

FAITH IN EQUALITY: RELIGION AND BELIEF IN EUROPE

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PRACTICE**

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Faith in Equality: Religion and Belief in Europe

An Equinet Report

The Equinet Report *'Faith in Equality: Region and Belief in Europe'* is published by Equinet, European Network of Equality Bodies.

Equinet brings together 46 organisations from 34 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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Equinet Secretariat | Rue Royale 138 | 1000 Brussels | Belgium
info@equineteurope.org | www.equineteurope.org
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List of Working Group members

Commissioner for the Protection from Discrimination, **Albania** | Ombud for Equal Treatment, **Austria** | Unia (Interfederal Centre for Equal Opportunities), **Belgium** | Institute for Equality between Women and Men, **Belgium** | Institution of Human Rights Ombudsman, **Bosnia and Herzegovina** | Commission for Protection against Discrimination, **Bulgaria** | Office of the Ombudswoman, **Croatia** | Ombudswoman for Persons with Disabilities, **Croatia** | Public Defender of Rights – Ombudsman, **Czech Republic** | Danish Institute for Human Rights, **Denmark** | Gender Equality and Equal Treatment Commissioner, **Estonia** | Non-Discrimination Ombudsman, **Finland** | Defender of Rights, **France** | Federal Anti-Discrimination Agency, **Germany** | Greek Ombudsman, **Greece** | Equal Treatment Authority, **Hungary** | Office of the Commissioner for Fundamental Rights, **Hungary** | National Equality Councillor, **Italy** | Office of the Ombudsman, **Latvia** | Office of the Equal Opportunities Ombudsperson, **Lithuania** | Commission for the Rights of Persons with Disabilities, **Malta** | The Protector of Human Rights and Freedoms (Ombudsman), **Montenegro** | Netherlands Institute for Human Rights, **Netherlands** | Equality and Anti-Discrimination Ombud, **Norway** | Commissioner for Human Rights, **Poland** | Commission for Citizenship and Gender Equality, **Portugal** | High Commission for Migration, **Portugal** | National Council for Combating Discrimination, **Romania** | Commissioner for Protection of Equality, **Serbia** | National Centre for Human Rights, **Slovakia** | Advocate of the Principle of Equality, **Slovenia** | Equality Ombudsman, **Sweden** | Equality and Human Rights Commission, **UK – Great Britain** | Equality Commission for Northern Ireland, **UK – Northern Ireland**

Authors

The chapters of the Report were drafted by the following Working Group members:

Chapter 1: **Veronika Bazalová** (Public Defender of Rights, Czech Republic)

Chapter 2: **Frédérique Ast** (Defender of Rights, France) and **Ingrid Thorsnes** (Equinet)

Chapter 3: **Tine Thomsen** (Danish Institute for Human Rights, Denmark)

Chapter 4: **Madalina Rosu** (National Council for Combating Discrimination, Romania)

Chapter 5: **Rosmarie Doblhoff-Dier** (Ombud for Equal Treatment, Austria)

Chapter 6: **Imane El Morabet** (Unia – Interfederal Centre for Equal Opportunities, Belgium)

Chapter 7: **Lindsey Reynolds** (Equality and Human Rights Commission, UK - Great Britain)

Editorial and publication coordination

Veronika Bazalová (Public Defender of Rights, Czech Republic)

Tamás Kádár (Equinet, European Network of Equality Bodies)

Editing

Sarah Cooke O'Dowd (Equinet, European Network of Equality Bodies)

Cover Design

Vertige ASBL

List of Abbreviations

International

CEO	Chief Executive Officer
CJEU	Court of Justice of the European Union (Luxembourg)
CRC	UN Convention on the Rights of the Child
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights (Strasbourg)
EC	European Commission
EU	European Union
FAFCE	Federation of Catholic Families in Europe
FIFA	Fédération Internationale de Football Association
FRA	European Union Agency for Fundamental Rights
HRC	UN Human Rights Committee
ICCPR	UN International Covenant on Civil and Political Rights
ICESCR	UN International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LGBT	Lesbian Gay Bisexual Transexual
TFEU	Treaty on the Functioning of the European Union

National

AGG	Allgemeines Gleichbehandlungsgesetz – General Act on Equal Treatment, Germany
CCOJB	Belgian Federation of Jewish Organizations
CGIL	Confederazione Generale Italiana del Lavoro
CRC	Evangelical Christian Church (Great Britain)
CRvB	Centrale Raad van Beroep (Netherlands)
EAT	Employment Appeal Tribunal (Great Britain)
EHRC	Equality and Human Rights Commission (Great Britain)
ET	Employment Tribunal (Great Britain) – to be checked!
FYROM	Former Yugoslav Republic of Macedonia
NHS	National Health Service (United Kingdom)
NIHR	Netherlands Institute for Human Rights

Executive Summary

This report was produced by Equinet's Working Group on Equality law in order to analyse the legal developments that have taken place in the field of discrimination based on religion and belief since 2011, when the last Equinet legal report on this issue was published. While it cannot aspire to be a comprehensive academic analysis, it aims to provide an overview of the most important developments in case law on religion and belief and assist those working with anti-discrimination law, from equality bodies to legal professionals and NGOs.

The opening chapter describes a **general legal framework** including EU law, the Council of Europe's European Convention on Human Rights, the United Nation's International Covenants on Civil and Political Rights, on Economic, Social and Cultural Rights, and on the Rights of the Child and the International Labour Organisation's Convention on Discrimination. Importantly, the report underlines that at the EU level there continues to be a gap in protection against discrimination on the ground of religion and belief, with only employment and occupation covered, given the delay in adopting the 'Horizontal Directive' proposed in 2008. The report underlines the importance of intersectional discrimination experienced by religious minorities, involving other grounds such as gender or race and ethnic origin. Such intersections can be used to tackle some of the cases that would otherwise fall outside the scope of legal protection.

The following chapters cover the areas of employment, education, provision of goods and services, manifestation of religion and belief in public and public administration and state functions. Each chapter delves into the legal framework specific for that area and presents major court rulings (ECtHR, CJEU, national judiciary) and equality bodies' decisions.

Equality bodies shared the highest number of cases on religion and belief in the field of **employment**. Cases are discussed in a number of subcategories, such as recruitment and selection; headgear and religious symbols; religious harassment in the workplace; justified occupational requirement; opting out of certain work tasks; cases relating to work patterns; and conflicts of rights. Perhaps one of the most important developments in the field has been the adoption of the first ever CJEU judgments on the ground of religion and belief (Achbita and Bougnaoui). The report suggests that in these, the CJEU has adopted a cautious approach and one which appears to contradict to some extent the ECtHR judgment in the case of Eweida and Others v. the United Kingdom. The CJEU judgments appear to allow more space for employers to ban the wearing of religious symbols in the workplace without violating the fundamental right to freedom of religion or belief. Similarly, national case law shows the existence of contentious issues that would need to be clarified by further international and national case law, such as whether neutrality can be accepted as a legitimate aim for private and/or public employers; how far can 'reasonable accommodation' linked to religion and belief be required from the employer; or the scope of the occupational requirement exception.

The field of **education** is identified as a particularly sensitive one, where any legal and policy decisions impact on and have to be viewed in light of children's rights and their best interests. The cases reported by equality bodies illustrate this view. Member States have a wide margin of appreciation in whether they prioritise religious diversity or rather religious neutrality and secular education. The report makes the case for continuing discussions on this in light of all arguments to reach an adequate balance. Some of the cases reported by equality bodies underline the importance

of transparent requirements and continued dialogue between schools, students, parents, equality bodies, education experts and policy makers. Consultation and accommodation of alternatives are steps which may result in significant improvements to the overall exposure of students to events impairing their learning experience.

While the field of the **provision of goods and services** is not covered by EU equal treatment law on this ground, equality bodies have reported a large number of cases decided at the national and international level. These related to the refusal of services to customers wearing religious headgear; the harassment of Muslim customers during the provision of services; the accommodation of religious prescriptions when providing services; and the restriction of services to certain groups of customers due to religious reservations. The report underlines the importance of thoroughly examining commonly used justifications for discriminatory behaviour towards certain religious groups, such as those relating to health and safety or security. These justifications are to be accepted only if there is evidence of an actual risk. Furthermore, some of the justifications raise questions relating to the different position and responsibilities of public and private service providers. A number of cases illustrate the difficult conflicts between freedom of religion as invoked by service providers on the one hand and equal treatment on the ground of sexual orientation on the other.

The Working Group decided to dedicate a separate chapter to the issue of **manifesting religion and belief in public**. This is justified by the concerns raised by the legal prohibition introduced in some European countries of wearing the full-face veil in public areas and the prohibition of the so-called burkini on public beaches. The burkini ban on public beaches is an issue that arose in France in the course of 2016. It can be perceived to be a response to increased tensions and public fears following the terrorist attacks. The report concluded that such a general ban is disproportionate and could be perceived as a ‘collective punishment’ of Muslims following the terror attacks. The ban on wearing the full-face veil in public areas has been introduced or is being discussed in a number of European countries. The jurisprudence of the European Court of Human Rights has accepted such bans in cases brought against France and Belgium. Importantly, it did so accepting the requirement of ‘living together’ as a justification and dismissing other often invoked arguments linked to public safety, gender equality and human dignity. The report argues that the abstract principle of ‘living together’ in its current form does not contribute to legal certainty as its meaning in respect of restricting fundamental rights, including the right to freedom of religion, is not sufficiently delineated.

The last chapter draws together cases in the area of **public administration and state functions**, including conscientious objection to military service; religious headgear in the context of administrative functions; regulation of places of worship, burial and cremation; social security and taxation; and observance of dietary laws. In general there is a wide margin of appreciation given to states to determine to what extent it is necessary to limit the individual right to freedom of religion in the context of public functions. The cases demonstrate that states continue to grapple with the challenges of striking a balance between the right to freedom of thought, conscience and religion of an individual or a group against public safety, public order, health or morals, or the protection of the rights and freedoms of others.

1 Introduction

The Equinet Working Group (Law in Practice) has prepared this updated version of its 2011 report on discrimination based on religion and belief.¹ In the past six years, the legal area has further evolved, not the least through judicial decisions that often spark wider public attention and provoke heated debates. The issues arising from religion and belief are particularly complex and dependant on the social and cultural background of each country². That is the reason why the European Court of Human Rights (ECtHR) affords in this field a wide margin of appreciation to states. The number of legal disputes is growing and possibly increasing multiculturalism, conflicts between the competing fundamental rights and historical sectarian conflicts all play a role in this.

In 2013 the population of Europe was largely Christian (78.2%) followed by religiously unaffiliated people (14.7%), Muslims (6.1%), Buddhists (0.2%), Jews (0.2%) and Hindus (0.2%).³ In 2015, according to the Eurobarometer on Discrimination in the EU, one in five respondents (27,718 in total) felt discriminated against or harassed. Discrimination on the ground of religion or belief was reported by 3% of the respondents indicating a slight increase from 2% in 2012.⁴

On the other hand it seems that views towards religion have become more tolerant. More people (in comparison to 2012) can imagine having a person from a minority religion in the highest political office. Around 80% of respondents would feel comfortable working with a religious colleague (Christian, Jew, Buddhist or Muslim). About 70% of respondents would feel at ease if their son or daughter had a relationship with a person from a different religious group.⁵ However wide variations in perception persist between countries and religions, with respondents typically feeling considerably less comfortable with Muslim persons.

Case law is still evolving. One of the highlights is the recent decision of the Court of Justice of the European Union (CJEU) concerning a neutrality policy in the workplace.⁶ It was the first time that the CJEU has dealt with religious discrimination under the Framework Directive. The Court adopted the opinion that dress codes regulating religious attire do not constitute direct discrimination. Furthermore such regulation may pursue a legitimate aim – employer's wish to portray an image of neutrality. The outcome is noteworthy as it appears to take a different approach compared with a

¹ Equinet. Equality law in practice: a question of faith: religion and belief in Europe: an Equinet report. Brussels: Equinet Secretariat, 2011. ISBN 978-92-95067-61-5. Available at: http://www.equineteurope.org/IMG/pdf/Religion_and_Belief_Report_merged_.pdf.

² Equinet. A Growing Agenda: the work of equality bodies on the ground of religion or belief: an Equinet perspective. Brussels, 2015. ISBN 978-92-95067-91-2. Available at: http://www.equineteurope.org/IMG/pdf/perspective_final_web-2.pdf

³ Grim, B. J., Johnson, T. M., Skirbekk, V., & Zurlò, G. A. (2014). *Yearbook of International Religious Demography 2014*. Leiden: Brill NV.

⁴ European Commission. *Special Eurobarometer 437 'Discrimination in the EU in 2015' – Report*. October 2015. ISBN 978-92-79-50342-9.

⁵ Ibid.

⁶ C-157/15 (Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV)

previous European Court of Human Rights seminal judgment⁷. For further details see Chapter three on employment.

If the conclusions of the top level European judicial institutions are only ambiguous, at a national level they are sometimes utterly contradictory. In France, it has been possible to dismiss a Muslim employee who had been working in a day-care centre because of a headscarf. In Germany, this would constitute discrimination (see Chapter three on employment). This is testament to how much the context of the case matters.

The majority of the featured case law concerns less favourable treatment against Muslims. According to a recent survey conducted by the European Union Agency for Fundamental Rights (FRA), nearly one in five interviewed Muslims reported religious discrimination. That is an increase since 2008 when only one in 10 Muslims felt discriminated against on this basis.⁸

It is important to remember that the EU protection against discrimination on the grounds of religion and belief is incomplete. The EU law (Framework Directive) specifically prohibits differential treatment based on religion only in the area of employment (including vocational training).⁹ Other well-known areas from the EU directive prohibiting racial and ethnic discrimination¹⁰ (education, healthcare, provision of goods and services) are not covered. This gap should already have been closed by the proposed Horizontal Directive¹¹. The legislative work however has been stalled since 2008 and it seems to be difficult to find agreement across EU Member States. However, most of the Member States adopted complex national anti-discrimination law and exceeded the mandatory requirements stemming from EU law.¹²

National equality bodies have a key role in the promotion of equal treatment and they all provide independent assistance to victims of discrimination. Equinet is the platform for equality bodies to meet, to discuss and to resolve diverse issues arising from the equality agenda.

The aim of this publication is to provide the legal background and details about the case law concerning discrimination on the ground of religion and belief. It should assist those working with anti-discrimination law, from equality bodies to legal professionals and NGOs. If further information on a particular case is needed it is possible to contact the relevant national equality body.¹³ A comprehensive academic analysis of the case law is beyond the remit of this report.

⁷ Case of Eweida and others v. the United Kingdom, applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013

⁸ European Union Agency for Fundamental Rights. EU-MIDIS II. Second European Union Minorities and Discrimination Survey. Muslims – Selected findings. Luxembourg: Publications Office of the European Union, 2017. Available at: <http://fra.europa.eu/en/about-fra>.

⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

¹⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

¹¹ Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426/FINAL, as adopted by the European Commission on 2/7/2008.

¹² The list of mandates of national equality bodies are available on the European Directory of Equality Bodies: http://www.equineteurope.org/spip.php?page=tableau_neb§ion=grounds.

¹³ The contacts are available at the website of the Equinet: <http://www.equineteurope.org/-Equinet-Members>.

The structure of this report changed in comparison to the 2011 publication. The opening chapter describes a general legal framework including EU law and European and international human rights conventions. The following chapters cover the areas of employment, education, provision of goods and services, manifestation of religion and belief in public and public administration and state functions. Each chapter delves into the legal framework specific for that area and presents major court rulings (ECtHR, CJEU, national judiciary) and equality bodies' decisions. The concept of conflicting rights from the 2011 report was abandoned due to its confusing potential (e.g. some cases could fit into two or more concurring chapters). The publication does not cover the area of hate speech because Equinet will work on this topic in detail during 2018. Meanwhile those who are interested in combating hate speech may consult the manual prepared by the Council of Europe.¹⁴ The updated paper includes the most relevant and recent case law. For earlier cases please consult the 2011 report.

¹⁴ Agata de Latour, Nina Perger, Ron Salaj, Claudio Tocchi and Paloma Viejo Otero. We CAN! Taking action against hate speech through counter and alternative narratives. © Council of Europe, 2017. ISBN 978-92-871-8445-0. Available at: <https://rm.coe.int/wecan-eng-final-23052017-web/168071ba08>.

2 Legal Framework

This report concerns both the right to freedom of religion and belief, and the protection against discrimination on the ground of religion and belief. These two aspects are deeply inter-connected, as both are founded on the concepts of dignity and equality.¹⁵ Further on, the report will discuss situations where the right to religious freedom can be considered as legitimate justification for otherwise illegal differential treatment of others.

There are two approaches of religious freedom which have been traditionally couched in terms of objective and subjective approaches. An objective approach involves determining whether a certain act 'counts' as religious practice for the purposes of legal protection by reference to the tenets recognized as mandatory in a particular religion (by e.g., the authoritative bodies or other members of the community). A subjective approach, on the other hand, relies 'not on what others view the claimant's religious obligations as being, but rather [on] what the claimant views these personal religious "obligations" to be'. The CJEU and the ECtHR both have considered the notion of religion in a subjective manner. The beliefs are also protected both in the European Convention on Human Rights and in EU law. In a 1982 case¹⁶, the ECtHR gave its interpretation of the understanding of a 'conviction': *'In its ordinary meaning the word "convictions", taken on its own, is not synonymous with the words "opinions" and "ideas", such as are utilised in Article 10 of the Convention, which guarantees freedom of expression; it is more akin to the term "beliefs" appearing in Article 9 – which guarantees freedom of thought, conscience and religion – and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.'* Beliefs referring to veganism, vegetarianism or pacifism may be thus covered under the protection of EU and European law.

In Great Britain, belief in man-made climate change has been considered as a philosophical belief (2009).¹⁷ The claimant was made redundant from his position of Head of Sustainability at Grainger plc, a large residential landlord. He challenged his dismissal arguing that he had been selected for redundancy because of his belief in man-made climate change and the moral imperative to adjust his lifestyle accordingly (which put him at odds with other senior staff). He argued that this amounted to discrimination as his belief amounted to 'a philosophical belief similar in cogency and status to a religious belief'. The Employment Tribunal held in March 2009 that a belief in man-made climate change and the alleged resulting moral imperatives was capable, if genuinely held, of being a philosophical belief. The Employment Appeal Tribunal (EAT) further argued that to warrant protection, a belief must: be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; relate to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion, and importance; be worthy of respect in a democratic society; not be incompatible with human dignity; and not conflict with the fundamental rights of others. After this finding, the case settled for £55,000 in April 2010, shortly before a further court hearing.¹⁸

¹⁵ Vickers, Lucy. Religion and Belief Discrimination in Employment - the EU law, European Network of Legal Experts in the non-discrimination field, 2006.

¹⁶ see Campbell and Cosans v. the United Kingdom judgment of 25 February 1982, Series A no. 48, p. 16, § 36

¹⁷ Nicholson v Grainger [2009] UK EAT0219/09/ZT

¹⁸ See also Redfearn v United Kingdom (Application 47335/06) about the dismissal of a bus driver who transported disabled adults and children due to his election as a BNP MP (British National Party- a far right

The analysis in this report is set against the background of the protection of the freedom of religion provided by different European and international legal systems. The present chapter will give a presentation of the key legal standards for the protection in the European and international human rights and equality legislation. To avoid repetition, the legal framework will not be presented in each of the thematic chapters. Due to the scope of the report, national legislation in the different jurisdictions across Europe will not be presented in the following, unless it is necessary to understand the national legal provision or case law in question.

The Council of Europe's European Convention on Human Rights provides the right to freedom of religion and belief (article 9) and protects everyone from discrimination based on religion and belief (article 14). Article 14 of the Convention only prohibits discriminatory conduct related to the other rights guaranteed by the Convention. Indeed, this article states that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination'. As such, the applicability of the principle of non-discrimination under the Convention may be limited, even if, 'When applying Article 14, the ECtHR has adopted a wide interpretation of the scope of ECHR rights. Firstly, the ECtHR has made clear that it may examine claims under Article 14 taken in conjunction with a substantive right, even if there has been no violation of the substantive right itself. Secondly, it has held that the scope of the ECHR extends beyond the actual letter of the rights guaranteed. It will be sufficient if the facts of the case broadly relate to issues that are protected under the ECHR',¹⁹

Article 1 of Protocol 12 adopted on 4 November 2000 establishes a general prohibition on discrimination of the enjoyment of any right, including those protected under national law. However, this Protocol has not yet been ratified by all Contracting States and is therefore not applicable to all of them. Furthermore, standards set out in the core United Nations conventions and the European Social Charter will also usefully contribute to illustrate the whole picture of the legal protection of the freedom of religion and discrimination on the grounds of religion and belief.

2.1 European Union Law

The European Union's commitment to the principle of non-discrimination was reaffirmed in December 2000 with its **Charter of Fundamental Rights**. Whereas Article 10 of the Charter recognises the right to freedom of thought, conscience and religion, Article 21 prohibits discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation in all areas, where EU law is applicable. Since the

political party which at that time only extended membership to white nationals). This case was later submitted to the European Court of Human Rights who ruled in November 2012, that the Article 9 claim was manifestly ill-founded. The Court held that the UK had violated Article 11 of the Convention by failing to secure Redfearn's freedom of association and so had breached his human rights. The options for the UK Government were either to create an exception to the requirement for the qualifying period for an unfair dismissal claim or by creating a free-standing claim for unlawful discrimination on grounds of political affiliation. The Enterprise and Regulation Reform 2013 removed the qualifying service requirement where a dismissal related to an employee's political opinions or affiliation. However, political beliefs are not covered under the religion or belief legislation in UK. For other cases in the UK relating to philosophical beliefs encompassing political opinion (democratic socialism), see also *Olivier v Department for Work and Pensions* ET/1701407/2013 and *Henderson v General Municipal and Boilermakers Union* [2016] EWCA Civ 1049.

¹⁹ European Union Agency for Fundamental Rights, Council of Europe: Handbook on European non-discrimination law, page 61. Luxembourg: Publications Office of the European Union, 2011

entry into force of the Lisbon Treaty in December 2009, the Charter has the same binding legal value as the Treaties.

2.1.1 Religion and belief as grounds of discrimination

In line with the EU Charter, the **EU Council Directive 2000/78/EC of 27 November 2000 (the Framework Directive)** establishes a general framework for equal treatment in employment and occupation and prohibits direct and indirect discrimination, harassment, instructions to discriminate and victimisation on grounds of religion or belief. Until the *Achbita and Bougnaoui* cases decided in March 2017,²⁰ the CJEU had no opportunity to give its interpretation of the Framework Directive on religious discrimination.²¹ The Framework Directive does not include a definition of the terms ‘religion and belief’. In the *Samira Achbita* case, which will be further discussed in Chapter 3, the Luxembourg Court points to recital 1 of Directive 2000/78 where reference is made to fundamental rights as protected in the European Convention on Human Rights and the Charter of Fundamental Rights of the EU. Based in these references, the Court states:

‘In so far as the [European Convention on Human Rights] and, subsequently, the Charter use the term “religion” in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of “religion” in Article 1 of that directive should be interpreted as covering both the forum internum, that is the fact of having a belief, and the forum externum, that is the manifestation of religious faith in public.’

The fact that Islam does not clearly mandate women to wear a *hijab* or that restrictions on religious symbols only affect the manifestation of religious beliefs (the *forum externum*) while allegedly leaving intact the beliefs themselves (the *forum internum*) is therefore not relevant. The CJEU thus opts for a broad concept of religion, in line with the interpretation of religious beliefs under the European Convention on Human Rights. The more detailed content of the right to religious freedom in the Convention will be further discussed.

2.1.2 Forms of discrimination

According to Article 2 (2) (a) of the Framework Directive, **direct discrimination** occurs where a person is treated less favourably than another is, on any of the grounds referred to in Article 1, including religion and belief.

Further on, **indirect religious discrimination**, as defined in Article 2 (2) (b) occurs where an apparently neutral policy or practice puts persons of a particular religion or belief at a particular disadvantage, unless the policy or practice is a proportionate means of achieving a legitimate aim.

²⁰ Report to C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, C-157/15 (*Samira Achbita*, *Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*)

²¹ There are now other pending cases on religious issues, see C-193/17 and C-414/16.

Contrary to the US or Canada, there is no recognition of reasonable accommodation as such beyond disability and covering religion.²² Nevertheless, in an old case, the European Court of Justice seemed to favour this concept even prior to the Framework Directive. In its *Vivian Prais* case²³, the Court acknowledged that 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'. In this case, the claimant had applied for an open competition organised by the European Communities. As the dates of the written examination coincided with the Jewish holiday, she could not attend the test for religious reasons. So far, the Court had no opportunity to give any further interpretation on indirect discrimination based on religion.

Harassment on the basis of religion and belief is also illegal, as described in Article 2 (3) of the Directive. Harassment is defined as unwanted conduct with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Victimisation is also prohibited under the Framework Directive. Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment (Article 11).

2.1.3 Exceptions

It follows from Article 2 (5) that the Directive shall be applied 'without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.' This means there can be legitimate reasons to allow measures that otherwise would be considered direct discrimination.

Moreover, there are two exceptions to what should be considered unlawful discrimination under Article 4 of the Directive. The first exception to the principle of equal treatment is the general 'genuine occupational requirement' exception. This allows employers to differentiate 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 post. It includes situations where being of a particular religion may be a legitimate requirement for a position.

Further on, 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

²² For further information, please refer to the EU report drafted by E. BRIBOSIA and I. RORIVE, Reasonable accommodation beyond disability in Europe?, 2013, available at: http://ec.europa.eu/justice/discrimination/files/reasonable_accommodation_beyond_disability_in_europe_en.pdf; See also Council of Europe, Institutional accommodation and the citizen: legal and political interaction in a pluralist society (Trends in social cohesion No. 21) (2010), https://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/source/Trends/Trends-21_en.pdf

²³ Court of Justice, 27 October 1976 Vivian Prais, Case C-130/75

of a particular religion or belief. However, it does not permit discrimination on any other ground, for example sexual orientation or gender.

2.1.4 The current lack of protection concerning the field of goods and services

The EU General Framework Directive²⁴ prohibits discrimination on the grounds of religion and belief in employment and vocational training. To prevent from discrimination in the access to and supply of goods and services, two European directives outline the minimum standards of protection for all Member States. Whereas the Racial and Ethnic Origin Directive²⁵ requires Member States to prohibit certain forms of discrimination in the access to and supply of goods and services available to the public on the grounds of racial or ethnic origin, the Gender Goods and Services Directive²⁶ does so regarding discrimination between men and women in this area. However, there is currently no mandatory protection from religious discrimination when it comes to accessing goods and services.

In an attempt to rectify this, the European Commission proposed a new *Horizontal Directive* in 2008. A new draft directive proposing a prohibition of discrimination on the grounds of religion and belief discrimination outside employment was put forward in 2008.²⁷ However, this directive would require unanimous support in the Council of the EU and it has not moved forward due to the objection of some Member States.

According to the latest consolidated text of the proposal,²⁸ the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to

- access to social protection, in so far as it relates to social security, including statutory supplementary pension schemes, and to social assistance, social housing and healthcare,
- access to education and
- access to and supply of goods and other services, including housing, which are available to the public and which are offered outside the context of private and family life. Access under this point shall include the process of seeking information, applying, registration, ordering, booking, renting and purchasing as well as the actual provision and enjoyment of the goods and services in question.

In the context of the interplay between State and religion, the new proposal emphasises that the Directive shall be without prejudice to national measures authorising or prohibiting the wearing of religious symbols and does not limit the exclusive competence of Member States in these matters. The Directive shall also be without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches

²⁴ Directive 2000/78/EC

²⁵ Directive 2000/43/EC

²⁶ Directive 2004/113/EC

²⁷ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 2008.

²⁸ Council Doc. 10780/17, 29/6/2017. As for the latest status of discussions within the Council or its preparatory bodies see <http://eur-lex.europa.eu/legal-content/en/HIS/?uri=CELEX:52008PC0426>.

and other organisations based on religion or belief and shall not limit the exclusive competence of the Member States in these matters.²⁹

The proposed *Horizontal Directive* also emphasises the importance of protecting private and family life.³⁰ In other words, transactions between private individuals acting in private capacity will not be covered.³¹

Although there are no religion and belief discrimination provisions outside employment at European Union level, a number of Member States have prohibited this kind of discrimination in sectors such as education and in the provision of goods and services.³² Due to the lack of protection of religion and belief outside the labour market at EU level, the interpretation of national legislation concerning discrimination outside the employment field will often build on human rights standards and where there is no such domestic legislation; the cases must be solved based directly on the State's human rights obligations.

2.2 The European Convention on Human Rights

2.2.1 Freedom of Religion

In its *Kokkinakis v. Greece* case³³, the ECtHR ruled that '[a]s enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it'.

The structure of Article 9 indicates that forum internum (the inner sphere) is absolute. Freedom to adopt or have a religion or belief is generally considered as an absolute right and cannot be subjected to State interference.

However, Article 9 (2) of the Convention provides a 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.³⁴ The freedom to manifest one's religion or belief can be limited under Article 9 (2) 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

²⁹ Council Doc. 10780/17, 29/6/2017, Article 3a and 4.

³⁰ Rec 17 of the Proposed Horizontal Directive

³¹ Similar provisions prevail in the already existing Equality Directives that contain prohibitions on discrimination in the provision of goods and services. 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 (Article 3 (1) Gender Goods and Services Directive). The Racial and Ethnic Origin Directive also refers to the fact that it only applies to goods and services available to the public (Article 3 (2) Racial and Ethnic Origin Directive).

³² To get a complete overview, please refer to the table available on Equinet website : http://www.equineteurope.org/spip.php?page=tableau_neb§ion=grounds

³³ *Kokkinakis v. Greece*(14307/88) [1993] ECtHR 20 (25 May 1993)

³⁴ The European Court of Human Rights, Overview of the Court's case-law on freedom of religion, 2013. http://www.echr.coe.int/Documents/Research_report_religion_ENG.pdf

morals, or the protection of the rights and freedoms of others. Moreover, not all opinions or convictions necessarily fall within the scope of the provision, and the term ‘practice’ as employed in Article 9 (1) does not cover each act which is motivated or influenced by a religion or belief.³⁵ Furthermore, the States are often granted a wide margin of appreciation in deciding whether and to what extent a restriction on the right to manifest one’s religion or beliefs is ‘necessary’.³⁶ In this connection the Court may also, if appropriate, have regard to any consensus and common values emerging from the practices of the States Parties to the Convention.³⁷

Given the importance in a democratic society of freedom of religion, since *Eweida v. UK*³⁸, the Court has considered that, ‘where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate’³⁹.

‘Religion’ and ‘belief’ are not defined in the Convention. A personal or collective conviction will benefit from the right to freedom of thought, conscience and religion if it attains a certain level of cogency, seriousness, cohesion and importance.⁴⁰ The Court has taken a broad and subjective approach to what should be considered a religion: It extends to ideas, philosophical convictions of all kinds, with the express mention of a person’s religious beliefs, and their own way of apprehending their personal and social life.⁴¹

For example, the Grand Chamber of the ECtHR ruled that, *‘by wearing the headscarf, the applicant 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’*⁴². In so affirming, no question over the interpretation of the sacred scriptures is risen, since there is no *‘no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question’*⁴³, such as for example displaying a cross. Therefore, the mere existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. Thanks to this broad approach, religious practices which might not be generally recognized or considered as required by the religion may also be protected.

³⁵ *Pretty v. the United Kingdom*, Application No. 2346/02

³⁶ The European Court of Human Rights, Guide to Article 9 Freedom of Thought, Conscience and Religion, 2015

³⁷ *Bayatyan v. Armenia* Application No. 23459/03 and *S.A.S. v. France* No. 43835/11

³⁸ In this case, the Court left behind the so-called freedom to resign formally developed by the European Commission. According to this doctrine, if an individual could escape the restriction – by e.g., resigning from her job and finding another one, no interference with her freedom of religion would be found (see for example *Konttinen v. Finland*, No. 24949/94)

³⁹ *Eweida v. UK*, ECtHR, 15 January 2013, No. 48420/10, para 83

⁴⁰ The European Court of Human Rights, Guide to Article 9 Freedom of Thought, Conscience and Religion, 2015
http://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf

⁴¹ The European Court of Human Rights, Overview of the Court’s case-law on freedom of religion, 2013.

⁴² *Leyla Sahin v. Turkey* (ECtHR, 10 November 2005, No. 44774/98)

⁴³ *Eweida v. UK*, ECtHR, 15 January 2013, No. 48420/10

Further on, the ECtHR have in a number of cases found the right to religious freedom to also contain a right to not be religious and not have other religions or beliefs imposed against one's own conviction.⁴⁴

2.2.2 Other relevant provisions

According to Article 14 of the Convention, enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground, including religion and belief. The accessory nature of Article 14 means that it only provides protection from discrimination if rights and freedoms in other provisions are also at play and can thus be invoked. Protocol No. 12 removes this limitation and guarantees that no-one shall be discriminated against on any ground by any public authority but so far only a limited number of the European countries have signed and ratified this legal instrument.

The right to non-discrimination is closely related to the right to freedom of religion, however the freedom of religion goes further, and gives broader positive rights to the individual, while the prohibition of discrimination mainly protects the individual from negative treatment from others.

Despite its general reluctance to adopt the rationale of reasonable accommodation in religious matters,⁴⁵ the Grand Chamber of the ECtHR has offered in *Thlimmenos v. Greece*⁴⁶ one example where the religious motivation behind an action may justify differential treatment. In this case, the Court held that States should accommodate persons who have different needs unless there is an 'objective and reasonable justification' not to do it. This case concerns the denial of appointment of a Jehovah witness as a chartered accountant because he had been convicted of a serious crime for having refused to carry out military service due to religious reasons. The Court accepted that the Greek legislation pursued the legitimate aim of preventing dishonest or untrustworthy people from practicing the profession of chartered accountant. However, it emphasised that a conviction for being a conscientious objector cannot be considered to denote his untrustworthiness or dishonesty. Thus, there was no reasonable and objective justification for applying this rule to Thlimmenos.

Two other cases can be considered as adopting a more sensitive and accommodating approach towards religious minorities' particular concerns. However, they are isolated and the reasoning of the Court must be construed with the particular circumstances of the cases.⁴⁷

Article 9 can also be read in conjunction with Articles 10 and 8 of the Convention. To the extent that a distinctive style or dress can be intended as a statement, it may be within the scope of the freedom

⁴⁴ Kokkinakis v. Greece Application No. 14307/88 and Buscarini and Others v. San Marino Application No. 24645/94

⁴⁵ For an example, ECtHR Sessa v. Italy No. 28790/08 concerning a lawyer and member of the Jewish faith, unable to attend a court hearing scheduled on Yom Kippur. On this particular topic, please refer to Marie-Claire Foblets, Katayoun Alidadi (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, 2012, Routledge, 382 p.; L Waddington, 'Reasonable Accommodation' (2011) 36 NTM/NJCM-Bulletin 41, 49; K Alidadi, 'Reasonable accommodation for religion and belief: adding value to Article 9 of the Convention and the EU's anti-discrimination approach in employment?' (2012) 37 ELRev 693, 707-710; S Benedi Lahuerta, 'Taking EU Equality Law to the Next Level: in Search of Coherence' (2016) European Labour Law Journal

⁴⁶ Case 6 April 2000 No. 34369/97

⁴⁷ See in this respect Jakóbski v. Poland (7 December 2010 No. 18429/06) and Gatis Kovalkovs v. Latvia No. 35021/05) concerning the accommodation of the religious needs of the detainees

of expression, as so-called ‘symbolic speech’.⁴⁸ 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.⁴⁹

The second sentence of Article 2 of Protocol No. 1 guarantees the right of parents to have their children educated in conformity with their religious and philosophical convictions. It constitutes a whole that is dominated by its first sentence, the right to education, the right set out in the second sentence being an adjunct of this fundamental right. The Convention must be read as a whole and Article 2 of Protocol No. 1 constitutes, at least in its second sentence, the *lex specialis* in relation to Article 9 in matters of education and teaching.⁵⁰

At the European level, there is also the **European Social Charter** which is a Council of Europe treaty which has been opened for signature since 18 October 1961. The Charter was revised in 1996. The Charter was established to support the European Convention on Human Rights which is principally for civil and political rights, and to broaden the scope of protected fundamental rights to include social and economic rights. The European Committee of Social Rights (ECSR) is the body responsible for monitoring compliance in the States party to the Charter. The Charter concerns employment, vocational training, education, health and social protection. According to Article E of the revised Charter, the rights set forth in the Charter shall be secured without discrimination on any ground, including religion and ‘other status’.

2.3 The United Nations Conventions

The UN International Covenant on Civil and Political Rights (ICCPR)

The UN Covenant on Civil and Political Rights is similar to the European Convention on Human Rights in many ways, and includes the right to freedom of religion in Article 18, reflecting also Member States’ obligations under the Universal Declaration of Human Rights. The wording of the provisions in the Convention and the ICCPR are quite similar, but the latter includes a specific reference to the right to freedom from coercion in Article 18 (2): ‘No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.’

In their General Comment No. 22 concerning freedom of thought, conscience and religion the Committee comments on the understanding of what is to be considered a religion:

‘Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent

⁴⁸ Grigoriades v. Greece Application No. 24348/94

⁴⁹ Kara v. UK., Application No. 36528/97 and McFeeley v. the United Kingdom No. 8317/78

⁵⁰ Folgerø and Others v. Norway [GC], § 84; Lautsi and Others v. Italy [GC], § 59; and Osmanoğlu and Kocabaş v. Switzerland, §§ 90-93

*religious minorities that may be the subject of hostility by a predominant religious community.*⁵¹

Further on, the Covenant contains a prohibition of discrimination in Articles 2 and 26. While Article 2 is related to the fulfilment of the rights in the Covenant, Article 26 goes further, stating that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... religion'. This general prohibition of discrimination on the ground of religion and belief is also emphasized in the UN General Assembly Resolution 63/181 on elimination of all forms of intolerance and of discrimination based on religion or belief.⁵² The General Assembly urges the Member States 'to ensure that no one is discriminated against on the basis of his or her religion or belief when accessing, inter alia, education, medical care, employment, humanitarian assistance or social benefits.'

The International Covenant on Civil and Political Rights also includes provisions concerning the right to freedom of expression in Article 19 and private life in Article 17, with similar wordings as in the European Convention on Human Rights Articles 10 and 8.

The UN International Covenant on Economic, Social and Cultural Rights (ICESCR)

According to Article 2 of the Covenant, the States Parties undertake to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind, including on the ground of religion. The Covenant includes rights to health, housing and social protection.

Further on, it follows from Article 13 (3) of the Covenant that the States Parties are obliged to respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.

The UN Convention on the Rights of the Child (CRC)

According to Article 2 of the CRC, the States Parties are obliged to ensure the rights set forth in the Convention without discrimination of any kind, including based on religion. Further on, Article 14 confirms that children have freedom of religion. The freedom of the child must of course be seen in conjunction with the same right of the parents or legal guardians. In a speech by the United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, she stated:

*'Parents are also not obliged to provide a religiously "neutral" upbringing in the name of the child's right to an "open future" ... The rights of parents to freedom of religion or belief include their rights to educate their children according to their own conviction and to introduce their children to religious initiation rites.'*⁵³

⁵¹ UNICCPR General Comment number 22, 1993.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.4&Lang=en

⁵² UN General Assembly Resolution 63/181, 2009
http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201105/20110526_414ungares63181_en.pdf

⁵³ Children also have the right to freedom of religion or belief, and that must be protected, 2015.
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16647&LangID=E>

Further on, the CRC Article 30 protects children belonging to religious minorities, obliging the state to let minority and indigenous children enjoy their own culture and to profess and practise their own religion.

ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

ILO action for the elimination of discrimination in employment and occupation is based on the ILO Constitution, which commits the ILO to fight against discrimination based on race, religion, or sex. Its principal convention in this area is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which is supplemented by a number of other ILO standards. Convention No. 111 prohibits discrimination in employment and occupation on the grounds of religion, race, colour, and national origin, among other statuses. Convention No. 111 is one of the eight fundamental conventions of the ILO.

3 Employment

This chapter focuses on religious discrimination and freedom of religion issues in the context of employment.

The main issues that arise are: the desire of public or private sector employers to remain secular or neutral; the desire of employees to wear Islamic headscarves and other religious symbols; 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; opting out of certain work duties due to religious reasons and the nature of the exceptions to unlawful discrimination in the Framework Directive, the ‘genuine occupational requirement’ exception and the exception related to religious institutions.

The Islamic headscarf issue reached the Court of Justice of the European Union (CJEU) in 2017 through two preliminary references, *Achbita* and *Bougnaoui*, issued by Belgian and French courts, respectively. While the CJEU has dealt with religious freedom issues before in the context of the internal market this is the first time that the CJEU has been asked about religious discrimination under Directive 2000/78 (the Framework Directive), although the latter has prohibited religious discrimination in employment within the EU since 2000. In addition, these are the first two cases where the CJEU is confronted with the issue of whether restricting the use of the Islamic headscarf at work can amount to religious discrimination. In contrast, several national jurisdictions and the ECtHR (see e.g. *Ebrahimian v France*) have already dealt with this matter.

This chapter will touch upon the specific legal framework in the area of employment and then look at religious discrimination by examining case law at both international and national level.

3.1 Legal Framework

The general legal overview was presented in Chapter 2. Furthermore it is necessary to clarify the scope of the employment area. The term ‘employment’ as used in the Framework Directive covers conditions related to access to employment and self-employment and conditions of employment, including dismissals and pay. With regard to ‘access to employment’ this covers not only the selection criteria and recruitment conditions, but also those influencing factors that need to be considered before the individual makes a decision.⁵⁴ Once the working relationship has been established the CJEU has 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.⁵⁵

Vocational guidance and training are also included under the scope of the Framework Directive. In the *Gravier v. City of Liege* Case (C-293/83), the CJEU took a broad and inclusive stand on this issue and stated 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

⁵⁴ See case C-54/07 (*Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*)

⁵⁵ See case C-614/11 (*Niederösterreichische Landes-Landwirtschaftskammer v Anneliese Kuso*) for a summary of the CJEU’s case law on the meaning of the term ‘dismissal’

training of the pupils or students, and even if the training programme includes an element of general education.'

3.2 Case law

On 14 March 2017 the CJEU gave, for the first time, two judgments concerning discrimination on the grounds of religion and belief:

CJEU: Case C-157/15 Samira Achbita & Centrum v. G4S (2017)

Area: private sector

Conclusion: no discrimination

The case concerns a Belgian woman, Ms. Achbita, working as a receptionist for the security company G4S, who wanted to wear a hijab at work for religious reasons. According to an internal rule G4S did not allow the use of headscarves with the uniform, and the woman was dismissed. The internal rule was put in place only a few days before the dismissal and soon after Ms. Achbita notified her employer that she was going to wear the Islamic headscarf.

The main question before the court was whether the prohibition on wearing a headscarf at the workplace constitutes direct discrimination, when the employer's prohibits all employees from wearing outward symbols of political, philosophical or religious belief at the workplace.

Advocate General Kokott gave her opinion on the case on 31 May 2016, finding the prohibition legal. The AG stated: 'If the ban is based on a general company rule which prohibits political, philosophical and religious symbols from being worn visibly in the workplace, such a ban may be justified if it enables the employer to pursue the legitimate policy of ensuring religious and ideological neutrality.'

In its judgments, the CJEU found that an existing general internal rule of a private employer prohibiting the wearing of visible signs of political, philosophical or religious beliefs does not constitute direct discrimination on the basis of religion or belief as long as this internal rule is universally applied to all employees.

The Court also considered indirect discrimination and went on to rule that an employer's desire to project an image of neutrality can constitute a legitimate aim, notably where the only workers involved are those who come into contact with customers.

The CJEU further considered the ban appropriate for the purpose of pursuing a policy of neutrality provided that that policy is genuinely pursued in a consistent and systematic manner.

The Court ruled that the ban can be considered 'strictly necessary' if two conditions are met. Firstly, it should cover only the employees who visually interact with customers. Secondly, dismissal is allowed only if it is not possible (taking into account 'the inherent constraints to which the undertaking is subject' and without taking on an 'additional burden') to offer the applicant a post not involving any visual contact with customers.

On 9 October 2017, the Belgian Court of Cassation overturned the decision of the Labour Court⁵⁶ of Antwerp of 23 December 2011. The Court concluded that the Labour Court decision was unlawful to the extent that it considered that the employer could not be held liable for the breach of the anti-discrimination rules since s/he could not reasonably foresee that the dismissal was unlawful because of the uncertainty of the case law on this issue and because the employee had not provided sufficient evidence of the existence of a fault.

Following the interpretation of the CJEU as to the absence of direct discrimination in the case at hand, the Court of Cassation dismissed the first argument ground on the existence of a direct discrimination. The Court of Cassation did accept the second argument according to which there could be an abuse of the right to dismiss (and an indirect discrimination) even in the absence of a fault and even if the wrongful conduct has been committed unknowingly. It underlined that, in principle, an employer could not be held liable, according to Belgian law, for an abuse of the right to dismiss employees when the employer was not able to foresee that the dismissal was unlawful. However, the Directive 2000/78, as construed by the Court in its former case law (including the case law on equality between women and men), entails, according to the Court of Cassation, the liability of employers committing discrimination even in the absence of a fault and even if the wrongful conduct has been committed unknowingly. Therefore, the Court of Cassation considered that the recognition of liability of the employer for a breach of anti-discrimination rules could not be made conditional on the evidence, brought by the victim of the discrimination, that a fault had been committed. The Court therefore overturned the judgment of the Labour Court except with regard to the consideration that there was no direct discrimination in the case at hand. The case has been referred to the Labour Court of Ghent.

CJEU: Case C-188/15 Asma Bougnaoui & ADDH v. Micropole SA (2017)

Area: private sector

Conclusion: discrimination

The case concerns a French female design engineer who wanted to wear a hijab while conducting her work. After a complaint from a customer, the woman was asked to remove her headscarf, which she refused. The woman was later dismissed. The main question before the Court was whether the wish of a customer to no longer have the services provided by an employee wearing a headscarf, is a genuine and determining occupational requirement in accordance with Article 4 of the Directive 2000/78 (justification of differential treatment).

Advocate General Sharpston gave her opinion on the case on 13 July 2016, finding that the prohibition was illegal direct discrimination.⁵⁷ The AG stated: 'In particular, there is nothing to suggest that Ms. Bougnaoui was unable to perform her duties as a design engineer because she wore an Islamic headscarf.' She also found indirect discrimination in case the court would not find direct discrimination.

⁵⁶ The Belgian Court of Cassation ruling of 9 October 2017, <http://unia.be/nl/artikels/de-zaak-achbita-opnieuw-voor-rechter>

⁵⁷ OPINION OF ADVOCATE GENERAL SHARPSTON delivered on 13 July 2016 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0188>

The Court found that the case of Bougnaoui was different from the Achbita case, because there did not exist any internal rule concerning the dress code of the employees. In the absence of such an established internal rule, the Court found that the willingness of an employer to take account of the wishes of a customer to no longer have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of the Directive. A parallel can be drawn to the Feryn case, where the court found direct discrimination.⁵⁸

On 22 November 2017⁵⁹, the Court of Cassation noted that the CJEU had clarified the issue of the refusal of an employee to abandon the wearing of the Islamic headscarf in the exercise of her professional activities at the employer's customers and that it was for the national court to determine whether – taking into account the constraints inherent in the business and without the business having to undergo an additional charge, it had been possible for the employer, faced with such a refusal, to propose a work assignment that did not involve visual contact with those customers, rather than proceeding to the complainant's dismissal.

The Court of Cassation held that an employer might provide in the rules of the company or in a memorandum subject to the same provisions as the rules (pursuant to Article L 1321-5 of the French Code du Travail) a neutrality clause prohibiting staff from wearing political, philosophical or religious signs or symbols in the workplace, since that general clause was undifferentiated and was applied only to employees in contact with customers. Where an employee refused to comply with such a clause in the exercise of her professional activities with the company's customers, it was for the employer to decide whether, taking into account the constraints inherent in the company and without the company having to suffer an additional burden, it was possible to propose that the employee's work assignment should not involve visual contact with the customers, rather than proceeding to her dismissal.

In the case of Ms. Bougnaoui, the lower court held that the restriction that Micropole SA had imposed on employees to manifest their religious beliefs by means of religious dress was proportionate to the aim pursued, because she had only limited contacts with customers, and it therefore appeared that her dismissal was not an act of discrimination on the ground of her religious beliefs. She was authorised to continue to express those beliefs within the company; but it was justifiable and legitimate to impose a restriction when the freedom given to an employee to manifest her religious beliefs went beyond the scope of business and encroached on the sensitivities of the business' customers and, therefore, on the rights of others.

It was apparent from the lower court's findings that the company's internal rules did not include any neutrality clause prohibiting the visible wearing of any political, philosophical or religious sign in the workplace; nor was it set out in a memorandum subject to the same provisions as the rules of procedure pursuant to Article L 1321-5 of the Code du Travail. The prohibition on Ms. Bougnaoui to wear the Islamic headscarf in her contact with customers was merely an oral instruction given to an

⁵⁸ C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, judgment of 10 July 2008. The director of the company Feryn publicly stated that the company could not employ 'immigrants' because its customers were reluctant to give them access to their private residences.

⁵⁹ Judgment n° 2484 du 22 November 2017 (13-19.855) – Cour de cassation – Chambre sociale – ECLI: FR: CCASS:2017: SO02484

employee and aimed at a particular religious sign [un ordre oral donné à une salariée et visant un signe religieux déterminé] – which resulted in an act of discrimination directly based on religious convictions.

It followed from the judgment of the CJEU in answer to the question referred for a preliminary ruling that an employer's willingness to take into account the wishes of a client who no longer wished to use the services of that employer when provided by an employee wearing an Islamic headscarf could not be regarded as a fundamental and decisive occupational requirement within the meaning of Article 4 (1) of the Framework Directive.

For these reasons: the Court of Cassation struck out and annulled [cassé et annulé] the judgment between the parties of 18 April 2013 of the Paris Cour d'Appel.

CJEU: Case C-414/16 Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. (pending)

Area: private sector (church employer)

Conclusion: pending in CJEU, referred by third instance German court; at national level finding of discrimination at first instance, finding of no discrimination at second instance⁶⁰

After reading an advertisement for a job that was published, Vera Egenberger applied unsuccessfully for a fixed term post of 18 months with the Evangelisches Werk für Diakonie und Entwicklung e.V. This is an association which exclusively pursues charitable, benevolent and religious purposes, is governed by private law, and which is an auxiliary organisation of the Evangelische Kirche in Deutschland (the Protestant Church in Germany). The post advertised entailed preparing a report on Germany's compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. Vera Egenberger had many years of experience in this field and was the author of a range of relevant publications.

The applicant claimed that she was not appointed to the post because of her lack of confessional faith, and that this was in breach of her right to belief and that she had been discriminated against on the basis of this belief.

On 9 November 2017 Advocate General Tanchev gave his opinion finding firstly that an employer may not itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer/church's ethos.

He further found in assessing genuine, legitimate and justified occupational requirements, having regard to the nature of the activities or of the context in which they are carried out, along with the organisation's ethos, the national referring court is to take account of the following:

(1) The right of religious organisations to autonomy and self-determination is a fundamental right that is recognised and protected under EU law. The Directive, and in particular its reference to the 'ethos' of religious organisations, is to be interpreted in conformity with this fundamental right;

⁶⁰ Federal Labour Court, decision of 17.3.2016 - 8 AZR 501/14 (A)

(2) Member States have a wide but not unlimited margin of appreciation with respect to occupational activities for which religion or belief amounts to genuine, legitimate and justified occupational requirements, by reason of the nature of the activities and the context in which they are carried out;

(3) the Directive is to be implemented in such a way that the model selected by the individual Member States for the conduct of relations between churches and religious associations or communities and the State, is to be respected and not prejudiced;

(4) the word 'justified' in the Directive requires analysis of whether occupational requirements entailing direct discrimination on the grounds of religion or belief are appropriately adapted to protect the right of the EWDE to autonomy and self-determination, in the sense that they are suitable for the purpose of attaining this objective;

(5) the words 'genuine, legitimate' in the Directive require analysis of the proximity of the activities in question to the proclaimed mission of the EWDE;

(6) the impact in terms of proportionality on the legitimate aim of securing the *effet utile* of the prohibition on discrimination on the basis of religion or belief is to be weighed against the right of the EWDE to its autonomy and self-determination, with due account taken of the fact that the Directive makes no distinction between recruitment and dismissal.⁶¹

The case is still pending before the Court.

ECtHR: Ebrahimian v. France (2015)⁶²

Area: public sector

Conclusion: no violation

This case concerned the decision not to renew the contract of employment of a hospital social worker because of her refusal to stop wearing the Muslim veil. The applicant complained that the decision not to renew her contract as a social worker had been in breach of her right to freedom to manifest her religion. The Court found that the national courts had afforded greater weight to the principle of secularism-neutrality and to the State's interest than to the applicant's interest in not having the expression of her religious beliefs curtailed, but that this did not create a problem with regard to the Convention. The Court noted in particular that wearing the veil had been considered by the authorities as an ostentatious manifestation of religion that was incompatible with the requirement of neutrality incumbent on public officials in discharging their functions.

⁶¹ For a complete overview of these conclusions, see <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-11/cp170117en.pdf>

⁶² Application No. 64846/11

ECtHR: Eweida and Others v. the United Kingdom (2013)⁶³

Area: public and private sector

Conclusion: violation and no violation

Two of the applicants in the case, a British Airways employee (Eweida), and a geriatrics nurse (Chaplin), are practicing Christians. They complained that their employers placed restrictions on their visibly wearing Christian crosses around their necks while at work, and alleged that domestic law had failed adequately to protect their right to manifest their religion.

Eweida: The Court held that on one side of the scales was the applicant's desire to manifest her religious belief. On the other side of the scales was the employer's wish to project a certain corporate image. While this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. **Conclusion: violation**

Chaplin: The Court found that the importance for the applicant to be allowed to bear witness to her Christian faith by wearing her cross visibly at work weighed heavily in the balance. However, the reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was inherently more important than that which applied in respect of the first applicant and the hospital managers were well placed to make decisions about clinical safety. **Conclusion: no violation**

Ladele and McFarlane: The two latter applicants in the case, Ladele and McFarlane – respectively a Registrar of Births, Deaths and Marriages and a counsellor with a confidential sex therapy and relationship counselling service – were practising Christians who alleged that domestic law had failed adequately to protect their right to manifest their religious beliefs. They both complained that they had been dismissed for refusing to carry out certain duties which they considered would condone homosexuality, a practice they felt was incompatible with their religious beliefs.

The Court found that there had been no violation of Article 9 (freedom of religion) taken alone or in conjunction with Article 14 (prohibition of discrimination) of the Convention, as concerned McFarlane, and no violation of Article 14 taken in conjunction with Article 9 as concerned Ladele. It held in particular that it could not be said that national courts had failed to strike a fair balance when they upheld the employers' decisions to bring disciplinary proceedings. In each case the employer was pursuing a policy of non-discrimination against service-users, and the right not to be discriminated against on grounds of sexual orientation was also protected under the Convention. The Court generally allowed the national authorities a wide margin of appreciation when it came to striking a balance between competing Convention rights. **Conclusion: no violation**

⁶³ Applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10. The case of Eweida is already mentioned in the 2011 Equinet report (p. 14), but the report was finalized before the case was considered by the ECtHR.

3.2.1 Recruitment and selection

Northern Ireland: Protestant not appointed chair of public body (2012)⁶⁴

Area: public sector

Conclusion: discrimination

The claimant in this case alleged religious and political discrimination in the failure to appoint him to the Chair of a public body in Northern Ireland, following a publically advertised recruitment exercise. An appointments panel selected five candidates who were deemed appointable; the final selection was to be made by the Minister of the government department. Dr Lennon was a Protestant, as were three other of the appointable candidates. The then Minister was a Catholic Nationalist. He appointed the only Catholic in the pool who was also known to him, to this senior position. The Employment Tribunal concluded that the Minister had added criteria that were not part of the selection process and that the Department had not provided an adequate non-discriminatory explanation for the failure to appoint Dr Lennon. Dr Lennon received £150,000 compensation.

3.2.2 Headgear and religious symbols

Albania: Nurse wearing headscarf (2013)

Area: public sector

Conclusion: discrimination

A doctor at a hospital refused to work with a nurse who wore a headscarf. The doctor said to the nurse: 'You are covered with a headscarf. This is a laic and not a religious institution and the state is laic, therefore you should go and work in an institution where it is allowed to wear a headscarf.'

The Commissioner for Protection from Discrimination found direct discrimination in the area of employment due to religious beliefs of the nurse from the direction of the hospital, as well as harassment in the employment area due to the religious belief of the nurse by the doctor. Based on the Commissioner's recommendations, the hospital department undertook steps to regulate the discriminatory situation by applying disciplinary action to the doctor and taking measures for the employment of the nurse.

Austria: Notary employee dismissed for wearing a full-face veil at work (2016)

Area: public sector

Conclusion: no discrimination

An employee of a notary converted to Islam and slowly changed her way of clothing. At first, her employer accepted her wearing of a headscarf (hijab) and also her later full-length outer garment (abaya). He decreased her contact with clients, though. When she started to wear a full-face veil (niqab), she was warned that this would not be tolerated. She continued to wear it and was dismissed.

The Supreme Court, deciding on the substance matter after two contradicting judgments at the first and second instance, ruled that the dismissal was not discriminatory as it was covered by the

⁶⁴ Lennon v Department for Regional Development (NIFET 00075 11FET (19 June 2012))

exception for genuine and determining occupational requirements (Article 4 (1) of Directive 2000/78/EC, as transposed in § 20/1 Austrian Equal Treatment Act). Still, the Court clarified that discrimination by prohibition of religious clothing constitutes direct discrimination. It then referred to the judgment of the ECtHR *S.A.S. v France* and concluded: 'The non-veiling of her face constitutes – by reason of the nature of the particular occupational activities of the claimant as being an employee of a notary – a genuine and determining occupational requirement as "it is among the undisputed basic rules of interpersonal communication in Austria to not cover one's face".' Although, the Supreme Court clearly allowed a ban of the niqab in these circumstances, it drew a very distinctive line when it came to the employer's behaviour of restricting her contact with clients during her wearing the hijab and the abaya (not covering her face): Here, the Court found a clear direct discrimination based on the religion of the claimant in the field of working conditions and did not accept justifications such as 'my clients would be alienated' or 'my reputation as being impartial would suffer'.

The Court rejected the additional claim based on indirect discrimination on the basis of gender, as the dismissal was not based on a provision, criterion or practice appearing neutral but on an individual order directed against a religious piece of clothing, leaving no room for a test of indirect discrimination.

Austria: Trainer allowed to wear headscarf after the Ombud's intervention (2017)

Area: private sector

Conclusion: discrimination

A woman, Mrs S, had been working as a trainer for several years in a private company. The company was largely funded by public institutions. Its aim was to qualify adults to enhance their possibilities in the job market. Mrs S, who is a Muslim, had been wearing a headscarf from the beginning of her employment without criticism by the company.

After the publication of the General Attorney's opinion in the *Achbita* case, but prior to the CJEU's ruling, the company published an instruction for all employees demanding neutrality in matters of religion and belief. Therefore, visible signs and symbols of religion or belief were banned from the company's premises. The company justified this with the rising diversity of people in trainings.

Very soon the ruling in the *Achbita* case was pronounced and the company's instruction was discussed in the media. Mrs S. consulted the Ombud for Equal Treatment and contacted her employer afterwards, to tell him, that she felt discriminated. After an intervention of the Ombud in cooperation with the labour union, which is one of the funding institutions, the CEO told Mrs S. that she could continue to work as a trainer even if wearing the headscarf. Nevertheless the company just amended its policy, now referring to secularity, neutrality and a humanistic philosophy. This policy is still in place.

Belgium: A regional employment agency introduced a ban on religious signs for its employees (2015)⁶⁵

Area: private sector

Conclusion: discrimination

The applicant was employed at a regional employment agency, Actiris, since 1990 and had a back-office job in which she did not come into contact with the public. From the very beginning she wore a headscarf at work. During 22 years no problems arose in this regard, until 2012 when the internal labour regulations were amended, in which a rule was inserted that all members of staff had to adapt their clothing so as to be compatible with the work environment of Actiris. All headgear was prohibited. On 25 April 2013 the labour regulations were amended and a clause of neutrality was added: all staff members had to respect the principle of neutrality in the public sector, and equal treatment of citizens in all situations was to prevail. This meant that employees were not allowed to wear religious symbols.

The applicant (and other staff members who wore the headscarf) got, on the basis of the amended labour regulations, several warning letters for not applying the internal rule properly. The applicant considered the prohibition and the sanctions a discrimination on the basis of religion and lodged proceedings for direct and indirect discrimination on religious grounds.

The court highlighted the difference between inclusive and exclusive neutrality. Inclusive neutrality means that an equal and non-discriminatory treatment of citizens is strived for, but at the same time, religion can be manifested at work. The behaviour, not the appearance, of the employees must be neutral. Exclusive neutrality means that employees also need to show impartiality in their appearance and therefore all religious, philosophical or political symbols are not allowed at the workplace. The Court qualified the ban as an indirect distinction on the basis of religion: the ban is an apparently neutral provision, but affects in reality employees who wish to wear a specific religious symbol and manifest their freedom of religion. The Court concluded that a general ban is not an appropriate and necessary measure to pursue the principle of neutrality, due to the fact that the employee worked for almost 20 years with a headscarf without any problems due to this headscarf. The employer failed to prove the necessity and appropriateness of the ban for the sake of neutrality. Therefore the ban is an indirect discrimination on the basis of religion.

Belgium: Home care nurse decided to wear headscarf (2016)⁶⁶ & headscarf in a retirement home (2015)⁶⁷

Area: public sector

Conclusion: discrimination, settlements

A home care nurse decided to wear a headscarf, after several years of employment without the headscarf.⁶⁸ Her employer referred to the labour regulations that included a general ban on head

⁶⁵ Brussels Labour Tribunal 16 November 2015, link to the decision: <http://www.unia.be/nl/rechtspraak-alternatieven/rechtspraak/arbeidsrechtbank-brussel-16-november-2015>

⁶⁶ Settlement of 8 March 2016, <http://www.unia.be/nl/rechtspraak-alternatieven/onderhandelde-oplossingen/thuisverpleegster-mag-hoofddoek-dragen>

⁶⁷ Settlement of 10 July 2015, not published

gear when in contact with patients, due to hygiene and neutrality reasons. The nurse filed a complaint with Unia, the Belgian equality body. Unia qualified the ban as indirect discrimination on the basis of religion and was of the opinion that there were no valid reasons to justify this ban. As a solution, the employer proposed a 'neutral-looking headscarf' in accordance with the uniform and hygiene measures, that can be worn by every employee who wants to cover his/her head. The solution will be evaluated in dialogue with every concerned employee.

A comparable solution was found in a case about a retirement home where employees are not allowed to wear religious symbols due to a general ban on wearing religious (and philosophical, political) symbols. This ban was motivated by two reasons: hygiene (wearing a headscarf is not in accordance with the hygiene rules) and potential negative reactions from colleagues and residents. After the intervention of Unia, the organization changed its labour regulations, by adding the sentence: 'employees who wish to cover their heads must use a bandana provided by the institution.'

France: Islamic veil at day-care centre (2014)

Area: private sector

Conclusion: no violation

When returning from maternity leave, followed by parental leave in 2008, a deputy director in a day-care centre was dismissed for wearing an Islamic veil to work, in violation of internal regulation and an explicitly secular philosophy.

The plenary session of the Court of Cassation did not address the question whether or not discrimination had occurred and whether it was justified. It followed an altogether different justification to conclude that the plaintiff's dismissal was legal, based on legitimate restrictions to a fundamental freedom.⁶⁹

The Court approved the lower court's finding that the restriction on religious freedom at issue was justified inasmuch as the centre was a small business whose employees came into continual contact with young children and their parents, such that the day-care centre had a legitimate interest in trying to make parents from all backgrounds feel welcome.

The Court of Cassation sitting in plenary session took a different approach from the Social Chamber as regard to the internal regulations. Rather than assessing its wording in an abstract way, it opted for an examination in concreto; i.e. regardless of the fact that the wording of the clause in question was formulated in general terms where the rule was intended to apply de facto to all members of

⁶⁸ In the Netherlands there are also cases in which an employer uses reasons of hygiene to prohibit manifestations of religion. College voor de Rechten van de Mens 21 June 2016 (Muslim employee at a hospital covering her arms, conclusion: discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2017-77>; College voor de Rechten van de Mens 9 December 2014 (Muslim employee at a hospital wearing a headscarf that also covers the breast, conclusion: no discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2014-152> ; College voor de Rechten van de Mens 6 February 2014 (Muslim with religious beard rejected for a job at a cheese packaging factory, conclusion: discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2014-13>.

⁶⁹ Judgment n° 612 25 June 2014 (13-28.369) - Cour de cassation - Assemblée Plénière - <https://www.courdecassation.fr/jurisprudence/2/assemblee-pleniere/22/612-25-29566.html>

staff by virtue of their position and to the premises where they performed their task. The Court ruled that, in light of the wording of the day-care centre's internal regulations and above all the context in which the regulations were intended to apply ('a small-scale group, employing only eighteen members of staff, who were or could be in direct contact with the children and their parents'), the Court of Appeal could have deduced therefrom that it was sufficiently 'justified by the nature of the tasks performed by the group's employees and proportional to the aims pursued'. Had the internal regulations been intended to apply to a large company in which the employees perform highly diverse and clearly distinguished tasks, with some in contact with customers and others not, then the clause would have been too general and vague as it would have been disproportional for some members of staff. However, as in the present case all employees could find themselves in contact with the children and their parents, it was irrelevant that the clause did not stipulate exactly which positions were concerned by the duty of loyalty as it was justified for all employees.

The Court limited its analysis to these considerations on the merits of the functions and the context of employment to appreciate the legitimacy of a limitation to a freedom pursuant to the Labour Code. The plenary session of the Court did not even discuss whether neutrality can be argued to constitute an occupational requirement exception.

It further decided that the day-care centre was not an organisation with an ethos and belief to be protected pursuant to Article 9 ECHR, since its main purpose was not to promote or hold religious convictions, but to structure an action towards the care of small children.

Germany: Prohibition of the headscarf for legal trainees (2017)⁷⁰

Area: public sector

Conclusion: no discrimination

Rejection of the adoption of an interim injunction: According to the impact assessment of the court, the prohibition of the headscarf for legal trainees based on the neutrality of public officials in Hesse was not a sufficient ground to justify interim measure because the exercise of public powers during the legal traineeship is limited to certain duties and temporary. Therefore the prohibition to wear a headscarf in the exercise of these temporarily limited duties does not permanently infringe upon the rights of the trainee to exercise her profession and belief and thus does not outweigh the religious neutrality of the state in judicial proceedings.

Germany: Headscarf at children's day-care centre (2016)⁷¹

Area: public sector

Conclusion: violation

The prohibition of wearing a headscarf during work in a children's day centre is a serious interference with the basic right to freedom of belief and confession of the persons concerned. The opposing constitutional positions (negative beliefs and freedoms of the children and their parents' fundamental rights, principle of state neutrality) are not given any weight since the abstract danger of their impairment could not justify a ban.

⁷⁰ Federal Constitutional Court, judgment of 27.6.2017 - Az. 2 BvR 1333/17

⁷¹ Federal Constitutional Court, judgment of 18.10.2016 - 1 BvR 354/11

The characteristic of the suitability of endangering or disturbing the peace of the institution or the neutrality of the public institution is to be limited by the fact that the external religious statement must constitute a sufficiently concrete threat to the protective goods mentioned therein. The existence of the specific hazard must be documented and justified. The mere wearing of an 'Islamic headscarf' does not in itself constitute a sufficiently concrete danger in the kindergarten area.

Netherlands: Headscarf at the police (2017)⁷²

Area: public sector

Conclusion: discrimination

A Muslim woman worked at the national police. She had an administrative function in which she took calls from civilians regarding non-urgent questions or problems. She also followed a training in which she took police reports of civilians through a three-dimensional video connection. Police staff members taking these reports were bound to wear a police uniform. The woman was not allowed to wear a police uniform if she would combine it with her headscarf. She could only wear a headscarf during work in combination with civilian clothes. The national police claimed they had a code of conduct regarding lifestyle neutrality and also referred to the Achbita case. In the code of conduct, it was stated that police staff members should distance themselves from visible manifestations of religion and belief that could impair their neutrality, safety and authority appearance such as, among other things, a head scarf. The woman filed a complaint with the Netherlands Institute for Human Rights (NIHR).

The NIHR decided that the national police indirectly discriminated against the woman on the ground of her religion. The prohibition to wear a headscarf with a police uniform particularly affected the woman because she wore one as a Muslim and there was no objective justification. According to the NIHR, the necessity requirement was not met in this particular case. The national police did not substantiate enough why it would be necessary to forbid the woman wearing her headscarf, considering her function. Firstly, the woman was not visible for civilians who would call her. Secondly, the woman purely had administrative work tasks and didn't decide on the follow-up of the reports she took. In this context, the aim of impartial appearance (in the sense of avoiding possible appearance of non-neutrality or non-objectivity) only applied to a small extent. Thirdly, her safety was not at stake because she was in another room than the person who reported to her through the three-dimensional video connection. In the line of reasoning the NIHR also considered the fact that in contrary to the code of conduct the police allowed the woman to wear a headscarf with civilian clothes while she would unmistakably be seen as a police officer in function by civilians who would report to her through the video connection.

⁷² College voor de Rechten van de Mens 20 November 2017, <https://www.mensenrechten.nl/publicaties/oordelen/2017-135>. In the Netherlands there have been more discrimination cases concerning women wearing a headscarf. College voor de Rechten van de Mens 18 December 2015 (case about a Muslim woman applying for a job as a dentist assistant, conclusion: discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2015-145> ; College voor de Rechten van de Mens 9 June 2016 (case about a Muslim woman applying for a job as a skin therapist, conclusion: discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2015-67> ; College voor de Rechten van de Mens 4 April 2013 (case about a Muslim woman applying for a job as a helper at a Prenatal store, conclusion: discrimination, <https://www.mensenrechten.nl/publicaties/oordelen/2013-44>.

The outcome of the judgment caused a society-wide debate about the NIHR, neutrality of the police force and Islamization. The first reaction of the Minister of Justice and Security on the judgment was to keep the police neutral without headscarves. The debate was covered by and can be found in the newspapers, TV, social media and the internet.

Netherlands: Wearing a headscarf as a Court Registrar (2016)⁷³

Area: public sector

Conclusion: discrimination

A woman applied for a post as an external registrar at the Rotterdam District Court. She told the Court that she didn't want to take off her headscarf during court hearings due to her Islamic belief. The woman was rejected for the post, because her wearing a headscarf during court hearings would not be in accordance with the clothing regulations. The dress code of the Court should ensure that no sign of personal conviction was visible at the hearings and that the Court is neutral. The woman lodged a complaint to the Netherlands Institute for Human Rights (NIHR).

The NIHR concluded that the Court indirectly discriminated the woman on the ground of religion by dismissing her for the post. The clothing regulations - a seemingly neutral rule - particularly affected Muslim women wearing a headscarf. Indirect discrimination is not forbidden if there is an objective justification. The NIHR considered that the general interest of impartiality and independence of the judiciary is of importance. On the other hand, the woman had an interest to have access to a job without having to act contrary to her religion and a Court Registrar is not part of the judiciary. The NIHR was not convinced that the independence and impartiality of the Court would be prejudiced by allowing an external Court Registrar to wear a headscarf and the Court did not substantiate this point of view. The NIHR concluded that the clothing regulations of the Court were not necessary and too severe with regard to the post of an external Court Registrar.

Norway: Prohibition against use of headscarf by personnel at nursing home (2016)⁷⁴

Area: private sector

Conclusion: discrimination

The Ombud handled a complaint regarding whether the decision by the Board of Directors of a nursing home to forbid its personnel the use of headgear while at work, violated the so-called 'Ethnicity Anti-Discrimination Act'. The complaint had been filed by a female nursing personnel employee, who on account of her faith, had decided to use the Muslim hijab at work. The Board had reacted to her decision by voting for the enactment of the regulation in question, thereby providing for an all-neutral uniform internal code. According to the Board, the sight of personnel wearing (religious) headgear contributed to disorient and instil fear in the nursing home's patients, given that these were elderly people suffering from dementia/Alzheimers. Allegedly, some personnel and patients family members had voiced concern. The Board pointed to the fact that an increasing

⁷³ College voor de Rechten van de Mens 26 May 2016, <https://www.mensenrechten.nl/publicaties/oordelen/2016-45>

⁷⁴ Equality and Anti-Discrimination Ombud's opinion of 5. December 2016 - nr. 16/2271- Violation of Anti-Discrimination Act

number of Norwegian nursing personnel have a minority background, which, if allowed to use religious headgear, would create outward appearance disparity. The board invoked the necessity of neutrality in appearance in order to protect the patients.

The nursing home was privately-owned but had signed an operations agreement with the municipality. The municipality did not look with favour upon the Board's decision, and threatened to discontinue its contract, should the Board persist.

Although the Board had specifically targeted the religious hijab, the prohibition was neutral in that it covered all kinds of headgear. Accordingly, the Ombud assessed the question as indirect discrimination. The Ombud pointed to the ECtHR's jurisprudence (Leyla Shahin case - 2005), as well as the preparatory works of the Ethnicity Anti-Discrimination Act, which both afford a strong protection for the use of religious headgear. The Ombud did not find that the Board had actually documented any purported signs of disorientation or fear by the patients. Nor had the Ombud received any kind of information to the effect that using a hijab interfered with nursing duties. The Ombud pointed to the fact that hospitals and nursing homes, especially in the public sector, had introduced a so-called 'uniform hijab' that functioned well. Were the use of a hijab actually shown to disturb some patients, this would not of its own legitimize a general ban, unless it was shown to create a health or security hazard. The Ombud emphasized that negative attitudes and stereotypes regarding cultural background, be it from family members or employees, were not legitimate grounds for applying the exception to the prohibition to discriminate.

As to achieving neutrality as a purpose of its own, the Ombud stressed the fact that even though neutrality is a legitimate goal, it must be assessed in light of the activity of the establishment in question, and the job being performed. The Ombud could not recognize such a need for this nursing home. The conclusion was therefore that the Board had violated the Act.

The Board appealed to the Anti-Discrimination Tribunal, which handled the case on very short notice, due to its importance and wide media coverage. In an in-depth decision, the tribunal confirmed the Ombud's opinion (Decision of 28 February 2017 No. 2/2017).

Norway: Security company may refuse to let employees wear hijab (2014)⁷⁵

Area: private sector

Conclusion: no discrimination

The case concerned the legality of regulations of a private security company responsible for the security at several of the larger Norwegian airports. Their uniform regulations had a clause that stated that religious headgear and veil may not be used while wearing the company's uniform. The Tribunal found that a prohibition against religious headwear constitutes direct discrimination because of religion and indirect discrimination because of gender, but this was accepted as lawful, as they found that the regulation had a justified objective in the neutrality required to create an atmosphere of respect and order at the security gates. They found that the regulation was necessary given the business profile of the firm. Furthermore, the Tribunal found that the regulation was proportional, as an acceptance of the use of hijab might in practice lead to the introduction of gender

⁷⁵ Equality and Anti-Discrimination Tribunal's decision of 1. April 2014 – nr. 2/2014- No violation of Gender Equality and Anti-Discrimination Acts

segregated security check-points: according to the tribunal, a situation where a woman wearing a hijab would body search a man could lead to a conflict situation which might again lead to the need for gender segregated check-points. The Tribunal further found that value-neutral uniform regulations protect individuals against social religious pressure.

The Tribunal's jurisprudence indicates that the aim of neutrality has more weight in respect of some activities/ professions (security guards) than others (nurses).

Great Britain: Bilingual support worker asked to remove veil (2007)⁷⁶

Area: public sector

Conclusion: no discrimination

The Employment Appeal Tribunal (EAT) upheld an earlier decision that there was no direct or indirect discrimination when a bilingual support worker in a school was asked to remove her veil. Observations of her work by the local authority had led to the conclusion that her performance of her duties when veiled was less effective because the children were deprived of non-verbal signals, which were an important part of communication.

The EAT held that the claimant had not been treated less favourably than a comparator would have been. The comparator could be a woman who, whether Muslim or not, wore a face covering. The Tribunal found that any such comparator would have been suspended since obscuring the face and mouth while teaching methodology for children reading English as a second language was a barrier to effective learning in circumstances where the education of children was paramount. The instruction to remove her veil whilst teaching did not 'target the veil'. It had been issued to achieve a legitimate aim, being the provision of the best quality education. The instruction was a proportionate means of achieving that aim. The EAT declined to refer the case to the CJEU.

3.2.3 Religious harassment in the workplace

Northern Ireland: Sectarian harassment of a Catholic man (2011)

Area: private sector

Conclusion: discrimination, settlement

A dump driver in a mill alleged that he was subjected to sectarian harassment and religious discrimination in his employment. Examples of the type of harassment he alleged fellow employees subjected him to included: offensive sectarian name calling, being spat at, offensive and threatening sectarian graffiti. He became afraid and took sick leave suffering from stress. He raised a grievance with his employer. The employer suggested he should move to a different job. The claimant thought the harassers, and not he, should be moved. The employer then issued a final written warning to the claimant concerning his sick absence. The claimant alleged this amounted to religious discrimination and constructive dismissal. The company did not have an Equal Opportunity Policy nor an Anti-Harassment policy in place.

The company settled the case before hearing. They paid £50K compensation to the claimant and as part of the settlement terms, met with the Equality Commission, and reviewed their practices,

⁷⁶ Azmi v Kirklees MBC[2007] I.R.L.R. 484

policies and procedures to ensure they comply in all respects with obligations under national and European equality law. The company implemented recommendations made by the Commission, including implementation of policies and training of staff.

Great Britain: Dismissal because of inappropriate conversation (2015)⁷⁷

Area: private sector

Conclusion: discrimination

The claimant was a Belgian national who worked at a nursery in London. She was a member of an evangelical church. One of her colleagues was a lesbian in a civil partnership. The claimant gave her a Bible as a gift on returning to work after an accident. During a workplace discussion, the colleague stated she would not wish to attend church until it recognised her relationship and allowed her to marry there. The claimant responded by stating that ‘God is not okay with what you do’, adding ‘we are all sinners’. This upset the colleague. A disciplinary hearing ruled that the claimant had committed gross misconduct and should be dismissed. She appealed unsuccessfully. She brought a claim of direct and indirect discrimination and harassment against her employer. The Employment Tribunal dismissed the claim of harassment. However, it upheld the claims of both direct and indirect discrimination. It stated that her belief that homosexuality is a sin is a genuinely held belief, worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others. It also stated that the employer had made stereotypical assumptions about the claimant and her beliefs and could not provide a non-discriminatory explanation for her treatment. The tribunal also upheld the claim of indirect discrimination, stating that the employer had applied a provision, criterion or practice that employees should not express any adverse views of homosexuality or state that homosexuality is a sin. This placed the claimant and others sharing her beliefs at a particular disadvantage. There was no objective justification for this, since the employer had not treated the colleague in the same way for her part in the conversation, had no agreement about such conversations and had not warned that dismissal would result from inappropriate conversations. The dismissal was therefore not proportionate.

Great Britain: Christian worship services at workplace (2016)⁷⁸

Area: public sector

Conclusion: no discrimination

The claimant worked as Head of Forensic Occupational Therapy at East London NHS Foundation Trust. She worked in a secure psychiatric centre. She attended an evangelical Christian church (CRC). She was initially granted permission on a trial basis to arrange for volunteers from her church to provide Christian worship services at the Centre. However, following complaints from staff the services were suspended. There was a further complaint from a Muslim colleague who stated that the claimant had tried to impose her religious views by inviting her to events and CRC services and giving her CRC literature and DVDs. The claimant had also asked her colleague to pray with her. The colleague stated that she felt she was being ‘groomed’ and she had begun to feel ill as a result. Following an investigation, a disciplinary hearing upheld three of eight allegations against the

⁷⁷ Mbuyi v Newpark Childcare (Shepherds Bush) Ltd [2015] ET 3300656/2014

⁷⁸ Wastenev v East London NHS Foundation Trust [2016] UKEAT 0157/15/LA

claimant in February 2014. She received a final written warning, but this was later reduced to a first written warning. The claimant brought a claim of direct and indirect discrimination and harassment against the Trust.

The Tribunal and Employment Appeal Tribunal rejected all three grounds; direct and indirect discrimination and harassment. They also considered Article 9 but this brief case report will focus on the harassment elements. The claimant argued that the disciplinary proceedings, and in particular the 'oppressive sanction' were unwanted conduct related to her religion with the purpose or effect of violating her dignity and creating an intimidating, hostile, degrading or offensive environment. However, the Employment Tribunal (ET) found that the reason for her treatment was because these acts blurred professional boundaries and placed improper pressure on a junior employee rather than that they were religious acts. They had no doubt that the employer would have taken a similar approach had, for example, the claimant been pressing a particular political point of view. The employer would have been rightly criticised if it had not taken the complaint seriously and investigated it. On the issue of the sanction, the ET found that the sanction was not oppressive, the claimant had been accused of serious misconduct amounting to a misuse of power. They rejected the claimant's case that the imposition of a final written warning or its replacement with a first written warning was treatment of her because of religion or belief. On Appeal the EAT upheld the initial decision, stating that the Judge was satisfied that the ET approached its task correctly and provided a proper and adequate explanation of its reasons. In August 2017, the claimant was refused leave to appeal against the EAT decision.

3.2.4 Justified occupational requirement

Croatia: Employment in a Catholic faculty (2017)

Area: public sector

Conclusion: discrimination

The Croatian Ombudsman (national equality body) received a complaint in 2012 claiming that a Catholic faculty's public competition to recruit two positions (head of General & Legal Affairs Department and head of Postgraduate Studies Office) was discriminatory. The competition required that the applicants, among other documentation, presented a certificate of baptism. The question was whether this was a genuine, legitimate and justified occupational requirement for the above mentioned positions. The Ombud concluded that, according to Antidiscrimination Law (which implemented Article 4 of the Framework Directive), the faith-based organisation exception is applicable only if the religious belief of a person is a genuine, legitimate and justified occupational requirement for the concrete position, but not all the employees of the Faculty. In this case, the vacancies were administrative positions in an ethos-based faculty, for which there were no special conditions regarding belief in the faculty's internal regulations.

The Ombud's Office issued a recommendation to change the existing practice for the jobs that do not require an affiliation to the Catholic Church, but the practice continued during 2014 and 2016 for administrative and auxiliary staff, so the Ombudsman reaffirmed its position in another recommendation and warning.

Germany: Discrimination of an intensive caregiver because of the lack of religious affiliation (2012)⁷⁹

Area: private sector

Conclusion: discrimination

The Labour Court Aachen dealt with the question of whether religious affiliation constitutes a justified occupational requirement for a position as a nurse in a Catholic hospital.

The lawsuit was initiated by a nurse who was objectively qualified for a vacant position as an intensive caregiver in a Catholic hospital and whose application was rejected solely because of the lack of religious affinity. The applicant saw this as an unjustified disadvantage within the meaning of the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz – AGG) and claimed compensation in the amount of three months' salary.

The Labour Court concluded that the rejection of the nurse is an unacceptable disadvantage solely because of the lack of religious affiliation, triggering compensation pursuant to Article 15 (2) of the AGG.

The court referred to the provisions of the ecclesiastical service according to which the religious community could only demand membership in the Catholic Church in the pastoral, catechetical, and, as a rule, in the educational sphere. According to the wording of the regulation, it is sufficient for all the other Catholic institutions to ensure that the candidate complies with the specific mandate in a credible manner.

The court, however, only granted compensation to the rejected nurse in the amount of one month's salary. According to the judges, the infringement of the AGG was considered to be minor, taking into account the 'difficult and largely unexplained legal situation'.

Germany: Termination of a church musician on the ground of extramarital relations (2012)⁸⁰

Area: private sector

Conclusion: no violation, settlement

The State Labour Court declared effective the termination of a married church musician because of the 'maintenance of an extramarital relationship'. According to the Court, the church musician had disappointed the legitimate loyalty expectations of his employer, so that his right to free development of the personality recognized by the Court did not protect him from an effective termination of the employment relationship. The particular position which the applicant had as a church musician justified the employer's demand for an identification of the plaintiff with the core points of the Catholic doctrine of faith and morals.

In the next instance, the case was settled.

⁷⁹ Labour Court Aachen, judgment of 13.12.2012 - 2 Ca 4226/11

⁸⁰ State Labour Court Hamm, judgment of 14.6.2013 - 10 Sa 18/13

Germany: Extraordinary termination due to withdrawal from the church (2013)⁸¹

Area: private sector

Conclusion: no violation

The withdrawal of a member of the Catholic Church employed in an area close to the announcement of the faith may justify the extraordinary termination of the employment relationship.

The Federal Labour Court had to decide whether a childcare centre belonging to Caritas could terminate a social worker because he had left the Catholic Church. The Federal Labour Court (Bundesarbeitsgericht – BAG) - as well as the lower instance courts - decided this in the affirmative.

In the opinion of the judges, the social worker not only violated his obligations under employment law. It is also unacceptable to his employer to continue his employment as a social worker.

The Federal Labour Court came to the conclusion that the dismissal did not discriminate. The unequal treatment on grounds of religion was justified.

3.2.5 Opting out of certain work tasks

Denmark: Student was told to taste pork meat against her religious belief (2015)⁸²

Area: public sector

Conclusion: discrimination

A Muslim student who was training to become a chefs assistant (vocational training⁸³), refused to taste pork meat. She agreed to touch the meat and prepare food containing it. The school of training, however, insisted that she tasted the meat and told her she did not have to eat it, but could spit it out after having tasted it.

In a meeting with a student counsellor and a department director the student was told that the school had a rule stating that all students had to taste the food they were preparing and this rule applied to all students, including vegetarians. The student explained that her religion forbid her to taste pork meat and was then told to consider finding something else to do. After this, the student decided to leave the training and filed a complaint to the Board of Equal Treatment. She argued that she had been discriminated against on the ground of her religion.

The Board of Equal Treatment found that the student had been indirectly discriminated against, because the apparently neutral rule, which applied to all students, was in particular interfering with people of Muslim faith. The Board further found there was no legitimate aim. The student was awarded a compensation.

The decision was appealed by the school, and brought before the City Court and the Western High Court, who both upheld the decision.

⁸¹ Federal Labour Court, judgment of 25.4.2013 - 2 AZR 579/12

⁸² Western High Court, judgment of 5.5.2015 - B-1213-12

⁸³ Some of the vocational training cases are to be found in the employment chapter.

Estonia: Cook refused to eat during Ramadan (2017)

Area: private sector

Conclusion: recommendation

A cook in a restaurant kitchen did not eat during Ramadan from sunrise to sunset. Namely, during Ramadan the cook did not taste the food he was cooking. As he could not cook without tasting the food, during his shift somebody else had to taste the food he was cooking. Moreover, the cook worked next to a hot stove. According to the employer the employee did not look well. The employer was afraid the cook would pass out, when he did not eat for a long period of time and worked next to a hot stove. If there was an accident in the kitchen the employer would be liable. During the hiring process the employee did not disclose the information about his health or belief. The employer asked how he could resolve the situation without discriminating the employee.

The Equality Commissioner stated that religious belief could not be the reason why the employee was treated differently or worse than other employees. Both, the employer as well as the employee, had to take into account the interests of the other party. If the employee could not perform some of his tasks because of his belief or health, the employer should rearrange his tasks taking into account the interests of the employee, so that his tasks would not contradict his belief. Also, the employer should rearrange the tasks of an employee, if it were needed for safety reasons. If the employee could not fulfil the tasks to a significant amount, then the employer could offer the employee another vacancy with tasks the employee could perform. On the other hand, belief did not give an employee the right to leave a significant amount of the work undone.

Germany: Employee refused to sell alcohol due to Muslim faith (2011)⁸⁴

Area: private sector

Conclusion: violation

An employee who had been working as an assistant in a department store had claimed that he was prohibited by his Muslim faith from following the instructions of the employer to sell alcohol. The employer had then terminated him extraordinarily. The employee challenged the decision and was successful.

The Court found that if an employee refuses an employer's work instruction based on a serious internal conflict of faith, the employer's insistence on complying with the contract may result in a failure to fulfil his obligations within regard to the freedom of belief. In this case, the refusal of the worker to comply with the instruction was not a presumptive breach of duty, but may be appropriate to justify a termination of the employment relationship on personal grounds only if the employer was not able to use the worker otherwise.

Great Britain: Sikh refused to be in contact with meat products (2010)⁸⁵

Area: public sector

Conclusion: successful appeal against finding of no discrimination

⁸⁴ Federal Labour Court, judgment of 24.2.2011 - 2 AZR 636/09

⁸⁵ Chatwal v Wandsworth Borough Council UKEAT/0487/10/JOJ

The claimant was an Amritdhari Sikh employed by Wandsworth Borough Council as a Customer Services Advisor. Although not all Sikhs are vegetarians, Amritdhari Sikhs are not supposed to have direct or indirect contact with meat or meat products.

The Employer introduced a new rule that staff in the claimant's department who used the communal kitchen had to clean it on a rota basis or, if they declined, they would no longer be able to use the kitchen. The claimant refused to clean the fridge in case he came into contact with meat products, although he was willing to clean other kitchen areas, and was therefore banned from using the facility.

The claimant was later suspended, and eventually dismissed, on an unrelated matter. He brought a claim of indirect race, religion and belief discrimination. The Employment Tribunal, at a pre-hearing review, found that he had not been discriminated against because he had been unable to show that Sikhs were particularly disadvantaged by the decision. The Claimant appealed the decision and the Employment Appeal Tribunal ruled in July 2011 that the Employment Tribunal had failed to consider properly whether or not a significant group of Sikhs were disadvantaged by the council's policy and referred the case back to them to reconsider. The final outcome is unknown.

Netherlands: Bus driver refused to shake hands with women (2016)⁸⁶

Area: private sector

Conclusion: discrimination

A man applied for a job as a bus driver. He does not shake hands with women due to his Islamic belief. Prior to his job interview he informed the employment agency about it and they communicated it to the bus company. The bus company then cancelled the job interview with the man. The NIHR concluded that the bus company indirectly discriminated the man on the ground of his religion. The bus company requires its bus drivers to shake hands with men and women to provide an excellent service to customers and to create an excellent working environment. According to the bus company it is a common and polite way of greeting one another in the Netherlands. Shaking hands is also a way to treat co-workers and customers equally and respectfully. The Netherlands Institute for Human Rights (NIHR) concluded that this requirement particularly affects persons who do not shake hands with the other sex because of their religion. This means there should be an objective justification for indirect discrimination. The interest of the bus company was weighed against the interest of the man to be able to manifest his religion by not shaking hands,

⁸⁶ College voor de Rechten van de Mens 22 December 2016, <https://www.mensenrechten.nl/publicaties/oordelen/2016-142/detail>. There are more Dutch cases about Muslim job applicants or employees refusing to shake hands. College voor de Rechten van de Mens 7 August 2014 (Muslim woman applying for a job at a school, conclusion: no discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2014-93>; College voor de Rechten van de Mens 5 August 2014 (Muslim man not shaking hands, conclusion: no discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2014-92>; College voor de Rechten van de Mens 17 December 2013 (Muslim man not shaking hands, conclusion discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2013-168>; College voor de Rechten van de Mens 12 October 2012 (Muslim woman working at a municipality not shaking hands, conclusion: discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2012-161>; College voor de Rechten van de Mens 22 March 2012 (Man rejected for a job as a traffic warden, conclusion: no discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2012-54>

without being discriminated against. Although the bus company stated that shaking hands is a substantial and necessary job requirement, the NIHR decided that it's a subordinate part of the function. Furthermore, the bus company did not substantiate in which way the behaviour of the man would create offensive and unsafe situations and would obstruct him to provide an excellent service. The man stated that he always greets women in a respectful way and he always explains why he doesn't shake hands. The man also stated that he would help women enter and leave the vehicle whenever necessary, and in emergency situations. The interest of the man therefore prevails.

This case was picked up extensively by the media. Even some of the Dutch politicians were astonished by the outcome. They were of the opinion that shaking hands is a common way of greeting one another in the Netherlands. The NIHR also received phone calls and e-mails from concerned civilians. In response to all the publicity the NIHR published a statement on its website. This statement explained that the NIHR always looks at the circumstances of a case and how the NIHR weighed the different interests in this particular case.

Sweden: Religiously motivated refusal to shake hands with persons of the opposite sex (2016, 2017)⁸⁷

Area: private sector

Conclusion: no violation and violation

During 2015 and 2016, the Equality Ombudsman investigated two cases concerning demands to shake hands in working life. The employers involved in both cases had denied (male) applicants jobs when the applicants had declared that, according to their interpretation of Islam, they could not shake hands with persons of the opposite sex.

The first case concerned a position at a company providing a shelter-facility for underage migrants. According to the employer, the applicant's practice not to shake hands with women could be perceived negatively. In addition, the practice would also run counter to the shelter's task of integrating the children into Swedish society. Finally, the employer submitted, physical contact was required with children of both sexes harboured by the shelter. As the applicant could not touch persons of the opposite sex (outside his close family), he would not be able to perform tasks in relation to girls.

The second case concerned a private company that managed a shelter providing treatment and behaviour-programs for boys and young men with social problems, such as drug-abuse or criminality. The employer stated that the applicant's refusal to shake hands with persons of the opposite sex would amount to discrimination of women. In any event, the practice would be perceived negatively and could be a source of conflict, potentially jeopardizing the treatment. Furthermore, allowing the practice would be in breach of the employer's values and guidelines, notably on promoting equality between men and women.

In both opinions, the Equality Ombudsman stressed that upholding a principle of equal treatment in the workplace must generally be considered a legitimate and important aim. To mark a distinction between men and women, even if done respectfully, does not conform to the demands of equal

⁸⁷ Decisions of the Equality Ombudsman of September 1st 2016 in case ANM 2016/230 (non-violation) and the 9 of May 2017 in case GRA 2016/55 (violation) Private employer

treatment that equality requires. So, while the employer – considering that touching is connected to issues of bodily integrity – cannot typically require greetings specifically by hand shaking, it is legitimate to demand that no relevant distinction is made based on gender or any of the other grounds protected under the Swedish Discrimination Act.

In the first case, concerning the shelter facility for underage migrants, the Ombudsman held that there was an objectively justified need for employees to be able to have physical contact with the children of both sexes in various situations, e.g. comforting. The applicant was therefore not in a comparable situation with respect to his possibilities to provide such physical contact with girls. Thus, the employer was neither in breach of the prohibitions of direct nor indirect discrimination. In the second case, concerning the shelter for boys and young men with social problems, the Equality Ombudsman considered that both the aims of equal treatment and avoiding conflicts were legitimate aims. However, relating to the relevant work tasks, a demand specifically to greet by shaking hands would appear an undue burden with respect to the applicant's interests to abide by his religion. In determining the outcome of the balancing, the Equality Ombudsman gave specific weight to the strong societal interest to ensure that persons with religious beliefs are not excluded from employment and income. In thus finding a violation of the prohibition of indirect discrimination, the Ombudsman concluded that it would have been sufficient to demand that the applicant greet persons without distinction based on gender etc. to attain the stated aims of equality. The Ombudsman further stated that the company's internal rules did not qualify as a principle of neutrality of the kind that was subject for review by the CJEU in the case of Achbita.

Norway: Doctor denied job offer for refusing to prescribe some forms of birth control due to her religious beliefs (2015)⁸⁸

Area: public sector

Conclusion: no discrimination

The case concerned a Polish doctor who was not given a job for refusing to prescribe some forms of birth control (spiral) due to her religious beliefs. The main issue in this case was whether the termination was contrary to freedom of conscience/religion freedom Article 9. The doctor argued that she could not insert spiral on patients who wanted this, because there could be a risk of the spiral having an abortive function (already fertilized eggs being rejected by the female body / not attach to the uterine lining). The regional court found that it was not in breach of article 9 to demand the doctor to conduct this kind of procedure, and the dismissal was not discriminatory.

Sweden: Midwife unwilling to assist or take part in abortions (2014)⁸⁹

Area: public sector

Conclusion: no discrimination

In April 2014, the Equality Ombudsman issued a decision after investigating a complaint from a midwife. The midwife reported that she had not been offered a position as a midwife at three

⁸⁸ Equality and Anti- Discrimination Tribunal's decision of 8. July. 2015 nr. 14/388. No violation of Anti-Discrimination Act

⁸⁹ Decision of the Equality Ombudsman on the 10 April 2014, ANM 2014/12, ANM 2014/226 and ANM 2014/227. No violation of the Discrimination Act#

different hospitals in the south of Sweden, after having told the employer that she was not willing to assist or take part in abortions, because of her Christian faith. The hospitals held that a midwife should be able to perform all assignments and that midwives must be able to rotate between different wards, hence it would not be possible for the complainant to work at the maternity ward only. The hospitals held that the religion of the complainant was of no importance, the decision was based upon the fact that the complainant had declared herself incapable of performing all the tasks that a midwife should be able to perform.

In the Ombudsman's decision they concluded that the midwife had not been a victim of direct discrimination. She was not able to perform all the relevant tasks for the position and was therefore not in a comparable situation with other applicants. Neither was she a victim of indirect discrimination. To be able to perform all relevant tasks, including abortion related care, is an apparently neutral criterion that would put persons with a certain kind of deep religious conviction at a particular disadvantage compared to other persons. However, the aim to ensure that women are given access to gynaecological health care, including abortion care, is a legitimate aim. To demand that a midwife should be able to perform all relevant tasks of his/her job assignment is an appropriate and necessary mean of achieving that aim. The Ombudsman also considered whether these conclusions could contravene the freedom of religion, Article 9 of the European Convention on Human Rights, and decided that this was not the case.

3.2.6 Work patterns cases

France: Termination of a probation period of a Jewish shop assistant (2015)

Area: private sector

Conclusion: discrimination

A claim was lodged with the French Defender of Rights concerning the termination of the probation period of a Jewish shop assistant. After an inquiry of the Defender of Rights based on different hearings and recorded telephone conversations, it appeared that the CEO, being himself a practising Jewish person, and the manager refused by principle that any Jewish person would work during Shabbat and therefore prevented themselves from hiring them. When they had found out that the claimant was Jewish shortly after his hiring, his contract was terminated.

In its decision MLD 2013-186 of 3 October 2013, the Defender of Rights concluded that such a situation was discriminatory on the basis of religious grounds and contrary to Articles 225-1 and 225-2 of the French Criminal Code. It decided to refer the file to the Prosecutor who eventually decided to pursue before the Paris Criminal Court.

In its decision MLD 2014-199 of 7 December 2014, the Defender of Rights decided to present observations before the Criminal Court (as an 'amicus curiae'). The Court followed the position of the Defender of Rights in this judgment dated 15 December 2015. It fined the different defendants.

The Court also convicted the defendants to pay damages to the victim amounting to EUR 2,700 referring to the material damages (corresponding to 2 month's salary) and to EUR 5,000 referring to the moral damages.

Great Britain: Distribution of religious material at work (2003)⁹⁰

Area: public sector

Conclusion: no discrimination

The claimant was employed by Lambeth Council as an accountancy assistant. He was also the honorary senior evangelist of the Celestial Church of Christ Worldwide.

The Christian prayer group of which the claimant was a member was permitted to hold prayer meetings in a room at his place of work. He distributed a document to various staff members; which was based on extracts from the New International Version of the Bible. The first two headings were: 'Sexual activity between the members of the same sex is universally condemned' and 'Male homosexuality is forbidden by law and punished by death.' The materials had not been distributed during a prayer group meeting and a number of the recipients were not members of the prayer group.

Some staff members who found the document homophobic and offensive formally complained to management. The claimant was suspended and faced a disciplinary hearing. His behaviour was held to amount to gross misconduct and he was dismissed with immediate effect. His appeal failed and he launched a claim for direct and indirect religious discrimination and unfair dismissal.

He argued that because the material he had distributed had come from the Bible he was protected by the prohibition against discrimination on grounds of religion and belief. The tribunal found that, irrespective of its source, the material 'was hostile and offensive towards homosexuals and was thereby homophobic' and that he had been dismissed for distributing the literature 'outside the confines of the prayer group and its meeting place'. There was no evidence that the employer was discriminatory towards religion in general or Christianity in particular. It concluded that he had not been treated less favourably on grounds of his religion or belief and that the respondent's classification of behaviour causing harassment or discrimination as gross misconduct that should lead to dismissal did not amount to a provision, criterion or practice that put Christians such as the claimant at a particular disadvantage when compared with others.

Great Britain: Work pattern for a member of Baptist church (2013)⁹¹

Area: public sector

Conclusion: no discrimination

The claimant worked as a residential care worker at a children's home which provided short residential breaks for children with serious disabilities and complex care needs. The care home was open seven days a week and staff were employed on a rota system. As a member of a Baptist church in South London, the claimant believed that Sunday was a day of rest and did not wish to work on that day. For two years, the employer was able to accommodate her wishes within the rota system, but eventually insisted that she must work on occasional Sundays. She refused and following a final warning, resigned. She brought a claim for indirect religious discrimination, arguing that because of

⁹⁰ [2003] UKEAT 1108_02_1607

⁹¹ Mba v London Borough of Merton [2013] EWCA Civ 1562

her particular beliefs, she was put at a disadvantage compared with others who did not share those beliefs.

The Employment Tribunal found that there was no indirect discrimination and that the employer was justified in requiring the claimant to work on the occasional Sunday. The Employment Appeal Tribunal supported this decision as did the Court of Appeal.

Great Britain: Work pattern for a Muslim employee who wished to leave at lunchtimes to visit Mosque (2010)⁹²

Area: private sector

Conclusion: no discrimination

The claimant was a Muslim man who was employed as a security guard by G4S Security Services at a client's site in Highgate in North London. He regularly left the site on Friday lunchtimes to attend Finsbury Park Mosque. The employer informed the claimant that he could no longer leave the Highgate site at lunchtimes, since the company was contractually obliged to ensure that a specified number of security guards were present throughout operating hours.

The employer offered to change the claimant's contract to a different pattern with the option of him working either on a Saturday or a Sunday instead of on a Friday. He was not prepared to work at the weekend and instead stopped working Fridays, taking the days off either as sick leave, annual leave or authorised unpaid leave. Eventually the employer told the claimant that this arrangement could not continue.

The claimant brought a claim for indirect religious discrimination, arguing that G4S's requirement that security guards be on site at Friday lunchtimes placed Muslims at a particular disadvantage. An Employment Tribunal rejected his claim, ruling that the requirement was objectively justified and a proportionate means of achieving the legitimate aim of meeting the employer's operational needs. The decision was upheld by the Employment Appeal Tribunal who found that G4S tried to accommodate the claimant in every possible way by offering him the option of working on a Saturday or a Sunday in place of working on a Friday. Once he turned down their suggestions, the EAT concluded that it was very difficult to see what else the employer could reasonably have done.

Great Britain: Time off for religious events (2016)⁹³

Area: public sector

Conclusion: no discrimination

The claimant was a Roman Catholic from Sardinia who was employed by London Underground as a Quality engineer. Between 2009 and 2013, his employer allowed him to take five consecutive weeks of annual leave during August to attend religious events with his family in Sardinia. A new line manager informed him in 2013 that the arrangement would have to cease thereafter and that, as a

⁹² Cherfi v G4S Security Services UKEAT/0379/10/DM. See also Dutch case about an employee requesting one hour time off every three weeks on Friday to visit the mosque. Conclusion: discrimination. College voor de Rechten van de Mens 26 January 2016, <https://www.mensenrechten.nl/publicaties/oordelen/2016-7>

⁹³ Gareddu v London Underground UKEAT/0086/16/DM

member of a small team, he could take no more than 15 continuous days' annual leave during the summer. A dispute arose after certain annual leave requests were refused.

The claimant put forward a grievance, submitting a list of 17 religious festivals that he intended to attend with his family during this period. This was rejected as was the subsequent appeal. The employer argued that requests for more than three weeks' leave were relatively rare, and usually made only for major life events, such as marriage. It also argued that the claimant's insistence that he attend a large number of festivals was a purely personal choice that did not amount to a protected characteristic. He then claimed indirect religious discrimination.

An Employment Tribunal found against the claimant firstly, because he did not necessarily attend the same festivals every year and secondly, his motive for wanting the lengthy period of time off related to his family arrangements, and was not a manifestation of his religious beliefs. Thus while there was a sufficient link between the individual festivals and the religious belief, there was an insufficient connection between the series of different festivals each year. The five-week period was related to family arrangements, rather than any underlying religious beliefs. The appeal was unsuccessful

3.2.7 Conflict of rights

Norway: Religious school disallowing the election of women to their board of directors (2017)⁹⁴

Area: church employer

Conclusion: discrimination

The Ombud assessed whether the statutes of a Christian religious community violated the Gender Equality Act, by disallowing the election of women to the Board of Directors of the schools owned by the community. The case was assessed pursuant to the rules and guidelines applicable to employment. The rule had its roots in the religious community's policy whereby only men could preach, and discharge duties with religious questions. This in turn, was rooted in its official interpretation of passages of the Bible, which proclaims that God has given women and men different life tasks, and that women must be good housewives, obey their husbands and have limited management activities.

This interpretation did not reach consensus, neither within the community nor at the Board. Opposition members agreed that women could not handle theological questions, but they disagreed that women could not hold management positions outside the religious scope. They pointed to the fact that the Board, which hierarchically is above all other boards within the community, deals with all matters related to religion and only allows men among its members. They argued therefore that women should be allowed to serve on the community's school boards. The Board adopted the rule nonetheless (without unanimity).

The Board's argument was that the rule was theologically justified, therefore legitimate. Accordingly, it was a valid exception to the prohibition to discriminate. The rule was necessary because as a school board member, a woman not only would find herself in a management position, but more importantly, she would have to make decisions and vote on questions related to religion. The Ombud

⁹⁴ Equality and Anti- Discrimination Ombud's opinion of 12. May 2017 nr. 16/453- Violation of Gender Equality Act

noted that according to national law and EU Directive 2006/54/EC Article 14 (2), gender may be an employment criterion only if it is decisive for the implementation of the duties in question. According to the preparatory works of the Gender Equality Act this principle applies to appointments within religious communities. The question was therefore whether a school board member position implied management duties that were so closely related to the community's religious activities, or the achievement of its religious purpose, that women should be excluded. The Ombud could not appraise how many of these activities, (other than the usual administrative and operational decision-making), were assigned to school board members. However, the Ombud's view was that board members, to the extent that they would have to make such decisions, would consult with the all-male Board, and/or follow its religious/theological precepts/guidelines. The Ombud pointed out that women could (after many years) be appointed as managers at the community schools. Such a position entailed making decisions in one way or another related to religious matters. Accordingly, the Ombud did not see the point of excluding women from school board positions. The Ombud concluded that the rule was unnecessary, independently of whether it could be said to have a legitimate purpose. Furthermore, it did not see the exclusion of women as a proportional measure. The Ombud pointed to the preparatory works of the Gender Equality Act, in which religious communities are being described as having a role-model in Norwegian society. The preparatory works criticize gender discrimination within religious communities because it prevents female members from taking the opportunity to practice their religion on the same footing as other members. The conclusion was that the rule excluding women from being elected as school board members violated the Gender Equality Act. The community has appealed the Ombud's opinion to the Equality and Anti-Discrimination Tribunal, which has not come with a decision yet.

Great Britain: Application for foster carers (2011)

Area: public sector

Conclusion: no discrimination

Another case from Great Britain involved a Pentecostal Christian couple whose application for approval as short-term foster carers was deferred because of their negative views on same sex relationships which were not in line with national standards for Fostering Services.⁹⁵ Their application for Judicial Review was unsuccessful on the basis that the local authority was entitled to explore the extent to which prospective foster carers' beliefs might affect their behaviour and their treatment of a child being fostered by them.

3.2.8 Other cases

Northern Ireland: Unfair selection for redundancy on grounds of religion or belief (2013)⁹⁶

Area: private sector

Conclusion: discrimination

The claimant in this case was employed as a sales and marketing executive in a printing firm. He claimed that he was a victim of religious discrimination throughout much of his employment and ultimately his post was identified for redundancy. The owners of the firm, and 14 of its 24

⁹⁵ (2011) EWHC 375

⁹⁶ Connolly v Oakdene Services

employees, belonged to a Christian 'Brethren' denomination. The claimant did not hold this religious faith. The Employment Tribunal decided that the claimant was discriminated against on grounds of religious belief. Examples of less favourable treatment in his employment included discrimination in pay, provision of company car, provision of mobile technology and discriminatory comments. The Tribunal held that at the outset, his was the only post identified for redundancy and there were substantial shortcomings in the way in which the firm dealt with his subsequent grievance on the matter. Taken together, this treatment amounted to a fundamental breach of contract. The Applicant was awarded compensation for injury to feelings and unfair dismissal, as a result of religious discrimination. Subsequently an appeal of this decision was lodged, but then withdrawn.

Croatia: Attending Catholic pilgrimage (2016)

Area: public sector

Conclusion: discrimination

A regional firefighting association (founded and financed by the local authorities), whose members are local fire departments and volunteer fire brigades, issued a memo to all its members informing them about the upcoming pilgrimage to a well-known and frequently visited Catholic church. The memo reiterated that the visit is a part of the annual activities plan and informed all the units about the minimum number of members that are obliged to attend the pilgrimage. In addition, the memo mentioned the possibility that the departments who did not participate could possibly face a budget cut. The equality body requested information about the circumstances of the case. In response, the fire-fighting association claimed that all the requests were for organisational purposes (transport etc.).

The equality body held there was discrimination based on belief, explaining that participation in religious activities has to be voluntary. Thus, any sanction for non-compliance with this kind of request is not in accordance to anti-discrimination law.

The head of the fire-fighting association reported back to the equality body announcing that next year the fire departments will only be asked to register the number of their members who wish to participate for organisational purposes and that it will be stressed that the participation in the religious activity is strictly voluntary.

3.3 Conclusion

Since our 2011 report, the CJEU has given its first judgments on religious discrimination under Directive 2000/78. In these judgments the CJEU has adopted a rather cautious approach. The CJEU judgments appear to contradict the ECtHR judgment in the case of *Eweida and Others v. the United Kingdom* where the ECtHR ruled that there had been a violation of the right to freedom of religion or belief when Mrs. Eweida was not permitted to wear a crucifix at work. The ECtHR in *Eweida* considered that on the one hand was Mrs. Eweida's desire to manifest her religious belief and on the other hand was the employer's wish to project a certain corporate image, and that a fair balance had not been struck. Although the ECtHR recognized that the employer's wish to project a certain corporate image could be regarded as a legitimate aim, it found that the national court accorded it too much weight.

It could be argued that in contrast to Eweida, the ruling of CJEU provides more space for employers to ban the wearing of religious symbols in the workplace without violating the fundamental right to freedom of religion or belief. The judgment might be understood as confirming that the desire of a company to present itself in a neutral way is an objective justification for a different treatment of employees.

Second, it is notable that the CJEU examines whether the objective is legitimate and the requirement is proportionate but at the same time does not examine the proper balance between the desire of the employee to manifest her religious belief and the employer's wish of a neutral workplace environment.

The question is whether the CJEU judgments provide enough guidance to enable national judges to determine whether a company ban on wearing visible religious, political or philosophical symbols, can be regarded as indirect discrimination.

In the national cases mentioned in this chapter the national judges in some cases seem to have taken a rather narrow approach to the interpretation of whether there has been religious discrimination or a breach of Article 9 of the European Convention on Human Rights. In other cases the national judges seem to weigh the right to manifest one's religion quite heavily.

National case law shows there are contentious issues that have to be clarified by further international case law, such as:

- Neutrality/neutral image as a legitimate aim for employers and possible differences in this between public and private employers
- Different approaches as regards the different positions and functions, depending on how far they are a position of trust or authority (e.g. in wearing headscarf)
- For religious garments, how far hygiene can be used as a justification
- In what tasks and positions can religious affiliation be a genuine and determining occupational requirement
- How far can 'reasonable accommodation' be required from the employer (e.g. concerning headscarves, but also religious holidays, opt-outs from work duties, etc.)

4 Education

This chapter will focus on discrimination based on religion or beliefs in both educational facilities and institutions, and the education system as a whole, at national level in Member States.

Consistent with the trend shown in the 2011 report, a majority of the cases dealing with religious freedom across the EU are connected to the Muslim religion, particularly with Muslim women's dress.

Following the discussion on legal framework, the first section of case-by-case analysis will deal with cases submitted by individuals concerning a supposed breach of their own right to freedom of religion and beliefs, while the second part will focus on wider encompassing issues raised from institutional policies implemented by authorities, and the approach adopted by equality bodies.

4.1 Legal framework

4.1.1 Protection under European Union Law

In *Gravier v. Liege*⁹⁷ case, CJEU interpreted broadly the 'vocational training' term as covering all training and skills developed relating to employment, whatever the age and level of the training of the pupils. Following this case, in France, even the academic studies that prepare students for the labour market are considered to be covered by the term vocational training.

Although the protection from discrimination provided by the Framework Directive relates to vocational guidance, vocational training, advanced vocational training and retraining, there are some Member States that provide protection from discrimination on all grounds in their equality legislation, including the protection from discrimination on the grounds of religion and belief in the provision of all types of education (primary education, secondary education and academic education). Some examples of these countries: Belgium, Bulgaria, Czech Republic, France, Finland, FYROM, Hungary, Lithuania, Malta, Netherlands, Norway, Romania, Serbia, Slovakia, Slovenia, Sweden, United Kingdom and others.

Regarding the problem of displaying religious signs by the schools or by the pupils, the Member States are using different approaches. For example, in France pupils at the primary and secondary level are forbidden to wear religious symbols in public schools, also the schools are forbidden to display such symbols. On the other hand, in Italy and Romania the schools may display religious signs.

Regarding the schools based on a particular religion, in Hungary, Lithuania, United Kingdom and the Netherlands, the equality legislation allows these schools under certain conditions to refuse students that are not a member of the particular religion. For the rest of the Member States, there is no such exception in their equality legislation for the schools that are founded on a certain religion.

4.1.2 Protection under the European Convention on Human Rights

Article 9 of the European Convention on Human Rights provides the freedom of thought, conscience and religion:

⁹⁷ C-293/83

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

One important CJEU judgment on this matter is the one from *Lautsi v. Italy* case⁹⁸. The application was from Mrs Soile Lautsi against the School Council of a School in Abano Terme. Mrs. Lautsi's children attended a state school where all the classrooms had a crucifix on the wall, which she considered contrary to the principle of secularism. In the first instance, Lautsi complained before the Veneto Administrative Court and the Court decided that the presence of the crucifixes in the state school's classrooms did not offend the principle of secularism. Lautsi appealed to the Supreme Administrative Court. The Supreme Administrative Court upheld the Veneto Administrative Court's decision. Then she appealed to the ECtHR considering that displaying the crucifixes in the public school attended by her children was infringing Article 9 of the Convention and Article 2 of Protocol No. 1. Finally, the Grand Chamber of the ECtHR ruled that there was no violation of the provisions mentioned above and stated:

'The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools speaks in favour of that approach.'

In the case of *Grzelak v Poland*,⁹⁹ an ordinance of the Minister of Education was contested, as it concerned marking pupils work in religious classes, and including said mark in the official reports, implicitly having an effect on the 'average mark'. While the subject is optional, and there are alternatives that students or parents of pupils can choose, the requirements for implementation of these alternative classes are difficult to reach in many schools due to the country being predominantly Catholic Christian and the high level of religiosity in public schools. Additionally, students who did opt out of religious classes had two possibilities: to have no mark in religion or just a straight line in the appropriate graph of the school reports, which underlined the fact that they did not attend the class. The courts approach led them to the conclusion that there was a breach of Article 14 in conjunction with Article 9, as reports are official documents and the exclusion of a grade from the report disclosed the religion or beliefs of a person, and this had a significant impact in the cultural circumstances of Polish society.

In the case of *Leyla Sahin v. Turkey*¹⁰⁰, 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' (para 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

⁹⁸ Judgment of 18 March 2011, application No. 30814/06

⁹⁹ Judgment of 22 November 2010, application No. 7710/02

¹⁰⁰ Judgment of 10 November 2005, application No. 44774/98

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 9.¹⁰¹

The case of *Osmanoglu and Kocabas v. Switzerland*¹⁰², presents a similar situation, where parents of two girls of Turkish origin and Muslim faith complained about the compulsory nature of mixed-gender swimming lessons. Their claim was that this activity and conditions under which it is taken, violates the provisions of Article 9. The case was dismissed by both a local court in 2011 and a Swiss federal court in 2012. The European Court of Human Rights ruled, in a unanimous decision on 10 January 2017, that taking into consideration the flexibility shown by the school, in allowing the girls to swim in 'burkinis' and offering the possibility of changing in a separate room, their right to religious freedom was not restricted in any way. The ECtHR chambers' decision may be appealed to the Grand Chamber.

The cases *Aktas v. France*, *Bayrak v. France*, *Gamaleddyn v. France*, *Ghazal v. France*, *J. Singh v. France* and *R. Singh v. France* from 30 June 2009 (decisions on admissibility) concerned the expulsion of six pupils from school for wearing conspicuous symbols of religious affiliation. They were enrolled in various state schools for the year 2004/2005. On the first day of school, the girls, who are Muslims, arrived wearing a headscarf or kerchief. The boys were wearing a 'keski', an under-turban worn by Sikhs. As they refused to remove the offending headwear, they were denied access to the classroom and, after a period of dialogue with the families, expelled from school for failure to comply with the French Education Code. Before the Court, they complained of the ban on headwear imposed by their schools, relying in particular on Article 9 of the Convention. The Court declared the applications inadmissible (manifestly ill-founded), holding in particular that the interference with the pupils' freedom to manifest their religion was prescribed by law and pursued the legitimate aim of protecting the rights and freedoms of others and of public order. It further underlined the State's role as a neutral organiser of the exercise of various religions, faiths and beliefs. As to the punishment of definitive expulsion, it was not disproportionate to the aims pursued as the pupils still had the possibility of continuing their schooling by correspondence courses.

4.2 Case analysis and key issues

The following section will examine some cases which show what criteria arise as the basis for discrimination in education systems in the EU. The following list will present multiple cases and differing criteria, it is not intended, however, to represent the frequency with which a certain criterion is present in discrimination cases.

Romania: Discrimination in kindergarten facility (2015)

Conclusion: discrimination

Decision 599, dated 9 December 2015 had as an object of the case the possible discrimination manifested against a minor, based on his belonging to a certain Church. Specifically, the educational

¹⁰¹ Equinet report 'Equality Law in Practice. A Question of Faith: Religion and Belief in Europe', 2011, p.21

¹⁰² Judgment of 10 January 2017, application No. 29086/12. Available only in French at: [https://hudoc.echr.coe.int/eng#{\"itemid\":\"001-170346\"}](https://hudoc.echr.coe.int/eng#{\)

facility the minor was sent to, may have subjected the 3-year-old child to differentiated treatment, compared to others in his group, because of the religious upbringing provided by the parents.

The file was registered at the National Council for Combating Discrimination and after completing the legal procedural steps, the body took note of the complainants' claims. The father of the child, claims that following a discussion with the representative of the kindergarten he was left with the understanding that the inclusion of his child in a German-speaking, mixed group of children aged 3–6, would not represent an issue. After the registration however, the father noticed some irritation in conversations with one of the teaching staff, who went as far as to suggest that children in the church she attends are different to the claimants' son, claiming he is meaner and lacks focus. This also suggests the teacher had knowledge of the confidential registration form, where the information regarding religious belonging was logged.

After several more talks with the teachers, a psychologist was requested to supervise the child. He noted, while slightly more spirited than others, the child is completely normal for his age. It is mentioned by the father that he retired his child from the above-mentioned institution.

The defendants claim they had recommended registration in the Romanian-speaking, 3-year-old group in the kindergarten from the very start, to the family. The teaching staff also maintain that the child was abusive towards other children and disruptive during class, which prompted them to approach even the subject of religious education with the child's family.

The Directors' Board of the National Council for Combating Discrimination, having analysed and taken note of the two sides' statements and the evidence submitted, and taking into consideration the right to education, the minor's eventual withdrawal from the institution and the extent to which 'belonging to a certain religious cult' was the basis for discrimination against the minor, decided in favour of the complainant.

All members of the Directors' Board voted for a warning in this case, save for one, who expressed a separate opinion. He made note of the child's age, and considers a harsher measure would be better suited, as an infringement upon a child's right to education by teaching staff and a teaching institution stresses the severity of the situation.

The decision of the National Council for Combating Discrimination went uncontested by the defendants.

Albania: Not accepted in public educational institution because of headscarf (2015)

Conclusion: discrimination

On 29 September 2014, a 16 year-old female complainant submitted a complaint to the Commissioner for Protection from Discrimination (CPD) against an educational institution, for not being accepted in the public institution because of her religious belief. The complainant expressed that after she had completed the 10th grade, in June 2014 she decided to wear the headscarf.

At the beginning of the school year 2014/2015, the complainant went to the school, but the staff of this institution denied her the right to attend classes wearing a headscarf, claiming that the state is secular and for this reason religious symbols cannot be allowed in public educational institutions.

The CPD handled the complaint, and at the end of the administrative proceeding, based on the evidence and facts, came up with the decision No. 14 on 29 January 2015, on:

Ascertainment of direct discrimination in the field of education, due to the religious beliefs of the pupil J.R, by the Regional Education Directorate of Korça and General High School 'Muharram Çollaku', Pogradec.

Obligation of the Regional Education Directorate of Korça and General High School 'Muharram Çollaku' Pogradec, to stop immediately discriminatory attitudes and actions, as well as the use of all opportunities that legal provisions in the field of education give, in order to ensure learning performance of the pupil J.R at the same level with the other pupils.

Recommendation to the Ministry of Education and Sports, to amend the law No. 69/2012 '*On pre-university education system in the Republic of Albania*', envisaging legal and sublegal acts, formulated with precision, understandable and the clearest possible, so that citizens are aware of their rights, freedoms and restrictions.

The Ministry of Education and Sports has submitted an appeal to the Administrative Court of First Instance, Tirana against the decision of the Commissioner for Protection from Discrimination. In this lawsuit, the Ministry of Education and Sports sought the repeal of the decision of the CPD.

The court rejected the lawsuit, and decided in favour of the CPD decision. The Regional Education Directorate of Korça, pursuant to the recommendation of the Commissioner for Protection from Discrimination, took all measures necessary to immediately stop the discriminatory attitudes and actions against the student, by returning her to school, as well as providing access to education at the same level with the other pupils.¹⁰³

Bulgaria: The Bulgarian headscarf Case (2013)¹⁰⁴

Conclusion: no discrimination

The complainants claim that they are Muslims in conviction, as well as their daughter. For this reason, as of June 2011, their daughter decided to go everywhere with a scarf on her head 'as the Muslim woman's Islamic religion demands'. According to the applicants, after the first school day, they and their daughter were subjected to 'incredible harassment by the school principal and some teachers' who were 'informally sent' by the director to 'dissuade' the child from 'attending' the school dressed like this' because of the limitation set out in the Rules of the school.

The five-member extended panel found that no discrimination took place taking into account that the freedom of religion or belief is subject to restrictions if they are provided for by law when necessary and in the interest of national security, protection of public order, health or morals or protection of the rights and the freedoms of others. The equality body considered that the reflection in Article 5 of the Bulgarian Act of Education principle of secular education represents the

¹⁰³ The Czech equality body handled a similar case. See report on inquiry concerning ban on wearing headdress at a secondary medical school, 2 July 2014, file number 173/2013/DIS/EN, available at: https://www.ochrance.cz/fileadmin/user_upload/ESO/173_2013_DIS_eng.pdf.

¹⁰⁴ Ruling No. 109/2013 on case file No. 295/2011, 28 May 2013.

development and concretization of the constitutional principle of the secular state in the field of education. This principle assumes and requires the impartiality of public authorities in the regulation and governance of the state, and an explicit disallowance of proselytism or indoctrination in the activities of the state. The principle of the secular state arises from the Constitution and does not assume that the state shall be indifferent to religion, but rather that it shall ensure the freedom of religion and belief in the context of confessional and cultural pluralism. This model of governance requires the neutrality of the State with respect to religious denominations and confessions in the organization of the public sphere.¹⁰⁵

The realization of the right to education in accordance with the above restrictions and the right of the parents to choose a special educational establishment in accordance with the religious and moral education they give to their children have brought the panel to the conclusion that the limitation set out in the Rules of the school is objectively justified by a legal aim provision and the means of achieving the goal are appropriate and necessary. The decision of the equality body was appealed. The Administrative Court of Sofia-city and, by its Decision No 1797 of 18.02.2016, the Supreme Administrative Court confirmed the decision of the Commission for Protection against Discrimination.

Belgium: Headscarf in a fashion design course (2015)¹⁰⁶

Conclusion: discrimination, settlement

A Muslim woman who wears a headscarf wanted to study fashion, but was rejected by the Executive Board of the College, due to her headscarf. The Board justified this refusal by stating that her faith and her headscarf would go against the content of the training: she will be forced to draw men, touch their bodies and occasionally ask personal questions. Therefore, there is no place for religious beliefs at this fashion school.

Unia concluded a direct discrimination on the basis of religion and belief. The solution consisted in better informing students before they register about the course and content of the training. The school regulations were also changed: a ban on religious symbols is not applied anymore.

Great Britain: Wearing a religious symbol in school (2007)¹⁰⁷

Conclusion: no violation

This case concerns a 14 year-old pupil of a non-denominational secondary school in England who started to wear a silver ring as a symbol of her religiously-motivated commitment to celibacy before marriage. After being told she could not do so, since the wearing of the ring contravened the school's uniform policy which had been in place since the early 1990s, the pupil complied, but then started wearing the ring again in 2006. When she continued to do so, she was placed in isolation and forced

¹⁰⁵ A similar case was submitted by the German equality body (judgment of 20.3.2015 - 1 O 365/14, by District Court Bonn), the difference being that it was a private school which prohibited wearing the headscarf. It was decided that the prohibition was lawful and compatible with the rights of the school on the basis of the private school and teaching contracts.

¹⁰⁶ Unia, 25 March 2015, <https://www.unia.be/nl/rechtspraak-alternatieven/onderhandelde-oplossingen/moslima-mag-geen-mode-studeren>.

¹⁰⁷ R (Playfoot) v Millais School Governing Body [2007] EWHC 1698

to study on her own. She raised a Judicial Review of the decision of the governing body on Article 9 and 14 grounds

The High Court refused her application for a judicial review because in choosing to come to Millais School rather than other specifically Christian institutions, the pupil and her parents had voluntarily accepted the school uniform. In addition, the wearing of the ring was not considered to be a manifestation of her belief, while the school had offered her other means by which she could express her belief without undue hardship or inconvenience, such as attaching the ring to her bag. The High Court also rejected her complaint that she had been treated less favourably than Muslim girls who were allowed to wear headscarves and Sikh girls who were allowed to wear Kara bangles. The Court considered that the school had reached carefully considered decisions on each occasion it had been called upon to permit exceptions to the uniform policy. It has to be borne in mind that this is an old case which pre-dates Eweida.

Sweden: Religious constraints with regards to clothing (2016)¹⁰⁸

Conclusion: discrimination

A woman studied to become a dentist at a university. The university's hygiene routines stipulated that short-sleeved work clothes must be worn during activities that involved physical contact with patients. The student, a practising Muslim, didn't want to show her bare arms due to religious beliefs. She asked the university for permission to wear disposable sleeves in addition to her short-sleeved work clothes. The university turned her request down, basing the decision mainly upon hygiene criteria and the security of patients. The university stated that the use of disposable sleeves would increase the risk of infections. After investigating the student's complaint, the Equality Ombudsman considered that the university had discriminated against her and decided to bring the case to court. The district court of Stockholm held that the student had been a victim of indirect discrimination. In its reasoning, the court made the following assessments. The aim of the hygiene routines (the rule about short-sleeved work clothes) is to prevent contamination. This is a legitimate aim. During the proceedings, the Ombudsman had presented evidence indicating that correctly handled disposable sleeves constitute a safe alternative to bare underarms in view of hygiene demands and patient security. This led the district court to conclude that the university couldn't fulfil the burden of proof, once it was reversed, and the student had therefore been discriminated against.

The following cases under examination will look at further-reaching policy decisions taken by public authorities or institutions and their interaction with existing regulations.

Belgium: Flemish Education Council approving the prohibition of conspicuous philosophical signs at school (2014)¹⁰⁹

Conclusion: discrimination

In 2013 the Flemish Education Council (a public authority at the head of 700 public primary and secondary schools in the Flemish Region) approved an Administrative Circular of the Board of the Flemish Community schools, prohibiting the wearing of any conspicuous philosophical signs at

¹⁰⁸ Judgment of the District court of Stockholm, 16 November 2016, case T 3905-15.

¹⁰⁹ Council of State Belgium, 14 October 2014

school. On this basis, several School Boards adopted internal regulations prohibiting the wearing of any conspicuous philosophical signs in the school premises.

Students wearing the Islamic headscarf and their parents, and two Sikh students, filed an action before the Council of State for annulment of the Flemish Education Council decision and of the internal implementation regulation of their school. The Council of State stated that such a prohibition of any conspicuous philosophical signs at school constitutes an interference with the right to freedom of religion.

According to the Council of State, the disputed Circular was adopted by the Flemish Education Council because of serious problems in some schools in the Antwerp Region. However, the schools of the applicants were not in such a situation that could justify such a prohibition in their internal regulations.

Denmark: High schools' ban on practicing religious rituals within their confines (2017)¹¹⁰

Conclusion: no discrimination

A high school introduced in the school regulations a ban on practising religious rituals in the school areas.

The rule intended to secure a safe learning environment, respect and tolerance towards the student's different cultural background and ease tensions within the school, avoiding incidents related to the practising of religious rituals. Before introducing the rule, there had been several incidents with tensions within the school. On at least one occasion, persons who were not students at the school had participated in praying in the school areas.

A student filed a complaint to the Board of Equal Treatment claiming she had been indirectly discriminated on the ground of her religion.

The Board stated that the rule could constitute indirect discrimination. The Board, however, found the School's desire to secure a safe environment etc. constituted a legitimate aim. The Board further considered the ban appropriate for the purpose of pursuing a safe learning environment.

Finally, the Board found the ban necessary, emphasising that prior to the introduction of the ban, there had been incidents where students had felt unsafe.

One member of the Board did not find the ban necessary.

Great Britain (Scotland): Compulsory religious observance in schools (2016)¹¹¹

Conclusion: settlement

In September 2016 the Humanist Society Scotland sought a Judicial Review of a decision of the Scottish Government not to extend the parental right to opt their child out of religious observance in schools, to young people. The HSS sought to argue that the position was not in line with the UN Convention on the Rights of the Child (UNCRC). As part of a settlement agreement the Scottish

¹¹⁰ <https://www.retsinformation.dk/Forms/R0710.aspx?id=192312>

¹¹¹ Humanist Society Scotland v The Scottish Ministers 2016

Government launched a consultation on revised guidance for Religious Observance in Scottish Schools. The legal action was ultimately withdrawn.

The Equality and Human Rights Commission (equality body) responded to the Scottish Government consultation on revisions to the Government's guidance on religious observance. The consultation response referred to a 2016 UNCRC concluding observation which recommended that the UK ensure that children can independently exercise the right to withdraw from religious worship at school. The EHRC welcomed the intention behind the suggested amendment to the guidance which recommended taking account of children and young people's views in relation to withdrawal from religious observance. However EHRC is of the view that in order to comply with Article 12 UNCRC, the guidance should clarify that the views of children and young people who have sufficient maturity and understanding must be respected and not just taken into account.

In March 2017 the Scottish Government published new guidance which asked Head Teachers to ensure that students' views are considered when discussing their involvement in religious observance at school.

Sweden: Student of hotel and restaurant school wearing headscarf (2011)¹¹²

Conclusion: discrimination, settlement

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 headaddress. 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 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 May 2011 in which the woman was awarded 40.000 SEK.

¹¹² Decision by the Swedish Ombudsman of 31 January 2011, The Swedish Ombudsman's Office v Stockholms Hotell- och restaurangskola, ANM 2009/1224

Hungary: Denominational university and no admission of homosexuals (2005)¹¹³

Conclusion: no discrimination

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 exempt 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.

France: Veiled mothers accompanying children during school trips (2015)

Conclusion: violation

In autumn 2014, the new Minister of Education, Najat Vallaud Belkacem, stopped the ban of veiled mothers from accompanying state school children during school trips, initially validated by the Montreuil Administrative tribunal¹¹⁴ and the 2012 Chatel (name of the former Minister of Education) Circular. Vallaud-Belkacem explains that 'parents accompanying their children on school trips are not subject to religious neutrality. They cannot be considered as part of public service and are not subject to public service rules. The principle is that mothers (the parents) are not subject to religious

¹¹³ Supreme Court, 8 June 2005, Háttér Társaság a Melegekért v. Károli Gáspár Református Egyetem CASE 247 1

¹¹⁴ Montreuil Administrative tribunal, No. 1012015, 22 November 2011.

neutrality. Therefore, acceptance of their presence in school trips should be the rule and the norm, not the exception.’

This political decision follows the opinion of the Council of State requested by the Defender of Rights. The Council of State, which also acts as an advisory body to the government, ruled that mothers simply offering teachers additional adult supervision on school outings should not be ‘submitted to [the requirements of] religious neutrality’. It reiterated that the right to freedom of religion for accompanying mothers should be respected and that the proportionality of limitations imposed on the basis of local circumstances should be examined on a case-by-case basis¹¹⁵.

Since then, lower administrative tribunals have followed this opinion. The Nice administrative tribunal recalled on 9 June 2015 that parents authorised to participate in field trips, as the students, are users of the public service. Any restriction of the freedom of religion shall be based on specific express legislation or on considerations related to public order or functional requirements of the organisation of public service, which the State has the burden of establishing. As the school did not prevail itself of a legal requirement, public order or of functional requirements necessary to the proper management of the public service, its decision contained an error of law.¹¹⁶ Later on the Amiens Administrative tribunal came to the same conclusion on 15 December 2015. It decided that even if school authorities can, in specific circumstances, limit the expression of religious freedom in order to ensure the respect of public order, in the absence of an explicit legal text they are not subject to the strict obligation of neutrality imposed on personnel and students, and religious signs cannot be forbidden on a continuous basis. As regards the petitioner’s claim, she did not establish before the court that she had submitted requests to accompany field trips and the subsequent refusals, therefore her claim was dismissed.¹¹⁷

France: Pork meals, school lunches and *laïcité* (2017)

Conclusion: violation

A mayor of Chalon-sur-Saône, near Dijon, had decided in deference to the principle of *laïcité* to remove pork substitutes from school lunch menus. The local Muslim Defence League challenged this modification in the administrative court; and in ***Ligue de Défense Judiciaire des Musulmans et autres*** (No. 1502100, 1502726, 28 August 2017), the *Tribunal administratif de Dijon* handed down a decision annulling it.

Following an investigation involving the Defender of Rights and the National Consultative Commission on Human Rights, the Tribunal held that the Mayor’s decision had not given primary attention to the interests of children within the meaning of the International Convention on the Rights of the Child. Ever since 1984, the school canteens of Chalon-sur-Saône had been offering a substitute meal when pork was served and that choice made it possible to take account of the

¹¹⁵ Conseil d’Etat, Study adopted on the request of the Defender of Rights by the Plenary Assembly of the Conseil d’Etat on 19 December 2013, available at: <http://www.legifrance.gouv.fr//fr/publications/etudes/application-du-principe-de-neutralite-religieuse-dans-les-services-publics-etude>

¹¹⁶ <http://www.equalitylaw.eu/downloads/2881-france-ta-nice-islamic-veil-pdf-58-kb>

¹¹⁷ <http://www.equalitylaw.eu/downloads/3655-france-administrative-tribunal-decision-quashing-the-instruction-of-4-december-2013-of-the-academic-director-of-the-amiens-district-excluding-the-participation-to-field-trips-of-veiled-mothers-pdf-60-kb>

freedom of conscience of children and the religious or cultural concerns of parents. In the opinion of the Tribunal, the Mayor's decision had taken away that choice from users of the service by putting an end to a practice that had never previously been questioned; moreover, the children's families were not necessarily able to find another way of ensuring that they got their lunch.

Without adopting any general position of principle, the Tribunal concluded with regard to the particular case of the school canteens of Chalon-sur-Saône:

- that a substitute menu had been offered, without any discussion, since 1984;
- that the town's removal of that menu had not been motivated by any technical or financial constraints; and
- that in the past, where a substitute menu was offered the children had been grouped by tables according to their menu-choices; and the town had therefore failed to demonstrate that there was no possible alternative method such as recourse to anonymized questionnaires or operating a self-service system.

In view of those findings, the Tribunal of First Instance concluded that it did not have to examine the applicants' other argument based on the violation of freedom of conscience and worship.

Finally, the Tribunal stated that its conclusions did not prejudice any future decision in the event of a dispute over a school canteen where no substitute meal had ever been offered.

The contested decision was annulled.

Serbia: Formal approval (blessing) given by the competent Serbian Orthodox Church Bishop as the Faculty of Orthodox Theology enrolment precondition does not in itself constitute an act of discrimination (2012)

Conclusion: no discrimination

A non-governmental organization filed a complaint against the University of Belgrade Faculty of Orthodox Theology as its Statute stipulates that a person wishing to enrol in undergraduate academic studies and postgraduate academic studies (master) in this Faculty, needs a formal approval by the competent bishop and that persons who have been granted an official approval (blessing) by the competent bishop are eligible to apply for teacher, lecturer, associate and researcher positions. The analysis of regulations which provide that a formal approval (blessing) issued by a competent bishop is a precondition for any candidate applying to enrol in or acquire a title at the Faculty of Orthodox Theology, indicates that such precondition applies to all prospective candidates equally, both male and female. For this reason, legally binding provisions related to the prohibition of indirect discrimination are relevant when considering this particular enrolment criterion from the aspect of anti-discrimination regulations. As the granted approval (blessing) constitutes a condition applicable to each and every person wishing to enrol in undergraduate and graduate studies or for those wishing to apply for teacher, lecturer, associate and researcher positions on Faculty of Orthodox Theology such condition, per se, does not put any person in a less favourable position on the grounds of their religion or religious beliefs. Namely, although criteria for being granted an official approval (blessing) by a competent bishop remain unclear, the complaint itself does not allege, nor has such case of a person who had been denied the official approval (blessing) on the grounds of his/her religion or religious beliefs been recorded. For this reason, allegations of the complainant that the

rule of the University of Belgrade Faculty of Orthodox Theology Statute stipulating that a person wishing to enrol in undergraduate academic studies and postgraduate academic studies (master) at the Faculty of Orthodox Theology as well as those wishing to apply for teacher, lecturer, associate and researcher positions with the Faculty of Orthodox Theology need to have a formal approval (blessing) of the competent bishop constitutes 'an act of discrimination against students and professors of the Faculty of Orthodox Theology on the grounds of religious beliefs', are unfounded.

Serbia: Recommendations for pre-schools to meet specific nutritional requirements (2014)

Conclusion: recommendation

Following a complaint procedure, the Commissioner for the Protection of Equality learned that adequate nutrition corresponding to children's health status and other specific needs they might have in respect of food, has not been provided in other preschool institutions throughout Serbia. Namely, as most children attending preschool institutions in Serbia have no specific nutritional needs, i.e. they are able to consume all meals provided by these institutions, day-care meals are organized in such a way that they meet the needs of the vast majority of children. However, a certain number of children are unable to eat meals provided in preschool institutions, either for health or other reasons, which is something that needs to be taken into account when providing meals to children attending day-care. This is the reason recommendations containing measures for achieving equality were issued to all preschool institutions in Serbia – totalling 160. The recommendation indicates that the operation of preschool institutions should be organized in such a way as to accommodate the individual needs of each child, including those related to specific nutritional requirements, since from the standpoint of anti-discrimination regulations, it is considered unacceptable that children on a specific nutritional regime are being offered the same food as the children with no such needs. The Commissioner for the Protection of Equality issued the recommendation to pre-school institutions to provide adequate food choices for children who have specific nutritional requirements due to health issues, religious or other non-health reasons. Out of the total of 160 preschool institutions which have been issued this recommendation containing measures for achieving equality, more than fifty percent of them have responded that meals meeting the needs of all children have been provided.

4.2.1 Analysis of key issues

The issues present in the cases offered by national equality bodies have once again, as with the 2011 report, a definitive focus on the Islamic religion, particularly on dress issues for women of the Muslim faith. It would appear that there is still targeted discrimination towards Muslims in many regions, whether conscious or not. Many of these instances where hygiene issues and differences of belief were invoked, were found to be unjustifiable by courts of law, as alternatives were available in ensuring appropriate measures of hygiene and informing students with respect to what is expected of them and did not hold up in the face of legal scrutiny, such as the cases of the Belgian fashion design course and the Swedish dentistry school.

Furthermore, the legal provisions of secularised education have been used in attempts to justify individual cases of banning students, or preventing them from attending classes while wearing headscarves. While in a Bulgarian case this was found to be permissible, in the case put forward by Albania it was found to be discrimination on the basis of the pupil's religion.

In the United Kingdom case of *R (Playfoot) v. Millais School Governing Body* a teenage girl was not permitted to wear a religiously influenced ring to school as it contravened school uniform policy. This suggests that when there is the possibility of enrolment in other schools of ones' specific faith or ones that enforce a more lax uniform policy, it cannot be considered discrimination to ask students to forego religious symbols and apparel. This also raises the question of promoting ones' religion and if it can be considered a form of proselytism to wear a piece of jewellery or clothing which is not specifically required by ones' faith, as the same school, Playfoot claimed in her defence, that other Muslim girls were allowed to wear headscarves or Sikh girls to wear *Kara* bangles. This defence was dismissed as the school carefully considered all exceptions allowed to their uniform policy. However this is an older, pre-Eweida case.

Regarding the second section of the chapter, that dealing with policies taken by public authorities with a wider reach in their scope, we have three examples from Belgium, Denmark and Scotland. These three cases have different issues at their core, and will be treated separately in the following paragraphs.

The case of the Flemish Education Council approving the prohibition of conspicuous religious symbols may show, once again, a tendency towards indirect discrimination on some level, be it conscious or subconscious. The motivation of the decision to ban such symbols was based on the fact that certain schools in a region were having serious problems. It should be noted, Muslim students wearing the headscarf and two Sikh students filed complaints with the Council of State, which ruled that such a ban is an infringement on their right to freedom of religion. Furthermore, it was argued that, in light of the evidence that the complainants did not come from those schools that were considered to have serious problems, such a ban does not address the cause of those problems and would be treating the symptoms, instead of the real issue. The problem with this approach is that such a ban on religious symbols increases an already existing gap between individuals of different religions, instead of promoting acceptance of individuality and ensuring students have the ability to exercise their right to freedom of religion in a non-intrusive, hostility-free environment.

The Danish high schools' ban on practising religious rituals in school areas contrasts the decision of the Belgian Council of State, however with a different issue at its core. The switch from banning religious symbols to prohibition of religious practices and the reducing the scope from some 700 schools in the case of the Flemish Educational Council to a single institution in the Danish case, were considered sufficient grounds for upholding the schools' decision. Taking into account that this may be seen as indirect discrimination, but also accounting for the issues that arose before the introduction of the ban and the fact that pursuing a safe learning environment is considered a legitimate aim, the Danish Board of Equal Treatment found the ban necessary.

Lastly, the case of compulsory religious observance in Scottish schools was settled briefly after a complaint was brought up by the Humanist Society Scotland, which sought to prove that the decision of the Scottish government was not in accordance with the UN Convention on the Rights of the Child.

4.3 Conclusion

The field of education is to be handled with extraordinary care, as any decisions would impact heavily on children's rights and the development of young individuals. There is currently, due to various reasons including history and relations between the state and religious communities, a variety of

approaches in Europe concerning the limits of freedom of religion and belief in education. Some Member States allow for far-reaching religious diversity, others prioritise religious neutrality and secular education. While currently Member States are granted a wide margin of appreciation in this regard, there are also arguments for the necessity of more consistency and clarity to ensure equal and adequate protection to freedom of religion and an appropriate balancing between religious diversity and religious neutrality.

The following conclusions can be drawn from the cases and analysis described in the subsections above:

- Although adjudicatory bodies such as the Commissioner for Protection from Discrimination in Albania and the NCCD in Romania, have ruled in favour of the plaintiff, the cases show a fundamental issue, with lack of cohesion at policy level in lower hierarchy institutions such as public schools. Moreover, the issue requires special attention in relation to the preparation of staff with regards to discriminatory behaviour.
- Some issues arise as a conflict between the secular states principle and the right of individuals to manifest their religion or beliefs in public institutions without infringing on the right of others. In such cases the individuals are often prohibited to attend schools on the basis of clothing (i.e. headscarves).
- Some indications point to a lack of transparency of the requirements in schools. In such cases the institutions have not taken into consideration religious implications which directly contravene school norms or requirements (see cases Belgium, Flemish Education Council and Playfoot). Although courts have reached different decisions, it is clear that the students have lacked foresight into the potential implications of their actions. As such the students may have suffered disruptions in their learning process which should be avoided if at all possible.
- Consultation between EU experts and equality bodies, but also between equality bodies, school officials and psychologists as a means of achieving better policy and legislation, may be a tool which is undervalued and underutilized. In many instances parental as well as specialized consultations are disregarded on matters which precede state legislation. Before any significant damage to the experience of the student is rendered, consultation and accommodation of alternatives are steps which may result in significant improvements to the overall exposure of students to events impairing their learning experience.
- The focus should be on increasing protection of students against discrimination. A solution would be the adoption of the proposed Horizontal Directive at the EU level to offer protection in the field of education. Integration of EU level policies may reduce religious discrimination by offering a broader framework for integration of different religious communities.

5 The Provision of Goods and Services

This chapter examines cases of discriminatory behaviour of enterprises offering goods and services to certain groups of customers. It reviews if health, safety or security issues or the protection of rights and freedoms of others may justify religious discrimination and how religious prescriptions may be accommodated by service providers. It thoroughly examines whether certain anti-Muslim conduct also constitutes other or intersectional forms of discrimination such as race or gender related discrimination; and, vice versa, whether the right to manifest one's religion might lead to discrimination of certain groups of customers, e.g. on grounds of their sexual orientation.

5.1 Legal framework

5.1.1 European Union

From its very beginnings, the EU emphasised the importance of free and non-discriminatory movement of goods and services within its internal market. The definition of what constitutes goods and services can therefore easily be derived from substantial treaty provisions and CJEU case law. Article 57 of the Treaty on the Functioning of the European Union (TFEU)¹¹⁸ 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 Court: *'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'*.¹¹⁹

5.1.2 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 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 and health of customers.

As mentioned above, the right to private and family life is also relevant in relation to manifesting religion under the Convention. Article 8 of the Convention 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 your own house, Article 8 is unlikely to be engaged.¹²⁰

¹¹⁸ Treaty on the functioning of the European Union, Official Journal No 115, 9 May 2008, p 0070 – 0070

¹¹⁹ 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.

¹²⁰ See for example *Preddy v Hall* Court of Appeal [2012] EWCA Civ 83.

5.1.3 Domestic legislation

Although no agreement could be established at the EU level so far, several Member States provide at least some form of protection from religious discrimination in the provision of goods and services.¹²¹ Hence, discrepancies about the level of protection throughout the anti-discrimination legislations of Europe remain.

5.2 Case law

According to the various aspects of interplay between service providers and customers, four broad categories of cases can be identified:

- Cases dealing with the refusal of services to customers wearing headscarves or other religious headgear, be it for health and safety concerns, security issues or for a 'better integration to society'
- Cases dealing with forms of harassment linked to religious (anti-Muslim) discrimination
- Cases dealing with the question whether service providers have to accommodate specific religious prescriptions
- Cases examining whether freedom of conscience or religious belief can serve as a justification for discriminating customers (specifically on grounds of their sexual orientation)

5.2.1 Refusing services to customers wearing religious headgear

ECtHR: Phull v France (2005)¹²²

Conclusion: no violation

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 Convention. 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.'

¹²¹ Such as Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, United Kingdom.

¹²² European Court of Human Rights, 11 January 2005, Application No 35753/03.

ECtHR: El Morsli v France (2008)¹²³

Conclusion: no violation

A Muslim woman was denied entrance to the French consulate 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 Convention. 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.

Belgium: All hats forbidden in a bowling club (2011)¹²⁴

Conclusion: discrimination

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.

France: Ban of headgear in bowling clubs (2015)

Conclusion: discrimination

In its Decision 2015-102, the Defender of Rights considered that refusing access for a Muslim veiled woman to a bowling club was discriminatory. This refusal was initially based on the in-house regulation prohibiting all kinds of headgear. During investigation, the CEO of the bowling explained that this rule was based on security and identification of the customers. If the Defender of Rights admitted that such an aim could be considered as legitimate, this rule had disparate impact on persons wearing religious signs, such as Muslim women. The Defender of Rights expressed doubts as to whether such a rule was appropriate and proportionate. It raised the question of the concrete appreciation of a security risk concerning a woman who can be easily identified while accompanying her child for a birthday party, based on the fact that there was a guard at the entrance and surveillance cameras within the facilities. The Defender of Rights concluded that such an in-house regulation was discriminatory and recommended to redraft it, which was eventually done. Very recently, in July 2017, the CEOs of two different bowling clubs were reminded that they had broken the law and told not to repeat their misdemeanour. They were also recommended to change their in-house regulation.

In other older cases, the in-house regulations have been amended in such a way that they still prohibit all headgear except religious attire.

¹²³ European Court of Human Rights, 4 March 2008, Application No 15585/06.

¹²⁴ Civil Court, Brussels, 25 January 2011, file no NR. 10/5373/A, <http://www.unia.be/nl/rechtspraak-alternatieven/rechtspraak/rechtbank-van-1ste-aanleg-brussel-25-januari-2011>.

Belgium: Ban on wearing headgear in a gym facility (2015)¹²⁵

Conclusion: no discrimination

A fitness complex applied a ban on wearing headgear for users because of security reasons. Two women who wore headgear for religious and medical reasons lodged an injunction proceeding, supported by Unia on the grounds of religious discrimination and discrimination on the basis of health status.

In the first instance the judge rejected the discrimination claim, because the judge was of the opinion that Unia and the victims misread the code of conduct: according to the judge, the ban is limited to loose clothing and headgear. An interpretation that goes against the facts of the case and the interpretation of the fitness complex.

The judge also suggested that an exception because of health and religious reasons should be provided in the code of conduct so that any misunderstanding can be prevented. This was not respected by the fitness complex. Unia and the victims filed an appeal. The Court of Appeal concluded that there is no direct nor indirect discrimination on the basis of religion, because it would be a disproportionate burden to specify in the code of conduct which headgear is allowed and safe and that there is no valid alternative to a general ban.

France: Cases on limited access to sport facilities with headscarf (2014, 2017)¹²⁶

Conclusion: discrimination, pending

In two cases the French Defender of Rights claimed that, even if the customers' safety may appear as a legitimate aim, the total exclusion of any sporting activities of a fitness club based on the wearing of their headscarf seems disproportionate and discriminatory. The wearing of an adapted veil in terms of dimension, materials, and attachment between the head or neck (in order to avoid any risk of injury) shall thus, in principle, be accepted. It shall be recalled that this rule has been followed by the FIFA concerning female soccer players who are allowed to play soccer when wearing a veil.

In one case, the Defender of Rights presented its observations before the Lyon Criminal Court which did not follow the Defender's arguments in its judgment dated 18 September 2015. The defendant had in the meantime presented another in-house regulation according to which caps and bandanas were allowed insofar as they did not hide the neck, the shoulders and the face in order for the staff to check the posture and safeguard security.

In the other case, the Thionville Criminal Court followed the Defender of Rights when ruling on 17 June 2014, that the exclusion from a fitness club based on neutrality was discriminatory under Articles 225-1 and 225-2 of the French Criminal Code. The Court convicted the CEO of the fitness club to a EUR 500 suspended fine and awarded EUR 250 of damages.

¹²⁵ Court of First Instance, Brussels, 2 June 2014 and Court of Appeal, Brussels, 8 September 2015.

¹²⁶ French Defender of Rights, MLD-2014-081 of 26 May 2014 et MLD-2014-204 of 22 December 2014.

Germany: Headscarf ban in a sport studio (2013)¹²⁷

Conclusion: no discrimination

In this case, the operator of a sports studio had terminated the contract with the applicant because she had worn a headscarf during training in his fitness studio. The applicant felt discriminated against by her dismissal because of her religion and claimed damages for a breach of the German Anti-Discrimination Act. As in the previous instance, the applicant had no success.

The court held that there is no discrimination in the present case because the defendant's request to take off the headscarf during the training does not have any religious background, but rather serves to prevent injuries during training on the fitness equipment.

Belgium: Café refusing its service to a woman wearing a headscarf (2009)¹²⁸

Conclusion: discrimination

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 agreed as there was no evidence that religious symbols caused security concerns in the café, and it falls outside the scope of private companies and individuals 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.

France: Restaurant refusing to serve Muslim women wearing headscarves (2017)

Conclusion: discrimination

The restaurant manager told the headscarf-wearing customers the following: 'Terrorists are Muslim and all Muslims are terrorists ... They recently killed a priest. This is a secular country and I have a right to an opinion ... I don't want people like you here.' In response, the Muslim women told the restaurateur that they 'do not wish to be served by a racist,' to which he replies: 'Racists like me don't plant bombs and don't kill people.' The ordeal ended with the man telling the women to 'get out' and being told 'don't worry, we're leaving'.

The Bobigny Criminal Tribunal concluded that it was a case of religious discrimination and convicted the restaurant manager to a fine of EUR 5,000 (suspended EUR 3,000) and compensation of EUR 1,000. The judgment was also displayed in the restaurant for 2 months.

¹²⁷ District Court Bremen, judgment of 21 June 2013 - 4 S 89/12. Similar cases in the Netherlands. College voor de Rechten van de Mens 17 March 2014 (12 year old girl not allowed to wear a gym headscarf in a karate club, conclusion: discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2014-27>; College voor de Rechten van de Mens 25 September 2012 (no headgear allowed at a sports centre, conclusion: discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2012-153>.

¹²⁸ Brussels Court, 22 December 2009, file No. RG 2009/ 12. 031/A, <http://www.unia.be/nl/rechtspraak-alternatieven/rechtspraak/rechtbank-van-eerste-aanleg-van-brussel-22-december-2009>.

Belgium: Ban on wearing a headscarf in an ice cream parlour / cocktail bar (2015)¹²⁹

Conclusion: discrimination

The manager of an ice cream parlour refused access to two women wearing Islamic headscarves, by referring to a code of conduct that states that “‘headgear’ in general such as hats, caps, headscarves ... are not allowed.” The ban was intended to create a positive climate, social peace and to preserve the image of the bar.

In the first instance, the Court considered that the code of conduct was not discriminatory, because it was a simple dress code. In appeal, the Court concluded that it was indirect discrimination on the ground of religion. Although the aim (positive climate) is legitimate, a general ban is disproportionate and not necessary to create this positive climate. The manager was obliged to adapt the code of conduct by clearly providing an exemption for religious and medical headgear.

Netherlands: Landlord refusing to rent a room to a Muslim woman (2016)¹³⁰

Conclusion: discrimination

An Algerian woman had a telephone conversation with a landlord about a room she wanted to rent. In the conversation the landlord asked her about her education, income, origin and if she wears a headscarf. The woman told the landlord that she wears a headscarf. Then the landlord told her that he didn’t want tenants with religious clothing and he refused to rent the room to her.

Norway: Hair dresser refusing its service to women wearing hijabs (2017)¹³¹

Conclusion: discrimination

Two young Muslim women went to a hairdresser and asked about some prices. The hairdresser stated that she did not give service to ‘people of your kind’, and the women left the salon. The hairdresser was reported to the police (criminal case) and the Equality and Anti-Discrimination Ombud (civil case). The Ombud and the Courts (both district and regional court) found that the hairdresser had discriminated the woman. The hairdresser argued that the hijab is a political, not a religious symbol, but neither the Ombud,¹³² nor the courts agreed with this understanding.¹³³

¹²⁹ Court of First Instance Veurne 2 July 2014 and Court of Appeal Ghent 8 October 2015.

¹³⁰ College voor de Rechten van de Mens 21 June 2016, <https://www.mensenrechten.nl/publicaties/oordelen/2016-58/detail>

¹³¹ College voor de Rechten van de Mens 28 June 2016 (Dutch case about an owner refusing to give a sewing course to a woman with a headscarf, conclusion: discrimination), <https://www.mensenrechten.nl/publicaties/oordelen/2016-62>.

¹³² Equality and Anti-Discrimination Ombud’s opinion of 6 January 2017- nr. 15/2030.

¹³³ The judgment from the regional court (in Norwegian) <https://lovdata.no/dokument/LGSTR/avgjorelse/lg-2016-164427?q=hijab>. 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.

Sweden: No medical service due to patient's unwillingness to shake hands (2016)¹³⁴

Conclusion: no discrimination

The Equality Ombudsman investigated a complaint from a woman who reported that she was refused a medical examination after not wanting to shake hands with her male doctor. The Ombudsman considered that the woman had been subjected to direct discrimination and decided to take the case to court. The District Court of Hässleholm considered that the woman had been discriminated against on the ground of her religion and awarded her compensation. The judgment was appealed by the respondent party. The Court of Appeal held that the Equality Ombudsman had not fulfilled the burden of proof concerning the relationship between the woman's religion and the default medical examination. The Ombudsman appealed the judgment, advocating that there had been an inaccurate assessment of evidence and demanded that the Supreme Court should refer the case for a preliminary ruling to the Court of Justice of the EU. The referral should serve to clarify the interpretation of the rules concerning the interpretation and the placement of the burden of proof (Article 8 Directive 2000/43/EC). The Supreme Court decided in October 2016 to refuse leave of appeal.

5.2.2 Anti-Muslim harassment during the provision of services

Austria: Woman being harassed by her doctor (2017)

Conclusion: discrimination

A patient was wearing a headscarf when visiting a doctor. The doctor repeatedly cast aspersions about the Muslim religion, her position as a woman in society and her willingness to be oppressed by wearing a headscarf. The doctor even called the employer of the patient and continued to complain about her. Although religious discrimination is not prohibited beyond the workplace in the Austrian anti-discrimination legislation, the Austrian Ombud for Equal Treatment came to the conclusion that gender stereotypes about the victim's performance as a woman in western society lead to an intersectional form of discrimination combining sexist and anti-Muslim harassment. A settlement between the doctor and the client has been reached.

Denmark: Harassment at online sales site (2015)

Conclusion: discrimination

A man with an ethnic minority name placed a bid on a car at an online sales site 'Den Blå Avis'. The seller replied in an e-mail 'Fuck you Muslim'. The man who placed the bid filed a complaint to the Board of Equal Treatment arguing he had been harassed on the ground of his race/ethnic origin.

The Board of Equal Treatment stated the defendant knew the plaintiff's name when he wrote 'Fuck you Muslim'. The Board therefore had no doubt this was linked to the plaintiff's ethnicity and found that the plaintiff had been harassed on the ground of his ethnicity. The plaintiff was awarded compensation.

¹³⁴ Details about the case and the judgments (in Swedish) <http://www.do.se/lag-och-ratt/diskrimineringsarenden/vardmottagning-malmo/>.

5.2.3 Accommodating religious prescriptions when providing services

Belgium: Recommendations regarding the allowance of 'burkinis' (2017)¹³⁵

Conclusion: recommendation

The burkini is a swimsuit intended to comply with religious instruction for women to dress modestly. It covers the body from head to ankle leaving the face and the hands revealed. It can also be worn for other reasons, such as medical issues.

In Belgium, a lot of municipalities don't allow such swimsuits in public swimming pools due to safety and hygienic reasons. Other reasons such as equality between men and women, human dignity and ecological reasons (a burkini absorbs too much water) are also invoked.

Unia made a recommendation stating that a general ban on 'burkinis' or other comparable swimsuits is discriminatory, because the ban excludes people (especially women) who want to wear such swimsuits due to religious or medical reasons.

Netherlands: No room for praying provided in an indoor playground (2017)¹³⁶

Conclusion: no discrimination

An owner of four indoor playgrounds asked the Netherlands Institute for Human Rights (NIHR) for an opinion¹³⁷ about his policy to forbid customers to pray in the playgrounds. Muslim customers would like to pray in the playground on a daily basis, preferably in the aisles between the playground equipment and in between tables and chairs. This causes nuisance, because there is no room for it in the playground. Children are running and playing everywhere. Moreover, fights occur with other visitors when Muslim visitors are praying. The playground staff then has to mediate which asks a lot of them. There are also conflicts between the staff and Muslim customers wanting to pray. When the staff requests visitors to stop praying in the playground, visitors state that there is no prohibition mentioned in the house rules. Therefore, the owner of the playgrounds asked the NIHR for an opinion. He would like to know if he can prohibit customers from praying in the playground and if he can place a prohibition sign at the entrance.

The NIHR concluded that the owner would not discriminate on the ground of religion by forbidding Muslim customers to pray in the playgrounds. The owner wants to provide a service in which children are able to play in an indoor area with play equipment. He does not want the area to function as a place where people can pray. The NIHR decided that it is up to the owner to decide for which purpose and for which activities he uses the business area. In addition, the Dutch equality law does not oblige the owner to provide a separate room for visitors to pray. The owner could not refuse visitors entrance to the playground on the basis of their religion, but that is not the case. He is allowed to notify visitors in the house or introduce rules that everybody is welcome at the playground but that it is prohibited to pray there.

¹³⁵ Unia, 10 July 2017, <http://www.unia.be/nl/wetgeving-aanbevelingen/aanbevelingen-van-unia/advies-unia-antwoordt-op-vragen-over-lichaamsbedekkende-zwemkleding>.

¹³⁶ College voor de Rechten van de Mens 20 June 2017, <https://www.mensenrechten.nl/publicaties/oordelen/2017-76>.

¹³⁷ In the Netherlands organizations can ask the NIHR for an opinion themselves. For example if a certain policy would be discriminatory.

5.2.4 Restricting services to certain groups of customers due to religious reservations

European Committee of Social Rights: CGIL v Italy (2016)¹³⁸

Conclusion: violation

The case concerns lack of abortion services provided by the National Health Service due to many doctors and other health personnel objecting to performing or assisting the performing of abortions. In its decision, the Committee unanimously concluded that there was a violation of Article 11 of the European Social Charter (the right to health), read in conjunction with Article E (non-discrimination clause).

European Committee of Social Rights: FAFCE v Sweden (2016)¹³⁹

Conclusion: no violation

In another case before the Committee from 2015, the Federation of Catholic Families in Europe (FAFCE) alleged that Sweden is in violation of Article 11 on the grounds that Sweden has failed to enact a comprehensive and clear legal and policy framework governing the practice of conscientious objection by health care providers in Sweden who then discriminate against these employees on the grounds of religion. The committee found that there had been no violation of the Charter.

Great Britain: Bed and Breakfast Cases (2013, 2017)¹⁴⁰

Conclusion: discrimination, settlement

A series of cases in Great Britain have concerned the way same sex couples have been treated by businesses offering Bed and Breakfast accommodation. In the first (Black and Morgan v Wilkinson), a same sex couple were denied a double room on the grounds that it was against the religious beliefs of the owners. A Court upheld a claim of direct and indirect discrimination on the grounds of sexual orientation. The owners appealed and the Court of Appeal upheld the first instance decision.

Conclusion: discrimination

In Hall and Preddy v Bull however, the hotel owners took a slightly different approach, by not allowing unmarried couples, whether same or opposite sex, to share a double room. The website stated they preferred to let rooms to heterosexual married couples only. The County Court upheld the claim of direct and indirect discrimination. The Court held that the claimants had suffered direct and indirect discrimination. The court stated there was no material difference between marriage and a civil partnership. The refusal to allow the couple to occupy the double room which they had booked was because of their sexual orientation: this was direct discrimination. On appeal, the Court of Appeal upheld the decision. The case went to the Supreme Court where the majority found there

¹³⁸ Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, 11 April 2016, Complaint No. 91/2013.

¹³⁹ Federation of Catholic Families in Europe (FAFCE) v. Sweden, Complaint No. 99/2013.

¹⁴⁰ Hall and Preddy v Bull and Bull [2013] UKSC 73, Black and Morgan v Wilkinson [2013] EWCA Civ 820. and EHRC v Forrest (case settled) see case info here: <https://www.equalityhumanrights.com/en/legal-work-scotland/bull-v-hall-why-supreme-court-found-direct-discrimination> and here: <https://www.equalityhumanrights.com/en/our-work/news/scotland-equalities-commission-concludes-%E2%80%98heterosexual-friendly%E2%80%99-bed-and-breakfast>

was direct discrimination and a minority that there was unjustified indirect discrimination.
Conclusion: discrimination

In EHRC v Forrest, the Bed and Breakfast owners again took a different approach. They used their website to advertise as a 'heterosexual friendly B&B' and stated (in pictures) 'Man + Woman = Marriage'. The Equality and Human Rights Commission (Equality Body) requested that the wording be removed. When it was not, they raised an action for interdict (Injunction). The case settled and the wording was removed, so the defence was never fully explored and there was no judicial decision. **Conclusion: settlement**

England: Restricting adoption services to same sex couples (2012)

Conclusion: discrimination

Catholic Care is an English private adoption agency. Prior to a change in the law it excluded same sex couples from consideration as adoptive parents in line with what it perceived Roman Catholic teaching to be. A change to regulations in 2007 / 08 made this policy illegal.

Catholic Care and another adoption agency, Father Hudson's Society, then applied to the Charity Commission to allow it to amend its charitable objects in order to permit it to restrict its service to mixed sex couples under a limited exception to the Equality Act. The Charity Commission refused the request; both societies initially appealed, but later the Father Hudson's Society withdrew its appeal.

The Tribunal dismissed the appeal in June 2009 stating that Catholic Care's proposed change of objects was unlawful. The case next went to the High Court which sent the case back to the Charity Tribunal in March 2010. Once again, in April 2011, the Charity Tribunal found that the less favourable treatment for same sex couples proposed by Catholic Care could not be justified. Moreover, the possible closure of the service did not outweigh the detriment to same sex couples and the detriment to society generally of permitting the discrimination. When the case was brought before the Upper Tribunal in November 2012, Catholic Care argued that by restricting its service in this way, it could continue to raise donations and prevent its closure; it also argued that the service denied to same sex couples would be available via other voluntary adoption agencies and local authorities.

The Upper Tribunal disagreed and found against Catholic Care, which stated publicly that it would be forced to close its adoption service as a result. It appears to have done so; adoption is not listed as one of the services it provides on its website.

Northern Ireland: Refusal to bake a cake supporting gay marriage (2016)¹⁴¹

Conclusion: pending

Ashers Bakery refused to bake a cake for Gareth Lee bearing the slogan 'Support Gay Marriage' with the Sesame Street puppets Bert and Ernie. The Equality Commission for Northern Ireland supported legal action against the bakery for alleged discrimination on grounds of sexual orientation. The bakery and the owners denied that they had discriminated unlawfully and that they were entitled to refuse to supply services which could conflict with freedom of conscience or religious belief or political opinion with respect to opposition to same sex marriage. The Court at first instance found

¹⁴¹ Gareth Lee v. Ashers Bakery, 19 May 2016, see http://www.bailii.org/ew/cases/Misc/2015/NICty_2.html.

that Mr. Lee was discriminated against on grounds of sexual orientation and under Northern Ireland legislation prohibiting discrimination on the grounds of religious belief and/or political opinion.

The bakery appealed to the Court of Appeal in Northern Ireland. The NI Attorney General intervened arguing that the legislation which provided redress for Mr. Lee was unconstitutional. The Court of Appeal accepted that the defendants were Christians and that because of their religious beliefs they felt that they could not promote same-sex marriage. Nevertheless, they were in business to provide service to all – and that was what the law prescribed. The defendants were not a religious organisation: they were a business for profit and there were no exceptions available to them. Mr Lee had been discriminated against on grounds of sexual orientation directly on both political and religious grounds. As to Article 9 ECHR, the Court found that the Bakery and the owners were limited as to how they could manifest their beliefs. There were competing human rights in play in the case; and the law limited the manifestation of the defendants' religious beliefs. The defendants were entitled to hold and manifest their religious beliefs but only in accordance with the law. The Attorney General's claims were dismissed. The case has been referred to the UK Supreme Court, by way of reference from the Attorney General for Northern Ireland and by way of application for appeal by the Ashers Baking Company. These matters will be heard by the Supreme Court sitting in Belfast on 1-2 May 2018.

Netherlands: Refusing hall rental for a meeting with youngsters coming out (2014)¹⁴²

Conclusion: discrimination

A working group called Young&Out¹⁴³ contacted a landlord about the lease of a hall in a church building.¹⁴⁴ In the application form they mentioned that they were searching for space to organize meetings for youngsters under 18 years who are coming out. The landlord invited the group by e-mail to view the location and discuss the possibilities. He also wrote that the space he leases is owned by the church council and that there are certain demands with regard to the (nature of the) rental activities. This could mean that the church council would not want to lease the hall for the meetings. If the group is still interested after the visit he will discuss the application with the church council. After the visit of the location the landlord informed the working group that he contacted the church council. Their reaction to the request was: *"Homosexuality is a hot topic in society but also in the church. The same goes with regard to the requested location. However, as a church council we have a certain responsibility to our community, especially with ethical matters like this one. Therefore it would not be wise to rent out the location to organisations like the working group. Surely there will be other more neutral locations available for the working group where no ethical matters arise."* The landlord explained that he had to follow the church council and apologized. The NIHR decided that in light of the content of the e-mail there was direct discrimination in this case on the ground of sexual orientation. The text in the e-mail shows that the church council linked their rejection to the sexual orientation of members of the working group.

¹⁴² College voor de Rechten van de Mens 8 September 2014, <https://www.mensenrechten.nl/publicaties/oordelen/2014-109/detail>.

¹⁴³ Part of a Dutch association for the integration of homosexuals.

¹⁴⁴ The NIHR also handled the complaint against the landlord. See College voor de Rechten van de Mens 9 September 2014 (conclusion: discrimination, because the landlord has his own responsibility to refrain himself from discriminatory treatment of customers, <https://www.mensenrechten.nl/publicaties/oordelen/2014-110>).

Poland: Printing company refusing to print name and logo of a LGBTI foundation (2016)¹⁴⁵

Conclusion: discrimination

The Commissioner for Human Rights informed the Police about the possible offence committed by a printing company which refused to print a poster (roll-up) with the name and logo of the 'LGBT Business Forum' Foundation. The employee sent an email to the foundation saying that he did not support promotion of LGBT movements with his work. In July 2016, the Court decided that the employee is guilty of the offence and that he had no right to refuse service on a discriminatory basis. Because of the difficult personal situation of the employee, the court decided not to fine him. The court of second instance upheld the decision of the court of the first instance.

5.3 Conclusion

Although efforts have been made to enhance protection, the gap in protection from religious discrimination beyond the workplace could not be closed. This is despite evidence and a significant case load proving 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 Horizontal Directive Proposal as soon as possible.

Several conclusions can be drawn from the cases examined above:

- In relation to religious discrimination in the provision of goods and services, justifications for discriminatory behaviour towards certain religious groups have to be examined thoroughly, be they health and safety concerns, the need to maintain security or the aim of enhancing integration. There may be legitimate reasons to refuse a service to persons wearing certain forms of headgear, but as several sports and fitness cases demonstrate, there has to be clear evidence of an actual health and safety risk. If this relation cannot be proven, the prohibition may constitute direct (if only Muslim headscarves are forbidden) or indirect discrimination (if all forms of headgear are forbidden).
- In relation to security concerns, these often arise in the context of public security issues in places such as airports. The need to ensure the safety of the public and prevent crime is usually not apparent when it comes to the conduct of private companies.
- It is also questionable when a private company is arguing that integrating Muslims by requiring women to remove their headscarves constitutes a legitimate aim. It has to be examined thoroughly when private organisations seek to justify discrimination by appealing to matters normally pertaining to public policy.
- Where national anti-discrimination law does not protect from discrimination on the grounds of religion or belief, it might need a closer look whether the behaviour at stake does not also constitute other or intersectional forms of discrimination by entailing racial or gender stereotypical attitudes. Harassment relating to the Muslim headscarf might therefore also fall under the scope of existing national standards deriving from the Racial and Ethnic Origin Directive or/and the Gender Goods and Services Directive.

¹⁴⁵ More details: <https://prodiversity.pl/2017/04/polish-court-the-printing-company-cant-deny-lgbt-foundation-access-to-their-services/>.

- In the constellation of discriminatory behaviour that seeks justification through Article 9 of the European Convention on Human Rights claims, case law proves that companies or their employees providing services to certain groups of persons might not manifest one's religion at any time and place of one's own choosing: It particularly does not justify a policy which places people of a certain sexual orientation at a particular disadvantage. 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.
- A requirement to provide a non-discriminatory service is potentially a legitimate reason to limit an enterprise or its employees' ability to manifest their religion or belief at work. Factors which will be considered 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; and whether permitting the exemption requested by the employee on the basis of their religion or belief would amount to unlawful discrimination against others.
- It might be useful to consider issuing guidance at the EU level on principles established in the area of law concerning conflicts between religion and sexual orientation.

6 Manifesting Religion and Belief in Public

This chapter focuses on the manifestation of religion or belief in public. The main issues that will be discussed are the prohibition of the full-face veil in public areas and the prohibition of the so-called burkini on public beaches.

In a few European countries the wearing of full-face veils in public spaces is prohibited by law and can lead to sanctions (i.e. fines, prison, administrative fines). The possibility of wearing this religious garment is increasingly becoming an exception. Meanwhile, the European Court of Human Rights has determined different cases about the compatibility of such ban with different fundamental rights, including freedom of religion or belief. The conclusions of these cases will be explained further in this chapter.

A specific French problem is the controversial ban on the burkini on public beaches. The situation attracted a lot of national and international media attention. This also led to discussions about the possibility of wearing a burkini in public beaches in Belgium. The consensus was that such a general ban is disproportionate, but a ban in public swimming pools may be allowed due to safety and hygiene reasons under certain conditions. Unia, the Belgian Equality Body, examined the arguments put forward in favour of such a ban. More information about this analysis can be found in Chapter 3.

This chapter looks firstly at the European equality and human rights legal frameworks concerning these issues. Concerning the face veil, this chapter will give an overview of the national legislation or regulations that have been introduced. Secondly, the report examines the issues in detail: the case law before the ECtHR, the arguments that have been put forward in relation to proposed legislation as to why the bans are lawful. The specific French controversy about the burkini will also be given attention. Finally, conclusions are drawn from the main issues that arise.

6.1 Legal framework

6.1.1 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 in public spaces. 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.

6.1.2 European Convention on Human Rights

The right to freedom of religion under Article 9 of the Convention is directly relevant to such bans. The right to freedom of religion includes the freedom to manifest one's religion, both privately and publicly. 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 Convention 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.’¹⁴⁶

Concerning the full-face veil, Article 2 Protocol 4 of the Convention provides a right 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.

6.2 Full-face veil

6.2.1 National laws banning full-face veils: an overview

In March 2010, Thomas Hammarberg, the Council of Europe’s Commissioner for Human Rights, stated that bans on the full-face veil would not liberate oppressed women but might instead lead to their further alienation from European societies. In his view, ‘a general ban on such attire would constitute an ill-advised invasion of individual privacy,’ raising ‘serious questions about whether such legislation would be compatible with the European Convention on Human Rights.’ He also 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’.

In June 2010, the Council of Europe’s Parliamentary Assembly passed a recommendation, ‘calling on member states not to establish a general ban of full veiling or other religious or special clothing.’ In July 2010, Thorbjørn Jagland, Secretary General of the Council of Europe, stated that bans on the full-face veil ‘missed the point of European democracy and human rights’ and ‘feed on irrational, populist fear of difference, fear of the unfamiliar.’

Several NGOs (Human Rights Watch, Amnesty International, Article 19, la Ligue des droits de l’Homme and others), the Human Rights Commission of the Council of Europe, 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 State (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.

This did not prevent various countries from adopting a ban. Some countries across Europe have wrestled with the issue of the full-face veil, in various forms such as the body-covering burka and the niqab, which covers the face apart from the eyes. A number of countries have in the last years developed laws to outlaw the wearing in public areas of the full-face veil or other full coverings of faces, while other countries do not have such bans, or only have specific laws to deal with imminent threats of crime or violence.

¹⁴⁶ ECRM 22 October 1998, Kara t. VK.

On 11 April 2011 France became the first European country to ban the full-face veil in public places. Anyone who disobeys this law is fined with a EUR 150 penalty or with the obligation to attend a course in French citizenship. In September 2011 the first fines were imposed relating to the ban and the defendants appealed the decision and fine to the ECtHR. This resulted in the S.A.S. against France decision of 26 June 2014 (see below).

Belgium followed this example: the Belgian ban on face coverings was voted on 28 April 2011 and came into force on 13 July of the same year. It stipulates that those who, except for contrary legal provisions, are present in places that are accessible to the public with their faces completely or partially covered or hidden, such as not to be recognizable will be punished with a fine of between EUR 15 to 25 and/or detention of 1 to 7 days.

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. In December 2012, Belgium's Constitutional Court rejected appeals for the ban to be annulled, ruling that the ban does not violate fundamental rights such as the right to freedom of religion, the right to freedom of expression and the right to private life, provided that the ban is not interpreted in such a way that it also covers places of worship. Before the law was passed, the face veil was already banned in several districts under old local laws originally designed to stop people masking their faces completely at carnival time. It has to be borne in mind that in 2011, the Brussels Police Tribunal in Belgium already ruled that the fine of EUR 200 imposed on a woman wearing the niqab was unlawful and void for breaching Article 9 of the Convention. 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.¹⁴⁷

In the Netherlands, the House of Representatives adopted a legislative proposal about a partial ban on wearing the facial veil in public places, including schools, hospitals, government buildings and public transport. It will go to the Senate, where it has to be approved before becoming law. According to the latest information, the proposal is still pending.

In Italy, there are laws that prohibit helmets and clothing that make identification difficult in public. In December 2015, Lombardy, the wealthiest region in Italy, approved a ban that explicitly prohibits Islamic facial coverings in hospitals and local government buildings.

In other European countries, municipal councils have adopted regulations banning the burqa on the grounds of public security. For example in Barcelona and Lérida: On 8 October 2010 the municipality of Lérida – like Barcelona and other municipalities – adopted an amendment to the general municipal ordinance on civil rights and responsibilities and living together, authorizing specific by-laws to limit or prohibit access to municipal areas or premises used for public services for persons wearing full-face veils, balaclavas, full-face helmets or other forms of clothing or accessories preventing or hindering identification and visual communication. On the same day, it amended to the same effect its specific by-laws relating to the municipal archives, municipal offices and public transport.

¹⁴⁷ Constitutional Court, 6 December 2012, decision No. 145/2012, <http://www.const-court.be/public/f/2012/2012-145f.pdf>

Relying inter alia on Article 16 of the Constitution – concerning freedom of opinion, religion and worship – and referring to Article 9 of the Convention, an association¹⁴⁸ unsuccessfully lodged an application for annulment with the Catalonia High Court of Justice.

Ruling on an appeal on points of law, the Supreme Court quashed the judgment of the Catalonia High Court of Justice on 6 February 2013¹⁴⁹ and annulled the amendments to the general municipal ordinance and to the specific by-laws concerning the municipal archives and municipal offices, by arguing that it could not be said that ‘legitimate aims’ were constituted by the protection of ‘public tranquillity’, ‘public safety’ or ‘public order’, since it had not been shown that the wearing of the full-face veil was detrimental to those interests. It made the same observation for the ‘protection of rights and freedoms of others’, since the term ‘others’ did not designate the person who sustained an interference with the exercise of the right to respect for freedom of religion but rather third parties. The Supreme Court went further and stated that it is not possible to restrict a constitutional freedom based on the supposition that the women who wore it did so under duress. It thus concluded that the limitations in question could not be regarded as necessary in a democratic society. Lastly, referring to academic legal writings, it stated that a ban on the wearing of the full-face veil would have the result of isolating the women concerned and would give rise to discrimination against them, and would thus be incompatible with the objective of ensuring the social integration of groups of immigrant origin. The Supreme Court ruling did not however preclude the possibility that the legislator (the Spanish Parliament) considers as appropriate a regulation on the burka. This means that it is possible to ban the wearing of the burka and niqab in Spain, but it must be done through a law, as it affects the exercise of a fundamental right.

Bulgaria has also banned women from wearing veils covering their faces in public. According to Article 6 of the Bulgarian Act Restricting the Wearing of Clothing Concealing or Hiding the Face ‘any person, who wears clothing that partially conceals or completely hides the face thereof in a public place, shall be liable to: 1) a fine amounting to BGN 200: for a first violation; 2) a fine amounting to BGN 1,500: for each subsequent violation. If the offenders are public officials, the sanction shall be: 1. a fine amounting to BGN 500: for a first violation; 2. a fine amounting to BGN 2,000: for each subsequent violation. The same sanction shall likewise be imposed on the abettors and connivers’.

Austria is the latest European country to ban face veils in public. Under this law it is illegal in Austria to cover or hide one’s face with clothing or other objects (e.g. masks, etc.) in public buildings or public places (including public and private means of transport) in a way that the person cannot be recognized. However, it is not considered as an infringement if the covering or hiding is due to regulations of federal or state laws, events with artistic, cultural or traditional background, occurs within sporting activities or has health- or work-related causes. The penalty for infringement is a fine of up to EUR 150. The law took effect on 1 October 2017.

¹⁴⁸ Watari Immigrants Association for Freedom and Justice (Asociación Watani para la libertad la justicia, a Muslim advocacy group)

¹⁴⁹ Supreme Court of Spain, Chamber for Contentious Administrative proceedings, Section VII, 6 February 2013, decision [693/2013](http://www.poderjudicial.es/cgpi/es/Poder%20Judicial/Tribunal%20Supremo/Sala%20de%20prensa/El%20Tribunal%20Supremo%20anula%20la%20prohibicion%20del%20velo%20integral%20en%20Lleida%20los%20ayuntamientos%20carecen%20de%20competencias%20para%20limitar%20un%20derecho%20fundamental), Link: [http://www.poderjudicial.es/cgpi/es/Poder Judicial/Tribunal Supremo/Sala de prensa/El Tribunal Supremo anula la prohibicion del velo integral en Lleida los ayuntamientos carecen de competencias para limitar un derecho fundamental](http://www.poderjudicial.es/cgpi/es/Poder%20Judicial/Tribunal%20Supremo/Sala%20de%20prensa/El%20Tribunal%20Supremo%20anula%20la%20prohibicion%20del%20velo%20integral%20en%20Lleida%20los%20ayuntamientos%20carecen%20de%20competencias%20para%20limitar%20un%20derecho%20fundamental)

In June 2017 Norway also proposed a ban on the full-face veil as politicians believe it damages communication between teachers and pupils. The ban targets the niqab, burkas, balaclavas and masks, and would apply in nurseries, schools and universities.

It looks like Denmark might become the next European country to restrict the burqa and the niqab, worn by some Muslim women, after recently, in February 2018, a bill backing a ban on facial covering was submitted to the Danish parliament.

These laws have in common that they do not refer in particular to the full-face veils and are framed in a neutral manner. However they outlaw the use of garments such as the niqab and the burqa and have consequently a specific negative effect on Muslim women who, for religious reasons, wish to wear the full-face veil in public.

Overview

Country	Nation-wide ban on face veils by law	Partial ban on face veils by law	Partial/general ban on face veils by by-laws	Proposition of general/partial ban on face veils
France	X			
Belgium	X			
Netherlands				X
Italy			X	
Spain			X	
Bulgaria	X			
Austria	X			
Norway				X
Denmark				X

6.2.2 Cases and key issues

As mentioned before, different European countries have adopted nation-wide bans on face veils.

It is notable that the opinions of the different Councils of State when they had to give advice, which clearly are against a general face veil ban, were not taken into account and followed by the concerned governments.

The French Council of State considered for example that such a ban is ‘fragile in light of the principle of non-discrimination’ and, as such, felt that it could not be based on ‘any indisputable legal foundation’. Secularism could not provide the basis for a general restriction on the expression of religious convictions in the public space, as the ECtHR had ruled in February 2010 in the case *Arslan and others v. Turkey* (application No. 41135/98). The Council of State recalled that the secular principle concerns relations between public authorities and the various religions or persons who subscribe to them. It is only ‘directly binding on society or individuals in the case of specific demands made on certain public services (as in the case of educational institutions)’.

Comparable arguments were developed by the Advisory Department of the Council of State of the Netherlands. The Council of State stated that the government should not interfere in the personal choice of a woman wearing the full veil. Her personal choice should prevail. The Council went further and argued that subjective feelings of insecurity are not sufficient to introduce such prohibition. The conclusion was that a general ban of the full-face veil is a disproportionate interference with freedom of religion or belief.

In order to justify these bans on the full-face veil in public places, generally three main arguments are invoked.

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 a 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’.

The rationale is 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.

Public security

A second type of argument is public security. According to this argument, the police need 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, Belgian and Dutch 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 woman wearing a burqa comes to pick up her children without being able to be identified.

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 recognizable and identifiable. Today, the human face is the instrument of identification and socialization. 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.

The important question is if these arguments are sufficient for a limitation of individual rights. The ECtHR clarified this issue in the *S.A.S. v. France* of 1 July 2014 and confirmed this decision in the *Belcacemi and Oussar v. Belgium* and *Dakir v. Belgium* cases of 11th July 2017.

ECtHR: S.A.S. v. France (2014)

Conclusion: no violation

The ECtHR considered that the overall prohibition provided for in the 2011 French Law, sanctioned by fines of EUR 150 or citizenship classes, or both, for any woman caught covering her face, is compatible with the European Convention on Human Rights.

The applicant, a French national who is a practicing Muslim challenged the French law banning the covering of the face in public. The applicant wore a burqa and niqab in accordance with her religious faith, culture and personal convictions. The applicant argued that by preventing her from wearing the burqa/niqab, the ban violated her rights under Articles 3, 8, 9, 10, 11 and 14 of the Convention.

The Court rejected the two principal arguments advanced by the French government to justify the blanket ban—that the ban was a necessary and proportionate response to threats to public safety and an affront to gender equality and human dignity, of both those who chose to wear it and those who do not.

The ECtHR accepted the justification that ‘a State may find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud’ (para 139). However, although the restriction pursued a legitimate aim, the ECtHR did not find that it was necessary in a democratic society. In the absence of ‘a general threat to public safety’, the ECtHR found that a blanket ban was disproportionate (para 139).

Instead, the Court considered that the ban on the wearing of this religious clothing was justified by the necessity of ‘living together’, as part of the ‘protection of the rights and freedoms of others’ (para

121). The ECtHR accepted that a State gives particular weight to the interaction between individuals and considers this interaction to be 'adversely affected by the fact that some conceal their faces in public places' (para 141). The conclusion is that the ban can be regarded as justified 'solely in so far as it seeks to guarantee the conditions of "living together"' (para 142).

With regard to whether the ban was sufficiently proportionate to this aim, the ECtHR acknowledged that the blanket ban was broad, carried the possibility of criminal sanctions, primarily affected Muslim women, and could result in the isolation and restriction of autonomy of women who choose to wear a veil over their faces (paras 145 and 146). However, the ECtHR also reasoned that the ban only restricts certain types of clothing, was not motivated by the religious significance of full-face veils, and that the penalty for a violation is relatively minor (paras 151 and 152).

The State proposed that wearing clothing that conceals the face in public was incompatible with the 'ground rules of social communication' (paras 153 and 154): *'From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society (see para 128 above). It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.'* (para 153).

The ECtHR also noted that France had scope to interpret the European Convention on Human Rights, as the issue was a choice of society decided in a democratic process. The lack of consensus in Europe on this issue was also relevant (para 156). As such, ECtHR found the law to be proportionate to its legitimate aim, and therefore, not to contravene Articles 8 or 9 of the Convention.

ECtHR: Belcacemi and Oussar v. Belgium and Dakir v. Belgium (2017)

Conclusion: no violation

Predictably, the ECtHR came to the same conclusion in the Belcacemi and Oussar v. Belgium and Dakir v. Belgium cases of 11 July 2017.

In both cases the applicants contested the ban; however the facts are slightly different.

In Belcacemi and Oussar, the applicants were fined based on a municipal face covering ban; after the enactment of the national ban, they filed an application for suspension and annulment of the Law with the Belgian Constitutional Court. As mentioned before this appeal was dismissed. In Dakir, the case originates from the decision of three Belgian municipalities (Pepinster, Dison and Verviers) to adapt a pre-existing municipal by-law by inserting a specific provision which prohibits the face covering. The applicant submitted to the Council of State an application for annulment of this provision, which was rejected for not complying with an admissibility condition.

By referring to S.A.S. v. France, the Court found the ban imposed by the joint by-law of municipalities in the concerned police area could be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'. It therefore held that the ban could be regarded as 'necessary in a democratic society'.

Again, leaving a wide margin of appreciation to the national authorities, the Court held that the decision on whether or not to prohibit the wearing of full-face veil in public places is ‘a choice of society’. The contested law aims to protect a form of interaction which, according to Belgian authorities, is necessary to assure the functioning of a democratic society. The ECtHR concluded that the face veil is a practice that is incompatible with ‘the modalities of social communication, and more generally the establishment of human relations indispensable for life in society’.

Analysis

The respect for the minimum requirements of ‘life in society’ or ‘living together’ was found legitimate by the ECtHR.

It is remarkable that the ECtHR changed its view on the practice of wearing religious clothing by Muslim women. In *Dahlab*, and as confirmed in *Leyla Sahin* (which is about the headscarf), the Court stated that: ‘the wearing of a headscarf ... appears to be imposed on women by a precept which is laid down in the Koran and which ... is hard to square with the principle of gender equality’ and that it ‘appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination’ (para 13). In *S.A.S.*, however the ECtHR refused to accept it as a legitimate aim:

‘A State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.’ (para 119)

The protection of human dignity is also rejected in a similar way as a legitimate aim by the ECtHR: *‘is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy’ (para 120).*

In this way, the ECtHR gives great importance to the applicants’ autonomy and does not assign an interpretation to religious clothing that is often not shared by the women concerned. The ECtHR also clearly gives a message that society cannot impose its view on a particular religious dress on the women concerned. This development in the ECtHR’s jurisprudence is welcomed and hopefully marks the end of the ECtHR making value judgments about items of religious clothing.

On different occasions, the ECtHR has recognized the negative and traumatizing impact that the ban might have on the concerned women (para 146 and para 152).

Another important element in the judgment is that the Court expresses its concern about the Islamophobic remarks preceding the adoption of the law and warns of the ‘risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance’ and further reiterates ‘that remarks which constitute a general, vehement attack on a religious or ethnic group are incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention and do not fall within the right to freedom of expression that it protects’ (para 149). The Court also tries to acknowledge the broader impact of this legislation on the Muslim community ‘including some members who are not in favour of the full-face veil being worn’ (para 148). The

concern of the many human rights organizations about the disproportionate character of the ban is also mentioned.

Dissenting Opinion

Two judges issued a joint dissenting opinion arguing that the French law violated the applicant's rights under Articles 8 and 9 of the Convention. They called into question both the purported legitimate aim of the law and its proportionality.

The dissenting judges asserted that the majority failed to show 'which concrete rights of others within the meaning of Article 8 (2) and Article 9 (2) of the Convention could be inferred from the abstract principle of "living together" or from the "minimum requirements of life in society."' (paras 3–10). The dissenting judgments expressed doubt that the law pursues any legitimate aim under the Convention (para 12).

The dissenting judges also challenge the proportionality of the ban by asserting that the State should not have been granted such a broad margin of appreciation in a case involving such a close connection between the prohibited dress code and an individual's 'religious faith, culture, and personal conviction' (paras 16 and 17). The dissenting judges also pointed out that the restrictive measure cannot be expected to have the desired effect of liberating women presumed to be oppressed, but will further exclude them from society and aggravate their situation. They concluded by pointing out that the French government failed to show why less restrictive measures could not have been put into place (paras 13–24).

Comments

Taking into account these arguments, it is indeed remarkable that the argument of 'living together' is accepted without much discussion as a legitimate aim, despite it being a general and vague concept. Communicating is obviously easier when seeing each other's face. However, as the ECtHR admits itself, the notion is flexible and risks abuse (para 122). The ECtHR recognizes that it should 'engage in a careful examination of the necessity' of the blanket ban, but in the end accepts the wide margin of appreciation of France (para 155). These two concepts could seem incompatible with one another. Due to the complexity of the issue, the specific Islamophobic context of discussions prior to the adoption of the law (as noted by the ECtHR itself) and the negative impact on some Muslim women, the ECtHR could have engaged in a more thorough examination of the necessity. These judgments could be compared with some of the ECtHR decisions about Article 10 of the Convention (freedom of expression), where the ECtHR has always emphasized that 'freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. The freedom of expression is not only applicable to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society' (Handyside v. the United Kingdom, judgment of 7 December 1976, para 49). The parallel with Article 10 is an interesting one because the full-face veil can also be considered as a form of symbolic speech.

It is also questionable whether the State can impose a criminal law requirement on its citizens to communicate with each other. Many people choose not to be available for communication. With the exception of certain specific situations such as guaranteeing road safety, identity checks, getting children from school, etc., is it not a matter of individual freedom whether or not people want interaction with others on the street. The dissenting judges identified counterexamples where face coverings are allowed¹⁵⁰.

Even if the legitimacy of this goal is accepted, such a severe restriction of fundamental rights, linked with penalties, could be disproportionate. There are many less intrusive measures which could potentially be used in order to achieve changes of attitudes and behaviour in this field, for instance a ban that only applies in specific situations.

The overall conclusion is that the arguments contained within the judgment could be perceived as inconsistent. On the one hand, the arguments contain well-developed reasoning on the issues of gender equality, human dignity and public security. On the other hand, the ECtHR provided almost no analysis of what the concept of 'living together' entails. The Court seems to accept the vague principle of imposing blanket bans that include a majority view, rather than the protection of individual rights. As the dissenting judges argue, 'it still remains the task of the Court to protect small minorities against disproportionate interferences' (para 20).

6.3 Burkini

France dealt with a specific problem in 2016: thirty seaside municipalities adopted by-laws forbidding access to public beaches and bathing in the sea to each person wearing attire which was not proper and respectful of good morals, secularism, health and security. Even if these regulatory measures did not mention them expressly, Muslim women wearing a burkini on the beach were targeted and thus some of them were told by the police to leave the beach and even fined in several towns. The ban generated broad international criticism.

These by-laws have been challenged before the administrative courts and tribunals and in particular the one adopted by the Mayor of Villeneuve-Loubet, a city near Nice which had just been struck by a violent terrorist attack. Banning the burkini was viewed as a response to growing terror concerns and heightened tensions after a series of terror attacks in France.

After the dismissal of the petition by the Nice administrative tribunal on 22 August 2016, the emergency interim judge of the Council of State ordered a decision banning clothes demonstrating an obvious religious affiliation, worn by swimmers on public beaches, to be suspended.

The French administrative court ruled that the mayor may take general police measures only when required for maintaining peace and good order, safety, security and public health. Decisions made by any mayor of a city located on the beach, aimed at regulating the access to the beaches and swimming, must therefore be adequate, necessary and proportionate with respect to what is strictly necessary to maintain peace and good order. The need to maintain peace and good order must be specified according to relevant circumstances, time and location, appropriate safety measures in beach access, safety of the swimmers and also hygiene and decency on the beach. The mayor should

¹⁵⁰ See paragraph 9 of the joint dissenting opinion: 'examples that are perfectly rooted in European culture, such as the activities of skiing and motorcycling with full-face helmets and the wearing of costumes in carnivals'

not take other factors into account, and any measure restricting public liberties must be justified by clearly identified risks of breaches against peace and good order.

The emergency interim judge of the Council of State then looked at the Mayor's order and considered that no evidence was brought before him to show that risks of breaches against peace and good order existed on the beaches of Villeneuve-Loubet, in relation to bathing attire. Considering that such risks did not exist, the concern resulting from recent terrorist attacks, in particular the attack that took place in Nice on 14 July, were not sufficient to legally justify the mayor's order. The emergency interim judge of the Council of State concluded that, in such conditions, the mayor could not exercise his powers in forbidding people from having access to the beach and swimming, insofar as such measures were justified neither by risks of breaches against peace and good order, nor by reasons of hygiene or decency. The conclusion is that the so-called 'burkini ban' had seriously infringed upon fundamental liberties such as religious freedom and individual freedom in a manner that was clearly illegal. Considering also the urgent nature of the case, the emergency interim judge of the Council of State declared the decision of the judge of the Administrative Tribunal of Nice to be null and void, and ordered this provision to be suspended.

However, on 3 July 2017, the Marseille Administrative Court of appeal dismissed the petition of the League of Human Rights against the 'anti-burkini' by-law issued on 16 August 2016 by the Socialist mayor of Sisco (Haute-Corse) given the proven risks of disturbing public order. The Court admitted that this regulation was adopted due to several incidents attributed to a dispute over the wearing of this bathing suit for Muslim women. It recalled in a statement that a violent altercation had occurred between inhabitants of the commune and families of Maghrebian origin, whose wives wore burka or hijab. A violent fight broke out between residents and a group of about ten people outside the commune. Five people were wounded, three vehicles burned and a hundred French national police officers and gendarmes had to intervene. As a result of this altercation, more than 300 people marched through the streets of Bastia in a 'very tense atmosphere', recalled the Court of appeal.

6.4 Conclusion

Although the full-face veil and the burkini are not comparable, they are both the subject of the will of politicians to legislate against forms of religious garments. The larger question is whether a society should ban articles of religious clothing for different reasons, such as public security, equality between women and men, etc. It is clear that the arguments that are invoked to ban a full-face veil in public places cannot be applied to a so-called burkini ban at public beaches, due to the fact that a burkini does not cover the face in contrast to the full-face veil. The French burkini-bans can be perceived to be a response to increased tensions and public fears following the terrorist attacks. We can conclude that a general ban on burkinis in public beaches is disproportionate and misguided and sends the wrong message. Indeed the burkini does not pose a threat to public safety and could be perceived as a 'collective punishment' of Muslims following the terror attacks.

Concerning the bans on the full-face veil, as stated before the jurisprudence of the ECtHR states clearly that the 'living together' argument is the only valid argument for a blanket ban. This abstract principle in its current form does not contribute to legal certainty as it is not sufficiently delineated what it means in respect of restricting fundamental rights, including the right to freedom of religion.

7 Public Administration and State Functions

This chapter draws together reported cases at international and national level alongside case examples submitted by equality bodies in the context of public administration and state functions. This is a new chapter which expands upon some of the themes which emerged in Chapter 3 on provision of goods and services of the 2011 report, but with a focus on public functions as opposed to private services. Therefore some of the Strasbourg cases pre-date the 2011 report. The cases submitted for this chapter have been grouped under the sphere in which the alleged violation or discrimination occurred;

1. Conscientious objection to military service,
2. Religious headgear in the context of administrative functions
3. Regulation of places of worship, burial and cremation
4. Social security and taxation
5. Observance of dietary laws

The scope of the Framework Directive does not extend to these areas. Social security is expressly excluded from the Directive, under Article 3 (3). Some national legal systems prohibit religion and belief discrimination in the context of services and public functions and some equality bodies have powers in this sphere so in part 4 there is some reference to findings regarding discrimination.

However, the majority of cases in this chapter are considered under Article 9 of the European Convention on Human Rights, some alongside Articles 8, 10, 14 and Article 3 Protocol 1. There is also some reference to the International Covenant on Civil and Political Rights (ICCPR) (Articles 18 and 26).

The approach taken in this chapter is to take as its starting point the issues and general principles that have been considered at ECtHR level, before looking at a featured case and considering relevant trends and developments in case examples at national level. In doing so, the chapter draws out examples of positive obligations and legitimate aims. This assists in this complex and sensitive area, where there is usually a wide margin of appreciation given to states to determine to what extent it is necessary to limit the individual right to freedom of thought, conscience and religion.

7.1 Conscientious objection to military service

7.1.1 Background and international cases

Cases concerning conscientious objection to military or civil service based on religion or belief were reported by the **Greek** Ombudsman and the Non-Discrimination Ombudsman for **Finland**.

There have been significant developments in this area in a series of ECtHR cases dating back to the European Commission of Human Rights in the seventies and eighties. The Commission consistently held that in interpreting Article 9 of the Convention, it also had to take into consideration the terms of Article 4 (3) (b) of the Convention which states that forced or compulsory labour shall not include *'any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service exacted instead of compulsory military service'*. In the Commission's view, a choice was left to the High Contracting Parties to the Convention whether or not to recognise

conscientious objectors and, if so recognised, to provide some substitute service. It followed that these Articles did not prevent a State which had not recognised conscientious objectors from punishing those who refused to do military service.¹⁵¹

In *Thlimmenos v Greece*¹⁵² however, the ECtHR held that there was unlawful religious discrimination when the Applicant (a Jehovah's Witness) was denied entry to the accountancy profession on the basis that he had a conviction for refusing to wear military uniform due to his pacifist beliefs. The Court held there was no need to consider Article 9 separately as there was a violation of Article 14 which fell within the ambit of Article 9. The Court reached the seminal conclusion that the right not to be discriminated against is also violated when states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different.¹⁵³ Although the Court did not determine the Article 9 claim, the applicant submitted that the Commission's case law, to the effect that the Convention did not guarantee the right to conscientious objection to military service, had to be reviewed in the light of present-day conditions.

In *Bayatyan v Armenia*¹⁵⁴ at first instance in 2010, the Court confirmed the Commission's approach to Article 9 in a case concerning a Jehovah's Witness charged with draft evasion and sentenced to imprisonment. However, the case was referred to the Grand Chamber which reassessed this position by considering the *travaux préparatoires*, and by applying the *living instrument* principle in light of an emerging consensus on standards as well as the ICCPR and the Charter of Fundamental Rights of the European Union. The Grand Chamber held for the first time that although Article 9 did not explicitly refer to a right to conscientious objection, opposition to military service motivated by a serious and insurmountable conflict between the obligation to serve in the army and an individual's conscience or deeply and genuinely held religious or other beliefs constituted a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.¹⁵⁵ The Court concluded that the applicant's conviction was an interference with Article 9 which was not necessary in a democratic society.

In *Savda v Turkey*¹⁵⁶ in 2012 the ECtHR went a step further and considered that there was a positive obligation on the authorities to make available an effective and accessible procedure which would have enabled the applicant to have established whether he was entitled to conscientious-objector status, in order to protect his interests as guaranteed by Article 9.

7.1.2 Featured case: (Greece) independence of committee determining conscientious objector status: Violation of Article 9¹⁵⁷

The Greek Ombudsman has previously raised concerns about the issue of the composition and independence of the Armed Forces Special Committee, responsible for examining applications for conscientious objector status. In this ECtHR (First Section) case, two of the three civilian members of

¹⁵¹ See, for example *X v Austria* 5591/72, *X v Germany* 7705/76 and *A v Switzerland* 10640/83

¹⁵² *Thlimmenos v Greece* 34369/97 6th April 2000

¹⁵³ *Ibid* at para 44

¹⁵⁴ *Bayatan v Armenia* 23459/03

¹⁵⁵ *Ibid* at para 110

¹⁵⁶ *Savda v Turkey* 42730/05 see para 99

¹⁵⁷ *Papavasilakis v Greece* 66899/14 15th September 2016 see para 60

the Committee (university professors of psychology and philosophy) were unable to attend and not replaced, meaning that the majority of the Committee had a military background. The Court emphasised that the positive obligation on States is not confined to ensuring that their domestic legal system includes a procedure for examining applications for conscientious objector status. It also encompasses the obligation to provide for an effective and accessible investigation, which in turn requires independence of the individuals conducting it. The Court held that there was a failure to comply with that positive obligation under Article 9 by failing to ensure that interviews of conscientious objectors are conducted in conditions guaranteeing procedural efficiency and equal representation required by the national law.

7.1.3 Other military service cases at national level

The **Greek** Ombudsman is concerned about recent legislative changes in military service, which go some way to tackle issues surrounding conscientious objection and alternative military service. However, the new provision for the buyout of service time disproportionately affects conscientious objectors who have to pay a much higher fee compared to those buying out regular military service.¹⁵⁸

In **Finland**, the Non-Discrimination Ombudsman challenged legislation from 1985 which provides that only Jehovah's Witnesses are currently exempt from both military and civil service.¹⁵⁹ The legislation has faced international criticism. In this case, the man refused to carry out military or civil service as a result of his pacifist beliefs and so received a six-month prison sentence. At the Court of Appeal hearing, the Ombudsman argued that the current legislation is discriminatory and violates equal treatment provisions in the ICCPR (Articles 18 and 26) and the European Convention on Human Rights (Articles 9 and 14). In February 2018 the Helsinki Court of Appeal decided in favour of the pacifist conscientious objector accepting the Ombudsman's arguments that the current exemption only for Jehovah's Witnesses constitutes discrimination violating both the Constitution and Finland's human rights obligations. The case will most probably later be tried at the Supreme Court.

Summary:

The recent cases on conscientious objection have come a long way from the early reluctance of the European Commission of Human Rights to consider conscientious objection to military service under Article 9. With the *Papavasiliakis* case, the ECtHR has further developed this line of case law to establish that the positive obligation under Article 9, which requires a mechanism of inquiry that is effective and accessible, also requires independence. However, the national case examples show potential for further development in relation to arguably discriminatory aspects of such procedures.

7.2 Religious headgear in public administrative context

7.2.1 Background and international cases

In-depth commentary on recent cases on wearing full-face veils in public spaces has been provided in Chapter 6. In this chapter we consider related issues arising in the specific context of public

¹⁵⁸ <http://www.synigoros.gr/?i=human-rights.el.danews.345630>

¹⁵⁹ Helsinki Court of Appeal (case nr. R 16/738)

administrative functions such as administration of justice in courts and regulation of security and identity documentation in case examples from **France, Great Britain, Croatia, Belgium and Germany.**

In *Sahin v Turkey*,¹⁶⁰ the Grand Chamber considered a case concerning a female student who was prohibited from wearing a headscarf at University. In finding there was no violation of Article 9, the Court accepted that the regulations were a measure which pursued the legitimate aim of protecting the rights and freedoms of others and protecting public order thereby upholding the principles of pluralism and secularism.

In assessing necessity however, the Grand Chamber focussed on secularism as an underpinning principle of the Turkish state. The Court followed the reasoning in *Dahlab v Switzerland*¹⁶¹ and found that the headscarf could not easily be reconciled with principles of tolerance, respect and gender equality.¹⁶² However, as discussed in Chapter 6, more recently in *S.A.S v France*,¹⁶³ the Court took the view that a state party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in Articles 8 and 9, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.¹⁶⁴

In relation to Article 14, in *Sahin*, the Court disposed of the discrimination arguments briefly, determining that the regulations on the Islamic headscarf were not directed against the applicant's religious affiliation, but pursued, among other things, the legitimate aim of protecting order and the rights and freedoms of others and were manifestly intended to preserve the secular nature of educational institutions. In *S.A.S.* however, the Court has acknowledged that there can still be discrimination where there is a general policy or measure that has disproportionately prejudicial effects on a particular group, even where it was not specifically aimed at that group and there was no discriminatory intent.¹⁶⁵

In December 2017, the Court gave further guidance on this topic in the case of *Hamidovic v Bosnia and Herzegovina*.¹⁶⁶ When Hamidovic, a member of the Wahhabi/Salafi Islam community, refused to remove his skull cap when giving evidence at a criminal trial, he was convicted of contempt of court and sentenced to a fine, which was changed to a 30 day sentence for non-payment. This was because of a rule that there were no religious symbols permitted in the Court room. The Court held that there had been a violation of Article 9. In doing so the Court considered a report of comparative evidence from 38 contracting states which found that there were no such prohibitions for private citizens in Court rooms. In a minority of states there is a loose dress code, which in Belgium, Italy, Portugal and Slovakia means uncovering one's head while in the courtroom. The Court also considered special rules for garments which cover the face and set out the guidance provided in the *R v D (R)* case discussed below. The Court was clear that the facts of this case are to be distinguished from the recent cases on religious neutrality in the workplace. The Court determined that there was a limitation on the manifestation of religion which was prescribed by law. Following the reasoning in

¹⁶⁰ *Sahin v Turkey* 44774/98 (10th November 2005)

¹⁶¹ *Dahlab v Switzerland* 42393/98

¹⁶² *Sahin* at para 111

¹⁶³ *S.A.S. v France* 43835/11 at 119

¹⁶⁴ *Ibid* at para 119

¹⁶⁵ *S.A.S. v France* (*ibid*)

¹⁶⁶ *Hamidovic v Bosnia and Herzegovina*, 5 December 2017, application No. 57792/15

Sahin and associated cases, the Court accepted that the aim of upholding secular and democratic values is linked to the protection of rights and freedoms of others. The Court rejected the Government's argument that a legitimate aim would be maintaining the authority and impartiality of the Judiciary, as this is not in the text of Article 9 (2). The Judgment therefore rested on whether the measure was necessary in a democratic society. Whilst emphasising the principle of subsidiarity, the Court stated that freedom to manifest one's religion is a fundamental right: not only because a healthy democratic society needs to tolerate and sustain pluralism and diversity, but also because of the importance to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. Unlike some other members of his religious group in similar trials, the applicant appeared before the court as summoned and stood up when requested, thereby clearly submitting to the laws and courts of the country. There was no indication that he was not willing to testify or that he had a disrespectful attitude. The Court therefore held that his punishment for contempt of court on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society.

7.2.2 Featured case and comparative analysis: (France) religious headgear in identity documents: Human Rights Committee upheld complaint under Article 18 ICCPR

The 2011 report¹⁶⁷ covered the case of *Mann Singh v France* at the ECtHR¹⁶⁸, where the ECtHR found no violation of Article 9 in relation to the French requirement to appear bareheaded on a driving licence photo. The report also covered *Ranjit Singh v France*¹⁶⁹ in which Ranjit Singh raised an individual petition before the UN Human Rights Committee (HRC) in relation to his passport photo. The HRC adopted an opposing position from the ECtHR in *Mann Singh*.

Since these cases, Mr Mann Singh has also raised a separate challenge before the HRC in relation to his fourth French passport (there had been no concern about him wearing his turban in his first three).¹⁷⁰ The HRC followed their *Ranjit Singh* decision. It was accepted that reducing fraud and falsification of documents was a valid objective for the state to pursue, however the state could not prove that the measure was required to attain that objective. The HRC noted that the state did not explain how identification would be made easier with an identity photograph where someone appears bareheaded while in his day-to-day life he always wears a turban, and how this would reduce the risk of falsification of identity documents. The HRC upheld the complaint under Article 18 ICCPR on the grounds that the measure is neither necessary nor proportionate.

In spite of these legal challenges, the regulations in France remain unchanged and appear to be stricter than most of the rest of Europe. The general rule in most countries is that there should be no headgear in personal documents such as passports, driving licences or ID card photos, however most states make an exception for health reasons or for religious reasons as long as the person is identifiable and full or most of the face,¹⁷¹ and in some cases ears,¹⁷² or cheeks, chin and forehead¹⁷³

¹⁶⁷ Chapter three p35

¹⁶⁸ *Mann Singh v France* application 4479/07

¹⁶⁹ HRC 11- 29.07.11, 102 Session reported in 2011 report at p36

¹⁷⁰ *Singh v. France* HRC, 26/09/2013, CCPR/C/108/D/1928/2010)

¹⁷¹ Eg Croatia, Austria, Czech Republic, Finland, Germany, Greece, Latvia, Lithuania (also specifies civilian clothes), Montenegro, Netherlands, Serbia, Slovakia, Sweden

¹⁷² Eg Norway, Bulgaria

¹⁷³ Eg Denmark

are showing. In some states, if religious headgear is worn, a form of certification is required such as a written statement by the ministry of the interior¹⁷⁴ or a certificate or any other document confirming her/his religious affiliation to a religious group previously registered by the authorities.¹⁷⁵

In **Belgium** religious headgear is allowed in driving licences and passports as an exception. However in practice, some municipalities demand a certificate by an Imam proving that the person wears the headgear due to religious reasons. This contradicts the advice of the Federal Department of Internal Affairs which states clearly that municipalities have no right to demand a certificate from the responsible religious community. However the municipalities argue that the '*General Instruction on electronic identity cards of Belgians*' are not clear enough and are open to interpretation. They do not clearly state that municipalities cannot ask for a certificate from the responsible religious authorities in order to apply the exemption on the general rule that all head coverings of any type must be removed for the photo. Due to this lack of clarity Unia, the equality body, published a recommendation stating that the General Instruction should be clarified by stating explicitly that a certificate of the responsible religious authorities cannot be requested by the municipalities.

There has been very limited discussion of the requirement to wear safety helmets, suggesting that public road safety is widely accepted as a legitimate aim. In **Germany**, the Administrative Court held that a member of the religious community of the Sikhs has in principle no entitlement to exemption from the requirement to wear a protective helmet when driving on a street due to the religious requirement to cover the head with a turban.¹⁷⁶ This would appear to follow the jurisprudence of the ECtHR. In 1978 an ECtHR case pursued by a Sikh man¹⁷⁷ was held inadmissible on the grounds that compulsory crash helmets can be justified for the protection of health, even though the law subsequently changed to allow the wearing of a turban.

7.2.3 Cases on wearing religious headgear in Courts at a national level

The 2011 report highlighted a case from **Austria** in which a Sikh man had been refused entry to a Viennese Court¹⁷⁸ because he would not remove his ceremonial sword. The Ombud for Equal Treatment found that the differential treatment was a proportionate response to the legitimate aim of security and safety.

In **Belgium** an example arose from civil procedure regulations requiring uncovered heads in courtrooms dating back to 1876. Unia, the equality body, issued a recommendation that the law be clarified, on the basis that applying this provision to religious head-coverings is unrelated to the provision's aim of maintaining order in the courtroom. The rule does not demand neutrality from people who attend court sessions.

In a case from **Great Britain**¹⁷⁹, a Muslim woman was accused of witness intimidation and wished to wear a niqab during the trial. She was alleged to have committed the offence while wearing a burqa and niqab so no issue of her identity would arise at trial, however the Court accepted there was a

¹⁷⁴ Eg Estonia

¹⁷⁵ Eg Poland

¹⁷⁶ Administrative Court Freiburg, judgment of 29.10.2015 - 6 K 2929/14

¹⁷⁷ X v United Kingdom Application 7992/77

¹⁷⁸ Chapter 3, page 34

¹⁷⁹ R v D Crown Court [2013] EqLR 1034

need for witnesses, jurors and the Judge to observe the demeanour of the witness as an aspect of the legitimate aim of protection of public order and the rights and freedoms of others. The Court considered her qualified rights under Article 9 and gave detailed guidance, directing that she was free to wear the niqab during trial except whilst giving evidence. Instead she could give evidence from behind a screen shielding her from the public but not from the judge, jury and counsel, or by means of a live TV link; no drawing, sketch or other image of the accused with her face uncovered was to be made in court or disseminated or published outside court.

Summary:

The ECtHR has emphasised that *‘where questions concerning the relationship between State and religions are at stake, as rules in this sphere vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one’s religion or beliefs is necessary’*.¹⁸⁰

However states continue to grapple with this responsibility. The points made in relation to the 2005 case of *Sahin v Turkey* call into question whether the Court may now take a different approach to religious expression through the wearing of a headscarf which does not cover the face. The French cases exemplify the higher level of protection given by the HRC to manifestation of religion, although the HRC communications are non-binding. The 2011 report concluded¹⁸¹ that it will be important to review what actions the French government takes in response to the Mann Singh and Ranjit Singh case. However there has been no change in France, despite more relaxed rules elsewhere in Europe. The Court room examples at national and ECtHR level highlight the need for cultural sensitivity and to try to find the least intrusive interference, in order to be proportionate. However, a desire for Court rooms to be secular, neutral places as a means of preserving the impartiality of the judiciary has not been established as an element of a legitimate aim.

7.3 Regulation of places of worship, marriage, burial and cremation

7.3.1 Background and international cases

Case examples relating to regulation of buildings, registering, establishing and maintaining places of worship, marriage, burial or cremation were submitted by the equality bodies from **Bulgaria, Greece, Great Britain and Croatia**.

The ECtHR has previously established that cemetery layout can engage Article 9 where it is an essential part of religious practice.¹⁸² However, in general, there is a wide margin of appreciation afforded to states in terms of public planning / local development plans.¹⁸³ There is no positive obligation upon states to grant special status to places of worship, but where a state chooses to do so, the non-discrimination principle will apply.¹⁸⁴ Refusal to register the Church of Scientology as a

¹⁸⁰ Hamidovic v Bosnia and Herzegovina ibid at para 38

¹⁸¹ p37

¹⁸² Johannische Kirche and Peters v Germany 41754/98 2001

¹⁸³ Vergos v Greece 65501//01 (24th June 2004)

¹⁸⁴ Cumhuriyetci v Turkey 32093/10 (2nd December 2014)

religious organization has previously been considered in three cases against Russia.¹⁸⁵ A common theme in these cases is the long, drawn out and formalistic processes invoked rather than any overriding social policy objection in refusing the request.

Burdensome administrative processes were previously considered in relation to registration of places of worship in *Manoussakis v Greece*.¹⁸⁶ The applicants were Jehovah's witnesses who had requested permission to register a room where they held meetings as a place of worship. There had been no decision for three years when they were prosecuted and sentenced to three months imprisonment for operating an unauthorised place of worship. The Court upheld their claim under Article 9 on the basis of evidence that there had been a considerable delay in dealing with the authorisation request. The State could not therefore rely on the applicants' failure to comply with the legislation as justification for their conviction.

7.3.2 Featured Case: (Great Britain) refusal to dedicate land for funeral pyre¹⁸⁷

Regulations governing cremation facilities were challenged in Great Britain in the case of *R (Ghai)*. A request for the City Council to dedicate land for the construction of open air funeral pyres for members of the Hindu faith was refused on the basis that current legislation required that cremations should be carried out in a properly-equipped building that was far from roads and homes. A Judicial Review was initially refused. The Equality and Human Rights Commission, the equality body, intervened in the case, submitting that not permitting Mr Ghai to have an open air funeral pyre for his own funeral would breach his rights under Articles 8 and 9 of the European Convention on Human Rights. The Court at first instance accepted that there was a legitimate aim as a large portion of the public would find it abhorrent that human remains were burned in this manner. Open air pyres could also be affected by wind speed and direction and would be hard to regulate. The claimant conceded that with time, education and publicity, discerning adults may recognise that Hindu open air funerals are a practice worthy of respect but that would require engagement with the political, not the judicial, process. Although Article 9 was engaged, any interference would be justified. On appeal, Ghai claimed that his religious beliefs would be satisfied if he was cremated within a building, provided that the cremation was by fire rather than electricity and that sunlight could shine directly on his body. The Court of Appeal allowed the appeal on the basis of a technical reading of the regulations. The Court held that Ghai's wishes could be accommodated without necessarily infringing the legislation on cremation and that the Ministry of Justice's definition of a building had been too narrow.

7.3.3 Example cases on regulation of places of worship, marriage, burial and cremation at national level

In **Bulgaria** legislation extends freedom of religion to include establishment of places of worship and local government can permit the use of public buildings free of charge and can assist with subsidies. The Mayor of Sofia was found to have indirectly discriminated against a religious institution by issuing constantly changing instructions and preventing the application from reaching the

¹⁸⁵ *Kimlya and Ors v Russia* 76836/01; *Church of Scientology of St Petersburg v Russia* 47191/06, *Jehova's Witnesses of Moscow and Ors v Russia*

¹⁸⁶ *Manoussakis v Greece* 1996-IV 1346

¹⁸⁷ *R (Ghai) v Newcastle City Council & Ors* [2010] EWCA Civ 59

appropriate competent body. The panel emphasised that the judgment was not focussed on any particular decision by the Municipal Council or whether or not the application would be granted. The main concern was the omission of the Mayor and his failure to refer the issue to the Council.¹⁸⁸

In **Great Britain**, in *R (Hodkin) v Registrar General of Births, Deaths and Marriages*¹⁸⁹ two members of the Church of Scientology were unable to be married in the London Church Chapel as registration as a chapel for solemnization of marriages had been refused under legislation which dated back to 1855. The Supreme Court held that Scientology should be classified as a religion as religions should not be restricted to faiths involving 'a supreme deity'.

In **Croatia** religious communities can benefit from tax exemption when buying a sacred building or land, or land designated for this purpose, but it is usually larger religious communities who benefit from this exemption. In a 2012 decision concerning the Baptist religious minority, the Constitutional Court held that the official interpretation of the relevant law was too strict and formalistic, without any rational justification. In 2015, the Ministry of Finance amended the rules to focus on the intended purpose of the acquired property.

Obstacles to the burial of heterodox individuals are an issue of concern for the **Greek** Ombudsman, the equality body. The underlying principle in dispute is the view that cemeteries are of a public, secular nature rather than being religious in character. For example, recent complaints relate to concerns about standards of areas designated for use by certain faiths.¹⁹⁰ A Muslim association also sought a separate cemetery for exclusive use, leading to questions about the neutrality of the process for dealing with this request.¹⁹¹

Summary

The cases described demonstrate the range of aspects of administrative functions which require sensitivity to freedom of thought, conscience and religion and can engage Article 9. However several of these cases demonstrate how excessive bureaucracy, narrow interpretation of regulations and administrative delays can significantly restrict freedom of religion. It is harder to establish a legitimate aim where the reasons for the interference are formalistic rather than substantive.

This was the very essence of the *Manoussakis* case over twenty years ago. Perhaps more progress could be achieved, by encouraging local and central Governments to proactively review policies and procedures. Alternatively, positive action could be used. A good example of this came from **Finland**, where an area of a public library was designated for use as a temporary place of worship during Ramadan. The Deputy Parliamentary Ombudsman accepted that this should be seen as a positive action measure, reasoning that it could be justified as a means of promoting equal opportunities and encouraging integration into Finnish society.¹⁹²

¹⁸⁸ Decision No. 256/30.11.2012 by a five member panel of Commission for Protection against Discrimination

¹⁸⁹ *R (Hodkin v Registrar General for Births, Deaths and Marriages* [2013] UKSC 77

¹⁹⁰ case 215840/2016

¹⁹¹ case 214783/2016

¹⁹² case 3033/4/10 (15.5.2012)

7.4 Social security

7.4.1 Background and international cases

The potential for tension between taxation and freedom of religion has been apparent since the case of *C v UK*¹⁹³ in which the Court confirmed that Article 9 does not confer the rights to refuse to comply with taxation legislation that applies neutrally and generally in the public sphere. The potential for discrimination on the grounds of religion and belief in the realm of social security was highlighted in the 2011 report in a Swedish direct discrimination case where social security support had been terminated as a result of a Muslim man's refusal to shake hands with a female representative of a company at an interview for a traineeship.¹⁹⁴

7.4.2 Featured contrasting cases from Sweden and Netherlands: Social security sanctions

Contrasting cases from **Sweden** and the **Netherlands** demonstrate different approaches to alleged discrimination in the context of social security sanctions.

In the Swedish case brought by the Equality Ombudsman (the equality body), a man who belonged to the Jehovah's Witness faith declined a job as a salesman, as it would require him to sell lottery tickets, which contradicted his religious convictions. The Employment Agency held that he had not made sufficient efforts to find a job, and as a consequence, he was no longer allowed to participate in the programme and was left without benefits for 45 days.

The Court of Appeal found indirect discrimination. This was on the grounds that the criterion that any person who participates in a labour market programme should be obliged to seek jobs that include the promotion of lotteries is a neutral criterion. It may put Jehovah's Witnesses at a particular disadvantage. The aim of the labour market programme is ultimately that the enlisted persons should become self-reliant. This constitutes a legitimate aim. However the legitimate aim of ensuring self-reliance must be balanced against the interest of the man to follow his religious convictions without negative consequences. In that balance of interests, religious motives merit serious consideration, according to the Court of Appeal, and the Public Employment Agency had failed to strike a fair balance.¹⁹⁵

A different outcome arose from the case from the Netherlands¹⁹⁶ which took a human rights, rather than discrimination law approach. In 2017 a local authority reduced the social welfare of a woman because she refused to take off her niqab during employment training and was therefore prevented from participating. The woman was told that she is allowed to wear a headscarf but no niqab because this would impede her integration and reduce her chances of finding employment. When she decided to continue wearing the niqab, her social welfare was reduced.

¹⁹³ (1983) 37 D & R 14243

¹⁹⁴ P70 2011 report: The Swedish Ombudsman v the Unemployment Agency (Sweden) T 7324-08, 2010 -02-08

¹⁹⁵ Judgment of Svea Court of appeal, 22 March 2017 in case T 777-16

¹⁹⁶ Cenrale Raad van Beroep 9 May 2017, ECLI:NL:CRVB:2017:1639, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CRVB:2017:1639>

The Centrale Raad van Beroep (hereafter 'CRvB') ruled that the instruction to not wear a facial veil during employment training interferes with the right to freedom of religion. According to the CRvB this infringement was necessary in order to protect the rights and freedoms of others. Those who rely upon social welfare should put in the effort to be self-reliant again and to leave the social welfare system. This entails a general obligation to reintegrate. The woman had minimal chances of entering the labour market if she kept wearing a niqab, because an uncovered face plays a crucial role in contact with other people and the recruitment process. The CRvB decided that wearing a niqab makes it difficult for someone to obtain access to the labour market in the current societal context. This would put unnecessary pressure on the public means. In addition, the measure of temporarily reducing the social welfare of the woman was proportionate. Therefore there was no violation of Article 9.

7.4.3 Examples related to social security sanctions at national level

The **Greek** Ombudsman body has been involved in long-term efforts to eliminate discrimination against conscientious objectors whose past imprisonment for avoiding military service impacted on their social security rights. After some delay, a new provision was enacted in 2015 to clarify that periods of imprisonment for this purpose were recognised as pensionable, without exceptions.

In **Finland**, the Non-Discrimination Ombudsman concluded that a Muslim person who stayed at an emergency shelter for two months had been severely discriminated based on his religion.¹⁹⁷ The obligation on him to participate in faith based prayers of another religion than his own constituted a grave violation of his constitutionally based right to freedom of religion. The case was resolved after the equality body initiated and concluded mediation procedures. The victim received a compensation of EUR 4,000.

Summary

These case examples demonstrate the potential for discrimination and interference with freedom of religion and belief when qualification criteria are attached to eligibility for social security or emergency accommodation. The consequences can be severe, potentially rendering a claimant wishing to adhere to their religion destitute or without funds. Although some cases were argued on discrimination grounds and others on human rights grounds, both sets of cases acknowledge that in general terms the goal of achieving self-reliance and integration into society is a legitimate aim, however the difficulty lies in striking a fair and proportionate balance.

7.5 Observance of dietary laws

7.5.1 Background and international cases

The case law of the ECtHR relating to observance of dietary laws has focussed on two main areas: ritual slaughter and provision of food in prison. Developments on these themes have been reported in **Belgium, France, Bulgaria and Denmark**.

¹⁹⁷ Mediation agreement facilitated by the Finnish Non-Discrimination Ombudsman in 2017.

The ECtHR held in *Cha'are Shalom Ve Tsedek v France*¹⁹⁸ that whilst the ritual slaughter of animals in accordance with religious requirements can fall within the manifestation of religion, Article 9 does not guarantee the right to personally perform ritual slaughter. Restrictions imposed on religious slaughter can be justified under Article 9 (2) in terms of public safety or health.

In *Jakobski v Poland*¹⁹⁹ the Court held that there was a violation of Article 9 where the prison authorities refused to provide a vegetarian diet to an inmate who wished to adhere to vegetarianism as part of his Buddhist faith. The Court considered whether there could be a positive obligation on the state, given the applicant's status as a prisoner, but concluded that whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 9 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.

In terms of Article 9 (2) whilst the Court was prepared to accept that a decision to make special arrangements for one prisoner within the system can have financial implications for the custodial institution and thus indirectly on the quality of treatment of other inmates, it must consider whether the State can be said to have struck a fair balance between the interests of the institution, other prisoners and the particular interests of the applicant.

The Court held that there had been a failure to strike that fair balance, particularly taking account of the applicant's flexibility as he was not asking for meals to be prepared in a prescribed manner as well as the lack of evidence of any disruption caused to the prison as a result.

7.5.2 Featured case: (Belgium) Advocate General opinion on outlawing slaughter of un-stunned animals²⁰⁰

The background to this case is that the Jewish religious Orthodox law and Muslim religious laws forbid the consumption of animals that are not fully conscious when their necks are cut. If the animals are stunned at the time of the slaughter, the meat is not considered kosher by Jewish standards or halal by Muslim standards.

Belgium therefore had an exception to the general rule that animals can only be slaughtered after they have been stunned. The exception meant that this rule did not apply to slaughters prescribed by religious rituals, provided that they are performed according to conditions established by Royal Decree. In particular, such slaughters can only be performed pursuant to the Jewish or Muslim ritual and by specialized butchers authorized by the representative organs of the Jewish religion (Consistoire Central israélite) and of the Muslim religion (Exécutif des Musulmans) in Belgium.

¹⁹⁸ 27417/95 (27th June 2000)

¹⁹⁹ *Jakobski v Poland* 18429/06 (7th December 2010) see also *Vartic v Romania* (No. 2) 14150/08 17th December 2013 see paras 48 - 54

²⁰⁰ C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and others*

The basis of this rule and exception is Article 4 (4) of the European Regulation No. 1099/2009 which states that slaughtering animals without stunning them – as happens in the halal and kosher traditions – can only be carried out by licensed slaughterhouses.

In 2016 various Muslim organisations challenged the regulation in proceedings before the Brussels Court of First Instance. The Court requested an opinion from the CJEU on the question of religious freedom. However, the Belgian Court has indicated some sympathy to the applicants' case, stating: *'Serious arguments have been presented that suggest the need to carry out ritual slaughter in a licensed slaughterhouse appears to be an unlawful breach of the freedom of religion.'*²⁰¹

According to the opinion by European Court of Justice Advocate General Nils Wahl in this case, the requirement for ritual slaughtering without stunning to be carried out in an approved slaughterhouse does not infringe the right to religious freedom. The opinion states: *'the obligation to ensure that all slaughter locations are approved, and that they meet the requirements laid down in EU legislation is perfectly neutral and applies to any party that organises slaughtering. Legislation that applies in a neutral manner, with no connection to religious convictions, cannot in principle be regarded as a limitation on freedom of religion.'* A decision of the Court is awaited.

Meanwhile, both the Wallonia region and the Flemish region passed laws earlier this year that will outlaw any slaughter that is not preceded by stunning by 2019. The Belgian Federation of Jewish Organizations, or CCOJB, filed the motion with the Constitutional Court of Belgium on 28th November 2017 seeking an injunction against the ban passed in May by the parliament of Belgium's Wallonia region.

7.5.3 Cases relating to dietary laws at national level

In February 2014 the **Danish** Parliament also adopted a ban on ritual slaughter of animals in accordance with the kosher rules in Judaism and halal rules in Islam by outlawing the slaughter of unstunned animals. The ban was criticised among others by the Advisory Committee on the Framework Convention for the Protection of National Minorities.

Two cases on prison food were reported from **Bulgaria and France**. In the **Bulgarian** case²⁰² the complainant was serving a life sentence and since 2003 he had wished to adhere to the requirement of Islam that he should not consume pork or pork products. However, his request had been denied by the prison manager and he had not been provided with an appropriate diet. He argued that prisoners in other prisons are provided free meals in accordance with the specific requirements of the religion they profess.

The panel found that the prison chief has discriminated on the ground of religion by failing to provide free food in compliance with the requirements of his religion to the prisoner. A fine was imposed.

In a case from **France** a prison was ordered to provide regular menus with halal meat options within three months in a landmark legal ruling of the administrative tribunal in Grenoble.²⁰³ It was the first time a French legal institution has ruled that a prison must provide certain food to accommodate

²⁰¹ Brussels Court of First Instance 25 July 2016, unpublished

²⁰² Decision 238/16.06.2016 under case file 20/2015

²⁰³ 9th November 2013

inmates' religious beliefs. In its ruling, the court said that by refusing to supply halal meals, the prison warden had violated Article 9 ECHR. The court also stated that France's secularism laws, in addition to enforcing a strict separation between church and state, require that *'the Republic guarantees the free exercise of religion'*. The court considered that making halal meals available would come with 'no prohibitive additional cost' to the prison, nor would it present any 'particular technical difficulty'.

However the decision was eventually quashed by the Administrative Appeal Court on 22 July 2014 as the prison authorities provided to all in-mates vegetarian food and meals without pork. The detainees could benefit from accommodated meals for religious celebrations and could also buy halal food. This decision was later upheld by the Conseil d'Etat (the highest administrative Court).²⁰⁴

Summary:

The individual right to manifest freedom of religion through observance of dietary laws faces interference from the state in two main areas: ritual slaughter and provision of meals in prisons. Although dating back to 2000, the *Cha'are Shalom Ve Tsedek* case is clearly still highly influential for ECtHR decisions as well as national policy on animal slaughter.

In *Jakobski v Poland* and more recently in *Vartic v Romania*, the Court emphatically distinguished the cases from the *Cha'are Shalom ve Tsedek* case, rather than overrule it, noting that in that case, attention had been given to the large number of alternative sources of glatt meat available. In contrast there was no indication that alternatives had been considered for the two prisoners. The Court in both cases hinted at analysing the prisoners' cases in terms of a positive obligation under Article 9 (1) and expressly did not rule out the possibility.

There is an emerging trend towards placing tough restrictions on methods of slaughter which has led to concerns and legal challenges from communities representing different faiths, which may be resolved when the CJEU issues a decision in the *Liga* case. In relation to the ritual slaughter issue, the Danish ban was criticised by the Advisory Committee on the Framework Convention for the Protection of National Minorities. The Committee made reference to the *Cha'are Shalom ve Tsedek* case and recommended: *'the authorities adopt a religiously sensitive approach to the question of ritual slaughter of animals and consider, in consultation with those concerned, solutions which take into account religious freedom.'*

7.6 Conclusion

The themes developed in this chapter show that the principles from the early cases from the ECtHR under Article 9 continue to exert their influence in all contexts.

States continue to grapple with the challenges of striking a balance between the right to freedom of thought, conscience and religion of an individual or a group against public safety, public order, health or morals, or the protection of the rights and freedoms of others.

Objectives which have been accepted at international and/or national level as an element of these legitimate aims include: reduction of fraud, the need for jurors to observe demeanour of a witness, safety and security, maintaining order in a court room, public concerns about open air burning of

²⁰⁴ <http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2016-02-10/385929> on 10 February 2016

human remains, self-reliance in the labour market and integration into society. 'Living together' has been accepted by the ECtHR as sufficiently linked to the aim of rights and freedoms of others. However the ECtHR was not keen to accept maintaining the appearance of the independence of the judiciary as a legitimate aim.

In general there is a wide margin of appreciation given to states to determine to what extent it is necessary to limit the individual right to freedom of religion in the context of public functions. When assessing proportionality, courts have weighed heavily in favour of public interest in grave matters concerning road safety and ritual slaughter.

Violations are more likely to be established where the interference arises from formalistic, procedural and bureaucratic difficulties which unnecessarily inhibit freedom of religion or where alternatives have not been considered.

Strasbourg has clarified the extent of positive obligations under Article 9, e.g. to ensure that a domestic legal system includes an independent procedure for examining applications for conscientious objector status as well as a procedure for an effective and accessible investigation. There is no obligation to guarantee the right to personally perform ritual slaughter. There is no positive obligation upon states to grant special status to places of worship, but where a state chooses to do so, the non-discrimination principle will apply. The Court has not ruled out that there could be a positive obligation to provide vegetarian meals to prisoners who require them as a result of their faith.

There are few discrimination cases in this context due to the uneven protection given to religion and belief as a protected characteristic at EU level. The discrimination cases argued at national level relate to social security sanctions and conscientious objection. This chapter has considered many Strasbourg cases which invoked Article 9 as well as Article 14 but only one violation of Article 14 was found, in the influential case of *Thlimmenos v Greece*, and in general there was no detailed separate consideration given to the Article 14 arguments. Perhaps further research would be useful to assess whether Article 14 is under-developed in religious expression cases and to evaluate the progress of Article 1 of Protocol 12, the general prohibition on discrimination of the enjoyment of any right, including those protected under national law.

EQUINET MEMBER EQUALITY BODIES

ALBANIA

Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA

Austrian Disability Ombudsman
www.behindertenanwalt.gv.at

AUSTRIA

Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.at

BELGIUM

Institute for the Equality of Women and Men
www.igvm-iefh.belgium.be

BELGIUM

Unia (Interfederal Centre for Equal Opportunities)
www.unia.be

BOSNIA AND HERZEGOVINA

Institution of Human Rights Ombudsman of Bosnia and Herzegovina
www.ombudsmen.gov.ba

BULGARIA

Commission for Protection against Discrimination
www.kzd-nondiscrimination.com

CROATIA

Office of the Ombudsman
www.ombudsman.hr

CROATIA

Ombudsperson for Gender Equality
www.prs.hr

CROATIA

Ombudswoman for Persons with Disabilities
www.posi.hr

CYPRUS

Commissioner for Administration and Human Rights (Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC

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.volinik.ee

FINLAND

Non-Discrimination Ombudsman
www.syrjinta.fi

FINLAND

Ombudsman for Equality
www.tasa-arvo.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

Irish Human Rights and Equality Commission
www.ihrec.ie

ITALY

National Equality Councillor
www.lavoro.gov.it/ConsiglieraNazionale

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

(FYRO) MACEDONIA

Commission for the Protection against Discrimination
www.kzd.mk

MALTA

Commission for the Rights of Persons with Disability
www.crpdp.org.mt

MALTA

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

MONTENEGRO

Protector of Human Rights and Freedoms (Ombudsman)
www.ombudsman.co.me

NETHERLANDS

Netherlands Institute for Human Rights
www.mensenrechten.nl

NORWAY

Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND

Commissioner for Human Rights
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 Migration
www.acm.gov.pt

ROMANIA

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

SERBIA

Commissioner for Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA

National Centre for Human Rights
www.snslp.sk

SLOVENIA

Advocate of the Principle of Equality
www.zagovornik.gov.si

SPAIN

Council for the Elimination of Ethnic or Racial Discrimination
www.igualdadynodiscriminacion.msssi.es

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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