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DISCRIMINATION CASES IN FRONT OF THE EUROPEAN COURTS AND THE ROLE OF NATIONAL EQUALITY BODIES

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THE JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EU IN DISCRIMINATION CASES,

THE POTENTIAL ROLE AND ADDED VALUE OF NATIONAL EQUALITY BODIES IN THESE PROCEDURES

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Introduction

1. It is a great pleasure to be invited to speak at this important Equinet seminar on the role of National Equality Bodies (NEB) in discrimination cases before the Court of Justice of the European Union (CJEU).[2]

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Member of the editorial committee of the Equality Law Reports.
[2] This is the new name of the court after the Lisbon Treaty. I shall not make a distinction in this paper between the CJEU and the European Court of Justice, its predecessor but refer to both as "the Court" unless the context otherwise requires.

2. It is my task to consider the jurisprudence of the CJEU as it applies in discrimination cases where an NEB has played an important role. In this way I shall explore the potential role and added value of NEBs in such proceedings.

Two historical examples of the contribution of NEBs to the acquis communautaire

3. NEBs have been involved in many cases before the CJEU and its predecessor the European Court of Justice (ECJ). There are some particularly famous cases. For instance Mrs Marshall could not have brought her two cases[3] establishing first that a different pension age for men and women did not justify different retirement ages and secondly that compensation for discrimination had to be full, effective proportionate and dissuasive, without help from the British Equal Opportunities Commission.[4]

4. Another relatively early example of the role played by the Swedish NEB is Case C-236/98 *Jämställdhetsombudsmannen v Örebro läns landsting* [2000] E.C.R. I-02189 (*JämO*). In *JämO* the proceedings were brought by the Swedish NEB[5] on behalf of two midwives, arguing that the County Council[6] which employed them discriminated against midwives by paying them a lower basic monthly salary than a clinical technician although they performed work of equal value.

[3] Case 152/84 *Marshall v Southampton and South West Hampshire AHA* [1986] E.C.R. 723, and Case C-271/91 *Marshall v Southampton and South West Hampshire AHA* (No.2) [1993] E.C.R. I-4367.
[4] The Equal Opportunities Commission (EOC) assisted in many cases which were referred to the Court. The EOC was set up by the Sex Discrimination Act 1976; the relevant provisions of that Act were repealed by the Equality Act 2006 which established an Equality and Human Rights Commission which became the NEB for the whole of Great Britani I relation to all the grounds referred to in Article 13 TEC. A separate equivalent body was established for Northern Ireland by the Northern Ireland Act 1998.
[5] The Jämställdhetsombudsman – the Equal Opportunities Ombudsman.
[6] The Landsting.

5. The judgment of the ECJ in *JämO* has been cited in nearly 30 subsequent cases[7] and has established that a term by term comparison of the pay given to a woman and that given to a man must be undertaken.

6. This conclusion has been highly important in helping women to achieve transparency in pay systems and so to achieve compliance with the principle of equal pay for work of equal value now found in Article 157 TFEU but which has been part of every Treaty since the Treaty of Rome. So *JämO* has radically improved the position of women in achieving equal pay.

NEBs become part of the equality struture

7. It has not always been appreciated that NEBs can have such a role. Everyone will probably know that the first Directive to give a *specific* role to NEBs was Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Race Directive): see Article 13. Prior to that not every member state had an NEB. Some very big states, notably such as France for instance, did not.

8. The background to that provision lay in the discussions that took place before the Directive was first proposed by the European Commission. The Commission held a conference in Vienna in late 1998 to discuss what use it would make of the new powers to propose anti-discrimination legislation which were contained in Article 13 TEC.[8] Many contributors to that conference argued that it was necessary to support individuals to achieve their non – discrimination rights and that it was necessary to have some official support to that end. They pointed to cases like *Marshall* and *JämO*

[7] There are nearly 30 cases in the Court which have cited this judgment. The most recent is Case C‑471/08, *Sanna Maria Parviainen v Finnair Oyj* [2010] E.C.R. I-06529.
[8] Now Article 19 TFEU.

where the role of the NEB had been so important in achieving real gains in the development of equality law.

9. There had already been some action at the European level in creating a transnational NEB, and this too was seen as a catalyst for change. Thus Council Regulation No. 1035/97 of the 2nd June 1997 had provided for the setting up of a European Monitoring Centre on Racism and Xenophobia,[9] and as I recall it there were representatives from that Centre at the conference.

10. Building on the experience in the Member States[10] where there were NEBs I suggested at that the Vienna conference that there were five minimum conditions for effective anti-discrimination legislation. I said such legislation should provide for individual rights and remedies, criminal sanctions, information and training, mainstreaming and monitoring.[11]

11. In respect of individual rights I pointed out[12] that there had to be proper access to the courts and equality of arms before the courts and that in some countries this was best achieved by NEBs that

> …help with the preparation and funding of discrimination cases…[I added that other states]…will have to consider what assistance is necessary to make sure that such individual rights are real.

12. In its Communication proposing the Race Directive, issued soon after that conference, the European Commission included a provision for such bodies[13] with powers to support individuals, and to monitor and inform more widely.

[9] See OJ L151, 10/06/1997, pp. 1- 7.
[10] For instance I was already very much aware of the work of the Dutch Equal Treatment Commission - Commissie Gelijke Behandeling (Kleinesingel 1-3, Postbus 16001, NL – 3500 DA, UTRECHT, Tel: +31 30 8883888, Fax: +31 30 8883883; www.cgb.nl. I was also very impressed by some of the work then undertaken in Vienna in relation to women's rights.
[11] See Allen R., Article 13 EC Evolution and Current Contexts, in ed. Meenan H., Equality Law in an Enlarged European Union, 2007, Cambridge University Press.
[12] Ibid. p. 53.

13. This remained part of the text of the final Directive, so that in its final text the Race Directive provided in Chapter III, Article 13 that -

> **CHAPTER III - BODIES FOR THE PROMOTION OF EQUAL TREATMENT**
>
> **Article 13**
>
> 1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
>
> 2. Member States shall ensure that the competences of these bodies include:
>
> - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
>
> - conducting independent surveys concerning discrimination,
>
> - publishing independent reports and making recommendations on any issue relating to such discrimination.

14. As should also be well known to this audience, unfortunately Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation did not include an equivalent provision. This is largely recognised to have been an oversight.

15. However other provisions[14] such as the Recast Gender Directive (2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of

[13] See Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Brussels, 25.11.1999 COM(1999) 566 final 1999/0253 (CNS) (see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0566:FIN:EN:PDF)

[14] See also Article 8a of Gender Employment Directive 2002/73/EC, and Article 12 of the Gender Employment Directive (2004/113/EC).

men and women in matters of employment and occupation (recast)) did have a similar provision: see Article 20.

16. As a result NEBs have now become an established feature in all member states with a key role in promoting equality and assisting individuals to ensure that they are able to secure their equality rights. Much has been written about their role already.[15]

17. It is generally accepted that these bodies should accord with the Paris Principles in their methods of working.[16] Adherence to those principles is very important in securing the independent authority and therefore democratic reliability of such bodies. So how can NEBs work with the CJEU to prove their worth in the future?

The role of the CJEU

18. It is important to be clear first about the possible roles that the CJEU could have in discrimination cases. There are broadly three contexts in which the CJEU can play a role in relation to discrimination law:

    - firstly it may give a judgment on a reference for a preliminary ruling pursuant to Article 267 TFEU (ex Article 234 TEC);[17]

[15] See e.g. Moon G., Enforcement Bodies, Chapter 8 in eds Schiek D., Waddington L, and Bell M., Non Discrimination Law, Ius Communis, Hart Publishing, 2007; Holtmaat R. Catalysts for Change: Equality Bodies according to Directive 2000/43/EC, Migration Policy Group, 2007 (available at http://www.migpolgroup.com/publications_detail.php?id=159); and the Synthesis Report, Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC by Ammer M., Crowley N., Liegl B., Holzleithner E., Wladasch K., and Yesilkagit K., October 2010 (available at www.ec.europa.eu/social/BlobServlet?docId=6454&langId=en). It is also interesting that the Council of Europe has considered this approach: see the report of Dr Thomas Hammarberg, in his Opinion of the Commissioner for human rights on national structures for promoting equality given at Strasbourg, 21 March 2011 (which can be found at https://wcd.coe.int/ViewDoc.jsp?id=1761031).

[16] See the UN General Assembly resolution 48/134 of 20 December 1993 on National institutions for the promotion and protection of human rights at http://www.unhchr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/A.RES.48.134.En?Opendocument

[17] This says "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it

- secondly it can determine staff cases in accordance with non-discrimination rules; and
- thirdly it can apply the principle of equal treatment in the context of other litigation, not so obviously concerned with the scope of the key non-discrimination texts.

19. Each of these is worth considering shortly. I should add that the CJEU can also give rulings on an application by the Commission that a member state has not transposed an equality Directive into domestic law.[18] There have been some very important occasions on which this has happened, but usually only with the indirect assistance of an NEB.

Article 267 references

20. The CJEU has recently restated the purpose of references under Article 267 in Case C-366/10, *Air Transport Association of America, and others v. the Secretary of State for Energy and Climate Change* (judgment of the Grand Chamber given on 21 December 2011) (*Air Transport Association of America*) where there was a challenge to a piece of European legislation on the basis that it was not compatible with international law.

21. The CJEU explained its particular role in such a context at [47] – [48] -

> 47. … The main purpose of the jurisdiction conferred on the Court by Article 267 TFEU is to ensure *that European Union law is applied uniformly by national courts*. That requirement of uniformity is particularly vital where the validity of an act of European Union law is in question. Differences between courts of the Member States as to the validity of acts of European Union law would be liable to jeopardise the very unity of the European Union legal order and to undermine the fundamental requirement of legal certainty (Case C-344/04

to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

[18] This has been particularly important in relation to action to secure compliance with the equality Directives by Germany: see e.g. C-329/04 *Commission v Germany* .

IATA and ELFAA [2006] ECR I-403, paragraph 27 and the case-law cited).

48 The Court of Justice alone therefore has jurisdiction to determine that an act of the European Union, such as Directive 2008/101, is invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 17; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 17; Case C-6/99 *Greenpeace France and Others* [2000] ECR I-1651, paragraph 54; IATA and ELFAA, paragraph 27; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 54). (Emphasis added).

22. The role of the CJEU is therefore to ensure the uniform application of Union law. This is particularly important when the issue arises in a final court of appeal since in that case the obligation to make a reference is greater. [19]

23. Thus, it was said in C-99/00 *Kenny Roland Lyckeskog* [2002] ECR I-4839 at [14] – [18] that–

14. The obligation on national courts against whose decisions there is no judicial remedy to refer a question to the Court for a preliminary ruling has its basis in the cooperation established, in order to ensure the proper application and uniform interpretation of Community law in all the Member States, between national courts, as courts responsible for applying Community law, and the Court. *That obligation is in particular designed to prevent a body of national case-law that is not in accordance with the rules of Community law from coming into existence in any Member State* (see, *inter alia*, *Hoffmann-La Roche*, cited above, paragraph 5, and Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, paragraph 25).

15. That objective is secured when, subject to the limits accepted by the Court of Justice (*CILFIT*), supreme courts are bound by this obligation to refer (*Parfums Christian Dior*, cited above) as is any other national court or tribunal against whose decisions there is no judicial remedy under national law (Joined Cases 28/62, 29/62 and 30/62 *Da Costa en Schaake* [1963] ECR 31).

16. Decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under

[19] See the text of footnote 17 above.

national law' within the meaning of Article 234 EC [now Article 267 TFEU]. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy.

17. That is so under the Swedish system. The parties always have the right to appeal to the Högsta domstol against the judgment of a hovrätt, which cannot therefore be classified as a court delivering a decision against which there is no judicial remedy. Under Paragraph 10 of Chapter 54 of the Rättegångsbalk, the Högsta domstol may issue a declaration of admissibility if it is important for guidance as to the application of the law that the appeal be examined by that court. Thus, uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at last instance, by the supreme court.

18. If a question arises as to the interpretation or validity of a rule of Community law, the supreme court will be under an obligation, pursuant to the third paragraph of Article 234 EC, to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage. (Emphasis added).

Acte clair

24. So whenever an issue arises in a member state that affects the interpretation of union law there is a good reason to ask for a reference unless of course the meaning of the law is entirely clear. In this last situation the interpretation is said to be *acte clair*.

25. The CJEU has explained that a matter is *acte clair* so that a national court is relieved from the outset simply of the obligation to seek a preliminary ruling if the CJEU or before it the ECJ has already delivered a ruling on that point or the correct application of European Union law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved: Case 283/81 *Cilfit and Others* [1982] ECR 3415, [13] to [16] and [21].

26. Sometimes it is argued that the Court should not give a ruling on a case before it because a reference should not have been made because it is alleged that the issue at stake was acte clair. However the CJEU will not refuse to accept a reference on that ground.

27. The approach of the court to accepting a reference was recently set out by Advocate General Kokott in Joined Cases C-165/09, C-166/09 and C-167/09 *Stichting Natuur en Milieu, and others v College van Gedeputeerde Staten van Groningen, and others* -

> 37. …there is a presumption that questions on European Union law are to be regarded as relevant. (12) Thus, having regard to the function of the preliminary ruling procedure, the referring court's observations on the relevance of the questions referred may not be subject to excessively strict requirements.
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> 38. Consequently, only in exceptional circumstances is it for the Court to examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. (13) It is settled case-law that a reference from a national court may be refused only where it is quite obvious that the interpretation of European Union law sought bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (14) Save for such cases, the Court is, in principle, bound to give a preliminary ruling on questions concerning the interpretation of European Union law. (15)

12. - Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-0000, paragraph 29; Joined Cases C-395/08 and C-396/08 *Bruno and Pettini* [2010] ECR I-0000, paragraph 19; and Case C-393/08 *Sbarigia* [2010] ECR I-0000, paragraph 20.
13. - Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 27.
14. - See, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24.
15 - See *Bosman* (cited in footnote 14), paragraph 59, and *IATA and ELFAA* (cited in footnote 14), paragraph 24.

The role of Article 267 references

28. Article 267 references have been very important indeed to the development of equality law. There are many examples of the effect of those judgments. Some are highly specific and of limited effect, others have such a wide effect that they determine the scope of the protections to a great degree. In this last category a precedent is created for Union law as a whole. If that is the result of NEB support the NEB can be genuinely and justifiably proud of what it has achieved.

29. There are many good examples to choose from. Four of my favourite cases for explaining how this role could and does work are

    - Case C-13/05 *Sonia Chacón Navas v. Eurest Colectividades SA* [2006] E.C.R. I-6467 (*Chacón Navas*);
    - Case C-303/06 *Coleman v Attridge Law* [2008] E.C.R. I-5603 (*Coleman*);
    - Case C-17/05 *Cadman v Health & Safety Executive* 2006 E.C.R. I-09583 (*Cadman*) and
    - Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] E.C.R. I-5187 (*Firma Feryn*)

30. I will start with a very important case albeit one where the participation of an NEB might have achieved more. *Chacón Navas* will be recalled as the case in which the Court determined just how far Directive 2000/78/EC went to protect persons from disability discrimination. The Court held at [43] that

> …the concept of "disability" [as used in that Directive] must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.

31. The case is particularly interesting as the Claimant in that case was not represented before the Court although the Respondent employer, and the Spanish, Czech, German, Netherlands, Austrian and UK governments were, as well as the European Commission. Perhaps the claimant had insufficient

funds. I do not know, but if so then this is a case in which the support of the NEB could have been very helpful.

32. The Court rejected the suggestion that an illness would be enough for a person to qualify as a disabled person and therefore for the special equal treatment rights conferred by the Directive; however the ruling which it gave by no means deprived the Directive of large effect. This was due to the submissions of the Commission I suspect. If however the Spanish NEB had been represented in the Court it might well have been able to enlarge more fully on what might be the autonomous Union law meaning of disability.

33. This contrasts with the position in *Coleman* in which the Court determined that a person is protected under the same Directive even if they are not themselves disabled but they are in a particular association with a person who is.

34. That case was brought with the specific assistance of the British Disability Rights Commission (DRC).[20] The DRC had spent about 3 years looking for a case to support to establish this point which has been of huge importance firstly for carers and also in other contexts.

35. The expert assistance of the DRC ensured that the Court was made aware of the developing international law in this area. Thus AG Poiares Maduro said in his Opinion in that case at footnote 4 -

> … equal treatment and non-discrimination as guaranteed by the Directive should be placed within a broader human rights context. … A recent development in the area of international human rights which concerns disability issues is the adoption of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol. The Convention was adopted by the General Assembly on 13 December 2006 and opened for

[20] The DRC no longer exists for the same reasons that the EOC has ceased to exist – see footnote 4.

signature on 30 March 2007 when 81 States and the European Community signed it. It provides, inter alia, that the signatory parties are to prohibit 'all discrimination on the basis of disability' (Article 5(2)).

36. The future importance of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol in interpreting the Directive across the member states was thus acknowledged as a result of the intervention of an NEB in this case.

37. Another good example of the role that an NEB can take in the context of an Article 167 reference is to be found in *Cadman*. In that case the Equal Opportunities Commission had intervened in the proceedings in the domestic court. In the ECJ it was able to make general submissions as to the proper approach to equal pay cases. These general submissions sought to bring together the key aspects of difficult and diffuse case law. The Court set out the basic scheme of the principle for equal pay for the same work or work of equal value at [27] – [32] in a concise but compelling way –

The general scheme arising from Article 141(1) EC

27 Article 141(1) EC lays down the principle that equal work or work of equal value must be remunerated in the same way, whether it is performed by a man or a woman (*Lawrence v Regent Office Care Ltd* (C-320/00) [2002] E.C.R. I-7325 ; [2002] 3 C.M.L.R. 27 at [11]).

28 As the Court held in *Defrenne v SA Belge de Navigation Aérienne (SABENA)* (43/75) [1976] E.C.R. 455; [1976] 2 C.M.L.R. 98 at [12], that principle, which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified, forms part of the foundations of the Community (see also *Brunnhofer v Bank der Osterreichischen Postsparkasse AG* (C-381/99) [2001] E.C.R. I-4961; [2001] 3 C.M.L.R. 9 at [28], and Lawrence and Others at [12]).

29 Furthermore, it must be recalled that the general rule laid down in the first paragraph of Art.1 of Directive 75/117, which is principally designed to facilitate the practical application of the principle of equal pay outlined in Art.141(1) EC, in no way alters the content or scope of that principle (see

Jenkins v Kingsgate (Clothing Productions) Ltd (96/80) [1981] E.C.R. 911; [1981] 2 C.M.L.R. 24 at [22]). That rule provides for the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration for the same work or for work to which equal value is attributed (*Rummler v Dato-Druck GmbH* (237/85) [1986] E.C.R. 2101; [1987] 3 C.M.L.R . 127 at [11]).

30 The scope of Art.141(1) EC covers not only direct but also indirect discrimination (see, to that effect, *Jenkins* at [14] and [15], and *Elsner-Lakeberg v Land Nordrhein-Westfalen* (C-285/02) [2004] E.C.R. I-5861 ; [2004] 2 C.M.L.R. 36 at [12]).

31 It is apparent from settled case law that Art.141 EC, like its predecessor Art.119 of the EEC Treaty (which became Art.119 of the EC Treaty — Arts 117 to 120 of the EC Treaty have been replaced by Arts 136 EC to 143 EC), must be interpreted as meaning that whenever there is evidence of discrimination, it is for the employer to prove that the practice at issue is justified by objective factors unrelated to any discrimination based on sex (see, to that effect, inter alia, *Danfoss* at [22] and [23]; *Kowalska v Freie und Hansestadt Hamburg* (C-33/89) [1990] E.C.R. I-2591 at [16]; *Hill and Stapleton* at [43]; and *Schönheit v Stadt Frankfurt am Main* (C 4 & 5/02) [2006] 1 C.M.L.R. 51 at [71]).

32 The justification given must be based on a legitimate objective. The means chosen to achieve that objective must be appropriate and necessary for that purpose (see, to that effect, *Bilka-Kaufhaus GmbH v Weber von Hartz* (170/84) [1986] E.C.R. 1607; [1986] 2 C.M.L.R. 701 at [37]).

38. *Firma Feryn* is a case in which the Belgian NEB took an even more direct role in litigation before the ECJ. It will be recalled that this case concerned an obvious wrong but where there was no identified victim. Thus there was no individual person who could make a complaint.

39. A director of the defendant Belgian company, which specialised in installing doors, made public statements to the effect that positions as door fitters offered by the company were not open to "immigrants". This was the context

in which proceedings were brought against the defendant by Belgian anti-racism NEB.[21]

40. It was alleged that there was race discrimination simply as a result of these statements but the claim was dismissed at first instance on the ground that it had not been shown that any particular person had been discriminated against.

41. On appeal by the NEB, a reference was made to the ECJ for a preliminary ruling on the three questions

- whether there was direct discrimination, in the meaning of article 2(2)(a) of Council Directive 2000/43/EC 1 on equal treatment irrespective of racial or ethnic origin, where, in the context of recruitment of employees, there was no particular victim but an employer stated that it had a discriminatory selection policy;
- how the provision in article 8(1) of the Directive as to the reversal of the burden of proof should operate in such a case; and
- what, in such a case, could be an "effective, proportionate and dissuasive" sanction for infringement of anti-discrimination measures, within the meaning of article 15 .

42. The rulings of the Court were very important indeed for anti-discrimination campaigners. I shall set out in full what the Court held in the Operative Part of its judgment

> 1 The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.
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> 2 Public statements by which an employer lets it be known that under its

[21] The Centrum voor Gelijkheid van Kansen en voor Racismebestrijding (Centre for equal opportunities and opposition to racism).

> recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of article 8(1) of Directive 2000/43 . It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment.
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> 3 Article 15 of Directive 2000/43 requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that Directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.

43. The body of the judgment amplified those points. Thus in relation to remedy it was said at [36] – [39] –

> 36 Article 15 of Directive 2000/43 confers on member states responsibility for determining the rules on sanctions for breaches of national provisions adopted pursuant to the Directive. Article 15 specifies that those sanctions must be effective, proportionate and dissuasive[22] and that they may comprise the payment of compensation to the victim.
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> 37 Article 15 thus imposes on member states the obligation to introduce into their national legal systems measures which are sufficiently effective to achieve the aim of the Directive and to ensure that they may be effectively relied on before the national courts in order that judicial protection will be real and effective. Directive 2000/43 does not, however, prescribe a specific sanction, but leaves member states free to choose between the different solutions suitable for achieving its objective.
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> 38 In a case such as that referred by the national court, where there is no direct victim of discrimination but a body empowered to do so by law seeks a finding of discrimination and the imposition of a penalty, the sanctions which article 15 of Directive 2000/43 requires to be laid down in national law must also be effective, proportionate and dissuasive.
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> 39 If it appears appropriate to the situation at issue in the main proceedings,

[22] Interestingly this text refers back to the 2nd *Marshall* case, see footnote 3 above.

> those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.

44. It will be seen too that this judgment combines both civil and criminal penalties for such behaviour since it indicates that it may be necessary to impose both a prohibitory injunction and also a fine. I strongly believe this point is as important as any in this judgment since in some cases criminal sanctions will be necessary as I pointed out in 1998.[23] Moreover in his Opinion AG Poiares Maduro said that "purely token sanctions are not sufficiently dissuasive to enforce the prohibition of discrimination": see [28].[24]

Staff cases and other litigation

45. There are numerous cases brought before the old Court of First Instance in which staff of the institutions of the European Union and Communities such as the Parliament and the Commission and the European Central Bank have complained of discriminatory treatment. Although these cases are not often seen directly by those working in NEBs in member states they are an important influence on the thinking of the Court because they bring home in a particular way how equal treatment is a universal principle.

46. There is for instance no specific legislation which requires that every aspect of the principle of equal treatment applies to the treatment of staff though the Court of Frist Instance has had no difficulty in holding that it does apply.

[23] See [10] above.
[24] He referred by analogy to Case 14/83 *Von Colson and Kamann*, [1984] ECR 1891 at [23] - [24].

47. This is not an area of law with which NEBs can so readily directly engage though it is something that they should be aware of. Such cases are sometimes turned up when searching the data base of the case law of the Court. The case should not be ignored without a thought! I see no reason why an NEB might not offer support in such cases where the claimant lives or works in the relevant member state.

The added value of NEB involvement

48. The cases that I have discussed above, are cases in which the NEB has been able to establish major points of anti-discrimination law. What can be said about the added value that the NEB has brought to these proceedings?

49. In my view there are at least four main points that are really important about the role of the NEB. Not all of these points apply in every case but they are points which in the round should be borne in mind by NEBs in all member states when determining their work programmes and their litigation strategy.

50. Firstly the NEB will be an expert body. Its role is not merely to assist litigants to establish equality rights but also to act independently in conducting surveys, publishing reports and making recommendations. For this reason it has a special expertise in any member state and so can act in a didactic role teaching the Court about the context in which discrimination can and does occur, and showing how certain acts of discrimination must be addressed as a priority.

51. *Firma Feryn* provides an excellent example of two aspects of the role of an NEB. Firstly it must have been obvious to the Belgian NEB that if the employer in that case got away with this action then it would only encourage others to act similarly. This would have been quite unacceptable since it would have the effect of warning off applicants for employment with such

firms who for irrelevant personal characteristics would have realised that they were unacceptable. Such a result would have been wholly contrary to the underlying concept of a Europe of many nations but one Union. The NEB was able to use its powers as a regulator within Belgium to help establish a regulatory norm for the whole of the Union. So an NEB can have a "policing" role in relation to equality.

52. Secondly because it was seen as a victimless act – in the sense that no person could specifically claim to have been the victim of discrimination – it required a public body to act and to stop the conduct straight away. In other countries this might have been achieved by the state commencing criminal proceedings. I believe that prior to the establishment of HALDE in France[25] this might have happened. However of course the taking of criminal proceedings normally depends on the acts of a state prosecutor who will almost always not be an expert in this field. So an NEB can act when there is no other person or body able or ready to enforce the law.

53. Another way in which an NEB can add value as in *Coleman* is to identify a gap in the law and then to take a case that extends the protection in Union law further than merely those who had relevant protected characteristics. This case came out of the insight which the NEB had into the contexts within which discrimination could occur. It was the ability of the NEB to see that the law *ought* to extend that far that caused it to find a test case and to take it with the specific intention of seeking a ruling not merely for the UK but which would have an impact across the member states. Thus the expertise which it had about problems within the UK was leveraged and applied to the Union as a whole.

[25] See now http://www.defenseurdesdroits.fr/ This organisation was enshrined in the French Constitution on 23 July, 2008 and established by organic and ordinary law of 29 March 2011. It combines the missions of the Ombudsman, the Ombudsman for Children, the High Authority against Discrimination and for Equality (HALDE) and the National Commission of Police Ethics (CNDS).

And for the future…

54. I have said before and repeat here that I also consider that there is deficit in the procedural rules of the CJEU in that at present it does not permit for NEBs set up to comply with Union law to intervene in Article 267 references!

55. Nor do the procedural rules of the CJEU permit bodies such as the European Union Agency for Fundamental Rights (which replaced the European Monitoring Centre for Racism and Xenophobia with effect from the 1st March 2007[26]) to intervene.

56. In my view given that the CJEU has long established that it takes a literal, teleological and contextual interpretation of any Union law provision[27] it would be very helpful to the CJEU were to change its procedure in this respect. In my own country the Equality and Human Rights Commission is empowered to, and frequently does, intervene in key litigation. It will do so this Autumn in a case which should go to the CJEU on an Article 267 reference to establish the extent to which volunteers are protected under Union equality law.

57. Alternatively it ought to be possible for any relevant NEB and in some cases all concerned NEBs to inform the European Commission – which does have procedural rights to submit to and be heard by the CJEU – of the views relevant to any case before it.

[26] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights OJ L 53, 22.2.2007, p. 1–14

[27] See for instance Case T-251/00 *Lagardère and Canals v Commission* [2002] ECR 11-4825, [72] et seq., and Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals v Commission* [2005] ECR 11-4065, [41] et seq.; f or a recent example of this approach Case C‑434/09, *Shirley McCarthy v Secretary of State for the Home Department* at [31] et seq..

Finally…

58. I very much look forward to working with NEBs from across the member states in using the CJEU as a means to advance equality law. If you think that there is a specific issue on which I can help then please do not hesitate to contact me.

ROBIN ALLEN QC
Cloisters

21 March 2012