



Equality Law in Practice

*A Question of Faith : Religion and
Belief in Europe*

 **Equinet**
European network
of equality bodies

An Equinet Report
2011

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A question of faith: Religion and belief in Europe

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Equinet brings together 37 organizations from 30 European countries which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

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Preface

Equinet's Working Group on Equality Law in Practice consists of legal experts working for national equality bodies and focuses on how EU and national equality legislation is interpreted. This work is intended to further the goal of achieving enhanced and harmonised protection from discrimination across all the EU Member States.

The working group uses real-life cases from different Member States to analyse how the Directives and national legislation are applied in practice. This methodology permits a comparison of the different national legislations and the solutions to the individual cases, achieving a number of objectives: identifying patterns in the way the Directives have been implemented and applied in national laws; identifying potential gaps in protection or areas requiring legal clarification in the Directives; and identifying potential and existing legislative gaps in national legal systems.

In 2011, the working group members decided to take a novel approach, collecting and discussing a large number of cases relating to a specific topic, namely religious discrimination and freedom of religion under Article 9 of the European Convention of Human Rights. Firstly, they focused on religious discrimination and ways in which the right to manifest religion or belief can generally be limited, including in the field of employment, education, the provision of goods and services and in public spaces, such as the ban on veils covering the whole face. Secondly, they discussed cases relating to religious discrimination and the ways in which the right to manifest religion or belief can specifically be limited where it conflicts with the rights of others, including the rights persons identified by sexual orientation, gender or children.

The working group decided to choose this topic given the growing number of religious discrimination cases in Europe and the complex legal issues that the cases raise. For example, to what extent can employers limit the right to manifest a religion in the workplace; when will security concerns justify religious discrimination in the provision of goods and services; is the prohibition on full veils of Muslim women in several EU Member State a breach of Article 9 and the right to freedom of movement; and in what circumstances should the rights of gay persons prevail over a person wishing to manifest their religion?

National equality bodies, even if they do not have a specific human rights mandate, face more and more cases that require them to assess both religious discrimination issues and the limits of freedom of religion.

The summary of the findings for each category of cases contains a number of conclusions and lessons learnt which we hope will have practical value for equality bodies, national governments, the EU institutions and other stakeholders in their work on EU anti-discrimination law.

It is to be noted that the conclusions are based on the work and assessments of the individual staff members of this Equinet working group and not of all the members of Equinet. As a result the conclusions may not represent the definitive position either in an individual Member State or on the effect of the Directives. In addition, the conclusions do not necessarily represent the position or opinion of the equality bodies either that have been involved in preparing this report or the other equality bodies that are members of Equinet.

Finally, on behalf of the Equinet network, we would like to thank all of those who devoted their time, energy and expertise and contributed to this report.

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Introduction

Why focus on religion and belief?

Equinet's Law in Practice Working Group decided to concentrate on Religion and Belief cases in this year's report as it was apparent to equality bodies that this area of law was bringing forth a number of controversial and difficult cases which were affecting the fundamental rights of those who hold religion and belief and those who do not. The aim of the report is to highlight and clarify the key areas of debate, as well as to provide some conclusions that can be drawn.

This analysis is set against the background of protection provided by two different systems. Firstly, the EU Equality Directives and in particular the *General Framework Directive*¹, which prohibits discrimination on grounds of religion or belief in employment and vocational training. Secondly, the Council of Europe's European Convention of Human Rights and in particular Article 9 which provides the right to freedom of religion or belief.

It is also against the background that nearly 87% of 26² EU Member States' populations adhered to one of the three world religions: Christianity, Judaism and Islam³. This report analyses religious discrimination on Article 9 issues in the sectors of employment, education, the provision of goods and services and public spaces. It also analyses conflicts that can arise between the rights of religious persons and the rights of other groups defined by sexual orientation, gender or children.

In 2008 the European Commission assessed the impact of the *Framework Directive* prohibiting religion and belief discrimination in employment and found that:

'National case law arising since the adoption of the Directive has highlighted conflicts between employee dress codes and manifestations of religious belief. Some of these cases have been treated as human rights matters (raising issues of freedom of religious expression) rather than discrimination cases, but they indicate that this area is likely to be a sensitive issue in implementing the Directive'.⁴

The experience of the national Equality Bodies echoes this concern as issues arising from religion and belief cases can be controversial and difficult to deal with, as a fine balancing of rights needs to be achieved. The importance of finding the right balance is illustrated by the judgement of Lord Nicholls in a UK case:

"Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony."⁵

Further, another European Commission report looked at discrimination in health, education, housing, transport, information and advice, social security, social services, insurance and financial services and goods and services in general, and found that discrimination is a 'widespread phenomenon across the EU'⁶. While there were variations in the problems

¹ 2000/78/EC

² Details were not available for one country

³ Figures are taken from the 'Study on discrimination on grounds of religion and belief, age, disability and sexual orientation outside employment', European Policy Evaluation Consortium 13 June 2008. This study was commissioned by the European Commission with a view to introducing further legislation prohibiting religion and belief (and other) discrimination outside employment.

⁴ COM(2008) 225 final

⁵ R (Williamson) v Secretary of State for Education and Skills (2005) UKHL 15 para15

encountered by the protected groups, not being able to access services or goods at all and degrading treatment were common across all groups in all areas⁷.

In relation to education, the report found that ‘discrimination on the basis of religion or belief may affect individuals at the level of primary, secondary or tertiary education’ but that it can ‘become more prominent in secondary schools. The extent to which an individual adherence or practice of a particular religion or belief is visible interacts with the extent of discrimination’⁸.

The report notes that:

‘in many EU Member States, complaints about excluding pupils from educational institutions because they adhere and/or practice a particular religion have been made ... Opinions put forward... differ significantly concerning whether the expression of religious identity promotes or actually inhibits equal opportunities and ... whether matters such as exclusion from schools because of religion/religious dress constitutes discrimination or not.’⁹

For example, in the Netherlands and Belgium schools may prohibit the outward display of religious symbols by pupils and in France it is prohibited by the law itself. In Sweden however case law has established that denial of a right to wear religious dress at school constituted indirect discrimination.¹⁰ The European Commission report concludes that the French, Dutch and Belgian approach did not constitute discrimination on grounds of religion and belief because:

‘it is clear that the public policies of these Member States e.g. relating to social cohesion, integration... the right to religious freedom, to equality, to education...are defined and weighed against one another. The principle that children ... should have equal opportunities...in education has informed both the judgement to prohibit the outward display of religious symbols at school by pupils in some Member States and to allow it in others’, the debate is around how, and whether, a multicultural society is to be created and ... how religious ... identities can be expressed and pursued.’¹¹

The European Commission report also found that degrading or insulting behaviour on grounds of religion or belief is prevalent in goods and services in general, in housing, health and transport.¹²

Controversial debates around manifesting religion or belief through dress also arises in public spaces more generally and this is considered in chapter 4 of this report. These debates illustrate the different approaches of Member States to the treatment of veiled Muslim women and whether refusal to permit the wearing of veils in public spaces constitutes either discrimination on grounds of religion and/or gender, or a breach of their Article 9 rights. This issue is likely to be determined by the European Court of Human Rights in the future.

Equality Bodies have contributed significantly to the public debates and case law on the issues arising from the protection against religion and belief discrimination and the Article 9 right in both casework and conferences.¹³

⁶ P 4 ibid

⁷ P 4 ibid

⁸ P 50 ibid

⁹ P 51 ibid

¹⁰ Decision by the Swedish Ombudsman of 31 January 2011, ANM 2009/1224

¹¹ P 49 - 50 ibid

¹² P 54 ibid

¹³ For example, the British Equality and Human Rights Commission is currently intervening in two cases (Eweida and Chaplin v UK and Ladele and Macfarlane v UK) before the European Court of Human Rights concerning employee’s rights to manifest their religion at work in wearing religious symbols and secondly whether they may be exempted from providing services which do not accord with their religious beliefs.

In addition, the EHRC has also published a Human Rights Review (<http://www.equalityhumanrights.com/human-rights/human-rights-review/>) which considers the approach to religion and belief cases in the European Court of Human Rights and the British courts. Further the French Equality Body, the Defender of Rights and others, held a

Legal Framework

As stated above, this report is made against the background of EU Equality Directives and the European Convention of Human Rights. A brief summary of the provisions is set out below:

EU Equality Directives

As noted above, protection from religion and belief discrimination in employment and vocational training is provided by the *General Framework Directive*.

A draft Directive prohibiting religion and belief discrimination outside employment¹⁴ (hereafter *Proposed Directive*) is also currently going through the European Institutions legislative stages. However, it has been stalled for some time as Member States could not reach agreement. The Civil Liberties, Justice and Home Affairs Committee of the European Parliament is currently considering how to move forward with the Directive.¹⁵

Although there are no religion and belief discrimination provisions outside employment at European Union level, a number of Member States have prohibited such discrimination in sectors such as education and the provision of goods and services. However, the documentation which accompanied the European Commission's proposal for the Directive stated:

*'the fact remains that the European legal framework for tackling discrimination is not yet complete. In particular, whilst some Member States have taken action prohibiting discrimination on grounds of age, sexual orientation, disability and religion or belief outside the area of employment, there is no uniform minimum level of protection within the European Union for people who have suffered such discrimination.'*¹⁶

Therefore, cases taken outside the employment field rely on human rights provisions where there is no domestic prohibition against religion and belief discrimination, and this trend is reflected in the types of cases covered in this report.

European Convention on Human Rights

Article 9(1) of the ECHR provides an absolute right for individuals to hold religious and other beliefs and a qualified right to manifest religion or belief. Manifestation includes a right to worship, to teach others about a religion or belief, and to practise and observe it by wearing symbols or special clothes, or by eating certain foods.

Article 9 recognises that belief systems are part of the identity of individuals and their perception of life and that respect for different beliefs is central to tolerance in a pluralistic society.

Under Article 9(2), interference with an individual's freedom to manifest their religion or belief is permissible only if it is prescribed by law and can be justified as being necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others. For example, uniform policies

conference on key issues arising in the field of religion and belief discrimination law. Several European Equality Bodies (UK, NL, France, Greece, Spain) contributed to this Conference. They addressed religious discrimination cases that had arisen in their respective countries (Les discriminations religieuses en Europe: droits et pratiques", publication due in June 2012.)

¹⁴ And discrimination on grounds of sexual orientation, disability and age

¹⁵ <http://www.europarl.europa.eu/committees/en/LIBE/events.html> (accessed on 19.03.2012) - Public hearing 'Unblocking the Anti-Discrimination Directive', 20.03.2012

¹⁶ COM(2008) 420 final

at work or school, or requirements to work at certain times or carry out certain tasks may restrict the extent to which people can manifest their beliefs.

The cases concerning conflicts focus in particular on the justification for limiting the manifestation of a religion for reasons of "protection of the rights and freedoms of others".

Structure of this report

In each of the following chapters the same structure is followed with the relevant legal framework and an analysis of some key cases and issues. Some conclusions have also been drawn in relation to each key sector or conflict.

As described above, the chapters focus on the following issues and can be found in this order:

- Employment
- Education
- Goods and Services
- Public Spaces
- And conflicts relating to:
 - Sexual orientation
 - Children's rights
 - Gender

1. Employment

This chapter considers religious discrimination and Article 9 issues in the context of employment. A number of factors are examined that have been considered important in determining such cases: in education the need to further children's education and their rights; health and safety concerns; dress codes; the effect that accommodating the religion or belief would have on the functioning of the organisation; and the aim of public or private bodies to remain secular or neutral.

a) Legal framework

Protection under the Equality Directives

The Council Directive 2000/78/EC of 27 November 2000 (the *Framework Directive*) establishing a general framework for equal treatment in employment and occupation prohibits direct and indirect discrimination, harassment, instructions to discriminate and victimisation on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation.

The Court of Justice of the European Union (CJEU) has in several cases interpreted the concept of “employment”. This covers not only conditions related to access to employment, but also conditions of employment, including dismissals and pay, and in general the CJEU has applied a fairly wide and inclusive definition of what to include.

With regard to “access to employment” this covers not only the conditions obtaining before an employment relationship comes into being, but also those influencing factors that need to be considered before the individual makes a decision. Once the working relationship has been established the CJEU has again applied a fairly wide understanding, also in regard to the area of dismissals. The area of dismissal covers almost all situations where the working relationship is brought to an end, including the question of voluntary-redundancy schemes or compulsory retirement.

Vocational guidance and training are also included under the scope of the employment directive, and the CJEU has again taken a broad and inclusive stand on this issue and decided that “any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education”.¹⁷

Generally speaking, under the *Framework Directive* direct religious discrimination is unlawful, unless one of the exceptions below applies. Indirect religious discrimination occurs where an apparently neutral policy or practice puts persons of a particular religion or belief at a particular disadvantage and the policy or practice is not a proportionate means of achieving a legitimate aim.

There are two main exceptions to unlawful discrimination in employment under Article 4 of the *Framework Directive*. The first exception to the principle of equal treatment is the general “genuine occupational requirement” exception.¹⁸ This allows employers to differentiate between individuals on the basis of a protected characteristic, where this characteristic is directly related to the suitability or competence required to perform the duties of a particular

¹⁷ Gravier v. City of Liege Case C-293/83

¹⁸ Article 4(1) Framework Directive 2000/78/EC

post. It includes situations where being of a particular religion may be a legitimate requirement for a position, such as requiring a school teacher in a Catholic school to be Catholic.

The second exception relates specifically to religious institutions.¹⁹ The *Framework Directive* specifically permits organisations that are based on a “religion” or a “belief” to impose certain conditions on an employee. The Framework Directive thus allows organisations such as churches and other religious based organisations to require that employees are of a particular religion or belief. However it does not permit discrimination on any other ground, for example sexual orientation or gender.

The CJEU has not yet had the opportunity to rule on the interpretation of this provision, but it has been analysed and applied at the national level. It is considered in detail in chapter 2.1 of the report dealing with conflicts between religion or belief and sexual orientation as the cases have often arisen in that context.

Protection under Article 9 of the European Convention on Human Rights

As stated in the introduction to the report, freedom of thought, conscience and religion is a fundamental right, protected by Article 9(1) of the European Convention on Human Rights (ECHR). The right to manifest one’s religion or beliefs can however be limited as long as they 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 European Court of Human Rights (ECtHR) and national courts have in a number of cases examined the issue of manifesting religion in the workplace and some of those cases are analysed below.²⁰

b) Analysis of cases and key issues

In a number of cases national courts have considered the right to manifest religions or beliefs in employment situations either in the context of claims of religious discrimination or claims of breaches of Article 9 of the ECHR. The types of issues that arise are: the impact that manifesting a religion or belief would have on particular groups (e.g. children in schools) and other employees; health and safety concerns; dress codes; and the desire of public or private sector employers to remain secular or neutral. As the summarised case law below shows, employers’ rights to organise and regulate their workplace are generally broad when it comes to limiting an employee’s right to manifest their religion or belief and there have not been many cases where religious discrimination or a breach of Article 9 has been established.

Schools and furthering children’s education

Azmi case (United Kingdom)²¹

Ms. Azmi was a classroom assistant in a school who wanted to wear a full face veil. She claimed that her suspension for refusing to remove the veil was direct and indirect religious discrimination.

¹⁹ Article 4(2) Framework Directive 2000/78/EC

²⁰ Kalac v. Turkey 1.7.1997 (Application no. 20704/92), Dahlab v. Switzerland 15.2.2001 (Application no. 42393/98), Leyla Sahin v. Turkey 10.11.2005 (Application no. 44774/98)

²¹ UK – Azmi v Kirklees Council [2007] ICR 1154 (Employment Appeal Tribunal)

The Employment Appeal Tribunal confirmed that anyone who covered their face at work would be subject to the same treatment and it was therefore not on the grounds of her religion. As a result, it was not a case of direct discrimination. The Tribunal held instead that the treatment was potentially indirectly discriminatory as the requirement to have her show her face put her at a particular disadvantage as a Muslim. However it was held that the discrimination was proportionate. The aim was to enable the children to get the best education and for this they needed to be able to see her face. The children would have problems in being able to understand Ms. Azmi if they would not have the visual cues of seeing her lips move and body language.

This type of case also links to the cases discussed in chapter 2.2 of the report regarding potential conflicts between the right to manifest a religion or belief, and protecting the rights of others such as children. This case is concerned with ensuring that the best interests of children are taken into account in deciding whether the treatment was proportionate.

Health and Safety Concerns

Headscarf case 1 (Austria)²²

A Muslim woman wearing headscarf applied for a job as sewer in a textile company. During the job interview, the human resource officer informed the woman that she was offered the job, but that she could not wear the headscarf at work. The woman inquired if she could at least wear the “underscarf”, which is often placed under the headscarf. The officer refused this as well and informed the woman that as a result she could not be accepted for the job.

In their answer to the Ombud for Equal Treatment, the company stated that the prohibition of the headscarf was for security reasons. The company had already had an accident with a woman wearing the headscarf. There was a risk that the feed mechanism of certain machines in the factory would catch the headscarf. This was the reasoning behind the prohibition of wearing wide clothes. There was also an obligation to pin up one's hair in the factory and to wear adhesive clothes. The company further stated that approximately 50% of their staff is of a non-Austrian background and that discrimination does not exist in the company.

On request of the Ombud for Equal Treatment, the Federal Ministry of Labour informed the Ombud that the requirement of not wearing the headscarf when using the sewing machines was justifiable from the point of view of industrial safety.

The Ombud for Equal Treatment found that this might be a case of direct or alternatively indirect discrimination on the ground of religion and lodged a complaint to the Equal Treatment Commission.

The Ombud argued that the majority of the Austrian society associates the wearing of headscarf with Islam. A less favourable treatment because of wearing a headscarf was therefore direct discrimination on the ground of religion.

Alternatively the Ombud for Equal Treatment argued that the prohibition on wearing a headscarf during work is a neutral rule putting persons belonging to Islam at a particular disadvantage compared with other persons. The Ombud acknowledged that industrial safety was a legitimate aim, which could justify indirect discrimination. However the complete prohibition of the headscarf was not appropriate and necessary as the headscarf could be tied in a way that there is no risk of the scarf being caught by the feed mechanism of the machines in the factory.

²² GAW II/8/2007, GKB II/27/07

The Equal Treatment Commission stated in its decision that the general aim of the Equal Treatment Act is to eliminate discrimination in the working environment. However the Commission was of the opinion that the employer credibly demonstrated, that the prohibition of the headscarf was solely for security reasons. The Equal Treatment Commission therefore stated that there was neither direct nor indirect discrimination. There was no direct discrimination as she was not treated differently because of her religion. There was no indirect discrimination, as although the policy put Muslim women at a particular disadvantage, the policy was for a legitimate aim and proportionate.

Dress codes

Eweida v British Airways (United Kingdom)²³

Ms. Eweida was a member of the check in staff for British Airways. She was refused permission to wear a cross over her uniform as this was in breach of the uniform policy. At the Employment Tribunal Ms. Eweida brought claims of direct and indirect discrimination on grounds of religion or belief, as well as harassment. All these claims failed. She appealed against the finding that there was no indirect discrimination. The Employment Appeal Tribunal (EAT) had held that there was no indirect discrimination because there was no evidence that a group of Christians were put at a particular religious disadvantage when compared with non-Christians. The EAT dismissed the appeal and held that this was a cogent and justified conclusion displaying no error of law.

Ms. Eweida appealed to the Court of Appeal. It found that wearing a cross was not a mandatory requirement of Ms. Eweida's religion. She was therefore unable to establish that the requirement to conceal her cross put people sharing her religion or belief at a particular disadvantage and therefore her claim failed. In relation to Article 9, the Court of Appeal noted that the ECtHR have not been ready to find an interference with the right to manifest a religion where a person has voluntarily accepted a role which does not accommodate that practice and where there are other means open to that person to practice their religion without undue hardship (in this case she was offered backroom posts). As a result there was no finding of any breach of Article 9.

It is important to note that Ms. Eweida filed a petition in the ECtHR in relation to the case claiming a breach of Article 9.²⁴ The British Equality and Human Rights Commission has also intervened to provide submissions in the case which is yet to be heard.

Headscarf case 2 (Denmark)²⁵

The plaintiff was a Muslim girl who wore a religious headscarf while working as an intern at a department store. She claimed that she had been discriminated against on grounds of religion or belief when she was dismissed for wearing the headscarf. In her submissions the plaintiff also referred to Article 9 in the European Convention on Human Rights, as well as other international conventions.

The department store referred to the store's clothing guidelines and stated that the guidelines were enforced in a way so that employees were not allowed to wear headgear. However, the court found that the purpose of the guidelines was to emphasise the store's profile and image

²³ Eweida v British Airways [2010] EWCA CV 80, Court of Appeal

²⁴ The case of Eweida has been joined with a similar British case concerning the wearing of Christian crosses in the workplace, Chaplin v Royal Devon and Exeter NHS Foundation Trust. The petitions in the European Court of Human Rights have been joined, Eweida and Chaplin v UK, Applications 48420/10 and 59842/10

²⁵ U.2000.2350.Ø

which entailed that the employees in customer related sections should be dressed in a “businesslike” and “nice” way. The guidelines did not specify that the employees should be dressed in exactly the same way and were therefore to some extent broad in their character. The Eastern High Court found that the dismissal amounted to unlawful indirect religious discrimination as the employer could not demonstrate that the treatment was proportionate. The plaintiff was awarded 10.000 DKK in compensation.

UPS case (Sweden)²⁶

The complainant was a Muslim man who had a beard because of his religious belief. During an interview he was informed by the company that they did not allow employees to have a beard. He was hired for the job and was told by his boss that he needed to shave his beard. He refused to do this for religious reasons and was dismissed. The Ombudsman claimed indirect discrimination since the company applied a policy that appeared to be neutral but which discriminates against men who for religious reasons cannot shave their beard.

UPS argued that their policy stipulated that all employees had to wear a uniform and that a beard is not allowed. A moustache was, however, allowed. The policy originated from UPS in the USA. However, UPS could adapt the policy to requirements under Swedish law.

The Ombudsman held that the complainant had been subject to indirect discrimination since the rule appeared neutral but it particularly disadvantaged people with religious beliefs, and the uniform policy was not proportionate. The dispute was settled and the complainant was awarded 75.000 SEK.²⁷

The effect that accommodating religions or beliefs would have on the functioning of the organisation

Ahmad case (United Kingdom)²⁸

Mr. Ahmad worked as a school teacher and was employed by a local authority. He complained that he was forced to resign because he was refused permission to attend a mosque to worship during work hours. He claimed unfair dismissal and invoked Article 9 rights. Mr. Ahmad contended that the school timetable should have been amended to allow him to be absent for 45 minutes on Friday afternoons.

The European Commission of Human Rights emphasised that Mr. Ahmad had freely entered into a contract which required him to work full time and which was incompatible with his attendance at mosque on Friday afternoons. He had not informed his employer at the time of contracting (or for another 6 years) of the possible need for him to attend mosque on Fridays.

The Court of Appeal in the UK had found that in Mr. Ahmad’s case there had been serious difficulties arising when he was allowed to take time off on Friday afternoons. The European Commission of Human Rights took note of the UK government’s submissions on the requirements of the education system as a whole, the timetabling needs of the schools involved and found that the employer’s requirement for him to comply with his contract obligations did not interfere with his Article 9 rights.

²⁶ The Swedish Ombudsman’s Office v United Parcel Service

²⁷ In Sweden, an out-of-court settlement usually only involves a discussion on the compensation to be paid and does not elaborate on whether the case constitutes discrimination or not. UPS denied that it had discriminated the complainant.

²⁸ UK – Ahmad v UK (1981) 4 EHRR 128

Copsey case (United Kingdom)²⁹

Mr. Copsey worked as a team leader in the sand processing part of a quarry. He was dismissed when he refused (because of his Christian religion) to agree on a change in his contract which would require him to work on Sundays.

Mr. Copsey brought a claim of breach of Article 9. His claims in the Employment Tribunal and Employment Appeal Tribunal were dismissed. Mr. Copsey's claim raised issues about the possible legal limitations placed by Article 9 on the right of an employer to set the working hours of those employed and to dismiss an employee who does not keep to the agreed working hours or agree to reasonable changes in them.

The Court of Appeal decided in a similar way to the Ahmad case above by holding that the dismissal was lawful and there was no breach of Article 9. An employee is not entitled to complain that there has been a material interference with his Article 9 rights when he refuses to accept a change in his contract which prevents him from attending religious services. Case law shows that Article 9 is not engaged when working practices mean that an employee cannot attend religious services. In addition, the court held that Mr. Copsey was not dismissed on grounds relating to his religious belief, but because he could not comply with his contractual obligations.

The court took into account that the employer had compelling economic reasons for changing the work practices. Alternative employment options were fully explored, and from discussions with the other employees, it was the impression that there was dissatisfaction amongst the colleagues for what they perceived as special treatment of Mr. Copsey.

Seventh-Day-Adventist's case (Czech Republic)³⁰

Two sisters of the Seventh-Day-Adventist belief had been working for a social care facility since 1991. Before contracting they agreed with the employer that they will be excluded from Saturday shifts on grounds of religious belief, and they offered to do Sunday shifts instead. In July 2010 the job assignment of the sisters was changed, and they now also had to work on Saturdays. As they both repeatedly refused to work on Saturdays they were both dismissed. The two sisters claimed that they had been subject to religious discrimination and a breach of their constitutional right to freedom of religion.

The Defender of Rights opened a case. The employer explained that he refused to organise shift exchanges between his employees, after other employees complained that the sisters received preferential treatment at the expense of other employees, as the shifts were planned according to their requirements.

The Defender of Rights was of the opinion that there was no direct religious discrimination as the change in job assignment was not motivated by the religion or belief of the sisters, and the dismissal was also not based on their religion or belief, but on the grounds of their repeated absence. Secondly, there was no indirect discrimination and although the policy put the sisters at a disadvantage the policy was proportionate in order to ensure that the care facility could operate effectively.

²⁹ UK – Copsey v. Devon clays Ltd (2005) EWCA Civ 932

³⁰ 176/201/DIS/JKV

State or private bodies wanting to remain secular or neutral

Headscarf case 3 (Austria)³¹

An Austrian woman of Turkish origin wore a religious headscarf. She started to work as a "kindergarten assistant" for a private organisation that ran a couple of child care institutions for children up to three years old. The assistants support the kindergarten teacher in their daily work, but do not have educational tasks. At the time of renewal of the contract, a group of parents opposed the re-appointment of the woman. The contract was not renewed.

The Ombud for Equal Treatment claimed that this was a case of direct discrimination on the ground of religion.

On its website the kindergarten did not present itself as an organisation attached to a particular religion or ethos. It is also stated that the organisation adheres to the principle of non discrimination. In its statement to the Ombud for Equal Treatment, the kindergarten argued that the headscarf is a religious sign and that the parents of the children did not want their children to be in contact with a religiously dressed woman. The organisation defined itself as being neutral towards all religions and beliefs and therefore would not accept the wearing of religious dress.

They further argued that the genuine occupational requirement exception pursuant to Article 4(2) of the *Framework Directive* applied. They claimed the kindergarten considered itself as religiously neutral and that was a genuine occupational requirement. Discrimination on grounds of religion or belief does not occur where the religion or belief of the person concerned is a genuine, legitimate and justified occupational requirement, having regard to an organisation's religious ethos.

Finally the kindergarten justified the non-renewal of the contract by relying on Article 4(1) of the *Framework Directive*. They referred to the situation where unequal treatment based on religion or belief is not considered to be discriminatory when this constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

The Ombud for Equal Treatment was of the opinion that the kindergarten assistant was directly discriminated against because of her religion by wearing a religious symbol. The exceptions under Article 4(1) and (2) were not applicable in the present case as the kindergarten was not an organisation attached to a particular ethos where the religion or belief of the person concerned constituted a genuine, legitimate and justified occupational requirement.

Under the exemption a balance of interests is required between the principle of non discrimination and the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions according to Art 2 in the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. The Ombudsman for Equal Treatment was of the opinion that the interest of the kindergarten assistant not to be discriminated against prevailed over the interest of the parents that their children should not be in contact with a woman with a headscarf. The Ombud for Equal Treatment therefore initiated a procedure at the Equal Treatment Commission. However a friendly settlement was reached before the Equal Treatment Commission had to decide on the merits of the case.

³¹ GAW II/28/2010, GBK II/106/10

Headscarf case 4 (Denmark)³²

The plaintiff claimed to have been subjected to indirect religious discrimination when she was dismissed from her job in a supermarket where she served customers. The plaintiff also claimed that a prohibition against headaddress was a violation of Article 9 of the European Convention on Human Rights. In a Supreme Court judgment, the court accepted that a company's wishing to be politically and religiously neutral was a legitimate aim and that a clothing requirement as a mean to achieve that aim was proportionate and necessary. The Supreme Court found that a dismissal of the plaintiff for having worn a headscarf for religious reasons in opposition to the rules on clothing did not amount to unlawful differential treatment. The clothing regulation in the supermarket applied to every employee and was consequently enforced. The Court recognised that the prohibition of wearing a headscarf when having direct contact with customers would mainly affect Muslim women but found that the differential treatment was objectively justified in the performance of the work. The Court also did not find that the clothing regulation was in breach of Article 9 of the European Convention of Human Rights.

Headscarf case 5 (Belgium)³³

Ms. A started working for her employer – a private company – in 2003 as a receptionist. In 2006 she informed her employer that she would start to wear the Islamic headscarf during working hours due to her religion. She was told that wearing a headscarf would not be tolerated as this was incompatible with the neutrality that the company pursues, both internally and externally. The complainant claimed that this was direct religious discrimination and in breach of Article 9 of the European Convention on Human Rights.

The Belgian Employment Tribunal found that there was no case of direct discrimination. She was not dismissed because she was a Muslim, but because of the fact that she refused to follow the obligation to wear a neutral outfit, imposed by the existing dress code for the post of receptionist.

Wearing distinctive signs of a particular belief involves only one aspect of the expression of faith. The fact that during working hours neutral clothes and even a uniform is imposed, does not affect the ability to have a religious belief. Ms. A failed to show that she was treated less favourably than other workers. All employees were obliged to follow the dress code instructions. Article 9 of the Convention is not absolute and it can therefore not be reasoned that the protection criterion “faith” in the sense of anti-discrimination includes all manifestations of faith. The tribunal held that the neutrality that the company strived to achieve was a legitimate aim and the means of achieving that aim were proportionate and necessary.

Conclusion

A general conclusion which can be drawn from the above mentioned case law is that the domestic courts and the ECtHR have generally taken a narrow approach to the interpretation of whether there has been religious discrimination or a breach of Article 9 of the ECHR.

Out of the 11 examined cases all but 3 came to the conclusion that there was neither religious discrimination nor a breach of Article 9. In the Danish headscarf case damages were awarded by a court for indirect religious discrimination; in the Swedish UPS case indirect religious discrimination was found by the Ombudsman but the case was settled; and in the Austrian

³² U.2005.1265.H

³³ Decision of 23 December 2011, Antwerp Labor Court.

headscarf case no determination was made as a settlement was reached between the parties.

A number of specific conclusions can be drawn from the cases:

- There are a number of legitimate reasons for which the manifestation of a religion can be limited in the workplace including ensuring that the best interests of children are taken into account in education; to prevent the risk of injury of staff for health and safety reasons; and to ensure the efficient functioning of the organisation. In such cases the proportionality of the actions of the employer will be crucial in determining the claims;
- There are however concerns that some national courts may be taking a too narrow approach to establishing religious discrimination or breaches of Article 9, particularly in relation to policies concerning dress codes and private organisations wishing to remain secular or neutral;
- In relation to dress codes and the Eweida case in the UK, the courts may be setting too high a threshold for establishing that there is an interference with the right to manifest a religious belief;
- In relation to issues of private bodies wanting to remain religiously neutral, it is also questionable whether national courts are giving sufficient consideration to whether such a policy is both a legitimate aim and is proportionate particularly in roles such as working in a supermarket or as a receptionist as the Danish and Belgium headscarf cases demonstrate.

2. Education

This chapter focuses on religious discrimination or potential breaches of Article 9 in the provision of education. As part of this discussion the chapter also examines the fact that in some Member States national equality legislation permits an exception to direct religious discrimination where "faith schools" are lawful.³⁴ It does not deal with issues relating to the discrimination of employees who work in the education field, which is dealt with in the chapter 1 above.

In the recent years most of the cases across the EU relating to the manifestation of religions or beliefs in the context of education have related to the Muslim religion and in particular Muslim women's dress. Of the 35 cases on religious discrimination in education in which the Dutch Equal Treatment Commission gave an opinion up until December 2011, 34 were concerned with manifestations of the Muslim religion. Most of these cases dealt with the wearing of headscarves or niqabs (face veils) or the refusal to shake hands with persons of the opposite sex being contrary to school policies. The cases on religious dress will be dealt with below, while the cases on shaking hands are discussed in chapter 7 below on conflicts between the right to manifest religions and the rights of others defined by gender.

a) Legal framework

Protection under the Equality Directives

Currently the only required protection from religious discrimination is under Directive 2000/78/EC which establishes a general framework for equal treatment in employment and occupation. This includes protection from discrimination in the access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3, paragraph 1-b). Vocational training has been interpreted broadly by the CJEU as covering all training and skills developed relating to employment, whatever the age and level of the training of the pupils even if it includes a level of general education.³⁵

In France, for example, following this CJEU case law, both those studies that train students for a specific job, such as hairdresser or carpenter, as well as the more generic studies that prepare students for the labour market, including academic studies, are considered to be covered by the term vocational training.

Although primary and secondary education are not covered by the *Framework Directive* (nor explicitly other forms of education, such as academic studies), a number of Member States do provide protection from discrimination on the ground of religion or belief in the provision of these types of education.³⁶

It is also important to note that the *Proposed Directive*, which the Council of the EU has still not been able to adopt, does propose to prohibit discrimination in the provision of education on grounds of religion, as well as the grounds of disability and sexual orientation.³⁷ The delay

³⁴ For the purpose of this report, faith schools mean schools whose teachings and ethos relate to a particular religion or belief and may require that only students of that religion or belief can attend the school.

³⁵ *Gravier v Liege* C-293/83

³⁶ For instance Sweden, The Netherlands, the United Kingdom, Belgium, Hungary, Norway, Austria, Slovakia, Czech Republic, Finland, Lithuania and France all have a prohibition of discrimination on all grounds in their equality legislation. In Denmark only discrimination on the grounds of gender and ethnic origin is prohibited.

³⁷ Proposal COM (2008) 426, 2 July 2008, see article 3(1)(c). Age discrimination in the provision of education would be permitted under article 2(6).

of the EU Member States to agree the *Proposed Directive* means that there is a significant gap in required protection from religious discrimination in education at EU level.

According to Directive 2000/78/EC, it is unlawful to discriminate on the grounds of religion and belief in the access to vocational training. It is not expressly stated that discrimination is also prohibited *during* the education or training. However, a number of Member States have explicitly included discrimination *during* education in their equality legislation.

Therefore, the prohibition of discrimination on the grounds of religion and belief in education entails a right to non-discriminatory access to education and a right to be free from discriminatory remarks or acts by teachers or other members of the schools staff. The most difficult issue is the extent to which students are permitted to manifest their religion within the school or in relation to the school's activities and policies.

Article 3, paragraph 1-b of Directive 2000/78/EC does not distinguish between public and private schools. Nor do some of the Member States that have adopted equality legislation in relation to education.³⁸ There are however great divergences between the Member States when it comes to public and private schools. In some countries, public schools are neutral when it comes to religion and belief. But neutrality may mean an absence of religious or philosophical signals within the schools, as in France, or an open attitude towards religion and belief, meaning that the schools are open to all pupils/students without distinction on the basis of religion or belief, such as in The Netherlands and in the United Kingdom. In other Member States, public schools, although not religious in nature, may nevertheless display signs that are connected to a (dominant) religion, such as in Italy.³⁹ Private schools are privately owned and run, but this may not mean that they don't (also) receive any state funding, as for example in Norway. Most private schools are based on a certain religion or belief or on a particular educational method.

In some Member States,⁴⁰ such as the Netherlands, there is an exception in the equality legislation that allows schools based on a particular religion to refuse students/pupils that are not a member of that religion or that do not follow the school's religious rules. In the Netherlands, these schools may also accept students that do not have the faith that the school is founded on, but they may prohibit these students from manifesting their faith. In order to apply the exception, these 'faith schools' have to demonstrate that the policies that they adopt to maintain their religious identity are applied in a consistent manner and are necessary to safeguard this identity; and that the policy does not lead to discrimination on any other ground than religion or belief.

This means that, for instance, a Catholic school may demand from its pupils that they be Roman-Catholics. If such a school accepts non-Catholic pupils on the condition that they respect the school's religion, the school may demand from these pupils that they do not display any religious signs that are not Catholic, such as headscarves, as long as it can demonstrate that such a dress code is necessary for the maintaining of the Catholic identity of the school and provided that it adopts the policy in a consistent manner, i.e. equally towards all pupils.

In Norway, there are private religious schools, but they are not exempted from the prohibition of discrimination in education. However, in the preparatory works of the equal treatment legislation it is stated that if there is a shortage of places available at such a school, it could be objectively justified for the school to give priority to students of the same faith as the school is founded on. And in Hungary, there is not just an exception for religious discrimination in

³⁸ For instance in Norway, Sweden, Hungary and the Czech Republic

³⁹ See Grand chamber judgment of the European Court of Human Rights, 18 March 2011, *Lautsi v. Italy* (Application no. 30814/06)

⁴⁰ But also in the United Kingdom, Hungary, Lithuania

education in the equality legislation, but also – under strict rules – for discrimination based on gender and national and ethnic origin. While the exception for religious discrimination is usually motivated by the wish to allow religious groups to provide their children with education in conformity with their beliefs, it seems that the rationale behind the exception for separate education based on gender or national/ethnic origin is to allow for positive measures aimed at specific groups.

However, in most Member States there is no exception to the prohibition of discrimination for schools that are founded on a certain religious faith, irrespective of whether these are private or public schools. In a recent decision the Supreme Administrative Court of the Czech Republic ruled that education is a public service⁴¹. Schools are therefore obliged to keep to the rules relating to the provision of education contained in the Education Act, among which is the principle of non-discrimination, regardless of whether they are run by public, private or religious bodies.

Protection under the European Convention of Human Rights

The European Convention on Human Rights applies to situations of education in relation to both Article 9 and Article 2 of Protocol 1 which provides a right to education and includes “the entry to nursery, primary, secondary and higher education”.⁴²

Article 9 of the ECHR

The right to manifest one’s religion is also applicable to the education sector. The landmark case in this respect is the case of *Leyla Sahin*.⁴³ In that case, the ECtHR decided that the ban on wearing Islamic headscarves in higher-education institutions interfered with the right of the complainant, a university student who wanted to wear a hijab, to manifest her religion. However, the Grand Chamber of the ECtHR also decided that “Article 9 does not protect every act motivated or inspired by a religion or belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief” (§66). The ECtHR found that the university could restrict the complainant’s right to manifest her religion in order to defend the principle of state secularism. This was considered a public order ground of justification for an interference with the right to manifest a religion in Turkey. As a result the prohibition to wear a headscarf did not constitute, given the particular situation in Turkey, a violation of Article 9.

The right to education

The right to education in Article 2, protocol 1 of the ECHR reads as follows: “no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

The negatively formulated right to education in the first sentence of Article 2, Protocol 1 (no one shall be denied..) is not a socio-economic right that places an obligation on Member States to provide for or to subsidise education of any particular type. Rather, according to the ECtHR, Article 2 of Protocol 1 guarantees to persons “the right, in principle, to avail

⁴¹ 1 As 53/2011-109

⁴² Judgement of 23 July 1968, *Belgian Linguistic Cases* (Application nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64)

⁴³ Judgment of 10 November 2005, *Leyla Sahin v. Turkey* (Application no. 44774/98)

themselves of the means of instruction available at a given time”⁴⁴ Thus, the right to education in Article 2, Protocol 1, is primarily a right to equal access to education without discriminatory restrictions, although it is generally understood that this right also places on Member States the positive obligation to provide for a certain minimum level of education, as otherwise right to education would be illusory.⁴⁵ The state may restrict itself, however, to providing a minimum level of public education and is under no obligation to set up or to fund education that is based on a particular religion or belief. As the right to education is directed towards the state, it implies that state schools should accept students/pupils without discrimination. However, the right to non-discriminatory access does not give a right to access to any particular private school of choice.

The principle of non-discriminatory access to education does not imply that state schools cannot impose a ban on religious manifestations, such as religious dress. In the *Leyla Sahin* case, the ECtHR decided that because the prohibition of religious dress in higher education didn't constitute a violation of Article 9, no separate question arose in relation to Article 2 of Protocol 1.

The second sentence of Article 2 of Protocol 1 gives a right to parents to ensure that their children receive education and teaching that is in conformity with their religious or philosophical convictions. According to the ECtHR, education is the whole process of transmitting beliefs, culture and other values, whereas teaching refers in particular to the transmission of knowledge and to intellectual development.⁴⁶ The right to respect for religious and philosophical convictions covers thus both the activities of a school and the curriculum.

The second sentence does not just give parents the right to choose for a (private) school that meets their religious or philosophical views. It also gives parents the right to oppose to teaching of activities of public schools that do not correspond with their religious or philosophical convictions. But it is important to note that this does not mean that these schools cannot include any type of religious education in their curriculum, or that they should refrain from including in the lessons any information that may be regarded by parents as in contradiction to their religious or philosophical convictions.

In its case law, the ECtHR has judged that the government that is responsible for the curriculum is entitled to include in the teaching of public schools the transmission of information of a directly or indirectly religious or philosophical kind, but it must do so in an objective, critical and pluralistic way. If the transmission of religious ideas assumes the character of indoctrination, this constitutes a violation of Article 2 of Protocol 1.⁴⁷ If a Member State has a particular state religion taught in public schools, the religious instruction is not contrary to Article 2, Protocol 1 if parental beliefs are respected by granting exemptions. The parental right to respect for their religious or philosophical convictions does not however give parents a right to claim separate teaching during the religious teaching.⁴⁸

b) Analysis of cases and key issues

In the following section, cases that give some insight into the types of disputes that arise in the different Member States in relation to the manifestation of religion in education are

⁴⁴ *Belgian Linguistic Cases*

⁴⁵ Klaus Dieter Beiter, *The Protection of the Right to Education by International Law*, Leiden, 2006, p. 165

⁴⁶ Judgment of 25 February 1982, *Campbell and Cosans* (Application no. 7511/76 and 7743/76)

⁴⁷ Judgment of 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen* (Application no. 5095/71, 5920/72, 5926/72)

⁴⁸ Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, Antwerpen – Oxford, 2006, p. 899. For instance in the case of *Lautsi and others v. Italy*, judgement of 11 March 2011

examined. These cases provide an overview but are not intended to be exhaustive. The cases are broadly divided into two categories: general education cases which relate to discrimination or the limits of the right to manifest religion or belief; and two cases that relate specifically to one of the countries which have a faith school exception permitting religious discrimination.

The Swedish Niqab case⁴⁹

The Swedish Ombudsman decided not to bring this case to court. The complainant was a woman who studied to become a daycare teacher. She wore a niqab and wanted to wear it in school. The school had a rule that prohibited covering one's face with a veil or a similar head covering. The rule was based upon a non-binding decision by the Education Board. The Education Board's decision only mentions burqas, not niqabs, and stated that burqas may be prohibited for teaching reasons or for reasons stemming from school regulations. The school considered the difference between burqas and niqabs to be so minor that it applied the decision of the Education Board to the niqab and similar head coverings. It prohibited niqabs and similar head coverings for teaching and safety reasons. The school also held that the ban on niqabs was justified from a social point of view since it would impede the social interaction between the teachers and the students.

The complainant was informed by the school that she was not allowed to wear her niqab in school. However, while the case was being investigated by the Ombudsman's Office she was allowed to wear her niqab.

The Ombudsman held that, through a general rule against wearing a niqab, it was not in accordance with the Discrimination Act to prohibit a student from attending school without taking into account specific conditions which would have allowed the student to attend school. However, since the complainant had been allowed to attend school and to finish her studies the Ombudsman held that it was unclear whether she had been treated less favourably as required by the law. The Ombudsman stated that it was therefore unclear whether a court would conclude that the complainant had been discriminated against and award compensation as a result. Consequently, the Ombudsman decided not to submit a claim before the courts and the case was concluded with a written decision by the Ombudsman.

The Swedish Ombudsman's Office v Stockholms Hotell- och restaurangskola (Sweden)⁵⁰

A young Muslim woman, who was studying at the Stockholm Hotel and Restaurant School, wanted to wear a headscarf that covered her hair while at school. The school had a dress code that prescribed that during classes when serving customers was practiced, a uniform dress was to be worn. Only those clothes that were prescribed in the dress code were allowed and the dress code did not include headscarf. As a result, the student was prohibited to wear her headscarf during these classes.

The woman complained to the principal of the school but to no avail. The school held that the complainant was not allowed to wear her headscarf during classes due to reasons of hygiene, without providing evidence as to why the wearing of a headscarf would be contradictory to these rules of hygiene.

Since she wanted to be awarded her graduation diploma, the complainant removed her headscarf during the classes when serving customers. This was despite the fact that she

⁴⁹ Decision of the Swedish Ombudsman, 30 November 2010, ANM 2009/103

⁵⁰ Decision by the Swedish Ombudsman of 31 January 2011, ANM 2009/1224

experienced discomfort as a result. After the complainant graduated, but prior to the Ombudsman's decision, the school changed its dress code.

The Ombudsman concluded that the woman had been subject to indirect discrimination connected with her religious belief and gender. The dispute was settled through an out-of-court settlement on 13 of May 2011 in which the woman was awarded 40.000 SEK.

Examinations for Jewish students on Saturdays (France)⁵¹

In 2008, a religious association and the Jewish Central Consistory lodged a claim with the French Equality Body (HALDE) based on the difficulties encountered by practising Jewish students when examinations in public higher education took place on Saturdays and on Jewish religious holidays. In fact, the Jewish religion prohibits taking examinations during these periods.

The HALDE found that Jewish students had no absolute right to the rescheduling of classes or examinations to accommodate their religious practices. However, the French Equality Body also reaffirmed the obligation of the heads of academic establishments, whose decisions are subject to review by the courts, to consider each case individually, and to reconcile as far as possible religious freedom with the obligations inherent in school life. This position is similar to that taken by the French Council of State⁵² and with the position taken in a ministerial instruction of 2004 indicating that *“school and university services should take all necessary measures in order not to organise examinations or important tests during religious holidays”*. It also seems to be consistent with ECtHR and CJEU case law.⁵³

Begum v Denbigh High School (United Kingdom)⁵⁴

Ms Begum wanted to wear a Jilbab (full length dress) to school; however, this did not comply with the school's uniform policy. She was required to return home to change into the school uniform. Ms Begum did not return to school for two years and eventually found a place in another school where she was permitted to wear the Jilbab.

She issued proceedings claiming that her exclusion from school unjustifiably limited her Article 9 right to manifest her religion and denied her right to education.

The court decided by a majority that there was no interference in her right to manifest her religion (with two judges dissenting) because:

- It was her choice to stay away from the school and not comply with the uniform rules.
- She knew of the rules when she joined the school and had previously complied with them.
- She could have gone much sooner to an alternative school where a Jilbab was allowed.
- By choosing Denbigh School fully aware of the uniform requirements she was accepting the uniform rules.

⁵¹ HALDE Decision no. 2008-33 of 18 February 2008. See also HALDE Decision no. 2009-151 of 27 April 2009

⁵² Council of State 14 April 1995, Consistoire central des Israelites de France and Koen, op.cit. commented on in *Revue Française de Droit Administratif*, 1995, p. 58.

⁵³ See ECHR 27 April 1999 *Martins Casimiro et Cerveira Pereira v. Luxemburg*, no. 44888/98, concerning the refusal to give Seventh-Day Adventists a general exemption on religious grounds from attending school on Saturdays, justified by the need to protect the rights and freedoms of others, notably the right to education; E.J.C. 27 October 1976 *Vivian Prais*, aff. 130/75 ruling that “if it is desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests” and “if informed of the difficulty in good time, [the defendant] would have been obliged to take reasonable steps to avoid fixing for a test a date which would make it impossible for a person of a particular religious persuasion to undergo the test (...)”.

⁵⁴ [2006] UKHL15 House of Lords, 22 March 2006

In any event, the court decided that if there had been any interference it was justified because the school had a statutory authority to lay down rules on the uniform, it had clearly communicated the policy to all those affected by it and the rules were made to protect the legitimate rights of others.

The British “Niqab case” (United Kingdom)⁵⁵

A girl complained that her school would not allow her to wear a Niqab (face veil). The pupil claimed a breach of Article 9. The school argued that the Niqab was not compatible with the school uniform. The school policy to require pupils to wear a school uniform was based on considerations relating to the effective teaching and learning, and to school security.

The High Court relied on the reasoning in the Begum decision and found that Article 9(1) does not imply that one should be allowed to manifest one's religion at any time and place of one's choosing. The High Court agreed with the school's submission that even if Article 9(1) had been breached, the school could rely on Article 9(2) which stipulates that the right to manifest one's religion is subject to the limitation of protecting the rights and freedoms of others. The High Court found the stated objectives of having a school uniform sufficiently important to be justified and the prohibition of the Niqab was connected to these objectives.

Wearing a headscarf during gymnastics (Netherlands)⁵⁶

A girl who wore a headscarf had recently begun her high-school studies. During the first gymnastics lesson, she was told that she could not participate in the sports lessons while wearing a headscarf, even though she wore a special headscarf designed for sports. The girl felt discriminated against on the ground of her religion and filed a complaint with the Equal Treatment Commission.

As the school prohibited the wearing of all head coverings during sports lessons, not just of headscarves but also for example baseball caps, the Equal Treatment Commission found that the prohibition is a neutral rule but which leads to indirect discrimination on the ground of religion. The school argued that the indirect discrimination was justified for security reasons.

The Equal Treatment Commission found however that although the aim of preventing accidents during sports lessons is a legitimate aim, the prohibition of all types of headscarves is not proportionate to reach that aim. The school had asked its gym teachers if they thought a headscarf could be dangerous and based its decision on their view that it was the case. The girl however produced a report by a respected research institute in the Netherlands from which it could be concluded that the sports headscarf did not lead to any risk of physical injuries. On the basis of these research results, the Commission concluded that the prohibition to participate in the sports lessons with one of these sports headscarves constituted indirect discrimination that was not objectively justified.

Headscarf in a Catholic high school (The Netherlands)⁵⁷

A Muslim pupil of a Catholic high school started to wear a headscarf in her second year of high school. She was not allowed to follow classes wearing the headscarf, but was allowed to study in the office of the team leader. The prohibition on wearing a headscarf had been laid down in the school's dress code since the semester in which the girl started to wear her

⁵⁵ R(on the Application of X) v Y School , High Court , 27 February 2007

⁵⁶ Decision of the Dutch Equal Treatment Commission 21 June 2011, 2011-95

⁵⁷ Decision of the Dutch Equal Treatment Commission 7 January 2011, 2011-2

headscarf. The school wanted to dismiss her from the school if she continued to wear the headscarf. The father of the girl filed a complaint with the Equal Treatment Commission.

The Equal Treatment Commission has decided that since the school expressly prohibited the wearing of a headscarf because it sees the headscarf as an expression of a different religion than the Catholic religion, the prohibition was direct discrimination on the ground of religion.

The school argued that it was allowed to discriminate on the ground of religion under the exception clause in the equality legislation (see above in legal framework). The Equal Treatment Commission however decided that the school did not adopt a consistent policy towards headscarves that aims at safeguarding its Catholic identity. This was because before the procedure in the Equal Treatment Commission, the school had communicated generally and to the girl in particular that the prohibition to wear a headscarf during classes was only added to the school's dress code as a means to provide a prohibition on wearing hats and caps during classes. It had expressly stated that the prohibition had nothing to do with religion in general or with the religion of the girl.

Only later, in the procedure before the Equal Treatment Commission did the school state that it prohibited wearing a headscarf because it would be contrary to the Catholic identity of the school. The Equal Treatment Commission found this latter argument unconvincing as the school did not apply a consistent policy to safeguard its religious identity. In this conclusion it also took regard to the fact that the dress code did not prohibit any other forms of religious dress or signs that express a different religion than headscarves. In addition, the fact that the argument for headscarves being contrary to the religious identity of the school was only raised after the dispute between the pupil and the school had been taken to the Equal Treatment Commission showed that the prohibition to wear a headscarf during classes was not necessary for the maintaining of the Catholic identity. Therefore, it was decided that the direct discrimination was not justified in accordance with the requirements of the exception for faith schools.

Dress policy at primary school (The Netherlands)⁵⁸

A Protestant primary school asked the Equal Treatment Commission to give a decision on its dress policy. The school wanted to state in the dress policy that the clothing of both staff and pupils may not refer explicitly to any other religious conviction than that of the school. The school argued that it is allowed to impose such a rule on the ground of the exception in the equality legislation for faith schools that are based on a religion or belief.

The Equal Treatment Commission decided that the dress policy refers directly to religion and therefore causes direct discrimination. The Equal Treatment Commission has a standing case law that wearing a headscarf is a manifestation of the Islamic faith, even if not all Muslim women wear headscarves. The meaning of the word religion in the equality legislation is interpreted broadly, in conformity with the international human rights conventions in which the freedom of religion is laid down, as including not just the right to have a religion but also the right to manifest ones religion. The wearing of a headscarf can be regarded as a manifestation of a religion and is therefore protected by the equality legislation. This is irrespective of the fact that religious prescriptions are interpreted and followed in different ways and that not all Muslims think the same about the wearing of a headscarf.

In relation to the argument of the school that it falls under the exception for schools based on a particular religion or belief, the Commission argued that the school had a religious identity and that it applied a consistent policy towards the safeguarding of that identity, as the school

⁵⁸ Decision of the Dutch Equal Treatment Commission of 16 April 2007, 2007-61.

only accepts students that respect the religious principles of the school. Also, the school starts and ends every school day with a prayer, biblical stories and religious education form a part of the daily curriculum and all pupils are obliged to participate in religious festivities. The fact that the school accepts pupils from other religions, as long as they respect the Protestant identity of the school, does not make the policy of the school inconsistent. According to the Commission, the school's dress policy fitted into this consistent policy and must therefore be deemed necessary to safeguard the religious identity. As the rule on religious dress did not discriminate on any other ground than religion or belief, the Commission decided that the direct discrimination in the dress policy was objectively justified.

Analysis of key issues

As is true for many of the cases described in other chapters of this report, many of the cases that are described above have been much debated after they were decided. Some have led to government measures, such as the French case on examinations for Jewish students. Two months after the HALDE decision, the French Ministry of Education issued a note calling educational authorities to find solutions, such as a non failing grade or the organisation of special sessions of an examination for those who cannot take an examination due to religious constraints. Further, after the decision of the Dutch Equal Treatment Commission in relation to the Catholic faith school, the dispute was taken to court. Both the lower District Court and the Appellate Court⁵⁹ decided that the prohibition to wear a headscarf was justified to safeguard the Catholic identity of the school. There was a lot of media attention for this case, but through this media attention it also became apparent that many Catholic schools do allow girls to wear headscarves.

In the following section, the abovementioned cases will be analysed in relation to the reasons why schools limit the freedom to manifest the religion and belief of students/pupils, the extent to which these limitations are allowed in different Member States and the different legal perspectives that may stem from the equality legislation and the ECHR.

Reasons for the limitation of the manifestation of religion or belief

The cases demonstrate that most disputes between schools and students/pupils about the manifestation of their religion or belief concern Islamic dress: headscarves, face veils, long dresses.

In the cases above concerning religious dress, all the schools had a dress policy that prohibited the wearing of certain clothing, or in the cases of the United Kingdom, a uniform policy that required students to wear a school uniform. The dress policies differ greatly. Some schools have a dress policy in writing that is communicated when a student or pupil sign up for the school, like the school uniform policies in the United Kingdom, other schools formulate a dress policy by taking ad hoc decisions when confronted with religious dress. Some schools prohibit all religious dress that is an expression of another religion than that of the school, other schools do not prohibit religious clothing as such, but they prohibit all clothing that is not in line with the school uniform or all face or head coverings, including baseball caps and headscarves or niqabs. Schools may prohibit just a particular type of religious dress, such as face veils like niqabs and burqas, or they may prohibit the wearing of religious dress just during particular lessons, such as the serving lessons at the Swedish hotel and restaurant school.

⁵⁹ Judgement of 4 April 2011, District Court of Haarlem and judgement of 6 September 2011, Appellate Court of Amsterdam

The reasons why all or some religious clothing is prohibited during all or some classes differ.

In the case of schools that require pupils to wear a school uniform, the uniform policy may be based on the idea that was brought forward in the British niqab case: a learning environment in which all students are dressed in a uniform way, will increase the effectiveness of the teaching and school security. In these cases, the reason not to allow religious dress (or any dress that is not the school uniform) was not based on the religious nature of the religious dress, but on ideas and philosophies about a school environment that is optimal for the development and learning of pupils. The prohibition of wearing a facial veil may also be for perceived communication difficulties of facial veils, as was stated by the school in the Swedish niqab case.

In the case of faith schools, the reason for a dress policy prohibiting either all or some clothing that expresses another belief than that of the school is generally because the school wants to safeguard its religious identity.

The prohibition to wear headscarves or niqabs may also have more practical reasons associated with health and safety in a similar way to cases concerning the provision of goods and services. An example of this was the prohibition on wearing a headscarf during sports lessons in the Dutch case and the Swedish niqab case, where the reason provided for the prohibition was the safety of the pupil. In relation to the Swedish hotel and restaurant case, the prohibition on wearing any other clothing than the prescribed uniform during serving lessons was for reasons of hygiene.

Justification for the discrimination

When looking at the general education cases concerning dress policy, certain observations can be made.

First of all, schools often formulate their dress policy in such a way that the policy does not constitute direct discrimination on the ground of religion, but indirect. This is for instance because the policy prohibits more than just headscarves or niqabs, but also other head coverings such as baseball caps or woollen hats.

As a consequence, it has to be assessed whether the indirect discrimination is objectively justified. This was explicitly done in the Swedish and Dutch cases, as these cases were looked at from the angle of the equality legislation. The British cases were decided on the basis of Article 9 ECHR, which also foresees a justification test, but a slightly different one from the equality legislation. In the equality legislation, indirect discrimination may be justified if it has a legitimate aim and if the means to achieve that aim are appropriate and necessary. In Article 9(2) of the ECHR, it is stated that the freedom to manifest one's religion or belief 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, public order, health or morals, or for the protection of the rights and freedoms of others.

In relation to the objective justification test in the equality legislation, it can be concluded that dress codes that are based on a presupposed risk – for health and safety – but that are not based on a proper investigation and evidence of that risk, are not objectively justified. An example is the Dutch gymnastics case, where the prohibition was imposed for the safety of the pupils, but independent research showed that the type of headscarf that the pupil wanted to wear was not unsafe at all. In that case, the prohibition did not meet the objective justification test. Another example is the Swedish hotel and restaurant school case, where the uniform policy during the serving lessons was based on reasons of hygiene, but it was never substantiated why a headscarf would be unhygienic. The fact that the school changed its

policy during the investigation of the Ombudsman also showed that the hygiene argument was unconvincing.

The prohibition of religious dress may also be unlawful if it is not proportionate, for example if a rule is too general, such as in the Swedish niqab case. As the Swedish Ombudsman concluded, a general rule that does not leave room to investigate if there are ways in which a student/pupil can attend school while wearing the religious dress, will not be proportionate and is incompatible with the Swedish equality legislation.

In the two British cases, that were decided on the ground of the ECHR, a different approach was taken. The ECHR was argued because at the time of the cases being commenced, the religious discrimination provisions regarding education had not come into force.⁶⁰ The British cases demonstrate the narrower approach to breaches of Article 9 than claims of religious discrimination.

In the Begum case, the British House of Lords court's primary finding was that the right of Ms. Begum to manifest her religion was not interfered with, because she knew of the uniform policy when she joined the school, she had complied with it before she started to wear a jilbab and she could have changed schools after she had found out that she could not wear a jilbab to school. This is a totally different approach from that of the equality legislation, where the possibility for a student to choose another school which does allow religious dress or where the fact that the student/pupil did not always wear a headscarf, niqab or jilbab are not generally considered relevant elements of the decision. The equality legislation focuses on the obligation of any particular school not to discriminate on the ground of religion; whether a pupil can also join another school where he/she would not be discriminated, is a separate question from the question whether that particular school has violated its non-discrimination obligations. In any event, the court held that if there was interference it was justified.

In the British niqab case, the High Court followed the reasoning in the Begum decision and held for similar reasons that there was no interference with the Article 9(2) right to manifest a religion. The court then also assessed whether (if there was interference) it was for a legitimate aim and proportionate. It held that the aim of the uniform policy, which served the rights of other students to be in an effective and secure learning environment, was legitimate and the policy was proportionate.

In relation to the two cases regarding faith schools, the Dutch Equal Treatment Commission decided that the prohibition to wear religious dress that is incompatible with the religion of the school, constituted direct discrimination on the ground of religion. The Dutch Commission came to this decision as these dress policies of the schools referred directly to the religious nature of the dress as a reason for the prohibition.

In the Netherlands, like in several other Member States, this direct discrimination can be justified if the school is a so-called 'faith school'. In the Netherlands, in order to meet the criteria for that exception, the school must demonstrate that it applies a consistent policy towards the safeguarding of the religious identity of the school; that the dress code is a necessary element to safeguard this identity and that the dress code doesn't discriminate on any other non-discrimination ground. The reason why schools have to demonstrate that they apply a consistent policy towards religious dress is to avoid them from only using their religious identity to exclude headscarves or niqabs. This however is quite a particular approach that only applies to 'faith schools'. The approach taken towards such schools may differ greatly in the different Member States, according to their religious and social history and traditions.

⁶⁰ The Equality Act 2006 that included the prohibitions relating to religious discrimination in education came into force on 30 April 2007

Adjustments of policies to the needs of religious students

Finally, the French case concerning the days of the week when exams were held demonstrates that an important factor in deciding whether there has been indirect religious discrimination, and the proportionality of the actions of the school, is the extent to which the manifestation of the religion can be accommodated by making changes to policies and practices.

Conclusions

The following conclusions can be drawn from the cases and analysis:

- At EU level in relation to education there is currently only protection from religious discrimination for vocational training connected to employment under the *Framework Directive*. There is no required protection in relation to other forms of education. The European Council and other EU institutions should therefore take active steps to seek agreement on the *Proposed Directive* which would require protection from religious discrimination in all forms of education;
- In a number of countries there are national laws which permit faith schools based on a particular religion an exception to direct religious discrimination whereby the schools can require the students to adhere to particular religious principles. There are however a wide range of differing criteria as to how those exceptions are constructed and they vary depending on the traditions of the countries;
- The right in Article 9 ECHR to manifest a religion applies to education settings although, as is the case in the sectors of employment and the provision of goods and services, that right can be legitimately limited. In addition, Article 2 of Protocol 1 of the ECHR requires the State to ensure that education is provided in conformity with a person's religious convictions;
- Many of the cases concerning education and the limits of manifesting a religion in that sector have concerned Muslim girls or women wishing to wear some form of headscarf or veil. These are usually cases of indirect religious discrimination;
- In order to determine whether prohibitions on headscarves or veils are proportionate and justified, a careful analysis is required of the reasons for the prohibitions, their extent, and whether alternatives to prohibitions are reasonable. Common reasons for bans include: to facilitate a uniform and consistent environment for teaching, to avoid problems of communication, security issues, and health or hygiene. Clear evidence will be required in order to substantiate those reasons;
- In relation to claims that have been determined under Article 9, the British cases demonstrate that they may be taking a too restrictive approach as to whether or not there has been an interference with a right to manifest a religion, which means it is less likely that Article 9 claims are successful. This issue is likely to be clarified in the European Court of Human Rights in the context of employment and the *Eweida v UK* and *Chaplin v UK* cases as discussed in chapter 1 on employment;
- Cases concerning faith schools usually raise issues of direct religious discrimination and relevant national laws which provide exceptions to such discrimination to ensure that faith schools can adhere to their particular religious beliefs and practices. However, as the Netherlands case concerning a Catholic faith school demonstrates, careful analysis will still be required as to whether the requirements of those exceptions are satisfied.

3. The provision of goods and services

This chapter examines cases of religious discrimination or Article 9 claims in relation to the provision of goods and services. In particular, it reviews how the operation of health and safety or security issues interacts with the provision of goods and services, especially in relation to religious dress.

a) Legal framework

European Union and domestic equality law

At EU level there is currently no required protection from religious discrimination in the provision of goods and services. This contrasts with the position in relation to protection from race and gender discrimination under the *Race Directive*⁶¹ and the *Gender Goods and Services Directive*.⁶² This indicates there is currently a significant gap in protection from religious discrimination at EU level. In an attempt to rectify this, in 2008 the European Commission proposed a new *Goods and Services Directive*.⁶³ It proposed to provide protection against discrimination based on sexual orientation, age, disability, religion and belief with regard to access to social protection (including social security), goods and services (including housing), health care and education. Unfortunately the Council of the EU has been so far unable to secure agreement to the *Proposed Directive*.

Despite this, there are many Member States that do provide some form of protection from religious discrimination in the provision of goods and services.⁶⁴

Important factors under EU equality law are the scope of what constitutes goods and services, as well as the distinction between the public and private spheres of life.

Article 57 of the Treaty on the Functioning of the European Union (TFEU)⁶⁵ states that services include: "(a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions."

Under Article 57, services are also defined by remuneration. Remuneration has been interpreted broadly by the ECJ: "*Remunerated services do not lose their commercial character either because the provider is a non-profit-making enterprise or because of the recreational or sporting nature of the service. Services fall within the scope of the Treaty even when they are not paid for by those for whom they are performed provided that there is remuneration from some party*"⁶⁶

In relation to the distinction between the public and the private spheres of life, the *Proposed Directive*⁶⁷ refers to it only applying to professional or commercial activities.⁶⁸ Furthermore,

⁶¹ The Race Directive 2000/43/EC

⁶² Gender Goods and Services Directive 2004/113/EC

⁶³ Equal treatment of persons irrespective of religion or belief, disability, age or sexual orientation * European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Official Journal C 137 E , 27/05/2010 and Proposal for council directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (art 3) DATE

⁶⁴ "France, Belgium, UK, Cypress, Denmark, Hungary, Netherlands, Slovakia, Sweden, Norway. Austria and Finland do not currently have domestic legislation in this regard and in Austria, there are ongoing discussions", Dynamic interpretation, European antidiscrimination Law in practise IV, Equinet, 2009, 11;

⁶⁵ Treaty on the functioning of the European Union, Official Journal n° 115 du 09/05/2008 p. 0070 - 0070

⁶⁶ European Anti-discrimination Law Review No. 10-2010, Human European Consultancy and Migration Policy Group, 2010. See also case C-70/95 Sodemare v. Regione Lombardia; Case C-415/93 Bosman; Case C-51/96 and C-191/97 Deliège v Ligue Francophone de Judo et Disciplines associées

⁶⁷ Proposal for council directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

the *Proposed Directive* refers to the importance of protecting private and family life.⁶⁹ In other words, transactions between private individuals acting in private capacity will not be covered: letting out a room in a private house does not need to be treated in the same way as letting out rooms in a hotel or bed and breakfast.

Similar provisions exist in relation to the other Equality Directives that contain prohibitions on discrimination in the provision of goods and services.⁷⁰ The *Gender Goods and Services Directive* states that it applies to both the public and private sectors so long as goods and services are offered outside the field of private and family life.⁷¹ The *Race Directive* also refers to the fact that it only applies to goods and services available to the public.⁷²

European Convention on Human Rights

Article 9 of the ECHR provides that the right to manifest a religion or belief can be limited for reasons of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. This may include circumstances such as ensuring the safety of staff at work.

As mentioned above, the right to private and family life is also relevant in relation to manifesting religion under the ECHR. Article 8 of the ECHR⁷³ protects the right to private and family life but can also be subject to limitations. A crucial factor in relation to the protection from discrimination in the provision of goods and services is the extent to which the provision of a good or service is part of private life. Where a service is provided to the public (such as renting out a bed and breakfast) as opposed to deciding who will live with you in our own house, Article 8 is unlikely to be engaged.⁷⁴ This is discussed in chapter 5 on conflicts between religion or belief and sexual orientation in the context of providing goods and services to the public.

b) Analysis of cases and key issues

There are three broad categories of cases concerning religion and the provision of goods and services: health and safety concerns; security issues; and one unusual case from Belgium that considered whether the need to "integrate" in society could be a legitimate reason to discriminate in the delivery of a service to a religious group.

Health and safety issues

The Swedish Ombudsman's Office v G.O A. E. (Sweden)⁷⁵

The claimant was a Muslim woman who wore a headscarf. She visited a sports and fitness club with her friend in order to find out more about aerobics and spinning classes. She was

⁶⁸ Article 3 of the Proposed Directive

⁶⁹ Recital 17 of the Proposed Directive.

⁷⁰ The Race Directive 2000/43/EC and the Gender Goods and Services Directive 2004/113/EC

⁷¹ Article 3(1) Gender Goods and Services Directive.

⁷² Article 3(2) Race Directive.

⁷³ Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (art 8 ECHR).

⁷⁴ See for example *Preddy v Hall* Court of Appeal [2012] EWCA Civ 83

⁷⁵ (M. T 3169-08, 2010-10-05)

told that there was a prohibition on taking part in the group exercises while wearing a headscarf.

The Ombudsman brought a claim of direct and indirect discrimination against the sports and fitness club.

The Court of First Instance in Malmö held that since the rule prohibiting wearing a headscarf during group exercises had existed for decades and had no connection with religion, the woman had not been subjected to direct discrimination. The Court held, on the other hand, that by applying a rule that appears neutral, the sports club had subjected the woman to indirect discrimination because the rule in practice affects those persons who due to religious reasons cannot take off their headscarves. The Court continued by stating that the rule motivated by safety concerns did not constitute a legitimate aim since it applied to all forms of exercise and the safety concerns had not been specified. The Court also did not find that the sports club's argument concerning hygiene and health was a legitimate aim. The fact that the sports club had no intention to discriminate was irrelevant to the case. Consequently the Court held that the sports club had subjected the complainant to indirect discrimination and awarded her 5000 SEK.⁷⁶

Bowling club case (Belgium)⁷⁷

A bowling club deterred women wearing Muslim headscarves from playing on the basis of a policy that banned all hats.

The claimant alleged indirect religious discrimination. The Court found that the safety and security reasons constituted a legitimate aim as there was a general need to secure the safety of those playing at the venue. But it held the interference with the right to manifest a religion was not proportionate as the headscarf was not dangerous for the bowling machinery and that the women could be identified by the security cameras.

Security issues

Headscarves in café case (Belgium)⁷⁸

A café in Belgium refused to serve a female customer because she was wearing a headscarf. The owner justified the refusal on the grounds of needing to maintain security.

The claimant claimed direct religious discrimination. The civil court found that direct discrimination had taken place because there was no evidence that religious symbols caused security concerns in the café, and it fell outside the scope of a private company and individual to maintain public order. This highlights that some of the Member States' courts may take a different approach to issues of security and public order when a private company invokes these issues as a justification for discrimination.

Austrian Equal Treatment Commission v X, Senate III (Austria)⁷⁹

A Sikh man complained that he had been refused entry to a Viennese court because he would not remove the ceremonial sword carried by members of this religion.

⁷⁶ The Court applied the previously applicable Discrimination Act that was valid up until 31 December 2008. The new Discrimination Act, valid as of 1 January 2009, has increased the level of compensation awarded by the courts.

⁷⁷ Civil Court, Brussels, 22.12.09

⁷⁸ Brussels Court, 25.01.11

⁷⁹ Handbook on European non-discrimination law, ECtHR-FRA, 2011, p. 106

The Austrian Equal Treatment Commission examined this case on the basis of ethnic discrimination and not religious discrimination.⁸⁰ On the facts, it found that the differential treatment was for a legitimate aim of security and safety, and was proportionate.⁸¹

Phull v France⁸²

A Sikh man challenged an airport requirement (relating to security checks) to take off his turban. He stated that security staff at a French airport compelled him to remove his turban for inspection. The claimant argued that it was unnecessary for the security staff to make him remove his turban, especially as he had not refused to go through the walk-through scanner or to be checked with a hand-held detector.

The claimant argued these security measures breached his right to manifest his religious freedom under Article 9 of the ECHR. The ECtHR found that the aim was legitimate because the purpose was to ensure the safety of the other passengers within the meaning of Article 9(2). The court also found the measures were proportionate and added: “the arrangements for implementing them in the present case fell within the respondent State's margin of appreciation, particularly as the measure was only resorted to occasionally.”

El Morsli v France⁸³

A Muslim woman was denied entrance to the French consulates at Marrakesh in Morocco because she did not take off her headscarf for identity control, although the claimant was ready to show her face and hair to a female security agent.

The claimant alleged this decision infringed her right to manifest her religion under Article 9 of the ECHR. The ECtHR found that security checks consisting in ordering the removal of a veil in order to submit to such checks were for a legitimate aim of ensuring security and did not constitute a disproportionate interference with the exercise of the right to manifest a religion.

Mann Singh v France⁸⁴

A Sikh man who was in the process of obtaining his driver's license refused to give a photograph without his turban on the grounds of his religious belief.

The claimant alleged this measure breached his right to manifest his religion under Article 9 of the ECHR. The Court noted that the requirement of a passport photograph with an uncovered head for the driving license was necessary to the authorities for public safety reasons, protection of the law (Highway Code) and order, and to identify the driver and control his right to drive the vehicle. It stressed that such controls are proportionate and necessary for reasons of public security and safety within the meaning of Article 9(2) of the ECHR.

⁸⁰ It should be noted that in some Member States issues of religious discrimination are also sometimes considered as racial or ethnic discrimination, for example in Britain in *Sarika Watkins-Singh v Aberdare Girls School*, High Court, 29 July 2008.

⁸¹ “While access to justice is not specifically mentioned by the non-discrimination directives among the examples of goods and services, it is conceivable that they fall within this ambit to the extent that the courts system represents a service provided to the public by the State for remuneration”, Handbook on European non-discrimination law, FRA, 2011, 77

⁸² European Court of Human Rights, 11.01.05, Application No 35753/03.

⁸³ European Court of Human Rights, 04.03.08; Application 15585/06.

⁸⁴ European Court of Human Rights, 27.11.08; Application No 24479/07.

Ranjit Singh v France⁸⁵

A French decree requires that all the passport photographs presented for the delivery of a resident's card have to represent the applicant's uncovered head.

The claimant, who is Sikh, alleged to be a victim of violation of Articles 2, 18 and 26 of the United Nations International Covenant on civil and political rights which protects the freedom of religion and the principle of non-discrimination. The procedure was brought under the individual petition procedure, which enables individuals in Member States that have agreed to the petition procedure to bring claims before the United Nations when they have exhausted all their domestic and other international remedies.

The UN Human Rights Committee adopted an opposite position to the one adopted by the ECtHR in a similar case (ECtHR, Mann Singh v France). The Committee held that the French decree led to indirect discrimination because it put Sikhs at a particular disadvantage due to the religious obligation requiring them to permanently cover their heads. The Committee held that although the requirement to remove any headgear was for a legitimate aim of ensuring security, it was not proportionate, and stated that:

"Even if the obligation to remove the turban for the identity photograph might be described as a one-time requirement, it would potentially interfere with the author's (Ranjit Singh's) freedom of religion on a continuing basis."

The committee also said that France had failed to explain how the Sikh turban hindered identification since the wearer's face would be visible and he would be wearing it at all times. Therefore, it concluded that the law violated Article 18 of the International Covenant on Civil and Political Rights regarding freedom of religion. France has until March 2012 to respond to the decision, although it is not binding.

Goal of integration as a justification for discrimination

The Belgian Centre for Equal Opportunities and Opposition to Racism (CEOOR, national equality body) and "meldpunt" (local equality body) v "M."

M. is a private association with Flemish Christian principles.⁸⁶ It gives food packages and helps to provide other goods for babies and families in need. Women who need help and wear Islamic headscarves must remove them; otherwise, they are denied access to the building and have to wait in the hall for their food package.

The CEOOR claims that this is direct religious discrimination. The Centre held that direct discrimination can be justified by a legitimate aim if the means of achieving that aim are appropriate and necessary⁸⁷. M. explained: *"We ask Muslim women to take off their headscarves because we believe that everyone must integrate. Everyone is equal. In this case, there are no men, just women. I also put my shoes off in the mosque."* The aim is not legitimate because it is not for individuals and private organisations to pursue an integration policy. This is a jurisdiction of a public authority. But if the aim was considered legitimate, it is not proportionate because there was no evidence that treating Muslim women wearing headscarves less favourably would help these women to integrate better in society. This case is still pending and demonstrates that it may not be possible for private organisations to justify

⁸⁵ United Nations Human Rights Committee, 11- 29.07.11, 102 Session

⁸⁶ The statutes describe the main goal of this non-profit association: "the relaxation of its members by establishing a centre for gatherings of circles of friends, to aid all the good works and works of welfare, without discrimination, in particular all social activities including assistance to young children and expectant mothers."

⁸⁷ Under the Belgian antidiscrimination law, difference of treatment based on religion in goods and services area could amount to discrimination unless it's objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (art 7 - Law 10 May 2007 against discrimination)

their discriminatory policies when they relate to matters of public, not private, policy. The CEOOR has not brought legal action in this case yet and so this is only the CEOOR's opinion.

Conclusions

A clear conclusion that can be drawn is that there is a gap in protection from religious discrimination at EU level since there is currently no required prohibition of religious discrimination in the provision of goods and services. This is despite evidence that such discrimination occurs in the Member States. Therefore, there seems to be an urgent need for the European Commission, the Council of the EU and the European Parliament to seek agreement on the proposed *Goods and Services Directive* as soon as possible.

A crucial issue in relation to the provision of goods and services cases is the extent to which the activity is provided to the public and commercial as opposed to it being a part of private life. Where goods and services are made available to the public, the persons providing them will not be able to rely on Article 8 of the ECHR to refuse to provide a good or a service based on religious reasons.

In relation to religious discrimination (where Member States have such provisions) and Article 9 claims concerning the provision of goods and services, common justifications for interferences with the manifestation of religion are health and safety concerns, as well as the need to maintain security. Several conclusions can be drawn from the cases examined:

- Health and safety may be a legitimate reason to refuse a service, but as the Swedish sports and fitness case demonstrates, there must be clear evidence of there being an actual health and safety concern;
- In relation to security concerns, these often arise in the context of public security issues concerning public bodies such as courts, immigration and consular control, drivers' licences and identification cards. The need to ensure the safety of the public and prevent crime in such circumstances is usually apparent, and often the interference with the right to manifest a religion is justified;
- However, the French cases of *Mann Singh v France* and *Ranjit Singh v France* demonstrate that there is a difference in interpretation of the requirements regarding freedom of religion in relation to the policy of photos for drivers' licences and passports. The United Nations Human Rights Committee made a more in depth analysis of the issues concerning the justification and proportionality of the actions of the French government than the ECtHR. It will be important to review what actions the French government takes in response, as well as how the ECtHR deals with the issues in similar cases in the future;
- The Belgian case of *M.* demonstrates a worrying development where a private company is arguing that integrating Muslims by requiring Muslim women to remove their headscarves constitutes a legitimate aim. In other words, the case highlights a problematic development, namely when private organisations seek to justify discrimination by appealing to matters normally pertaining to public policy.

4. Wearing full face veils in public places

This chapter focuses on the wearing of religious clothing and in particular the full face veil⁸⁸ in public areas. This merits particular consideration in the report as a number of countries in Europe have recently introduced legislation to ban the wearing of the full veil in public places. The chapter looks firstly at the European equality and human rights legal frameworks concerning the issue, as well as national legislation or regulations that have been introduced. Secondly, the report examines the issues in detail: the case that has dealt with the issue in Belgium, the arguments that have been put forward in relation to proposed legislation as to why the bans are lawful, the case law before the ECtHR, and the views of NGOs working on the issues. Finally, conclusions are drawn from the main issues that arise.

a) Legal framework

European Union equality law

Neither the *Framework Directive* 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, nor the Proposal of 2 July 2007 for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation apply to the banning of the full face veil. The scope of the *Framework Directive* is limited to employment and occupation and the scope of the *Proposed Directive* of 2 July 2007 on “goods and services” may not extend to the access to public spaces where there is no provision of a good, services or facilities involved.

As a result, EU equality law does not currently provide protection from discrimination on grounds of religion in such circumstances.⁸⁹

European Convention on Human Rights

The right to freedom of religion under Article 9 ECHR is directly relevant to such bans. The right to freedom of religion includes the freedom to manifest one’s religion, both privately and publicly.⁹⁰ These issues are discussed in detail below.

The right to freedom of expression and the right to privacy under Articles 10 and 8 of the ECHR may also be relevant. To the extent that a distinctive style or dress can be intended as a statement, it may be within the scope of the freedom of expression, as so-called “symbolic speech”. The European Commission of Human Rights has also ruled that: “*constraints imposed on a person’s choice of mode of dress constitute an interference with the private life as ensured by Article 8 § 1 of the Convention.*”⁹¹

⁸⁸ There are two types of full veil: the Burqa and the Niqab. The Burqa is an enveloping outer garment worn by women in some Islamic traditions to cover their bodies in public places. The burqa is usually understood to be the woman’s loose body-covering, plus the head-covering, plus the face-veil. The Niqab is a cloth which covers the face, worn by some Muslim women as a part of sartorial hijāb. The niqab is most common in the Arab countries of the Arabian Peninsula such as Saudi Arabia, Yemen, Bahrain, Kuwait, Qatar, Oman, and the UAE.

⁸⁹ However, in a number of countries there is national discrimination law that does provide protection from discrimination in relation to the exercise of public functions such as the police, for example in Britain. In such countries it would be possible to bring a claim of indirect religious discrimination.

⁹⁰ C. EVANS, *Freedom of religion under the European convention on human rights*, Oxford, Oxford University Press 2001, 103 e.v.

⁹¹ ECHR 22 October 1998, *Kara v. UK.*, Application no. 36528/97

Finally, the Protocol 4 of the ECHR provides a right under Article 2 to move freely within a country once lawfully there. A general ban on the full veil may also be a breach of this right to freedom of movement unless the restriction on movement can be justified.

Thomas Hammarberg, the former Council of Europe Human Rights Commissioner, warned that the ban on the full veil may lead to discrimination against Muslims and fuel rising anti-Muslim sentiments across Europe: “*The way the dress of a small number of women has been portrayed as a key problem requiring urgent discussion and legislation is a sad capitulation to the prejudices of the xenophobes*”.⁹²

Several NGO (Human Rights Watch⁹³, Amnesty International⁹⁴, Article 19⁹⁵, la Ligue des droits de l’Homme⁹⁶, ...), the Human Rights Commission of the Council of Europe⁹⁷, the French Council of State (in its advice on the proposition of a law banning the full veil), the advice of the Belgian Auditor of the Council of State⁹⁸ (in a procedure cancelling a municipal ruling for banning the full veil) have also all expressed concerns about the laws as possibly breaching human rights.

National laws banning full face veils

There are two contrasting approaches in European countries regarding the wearing of a full face veil in public spaces.⁹⁹ A number of countries have in the last year developed laws banning the full face veil or other full coverings of faces in public spaces, while other countries do not have such bans, or only have specific laws to deal with imminent threats of crime or violence.¹⁰⁰

France, Belgium, and most recently the Netherlands have introduced a general ban on the full face veil under national laws. In other Member states, there are local initiatives banning the full face veil in the public space of their municipality or there are plans to introduce such bans.

The first country to introduce the ban was France in April 2011.¹⁰¹ Anyone who disobeys this law is fined with a 150 Euros penalty or a course in French citizenship. In September 2011 the first fines were imposed relating to the ban and the defendants have indicated that they will appeal the decision and fine to the ECtHR.¹⁰²

The Belgian parliament approved a law to ban items of clothing that conceal the whole face or make it unrecognisable on 1 June 2011. Women who disobey the ban will face up to seven days in jail or a fine of between €15 and €25. Although the legislation does not refer in particular to full face veils, it outlaws the use of garments such as the niqab and the burqa. It is also important to note that an action for annulment and suspension of the law was brought on 26 July 2011 before the Constitutional Court, but the case is still pending.

In the Netherlands, on 27 January 2012 the council of ministers approved a law that prohibits the wearing of clothing that conceal the whole face or make it unrecognizable. The arguments

⁹² <http://www.euractiv.com/en/culture/council-europe-blasts-burqa-ban-news-506689>.

⁹³ <http://www.hrw.org/en/news/2010/04/21/belgium-muslim-veil-ban-would-violate-rights>.

⁹⁴ <http://www.aivl.be/nieuws/amnesty-roept-kamer-op-boerkaverbod-te-verwerpen/24043>.

⁹⁵ <http://www.article19.org/data/files/pdfs/publications/bans-on-the-full-face-veil-and-human-rights.pdf>.

⁹⁶ <http://www.liguedh.be/2010/886-interdiction-du-port-du-voile-integral-une-mauvaise-solution-a-un-vrai-probleme>.

⁹⁷ <http://assembly.coe.int/Documents/AdoptedText/ta10/FRES1743.htm>.

⁹⁸ Report Belgian Auditor of the Council of State, Ms B. v Municipality of Etterbeek January 11 2011.

⁹⁹ We define public spaces as the common physical space that people have to enter in order to meet their basic needs : the street, the subway, parks, shops.

¹⁰⁰ For example in the United Kingdom the government has recently consulted on strengthening the ability of police to compel people in public spaces to remove head coverings where there is a reasonable prospect that they may engage in crime: <http://www.homeoffice.gov.uk/publications/about-us/consultations/police-powers/consultation-document?view=Binary>. This consultation was in response to the riots in Britain in summer 2011.

¹⁰¹ Law 2010-1192 dated October 11th, 2010 prohibiting the covering of the face in the public space.

¹⁰² <http://www.bbc.co.uk/news/world-europe-15013383>

for the law were similar to those in Belgium and France: public security, social interaction and equality between women and men. However, the Advisory Department of the Counsel of State was of the opinion that:

- The government should not interfere in the personal choice of a woman wearing the full veil. Her personal choice should prevail;
- Subjective feelings of insecurity are not sufficient to introduce such prohibition; and
- A general ban of the full face veil is a disproportionate interference with freedom of religion or belief.

The advice of the Counsel of State was not followed though, and the government approved the law.

An Italian parliamentary commission approved a draft law on 2 August 2011 that prohibits women from wearing veils that cover their face in public. The law will be forwarded to the Italian parliament, and if the law is adopted, Italy would be the fourth European country to ban face veils following France, Belgium and Holland.

There are also a number of local municipalities that have banned the full face veil in public. For example in Barcelona, the local municipality declared a ban to full face veils in public places such as municipal offices, markets and libraries. In Italy, several municipal councils have also adopted regulations banning the burqa on the grounds of public security.

b) Analysis of cases and key issues

Ms B. v Municipality of Etterbeek, 26 January 2011 (Belgium)

The municipality of Etterbeek adopted a local police regulation that forbade hiding one's face in public area except during "carnival times". The municipality applied this rule to women who wore a full veil. The police intercepted Ms B. who wears a niqab several times while she was walking on the street and imposed on her administrative sanctions (a fine) each time she was stopped. Ms. B argued that the law violated her freedom of religion and the prohibition on indirect religious discrimination. The claim was brought in first instance in front of the Correctional Tribunal and on appeal in front of the Police tribunal. It is important to note that the municipal regulation questioned in this case came into force before the national law banning the full veil was adopted in June 2011.

The Police tribunal based its ruling on Article 9 of the ECHR and did not take antidiscrimination law into consideration as it does not apply where there is an express law permitting discrimination.¹⁰³

Firstly, the judge recalled the jurisprudence of the ECtHR¹⁰⁴ by insisting on the fact that Article 9 is not limited to codified manifestations of religion or belief but it protects any manifestation of people's beliefs and faith (personal or codified). Consequently, the fact that the full veil is not a unanimous practice and is not compulsory among Muslims is not relevant to a claim of a breach of Article 9.

Then the judge continued by considering two of the three conditions of Article 9 being fulfilled to limit the freedom of religion. Firstly, this general rule can be considered as a law according to ECHR. Secondly, the judge said that the aim invoked by the municipality (public security) was legitimate.

¹⁰³ Under article 11 of the Belgium Anti-Discrimination law, where there is an express law that permits discrimination of a protected group, the anti-discrimination law does not apply.

¹⁰⁴ Leyla Sahin v Turkey Application No. 44774/98, El Morsli v France Application No 15585/06.

However, the tribunal ruled that the third condition (proportionality) was not fulfilled. According to the judge, it was not proportionate to forbid women with a full veil to walk around in public areas in order to ensure security. The judge added that there were already sufficient rules that oblige women with full veils to uncover their faces in order to ensure public security (for example when she comes to pick up her children at school, or when there is an identity control). The tribunal also said that public security does not require being able to identify people in the street at first sight and at all times.

The consequence of this decision was that the administrative sanctions were considered to be unlawful and void for breaching Article 9 of ECHR.

Arguments used to justify the banning of the full face veil

There are generally three main arguments invoked in order to justify the banning of the full face veil in public places.

Dignity of women and equality between men and women

The recurrent argument made is that the full veil is imposed by men and is a symbol of subjugation and subordination of women. According to this argument, by walking in “a mobile jail”, their faces become invisible and women therefore lose their dignity and humanity.

In the parliamentary works of the Belgian law that bans the full face veil, the legislators argued that “*the full veil is a shocking regression for women because a body without face is a body without human identity. The full veil deprives women of their status as human beings. It is also the most visible demonstration of other violent violations of human rights, like the right to education, the right to make use of one’s body, the right to come and go freely in public spaces, the right to freedom of expression and opinion*”¹⁰⁵

As noted by the Constitutional Council, “*Parliament felt that (...) those women who conceal their face, voluntarily or otherwise, are placed in a situation of exclusion and inferiority patently incompatible with constitutional principles of liberty and equality.*”¹⁰⁶

Public security

A second type of argument is public security. According to this argument, the police needs to be able to see everyone’s face on the streets for a number of reasons including to prevent criminal activities (e.g. bank robberies) and suicide-bombings, and to identify criminals or prisoners evading the police.

According to the French and Belgian legislators, the law is needed for protecting public security and maintaining public order, as any group of extremists could use the full-face veil to cause deadly attacks. In France the following examples are cited in the parliamentary works regarding public safety: the attacks of post offices in France where the attackers were hidden by a full veil, and the difficulties that can arise after school when a person wearing a burqa comes to pick up her children without being able to be identified.¹⁰⁷

¹⁰⁵ Parl. work, 0219/2004, 18 April 2011, 7.

¹⁰⁶ Constitutional Council 7 October 2010, DC 2010-613.

¹⁰⁷ Parl. work, 0219/2004, 18 April 2011, 7.

Social interaction

A third argument is that every person walking in a public area should be identifiable and able to be communicated with. Whenever a person is in a public area and comes across somebody, it is claimed that the person should not deny his/her membership of society by hiding his/her face.

According to this position, it is essential to be able to identify a person in order to live together. Indeed, in order for a society to exist, a social link is needed. And in order for a social link to exist, it is necessary to be recognisable and identifiable. Today, the human face is the instrument of identification and socialisation. In this context, the full veil is a refusal of any human exchange and the ban is fundamental for people to be able to live together.

Countering arguments

It is important to note two preliminary issues concerning arguments against the ban of the full veil.

Firstly, one of the main arguments for banning the full veil is “being recognizable”. However, there are many situations in which a person is unrecognizable: such as wearing large sunglasses with a hat, wearing a hat and a scarf in the winter, certain types of heavy makeup or a long beard. It is clear that if the prohibition is applied consistently, lots of unforeseen and undesirable consequences could occur. If such a law is not consistently applied and one can prove that the legislation is exclusively or primarily aimed at religious clothing, this may be a possible breach to the right to freedom of religion as well as unlawful indirect discrimination.¹⁰⁸

Secondly, another recurrent argument for a ban is to say that the Koran does not explicitly compel the wearing of the full veil. For instance, the Belgian legislator made this argument by stating that it is not a religious matter but a sociological phenomenon and therefore does not violate human rights related to the freedom of religion. However, this argument is not a valid one as the European Court of Human Rights has already ruled on several occasions that “*The freedom of religion excludes any state appreciation on the legitimacy of the religious beliefs*”¹⁰⁹

In the case *Layla Sahin v Turkey* the Court ruled that: “*The applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty.*”¹¹⁰

Human dignity and equality between women and men

- *Human dignity*

This principle may be considered a legitimate aim under Article 9 ECHR. However, this concept is unlikely to fulfil the proportionality requirement as this principle of dignity involves the respect of individual freedom.¹¹¹ The European Court of Human Rights has interpreted this combination of principles by considering that the principle of personal autonomy must prevail according to which each can live his/her life according to his/her convictions and

¹⁰⁸ E. BREMS, J. VRIELINK and S. OUALD CHAID, *Juridische aspecten van locale en algemene verboden op gezichtsverhulling in België*, NJW, 2011, 406.

¹⁰⁹ ECHR *Hasan and Chaush v. Bulgaria*, 26 October 2000, Application no. 30985/96

¹¹⁰ ECHR *Leyla Sahin v. Turkey*, 10 November 2005, Application no. 44774/98

¹¹¹ Advice of the Council of State of France of 25 March 2010 concerning the law proposal to ban the full veil, 19

his/her personal choices, including by putting him/herself physically or morally in danger, as long as this attitude does not go against other people's rights.¹¹²

- *Equality between women and men*

Promoting equality between women and men is indeed a legitimate aim that can justify some restrictions if conflicting with other human rights. However, these restrictions should be relevant to the objective and proportionate to that aim.

In order to determine this, a distinction must be made between women who voluntarily chose to wear a full veil and women who are compelled to wear a burqa/niqab. The prohibition does not take the first group of women into consideration. A French study recently conducted by the organisation "At Home in Europe" shows that 31 of the women among the 32 questioned decided voluntarily to wear the full veil and 20 (among those 31) were even in disagreement with their family.¹¹³ Therefore the ban cannot contribute to the achievement of gender equality. The women are in fact limited in their choice. As explained above, the respect of individual freedom is critical in a democratic society. The ECtHR has ruled on issues of personal autonomy that: "*cela peut également inclure la possibilité de s'adonner à des activités perçues comme étant d'une nature physiquement ou moralement dommageables ou dangereuses pour sa personne.*"¹¹⁴ In other words, even if a particular practice is harmful to a person (or assumed to be severely harmful), one must still take that person's autonomy into account. The choice of a woman wearing such clothing is an aspect of her personal autonomy.¹¹⁵

On the other hand, when a woman is compelled to wear a burqa or niqab, this raises issues of the oppression of women. In such cases a relevant question should be whether a ban will really help these women. The answer may be likely negative as the oppressed woman is treated as an offender, rather than as a victim. A ban could further worsen the fight of those who are coerced by family or by the dictates of tradition to cover themselves in public. Many believe that by making the burqa and the niqab illegal, many women would be forced to stay at home, which would further alienate them and deprive them of their freedom of movement, their right to education, their access to public and health services, economic opportunities and their ability to seek advice or support. Thomas Hammarberg, former Human Rights Commissioner of the Council of Europe, said "[These laws] would further stigmatise these women and lead to their alienation from the majority of society"¹¹⁶

Therefore, the objectives pursued by the principle of equality between men and women and the dignity of women, even if legitimate, are unlikely to satisfy the proportionality required by Article 9 of ECHR. Indeed, a general ban is unlikely to be adequate or necessary in order to create equality between men and women in either of the two possible situations - whether the woman chooses to wear the full veil and even where she is forced to do so.

Public security as a legitimate aim

To be a legitimate aim security concerns must be objectively based concerns. Thus, the expressions of religion cannot be banned just because a part of the population finds them undesirable or even frightening. The ECHR ruled in the same way in *Vajnai v Hungary*: "*a legal system which applies restrictions to human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs*

¹¹² ECHR 17 February 2005, KA and AD v. Belgium, Application no. 42758/98 and 45558/99

¹¹³ http://www.soros.org/initiatives/home/articles_publications/publications/unveiling-the-truth-20110411/a-unveiling-the-truth-20100510.pdf

¹¹⁴ ECHR 17 February 2005, KA and AD v. Belgium, § 83 and ECHR, *Pretty v. UK*, § 66. (Application no. 2346/02)

¹¹⁵ Cf. *supra*.

¹¹⁶ <http://www.onislam.net/english/news/europe/453159-eu-rights-body-blasts-veil-ban.html>

recognised in a democratic society, since that society must remain reasonable in its judgment.”¹¹⁷

Moreover, there is a risk that subjective views are based on motives that are not valid and rational government policy because they can be, for example, discriminatory. A fear of Islam, for instance, should be addressed by the government in its policies but not as a reason to take legislative action against Muslim people. The subjective feeling of insecurity related to the wearing of the full veil should therefore not justify a prohibition.

The need to protect public safety could however be regarded as a legitimate aim. However, in order for such a restrictive measure to be proportionate, it must focus on a real and concrete security problem. The limitation of fundamental rights of an individual, in this case especially the religious freedom, cannot simply be based on speculations. Thus, the ECtHR ruled in the case *Ahmet Arslan and others v Turkey*¹¹⁸ that a criminal conviction for wearing religious clothing in public areas is a violation of Article 9 ECHR. Since the case indicated that the applicants were in no way at that place and time a threat to the public order or exercising pressure on others, their criminal conviction was considered disproportionate in relation to the aim of protection of public order and safety and the rights of others.

In addition, a general ban of all forms of clothing that covers the face in public areas is arguably disproportionate to its purpose. The proportionality principle requires that the restriction of a fundamental freedom is sufficiently precisely tailored and does not go beyond what is necessary to achieve the goal. Safety requires “being identifiable” more than “being recognizable”. Being identifiable does not require that one is always recognizable as an individual but only that a person identifies himself during (legitimate) identity checks.¹¹⁹ Thus, if a prohibition is based on safety arguments, it must be specified to areas where there is a greater safety risk, such as prisons, consulates and airports.¹²⁰

For example, in Belgium and in France there are already laws requiring every person in public areas to show his/her face if necessary (at the airport, at the hospital, by taking his/her child to the school). The Belgian decision of 26 January 2011 mentioned above puts forward several decisions of the ECtHR that considered that limitations of the freedom of religion could be justified in order to protect the public security if these limitations were imposed momentarily to allow the identification of the concerned person.¹²¹ The Court considered that, in two scenarios (at the airport and to obtain a visa), the controls were necessary in order to ensure the public security and that the obligation to remove the clothing partially hiding one's face respected Article 9(2) given that the requirement was for a limited time. On the basis of these decisions, the Belgian court considered that a general ban on the full veil was disproportionate and breached Article 9 as it prevented the woman from manifesting her religion in any public place. The court considered that it had not been demonstrated that a limitation of such a scale is necessary to ensure the public safety.

Social interaction as a possible legitimate aim

A crucial issue is whether the State can impose with criminal law a requirement on its citizens to communicate with each other.

¹¹⁷ ECHR 8 July 2008, *Vajnai v. Hungary*, § 57, Application no. 33629/06

¹¹⁸ ECHR 23 February 2010, *Ahmet Arslan e.a. v. Turkey*, § 50, Application no. 41135/98

¹¹⁹ For example by lifting up the veil to show one's face in certain circumstances (at the hospital, police office, and airports)

¹²⁰ Advice of the Council of State of France of 25 March 2010 concerning the law proposal to ban the full veil

¹²¹ ECHR 4 March 2008, *El Morsli v. France*, Application no. 15585/06 and ECHR 11 January 2005, *Phull v. France*., Application no. 35753/03

Firstly, one needs to ask whether recognition and communication is always a requirement in public areas. Many people choose not to be available for communication. It is a matter of individual freedom whether or not they want contact with other people on the street.

Even if the legitimacy of this goal could be accepted, such a severe restriction of fundamental rights, linked with penalties, is highly unlikely to be proportionate, considering the case law of the ECtHR. Indeed, there are many less intrusive measures which could be used in order to achieve changes of attitudes and behaviour in this field.

According to the recommendation of the Council of State of France, the objective pursued by the principle of "communicability" cannot be considered as constituting a legitimate aim of the law and order aspect of Article 9 of ECHR.

Conclusions

The recent national bans in a number of European countries of wearing full veils in public places raises possible issues of religious discrimination and breaches of Article 9 and the right to freedom of movement under the ECHR.

In relation to religious discrimination there is currently no protection from such discrimination in relation to the provision of goods and services, and in any event it is not clear to what extent such provisions would provide protection if introduced. However, as stated in chapter 3 relating to the provision of goods and services, it is important for the *Proposed Directive* to be agreed on in order to harmonise the levels of protection for religious discrimination. If it is agreed on, it would be appropriate to test the extent to which the Directive could apply to bans in public spaces.

On the basis of the evidence available, the bans are likely to breach Article 9 and Protocol 4 of the ECHR. Although the reasons for the ban (promoting equality between men and women, public security concerns and promoting social interaction) are or may be legitimate aims, the measures are unlikely to be proportionate. There are other less extreme ways in which the aims could be achieved, for example in relation to public security only asking Muslim women to remove their veil at security points such as at airports or at consulates when obtaining visas.

The bans are likely to be the subject of further litigation both in national courts and the ECtHR and where possible, equality bodies may want to become involved in such litigation if they have the powers to do so.

5. Manifesting religion and conflicts with non-discrimination on the ground of sexual orientation

This chapter examines the scope of the right to manifest religion or belief, including where there is a conflict with the fundamental human right of others on the ground of sexual orientation. This chapter focuses on conflict in the context of employment and services.

This chapter will look at two key areas of tension:

- Where an employee or service provider refuses to perform a task of the employment or refuses to provide a service to persons because of employee's/service provider's religious beliefs on homosexuality;
- The Occupational Requirement exceptions under the *General Framework Directive*.

a) Legal framework

European Union law

The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and among, its objectives, is the promotion of coordination between Member States' employment policies. It is recognised that discrimination based on religion or belief (and disability, age or sexual orientation) may undermine the achievement of the EU's objectives, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons. To this end, direct or indirect discrimination based on religion or belief (and disability, age or sexual orientation) in employment and vocational training was prohibited by the *General Framework Directive* in accordance with Article 19 of the Treaty on the Functioning of the European Union.

The question of the extent to which someone is entitled to manifest their religion and to what extent they will be permitted to manifest this right when it infringes on the fundamental rights of others is dealt with through the following provisions in the *General Framework Directive*:

- Direct and indirect discrimination religious discrimination claims;
- Claims of direct or indirect sexual orientation discrimination.

European Convention on Human Rights

Article 9 of the European Convention on Human Rights provides that the right to manifest a religion or belief can be legitimately circumscribed where "*such limitations are prescribed by law and are necessary in a democratic society in the interests of the protection of the rights and freedoms of others.*" This would include, for example, the protection of the rights of lesbian, gay, bisexual and transsexual people not to be discriminated against.

b) Analysis of cases and key issues

i) Manifesting religion in employment and the provision of services where it conflicts with groups defined by sexual orientation

This section will analyse the following key factors:

- How courts have decided cases where employees and service providers have sought to manifest their religion and have thereby impacted on other people's fundamental rights;
- In relation to employment, whether the fact that it is a public service makes a difference in the courts' decision making;
- Whether adjustments could be made to facilitate the manifestation of religion and belief and also avoid discrimination against others;
- The effect that any adjustments would have on other staff (i.e. preferential treatment)

We focus on two important cases concerning individuals who did not want to officiate at same sex partnerships ceremonies: from the UK's Court of Appeal the case of *Ladele v Islington Council*¹²² and a case from the Dutch Equal Treatment Commission.¹²³

Ladele v Islington Borough Council - Registration of same sex partnerships (United Kingdom)

Ms. Ladele, a Registrar of Marriages, was threatened with dismissal for misconduct because she refused to conduct civil partnership ceremonies for same-sex partners on religious grounds.

Ms. Ladele lodged proceedings for direct and indirect discrimination and harassment on religious grounds under domestic provisions which implemented Directive 2000/78/EC.

In relation to claims of direct discrimination and harassment the Court of Appeal found that the reason for her treatment was her refusal to conduct civil partnership ceremonies, not her religious beliefs and therefore there had been no direct discrimination. They also found that the treatment did not amount to harassment.

In relation to indirect discrimination the court determined that the Council's aims of providing an efficient service and adhering to the "dignity for all" policy for residents and staff were legitimate. It found that the means of achieving these aims were appropriate and necessary for the following reasons:

- Exempting Ms Ladele from performing civil partnerships would undermine the Council's policy of avoiding discrimination between staff and of the community it served.
- Implementing the policy did not impinge on Ms Ladele's religion and belief: she remained free to hold those beliefs and free to worship as she wished.
- Ms Ladele was employed in a public job working for a public authority and she was required to perform a secular task.
- Her refusal to perform that task amounted to discrimination against lesbian and gay service users.

In relation to Article 9 the court considered Ms Ladele's right to manifest her religion and noted ECtHR case law which found that:

- 'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing.'¹²⁴

¹²² *Ladele v Islington Borough Council* [2009] EWCA CV 1357, Court of Appeal

¹²³ Dutch Equality Body Opinion 2008-40

- 'The main sphere protected by Art 9 is that of 'personal convictions and religious beliefs' although it 'also protects acts that are closely linked to those matters such as acts of worship or devotion forming part of the practice of a religion or belief'¹²⁵

Her appeal was therefore dismissed by the Court of Appeal. Ms Ladele has now appealed to the European Court of Human Rights, joined with another similar case.¹²⁶

Registrar case (Netherlands)

In this Dutch case, a practicing member of a Reformed Congregation claimed that a municipality's requirement that registrars must be prepared to perform same sex registered partnerships meant that he was excluded from a position of special registrar of births, deaths, and marriages.

The man claimed that the requirement that every registrar had to register same sex partnerships amounted to indirect discrimination on the ground of religion under domestic provisions implementing Directive 2000/78/EC.

The Equal Treatment Commission had decided in a previous case that where a municipality can accommodate someone's request to be exempted from conducting same sex partnerships without excessive organisational difficulties indirect discrimination on grounds of religion can easily be avoided. In that particular case, the municipality was not justified in refusing a registrar's request to be exempted from conducting same sex partnerships.¹²⁷

However, in the present case the Equal Treatment Commission found that the requirement on Registrars to register same sex partnerships was not applied on the grounds of the individual Registrar's religious beliefs and therefore there was no direct religious discrimination.

In relation to indirect discrimination, the Equal Treatment Commission found that the requirement to register same sex partnerships put people with certain religious beliefs at a particular disadvantage and therefore the question of objective justification arose.

The municipality argued that the requirement was justified as it was aimed at implementing statutory obligations: the legislator has provided that registration of partnerships is available to couples of the same sex and the municipality must implement this legislation. Pursuant to this Act it falls within the municipality's responsibility to prevent couples from being excluded from this right on the basis of their sexual orientation. The Commission considered that these aims were legitimate.

The Commission went on to consider whether the means of achieving these aims were proportionate. It noted that a request to be excused from performing same sex partnerships is contrary to the equality principle. The legislator has provided that persons with a homosexual orientation are protected against discrimination on equal terms with persons with a religious

¹²⁴ Paragraph 53 Ladele *ibid*. See also para 57 of Ladele: the Court of Appeal noted that a claim by a Quaker that they should not be required to pay tax insofar as it was used to finance weapons research on grounds it would infringe his Art 9 rights was deemed inadmissible by the court - (C v UK, application 10358/83, 37 ECHR Dec and Rep 142). And see para 58 Ladele quoting *Sahin v Turkey* (2007) 44 EHRR 5 where the Grand Chamber held that there had been no violation of Art 9 when a university refused admission to lectures and enrolment on courses to students with beards or Islamic headscarves'... the need 'to maintain and promote the ideals and values of a democratic society, in that case 'the principle of secularism' can properly lead to 'restrict[ing] other rights and freedoms.. set forth in the Convention'. The court found that Art 9 'does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief'¹²⁴.

¹²⁵ Paragraph 56 Ladele *ibid*. Accordingly, the Article did not protect pharmacists who claimed that their 'religious beliefs justified their refusal to sell contraceptives as the sale of contraceptives is legal and occurs nowhere other than in a pharmacy and the pharmacists could manifest their beliefs many ways outside the professional sphere' (Pichon and Sajous v France, application 49853/99).

¹²⁶ *McFarlane and Relate Avon Ltd*, Application nos. 51671/10 and 36516/10

¹²⁷ CGB 15 March 2002, opinions 2002-25 and 2002-26

conviction. If the defendant makes an exception and allows the applicant not to perform partnerships between persons of the same sex, he thus allows the applicant to discriminate against a group protected by law. Facilitating such an expression of religion with such far-reaching consequences for the rights of a group of persons protected by law cannot be justified in the opinion of the Commission.

On the basis of the above the Commission concluded that although the applicant was placed at a particular disadvantage the requirement was justified by the need not to discriminate against others in respect of sexual orientation.

Hall & Preddy v Bull & Bull - hotel case (United Kingdom)¹²⁸

Mr and Mrs Bull ('the Respondents') ran a hotel in their own home and, because of their religious beliefs, had a policy of only allowing married couples to stay in double rooms. Mr Hall and Mr Preddy ('the claimants'), who were civil partners, were consequently refused a double room.

Mr Hall and Mr Preddy complained to the County Court of direct and indirect sexual orientation discrimination, which is prohibited under domestic legislation in the provision of goods and services.¹²⁹ The Respondents argued that if they had indirectly discriminated that was justified by their right to manifest their religion and their right to private life under Article 8.

The court concluded that on "*a proper analysis of the defendants' position ... the only conclusion which can be drawn is that the refusal to allow them to occupy the double room which they had booked was because of their sexual orientation and that prima facie the treatment falls within the Sexual Orientation Regulations and that this is direct discrimination*".

The court went on to find that the domestic regulations were compatible with the ECHR:

"The Regulations recognise the Article 8 right of the claimants to respect for their private and family life. The defendants' right to have their private and family life and their home respected is inevitably circumscribed by their decision to use their home in part as a hotel. The regulations do not require them to take into their home (that is the private part of the hotel which they occupy) persons such as the claimants and arguably therefore do not affect the Article 8 rights of the defendants. If I am wrong about that then the regulations are necessary to protect the convention rights of the claimants and are a proportionate response to achieve that end."

The court went on to say that:

"The regulations do affect the right of the defendants to manifest their religion which is a right protected under Article 9.2. This right however is not absolute and can be limited to protect the rights and freedoms of the claimants. It seems to me that in so far as the regulations do affect this right they are, as I have said above, a necessary and proportionate intervention by the state to protect the rights of others."

The County Court concluded therefore that the refusal to allow the Claimants to occupy the double room was because of their sexual orientation (as there was no difference in law between civil partnership and marriage) and it amounted to direct discrimination.

The court also considered indirect discrimination and decided that the requirement to be married did place civil partners at a particular disadvantage and that the defendants had not

¹²⁸ (2011) Bristol County Court Case No 9BC02095/6 (4th January 2011)

¹²⁹ The Equality Act (Sexual Orientation) Regulations 2007 (these provisions are now contained in the Equality Act 2010)

justified the requirement by reference to matters other than sexual orientation and therefore the indirect discrimination case also succeeded.

The court considered that the Respondent's reliance on their right to manifest their religion did not justify their treatment of the Claimants as Art 9 (2) provided that the right to manifest religion may be limited where this is prescribed by law and is necessary to protect the rights of others.

Mr and Mrs Bull lost their appeal to the Court of Appeal in February 2012¹³⁰. They may petition the European Court of Human Rights.

Case on towels for gay sports event (Netherlands)¹³¹

A foundation ('the applicant') which organises gay sports activities requested a quote from a textile company ('the defendant') to embroider towels commemorating an event with the text: 'Gay Sport Nijmegen PINK Tournament 2009'. The defendant informed the applicant that he regretted that the applicant had submitted this request for a quotation and asked the applicant not to give assistance to such events. The defendant added to this that God has created human beings in His honour and requests them to live in His honour and explicitly prohibits a sexual relationship between human beings of the same sex. The defendant informed the applicant that the applicant, just like everybody else, could order towels from him, however, the defendant does not print or embroider texts which he cannot support. On its website the defendant stated that no texts will be printed which are blasphemous, or could (possibly) be offensive or intended for activities that they could not support on principle. In response to the applicant's request, the defendant communicated that he was prepared to offer towels with the text 'Nijmegen 2009'.

The applicant claimed indirect discrimination on grounds of sexual orientation under domestic provisions which prohibit such discrimination. Article 7 of the Equal Treatment Act prohibits discrimination on – among others – the ground of sexual orientation in the provision of goods and services. The definitions of direct and indirect discrimination (also stated in Article 1 of the Act) are identical to those of the *General Framework Directive*.

The Dutch Equal Treatment Commission held that the equal treatment legislation does not require that a service may only be offered when everyone can use it equally or when an equivalent alternative service is offered. The commission found that there was no restriction on those to whom the defendant would provide a service as it was prepared to print towels for the applicant, just as it was prepared to do so for everyone else - provided the text was consistent with the defendant's religious beliefs.

Furthermore, there is no general obligation to purchase or sell specific goods. The Commission gave the example of a clothes shop which is allowed to sell ladies' clothing only, but is prohibited from refusing to sell to men.¹³² In the Commission's opinion any other interpretation of the legislation would result in unworkable effects: every combination of services will be more attractive to one group than to another group and may as a result indirectly discriminate on one or more grounds protected by the equal treatment legislation. Suppliers of goods and services would in that case have to wonder in every specific case which groups might be attracted to an offer. If this type of situation would come within the scope of the equal treatment legislation, one would subsequently have to search for a less discriminating alternative. In the Commission's view the legislator has not intended to bring this type of situation under the scope of the equal treatment legislation.

¹³⁰ Court of Appeal reference: [2012] EWCA Civ 83

¹³¹ CGB (9 March 2010, Opinion 2010-32

¹³² Compare CGB 10 May 2007, 2007-76 and CGB 8 July 2009, 2009-58

The Commission was of the view that, in transactions among citizens, everyone would have an absolute right to compliance with every wish related to a protected ground: everyone could oblige suppliers of goods and services to print texts that they did not support, for any reason whatsoever. This is however not the intention of the equal treatment legislation. The equal treatment legislation simply provides that everything offered in goods and services must be available to everyone.

The applicant asserts that the refusal to print text relating to gay games results in indirect sexual orientation discrimination because mainly homosexuals will want to buy an article with such text. In the opinion of the Commission this argument disregards the fact that the defendant does not want to manufacture articles with such a text at all, and therefore does not want to sell them to anybody, even if the buyer is heterosexual. The claim therefore failed.

- **Commentary:**

It is arguable that this decision did not apply the correct legal tests and appears to have conflated the tests in indirect and direct discrimination claims.

- Indirect discrimination

In respect of the indirect discrimination claim it is arguable the Commission should have asked itself whether an apparently neutral provision, criterion or practice had been applied which would put persons having a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In relation to the first question, it is arguable a refusal to provide the service requested, which falls within the general ambit of services provided, on the basis that the specific text requested did not comply with the defendant's view that God had prohibited same sex relationships is not a neutral provision: it is a limitation related to sexual orientation. This claim would therefore correctly be determined under the direct discrimination provisions: less favourable treatment on grounds of sexual orientation. This is discussed further below.

Proceeding with the indirect discrimination analysis, it is possible that a practice which prohibits embroidering text relating to 'gay games' would put lesbians, gay men and bisexual people at a particular disadvantage compared to heterosexual people as the former are arguably more likely to commission such text. The claimants would have to adduce evidence to support this assertion.

Therefore the question then arises as to whether such a potentially indirectly discriminatory rule is nevertheless justified by a legitimate aim and whether the means of achieving that aim are appropriate and necessary.

Manifesting religious beliefs is a legitimate aim as this right is guaranteed under Article 9(2) ECHR. However, as noted above, the right to manifest religious belief is not automatically justified as it may be limited where this is prescribed by law and necessary in a democratic society to protect the rights and freedoms of others. In this case there is a prohibition on discrimination on grounds of sexual orientation in the delivery of services and the requirements of 'appropriateness' and 'necessity' must still be satisfied. Applying the reasoning in *Ladele* and the Dutch registrar case above, the defendant was providing a secular service and his freedom to manifest his religion would not be impinged by the request to provide the embroidered text; he would remain free to hold his beliefs and worship as he wishes; the Dutch government have legislated to prohibit discrimination on grounds of sexual orientation in the provision of services; permitting the defendant to decline to provide services as requested by the applicants would amount to discrimination on grounds of sexual orientation.

Therefore, arguably, if an indirect discrimination claim were appropriate (despite the comments above relating to whether or not the rule was neutral) the applicant's claim would have been successful, following the case law cited above.

o Direct discrimination

As noted above, it is arguable that a refusal to provide the service requested, which falls within the general ambit of services provided, on the basis that the specific text requested did not comply with the defendant's view that God had prohibited same sex relationships is not a neutral provision: it is a limitation related to sexual orientation. This claim would therefore correctly be determined under the direct discrimination provisions.

Therefore, the Commission should have considered whether the applicant was treated less favourably on grounds of sexual orientation. If the Dutch domestic discrimination provisions mirror the provisions in the *General Framework Directive* (which applies in the field of employment) then arguably the Dutch Commission ought to have followed the decision of the ECJ in *Coleman v Attridge Law*¹³³, '*The principle of equal treatment enshrined in the [General Framework Directive] ... applies not to a particular category of person but by reference to the grounds*'.

In the Dutch towels case the reason for the refusal of the embroidering service was related to the ground of sexual orientation and therefore would constitute direct discrimination. Arguably, as the Dutch domestic provisions prohibiting discrimination on grounds of sexual orientation outside employment echo those provisions in the *General Framework Directive* in the employment field, the Dutch provisions prohibiting discrimination in goods and services should be read consistently with the *Framework Directive* for reasons of consistency and legal clarity.

ii) Occupational Requirements exceptions

This section sets out the two occupational requirement exceptions in the *General Framework Directive*. One of these exceptions permits organisations with a religious ethos to require an employee to be of a particular religion or belief where the employment is for the purposes of religion, but that it cannot be used to discriminate against persons on other grounds (e.g. sexual orientation).

EU legislation:

"Article 4 – Occupational requirements

1. Notwithstanding Article 2(1) and (2) [prohibiting discrimination on ground of sexual orientation/religion or belief etc], 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

¹³³ C-303/06 This case was brought under the General Framework Directive in the field of employment and its purpose is 'to combat all forms of discrimination on grounds of disability [and sexual orientation]. The principle of equal treatment enshrined in the Directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1. That interpretation is supported by the wording of Article 13 EC, which constitutes the legal basis of Directive 2000/78, and which confers on the Community the competence to take appropriate action to combat discrimination based, inter alia, on disability'

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 regard to the organisation's ethos."

This section includes an analysis of key factors:

- Both exceptions should be narrowly construed as they are derogations from the principle of equality.
- Art 4(2) exception only covers posts which exist entirely to promote or represent religion (e.g. priests, not cleaners).
- Article 4(2) cannot be used to justify differential treatment on other grounds (e.g. sexual orientation).
- However, it is possible to justify differential treatment on all the grounds covered by the Directive under Article 4(1) 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.
- Art 4 has been used in that way in a number of cases where the Directive is not being complied with.

Vaasa Administrative Court: Eligibility for assistant vicar post (Finland)¹³⁴

The complainant, a female minister ('A'), applied for the office of assistant vicar in the parish of 'Z' while she was openly living with another woman and was possibly going to have the partnership registered. The Church Chapter which considered her application decided that she did not possess the necessary qualities to be an assistant vicar because of this relationship.

Under the domestic provisions and according to the Church Order, the Cathedral Chapter shall make a decision on the applicants' eligibility for the office and shall issue a statement on the applicants to the parish. In the statement, the applicants shall be assessed on the basis of their abilities and skills and taking into account the needs of the parish.

According to the Church Order, applicants who:

- Have been suspended or dismissed from the office of minister
- are, with certain exceptions, applying for another office of vicar or assistant vicar, or
- who obviously lack the necessary qualities to attend to the office

¹³⁴ Dnro 00477/04/5990, issue date 27 August 2004, Number 04/0253/3

shall not be eligible in the election.

According to Section 6 of the Constitution of Finland, everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.

According to Section 6 of the Non-discrimination Act, nobody may be discriminated against on the basis of sexual orientation or other personal characteristics.

The Act on Registered Partnerships, which grants two adults of the same sex the opportunity to have their partnership registered became effective on 1 March 2002.

In the Administrative Court 'A' argued that the decision of the Cathedral Chapter should be revoked because it was not based on one of the permissible grounds to exclude applications under the Church Act nor the Church Order.

She also argued that the decision of the Cathedral Chapter discriminated against her on ground of her sexual orientation and family relations and thus violated her right to equal treatment under domestic anti discrimination law, the Constitution of Finland and international conventions on human rights.

The Administrative Court held that entering into a partnership with a person of the same sex is provided for and accepted in the law. Discrimination based on living in a partnership with a person of the same sex is prohibited by the Finnish Constitution and the Non-Discrimination Act. The court stated that it is not possible to make an exception to these provisions in recruitment to the post of minister, if there is not at least a legal exception in church legislation that has its basis in the church legislation.

The court seems to emphasise that it is permissible for a church or a religious community to say that they will only accept a worker who does not live in a same-sex relationship, *if* this is part of the church's doctrine or ethos. However, in this particular case, the court found that in the Finnish Evangelical Lutheran Church there was no unanimity on this issue (i.e. it was not part of the doctrine of the Lutheran Church). As no such agreed doctrine existed, the decision of the Cathedral Chapter is unlawful in this case.

The Administrative Court therefore revoked the decision of the Cathedral Chapter and the question of 'A's eligibility for office of assistant vicar was returned to the Cathedral Chapter for reconsideration.

Reaney v Hereford Diocesan of Board of Finance (United Kingdom)¹³⁵

In this UK case Mr Reaney, who was gay, applied for the post of Youth Officer with the Respondent. The Bishop of Hereford decided not to offer the claimant the post, even though the interview panel had found him to be by far the best candidate, because he did not believe that the claimant could remain celibate. Church of England guidance stated that the clergy could not enter into sexually active gay relationships. This guidance was describing the standard of behaviour expected for ordained Ministers and drew a distinction with the standard expected of the laity.

Mr Reaney brought a claim for direct and indirect sexual orientation discrimination and harassment under domestic legislation which implemented the *General Framework Directive* 2000/78/EC.

¹³⁵ Employment Tribunal, case number 1602844/2006

The Tribunal also considered the domestic exception, the ‘general occupational requirement’, as permitted under Art 4(1). Differential treatment in employment is permitted in the UK where the employment is for purposes of an organised religion and:

- the employer applies a requirement related to sexual orientation so as to comply with the doctrines of the religion
- or because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

The Employment Tribunal decided that there had been direct discrimination.

They went on to consider whether an occupational requirement applied to the post and set out Parliament's intention on how the provision implementing Article 4(1) should be interpreted. Key aspects of the scope of this exception in UK law are as follows:

- It was not a blanket exemption, but must be justified on case by case basis and therefore does not apply to all jobs within that organisation.
- The exception should be narrowly construed as it is a derogation from the principle of equal treatment.
- It only applies where the post is ‘for purposes of organised religion’:

"[...] Even if an employer can show that the job exists for the purposes of organised religion, and that is a significant hurdle, he may only apply a requirement related to sexual orientation if one of two further tests are met. In the first test the requirement must be applied to comply with the doctrines of the religion. We do not believe that that test will be met in relation to many posts. It would be very difficult for a church to argue that a requirement related to sexual orientation applied to a post of cleaner, gardener or secretary. Religious doctrine rarely has much to say about posts such as those. If the first test is not met, what about the second? ... Both elements are to be satisfied before the second test can be met. It is therefore a very strict test and one that can be met in very few cases. The position of a cleaner, librarian, which has been raised many times, must be judged against those strict criteria. They are strict criteria and one cannot say in any specific case what the situation will be. In such cases one has to apply the criterion and see whether or not they are fulfilled..."¹³⁶

The Tribunal found in the case of Reaney that the post was to fulfil a role of representation of the Diocese and therefore fell within the exception which permitted discrimination in the small number of posts outside the clergy that exist entirely to promote and represent religion. Further, they found that the Bishop applied a requirement related to sexual orientation (to be celibate) to comply with the doctrines of the religion. Finally the Tribunal considered whether Mr Reaney met that requirement. On the facts at the time of the decision not to appoint Mr Reaney he was single and stated that he intended to remain celibate. Therefore the Tribunal concluded that the Bishop was not reasonable in not accepting that the claimant met this requirement and therefore the occupational requirement exception did not apply in this case and Mr Reaney was therefore directly discriminated against and awarded compensation.

The Tribunal also found that the claim for indirect discrimination was successful but the claim for harassment was not.

¹³⁶ Para 90 of *Amicus -v- Secretary of State for Trade and Industry [2004] IRLR 430*, Mr Justice Richards set out the statement of the Minister of State, Lord Sainsbury of Turville, in replying to the debate on the regulations in the House of Lords.

- **Commentary:**

The Tribunal dealt with this case under the exception for the purposes of a religious organisation under Regulation 7(3) which was based on Article 4(1). In November 2009 the European Commission sent a Reasoned Opinion¹³⁷ to the UK stating that:

'The Commission maintains that the wording used in regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 is too broad, going beyond the definition of genuine occupational requirement allowed under Article 4(1) of the Directive. The Commission reiterates its view, expressed in the letter of formal notice, that the rationale behind Article 4(1) is not the exclusion of 'negative characteristics'

The UK government replied that the then Equality Bill¹³⁸ would address this issue and ensure the provisions are compliant with the Directive. However, the Equality Act 2010 provisions are the same as those in the Sexual Orientation Regulations and therefore these provisions are unlikely to be compliant with the Directive. The next stage in the infringement proceedings would be for the EC to bring the case to the Court of Justice of the European Union.

Hungary – Háttér Társaság a Melegekért v. Károli Gáspár Református Egyetem (Hungary)¹³⁹

After having dismissed a theology student who had confessed his homosexuality to one of his professors, the Faculty Council of the Theological Faculty of the Gáspár Károli Calvinist University had published a general declaration on 10 October 2003, claiming that the church may not approve the education, recruitment and employment of pastors and teachers of religion who conduct a homosexual way of life. According to the declaration, "the homosexual practice is condemned as a sin, like adultery, by the Bible. Therefore, such relationships cannot be tolerated by the Reformed Church, their blessing is impossible. Consequently, leading or popularising such a lifestyle is incompatible with the profession of religion teachers, with education of these teachers and all other kinds of religious services."

The claimant, an LGBT NGO brought an *actio popularis* claim against the university requesting the court to declare that the defendant's published opinion violated the right of homosexuals as a social group to equal treatment, to withdraw its declaration, as well as to pay punitive damages. The claim was taken under domestic anti-discrimination legislation.

The university argued that they reached their decision within the boundaries of freedom of religion and freedom of expression in accordance with the Hungarian Constitution.

The Supreme Court accepted the claimant's argument that proving an abstract disadvantage may be sufficient to establish prima facie less favourable treatment and to shift the burden of proof. However, it decided that the denominational university was exempted from the non discrimination provisions in the Act on Equal Treatment. The Act provides that an action based on a protected characteristic 'shall not be taken to violate the requirement of equal treatment if it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation'.

The Court found that in the case of a denominational university it may objectively be considered to be reasonable to exclude homosexuals from theological education, taking in consideration the fact that later on they may become pastors. This is so even though students with a degree in theology do not automatically become pastors.

The Supreme Court therefore dismissed the claim.

¹³⁷ Reasoned Opinion Infringement Number 2006/2450

¹³⁸ which was enacted as equality Act 2010

¹³⁹ Supreme Court, CASE 247 1 (08.06.2005)

- **Commentary:**

The domestic legal provisions for justifying direct and indirect discrimination merit closer attention by the Hungarian judiciary as well as by the European Commission in order to ensure proper implementation of the EU Directives.

In this case the Supreme Court used the general exempting rule under the Hungarian Act on Equal Treatment, providing that an action based on a protected characteristic *'shall not be taken to violate the requirement of equal treatment if it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation'*. This section, as *lex generalis*, can only be used in areas not covered by the EU Directives, as it provides a wider possibility for justification than the Directives¹⁴⁰.

Article 22 of the Equal Treatment Act also contains (and has contained) a specific, narrower exempting clause for employment, following the genuine and determining occupational requirement exception in the Directives. However, the Supreme Court analysed the case as an education case, therefore it did not investigate the employment element of the case and thus did not invoke this article.

Following this judgement, Article 7 Paragraph (2) of the Equal Treatment Act has been amended, stipulating that in the case of conflicting fundamental rights (such as between the right to education and the freedom of religion) a stricter test (absolute necessity, suitability and proportionality) is applied. Therefore, arguably the Supreme Court might come to a different conclusion in similar cases in the future¹⁴¹.

European Commission Report on the implementation Article 4(2) of the General Framework Directive

The European Commission made the following report on the implementation and impact of Article 4(2)¹⁴²:

"Religion or belief

Article 4(2) permits a specific exception to the principle of equal treatment in the case of churches and other organisations with an ethos based on religion or belief. This would allow such bodies to choose a person of the same religion or belief for a job where being of that religion or belief is a genuine, legitimate and justified occupational requirement. This exception only allows for different treatment on the grounds of religion or belief, and cannot be used to justify discrimination on another ground, for example sexual orientation. It should also be clearly linked with the nature of the activities carried out.

A number of Member States have adopted provisions in national law in line with Article 4(2) of the Directive. Some countries have provided exceptions that may go beyond the strict terms of the Directive or which remain ambiguous. Other Member States have chosen not to include any 'Article 4(2) exception'¹⁴³.

¹⁴⁰ See also case C-144/04, Werner Mangold v Rüdiger Helm

¹⁴¹ See also András Kádár, Country report on Hungary 2009, Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, European network of legal experts in the non-discrimination field

¹⁴² p 4, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "The application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation : document COM(2008) 225 final.

¹⁴³ CZ, EE, FR, LT, PT, FI, SE do not provide in their laws for such exception (though there may be special regulations governing some recruitments by religious institutions).

Conclusions

Conclusions on the scope of the right to manifest religion in employment and the provision of services

The following principles are illustrated by the above cases concerning employment, the provisions of services and conflicts with sexual orientation:

- A requirement to provide a non discriminatory service is potentially a legitimate reason to limit employees' ability to manifest their religion or belief at work. Factors which will be considered in justifying such a limitation include: whether the service has been prescribed by law (and no exception has been provided on the ground of religion and belief); whether the requirement impinges upon the employee's ability to hold their belief and worship as they wish; whether the employee is in a public job working for a public authority performing a secular task; whether permitting the exemption requested by the employee on the basis of their religion or belief would amount to unlawful discrimination against others;
- 'Article 9 ECHR does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing';
- 'the main sphere protected by Art 9 ECHR is that of personal convictions and religious beliefs although it 'also protects acts that are closely linked to those matters such as acts of worship or devotion forming part of the practice of a religion or belief';
- The right to manifest religion does not justify a policy which places people who share a sexual orientation at a particular disadvantage because Article 9(2) provides that the right to manifest religion may be limited where this is prescribed by law and is necessary to protect the rights of others;
- The Dutch Equal Treatment Commission Opinion in the towels case may have applied the wrong tests to the case and in any event the case demonstrates a difficulty with services cases: what is the properly defined scope of a service that must be provided without discrimination on grounds of sexual orientation. This issue may be appropriate to be considered by the CJEU if the *Proposed Directive on Goods and Services* is agreed on in the future.

Suggestions for EU institutions

- In 2012 the European Commission will prepare a report for the European Parliament on the implementation of the *General Framework Directive* in accordance with Article 19 of the Directive. In the preparation of this report the Commission could usefully take into account the findings in the above cases.
- The European Commission may wish to consider issuing guidance on principles established in this developing area of law concerning conflicts between religion and sexual orientation;
- As the European Commission has said 'the European legal framework for tackling discrimination is not yet complete. In particular, whilst some Member States have taken action prohibiting discrimination on grounds of age, sexual orientation, disability and religion or belief outside the area of employment, there is no uniform minimum level of protection within the European Union for people who have suffered such discrimination.'¹⁴⁴ Equinet expresses its hope that the Council of the EU, the

¹⁴⁴ COM(2008) 420 final

European Parliament and the European Commission will progress the Proposed Directive prohibiting discrimination outside employment on grounds of religion and belief, age, sexual orientation and disability without further delay.

Genuine Occupational Requirements

- Article 4 is a permissive provision – i.e. Member States may choose whether or not to introduce an exception into domestic legislation;
- The exception should be narrowly construed as it is a derogation from the principle of equal treatment;
- It is not a blanket exemption but must be justified on a case by case basis;
- Article 4(2) only allows for different treatment on the grounds of religion or belief, and cannot be used to justify discrimination on another ground;
- Exceptions under Article 4 should also be clearly linked with the nature of the activities carried out;
- The European Commission Report on the implementation Article 4(2) of the *General Framework Directive* found that some countries have provided exceptions that may go beyond the strict terms of the Directive or which remain ambiguous.
- Some countries appear to have not implemented Article 4(1) correctly in domestic legislation and infringement proceedings by the European Commission against them may be appropriate.

Suggestions for EU institutions:

- As noted above the *General Framework Directive* will be reviewed by the European Commission in 2012 and a report produced, together with proposals for amendment if appropriate, for the European Parliament. The Commission may wish to consider commissioning research into how the Framework Directive provisions are being interpreted on the ground of religion;
- The European Commission should take appropriate action where countries' provisions regarding Articles 4(1) and (2) have gone beyond the provision in the Directive or are ambiguous;
- The European Commission may wish to consider producing guidance on how these provisions should be interpreted.

6. Manifesting religion and conflicts with the rights of children

This chapter considers how in the context of religious discrimination or Article 9 claims conflicts with the rights of children can arise in the context of education, employment and the provision of services. The cases also demonstrate the need for the best interests of children to be taken into account, as required by the United Nations Convention on the Rights of the Child.

a) Legal framework

European Union equality law

Issues of conflicts between manifesting a religion and the rights of children may arise in relation to employment and the application of the *Framework Directive*. In deciding for example whether an employer has indirectly discriminated against a teaching assistant who wants to wear a full face veil, a relevant factor will be the effect it would have on the children's interests and education if they cannot see the person's lips move and body language. This was discussed in Chapter 1 and the Azmi case in the United Kingdom.¹⁴⁵

In a number of Member States there are also national provisions relating to religious discrimination in education where the possibility of conflicts with children's rights may also arise.

It is also important to recognise that currently there is no protection from discrimination of children in the context of EU equality law outside employment. The *Proposed Directive* relating to goods and services and education would provide such protection but it is currently blocked at the EU Council level, as explained in previous chapters.

Protection under the European Convention on Human Rights and the Convention on the Rights of the Child

Article 9 and the right to manifest a religion may be subject to limitations where it is necessary to protect the rights of others and this includes the rights of children.

In addition, the rights of the child are protected by the 1989 UN Convention on the Rights of the Child. According to this, the best interests of children must be the primary concern in making decisions that may affect them (see Article 3-1 of the Convention). All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers.

Children's rights may be threatened by public authority as by their family or by third parties. Parents and child-carers can thus represent an obstacle to the full exercise of the rights of the child. Ensuring public order as well, the state will in some cases subject the parents' or child-carers' freedom of religion to limitations deemed necessary in regard to the primacy of a particular social interest such as the protection of secularism, health and security or, more generally, the best interests of the child.

For example, the Canadian Supreme Court decided that the exercise of the right of freedom of religion was incompatible with the respect of the (absolute) right to life of the child and

¹⁴⁵ Azmi v Kirklees Council [2007] ICR 1154 (Employment Appeal Tribunal)

should be limited accordingly in a case relating to the refusal of the opposition of a Jehovah's Witness couple to administer a blood transfusion to their child since it was necessary for the child's survival.¹⁴⁶

An important contrasting case concerning Article 9 in the context of the rights of the child was the *Palau-Martinez* case, judged by the European Court of Human Rights on 16 December 2003¹⁴⁷. This concerned the ruling of French courts relating to the granting of custody of two children to their father. The mother and ex-wife, Mrs Palau-Martinez, belonged to the Jehovah's Witnesses. The court of appeal observed that the rules the Jehovah's Witnesses imposed as regards the upbringing of their members' children were "*essentially objectionable on account of their harshness, their intolerance and the obligation for the children to engage in proselytism*". It considered that it was in the children's interest "*to escape from the constraints and interdicts imposed by a religion structured as a sect*".

The European Court of Human Rights found breaches of Articles 8 (right to family life) and 14 (on discrimination) decided that the difference in treatment thus introduced by the Court of Appeal had pursued a legitimate aim, namely protection of the children's interests. As to whether it was proportionate to that aim, the Court noted that in its judgment the Court of Appeal had made observations of a general nature about Jehovah's Witnesses. There was no practical, direct evidence that the applicant's religion had influenced the children's upbringing or daily life. Moreover, whereas the applicant had asked the court to commission a social report, a common practice where custody of children was concerned, the Court of Appeal had not thought it necessary to allow her application. Such a report would no doubt have provided some concrete information about the children's lives with each of their parents and made it possible to ascertain what impact, if any, their mother's practice of her religion had had on them. The Court of Appeal had ruled on the basis of general considerations without establishing a link between the children's living conditions with their mother and their real interests. Although relevant, that reasoning had not been sufficient. The Court could accordingly not conclude that there had been a reasonably proportionate relationship between the means employed and the aim pursued and breaches of Articles 8 and 14 were established.

b) Analysis of cases and key issues

Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others (United Kingdom)¹⁴⁸

The claimants aimed at challenging the Education Act 1998. In the UK, a statutory ban imposed in 1986 and extended in 1998 applies to corporal punishment given by school teachers and other members of staff at a school, whether public or private. In 2003, it was further extended to child minders. Since 2004, punishment of a child which caused "actual bodily harm" cannot be justified, even if it is administered by a parent.

The claimants claimed to speak on behalf of a "large body of the Christian community" in the UK whose "fundamental beliefs" include a belief that "part of the duty of education in the Christian context is that teachers should be able to stand in the place of parents and administer physical punishment to children who are guilty of indiscipline". There was thus interference between the ban imposed by law and the freedom of religion as referred to in Article 9 of the ECHR.

¹⁴⁶ *R v Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R., p. 315.

¹⁴⁷ Application no. 64927/01

¹⁴⁸ [2005] 2 WLR 590

Article 19 of the Convention on the Rights of the Child requires States to take “*all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child*”.

Various other articles reinforce the child’s right to physical integrity and protection of his or her human dignity. The Preamble affirms that precisely because of their “physical and mental immaturity”, children need “special safeguards and care, including appropriate legal protection”. Article 37 requires protection from “torture or other cruel, inhuman or degrading treatment or punishment”.

The Council of Europe’s human rights mechanisms first challenged corporal punishment of children more than 30 years ago. In 1978, the European Court of Human Rights (ECtHR) found the judicial birching of a 15 year-old boy breached his right to protection from degrading punishment. Subsequent decisions during the 1980s and early 1990s condemned school corporal punishment, first in state schools and later in private schools in the UK. Other significant European Commission on Human Rights and ECtHR decisions have emphasised that rights to private or family life or to freedom of religious belief cannot be used to reject banning all corporal punishment.

The House of Lords decided that the ban of corporal punishment at school was “*necessary in a democratic society (...) for the protection of the rights and freedoms of others*”.

Firstly, the statutory ban was considered as pursuing a legitimate aim: children are vulnerable, and the aim of the legislation is to protect them and promote their well-being. Corporal punishment involves deliberately inflicting physical violence. The legislation is intended to protect children against the distress, pain and other harmful effects this infliction of physical violence may cause. That corporal punishment may have these harmful effects is self-evident.

Secondly, the means chosen to achieve this aim were considered as appropriate and not disproportionate in their adverse impact on parents who believe that carefully-controlled administration of corporal punishment to a mild degree can be beneficial.

Therefore, the legislature was entitled to take the view that, overall and balancing the conflicting considerations, all corporal punishment of children at school is undesirable and unnecessary and that other, non-violent means of discipline are available and preferable. Contrary to the claimants’ submissions, the House of Lords held that a universal ban was preferable to a selective ban which exempts schools where the parents or teachers have an ideological belief in the efficacy and desirability of a mild degree of carefully-controlled corporal punishment. Even if Parliament was bound to respect the claimants’ belief, it decided that the manifestation of these beliefs was not in the best interests of children.

As a result, there was no breach of Article 9.

HALDE Decision of 6 November 2006 (France)¹⁴⁹

A youth leader for sporting and leisure activities was hired for a short term contract by an organisation in charge of the social integration of autistic children. However, at preparatory meetings, the claimant arrived veiled and indicated her refusal to go swimming with the children. The organisation’s director decided to terminate the contract of employment in particular on the basis of health and safety of the children.

¹⁴⁹ Decision no. 2006-242

Articles 225-1 and 225-2 para. 3 of the Penal Code provides that discriminatory dismissal on the basis of religious discrimination may be subject to three years' imprisonment and a fine of €45,000. Article L. 1132-1 of the Labour Code also prohibits discrimination within the field of private employment when hiring or firing an employee, or for any other measure adopted during the course of an employment contract. According to this provision, no one may be denied access to a recruitment process or training period, no employee may be punished, dismissed, or discriminated against, either directly or indirectly, as far as his/her remuneration, classification or promotion is concerned in particular, on certain grounds specifically provided for by law. Religion and religious convictions are mentioned as prohibited grounds covered by Article L. 1132-1 mentioned below.

The HALDE deemed that the specific requirements of swimming pool safety concerning autistic children could legitimately justify the termination. This position is consistent with the Highest Judicial Court case-law. In the *Azad Case*¹⁵⁰, the Court held that there was no violation of the right to freedom of religion in requesting a Muslim butcher to handle pork. The Court of Cassation held that the employer is not guilty of any misconduct when requesting from his/her employee to perform the task for which he/she was hired, as long as it is not contrary to public order.

HALDE decision no. 2007-210 of 3 September 2007 (France)

Parents went to visit their daughter, who had to undergo surgery, in a mobile anaesthesia surgical unit. The mother was wearing a niqab, meaning a full black veil covering the entirety of her head and face, with the exception of a slit for her eyes. A nurse came and asked the mother to uncover her face, and the mother reported the incident to the HALDE. The investigation brought to light the following facts. The little girl was in the room with other children having undergone or about to undergo surgery like her. The nurse felt that the sudden arrival of a person dressed entirely in black with her face hidden behind a black veil might shock the children, already shaken up by the hospital environment and anxious from the upcoming or recent surgery. The nurse asked the mother to uncover at least her face in order to avoid traumatising the other children, specifying that the girl would be placed in an individual room as soon as possible so that the mother could come visit her as she wished.

Article L 6112-2 of the French Code on Public Health specifies that hospital workers may not discriminate between patients as far as care is concerned. A circular specifies that all patients must be treated in the same manner, regardless of their religious beliefs, such that there can be no doubt about the neutrality of the hospital workers. In the same ministerial instruction, it is stated that it is important to ensure that the expression of religious beliefs does not impede the provision of healthcare, the enforcement of hygiene rules, the peace of other hospitalised individuals and their families and friends, and normal operations within the ward.

The Convention on the Rights of the Child states that, in all decisions regarding children, whether they are issued by public or private institutions for social protection, the courts, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. This provision has a direct effect within the French legal order.

It was shown that the claimant was denied neither access to the establishment nor access to care for her child. It was not requested that the veil be removed at the entrance of the establishment, or even in the waiting room, but only upon entry into the shared waking room. The request came in response to a need specific to the situation. The medical staff appears to

¹⁵⁰ See Cass. Social Chamber, 24 March 1998 *Azad c/M'ze*, no. 95-44.738

be in the best position to determine what is right for the children placed in a vulnerable situation. The nurse sought a response so that appropriate measures could be enforced, without ever appearing to want to offend the claimant's religious beliefs. The HALDE Council observed that, taking into account the special circumstances, no religious discrimination had occurred and closed the case.

Conclusions

The following conclusions can be drawn from the cases:

- Religious discrimination and limiting the right to manifest a religion are likely to be lawful or not breach Article 9 where it is necessary to protect the rights of children. Relevant factors will be whether children's education may be affected; their health and safety; and whether they may be subjected to any violence or distress;
- In these types of cases it will be important for equality bodies to carefully review how the Convention on the Rights of the Child will apply, and in particular the need to consider their best interests;
- As the *Proposed Directive* relating to goods and services and education would provide protection from discrimination against children in these fields, the EU institutions should take active steps to ensure the Directive is agreed on as soon as possible.

7. Manifesting religion and conflicts with gender equality

This chapter examines situations where there may be conflicts between the manifesting of a religion or belief and gender equality. These types of cases arise in several different situations: firstly, where the manifesting of a right by one person such as an employee may adversely impact on the rights of another employee. The cases below concerning priests and handshaking requirements demonstrate this. It may also arise in the context of Article 9 claims under the ECHR where gender equality is used as an argument for limiting the rights of Muslim women to wearing headscarves.

a) Legal framework

European Union equality law

Gender equality has long been considered as a core right within the EU legal order. It has also a special status in EU Law. Historically, the *Gender Directives* were the first pieces of social legislation and EU law prohibiting discrimination was first set out on the issue of sex equality, which has been enshrined as a general principle of EU Law since 1978.¹⁵¹ There are also specific provisions of the EU Charter of Fundamental Rights relating to gender equality.¹⁵²

Currently, in EU law religious discrimination is only required to be unlawful within the employment field under the *Framework Directive* although, as discussed previously, many Member States have national laws protecting against religious discrimination in other sectors such as education and the provision of goods and services. Cases concerning conflicts between manifesting a religion and gender equality have often arisen in the context of employment or education. These have been situations where the desire of one employee or student to manifest a belief impacts on the rights of other employees or students in terms of their gender.

European Convention on Human Rights

Gender equality is recognised by the European Court of Human Rights (ECtHR) as one of the key principles underlying the Convention and a goal to be achieved by Member States of the Council of Europe.¹⁵³ The Court considers that “*only very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention*”.¹⁵⁴ Therefore, the standard of protection seems very high when discrimination leads to exclusion on a gender basis. It is only when the issue of discrimination relates to matters of fiscal and social policy (e.g. pension schemes, retirement

¹⁵¹ See the Equal pay Directive 1975 75/117/EEC and the Equal Pay Directive 76/207/EEC

¹⁵² Article 23 of the Charter requires equality between men and women to be ensured in all areas including employment and equal pay.

¹⁵³ For example, ECHR 28 May 1985 *Abdulaziz, Cabales and Balkandali v. United-Kingdom*, Application nos. 9214/80, 9473/81 and 9474/81 §78; ECHR 24 June 1993 *Schuler-Zgraggen v. Switzerland*, Application no. 14518/89 §67; ECHR 7 October 2010 *Konstantin Markin v. Russia*, Application no. 30078/06.

¹⁵⁴ For example ECHR 20 June 2006 *Zarb adami v. Malta*, no. 17209/02.

age etc.) that the European Court affords the State Parties a wide margin of appreciation where gender discrimination is concerned.¹⁵⁵

The issue of the relationship between the right to manifest a religion and gender equality has arisen under Article 9 in relation to a number of education cases and the issue of teachers or students wearing a headscarf. Unlike the discrimination cases however, these cases concern situations where a manifestation of a belief is also argued as conflicting with gender equality. Violations of Article 9 have generally not been found and the bans on headscarves were judged as justified either on the basis of security reasons, or secularism (consistent with the values of a democratic society) and/or gender equality¹⁵⁶. In all events, the States Parties are given a wide margin of appreciation due to the lack of consensus on religion around Europe.

For example, in *Dahlab v. Switzerland* and *Sahin v. Turkey*¹⁵⁷ the ECtHR considered as justified the ban on the headscarf in two secular states to a teacher of young children and to a university student in her 5th year of medicine by taking into account gender equality. These decisions were largely criticised as they are detrimental to Muslim women. In the *Dahlab* case it held that the headscarf was “hard to square with the principle of gender equality” and “might have some kind of proselytising effect”. Therefore the Court found it “difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination.”

These decisions have been criticised by a number of commentators that have argued that the refusal to permit the women to wear headscarves was actually detrimental to their right to equal treatment as they were excluded from employment and education. A similar approach has been taken in some Member States or other European countries such as in Norway. In Norway the Norwegian Gender Equality Ombudsman found that an employer's refusal to permit wearing a hijab by a Muslim female employee was both religious discrimination and gender discrimination.¹⁵⁸

b) Analysis of cases and key issues

There are two main types of cases that have been examined below. Male priests working in religious institutions that have refused to work with female priests, and persons that refuse to shake the hands of persons of the opposite sex.

Case on eligibility for the office of vicar (Finland)¹⁵⁹

A male minister, who applied for the office of vicar, had during an interview announced that on the basis of his religious conviction he would not be able to hold a religious service together with a female minister. Due to this announcement, the Cathedral Chapter of the Evangelical Lutheran Church of Finland found that he should be considered to have announced in advance that he would not be prepared to perform all the duties and obligations belonging to the office of vicar and was not eligible as a candidate for the election of vicar.

¹⁵⁵ ECHR 12 April 2006 *Stec and Others v. UK* [GC], nos. 65731/01 and 65900/01 (pension payments and invalidity benefits).

¹⁵⁶ ECHR 4 March 2008 *El Morsli v. France*, no. 15585/06 ; ECHR 4 December 2008 *Dogru and Kervanci v. France*, nos. 27058/05 and 31645/04; ECHR 30 June 2010 *Aktas et al*, no. 43563/08; ECHR 15 February 2001 *Dahlab v. Switzerland*, no. 42393/98; ECHR 10 November 2005 (GC) *Sahin v. Turkey*, no. 44774/98.

¹⁵⁷ See above

¹⁵⁸ See for example The Equality Ombud's case No. 2000/169 (The Equality Tribunal's case No. 8/2001); The Equality Ombud's cases No. 2003/70, No. 07/627 and No. 08/1351

¹⁵⁹ Supreme Administrative Court, KHO:2008:8

The applicant made a claim in the Administrative Court and asked for the decision of the Cathedral Chapter to be revoked and to be nominated for the election of vicar. There were no female ministers in the parish at the time, so the question of holding a religious service together with a female minister was not based on a women actually being discriminated against. A person's position on female priesthood is part of his/her religious conviction. The decision of the Chapter was incompatible with the principle of equality laid down by the Constitution of Finland and with the prohibition on gender discrimination laid down by the Non-discrimination Act.

The Administrative Court rejected the appeal. The Court stated that there are no provisions in the Church Act or the Church Order that would entitle an employee who has accepted a church office to refuse, on the basis of the freedom of religion or conscience, to carry out duties or obligations that belong to the office. Work management, the division of duties and working conditions must be arranged in such a manner that employees are not treated unequally on the ground of their gender. Work shift arrangements on the basis of gender as such are discriminatory measures. Although there was no female minister in the parish in question, it was just a matter of time until the situation would change in terms of female ministers. Additionally, a vicar's attitude towards female ministry has significance in terms of female ministers applying for office.

The Supreme Administrative Court rejected the appeal. The Court stated that the applicant's freedom of religion and conscience had not been violated; nor had his right to manifest his religious conviction or opinion. The decision of the General Synod to make the office of minister open to women meant that the provisions of the Act on Equality between Women and Men would also apply to the Evangelical Lutheran Church of Finland. The Act obliges authorities and employers to promote equal opportunities.

There is a clear distinction between religious conviction and discriminatory measures based on it. Religious conviction or an opinion as such can be accepted, but discriminatory behaviour cannot be accepted even on the basis that it is founded on religious conviction. The obligation of ministers of different sex to co-operate with one another cannot be evaded through work shift arrangements based on conviction.

Case concerning a visiting preacher who refused to hold a religious service with a female priest (Finland)¹⁶⁰

A religious community that took a negative view on female ministry had organised an event in the facilities of the Evangelical Lutheran parish. 'B', the chairperson of the local chapter of the community, had agreed with the parish on the organisation of the event. 'A', who had been ordained as a priest but was not in office in the parish, had arrived to preach a sermon in the religious service that preceded the event and was organised by the parish. 'C', a female minister who was in office as the parish minister, had been ordered to hold the service. Prior to the commencement of the service, 'A' and 'B' had, on the basis of their conviction, made it clear to 'C' that as a female minister, she would not be allowed to participate in the service with 'A', whereupon 'C' had left the church.

The public prosecutor demanded that 'A' and 'B' be sentenced for discrimination based on gender as they had prevented 'C' from performing the work duty assigned to her as a minister in the service.

'A' and 'B' denied the charges. 'A' stated that on the basis of the freedom of religion, no-one could be obliged to practise religion in a manner that was against his or her religious

¹⁶⁰ Supreme Court, KKO:2010:74

conviction. He was not in office as an Evangelical Lutheran minister and was not in a position to issue orders of any kind. 'B' also pointed out that he was not in a position to issue orders for ministers to prevent them from participating in the service.

The Supreme Court did not amend the outcome of the conviction of the Court of Appeal which had found 'A' and 'B' guilty of discrimination as charged. 'A' had been sentenced to 20 day fines by the District Court, which was sustained by the Court of Appeal. 'B' had been guilty of such a minor offence that he had not been convicted.

The Supreme Court found that discrimination on the ground of gender or any other ground in arranging a public meeting is prohibited by the Criminal Code, which was to be applied in the case. What was decisive in the matter was the fact that discrimination linked with a religious service is covered by the Criminal Code, and not by the Act on Equality between Women and Men. 'A' and 'B' could be considered to have participated in the organisation of the religious service which is a public meeting as referred to by the Criminal Code.

The Supreme Court found that actions that violate human dignity or other fundamental rights or are against the principles of the judicial system cannot be carried out in the name of freedom of religion and conscience. Prevention of discrimination is an acceptable reason for restricting the autonomous powers of religious communities as well as the rights of a private individual.

When exercising his or her right to practice a religion, a person can be expected to take into account his own special status as well as that of another in the circumstances where religion is practiced. A person who arrives to practice religion in an event organised by a community whose guiding principles are not in accordance with his or her personal conviction shall take into account these principles. This is particularly the case if the behaviour that is in accordance with the person's conviction results in a clear violation of human rights, such as discrimination on the basis of gender.

Case on student shaking hands with persons of the opposite sex (Netherlands)¹⁶¹

Ms A was of the Muslim faith. One of the religious requirements that Ms A observed was the avoidance of physical contact with members of the opposite sex, in this case males over the age of twelve. In daily life this is mainly evident in her refusal to shake a man's hand.

In June 2005 Ms A applied to the respondent, a school for vocational training, for admission to the Teaching Assistant training course. Part of the application procedure involved an intake interview and a follow-up interview. In these interviews Ms A stated that on account of her religion she did not shake a man's hand. In a letter dated 14 July 2005 the respondent informed Ms A that she could not be admitted to the training course if she was not prepared to shake a man's hand, if in given situations this was necessary.

Ms A requested the Dutch Equal Treatment Commission (further referred to as the Commission), for an opinion on the question of whether the respondent, through the requirement, had unlawfully discriminated against her on the ground of religion.

In relation to direct discrimination the Commission held that as the respondent made no direct reference to Ms A's religious persuasion or its expression there was no direct discrimination. In relation to indirect discrimination, the Commission held that the requirement that students should be willing, when the occasion arises, to shake anyone's hand mainly affects people of a given religious persuasion, like Ms A. So, by imposing an admission requirement that

¹⁶¹ CGB 27 March 2006, Opinion 2006-51

affects in particular the adherents of a given religious persuasion the respondent had indirectly discriminated against Ms A.

In relation to justification, the respondent indicated that there were three aims of the admission requirement: to create or uphold uniform good manners and etiquette and to develop citizenship competency; to observe the duties imposed by the Adult and Vocational Education Act (WEB); and to protect the principle of the equality of men and women. The Commission considered those aims to be legitimate. It then considered whether the means used to achieve the aims were proportionate.

In relation to the first aim, respondent argued that it is a large educational establishment that has a staff and a student population with a wide variety of cultural backgrounds, ethnicity and religious persuasion. The respondent therefore considered it important from an educational point of view that everyone should be clear about etiquette. Confusion in this regard could, according to the respondent, result in unnecessary tensions between and/or among students and/or staff. The fact that a greeting is by definition culturally determined does not detract from this, argued the respondent. The respondent saw it as its educational task to observe and disseminate the customary, generally accepted good manners and courtesies. According to the respondent, shaking hands is one of them.

The Commission found that in teaching ethical values the respondent was focusing on what is customary among the majority of the population of the Netherlands. The respondent argued that shaking hands was part of the generally accepted social code in the Netherlands. The Commission noted that applying this part of the social code excludes students from ethnic minorities, like Ms A. The Commission was unable to conclude from respondent's arguments that the respondent would be unable to achieve its aim in a manner that would not exclude people like Ms A. It was impossible to see why good manners imply that people must shake hands. Ms A stated at the hearing that she greets members of the opposite sex with a friendly nod of the head and, if requested, explains her actions. It was impossible to see why this conduct should be in conflict with customary good manners. This is all the more cogent seeing that good manners are subject to change over the years and also differ per age group and cultural group.

In relation to the second aim, the respondent argued that under the Adult and Vocational Education Act it has a statutory responsibility to focus its education on the social functioning of the participants in a manner that chimes with social requirements. Consistent with the reasoning concerning the first aim, the Commission found that training students in a manner that chimes with social needs does not necessarily need them to shake hands.

In relation to the third aim, the respondent argued that the refusal to shake a man's hand contravened the principle of the equality of men and women. In an earlier opinion¹⁶² the Commission had taken the ground that refusing to shake the hand of people other than those of the same sex could be construed as a denial of the equality of men and women and that this refusal was therefore not protected by the equal treatment legislation in spite of the fact that the refusal stemmed from a specific religious conviction.

The respondent rightly felt responsible for preventing discrimination, as under the equal treatment legislation it has a duty to ensure a discrimination free working and learning environment. The means used by the respondent to comply with this duty was the requirement that students should be willing, when the occasion arises, to shake the hand of a person of the opposite sex.

However, seeing there is at least one alternative that not only satisfies the desire of students like Ms A to avoid physical contact with men (or women) but also respondent's duty of care in

¹⁶² CGB 5 March 2002, opinion 2002-22

regard to a discrimination-free working and learning environment, the Commission decided that the means were not proportionate. The Commission reasoned that it can suffice for respondent to require that its students (and staff) do not discriminate against each other on one of the grounds protected by equal treatment legislation. For Ms A this means that she is required to greet everyone respectfully.

Respondent failed to demonstrate that shaking hands as such constitutes an essential part of the training course. For this reason the desire of students to avoid such physical contact cannot constitute a reason for refusing them access to a training course. Matters would be different if any form of physical contact were to be inevitable in essential parts of the course.

It was the Commission's view that the means (the requirement that on occasion students should be willing to shake hands without discriminating), is unnecessary seeing there was at least one other means for achieving the same aim which would not lead to indirect discrimination on religious grounds.

As a result the Commission decided that there was unlawful discrimination against Ms A.

The Swedish Ombudsman v the Unemployment Agency (Sweden)¹⁶³

The complainant, a Muslim man from Bosnia, was unemployed and had registered with the Unemployment Agency. He underwent a training programme and received compensation from the Social Security Agency. During and as part of the training he was offered to meet an employer to discuss the possibility of a traineeship.

At the meeting the complainant refused to shake hands with a female representative of the company due to his religious beliefs. The female employee felt humiliated and excluded from the rest of the group by the complainant's refusal to shake her hand. The company did not offer the complainant a traineeship since they did not find him physically fit to carry out the required tasks.

A few weeks later the Unemployment Agency was informed about what had happened in the meeting between the complainant and the company. As a result the Unemployment Agency decided to deny the complainant further support and he was denied financial unemployment compensation as a consequence, since his refusal to shake hands with the female employee had, according to the Unemployment Agency, resulted in him not being offered a traineeship.

The complainant filed a complaint with the Swedish Ombudsman who, after investigating the case, filed a lawsuit against the Unemployment Agency. The Ombudsman claimed that the complainant had been subject to direct and indirect discrimination based on his religious beliefs. The Unemployment Agency defended its action by referring among others to the Gender Equality Act according to which men and women should be given equal opportunities in the labour market.

The Court of First Instance in Stockholm held that the Ombudsman had proved that the complainant had been subject to direct discrimination due to his religious belief. The Court stated that the Unemployment Agency had not showed that there were other reasons than the complainant's refusal to shake hands that caused the Agency to withdraw its support. The Court also held that it had been proven that the complainant had explained to the female employee that due to his religious belief he was prevented from shaking hands with women. There was therefore no doubt that he had been treated less favourably on grounds of his religion. The Court did not go into whether the complainant had been subject to indirect

¹⁶³ Stockholms tingsrätt T 7324-08, 2010-02-08

discrimination or whether the rights of the female employee had been violated. The Court awarded the complainant 60000 SEK.

Conclusions

The following conclusions can be drawn from the cases concerning conflicts with gender:

- The manifesting of religions can be legitimately limited either in relation to religious discrimination claims or Article 9 in order to prevent the breach of the fundamental rights of others on grounds of gender, including where gender discrimination occurs;
- In relation to Article 9 claims and the manifesting of religion by Muslim women wearing headscarves, the European Court of Human Rights found in several cases (*Dahlab v. Switzerland* and *Sahin v. Turkey*) that promoting gender equality was one of the legitimate reasons for finding that there had been no breach of their Article 9 rights by preventing them from wearing headscarves. However, some commentators have raised concerns that the prohibitions actually are a form of gender discrimination and several European countries have taken a similar approach such as Norway. These issues may be worthy of reconsideration by the European Court of Human Rights;
- In the context of religious organisations, the Finnish cases demonstrate that in countries where women are permitted to become priests or hold similar religious positions, it will be direct sex discrimination where male priests refuse to work with female priests on purported grounds of religious convictions;
- The handshake cases from the Netherlands and Sweden demonstrate that employers and institutions providing vocational training should carefully consider whether requirements that Muslim women or men shake hands with persons of the opposite sex are for a legitimate aim and proportionate. If they are not they are likely to amount to either direct or indirect religious discrimination.

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CYPRUS

Office of the Commissioner for Administration
(Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC

Office of the Public Defender of Rights
www.ochrance.cz

DENMARK

Board of Equal Treatment
www.ast.dk

DENMARK

Danish Institute for Human Rights
www.humanrights.dk

ESTONIA

Gender Equality and Equal Treatment Commissioner
www.svv.ee

FINLAND

Ombudsman for Equality
www.tasa-arvo.fi

FINLAND

Ombudsman for Minorities
www.ofm.fi

FRANCE

Defender of Rights
www.defenseurdesdroits.fr

GERMANY

Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE

Greek Ombudsman
www.synigoros.gr

HUNGARY

Equal Treatment Authority
www.egyenlobanasmod.hu

HUNGARY

Office of the Commissioner for Fundamental Rights
www.ajbh.hu

IRELAND

Equality Authority
www.equality.ie

ITALY

National Office against Racial Discrimination - UNAR
www.unar.it

LATVIA

Office of the Ombudsman
www.tiesibsargs.lv

LITHUANIA

Office of the Equal Opportunities Ombudsperson
www.lygybe.lt

LUXEMBURG

Centre for Equal Treatment
www.cet.lu

MALTA

National Commission for the Promotion of Equality
www.equality.gov.mt

NETHERLANDS

Dutch Equal Treatment Commission
www.cgb.nl

NORWAY

Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND

Human Rights Defender
www.rpo.gov.pl

PORTUGAL

Commission for Citizenship and Gender Equality
www.cig.gov.pt

PORTUGAL

Commission for Equality in Labour and Employment
www.cite.gov.pt

PORTUGAL

High Commission for Immigration and Intercultural Dialogue
www.acidi.gov.pt

ROMANIA

National Council for Combating Discrimination
www.cncd.org.ro

SERBIA

Commission for the Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA

National Centre for Human Rights
www.snsip.sk

SLOVENIA

Office for Equal Opportunities
www.uem.gov.si

SPAIN

Spanish Race and Ethnic Equality Council
www.igualdadynodiscriminacion.org

SWEDEN

Equality Ombudsman
www.do.se

UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission
www.equalityhumanrights.com

UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland
www.equalityni.org

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