status of a constitutional law in Austria, we would use it in our argumentation and especially rely on Art. 8 ECHR (respect for private and family life) and Art. 9 ECHR (freedom of religion).

Belgium

Centre for Equal Opportunities and Opposition to Racism

Preliminary remarks
Belgium is a federal state where – depending on the subject and locality of the matter – legislative authority is independently held by either the federal state, the Communities (3) or the Regions (3). As a general principle, the federal anti-discrimination law is not applicable in matters that fall within the competence of the Communities or Regions. On the other hand, the Communities and Regions are of course under the same obligation as the federal state to implement the relevant European legislation within their areas of competence.

The Centre for Equal Opportunities and Opposition to Racism (CEOOR) is an autonomous federal public agency, whose authority to deal with discrimination cases, in accordance with the 15 February 1993 CEOOR Establishment Act, is limited to the federal anti-discrimination and anti-racism legislation. However, today co-operation agreements are being negotiated with the Communities and Regions in order to expand the CEOOR's legal mandate to non-federal discrimination cases.

Recently, the Belgian federal Parliament adopted three new acts in order to harmonise the existing anti-discrimination legislation and to refine the implementation of the EC directives on the federal level:

10 May 2007 Anti-discrimination Act:
This act replaces the 25 February 2003 Anti-discrimination Act and (re-)adds the following grounds to those covered by the 2000/78/EC Directive (religion or belief, disability, age and sexual orientation): civil status, birth, fortune, political conviction, language, future or present health condition, physical or genetic characteristic and social origin. The CEOOR's legal mandate covers all of these grounds, except for language (which will be assigned to a yet to be designated autonomous agency).

10 May 2007 Anti-racism Act:
This act modifies the 30 July 1981 Anti-racism Act and broadens the implementation of the 2000/43/EC Directive grounds by covering not only "so-called" race and ethnic origin, but also skin colour, descent, national origin and – newly added – nationality. The CEOOR's legal mandate covers all of these grounds.

10 May 2007 Gender act:
This act replaces the 7 May 1999 Gender Act. Please note that the issue of gender discrimination is excluded from the CEOOR's legal mandate, as it falls within the exclusive competence of the Belgian Institute for Equality between Men and Women.

The scope of this new legislation – which is identical for all three acts – is broader than demanded by the EC directives, as the following domains are encompassed (in short):

- access to and offering of goods and services accessible to the public;
- social protection (including social security and health care), social advantages and additional schemes to social security;
- employment (access to employment, working conditions, dismissal, etc.), including membership of and participation in trade unions and professional organisations;
- statements in official documents and minutes;
- access to and participation in economic, social, cultural and political activities accessible to the public.

Question 1
First of all, it should be taken into consideration that in Belgium, a decision to forcibly take custody of and put a child in a foster home because of a problematic educational situation can only be taken by a youth judge, after an advisory report has been made by the Youth Tribunal's social service. Proceedings before the Youth Tribunal can only be initiated by the Public Prosecutor (i.e. youth protection magistrate). However, before such intrusive measures are taken (and unless there is an imminent safety threat for the child within the family), the non-judicial youth protection agencies – which are structured differently in the three Communities – will first try to prevent further escalation of the (supposed) educational problem by proposing voluntary measures to the family.

This is probably quite similar to the initial intervention of the Swedish social authorities in ZH's case. It is however less clear whether or not the social authorities' actions to forcibly take custody of the child, put the child under foster care and limit the mother's right of access were taken in execution of a judicial decision (in which case appeal proceedings should of course be available – see question 2).

Secondly, it seems relevant to mention that a Belgian youth judge's decision to take custody of and place a child under foster care does not necessarily mean that its parent(s) has (have) lost legal parental authority over the child (e.g. decisional power on educational aspects, including religion). Also, a judicial out-of-house placement measure should always favour a family-based approach, e.g. by ensuring that the distance between the foster family and the child's habitual residence is limited. On the other hand, youth judges may overrule these principles – and even limit or exclude the parents(') access or visitation rights – if this is found not to be in the best interest of the child.

According to the CEOOR, decisions taken by the Youth Tribunal and/or the non-judicial youth protection agencies fall outside the scope of both the 2000/43/EC and 2000/78/EC Directives, as well as the above-mentioned Belgian anti-discrimination legislation. After all, the application of the youth protection legislation cannot be reduced to a matter of "access to and offering of (public) services" or "social protection", as it is clear that these concepts should be interpreted in the light of the EC Treaty. And although the Belgian legislator has chosen to broaden the implementation of the EC anti-discrimination directives to certain other domains, the CEOOR believes that none of these cover youth protection measures in general (nor foster care decisions in particular).

On the other hand, the 10 May 2007 acts have also been made applicable to "statements in official documents and minutes". Therefore, if for example a report made by a non-judicial youth protection agency or even the Youth Court's social service would contain discriminatory statements, a resort to the above-mentioned legislation may seem possible (although there is no explicit mention of such statements by the social authorities in ZH's case). Another nuance is that the federal acts also contain some specific criminal offences, including intentional discrimination by civil servants and public officers.

However, since youth protection is governed by the Communities (with the exception of youth criminality) – which automatically excludes the application of the federal anti-discrimination legislation – even these hypothetical suggestion are of no practical relevance for the Belgian solution to ZH's case.

Finally, it should be noted that (today) none of the anti-discrimination decrees adopted by the Flemish, French or German Communities cover "statements in official documents and minutes", nor are they in any other way applicable to the case at hand. Other legal instruments may however be invoked, such as certain constitutional rights and international standards (e.g. UNCRC, ECHR). The fundamental rights of children and their family are of course also formally acknowledged by the Community youth protection decrees. Another example of a legal instrument which might be relevant in this type of case is the 2006 Flemish decree on the legal position of minors, which enforces children's rights within the general area of child welfare (including youth protection).

Question 2
Since a decision to forcibly place a child in a foster home because of a problematic educational situation would in Belgium be taken by a judicial instance (Youth Tribunal), parties who feel that their (parental or other) rights have been violated and/or the decision does not serve the best interest of the child, may address the Court of Appeal (Youth Chamber). Also, unless in this case ZH has lost not only custody but also parental authority over her daughter H, she could under Belgian law always (re-)address the Youth Tribunal if she feels that the cultural-religious identity of her child is not respected by the foster family.

If a (definite) decision in appeal is taken in disrespect of substantial procedural rules or in case of misinterpretation of the law, an action for annulment can be brought before the Court of Cassation (which will after annulment refer back to the level of the Appeal Court).

Furthermore, if aspects of (e.g. youth protection) legislation are felt to be in contradiction with certain fundamental rights, parties may bring an action for annulment before the Belgian Constitutional Court. Also, any tribunal may refer preliminary issues to this Court.

Since some elements suggest that there may be a violation of fundamental rights in ZH's case (see questions 4, 6 and 8), an action before the European Court of Human Rights could of course be taken into consideration after all national remedies have been exhausted.

As to a possible (non-judicial) intervention of the CEOOR, ZH's case could not be dealt with by the Racism and ("non-racial") Discrimination Departments, since the above-mentioned anti-discrimination legislation is not applicable. However, within the CEOOR there is also an Integration Department, which possibly could – but then from a non-legal perspective – examine whether the core of the problem lies in the social authorities' rather ethnocentric approach and/or intercultural communication (see also question 5).

Finally, in Belgium there are also several children's rights organisations which could deal with complaints similar to the situation of ZH and her daughter H. For example, within the French Community, the Délégué Général de la Communauté Française aux Droits de l'Enfant is legally entitled to verify whether youth welfare agencies are operating correctly, to try and mediate between parties (parents and children) and/or agencies, etc.

Question 3
Based on the information provided, it cannot be excluded that ZH is in fact experiencing a certain disadvantage or even unfavourable treatment by the social authorities because of her ethnic-cultural background. For example, this could be the case if the social authorities' assessment in ZH's case would indeed be based on an ethnocentric view on child welfare.

Therefore, from a fundamental rights perspective (e.g. art. 14 ECHR, art. 2 UNCRC, art. 26 ICCPR, art. 2 ICESCR), the following discrimination grounds may be relevant for the case: race (colour), religion, national or social origin and language. On the other hand, the CEOOR is not convinced that ZH's situation is in fact a clear-cut example of such discrimination (see questions 4 and 6).

Question 4
If the social authorities were in fact acting from an ethnocentric perspective on (child) welfare and in the absence of any objective justification, one could argue that certain "apparently neutral" standards (i.e. Swedish norms and values) used by these authorities are likely to result in indirect discrimination of families with a different ethnic-cultural background (incl. religion). If on the other hand there would be reason to suspect that ZH was actually treated less favourably than another in a comparable situation because of her ethnic-cultural background, one could even defend the idea of direct discrimination.

But again, since in Belgium the specific anti-discrimination acts would not be applicable in the case at hand, ZH's claim seems essentially a fundamental rights issue. Moreover, the CEOOR believes that although some elements may suggest a violation of the fundamental non-discrimination principle (e.g. art. 14 ECHR), the factual arguments to support this statement will probably fail to be convincing (see question 6). On the other hand, the social authorities' intervention does seem likely to be in conflict with other fundamental rights, such as the right to respect for private and family life (art. 8 ECHR), freedom of religion (art. 9 ECHR), fair trial (art. 6 ECHR) and effective remedy (art. 13 ECHR). If legal action would be undertaken in ZH's case, these aspects should certainly be taken into consideration.

Therefore, the CEOOR would suggest the following steps in the analysis of the case:

Primarily:
- do the decisions of the social authorities to (a) threaten ZH to comply with them, (b) forcibly take custody and put H under foster care and (c) limit ZH's access to H, constitute a violation of the right to respect for private and family life (art. 8 ECHR)?
- does the fact that H's ethnic-cultural background (including her Muslim upbringing) is completely disregarded in the foster home, constitute a violation of both art. 8 ECHR and art. 9 ECHR (the right to freedom of religion)?

Subsequently:
- if art. 8 and/or 9 ECHR have indeed been violated by the social authorities / the foster home, does this also imply an inequality in the enjoyment of these rights by ZH (and H) in breach of the non-discrimination provision under art. 14 ECHR?

Additionally:
- have the decisions to forcibly take custody over H and limit ZH's access to the child been taken in line with the fair trial provision under art. 6 ECHR?
- has there been effective remedy (art. 13 ECHR) in respect of ZH's claims under art. 8 and 9 ECHR (in possible conjunction with art. 14 ECHR)?

The issue of the possible violation of art. 8 ECHR (in conjunction with art. 14 ECHR) will be dealt with more extensively under the "objective justification" test (see question 6).

Question 5
The 15 February 1993 Establishment Act allows the CEOOR to inform individuals on their rights and duties, to deal with discrimination complaints (including by mediation), to advise the government on improving legislation, to address recommendations to both public agencies and private persons, and to undertake legal action based on specific legislation (e.g. the 10 May 2007 Anti-discrimination and Anti-racism Acts). On the other hand, as a non-judicial public agency, the CEOOR is by no means entitled to act against court rulings.

But again, since ZH's situation falls outside the scope of the above-mentioned acts, there would be no legal intervention possibilities for the CEOOR's Racism and Discrimination Departments. However, if the core of the problem would lie in the intercultural communication between ZH and the social authorities, the CEOOR's Integration Department could possibly try and deal with the case from a non-legal perspective.

Question 6
It has already been argued that the facts in ZH's case should be analysed in the light of fundamental rights provisions (see question 4). According to the CEOOR, the key issue is the possible violation of the right to respect for private and family life (art. 8 ECHR), in conjunction with the non-discrimination provision under art. 14 ECHR. The issue of whether the social authorities' intervention in ZH's case was "objectively justified" in this respect will be briefly dealt with in the following paragraphs.

There is quite extensive ECHR case law on the possible incompatibility of limiting parents' custodial and access rights on the one hand, and the right to respect for private and family life on the other hand (e.g. 12963/87 case of Margareta and Roger Andersson v. Sweden). Art. 8 ECHR clearly states that there shall be no interference by a public authority with the exercise of this right, except when such is (i) in accordance with the law and (ii) necessary in a democratic society (in terms of specific state interests, such as the protection of health and morals, and the protection of the rights and freedoms of others).

The CEOOR believes that there is reason to argue that the aggregate of restrictions imposed on ZH's custodial and access rights is disproportionate to the aims pursued (and thus not justified). Moreover, ZH could even contest the very legitimacy of these aims, since there seems to be no medical evidence to support the social authorities' assessment of H's eating disorder. Also, the fact that an independent psychiatrist's report has not at all been taken into consideration may constitute a violation of art. 6 ECHR (fair trial).

With respect to the possible violation of art. 14 ECHR, the CEOOR finds it hard to establish whether ZH's has actually been treated less favourably because of her ethnic-cultural background. Even if it is accepted that the social authorities' ethnocentric approach results in a particular disadvantage for families with another ethnic-cultural background, the CEOOR believes that the decisions taken by these authorities "in the best interest of the child" are not necessarily discriminating. On the other hand, the argument that a certain degree of moral (and cultural) subjectivity is almost inherent to matters of child welfare, does of course not automatically lead to the conclusion that the decisions taken by the social authorities in ZH's case actually pass the "objective justification" test. However, based on the information provided, the CEOOR is unable to give a conclusive answer to whether – with the aim of ensuring H's "best interest" – Swedish educational norms and values have been an appropriate and necessary standard to assess ZH's capacity as her child's primary caretaker.

Finally (and even when taking into consideration the child's early age) the CEOOR does not see how there could be any "objective justification" for the foster parents' flagrant disrespect of H's ethnic-cultural background (by ignoring elementary religious practices, not allowing her to speak Farsi with her mother, etc.). This situation seems not only in contradiction with both art. 8 and 9 ECHR (in possible conjunction with art. 14 ECHR), but is also hard to reconcile with several UNCRC provisions (including art. 20 on the protection of children temporarily or permanently deprived of their family environment).

Question 7
See answers to previous questions.

Question 8
It follows from the answers to the previous questions that in the CEOOR's opinion, ZH's case is essentially a fundamental rights issue. From a practical legal perspective, the CEOOR has chosen to develop an argumentation which is mainly based on the European Convention on Human Rights (ECHR). Other international standards protecting the before-mentioned fundamental rights may of course also be useful in this case.

Hungary

Equal Treatment Authority

Question 1
Authority: Yes, it falls within the scope of anti-discrimination law, i.e. ETA. 4§ c) – child welfare agency, h) – rehabilitation centre, children's ward.

Question 2-3
The procedure and decisions are not examined by the authority only in point of equal treatment. 2nd, 3rd instance: in point 2.

Protect ZH from her child:
Court (Act XIX of 1998 on Criminal Procedure 138/A.§ , 138/B.§)
Family and Child Welfare Service can help placing children for transitional care (Act XXXI of 1997 – Child Protection Act 29-51. §) –
- petitioning
- substitute parents
- transitional home for children – above 20.000 habitant is compulsory
- transitional home for family (with parent) – above 30.000 habitant is compulsory

Local Guardian Court:
Request for host family (Child Protection Act 70-71.§), provision of a host family.
Usually placement in a foster home with temporary effect (notary, police, court, public prosecutors office, border guard, moreover penal institution!) (Child Protection Act 72-76. §) → within 30 days the guardian court supervising the accommodation procedure, dismiss proceeding as it is, or bringing up child transitional/permanent period, or bring charges against the alteration of custody.

County Public Administration Office, Social and Foster Affairs -2nd instance
In accordance with the 13th section of Government Decree No. 331/2006 on Child Protection and Child Welfare services on tasks and competences, the organization and jurisdiction of Guardian court respectively, the County Public Administration Office, Social and Foster Affairs direct, control and monitor the municipal Guardian Court within its competence, furthermore exercise 2nd instance delegated power in cases of municipal Guardian Courts on child protection and child welfare.

Administrative Court
In administrative action supervise the decision of County Public Administration Office, Social and Foster Affairs – proceed in a case without delay – (Civil Code of the Republic of Hungary 324. §, 333. §) – there is no right to appeal (CC 340§)

Head of Children's ward or an institutional forum of representation of interest
You can lodge a complaint concerning injuries like objections of services, and basic rights of children, moreover cases on employee breach of duty the children and parents respectively.

Legal Representative of Children
Ensure the rights of children participating in child-protection caring; initiate the investigation of child complaints (Child Protection Act 36. §)

Civil Rights Ombudsman
Examine abuses concerning the constitutional rights of children (Child Protection Act 11.§ (2))

Protected property: member of ethnic minority (ETA 8.§ e), religious persuasion (ETA 8. § i) - in case of rehabilitation centre and children's ward.
The mother is a devout Muslim and her child has the right to freedom of religion in the case of substituent protection and in foster home in accordance with Child Protection Act 7. § (3) and 9. § (1) d) furthermore to attention to her religious and cultural persuasion.

Question 4
Direct discrimination

Question 5
In line with ETA 15.§ (6) it does not investigate the executive decisions and measures of courts.

Question 6
Justification: ETA 7.§ - in case of religious persuasion e.g. proceed in a case by law
In case of ethnic minorities: no justification – ETA 7.§ (3)- the injury of constitutional basic rights, so thus the justification is more strict, the objective justification is not proper enough.

Question 7
There is no exception.

Question 8
Yes, if the Hungarian regulation was not sufficient, I would use international standards
E.g. New York Conventions (Act LXIV of 1991, article 2., 3., 14., exemption from discrimination, freedom of religion); UN Treaty- 'Right of children in the first place'; reference to the EJC – jurisdiction and the national courts' jurisdiction.

The Netherlands

Equal Treatment Commission

Question 1
Section 7a (1) of the Equal Treatment Act prohibits discrimination on the ground of race in social protection, including social security and social advantages. We are not totally sure whether this section is broad enough for this case to be considered under this section (it is a rather new section in our equal treatment legislation). The legal history of this section says that the term "social protection" includes all aspects of welfare. This may imply that the decisions of social authorities fall under the term "social protection", as a result of which we would be able to consider the case under this section.

Question 2
If the case falls within the scope of section 7a of the Equal Treatment Act, the Dutch Equal Treatment Commission is competent and can give a non-binding opinion on this case. This procedure is without costs. Parties do not need to have a lawyer. A district court (administrative court) will also be competent and can give a binding opinion on this case. For this procedure, legal charges must be paid. A lawyer will be obligatory.

Question 3
Race. According to the definition in the International Convention on the Elimination of All Forms of Racial Discrimination and in accordance with established case law of the Dutch Supreme Court, the term "race" must be interpreted broadly and includes: skin colour, descent, and national or ethnic origin. ZH and H have an Iranian origin.

We would not be able to examine whether there is also discrimination on the ground of religion. The section for social protection (including governmental actions) mentioned above is limited to the ground of race. Section 7 of the Equal Treatment Act, which prohibits discrimination in the sphere of goods and services, does not regulate treatment which follows from a purely governmental task.

Question 4
Section 10 (1) of the Equal Treatment Act describes the burden of proof in equal treatment cases and says that if a person who considers that he has been wronged through discrimination as referred to in this Act establishes before a court facts from which it may be presumed that discrimination has taken place, it shall be for the respondent to prove that the action in question was not in breach of this Act. ZH therefore has to establish facts from which it may be presumed that discrimination has taken place with regard to H. This means also that there will have to be a relation between the decisions of the social authorities and the race of ZH or H.

It should be established who has been discriminated against. Does ZH complain that the discrimination concerns herself, because the decisions of the social authorities might possibly have lead to refusing her daughter H a real possibility of coming into contact with her mother's culture, mother tongue or religion? Here it can be questioned whether the section on social protection could also be used for the mother.

Or does ZH complain that her daughter H has been discriminated against by the decisions of the social authorities, which might possibly have lead to refusing her daughter a real possibility of coming into contact with her mother's culture, mother tongue or religion? Here it can be questioned whether the mother is allowed to act on behalf of her daughter, since her daughter has been taken out of her custody.

According to ZH:
The social authorities, by placing H in a Swedish foster home, give her no real possibility of coming into contact with her mother's culture, mother tongue or religion etc.; the foster parents do not speak any other language than Swedish; H has no possibility of practicing her religion in the foster home (this is a part of a persons religion, but probably also of a person's culture); the foster parents feed H pork (this is a part of a person's religion, but probably also of a person's culture); neither ZH nor the father get to celebrate the special holidays from their culture with H; the foster home continually harass H if she speaks Farsi with her mother – with no action taken from the authorities.

We have no information on the arguments the social authorities have against establishing a presumption of discrimination. The social authorities might argue that H is given the possibility to come into contact with her mother's culture, mother tongue or religion etc. In that case some facts may not be established and cannot lead to a presumption.

If a presumption of discrimination is established, the social authorities will have to prove that the decisions made were not in breach of the Equal Treatment Act. Also here we have no information on the arguments of the social authorities.

It is therefore difficult to say, without having heard the arguments of the social authorities, whether the decisions lead to discrimination. In this regard a case that came before the Dutch Supreme Court in 1976 is interesting. The Supreme Court in this case said that a judge does not have the obligation to deny a request for placing a child in a foster home when that foster home does not have the same religion as

the child. In this case the child could live according to its own religion within the foster home (Dutch Supreme Court 14 May 1976, *NJ* 1976, 505). A far-reaching measure like placing the child in another foster home was not justified, as the child did well in the foster home.

If there would be discrimination, it would be indirect discrimination on the ground of race, when the decisions of the social authorities are neutral decisions which disadvantage children with a non-Swedish background. Direct discrimination would only be the case if the social authorities would treat ZH or her daughter differently BECAUSE of their origin. We do not think this is the case here.

Maybe this goes beyond the case, but it could be questioned whether the social authorities, when it concerns foreign children, should have a positive duty to safeguard/promote contact with and preservation of their culture. The Dutch equal treatment legislation however does not have such a duty (see for example CGB 27 January 2006, opinion 2006-13: this case concerned the question of whether a school had a duty to develop a specific policy to prevent discrimination on the grounds of sexual preferences).

It is not one of the questions of this case, but Dutch equal treatment legislation also prohibits discriminatory treatment, so that we could also examine the treatment of ZH by the social authorities. This would be because, according to ZH, Swedish norms and values have repeatedly been pointed out in dialogue with the mother by both social authorities and the foster home's staff in oral confrontations questioning the mother's capacity to act as custodian and as caretaker of her child. ZH also has the opinion that her aggression appears only in contact with the social authorities and not against H. She believes that it is her rather intensive and outspoken character, as a contrast to the "Swedish" rather quiet and reserved character, which makes the social authorities think she is "aggressive". Since this was not the question I will not go further into it.

Question 5
We could give an opinion in spite of court rulings, but our practice is not to do so.

Question 6
Pursuant to Dutch equal treatment legislation, there may be facts and circumstances, to be put forward by the respondent, which justify the indirect discrimination. It must be examined whether this is the case in a specific situation by assessing the aim of the discrimination and the means used to achieve this aim. The intended aim must be legitimate, in the sense that it must be sufficiently important and non-discriminating, and the means used must be appropriate and necessary. A means is appropriate if it is suitable for achieving the intended aim, and necessary if the same aim cannot be achieved by using other, less discriminating means and if the means are proportionate to the aim. It is only when all these conditions are satisfied that the indirect discrimination does not constitute a violation of equal treatment legislation.

If in this case there would be indirect discrimination on the ground of race, we would ask the social authorities what the aim of their decisions was. We have no information on that but probably the social authorities would say that they acted in the best interest of a child. The Dutch Equal Treatment Commission will not be able to weigh this interest, since it lacks the knowledge that the social authorities have. We would therefore base our opinion on the information given by the social authorities and follow that. We would make use of section 3 of the UN Convention on the Rights of the Child:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Question 7
There are only exceptions to direct discrimination under the Equal Treatment Act. In the case of indirect discrimination we look at whether there is an objective justification (see question 6).

Question 8
For the interpretation of section 7a of the Dutch Equal Treatment Act we might look at the Race Directive.
For the interpretation of "race" we refer as a standard to the definition in the International Convention on the Elimination of All Forms of Racial Discrimination (see question 3).
For the objective justification test we could use section 3 of the UN Convention on the Rights of the Child (see question 6).

Norway

Equality and Anti-Discrimination Ombud

Question 1
The case falls within the scope of the Anti-Discrimination Act which prohibits discrimination in all areas of society on the grounds of inter alia ethnicity, language and religion.

Question 2
The case could either be brought before a district court (court of first instance) or be considered by the Equality and Anti-Discrimination Ombud. However, the Ombud cannot change or repeal decisions made by other governmental authorities. Such authorities will normally voluntarily change their practice according to statements and guidance from the Ombud, and are expected to do so.

Question 3
Under Norwegian law, the grounds that would apply here would be language, religion and ethnicity, considering that mother and child were not allowed to speak their mother tongue together and the child had no possibility of practising her religion or celebrating cultural holidays.

In relation to the mother, and contrary to the situation of Swedish parents with children in foster care, she might experience that her child might be alienated from her mother tongue, culture and religion. Thus, the relationship between mother and child might suffer, and the possibility of future reunion/reversal of the decision of foster care might accordingly be slim.

Accordingly, both ZH and H might have suffered discrimination in this case, based on ethnicity, language and religion.

Question 4
Bearing in mind that not all facts in the case are known, we would not consider the decision to threaten ZH to comply with the social authorities, to take the child into foster care or to limit ZH access to H, to be discrimination unless there are circumstances indicating that her ethnicity, religion or language were factors in the decision-making process.

The governing rule in cases concerning foster care is what is in the best interest of the child. In cases where the child in question has an ethnic minority background there is a challenge in reviewing the practice of social authorities, a practice which may be ethnocentric, based on the values and traditions of the majority. One of the aspects of the case the Ombud would look into would be how the social authorities have identified ethnocentric factors and taken them into consideration.

Also, there may be possible violations of other fundamental rights/national law regarding public administration in this case. Examples may be the refusal to appoint an independent psychiatrist to examine ZH and H together, and the lack of medical evidence concerning H's eating disorder. This does not however, on the face of it, seem to be related to the family's ethnicity, language or religion. Any review of the case based on these grounds would not be considered by the Equality and Anti-Discrimination Ombud, but rather by the courts or the Parliamentary Ombudsman for Public Administration.

Having said that, as mentioned under question 3, other aspects of the case might be considered discriminatory.

Question 5
The Equality and Anti-Discrimination Ombud cannot act against court rulings. Cases that are brought before a court or that have been through the court system cannot be reviewed by the Ombud.

Question 6
As mentioned under question 3, the decision to deny ZH and H to speak Farsi together, refusal to let H exercise her religion and celebrate special holidays might constitute discrimination. It would seem that the language aspect of the case may be considered to be *direct* discrimination, whereas the refusal to make arrangements to give the child a chance to exercise her religion and take part in traditions of her culture may be considered to be *indirect* discrimination.

Outside working life, under Norwegian law, indirect discrimination is only determined in cases where a person suffers *particular* disadvantages from differential treatment.

The Ombud would initially consider whether ZH and H have suffered particular disadvantages. As mentioned under question 3, the result in this case may be that H will become alienated from her own language, culture and religion. For ZH this may complicate their relationship further.

The objective justification test under Norwegian law states that differential treatment necessary to achieve a legitimate aim, and which is proportionate, is not considered to be discrimination under the Anti-Discrimination Act.

If the responsible party – in this case the social authorities and foster parents - can eliminate or diminish the disadvantages by accessible and inexpensive means, there would be no objective justification.

In this case, ordering the foster parents not to feed H pork would seem to be a small

adjustment. Also, the social authorities could try to make arrangements for H to practice her religion, for example by examining the possibility of making a contract with members from the congregation of H's religion who could accompany the child to prayers etc.

The facts of the case do not state the reasons behind the decision to prohibit ZH and H from speaking Farsi together. Unless valid reasons are given to support the decision, the Ombud could suggest for example that an interpreter be present during the visits.

To sum up, unless the authorities can prove that it would be contrary to the best interest of H to speak her language with her mother, take part in her traditions and exercise her religion, it would seem that there would be no objective justification for the discrimination in this case.

Question 7
The Convention on the Rights of the Child and the ECHR are given priority over national legislation in Norway. Thus, if the Ombud states that there is a violation of the Anti-Discrimination Act, the CRC or the ECHR would prevail if there was a conflict of laws.

Under the Anti-Discrimination Act the only possible exception would be the objective justification rule.

Question 8
The Convention on the Rights of the Child (especially articles 3, 8, 9 and 20) would be an important factor for the courts when considering this case, as well as the anti-discrimination legislation and articles 8, 9 and 14 of the ECHR. Under Norwegian law, both the ECHR and the CRC are given priority over national legislation.

The Ombud does not monitor or enforce the above-mentioned conventions and would give its statement based on anti-discrimination legislation, including the UN Convention on the Elimination of Racial Discrimination and the 2000/43 Directive.

Annex 3
Country responses to the case on age, recruitment and training

Austria

National Equality Body

Question 1
The directive 2000/78/EC was not transferred into one unique Act in Austria, but into several Acts, due to the fact that Austria is a federal state and according to the constitution legislative authority is either held by the federal state or by the Länder (provinces). Austria has an Equal Treatment Act (federal level) and nine Acts of the Länder dealing with equality issues in the fields of their competence. Moreover there is a separate Act, the so called Federal Equal Treatment Act, dealing with the public sector only.

The following provision exists in the Federal Equal Treatment Act:

Sec 13 par 1

No person shall be subject to direct or indirect discrimination on grounds of…age, with regard to the establishment of an employment or training relationship in the public sector.

Question 2
The Austrian National Equality Body is competent to provide advice, support and information on equality issues. But it is not competent to deal with cases of discrimination within the scope of the Federal Equal Treatment Act.

Each ministry has to establish contact persons who provide advice to civil servants feeling discriminated against and deal with equality issues in the public sector. They are also responsible for persons applying to become a civil servant (which can be seen as rather problematic because persons who apply for a job in a ministry usually don't know about an internal contact person being responsible for issues of discrimination).

Austria has an Equal Treatment Commission on the one hand and a Federal Equal Treatment Commission on the other hand, which is responsible for cases of discrimination within the scope of the Federal Equal Treatment Act. The Federal Equal Treatment Commission can issue a (not legally binding) decision in matters of possible discrimination. It can state a violation of the Equal Treatment Act, no violation or declare that the case is not within the scope of the Equal Treatment Act.

Every person feeling discriminated against within the scope of the Federal Equal Treatment Act can lodge a complaint before the Federal Equal Treatment Commission.

To sue damages the competent court would be the labour court.

Question 3
The National Equality Body considers the age requirement to constitute direct discrimination because all persons not aged between 25 and 32 years are a priori excluded.

Question 4
The following exception exists in the Federal Equal Treatment Act, Sec 13b par 1:

Unequal treatment based on a characteristic related to one of the grounds for discrimination specified in sec 12, shall not constitute discrimination where by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

The National Equality Body considers this exception not to be applicable in the present case. This exception has to be interpreted in a narrow sense. A certain age cannot be seen as a genuine and determining occupational requirement for becoming a diplomat.

Question 5
The following exception exists in the Federal Equal Treatment Act:

Sec 13b par 3

Discrimination on the ground of age shall not be deemed to have occurred if unequal treatment is

objective and appropriate

justified by a legitimate aim, especially lawful objectives set in the spheres of employment, labour market and educational policies, and

the means for achieving these objectives are appropriate and necessary.

Sec 13b par 4

Unequal treatment pursuant to par 3 may include, in particular,

the setting of special conditions on access to employment and vocational training as well as specific employment and working conditions, including those relating to dismissal and pay, in order to promote the integration into the labour market of young people, older employee and persons with care giving duties to safeguard the protection of these groups,

the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment

fixing the maximum age of recruitment which is based on the training requirement of the post in question or the need for reasonable period in employment prior to retirement.

Pursuant to the knowledge of the National Equality Body neither the courts, the Equal Treatment Commission nor the Federal Equal Treatment Commission have had to deal with such a question yet. Following the academic comment to the Equal Treatment Act a long training period by itself or running through a designated entire diplomatic career cannot be considered as justification for an age limit.

Age limits, especially for jobs with a long training period, will not be justified as long as the employer can benefit from the employee. The question in the present case is whether a minimum of 17 years of working as a diplomat can be an adequate time to talk about a benefit for the employer (ministry of foreign affairs). An academic argument refers to the period of time that would allow the employer (due to the labour law) to ask the employee to pay back costs for training. In the private sector according to Austrian judicature this would be around 5 years.

From the National Equality Body's point of view the exception as mentioned in Sec 13b par 4 no 3 Federal Equal Treatment Act would not be applicable in the present case. The training Mr. Hansen would have to go through to become a diplomat takes around 3 years. He then would be able to work in the Foreign Service for a minimum of 17 and up to 25 years. Purely economic reasons (resources for the training programme) will not justify a differentiation because of the age of the applicants. Moreover the Ministry for Foreign Affairs will be able to benefit form Mr. Hansen for at least 17 years, which is a rather long period of time compared to around 3 years of training.

Question 6
The national Equality Body would refer to section 6 (1) (c) Directive 2000/78/EC and to relevant case law of the European Court (Mangold).

Belgium

Centre for Equal Opportunities and Opposition to Racism

Preliminary remarks
Belgium is a federal state where – depending on the subject and locality of the matter – legislative authority is independently held by either the federal state, the Communities (3) or the Regions (3). As a general principle, the federal anti-discrimination law is not applicable in matters that fall within the competence of the Communities or Regions. On the other hand, the Communities and Regions are of course under the same obligation as the federal state to implement the relevant European legislation within their areas of competence.

The Centre for Equal Opportunities and Opposition to Racism (CEOOR) is an autonomous federal public agency, whose authority to deal with discrimination cases, in accordance with the 15 February 1993 CEOOR Establishment Act, is limited to the federal anti-discrimination and anti-racism legislation. However, today, cooperation agreements are being negotiated with the Communities and Regions in order to expand the CEOOR's legal mandate to non-federal discrimination cases.

Recently, the Belgian federal Parliament adopted three new acts in order to harmonise the existing anti-discrimination legislation and to refine the implementation of the EC directives on the federal level:

10 May 2007 Anti-discrimination Act:
This act replaces the 25 February 2003 Anti-discrimination Act and (re-)adds the following grounds to those covered by the 2000/78/EC Directive (religion or belief, disability, age and sexual orientation): civil status, birth, fortune, political conviction, language, future or present health condition, physical or genetic characteristic and social origin. The CEOOR's legal mandate covers all of these grounds, except for language (which will be assigned to a yet to be designated autonomous agency).

10 May 2007 Anti-racism Act:
This act modifies the 30 July 1981 Anti-racism Act and broadens the implementation of the 2000/43/EC Directive grounds by covering not only "so-called" race and ethnic origin, but also skin colour, descent, national origin and – newly added – nationality. The CEOOR's legal mandate covers all of these grounds.

10 May 2007 Gender act:
This act replaces the 7 May 1999 Gender Act. Please note that the issue of gender discrimination is excluded from the CEOOR's legal mandate, as it falls within the exclusive competence of the Belgian Institute for Equality between Men and Women.

The scope of this new legislation – which is identical for all three acts – is broader than demanded by the EC directives, as the following domains are enclosed (in short):

- access to and offering of goods and services accessible to the public;

- social protection (including social security and health care), social advantages and additional schemes to social security;
- employment (access to employment, working conditions, dismissal, etc.), including membership of and participation in trade unions and professional organisations;
- statements in official documents and minutes;
- access to and participation in economic, social, cultural and political activities accessible to the public.

Question 1
The scope of the 10 May 2007 Anti-discrimination Act includes "employment" in the broadest sense, both in the public and private sector, and regardless of the legal nature of the contract.

However, (age) discrimination issues which would arise in appointment procedures for civil servants by the Communities or Regions are excluded from the scope of this federal act. Depending on the situation, the non-federal anti-discrimination acts – i.e. the 8 May 2002 Flemish Decree, the 17 May 2004 Decree of the German Community, the 19 May Decree of the French Community and the 27 May 2004 Decree of the Walloon Region – will then apply.

The CEOOR will consider the Ministry of Foreign Affairs in the case at hand to be a Belgian federal public agency whose selection and recruitments procedures fall within the scope of the 10 May 2007 Anti-discrimination Act.

It seems rather unlikely that a similar case would arise in Belgium since the (updated) 25 April 1956 Royal Decree on staff regulations for the Ministry of Foreign Affairs only determines a minimum age requirement (22 years) for candidate-diplomats (which may even seem irrelevant, since it is impossible to meet the pre-training requirements before that age).

Question 2
The CEOOR's main competences include providing information and (non-binding) advice in discrimination issues (based on the before-mentioned grounds), dealing with discrimination complaints in a non-judicial way (e.g. trough negotiation and mediation) and undertaking legal action based on the Anti-discrimination and Anti-racism Acts.

As to court competence in Belgium, the case at hand would have to be brought before the Council of State, which is competent to both suspend and annul administrative acts. Such acts may be of an individual (e.g. the refusal of Mr. Hansen's candidature) as well as a general (reglementary) nature (e.g. the Royal Decree containing supposedly unlawful age requirements).

Question 3
Under the 10 May Anti-discrimination Act, this requirement would be considered as a direct distinction based on age. Such a distinction will automatically constitute direct discrimination unless it can be justified in accordance with the law (see answers to the following questions).

Question 4
The exception for "genuine and determining occupational requirements", in case of a direct distinction based on age, sexual orientation, religion or belief and disability in matters of employment and occupation, is provided under art. 8 of the 10 May 2007 Anti-discrimination Act (incl. the legitimate aim and proportionality test).

The judge is to verify in each concrete case if one of these characteristics is a "genuine and determining occupational requirement" (art. 8, §3). However, art. 8, §4 also provides for the possibility to establish by Royal Decree a non-exhaustive list of situations in which one of the characteristics is a "genuine and determining occupational requirement".

Please note that if the age requirements in the case at hand were established by or in execution of a law (e.g. art. 8, §4 / Royal Decree), the 10 May 2007 Anti-discrimination Act cannot be invoked (art. 11, §1). This does however not necessarily imply that the given requirements are in conformity with the Belgian Constitution, EC law or other international standards (art. 11, §2) (see answer to question 6).

Either way, considering the elements in Mr. Hansen's case and the arguments given by the Ministry of Foreign Affairs, the CEOOR feels that the "genuine determining occupational requirement" test is rather redundant. If I the given age requirements are at all justified, such justification would be based on the specific age exception in art. 6 of Directive 2000/78/EC (rather than the more general exception in art. 4.(1)) (see answer to question 5).

Question 5
A specific exception for differences of treatment on grounds of age in matters of employment and additional schemes to social security is provided under art. 12 of the 10 May Anti-discrimination Act.

It seems quite clear that in the case at hand, the arguments given by the Ministry of Affairs to defend the age requirements are based on the (legitimate) aim defined under art. 6(1) c) of the 2000/78/EC Directive: "the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement". Although this aim is not expressly mentioned in the Belgian

Anti-discrimination Act, the CEOOR believes that it is automatically covered by the more general provision of "(…) legitimate aims of the policy in the area of employment, labour market or any other comparable legitimate aim" (art. 12, §1).

As to the objective justification test, the CEOOR's feels that although the length of the training programme for diplomats may justify to some extent the use of age criteria, the given requirements – "between 25 and 32 years old" – do not seem appropriate and necessary in that respect. Elements to support this statement are indeed the retirement age for diplomats (70 years, early retirement possible at 62 years, state pension at 67 years) as well as the fact that despite the Ministry of Foreign Affairs' argument of needing qualified personnel (…), the relevant experience of candidates over 32 years of age is not at all taken into consideration.

Question 6
It has already been mentioned that since age requirements for diplomat candidates would in Belgium be determined by Royal Decree, the 10 May 2007 Anti-discrimination Act could not be invoked to contest such direct distinction based on age.

In the case at hand, Mr. Hansen would therefore have to address the Council of State in order to try and have this administrative act annulled. Such action is likely to be based on the alleged inconformity of the Royal Decree with the general principles of equality and non-discrimination in art. 10-11 of the Belgian Constitution, in the light of the duty of the Belgian legislator under art. 16 of the 2000/78/EC Directive to abolish any laws, regulations and administrative provisions contrary to the principle of equal treatment.

Denmark

Danish Complaints Committee for Ethnic Equal Treatment

Question 1
The case falls within the scope of the anti-discrimination law in Denmark, the specific law being the act on prohibition against differential treatment in the labour market etc. The act covers direct and indirect discrimination due to age etc., cf. § 1 (1). Cf. § 2 (1) an employer is not allowed to discriminate employees or applicants for available positions at employment, dismissal, transfer, promotion or in regard to pay and working conditions.

Question 2
Today there is as yet no administrative complaints committee that deals with complaints over age discrimination, like we see it with the Complaints Committee for Ethnic Equal Treatment and the Gender Equality Board. There is however a bill out suggesting a new complaints committee that covers all grounds. This has however not been proposed in Parliament yet so it is still the traditional court system that deals with these complaints.

A complaint over age discrimination will start at city court level.

Question 3
In Mr. Hansen' case it would be direct discrimination.

Question 4
Yes, such an exception does exist (§ 6, subsection 2 in the act on prohibition against differential treatment in the labour market etc.) It would however not apply, meaning that it is not relevant.

Question 5
Article 6 (1) is implemented in § 5a subsection 3 in the act on prohibition against differential treatment in the labour market etc. A non official translation of this provision is as follows:

Notwithstanding the provision in subsection 1 the act is not an obstacle to the upholding of existing age limits existing in or agreed upon with reference to collective agreements and arrangements assuming that these age limits are objectively and reasonably justified by a legitimate aim within the scope of Danish legislation and that the means of achieving this aim are appropriate and necessary.

The provision, § 5a subsection 3, is an exception from the principle rule that agreements that contradict the prohibition against differential treatment are invalid. The provision makes it possible to maintain existing age limits in collective agreements. The age limits must be objectively and reasonably justified and be reasonable compared to the aim they are meant to achieve.

This exception only applies to age limits in collective agreements and arrangements that were valid on 28 December 2004, where the latest amendment to the act came into force. New agreements on new provisions that imply age limits can therefore not be entered into unless it happens as part of an agreement on implementation of the Employment Directive cf. § 1 subsection 7.

Article 6 (2) is implemented in § 6a in the act on prohibition against differential treatment in the labour market etc. A non official translation of this § is as follows:

Notwithstanding §§ 2-5 this act is not an obstacle to the establishment of age limits

for access to occupational social security schemes or for the use of age criteria in actuarial calculations within the scope of these arrangements. The use of age criteria must not result in discrimination on the grounds of sex.

I have tried to find out whether there are any such collective agreements regarding diplomats and age limits but without success.

Question 6
Unfortunately I do not have the knowledge to answer this question.

Hungary

Equal Treatment Authority

Question 1
The case falls within the scope of anti-discrimination law (the Equal Treatment Act Nr. 125 of 2003) in Hungary.

Question 2
The competent authority is the Equal Treatment Authority. The Labour Court would be competent as well.

Question 3
The age requirement of the Ministry constitutes direct discrimination in employment field, see: Equal Treatment Act Para 15 (1) a).
According to the Hungarian law system the Labour Inspectorate could also be competent (see Act 75 of 2006, Para 1 (2) a) on labour inspection).

Question 4
The characteristic (based on age) in this case does not constitute a general and determining occupational requirement. The requirement created by the Ministry towards the applicants, according to the Article 6 Point 1 c) of Directive 2000/78/EC, is neither legitimate nor proportionate because the claimant, of 43 years of age, would, after completion of the training programme, be young enough to work for 17-25 years in the service of the Ministry and he would be able to build his career in the Foreign Service, so it is not reasonable to limit the opportunity for applying to the training programme to age 32.

According to Chapter III of Equal Treatment Act (Act CXXV of 2003) which prohibits discrimination in the employment field, the principle of equal treatment is not violated if:
a) the discrimination is proportional, justified by the characteristic or nature of the work and is based on all relevant and legitimate terms and conditions, or
b) the discrimination arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.

We would like to point out that Article 23 of our Act on Equal Treatment, which says that an act, a government decree based on an act or a collective contract may order an obligation for positive discrimination for a specified group of employees in respect of the employment relationship or other relationship aimed at employment.

In Mr Hansen's case we can not apply any exception mentioned above.

According to the Hungarian Equal Treatment Act (see Para 22 (1) a), the requirement is not proportionate because of the actual age of Mr Hansen. He has at least 17 years (50% of the years spent in the Foreign Service) ahead which could be quite enough to build and complete his carrier as a diplomat.

Question 5
An objective justification would apply in the case of a traineeship programme between two Member States, for a limited period and providing trainees with work experience only for young people starting out on a career to gain experience, before they start their first job.

Question 6
As the case can be solved according to the provisions of the Hungarian Equal Treatment Act, it is not necessary to use international standards.

Netherlands

Dutch Equal Treatment Commission

Question 1
The case falls within the scope of the Dutch equal treatment legislation. According to section 3, under a, of the Equal Treatment in Employment (Age Discrimination) Act (WGBL) it shall be unlawful to discriminate with regard to the recruitment, selection and appointment of personnel. It is not a problem that it concerns a position within the government (public sphere).

Question 2
The Dutch Equal Treatment Commission is competent and can give a non-binding opinion on this case. This procedure is without costs. Parties do not need to have a lawyer. A district court would also be competent and can give a binding judgment. For this procedure, legal charges must be paid. In employment cases before a district court a lawyer is not obligatory.

Question 3
The age-requirement would constitute direct discrimination on the ground of age, since the advertisement directly refers to age (between 25 and 32 years). The reason for rejecting Mr. Hansen was that, while he was a good candidate, he did not meet the age requirements.

Question 4
The Equal Treatment in Employment (Age Discrimination) Act does not explicitly include such an exception. We think however that arguments related to a genuine and determining occupational requirement could in some cases be brought up in relation to the objective justification test. E.g. an 80 year old man who wants to become a pilot.

Question 5
The following exceptions to the prohibition of discrimination on the ground of age can be found in the Employment (Age Discrimination) Act:

Section 7 - Objective justification

1. The prohibition on discrimination shall not apply if the discrimination:

a) is based on employment or labour-market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament;

b) relates to the termination of an employment relationship because the person concerned has reached pensionable age under the General Old Age Pensions Act (AOW), or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties;

c) is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.

2. The preceding subsection shall not apply to cases of harassment as referred to in section 2.

Section 8 - Pensions

1. For the purposes of this section 'pension scheme' shall mean a pension scheme applying to one or more persons solely in connection with their activities in a company, branch of industry, occupation or public service, which scheme supplements a statutory social security system and, in the case of a scheme applicable to a person, is not arranged privately by the person in question.

2. The prohibition on discrimination shall not apply to the age of admission or to the pensionable age laid down in the pension scheme, nor to the establishment of different ages for admission or entitlement for employees or for groups or categories of employees.

3. The prohibition on discrimination shall not apply to actuarial calculations in the context of pension schemes which make use of age criteria.

Objective justification:

Pursuant to section 7, first sentence and subsection (1)(c) of the Employment (Age Discrimination) Act, discrimination on the grounds of age is not prohibited when it is objectively justified. The party which has discriminated must for this purpose adduce facts which justify the discrimination. The decision whether an objective justification exists in an actual case must be based on an assessment of the aim of the discrimination and the means used to achieve this aim. The aim must be legitimate, in the sense of sufficiently important, or meet a real need. Another requirement set on a legitimate aim is that it may not be intended to discriminate. The means used must be appropriate and necessary. A means is appropriate if it is suitable for achieving the aim. A means is necessary if the aim cannot be achieved by using a means which does not result in discrimination, or which is at any rate less onerous, and if the means is proportionate to the aim. It is only when all these conditions are satisfied that the discrimination is not in breach of equal treatment legislation.

When assessing whether there is an objective justification, the Dutch Equal Treatment Commission (ETC) will take into account section 6 (1) (c) of Directive 2000/78/EC, which says that differences of treatment can be objectively justified, if it concerns the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

The case does not give us insight on the aim of the discrimination and this makes it difficult to see whether the aim is legitimate. If the aim would be the need to have high level diplomats or to ensure well qualified personnel at all times, these aims would be legitimate since they meet a real need of the Ministry and are not intended to be discriminating.

The means used is the age requirement. It can be questioned however whether the age requirement is appropriate/suitable for achieving the aim of having high level diplomats or ensuring well qualified personnel at all times. According to the Ministry, it takes a long time to achieve the competence necessary to become a high level diplomat. They do however not indicate how long it takes. Mr. Hansen will be 45 years old upon completion of the three-year training programme and will in theory have the

possibility to work in the Foreign Service for another 25 years, and for 17 years at a minimum. It would be interesting to get figures on how long diplomats generally keep doing this work. Is it really a job for life or do a lot of people switch? Furthermore we would need to know what the costs for training are.

In a case that came before the ETC (ETC 22 September 2005, opinion 2005-174, to be found on www.cgb.nl (in Dutch)) a man born in 1943 had applied for a post in which he would be able to work for 6 months to 3,5 years after finishing the training programme of 5 months before his retirement at the age of 62 (pre-pension) or 65 (pension). The employer did not use an age requirement in the advertisement but rejected the man because of his age.

In this case the employer said that the aim of the discrimination was to ensure that the result of the training would exceed the efforts in terms of period of training and costs of training in a reasonable manner. The ETC decided that this aim was legitimate, since the employer may want to benefit from knowledge that employees receive at the training as long as possible.

The means used by the employer was to reduce the selection of persons who will not be expected to work for the company during a period of time that is proportionate to the period of training and costs of training. The ETC considered the means suitable for achieving the aim and therefore appropriate.

According to the ETC the means used were also necessary to reach the aim, since the man would be able to work for 6 months to 3,5 years after finishing the training programme of 5 months before his retirement, since (according to the information of the employer) it takes 2 or 3 years to reach the required level of this specific post, and since the costs for training would be €50.000. Since the man did not sufficiently challenge the arguments of the employer, the ETC concluded that under these circumstances the aim could not be achieved by using a means which does not result in discrimination, or which is at any rate less onerous. The means was also proportionate to the aim. The ETC thus concluded that the (direct) discrimination on the ground of age was objectively justified.

A related ETC case on the subject (to be found on www.cgb.nl (in Dutch)) is ETC 2 February 1999, case 1999-10 and 1999-11: an age requirement (maximum 31 years) for a six year training programme for becoming a judge or public prosecutor lead to discrimination on the ground of sex, since women older than 31 who had finished their university studies later due to taking care of their children could not apply. The opinions came out before the Employment (Age Discrimination) Act came into force. Today this training programme no longer has an age requirement.

Question 6
When assessing whether there is an objective justification, the Dutch Equal treatment Commission (ETC) will refer to and take into account section 6 (1) (c) of Directive 2000/78/EC, which says that differences of treatment can be objectively justified if it concerns the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Norway

Equality and Anti-Discrimination Ombud

Question 1
The case falls within Norwegian anti-discrimination legislation, more specifically the Working Environment Act Chapter 13, which prohibits discrimination on the grounds of inter alia age in working life.

Question 2
The Norwegian Equality and Anti-Discrimination Ombud would be competent, rendering non-binding legal statements. Furthermore, the courts of first instance (district courts) would be competent.

Question 3
Direct discrimination, since Mr. Hansen's age was referred to specifically as the ground for disqualification.

Question 4
Under the Working Environment Act chapter 13 there is an exception as mentioned in Article 4 (1) of Directive 2000/78/EC. It would not, however be applicable in this case. The exception is to be interpreted in a strict manner, and age as a criterion would be considered a too general characteristic to fall within the exception.

Question 5
Under the Working Environment Act chapter 13 there is an exception as mentioned in Article 6 of Directive 2000/78/EC. The argument of the Ministry that it wants to recover the costs of the training, and that it wants highly qualified personnel would be considered legitimate aims since the aims do not seem to be discriminatory in themselves and are based on actual needs.

We would not, however, consider the means chosen, namely a maximum age requirement, to be appropriate, nor necessary. Whether a person is qualified must be assessed based on

his or her qualifications and experience. To become a highly qualified diplomat, the diplomats in training must be able to achieve the relevant competence. Each applicant must be considered in light of this. An age requirement would not in itself be appropriate upon selection of candidates in this regard.

Furthermore, Mr. Hansen would have between 17 and 25 years of service left upon completion of the training. Unless proven otherwise, it is reasonable to believe that this would be a long enough period to obtain the necessary experience to become a highly qualified diplomat. Thus, we would not consider the age requirement necessary, either.

If the Ministry wanted to ensure that their new diplomats stay in the Foreign Service, the age requirement would seem neither appropriate nor necessary, since diplomats of every age are able to leave the service, regardless of how old they were upon completion of the training. As mentioned above, an employment period of between 17 and 25 years before retirement would seem to be a reasonable period to obtain the necessary experience to become a highly qualified diplomat.

Question 6
Reference would probably be made to article 6, section (1) c) (on the fixing of maximum age for recruitment) of Directive 2000/78/EC.

Slovakia

National Centre for Human Rights

Question 1
The general constitutional principle of prohibition of discrimination in the Slovak legal order represents Art. 12 par. 2 of the Constitution, that stipulates:

Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.

According to Art. 6 of the Act Nr. 365/2004 Coll. on Equal treatment in Certain Areas and Protection against Discrimination (the "Antidiscrimination Act") in conformity with the principle of equal treatment, any discrimination shall be prohibited in employment relations, similar legal relations and related legal relations on grounds of sex, religion or belief, racial, national or ethnic origin, disability, age and sexual orientation.

The principle of equal treatment under paragraph 1 shall apply only in combination with the rights of natural persons provided for under separate legal provisions regulating access to employment, occupation, other gainful activities or functions including recruitment requirements and selection criteria and modalities.

The principle of equal treatment in employment is also regulated in the Labour Code (Art. 13 of the Act Nr. 311/2001 Coll.) and in Art. 3 of the Act No. 312/2001 Coll. on Civil Service.

Question 2
A district court.
Other institutions: labour inspectorate, the Slovak National Centre for Human Rights as a national equality body.

Question 3
Direct discrimination

Question 4
(Art. 8/1 of the Antidiscrimination Act)-

Legitimate aim: the requirement of the Ministry of Foreign Affairs to have high level diplomats at their posts all the time may be considered as a legitimate aim.

Genuine and determining: the age requirement alone *is not a genuine and determining occupational requirement.*

Proportionate: with regard to the professional qualification of Mr. Hansen (his PhD. in Political Science, speaking English and French, his experience as a journalist and as a junior expert for the UN) his age is not a decisive requirement for the position of a diplomat. It is above all his qualifications and professional experience that are to be taken into account in considering his ability to fulfil the tasks of a professional diplomat. For that reason the age requirement *is not proportionate* to the aim pursued.

Question 5
Objective justification test according to Art. 8/3 of the Antidiscrimination Act:

Differences of treatment on grounds of age shall not be deemed to constitute discrimination if they are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Differences of treatment on grounds of age shall not be deemed to constitute discrimination if they consist in

the fixing of a minimum or maximum age as a recruitment criterion,

the setting of special conditions on access to employment and vocational training, and special conditions on employment, including

remuneration and dismissal, for persons of a certain age bracket or persons with caring responsibilities, where such special conditions are intended to promote vocational integration or ensure the protection of such persons,

the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment.

As mentioned in answer 4, the age requirement may in our opinion pursue a legitimate aim but must be objectively justified because the requirement in question is neither appropriate nor necessary.

The legitimate aim may be reached by less restrictive means. The argument of the Ministry to justify the age requirement does not answer the question of whether the age policy is able to ensure that younger employees (diplomats) completing their training programmes will stay in the service of the Ministry and will not leave.

Question 6

In a case of age discrimination we would probably refer to the EU age anti-discrimination law and the ECJ jurisdiction in the Mangold case C- 144/04, mainly with regard to the argument of the Court stating that the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law.

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