HANDBOOK

Handbook on European non-discrimination law

2018 edition

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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Foreword

In January 2010, the European Court of Human Rights and the European Union Agency for Fundamental Rights decided to cooperate on the preparation of a handbook on European case law concerning non-discrimination. We are now pleased to present an updated version of this handbook, which contains updated examples of relevant case law and an improved structure.

When the Lisbon Treaty entered into force, the Charter of Fundamental Rights of the European Union became legally binding. Furthermore, the treaty provides for EU accession to the European Convention on Human Rights. In this context, increased knowledge of common principles developed by the Court of Justice of the European Union and the European Court of Human Rights have become essential for the proper national implementation of a key aspect of European human rights law: the standards on non-discrimination. Furthermore, the work of the FRA is anchored in the 2030 Agenda for Sustainable Development and committed to the principles of universality, equality and leaving no one behind. In this context the handbook promotes SDG 5 (Achieve gender equality and empower all women and girls), 10 (Reduce inequality within and among countries) and 16 (Promote just, peaceful and inclusive societies).

This handbook is designed to assist legal practitioners who are not specialised in the field of non-discrimination law, serving as an introduction to key issues involved. It is intended for lawyers, judges, prosecutors, social workers and persons who work with national authorities, non-governmental organisations (NGOs) and other bodies that may be confronted with legal questions relating to issues of discrimination.

With the impressive body of case law developed by the European Court of Human Rights and the Court of Justice of the European Union in the non-discrimination field, it seems useful to present an updated and accessible handbook intended for legal practitioners – such as judges, prosecutors and lawyers, as well as law-enforcement officers – in the EU and Council of Europe member states and beyond. In particular, those at the forefront of human rights protection need to be aware of the non-discrimination principles, in order to be able to apply them effectively in practice. It is the national level that brings non-discrimination provisions to life, and it is here, on the ground, that the challenges become visible.

We would like to thank Dr. Magdalena Jankowska-Gilberg and Dr. Dagmara Rajska for their contribution in drafting this updated handbook. We would also like to thank all those who provided input and support throughout its preparation, in particular the Office of the United Nations High Commissioner for Human Rights and the Council of Europe Department of the European Social Charter. We are also grateful for the documentary support provided by the Court of Justice of the European Union.

Roderick Liddell
Registrar of the European Court of Human Rights

Michael O'Flaherty
Director of the European Union Agency for Fundamental Rights

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Abbreviations

CEDAW	Convention on the Elimination of Discrimination Against Women
CFI	Court of First Instance
CJEU	Court of Justice of the European Union (prior to December 2009, European Court of Justice)
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CST	European Union Civil Service Tribunal
ECHR	European Convention on Human Rights (full name: European Convention for the Protection of Human Rights and Fundamental Freedoms)
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IGO	Inter-Governmental Organisation
TCN	Third-Country National
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

How to use this handbook

This handbook provides an overview of key aspects of non-discrimination law in Europe, with specific reference to the prohibition of discrimination provided in the Council of Europe's European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), and the law of the European Union, as interpreted by the Court of Justice of the European Union (CJEU).

The handbook acknowledges that the principle of non-discrimination is very important because it influences the enjoyment of all other human rights. The aim of non-discrimination law is to allow all individuals an equal and fair prospect to access opportunities available in a society.

The handbook is designed to assist legal practitioners who are not specialised in the field of non-discrimination law, serving as an introduction to key issues involved. It is intended for lawyers, judges, prosecutors, social workers, as well as for persons who work with national authorities, non-governmental organisations (NGOs) and other bodies that deal with legal questions relating to issues of discrimination. The handbook may also be useful for legal research or public advocacy purposes. It is designed to permit practitioners to refer directly to specific sections/topics as required; it is not necessary to read the handbook as a whole.

It is a point of reference on European non-discrimination law, explaining how each issue is regulated under EU law as well as under the ECHR. Where relevant, there are also references to the European Social Charter (ESC), other Council of Europe (CoE) instruments and international treaties concluded under the auspices of the United Nations (UN) relating to non-discrimination.

The ECHR law is described mainly through selected case law of the ECtHR. The law stemming from the EU law is presented through legislative measures (non-discrimination directives), relevant provisions of the EU treaties, the Charter of Fundamental Rights of the European Union (EU Charter) and the jurisprudence of the CJEU.

The case law described or cited in this handbook provides examples of an important body of both ECtHR and CJEU jurisprudence. The handbook covers, as far as possible, given its limited scope and introductory nature, legal developments until April 2017, including later developments where possible. The preference was given for more recent case law, although older leading cases are mentioned where necessary. To avoid confusion, the handbook refers to the European Court of Justice (ECJ) as CJEU, even for decisions issued before December 2009. Since many cases involve several different aspects covered in the handbook, the choice of section under which a given case is discussed is subjective.

Each chapter covers a distinct subject, while cross-references to other topics and chapters provide a fuller understanding of the applicable legal framework and relevant case law. Each chapter starts with a table outlining the issues addressed in that chapter. The table also specifies the applicable legal provisions under the two separate European systems and lists relevant CJEU and ECtHR case law. The chapter then presents the legal provisions under each system relating to the topic covered. This allows the reader to see where the two legal systems converge and where they differ. Practitioners in non-European Union (EU) states that are member states of the CoE, and thereby parties to the ECHR, can access the information relevant to their own country by going straight to the CoE Sections. Practitioners in EU Member States will need to use both sections as those states are bound by both legal orders.

In addition, key points are presented at the beginning of each section.

The handbook begins with a brief exploration of the two legal systems as established by CoE and EU law. Chapter 1 explains the context and background to European non-discrimination law and outlines the personal and material scope of both systems.

Chapter 2 outlines when differences in treatment are considered discriminatory. The focus is on discrimination categories (such as direct and indirect discrimination, harassment or instruction to discriminate, hate crime and hate speech). Chapter 3 then covers possible justifications for differential treatment.

In Chapter 4, the principle of non-discrimination is presented from the perspective of various areas of life including, among others, employment, access to welfare and social security, education, private and family life.

Chapter 5 analyses the discrimination grounds such as sex, gender identity, sexual orientation, disability, age, race, ethnic origin, national origin and religion or belief.

Chapter 6 examines the procedural issues in non-discrimination law. Special attention has been given to the shift in the burden of proof. Other evidential questions, such as the role of statistics and other data, have also been explained.

The electronic version of the handbook contains hyperlinks to the case law and EU legislation. Hyperlinks to EU law sources direct the reader to eur-lex overview pages, from where one can open the case or legislation in any available EU language. The ECtHR and ESC case law is hyperlinked to the Hudoc database, which is available in English and French. For some cases, translations into other languages are available.

1 Introduction to European non-discrimination law: context, evolution and key principles

EU	Issues covered	CoE
Charter of Fundamental Rights, Art. 20 (equality before the law) and 21 (non-discrimination) TEU, Art. 2, 3 (3), 9 TFEU, Art. 10 Employment Equality Directive (2000/78/EC) Racial Equality Directive (2000/43/EC) Gender Goods and Services Directive (2004/113/EC) Gender Equality Directive (recast) (2006/54/EC) CJEU, C-571/10, *Kamberaj v. IPES* [GC], 2012 CJEU, C-236/09, *Association Belge des Consommateurs Test-Achats ASBL v. Conseil des ministres* [GC], 2011	**Equality and non-discrimination**	ECHR, Art. 14 (prohibition of discrimination), Protocol No. 12, Art. 1 (general prohibition of discrimination) ESC, Art. E, Protocol Providing for a System of Collective Complaints (Revised) Framework Convention for the Protection of National Minorities Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Convention on Action against Trafficking in Human Beings Convention on Access to Official Documents Protocol to the Convention on Cybercrime Convention on Human Rights and Biomedicine ECtHR, *Khamtokhu and Aksenchik v. Russia* [GC], Nos. 60367/08 and 961/11, 2017 ECtHR, *Pichkur v. Ukraine*, No. 10441/06, 2013 ECtHR, *Savez crkava "Riječ života" and Others v. Croatia*, No. 7798/08, 2010

EU	Issues covered	CoE
TFEU, Art. 18 Directive on the right to family reunification (2003/86/EC) Directive on long-term legally resident third country nationals (2003/109/EC)	Non-discrimination based on nationality and immigration status	

This introductory chapter outlines the origins of non-discrimination law in Europe. From the outset, it is important to note that national judges and prosecutors are required to apply the guarantees provided for under the European Convention on Human Rights (ECHR) and those under the EU non-discrimination directives, irrespective of whether a party to the proceedings invokes them. This is consequent to the legal principles established in each respective system, for example, the direct effect of Union law in the EU Member States and the direct applicability afforded to the ECHR,[1] which means that it must be complied with in all EU and Council of Europe (CoE) Member States.

1.1. Context and background to European non-discrimination law

Key points

- Protection against discrimination in Europe can be found within both EU and Council of Europe law.
- Both systems operate separately but they can influence each other through their case law.

The term 'European non-discrimination law' suggests that a single Europe-wide system of rules relating to non-discrimination exists. It is, however, made up of a variety of sources. This handbook draws mainly from the law of the CoE (focusing on the ECHR) and the EU. These two systems have different origins, structures and objectives.

1 See CJEU, C-555/07, *Seda Kücükdeveci v. Swedex GmbH & Co. KG* [GC], 19 January 2010.

Although both systems operate separately, there are numerous links between them. The Court of Justice of the European Union (CJEU) refers to ECHR[2] and the European Social Charter (ESC)[3] as providing guidance for the interpretation of EU law. Both acts are also referred to in the EU treaty framework: Article 6 (3) of the Treaty on European Union (TEU) explicitly acknowledges the ECHR as a source of inspiration for the development of fundamental rights in the EU; Article 52 (3) of the EU Charter provides that the meaning and scope of corresponding Charter rights shall be the same as those laid down by the ECHR[4] (although EU law may provide more extensive protection). Article 151 of the Treaty on the Functioning of the European Union (TFEU) and the preamble to the EU Charter mention the European Social Charter. In their case law, the European Court of Human Rights (ECtHR) and the European Committee on Social Rights (ECSR) refer to EU legislation and the CJEU case law.[5]

EU law and the ECHR are closely connected. All EU Member States have joined the ECHR and the CJEU looks to the ECHR for inspiration when determining the scope of human rights protection under EU law. The EU Charter of Fundamental Rights also reflects (though is not limited to) the range of rights in the ECHR. Consequently, EU law is largely consistent with the ECHR. However, if an individual wishes to make a complaint about the EU and its failure to guarantee human rights, they are not entitled to take the EU, as such, before the European Court of Human Rights (ECtHR). Instead, they must either: make a complaint before the national courts, which can then refer the case to the CJEU through the preliminary reference procedure; or complain about the EU indirectly before the ECtHR while bringing action against a Member State.

The Lisbon Treaty contains a provision mandating the EU to join the ECHR as a party in its own right and Protocol 14 to the ECHR amends it to allow this to happen. It is not yet clear when this would happen and what the future relationship between the CJEU and the ECtHR would be.

2 For example, see CJEU, C-510/11 P, *Kone Oyj and Others v. European Commission*, 24 October 2013, paras. 20-22.

3 For example, see CJEU, Joined cases C-395/08 and C-396/08, *Istituto nazionale della previdenza sociale (INPS) v. Tiziana Bruno and Massimo Pettini* and *Daniela Lotti and Clara Matteucci*, 10 June 2010, paras. 31-32.

4 See also Art. 53 of the EU Charter of Fundamental Rights and its Preamble.

5 For example, see ECtHR, *Biao v. Denmark*, No. 38590/10 [GC], 24 May 2016.

1.1.1. Council of Europe: development of non-discrimination law

Key point

- The principle of non-discrimination is enshrined in a number of Council of Europe treaties.

The Council of Europe is an intergovernmental organisation that originally came together after the Second World War to promote, among other things, the rule of law, democracy, human rights and social development (see Preamble and Article 1 of the Statute of the Council of Europe). In 1950, CoE member states adopted the Convention for the Protection of Human Rights and Fundamental Freedoms, calling on the ECHR to help achieve these aims. The ECHR was the first of the modern human rights treaties drawing from the United Nations Universal Declaration of Human Rights. It sets out a legally binding obligation for its members to guarantee a list of human rights to everyone within their jurisdiction, not just citizens. The implementation of the ECHR is reviewed by the ECtHR, which hears cases brought against member states. The Council of Europe currently has 47 members and any state wishing to join must accede to the ECHR.

The prohibition of discrimination is established in Article 14 of the ECHR, which guarantees equal treatment in the enjoyment of the other rights set out in the Convention. Protocol 12 (2000) to the ECHR, not yet ratified by all EU Member States,[6] expands the scope of the prohibition of discrimination to equal treatment in the enjoyment of any right, including rights under national law.

The ESC (revised)[7] is the CoE's other main human rights treaty. Unlike the 1961 Charter,[8] it contains Article E, an explicit provision prohibiting discrimination. Its wording is very similar to that of Article 14 of the ECHR. It provides protection from discrimination through a horizontal clause covering grounds such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health association with a national minority, birth or 'other status'.

6 For the number of EU Member States that ratified Protocol 12, see Chart of signatures and ratifications of Treaty 177.

7 Council of Europe, European Social Charter (revised), CETS No. 163, 3 May 1996.

8 Council of Europe, European Social Charter, CETS No. 35, 18 October 1961.

The ECSR is responsible for monitoring the compliance with the ESC. It stressed that the "insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein."[9] Accordingly, the revised ESC does not allow discrimination on any of the grounds listed in this article (which is a non-exhaustive list, similarly to Article 14 of the ECHR) in respect of any of the rights contained in the instrument.

Under the ESC, the additional protocol provides for a system of collective complaints. It entitles non-governmental organisations (NGOs) enjoying participatory status with the Council of Europe to lodge collective complaints against a state which has ratified it, for non-compliance with the ESC.

The principle of non-discrimination is a governing principle in a number of other Council of Europe instruments, even if these are not a primary focus of this handbook. [10] For example, protection against discrimination is also provided in the Framework Convention for the Protection of National Minorities,[11] the Convention on Action against Trafficking in Human Beings[12] and the Convention on Access to Official Documents.[13] The Protocol to the Convention on Cybercrime[14] also calls for protection against discrimination. Furthermore, the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) condemns all forms of discrimination against women.[15] In its preamble, the Istanbul Convention recognises that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over and discrimination against women by

9 ECSR, *International Association Autism-Europe v. France*, Complaint No. 13/2002, 4 November 2003.

10 The texts of all Council of Europe treaties are available at the Council of Europe Treaty Office webpage.

11 Council of Europe, Framework Convention for the Protection of National Minorities (FCNM), CETS No. 157, 1995. See Art. 4, 6 (2) and 9.

12 Council of Europe, Convention on Action against Trafficking in Human Beings, CETS No. 197, 2005. See Art. 2 (1).

13 Council of Europe, Convention on Access to Official Documents, CETS No. 205, 2009. See Art. 2 (1).

14 Council of Europe, Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, ETS 189. See Art. 3 (1).

15 Council of Europe, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, 2011. See Art. 4.

men and prevented the full advancement of women.[16] The Convention on Human Rights and Biomedicine prohibits any form of discrimination against a person on the grounds of his or her genetic heritage.[17] In addition, the European Commission against Racism and Intolerance (ECRI), [18] a human rights body of the Council of Europe, monitors problems of racism, xenophobia, antisemitism, intolerance and racial discrimination.[19]

The principle of non-discrimination has been influential in shaping CoE standards and is seen as a fundamental right that needs to be protected.

1.1.2. European Union: development of non-discrimination law

Key points

- EU non-discrimination law comprises a variety of legal acts promoting equality in different areas of life.
- EU institutions are legally bound to observe provisions of the EU Charter of Fundamental Rights, including prohibition of discrimination. EU Member States must also observe the Charter when acting within the scope of EU law.

The original treaties of the European communities did not contain any reference to human rights or their protection. The creation of an area of free trade in Europe was not expected to have any impact on human rights. However, as cases began to appear before the CJEU alleging human rights breaches caused by Community Law, the CJEU developed a body of judge-made laws, known as the 'general principles' of Community Law. According to the CJEU, these general principles would reflect the content of human rights protection found

16 The European Commission proposed that the EU signs the Istanbul Convention; see Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, COM (2016) 109 final, Brussels, 4 March 2016.

17 Council of Europe, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, CETS No. 164, 1997. See Art. 11.

18 The first Summit of Heads of State and Government of the Council of Europe set up ECRI in 1993, composed of 47 independent experts.

19 See ECRI's webpage.

in national constitutions and human rights treaties, in particular the ECHR.[20] The CJEU stated that it would ensure the compliance of Community Law with these principles. With subsequent revisions of the treaties, human dignity, freedom, democracy, equality, the rule of law and respect for human rights became the Union's founding values, embedded in its treaties and mainstreamed into all its policies and programmes.

The EU anti-discrimination law was originally limited to a provision prohibiting discrimination based on sex in employment. The relevant measures aimed to prevent EU Member States from gaining a competitive advantage by offering lower rates of pay or less favourable working conditions to women. The body of anti-discrimination law evolved considerably, to include areas such as pensions, pregnancy and statutory social security regimes. However, until 2000, non-discrimination law in the EU only applied to employment and social security, and only covered the grounds of sex. In addition, the prohibition of non-discrimination on the basis of nationality is a fundamental principle laid out in the Treaty on the Functioning of the EU (Articles 18 and 45 of the TFEU) and its predecessors.

When the Amsterdam Treaty entered into force in 1999, the EU gained the ability to take action to combat discrimination on a wide range of grounds. This competence led to the introduction of new equality directives, as well as the revision of the existing provisions on sex equality. There is now a considerable body of anti-discrimination law in the EU.

According to Article 2 of the TEU, the non-discrimination principle is one of the fundamental values of the Union. Article 10 of the TFEU requires the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, when defining and implementing its policies and activities. In 2000, two directives were adopted: the Employment Equality Directive (2000/78/EC)[21] prohibited discrimination on the basis of sexual orientation, religion or belief, age and disability, in the area of employment; and the Racial

20 This was first established in cases such as CJEU, Case 29/69, *Erich Stauder v. City of Ulm*, 12 November 1969; CJEU, Case 11/70. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17 December 1970; CJEU, Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, 14 May 1974; and regarding the principle of non-discrimination: CJEU, C-149/77, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, 5 June 1978.

21 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22.

Equality Directive (2000/43/EC)[22] introduced prohibition of discrimination on the basis of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, as well as goods and services. This was a significant expansion of the scope of non-discrimination law under EU law. It recognised that to allow individuals to reach their full potential in the employment market, it is also essential to guarantee them equal access to areas such as health, education and housing. In 2004, the Gender Goods and Services Directive (2004/113/EC)[23] extended the scope of sex discrimination to the area of goods and services. However, protection on the grounds of sex does not quite match the scope of protection under the Racial Equality Directive. The so-called Gender Equality Directive (recast) (2006/54/EC)[24] guarantees equal treatment only in relation to social security, and not to the broader welfare system, such as social protection and access to healthcare and education.

Although sexual orientation, religious belief, disability and age are only protected grounds in the context of employment, a proposal to extend protection to other areas, such as accessing goods and services (known as the 'Horizontal Directive'),[25] is currently being debated in EU institutions.

In recognising that its policies could have an impact on human rights and in an effort to make citizens feel 'closer' to the EU, the EU and its Member States proclaimed the EU Charter of Fundamental Rights in 2000. The EU Charter contains a list of human rights, inspired by the rights contained in the constitutions of the Member States, the ECHR and universal human rights treaties such as the UN Convention on the Rights of the Child. Under the title 'Equality' (Articles 20 to 26), the EU Charter emphasises the importance of the principle of equal treatment in the EU legal order.

22 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22–26.

23 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp. 37–43.

24 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23–36.

25 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.

The EU Charter of Fundamental Rights,[26] as adopted in 2000, was merely a non-binding 'declaration'. However, when the Treaty of Lisbon entered into force in 2009, it altered the status of the Charter to make it a legally binding document with the same legal value as the EU treaties. As a result, EU institutions are bound to comply with the Charter, as are EU Member States but only when implementing EU law (Article 51 of the EU Charter). Article 21 of the EU Charter contains a prohibition of discrimination on various grounds. This means that individuals can complain about EU legislation or national legislation that implements EU law, if they feel the Charter has not been respected. National courts can seek guidance for the correct interpretation of EU law from the CJEU through the preliminary reference procedure under Article 267 of the TFEU.

The establishment of new bodies within the EU, such as the European Union Agency for Fundamental Rights (FRA)[27] or the European Institute for Gender Equality (EIGE),[28] have accompanied these developments to promote fundamental rights and equality. Besides that, the European Network of Equality Bodies (Equinet)[29] promotes equality in Europe by supporting and enabling the work of national equality bodies, bringing together 46 organisations from 34 European countries. The EU equal treatment legislation requires Member States to set up an equality body to provide independent assistance to victims of discrimination. Most Member States have implemented this requirement, either by designating an existing institution or by setting up a new body to carry out the tasks assigned by the new legislation. However, no specific guidelines exist for Member States on how these bodies should operate. So far, European anti-discrimination law only requires that equality bodies are set up in the fields of race, ethnic origin and gender. Many countries have bodies that deal with other grounds of discrimination as well.

26 Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, pp. 389–405.

27 See FRA's website.

28 See EIGE's website.

29 See Equinet's website.

1.1.3. European non-discrimination law and UN human rights treaties

Key points

- European human rights law is influenced by the UN human rights treaties.
- The European Union has ratified the Convention on the Rights of Persons with Disabilities (CRDP), the provisions of which are an integral part of the Union's legal order.

Naturally, human rights protection mechanisms are not limited to Europe. As well as other regional mechanisms in the Americas, Africa and the Middle East, the United Nations (UN) created a significant body of international human rights law. All EU Member States are party to the following UN human rights treaties, all of which contain a prohibition on discrimination: the International Covenant on Civil and Political Rights (ICCPR),[30] the International Covenant on Economic Social and Cultural Rights (ICESCR),[31] the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[32] the Convention on the Elimination of Discrimination Against Women (CEDAW),[33] the Convention Against Torture,[34] and the Convention on the Rights of the Child (CRC).[35] All these human rights treaties recognise protection against discrimination in the provision, protection and promotion of rights. EU legislation, including the equality directives, refers to various international agreements, including the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations

30 United Nations (UN), General Assembly (GA) (1966), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations Treaty Series (UNTS) vol. 999, p. 171.

31 UN, GA (1966), International Covenant on Economic Social and Cultural Rights (ICESCR), 16 December 1966, UNTS vol. 993, p. 3.

32 UN, GA (1966), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 16 December 1966, UNTS vol. 660, p. 195.

33 UN, GA (1966), Convention on the Elimination of Discrimination Against Women (CEDAW), 18 December 1979, UNTS vol. 1249, p. 13.

34 UN, GA (1984), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS vol. 1465, p. 85.

35 UN, GA (1989), Convention on the Rights of the Child (CRC), 20 November 1989, UNTS vol. 1577, p. 3. In addition most of the Member States are also party to the International Convention for the Protection of All Persons from Enforced Disappearance (UN Doc. A/61/488, 20 December 2006); however, none are yet party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (UN Doc. A/RES/45/158, 1 July 2003).

Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the International Convention on the Elimination of all Forms of Racial Discrimination.[36] References to UN treaties can also be found in the jurisprudence of the ECtHR. The ECtHR emphasised that the ECHR cannot be interpreted in a vacuum, but must be interpreted in harmony with the general principles of international law. One should take into account any relevant rules of international law applicable in the relations between the parties, in particular the rules concerning the international protection of human rights.[37]

Traditionally, only states can become members of human rights treaties. However, as states cooperate more through international organisations – to which they delegate significant powers and responsibilities – there is a pressing need to make sure that these organisations also commit themselves to give effect to the human rights obligations of their member states. The 2006 Convention on the Rights of Persons with Disabilities (CRPD) [38] is the first UN-level human rights treaty that is open to membership by regional integration organisations, and which the EU ratified in December 2010.[39] In 2015, the Committee on the Rights of Persons with Disabilities conducted its first review to determine how the EU has implemented its obligations.[40] In its Concluding observations, the Committee expressed its concern that the EU directives, the Racial Equality Directive (2000/43), the Gender Goods and Services Directive (2004/113) and the Gender Equality Directive (recast) (2006/54) failed to explicitly prohibit discrimination on the grounds of disability and to provide reasonable accommodation to persons with disabilities in the areas of social protection, health care, rehabilitation, education and the provision of goods and services, such as housing, transport and insurance.[41] It recommended that the EU extend protection against discrimination to persons with disabilities by adoption of the proposed horizontal directive on equal treatment.[42]

36 For example, see recital 4 of Directive 2000/78, recital 3 of Directive 2000/43.

37 ECtHR, *Harroudj v. France*, No. 43631/09, 4 October 2012, para. 42. See for example ECtHR, *Khamtokhu and Aksenchik v. Russia* [GC], Nos. 60367/08 and 961/11, 24 January 2017 referring to the CEDAW; ECtHR, *Nachova and Others v. Bulgaria* [GC], Nos. 43577/98 and 43579/98, 6 July 2005 referring to the ICERD.

38 UN Doc. A/61/611, 13 December 2006. All Member States except Ireland ratified the CRPD.

39 For the EU the CRPD entered into force on 22 January 2011.

40 UN, Committee on the Rights of Persons with Disabilities (2015), *Concluding observations on the initial report of the European Union*, CRPD/C/EU/CO/1, 2 October 2015.

41 *Ibid.*, para. 18.

42 *Ibid.*, para. 19.

The CRPD contains an extensive list of rights for persons with disabilities, aimed at securing equality in the enjoyment of their rights, as well as imposing a range of obligations on the state to undertake positive measures. According to Article 216 (2) of the TFEU, international agreements concluded by the EU are binding to the Union and the Member States, and are an integral part of Union law. As the EU is party to the CRPD, when applying EU law, EU institutions and Member States have to comply with the convention. In addition, individual Member States have acceded to the CRPD in their own right, which imposes obligations upon them directly. The CRPD became a reference point for interpreting both EU and ECtHR law relating to discrimination on the basis of disability.[43] In 2013, the CJEU applied the definition in accordance with the concept of 'disability' used in the United Nations Convention on the Rights of Persons with Disabilities. The CJEU stated that "Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with the Convention."[44]

On 11 May 2017, the Council of the EU adopted two decisions on the signing of the Istanbul Convention by the EU, covering judicial cooperation in criminal matters and asylum and non-*refoulement*. The EU Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, signed the Istanbul Convention on behalf of the European Union on 13 June 2017. The decision on signing is the first step in the process of the EU joining the Convention. Following the official signing, accession requires the adoption of the decisions on the conclusion of the Convention. These decisions will need the consent of the European Parliament.

43 CJEU, C-312/11, *European Commission v. Italian Republic*, 4 July 2013; CJEU, C-363/12, *Z. v. A Government department and The Board of Management of a Community School* [GC], 18 March 2014; CJEU, C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, 22 May 2014; CJEU, C-395/15, *Mohamed Daouidi v. Bootes Plus SL and Others*, 1 December 2016; CJEU, C-406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, 9 March 2017.

44 CJEU, Joined cases C-335/11 and C-33711, *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab* and *HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, 11 April 2013.

1.2. Who receives protection under European non-discrimination law?

Key points

- The ECHR protects all individuals within the jurisdiction of its 47 States Parties.
- Under EU secondary law, the protection is somewhat limited.

A preliminary point should be made on the issue of the beneficiaries of protection under EU law and the ECHR. **Under the ECHR,** protection is guaranteed to all those within the jurisdiction of a member state, whether they are citizens or not, and even beyond the national territory to those areas under the effective control of the state (such as occupied territories).[45] However, as discussed in Section 5.7, the case law of the ECHR shows that a state may consider nationals and non-nationals to be in distinct situations (and consequently treat them differently under certain circumstances).

Under EU law, Article 18 of the TFEU prohibits 'any discrimination on grounds of nationality' so that all nationals and EU citizens could be treated equally within the scope of the Treaties. The aim of Article 18 was to ensure that the principle of equal treatment was being upheld, so as to allow the free movement of persons. This is because the free movement of workers (Article 45) is one of the most important rights provided to individuals within the European Union. Article 18 is to be applied in instances where no other specific rights of non-discrimination exist, and it guarantees the equal treatment of all residents, provided that the situation is governed by EU law.

Although Articles 20 and 21 of the EU Charter are broader, under EU secondary law, the personal scope of the protection is limited. Third-country nationals (TCNs) – citizens of a state that is not a member of the EU – are not protected against unfavourable treatment based on nationality under the non-discrimination Directives.[46] Both the Racial Equality Directive and the Employment Equality Directive state that they do not create any right to equal treatment for TCNs

45 ECtHR, *Al-Skeini and Others v. the United Kingdom* [GC], No. 55721/07, 7 July 2011, para. 138; ECtHR, *Loizidou v. Turkey* [GC], No. 15318/89, 18 December 1996, para. 52; ECtHR, *Mozer v. the Republic of Moldova and Russia* [GC], No. 11138/10, 23 February 2016, para. 101.

46 See Art. 3 (2) of both Directive 2000/43/EC and Directive 2000/78/EC.

in relation to conditions of entry and residence[47] and in relation to access to employment and occupation.[48] They also state that they do not cover 'any treatment which arises from the legal status of third-country nationals'.[49] However, apart from those exceptions, prohibition of direct or indirect discrimination based on racial or ethnic origin, as regards the areas covered by the Directives, also applies to TCNs. The Gender Equality Directive (recast), and Gender Goods and Services Directive do not exclude protection for TCNs. Furthermore, TCNs will enjoy a right to equal treatment in broadly the same areas covered by the non-discrimination directives where they qualify as 'long-term residents', which requires a period of five years of lawful residence.[50] They may also rely on protection arising from gender equality provisions. In addition, the Family Reunification Directive allows for TCNs resident in a Member State to be joined by family members in certain conditions.[51] They may be protected in certain areas (for instance in employment) under agreements with third countries or under other instruments of EU law, such as Directive 2003/109 EC on long-term legally resident third-country nationals.

Under EU law, these rules do not prevent Member States from introducing more favourable conditions under their own national law. In this respect, the ECHR places obligations on Member States regarding TCNs, which in some cases go beyond the requirements of EU law.

1.3. Scope of the ECHR: Article 14 and Protocol No. 12

Key points

- Article 14 of the ECHR prohibits discrimination only in relation to the exercise of another right guaranteed by the Convention.
- Under Protocol No. 12, the prohibition of discrimination became a free-standing right.

47 Art. 3 (2) of both Directive 2000/43/EC and Directive 2000/78/EC.

48 Directive 2000/43/EC, Recital 13 and Directive 2000/78/EC, Recital 12.

49 Art. 3 (2) of both Directive 2000/43/EC and Directive 2000/78/EC.

50 Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.01.2004, p. 44, Art. 11 (1).

51 Directive 2003/86/EC on the right to family reunification, OJ L 251, 3.10.2003, p. 12.

Article 14 guarantees equality in 'the enjoyment of [...] [the] rights and freedoms' set out in the ECHR. The ECtHR will therefore not be competent to examine complaints of discrimination unless they fall within the ambit of one of the rights protected by the ECHR.

Whenever the ECtHR considers an alleged violation of Article 14, this is always done in conjunction with a substantive right. An applicant will often allege a violation of a substantive right, and in addition, a violation of a substantive right in conjunction with Article 14. That is, that the interference with their rights was, in addition to failing to meet the standards required in the substantive right, also discriminatory, in that those in a comparable situation did not face a similar disadvantage. As noted in Chapter 4, where the ECtHR finds a violation of the substantive right, it will not go on to consider the complaint of discrimination, where it considers that this will involve an examination of essentially the same complaint.

This section will first briefly set out the rights guaranteed by the ECHR and then explain how the ECtHR has interpreted the scope of the ECHR for the purposes of applying Article 14.

1.3.1. Rights covered by the ECHR

Since Article 14 is wholly dependent on discrimination based on one of the substantive rights guaranteed in the ECHR, it is necessary to gain an appreciation of the rights covered by this Convention. The ECHR contains a list of rights, predominantly characterised as 'civil and political'; however, it also protects certain rights, which might be considered 'economic and social'.

The substantive rights contained within the ECHR cover a number of areas: for example, the right to life, the right to respect for private and family life and freedom of thought, conscience and religion.

Wherever an issue of discrimination relates to one of the areas covered by an ECHR right, the ECtHR will consider complaints alleging a violation of Article 14.

This is an extremely significant distinction between EU law and the ECHR, in that the ECHR provides protection from discrimination over issues that EU non-discrimination law does not regulate. Although the EU Charter of Fundamental Rights obliges the EU not to interfere with human rights in the measures it

takes (including a prohibition of discrimination), the Charter only applies to the Member States when they are applying EU law.

Since the introduction of the non-discrimination directives and the extension of protection to accessing goods and services and the welfare system, the difference in scope between the protection offered under the ECHR and the directives has diminished. Nonetheless, particular areas where the ECHR provides protection over and above EU law can be identified. These will be examined below.

1.3.2. Scope of ECHR rights

When applying Article 14, the ECtHR has adopted a wide interpretation of the scope of ECHR rights:

- first, 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 of itself;[52]

- second, it has held that it was possible for a complaint of discrimination to fall within the scope of a particular right, even if the issue in question did not relate to a specific entitlement granted by the ECHR. In such cases, it was sufficient that the facts of the case broadly relate to issues that are protected under the ECHR.[53]

> Example: In *Zarb Adami v. Malta*,[54] the applicant complained of sex discrimination due to the disproportionately high number of men called for jury service. The ECtHR found that, although 'normal civic obligations' were not covered by the prohibition of 'forced or compulsory labour' under Article 4 (put otherwise, that the ECHR does not confer a right to be free from performing jury service), the facts of the case did fall within the scope of the right. 'Normal civic obligations' could become 'abnormal' where they were applied in a discriminatory manner.

52 See, for example, ECtHR, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003.

53 See, for example, ECtHR, *A.H. and Others v. Russia*, No. 6033/13 and 15 other applications, 17 January 2017, para. 380f.

54 ECtHR, *Zarb Adami v. Malta*, No. 17209/02, 20 June 2006.

Example: In *Khamtokhu and Aksenchik v. Russia,*[55] two men serving life sentences in Russia complained of discriminatory treatment between them and other convicts who were not eligible for a life sentence under national law, namely women of all ages and men who were under 18 years when committing the offence or over 65 years at the date of conviction. They alleged a violation of Article 14 in conjunction with Article 5. The ECtHR found that Article 5 of the Convention did not preclude the imposition of life imprisonment where such punishment was prescribed by national law. Nevertheless, the prohibition of discrimination enshrined by Article 14 extends beyond the enjoyment of the rights and freedoms guaranteed by states in accordance with the Convention and its Protocols. It also applies to additional rights voluntarily provided by the state, which fall within the general scope of the Convention. The ECtHR found that the difference in treatment between the applicants and juvenile offenders was justified by their mental and emotional immaturity, and their capacity for rehabilitation and reformation; the difference of treatment with the offenders aged over 65 years was justified by the fact that the eligibility for release on parole after 25 years would otherwise be illusory in their case. For the difference in treatment on account of sex, on the basis of the existing international instruments on the situation and needs of women and the statistics submitted by the government, the Court concluded that there was a public interest justifying the position under national law that women were ineligible for the life sentence. It further appeared difficult to criticise the Russian legislature for having established, in a way that reflected the evolution of society in that sphere, the exemption of certain groups of offenders from life imprisonment. Such an exemption represented, all things considered, social progress in penological matters. In the absence of common ground regarding the imposition of life imprisonment, the Russian authorities had not overstepped their margin of appreciation. There had thus been no violation of the Convention.

Example: The case of *A.H. and Other v. Russia*[56] concerns an allegedly discriminatory ban on the adoption of Russian children by US nationals. The ECtHR reiterated that the right to adopt was not guaranteed by the ECHR. However, where a state had gone beyond its obligations under Article 8 and created such a right in its domestic law, it could not, in applying that right, take

55 ECtHR, *Khamtokhu and Aksenchik v. Russia* [GC], Nos. 60367/08 and 961/11, 24 January 2017, para. 58.

56 ECtHR, *A.H. and Others v. Russia*, No. 6033/13 and 15 other applications, 17 January 2017.

discriminatory measures within the meaning of Article 14. The applicants' right to apply for adoption, and to have their applications considered fairly, fell within the general scope of private life under Article 8.[57]

Example: In *Pichkur v. Ukraine*,[58] the payment of the applicant's pension was terminated on the ground that he resided permanently abroad. He complained that the deprivation of his pension on the ground of his place of residence had been discriminatory. The ECtHR stressed that if a state had legislation in force providing for the payment of a welfare benefit as of right, that legislation had to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for those satisfying its requirements. Consequently, although the said provision did not include the right to receive a social-security payment, if a state decided to create a benefits scheme, it had to do so in a manner which was compatible with Article 14.

Similarly, for the purpose of applying Article 14, the ECtHR has found in many other cases that any form of state benefit which becomes payable will fall under the scope of either Article 1 of Protocol No. 1[59] (because it is deemed to be property)[60] or Article 8 (because it affects the family or private life).[61]

1.3.3. Protocol No. 12 to the ECHR

Protocol No. 12 prohibits discrimination in relation to the 'enjoyment of any right set forth by law' and 'by any public authority' and is thus greater in scope than Article 14, which relates only to the rights guaranteed by the Convention. In the first case examined by the ECtHR under Protocol No. 12, *Sejdić and Finci v. Bosnia and Herzegovina*[62] (discussed in Section 5.6), the Court confirmed that Article 1

57 *Ibid.*, para. 385.

58 ECtHR, *Pichkur v. Ukraine*, No. 10441/06, 7 November 2013.

59 An explanation as to the scope of Art. 1 of Protocol No. 1 to the ECHR can be found in: A. Grgić, Z. Mataga, M. Longar and A. Vilfan (2007), 'The right to property under the ECHR', *Human Rights Handbook*, No. 10.

60 For example, ECtHR, *Stec and Others v. the United Kingdom* [GC], Nos. 65731/01 and 65900/01, 12 April 2006 (pension payments and invalidity benefits); ECtHR, *Andrejeva v. Latvia* [GC], No. 55707/00, 18 February 2009 (pension payments); ECtHR, *Koua Poirrez v. France*, No. 40892/98, 30 September 2003 (disability benefit); ECtHR, *Gaygusuz v. Austria*, No. 17371/90, 16 September 1996 (unemployment benefit).

61 For example, ECtHR, *Weller v. Hungary*, No. 44399/05, 31 March 2009 (a social security payment for the purposes of supporting families with children).

62 ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 22 December 2009.

of Protocol No. 12 introduced a general prohibition of discrimination. It further confirmed that the notions of discrimination prohibited by both Article 14 and Article 1 of Protocol No. 12 were to be interpreted in the same manner.[63]

The commentary provided on the meaning of these terms in the Explanatory Report of Protocol No. 12 states that Article 1 of Protocol No. 12 relates to discrimination:

(i) in the enjoyment of any right specifically granted to an individual under national law;

(ii) in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;

(iii) by a public authority in the exercise of discretionary power (for example, granting certain subsidies);

(iv) by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).[64]

Example: In *Savez crkava "Riječ života" and Others v. Croatia*,[65] the applicants (three Reformist churches) complained that, unlike other religious communities, they were denied certain privileges, such as the right to provide religious education in schools and nurseries or to have religious marriages recognised by the state, as the domestic authorities refused to conclude an agreement with them regulating their legal status. The applicant churches' complaint in this respect therefore did not concern "rights specifically granted to them under national law", as it was in the state's discretion to grant such privileges. The ECtHR concluded that the criteria to grant privileged status were not applied on an equal basis to all religious communities. The Court held that this difference in treatment did not have an objective and reasonable justification and was in violation of Article 14 in conjunction with Article 9 of the ECHR. Relying on the Explanatory Report on Protocol No. 12, it considered that the applicants' complaint fell within the third category specified by the Explanatory Report, as it concerned alleged discrimination

63 Compare also: ECtHR, *Pilav v. Bosnia and Herzegovina*, No. 41939/07, 9 June 2016.

64 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), Explanatory Report, para. 22.

65 ECtHR, *Savez crkava "Riječ života" and Others v. Croatia*, No. 7798/08, 9 December 2010.

"by a public authority in the exercise of discretionary power". However, it was not necessary to examine the complaint under that Protocol as the ECtHR had already found a violation of Article 14.

The Explanatory Report of Protocol No. 12 further states that, while that Protocol principally protects individuals against discrimination from the state, it will also apply to those relationships between private persons, which should normally be regulated by the state. These may include, 'for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity'.[66] Broadly speaking, Protocol No. 12 will prohibit discrimination outside purely personal contexts, where individuals exercise functions placing them in a position to decide on how publicly available goods and services are offered.

1.4. Scope of EU non-discrimination law

Key points

- Under EU non-discrimination law, the prohibition on discrimination is free-standing, but it is limited to specific areas.
- Article 20 of the EU Charter confirms that everyone is equal before the law; Article 21 prohibits any discrimination on an open list of grounds.
- The principle of non-discrimination can only be applied, where the matter falls within the scope of EU law.
- Protection under EU non-discrimination directives has a varied scope:
  - protection on the grounds of race and ethnicity is the widest, covering access to employment, welfare systems, and goods and services;
  - sex discrimination is prohibited in the context of access to employment, social security (which is more limited than the broader welfare system), and goods and services;
  - sexual orientation, disability, religion or belief, and age are protected grounds only in the context of access to employment.

66 *Ibid.*, para. 28.

Unlike Article 14 of the ECHR, the prohibition of discrimination in Article 21 of the EU Charter of Fundamental Rights is a freestanding right applying to situations that do not need to be covered by any other Charter provision. It prohibits discrimination 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'. Article 20 of the EU Charter provides that everyone is equal before the law.

It should be noted that the EU Charter makes a distinction between "equality before the law" under Article 20 and non-discrimination under Article 21.[67] Article 20 of the Charter corresponds to a principle, which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law.[68] This principle requires states and EU institutions to comply with the requirements of formal equality (treating like cases in a like manner) in framing and implementing EU law. Article 21 embeds non-discrimination into the framework of substantive norms. This is accompanied by a non-exhaustive list of prohibited grounds.

According to the CJEU, the principle of equal treatment is a general principle of EU law, enshrined in Article 20 of the Charter, of which the principle of non-discrimination, laid down in Article 21 (1) of the Charter, is a particular expression.[69]

Example: In *Glatzel*,[70] the CJEU had to determine whether the EU legislation in question (more severe requirements of visual acuity for drivers of heavy goods vehicles, but not for other drivers) was compatible with Articles 20, 21 (1) and 26 of the EU Charter.

67 See, for example, FRA (2012), *FRA Opinion on proposed EU regulation on property consequences of registered partnerships*, FRA Opinion, 1/2012, 31 May 2012, which looks at 'Discrimination (Article 21 of the Charter)' (Section 2.1) and 'Equality before the law (Article 20 of the Charter)' (Section 2.2).

68 CJEU, Joined cases 117-76 and 16-77, *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen; Diamalt AG v. Hauptzollamt Itzehoe*, 19 October 1977; CJEU, Case 283/83, *Firma A. Racke v. Hauptzollamt Mainz*, 13 November 1984; CJEU, C-292/97, *Kjell Karlsson and Others*, 13 April 2000.

69 CJEU, C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, 22 May 2014, para. 43.

70 CJEU, C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, 22 May 2014.

As regards the conformity with Article 21 (1) of the EU Charter, the CJEU stated that the differential treatment of a person with impaired eyesight can be justified by concerns such as road safety, which fulfils an objective of public interest, is necessary and is not a disproportionate burden. Furthermore, the court recalled that Article 20 of the EU Charter aims to ensure inter alia that comparable situations do not receive different treatment. In so far as the situations of two groups of drivers are not comparable, a difference in treatment of the situations concerned does not infringe the right of drivers in one or other of the groups to 'equality before the law' in Article 20 of the Charter.

In addition to those Articles, Title III of the EU Charter contains a number of other provisions relating to equality. Article 22 introduces the obligation to respect cultural, religious and linguistic diversity. Article 23 concerns gender equality. Pursuant to Article 24, children have the right to such protection and care as is necessary for their well-being. Article 25 states that the EU recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. According to Article 26, the EU recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community. All EU secondary legislation, including the Equality Directives, must comply with the Charter.

Example: In *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres*[71] (discussed in Section 5.1), the CJEU found that an exception in the Gender Goods and Services Directive permitting differences in the insurance premiums and benefits between men and women was invalid. The Court relied on Articles 21 and 23 of the Charter of Fundamental Rights.

However, the principle of non-discrimination can only be applied where the matter falls within the scope of Union law.

71 CJEU, C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres* [GC], 1 March 2011.

Example: In *Bartsch*,[72] the CJEU clarified that where the allegedly discriminatory treatment contains no link with EU law, the application of the principle of non-discrimination is not mandatory. In this case, the employee died on 5 May 2004, i.e. before the expiry of the deadline for implementation of Directive 2000/78/EC (December 31 2006), leaving a widow who was 21 years younger. The employer's occupational pension scheme excluded the surviving spouse's right to the pension, if they are more than 15 years younger than the deceased employee. The CJEU ruled that the case did not fall within the scope of Union law because, on the one hand, the guidelines of the occupational pension scheme could not be considered as an implementation measure of Directive 2000/78/EC, and at the time, the deadline for implementation of the directive had not expired.

The Equality Directives differ in terms of protected groups and the areas in which discrimination is prohibited.

The Racial Equality Directive (2000/43/EC) prohibits discrimination on grounds of race or ethnic origin in employment, vocational training, membership of employer and employee organisations, social protection, including social security and healthcare, social advantages, education, and access to and supply of goods and services, including housing. It covers all natural persons within the EU. However, there are two restrictions on its scope of application. First, it only applies to such goods and services that are available to the public. Second, it does not apply to differential treatment based on nationality and is without prejudice to provisions governing the entry, residence and employment of third country nationals.

Example: In *Servet Kamberaj v. IPES and Others*,[73] an application for housing benefit submitted by a third-country national was refused owing to the exhaustion of the funds for third-country nationals. The CJEU held that difference in treatment was based on the complainant's status as a third-country national and therefore it did not fall within the scope of Racial Equality Directive.

72 CJEU, C-427/06, *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [GC], 23 September 2008.

73 CJEU, C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [GC], 24 April 2012.

The Employment Equality Directive (2000/78/EC) prohibits discrimination on the basis of sexual orientation, religion and belief, age and disability in the area of employment, occupation and related areas such as vocational training and membership of employer and employee organisations. Similar to the Racial Equality Directive, the Employment Equality Directive applies to persons within the EU, and to both the public and private sectors, but it does not cover nationality-based discrimination. It also provides a number of specific exceptions from the application of its provisions.[74]

The Gender Goods and Services Directive (2004/113/EC) provides for protection against discrimination on the grounds of sex regarding access to and supply of goods and services. It covers all persons and organisations (both in the public and private sectors) that make goods and services available to the public and/or goods and services offered outside the area of private and family life. It excludes the following from its scope of application: media content, advertisement and education. Furthermore, it does not apply in the field of employment and self-employment.

The Gender Equality Directive (recast) (2006/54/EC) guarantees equal treatment on grounds of sex in matters of pay (Article 4), occupational social security schemes (Article 5), and access to employment, vocational training and promotion and working conditions (Article 14).

Further legal acts promote gender equality, in the area of state social security (Directive 79/7/EEC),[75] equal treatment between self-employed men and women (Directive 2010/41/EU),[76] relating to pregnancy (Directive 92/85/EEC)[77] and parental leave (Directive 2010/18/EU).[78]

74 See Chapters 2 and 3.

75 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.1.1979, pp. 24–25.

76 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, pp. 1–6.

77 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992, pp. 1–7.

78 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18.3.2010, pp. 13–20.

2 Discrimination categories

EU	Issues covered	CoE
Racial Equality Directive (2000/43/EC), Art. 2 (2) (a) Employment Equality Directive (2000/78/EC), Art. 2 (2) (a) Gender Equality Directive (recast) (2006/54/EC), Art. 2 (1) (a) Gender Goods and Services Directive (2004/113/EC), Art. 4 (1) (a) CJEU, C-356/12, *Glatzel v. Freistaat Bayern*, 2014 CJEU, C-267/12, *Hay v. Crédit agricole mutuel*, 2013 CJEU, C-303/06, *Coleman v. Attridge Law and Steve Law* [GC], 2008 CJEU, C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen* [GC], 2008 CJEU, C-423/04, *Richards v. Secretary of State for Work and Pensions*, 2006 CJEU, C-256/01, *Allonby v. Accrington and Rossendale College*, 2004 CJEU, C-13/94, *P v. S and Cornwall County Council*, 1996	**Direct discrimination**	ECHR, Art. 14 (prohibition of discrimination) ESC, Art. E (non-discrimination) ECtHR, *Guberina v. Croatia*, No. 23682/13, 2016 ECSR, *CGIL v. Italy*, Complaint No. 91/2013, 2015 ECtHR, *Burden v. the United Kingdom* [GC], No. 13378/05, 2008

EU	Issues covered	CoE
Racial Equality Directive (2000/43/EC), Art. 2 (2) (b) Employment Equality Directive (2000/78/EC), Art. 2 (2) (b) Gender Equality Directive (recast) (2006/54/EC), Art. 2 (1) (b) Gender Goods and Services Directive (2004/113/EC), Art. 4 (1) (b) CJEU, C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* [GC], 2015 CJEU, C-385/11, *Elbal Moreno v. INSS and TGSS*, 2012 CJEU, C-152/11, *Odar v. Baxter Deutschland GmbH*, 2012	**Indirect discrimination**	ECHR, Art. 14 (prohibition of discrimination) ESC, Art. E (non-discrimination) ECSR, *AEH v. France*, Complaint No. 81/2012, 2013 ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 2007
CJEU, C-443/15, *Parris v. Trinity College Dublin and Others*, 2016.	**Multiple and intersectional discrimination**	ECtHR, *Carvalho Pinto de Sousa Morais v. Portugal*, No. 17484/15, 2017 ECtHR, *S.A.S. v. France* [GC], No. 43835/11, 2014 ECtHR, *B.S. v. Spain*, No. 47159/08, 2012.
Racial Equality Directive (2000/43/EC), Art. 2 (3) and (4) Employment Equality Directive (2000/78/EC), Art. 2 (3) and (4) Gender Goods and Services Directive (2004/113/EC), Art. 4 (3) and (4) Gender Equality Directive (recast) (2006/54/EC), Art. 2 (2) (a) and (b)	**Harassment and instruction to discriminate**	ECHR, Art. 2 (right to life), Art. 3 (prohibition of torture), Art. 9 (freedom of religion), Art. 11 (freedom of assembly and association), Art. 14 (prohibition of discrimination) ESC, Art. E (non-discrimination), Art. 26 (The right to dignity at work) ECtHR, *Đorđević v. Croatia*, No. 41526/10, 2012 ECtHR, *Catan and Others v. the Republic of Moldova and Russia* [GC], Nos. 43370/04, 18454/06 and 8252/05, 2012

EU	Issues covered	CoE
Charter of Fundamental Rights, Art. 23 (men and women), Art. 24 (children), Art. 25 (the elderly), Art. 26 (Persons with disabilities) Racial Equality Directive (2000/43/EC), Art. 5 Employment Equality Directive (2000/78/EC), Art. 7 Gender Equality Directive (recast) (2006/54/EC), Art. 3 Gender Goods and Services Directive (2004/113/EC), Art. 6 European Parliament resolution on strengthening the fight against racism, xenophobia and hate crime (2013/2543(RSP)) CJEU, C-173/13, *Leone and Leone v. Garde des Sceaux, ministre de la Justice and Others*, 17 July 2014 CJEU, C-407/98, *Abrahamsson and Anderson v. Fogelqvist*, 6 July 2000 CJEU, C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 CJEU, C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995	**Specific measures**	ECHR, Art. 14 (prohibition of discrimination), Protocol No. 12, Art. 1 (General prohibition of discrimination) ESC (Revised), Art. E ECtHR, *Çam v. Turkey*, No. 51500/08, 2016 ECtHR, *Horváth and Kiss v. Hungary*, No. 11146/11, 2013 ECSR, *The Central Association of Carers in Finland v. Finland*, No. 71/2011, 2012
European Parliament resolution on strengthening the fight against racism, xenophobia and hate crime (2013/2543(RSP)) Council Framework Decision on racism and xenophobia (2008/913/JHA) Victims' Rights Directive (2012/29/EU)	**Hate crime / Hate speech**	ECtHR, *Škorjanec v. Croatia*, 25536/14, 2017 ECtHR, *Halime Kiliç v. Turkey*, No. 63034/11, 2016 ECtHR, *Identoba and Others v. Georgia*, No. 73235/12, 2015 ECtHR, *M'Bala M'Bala v. France* (dec.), No. 25239/13, 2015 ECtHR, *Delfi AS v. Estonia* [GC], No. 64569/09, 2015 ECtHR, *Perinçek v. Switzerland* [GC], No. 27510/08, 2015 ECtHR, *Virabyan v. Armenia*, No. 40094/05, 2012

Key point

- Discrimination defines a situation where an individual is disadvantaged in some way on the basis of 'one or multiple protected grounds'.

Non-discrimination law aims to allow all individuals an equal and fair prospect to access opportunities available in a society. We make choices on a daily basis over issues such as whom we socialise with, where we shop and where we work. We prefer certain things and certain people over others. While expressing our subjective preferences is commonplace and normal, at times we may exercise functions that place us in a position of authority or allow us to take decisions that may have a direct impact on others' lives. We may be civil servants, shopkeepers, employers, landlords or doctors who decide over how public powers are used, or how private goods and services are offered. In these non-personal contexts, non-discrimination law intervenes in the choices we make in two ways.

First, it stipulates that those individuals who are in similar situations should receive similar treatment and not be treated less favourably simply because of a particular 'protected' characteristic that they possess ('direct' discrimination). Second, in some situations treatment based on a seemingly neutral rule can also amount to discrimination, if it disadvantages a person or a group of persons as a result of their particular characteristic ('indirect' discrimination).

The non-discrimination principle prohibits scenarios where persons or groups of people in an identical situation are treated differently, and where persons or groups of people in different situations are treated identically.

This chapter discusses in greater depth the meaning of direct and indirect discrimination, some of their specific manifestations, such as multiple discrimination, harassment or instruction to discriminate, hate crime and hate speech and how they operate in practice through case law. It will then examine how the justification test operates.

2.1. Direct discrimination

Key points

- Direct discrimination is when a person is treated less favourably on the basis of 'protected grounds'.
- Less favourable treatment is determined through a comparison between the alleged victim and another person, who does not possess the protected characteristic, in a similar situation. The European and national courts have accepted the notion of discrimination by association, where an individual is treated less favourably because of their association with another individual who possesses a 'protected characteristic'.

Direct discrimination is defined similarly under the ECHR and EU law. **Under EU law**, Article 2 (2) of the EU Racial Equality Directive states that direct discrimination is 'taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'.[79] **Under the ECHR**, the ECtHR uses the formulation that there must be a 'difference in the treatment of persons in analogous, or relevantly similar, situations', which is 'based on an identifiable characteristic'.[80]

Procedurally, **under the ECHR,** an applicant must be able to show that he or she was "directly affected" by the measure complained of, in order to be able to lodge an application (victim status).[81]

Under EU law, unlike the ECHR, direct discrimination can be established, even if there is no identifiable complainant claiming to have been a victim of such

Direct discrimination will have occurred when:

- an individual is treated less favourably;
- by comparison to how others, who are in a similar situation, have been or would be treated;
- and the reason for this is a particular characteristic they hold, which falls under a 'protected ground'.

79 Similarly: Employment Equality Directive, Art. 2 (2) (a); Gender Equality Directive (recast), Art. 2 (1) (a); Gender Goods and Services Directive, Art. 2 (a).

80 ECtHR, *Biao v. Denmark* [GC], No. 38590/10, 24 May 2016, para. 89; Similarly, ECtHR, *Carson and Others v. the United Kingdom* [GC], No. 42184/05, 16 March 2010; para. 61; ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007, para. 175; ECtHR, *Burden v. the United Kingdom* [GC], No. 13378/05, 29 April 2008, para. 60.

81 ECtHR (2014), Practical guide on admissibility criteria.

discrimination. In the *Feryn* case,[82] the CJEU found that an employer which declares publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of the Racial Equality Directive (2000/43), since such statements are likely to strongly dissuade candidates from submitting their applications and hinder their access to the labour market.

2.1.1. Less favourable treatment

At the heart of direct discrimination is the less favourable treatment that an individual is subject to. This can be relatively easy to identify compared with indirect discrimination, where statistical data is often needed (see below). Here are examples taken from cases that are referred to in this Handbook: refusal of entry to a restaurant or shop, receiving a smaller pension or lower pay, being subject to verbal abuse or violence, being refused entry at a checkpoint, having a higher or lower retirement age, being barred from a particular profession, not being able to claim inheritance rights, being excluded from the mainstream education system, being deported, not being permitted to wear religious symbols, being refused or revoked social security payments. Consequently, the first feature of direct discrimination is evidence of the difference of treatment. Direct discrimination can also arise from treating two people in different situations in the same way. The ECtHR has stated that 'the right not to be discriminated against in the enjoyment of the rights guaranteed under the ECHR is also violated when States [...] fail to treat differently persons whose situations are significantly different'.[83]

2.1.2. A comparator

Less favourable treatment can be established by making the comparison to someone in a similar situation. A complaint about 'low' pay is not a claim of discrimination unless it can be shown that the pay is lower than that of someone hired by the same employer to perform a similar task. Therefore, to determine whether a person was treated less favourably, it is necessary to identify a suitable 'comparator': that is, a person in materially similar circumstances,

82 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008. See also CJEU, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, C-81/12, 25 April 2013.

83 ECtHR, *Thlimmenos v. Greece* [GC], No. 34369/97, 6 April 2000, para. 44. Similarly, ECtHR, *Pretty v. the United Kingdom*, No. 2346/02, 29 April 2002, para. 88.

with the main difference between the two persons being the 'protected ground'. Proving a comparator does not need to be contentious, and discrimination may be established without an explicit discussion in this regard. Below are some examples of cases where proving the comparator was expressly raised as an issue by the deciding body.

Under EU law, in a number of cases the CJEU examined in detail whether two groups could be considered as comparable.

Example: In *Wolfgang Glatzel v. Freistaat Bayern*,[84] the applicant was refused a driving licence for heavy goods vehicles because of insufficient visual acuity in one of his eyes. Contrary to other categories of drivers, he did not have a possibility to obtain a driving licence in 'exceptional cases', after additional examinations confirming his ability to drive.

The CJEU found that the situation of both categories of drivers was not comparable. In particular, the two categories differed by the size of the vehicle driven, the number of passengers carried and the responsibilities which accordingly result from driving such vehicles. The characteristics of the vehicles concerned justified the existence of different conditions for different categories of driving licence. Consequently, a difference in treatment was justified and did not infringe the right to 'equality before the law' under Article 20 of the EU Charter of Fundamental Rights.

Example: In *P v. S and Cornwall County Council*,[85] the complainant was undergoing gender reassignment from male to female when she was dismissed by her employer. The CJEU found that the dismissal constituted unfavourable treatment. As to the relevant comparator, the CJEU stated that 'where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'. As to the grounds, although it could not be shown that the complainant was treated differently because he was a man or a woman, it could be shown that the differential treatment related to the concept of her sex.

84 CJEU, C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, 22 May 2014.

85 CJEU, C-13/94, *P v. S and Cornwall County Council*, 30 April 1996.

Example: The case *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*[86] concerns marriage benefits for same-sex partners. At the time of the dispute, marriage for same-sex couples was not possible in France, but registered civil partnership existed for both hetero- and homosexual couples. The claimant was employed by a bank that offered special benefits to employees on occasion of their marriage. The claimant applied for these benefits after he entered into a same-sex civil partnership, but the bank refused. The CJEU had to determine whether such a difference in treatment amounted to discrimination based on sexual orientation. The CJEU reaffirmed that while situations do not have to be identical, but only comparable, the comparability must be assessed in the light of the benefit concerned, and not in a global and abstract manner. The CJEU established that persons of the same sex who cannot marry and therefore conclude a civil partnership are in a situation comparable to that of married couples. The CJEU explained that although the difference in treatment is based on the employees' marital status and not expressly on their sexual orientation, it constitutes direct discrimination on the grounds of sexual orientation. Homosexual employees were unable to marry and consequently meet the condition required for obtaining the benefit claimed.

Under EU law, proving comparability in cases concerning equal pay involves establishing whether the work performed by a female worker is 'equal', or of 'equal value', to work performed by a male worker, and whether there are differences in the salary received by male and female workers. In this regard, the CJEU did not accept a comparison across companies.

Example: In *Allonby v. Accrington and Rossendale College*,[87] a female lecturer complained about different pay conditions under different employment contracts. The college where the complainant was initially employed as a lecturer did not renew her contract. She was later employed by a company that subcontracted lecturers to educational establishments, and deployed at her old college, performing the same duties as before, but for a lower salary. She alleged discrimination on the basis of sex, saying that male lecturers working for the college were paid more. As the difference in pay could not

86 CJEU, C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013.

87 CJEU, C-256/01, *Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, 13 January 2004.

be attributed to 'single source' (the same employer), the CJEU held that male lecturers employed by the college were not in a comparable situation to the complainant, who was employed by an external company.

An apparent exception for finding a suitable 'comparator', at least within the scope of employment, is where the discrimination suffered is due to pregnancy. It is well established case law of the CJEU, that where the detriment suffered by a woman is due to pregnancy, then it constitutes direct discrimination based on sex, there being no need for a comparator.[88] The same applies in situations when discrimination is related to maternity leave[89] or undergoing *in vitro* fertilisation treatment.[90]

Under the ECHR, the ECtHR stressed that two groups of people may be considered as being in an analogous situation for the purpose of one particular complaint but not another. For example, married and unmarried couples can be regarded as not being in a comparable situation in the fields of taxation, social security or social policy. In contrast, married and unmarried partners who had an established family life have been found to be in a comparable situation as regards the possibility to maintain contact by telephone while one of them was in custody.[91] Consequently, the comparability should be assessed in light of the aim of the contested measure and not in an abstract context.

Example: In *Varnas v. Lithuania*,[92] the applicant, a prisoner on remand, complained that he had been denied conjugal visits from his wife, while convicted prisoners were allowed such visits. The ECtHR explained that the requirement of being in an "analogous position" did not mean that the comparator groups had to be identical. The fact that the applicant's situation was not fully analogous to that of convicted prisoners did not preclude the application of Article 14 of the ECHR. The applicant had to show that he was in a relevantly similar situation to others who had been treated differently. The ECtHR went on to conclude a violation of Article 14 of the ECHR in conjunction with Article 8.

88 CJEU, C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 8 November 1990. Similarly, CJEU, C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd.*, 14 July 1994.

89 CJEU, C-191/03, *North Western Health Board v. Margaret McKenna*, 8 September 2005, para. 50.

90 CJEU, C-506/06, *Sabine Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG* [GC], 26 February 2008.

91 ECtHR, *Petrov v. Bulgaria*, No. 15197/02, 22 May 2008, para. 55.

92 ECtHR, *Varnas v. Lithuania*, 42615/06, 9 July 2013, for further details see Section 5.12.

Example: In *Burden v. the United Kingdom*,[93] two sisters had co-habited for a period of 31 years. They owned a property jointly and each had left their share in the property to the other in their will. The applicants complained that, unlike married couples or those that entered into civil partnerships, upon death of one, the other would have to pay inheritance tax. The ECtHR found that the applicants as siblings could not compare themselves to cohabiting couples who were married or civil partners. Marriage and civil partnerships amount to special relationships entered into freely and deliberately in order to create contractual rights and responsibilities. In contrast, the applicants' relationship was based on consanguinity and therefore was fundamentally different.

Example: In *Carson v. the United Kingdom*,[94] the applicants complained that the state did not apply the same increment to the pension payments of the retirees living abroad as those living the United Kingdom (UK). The ECtHR concluded that the applicants – who did not live in the UK or a state with which the UK had a reciprocal social security arrangement – were not in a similar position to those retired in the UK. Although these different groups had all contributed to government revenue through the payment of national insurance, this did not constitute a pension fund but rather general public revenue to finance various aspects of public spending. Furthermore, the duty of the government to apply increments was based on consideration of the rise in cost of the standard of living in the UK. The applicants were therefore not in a comparable situation to these other groups and there had accordingly been no discriminatory treatment.

Similarly, **under the ESC**, references to a comparator can be found in the case law of the ECSR.

Example: In *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy,*[95] the ECSR examined a complaint concerning discrimination of medical practitioners[96] who did not raise conscious objection to provide abortion services. They complained that they were disadvantaged at work in terms of

93 ECtHR, *Burden v. the United Kingdom* [GC], No. 13378/05, 29 April 2008.

94 ECtHR, *Carson and Others v. the United Kingdom* [GC], No. 42184/05, 16 March 2010.

95 ECSR, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Complaint No. 91/2013, 12 October 2015.

96 *Ibid*., para. 215 ff.

workload, distribution of tasks, career opportunities and protection of health and safety. The Committee confirmed that the non-objecting and objecting medical practitioners were in a comparable situation, because they had similar professional qualifications and worked in the same field of expertise. Consequently, the difference in treatment amounted to discrimination.

The ECSR stated that the legal status in national law of different groups is not relevant for the assessment of whether those groups are in a comparable situation. For example, in *Associazione Nazionale Giudici di Pace v. Italy*[97] (discussed in detail in Section 5.12), concerning access to the social security scheme, the ECSR compared the situation of tenured and lay judges. It held that in the circumstances of the case, only the duties assigned, hierarchical authority and tasks performed by both groups of judges were relevant. As they were similar, the ECSR found that lay judges were functionally equivalent to tenured judges. Moreover, it held that the comparison should be made only in respect to different groups in a certain Member State. In *Fellesforbundet for Sjøfolk (FFFS) v. Norway*[98] (discussed in detail in Section 5.5), concerning the retirement age of seafarers in Norway, the claimant argued that the national provision was discriminatory on the grounds of age, both in comparison to seafarers employed on ships in other countries (where the retirement age of seafarers was higher than in Norway) and to individuals in other professions in Norway. The ECSR held that examination had to be limited to the situation of Norway. Furthermore, the ECSR accepted that senior pilots and senior oil workers are comparable categories of workers for the purposes of this complaint. It considered that they were in a sufficiently similar situation, in particular owing to professional hardship and physical strain.

2.1.3. Causation

Chapter 4 will discuss the range of 'protected grounds' that exist in European non-discrimination law, such as: sex, gender identity, sexual orientation, disability, age, race, ethnic origin, national origin and religion or belief. This section will focus on the need for a causal link between the less favourable treatment and the protected grounds. In order to satisfy this requirement, one should ask the following question: would the person have been treated less favourably had they been of a different sex, of a different race, of a different age, or in any converse

97 ECSR, *Associazione Nazionale Giudici di Pace v. Italy*, Complaint No. 102/2013, 5 July 2016.

98 ECSR, *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No. 74/2011, 2 July 2013.

position under any one of the other protected grounds? If the answer is yes, then the less favourable treatment is clearly caused by the grounds in question.

The rule or practice that is being applied does not necessarily need to refer explicitly to the 'protected ground', as long as it refers to another factor that is indissociable from the protected ground. Essentially, when considering whether direct discrimination has taken place, one is assessing whether the less favourable treatment is due to a 'protected ground' that cannot be separated from the particular factor being complained about.

Example: In *Maruko v. Versorgungsanstalt der deutschen Bühnen*,[99] after the death of his registered same-sex partner, the complainant wished to claim the 'survivor's pension' from the company that ran his deceased partner's occupational pension scheme. The company refused to pay, on grounds that survivors' pensions were only payable to spouses and the complainant had not been married to the deceased. The CJEU accepted that the refusal to pay the pension amounted to unfavourable treatment and that this was less favourable in relation to the comparator of 'married' couples. The CJEU found that the institution of 'life partnership' in Germany created, in many aspects, the same rights and responsibilities for life partners as for spouses, particularly with regard to state pension schemes. It admitted that for the purposes of this case, life partners were in a similar situation to spouses. The CJEU then went on to state that this would amount to direct discrimination based on sexual orientation. Thus, the fact that they were unable to marry was indissociable from their sexual orientation.

Example: In *Richards v. Secretary of State for Work and Pensions*,[100] the complainant who had undergone male-to-female gender reassignment surgery wished to claim her pension on her 60th birthday, which was the pensionable age for women in the United Kingdom. At that time, Ms Richards was unable to have her new gender recognised for the purposes of pension legislation.[101] The government refused to grant the pension, maintaining that

99 CJEU, C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [GC], 1 April 2008.

100 CJEU, C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, 27 April 2006.

101 Prior to the Gender Recognition Act 2004 ("the GRA"), which came into force on 4 April 2005, it was necessary to take a person's gender as assigned at birth to determine that person's gender, so as to decide when that person attained 'pensionable age" for the purposes of pension legislation.

the complainant had not received unfavourable treatment in comparison to those in a similar situation. According to the government, the complainant had to be regarded as a "man" for the purposes of the pensions legislation. The CJEU noted that the absence of relevant national law precluded the complainant to fulfil the conditions of pension legislation. The CJEU found that a person who has undergone male-to-female gender reassignment in accordance with national law cannot be refused a pension she would be entitled to, had she been held to be a woman under national law.

2.1.4. Discrimination by association

The CJEU have given a broad interpretation of the scope of the 'protected ground.' It can include 'discrimination by association', where the victim of the discrimination is not themselves the person with the protected characteristic. It can also involve the particular ground being interpreted in an abstract manner. This makes it imperative that practitioners embark on detailed analysis of the reasoning behind the less favourable treatment, looking for evidence that the protected ground is causative of such treatment, whether directly or indirectly.

Example: In *S. Coleman v. Attridge Law and Steve Law*,[102] a mother claimed that she was treated unfavourably at work because her son was disabled. Her son's disability led her to be late to work on occasion and to request leave to be scheduled according to her son's needs. The complainant's requests were refused and she was threatened with dismissal, as well as receiving abusive comments relating to her child's condition. The CJEU considered her colleagues in similar posts and with children as comparators, finding that they were granted flexibility when requested. It also accepted that this amounted to discrimination and harassment on the grounds of the disability of her child.

The ECtHR has also confirmed that Article 14 covers discrimination by association.

Example: In *Guberina v. Croatia*[103] (discussed in Section 5.4), the ECtHR stressed that Article 14 also covers instances in which an individual is treated less favourably on the basis of another person's protected characteristic. It

102 CJEU, C-303/06, *S. Coleman v. Attridge Law and Steve Law* [GC], 17 July 2008.

103 ECtHR, *Guberina v. Croatia*, No. 23682/13, 22 March 2016.

found that the discriminatory treatment of the applicant on account of the disability of his child was a form of disability-based discrimination.

Example: In *Weller v. Hungary*,[104] a Romanian woman was ineligible to claim maternity benefits payable after giving birth because she was not a Hungarian citizen. Her Hungarian husband was also ineligible, the benefit being paid only to mothers. The ECtHR found that he had been discriminated against on the basis of fatherhood (rather than sex), since adoptive male parents or male guardians were entitled to claim the benefit, while natural fathers were not. A complaint was also lodged by the children, who claimed discrimination on the basis of the refusal to pay the benefit to their father, which the ECtHR accepted. Thus, the children were discriminated against on the grounds of the status of their father.

The concept of discrimination by association can be also found in national case law.

Example: The first case[105] of discrimination by association on the ground of sexual orientation in Poland concerns an employee who worked as a shop security guard. He took part in an equality parade, excerpts of which were shown on television. After the broadcast, the claimant was informed of his dismissal, his employer submitting that he 'could not imagine a homosexual working for his company'. The Polish courts considered that discrimination could occur regardless of whether the victim had a certain protected characteristic. The claimant's sexual orientation was therefore irrelevant. The courts went on to find that the claimant was discriminated against on the basis of his participation in the march linked to the lesbian, gay, bisexual and trans (LGBT) community. They confirmed that discrimination by association had taken place and awarded the claimant compensation.

104 ECtHR, *Weller v. Hungary*, No. 44399/05, 31 March 2009.

105 Poland, District Court in Warsaw (court of the second instance), V Ca 3611/14, 18 November 2015. See also, Tribunal du travail de Leuven, 10 December 2013, *Jan V.H. v. BVBA*, n° 12/1064/A.

2.2. Indirect discrimination

Key points

- Indirect discrimination occurs when an apparently neutral rule disadvantages a person or a group sharing the same characteristics.
- It must be shown that a group is disadvantaged by a decision when compared to a comparator group.

Both EU and CoE law acknowledge that prohibiting the different treatment of people in similar situations might not be sufficient to achieve factual equality. In some situations, offering the same treatment to people who are in different situations may put certain people at a particular disadvantage. In this case, it is not the treatment that differs, but rather the effects of that treatment, which will be felt differently by people with different characteristics. The idea that different situations should be treated differently has been incorporated into the concept of indirect discrimination.

Under EU law, Article 2 (2) (b) of the Racial Equality Directive states that 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared to other persons'.[106]

Under the ECHR, the ECtHR has drawn on this definition of indirect discrimination in some of its judgments, stating that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'.[107]

Under the ESC, the ECSR has found that indirect discrimination may arise by "failing to take due and positive account of all relevant differences between persons in a comparable situation, or by failing to take adequate steps to ensure

106 Similarly: Employment Equality Directive, Art. 2 (2) (b); Gender Equality Directive (recast), Art. 2 (1) (b); Gender Goods and Services Directive, Art. 2 (b).

107 ECtHR, *Biao v. Denmark* [GC], No. 38590/10, 24 May 2016, para. 103; ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007, para. 184.

The elements of indirect discrimination are as follows:
- a neutral rule, criterion or practice;
- that affects a group defined by a 'protected ground' in a significantly more negative way;
- in comparison to others in a similar situation.

that the rights and collective advantages that are open to all are genuinely accessible by and to all".[108]

It should be noted, however, that both kinds of discrimination result in a difference of treatment in comparable situations. For example, a woman could be excluded from employment either because the employer does not want to employ women (direct discrimination) or because the requirements for the position are formulated in such a way that most women would not be able to fulfil them (indirect discrimination). In some cases, the division is more theoretical and it might be problematic to establish whether the situation constitutes direct or indirect discrimination.[109]

2.2.1. A neutral rule, criterion or practice

The first identifiable requirement of indirect discrimination is an apparently neutral rule, criterion or practice. In other words, there must be some form of requirement that is applied to everybody. Follow some cases for illustration. For further examples, see Chapter 6 on evidential issues and the role of statistics.

Example: In *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social, Tesorería General de la Seguridad Social*,[110] the complainant had worked part-time for four hours a week for 18 years. According to the relevant provision, in order to obtain a pension – which was already proportionally lower – a part-time worker had to pay contributions for a longer period than a full-time worker. As the referring court explained, on the basis of a part-time contract of 4 hours a week, the complainant would have to work for 100 years to complete the minimum period of 15 years, which would

108 ECSR, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Complaint No. 91/2013, 12 October 2015, para. 237; ECSR, *Confédération française démocratique du travail (CFDT) v. France*, Complaint No. 50/2008, decision on the merits of 9 September 2009, paras. 39 and 41; ECSR, *International Association Autism-Europe v. France*, Complaint No. 13/2002, 4 November 2003, para. 52.

109 See, for example, CJEU, C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [GC], 1 April 2008, where the Advocate General Ruiz-Jarabo Colomer and CJEU reached different conclusions in this regard.

110 CJEU, C-385/11, *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, 22 November 2012.

give her access to a pension of € 112.93 a month. The CJEU held that the relevant provisions put part-time workers who have worked part time for a long time at a disadvantage. In practice, such legislation excludes those workers from any possibility of obtaining a retirement pension. Given that at least 80 % of part-time workers in Spain are women, the effect of this rule disproportionately affected women in comparison to men. Accordingly, it constituted indirect discrimination.

Example: In *D.H. and Others v. the Czech Republic*,[111] a series of tests were used to establish the intellectual capacity of pupils to determine whether they should be placed into special schools designed for children with special educational needs. The same test was applied to all pupils who were considered for placement in special schools. The ECtHR considered that there was a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In particular, the educational background of Roma children (such as a lack of preschool), some of the children's inability to speak Czech and their unfamiliarity with the testing situation were not taken into account. As a result, Roma students were inherently more likely to perform badly on the tests – which they did – with the consequence that between 50 % to 90 % of Roma children were educated outside the mainstream education system. The ECtHR found that this was a case of indirect discrimination.

Example: In *European Action of the Disabled (AEH) v. France*[112] (discussed in Section 4.4), the ECSR considered that limited funds in the state's social budget for the education of children and adolescents with autism indirectly disadvantaged persons with disabilities. The Committee explained that the limited public funding allocated to social protection could equally affect everyone who was supposed to be covered by this protection. However, a person with a disability is more likely to be dependent on community care, funded through the state budget, in order to live independently and in dignity, in comparison to other persons. Thus, budget restrictions in social policy matters are likely to place persons with disabilities at a disadvantage, which results in a difference in treatment indirectly based on disability. Consequently, the ECSR found that the state's limited social budget constituted indirect discrimination against persons with disabilities.

111 ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007.

112 ECSR, *European Action of the Disabled (AEH) v. France*, Complaint No. 81/2012, 11 September 2013.

Example: In a case[113] before the United Kingdom Employment Appeal Tribunal, the complainant, a train driver and single mother with three children under the age of five, filed a request for flexible working. Her request was refused on the basis that it would be unfair to allow her to only work the family-friendly shifts because other drivers would then be denied the choice of those shifts as a result. The courts agreed that the required shift pattern generally put women at a disadvantage, because more women have caring responsibilities than men and would be unable to work those hours. The case was remitted for the question of objective justification to be reconsidered.

2.2.2. Significantly more negative in its effects on a protected group

The second identifiable requirement is that the apparently neutral provision, criterion or practice places a 'protected group' at a particular disadvantage. Accordingly, indirect discrimination differs from direct discrimination in that it moves the focus away from differential treatment to differential effects.

Example: In *Odar v. Baxter Deutschland GmbH*,[114] the CJEU considered a formula in a social plan, resulting in employees aged over 54 years receiving less redundancy compensation than younger ones. Dr. Odar, who had severe disability, received a compensation under the social plan, which was calculated based on the earliest date at which he would receive a pension. If his compensation had been calculated under the standard formula, taking into account the length of service, he would have received twice the amount. The Court found that it did not constitute direct discrimination based on age (such a difference in treatment may be justified under Article 6 (1) of Directive 2000/78/EC) but indirect discrimination based on disability. The CJEU held that the difference in treatment disregarded the risks that persons with severe disabilities face over time, particularly in finding new employment, as well as the fact that those risks tend to become exacerbated as they approach retirement age. In paying a worker with a severe disability a compensation that is lower than the amount paid to a worker without a disability, the special formula has an excessive adverse effect on the legitimate interests of severely disabled workers and therefore goes beyond what is necessary to achieve the social policy objectives.

113 United Kingdom, Employment Appeal Tribunal, *XC Trains Ltd v. CD & Ors*, No. UKEAT/0331/15/LA, 28 July 2016.

114 CJEU, C-152/11, *Johann Odar v. Baxter Deutschland GmbH*, 6 December 2012.

When considering statistical evidence that the protected group is disproportionately affected in a negative way in comparison to those in a similar situation, the CJEU and ECtHR will seek evidence that a particularly large proportion of those negatively affected is made up of that 'protected group'. For instance, in *Di Trizio v. Switzerland*,[115] the ECtHR relied on statistics showing that 97 % of persons affected by the applied method of calculation of disability benefits were women who wished to reduce their working hours after the birth of a child. This will be considered in detail in Chapter 5 relating to evidential issues. For now, reference is made to the collection of phrases used by the CJEU appearing in the Opinion of Advocate General Léger in the *Nolte* case when speaking of sex discrimination:

'[I]n order to be presumed discriminatory, the measure must affect "a far greater number of women than men" [*Rinner- Kühn*[116]] or "a considerably lower percentage of men than women" [*Nimz*,[117] *Kowalska*[118]] or "far more women than men" [*De Weerd*[119]]'.[120]

> Example: In a case[121] before German courts, a woman applied to training for pilots at Lufthansa. Although she passed all the tests, she was not admitted because she was shorter than 1.65 m required for pilots. She complained about indirect discrimination, arguing that, since 44.3 % of all women but only 2.8 % of men were smaller than 1.65 m, the requirement specifically disadvantaged women. The case ended in friendly settlement. Lufthansa agreed to pay compensation for the unequal treatment.

2.2.3. A comparator

As with direct discrimination, a court will still need to find a comparator to determine whether the effect of the particular rule, criterion or practice is significantly more negative than those experienced by other individuals in a similar

115 ECtHR, *Di Trizio v. Switzerland*, No. 7186/09, 2 February 2016.

116 CJEU, C-171/88, *Ingrid Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG*, 13 July 1989.

117 CJEU, C-184/89, *Helga Nimz v. Freie und Hansestadt Hamburg*, 7 February 1991.

118 CJEU, C-33/89, *Maria Kowalska v. Freie und Hansestadt Hamburg*, 27 June 1990.

119 CJEU, C-343/92, *M. A. De Weerd, née Roks, and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others*, 24 February 1994.

120 Opinion of Advocate General Leger of 31 May 1995, paras. 57-58 in CJEU, C-317/93, *Inge Nolte v. Landesversicherungsanstalt Hannover*, 14 December 1995. For an example of a similar approach having been adopted under the ECHR, see the case of *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007 (discussed in Sections 6.2 and 6.3).

121 Germany, Federal Labour Court, 8 AZR 638/14, 18 February 2016.

situation. Both in cases of alleged direct and indirect discrimination, the courts will compare, for example, men to women, homosexual couples to heterosexual couples, individuals with disabilities to individuals without disabilities.

However, establishing indirect discrimination requires proving that there are two groups: one advantaged and one disadvantaged by the contested measure. Usually, the disadvantaged group does not exclusively consist of persons holding protected characteristics. For example, part-time employees disadvantaged by a certain rule are mostly women, but men can also be affected. On the other hand, not all persons holding a particular characteristic are disadvantaged. For example, in a situation in which having a perfect knowledge of a language is a condition for employment, it will mostly disadvantage foreign applicants, but there might be some people among those foreign candidates who are able to fulfil this requirement. In cases where a formally neutral criterion in fact affected an entire group, the CJEU has concluded that there had been direct discrimination.[122]

The following case provided an opportunity for the CJEU to clarify various aspects related to the concept of discrimination, the difference between direct and indirect discrimination and the appropriate comparator.

Example: In *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia*,[123] the claimant ran a shop in an urban district inhabited mainly by persons of Roma origin. She complained that the high placement of electricity meters on pylons, a practice which was not carried out in other districts, meant that she was unable to control her electricity consumption. Before the national courts, the claimant alleged discrimination based on ethnic origin, even though she was not Roma herself.

The CJEU held that the concept of 'discrimination on the grounds of ethnic origin' applied to any person who, although not a member of the race or ethnic origin concerned, was nevertheless affected by a discriminatory measure in the same way as persons who were members of that ethnic origin. Accordingly, it had to be established that there was a link between a discriminatory measure and racial or ethnic origin. As regards the

122 See C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [GC], 1 April 2008 discussed in detail in Section 2.1.3 and CJEU, C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013, discussed in Section 2.1.2 and 4.1.

123 CJEU, C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* [GC], 16 July 2015.

comparator, the CJEU held that all final consumers of electricity, supplied by the same distributor within an urban area, irrespective of the district in which they resided, had to be regarded as being in a comparable situation.

The second important issue concerns the question of whether the practice at issue fell within the category of direct or indirect discrimination. If the reason for the practice was based on the ethnicity of the majority of the district inhabitants, the alleged practice constituted direct discrimination. If the national courts reached the conclusion that the practice was based exclusively on objective factors unrelated to race or ethnic origin (for example because of the high level of illegal interference with electricity meters) the practice could constitute indirect discrimination, if a measure disadvantaged only districts inhabited by a Roma majority. Such a measure would be capable of being objectively justified if there existed no other appropriate and less restrictive means to achieve the pursued aims (ensuring the security of electricity transmission and the due recording of electricity consumption). In the absence of such measure, the practice would not be disproportionate only, if the inhabitants of the district were prejudiced in having access to electricity in conditions which are not of offensive or stigmatising nature and which do enable them to monitor their electricity consumption regularly.

2.3. Multiple and intersectional discrimination

Key points

- Addressing discrimination from the perspective of a single ground fails to tackle adequately various manifestations of unequal treatment.
- 'Multiple discrimination' describes discrimination that takes place on the basis of several grounds operating separately.
- 'Intersectional discrimination' describes a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and produce specific types of discrimination.

People with differing backgrounds often face multiple discrimination, because everyone has an age, a gender, an ethnic origin, a sexual orientation, a belief system or religion; everyone has some state of heath or may acquire a disability.

No group characterised by a specific ground is homogenous. Every person has a unique pattern of characteristics, which have impact on their relationships with other people, and may involve domination by some over others.

It is increasingly recognised that addressing discrimination from the perspective of a single ground fails to capture or adequately tackle the various manifestations of unequal treatment that people may face in their daily lives.

There is no single settled terminology – 'multiple discrimination,' 'cumulative discrimination,' 'compound discrimination,' 'combined discrimination' and 'intersectional discrimination' are often used interchangeably, although these terms have slightly different implications.

Most often 'multiple discrimination' describes discrimination that takes place on the basis of several grounds operating separately, while 'intersectional discrimination' refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable[124] and produce specific types of discrimination.

Under ECHR law, both Article 14 of the ECHR and additional Protocol No. 12 prohibit discrimination on a large number of grounds, making a claim on more than one ground theoretically possible. Furthermore, the non-exhaustive list of grounds of discrimination allows the ECtHR to extend and include grounds not expressly mentioned. However, the Court does not use the terms multiple or intersectional discrimination.

Example: In *N.B. v. Slovakia*,[125] concerning forced sterilisation of a Roma woman at a public hospital, the applicant expressly complained that she was discriminated against on more than one ground (race/ethnic origin and sex). The ECtHR made no explicit reference to discrimination or multiple discrimination. It stated, however, that "the practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups".[126] It found a violation of Articles 3 and 8 of the ECHR.

124 European Commission (2007), 'Tackling Multiple Discrimination. Practices, policies and laws'.

125 ECtHR, *N. B. v. Slovakia*, No. 29518/10, 12 June 2012. See also ECtHR, *V.C. v. Slovakia*, No. 18968/07, 8 November 2011.

126 *Ibid.*, para. 121.

In more recent cases, the ECtHR seems to tacitly recognise the phenomenon of intersectional discrimination, and it is also repeatedly urged to do so by different third-party interveners. The ECtHR clearly takes into consideration multiple-grounds approach, although still without using the terms multiple or intersectional discrimination.

Example: In *B.S. v. Spain*,[127] a female sex worker of Nigerian origin and legally resident in Spain, alleged that the Spanish police mistreated her physically and verbally on the basis of her race, gender and profession. She claimed that, unlike other sex workers of European origin, she was subject to repeated police checks and a victim of racist and sexist insults. In this case, two third-party interveners – the AIRE Centre and the European Social Research Unit of the University of Barcelona – asked the ECtHR to recognise intersectional discrimination, which required a multiple-grounds approach. The Court found a violation of Article 3, but this time went further to separately examine whether there was also a failure to investigate a possible causal link between the alleged racist attitudes and the violent acts of the police. Consequently, the ECtHR found a violation of Article 14, because the domestic courts failed to take into account the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute. The Court thus took a clearly intersectional approach, however, without using the term 'intersectionality'.

Example: The case *S.A.S. v. France*[128] concerns a ban on wearing a religious face covering in public. In this case, third-party interveners (Amnesty International and a non-governmental organisation, Article 19) also pointed to the risk of intersectional discrimination against Muslim women, which may express itself particularly in the form of stereotyping of sub-groups of women. The ECtHR acknowledged that the ban had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public, but considered this measure to have an objective and reasonable justification.

Example: In *Carvalho Pinto de Sousa Morais v. Portugal*,[129] the applicant brought a civil action against a hospital for medical negligence during her gynaecological surgery. The Administrative Court ruled in her favour and awarded her compensation. On appeal, the Supreme Administrative Court upheld the first-instance judgment but reduced the amount of damages.

127 ECtHR, *B.S. v. Spain*, No. 47159/08, 24 July 2012.

128 ECtHR, *S.A.S. v. France* [GC], No. 43835/11, 1 July 2014 (also described in Section 5.8).

129 ECtHR, *Carvalho Pinto de Sousa Morais v. Portugal*, No. 17484/15, 25 July 2017.

The applicant complained that the Supreme Administrative Court's judgment was discriminatory on the grounds of her sex and age. The Supreme Administrative Court had relied on the fact that the applicant was already 50 years old and had two children at the time of the surgery. It considered that at this age sexuality is not as important as in younger years and that its significance diminishes with age. The Supreme Administrative Court also stated that she "probably only needed to take care of her husband", considering the age of her children. The ECtHR observed that the issue was not considerations of age or sex as such, but rather the assumption that sexuality was not as important for a 50-year old woman and mother of two children as for someone of a younger age. That assumption reflected a traditional idea of female sexuality as being essentially linked to child-bearing purposes, and thus ignored its physical and psychological relevance for the self-fulfilment of women. Apart from being judgemental, it omitted to take into consideration other dimensions of women's sexuality in the concrete case of the applicant. In other words, the Supreme Administrative Court had made a general assumption without attempting to look at its validity in the concrete case. The wording of the Supreme Administrative Court's judgment could not be regarded as an unfortunate turn of phrase. The applicant's age and sex appeared to have been decisive factors in the final decision, introducing a difference in treatment based on those grounds. Therefore, the ECtHR found a violation of Article 14 of the ECHR in conjunction with Article 8.

Under **EU law**, the only mention of multiple discrimination at present[130] can be found in recitals to the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) stating merely that "women are often the victims of multiple discrimination".

Similarly to Article 14 of the ECHR, Article 21 of the EU Charter contains an open list of grounds. Extending grounds of discrimination is, however, impossible **under EU secondary law** because the grounds covered by the equality directives are listed exhaustively. The CJEU has repeatedly emphasised that it is not within its power to extend those grounds,[131] and it has so far not invoked Articles 20 or 21 of the EU Charter to overturn this position. This means that it would not be

130 As of April 2017.

131 CJEU, C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA* [GC], 11 July 2006, para. 56; C-303/06, *S. Coleman v. Attridge Law and Steve Law* [GC], 17 July 2008, para. 46; C-310/10 *Ministerul Justiției și Libertăților Cetățenești v. Ștefan Agafiței and Others*, 7 July 2011; C-406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, 9 March 2017.

possible to create new grounds to reflect the specific situations of discrimination experienced by certain groups, such as black women.

Another possibility is to combine grounds within the existing list without regarding this as a new subgroup. However, this approach has its limitations, because the scope of each directive is different. It is difficult to establish whether the open scope of Articles 20 and 21 would allow a broader interpretation, since the CJEU has not yet referred to them in such cases.

> Example: In *Parris v. Trinity College and Others*,[132] the CJEU had to address the possibility of multiple discrimination, since the referring court specifically posed this question. Dr Parris requested that on his death the survivor's pension provided for by the pension scheme should be granted to his civil same-sex partner. He was refused on the basis that they entered into a civil partnership only after he had turned 60, thus not meeting the pension scheme requirements. The civil partnership, however, was established in the United Kingdom in 2009, once Dr Parris was over 60 years old; in Ireland, it was only recognised from 2011 onwards. This meant that any homosexual person born before 1 January 1951 would not be able to claim a survivor's benefit for his civil partner or spouse under this scheme.
>
> The CJEU ruled, however, that if a measure is not capable of creating discrimination on any of the grounds prohibited by Directive 2000/78/EC – when these grounds are taken alone – then it cannot be considered to constitute discrimination as a result of the combined effect of such grounds, in this case sexual orientation and age.

Thus, **under EU law**, while discrimination may indeed be based on several protected grounds, the CJEU considered that there could be no new category of discrimination consisting of the combination of more than one of those grounds.

In international law, intersectionality is officially recognised by the CEDAW Committee as a pertinent concept for understanding the scope of State Parties' obligation to eliminate discrimination. The Committee stated that: "States parties must legally recognise and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned."[133]

132 CJEU, C-443/15, *David L. Parris v. Trinity College Dublin and Others*, 24 November 2016.

133 UN, CEDAW (2010), *General Recommendation 28 on the Core Obligations of States Parties under Art. 2*, CEDAW/C/GC/28, 16 December 2010, para. 18.

2.4. Harassment and instruction to discriminate

2.4.1. Harassment and instruction to discriminate under the EU non-discrimination directives

Key point

- Harassment is a particular manifestation of direct discrimination treated separately under EU law.

A prohibition on harassment and on instruction to discriminate as part of EU non-discrimination law were introduced to allow for more comprehensive protection.

Harassment features as a specific type of discrimination under the EU non-discrimination directives. It had previously been dealt with as a particular manifestation of direct discrimination. Its separation into a specific head under the directives is based more on the importance of singling out this particularly harmful form of discriminatory treatment, rather than a shift in conceptual thinking.

EU law adopts a flexible objective/subjective approach. First, it is the victim's perception of the treatment that is used to determine whether harassment has occurred. Second, however, even if the victim does not actually feel the effects of the harassment, a finding may still be made, so long as the complainant is the target of the conduct in question.

According to the non-discrimination directives, harassment shall be deemed to be discrimination when:

- unwanted conduct related to a protected ground takes place;
- with the purpose or effect of violating the dignity of a person;
- and/or creating an intimidating, hostile, degrading, humiliating or offensive environment.[134]

As the European Commission stated in the Explanatory Memorandum attached to the Commission's proposal for the Employment Equality Directive and Racial Equality Directive, harassment may take

134 See: Racial Equality Directive, Art. 2 (3); Employment Equality Directive, Art. 2 (3); Gender Goods and Services Directive, Art. 2 (c); Gender Equality Directive (recast), Art. 2 (1) (c).

different forms "from spoken words and gestures to the production, display and circulation of written words, pictures or other materials" as long as it is of serious nature.[135]

In *S. Coleman v. Attridge Law and Steve Law*,[136] the CJEU held that the prohibition of harassment is not limited to a person holding certain characteristics and therefore, for instance, the mother of a disabled child is also protected. Interpretation of the notion 'harassment' can be found in the case law of the European Union Civil Service Tribunal (CST),[137] responsible for determining disputes involving the European Union civil service at first instance. The CST explained that for the conduct to be considered as harassment, it should be perceived as excessive and open to criticism for a reasonable observer of normal sensitivity and in the same situation.[138] Furthermore, referring to the definition of 'harassment' given by the Employment Equality Directive (2000/78/EC), the CST stressed that from the condition 'the purpose or effect of violating the dignity of a person' follows that the harasser does not have to intend to discredit the victim or deliberately impair the latter's working conditions. It is sufficient that such reprehensible conduct, provided that it was committed intentionally, led objectively to such consequences.[139] The CST held that an appraisal of the performance of an official made by a supervisor, even if critical, cannot as such be classified as harassment. Negative comments addressed to a member of staff do not thereby undermine his personality, dignity or integrity where they are formulated in measured terms and are not based on allegations that are unfair and lacking any connection with objective facts.[140] It has also held that the refusal of annual leave in order to ensure the proper functioning of the service cannot, as such, be regarded as a manifestation of psychological harassment.[141]

135 Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM/99/0566 final - CNS 99/0253, 25/11/1999 and Proposal for a Council Directive establishing a General Framework for Equal Treatment in Employment and Occupation, COM/99/0565 final - CNS 99/0225.

136 CJEU, C-303/06, *S. Coleman v. Attridge Law and Steve Law* [GC], 17 July 2008.

137 In 2015, in view of the increase in litigation and the excessive length of proceedings in cases being dealt with in the General Court, the EU legislature decided to gradually increase the number of Judges at the General Court to 56 and to transfer to it the jurisdiction of the Civil Service Tribunal, which was dissolved on 1 September 2016.

138 European Union Civil Service Tribunal (CST), F-42/10, *Carina Skareby v. European Commission*, 16 May 2012, para. 65.

139 CST, F-52/05, *Q v. Commission of the European Communities*, 9 December 2008, para. 135.

140 CST, F-12/13, *CQ v. European Parliament*, 17 September 2014, para. 87.

141 *Ibid.*, para. 110.

The Gender Equality Directives set out sexual harassment as a specific type of discrimination, where the unwanted 'verbal, non-verbal, or physical' conduct is of a 'sexual' nature.[142] A FRA EU-wide survey on gender-based violence against women shows that 75 % of women in qualified professions or top management have been victims of sexual harassment,[143] and one in 10 women has experienced stalking or sexual harassment through new technologies.[144]

According to the definition of harassment, there is no need for a comparator to prove it. This essentially reflects the fact that harassment in itself is wrong because of the form it takes (verbal, non-verbal or physical abuse) and the potential effect it may have (violating human dignity).

Questions of fact, relating to whether conduct amounts to harassment, are usually determined at the national level before cases are referred to the CJEU. The following cases, therefore, draw from national jurisdiction.

Example: In a case[145] before the French Court of Cassation, an employee complained that his manager regularly criticised him, used inappropriate language and moved him to a smaller office. Despite an internal mediation procedure, the employee instituted civil proceedings against the company for failure to guarantee its employees safety at work. The Court of Cassation specified that the employer was liable for acts of harassment at the workplace, if he had not taken appropriate measures both to prevent any moral harassment and to stop it after it had been formally notified. Since in the case the employer did not adopt sufficient preventive measures, for instance by failing to provide relevant information and training, the French court concluded that the employer had been liable.

Example: In a case[146] before the Hungarian Equal Treatment Authority, a complaint was made about teachers who told Roma students that their misbehaviour at school had been notified to the 'Hungarian Guard',

142 Gender Goods and Services Directive, Art. 2 (d); Gender Equality Directive (recast), Art. 2 (1) (d).

143 FRA (2014), *Violence against women: an EU-wide survey. Main results report*, Luxembourg, Publications Office of the European Union (Publications Office), p. 96.

144 *Ibid.*, p. 104.

145 France, Court of Cassation, Social Chamber, *M. Jean-François X... v. M. Serge Y...; and Others*, No. 14-19.702, 1 June 2016.

146 Hungary, Equal Treatment Authority, Decision No. 654/2009, 20 December 2009.

a nationalist organisation known for committing acts of extreme violence against Roma. It was found that the teachers had implicitly endorsed the racist views of the Guard and created a climate of fear and intimidation, amounting to harassment.

In addition, the non-discrimination directives all state that an 'instruction to discriminate' is deemed to constitute 'discrimination'.[147] However, none of the directives provide a definition as to what is meant by the term. In order to be of any worth in combating discriminatory practices, it ought not to be confined to merely dealing with instructions that are mandatory in nature, but should extend to catch situations where there is an expressed preference or an encouragement to treat individuals less favourably due to one of the protected grounds. This is an area that may evolve through the jurisprudence of the courts. An example of instruction to discriminate would be a situation, in which a landlord instructs an estate agent not to rent his apartment to homosexual couples.

Acts of harassment and acts of instruction to discriminate, in addition to constituting discrimination, may well fall under national criminal law, particularly where they relate to race or ethnicity.[148]

2.4.2. Harassment and instruction to discriminate under the ECHR and ESC

While the ECHR does not contain specific provisions prohibiting harassment or instruction to discriminate, it does contain particular rights that relate to the same area. However, harassment may fall under the right to respect for private and family life (protected under Article 8 of the ECHR), or the right to be free from inhuman or degrading treatment or punishment under Article 3. Instruction to discriminate may be examined under other ECHR provisions, such as freedom of religion under Article 9 or freedom of peaceful assembly under Article 11, depending on the context. Where these acts display a discriminatory motive, the ECtHR will examine the alleged breaches of relevant Convention provisions either alone or in conjunction with Article 14, which prohibits discrimination.

147 Employment Equality Directive, Art. 2 (4); Gender Goods and Services Directive, Art. 4 (1); Gender Equality Directive (recast), Art. 2 (2) (b); Racial Equality Directive, Art. 2 (4).

148 See Sections 2.6 and 2.7.

Example: In *Bączkowski and Others v. Poland*,[149] the mayor of Warsaw made public announcements of a homophobic nature, stating that he would refuse permission to hold a march to raise awareness about sexual orientation discrimination. When the decision came before the relevant administrative body, permission was refused based on other reasons, such as the need to prevent clashes between demonstrators. The ECtHR found that the mayor's statements could have influenced the decision of the relevant authorities, and that the decision was based on the ground of sexual orientation and so constituted a violation of Article 14 of the ECHR in conjunction with Article 11 (the right of peaceful assembly).

Example: In *Đorđević v. Croatia*,[150] the applicants, a mentally and physically disabled man and his mother, complained that the authorities had failed to protect them from harassment and violence perpetrated by children living in their neighbourhood. The ECtHR noted that most of the alleged defendants were children under fourteen, who could not be held criminally liable under domestic law. However, the authorities had been aware of the situation of serious harassment directed against a person with physical and mental disabilities and they were obliged to take reasonable measures to prevent further abuse. Isolated reactions to specific incidents (like the prompt arrival of police officers, interviews with the children and police reports) were not sufficient in a situation where incidents of harassment and violence had persisted over a long period of time. The authorities should have taken action of a general nature to combat the problem. The ECtHR concluded that there had been a violation of Article 3 in respect of the disabled man. Regarding the mother's complaint, the ECtHR stressed that the continued harassment of her disabled son, of whom she was taking care, along with incidents which concerned her personally, had negatively affected her private and family life. By failing to address properly the acts of violence or to put in place any relevant measures to prevent further harassment of her son, the authorities had failed to protect her right to respect for private and family life, in breach of Article 8 of the ECHR.

Example: In *Catan and Others v. the Republic of Moldova and Russia*,[151] the ECtHR examined a complaint of harassment in relation to the right to education under Article 2 of Protocol No. 1. The applicants, children and

149 ECtHR, *Bączkowski and Others v. Poland*, No. 1543/06, 3 May 2007.

150 ECtHR, *Đorđević v. Croatia*, No. 41526/10, 24 July 2012.

151 ECtHR, *Catan and Others v. the Republic of Moldova and Russia* [GC], 43370/04, 18454/06 and 8252/05, 19 October 2012.

parents from the Moldovan community in Transdniestria, complained about the forcible closure of schools and harassment of pupils wishing to be educated in their national language. Incidents of harassment included detention of teachers, destruction of Latin script materials, as well as repeated incidents of vandalism and intimidation, including parents losing their jobs. The ECtHR considered those acts as interference with the applicant pupils' right to education but also found that the said measures amounted to an interference with the applicant parents' rights to ensure their children's education and teaching in accordance with their philosophical convictions. The measure did not seem to pursue any objective aim. In fact, the language policy of the 'Moldavian Republic of Transdniestria', as applied to these schools, appeared to have been intended to enforce the Russification of the language and culture of the Moldovan community. Consequently, there had been a violation of Article 2 of Protocol No. 1 by Russia.

Under the ESC, Article 26 (2) establishes a right to protection of human dignity against harassment creating a hostile working environment related to a specific characteristic of a person. It must be possible for employers to be held liable when harassment occurs in relation to work, or on premises under their responsibility, even when it involves, as a defendant or a victim, a third person not employed by them, such as independent contractors, self-employed workers, visitors, clients, etc.[152]

2.5. Special or specific measures

Key points

- To ensure that everyone has equal enjoyment of rights, governments, employers and service providers may need to take special or specific measures to adapt their rules and practices to those with different characteristics.
- The terms 'special' or 'specific' measures can be taken to include redressing past disadvantage suffered by those with a protected characteristic. Where this is proportionate, it may constitute a justification for differential treatment.

Refraining from discriminatory treatment is sometimes not sufficient to achieve factual equality. Therefore, in some situations, governments, employers and

152 ECSR, Conclusions 2014, Finland; Conclusions 2003, Sweden.

service providers must ensure that they take steps to adjust their rules and practices to take relevant differences into consideration – that is, they must do something to adjust current policies and measures. In the UN context, these are labelled 'special measures', while the EU law refers to 'specific measures' or 'positive action'. The ECtHR speaks about 'positive obligations'. By taking special measures, governments are able to ensure 'substantive equality', that is, equal enjoyment of opportunities to access benefits available in society, rather than mere 'formal equality'. Where governments, employers and service providers fail to consider the appropriateness of taking special measures, they increase the risk that their rules and practices may amount to indirect discrimination.

Example: In a case from the United Kingdom,[153] two female cabin crew members brought a claim against their employer, after it failed to offer arrangements that they considered appropriate to enable them to continue breastfeeding when they returned to work after maternity leave. They were required to work shifts of more than eight hours, which was not acceptable on medical grounds (prolonged periods without expressing milk increase the risk of mastitis). The Employment Tribunal found that the airline had discriminated against the claimants indirectly on grounds of their sex. It stressed that the airline should have reduced the breastfeeding mothers' hours, found them alternative duties or suspended them on full pay. The refusal could not be objectively justified because there was no convincing evidence that creating special arrangements for two employees would cause the employer excessive difficulties.

The example described above illustrates a situation in which a person in a disadvantaged position alleged that the employer did not adequately address their needs. The defendant fails to act and to provide for positive measures. In contrast, when the obligation to act is fulfilled, the term 'special measures' is used to include a situation where differential treatment takes place that favours individuals on the basis of their protected grounds. Therefore, the term 'special measures' can be understood from two different angles. From the perspective of the beneficiary, more favourable treatment is accorded on the basis of a protected characteristic, in comparison to someone in a similar situation. From the perspective of the victim, less favourable treatment is accorded on the

153 United Kingdom, Bristol Employment Tribunal, McFarlane and another v. easyJet Airline Company, ET/1401496/15 and ET/3401933/15, 29 September 2016.

basis that they do not hold a protected characteristic. Typical examples include reserving posts for women in male-dominated work places or ethnic minorities in public services, such as policing, in order to better reflect the composition of society. Reduced fees for public transport for elderly person to compensate for their reduced earning capacity represents another example.

Special measures therefore allow moving beyond an individual approach and taking into consideration the collective aspect of discrimination.

The terminology used to describe this varies greatly to include 'positive measures', 'positive' or 'reverse' discrimination, 'preferential treatment', 'temporary special measures' or 'affirmative action'.[154] This reflects its accepted function as a short-term and exceptional means of challenging prejudices against individuals who would normally suffer discrimination, by favouring members of a disadvantaged group.

In this context, the courts tended to treat differential treatment not as a distinct form of discrimination in itself but as an exception to the prohibition of discrimination. In other words, the courts accept that differential treatment has occurred, but that it may be justified in the interests of correcting a pre-existing disadvantage, such as underrepresentation in the workplace of particular groups.

Example: A case[155] before German courts concerns a job advertisement starting with the catchphrase: 'Women come to power!' An unsuccessful male candidate complained that he as a man was discriminated against. The

154 For example, ICERD, Art. 1.4 and 2.2; CEDAW Art. 4; CRPD Art. 5.4; UN, Committee on Economic Social and Cultural Rights (CESCR) (2009) *General comment No. 20: Non-discrimination in economic, social and cultural rights,* 2 July 2009, E/C.12/GC/20; UN,Committee on the Rights of the Child (CRC) (2009)*, General comment No. 11: Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11; UN, Committee on the Elimination of Racial Discrimination (CERD) (2009), *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. CERD/C/GC/32, 24 September 2009; UN, CERD (2004), *General Recommendation 30*, *Discrimination against non-citizens,* CERD/C/64/Misc.11/rev.3; UN, CERD (1994), *General Recommendation 14, Definition of Racial Discrimination,* U.N. Doc. A/48/18 at 114; UN, CESCR (1999), *General Comment 13: The Right to Education,* UN Doc. E/C.12/1999/10, 8 December 1999; UN, Committee on the Elimination of Discrimination Against Women (2004), *General Recommendation No. 25: Art. 4, para. 1, of the Convention (temporary special measures)*, UN Doc. A/59/38(SUPP), 18 March 2004; UN, Human Rights Committee (1989), *General Comment No. 18: Non-Discrimination*, UN Doc. A/45/40 (Vol. I.) (SUPP), 10 November 1989; UN, CERD (2005), *General Recommendation 30 on Discrimination against Non-Citizens*, UN Doc. HRI/GEN/1/Rev.7/Add.1, 4 May 2005.

155 Germany, Labour Court in Cologne, Az. 9 Ca 4843/15, 10 February 2016.

labour court however dismissed the complaint. It accepted the arguments put forward by the respondent company. It found that the difference in treatment was justified as the company (car dealer) had no female employees and the aim of the measure was to provide clients with both genders.

Under international law, the permissibility of taking positive measures in favour of disadvantaged groups is further reinforced by guidance issued by several of the monitoring bodies responsible for interpreting UN human rights treaties. Namely, such measures should be appropriate to the situation to be remedied, legitimate and necessary in a democratic society. Furthermore, they should respect the principles of fairness and proportionality, be temporary[156] and they shall not be continued after the objectives for which they have been taken have been achieved.

According to the UN Committee on the Elimination of Racial Discrimination, in order to be permissible, the sole purpose of such measures should be the elimination of existing inequalities and the prevention of future imbalances.[157] State Parties should educate and raise the awareness of the public on the importance of special measures to address the situation of victims of racial discrimination, especially discrimination as a result of historical factors.[158] In this regard, the Committee observed that overcoming the structural discrimination that affects people of African descent calls for the urgent adoption of special measures.

The UN Committee on the Elimination of Racial Discrimination (CERD) emphasised that treating in an equal manner persons or groups whose situations are objectively different will, in effect, constitute discrimination. Moreover, it stated that it is important that such measures are based on the realistic appraisal of the current situation of individuals and communities, including accurate and disaggregated data, and prior consultations with affected communities.[159]

156 UN, CERD (2009), *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. CERD/C/GC/32, 24 September 2009, para. 16.

157 *Ibid*., paras. 21-26.

158 UN, CERD (2011), *General recommendation No. 34: Racial discrimination against people of African descent*, 3 October 2011, CERD/C/GC/34.

159 CERD (2009), *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. CERD/C/GC/32, 24 September 2009, paras. 21-26.

The UN Human Rights Committee pointed out that the principle of equality sometimes requires States Parties to take measures to diminish or eliminate conditions which cause or perpetuate discrimination. In case "the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."[160]

The UN Committee on the Elimination of Discrimination Against Women elaborated that such 'temporary special measures' could include "preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems".[161] According to the case law of the CJEU, discussed below, the proportionality of such measures will be measured strictly.

Under EU law, the EU non-discrimination directives expressly foresee the possibility of positive action, stating: "[w]ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to [a protected ground]".[162] The EU Charter of Fundamental Rights also affirms that special protection is necessary for certain groups, namely: men and women (Article 23), children (Article 24), the elderly (Article 25) and persons with disabilities (Article 26).

Under EU law, specific measures also appear as a justification of differential treatment under the non-discrimination directives and in the case law of the CJEU, as well as within the exception of a 'genuine occupational requirement', as discussed later in Section 3.3.1.

160 UN, Human Rights Committee (1989), *CCPR General Comment 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.1, 10 November 1989.

161 UN, Committee on the Elimination of Discrimination Against Women (CEDAW) (2004), *General Recommendation No. 25: Art. 4, para. 1, of the Convention (temporary special measures)*, UN Doc. A/59/38 (SUPP), 18 March 2004, para. 22.

162 Racial Equality Directive, Art. 5; Employment Equality Directive, Art. 7; Gender Goods and Services Directive, Art. 6; and also with a slightly different formulation: Gender Equality Directive (recast), Art. 3.

The principal CJEU cases concerning special measures have arisen in the context of gender equality; namely the *Kalanke* case,[163] the *Marschall* case[164] and the *Abrahamsson* case.[165] Together, these cases defined the limits on how far special measures can be taken to compensate for the previous disadvantages suffered by, in these particular cases, female workers over the years.

Example: In *Kalanke v. Freie Hansestadt Bremen*, the CJEU took a strict approach to according preferential treatment to correct the underrepresentation of women in particular posts. This case concerns legislation adopted at the regional level, which accorded automatic priority to female candidates applying for posts or promotions. Where male and female candidates were equally qualified, and where female workers were deemed to be underrepresented in that sector, female candidates must be given preference. Underrepresentation was deemed to exist where female workers did not make up at least half of the staff in the post in question. In this case, an unsuccessful male candidate, Mr Kalanke, complained that he had been discriminated against based on his sex before the national courts. The national courts referred the case to the CJEU, asking whether this rule was compatible with Article 2 (4) of the Equal Treatment Directive of 1976 (the predecessor to Article 3 of the Gender Equality Directive on 'positive action'), which states that: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities".[166]

The CJEU stated that Article 2 (4) was designed to allow measures that, "although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life".[167] It was accepted that the rule pursued the legitimate aim of eliminating inequalities present in the workplace. Accordingly, measures that give women a specific advantage in the workplace, including promotion, would be acceptable, so long as these were introduced to bring an improvement in women's ability to compete in the labour market free of such discrimination.

163 CJEU, C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen*, 17 October 1995.

164 CJEU, C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*, 11 November 1997.

165 CJEU, C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, 6 July 2000.

166 Equal Treatment Directive 76/207/EEC, OJ L 39, 14.02.1976, p. 40.

167 This wording has been largely adopted in the preambles to the discrimination directives: para. 21 of the Gender Equality Directive (recast); para. 26 of the Employment Equality Directive; para. 17 of the Racial Equality Directive.

It was also stated, however, that any exception to the right to equal treatment should be strictly construed. It was found that where the rule in question guaranteed "women absolute and unconditional priority for appointment or promotion", this would in fact be disproportionate to achieving the aim of eliminating inequality relative to the right of equal treatment. Accordingly, the preferential treatment could not be justified in this case.

Nevertheless, later cases show that specific measures may be acceptable where the rule does not require automatic and unconditional priority to be accorded.

Example: The case of *Marschall v. Land Nordrhein-Westfalen*[168] concerns legislation similar in substance to the *Kalanke* case. However, the rule in question stated that equally qualified women should be given priority "unless reasons specific to an individual male candidate tilt the balance in his favour". Mr Marschall, who was rejected for a post in favour of a female candidate, contested the legality of this rule before the national courts, which referred the case to the CJEU, once again asking if this rule was compatible with the Equal Treatment Directive. The CJEU found that a rule of this nature was not disproportionate to the legitimate aim of eliminating inequality as long as "in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that their candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate". Thus, discretion built into the rule prevented the priority from being absolute and was therefore proportionate to achieving the aim of addressing inequality in the workplace.

Example: The case *of Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*[169] concerns the validity of Swedish legislation, which falls in between the unconditional priority of the rule in the *Kalanke* case and the discretion created in the *Marschall* case. The rule stated that a candidate of an underrepresented sex who possessed sufficient qualifications to perform the post should be accorded priority, unless "the difference between the candidates' qualifications is so great that such applications would give rise to a breach of the requirement of objectivity in the making of appointments".

168 CJEU, C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*, 11 November 1997.

169 CJEU, C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, 6 July 2000.

The CJEU found that in effect the legislation automatically granted candidates from the underrepresented sex priority. The fact that the provision only prevented this where there was a significant difference in qualifications was not sufficient to prevent the rule from being disproportionate in its effects.

Example: In *Maurice Leone and Blandine Leone v. Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales*,[170] the complainant was refused the right to early retirement. The relevant national provisions provided this right for civil servants who have three children and who have taken career breaks for each one of them. The complainant was a father of three children, but he never took career breaks. He complained this constituted indirect discrimination on grounds of sex since biological mothers were automatically qualified. The CJEU found that a measure such as an early retirement is limited to favouring an early end to working life, but it does not compensate for the disadvantages that the female servants may encounter in the course of their professional life. Therefore, the measure cannot contribute to ensure full equality in practice between men and women in working life. In conclusion, it held that the contested provisions give rise to indirect discrimination, unless it can be justified by objective factors unrelated to any discrimination on grounds of sex and it is appropriate and necessary to achieve that aim.

These cases highlight that the CJEU has generally been cautious in its approach to allowing specific measures to override the principle of fairness. Only in limited circumstances where the specific measures are not unconditional and absolute, will the CJEU allow national rules to fall within the derogation of Article 2 (4).

When faced with an issue concerning specific measures under the EU non-discrimination directives, practitioners must devote special attention to the 'action' that has been put in place to favour a particular grouping of persons. It is clearly the position, as evinced by the CJEU case law above, that specific measures are a last resort. Practitioners and court officials, if dealing with a case involving specific measures, must ensure that all candidates considered by the employer in question, including those that are not targeted by the special measures provision, are assessed objectively and fairly for the position in question. Special measures can only be utilised when an objective assessment has identified a number of

170 CJEU, C-173/13, *Maurice Leone and Blandine Leone v. Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales*, 17 July 2014.

candidates – including individuals from a targeted group – as equally capable of fulfilling an available role. It is only in such circumstances that a member of a targeted group, which is selected due to previous historic discrimination in the workplace, can be selected ahead of an individual that falls outside of the targeted group.

Furthermore, one positive action has been clearly distinguished from others. Article 5 of the Employment Equality Directive contains specific articulations of the general rule of specific measures in relation to persons with disabilities, which requires employers to make 'reasonable accommodation' to allow those with physical or mental disabilities to be given equal employment opportunities. This is defined as 'appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer'. Appropriate measures might include installing a lift or a ramp or a disabled toilet in the workplace to allow wheelchair access.[171]

Therefore, certain measures for the promotion of equality should be differentiated from 'affirmative action' as they do not discriminate against any other individual (for example, allowing breast-feeding in the workplace), and consequently there is no reason for them to be temporary or used as a last resort.

> Example: In *European Commission v. Italian Republic*,[172] the CJEU emphasised that the obligation to adopt effective and practical measures where needed, in particular cases as laid down in Article 5 of the Employment Equality Directive, covers all employers. Under Italian law, not all categories of employers were required to take appropriate measures, hence the CJEU held that Italy had failed to fulfil its obligation to ensure the correct and full implementation of Article 5 of the directive.

Under the ECHR, a state can be subject to positive obligations. The relevant ECtHR case law of positive actions is mainly devoted to the issue of whether, in certain situations, the state is obliged, rather than only allowed, to take positive actions.

171 For further details concerning reasonable accommodation, see Section 5.4.

172 CJEU, C-312/11, *European Commission v. Italian Republic*, 4 July 2013.

Example: In *Çam v. Turkey*,[173] concerning the refusal of a music school academy to enrol a student on the grounds of her visual impairment, the ECtHR established that the state had failed to take positive steps to ensure that students with disabilities could enjoy education in a non-discriminatory manner. The ECtHR noted that discrimination based on disability also covered the refusal to provide reasonable accommodation (for example, adaptation of teaching methods to make them accessible to blind students).[174]

Example: In *Horváth and Kiss v. Hungary*,[175] a case concerning the placement of Roma children in special schools, the ECtHR stressed that the state had positive obligations to undo a history of racial segregation in special schools.[176] The ECtHR also observed that the state had specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests.[177]

Example: In *Kurić and Others v. Slovenia*,[178] the applicants were nationals of states that had formerly constituted part of the Socialist Federal Republic of Yugoslavia. Under one of the laws passed after Slovenia had declared independence, the applicants were given six months to apply for citizenship of Slovenia. As they did not do this, after the expiry of the six-month deadline, their names were erased from the civil registry, resulting in their statelessness and meaning they were residing illegally in Slovenia. The ECtHR found that the prolonged refusal to resolve their residence status constituted an interference with their right to private and/or family life, and that they had been discriminated against because they were in a disadvantaged situation compared with other foreigners in Slovenia. In doing so, the Court stressed that "Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct 'factual inequalities' between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article".[179]

173 ECtHR, *Çam v. Turkey*, No. 51500/08, 23 February 2016, discussed in Section 4.4.3.

174 *Ibid.*, para. 67.

175 ECtHR, *Horváth and Kiss v. Hungary*, No. 11146/11, 29 January 2013, see Section 4.4.3. See also ECtHR, *Oršuš and Others v. Croatia* [GC] No. 15766/03, 16 March 2010.

176 ECtHR, *Horváth and Kiss v. Hungary*, No. 11146/11, 29 January 2013, para. 127.

177 *Ibid.*, 116.

178 ECtHR, *Kurić and Others v. Slovenia* [GC], No. 26828/06, 26 June 2012.

179 *Ibid.*, para. 388.

Under the ESC, Article E prohibits all forms of discrimination including indirect discrimination. According to the ECSR: "Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all".[180] A large number of ESC provisions includes the obligation for States Parties to take positive measures. For example, Article 23 of the ESC provides for the right of elderly persons to social protection. Pursuant to this provision, states should adopt all appropriate measures designed in particular to:

(i) enable elderly persons to remain full members of society for as long as possible;

(ii) enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able;

(iii) guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

The expression 'full members' means that elderly persons must not be excluded on account of their age. The ECSR has interpreted this article as requiring the introduction of legislation protecting elderly persons against discrimination. Article 15 (2) of the ESC requires States Parties to promote an equal and effective access to employment on the open labour market for persons with disabilities.[181] To this end, legislation must prohibit discrimination on the grounds of disability[182] to create genuine equality of opportunities in the open labour market,[183] prohibit the dismissal based on disability and confer an effective remedy on those who are found to have been unlawfully discriminated.[184] In addition, regarding working conditions, there must be obligations on the employer to take steps in accordance with the requirement of reasonable accommodation to ensure effective access to employment and to keep in employment persons with disabilities, in particular

180 ECSR, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Complaint No. 91/2013, 12 October 2015, para. 237; ECSR, *International Association Autism-Europe v. France*, Complaint No. 13/2002, 4 November 2003, para. 52.

181 ECSR, Conclusions XX-1 (2012), Czech Republic.

182 ECSR, Conclusions 2003, Slovenia.

183 ECSR, Conclusions 2012, Russian Federation.

184 ECSR, Conclusions XIX-1 (2008), Czech Republic.

persons who have become disabled while in their employment as a result of an industrial accident or occupational illness.[185]

Example: The case of *The Central Association of Carers in Finland v. Finland*[186] concerns the reorganisation of long-term care services for elderly persons in Finland. Service housing replaced the former institutional care facilities. The main difference between the two care servive types was the pricing system. Fees for long-term institutional care were fixed by law, making the service available to persons with low income. In contrast, there were no provisions regulating fees for service housing or service housing with 24-hour assistance, in particular there were no upper limits on fees. As a result, persons in need of such services were charged much higher fees than persons in institutional care. The complaining association alleged that the lack of regulation and the pricing system created uncertainties and prevented elderly persons from accessing services necessitated by their condition. The Committee held that there had been a violation of Article 23 of the ESC. The ECSR considered the following arguments to be decisive in its conclusion:

(i) insufficient regulation of fees and the fact that the demand for those services exceeded supply caused legal uncertainties to elderly persons in need of care owing to diverse and complex fee policies. It stressed that "[w]hile municipalities may adjust the fees, there are no effective safeguards to assure that effective access to services is guaranteed to every elderly person in need of services required by their condition";

(ii) the situation created an obstacle to the right to "the provision of information about services and facilities available for elderly persons and their opportunities to make use of them" as guaranteed by Article 23 (b) of the ESC.

185 ECSR, Conclusions 2007, Statement of Interpretation on Article 15(2).

186 ECSR, *The Central Association of Carers in Finland v. Finland*, Complaint No. 71/2011, 4 December 2012.

2.6. Hate crime

Key point

- Crimes motivated by prejudice, known as hate crimes or bias-motivated crimes, affect not only the individuals targeted, but also their communities and societies as a whole.

Crimes such as threats, physical attacks, property damage or even murders motivated by intolerance towards certain groups in society are described as hate crimes or bias crimes. Hate crime can therefore be any crime that targets a person because of their perceived characteristics. The essential element distinguishing hate crimes from other crimes is the bias motive.

The other characteristic feature of hate crimes is that the impact of the offence extends beyond the actual victims. It affects the whole group with which that victim identifies himself or herself and can cause social division between the victim group and society at large. Therefore, it poses particular danger to society. For this reason, hate crimes should not be treated like ordinary crimes. To properly deal with hate crimes, the bias motivation behind the act of violence must be revealed. Hate crimes should thus be recognised in a legal order as a special category of crimes. Special training, manuals, information and other appropriate tools should be provided to improve the capacity to investigate and judge hate crimes of persons (police officers, prosecutors, judges) dealing with them.

Under EU law, it is in principle established that hate crimes require a specific criminal law response.[187] Although the non-discrimination directives do not oblige Member States to use criminal law to address acts of discrimination, a Framework Decision of the European Council obliges all EU Member States to provide for criminal sanctions in relation to incitement to violence or hatred based on race, colour, descent, religion or belief, national or ethnic origin, as well as dissemination of racist or xenophobic material and condonation, denial or trivialisation of genocide, war crimes and crimes against humanity directed

187 European Parliament resolution of 14 March 2013 on strengthening the fight against racism, xenophobia and hate crime (2013/2543(RSP)). See also FRA (2012), *Making hate crime visible in the European Union: acknowledging victims' rights*, Luxembourg, Publications Office, p. 15.

against such groups.[188] Member States are also obliged to consider racist or xenophobic intent as an aggravating circumstance.

The only EU legal instrument that currently protects lesbian, gay, bisexual, transgender and intersex (LGBTI) victims of hate crime is the EU's Victims' Rights Directive.[189] It includes the grounds of sexual orientation, gender identity and gender expression when recognising the rights of victims, helping to ensure that victims of crime receive appropriate information, support and protection, and are able to participate in criminal proceedings. Moreover, states are obliged to carry out an individual assessment to identify specific protection needs of the victims who have suffered a crime committed with a bias or discriminatory motive (Article 22 of the directive).

It should be stressed that a victim does not have to be a member of the group at which the hostility is targeted. Through the concept of discrimination by association, protection is also provided to persons only assumed to have a particular characteristic or otherwise associated with a group holding particular characteristics.

Under the ECHR, the prohibition of discrimination entails an obligation to combat crimes motivated by racism, xenophobia, religious intolerance or by a person's disability, sexual orientation or gender identity. Furthermore, states have a positive obligation to protect individuals against violence, specifically when they were informed about the risk of lethal or serious bodily harm. The ECtHR has stated in a number of cases[190] that treating violence and brutality arising from discriminatory attitudes on an equal footing with violence, where there were no such overtones, would be turning a blind eye to the specific nature of acts that were particularly destructive of fundamental rights. It also emphasised that, while the choice of appropriate means of deterrence was in principle within the state's margin of appreciation, effective deterrence against serious acts required efficient criminal law provisions. The ECtHR has also ruled that states have an obligation to investigate the existence of any possible discriminatory motive

188 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (*Framework Decision on racism and xenophobia*), OJ L 328, 6.12.2008, p. 55.

189 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

190 See ECtHR, *M.C. and A.C. v. Romania*, No. 12060/12, 12 April 2016, para. 113.

behind an act of violence and that overlooking the bias motivation behind a crime amounted to a violation of Article 14 of the ECHR.[191] This approach extends the protection offered by the ECHR to members of vulnerable groups who are victims of hate crime, regardless of whether that abuse is perpetrated by state agents or third parties.[192] In other words, violence with underlying discriminatory motives constitutes an aggravated form of a human rights infringement. This should be reflected in the way investigations are conducted, and victims supported and protected.

Example: In *Identoba and Others v. Georgia*,[193] a case concerning a homophobic attack against the participants of a peaceful assembly of LGBT associations, the ECHR confirmed that 'hate crime' committed against individuals based on sexual orientation amounted to a violation of Article 3 of the ECHR taken in conjunction with Article 14. The ECtHR emphasised that the Georgian authorities had known or ought to have known the risks surrounding the demonstration, considering the various reports on the situation of lesbian, gay, bisexual and transgender people in Georgia. Since the police protection had not been provided timely and adequately, the authorities failed in their obligation to provide adequate protection.

Example: In *M.C. and A.C. v. Romania*,[194] the applicants were attacked by a group of people on their way home from an annual gay pride march. They were subjected to homophobic abuse and were punched and kicked. The ECtHR found that the authorities had failed to take into account possible discriminatory motives in the investigation of a homophobic attack and concluded that there had been a violation of Article 3 (procedural limb) read together with Article 14 of the ECHR.

Example: In *Virabyan v. Armenia*,[195] the applicant, a member of the opposition party was arrested during an anti-governmental demonstration. He was subsequently taken to the police station, where he sustained severe injuries. He complained that he had been ill-treated in custody on account of his political opinion. The ECtHR held that the state had failed to examine a possible causal link between the alleged political motives and the abuse

191 See for example ECtHR, *Abdu v. Bulgaria*, No. 26827/08, 11 March 2014 discussed in Section 6.3.

192 For example, see ECtHR, *R.B. v. Hungary*, 64602/12, 12 April 2016, para. 39.

193 ECtHR, *Identoba and Others v. Georgia*, No. 73235/12, 12 May 2015, see also Section 4.7.

194 ECtHR, *M.C. and A.C. v. Romania*, No. 12060/12, 12 April 2016.

195 ECtHR, *Virabyan v. Armenia*, No. 40094/05, 2 October 2012.

suffered by the applicant. Therefore, it found a violation of Article 14 of the ECHR taken in conjunction with Article 3 in its procedural limb.

Example: In *Nachova v. Bulgaria,*[196] two Roma men were shot dead while fleeing from military police who sought to arrest them for being absent without leave. A neighbour of one of the victims claimed that, immediately following the shooting, the officer who had killed the victims shouted 'You damn gypsies' at him. The ECtHR found that the state had violated the right to life of the victims (under Article 2 of the ECHR), not only substantively, but also procedurally, for failing to adequately investigate the deaths. It was found that the failure to investigate also amounted to a violation of Article 2, in conjunction with the right to be free from discrimination, since the State was under a duty to specifically investigate possible discriminatory motives.

Example: The *Škorjanec v. Croatia*[197] case concerns racially motivated acts of violence. The ECtHR specified that the obligation on the authorities to investigate possible racist motives concerns not only acts of violence based on a victim's actual or perceived personal status or characteristics, but also those based on a victim's actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic. The ECtHR noted that the prosecuting authorities' relied on the fact that the applicant herself was not of Roma origin and refused to examine whether she was perceived to be of Roma origin by the attackers. The authorities failed to take into account and establish the link between the racist motive for the attack and the applicant's association with her partner, who was of Roma origin. As a result, ECtHR found a violation of Article 3 under its procedural aspect in conjunction with Article 14 of the ECHR.

In a series of cases, the ECtHR considered gender-based violence as a form of discrimination against women.[198]

Example: In *Eremia v. the Republic of Moldova*,[199] the first applicant was a victim of domestic violence at the hands of her husband, a police officer.

196 ECtHR, *Nachova and Others v. Bulgaria* [GC], Nos. 43577/98 and 43579/98, 6 July 2005.

197 ECtHR, *Škorjanec v. Croatia*, 25536/14, 28 March 2017.

198 See also ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, discussed in Section 6.3.

199 ECtHR, *Eremia v. the Republic of Moldova*, No. 3564/11, 28 May 2013.

Their two daughters, the second and third applicants, regularly witnessed the violence, which affected their psychological well-being. The ECtHR held that the failure of the authorities to protect the applicants reflected the fact that they did not appreciate the seriousness of violence against women. The authorities' lack of consideration for the problem of violence against women in the Republic of Moldova amounted to discriminatory treatment based on sex in violation of Article 14 in conjunction with Article 3 of the ECHR.

Example: In *M.G. v. Turkey*,[200] the applicant was beaten by her husband during their marriage and threatened by him during their divorce. She complained about the lack of protection by the authorities from such domestic violence, and of systemic and permanent violence against women in Turkey. The ECtHR found that, while the applicant had divorced in 2007, until the entry into force of a new law in 2012 she had not had effective protection from her ex-husband, despite her numerous requests submitted to the national courts. Consequently, the ECtHR found a violation of Article 14 in conjunction with Article 3 of the ECHR.

Example: In *Halime Kiliç v. Turkey*,[201] the applicant's daughter had obtained protection orders against her violent husband. However, the authorities had not taken effective measures to protect her and she sustained fatal injuries. The ECtHR found that the failure of the national authorities to punish her husband for non-compliance with the protection order deprived them of their effectiveness and he had continued to insult her with impunity. Consequently, the ECtHR found a violation of Article 14 in conjunction with Article 2 of the ECHR.

In addition to the obligation of investigation, states have a duty to prevent hatred-motivated violence on the part of private individuals of which the authorities had or ought to have had knowledge[202] or to intervene in order to protect victims of crime in relation to the acts of private parties.

200 ECtHR, *M.G. v. Turkey*, No. 646/10, 22 March 2016.

201 ECtHR, *Halime Kiliç v. Turkey*, No. 63034/11, 28 June 2016.

202 ECtHR, *Đorđević v. Croatia*, No. 41526/10, 24 July 2012, paras. 138 and 149, discussed in Section 2.4.2.

Example: In *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*,[203] an ultra-Orthodox group attacked a group of Jehovah's Witnesses. Although notified, the police did not intervene to prevent the violence. The subsequent investigation was discontinued once the police asserted that it was not possible to ascertain the identity of the defendants. The ECtHR found that the failure of the police to intervene to protect the victims from racially motivated violence and the subsequent lack of an adequate investigation amounted to a violation of Article 3 (the right to be free from inhuman and degrading treatment or punishment) and Article 9 (the right to freedom of religion) in conjunction with Article 14, since it was based on religious grounds, of the ECHR.

Under CoE law, the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) condemns all forms of discrimination against women.[204]

2.7. Hate speech

Key point

- Hate speech is the advocacy of hatred based on one of the protected grounds.

Hate speech encompasses any public expressions which spread, incite, promote or justify hatred, discrimination or hostility towards a specific group. It is dangerous, as it contributes to a growing climate of intolerance against certain groups. Verbal attacks can convert into physical attacks.

According to European Commission against Racism and Intolerance,[205] hate speech is to be understood as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatisation or threat with respect to such a person or group of persons, as well as the justification of such types of expression.

203 ECtHR, *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, No. 71156/01, 3 May 2007.

204 Council of Europe, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, 2011. See Section 1.1.1.

205 European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 15 on Combating Hate Speech, 8 December 2015.

Hate speech may also take the form of public denial, trivialisation or the justification of crimes against humanity or war crimes, and the glorification of persons convicted for having committed such crimes.[206]

Hate crime and hate speech have the same aim of undermining the dignity and value of a human being belonging to a particular group. However, unlike hate crime, hate speech does not always have to a constitute criminal offence.

Under the ECHR, there is developing ECtHR case law on hate speech, including hate speech on the internet, which involves balancing different rights: the prohibition of discrimination, the right to private life and freedom of expression. In the following examples, the ECtHR confirmed that the principle of non-discrimination may limit the enjoyment of other rights.

Example: In *M'Bala M'Bala v. France*,[207] the applicant was a comedian, convicted for expressing negationist and antisemitic views during his live shows. He alleged that this conviction had breached his freedom of expression. The ECtHR found that the expression of hatred and antisemitism, and support for Holocaust denial could not fall within the protection of Article 10 of the ECHR. The Court also found that the applicant "had sought to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were incompatible with the letter and spirit of the Convention and which, if admitted, would contribute to the destruction of Convention rights and freedoms". His complaint was declared inadmissible.

Example: In *Vejdeland and Others v. Sweden*,[208] the applicants were convicted for circulating homophobic leaflets in a school. The ECtHR held that the interference with their freedom of expression had been necessary in a democratic society because of the protection of the reputation and the rights of others, and as such there had been no violation of Article 10 of the ECHR.

Example: In *Karaahmed v. Bulgaria*,[209] the applicant had attended a Sofia mosque for regular Friday prayers. On the same day, around 150 supporters of a right-wing political party came to protest against the noise emanating from loudspeakers at the mosque during the call to prayer. They shouted

206 *Ibid*.

207 ECtHR, *M'Bala M'Bala v. France* (dec.), No. 25239/13, 20 October 2015.

208 ECtHR, *Vejdeland and Others v. Sweden*, No. 1813/07, 9 February 2012.

209 ECtHR, *Karaahmed v. Bulgaria* No. 30587/13, 24 February 2015.

insults at the gathered worshippers and threw eggs and stones. A scuffle ensued between several demonstrators and worshippers when the former installed their own loudspeakers on the roof of the mosque to cover the sound of the prayers, and the latter attempted to remove them. Failure by the domestic authorities to strike a proper balance in their measures to ensure the effective and peaceful exercise of the rights of the demonstrators and the rights of the applicant and the other worshippers to pray together, as well as their subsequent failure to properly respond to those events and particularly to hate speech, meant that the state had failed to comply with its positive obligations under Article 9 (freedom of religion) of the ECHR.

Where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, the Member States may be entitled to impose liability on internet news portals if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.

Example: In *Delfi AS v. Estonia*,[210] the applicant company owned one of the largest internet news portals in Estonia. Following the publication of an article on the portal concerning a ferry company, a number of comments by anonymous third parties, containing personal threats and offensive language directed against the ferry company owner, were posted under the article. The portal deleted the comments weeks later and only upon demand of the applicant, but refused to pay damages. Defamation proceedings were instituted against the applicant company, which was ultimately ordered to pay € 320 in damages. The ECtHR found that the obligation to prevent or remove unlawful comments and a sanction of € 320 imposed on the applicant company had not constituted a disproportionate restriction on its right to freedom of expression. As to the content of the comments, it was found that expressions of hatred and blatant threats were manifestly unlawful – amounting to hate speech – and therefore did not require any further linguistic or legal analysis.[211]

210 ECtHR, *Delfi AS v. Estonia* [GC], No. 64569/09, 16 June 2015.

211 Compare with ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, No. 22947/13, 2 February 2016, where the Court observed that the use of vulgar phrases in itself was not decisive and that it was necessary to have regard to the specificities of the style of communication on certain internet portals. The expressions used in the comments, albeit belonging to a low register of style, were common in communication on many internet portals, so the impact that could be attributed to them was thus reduced.

The ECtHR considered that an obligation for large news portals to take effective measures to limit the dissemination of hate speech and speech inciting violence could not be equated to 'private censorship'. In fact, the ability of a potential victim of such speech to continuously monitor the internet was more limited than the ability of a large commercial internet news portal to prevent or remove unlawful comments.

The ECtHR is frequently called upon to balance competing rights. The following examples are cases in which expressing opinions was considered to be more important than the need to sanction hate speech.

Example: In *Perinçek v. Switzerland*,[212] the applicant, a Turkish academic, was convicted for publically denying that there had been any genocide of the Armenian people by the Ottoman Empire. Taking particularly into account the context in which the statements were made, the fact that they had not affected the dignity of the members of the Armenian community to the point of requesting a criminal conviction, and the fact that there had been no obligation under international law for Switzerland to criminalise such statements, the ECtHR found that the applicant's statements had related to a matter of public interest and had not amounted to a call for hatred or intolerance. The ECtHR concluded that it had not been necessary in a democratic society to subject the applicant to a criminal punishment in order to protect the rights of the Armenian community at stake in the present case.

Example: In *Sousa Goucha v. Portugal*,[213] the applicant, a well-known homosexual TV host, was the subject of a joke during a live television comedy show, which referred to him as female. The ECtHR did not consider that a joke comparing gay men to women amounted to homophobic hate speech. Therefore, the authorities' decision not to prosecute did not violate Article 14 taken in conjunction with Article 8 of the Convention.

Under international law, Article 20 of the ICCPR stipulates that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

212 ECtHR, *Perinçek v. Switzerland* [GC], No. 27510/08, 15 October 2015.

213 ECtHR, *Sousa Goucha v. Portugal*, No. 70434/12, 22 March 2016.

In this regard, the Human Rights Committee pointed out that the prohibition under Article 20, paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations. Paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the state concerned.[214]

Incitement to genocide is a crime under international law, punishable even if the act in question was at the relevant time and place, and not illegal under local law. In the famous judgment against Julius Streicher, the International Military Tribunal (IMT) in Nuremberg held that "in his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution."[215] The IMT found him guilty of crimes against humanity.

Article III of the UN Convention on the Prevention and Punishment of the Crime of Genocide envisages that the acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide shall be punishable.

In 2003, the UN International Criminal Tribunal for Rwanda (ICTR) convicted three former media executives of being key figures in the media campaign to incite ethnic Hutus to kill Tutsis in Rwanda in 1994.[216] They have been convicted of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and extermination and persecution as crimes against humanity. The Chamber noted that "Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of a person on the basis of his or her ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm".[217]

214 Human Rights Committee General Comment No. 11.

215 International Military Tribunal, judgment of 1 October 1946, in: The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, p. 501.

216 UN, International Criminal Tribunal for Rwanda, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze,* Case No. ICTR-99-52-T.

217 *Ibid.*

3 Justification for less favourable treatment under European non-discrimination law

EU	Issues covered	CoE
Objective justification: Racial Equality Directive, Art. 2 (2) (b); Employment Equality Directive, Art. 2 (2) (b); Gender Goods and Services Directive, Art. 2 (b); Gender Equality Directive (recast), Art. 2 (1) (b) **Specific grounds of justification:** **Genuine occupational requirement:** Gender Equality Directive (recast), Art. 14 (2); Racial Equality Directive, Art. 4; Employment Equality Directive, Art. 4 (1) **Religious institutions:** Employment Equality Directive, Art. 4 (2) **Age:** Employment Equality Directive, Art. 6 **Protection of public safety:** Employment Equality Directive, Art. 2 (5) CJEU, C-354/16, *Kleinsteuber v. Mars GmbH*, 2017 CJEU, C-188/15, *Bougnaoui and ADDH v. Micropole SA* [GC], 2017 CJEU, C-416/13, *Vital Pérez v. Ayuntamiento de Oviedo*, 2014 CJEU, C-285/98, *Kreil v. Bundesrepublik Deutschland*, 2000 CJEU, C-207/98, *Mahlburg v. Land Mecklenburg-Vorpommern*, 2000 CJEU, Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986	Justification for less favourable treatment under European non-discrimination law	ECHR, Art. 14 (prohibition of discrimination)

In certain circumstances, the courts may accept that differential treatment has been carried out but that it is acceptable. The approach to justification under EU law, despite certain differences, is substantially similar to that of the ECtHR.

Under the ECHR, the approach of the ECtHR is to operate a generally phrased justification, in the context of both direct and indirect discrimination. In contrast, **under EU law**, only specific limited exceptions to direct discrimination are provided for, and a general justification is examined only in the context of indirect discrimination. In other words, under the non-discrimination directives, in cases of alleged direct discrimination, the difference in treatment can only be justified where it is in pursuit of particular aims expressly set out in those directives.

It should be noted that the justification test on objective grounds under the ECHR and the justification test under the exceptions from non-discrimination directives are very similar. Both tests involve the assessment of legitimacy of goals pursued and of the proportionality of the means employed to achieve those goals.

3.1. Application of objective justification under ECHR

Key points

- Under the ECHR, differential treatment, in cases of alleged direct and indirect discrimination, is subject to objective justification.
- Differential treatment may be justified where it pursues a legitimate aim and where the means to pursue that aim are appropriate and necessary.

The objective justification is available with regard to both direct and indirect discrimination **under the ECHR**, According to the ECtHR:

> "a difference in the treatment of persons in relevantly similar situations... is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[218]

Accordingly, justified differential treatment will not constitute discrimination.

To justify differential treatment, it must be shown:

- that the rule or practice in question pursues a legitimate aim;
- that the means chosen to achieve that aim (that is, the measure which has led to the differential treatment) is proportionate to and necessary to achieve that aim.

To determine whether the differential treatment is proportionate, the court must be satisfied that:

- there is no other means of achieving that aim that imposes less of an interference with the right to equal treatment. Put otherwise, that the disadvantage suffered is the minimum possible level of harm needed to achieve the aim sought;
- the aim to be achieved is important enough to justify this level of interference.

The ECtHR jurisprudence shows that differential treatment relating to matters considered to be at the core of personal dignity, such as discrimination based on race or ethnic origin, private and family life are more difficult to justify than those relating to broader social policy considerations, particularly where these have fiscal implications. The ECtHR uses in this connection the terminology of the 'margin of appreciation', which refers to the state's sphere of discretion in determining whether differential treatment is to be justified. Where this margin is deemed 'narrow', the ECtHR adopts a higher degree of scrutiny.

218 ECtHR, *Burden v. the United Kingdom* [GC], No. 13378/05, 29 April 2008, para. 60; ECtHR, *Guberina v. Croatia*, No. 23682/13, 22 March 2016, para. 69.

3.2. Application of the objective justification under EU law

Key point

- Under EU law, objective justification is available with regard to indirect discrimination.

Under EU law, a similar wording of possible objective justification is used by the EU non-discrimination directives in relation to indirect discrimination. The Racial Equality Directive states:

> "[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary".[219]

For example, in a case concerning placing electricity meters at an inaccessible height,[220] the CJEU held that, to justify such practice, the referring court should determine whether there existed other appropriate and less restrictive means to achieve the pursued aims (security of the electricity transmission and the due recording of electricity consumption). If such measures did not exist, such practice would not be disproportionate, only if the inhabitants of the district were prejudiced in having access to electricity in conditions which are not of offensive or stigmatising nature and which do enable them to monitor their electricity consumption regularly.

In the context of employment, the CJEU has been reluctant to accept differential treatment based on reasons of management that are related to the economic concerns of employers, while it is more willing to accept differential treatment based on broader social and employment policy goals with fiscal implications. In cases concerning the latter considerations, the CJEU will accord states a broad

219 Racial Equality Directive, Art. 2 (b); Employment Equality Directive, Art. 2 (2) (b); Gender Goods and Services Directive, Art. 2 (b); Gender Equality Directive (recast), Art. 2 (1) (b).

220 CJEU, C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* [GC], 16 July 2015, (discussed in detail in Section 2.2.3).

'margin of discretion'. For instance, the CJEU held that the aim to promote higher education[221] or to compensate the disadvantages of career breaks for bringing up children[222] were legitimate aims that can justify indirect discrimination. In contrast, the CJEU stressed that the aim of restricting public expenditure cannot serve as justification.[223]

The CJEU took similar approaches under the principle of non-discrimination, as guaranteed by the EU Charter of Fundamental Rights. The CJEU indicated that a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned.[224]

Example: The CJEU offered an in-depth explanation of the idea of objective justification in *Bilka - Kaufhaus GmbH v. Weber Von Hartz*.[225] Here, part-time employees, who were excluded from the occupational pension scheme of Bilka (a department store), complained that this constituted indirect discrimination against women, since they made up the vast majority of part-time workers. The CJEU found that this would amount to indirect discrimination, unless the difference in enjoyment could be justified. In order to be justified, it would need to be shown that: "the [...] measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued, and are necessary to that end".

Bilka argued that the aim behind the difference in treatment was to discourage part-time work and incentivise full-time work, since part-time workers tended to be reluctant to work in evenings or on Saturdays, making it more difficult to maintain adequate staffing. The CJEU found that this could constitute a legitimate aim. However, it did not answer the question of whether excluding part-time workers from the pension scheme was

221 CJEU, C-238/15, *Maria do Céu Bragança Linares Verruga and Others v. Ministre de l'Enseignement supérieur et de la recherche*, 14 December 2016.

222 CJEU, C-173/13, *Maurice Leone and Blandine Leone v. Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales*, 17 July 2014.

223 CJEU, Joined cases C-4/02 and C-5/02, *Hilde Schönheit v. Stadt Frankfurt am Mein* and *Silvia Becker v. Land Hessen*, 23 October 2003.

224 CJEU, C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, 22 May 2014.

225 CJEU, Case 170/84, *Bilka - Kaufhaus GmbH v. Karin Weber Von Hartz*, 13 May 1986.

proportionate to achieving this aim. The requirement that the measures taken be 'necessary' implies that it must be shown that no reasonable alternative means exists which would cause less of an interference with the principle of equal treatment. It was for the national court to apply the law to the facts of the case.

3.3. Specific grounds of justification under EU law

Key points

- Under EU law there are specific exceptions to direct discrimination, which are tailored to the context of field of protection.
- The specific exceptions include:
  - genuine occupational requirements;
  - exceptions in relation to religious institutions;
  - exceptions particular to age discrimination.

As noted above, under the non-discrimination directives a specific set of grounds of justification exist allowing differential treatment to be justified in a limited set of circumstances. The 'genuine occupational requirement' exception is present in each of the directives[226] (except the Gender Goods and Services Directive, since it does not relate to employment). The requirement allows employers to differentiate against individuals on the basis of a protected ground where this ground has an inherent link with the capacity to perform or the qualifications required for a particular job.[227] The other two exceptions are found only in the Employment Equality Directive (2000/78/EC)[228]: first, the permissibility of discrimination based on religion or belief by employers who are faith-based organisations;[229] and second, the permissibility of age discrimination in certain

226 Gender Equality Directive (recast), Art. 14 (2); Racial Equality Directive, Art. 4; Employment Equality Directive, Art. 4 (1).

227 *Ibid.*

228 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22.

229 Employment Equality Directive, Art. 4 (2).

circumstances.[230] The strict approach of the CJEU to interpreting exceptions to differential treatment suggests any exceptions will be interpreted narrowly, since it places emphasis on the importance of any rights created for individuals under EU law. [231]

Additionally, Article 2 (5) of the Employment Equality Directive introduced an exception from the prohibition of discrimination for reasons related to the protection of public safety. The provision was intended to prevent and arbitrate a conflict between the principle of equal treatment on the one hand, and the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms on the other hand. All of these are necessary for the functioning of a democratic society. Article 2 (5) as an exception to the principle of the prohibition of discrimination must be interpreted strictly. The CJEU held, for instance, that measures which aim to avoid aeronautical accidents by monitoring pilots' aptitude and physical capabilities to ensure that human failure does not cause accidents are covered by Article 2 (5) of the Directive. It found, however, that a provision prohibiting pilots from continuing to work after the age of 60 was disproportionate.[232] It also held that a provision providing for an age limit of 60 yearsfor admission as a dentist under statutory health insurance schemes may be regarded as compatible with Article 2 (5) of the Directive, if it was to prevent a risk of serious harm to the financial balance of the social security system to achieve a high level of protection of health.[233]

3.3.1. Genuine occupational requirement

According to the non-discrimination directives, in so far as they deal with the sphere of employment:

> "Member States may provide that a difference in treatment based on a characteristic related to [the protected ground] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out,

230 Employment Equality Directive, Art. 6.

231 See, for example, CJEU, Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 15 May 1986, para. 36.

232 CJEU, C-447/09, *Reinhard Prigge and Others v. Deutsche Lufthansa AG* [GC], 13 September 2011, discussed in Section 3.3.3.

233 CJEU, C-341/08, *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [GC], 12 January 2010, paras. 60-64.

such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."[234]

This justification allows employers to differentiate between individuals on the basis of a protected characteristic, where this characteristic is directly related to the suitability or competence to perform the duties required of a particular post.

Example: In *Mario Vital Pérez v. Ayuntamiento de Oviedo*[235] (discussed in Section 5.5), the dispute concerns an age limit of 30 years for the recruitment of local police officers. The CJEU confirmed that the possession of particular physical capacities may be regarded as a 'genuine and determining occupational requirement' within the meaning of Article 4 (1) of the Employment Equality Directive (2000/78/EC). Moreover, it noted that "the possession of particular physical capacities is one characteristic relating to age".[236] In this case, the CJEU concluded, however, that the age limit was disproportionate.[237]

There are well established occupations that fall under the genuine occupational requirement derogation: in *Commission v. Germany*, the CJEU, relying on a Commission survey on the ambit of the derogation in relation to sex discrimination, indicated particular professions where the exception was likely to be applicable.[238] Particular attention was given to artistic professions, which may require particular attributes that belong to individuals as inherent characteristics, such as requiring a female singer to fit with a taste in performance style, a young actor to play a particular role, an able-bodied individual to dance, or men or

234 Gender Equality Directive (recast), Art. 14 (2); Racial Equality Directive, Art. 4; Employment Equality Directive, Art. 4 (1).

235 CJEU, C-416/13, *Mario Vital Pérez v. Ayuntamiento de Oviedo*, 13 November 2014.

236 *Ibid.*, para. 37.

237 See for CJEU reasoning Section 5.5. Compare with CJEU, C-229/08, *Colin Wolf v. Stadt Frankfurt am Main* [GC], 12 January 2010, para. 40 where the CJEU upheld the maximum recruitment age of 30 for front-line officers. The CJEU stated that physical fitness was a characteristic related to age and constituted a genuine and determining occupational requirement in the case. This was because frontline duties requires exceptional high physical capacity. Compare also with CJEU, C-258/15, *Gorka Salaberria Sorondo v. Academia Vasca de Policía y Emergencias* [GC], 15 November 2016 discussed in Section 5.5, where the CJEU considered that the age limit at 35 years for recruitment as a police officer did not constitute discriminatory treatment.

238 CJEU, Case 248/83, *Commission of the European Communities v. Federal Republic of Germany*, 21 May 1985.

women for particular types of fashion modelling. However, this was not an attempt at providing an exhaustive list. Other examples might include employing an individual of Chinese ethnicity in a Chinese restaurant to maintain authenticity, or the employment of women in women-only fitness clubs.

Example: In *Commission v. France*,[239] the CJEU found that in certain circumstances it is not unlawful to reserve employment positions primarily for male candidates in male populated prisons and for female candidates in female populated prisons. However, this exception could only be used in relation to posts that entailed those activities where being of a particular sex was relevant. In this case, the French authorities wished to retain a percentage of posts for male candidates, as there may arise a need for the use of force to deter potential troublemakers, along with other duties for which male employees were deemed to be more suitable. Although the CJEU accepted the arguments in principle, the French authorities failed to satisfy the requirement of transparency regarding specific activities that would need to be fulfilled by male candidates only; generalisations of sex suitability will not suffice.

Example: In *Johnston v. Chief Constable of the Royal Ulster Constabulary*,[240] a female police officer working in Northern Ireland complained that her contract was not renewed. The Chief Constable justified this on the grounds that female officers were not trained in the handling of firearms and this was on the basis that "in a situation characterised by serious internal disturbances the carrying of firearms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety". The CJEU found that, while the threat to safety should be taken into account, the threat applied equally to men and women, and women were not at greater risk. Unless the justification related to biological factors specific to women, such as the protection of her child during pregnancy, differential treatment could not be justified on the grounds that public opinion demand that women be protected.

Example: In *Mahlburg v. Land Mecklenburg-Vorpommern*,[241] the complainant, who was pregnant, was turned down for a permanent post as a nurse where

239 CJEU, Case 318/86, *Commission of the European Communities v. French Republic*, 30 June 1988.

240 CJEU, Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, 15 May 1986.

241 CJEU, C-207/98, *Mahlburg v. Land Mecklenburg-Vorpommern*, 3 February 2000.

a substantial amount of work was to be conducted in operating theatres. This was justified on the basis that harm could be caused to the child because of exposure to harmful substances in theatre. The CJEU found that because the post was a permanent one, it was disproportionate to bar the complainant from the post, because her inability to work in theatre would only be temporary. While restrictions on the working conditions of pregnant women were acceptable, these had to be strictly circumscribed to duties that would cause her harm and could not entail a generalised bar to work.

Example: In *Asma Bougnaoui and ADDH v. Micropole SA*,[242] (discussed in Section 5.8), the CJEU found that wearing an Islamic headscarf at work could be seen as a genuine and determining occupational requirement. The CJEU held that the Employment Equality Directive's requirement of a discriminatory rule being justified is only fulfilled if it is objectively dictated by the nature of the occupational activities concerned or by the context in which they are carried out. Therefore, the exception does not cover subjective considerations, such as the employer taking into consideration the particular request of the customer not wishing to be served by a worker wearing an Islamic headscarf.

Example: In a case[243] from Austria, a male gynaecologist complained about the rules of the procedure for a contract award with the statutory health insurance. Female candidates were automatically given 10 % more points in the selection procedure. The complainant claimed that, although he received the maximal number of points in all categories, he was placed third on the list because of the point advantage that female physicians received. The Austrian Supreme Court held that, in the circumstances of the case, sex was a genuine occupational requirement because there was an insufficient number of female gynaecologists (only 23 % of all gynaecologists were female) and some patients prefer to have a female doctor.

Paragraph 18 of the preamble to the Employment Equality Directive contains a more specific articulation of the genuine occupational requirement exception for certain public services relating to safety and security. This is not of itself a separate exception, but it should rather be regarded as making clear one of the consequences of the genuine occupational requirement exception in a particular context:

242 CJEU, C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA* [GC], 14 March 2017.

243 Austria, Austrian Constitutional Court, V 54/2014-20, 9 December 2014.

> "This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services."[244]

Typically, this might apply to a situation of refusing certain posts that are deemed to be highly physically demanding to those beyond a certain age, or with a disability. In this respect, Article 3 (4) of the directive permits Member States to expressly exclude the provision of its terms to the armed forces. While this provision does not appear in the Gender Equality Directive (recast), it is possible to appreciate how it might operate by examining two cases relating to sex discrimination and the armed forces. These cases were considered under Article 2 (2) of the Equal Treatment Directive, which contained the defence of 'genuine occupational requirement' now found in Article 14 (2) of the Gender Equality Directive (recast).

Example: In *Sirdar v. The Army Board and Secretary of State for Defence*,[245] the complainant had served as a chef as part of a commando unit. She was made redundant following cutbacks in military spending which introduced the principle of 'interoperability' for commando units. 'Interoperability' required that each individual be capable of performing a combat role, due to manpower shortages. The CJEU accepted that all-male commando units were justified to guarantee combat effectiveness, and that the principle of interoperability thereby excluded women. This was because the commandos were a small, specialised force that was usually in the first wave of any attack. The CJEU found the rule to be necessary in pursuit of the aim of ensuring combat effectiveness.

Example: In *Kreil v. Bundesrepublik Deutschland*,[246] the complainant applied to work as an electrical engineer in the armed forces. However, she was refused the post, since women were barred from any military posts involving the use of arms and could only participate in the medical and musical services of the forces. The CJEU found that this exclusion was too wide, since it applied to

244 Employment Equality Directive 2000/78/EC, OJ L 303, 2.12.2000, p. 17.

245 CJEU, C-273/97, *Angela Maria Sirdar v. The Army Board and Secretary of State for Defence*, 26 October 1999.

246 CJEU, C-285/98, *Tanja Kreil v. Bundesrepublik Deutschland*, 11 January 2000.

almost all military posts, simply because women in those posts might have to use weapons at some point. Any justification should be more closely related to the functions typically performed in each particular position. The credibility of the government's justification was also questioned because in those posts that were open to women, they were still obliged to undergo basic weapon training for the purposes of self-defence or defence of others. The measure was therefore not proportionate to achieving its aim. Furthermore, distinctions should not be made between women and men on the basis that women require greater protection, unless these relate to factors specific to the circumstances of women, such as the need for protection during pregnancy.

The ability to justify sex discrimination by referring to the effectiveness or efficiency of particular security or emergency services may well prove more difficult over time, as gender roles and social attitudes develop. In light of this, Member States are under an obligation to reconsider restrictive measures periodically.[247]

3.3.2. Religious institutions

The Employment Equality Directive specifically permits organisations that are based around a 'religion' or 'belief' to impose certain conditions on employees. Article 4 (2) of the Directive states that it does not interfere with "the right of churches and other public or private organisations, the ethos of which is based on religion or belief… to require individuals working for them to act in good faith and with loyalty to the organisation's ethos". Furthermore, employers connected to religious organisations may fall within the scope of the 'genuine occupational requirement' defence allowing for differential treatment based on religious tenets of the organisation in question.

Article 4 (1) and 4 (2) thus allow organisations such as churches to refuse, for instance, to employ women as priests, pastors or ministers, where this conflicts with the ethos of that religion. While the CJEU has not yet had the opportunity to rule on the interpretation of this provision, it has been applied at the national level. Below are two cases relating to the invocation of this defence to justify differential treatment on the basis of religion/belief.

247 Gender Equality Directive (recast), Art. 31 (3).

Example: In a case before the German courts,[248] an employee in a childcare centre run by a Catholic association was dismissed for leaving the Catholic church. The Federal Labour Court found the complainant had violated his obligation to loyalty. Although his work itself was not of religious nature, his religion and belief constituted a genuine legitimate and justified occupational requirement.

Example: In the *Amicus* case,[249] the UK courts were asked to rule on the compatibility of national regulations transposing the genuine occupational requirement defence in the context of religious employers with the Employment Equality Directive. It was emphasised that any exception to the principle of equal treatment should be narrowly interpreted. The wording of the national regulations permitted differential treatment where the employment 'is for the purposes of an organised religion', and it was underlined that this would be far more restrictive than 'for purposes of a religious organisation'. The court thus agreed with the submissions of the government that this exception would apply in relation to a very limited number of posts related to the promotion or representation of the religion, such as religious ministers. It would not allow religious organisations, such as faith schools or religious nursing homes, to argue that the post of a teacher (which is for the purposes of education) or a nurse (which is for the purposes of healthcare) was part of the 'purpose of an organised religion.'

3.3.3. Exceptions on the basis of age

Article 6 of Employment Equality Directive (2000/78/EC)[250] provides two separate justifications of differences of treatment on grounds of age.

Article 6 (1) allows age discrimination that pursues "legitimate employment policy, labour market and vocational training objectives", provided that this meets the proportionality test. A limited number of examples for when differential treatment may be justified is provided: Article 6 (1) (b) allows for the "fixing of minimum conditions of age, professional experience or seniority in service for

248 Germany, Federal Labour Court, 2 AZR 579/12, 25 April 2013.

249 United Kingdom, the United Kingdom High Court, *Amicus MSF Section, R. (on the application of) v. Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin), 26 April 2004.

250 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22.

access to employment". However, this list is not intended to be exhaustive and so could be expanded on a case-by-case basis.

The CJEU has repeatedly held that Member States enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it.[251] The CJEU accepted different aims that can be invoked by the respondent states, however, it stressed that the social and employment policy objectives to be legitimate must be of a 'public interest nature'.[252] For instance, it acknowledged that "the aim of putting in place a balanced age structure in order to facilitate planning of staff departures, ensure the promotion of civil servants, particularly the younger ones among them, and prevent disputes that might arise on retirement" was a legitimate policy aim.[253] In a case concerning compulsory retirement for university lecturers, it held that a legitimate aims could include the aim to provide quality teaching and the best possible allocation of posts for professors between the generations.[254] In *Abercrombie & Fitch Italia Srl*,[255] the CJEU considered whether the use of zero hour contracts for workers aged 25 years and under, and provision for automatic dismissal on attaining the age of 25, constituted unlawful age discrimination. It ruled that the provision was not precluded since it pursued a legitimate aim of employment and labour market policy, and the means laid down for the attainment of that objective are appropriate and necessary. In *Kleinsteuber v. Mars GmbH*,[256] the CJEU found that the method of calculation of early retirement pension for part-time workers did not amount to discrimination. The CJEU also noted that an incentive to remain in the undertaking until the statutory age of retirement cannot be created without giving the employee making that choice an advantage compared to the employee who leaves the undertaking early. It considered that such objectives, which aim to establish a balance between the interests at issue, in the context of concerns falling within

251 CJEU, Joined cases C-501/12 to C-506/12, C-540/12 and C-541/12, *Thomas Specht and Others v. Land Berlin and Bundesrepublik Deutschland*, 19 June 2014, para. 46.

252 CJEU, C-388/07, *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, 5 March 2009, para. 46.

253 CJEU, C-159/10 and C-160/10, *Gerhard Fuchs* and *Peter Köhler v. Land Hessen*, 21 July 2011, para. 60.

254 CJEU, Joined cases C-250/09 and C-268/09, *Vasil Ivanov Georgiev v. Tehnicheski universitet – Sofia, filial Plovdiv*, 18 November 2010, para. 52.

255 CJEU, C-143/16, *Abercrombie & Fitch Italia Srl v. Antonino Bordonaro*, 19 July 2017.

256 CJEU, C-354/16, *Ute Kleinsteuber v. Mars GmbH*, 13 July 2017.

employment policy and social protection, in order to guarantee the provision of an occupational pension, may be considered public interest objectives.

Article 6 (2) permits age discrimination with regard to access to benefits under occupational social security schemes, without the need to satisfy a test of proportionality. The CJEU stressed that the exception provided for in Article 6 (2) has to be interpreted restrictively[257] and found that the age-related increases in the pension contributions do not fall within the scope of this provision.[258]

Example: In *David Hütter v. Technische Universität Graz*,[259] the CJEU was asked to consider a reference relating to an Austrian law providing that work experience prior to attaining the age of 18 years could not be taken into account for the purpose of determining pay. Mr Hütter and a colleague were both apprentices for the TUG, who on completing their apprenticeships were offered a three-month contract. On the basis of the legislation in question, Mr Hütter, who was just over 18 years of age, had his pay determined with reference to his acquired 6.5 months of work experience, whereas his colleague who was 22 months older than him had her pay determined in line with her acquired 28.5 months experience. This led to a difference in monthly pay, despite each having gathered similar levels of experience. The CJEU accepted that the legislation's primary aims could be deemed legitimate: (1) so as not to place persons who have pursued a general secondary education at a disadvantage, compared with persons with a vocational qualification; and (2) to avoid making apprenticeships more costly and thereby promote the integration of young persons who had pursued that type of training into the labour market. However, the CJEU found that an objective justification had not been properly made out, as it had a disproportionate impact on younger workers, especially in those cases where experience was equal, yet the age of the applicant affected the value of remuneration, as in this case.

Example: The case *Franz Lesar v. Telekom Austria AG*[260] relates also to Austrian law which excludes taking into account periods of apprenticeship and of employment completed by a civil servant before reaching the age of 18, for

257 CJEU, C-476/11, *HK Danmark acting on behalf of Glennie Kristensen v. Experian A/S*, 26 September 2013, para. 46.

258 *Ibid.*, para. 54.

259 CJEU, C-88/08, *David Hütter v. Technische Universität Graz*, 18 June 2009.

260 CJEU, C-159/15, *Franz Lesar v. Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt*, 16 June 2016.

the purpose of determining the entitlement to a retirement pension and the calculation of its amount. The CJEU noted that the retirement scheme for civil servants is a scheme which provides workers of a given occupational sector with benefits designed to replace the benefits provided for by statutory social security schemes, and seeks to ensure the "fixing [...] of ages for admission or entitlement to retirement or invalidity benefits" within the meaning of Article 6 (2) of Directive 2000/78. Consequently, the CJEU found that this difference in treatment that is based directly on the criterion of age may be justified in so far as it seeks to guarantee within a civil service retirement scheme a uniform age for admission to that scheme and a uniform age for entitlement to the retirement benefits provided under that scheme.

Following the ruling in the *Hütter* case, Austrian law was amended. However, transitional measures continued to disadvantage those persons who were disadvantaged under the previous system and thus perpetuated age discrimination.[261] The Austrian government stated that the new law was "motivated by budgetary considerations". The CJEU held that budgetary considerations may influence the measures chosen by the Member State, but that they alone cannot constitute a legitimate aim within the meaning of Article 6 (1) of the Employment Equality Directive.[262]

The legitimate aims set out in Article 6 (1) have to relate to employment policy, labour market and vocational training. Accordingly, only limited types of legitimate aims may be put forward to justify the difference in treatment.

Example: In *Hörnfeldt v. Posten Meddelande AB*[263] the CJEU examined a national measure, which allows an employer to terminate an employee's employment contract on the sole ground that the employee has reached the age of 67 years and which does not take into account the retirement

261 According to the new law, periods of training and service prior to the age of 18 were taken into account, but, at the same time, the law introduced – only for civil servants who suffered that discrimination – a three-year extension to the period required for the promotion. See CJEU, C-530/13, *Leopold Schmitzer v. Bundesministerin für Inneres* [GC], 11 November 2014, paras. 9-15. See also C-417/13, *ÖBB Personenverkehr AG v. Gotthard Starjakob*, 28 January 2015 and CJEU, C-529/13, *Georg Felber v. Bundesministerin für Unterricht, Kunst und Kultur*, 2 January 2015.

262 CJEU, C-530/13, *Leopold Schmitzer v. Bundesministerin für Inneres* [GC], 11 November 2014, para. 41.

263 CJEU, C-141/11, *Torsten Hörnfeldt v. Posten Meddelande AB*, 5 July 2012.

pension level that the person concerned will receive. The CJEU held that such a measure can be objectively and reasonably justified by a legitimate aim of employment and labour-market policies, as long as it constitutes an appropriate and necessary means by which to achieve that aim. The CJEU noted that it is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement.

Example: In *Reinhard Prigge and Others v. Deutsche Lufthansa AG*,[264] the CJEU examined the mandatory retirement age of 60 for pilots employed by Lufthansa. Pursuant to a clause in a collective agreement, the employment contracts were automatically terminated at the end of the month in which the sixtieth birthday fell. The age limits set in collective agreement were lower than the limits set out in national legislation. The CJEU noted that principles laid down in the Directive apply not only to legislative, regulatory or administrative provisions, but also to collective agreements. With respect to exceptions to the principle of non-discrimination on ground of age provided for in Article 6, the CJEU held that air traffic safety did not constitute a legitimate aim within the meaning of this Article.

The CJEU found that traffic safety considerations are a legitimate aim under Article 2 (5) and Article 4 (1) of the Employment Equality Directive. However, in the circumstances of the case, the automatic termination of an employment contract at the age of 60 was disproportionate. The CJEU referred in particular to national and international legislation permitting the continuation of that activity, under certain conditions, until the age of 65. Furthermore, the CJEU noted that there were no apparent reasons as to why pilots, after having reached the age of 60, were considered to no longer possess the physical capabilities to act in their profession.[265]

264 CJEU, C-447/09, *Reinhard Prigge and Others v. Deutsche Lufthansa AG* [GC], 13 September 2011.

265 Compare with CJEU, C-45/09, *Gisela Rosenbladt v. Oellerking Gebäudereinigungsges.mbH* [GC], 12 October 2010, where the CJEU held that collective agreements which provide for the automatic termination of employment of employees who become entitled to an old-age pension or who reach a set age (such as 65) can amount to justified age discrimination. The CJEU took account of the fact that the retiring employees are entitled to financial compensation in the form of a pension and that the compulsory retirement is based on an agreement, which makes for considerable flexibility in the use of the mechanism, allowing the social partners to take account of the overall situation in the labour market concerned and the specific features of the jobs in question. The ECJ also observed that German law does not automatically force employees to withdraw from the labour market as it prevents a person who intends to continue to work beyond retirement age from being refused employment on the ground of age.

Example: In the *European Commission v. Hungary*,[266] the CJEU examined the proportionality of the law providing for the compulsory retirement of judges, prosecutors and notaries on reaching the age of 62. The government defended the disputed national measures on the grounds that they pursued two objectives, first, the standardisation of the age-limit for compulsory retirement in the public sector and second, the establishment of a 'more balanced age structure' facilitating access for young lawyers to the professions of a judge, prosecutor or solicitor, and guaranteeing them an accelerated career. The CJEU held that those aims were legitimate. However, the CJEU concluded that the lowering of the retirement age was not appropriate and necessary to meet those aims. The reason for this conclusion was the abrupt nature of the reduction in the retirement age from 70 to 62 within only one year. The CJEU stated that the provisions "abruptly and significantly" lowered the age-limit without introducing transitional measures. This meant that the persons concerned could not prepare themselves. Furthermore, the CJEU held that the amendments could not result in a balanced age structure in the medium and long terms. The CJEU explained that, while in 2012 the turnover of personnel would be significant owing to the fact that eight age groups would be replaced by one single age group, that turnover rate will slow down in 2013 when only one age group would have to be replaced.[267]

The CJEU held that the test formulated for objective justification of alleged indirect justification is very similar to justification of direct age discrimination, however, as the CJEU stressed it is not identical. Article 6 (1) of the Employment Equality Directive imposes on states the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification.[268]

It should be noted that the approach of the CJEU is also consistent with that of the ECtHR which examined the issue of different pensionable ages in the context of the ECHR, discussed in *Andrle v. the Czech Republic*,[269] in Sections 4.2 and 5.1. In this sense, the exceptions relating to age are consistent with the courts' approaches to employment and social policy justifications.

266 CJEU, C-286/12, *European Commission v. Hungary*, 6 November 2012.

267 A new law adopted by the Hungarian Parliament on 11 March 2013 lowered the retirement age for judges, prosecutors and notaries to 65 over a period of 10 years.

268 CJEU, C-388/07, *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, 5 March 2009, para. 65.

269 ECtHR, *Andrle v. the Czech Republic*, No. 6268/08, 17 February 2011.

4 Selected areas of protection

EU	Issues covered	CoE
TFEU, Art. 157 Racial Equality Directive (2000/43/EC), Art. 3 (1) (a) Employment Equality Directive (2000/78/EC), Art. 3 (1) (a) Gender Equality Directive (recast) (2006/54/EC), Art. 1, Art. 14 (1) (a) Council Directive (2003/109/EC), Art. 11 (1) (a) CJEU, C-548/15, *de Lange v. Staatssecretaris van Financiën*, 2016 CJEU, C-122/15, *C.*, 2016 CJEU, C-267/12, *Hay v. Crédit agricole mutuel*, 2013 CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 2013 CJEU, C-7/12, *Riežniece v. Zemkopības ministrija and Lauku atbalsta dienests*, 2013 CJEU, C-147/08, *Römer v. Freie und Hansestadt Hamburg* [GC], 2011 CJEU, C-79/99, *Schnorbus v. Land Hessen*, 2000 CJEU, C-116/94, *Meyers v. Adjudication Officer*, 1995	Employment	ECHR, Art. 14 (prohibition of discrimination) ECtHR, *I.B. v. Greece*, No. 552/10, 2013 ECtHR, *Danilenkov and Others v. Russia*, No. 67336/01, 2009

EU	Issues covered	CoE
TFEU, Art. 18 Racial Equality Directive (2000/43/EC) Gender Equality Directive (recast) (2006/54/EC) Council Directive (2003/109/EC), Art. 11 (1) (d) CJEU, C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v. García-Nieto*, 2016 CJEU, C-318/13, *X.*, 2014 CJEU, C-20/12, *Giersch v. État du Grand-Duché de Luxembourg*, 2013 CJEU, Case 32/75, *Cristini v. SNCF*, 1975	**Welfare and social security**	ECHR, Art. 8 (right to respect for private and family life), Art. 14 (prohibition of discrimination), Protocol No. 1, Art. 1 (Protection of property) ECtHR, *Gouri v. France* (dec.), No. 41069/11, 2017 ECtHR, *Bah v. the United Kingdom*, No. 56328/07, 2011 ECtHR, *Stummer v. Austria* [GC], No. 37452/02, 2011 ECtHR, *Andrle v. the Czech Republic*, No. 6268/08, 2011
TFEU, Art. 18 Regulation on freedom of movement of workers within the Community (1612/68), Art. 12 Racial Equality Directive (2000/43/EC), Art. 3 (1) (g) Council Directive (2003/109/EC), Art. 11 (1) (b) CJEU, C-491/13, *Ben Alaya v. Bundesrepublik Deutschland*, 2014 CJEU, Joined cases C-523/11 and C-585/11, *Prinz v. Region Hannover* and *Seeberger v. Studentenwerk Heidelberg*, 2013 CJEU, C-147/03, *Commission of the European Communities v. Republic of Austria*, 2005 CJEU, Case 9/74, *Casagrande v. Landeshauptstadt München*, 1974	**Education**	ECHR, Art. 8 (right to respect for private and family life), Art. 14 (prohibition of discrimination), Protocol No. 1, Art. 1 (Protection of property) ECtHR, *Çam v. Turkey*, No. 51500/08, 2016 ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 2011

EU	Issues covered	CoE
Racial Equality Directive (2000/43/EC) Gender Goods and Services Directive, Paragraph 13 of the Preamble Treaty on the Functioning of the European Union, Art. 57 Racial Equality Directive (2000/43/EC), Art. 3 (1) (h) Charter of Fundamental Rights, Art. 7, Art. 34 (3) Council Directive (2003/109/EC), Art. 11 (1) (f) CJEU, C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* [GC], 2015 CJEU, C-571/10, *Kamberaj v. IPES* [GC], 2012	**Access to supply of goods and services, including housing**	ECHR, Art. 3 (prohibition of torture), Art. 8 (right to respect for private and family life), and Art. 14 (prohibition of discrimination), Protocol No. 1, Art. 1 (Protection of property) ESC (Revised), Art. E, Art. 13 (4), and 31 (1) ECtHR, *Hunde v. the Netherlands* (dec.), No. 17931/16, 2016 ECtHR, *Vrountou v. Cyprus*, No. 33631/06, 2015 ECtHR, *Moldovan and Others v. Romania (No. 2)*, Nos. 41138/98 and 64320/01, 2005 ECSR, *CEC v. the Netherlands*, No. 90/2013, 2014 ECSR, *FEANTSA v. the Netherlands*, No. 86/2012, 2014
Charter of Fundamental Rights, Art. 47	**Access to justice**	ECHR, Art. 6 (right to fair trial) ECtHR, *Paraskeva Todorova v. Bulgaria*, No. 37193/07, 2010 ECtHR, *Anakomba Yula v. Belgium*, No. 45413/07, 2009 ECtHR, *Moldovan and Others v. Romania (No. 2)*, Nos. 41138/98 and 64320/01, 2005
Charter of Fundamental Rights, Art. 7 CJEU, C-391/09, *Runevič-Vardyn and Wardyn v. Vilniaus miesto savivaldybės administracija*, 2011 CJEU, C-104/09, *Roca Álvarez v. Sesa Start España ETT SA*, 2010	**Right for respect of private and family life**	ECHR, Art. 8 (right to respect for private and family life), Art. 12 (right to marry) and Art. 14 (prohibition of discrimination) ECtHR, *Kacper Nowakowski v. Poland*, No. 32407/13, 2017 ECtHR, *A.H. and Others v. Russia*, Nos. 6033/13 and 15 other applications, 2017 ECtHR, *Pajić v. Croatia*, No. 68453/13, 2016 ECtHR, *Vallianatos and Others v. Greece* [GC], Nos. 29381/09 and 32684/09, 2013 ECtHR, *X and Others v. Austria* [GC], No. 19010/07, 2013

EU	Issues covered	CoE
Charter of Fundamental Rights, Art. 12	Political participation	ECHR, Art. 10 (freedom of expression), Art. 11 (freedom of assembly and association), Protocol No. 1, Art. 3 (Right to free elections) ECtHR, *Pilav v. Bosnia and Herzegovina*, No. 41939/07, 2016 ECtHR, *Partei Die Friesen v. Germany*, No. 65480/10, 2016
Charter of Fundamental Rights, Art. 21 TFEU, Art 18 and 21 CJEU, C-182/15, *Petruhhin v. Latvijas Republikas Ģenerālprokuratūra* [GC], 2016 CJEU, C-42/11, *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge* [GC], 2012	Criminal law matters	ECHR, Art. 2 (right to life), Art. 3 (prohibition of torture), Art. 5, Art. 6 (right to fair trial), Art. 7 (No punishment without law) and Protocol No. 7, Art. 4 (Right not to be tried or punished twice) ECtHR, *Martzaklis and Others v. Greece*, No. 20378/13, 2015 ECtHR, *Stasi v. France*, No. 25001/07, 2011 ECtHR, *D.G. v. Ireland*, No. 39474/98, 2002 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 1988

Key point

- The scope of the ECHR is much wider than the EU non-discrimination directives – both in terms of the substantive rights and the manner that these are interpreted for the purposes of applying Article 14 of the Convention.

While European non-discrimination law prohibits direct and indirect discrimination, it does so only in certain contexts.

Article 14 of the ECHR applies in relation to the enjoyment of all substantive rights guaranteed by the ECHR, and Protocol No. 12 to the ECHR covers any right which is guaranteed at the national level, even where this does not fall within the scope of an ECHR right. Whereas the scope of the prohibition on discrimination under EU non-discrimination directives extends to three areas: employment, the welfare system, and goods and services. Currently, as discussed in Chapter 1, only the Racial Equality Directive applies to all three areas. While legislation which will extend the Employment Equality Directive to all three areas is under discussion,

this directive currently only applies to the context of employment. The Gender Equality Directive (recast) and the Gender Goods and Services Directive apply to the context of employment and access to goods and services but not to access to the welfare system.

This chapter will set out the scope of application of European non-discrimination law. In particular, it will examine substantive areas of protection covered.

4.1. Employment

Under EU law, protection against discrimination in the field of employment is extended across all the protected grounds provided for under the non-discrimination directives. It covers access to employment, conditions of employment, including dismissals and pay, access to vocational guidance and training, and worker and employer organisations.

The concept of 'access to employment' under the non-discrimination directives has been interpreted widely by the CJEU. It applies to a person seeking employment,[270] and also in regard to the selection criteria[271] and recruitment conditions[272] of that employment.[273]

> Example: In *Meyers v. Adjudication Officer*,[274] the CJEU held that access to employment covers "not only the conditions obtaining before an employment relationships comes into being", but also all those influencing factors that need to be considered before the individual makes a decision of whether or not to accept a job offer. Therefore, the granting of a particular state benefit (payable depending on level of income) was capable of falling in this area. This was because the candidate would be influenced by whether they would be entitled to this benefit when considering their decision to take up a post. Consequently, such a consideration had an impact on access to employment.

270 CJEU, C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH*, 19 April 2012.

271 CJEU, C-317/14, *European Commission v. Kingdom of Belgium*, 5 February 2015.

272 CJEU, C-416/13, *Mario Vital Pérez v. Ayuntamiento de Oviedo*, 13 November 2014.

273 Racial Equality Directive, Art. 3 (1) (a); Employment Equality Directive, Art. 3 (1) (a); Gender Equality Directive (recast), Art. 1 and 14 (1) (a).

274 CJEU, C-116/94, *Jennifer Meyers v. Adjudication Officer*, 13 July 1995.

Example: In *Schnorbus v. Land Hessen,*[275] the complainant applied for a training post as part of her qualification to join the judiciary. Under national law, it was necessary to pass a national exam, followed by a period of training and a second exam. The complainant had passed the first exam, but was refused a training post on the grounds that there were no vacancies. Her entry was consequently delayed until the next round of posts became available. The complainant argued that she had been discriminated against because priority was accorded to male candidates who had completed their military service. The CJEU found that national legislation regulating the date of admission to the training post fell within the scope of 'access to employment' since such a period of training was itself considered as 'employment' both in its own right and as part of the process of obtaining a post within the judiciary.

Example: In *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării,*[276] concerning homophobic remarks made by financial patron of a football, the CJEU held that the Employment Equality Directive applies to statements concerning the recruitment policy of the club even though there was no actual recruitment procedure open and there was no identifiable complainant who claims to have been the victim of discrimination.[277]

Similarly, in interpreting what falls within the conditions of employment, the CJEU has applied a rather broad interpretation. This has ultimately led to any condition derived from the working relationship to be considered as falling within this category.

Example: In *Meyers v. Adjudication Officer,*[278] the applicant, a single parent, complained of indirect sex discrimination due to the method used for calculating the eligibility of single parents for family credit. It fell to the CJEU to clarify whether the provision of family credit (a state benefit) was solely a social security issue, or whether it constituted a condition of employment, an important factor in determining this consideration. The CJEU took into

275 CJEU, C-79/99, *Julia Schnorbus v. Land Hessen*, 7 December 2000.

276 CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013.

277 See also CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008.

278 CJEU, C-116/94, *Jennifer Meyers v. Adjudication Officer*, 13 July 1995.

consideration that the family credit in question was payable when the following three conditions were satisfied: the income of the claimant does not exceed a specified amount; the claimant or their partner was working; the claimant or their partner had responsibility for a child. The CJEU held that the Equal Treatment Directive (now replaced by the Gender Equality Directive (recast)) would not be considered inapplicable solely because the benefit in question formed part of a social security system. Instead, a wider approach was adopted looking at whether the benefit was given in connection to a working relationship. In this case, to benefit from the family credit system, the applicant had to establish that either they, or their partner, were engaged in remunerative work. This requirement to establish a working relationship brought the family credit system within the category of a working condition.

Applying such a wide definition to the concept of employment and working conditions led the CJEU to find that the provision of workplace nurseries;[279] the reduction of working time,[280] the conditions for granting parental leave[281] also fell within its ambit.

The CJEU has also adopted a fairly inclusive approach to the issues of dismissals and pay. In relation to the ambit of dismissals, this covers almost all situations where the working relationship is brought to an end. This has been held to include, for example, where the working relationship has been brought to an end as part of a voluntary redundancy scheme,[282] or where the relationship has been terminated through compulsory retirement.[283]

Example: In *Riežniece v. Zemkopības ministrija and Lauku atbalsta dienests*,[284] the claimant, a civil servant, had been dismissed after taking parental leave. The official reason for dismissal was the suppression of the applicant's post. The CJEU ruled that the method for assessing workers in the context of the

279 CJEU, C-476/99, *H. Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*, 19 March 2002.

280 CJEU, C-236/98, *Jämställdhetsombudsmannen v. Örebro läns landsting*, 30 March 2000.

281 CJEU, C-222/14, *Konstantinos Maïstrellis v. Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, 16 July 2015.

282 CJEU, Case 19/81, *Arthur Burton v. British Railways Board*, 16 February 1982.

283 CJEU, C-411/05, *Félix Palacios de la Villa v. Cortefiel Servicios SA* [GC], 16 October 2007.

284 CJEU, C-7/12, *Nadežda Riežniece v. Zemkopības ministrija and Lauku atbalsta dienests*, 20 June 2013.

suppression of a post must not place workers who have taken parental leave in a less favourable situation than other workers. The CJEU concluded that there had been indirect discrimination because parental leave is taken by a higher proportion of women than men.

The concept of pay has been defined in Article 157 of the Treaty of the Functioning of the EU as being the "ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer". This covers a wide variety of benefits that a worker receives due to having entered a working relationship. The ambit of this definition has been considered in a range of cases before the CJEU, and this has been held to cover all benefits associated with a job, including concessionary rail travel,[285] expatriation allowances,[286] Christmas bonuses,[287] and occupational pensions,[288] taking account of periods of military service,[289] and continued payment of wages in the event of illness.[290] What one is essentially looking for in determining whether the issue falls within the term 'pay' is some form of benefit, which is derived from the existence of a working relationship.

Example: In *Jürgen Römer v. Freie und Hansestadt Hamburg,*[291] the complainant worked for the City of Hamburg as an administrative employee until he became incapacitated for work. After he entered a civil partnership with his long-term partner, he requested his supplementary retirement pension to be recalculated on the basis of a more favourable tax deduction category available for married couples. The competent administration refused on the ground that the applicant was not married but in a registered partnership. The CJEU confirmed that supplementary retirement pensions such as those paid to the complainant constitute pay. Consequently, if

285 CJEU, Case 12/81, *Eileen Garland v. British Rail Engineering Limited*, 9 February 1982.

286 CJEU, Case 20/71, *Luisa Sabbatini, née Bertoni, v. European Parliament*, 7 June 1972.

287 CJEU, C-333/97, *Susanne Lewen v. Lothar Denda*, 21 October 1999.

288 CJEU, C-262/88, *Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group*, 17 May 1990.

289 CJEU, C-220/02, *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich*, 8 June 2004.

290 CJEU, C-171/88, *Ingrid Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG*, 13 July 1989.

291 CJEU, C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg* [GC], 10 May 2011.

a Member State has a registered partnership putting same-sex couples into a legal position comparable to married couples, exclusion from marriage benefits constitutes direct discrimination. Protection of marriage and the family as such, cannot serve as valid justification for such discrimination. The CJEU ruled that same-sex couples must have access to employment, benefits including the right to retirement pensions granted to married couples.

Example: In the case of *C.*,[292] concerning supplementary tax on income from a retirement pension, the CJEU pointed out that the meaning of 'pay' should be interpreted broadly within the scope of the Employment Equality Directive (2000/78). The CJEU stressed that the notion of 'pay' covers any benefit that the employee receives in respect to their employment. The concept of 'pay' is also independent of whether it is received under a contract of employment, by virtue of legislative provisions, or on a voluntary basis. It might also include benefits that are paid after the termination of employment or to ensure that a worker receives income even where they are not performing any work. However, the CJEU held that tax on retirement pension income is external to the employment relationship and, therefore, does not fall within the scope of the Employment Equality Directive and Article 157 of the TFEU. It directly and exclusively derives from national tax legislation, applicable to a certain category of persons as specified in relevant tax provisions.

Example: In *Frédéric Hay v.Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*,[293] the CJEU considered that benefits envisaged for employees on the occasion of their marriage form a part of an employee's pay. The claimant, a homosexual man in a relationship with another man, had been refused the benefit on the ground that he did not fulfil the condition of getting married, a requirement for obtaining it. The CJEU found that the difference in treatment between married persons and those in a civil partnership amounted to discrimination based on sexual orientation.

292 CJEU, C-122/15, *C.*, 2 June 2016.

293 CJEU, C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013. See Section 2.1.2.

The definition of 'vocational guidance and training' has received attention from the CJEU in the context of free movement of persons.[294] The CJEU has adopted a broad interpretation of this term.

Example: In *Gravier v. City of Liège,*[295] a student who was a French national wished to study strip cartoon art at the Académie de Beaux-Arts in Liège. The complainant was charged a registration fee, whereas students from the host state were not. The CJEU stated that vocational training includes: "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 ..., whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education".

Example: The above definition of vocational training was applied in *Blaizot v. University of Liège and Others*,[296] where the complainant applied for a course to study veterinary medicine. The CJEU found that in general a university degree will also fall within the meaning of 'vocational training' even where the final qualification awarded at the end of the programme does not directly provide for the qualification required of a particular profession, trade or employment. It was sufficient that the programme in question provides knowledge, training or skills required within a particular profession, trade or employment. Thus, where particular trades do not require a formal qualification, or where the university degree does not of itself constitute the formal entry requirement to a profession, this will not prevent the programme being regarded as 'vocational training'. The only exceptions to this are "certain courses of study, which of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation".

Example: In *J.J. de Lange v. Staatssecretaris van Financiën*[297] (discussed in Section 5.5), the CJEU ruled that the tax treatment of vocational training costs incurred by a person may affect the actual accessibility to such training.

294 According to Art. 7 (3) of Regulation 1612/68 on freedom of movement of workers within the Community, a worker shall "have access to training in vocational schools and retraining schools" without being subject to less favourable conditions when compared to national workers (OJ L 271, 19.10.1968, p. 2).

295 CJEU, Case 293/83, *Françoise Gravier v. City of Liège*, 13 February 1985.

296 CJEU, Case 24/86, *Vincent Blaizot v. University of Liège and Others*, 2 February 1988.

297 CJEU, C-548/15, *J.J. de Lange v. Staatssecretaris van Financiën*, 10 November 2016.

In this case, the right to deduct the costs of vocational training from their taxable income differed, depending on age. The CJEU left it to the national court to determine if the national legislation was necessary to attain the objective of promoting the position of young people in the labour market.

Under EU law, the prohibition of discrimination also applies in relation to worker and employer organisations. This does not only deal with membership and access to a worker or employer organisations, but it also covers the involvement of persons within these organisations. According to guidance issued by the European Commission, this aims to ensure that discrimination is removed as regards membership or benefits derived in the context of these bodies.[298]

As regards pregnancy and maternity related discrimination, please see Section 5.1.

The national courts also interpret the prohibition of discrimination in the field of employment widely.

Example: In a case from the Former Yugoslav Republic of Macedonia,[299] an employer decided not to extend the contract of an employee, nor to offer her a new one, after he discovered that she was pregnant. The domestic court held that this constituted discrimination owing to pregnancy.

Example: In a case from Poland,[300] the complainant was an English teacher of Ukrainian nationality. She had been employed for over 12 years in a Polish school on the basis of a number of definite duration contracts, unlike some other teachers who were employed under indefinite duration contracts. The school authorities argued that the reason for offering fixed-term contracts was, among others, the limited duration of her residence permits. The Supreme Court noted that prohibition of discrimination covered all stages of employment, including this type of employment contract. It stated that this differential treatment, if it resulted only from Ukrainian nationality and residence permits, constituted discrimination on grounds of nationality.

298 Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (1999) 566 final, 25.11.1999.

299 The Former Yugoslav Republic of Macedonia, Primary Court II Skopje, I RO No. 618/15, 3 March 2016, Source: *European Equality Law Review* (2016), vol. 2, p. 97.

300 Poland, Polish Supreme Court, III PK 11/16, 7 November 2016; the court quashed the judgment and remitted the case to determine if the reasons for concluding definite contracts were discriminatory.

Although the **ECHR** does not guarantee a right to employment, Article 8 has been interpreted as covering the sphere of employment under certain circumstances. In *Sidabras and Džiautas v. Lithuania*,[301] a government ban on former KGB agents accessing employment in the public sector and parts of the private sector was held to fall within the ambit of Article 8 in conjunction with Article 14. Namely, it "affected their ability to develop relationships with the outside world to a very significant degree and has created serious difficulties for them in terms of earning their living, with obvious repercussions on the enjoyment of their private lives".[302] Similarly in *Bigaeva v. Greece*, it was held that Article 8 can also apply in the sphere of employment, such as in the context of access to a profession.[303]

Example: In *I.B. v. Greece*,[304] the applicant had been dismissed from his job, following complaints by staff members that he was HIV-positive. The ECtHR found that issues concerning employment and situations involving persons with HIV came within the scope of private life, and held that the applicant's dismissal had been in breach of Article 14 of the Convention taken in conjunction with Article 8. The ECtHR based its conclusion on the fact that the Court of Cassation had failed to adequately explain how the employer's interests in maintaining a harmonious working environment had prevailed over those of the applicant. In other words, it had failed to balance the competing interests of the applicant and the employer in a manner required by the Convention.

The ECtHR has also prohibited discrimination on the basis of membership of a trade union. The right to form trade unions is guaranteed as a stand-alone right in the ECHR.[305]

Example: In *Danilenkov and Others v. Russia*,[306] the applicants had experienced harassment and less favourable treatment from their employer on the basis of their membership in a trade union. Their civil claims before the

301 ECtHR, *Sidabras and Džiautas v. Lithuania*, Nos. 55480/00 and 59330/00, 27 July 2004, discussed in Section 6.4.

302 *Ibid.*, para. 48.

303 ECtHR, *Bigaeva v. Greece*, No. 26713/05, 28 May 2009.

304 ECtHR, *I.B. v. Greece*, No. 552/10, 3 October 2013.

305 For example, ECtHR, *Demir and Baykara v. Turkey* [GC], No. 34503/97, 12 November 2008.

306 ECtHR, *Danilenkov and Others v. Russia*, No. 67336/01, 30 July 2009.

national courts were dismissed, since discrimination could only be established in criminal proceedings. However, the public prosecutor refused to bring criminal proceedings because the standard of proof required the state to show 'beyond reasonable doubt' that discrimination had been intended by one of the company's managers. The ECtHR found that the absence of effective judicial protection of freedom of association for trade unions in national law amounted to a violation of Article 11 in conjunction with Article 14.

Under the ESC, Article 1 (2) requires that national legislation prohibits any discrimination in employment, inter alia on grounds of sex, race, ethnic origin, religion, disability, age,[307] sexual orientation and political opinion, including on grounds of conscientious objection or non-objection.[308] Discrimination is prohibited regarding recruitment or employment conditions in general (in particular, remuneration, training, promotion, transfer and dismissal or other detrimental action).[309] There must be adequate legal safeguards against discrimination in regard to part-time work. In particular, there must be rules to prevent non-declared work through overtime, and equal pay, in all its aspects, between part-time and full-time employees.[310]

Article 4 (3) of the ESC guarantees the right to equal pay for work of equal value without discrimination on grounds of sex. Article 20 of the Charter also concerns matters of employment and occupation without discrimination on grounds of sex, including pay. Article 27 of the ESC aims at ensuring that all persons with family responsibilities and who are engaged or wish to engage in employment have a right to do so without being subject to discrimination and as far as possible without conflict between their employment and family responsibilities.

307 ECSR, *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No. 74/2011, Decision on the merits of 2 July 2013, paras. 115-117.

308 ECSR, *Confederazione Generale italiana del Lavoro (CGIL) v. Italy*, Complaint No. 91/2013, Decision on the merits of 12 October 2015, para. 238; ECSR, Conclusions 2006, Albania; ECSR, Conclusions 2012, Iceland, Moldova and Turkey.

309 ECSR, Conclusions XVI-1 (2002), Austria.

310 ECSR, Conclusions XVI-1 (2002), Austria.

4.2. Access to welfare and social security

Under EU law, only the Racial Equality Directive provides broad protection against discrimination in accessing the welfare system and other forms of social security. Encompassed within this is access to benefits in kind that are held 'in common' by the state, such as public healthcare, education and the social security system.

The precise ambit of the area of social protection, including social security and healthcare, is uncertain, since it is not explained within the Racial Equality Directive and has yet to be interpreted through the CJEU case law. The Social Security Directive (79/7)[311] provides for equal treatment on the basis of sex, only in relation to 'statutory social security schemes' as opposed to 'occupational social security' schemes, which is dealt with in the Gender Equality Directive (recast). Article 3 of the Social Security Directive defines these as schemes which provide protection against sickness, invalidity, old age, accidents at work and occupational diseases and unemployment, in addition to "social assistance, in so far as it is intended to supplement or replace" the former schemes. The material scope of the Gender Equality Directive (recast) is defined in its Article 7. It covers the same risks as the Social Security Directive. According to Article 7 (1) (b) of the Gender Equality Directive, it also applies to occupational social security schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment.

The distinction between statutory social security schemes and occupational schemes of social security is relevant, since certain exceptions are allowed under the Social Security Directive but not under the Gender Equality Directive (recast).

Example: The case of *X*.[312] concerns the criteria for the granting of disability allowance which was part of the statutory social security system falling within the scope of the Social Security Directive (79/7/EEC). The claimant, a man, had received compensation for a work accident. The awarded amount was smaller than the amount that a woman of the same age and in a comparable situation would have been paid. The CJEU rejected the government's justification that this difference in the level of compensation

311 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6, p. 24.

312 CJEU, C-318/13, *X.*, 3 September 2014.

is justified because the life expectancies of men and women are different.[313] The CJEU pointed to the fact that from the general statistical data, according to sex, it cannot be concluded that a female insured person always has a greater life expectancy than a male insured person of the same age, placed in a comparable situation.

The scope of 'social advantages' is well developed through the CJEU case law in the context of the law on free movement of persons and has been afforded an extremely broad definition.

Example: In the *Cristini* case,[314] the complainant was an Italian national living with her children in France, whose late husband had been a 'worker' under EU law. The French railways offered concessionary travel passes for large families, but refused such a pass to Ms Cristini on the basis of her nationality. It was argued that 'social advantages' for the purposes of EU law were only those advantages that flowed from a contract of employment. The CJEU disagreed, finding that the term should include all advantages regardless of any contract of employment, including passes for reduced rail fares.[315]

Example: In *Vestische Arbeit Jobcenter Kreis Recklinghausen v. Jovanna García-Nieto and Others,*[316] a German employment centre refused to grant subsistence benefits to a Spanish national and his son for their first three months of residency in Germany. Under German legislation, foreign nationals do not have a right to obtain any social benefits during the first three months of residency in Germany. The CJEU found that this rule complied with EU legislation. The Citizenship Directive 2004/38/EC establishes a right for EU citizens to reside in other EU states for up to three months without any formalities apart from the obligation to hold a valid ID card or passport. Therefore, the directive allows the state to refuse social assistance to EU citizens during the first three months of their residency in that territory. They should have sufficient means of subsistence and personal medical cover

313 *Ibid*. paras. 37-40.

314 CJEU, Case 32/75, *Anita Cristini v. Société nationale des chemins de fer français*, 30 September 1975.

315 See also CJEU, C-75/11, *European Commission v. Republic of Austria*, 4 October 2012 concerning the scheme of reduced fares on public transport in Austria.

316 CJEU, C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v. Jovanna García-Nieto and Others*, 25 February 2016.

during this period. The CJEU concluded that such refusal does not require assessment of the individual situation of the person concerned.

Example: In *Elodie Giersch and Others v. État du Grand-Duché de Luxembourg*,[317] the claimants, children of frontier workers employed in Luxembourg, were not eligible for financial aid for higher education studies because they had not resided in Luxembourg. The CJEU noted that a Member State may reserve student aid for individuals who have a sufficiently close connection to that Member State. However, states assessing the actual degree of attachment that an individual has with the society or with the labour market of that Member State cannot rely solely on a residency condition. They should also take into account other elements. For example, the fact that one of the parents, who continues to support that student, is a frontier worker who has stable employment in that Member State and has already worked there for a significant period of time.

The CJEU defined 'social advantages' in the *Even* case as advantages:

> "which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community".[318]

The term applies to virtually all rights so long as they satisfy the *Even* definition: there is no distinction between a right that is granted absolutely or those rights granted on a discretionary basis. Further, the definition does not preclude those rights granted after the termination of the employment relationship being deemed a social advantage such as a right to a pension.[319] Essentially, in the context of free movement, a social advantage relates to any advantage that is capable of assisting the migrant worker to integrate into the society of the host state. The courts have been quite liberal in finding an issue to be a social advantage, for example:

317 CJEU, C-20/12, *Elodie Giersch and Others v. État du Grand-Duché de Luxembourg*, 20 June 2013.

318 CJEU, Case 207/78, *Criminal proceedings against Gilbert Even and Office national des pensions pour travailleurs salariés (ONPTS)*, 31 May 1979, para. 22.

319 CJEU, C-35/97, *Commission of the European Communities v. French Republic*, 24 September 1998.

- the payment of an interest-free 'childbirth loan' – despite the rationale behind the loan being to stimulate childbirth, the CJEU considered this to be a social advantage as it was viewed as a vehicle to alleviate financial burdens on low-income families;[320]
- the awarding of a grant under a cultural agreement to support national workers to study abroad;[321]
- the right to hear a criminal prosecution against an individual in the language of their home state;[322]
- payment of disability benefits which are intended to compensate for the extra expenses connected with their disability.[323]

Under the ECHR, there is no right to social security, though it is clear from the jurisprudence of the ECtHR that some forms of social security such as benefit payments and pensions may fall within the ambit of Article 1 of Protocol No. 1[324] or of Article 8.[325]

Example: In *Andrle v. the Czech Republic*,[326] the applicant complained that, unlike for women, there was no lowering of the pensionable age for men who had raised children. The ECtHR found that this difference in treatment between men and women was objectively and reasonably justified to compensate for the inequalities women face (such as generally lower salaries and pensions) and the hardship generated by the expectation that they would work on a full-time basis and take care of the children and the household. Consequently, the timing and the extent of the measures taken to rectify the inequality in question had not been manifestly unreasonable and there

320 CJEU, Case 65/81, *Francesco Reina and Letizia Reina v. Landeskreditbank Baden-Württemberg*, 14 January 1982.

321 CJEU, Case 235/87, *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, 27 September 1988.

322 CJEU, Case 137/84, *Criminal proceedings against Robert Heinrich Maria Mutsch*, 11 May 1985.

323 CJEU, C-206/10, *European Commission v. Federal Republic of Germany*, 5 May 2011.

324 See for example ECtHR, *Béláné Nagy v. Hungary* [GC], No.53080/13, 13 December 2016, concerning the right to disability pension.

325 In particular, see the following cases: ECtHR, *Andrejeva v. Latvia* [GC], No. 55707/00, 18 February 2009; ECtHR, *Gaygusuz v. Austria*, No. 17371/90, 16 September 1996; and ECtHR, *Koua Poirrez v. France*, No. 40892/98, 30 September 2003, all discussed in Section 5.7.

326 ECtHR, *Andrle v. the Czech Republic*, No. 6268/08, 17 February 2011.

had not been a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.[327]

Example: In *Stummer v. Austria*,[328] the applicant had spent about twenty-eight years of his life in prison and had worked for lengthy periods during that time. The national pension scheme did not take work in prison into account when calculating his pension rights. The ECtHR held that the affiliation of working prisoners to the old-age pension system remained a question of choice of social and economic policy within a large margin of appreciation of the state and found no violation of Article 14 in conjunction with Article 1 of Protocol No. 1 to the Convention.

Example: In *Fábián v. Hungary*,[329] the applicant, a pensioner employed by the civil service, complained about legislative amendment which upended the payment of old-age pensions to persons simultaneously employed in certain categories of the public sector, whereas pensioners working in the private sector remained eligible to receive the pension. The ECtHR held that the applicant had not demonstrated that, as a pensioner employed by the civil service, he was in a relevantly similar situation to pensioners employed in the private sector as regards his eligibility for the payment of old-age pensions. As such, there had been no violation of Article 14 in conjunction with Article 1 of Protocol No. 1. The ECtHR found that, following the amendment, it was the applicant's post-retirement employment in the civil service that entailed the suspension of his pension payments. It was precisely the fact that, as a civil servant, he was in receipt of a salary from the state that was incompatible with the simultaneous disbursement of an old-age pension from the same source. As a matter of financial, social and employment policy, the impugned bar on simultaneous accumulation of pension and salary from the state budget had been introduced as part of legislative measures aimed at correcting financially unsustainable features in the pension system of the respondent state. That did not prevent the accumulation of pension and salary for persons employed in the private sector, whose salaries, in contrast to those of persons employed in the civil service, were funded not by the state but through private budgets outside the latter's direct control.

327 See Section 2.5 on special measures.

328 ECtHR, *Stummer v. Austria* [GC], No. 37452/02, 7 July 2011.

329 ECtHR, *Fábián v. Hungary* [GC], 78117/13, 5 September 2017.

Although there is no right to healthcare under the ECHR, the ECtHR has held that issues relating to healthcare,[330] such as access to medical records,[331] will fall under Article 8 (such as access to medical records[332]) or Article 3, where a lack of access to health services is sufficiently serious to amount to inhuman or degrading treatment or interference with a person's private life.[333] Therefore, the complaints relating to discrimination in accessing healthcare may fall within the ambit of the Article 14.

Example: In *Durisotto v. Italy*,[334] the applicant complained that his daughter had been refused authorisation for experimental treatment unlike some other patients. The domestic court established that the relevant clinical testing method was available during a certain period and the applicant's daughter had not begun the treatment during this period. Consequently, the authorisation criterion as required by the relevant law was not satisfied in the applicant's daughter case. The ECtHR held that although there was a difference in treatment of persons in relevantly similar situations, that difference was justified. The domestic court's decision had been properly reasoned and was not arbitrary. Furthermore, it pursued the legitimate aim of protecting health and was proportionate to that aim. In addition, the therapeutic value of the experimental treatment had not been proved scientifically at the relevant time. Therefore, the ECtHR rejected this part of the application as manifestly ill-founded.

Access to other social benefits, particularly where they are intended to benefit the family unit, may also fall within the ambit of Article 8 of the ECHR. However, the margin of appreciation accorded to states in this area is relatively wide. The ECtHR has emphasised that states, due to their direct knowledge of their society and its needs, are in principle better placed to appreciate what is in the public interest on social or economic grounds. Therefore, the ECtHR generally

330 See CoE, ECtHR (2015), *Health-related issues in the case-law of the European Court of Human Rights,* Thematic report.

331 ECtHR, *K.H. and Others v. Slovakia*, No. 32881/04, 28 April 2009.

332 *Ibid.*

333 ECtHR, *Murray v. the Netherlands* [GC], 10511/10, 26 April 2016; ECtHR, *Sławomir Musiał v. Poland*, No. 28300/06, 20 January 2009.

334 ECtHR, *Durisotto v. Italy*, 62804/13, 6 May 2014.

respects the legislature's policy choice unless it is "manifestly without reasonable foundation".[335]

Example: In *Bah v. the United Kingdom*,[336] the applicant, a Sierra Leonean national, was granted indefinite leave to remain in the United Kingdom. The authorities allowed her minor son to join her on the condition that he would not have recourse to public funds. Shortly after his arrival, the applicant was obliged to leave her accommodation and find new housing. She applied to the local authority for assistance in finding accommodation; however, taking account of the immigration rules and her son's immigration status, the priority to which her status as an unintentionally homeless person with a minor child would ordinarily have entitled her, was refused. The ECtHR found that the applicant's differential treatment had resulted from her son's conditional immigration status, not his national origin. It was the applicant's choice to bring her son into the country in full awareness of the condition attached to his leave to enter. The legislation pursued the legitimate aim of allocating a scarce resource fairly, between different categories of claimants. The local authority had helped the applicant to find a private-sector tenancy and had offered her social housing within seventeen months. The difference in treatment in the applicant's case was reasonably and objectively justified.

Example: In *Gouri v. France*,[337] the applicant, an Algerian national living in Algeria, was refused an additional disability benefit in France on the grounds that she did not satisfy the requirement of residence in France. She complained that a refusal of a payment of the benefit to a person living abroad while it is awarded to a person living in France constitutes discriminatory treatment based on the place of residence. The ECtHR found that the applicant received a widow pension from the respondent state and only the additional disability benefit was suspended. Since the allowance pursued the goal of guaranteeing a minimum level of income to individuals residing in France, taking account of the cost of living in the country, she was not in a situation comparable to that of people living in France. Consequently, the applicant did not suffer discriminatory treatment.

335 See for example, ECtHR, *Stummer v. Austria* [GC], No. 37452/02, 7 July 2012, para. 89.

336 ECtHR, *Bah v. the United Kingdom*, 56328/07, 27 September 2011.

337 ECtHR, *Gouri v. France* (dec.), No. 41069/11, 23 March 2017.

Several Articles of the ESC relate to access to social security, welfare and health. These include: Article 11 (the right to protection of health), Article 12 (the right to social security), Article 13 (the right to social and medical assistance) and Article 14 (the right to benefit from social welfare services).

The ECSR has considered, for example, discrimination on grounds of territorial and/or socio-economic status between women who have relatively unimpeded access to lawful abortion facilities and those who do not have such access. In the same case, it also examined discrimination on the grounds of gender and/or health status between women seeking access to lawful termination of pregnancy procedures, and men and women seeking access to other lawful forms of medical procedures which are not provided on a similar restricted basis. The ECSR noted that, as a result of the lack of non-objecting medical practitioners and other health personnel in a number of health facilities in Italy, in some cases women are forced to move from one hospital to another within the country or to travel abroad, which amounted to discrimination.[338]

The ECSR also held that as part of the positive obligations that arise by virtue of the right to the protection of health, States Parties must provide appropriate and timely care on a non-discriminatory basis, including services relating to sexual and reproductive health. As a result, a health care system which does not provide for the specific health needs of women will not be in conformity with Article 11, or with Article E of the Charter taken together with Article 11.[339]

4.3. Education

Under EU law, protection from discrimination in access to education was originally developed in the context of the free movement of persons under Article 12 of Regulation 1612/68, particularly directed at the children of workers. Article 14 of the EU Charter of Fundamental Rights guarantees the right to education and to access continuing and vocational training. The CJEU case law relating to education concerns in particular equal access to educational institutions in another Member State and equal access to education funding.

338 ECSR, *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy*, Complaint No. 87/2012, decision on the merits of 10 September 2013, paras. 189-194.

339 ECSR, *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy*, Complaint No. 87/2012, 10 September 2013, para. 66; ECSR, *Confederazione Generale italiana de Lavoro (CGIL) v. Italy*, Complaint No. 91/2013, Decision on the merits of 12 October 2015, paras. 162 and 190.

Example: In *Commission v. Austria*,[340] students who wanted to pursue their university studies at an Austrian university, and possessed a secondary education diploma from a Member State other than Austria, had to produce that diploma and show that they met the specific entrance requirements for the relevant course of study in the country which had issued the diploma. The CJEU found that the access conditions to a University education for holders of Austrian and holders of non-Austrian diplomas were different, and that this placed holders of non-Austrian diplomas at a disadvantage and constituted indirect discrimination.

Example: In the case of *Casagrande v. Landeshauptstadt München*, the complainant was the daughter of an Italian national who was working in Germany.[341] The German authorities paid a monthly maintenance grant to schoolchildren who were of school age, with the aim to facilitate 'educational attendance'. The CJEU held that any general measures intended to facilitate the educational attendance fell within the scope of education.

Example: In *Laurence Prinz v. Region Hannover* and *Philipp Seeberger v. Studentenwerk Heidelberg*,[342] the CJEU found residency as a sole condition for the award of an education grant for studies in another Member State as disproportionate.

Example: In *Mohamed Ali Ben Alaya v. Bundesrepublik Deutschland*,[343] a Tunisian national applied several times to German universities to study maths (in conjunction with a preparatory language course) and was accepted. However, the German authorities refused to grant him a residence permit, arguing that there were doubts as to his motivation for wishing to study in Germany, that he possessed a weak knowledge of German and that there was in fact no connection between his proposed course of study and his intended career. The CJEU found that if third-country national students satisfy the conditions for admission, in such circumstances, they do have a right of entry.

340 CJEU, C-147/03, *Commission of the European Communities v. Republic of Austria*, 7 July 2005.

341 CJEU, Case -9/74, *Donato Casagrande v. Landeshauptstadt München*, 3 July 1974.

342 CJEU, Joined cases C-523/11 and C-585/11, *Laurence Prinz v. Region Hannover* and *Philipp Seeberger v. Studentenwerk Heidelberg*, 18 July 2013.

343 CJEU, C-491/13, *Mohamed Ali Ben Alaya v. Bundesrepublik Deutschland*, 10 September 2014.

Under the ECHR, Article 2 of Protocol No. 1 to the ECHR contains a freestanding right to education.[344] Accordingly, the ECtHR regards complaints of discrimination in the context of education as falling within the ambit of Article 14.[345]

Example: In *Horváth and Kiss v. Hungary,*[346] Roma children were placed in schools for children with disabilities. The ECtHR found that this was discriminatory treatment of members of a disadvantaged group. The state had failed to establish an adequate arrangement to permit Roma children to follow the programme in ordinary schools.[347]

Example: In *Ponomaryovi v. Bulgaria*,[348] the applicants were two Russian schoolchildren lawfully living with their mother in Bulgaria, but without a permanent residence permit. As such, they had been required to pay fees to pursue their secondary education unlike Bulgarian nationals and aliens with permanent residence permits who were dispensed from paying. The ECtHR found that the applicants' treatment was discriminatory, because they were required to pay school fees exclusively because of their nationality and immigration status. The national authorities had not advanced any reason justifying the difference in treatment and the ECtHR concluded that there had been a violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1.

The ECtHR has examined cases of discrimination in relation to the provision of reasonable accommodation for persons with disabilities.

Example: In *Çam v. Turkey*,[349] the ECtHR found that the refusal of a music academy to enrol a student on the grounds of her visual disability, despite her having passed a competitive entrance examination, was in breach of Article 14 in conjunction with Article 2 of Protocol No. 1. The ECtHR

344 See CoE, ECtHR (2017), *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights – Right to education*.

345 Discrimination on the grounds of education under the ECHR is discussed in the case *of D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007 in Section 2.2.1 and in the case of *Oršuš and Others v. Croatia* [GC], No. 15766/03, 16 March 2010 in Section 6.3.

346 ECtHR, *Horváth and Kiss v. Hungary*, No. 11146/11, 29 January 2013.

347 See also ECtHR, *Lavida and Others v. Greece*, No. 7973/10, 30 May 2013.

348 ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 21 June 2011.

349 ECtHR, *Çam v. Turkey*, No. 51500/08, 23 February 2016.

stressed that Article 14 of the Convention had to be read in the light of the European Social Charter and the UN Convention on the Rights of Persons with Disabilities, as regards the reasonable accommodation which persons with disabilities were entitled to expect. The ECtHR emphasised that the competent national authorities had made no effort to identify the applicant's needs and had failed to explain how or why her blindness could impede her access to musical education. Further, the music academy had not tried to adjust its educational approach in order to make it accessible to blind students.

Under the ESC, Article 15 (1) provides for effective equal access of children and adults with disabilities to education and vocational training. Additionally, Article 17 guarantees the right of all children to education in its both paragraphs.

According to the ECSR, equal access to education must be ensured for all children. In this respect, particular attention should be paid to vulnerable groups such as children from minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant teenagers, teenage mothers, children deprived of their liberty, etc. Children belonging to these groups must be integrated into mainstream educational facilities and ordinary educational schemes. Where necessary, special measures should be taken to ensure equal access to education for these children.[350]

The ECSR stressed, in the context of health education, that the principle of non-discrimination covered not only the way the education was provided but also the content of educational materials. Thus, in that regard, the principle of non-discrimination had two aims: children could not be subject to discrimination in accessing such education and the education could not be used as a tool for reinforcing demeaning stereotypes and perpetuating forms of prejudice against certain groups.[351]

350 ECSR, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Complaint No. 41/2007, decision on the merits of 3 June 2008, para. 34.

351 ECSR, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, Complaint No. 45/2007, 30 March 2009, para. 48.

4.4. Access to supply of goods and services, including housing

Under EU law, Protection from discrimination in the field of access to the supply of goods and services, including housing, applies to the ground of race under the Racial Equality Directive, and to the ground of sex under the Gender Goods and Services Directive. Paragraph 13 of the Preamble to the Gender Goods and Services Directive gives more precision to prohibition of discrimination, stating that it relates to all goods and services "which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context". It expressly excludes application to 'the content of media or advertising' and 'public or private education', though this latter exclusion does not narrow the scope of the Racial Equality Directive, which expressly covers education. The Gender Goods and Services Directive also refers to Article 57 of the Treaty on the Functioning of the European Union:

> "Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration [...]
>
> 'Services' shall in particular include:
>
> (a) activities of an industrial character
>
> (b) activities of a commercial character
>
> (c) activities of craftsmen
>
> (d) activities of the professions."

It would thus seem that this area covers any context where a good or a service is normally provided in return for remuneration, so long as this does not take place in an entirely personal context, and with the exclusion of public or private education. For example, in "*CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia*,[352] the CJEU confirmed that the supply of electricity is covered by Article 3 (1) (h) of the Racial Equality Directive (2000/43).[353]

352 CJEU, C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* [GC], 16 July 2015.

353 *Ibid.*, para. 43.

Case law from national bodies suggest that this will cover scenarios such as gaining access to or the level of service received in bars,[354] restaurants and night clubs,[355] shops,[356] purchasing insurance,[357] as well as the acts of 'private' sellers, such as dog breeders.[358] Although healthcare is covered specifically under the Racial Equality Directive, it may also fall under the scope of services, particularly where this is private healthcare or where individuals are obliged to purchase compulsory sickness insurance to cover health costs. In this sense, the CJEU has interpreted services in the context of free movement of services to cover healthcare that is provided in return for remuneration by a profit-making body.[359]

The Racial Equality Directive does not define housing. It is suggested, however, that this should be interpreted through the lens of international human rights law, in particular the right to respect for one's home under Article 7 of the EU Charter and Article 8 of the ECHR (given that all EU Member States are party) and the right to adequate housing contained in Article 11 of the International Covenant on Economic Social and Cultural Rights (to which all EU Member States are party). According to the UN Committee on Economic Social and Cultural Rights, adequate housing must satisfy a range of requirements. In particular, housing should: be of sufficient quality to ensure protection from the elements; reflect the cultural requirements of inhabitants (and so include vehicles, caravans, encampments and other non-permanent structures); be connected to public utilities and sanitation services; and connected to public services and work opportunities through an

354 Hungary, Equal Treatment Authority, Case No. 72, April 2008. For an English summary, see European Network of Legal Experts on the Non-Discrimination Field (2009), 'Hungary', *European Anti-Discrimination Law Review*, No. 8, July 2009, p. 49.

355 Sweden, Supreme Court, *Escape Bar and Restaurant v. Ombudsman against Ethnic Discrimination* T-2224-07, 1 October 2008. For an English summary, see European Network of Legal Experts on the Non-Discrimination Field (2009), 'Sweden', *European Anti-Discrimination Law Review*, No. 8, July 2009, p. 68.

356 Austria, Bezirksgericht Döbling, GZ 17 C 1597/05f-17, 23 January 2006.

357 France, Nîmes Court of Appeal, *Lenormand v. Balenci*, No. 08/00907, 6 November 2008; France, Court of Cassation, Criminal Chamber, No. M 08-88.017 and No. 2074, 7 April 2009. For an English summary, see European Network of Legal Experts on the Non-Discrimination Field (2009), 'France', *European Anti-Discrimination Law Review*, No. 9, December 2009, p. 59.

358 Sweden, Court of Appeal, *Ombudsman Against Discrimination on Grounds of Sexual Orientation v. A.S.*, T-3562-06, 11 February 2008. For an English summary, see European Network of Legal Experts on the Non-Discrimination Field (2009), 'Sweden', *European Anti-Discrimination Law Review*, No. 8, July 2009, p. 69.

359 CJEU, C-158/96, *Raymond Kohll v. Union des caisses de maladie*, 28 April 1998; CJEU, C-157/99, *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ* and *H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen*, 12 July 2001; and CJEU, C-385/99, *V.G. Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA* and *E.E.M. van Riet v. Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*, 13 May 2003.

adequate infrastructure. It should also include adequate protection against forced or summary eviction, and be affordable.[360] This understanding of housing also appears in FRA's approach in its report *The state of Roma and Traveller housing in the European Union – Steps towards equality*.[361]

Adopting this approach, access to housing would not only include ensuring that there is equality of treatment on the part of public or private landlords and estate agents in deciding whether to let or sell properties to particular individuals. It would also include the right to equal treatment in the way that housing is allocated (such as allocation of low quality or remote housing to particular ethnic groups), maintained (such as failing to upkeep properties inhabited by particular groups) and rented (such as a lack of security of tenure, or higher rental prices or deposits for those belonging to particular groups). In addition, Article 34 (3) of the EU Charter provides: "In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices."

Example: In *Servet Kamberaj v. IPES and Others*,[362] an Albanian national with a residence permit for an indefinite period in Italy, was denied certain housing benefits because the budget for the grant of that benefit to third-country nationals was already exhausted. With regard to housing benefit, the CJEU stated that the treatment of third-country nationals who are long-term residents cannot be less favourable than that granted to citizens of the Union. However, if the benefit does not fall under the concept of social security and social protection under Article 11 (1) (d) of Council Directive 2003/109/EC, Article 11 (4) of that directive does not apply (the possibility to limit equal treatment to core benefits).

Under the ECHR, the ECtHR has interpreted Article 8 to include cases relating to activities capable of having consequences for private life, including relations of an economic and social character. The ECtHR has also taken a broad approach

360 UN, Committee on Economic Social and Cultural Rights (1991), *General comment No. 4: The right to adequate housing (Art. 11 (1))*, UN Doc. E/1992/23, 13 December 1991.

361 FRA (2010), *The state of Roma and Traveller housing in the European Union – Steps towards equality*, Summary report, Vienna, FRA.

362 CJEU, C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [GC], 24 April 2012.

to the interpretation of the right to respect for home under Article 8. The ECtHR has construed the right to respect for home widely to include mobile homes such as caravans or trailers, even in situations where they are located illegally.[363] Where state-provided housing is in particularly bad condition, causing hardship to the residents over a sustained period, the ECtHR has also held that this may constitute inhuman treatment.

Example: In *Moldovan and Others v. Romania (No. 2)*,[364] the applicants had been chased from their homes, which were then demolished under particularly traumatic circumstances. The process of rebuilding their houses was slow, and the accommodation that was granted in the interim was of low quality. The ECtHR stated:

"the applicants' living conditions in the last ten years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement".[365]

This finding, among other factors, led the ECtHR to conclude that there had been degrading treatment contrary to Article 3 of the ECHR.[366]

Example: In *Vrountou v. Cyprus*,[367] the applicant had been refused a refugee card that would have made her eligible for a range of benefits – including housing assistance – from the authorities. The decision had been based on the fact that she was a child of a displaced woman and not a displaced man. The ECtHR found that this difference of treatment had no objective and reasonable justification and that this unequal treatment had resulted in a breach of Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1.

363 ECtHR, *Buckley v. the United Kingdom*, No. 20348/92, 25 September 1996.

364 ECtHR, *Moldovan and Others v. Romania (No. 2)*, Nos. 41138/98 and 64320/01, 12 July 2005.

365 *Ibid*., para. 110.

366 Case law of the ECtHR indicates that, in certain circumstances, discriminatory treatment can amount to degrading treatment. For example, see ECtHR, *Smith and Grady v. the United Kingdom*, Nos. 33985/96 and 33986/96, 27 September 1999, para. 121.

367 ECtHR, *Vrountou v. Cyprus*, No. 33631/06, 13 October 2015.

Example: In *Hunde v. the Netherlands,*[368] the applicant, a failed asylum seeker, complained that the denial of shelter and social assistance diminished his human dignity in a manner incompatible with Article 3 of the Convention. The ECtHR noted that, after his asylum proceedings had come to an end, the applicant had been afforded a four-week grace period during which he retained his entitlement to state-sponsored care and accommodation. Following this, he had the possibility to apply for a "no-fault residence permit" and/or to seek admission to a centre where his liberty would have been restricted. Consequently, the ECtHR concluded that the authorities had not failed in their obligation under Article 3 by having remained inactive or indifferent to the applicant's situation, and rejected the case as manifestly ill-founded.

Under the ESC, the right to adequate housing is guaranteed in Article 31 (1), and the right of adequate housing in respect of families in Article 16. The ECSR clarified this provision as meaning a dwelling which possess all basic amenities such as water, heating, waste disposal, sanitation facilities and electricity. It must not be overcrowded and must be secured. The relevant rights thus provided must be guaranteed without discrimination, particularly in respect of Roma or travellers.[369]

Example: In the complaint against France, *FEANTSA*[370] alleged that the manner in which legislation related to housing was implemented resulted in a situation of non-conformity with the right to housing under Article 31 and prohibition of non-discrimination under Article E of the ESC. It argued specifically that despite having improved the quality of housing for the majority of the population in France during the last 30 years, the country had effectively failed to implement the right to housing for all, and in particular in meeting the housing needs of the most vulnerable. ECSR found six violations of Article 31 by France, which concerned:

- insufficient progress as regards the eradication of substandard housing and lack of proper amenities of a large number of households;

368 ECtHR, *Hunde v. the Netherlands* (dec.), No. 17931/16, 5 July 2016.

369 ECSR, *International Movement ATD Fourth World v. France*, complaint No. 33/2006, 5 December 2007, paras. 149-155. See also, ECSR, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece*, Complaint No. 49/2008, 11 December 2009; ECSR, *European Roma Rights Centre (ERRC) v. France*, Complaint No. 51/2008, 10 October 2010.

370 ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. France*, Complaint No. 39/2006, 5 December 2007.

- unsatisfactory implementation of the legislation on the prevention of evictions and the lack of measures to provide rehousing solutions for evicted families;
- measures in place to reduce the number of homeless being insufficient, both in quantitative and qualitative terms;
- insufficient supply of social housing accessible to low-income groups;
- malfunctioning of the social housing allocation system, and the related remedies;
- deficient implementation of legislation on stopping places for Travellers (in conjunction with Article E).

Example: In *FEANTSA v. the Netherlands*,[371] the ECSR found that the Netherlands had not complied with the ESC by failing to provide adequate access to emergency assistance (food, clothing and shelter) to adult migrants in an irregular situation.

Under International Law, Article 9 of the CRPD provides for an obligation to take appropriate measures to ensure that persons with disabilities have access, on an equal basis with others to information, communications and other services, including electronic services. This obligation can be fulfilled by identifying and eliminating obstacles and barriers to accessibility.[372]

Example: This case[373] from Romania concerns the criteria for access to social housing. An assessment as to whether or not an applicant has the right to access social housing was based on a points system. A certain number of points were awarded for different categories, including four points for persons with disabilities, compared to 10 points for persons with a higher

371 ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, 2 July 2014. See also ECSR, *Conference of European Churches (CEC) v. the Netherlands*, No. 90/2013, 1 July 2014.

372 See UN, Committee on the Rights of Persons with Disabilities (2010), *Communication No. 1/2010*, CRPD/C/9/D/1/2010, 16 April 2013 concerning accessibility of the banking card services provided by private financial institution for persons with visual impairments on an equal basis with others.

373 Romania, National Council for Combating Discrimination, Decision 349, 4 May 2016; European network of legal experts in gender equality and non-discrimination (2016), National equality body decision on social housing criteria in Bucharest, News report, Romania, 20 September 2016.

education and 15 points for veterans and war widows, revolutionaries and former political detainees. The National Council for Combating Discrimination found that these rules limited access to public housing by persons with disabilities, and therefore constituted direct discrimination on the ground of disability.

4.5. Access to justice

Under EU law and the ECHR,[374] the relation of the right to access to justice to the prohibition of discrimination can be seen from two perspectives:

(i) Access to justice in cases of discrimination: this relates to the possibility of obtaining redress in situations where individuals have been discriminated against. This situation is discussed in Section 6.4 (Enforcement of non-discrimination law).[375]

(ii) Non-discriminatory access to justice: this relates to barriers to justice faced by certain persons irrespective of whether they were victims of discrimination. It means that ensuring effective access to justice for all requires that the justice system be organised in such a way that nobody is prevented from accessing justice for physical, linguistic, financial or other reasons. For example, financial barriers for persons who do not have sufficient means to initiate court proceedings can be addressed through a system of legal aid.[376]

Under EU law, access to justice is set out in Article 47 of the EU Charter of Fundamental Rights. Moreover, Article 20 confirms that everybody is equal before the law and Article 21 prohibits discrimination.

In relation to access to justice **under EU law**, the Committee on the Rights of Persons with Disabilities stressed that the EU should take appropriate action to combat discrimination faced by persons with disabilities in accessing justice,

374 For detailed information see FRA and CoE (2016), *Handbook on European law relating to access to justice*, Luxembourg, Publications Office.

375 See also FRA (2012), *Access to justice in cases of discrimination in the EU – Steps to further equality,* Luxembourg, Publications Office.

376 Council of Europe, Parliamentary Assembly (2015), Equality and non-discrimination in the access to justice, Resolution 2054, 24 April 2015. See also: UN, CEDAW (2015), *General Recommendation No. 33 "On women's access to justice"*, CEDAW/C/GC/33, 23 July 2015.

by ensuring that full procedural accommodation and funding for training justice personnel on the Convention are provided in its Member States.[377]

Under the ECHR, the right of access to justice is guaranteed by Article 13 and in the context of the right to a fair trial under Article 6. The ECtHR has dealt with several cases relating to discrimination in access to justice.

Example: In *Paraskeva Todorova v. Bulgaria*,[378] the national courts, when sentencing an individual of Roma origin, expressly refused the prosecution's recommendation for a suspended sentence, stating that a culture of impunity existed among the Roma minority and implying that an example should be made of the particular individual. The ECtHR found that this violated the applicant's right to a fair trial in conjunction with the right to be free from discrimination.

Example: In *Moldovan and Others v. Romania (No. 2)*,[379] it was found that excessive delays in resolving criminal and civil proceedings (taking seven years to deliver a first judgment) amounted to a violation of Article 6. The delays were found to be due to a high number of procedural errors and taken in conjunction with the pervading discriminatory attitude of the authorities towards the Roma applicants, it was found to amount to a violation of Article 14 in conjunction with Article 6 (and 8).

Example: In *Anakomba Yula v. Belgium*,[380] national law, which made it impossible for the applicant to obtain public assistance with funding a paternity claim on the basis that she was not a Belgian national, was found to amount to a violation of Article 6 in conjunction with Article 14. This is not to suggest that non-nationals have an absolute right to public funding. In the circumstances, the ECtHR was influenced by several factors, including that the applicant was barred because she did not have a current valid residence permit, even though at the time she was in the process of having her permit renewed. Furthermore, the ECtHR further observed that a one-year time bar existed in relation to paternity cases, which meant that it was not reasonable to expect the applicant to wait until she had renewed her permit to apply for assistance.

377 UN, Committee on the Rights of Persons with Disabilities (2015), *Concluding observations on the initial report of the European Union*, CRPD/C/EU/CO/1, 2 October 2015, para. 39.

378 ECtHR, *Paraskeva Todorova v. Bulgaria*, No. 37193/07, 25 March 2010.

379 ECtHR, *Moldovan and Others v. Romania (No. 2)*, Nos. 41138/98 and 64320/01, 12 July 2005.

380 ECtHR, *Anakomba Yula v. Belgium*, No. 45413/07, 10 March 2009, discussed in sections 4.5 and 5.7.

4.6. The 'personal' sphere: private and family life, adoption, home and marriage

Under both EU law and the ECHR, the right for respect for private and family life is guaranteed (Article 8 of the ECHR[381] and Article 7 of the EU Charter of Fundamental Rights).

Under the ECHR, over the years the ECtHR developed its case law under Article 8 covering a variety of issues related to private and family life. The ECtHR set out the general reach of Article 8:

> "the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to establish and develop relationships with other human beings [...] the right to "personal development" [...] or the right to self-determination as such. It encompasses elements such as names [...] gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 [...] and the right to respect for both the decisions to have and not to have a child".[382]

Example: In *Cusan and Fazzo v. Italy*,[383] a married couple was unable to give their child the mother's surname because, under domestic legislation, legitimate children were automatically given the father's surname at birth. The ECtHR found that the choice of surname of legitimate children was determined solely on the basis of discrimination arising from the parents' sex. While the rule that the husband's surname was to be handed down to legitimate children could be necessary to respect the tradition of family unity by giving to all its members the father's surname, the fact that it was impossible to derogate from this rule when registering a new child's birth was excessively rigid and discriminatory towards women.

381 An explanation as to the scope of Article 8 ECHR can be found on the ECHR website: Roagna, I. (2012), *Protecting the right to respect for private and family life under the European Convention on Human Rights*.

382 ECtHR, *E.B. v. France* [GC], No. 43546/02, 22 January 2008, para. 43.

383 ECHR, *Cusan and Fazzo v. Italy*, No. 77/07, 7 January 2014.

The ECtHR has examined a number of cases involving differential treatment regarding rules on inheritance, access of divorced parents to children, adoption and issues of paternity.[384]

The cases of *Mazurek v. France*,[385] *Sommerfeld v. Germany*[386] and *Rasmussen v. Denmark*[387] involved consideration of differential treatment in relation to rules on inheritance, access of fathers to children born out of wedlock, and paternity issues. Article 8 will also extend to matters of adoption. Many cases, such as *E.B. v. France* (discussed in Section 5.3), illustrate that adoption may fall within the scope of the ECHR, even though there is no actual right to adopt in the ECHR.

Example: In *Gas and Dubois v. France*,[388] a biological mother's homosexual civil partner was refused simple adoption of her partner's child. Under French law, a simple adoption resulted in all the rights associated with parental responsibility being removed from the child's father or mother in favour of the adoptive parent, except where an individual adopted the child of his or her spouse. The ECtHR held that the situation of the applicants was not comparable to that of married couples because under French law, marriage conferred a special status on those who entered into it and the ECHR did not go so far as to compel states to provide for same-sex marriage. The ECtHR noted that a heterosexual couple in a civil partnership would also have had their application refused under the relevant provisions and as such, while the applicants were in a comparable legal situation, there was no difference in treatment based on their sexual orientation and consequently, no violation of Article 14 in conjunction with Article 8 of the ECHR.

Example: In *X and Others v. Austria*,[389] the applicants were also an unmarried same-sex couple in which one partner wished to adopt the other partner's child. Unlike in *Gas and Dubois v. France*, the relevant provisions of Austrian law allowed for second-parent adoption for unmarried heterosexual couples. Given that the law contained an absolute prohibition on second-parent adoption by a same-sex couple, the national courts did not examine the

384 See also FRA and CoE (2015), *Handbook on European law relating to the rights of the child*, Luxembourg, Publications Office.

385 ECtHR, *Mazurek v. France*, No. 34406/97, 1 February 2000.

386 ECtHR, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003.

387 ECtHR, *Rasmussen v. Denmark*, No. 8777/79, 28 November 1984.

388 ECtHR, *Gas and Dubois v. France*, No. 25951/07, 15 March 2012.

389 ECtHR, *X and Others v. Austria* [GC], No. 19010/07, 19 February 2013.

merits of the adoption request, nor did the father's refusal to consent to the adoption play any role in the national courts' considerations of the applicants' case. The ECtHR found that this fact constituted a difference in treatment of the applicants in comparison to heterosexual unmarried couples, which had not been reasonably and objectively justified.

Example: In *A.H. and Others v. Russia*,[390] the applicants, US nationals, were couples in the final stage of adopting Russian children when a new law was adopted by the Russian Duma, banning the adoption of Russian children by US nationals. The ongoing procedures were stopped. The applicants complained that this ban violated their right to respect for family life and was discriminatory on the grounds of their nationality. The ECtHR found that the legislative ban on the adoption of Russian children was imposed only to US prospective parents. The government had failed to show that there were compelling reasons to justify the blanket ban being applied retroactively and indiscriminately to all prospective adoptive parents from the US, irrespective of the stage of the adoption proceedings and their individual circumstances. The ECtHR therefore concluded that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

States have a relatively broad margin of appreciation in organising their immigration policy. Although the ECHR does not guarantee the right of an 'alien' to enter or to reside in a particular country, in some cases a refusal to allow family reunification might breach the rights guaranteed by Article 8.

Example: In *Pajić v. Croatia*,[391] the applicant had applied for a residence permit on the grounds of family reunification with her partner. The national authorities had refused the request because the relevant domestic law excluded such a possibility for same-sex couples. By contrast, a residence permit would have been allowed for an unmarried different-sex couple in a similar situation. The ECtHR found that the domestic authorities had not advanced any justification or convincing and weighty reasons to justify the difference in treatment between same-sex and different-sex couples in obtaining family reunification. Indeed, a difference in treatment based solely

390 ECtHR, *A.H. and Others v. Russia*, Nos. 6033/13 and 15 other applications, 17 January 2017.

391 ECtHR, *Pajić v. Croatia*, No. 68453/13, 23 February 2016.

or decisively on the applicant's sexual orientation amounted to a distinction, which was not acceptable under the Convention.[392]

The ambit of Article 8 is extremely wide. The ECHR also has implications for other areas, such as entering into a civil union or marriage, which is specifically protected under Article 12.

Example: In *Muñoz Díaz v. Spain*,[393] the authorities had refused to recognise the validity of the applicant's Roma marriage when establishing her entitlement to a survivor's pension, despite having previously treated her as if she were married. The ECtHR found that because the state had treated the applicant as if her marriage was valid, she was in a comparable situation to other 'good faith' spouses (those who were not validly married for technical reasons, but believed themselves to be so), who would have been entitled to a survivor's pension. Although the ECtHR found that there was no discrimination in the refusal to recognise the marriage as valid (within the meaning of Article 14 taken in conjunction with Article 12), there was discrimination in refusing to treat the applicant similarly to other good faith spouses and accord the pension, in breach of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

Example: The case of *Vallianatos and Others v. Greece*[394] was lodged to challenge Greek law, which in 2008 introduced a possibility for different-sex couples to enter into a civil union, which was less formal and more flexible than marriage, but which excluded same-sex couples from its scope. The ECtHR noted that 19 out of 47 Council of Europe member states had authorised registered partnerships and that 17 of those 19 states had recognised both heterosexual and homosexual couples. It further concluded that there were no convincing and weighty reasons to prohibit same-sex couples from entering into a civil union. In other words, when a state introduces a form of registered partnership it must be accessible to all couples regardless of their sexual orientation. A violation of Article 14 taken in conjunction with Article 8 was found.

392 See also ECtHR, *Taddeucci and McCall v. Italy*, No. 51362/09, 30 June 2016.

393 ECtHR, *Muñoz Díaz v. Spain*, No. 49151/07, 8 December 2009.

394 ECtHR, *Vallianatos and Others v. Greece* [GC], Nos. 29381/09 and 32684/09, 7 November 2013.

Subsequently, the ECtHR had to determine whether Article 8 encompassed a positive obligation on a state to introduce a legal framework providing for the recognition and protection of same-sex couples.

Example: In *Oliari and Others v. Italy*,[395] three homosexual couples complained that under Italian law they had no possibility to get married or enter into any other type of civil union. The ECtHR noted European and international trends towards legal recognition of same-sex couples. It also observed that the Italian Constitutional Court had repeatedly called for a legal recognition of the relevant rights and duties of homosexual unions. Therefore, the ECtHR held that in those circumstances, Italy was under a positive obligation to ensure effective respect for the applicants' private and family lives by official recognition of same-sex couples. The legal framework for recognition of same-sex couples must at least provide for the "core rights relevant to a couple in a stable and committed relationship".[396] In conclusion, the ECtHR held that, by failing to enact such legislation, Italy had overstepped its margin of appreciation and failed to fulfil their positive obligation in breach of Article 14 read in conjunction with Article 8 of the ECHR.

While protection of the core of human dignity customarily calls for a narrower margin of appreciation by the ECtHR, this had to be balanced against the concerns of protecting others in a position of vulnerability whose rights might be abused.

Example: In *Kacper Nowakowski v. Poland*,[397] the applicant was a deaf and mute father whose contact with his son, who also had a hearing impairment, was restricted. The applicant complained in particular about the domestic courts' refusal to extend this contact. The ECtHR found that the domestic courts had failed to consider any means that would have assisted the applicant in overcoming the barriers arising from his disability, and had thus not taken all appropriate steps that could have been reasonably demanded with a view to facilitating contact. Therefore, the ECtHR concluded a violation of Article 8 of the Convention, considering it unnecessary to separately examine the complaint under Article 14, taken together with Article 8 of the Convention.

395 ECtHR, *Oliari and Others v. Italy*, Nos. 18766/11 and 36030/11, 21 July 2015.

396 *Ibid*., para. 174.

397 ECtHR, *Kacper Nowakowski v. Poland*, No. 32407/13, 10 January 2017.

In the above case, the ECtHR considered that the interests of the father went hand in hand with those of the child – that is, it was in the child's interests to have contact with the father. However, where the child's interests potentially conflict with those of the parent, the state enjoys a wider margin of appreciation in determining how best to protect the child.

> Example: In *Rasmussen v. Denmark*,[398] a father complained of a statute of limitations barring him from contesting paternity. The ECtHR found that this did amount to differential treatment on the basis of sex, but was justified. This pursued the legitimate aim of providing the child with security and certainty over their status, by preventing fathers from abusing the possibility of contesting paternity later in life. Since there was little uniformity of approach to this issue among the member states of the ECHR, the ECtHR accorded the state a wide margin of appreciation, finding the differential treatment was justified.[399]

Under EU law, the substantive family law remains under the sole competence of EU Member States. However, some issues with cross border implications are covered by the EU law. The case law of the CJEU regarding the right to family life developed mainly in the field of free movement of persons with regard to family members of EU citizens.[400] The CJEU held that "if Union citizens were not allowed to lead a normal family life in the host member state, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed".[401] Another area where family considerations and principle of non-discrimination can play a role is in the field of asylum and immigration law. For example, in determining who qualifies as beneficiaries of international protection, states must ensure protection for family life.[402] Furthermore, relevant case law of the CJEU for family rights concerns discrimination between men and woman as

398 ECtHR, *Rasmussen v. Denmark*, No. 8777/79, 28 November 1984.

399 *Ibid*.

400 See for example, CJEU, C-165/14, *Alfredo Rendón Marín v. Administración del Estado* [GC], 13 September 2016, discussed in Section 5.7.

401 CJEU, C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* [GC], 25 July 2008, para. 62.

402 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, pp. 9–26.

regards parental rights. In a case concerning the right of a father to parental leave, the CJEU held that the different condition attached to the entitlement to parental leave "is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties" and found that it constituted direct discrimination on grounds of sex.[403]

Example: In *Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA*,[404] the claimant was refused so-called 'breastfeeding' leave, because his child's mother was self-employed. The CJEU held that this constituted discrimination against men.

Example: In *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miestosavivaldybės administracija and Others*,[405] the applicants were a Lithuanian national belonging to the Polish minority and a Polish national. They complained that the spelling of their names on the marriage certificate issued by the Vilnius Civil Registry Division was incorrect. According to the applicants, this spelling was not in accordance with the applicant's official national language. The CJEU held that Article 21 of the TFEU does not preclude a refusal to amend surnames and forenames appearing on certificates of civil status, on condition that such a refusal is not liable to cause serious inconvenience to those concerned.[406]

Example: In *Mircea Florian Freitag*,[407] Mr Mircea Florian, a man with Romanian nationality, was born in Romania under the surname 'Pavel'. His mother divorced his father and married a German national, Mr Freitag. Mircea Florian thus obtained dual nationality, and his surname was changed to 'Freitag'. Years after, Mircea Florian, still habitually residing in Germany, went to Romania to change his surname back to the original 'Pavel'. He then requested that the German Registry Office change his name and update

403 CJEU, C-222/14, *Konstantinos Maïstrellis v. Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, 16 July 2015, discussed in Section 5.1.

404 CJEU, C-104/09, *Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA*, 30 September 2010.

405 CJEU, C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, 12 May 2011.

406 Compare with CJEU, C-438/14, *Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe*, 2 June 2016, where the CJEU held that a name containing several tokens of nobility and freely chosen by a German in another Member State of which he also holds the nationality does not necessarily have to be recognised in Germany, if it is justified on public policy grounds, in that it is appropriate and necessary to ensure compliance with the principle that all citizens of that Member State are equal before the law.

407 CJEU, C-541/15, *Proceedings brought by Mircea Florian Freitag*, 8 June 2017.

the civil register accordingly so that his name change was recognised under German law. However, under German law, this was only possible if the name in question had been acquired during a period of habitual residence in another EU Member State. The CJEU stressed that:

i. the rules governing the way in which a person's surname is entered on certificates of civil status are matters coming within the competence of the Member States;

ii. national legislation which places certain nationals of the Member State concerned at a disadvantage, simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 21 (1) of the TFEU;

iii. the discretion enjoyed by the competent authorities must be exercised by in such a way as to give full effect to Article 21 of the TFEU.

Consequently, the CJEU held that refusing to recognise a legally acquired surname, and the same as birth name, in a specific Member State, on the basis that the name was not acquired during a period habitual residence in that other Member State, hinders the exercise of the right, enshrined in Article 21 of the TFEU, to move and reside freely in the territories of the Member States.

4.7. Political participation: freedom of expression, assembly and association, and free elections

EU law confers a limited range of rights in this respect. Article 10 (3) of the TEU provides that every citizen shall have the right to participate in the democratic life of the Union and decisions shall be taken as openly and as closely as possible to the citizen. Article 11 of the TEU[408] obliges the institutions to give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. Article 20 of the TFEU provides, in particular, the right for EU nationals to vote and stand as a candidate in municipal elections and European Parliament elections. The EU Charter guarantees

408 See, for example, CJEU, T-754/14, *Michael Efler and Others v. European Commission*, 10 May 2017, where the CJEU concluded that the Commission infringed, inter alia, Art. 11 (4) of the TEU by refusing to register the proposed European citizens' initiative entitled 'Stop TTIP'.

freedom of expression and information (Article 11),[409] freedom of assembly and of association (Article 12), and political rights regarding the European Parliament and municipal elections (Articles 39 and 40).

Example: In *Spain v. United Kingdom*,[410] the CJEU held, as regards Article 20 (2) (b) of the TFEU, that that provision is confined to applying the principle of non-discrimination on grounds of nationality in exercising the right to vote in elections to the European Parliament, by providing that every citizen of the Union residing in a Member State of which he or she is not a national is to have the right to vote in those elections in the Member State in which he or she resides, under the same conditions as nationals of that state.

Example: In *Delvigne*,[411] a French national contested domestic provisions automatically and permanently stripping him of electoral rights, including the right to vote and stand for elections to the European Parliament, following his conviction for murder and the imposition of a custodial sentence of 12 years. Unable to benefit from subsequent changes to the law, Mr Delvigne continued to be deprived of his civic rights, as that deprivation resulted from a conviction that had become final before the new Criminal Code entered into force. He therefore alleged unequal treatment. The CJEU found that the French law was a permissible limitation on the rights contained in the Charter: a limitation such as that at issue is proportionate, in so far as it takes into account the nature and gravity of the criminal offence committed and the duration of the penalty. Furthermore, the new Code provided for the possibility of a person in Mr Delvigne's situation to apply for, and obtain, the lifting of the ban.

One of the main goals of the **CoE** is the promotion of democracy. This is reflected in many of the rights in the **ECHR**, which facilitate the promotion of political participation. The ECHR contains broad guarantees creating not only a right to vote and stand in elections (Article 3 of Protocol No. 1),[412] but also flanking rights

409 See, for example, CJEU, C-547/14, *Philip Morris Brands SARL and Others v. Secretary of State for Health*, 4 May 2016.

410 CJEU, C-145/04, *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland* [GC], 12 September 2006.

411 CJEU, C-650/13, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* [GC], 6 October 2015.

412 CoE, ECtHR (2016), *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights – Right to free elections*.

of freedom of expression (Article 10) and the right to freedom of assembly and association (Article 11).

Example: In *Pilav v. Bosnia and Herzegovina*,[413] a Bosnian politician was deprived of the right to stand for election for the national presidency because of his place of residence. The state Bosnia and Herzegovina is composed of two political entities: the Federation of Bosnia and Herzegovina and Republika Srpska. To effectively exercise the right to participate in elections to the Presidency, the applicant was required to move from Republika Srpska to the Federation of Bosnia and Herzegovina. Therefore, while theoretically eligible to stand for election to the Presidency, in practice, he could not use this right as long as he lived in Republika Srpska. The ECtHR found that the applicant was subjected to discriminatory treatment by the national authorities because of his place of residence and his ethnic origin. Consequently, it concluded that there had been a violation of Article 1 of Protocol No. 12 to the Convention.

Example: In *Identoba and Others v. Georgia*,[414] the applicants had organised a peaceful demonstration in Tbilisi to mark the International Day against Homophobia. The demonstration had been interrupted by a violent counter-demonstration and the applicants had suffered verbal and physical assaults. In light of the fact that the national authorities had failed to ensure that the march took place peacefully, the ECtHR found a violation of Article 14 in conjunction with Article 11.[415]

Example: In *Partei Die Friesen v. Germany*,[416] the applicant party had failed to obtain a minimum of 5 % of votes required to obtain a parliamentary mandate. The ECtHR had to decide whether a 5 % threshold violated the right of minority parties to participate in elections. It noted that the applicant's disadvantage in the electoral process resulted from only representing the interests of a small part of the population. Examining whether, as a national minority party, the applicant party should have enjoyed special treatment, the ECtHR concluded that, even interpreted in the light of the Framework Convention for the Protection of National Minorities, the ECHR did not require the state to exempt national minority parties from electoral thresholds.

413 ECtHR, *Pilav v. Bosnia and Herzegovina*, No. 41939/07, 9 June 2016.

414 ECtHR, *Identoba and Others v. Georgia*, No. 73235/12, 12 May 2015.

415 See also ECtHR, *Bączkowski and Others v. Poland*, No. 1543/06, 3 May 2007.

416 ECtHR, *Partei Die Friesen v. Germany*, No. 65480/10, 28 January 2016.

The aim of the said Framework Convention was to promote the effective participation of persons belonging to national minorities in public affairs. It provided for the exemption from the minimum threshold as an instrument for enhancing national minority participation in elected bodies, but did not establish an obligation to exempt national minority parties from electoral thresholds. Therefore there had been no violation of Article 14 in conjunction with Article 3 of Protocol No. 1.

The right to freedom of association has also been taken to include protection for the formation of political parties, for which the ECtHR has accorded a high level of protection against interference.[417] Similarly, as noted in Section 5.11, any interference with the right to free speech in the context of political debate is scrutinised very closely.[418]

Under international law, pursuant to Article 29 of the CRPD, states are required to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including by guaranteeing their right to vote. According to Article 12 (2) of the CRPD, states should recognise and uphold the legal capacity of persons with disabilities "on an equal basis with others in all aspects of life", including political life. The Committee recognised that an exclusion of the right to vote on the basis of a psychosocial or intellectual disability constitutes discrimination on the basis of disability.[419]

4.8. Criminal law matters

Under the ECHR, the prohibition of discrimination can relate to criminal law matters across a variety of rights, including the right to a fair trial (Article 6), the right to liberty (Article 5), the prohibition on retroactive punishment (Article 7) and double jeopardy (Article 4 of Protocol No. 7), the right to life (Article 2) and the right to be free from inhuman or degrading treatment or punishment (Article 3). There is also important case law concerning violence against women and other vulnerable groups, such as Roma or LGBT people, where the ECtHR has emphasised the states' obligation to investigate the discriminatory motives of

417 See for example ECtHR, *Party for a Democratic Society (DTP) and Others v. Turkey*, Nos. 3840/10, 3870/10, 3878/10, 15616/10, 21919/10, 39118/10 and 37272/10, 12 January 2016.

418 ECtHR, *Karácsony and Others v. Hungary* [GC], Nos. 42461/13 and 44357/13, 17 May 2016.

419 See for example, UN, Committee on the Rights of Persons with Disabilities (2013), *Communication No. 4/2011*, CRPD/C/10/D/4/2011, 9 September 2013, para. 9.2 ff.

violence. In a number of rulings, the ECtHR acknowledged that a lack of response to violence constituted a violation of Article 14.[420]

In addition to the previous topics already discussed elsewhere, the ECHR also protects the right to be free from arbitrary detention based on discriminatory grounds, and the right to be free from inhuman or degrading treatment or punishment based on discriminatory grounds during detention.[421]

Example: In *Martzaklis and Others v. Greece*,[422] HIV-positive prisoners detained in a prison hospital complained in particular about poor sanitary conditions and lack of appropriate medical treatment, detention in overcrowded and insufficiently heated rooms, food of poor nutritional value, and irregular and not individually prescribed medical treatment. The prison authorities justified their isolation as necessary for better monitoring and treatment of their conditions. The ECtHR held that the placement in isolation to prevent the spread of disease was not necessary, because the prisoners were HIV-positive and had not developed AIDS. They were exposed to physical and mental suffering going beyond the suffering inherent in detention. In conclusion, the ECtHR found that inadequate physical and sanitary conditions, irregularities in administration of appropriate treatment and lack of objective and reasonable justification for isolation of HIV-positive prisoners amounted to a violation of Article 3 in conjunction with Article 14 of the ECHR.

Example: In *D.G. v. Ireland* and *Bouamar v. Belgium*,[423] (discussed in Section 5.5), the applicants, who were minors, had been placed in detention by the national authorities. Here, the ECtHR considered that, although there had been violations of their right to liberty, there had been no discrimination because the differential treatment had been justified in the interests of protecting minors.

420 See among others ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009 relating to violence against women; ECtHR, *Boacă and Others v. Romania*, No. 40355/11, 12 January 2016 relating to violence against Roma and ECtHR, *M.C. and A.C. v. Romania*, No. 12060/12, 12 April 2016 relating to violence against LGBT persons. For further discussion and examples, see Section 2.6 concerning hate crime.

421 See, *Khamtokhu and Aksenchik v. Russia* [GC], Nos. 60367/08 and 961/11, 24 January 2017.

422 ECtHR, *Martzaklis and Others v. Greece*, No. 20378/13, 9 July 2015.

423 ECtHR, *D.G. v. Ireland*, No. 39474/98, 16 May 2002; ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.

Example: In *Stasi v. France*,[424] the applicant complained that he had been ill treated in prison because of his homosexuality and that the authorities had not taken the necessary measures to protect him. For example, the applicant claimed that he was forced to wear a pink star and that he was beaten and burned with cigarettes by other inmates. The ECtHR, noted that in response to each allegation the authorities took measures to protect him: the applicant had been segregated from the other inmates and had been seen by the building supervisor, a doctor and a psychiatrist. The ECtHR found that the authorities had taken all effective measures to protect him from physical harm during detention and that there had not been a breach of Article 3 without separately examining his complaint under Article 14.

Article 14 of the ECHR may also be applicable where provisions of criminal law are found to be discriminatory[425] or where convictions based on those discriminatory provisions remain on a person's criminal record.[426]

Under EU law, according to well-established case law of the CJEU,[427] even if the areas where criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, the national legislative provisions may not discriminate against persons to whom EU law gives the right to equal treatment. In the following case, the principle of non-discrimination was raised in proceedings relating to the execution of a European arrest warrant.[428]

Example: In *João Pedro Lopes Da Silva Jorge*,[429] a Portuguese national was sentenced in Portugal to five years' imprisonment for drug trafficking. Subsequently, he married a French national with whom he was resident in France. He was also employed by a French company under an indefinite duration contract. Not wishing to be surrendered to the Portuguese authorities, he requested to be imprisoned in France. However, the French

424 ECtHR, *Stasi v. France*, No. 25001/07, 20 October 2011.

425 ECtHR, *S.L. v. Austria*, No. 45330/99, 9 January 2003.

426 ECtHR, *E.B. and Others v. Austria*, Nos. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07, 7 November 2013.

427 CJEU, Case 186/87, *Ian William Cowan v. Trésor public*, 2 February 1989.

428 Compare CJEU, C-182/15, *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra* [GC], 6 September 2016, concerning an extradition to a third state of an EU citizen exercising freedom of movement.

429 CJEU, C-42/11, *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge* [GC], 5 September 2012.

provision allowing non-execution of the European arrest warrant was restricted solely to French nationals. The CJEU stated that Member States cannot limit the non-execution of arrest warrants solely to their own nationals, by automatically and absolutely excluding nationals of other Member States who are staying or resident in the territory of the Member State of execution, irrespective of their connections with that Member State. This would constituted discrimination on the grounds of nationality within the meaning of Article 18 of the TFEU.

5 Protected grounds

EU	Issues covered	CoE
TFEU, Art. 8 and Art. 157 Charter of Fundamental Rights, Art. 21 and 23 Gender Equality Directive (recast) (2006/54/EC) Gender Goods and Services Directive (2004/113/EC) CJEU, C-222/14, *Maïstrellis v. Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, 2015 CJEU, C-363/12, *Z. v. A Government department and The Board of Management of a Community School* [GC], 2014 CJEU, C-167/12, *C. D. v. S. T.* [GC], 2014 CJEU, C-427/11, *Kenny v. Minister for Justice, Equality and Law Reform, Minister for Finance and Commissioner of An Garda Síochána*, 2013 CJEU, C-243/95, *Hill and Stapleton v. The Revenue Commissioners and Department of Finance*, 1998 CJEU, C-43/75, *Defrenne v. Sabena*, 1976	Sex	ECHR, Art. 2 (right to life), Art. 3 (prohibition of torture), Art. 14 (prohibition of discrimination) ECtHR, *Emel Boyraz v. Turkey*, No. 61960/08, 2014 ECtHR, *Konstantin Markin v. Russia* [GC], 30078/06, 2012 ECtHR, *Andrle v. the Czech Republic*, No. 6268/08, 2011 ECtHR, *Ünal Tekeli v. Turkey*, No. 29865/96, 2004

EU	Issues covered	CoE
Gender Goods and Services Directive (2004/113/EC), Art. 4 (1) CJEU, C-423/04, *Richards v. Secretary of State for Work and Pensions*, 27 April 2006 CJEU, C-117/01, *K.B. v. NHS Pensions Agency et Secretary of State for Health*, 7 January 2004	**Gender identity**	ECHR, Art. 8 (right to respect for private and family life) and Art. 14 (prohibition of discrimination) ECtHR, *Y.Y. v. Turkey*, 14793/08, 2015 ECtHR, *Hämäläinen v. Finland* [GC], No. 37359/09, 2014 ECtHR, *Van Kück v. Germany*, No. 35968/97, 2003
Charter of Fundamental Rights, Art. 21 Employment Equality Directive (2000/78/EC) CJEU, C-528/13, *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, 2015 CJEU, Joined cases C-148/13 to C-150/13, *A and Others v. Staatssecretaris van Veiligheid en Justitie* [GC], 2014 CJEU, Joined cases C-199/12, C-200/12, C-201/12, *X and Y,* and *Z v. Minister voor Imigratie en Asiel*, 2013 CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 2013	**Sexual orientation**	ECHR Art. 5, Art. 8 (right to respect for private and family life), Art. 12 (right to marry), Art. 14 (prohibition of discrimination) ECtHR, *Taddeucci and McCall v. Italy*, No. 51362/09, 2016 ECtHR, *O.M. v. Hungary*, No. 9912/15, 2016 ECtHR, *E.B. and Others v. Austria*, Nos. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07, 2013 ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 2010 ECtHR, *E.B. v. France* [GC], No. 43546/02, 2008 ECtHR, *S.L. v. Austria*, No. 45330/99, 2003 ECtHR, *Karner v. Austria*, No. 40016/98, 2003 ECSR, *INTERIGHTS v. Croatia*, No. 45/2007, 2009

EU	Issues covered	CoE
UN Convention on the Rights of Persons with Disabilities (CRPD) Employment Equality Directive (2000/78/EC) CJEU, C-363/12, *Z. v. A Government department and The Board of Management of a Community School* [GC], 2014 CJEU, C-354/13, *FOA v. KL*, 2014 CJEU, Joined cases C-335/11 and C-337/11, *HK Danmark*, 2013	**Disability**	ECHR, Art. 8 (right to respect for private and family life), Art. 14 (prohibition of discrimination) ESC, Art. E ECtHR, *Guberina v. Croatia*, No. 23682/13, 2016 ECtHR, *Glor v. Switzerland*, No. 13444/04, 2009 ECtHR, *Pretty v. the United Kingdom*, No. 2346/02, 2002 ECtHR, *Price v. the United Kingdom*, No. 33394/96, 2001 ECSR, *AEH v. France*, Complaint No. 81/2012, 2013
Charter of Fundamental Rights, Art. 21 Employment Equality Directive (2000/78/EC) CJEU, C-548/15, *de Lange v. Staatssecretaris van Financiën*, 2016 CJEU, C-441/14, *DI, acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* [GC], C-441/14, 2016 CJEU, C-258/15, *Salaberria Sorondo v. Academia Vasca de Policía y Emergencias* [GC], 2016 CJEU, Joined cases C-501/12 and others, *Specht v. Land Berlin and Bundesrepublik Deutschland*, 2014 CJEU, C-416/13, *Vital Pérez v. Ayuntamiento de Oviedo*, 2014 CJEU, C-144/04, *Mangold v. Helm* [GC], 2005	**Age**	ECHR, Art. 5 (right to liberty and security), Art. 6 (right to fair trial) and Art. 8 (right to respect for private and family life) ESC, Art. 1 (2), Art. 23 and Art. 24 ECtHR, *D.G. v. Ireland*, No. 39474/98, 2002 ECtHR, *Schwizgebel v. Switzerland*, No. 25762/07, 2010 ECtHR, *V.v. the United Kingdom* [GC], No. 24888/94, 1999 ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 1999 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 1988 ECSR, *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No. 74/2011, 2013

EU	Issues covered	CoE
Racial Equality Directive (2000/43/EC) Council's Framework Decision on combating racism and xenophobia CJEU, C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* [GC], 2015 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 2008	**Race, ethnicity, colour and membership of a national minority**	ECHR, Art. 14 (prohibition of discrimination), Protocol No. 12, Art. 1 (General prohibition of discrimination) ECtHR, *Boacă and Others v. Romania*, No. 40355/11, 2016 ECtHR, *Biao v. Denmark* [GC], 38590/10, 2016 ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 2009 ECSR, *ERRC v. Ireland*, No. 100/2013, 2015
TFEU, Art. 18 Charter of Fundamental Rights, Art. 45 Citizenship Directive 2004/38/EC Council Directive concerning the status of third-country nationals who are long-term residents (2003/109/EC) CJEU, C-392/15, *European Commission v. Hungary*, 2017 CJEU, C-165/14, *Alfredo Rendón Marín v. Administración del Estado* [GC], 2016 CJEU, C-571/10, *Kamberaj v. IPES* [GC], 2012 CJEU, C-508/10, *European Commission v. the Netherlands*, 2012 CJEU, C-200/02, *Chen v. Secretary of State for the Home Department*, 2004 CJEU, C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, 2000 CJEU, Case 186/87, *Cowan v. Trésor public*, 1989	**Nationality or national origin**	Council of Europe's Convention on Nationality ECHR, Art. 3 (prohibition of torture), Art. 5 (right to liberty and security), Art. 8 (right to respect for private and family life), Protocol No. 4, Art. 3, Protocol No. 1, Art. 2 ECtHR, *Dhahbi v. Italy*, No. 17120/09, 2014 ECtHR, *Rangelov v. Germany*, No. 5123/07, 2012 ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 2011 ECtHR, *Andrejeva v. Latvia* [GC], No. 55707/00, 2009 ECtHR, *Zeïbek v. Greece*, No. 46368/06, 2009 ECtHR, *Anakomba Yula v. Belgium*, No. 45413/07, 2009 ECtHR, *Koua Poirrez v. France*, No. 40892/98, 2003 ECtHR, *C. v. Belgium*, No. 21794/93, 1996 ECtHR, *Moustaquim v. Belgium*, No. 12313/86, 1991

EU	Issues covered	CoE
Charter of Fundamental Rights, Art. 10 and 21 CJEU, C-188/15, *Bougnaoui and ADDH v. Micropole SA* [GC], 2017 CJEU, C-157/15, *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* [GC], 2017	**Religion or belief**	ECHR, Art. 3 (prohibition of torture), Art. 8 (right to respect for private and family life), Art. 9 (freedom of religion), Art. 10 (right to respect for private and family life), Protocol No. 1, Art. 2 (right to education) ECtHR, *İzzettin Doğan and Others v. Turkey* [GC], No. 62649/10, 2016 ECtHR, *Ebrahimian v. France*, No. 64846/11, 2015 ECtHR, *S.A.S. v. France* [GC], No. 43835/11, 2014 ECtHR, *Eweida and Others v. the United Kingdom*, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 2013 ECtHR, *Vojnity v. Hungary*, No. 29617/07, 2013 ECtHR, *Milanović v. Serbia*, No. 44614/07, 2010 ECtHR, *O'Donoghue and Others v. the United Kingdom*, No. 34848/07, 2010 ECtHR, *Alujer Fernandez and Caballero García v. Spain* (dec.), No. 53072/99, 2001 ECtHR, *Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, 2000
Racial Equality Directive (2000/43/EC) CJEU, C-317/14, *European Commission v. Belgium*, 2015	**Language**	Council of Europe Framework Convention for the Protection of National Minorities ECHR, Art. 6 (3) and Art. 14 (prohibition of discrimination) ECtHR, *Macalin Moxamed Sed Dahir v. Switzerland* (dec.), No. 12209/10, 2015 ECtHR, *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium*, No. 1474/62 and others, 1968

EU	Issues covered	CoE
Charter of Fundamental Rights, Art. 21 CJEU, C-149/10, *Chatzi v. Ypourgos Oikonomikon*, 2010	Social origin, birth and property	ECHR, Art. 14 (prohibition of discrimination), Protocol No. 1, Art. 1 (Protection of property) ECtHR, *Wolter and Sarfert v. Germany*, Nos. 59752/13 and 66277/13, 2017 ECtHR, *Chassagnou and Others. v. France* [GC], No. 25088/94 and others, 1999
Charter of Fundamental Rights, Art. 21	Political or other opinion	ECHR, Art. 3 (prohibition of torture), Art. 10 (right to respect for private and family life), Art. 11 (freedom of assembly and association), Art. 14 (prohibition of discrimination) ECtHR, *Redfearn v. the United Kingdom*, No. 47335/06, 2012 ECtHR, *Virabyan v. Armenia*, No. 40094/05, 2012
CJEU, C-406/15, *Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, 2017	Other status	ECHR, Art. 14 (prohibition of discrimination) ESC, Art. E ECSR, *Associazione Nazionale Giudici di Pace v. Italy*, Complaint No. 102/2013, 2016 ECtHR, *Varnas v. Lithuania*, No. 42615/06, 2013

Key points

- The principle of non-discrimination does not prohibit all differences in treatment, but only those differences based on one of the protected grounds.
- Protected ground is an identifiable, objective or personal characteristic, or 'status', by which individuals or groups are distinguishable from one another.
- Under the EU non-discrimination directives, the protected grounds are expressly fixed to: sex, racial or ethnic origin, age, disability, religion or belief and sexual orientation.
- Under the ECHR there is an open-ended list which may be developed on a case-by-case basis.

Under EU law, the non-discrimination directives prohibit differential treatment based on certain 'protected grounds', containing a fixed and limited list of protected grounds. These grounds cover sex (Gender Goods and Services Directive (2004/113/EC)[430], Gender Equality Directive (recast) (2006/54/EC)),[431] sexual orientation, disability, age or religion or belief (Employment Equality Directive (2000/78/EC)[432]), and racial or ethnic origin (Racial Equality Directive (2000/43/EC)[433]). Article 21 of the EU Charter also contains a prohibition on discrimination, which contains a non-exhaustive list of grounds, implied by a formulation 'such as'.[434] The EU Charter binds the EU institutions, but it will also apply to the Member States when they are interpreting and applying EU law.

A 'protected ground' is a characteristic of an individual that should not be considered relevant to the differential treatment or enjoyment of a particular benefit.

Under the ECHR, Article 14 contains an open-ended list, which coincides with the directives, but goes beyond them. Article 14 states that there shall be no discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The category of 'other status' has allowed the ECtHR to include those grounds (among others) that are expressly protected by the non-discrimination directives, namely: disability, age and sexual orientation.

430 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp. 37–43.

431 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23–36.

432 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22.

433 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22–26.

434 As regards the relation between the EU Charter and Directives, in CJEU, C-529/13, *Georg Felber v. Bundesministerin für Unterricht, Kunst und Kultur,* 21 January 2015, the CJEU was asked to interpret the principle of non-discrimination on grounds of age, as enshrined in Article 21 of the EU Charter and given expression in Directive 2000/78. The CJEU recalled that where Member States adopt measures which fall within the scope of Directive 2000/78, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, they must respect the Directive. Consequently, the CJEU decided to examine the questions referred solely in the light of Directive 2000/78.

5.1. Sex

Sex discrimination is relatively self-explanatory, in that it refers to discrimination that is based on the fact that an individual is either a woman or a man. **Under EU law**, this is the most highly developed aspect of the EU social policy and has long been considered a core right. The development of the protection on this ground served a dual purpose: first, it served an economic purpose in that it helped to eliminate competitive distortions in a market that had grown evermore integrated; and second, on a political level, it provided the Community with a facet aimed at social progress and the improvement of living and working conditions. Consequently, the protection against discrimination on the ground of sex has been, and has remained, a fundamental function of the EU: gender equality is a 'fundamental value' (Article 2 of the TEU) and an 'objective' (Article 3 of the TEU) of the Union. The acceptance of the social and economic importance of ensuring equality of treatment was further crystallised by the central position it was given in the EU Charter of Fundamental Rights.

Cases of sex discrimination may involve either men or women receiving less favourable treatment than persons of the opposite sex.

Example: In *Konstantinos Maïstrellis v. Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*,[435] the complainant worked as a civil servant. He requested parental leave while his wife did not have any employment. The CJEU found that, in accordance with the principle of equal opportunities and treatment of men and women in employment and occupation, a male civil servant has a right to take parental leave even if his wife is unemployed.

Example: In *Defrenne v. Sabena*, [436] the applicant complained that she was paid less than her male counterparts, despite undertaking identical employment duties. The CJEU held that this was clearly a case of sex discrimination. In reaching this decision, the CJEU highlighted both the economic and social dimension of the Union, and that non-discrimination assists in progressing the EU towards these objectives.

435 CJEU, C-222/14, *Konstantinos Maïstrellis v. Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, 16 July 2015.

436 CJEU, C-43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, 8 April 1976.

Example: In *Margaret Kenny and Others v. Minister for Justice, Equality and Law Reform, Minister for Finance and Commissioner of An Garda Síochána*,[437] the claimants were female civil servants assigned to clerical duties employed by the Minister. They complained that their salaries were lower than those of their male colleagues who were also performing administrative work in specific posts reserved for members of the police. The national authorities justified the difference in pay by the fact that members of the police must always comply with the needs of the operational forces. The CJEU explained that, to determine whether two different groups perform the same work, it is not sufficient to establish that the tasks performed by those groups are similar. The nature of work, the training requirements and the working conditions have to be taken into account. Professional training is consequently one of the criteria for determining whether or not the work performed is comparable.

Example: The case of *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres*[438] concerns the principle of equal treatment between men and women in the access to and supply of goods and services. In particular, it relates to the Gender Goods and Services Directive which permitted EU Member States to apply sex-specific risk factors in the calculation of premiums and benefits in insurance contracts. As a result, women and men paid different amounts of contributions under private insurance schemes. Relying on the EU Charter of Fundamental Rights, the CJEU ruled that taking into account the gender of the insured individual as a risk factor in insurance contracts constitutes discrimination and declared Article 5 (2) of the Gender Goods and Services Directive invalid. Thus, as of 21 December 2012 it is no longer possible to permit proportionate differences in individuals' premiums and benefits where the ground of sex is a determining factor.

The CJEU emphasised that, to justify any differential treatment between men and women, it must be shown that such treatment is based on objective factors unrelated to any discrimination on grounds of sex. This will be the case where the measures reflect a legitimate social-policy objective, are appropriate to achieve

437 CJEU, C-427/11, *Margaret Kenny and Others v. Minister for Justice, Equality and Law Reform, Minister for Finance and Commissioner of An Garda Síochána*, 28 February 2013.

438 CJEU, C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres* [GC], 1 March 2011.

that aim and are necessary to do so. [439] Therefore, justifications for a measure that is realised solely to the detriment of women or one that is based only on the financial or management considerations of employers cannot be accepted.

Pregnancy and maternity related discrimination is a particular form of sex discrimination. To protect pregnancy, maternity and parenthood, the EU has gradually developed a complex array of primary and secondary legislation.[440] Article 157 of the TFEU establishes the obligation of equal pay between men and women and provides a general legal basis for the adoption of measures in the field of gender equality, which includes equality and antidiscrimination on the ground of pregnancy or maternity within the workplace. Article 33 (2) of the EU Charter states that "to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity, and the right to paid maternity leave and to parental leave following the birth or adoption of a child." Besides the recast Gender Equality Directive, among others, the Pregnant Workers Directive[441] is primarily aimed at improving health and safety at work for pregnant workers, workers who have recently given birth and workers who are breastfeeding. It is supplemented by the Parental Leave Directive,[442] which sets minimum standards designed to facilitate the reconciliation of work with family life.

The CJEU has also greatly contributed to the development of this field of law, by further clarifying and applying the principles expressed in legislation and providing broad interpretations of relevant rights. According to the CJEU, protection of pregnancy and maternity rights not only translates into promoting substantive gender equality, but it also promotes the health of the mother following the birth and the bond between the mother and her new-born child.

439 CJEU, C-173/13, *Maurice Leone and Blandine Leone v. Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales*, 17 July 2014, para. 79.

440 For more details, see for example, European Commission, European Network of Legal Experts in the Field of Gender Equality (2012), *'Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries'*.

441 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992.

442 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18 March 2010.

In the early cases of *Dekker*[443] and *Hertz*,[444] the CJEU established that as only women can become pregnant, a refusal to employ or the dismissal of a pregnant woman based on her pregnancy or her maternity amounts to direct discrimination on the grounds of sex, which cannot be justified by any other interest, including the employer's economic interest. In *Melgar*,[445] for example, it clearly stated that "where non renewal of a fixed term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex" contrary to EU law. Moreover, a women is not obliged to disclose her pregnancy to the employer during recruitment process, or at any other stage of employment.[446] The CJEU further held that any unfavourable treatment directly or indirectly connected to pregnancy or maternity constitutes direct sex discrimination.[447]

However, the existing legal framework fails to regulate non-traditional ways of becoming a mother/parent. In particular, the practice of surrogacy is increasing across Europe and this creates a gap between social reality and legislation. Such an issue was highlighted by two cases decided by the CJEU in 2014.

Example: In cases *C. D. v. S. T.*[448] and *Z. v. A Government Department and the Board of Management of a Community School*,[449] the CJEU held that EU law does not require that a mother who has had a baby through a surrogacy agreement should be entitled to paid leave equivalent to maternity or adoption leave. Ms D., who was employed in a hospital in the United Kingdom, and Ms Z., a teacher working in Ireland, both used surrogate mothers to have a child. Both women applied for paid leave equivalent to maternity leave or adoption leave. The applications were refused on the ground that Ms D. and Ms Z. had never been pregnant and the children had not been adopted by

443 CJEU, C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 8 November 1990.

444 CJEU, C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening*, 8 November 1990. Note that the *Handels- og Kontorfunktionaerernes Forbund i Danmark* was acting on behalf of Birthe Vibeke Hertz.

445 CJEU, C-438/99, *Maria Luisa Jiménez Melgar v. Ayuntamiento de Los Barrios*, 4 October 2001.

446 CJEU, C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd.*, 14 July 1994; CJEU, C-320/01, *Wiebke Busch v. Klinikum Neustadt GmbH & Co. Betriebs-KG*, 27 February 2003.

447 CJEU, C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd.*, 14 July 1994; CJEU, C-421/92, *Gabriele Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. e.V.*, 5 May 1994.

448 CJEU, C-167/12, *C. D. v. S. T.* [GC], 18 March 2014.

449 CJEU, C-363/12, *Z. v. A Government department and The Board of Management of a Community School* [GC], 18 March 2014.

the parents. In both cases, the CJEU found that the intended mother could not rely on the provisions of either the Gender Equality Directive (recast) or the Pregnant Workers Directives, nor the provisions of the Employment Equality Directive, which prohibit discrimination on grounds of disability.

For the Pregnant Workers Directive, the CJEU found that granting maternity leave presupposes that the worker concerned has been pregnant and has given birth to a child. Therefore, a commissioning mother[450] does not fall within the scope of the directive, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.

Regarding the Gender Equality Directive, the CJEU found that a refusal to grant maternity leave to a commissioning mother does not constitute discrimination on grounds of sex, given that a commissioning father is not entitled to such leave either and that the refusal does not put female workers at a particular disadvantage compared with male workers. Furthermore, a refusal to grant paid leave equivalent to adoption leave to a commissioning mother is outside the scope of that directive.

Lastly, the CJEU considered that the inability to have a child does not constitute a 'disability' within the meaning of the Employment Equality Directive.[451]

Example: The *De Weerd*[452] case concerns national legislation relating to incapacity benefit. In 1975, national legislation had introduced incapacity benefit for men and unmarried women, irrespective of their income before becoming incapacitated. In 1979, this was amended and the benefit also made available to married women. However, a requirement that the recipient must have received a particular level of income during the preceding year was also introduced. The legislation was challenged on the ground (among others) that the income requirement discriminated indirectly against women (who were less likely to earn the required income than men). The state argued that the differential enjoyment was justified out of budgetary considerations to contain national expenditure. The CJEU found that while EU law does not prevent the state from regulating which categories of person benefit from social security benefits, it could not do so on a discriminatory manner.

450 A mother who has used a surrogate mother in order to have a child.

451 See Section 5.4.

452 CJEU, C-343/92, *M. A. De Weerd, née Roks, and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others*, 24 February 1994.

Example: In *Hill and Stapleton v. The Revenue Commissioners and Department of Finance*,[453] the CJEU made it clear that the principle of reconciliation between work and family life follows from the principle of equality. The government introduced a job-sharing scheme in the civil service, whereby a post could be shared by two individuals on a temporary basis, working 50 % of the hours of the full-time post and receiving 50 % of the regular salary. Workers were entitled to then return to their post full time where these posts were available. The rules allowed individuals in full-time employment to advance one increment on the pay scale per year. However, for individuals who were job sharing the increment was halved, with two years of job sharing equivalent to one increment. The two complainants in the present case returned to their posts as full-time workers and complained about the means by which the increment was applied to them. The CJEU found this to constitute indirect discrimination on the grounds of sex since it was predominantly women who took part in job-sharing. The government argued that the differential treatment was justified since it was based on the principle of applying the increment in relation to the actual length of service. The CJEU found that this merely amounted to an assertion that was not supported by objective criteria (in that there was no evidence that other individuals' length of service was calculated in terms of actual hours worked). The CJEU then stated "an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs."

Similarly, **under the ECHR**, protection against discrimination on the ground of sex is well developed. The ECtHR has stated that gender equality is a major goal in the member states of the Council of Europe.[454] The case law relating to gender equality encompasses a variety of legal issues.

A very important area of gender equality in the ECtHR jurisprudence concerns cases where women are victims of violence (discussed in Section 2.6). The ECHR held that gender-based violence was a form of discrimination against women in violation of Articles 2 and 3 in conjunction with Article 14 of the ECHR.[455]

453 CJEU, C-243/95, *Kathleen Hill and Ann Stapleton v. The Revenue Commissioners and Department of Finance*, 17 June 1998.

454 ECtHR, *Konstantin Markin v. Russia* [GC], No. 30078/06, 22 March 2012, para. 127.

455 For example, see ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, ECtHR, *Halime Kılıç v. Turkey*, No. 63034/11, 28 June 2016 and ECtHR, *M.G. v. Turkey*, No. 646/10, 22 March 2016, discussed in Section 2.6.

The principle of equality between men and women has also led the ECtHR to find a violation in context of employment and parental leave.

Example: In *Emel Boyraz v. Turkey*,[456] the applicant was dismissed from her post as a security officer on the grounds that the tasks of security officers involved risks and responsibilities that women were unable to assume, such as working at night in rural areas and using firearms and physical force. The ECtHR found that the authorities had not given sufficient justification to explain this purported inability of women to work as security officers in contrast to men. The ECtHR also pointed to the fact that the applicant had been working as a security officer for four years, and there were no indications that she had failed to fulfil her duties because of her sex. Consequently, there had been a violation of Article 14.

In *Konstantin Markin v. Russia*,[457] the applicant, a divorced radio intelligence operator in the armed forces, applied for three years' parental leave to bring up his three children. This was refused on the grounds that there was no basis for his claim in domestic law. However, he was subsequently granted two years' parental leave and financial aid by his superiors in view of his difficult personal circumstances. The applicant complained that male military personnel, contrary to female, were not entitled to three years' parental leave to take care of minor children. He considered that this difference in treatment was discriminatory on the grounds of sex. The ECtHR found that men were in an analogous situation to women regarding parental leave. The ECtHR did not accept that the difference in treatment was reasonably and objectively justified by either the traditional distribution of gender roles in society or the argument that parental leave for servicemen would have a negative effect on the fighting power and operational effectiveness of the armed forces. Therefore, the automatic restriction applied to a group of people on the basis of their sex fell outside any acceptable margin of appreciation and the ECtHR concluded that there had been a violation of Article 14 in conjunction with Article 8 of the ECHR.

Another category of cases on gender equality concerns challenges to different age requirements in respect of the enjoyment of social benefits. In the field of social security and fiscal matters, the ECtHR allows a wide margin of appreciation

456 ECtHR, *Emel Boyraz v. Turkey*, No. 61960/08, 2 December 2014.

457 ECtHR, *Konstantin Markin v. Russia* [GC], No. 30078/06, 22 March 2012.

to national authorities. In the *Andrle* case, the ECtHR reaffirmed that gender equality allows for taking special measures that compensate for factual inequalities between men and women.

> Example: In *Andrle v. the Czech Republic*,[458] the applicant complained that, unlike the position with women, there was no lowering of the pensionable age for men who had raised children. The Czech government argued that this difference in treatment was due to the position under the old communist system where women with children were required to work full time, as well as care for children and take care of the household. The measure aims to compensate for this double burden on women. The authorities had already started a gradual reform of its pension scheme towards equalising the retirement age. However, the old system still applied to people of the applicant's age. The ECtHR accepted that the measure was rooted in these specific historical circumstances and in the need for special treatment for women. The Court found that this was still reasonably and objectively justified. The ECtHR also held that the timing and the extent of the measures taken to rectify the inequality in question were not manifestly unreasonable and did not exceed the wide margin of appreciation afforded to the states in this area. Therefore, the state did not violate the non-discrimination principle.

In the *Andrle* case, the ECtHR clearly distinguished different treatment of men and women in the field of parental leave from that of pensions. According to that, gender could not provide sufficient justification for the exclusion of fathers from the entitlement to take parental leave, which is a short-term measure, and its reform would not entail serious financial repercussions as could be in the case in the pension scheme reform. Therefore, regarding pension schemes, states enjoy a wide margin of appreciation. However, for example in *Di Trizio v. Switzerland*,[459] (discussed in detail in Section 6.3), the ECtHR found that the method of calculating disability benefits which disadvantaged women who reduced their working hours after childbirth amounted to discrimination.

In *Khamtokhu and Aksenchik v. Russia*,[460] (discussed in detail in Section 1.3.2), the ECtHR examined the difference in treatment in life sentencing between men

458 ECtHR, *Andrle v. the Czech Republic*, No. 6268/08, 17 February 2011.

459 ECtHR, *Di Trizio v. Switzerland*, No. 7186/09, 2 February 2016.

460 ECtHR, *Khamtokhu and Aksenchik v. Russia* [GC], Nos. 60367/08 and 961/11, 24 January 2017.

and women who were exempt from life imprisonment. It concluded on the basis of statistics, the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood, that there existed a public interest in the exemption of female offenders from life imprisonment by way of a general rule.

In the context of gender equality, the ECtHR also examined national provisions concerning the choice of name and transmission of parents' surnames to their children. For instance, in *Cusan and Fazzo v. Italy*,[461] (discussed in detail in Section 4.6), it found a rule not allowing a married couple to give their child the mother's surname discriminatory towards women.

> Example: In *Ünal Tekeli v. Turkey*,[462] the applicant complained that national law obliged a woman to bear her husband's name upon marriage. Although the law permitted a woman to retain her maiden name in addition to her husband's name, the ECtHR found that this constituted discrimination on the basis of sex, because national law did not oblige a husband to alter his surname.

Under international law, gender equality is also recognised as central to human rights. Various United Nations bodies have addressed gender based discrimination in particular faced by women. They also stressed that women are often victims of multiple discrimination (when they experience discrimination on two or several grounds) and intersectional discrimination (where several grounds operate and interact with each other at the same time in such a way that they are inseparable).[463] A number of UN human bodies has also emphasised the harms of gender stereotypes[464] and the need to address harmful gender stereotypes

461 ECHR, *Cusan and Fazzo v. Italy*, No. 77/07, 7 January 2014.

462 ECtHR, *Ünal Tekeli v. Turkey*, No. 29865/96, 16 November 2004.

463 See for example, UN, Committee on the Rights of Persons with Disabilities (2016), *General comment No. 3 (2016) on women and girls with disabilities*, CRPD/C/GC/3, 2 September 2016; UN, CEDAW (2010), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/2010/47/GC.2, 19 October 2010, para. 18.

464 For an overview on how the UN human treaty bodies have applied those treaties in relation to gender stereotypes/stereotyping with a view to advancing women's human rights, see OHCHR Commissioned Report (2013), *Gender Stereotyping as a Human Rights Violation*, pp. 20–43.

in order to promote gender equality.[465] Differences in treatment that are based on gender stereotypes may constitute discrimination against women. The Committee on Economic, Social and Cultural Rights stated that "Gender-based assumptions and expectations, generally place women at a disadvantage with respect to substantive enjoyment of rights [...]. Gender-based assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality."[466] Similarly, the Committee on the Elimination of Discrimination against Women stressed that gender stereotypes are a root cause and consequence of gender-based discrimination.[467] For instance, in a case concerning discrimination in employment, the Committee found the violation of the Convention in the fact that the national courts were influenced by the stereotypical prejudices that extramarital relationships were acceptable for men and not for women.

5.2. Gender identity

Key points

- Under the ECHR, gender identity is protected under the category of 'other status'.
- Under EU law, gender identity is protected to a limited extent under the protected ground of sex. It covers individuals who intend to undergo or have undergone gender reassignment surgery.

Thus, the more broadly accepted definition of gender identity encompasses not only those who undertake gender reassignment surgery ('transsexuals'), but also persons who choose other means to express their gender, such as transvestism or cross-dressing, or simply adopting a manner of speech or cosmetics usually associated with members of the opposite sex.

465 UN, Committee on the Rights of Persons with Disabilities (2016), *General comment No. 3 (2016) on women and girls with disabilities*, CRPD/C/GC/3, 2 September 2016.

466 UN, CESCR (2005), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, E/C.12/2005/4, 11 August 2005, para. 11.

467 UN, CEDAW (2010), *Communication No. 28/2010*, CEDAW/C/51/D/28/2010, 24 February 2012, para. 8.8.

Gender identity refers to "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms".

Source: Yogyakarta Principles (2007), Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007. An independent body of experts in International Human Rights Law adopted these principles.*

It should be stressed, however, that **under EU** non-discrimination law, currently there is no specific provision for protection against discrimination on grounds of a person's gender identity or gender expression.[468] Following the case of *P v. S and Cornwall County Council*,[469] the non-discrimination ground of gender identity is only partly covered by the principle of equal treatment for men and women. The CJEU held that the scope of the principle of equal treatment for men and women could not be confined to the prohibition of discrimination based on the fact that a person is of one sex or the other. Accordingly, the ground of sex encompasses discrimination against an individual because he/she "intends to undergo, or has undergone, gender reassignment". Therefore, the ground of sex as construed under EU law currently protects gender identity only in a narrow sense. This approach is reaffirmed in the Gender Equality Directive (recast) (2006/54/EC).[470] Similarly, studies of national legislation regulating this area show no consistent approach across Europe, with states largely divided between those that address 'gender identity' as part of 'sexual orientation', and those that address it as part of 'sex discrimination'.

Example: The case of *K.B. v. NHS Pensions Agency*[471] concerns the refusal of KB's transsexual partner a widower's pension. This refusal was because the transsexual couple could not satisfy the requirement of being married; transsexuals were not capable of marrying under English law at the time. In considering the issue of discrimination, the CJEU held that there was

468 Explicit prohibition of discrimination on the ground of gender identity is foreseen in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, pp. 57–73, recital 9.

469 CJEU, C-13/94, *P v. S and Cornwall County Council*, 30 April 1996.

470 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23–36.

471 CJEU, C-117/01, *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, 7 January 2004.

no discrimination on the ground of sex because, in determining who was entitled to the survivor's pension, there was no less favourable treatment based on being male or female. The CJEU then changed the direction of the consideration. It then concentrated on the issue of marriage. It was highlighted that transsexuals were never able to marry, and thus never able to benefit from the survivor's pension, whereas, heterosexuals could. Consideration was then given to the ECtHR case of Christine Goodwin.[472] Based on these considerations, the CJEU concluded that the British legislation in question was incompatible with the principle of equal treatment as it prevented transsexuals from benefitting from part of their partners pay.

Example: Similar considerations arose in *Richards v. Secretary of State for Work and Pensions*.[473] Richards, who was born a man, underwent gender reassignment surgery. The case surrounded the state pension entitlement in the United Kingdom, as at the time, women received their state pension at the age of 60 years, while men received their state pension at the age of 65 years. When Richards applied for state pension at the age of 60 years, she was refused, with an explanation stating that legally she was recognised as a man and therefore she could not apply for state pension until she reached the age of 65 years. The CJEU held that this was unequal treatment on the grounds of her gender reassignment, and as a consequence this was regarded as discrimination contrary to Article 4 (1) of the Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security.[474]

Under the ECHR, the notion of gender identity is interpreted more widely. The ECtHR has held that the prohibition of discrimination under Article 14 of the Convention also covers questions related to gender identity.[475] The ECtHR stressed that "gender and sexual orientation are two distinctive and intimate characteristics [...]. Any confusion between the two will therefore constitute an attack on one's reputation capable of attaining a sufficient level of seriousness for touching upon such an intimate characteristic of a person."[476]

472 ECtHR, *Christine Goodwin v. the United Kingdom* [GC], No. 28957/95, 11 July 2002.

473 CJEU, C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, 27 April 2006.

474 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6, p. 24.

475 ECtHR, *Identoba and Others v. Georgia*, No. 73235/12, 12 May 2015, para. 96.

476 ECtHR, *Sousa Goucha v. Portugal*, No. 70434/12, 22 March 2016, para. 27.

Discrimination based on 'gender identity' can derive "from traditional social perceptions and legal settings linked to being a transsexual person".[477] There are two main legal issues relating to discrimination based on gender identity. The first relates to access to gender reassignment. The second relates to legal gender recognition procedures, which can enable transgender persons to live in accordance with their preferred gender identity.

Example: The case of *Hämäläinen v. Finland*[478] concerns the refusal to change the applicant's male identity number to a female one following her gender reassignment surgery, unless her marriage was transformed into a civil partnership. The ECtHR confirmed that states have an obligation to recognise the change of gender undergone by post-operative transsexuals through, inter alia, the possibility of amending all data relating to a person's civil status. However, in the applicant's case, the ECtHR dismissed the complaint under Article 14. The Court found that the problems experienced in relation to her request for a female identity number did not result from discrimination because her situation and the situation of cissexuals were not sufficiently similar to be compared with each other. The ECtHR also dismissed the Article 8 complaint, finding that the conversion of the applicant's marriage into a registered partnership would have no implications for her family life. The legal concepts of marriage and registered partnership were almost identical in Finland and the conversion would not have had any implications on the paternity of her biological child or on the responsibility for the care, custody and maintenance of the child.

The above judgment confirmed the states' obligation to enable legal gender recognition. However, at the same time, a legal requirement that a person must first change their civil status, as a prior condition for access to a legal change of gender, does not contravene the Convention if it does not affect the family life of the person concerned (for example their rights and obligations regarding a child).

477 FRA (2015), *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU – Comparative legal analysis – Update 2015*, Luxembourg, Publications Office, p. 15.

478 ECtHR, *Hämäläinen v. Finland* [GC], No. 37359/09, 16 July 2014.

Example: In *Y.Y. v. Turkey*,[479] the applicant had been refused gender reassignment surgery on the grounds that he was not 'permanently unable to procreate' as required by domestic law. He complained that, by refusing to grant him authorisation for gender reassignment surgery (without which it was not possible to obtain legal recognition of his preferred gender), the Turkish authorities had discriminated against him. The ECtHR stressed the importance of the freedom to define one's gender identity and held that the principle of respect for the applicant's physical integrity precluded any obligation for him to undergo treatment aimed at permanent sterilisation.

Example: In *Van Kück v. Germany*,[480] the private medical insurance company of the applicant, who had undergone gender reassignment surgery and hormone treatment, refused to reimburse the costs of her treatment. The German Court of Appeal, which heard the applicant's claim against the insurance company, determined that the medical procedures were not 'necessary' as required under the agreement. Therefore, the applicant was not entitled to reimbursement. The ECtHR found that, considering the nature of gender identity and the gravity of a decision to undergo irreversible medical procedures, the national court's approach had not only failed to ensure the applicant received a fair trial, violating Article 6 of the ECHR, but also violated her right to respect for private life guaranteed by Article 8 of the ECHR.

Example: In its ruling,[481] the Athens Justice of Peace confirmed the right to the recognition of gender identity without gender reassignment surgery. At his birth, the applicant was registered in the public registry as a 'girl'. From early childhood, however, the applicant showed symptoms of a gender identity disorder. He underwent hormone therapy (testosterone injections) and a double mastectomy. The court held that a requirement to undergo gender reassignment surgery to modify the existing entry in the public registry would be excessive and would violate Article 8 of the ECHR, as well as Articles 2 and 26 of the ICCPR. The court concluded that, in the applicant's case, the male sex was prevailing. Moreover, as the male sex and a male name are fundamental features of the applicant's personality, they must appear in the public registry; therefore, the existing entry must be modified accordingly.

479 ECtHR, *Y.Y. v. Turkey*, 14793/08, 10 March 2015.

480 ECtHR, *Van Kück v. Germany*, No. 35968/97, 12 June 2003, paras. 30 and 90-91.

481 Greece, Athens Justice of Peace, Decision No. 418/2016, 23 September 2016, see European network of legal experts in gender equality and non-discrimination (2016), *Recognition of gender identity without gender reassignment surgery*.

Under CoE law, the Istanbul Convention prohibits discrimination based on sexual orientation and gender identity. ECRI has started to monitor LGBTI-related issues in Council of Europe member states.[482]

Apart from the issues discussed above, there are other legal issues connected with discrimination on the basis of gender identity. For example, it is considered equally problematic that many states require the registration of a baby's sex at birth as either male or female.[483] Another issue which is highly criticised concerns medical intervention in babies in order to impose a specific sex where the newborn baby's sex is unclear.[484]

5.3. Sexual orientation

Sexual orientation can be understood to refer to "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender."

Source: Yogyakarta Principles (2007), Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, *March 2007. An independent body of experts in International Human Rights Law adopted these principles.*

Cases relating to sexual orientation discrimination typically involve individuals receiving less favourable treatment because they are gay, lesbian or bisexual, but the ground also prohibits discrimination on the basis of being heterosexual.

The following examples illustrate how the CJEU interprets the prohibition of discrimination on grounds of sexual orientation.

482 See Council of Europe, European Commission against Racism and Intolerance (ECRI) (2012), Information document on the fifth monitoring cycle of the European Commission against Racism and Intolerance, 28 September 2012, point 9.

483 FRA (2015), *The fundamental rights situation of intersex people*, Luxembourg, Publications Office; Council of Europe, Commissioner for Human Rights (2011), *Study on Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe*.

484 Several CoE documents condemned this controversial practice; see, for example, Resolution 1952 (2013), 'Children's right to physical integrity'.

Example: In *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării,*[485] Accept, an NGO promoting and protecting LGBT rights in Romania, complained that the principle of equal treatment as specified in the Employment Equality Directive was breached in recruitment matters by a professional football club. They referred in particular to homophobic public statements made by a patron of this club, who stated in an interview that he would never hire a homosexual player. The CJEU stated that it would have been sufficient for the club to have distanced itself from discriminatory public statements and proved the existence of express provisions in its recruitment policy aimed at ensuring compliance with the principle of equal treatment.

Example: In *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*,[486] a man who had a sexual relationship with another man was not allowed to give blood. The national authorities considered that the claimant was exposed to a high risk of contracting severe infectious diseases that could be transmitted through the blood. The CJEU concluded that, although such a permanent ban from giving blood for homosexual men was compatible with EU law (Article 21 of the EU Charter), including its prohibition of discrimination, it was only the case when less onerous methods of ensuring a high level of health protection did not exist. The CJEU left it in the hands of the domestic courts to ascertain whether there were any effective techniques for detecting infectious diseases, in particular HIV. In the absence of such techniques, the courts would have to verify whether a questionnaire and individual interview with a medical professional could establish the existence of a risk to the health of recipients.

The methods of assessing the credibility of declared sexual orientation of asylum applicants have been a matter of CJEU case law.[487]

485 CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013.

486 CJEU, C-528/13, *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, 29 April 2015.

487 For more information, see FRA (2017), *Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers*, Luxembourg, Publications Office.

Example: In *A and Others v. Staatssecretaris van Veiligheid en Justitie v. Staatssecretaris van Veiligheid en Justitie*,[488] the CJEU clarified how national authorities, in accordance with EU standards, could ascertain the sexual orientation of asylum applicants. Directives 2004/83/EC and 2005/85/EC provide the minimum requirements that third-country nationals must fulfil to be able to claim refugee status; they provide the minimum standards for the procedures for examining asylum applications and the rights of asylum seekers. National authorities are not allowed to carry out detailed questioning about the sexual practices of asylum applicants or submit them to any 'tests' to establish their homosexuality, because such evidence would of its nature infringe human dignity, the respect of which is guaranteed by the EU Charter of Fundamental Rights. Moreover, the CJEU held that not declaring one's homosexuality at the beginning of an asylum procedure before the relevant authorities must not lead to the conclusion that the individual's declaration lacked credibility.

Example: In *X, Y, and Z v. Minister voor Imigratie en Asiel*,[489] the CJEU found that homosexual persons can constitute a particular social group under the refugee definition because of existing criminal laws specifically targeting them. The right to asylum can be justified when the person risks persecution. A penalty of imprisonment for homosexual acts will be considered as a sufficient serious risk of persecution if this penalty is actually applied. The sexual orientation is a characteristic so fundamental for a person's identity that nobody should be forced to renounce it or conceal it in the country of origin to avoid persecution.[490]

Under the ECHR, Article 14 does not explicitly list 'sexual orientation' as a protected ground. In a series of cases, the ECtHR has stated, however, that sexual orientation is included among the 'other' grounds protected by Article 14.[491]

488 CJEU, Joined cases C-148/13 to C-150/13, *A and Others v. Staatssecretaris van Veiligheid en Justitie* [GC], 2 December 2014.

489 CJEU, Joined cases C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v. X and Y* and *Z v. Minister voor Immigratie en Asiel*, 7 November 2013.

490 For other case law relating to sexual orientation see in particular CJEU, C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [GC], 1 April 2008, discussed in detail in Section 2.2.3 and CJEU, C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013, discussed in Section 2.1.2.

491 See, for example, ECtHR, *Fretté v. France*, No. 36515/97, 26 February 2002, para. 32.

Example: In *S.L. v. Austria*,[492] the applicant complained that national law, as it stood at the time, criminalised consensual sexual relations between men where one of the parties was under eighteen. The contested provision did not apply to opposite-sex or female same-sex sexual relationships. The ECtHR found this to constitute discrimination based on sexual orientation.

The Austrian Parliament subsequently repealed the criminal provision – the subject matter of the above case. But the criminal convictions based on the repealed provision were not deleted from the criminal records of those people who had been convicted.

Example: In *E.B. and Others v. Austria*,[493] the applicants complained about the Austrian authorities' refusal to erase the criminal convictions for consensual homosexual relations from their criminal records, although the offence in question had been abolished. The ECtHR noted that a legal provision losing its force of law was not in itself a sufficient reason for deleting a conviction from a person's criminal record. However, both the Austrian Constitutional Court and the ECtHR had found that the contested provision violated the Austrian Constitution and the ECHR, respectively. Both held that the provision had been abolished to bring the situation into conformity with the law and the principle of equality, and that maintaining criminal record entries may have a serious negative impact on the private life of the individual concerned. Since the national authorities had failed to provide any justification as to why it was necessary to maintain the criminal record entries, the ECtHR found a violation of Article 14 taken in conjunction with Article 8 of the ECHR.

The ECtHR also examined a number of cases involving discrimination based on sexual orientation in the context of adoption and marriage.

Example: In *E.B. v. France*, [494] the applicant was refused adoption of a child because there was no male role model in her household. Given that national law permitted single parents to adopt children, the ECtHR found that the authorities' decision was primarily based on the fact that the applicant had

492 ECtHR, *S.L. v. Austria*, No. 45330/99, 9 January 2003.

493 ECtHR, *E.B. and Others v. Austria*, Nos. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07, 7 November 2013.

494 ECtHR, *E.B. v. France* [GC], No. 43546/02, 22 January 2008.

been in a relationship and living with another women. Accordingly, the ECtHR found that discrimination had occurred based on sexual orientation.

Example: In *Taddeucci and McCall v. Italy*,[495] the applicants, an Italian national and a New Zealand national, had lived together as a homosexual couple since 1999. When they decided to settle in Italy, the second applicant's application for a residence permit on family grounds was turned down, because the applicants were not married and therefore the Italian national's partner was not considered a family member. At the same time, only heterosexual couples could get married. Consequently, the condition of getting married could not be fulfilled in the applicants' case. The ECtHR found that the lack of a right to marry for same-sex couples under national law, which was a prerequisite for obtaining a residence permit, constituted a violation of Article 14 in combination with Article 8 of the ECHR.

The ECHR also protects from government interference relating to sexual orientation under Article 8 taken alone. Thus, even if discriminatory treatment based on this ground has occurred, it may be possible simply to claim a violation of Article 8 without needing to argue the existence of discriminatory treatment.

Example: In *Karner v. Austria*,[496] the applicant had been cohabiting with his partner, the main tenant, who died. The national courts interpreted the relevant legislation so as to exclude homosexual couples from automatically succeeding to a tenancy agreement where the main tenant died. The government argued that differential treatment was justified to protect those in traditional families from losing their accommodation. The ECtHR stressed that, although protecting the traditional family could constitute a legitimate aim, "the margin of appreciation [...] is narrow [...] where there is a difference in treatment based on sex or sexual orientation". The ECtHR continued that "the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act". The ECtHR thus made a finding of discrimination, since the

495 ECtHR, *Taddeucci and McCall v. Italy*, No. 51362/09, 30 June 2016.

496 ECtHR, *Karner v. Austria,* No. 40016/98, 24 July 2003, paras. 34-43.

state could have employed measures to protect the traditional family without placing homosexual couples at such a disadvantage.

Example: In *Schalk and Kopf v. Austria*,[497] the applicants, a same-sex couple, requested from the competent authority permission to get married. Their request was refused, because under domestic law a marriage could only be concluded between persons of the opposite sex. The legislation was subsequently changed, and the mechanism to recognise and give legal effect to same-sex couples was established in the form of a registered partnership. The ECtHR held, for the first time, that a cohabiting same-sex couple living in a stable relationship constituted 'family life', but that their inability to marry did not constitute a violation of Article 14 in conjunction with Article 8 of the ECHR. The Court pointed out that the national authorities were better placed to assess and respond to the needs of the society in the field and to take account of social and cultural connotations. Article 12 of the ECHR did not impose an obligation to establish a right to marry for same sex couples and consequently there was no violation of that provision.

Article 5 of the ECHR protects the right to liberty of persons irrespective of their sexual orientation. Interferences with this right are examined under Article 5.

Example: In *O.M. v. Hungary*,[498] the applicant, an Iranian national, claimed asylum on the basis of his homosexuality. The authorities ordered his detention, in particular because he was unable to prove his identity or right to stay in the country. The ECtHR found that the authorities had failed to carry out an assessment in a sufficiently individualised manner as required by national law. When placing asylum seekers who claimed to be part of a vulnerable group in the country that they had to leave, the authorities should exercise particular care to avoid situations which could reproduce the plight that forced them to flee. The authorities had failed to consider, when ordering the applicant's detention, the extent to which he was safe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. In conclusion, the ECtHR held that there had been a violation of Article 5 (1) of the ECHR.

497 ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010.

498 ECtHR, *O.M. v. Hungary*, No. 9912/15, 5 July 2016.

The ESC also protects sexual orientation among 'other' grounds.

> Example: The case of *Interights v. Croatia*[499] concerns the use of homophobic language in school materials. The ECSR stated that, although states enjoy a wide margin of discretion in determining the content of national school curricula, they have an obligation to ensure through the domestic legal system that state-approved sexual and reproductive health education was objective and non-discriminatory. The Committee found that the educational material used in the ordinary curriculum described and presented people of homosexual orientation in a manifestly biased, discriminatory and demeaning way. It held that the discriminatory statements constituted a violation of the right to health education (Article 11 (2) of the ESC) in light of the non-discrimination clause.

5.4. Disability

Neither the ECHR nor the Employment Equality Directive provide a definition of disability. Because of the nature of the CJEU's role, national courts frequently determine what constitutes a disability and present it as part of the factual background to disputes they refer to the CJEU.

In *Chacón Navas*,[500] the CJEU interpreted the concept of disability under Directive 2000/78/EC in a way close to a medical model of disability. However, as discussed in Chapter 1, the EU became party to the CRPD,[501] which is now a reference point for interpreting EU law relating to discrimination on the grounds of disability.[502] The CJEU stated that "Directive 2000/78 must, as far as possible,

499 ECSR, *International Centre for the Legal Protection of Human Rights (Interights) v. Croatia*, Complaint No. 45/2007, 30 March 2009.

500 CJEU, C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA* [GC], 11 July 2006.

501 For the EU the CRPD entered into force on 22 January 2011.

502 CJEU, C-312/11, *European Commission v. Italian Republic*, 4 July 2013; CJEU, C-363/12, *Z. v. A Government department and The Board of Management of a Community School* [GC], 18 March 2014; CJEU, C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, 22 May 2014; CJEU, C-395/15, *Mohamed Daouidi v. Bootes Plus SL and Others*, 1 December 2016; CJEU, C-406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, 9 March 2017.

be interpreted in a manner consistent with that Convention."[503] Consequently, the CJEU refers to the definition of disability as provided in the CRPD, which reflects the social model of disability. According to Article 1 of the CRPD:

> "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

According to Article 2 (3) of the CRPD, discrimination on the grounds of disability means any distinction, exclusion or restriction on the basis of disability, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2 (4) of the CRPD specifies that:

> "'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

Furthermore, Article 2 (3) explicitly acknowledges that denial of reasonable accommodation is covered by the definition of 'discrimination'. An example of denial of reasonable accommodation can be found in a case concerning refusal of the application for permission to build a hydrotherapy pool that would meet rehabilitation needs of a person with disability.[504] The Committee on the Rights of Persons with Disabilities stressed that a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. It found that a departure from the development plan could accommodate the individual needs of persons with disabilities and ensure them the enjoyment or exercise of all human rights on an equal basis with others and without discrimination.

503 CJEU, Joined cases C-335/11 and C-33711, *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab* and *HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, 11 April 2013.

504 UN, Committee on the Rights of Persons with Disabilities, Communication No. 3/2011, CRPD/C/7/D/3/2011, 21 May 2012.

As the authorities did not address the specific circumstances of applicant's case and her particular disability-related needs, the Committee found a violation of several provisions of the CRPD.

Under both EU and CoE law, it is also recognised that states have obligations to ensure reasonable accommodation to allow persons with disabilities the opportunity to fully realise their rights. Therefore, failure to do so amounts to discrimination.[505]

Example: In *HK Danmark*,[506] two employees were dismissed from their jobs with a shortened notice period because of workplace absences resulting from their health problems. The employers disputed that the claimants' state of health was covered by the notion of 'disability'. They argued that the only incapacity was that the claimants were not able to work full-time. The CJEU stated that "Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that convention." As a consequence, the CJEU held that "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers." This means that disability does not necessarily imply complete exclusion from work or professional life.

Furthermore, the CJEU interpreted Article 5 of the Employment Equality Directive as meaning that employers were required to take appropriate measures, in particular to enable a person with a disability to have access to, participate in, or advance in employment. The CJEU referred to the broad definition of reasonable accommodation as set out in Article 2 of the CRPD. The CJEU noted that pursuant to recital 20 in the preamble to the Employment Equality Directive and the second paragraph of Article 2 on reasonable accommodation, measures are not limited to those that are material, but can also include organisational measures. Consequently, it held that a reduction in working hours may be regarded as a reasonable accommodation measure in a case in which the reduction makes it possible for a worker to continue

505 ECtHR, *Çam v. Turkey*, No. 51500/08, 23 February 2016; ECtHR, *Horváth and Kiss v. Hungary*, 11146/11, 29 January 2013.

506 CJEU, C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab* and *HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, 11 April 2013.

their employment. The CJEU left the matter for the national court to assess whether a reduction in working hours represented in this particular case a disproportionate burden on the employer.

Under EU law, the concept of disability within the meaning of Directive 2000/78 does not cover every medical condition (even a severe one) but only one that prevents the person "from having access to, participating in or advancing **in employment**".[507]

Example: In *C. D.*[508] and *Z.*,[509] the claimant was unable to become pregnant. She used a surrogate mother to have a child. She applied for leave equivalent to maternity or adoption leave. However, her request was refused on the ground that she had neither been pregnant nor adopted a baby. The CJEU noted that her inability to have a child by conventional means did not prevent her from having access to, participating in, or advancing in employment. Consequently, it held that her condition did not constitute a disability within the meaning of the Directive. Thus, EU law does not require that a mother should be granted maternity leave or its equivalent in such a situation.

To establish whether the health problems of a person concerned are included in the scope of the notion of disability, the effects of the medical condition should be taken into consideration. Specifically, it is vital to examine whether or not this particular state of health may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.

Example: In *FOA v. Kommunernes Landsforening*, [510] the CJEU had to determine whether or not disability applied to an obese worker who had been dismissed. The CJEU held that obesity as such is not a disability within the meaning of Directive 2000/78, but in some cases, it can amount to a disability. The CJEU found that obesity can be considered as a disability,

507 CJEU, C-363/12, *Z. v. A Government department and The Board of Management of a Community School* [GC], 18 March 2014, para. 81 (emphasis added).

508 CJEU, C-167/12, *C. D. v. S. T.* [GC], 18 March 2014.

509 CJEU, C-363/12, *Z. v. A Government department and The Board of Management of a Community School* [GC], 18 March 2014.

510 CJEU, C-354/13, *Fag og Arbejde (FOA) v. Kommunernes Landsforening (KL)*, 18 December 2014, see in particular paras. 53-64.

irrespective of its medical classification,[511] when, for example, it results in reduced mobility or medical conditions preventing the person concerned from carrying out work or causing discomfort when carrying out a professional activity.

In *Mohamed Daouidi*,[512] the CJEU considered whether the dismissal of a worker due to temporary incapacity (but of unknown duration) could constitute direct disability discrimination. The Court ruled that the dismissal could, in principle, be considered directly discriminatory on the grounds of disability, provided the incapacity was 'long-term'.[513] Whether it is 'long-term', is a question of fact for national courts to decide based on all available objective evidence. Such evidence may include medical and scientific data, and knowledge relating to that person's condition. It may also include the fact that, at the time of the discriminatory act, the person's prognosis regarding short-term progress is uncertain, or the fact that the person's incapacity is likely to last a significant amount of time before they recover.

Under the ECHR, although not expressly featuring in the list of protected grounds, disability has been included by the ECtHR in its interpretation of 'other' grounds under Article 14.

Example: In *Glor v. Switzerland*,[514] the ECtHR found that the applicant, who was a diabetic, could be considered as a person with a disability, irrespective of the fact that national law classified this as a 'minor' disability. The applicant was obliged to pay a tax to compensate for failing to complete his military service, which was payable by all those who were eligible for military service. To be exempted from this tax one either had to have a disability reaching a level of '40 %' (considered equivalent to the loss of use of one limb), or be a conscientious objector. Conscientious objectors were obliged to perform a 'civil service'. The applicant's disability was such that he was found unfit to serve in the army, but the disability did not reach the severity threshold required in national law to exempt him from the tax. He had offered

511 The CJEU did not follow the approach advanced by the Advocate General who referred to WHO classification of obesity and stated that only Obese Class III can amount to a disability.

512 CJEU, C-395/15, *Mohamed Daouidi v. Bootes Plus SL and Others*, 1 December 2016.

513 Neither the CRPD nor Directive 2000/78 define 'long-term' as regards a physical, mental, intellectual or sensory impairment.

514 ECtHR, *Glor v. Switzerland*, No. 13444/04, 30 April 2009.

to perform the 'civil service' but this was refused. The ECtHR found that the state had treated the applicant comparably with those who had failed to complete their military service without valid justification. This constituted discriminatory treatment since the applicant found himself in a different position (as being rejected for military service but willing and able to perform civil service), and as such the state should have created an exception to the current rules.

Example: In *Guberina v. Croatia*,[515] the applicant requested tax exemption on the purchase of a new property adapted to the needs of his severely disabled child. The authorities did not take into consideration his son's particular needs and found that he did not satisfy the conditions for tax exemption on account of already being in possession of a suitable place to live. The ECtHR stressed that, by ratifying the CPRD, Croatia was obliged to respect such principles as reasonable accommodation, accessibility and non-discrimination against persons with disabilities and that, by ignoring the specific needs of the applicant's family related to his child's disability there had been a violation of Article 1 of Protocol 1 in conjunction with Article 14 of the Convention. In this case, for the first time, the ECtHR recognised that discriminatory treatment of the applicant on account of the disability of his child was "disability-based discrimination covered by Article 14".[516]

As with other protected grounds under the ECHR, it is not uncommon for cases to be dealt with under other substantive rights, rather than under Article 14.

Example: In *Price v. the United Kingdom*,[517] the applicant was sentenced to prison for a period of seven days. She suffered from physical disabilities due to ingestion of thalidomide by her mother during pregnancy, with the result that she had absent or significantly shortened limbs as well as malfunctioning kidneys. Consequently she relied on a wheelchair for mobility, required assistance to go to the toilet and with cleaning, and needed special sleeping arrangements. During her first night in detention she was placed in a cell that was not adapted for persons with physical disabilities and consequently was unable to sleep adequately, experienced substantial pain and suffered hypothermia. On transferral to prison she was placed in the hospital wing

515 ECtHR, *Guberina v. Croatia*, No. 23682/13, 22 March 2016.

516 *Ibid.*, para. 79. It is an example of so called discrimination by association. See Section 2.1.4.

517 ECtHR, *Price v. the United Kingdom*, No. 33394/96, 10 July 2001.

where some adaptation could be made, but she still experienced similar problems. She was also not permitted to charge her electric wheel chair, which lost power. The ECtHR found that the applicant had been subject to degrading treatment, in violation of Article 3. Discrimination based on one of the substantive rights of the ECHR under Article 14 was not raised in this case.

Example: In *Pretty v. the United Kingdom*,[518] the applicant, who suffered from a degenerative disease, wished to obtain an assurance from the government that her husband would not be prosecuted for assisting her to die where her condition had progressed such that she was unable to carry out the act herself. Under national law, assisting with the commission of a suicide constituted a criminal offence of itself, as well as amounting to murder or manslaughter. Among other things, the applicant argued that her right to make decisions about her own body protected in the context of the right to private life (under Article 8) had been violated in a discriminatory manner, since the state had applied a uniform prohibition on assisted suicide, which had a disproportionately negative effect on those who have become incapacitated and are therefore unable to end their lives themselves. The ECtHR found that the refusal to distinguish between those "who are and those who are not physically capable of committing suicide" was justified because introducing exceptions to the law would in practice allow for abuse and undermine the protection of the right to life.

Under the ESC, the wording of Article E of the Revised Social Charter is very similar to that of Article 14 of the ECHR. Similarly, although disability is not explicitly listed as a prohibited ground of discrimination under Article E, it is covered by the reference to 'other status'.[519] Another provision referring to rights for people with disabilities is Article 15 of the ESC (revised), providing, among others, for the right to education.

Example: In *European Action of the Disabled (AEH) v. France*,[520] the claimant organisation complained that, with regard to education, there was discrimination in the case of children with autism. It submitted that, owing to insufficient places and facilities in France, children were obliged to attend

518 ECtHR, *Pretty v. the United Kingdom*, No. 2346/02, 29 April 2002.

519 See for example ECSR, *European Action of the Disabled (AEH) v. France*, Complaint No. 81/2012, 11 September 2013, para. 132; ECSR, *International Association Autism-Europe v. France*, Complaint No. 13/2002, 4 November 2003, para. 51.

520 ECSR, *European Action of the Disabled (AEH) v. France*, Complaint No. 81/2012, 11 September 2013.

specialised facilities in Belgium. The ECSR acknowledged the importance of education as a condition of "independence, social integration and participation in the life of the community".[521] The ECSR held that the French authorities failed to take into account the specific learning needs of children with autism at schools within its own territory. As a result, families who wanted to educate their children with autism in a specialised school had to go abroad. The ECSR found that this constituted direct discrimination against them. Furthermore, the ECSR considered that the limited funds in the state's social budget for the education of children and adolescents with autism indirectly disadvantages these persons with disabilities. This constituted indirect discrimination.

The following example from national jurisdiction illustrates the link between the refusal of certain services and the obligation of the providers toward persons with disabilities.

Example: In a case before the French courts,[522] three unaccompanied applicants with disabilities filed a penal complaint against easyJet because the airline had refused them boarding a plane at a Paris airport. EasyJet explained that they had adopted such a policy towards disabled unaccompanied travellers since their flight personnel were not trained to "manage and assist disabled persons". The Court of Cassation confirmed that easyJet's transportation policy did not allow disabled persons to board a plane without verifying their individual capacity to travel. The Court further stated that Article 4 of the Regulation (EC) No. 1107/2006[523] allows airlines to refuse a person with disabilities to board a plane only in case of safety requirements that are established by national or international law, or a competent authority. However, easyJet did not prove the existence of such a safety requirement. The Court of Cassation pointed out that easyJet had an obligation to train its personnel in line with the EU regulation and French national law. In its ruling, the lower court sanctioned easyJet with an administrative fine for its discriminatory policy against persons with disabilities and the Cassation Court dismissed the company's appeal.

521 *Ibid.,* para. 75.

522 France, Court of Cassation, Criminal Chamber, *Easyjet v. Gianmartini and Others*, No. 13-81586, 15 December 2015.

523 Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

5.5. Age

The protected ground of age relates to differential treatment or enjoyment based on a victim's age. **Under the ECHR**, although age discrimination *per se* does not fall within the ambit of a particular right (unlike religion or sexual orientation), issues of age discrimination may arise in the context of various rights. As such the ECtHR has, as in other areas, adjudicated on cases whose facts suggested age discrimination, without actually analysing the case in those terms – in particular in relation to the treatment of children in the criminal justice system. The ECtHR has found that 'age' is included among 'other status'.[524]

Example: In *Schwizgebel v. Switzerland*,[525] a 47-year-old single mother complained about a refused application to adopt a child. The national authorities based their decision on the age difference between the applicant and the child, and that the adoption would impose a significant financial burden, since the applicant already had one child. The ECtHR found that she was treated differently from younger women applying for adoption based on her age. However, a lack of uniformity among states over acceptable age limits for adoption allowed the state a large margin of appreciation. In addition, the national authority's consideration of the age difference had not been applied arbitrarily, but it was based on consideration of the best interests of the child and the financial burden that a second child might pose for the applicant, which in turn could affect the child's well-being. Accordingly, the ECtHR found that the difference in treatment was justifiable.

Example: In *T. v. the United Kingdom* and *V. v. the United Kingdom*,[526] two boys had been tried and found guilty of a murder committed when they were 10 years old. The applicants complained that they had not been given a fair trial because their age and lack of maturity prevented them from participating effectively in their defence. The ECtHR found that in trying a minor the state should take "full account of his age, level of maturity and intellectual and emotional capacities" and take steps "to promote his ability to understand and participate in the proceedings". The ECtHR found that the state had failed to do this and had accordingly violated Article 6 of the ECHR, without examining the case from the perspective of Article 14.

524 ECtHR, *Schwizgebel v. Switzerland*, No. 25762/07, 10 June 2010.

525 *Ibid.*

526 ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999 and *V. v. the United Kingdom* [GC], No. 24888/94, 16 December 1999.

Example: In *D.G. v. Ireland* and *Bouamar v. Belgium*,[527] pending placement in a suitable institution the national authorities had placed the applicants who were minors in detention. The ECtHR found that in the circumstances this violated the right not to be detained arbitrarily (Article 5 of the ECHR). In both cases, the applicants claimed that the treatment was discriminatory compared with that of adults, since national law did not permit adults to be deprived of their liberty in such circumstances. The ECtHR found that any difference in treatment between minors requiring containment and education and adults with the same requirements would not be discriminatory, because it stems from the protective – not punitive – nature of the procedure applicable to juveniles. Accordingly, there was an objective and reasonable justification for any such difference in the treatment.

Under the ESC, there are also provisions relating to the issue of age discrimination. In particular, Article 23 providing for the right of elderly persons to social protection and Article 1 (2) and Article 24 relating to age discrimination in employment are relevant.

Example: In *Fellesforbundet for Sjøfolk (FFFS) v. Norway*,[528] the ECSR examined a national provision allowing the employers to terminate the employment contract of seafarers upon reaching the age of 62 years. The complainant argued that the contested provision was discriminatory on grounds of age.

The ECSR examined the complaint under Article 24 of the ESC; which provides for the right to protection in cases of termination of employment. It stressed that employment termination solely on grounds of age may amount to a restriction of that right to protection. The ECSR reaffirmed the principle that employment termination on grounds of age is not a justified reason for dismissal, unless such termination is objectively and reasonably based on a legitimate aim and that the means of achieving that aim are appropriate and necessary. The Committee further reiterated that Article 24 of the ESC establishes in an exhaustive manner the valid grounds on which an employer can terminate an employment relationship. Only two types of grounds can be relied on, namely those connected with the capacity or conduct of the

527 ECtHR, *D.G. v. Ireland*, No. 39474/98, 16 May 2002; ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.

528 ECSR, *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No. 74/2011, 2 July 2013.

employee and those based on the operational requirements of the company (economic reasons). Therefore, the dismissal by an employer for reaching a certain age would be contrary to the ESC, given that such a dismissal would not be based on one of the two valid grounds.

The government defended the contested provisions stating that these were based on considerations of employment policy and operational requirements, as well as the goal of ensuring the health and security of those at sea. The ECSR accepted those considerations as legitimate. However, in examining the proportionality, necessity and appropriateness of the measures taken, the ECSR found that the government failed to prove why it considered that health would deteriorate to such an extent that seafarers were not able to continue their work at the age of 62 years. In particular, it was evident that there were other options to ensure the safety and the operational requirements of shipping, for example through regular and sufficiently comprehensive medical examinations of seafarers. In conclusion, the ECSR held that the relevant provisions deprived the persons concerned of protection and constituted a violation of Article 24 of the ESC.

The ECSR also established that the age-limit provision affected the particular professional category of seafarers in a disproportionate way. Such a difference in treatment, therefore, constituted discrimination, contrary to the right to non-discrimination in employment guaranteed under Article 1 (2) of the ESC (the effective right of a worker to earn one's living in an occupation freely entered upon).

Under EU law, Article 21 of the Charter of Fundamental Rights sets a prohibition of discrimination based on different grounds, including age. The CJEU's holding in *Mangold*[529] established non-discrimination in respect of age as a general principle of EU law. Prohibition of discrimination on grounds of age is also included in the Employment Equality Directive (2000/78/EC). The CJEU stressed that the directive does not itself lay down this principle but "it simply gives concrete expression" to the general principle.[530] The source of this principle is to be found "in various international instruments and in the constitutional traditions common to the

529 CJEU, C-144/04, *Werner Mangold v. Rüdiger Helm* [GC], 22 November 2005. The case concerned a dispute between Mr Mangold and his employer relating the application of a German legal norm by the employer, which was allowing a specific form of age discrimination. It took place before the implementation deadline of Directive 2000/78/EC for Germany.

530 CJEU, C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* [GC], 19 April 2016, para. 23.

member states".[531] In *Kücükdeveci*,[532] the CJEU viewed the provisions on age discrimination in the Employment Equality Directive as giving expression to both general principles of equal treatment (embodied in Article 20 of the EU Charter) and of non-discrimination (embodied in Article 21 of the EU Charter).

> Example: In *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*,[533] the dispute related to a national provision that deprived an employee of the right to receive a severance payment when they could claim an old-age pension. As the case involved a dispute between individuals, the directive was not directly applicable and could not be relied upon as such against an individual. However, the CJEU relied on the general principle prohibiting discrimination on the grounds of age and found that the contested national provision constituted discrimination on this ground. Furthermore, it ruled that, if it is impossible to interpret the national provision in a manner that is consistent with EU law, the national court must disapply that provision.[534]

As a ground of discrimination, age has a different character to other non-discrimination grounds. The Employment Equality Directive (2000/78/EC) provides for a wide range of exceptions in terms of age (Article 6). So, if it can be shown that it is objectively justified as appropriate and necessary to achieve a legitimate aim, age-based differential treatment may be permitted under national law. Consequently, differences of treatment based on age may be permitted under certain circumstances.

531 *Ibid.*, para. 22.

532 CJEU, C-555/07, *Seda Kücükdeveci v. Swedex GmbH & Co. KG* [GC], 19 January 2010.

533 CJEU, C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* [GC], 19 April 2016. Compare with CJEU, C-499/08, *Ingeniørforeningen i Danmark v. Region Syddanmark* [GC], 12 October 2010.

534 *Ibid.*, para. 37. Following the CJEU judgment, the Supreme Court of Denmark delivered its judgment on 6 December 2016 (Case No. 15/2014). It found that it was neither possible to interpret the provision of the national law in conformity with EU law nor set aside national law because this would mean acting outside the limits of their competences. Accordingly, the Supreme Court ruled in favour of the employer. It noted that the only possible solution is an act of parliament amending national rules and reassuring compliance with EU law. See Denmark, Supreme Court (2016), 'The relationship between EU law and Danish law in a case concerning a salaried employee' and also a comment on the national judgment by Klinge, S. (2016), 'Dialogue or disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court challenges the Mangold-principle, *EU Law Analysis* (website).

Example: In *J.J. de Lange v. Staatssecretaris van Financiën*,[535] the dispute concerns national provisions which allow persons under the age of 30 years to deduct in full from their taxable income the costs of vocational training. By contrast, the right to that deduction is limited for persons who had already reached that age. The CJEU confirmed that, in this case, the Employment Equality Directive applies because the scheme is intended to improve access to training for young people. The CJEU noted, however, that the contested taxation scheme was not as such a precondition for access to vocational training, but that through its financial consequences it could affect accessibility to such training. The CJEU left it for the referring court to determine whether the contested tax provision was appropriate to improve the position of young people in the labour market. Assessing whether the contested taxation scheme was necessary, the CJEU relied on the government's arguments:

i. persons over the age of 30 were not excessively disadvantaged by that scheme because they still had the right to deduct up to € 15,000 from their training expenses, which was the average yearly cost of training;

ii. persons over the age of 30 had generally had the opportunity to undertake training before reaching that age and to pursue a professional activity, with the result that, being in a better financial position than young people who have recently left the school system, they are able to bear at least in part the financial burden of new training.

In light of these arguments and given broad discretion accorded to EU Member States in the social policy and employment field, the CJEU was not convinced that a Member State adopting a taxation scheme such as that at issue goes beyond what is necessary to attain the objective of promoting the position of young people in the labour market. However, it is for the national court to determine if that is the situation in the present case.

Example: In *Specht and Others v. Land Berlin and Bundesrepublik Deutschland*,[536] the proceedings concern a national provision under which a level of pay for civil servants is determined by reference to age at the time of recruitment. The government argued that the contested provision aims to reward previous professional experience. The CJEU stated that, as

535 CJEU, C-548/15, *J.J. de Lange v. Staatssecretaris van Financiën*, 10 November 2016.

536 CJEU, Joined cases C-501/12 to C-506/12, C-540/12 and C-541/12, *Thomas Specht and Others v. Land Berlin and Bundesrepublik Deutschland*, 19 June 2014. See also CJEU, C-20/13, *Daniel Unland v. Land Berlin*, 9 September 2015.

a general rule, an appropriate measure for achieving this aim might be to take account of the length of an employee's service and connect it to professional experience. In the circumstances of this case, however, a particular step of pay at the time of appointment was not based on previous professional experience but solely on age. The CJEU concluded that this age discrimination is contrary to the Employment Equality Directive.

One of the exceptions foreseen in the Employment Equality Directive relates to age limits for recruitment. Whether in certain cases the age limit imposed by national law fulfils the criteria specified in the directive has to be assessed on a case-by-case basis. Such an assessment needs to take into account all relevant facts and evidence, including the nature of the tasks of the persons concerned.

Example: In *Mario Vital Pérez v. Ayuntamiento de Oviedo*,[537] the CJEU was asked if an age limit of 30 years for the recruitment of a local police officer constitutes prohibited discrimination. The CJEU reaffirmed that "the possession of particular physical capacities is one characteristic relating to age".[538] It also stated that the aim to ensure the operational capacity and proper functioning of the police service constitutes a legitimate objective within the meaning of the directive. However, the CJEU rejected the Member State's arguments that in this case the age limit was necessary to achieve its aim. The eliminatory physical tests would be a sufficient measure with which to assess whether the candidates possess the particular level of physical fitness required for the performance of their professional duties. It also argued that neither the training requirements of the post nor the need to ensure a reasonable period of employment before retirement could justify the age limit.

Example: In contrast, in *Gorka Salaberria Sorondo v. Academia Vasca de Policía y Emergencias*,[539] setting the age limit at 35 years for recruitment as a police officer in the Basque Country was not considered to constitute discriminatory treatment. The CJEU distinguished this case from the *Mario Vital Pérez v. Ayuntamiento de Oviedo* case. It relied on the following facts:

537 CJEU, C-416/13, *Mario Vital Pérez v. Ayuntamiento de Oviedo*, 13 November 2014.

538 *Ibid.*, para. 37.

539 CJEU, C-258/15, *Gorka Salaberria Sorondo v. Academia Vasca de Policía y Emergencias* [GC], 15 November 2016.

i. the duties imposed on officials were physically demanding;

ii. it was considered that a police officer who is over 55 years old was no longer in full possession of the capabilities necessary for the proper performance of his duties;

iii. recruitment of a candidate older than 35 years would not provide sufficient time for that person to be assigned to his or her professional duties for a sufficiently long period.

Furthermore, the CJEU relied on statistical data presented in the proceedings which indicated how the age pyramid was going to develop in the following years. The data revealed that it had been necessary to re-establish a particular age structure to have a sufficient number of agents to whom the most physically demanding tasks could be assigned. This would be possible by gradually replacing older agents through the recruitment of younger staff, better equipped to take on physically demanding tasks.

5.6. Race, ethnicity, colour and membership of a national minority

Under EU law, although the Racial Equality Directive does exclude 'nationality' from the concept of race or ethnicity, the CJEU interpreted the concept of ethnicity according to Article 14 of the ECHR as having "its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds".[540]

Example: In *Feryn*,[541] the CJEU held that statements made public by an employer that he could not employ 'immigrants' constituted direct discrimination in respect of recruitment within the meaning of the Racial Equality Directive.

540 CJEU, C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* [GC], 16 July 2015, para. 46.

541 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008.

Apart from expressly excluding nationality, the Racial Equality Directive (2000/43/EC) does not itself contain a definition of 'racial or ethnic origin'. There are a number of other instruments, which offer guidance as to how racial and ethnic origin should be understood. Neither 'colour' nor membership of a national minority are listed expressly in the Racial Equality Directive, but are listed as separate grounds under the ECHR. These terms appear to be indissociable from the definition of race and/or ethnicity, and so will be considered here.

The EU Council's Framework Decision on combating racism and xenophobia under criminal law defines racism and xenophobia to include violence or hatred directed against groups by reference to 'race, colour, religion, descent or national or ethnic origin'. The CoE European Commission Against Racism and Intolerance (ECRI) has also adopted a broad approach to defining 'racial discrimination', which includes the grounds of 'race, colour, language, religion, nationality or national or ethnic origin'.[542] Similarly, Article 1 of the 1966 UN Convention on the Elimination of Racial Discrimination (to which all the Member States of the European Union and the Council of Europe are party) defines racial discrimination to include the grounds of 'race, colour, descent, or national or ethnic origin'.[543] The Committee on the Elimination of Racial Discrimination, responsible for interpreting and monitoring compliance with the treaty, has further stated that unless justification exists to the contrary, determination as to whether an individual is a member of a particular racial or ethnic group "shall [...] be based upon self-identification by the individual concerned."[544] This prevents the state from excluding from protection any ethnic groups whom it does not recognise.

Although **EU law** does not expressly list language, colour or descent as protected grounds, it does not mean that these characteristics could not be protected as part of race or ethnicity, in so far as language, colour and descent are inherently attached to race and ethnicity. It would also seem that to the extent that factors determining nationality are also relevant to race and ethnicity, the former ground may, in appropriate circumstances, also fall under the latter grounds.

542 ECRI, General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI (2003)8, adopted 13 December 2002, paras. 1 (b) and (c).

543 UN, GA (1966), Convention on the Elimination of All Forms of Racial Discrimination (CERD), UNTS vol. 660, p. 195.

544 UN, Committee on the Elimination of All Forms of Racial Discrimination (1990), *General Recommendation VIII concerning the interpretation and application of Article 1, Paragraphs 1 and 4 of the Convention*, Doc. A/45/18, 22 August 1990.

Example: Discrimination on the basis of ethnic origin is the subject matter of the proceedings in *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia*[545] (discussed in Section 2.2.3). The complainant argued that the placement of electricity meters at an inaccessible height put her in a disadvantageous position compared with other customers whose metres were in accessible locations. The only reason for installing electricity meters at height was – according to her allegations – that most of the inhabitants of the district were of Roma origin. Relying on this consideration, the CJEU found that the Racial Equality Directive (2000/43/EC) applies to the policy of the electricity supplier in this case. It was for the Bulgarian court to decide whether the practice could be objectively justified.

Religion is expressly protected as a separate ground under the Employment Equality Directive (2000/78/EC). However, an alleged victim of religious discrimination may have an interest in associating religion with the ground of race because, as EU law currently stands, protection from race discrimination is broader in scope than protection from religious discrimination: the Racial Equality Directive relates to the area of employment but also to access to goods and services, while the Employment Equality Directive only relates to the area of employment.

Under the ECHR, nationality or 'national origin' are listed as a separate grounds. The case law discussed below shows that nationality can be understood as a constitutive element of ethnicity. In explaining the concepts of race and ethnicity, the ECtHR has held that language, religion, nationality and culture may be indissociable from race. In the *Timishev* case, an applicant of Chechen origin was not permitted to pass through a checkpoint, because the guards were instructed to deny entry to persons of Chechen origin. The ECtHR gave the following explanation:

> "Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds."[546]

545 CJEU, C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* [GC], 16 July 2015.

546 ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 13 December 2005, para. 55.

Example: In *Boacă and Others v. Romania*,[547] the applicants are the heirs of a Roma man, allegedly beaten by the police and discriminated against because of his ethnic origins. The ECtHR found that the national authorities have failed in their obligation to investigate the racist motivation of crimes and found a violation of Article 14 read in conjunction with Article 3 (procedural limb) of the ECHR.[548]

Example: In *Sejdić and Finci v. Bosnia and Herzegovina*,[549] the first case to be decided under Protocol No. 12, the applicants complained that they are unable to stand in elections. As part of a peace settlement to bring an end to the conflict in the 1990s, a power sharing agreement between the three main ethnic groups was reached. This included an arrangement that any candidate standing for election has to declare their affiliation to the Bosniac, Serb or Croat community. The applicants who are of Jewish and Roma origin refused to do so and alleged discrimination on the basis of race and ethnicity. The ECtHR repeated the abovementioned explanation of the relationship between race and ethnicity and added that "[d]iscrimination on account of a person's ethnic origin is a form of racial discrimination". The ECtHR finding of racial discrimination illustrates the interplay between ethnicity and religion. Furthermore, the ECtHR found that despite the delicate terms of the peace agreement this could not justify such discrimination.

The ECtHR has been extremely strict regarding discrimination based on race or ethnicity stating: "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures".[550] Sometimes it may, however, be difficult to identify the relevant discrimination ground because the same facts can be seen from two different perspectives. Dependent on whether ethnic origin is the reason or not for the differential treatment, the conclusion might be different.

547 ECtHR, *Boacă and Others v. Romania*, No. 40355/11, 12 January 2016.

548 Compare also ECtHR, *Škorjanec v. Croatia*, No. 25536/14, 28 March 2017 (discussed in Section 2.6).

549 ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 22 December 2009.

550 *Ibid.*, para. 44. Similarly, ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 13 December 2005, para. 58.

Example: In *Biao v. Denmark*,[551] the applicants, a naturalised Danish citizen of Togolese origin living in Denmark and his Ghanaian wife, complained that their request for family reunification in Denmark was rejected for non-compliance with statutory requirements. According to Danish law, the permit would be granted if they could demonstrate that their aggregate ties to Denmark were stronger than their attachment to any other country, or if they had held Danish citizenship for at least 28 years. The Grand Chamber held that the relevant rule constituted a difference in treatment between Danish citizens of Danish origin and those of non-Danish origin. Referring to the European Convention on Nationality and a certain trend towards a European standard, the ECtHR noted that there were no other states which distinguished between nationals from birth and other nationals, including naturalised persons when it came to the determination of the conditions for granting family reunification. In the ECtHR's view, such a rule "places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish."[552] In conclusion, the ECtHR found a violation of Article 14, read in conjunction with Article 8 of the ECHR.

Under the ESC, references to race, ethnicity, colour and membership of a national minority as protected ground can be also found in the jurisprudence of the ECSR.

Example: In *European Roma Rights Centre (ERRC) v. Ireland*,[553] the ECSR found that special consideration should be given to the needs and different lifestyle of Irish Travellers[554] who are vulnerable minority. In conclusion, it held that Ireland violated Article 16 of the ESC by failing to provide sufficient accommodation to Travellers (such as permanent halting sites, group housing and transient halting sites). The ECSR stressed that failure to provide sufficient accommodation for Travellers may also amount to discrimination if the authorities fail to "take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and

551 ECtHR, *Biao v. Denmark* [GC], 38590/10, 24 May 2016.

552 *Ibid.*, para. 138.

553 ECSR, *European Roma Rights Centre (ERRC) v. Ireland*, Complaint No. 100/2013, 1 December 2015.

554 For the purposes of the various anti-discrimination laws, Irish Travellers are considered an ethnic group. See for example UN, Committee on the Elimination of Racial Discrimination (2005), Concluding Observations on Ireland, CERD/C/IRL/CO/2, 14 April 2005, para. 20.

to all".[555] However, the ECSR found no violation of Article E. It held that although there were still insufficient number of adequate accommodation for Travellers, the authorities showed their efforts to respond to the specific needs of the Travelling community.[556]

Example: In *ERRC v. Portugal*,[557] the European Roma Rights Centre (ERRC) asked the ECSR to hold that the access to social housing, substandard quality of housing, lack of access to basic utilities, residential segregation of Romani communities and other systemic violations of the right to housing amounted to a violation of several rights protected by the revised ESC. The ECSR unanimously held that there was a violation of Article E (non-discrimination), in conjunction with Article 31 (1) (failure to promote housing of an adequate standard), Article 16 (the right of the family to social, legal and economic protection) and Article 30 (the right to protection against poverty and social exclusion).

Under **international law**, the International Convention on the Elimination of All Forms of Racial Discrimination prohibits discrimination based on race, colour, descent, or national or ethnic origin. Other international instruments also prohibit discrimination based on race, colour and national origin.[558]

In international law the term 'racial discrimination' means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[559]

555 *Ibid*., para. 69.

556 See also ECSR, *European Roma and Travellers Forum (ERTF) v. Czech Republic*, Complaint No. 104/2014, 17 May 2016.

557 ECSR, *European Roma Rights Centre (ERRC) v. Portugal*, Complaint No. 61/2010, 30 June 2011. See also ECSR, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, decision on the merits of 26 June 2010.

558 ICCPR, Art. 2, 4 and 26; ICESCR, Art. 2; CRC, Art. 2, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 1 and 7.

559 ICERD, Art. 1, para. 1.

5.7. Nationality or national origin

Key points

- Under the ECHR, discrimination on the basis of national origin features is a protected ground.
- Under EU law, nationality discrimination is prohibited in the context of the free movement of persons.

Discrimination based on nationality and national origin is prohibited by several instruments of **international law**: the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

Article 2 (a) of the **CoE's** Convention on Nationality defines it as "the legal bond between a person and a State". While this treaty has not received widespread ratification, its definition is based on accepted rules of public international law,[560] and has also been endorsed by the European Commission against Racism and Intolerance (ECRI).[561] 'National origin' may be taken to denote a person's former nationality, which they may have lost or added to through naturalisation, or to refer to the attachment to a 'nation' within a state (such as Scotland in the United Kingdom).

Under EU law, discrimination on grounds of nationality is prohibited within the scope of the application of the treaties (Article 18 of the TFEU). As discussed in Section 1.2, EU law prohibits nationality discrimination, in particular in the context of the free movement of persons (Article 45 of the TFEU, Citizenship Directive[562]). According to Article 45 of the EU Charter of Fundamental Rights concerning freedom of movement and of residence, only EU citizens have the right to move and reside freely within the territory of the Member States.

560 ICJ, *Nottebohm Case (Liechtenstein v. Guatemala) (second phase)*, Judgment of 6 April 1955, ICJ Reports 1955, p. 4: "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."

561 ECRI, General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, adopted on 13 December 2002, p. 6.

562 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Example: Mr *Cowan*[563] was a British citizen on holiday in France, who was violently assaulted while leaving the subway station. French law provided for compensation for the harm suffered in such circumstances when the victim is French, holds a residence permit, or is a national of a country that has entered into a reciprocal agreement on the matter with France (which was the case of the United Kingdom). Mr Cowan claimed the French government discriminated against him based on nationality. The CJEU confirmed that persons in a situation governed by EU law should be placed on a completely equal footing with nationals of the Member State. Thus, every EU citizen who exercises the freedom of movement, in particular, recipients of services, is covered by the prohibition of discrimination on the grounds of nationality.

The principle of non-discrimination is not exclusively addressed to EU Member States. Entities not governed by public law also have to observe this principle when, in the exercise of their legal autonomy, they issue rules collectively regulating employment or the provision of services.[564] Working conditions in the different Member States are sometimes governed by provisions laid down by law and sometimes by agreements and other acts concluded or adopted by private persons. This limits the application of the prohibition of discrimination based on nationality to acts of a public authority and therefore risks creating inequality in its application. Consequently, the CJEU held that the prohibition of discrimination on grounds of nationality must be regarded as applying to private persons as well.

According to Article 45 (2), freedom of movement and residence may also be granted to nationals of third countries legally resident in the territory of a Member State.

Example: The *Chen*[565] case concerns a question as to whether a child has a right to reside in one Member State when they were born in a different one, while their mother, on whom they depend, is a third-country national. The CJEU considered that when a Member State imposes requirements to be met, in order to be granted citizenship, and where those were met, it is not open for a different Member State to then challenge that entitlement when they apply for residence.

563 CJEU, Case 186/87, *Ian William Cowan v. Trésor public*, 2 February 1989.

564 CJEU, C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, 6 June 2000.

565 CJEU, C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 19 October 2004.

Example: *Alfredo Rendón Marín v. Administración del Estado*[566] relates to EU citizens and their third-country national parents. The applicant was a man who had the sole care of a minor. He was a national of a third country, while the minor was an EU citizen. National legislation automatically denied a residence permit to the applicant in this situation, on the sole ground that he had a criminal record. The CJEU found that, where that denial has the consequence of requiring a child or children to leave the territory of the EU, there would be a compatibility conflict with EU law. Such a refusal would be consistent with EU law, only if it is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security. Accordingly, the national authorities have to assess all the relevant circumstances of the case, in the light of the principle of proportionality, bearing in mind the child's best interests and the fundamental rights.

Example: In *European Commission v. Hungary*,[567] the CJEU examined the Hungarian provisions that excluded nationals from other Member States from the profession of notary. The CJEU found that notaries as defined in the Hungarian legal system do not exercise public authority. Therefore, the nationality requirement constitutes discrimination on grounds of nationality, prohibited by Article 49 of the TFEU (freedom of establishment).

CJEU case law has progressively aligned the rules applied to EU nationals and third-country nationals legally residing within the EU. In *O. Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*,[568] the CJEU stated that the instruments protecting workers in general should be presumed as also protecting third-country nationals, even in cases where they are not legally authorised to work. In *Servet Kamberaj v. IPES and Others*,[569] the CJEU found that a derogation from the right of equal treatment should be interpreted strictly to safeguard the rights of third-country nationals to social and housing assistance,

566 CJEU, C-165/14, *Alfredo Rendón Marín v. Administración del Estado* [GC], 13 September 2016.

567 CJEU, C-392/15, *European Commission v. Hungary*, 1 February 2017. See also CJEU, C-50/08, *European Commission v. French Republic* [GC], 24 May 2011; CJEU, C-51/08, *European Commission v. Grand Duchy of Luxembourg* [GC], 24 May 2011; CJEU, C-53/08, *European Commission v. Republic of Austria* [GC], 24 May 2011; CJEU, C-54/08, *European Commission v. Federal Republic of Germany* [GC], 24 May 2011.

568 CJEU, C-311/13, *O. Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen,* 5 November 2014.

569 CJEU, C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [GC], 24 April 2012.

so as to ensure a decent existence for all those who lack sufficient resources as protected in Article 34 of the EU Charter on Fundamental Rights.

The principle of equal treatment, enshrined in Article 11 of Directive 2003/109/EC, applies to long-term residents in several fields, for example: education and vocational training, including study grants in accordance with national law; recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures; social security, social assistance and social protection as defined by national law; tax benefits; access to goods and services, and the supply of goods and services made available to the public and to procedures for obtaining housing.

Example: In *European Commission v. the Netherlands*,[570] the CJEU examined whether administrative charges to be paid by non-EU citizens for the issuing of residence permits in the Netherlands were in accordance with Directive 2003/109/EC.[571] It found that the charges applied to third-country nationals were excessive and disproportionate compared to those applied to nationals and therefore were liable to create an obstacle in the exercise of the rights conferred by Directive 2003/109/EC.

Under the ECHR, all member states of the Council of Europe (which includes all EU Member States) must ensure the rights guaranteed by the ECHR to all individuals within their jurisdiction, including third-country nationals. The ECtHR has maintained a balance between the state's right to control what benefits it may offer to those enjoying the legal bond of nationality and the need to prevent states from discriminating against those who have formed substantial factual bonds with the state. The ECtHR has applied great scrutiny in matters relating to social security, if individuals can show a strong factual tie to a state.

While the ECHR provides greater protection than EU law on the ground of nationality, it readily accepts that the absence of a legal bond of nationality often runs together with the absence of factual connections to a particular state. This, in turn, prevents the alleged victim from claiming to be in a comparable position to nationals. The essence of the ECtHR's approach is that the closer the factual

570 CJEU, C-508/10, *European Commission v. Kingdom of the Netherlands*, 26 April 2012.

571 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, pp. 44–53.

bond of an individual to a particular state, particularly in terms of taxation, the less likely it will find that differential treatment based on nationality is justified.

Example: In *Zeïbek v. Greece*,[572] the applicant was refused a pension entitlement intended for those with 'large families'. While she had the requisite number of children, one of her children did not hold Greek nationality at the time the applicant reached pensionable age. This situation had resulted from the government's earlier decisions to remove nationality from the applicant's entire family (which itself was tainted with irregularities) and then reissue nationality only to three of her children (since the fourth was already married). The ECtHR found that a policy of revocation of nationality has been applied in particular to Greek Muslims. The Court also found that the refusal of the pension could not be justified on the basis of preserving the Greek nation since this reasoning itself amounted to discrimination on the grounds of national origin.[573]

Example: In *Dhahbi v. Italy*,[574] the applicant, a Tunisian national, had entered Italy on a lawful residence and work permit. His application for a family allowance was rejected, because, according to relevant legislation, only Italian nationals and third-country nationals in possession of a long-term residence permit were eligible. The applicant alleged that he had been discriminated against on the grounds of his nationality. The ECtHR found that he had been treated less favourably than EU workers. The Court concluded that this difference in treatment, based exclusively on the grounds of nationality, required very weighty reasons to be justified and that the budgetary arguments put forward by Italy did not constitute sufficient justification. Therefore, there was a breach of Article 14 in conjunction with Article 8 of the ECHR.

Example: In *Anakomba Yula v. Belgium*,[575] a Congolese national was unlawfully resident in Belgium, because, shortly after giving birth, her residence permit expired and she began the process of applying for a renewal. She had separated from her Congolese husband, and both she and the natural father of her child, a Belgian national, wished to establish

572 ECtHR, *Zeïbek v. Greece*, No. 46368/06, 9 July 2009.

573 See also ECtHR, *Fawsie v. Greece*, No. 40080/07, 28 October 2010 and *Saidoun v. Greece*, No. 40083/0728, October 2010.

574 ECtHR, *Dhahbi v. Italy*, No. 17120/09, 8 April 2014.

575 ECtHR, *Anakomba Yula v. Belgium*, No. 45413/07, 10 March 2009.

the child's paternity. To do so, the applicant had to bring a claim against her spouse within a year of the birth. The applicant requested legal aid to cover the cost of the procedure, as she had insufficient funds. However, this was refused because such funding was only available to nationals of non-Council of Europe states where the claim related to establishing a right of residence. The applicant was advised to complete the renewal of her residence permit and then apply again. The ECtHR found that in these circumstances the applicant had been deprived of her right to a fair trial, and that this was based on her nationality. The state was not justified in differentiating between those who did or did not possess a residence permit in a situation where serious issues of family life were at stake, where there was a short time limit to establish paternity, and where the individual was in the process of renewing her permit.

The entitlement of states to regulate entry and exit of their borders by non-nationals is well established under public international law and accepted by the ECtHR. In this connection, the ECtHR has primarily intervened in complaints relating to the deportation of individuals where they face inhuman or degrading treatment or punishment or torture in the destination state (under Article 3),[576] or have formed strong family ties in the host state which will be broken if the individual is forced to leave (under Article 8).[577]

Example: In *C. v. Belgium* and *Moustaquim v. Belgium*,[578] the applicants, who were Moroccan nationals, had been convicted of criminal offences and were to be deported. They complained that this amounted to discrimination on the basis of nationality since neither Belgian nationals, nor non-nationals from other EU Member States could be deported in similar circumstances. The ECtHR found that that the applicants were not in a comparable situation to Belgian nationals, since nationals enjoy a right to remain in their home state, which is specifically enshrined in Article 3 of Protocol 4 of the ECHR. Furthermore, the difference in treatment between third-country nationals and nationals of other EU Member States was justifiable because the EU had created a special legal order as well as EU citizenship.

576 See, for example, ECtHR, *Trabelsi v. Belgium*, No. 140/10, 4 September 2014.

577 ECtHR, *Nunez v. Norway*, No. 55597/09, 28 June 2011.

578 ECtHR, *C. v. Belgium*, No. 21794/93, 7 August 1996; ECtHR, *Moustaquim v. Belgium*, No. 12313/86, 18 February 1991.

These cases should be compared to situations where the applicant has developed close factual links to the host state, through a long period of residence or contribution to the state through taxation.

Example: In *Andrejeva v. Latvia*,[579] the applicant used to be a citizen of the former Soviet Union, with the right to permanent residence in Latvia. National legislation classified the applicant as having worked outside Latvia for the period prior to independence (despite having been in the same post within Latvian territory before and after independence) and consequently calculated her pension based on the time spent in the same post after independence. Latvian nationals in the same post, in contrast, were entitled to a pension based on their entire period of service, including work prior to independence. The ECtHR found the applicant to be in a comparable situation to Latvian nationals since she was a 'permanent resident non-citizen' under national law and had contributed taxes on the same basis. It was stated that 'very weighty reasons' would be needed to justify differential treatment based solely on nationality, which it said did not exist in the present case. Although it accepted that the state usually enjoys a wide margin of appreciation in matters of fiscal and social policy, the applicant's situation was factually too close to that of Latvian nationals to justify discrimination on that basis.

Example: In *Ponomaryovi v. Bulgaria,*[580] two Russian teenagers living in Bulgaria were excluded from secondary education because they could not pay the required school fees. The ECtHR noted that a state could have legitimate reasons for restricting the use of resource-hungry public services by short-term and illegal immigrants, who, as a rule, did not contribute to their funding. Additionally, in certain circumstances, states could justifiably differentiate between different categories of aliens residing in its territory. However, unlike some other public services, education is a right that enjoys direct protection under the Convention. Education is a very particular type of public service, which not only directly benefits those using it, but also serves broader social functions. The ECtHR distinguished between education at university level, where higher fees for aliens could be considered fully justified, and primary and secondary education where the states enjoy a narrower margin of appreciation. In regard to the situation of the applicants, the ECtHR stressed that they were not in the same position as individuals

579 ECtHR, *Andrejeva v. Latvia* [GC], No. 55707/00, 18 February 2009.

580 ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 21 June 2011.

arriving unlawfully. They had come to live in Bulgaria as small children, were fully integrated and spoke fluent Bulgarian. In conclusion, the ECtHR found that Bulgaria had discriminated against the applicants on the grounds of their nationality and immigration status and had violated Article 14 in conjunction with Article 2 of Protocol No. 1 of the ECHR.

Example: In *Koua Poirrez v. France*,[581] a national of the Ivory Coast applied for a benefit payable to those with disabilities. It was refused on the basis that it was available only to French nationals or nationals from states with which France had a reciprocal social security agreement. The ECtHR found that the applicant was in fact in a similar situation to French nationals, since he satisfied all the other statutory criteria for receipt of the benefit, and had been in receipt of other social security benefits that were not dependent on nationality. It stated that 'particularly weighty reasons' would be needed to justify a difference in treatment between the applicant and other nationals. In contrast to the cases examined above, where the state was accorded a wide margin of appreciation, in relation to fiscal and social security matters, the ECtHR was not convinced by France's argument of the necessity to balance state income and expenditure, or of the factual difference that no reciprocity agreement existed between France and the Ivory Coast. Interestingly, the benefit in question was payable, irrespective of whether the recipient had made contributions to the national social security regime (which was the principal reason for not tolerating nationality discrimination in the above cases).

Example: In *Rangelov v. Germany*,[582] a Bulgarian national, held in preventive detention, was refused access to a therapeutic programme that a German national in his position would have been able to follow. The authorities based their refusal on the fact that an expulsion order had already been issued in the applicant's case and they were unable to prepare him for a life in Bulgaria as they did not know the living conditions there. The ECtHR found that such discrimination based exclusively on the ground of nationality made the continued detention arbitrary and thus in breach of Article 14 together with Article 5.

581 ECtHR, *Koua Poirrez v. France*, No. 40892/98, 30 September 2003.

582 ECtHR, *Rangelov v. Germany*, No. 5123/07, 22 March 2012.

5.8. Religion or belief

While EU law contains some limited protection against discrimination on the basis of religion or belief, the ECHR's scope is significantly wider than this, since Article 9[583] contains a self-contained right to freedom of conscience, religion and belief.

Example: In *Alujer Fernandez and Caballero García v. Spain*,[584] the applicants – members of the Baptist Evangelical Church – complained that, unlike Catholics, they were unable to allocate a proportion of their income tax directly to their church. The ECtHR found the case inadmissible, concluding that the applicant's church had not been in a comparable position to the Catholic Church, in that they had not made any such request with the government, and because the government had a reciprocal arrangement in place with the Holy See.

Example: In *Cha'are Shalom Ve Tsedek v. France*,[585] the applicant, a Jewish association, considered that the meat slaughtered by an existing Jewish organisation no longer conformed to the strict precepts associated with kosher meat, and sought authorisation from the state to conduct its own ritual slaughters. This was refused on the basis that it was not sufficiently representative within the French Jewish community, and that authorised ritual slaughterers already existed. The ECtHR found that in the circumstances there was no actual disadvantage suffered by the organisation since it was still able to obtain meat slaughtered in the required method from other sources.

Example: In *Vojnity v. Hungary*,[586] the applicant, a member of the Congregation of the Faith, had his access rights to his child withdrawn after the national authorities found that he had abused his rights to influence the child in pursuit of his own religious beliefs. The ECtHR held that the restrictions of the right of the applicant to respect for family life and the right to communicate and promote his religious convictions in his child's upbringing, pursued a legitimate aim, namely, the child's interest. However, it found that the authorities had disregarded the principle of proportionality by introducing a complete withdrawal of his access rights. It concluded that the

583 An explanation as to the scope of Art. 9 ECHR can be found in: CoE (2015), *Guide to Article 9*.

584 ECtHR, *Alujer Fernandez and Caballero García v. Spain* (dec.), No. 53072/99, 14 June 2001.

585 ECtHR, *Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, 27 June 2000.

586 ECtHR, *Vojnity v. Hungary*, No. 29617/07, 12 February 2013.

applicant was discriminated against on the basis of his religious convictions in exercising his right to respect for family life.

Example: In *İzzettin Doğan and Others v. Turkey*,[587] the applicants, followers of the Alevi faith, requested recognition of the services connected with the practice of their faith as a religious public service. The applicants' request was dismissed in accordance with national legislation. The applicants complained that the refusal of their request breached their freedom of religion and that their treatment was less favourable than that of citizens adhering to a majority branch of Islam. The ECtHR found that freedom of religion did not oblige a state to establish a particular legal framework bestowing privileges on religious groups. However, if they did, each religious group should have a fair opportunity, and the criteria for obtaining privileges should be applied in a non-discriminatory manner. Therefore, the ECtHR considered this difference in treatment between members of a religious minority and members of a religious majority to be discriminatory, and concluded that there had been a violation of the prohibition of discrimination and of the right to freedom of religion.

Example: In *Milanović v. Serbia*,[588] the applicant, a leading member of the Hare Krishna religious community in Serbia, was stabbed on several occasions. He reported these attacks to the police and his belief that they may have been committed by members of a far-right extremist group. The police questioned witnesses and several potential suspects but never identified the attackers. The ECtHR found that the state authorities had the additional duty to take all reasonable steps to unmask any religious motives and to establish whether or not religious hatred or prejudice could have played a role in the events, even though the ill-treatment had been inflicted by private individuals. Although it had been obvious in the light of the police reports that the religion of the applicant may have been a reason behind the attacks, the authorities had not conducted an investigation in accordance with the requirements of Article 14 in conjunction with Article 3 of the Convention.

Example: In *O'Donoghue and Others v. the United Kingdom*,[589] the applicant, a Nigerian national seeking asylum in the UK, and his partner, wished to get married in a Roman Catholic Church. As a person subject to immigration control, he was obliged to apply to the Secretary of State for permission

587 ECtHR, *İzzettin Doğan and Others v. Turkey* [GC], No. 62649/10, 26 April 2016.

588 ECtHR, *Milanović v. Serbia*, No. 44614/07, 14 December 2010.

589 ECtHR, *O'Donoghue and Others v. the United Kingdom*, No. 34848/07, 14 December 2010.

in the form of a certificate of approval, for which he had to pay a fee. These formalities were not compulsory in case of persons wishing to get married in the Church of England. The applicant applied for a certificate of approval and requested exemption from the fee on the grounds of his poor financial status, but his application was rejected. The ECtHR found the above scheme discriminatory on the ground of religion for which no objective and reasonable justification had been provided.

What actually constitutes a 'religion' or 'belief' qualifying for protection was subject matter of the following judgment concerning manifestation of religion at work.

Example: In *Eweida and Others v. the United Kingdom*,[590] the applicants, practising Christians, complained that they had suffered religious discrimination at work. The first and second applicants complained that their employers had placed restrictions on their visible wearing of Christian crosses while at work and the third and fourth applicants 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 ECtHR found a violation in respect of the first applicant, a British Airways employee, stressing that her cross was discreet and could not have detracted from her professional appearance. In addition, there was no evidence of any real encroachment on the interests of others. As regards the second applicant, a nurse, the interference was proportionate to the desired aim (protection of the health and safety of nurses and patients). In respect of the third applicant, a registrar of births, marriages and death, who had been disciplined for refusing to conduct a civil partnership, the authorities acted within a wide margin of appreciation given to a state when the right of others not to be discriminated against is at stake. In the case of the fourth applicant, a relationship and psychosexual counsellor in a private national organisation, the ECtHR found that there was reasonable and objective reason to restrict the applicants' freedom of religion in order to uphold other peoples' rights because the employer was pursuing a policy of non-discrimination for service users. Therefore, the state had acted within the limits of its wide margin of appreciation.

590 ECtHR, *Eweida and Others v. the United Kingdom*, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

In a series of cases relating to the substantive right to freedom of religion and belief under the ECHR, the ECtHR has made clear that the state cannot attempt to prescribe what constitutes a religion or belief, and that these notions protect "atheists, agnostics, sceptics and the unconcerned", thus protecting those who choose "to hold or not to hold religious beliefs and to practise or not to practise a religion".[591] These cases also note that religion or belief is essentially personal and subjective, and need not necessarily relate to a faith arranged around institutions.[592] Newer religions, such as Scientology, have also been found to qualify for protection.[593]

The ECtHR has elaborated on the idea of 'belief' in the context of the right to education under Article 2 of Protocol 1 to the ECHR, which provides that the state must respect the right of parents to ensure that their child's education is "in conformity with their own religious and philosophical convictions". The ECtHR stated:

> "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" (in the French text: "convictions") appearing in Article 9 [...] - and denotes views that attain a certain level of cogency, seriousness, cohesion and importance."[594]

One manifest symbol of an individual's religious belief is the wearing of religious clothing. The ECtHR has been faced with cases related to religious freedom in the context of states wishing to maintain secularism. Here it has placed particular weight on the state's stated aim of preventing disorder and protecting the rights and freedoms of others.

591 ECtHR, *S.A.S. v. France* [GC], No. 43835/11, 1 July 2014, para. 124; ECtHR, *İzzettin Doğan and Others v. Turkey* [GC], No. 62649/10, 26 April 2016, para. 103.

592 ECtHR, *The Moscow Branch of the Salvation Army v. Russia*, No. 72881/01, 5 October 2006, paras. 57-58; ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, No. 45701/99, 13 December 2001 para. 114; ECtHR, *Hasan and Chaush v. Bulgaria* [GC], No. 30985/96, 26 October 2000, paras. 62 and 78.

593 ECtHR, *Church of Scientology Moscow v. Russia*, No. 18147/02, 5 April 2007.

594 ECtHR, *Campbell and Cosans v. The United Kingdom*, Nos. 7511/76 and 7743/76, 25 February 1982, para. 36.

Example: In *S.A.S. v. France*,[595] following an amendment to national law, the applicant, a French national and practising Muslim, had been banned from covering her face in public. The ECtHR found that the ban on wearing the integral veil was necessary for 'living together' harmoniously and within the law. The ECtHR stressed that "respect for the minimum set of values of an open democratic society" prevailed over the individual's choice to wear a full-face veil. The ECtHR noted also that, while the ban disproportionately affected Muslim women wishing to wear a full-face veil, there was nothing in the law, which expressly focused on religious clothing; the ban also prevented any item of clothing which covers the face.

Example: In *Ebrahimian v. France*,[596] the applicant's contract of employment as a hospital social worker was not renewed after she had refused to stop wearing the Islamic headscarf. Relying on its previous case law on headscarf bans,[597] the ECtHR found that the right of the applicant to manifest her religion was incompatible with the requirement that a public hospital service remained neutral. The inference to the applicant's right to manifest her religion was justified by the necessity to protect the right of others.

Examples: In a judgment of 27 January 2015, the German Constitutional Court[598] rejected an abstract ban and restricted the possibility of the authorities introducing a headscarf ban in situations in which there is a concrete risk to neutrality or the rights of others.[599] In its Ordinance of 26 August 2016, the French Council of State declared that municipal bylaws forbidding Islamic swimwear on the beach were null and void.[600]

Example: In a case[601] from Austria, the complainant was employed as a notary clerk. When she wore the Islamic headscarf and Abaya her contact with clients was restricted. When she started wearing a full face veil she was dismissed. The Supreme Court found that limiting of the scope of her tasks was not justified. It emphasised that the non-wearing of a headscarf did not constitute a genuine and determining occupational requirement and

595 ECtHR, *S.A.S. v. France* [GC], No. 43835/11, 1 July 2014.

596 ECtHR, *Ebrahimian v. France*, No. 64846/11, 26 November 2015.

597 ECtHR, *Leyla Şahin v. Turkey* [GC], No. 44774/98, 10 November 2005; ECtHR, *Kurtulmuş v. Turkey* (dec.), No. 65500/01, 24 January 2006.

598 Germany, German Constitutional Court, 1 BvR 471/10, 1 BvR 1181/10, 27 January 2015.

599 See also: Belgium, Council of State, No. 228.752, judgement of 14 October 2014.

600 France, Council of State Ordinance, Nos. 402742 and 402777, 26 August 2016.

601 Austria, Supreme Court of Austria, 9 ObA 117/15, 25 May 2016.

confirmed direct discrimination in this regard. The court held however, that the wearing of face veils in the workplace did constitute an obstacle in the performance of work because unimpaired communication and interaction with clients, colleagues and employer was necessary. Therefore, there was a genuine and determining occupational requirement to not wear a face veil.

In 2017, almost 17 years after the adoption of the Employment Equality Directive (2000/78/EC), the CJEU delivered its first judgment on discrimination on grounds of religion.

Example: In *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*,[602] the complainant was dismissed for non-compliance with the internal rule not to wear visible signs of their political, philosophical or religious beliefs at work. The CJEU found that the contested internal rule covered any manifestation of such beliefs without distinction and treated all employees of the undertaking in the same way by requiring them to dress neutrally. Accordingly, such an internal rule did not introduce a difference of treatment that is directly based on religion or belief, for the purposes of the directive. By contrast, it held that such a rule could constitute indirect discrimination if it results in putting at a particular disadvantage persons adhering to a particular religion. However, such treatment could be objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, provided that the means of achieving that aim are appropriate and necessary. CJEU also stressed that a rule restricting religious symbols or attire can only be seen to be appropriate when it is part of a neutrality policy that "is genuinely pursued in a consistent and systematic manner".

Example: In *Asma Bougnaoui and ADDH v. Micropole SA*,[603] following a request from a customer, the complainant was asked not to wear the veil at work. As she did not agree to accept the request, she was dismissed. The CJEU reiterated that a generally applicable ban on all visible symbols of religious, philosophical or political belief would be indirectly discriminatory unless it would be justified. In contrast, if the decision to dismiss was not

602 CJEU, C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* [GC], 14 March 2017.

603 CJEU, C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA* [GC], 14 March 2017.

based on a general ban but was specific to the headscarf, then it would be necessary to answer whether compliance with such a request from a client could be seen as a "genuine and determining occupational requirement" that could justify a directly discriminatory policy. The CJEU explained that the concept of a "genuine and determining occupational requirement" refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. Therefore, it cannot cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.

5.9. Social origin, birth and property

It is possible to view these three grounds as interconnected as they relate to a status imputed to an individual by virtue of an inherited social, economic or biological feature.[604] As such they may also be interrelated with race and ethnicity.

Under EU law, in the following case, the complainants referred to birth as a protected ground.

Example: In *Zoi Chatzi v. Ypourgos Oikonomikon*,[605] the CJEU examined whether granting only one period of parental leave for twins was discriminatory on the basis of birth, contrary to Article 21 of the Charter of Fundamental Rights. The CJEU held that the rights in the Framework Agreement on parental leave were afforded to parents in their capacity as workers to help them reconcile their parental and professional responsibilities. There was no right relating to parental leave granted to the child, neither in the Framework Agreement nor in the EU Charter. Consequently, there was no discrimination based on birth where only one period of parental leave was given for twins. The CJEU further held that the Framework Agreement could not be interpreted as automatically allowing a separate period of parental leave for each child born. It was acknowledged that the Framework Agreement set down only minimum requirements and that adjustments to the rules could be made where EU Member States allowed more

604 The grounds of social origin, birth and property also feature under Art. 2 (2) of the International Covenant on Economic, Social and Cultural Rights, 1966 (to which all the EU Member States are party). See UN, CESCR (2009), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2 July 2009, paras. 24-26 and 35.

605 CJEU, C-149/10, *Zoi Chatzi v. Ypourgos Oikonomikon*, 16 September 2010.

than the minimum three months of required parental leave. However, when adopting measures transposing the Framework Agreement, the EU Member States' legislatures must keep in mind the principle of equal treatment and ensure that parents of twins receive treatment which takes their needs into account.

Under the ECHR, aside from the ground of 'birth', few, if any, cases have been brought before the ECtHR relating to these grounds. In *Mazurek v. France*,[606] the ECtHR found that the difference in treatment, based solely on the fact of being born out of wedlock, could only be justified by particularly 'weighty reasons'.

Example: In *Wolter and Sarfert v. Germany*,[607] the applicants were born out of wedlock. Following the death of their respective fathers, the applicants were recognised as heirs of their fathers' estate. However, in accordance with national legislation, the applicants could only have inherited it if they were born out of wedlock after 1 July 1949 and if their fathers died after 28 May 2009. The national courts held that the legislation could not apply retrospectively, because of the principle of legal certainty. The applicants complained that they were discriminated against as children born outside of marriage when compared to children born within marriage.

The ECtHR found that, although the legal certainty was a weighty factor, it was not sufficient to prevent the applicants from inheriting their fathers' estate and made reasonable the relation between proportionality of the means employed and the aim pursued. Consequently, the ECtHR found a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Example: In the case of *Chassagnou v. France*, [608] the applicants complained that they were not permitted to use their land in accordance with their wishes. A law obliged smaller landowners to transfer public hunting rights over their land, while owners of large land were under no such obligation and could use their land as they wished. The applicants wished to prohibit hunting on their land and use it for the conservation of wildlife. The ECtHR found that difference in treatment between large and small landowners constituted discrimination on the basis of property.[609]

606 ECtHR, *Mazurek v. France*, No. 34406/97, 1 February 2000.

607 ECtHR, *Wolter and Sarfert v. Germany*, Nos. 59752/13 and 66277/13, 23 March 2017. See also *Fabris v. France* [GC], No. 16574/08, 7 February 2013.

608 ECtHR, *Chassagnou and Others. v. France* [GC], No. 25088/94 and others, 29 April 1999.

609 See also ECtHR, *Herrmann v. Germany* [GC], No. 9300/07, 26 June 2012.

Under international law, the grounds of social origin, birth and property also feature under Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights, to which all the EU Member States are party. The Committee on Economic, Social and Cultural Rights, responsible for monitoring and interpreting the treaty has expanded on their meaning in its General Comment 20.[610] According to the Committee, 'social origin', 'birth' and 'property' status are interconnected. Social origin 'refers to a person's inherited social status'. It may relate to the position that they have acquired through birth into a particular social class or community (such as those based on ethnicity, religion, or ideology), or from one's social situation, such as poverty and homelessness. Additionally, the ground of birth may refer to one's status as born out of wedlock, or being adopted. The ground of property may relate to one's status in relation to land (such as being a tenant, owner, or illegal occupant), or in relation to other property.

5.10. Language

Under EU law, the ground of language does not feature, of itself, as a separate protected ground under the non-discrimination directives. Nevertheless, it may be protected under the Racial Equality Directive in so far as it can be linked to race or ethnicity. It has also been protected via the ground of nationality by the CJEU in the context of the law relating to free movement of persons.[611] The CJEU stressed on many occasions that the provisions of the TFEU relating to the freedom of movement for persons are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union; these provisions preclude measures which might place nationals of Member States at a disadvantage if they wish to pursue an economic activity in another Member State.[612]

> Example: In *European Commission v. Belgium*,[613] the CJEU examined linguistic requirements for candidates applying for posts in the local services established in the French-speaking or German-speaking regions.

610 UN, CESCR (2009), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2 July 2009, paras. 24-26 and 35.

611 CJEU, Case 379/87, *Anita Groener v. Minister for Education and the City of Dublin Vocational Educational Committee*, 28 November 1989.

612 CJEU, C-202/11, *Anton Las v. PSA Antwerp NV* [GC], 16 April 2013, para. 19; CJEU, C-461/11, *Ulf Kazimierz Radziejewski v. Kronofogdemyndigheten i Stockholm*, 8 November 2012, para. 29.

613 CJEU, C-317/14, *European Commission v. Kingdom of Belgium*, 5 February 2015.

According to the relevant law, persons, whose diplomas or certificates do not show that they were educated in the language concerned, were obliged to obtain a certificate issued only by one particular Belgian body following an examination conducted by that body. The CJEU found it legitimate to require candidates to have knowledge of the language of the region in which that municipality is located to be able to communicate with the authorities and public. However, making the certificate the only way in which those persons could prove their linguistic knowledge was disproportionate to the aim pursued. The CJEU concluded that Belgium failed to fulfil its obligations under Article 45 of the TFEU and Regulation No. 492/2011.

Under CoE law, the ground of language is mentioned in the Article 14 of the ECHR and Article 1 Protocol No.12. Furthermore, both the Council of Europe Framework Convention for the Protection of National Minorities 1995[614] (ratified by 39 CoE member states), and the European Charter for Regional or Minority Languages 1992[615] (ratified by 24 CoE member states), impose specific duties on states relating to the use of minority languages. However, neither instrument defines the meaning of 'language'. Article 6 (3) of the ECHR explicitly provides, in the context of the criminal process, that everyone enjoys the right to have accusations against them communicated in a language which they understand, as well as the right to an interpreter where they cannot understand or speak the language used in court.

The principle case before the ECtHR involving language relates to the context of education.

Example: In the *Belgium Linguistic case*,[616] a collection of parents complained that national law relating to the provision of education was discriminatory on the basis of language. In view of the French speaking and Dutch speaking communities in Belgium, national law stipulated that state provided or subsidised education would be offered in either French or Dutch, depending on whether the region was considered French or Dutch. Parents of French-speaking children living in the Dutch-speaking region complained that this

614 Council of Europe, Framework Convention for the Protection of National Minorities, CETS No. 157, 1995.

615 Council of Europe, European Charter for Regional or Minority Languages, CETS No. 148, 1995.

616 ECtHR, *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium*, No. 1474/62 and others, 23 July 1968.

prevented, or made it considerably harder, for their children to be educated in French. The ECtHR found that while there was a difference in treatment, this was justified. The decision was based around the consideration that regions were predominantly unilingual. The difference in treatment was therefore justified, since it would not be viable to make teaching available in both languages. Furthermore, families were not prohibited from making use of private education in French in Dutch-speaking regions.

In *Catan and Others v. the Republic of Moldova and Russia*,[617] (discussed in Section 2.4.2) the ECtHR reiterated that there was a right to receive education in a national language.

In a series of cases related to the rules for spelling of names, the ECtHR referred to the wide margin of appreciation that the member states enjoyed, and found that the relevant policy did not violate Article 14. The reasons given were that the policy did not deprive an individual of choice as to how their names should appear[618] nor was there any legal obstacle to choosing a Kurdish forename or surname, provided that they were spelt in accordance with the rules of the Turkish alphabet.[619]

Example: In *Macalin Moxamed Sed Dahir v. Switzerland*,[620] the applicant's request to change her surname on the grounds that the Swiss pronunciation of the name had an offensive meaning in her mother tongue was refused. The ECtHR held that she was not in a comparable situation to that of persons whose names had a ridiculous or humiliating meaning in a more common language such as a national language. Her situation was also not comparable to that of Polish migrants who had been authorised to change their names because they could not be pronounced by Swiss people. In conclusion, the ECtHR found the complaint manifestly ill founded.[621]

617 ECtHR, *Catan and Others v. the Republic of Moldova and Russia* [GC], Nos. 43370/04, 18454/06 and 8252/05, 19 October 2012.

618 ECtHR, *Bulgakov v. Ukraine*, No. 59894/00, 11 September 2007, para. 58.

619 ECtHR, *Kemal Taşkın and Others v. Turkey*, Nos. 30206/04 and others, 2 February 2010.

620 ECtHR, *Macalin Moxamed Sed Dahir v. Switzerland* (dec.), No. 12209/10, 15 September 2015.

621 Compare also CJEU, C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, 12 May 2011, discussed in Section 4.6.

Example: A case from Austria[622] concerned a job advertisement which required applicants to have German as their 'mother tongue'. The court held that a certain degree of language knowledge was necessary for a position as a graphic designer, but the requirement to speak German as a mother tongue constituted indirect discrimination on grounds of ethnic origin.

Example: In a case[623] from the United Kingdom, the instruction to a non-native English speaker not to speak her native language at work was justified. The national courts found that the treatment of the claimant was not connected with her nationality. They accepted that the reason for the instruction given to her was because of the reasonable suspicions (based on her behaviour) that she might be an animal rights activist wanting to infiltrate the company, which was involved in testing products on animals. Therefore, for security reasons, it was important that English-speaking managers could understand their staff in the workplace.

For further elucidation as to how the protected ground of language operates in practice, it is possible to draw on a case decided by the UN Human Rights Committee (HRC), responsible for interpreting and monitoring compliance with the International Covenant on Civil and Political Rights (which all EU Member States have joined).

Example: In *Diergaardt v. Namibia*,[624] the applicants belonged to a minority group of European descent, which had formerly enjoyed political autonomy and now fell within the state of Namibia. The language used by this community was Afrikaans. The applicants complained that during court proceedings they were obliged to use English rather than their mother tongue. They also complained of a state policy to refuse to respond in Afrikaans to any written or oral communications from the applicants, even though they had the ability to do so. The HRC found that there had been no violation of the right to a fair trial, since the applicants could not show that they were negatively affected by the use of English during court proceedings. This would suggest that the right to an interpreter during a trial does not extend to situation where the language is simply not the mother

622 Austria, Regional administrative court in Tirol, LVwG-2013/23/3455-2, 14 January 2014.

623 United Kingdom, Employment Appeal Tribunal, *Kelly v. Covance Laboratories Limited*, UKEAT/0186/15/LA, 20 October 2015.

624 HRC, *Diergaardt and Others v. Namibia*, Communication No. 760/1997, 6 September 2000.

tongue of the alleged victim. Rather it must be the case that the victim is not sufficiently able to understand or communicate in that language. The HRC also found that the state's official policy of refusing to communicate in a language other than the official language (English) constituted a violation of the right to equality before the law on the basis of language. While the state may choose its official language, it must allow officials to respond in other languages where they are able to do so.

5.11. Political or other opinion

Under the ECHR, 'political or other opinion' is expressly listed as a protected ground. However, **under EU law** they do not feature among the grounds protected by the EU non-discrimination directives.

At a general level, in the case of *Handyside v. United Kingdom*, the ECtHR established that the right to freedom of expression will protect not only '"information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the state or any sector of the population'.[625] Political opinion has been given privileged status. The ECtHR has repeatedly emphasised that free elections and freedom of expression, particularly freedom of political debate, constitute "the foundation of any democratic system".[626] Accordingly, the powers of states to put restrictions on political expression or debate on questions of public interest are very limited.[627]

Example: In *Virabyan v. Armenia*,[628] the applicant, a member of one of the main opposition parties, complained under Article 14 in conjunction with Article 3 of the ECHR that he had been subjected to ill treatment in custody on account of his political opinion. The ECtHR found that he had been subjected to a particularly cruel form of ill treatment in violation of Article 3. Examining the complaint under Article 14, the ECtHR noted that "political pluralism, which implies a peaceful co-existence of a diversity of political opinions and movements, is of particular importance for the survival of a democratic society based on the rule of law, and acts of violence committed by agents

625 ECtHR, *Handyside v. the United Kingdom,* No. 5493/72, 7 December 1976.

626 ECtHR, *Oran v. Turkey*, Nos. 28881/07 and 37920/07, 15 April 2014, para. 51.

627 ECtHR, *Kurski v. Poland*, No. 26115/10, 5 July 2016, para. 47.

628 ECtHR, *Virabyan v. Armenia*, No. 40094/05, 2 October 2012.

of the State which are intended to suppress, eliminate or discourage political dissent or to punish those who hold or voice a dissenting political opinion pose a special threat to the ideals and values of such a society."[629] The ECtHR found, however, that the evidence in the case was insufficient to prove that the ill treatment had been motivated by his political opinion. In particular, it stated that the finding that the applicant's arrest had been politically motivated was not sufficient to conclude that the ill treatment had also been inflicted for political motives. The ECtHR stressed that the state had an "additional duty to take all reasonable steps to unmask any political motive and to establish whether or not intolerance towards a dissenting political opinion may have played a role in the events".[630] It found that the authorities had done almost nothing to verify a possible causal link between alleged political motives and the abuse suffered by the applicant. In conclusion, it ruled that the manner in which the authorities had investigated the case constituted a violation of Article 14 of the Convention taken in conjunction with Article 3 in its procedural limb.

Example: In *Redfearn v. the United Kingdom*,[631] the applicant had been dismissed on account of his political affiliation to a far right political party which promoted, among others, the view that only white people should be citizens of the United Kingdom and called for the removal of settled non-white populations from the country. The applicant worked as a bus driver for a private company providing transport services for local authorities. The majority of his passengers were of Asian origin. There had been no complaints about his work or his conduct at work. However, once he had been elected as a local councillor for the right-wing party, he was summarily dismissed on account of his employer's concerns that the applicant might endanger its contract with a local council to transport vulnerable people of various ethnicities. The applicant complained that his dismissal, motivated solely on the grounds of his political involvement, violated his rights under Article 10 and 11 of the Convention.

The ECtHR did not examine whether the dismissal itself was justified. However, a violation of Article 11 was found on the basis that he had been unable to challenge the dismissal. The ECtHR noted that "in the absence of judicial safeguards, a legal system which allows dismissal from employment

629 *Ibid.*, para. 200.

630 *Ibid.*, para. 218.

631 ECtHR, *Redfearn v. the United Kingdom*, No. 47335/06, 6 November 2012.

solely on account of the employee's membership of a political party carries with it the potential for abuse".[632] The ECtHR also emphasised that the applicant's right to challenge his dismissal was still valid, notwithstanding the nature of his political beliefs stating: "Article 11 is applicable not only to persons or associations whose views are favourably received or regarded as inoffensive or as a matter of indifference, but also those whose views offend, shock or disturb".[633]

5.12. 'Other status'

Under the ECHR, the term 'other status' is broadly defined by the ECtHR as "differences based on an identifiable, objective, or personal characteristic, or "status", by which individuals or groups are distinguishable from one another."[634] Moreover, the interpretation of this notion "has not been limited to characteristics which are personal in the sense that they are innate or inherent".[635]

As can be seen from the previously described protected grounds, the ECtHR has developed several grounds under the 'other status' category, many of which coincide with those developed under EU law, such as sexual orientation, age and disability.

In addition to disability, age and sexual orientation, the ECtHR has also recognised that the following characteristics are protected grounds under 'other status': fatherhood;[636] marital status;[637] membership of an organisation;[638] military rank;[639] parenthood of a child born out of wedlock;[640] place of residence;[641] health or any

632 *Ibid.*, para. 55.

633 *Ibid.*, para. 56.

634 ECtHR, *Novruk and Others v. Russia*, Nos. 31039/11 and others, 15 March 2016, para. 90.

635 ECtHR, *Biao v. Denmark* [GC], No. 38590/10, 24 May 2016, para. 89.

636 ECtHR, *Weller v. Hungary*, No. 44399/05, 31 March 2009.

637 ECtHR, *Petrov v. Bulgaria*, No. 15197/02, 22 May 2008.

638 ECtHR, *Danilenkov and Others v. Russia*, No. 67336/01, 30 July 2009 (trade union); ECtHR, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (No. 2)*, No. 26740/02, 31 May 2007 (freemasons).

639 ECtHR, *Engel and Others v. the Netherlands*, Nos. 5100/71 and others, 8 June 1976.

640 ECtHR, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003; ECtHR, *Sahin v. Germany* [GC] No. 30943/96, 8 July 2003.

641 ECtHR, *Carson and Others v. the United Kingdom* [GC], No. 42184/05, 16 March 2010; ECtHR, *Pichkur v. Ukraine*, No. 10441/06, 7 November 2013.

medical condition;[642] former KGB officer status;[643] retirees employed in certain categories of the public sector;[644] detainees pending trial.[645]

Example: In *Varnas v. Lithuania*,[646] the applicant had been refused permission to receive conjugal visits from his wife during his pre-trial detention because, as the relevant authorities stated, "detainees who had not been convicted had no right to conjugal visits". Accordingly, the difference in treatment was based on the fact that the applicant was a detainee pending trial and not a convicted prisoner. The ECtHR found that the authorities had failed to provide any reasonable and objective justification for the difference in treatment and had thus acted in a discriminatory manner. In particular, the security consideration could not serve as a justification. The applicant's wife was neither a witness nor a co-accused in the criminal cases against him, so there was no risk of obstructing the process of collecting evidence. The ECtHR stressed that the authorities had relied on the legal norms, without explaining why those prohibitions had been necessary and justified in his specific situation. The ECtHR also considered that the particularly long period of the applicant's pre-trial detention (two years at the moment when the applicant had first asked for a conjugal visit) had reduced his family life to a degree that could not be justified by the inherent limitations involved in detention.

Under the ESC, the list of the grounds of prohibited discrimination specified in Article E of the ESC (revised) is also not exhaustive.

Example: In *Associazione Nazionale Giudici di Pace v. Italy*,[647] the ECSR examined differences in legal status between different categories of judges (tenured and lay judges). The claimant organisation alleged that persons performing the duties of a Justice of the Peace were discriminated against in matters of social security in comparison with tenured judges and other types

642 ECtHR, *Novruk and Others v. Russia*, No. 31039/11 and others, 15 March 2016.

643 ECtHR, *Sidabras and Others v. Lithuania*, No. 50421/08 and 56213/08, 23 June 2015.

644 ECtHR, *Fábián v. Hungary*, No. 78117/13, 15 December 2015. The case has been referred to the Grand Chamber.

645 ECtHR, *Varnas v. Lithuania*, No. 42615/06, 9 July 2013.

646 *Ibid.*

647 ECSR, *Associazione Nazionale Giudici di Pace v. Italy*, Complaint No. 102/2013, 5 July 2016.

of lay judges. Justices of the Peace, as members of the judiciary, exercised in practice the same duties as tenured judges. Moreover, both categories were treated equally for tax purposes and the same recruitment procedure was applied in regard to both categories. The main difference was that Justices of the Peace were denied the legal status of civil servants and workers, and provisions on remuneration, social security, pension and leave applied only to tenured judges. This resulted in a situation whereby some Justices of the Peace suspended or reduced their professional activity, and thereby were not entitled to social security protection, whereas the others enjoyed social security coverage stemming from other sources (under a pension scheme, an employment contract, or a self-employed professional activity). The ECSR found that the duties assigned to both groups and the tasks performed were similar, and confirmed that Justices of the Peace were in a comparable situation to tenured judged.

The government put forward several arguments to justify the differential treatment. They referred particularly to the selection procedure, the fixed term in office, part-time work, honorary service or remuneration by compensation. The ECSR found that these arguments concerned mere modalities of a work organisation and did not constitute an objective and reasonable justification of the differential treatment. In conclusion, it found a violation of Article E read in conjunction with Article 12 (1) of the Charter in respect of Justices of the Peace who were precluded from social security coverage.

Under EU non-discrimination directives, only discrimination based on the specified ground is prohibited. Consequently, differences in treatment between persons in comparable situations which are not based on one of the protected grounds will not constitute discrimination.[648]

648 CJEU, C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA* [GC], 11 July 2006.

Example: In *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*,[649] the complaint about discrimination concerned national legislation conferring on employees with certain disabilities specific advance protection in the event of dismissal, without conferring such protection on civil servants with the same disabilities. The CJEU stressed a difference of treatment on grounds of disability can only be established if the national legislation uses a criterion that is not inseparably linked to disability. In this case, the difference in treatment was based on the employment relationship itself, and as such did not fall within the general framework laid down by the Employment Equality Directive.

649 CJEU, C-406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol,* 9 March 2017.

6 Procedural issues in non-discrimination law

EU	Issues covered	CoE
Employment Equality Directive (2000/78/EC), Art. 10 Racial Equality Directive (2000/43/EC), Art. 8 Gender Goods and Services Directive (2004/113/EC), Art. 9 Gender Equality Directive (recast) (2006/54/EC), Art. 19 CJEU, C-81/12, *Accept v. Consiliul Național pentru Combaterea Discriminării*, 2013 CJEU, C-415/10, *Meister v. Speech Design Carrier Systems GmbH*, 2012 CJEU, C-104/10, *Kelly v. National University of Ireland*, 2011 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 2008 CJEU, C-381/99, *Brunnhofer v. Bank der österreichischen Postsparkasse AG*, 2001	**Sharing of the burden of proof**	ECHR, Art. 3 (prohibition of torture), Art. 14 (prohibition of discrimination) ECtHR, *Virabyan v. Armenia*, No. 40094/05, 2012 ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 2005
CJEU, C-423/15, *Kratzer v. R+V Allgemeine Versicherung AG*, 2016 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 2008	**Circumstances irrelevant for the finding of discrimination**	ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 2007

EU	Issues covered	CoE
CJEU, C-527/13, *Cachaldora Fernández v. INSS and TGSS* [GC], 2015 CJEU, Joined cases C-4/02 and C-5/02, *Schönheit v. Stadt Frankfurt am Main* and *Becker v. Land Hessen*, 2003 CJEU, C-167/97, *Regina v. Secretary of State for Employment*, 1999	**Role of statistics and other data**	ECtHR, *Di Trizio v. Switzerland*, No. 7186/09, 2016 ECtHR, *Abdu v. Bulgaria*, No. 26827/08, 2014 ECtHR, *Opuz v. Turkey*, No. 33401/02, 2009) ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 2007
Employment Equality Directive, Art. 17 Racial Equality Directive, Art. 15 Framework Decision on racism and xenophobia (2008/913/JHA) CJEU, C-407/14, *Arjona Camacho v. Securitas Seguridad España, SA*, 2015 CJEU, C-81/12, *Accept v. Consiliul Național pentru Combaterea Discriminării*, 2013	**Enforcement of non-discrimination law**	ECHR, Art. 6 (right to fair trial), Art. 8 (right to respect for private and family life), Art. 14 (prohibition of discrimination) ECtHR, *Sidabras and Others v. Lithuania*, No. 50421/08 and 56213/08, 2015 ECtHR, *García Mateos v. Spain*, No. 38285/09, 2013 ECtHR, *Hulea v. Romania*, No. 33411/05, 2012

Key points

- The initial burden rests with the complainant to establish evidence that suggests that discrimination has taken place.
- Statistical evidence may be used to help give rise to a presumption of discrimination.
- The burden then shifts to the alleged defendant who must provide evidence that shows that the less favourable treatment was not based on one of the protected grounds.
- The presumption of discrimination can be rebutted by proving: either that the victim is not in a similar situation to their 'comparator'; or that the difference in treatment is based on some objective factor, unconnected to the protected ground. If the defendant fails to rebut this presumption they may still attempt to justify the differential treatment.

Discrimination does not tend to be manifested in an open and easily identifiable manner. Proving direct discrimination is often difficult even though, by definition, the differential treatment is 'openly' based on a characteristic of the victim. As discussed in Chapter 2, the ground of differential treatment is often either not

expressed or superficially related to another factor (such benefits conditioned on an individual being retired, which are connected to age as a protected ground). In this sense, cases where individuals openly declare their basis for differential treatment as one of the protected grounds are relatively rare. An exception to this case may be found in the *Feryn* case,[650] where the owner of a company in Belgium declared, through advertisements and orally, that no 'immigrants' would be recruited to work for him. The CJEU found that this was a clear case of direct discrimination on the basis of race or ethnicity. However, the defendants will not always declare that they are treating someone less favourably than others, nor indicate their reason for doing so. A woman may be turned down for a job and told that she is simply 'less qualified' than the male candidate who is offered the job. In this situation, the victim may find it difficult to prove that she was directly discriminated against because of her sex.

To address the difficulty of proving that differential treatment has been based on a protected ground, European non-discrimination law allows the burden of proof to be shared. Accordingly, once the claimant can show facts from which it can be presumed that discrimination may have occurred, the burden of proof falls on the defendant to prove otherwise. This shift in the burden of proof is particularly helpful in claims of indirect discrimination where it is necessary to prove that particular rules or practices have a disproportionate impact on a particular group. To raise a presumption of indirect discrimination, a claimant may need to rely on statistical data that proves general patterns of differential treatment. Some national jurisdictions also accept evidence generated through 'situation testing'.

6.1. Shifting the burden of proof

The onus is normally on the person bringing the claim to convince the deciding body of the occurrence of discrimination. However, it can be particularly difficult to show that the differential treatment received was based on a particular protected characteristic. This is because the motive behind differential treatment often exists only in the mind of the defendant. Accordingly, claims of discrimination are most often based on objective inferences related to the rule or practice in question. Put otherwise, the plaintiff must show that the only reasonable explanation for the difference in treatment is the protected characteristic of the victim, such as sex or race. The principle applies equally in cases of direct or indirect discrimination.

650 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008.

Because the alleged defendant is in possession of the information needed to prove a claim, non-discrimination law allows the burden of proof to be shared with the alleged defendant (the shift of the burden of proof). Once the person alleging discrimination established a presumption of discrimination (prima facie discrimination), the burden then shifts to the defendant, which has to show that the difference in treatment is not discriminatory. This can be done either by proving that there was no causal link between the prohibited ground and the differential treatment, or by demonstrating that although the differential treatment is related to the prohibited ground, it has a reasonable and objective justification. If the alleged discriminator is unable to prove either of the two, they will be liable for discrimination.

The principle of the sharing of the burden of proof is well entrenched in the law of the EU[651]and ECHR. The ECSR has also acknowledged that in matters of discrimination, the burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment.[652]

Under EU law, the preamble of the Directive 2006/54/EC[653] emphasises that "[t]he adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts." The obligation to introduce the shifted burden of proof into the domestic non-discrimination regulations of EU Member

Shared burden of proof: the claimant needs to bring sufficient evidence to suggest that discriminatory treatment may have occurred. This will raise a presumption of discrimination, which the alleged defendant then has to rebut.

651 In addition to the cases referred to below, see: Racial Equality Directive, Art. 8; Employment Equality Directive, Art. 10; Gender Equality Directive (recast), Art. 19; Gender Goods and Services Directive, Art. 9.

652 ECSR, *Associazione Nazionale Giudici di Pace v. Italy*, Complaint No. 102/2013, 5 July 2016, para. 73; ECSR, *SUD Travail Affaires Sociales, SUD ANPE and SUD Collectivité Territoriales v. France*, Complaint No. 24/2004, 8 November 2005; ECSR, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Complaint No. 41/2007, 3 June 2008.

653 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

States also appears in the Racial Equality Directive,[654] the Employment Framework Directive[655] and the recast Gender Equality Directive.[656]

Under ECHR law, the sharing of the burden of proof has been explained through ECtHR case law. Along with other regional and global human rights protection mechanisms, ECtHR case law has adopted the sharing of the burden of proof more generally to prove claims of human rights violations. The practice of the ECtHR is to look at the available evidence as a whole, out of consideration of the fact that it is the state that often has control over much of the information needed to prove a claim. Accordingly, if the facts as presented by the claimant appear credible and consistent with the available evidence, the ECtHR will accept them as proved, unless the state is able to offer a convincing alternative explanation. In the ECtHR's words it accepts as facts those assertions that are

> "supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions... [P]roof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the ECHR right at stake."[657]

Example: In *Timishev v. Russia*,[658] the claimant alleged that he was prevented from passing a checkpoint into a particular region because of his Chechen ethnic origin. The ECtHR found this to be corroborated by official documents, which noted the existence of a policy to restrict the movement of ethnic Chechens. The state's explanation was found unconvincing because of

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

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

656 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

657 ECtHR, *Nachova and Others v. Bulgaria* [GC], Nos. 43577/98 and 43579/98, 6 July 2005, para. 147. This is repeated in the case of ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 13 December 2005, para. 39 and ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007, para. 178.

658 ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 13 December 2005, paras. 40-44.

inconsistencies in its assertion that the victim left voluntarily after being refused priority in the queue. Accordingly, the ECtHR accepted that the claimant had been discriminated against based on his ethnicity.

Under EU law, the person who claims to have been discriminated against must initially establish the facts from which it may be presumed that there has been discrimination. The assessment of the facts from which it may be presumed that there has been discrimination is a matter for national judicial bodies, in accordance with national law or practice.

Example: In *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG*,[659] the claimant alleged sex discrimination because she was paid less than a male colleague who was on the same pay grade. The CJEU stated that it was for the claimant to prove firstly, that she was receiving less pay than her male counterpart, and secondly that she was performing work of equal value. This would be sufficient to raise a presumption that the differential treatment could only be explained by reference to her sex. It would then fall to the employer to disprove this.

Example: In *Patrick Kelly v. National University of Ireland (University College, Dublin*),[660] the claimant applied for a vocational programme at University College Dublin (UCD) but his application was turned down. The claimant believed that he was better qualified than a female candidate that had been offered a place. He argued that he had not been granted the training because of sex discrimination and sought disclosure of the other applications to establish the facts. UCD disclosed only redacted versions.

The CJEU held that neither the directive on the burden of proof in sex discrimination cases (97/80/EC) nor the Equal Treatment Directive (76/207/EEC) generally entitled a vocational training applicant to access information about the qualifications of the other applicants based on a suspicion of discrimination, and that any disclosure would be subject to EU rules on the confidentiality of personal data. However, it was for the national court to

659 CJEU, C-381/99, *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG*, 26 June 2001, paras. 51-62.

660 CJEU, C-104/10, *Patrick Kelly v. National University of Ireland (University College, Dublin)*, 21 July 2011.

decide whether the aim of Council Directive 97/80/EC[661] required a disclosure of such facts in individual cases.

Example: In *Galina Meister v. Speech Design Carrier Systems GmbH*,[662] the claimant's applications for a job as a software developer were rejected. Being of the view that she fulfilled the requirements of the post, she claimed that she suffered less favourable treatment than another person in a comparable situation on the grounds of her sex, age and ethnic origin. The CJEU held that, in accordance with EU legislation (the Racial Equality Directive (2000/43/EC), the Employment Equality Directive (2000/78/EC) and the Gender Equality Directive (recast) (2006/54/EC), workers who meet the requirements stated in the vacancy notice but have their job applications rejected are not entitled to be given any reasons whether the position was filled by a different candidate at the end of the recruitment process. However, the refusal to provide such information can be considered as one of the elements presuming discrimination in that recruitment process.

Under the ECHR, the applicant similarly bears the burden of proof for facts from which it may be presumed that there has been discrimination.

Example: In *Virabyan v. Armenia*,[663] the applicant had been arrested on suspicion of carrying a firearm and subjected to ill treatment allegedly on account of his political opinion. In arguing his case, the applicant relied on various reports detailing the political situation in Armenia and the widespread suppression of political opposition carried out by the government. He also submitted that there was no credible evidence supporting the suspicion on which he had been arrested. He had been questioned solely about his participation in demonstrations and his role in encouraging others to participate. The ECtHR found that the applicant's arrest had been politically motivated but concluded that this fact was not sufficient to conclude that the ill treatment itself had also been inflicted for political reasons. In particular, the ECtHR stressed that there was no objective way to verify the applicant's

661 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, repealed by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

662 CJEU, C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH*, 19 April 2012.

663 ECtHR, *Virabyan v. Armenia*, No. 40094/05, 2 October 2012. For detailed description of the case, see Section 5.11.

allegations. There were other possible explanations of the violent behaviour of the police officers: revenge for the injury that the applicant had inflicted on one of them, the confrontation between the applicant and the police officers, or generally for reasons of police brutality. The ECtHR concluded that it could not be established beyond reasonable doubt that political motives had played a role in the applicant's ill treatment. In contrast, the evidence in the case was sufficient for the ECtHR to establish that the authorities had failed to investigate whether or not discrimination may have played a role in the applicant's ill treatment. The government should have proved that it had collected and secured the evidence, explored all practical means of discovering the truth and delivered fully reasoned, impartial and objective decisions, without omitting suspicious facts that might have been indicative of politically induced violence. As the authorities had not examined the numerous inconsistencies and other elements pointing at the possible politically motivated nature of that measure, and no conclusions had been drawn from the available material, the ECtHR could confirm that there had been a violation of Article 14 of the ECHR taken in conjunction with Article 3 in its procedural limb.

It is important to keep two issues in mind. Namely, it is national law that will determine what kind of evidence is admissible before national bodies, and this may be stricter than the rules used by the ECtHR or CJEU. Furthermore, the rule on the shift of the burden of proof will not normally apply in cases of criminal law where the state is prosecuting the defendant for a hate crime. This is partly because a higher standard of proof is needed to establish criminal liability, and partly because it would be difficult to require a defendant to prove that they did not hold a racist motive, which is entirely subjective.[664]

Where an applicant alleging direct discrimination established a presumption of discrimination, the alleged defendant can rebut the presumption in two ways. They may either prove that the claimant is not actually in a similar or comparable situation to their 'comparator', as discussed in Section 2.2.3, or that the differential treatment is not based on the protected ground, but other objective differences, as discussed in Section 3.2. If the defendant fails to rebut the presumption, they will have to raise justification for differential treatment, showing that it is an

664 For the approach of the ECHR to the reversal of the burden of proof in the context of racist violence see ECtHR, *Nachova and Others v. Bulgaria* [GC], Nos. 43577/98 and 43579/98, 6 July 2005, paras. 144-159. EU discrimination legislation does not require the reversal of the burden of proof to be applied in the context of criminal law.

objectively justified and proportionate measure. **Under the ECHR**, the objective justification test is available, whereas **under EU law** difference in treatment can be justified only in certain cases.[665]

Under the ECHR, where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent state, which must show that the difference in treatment is not discriminatory.[666] **Under EU law**, in the case of indirect discrimination, the defendant has to prove that the adopted measure, law or practice is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives pursued.[667]

Example: In *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG*,[668] the CJEU offered guidance on how the employer might rebut the presumption of discrimination. Namely, by showing that the male and female employees were not actually in a comparable situation because they performed work which was not of equal value. This might be the case if their jobs involved duties of a substantially different nature. Moreover, by showing that objective factors, unrelated to sex, explained the difference in pay. This might be the case if the male employee's income was being supplemented by travel allowances owed by virtue of him having to commute over a long distance and stay in a hotel during the working week.

Example: In *Feryn*,[669] the CJEU found that the advertisements and statements made by the defendant gave rise to a presumption of direct discrimination. However, the CJEU also said that the alleged defendant could rebut this presumption if he could prove that recruitment practices did not actually treat non-whites differently – for instance, by showing that non-white staff were in fact routinely recruited.

665 See Sections 3.1 and 3.2.

666 ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007, para. 189.

667 CJEU, C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* [GC], 16 July 2015, para. 128.

668 CJEU, C-381/99, *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG*, 26 June 2001.

669 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008.

Example: In *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*,[670] Accept, an NGO promoting and protecting LGBT rights in Romania, complained that homophobic public statements had been made by a patron of a professional football club. In particular, it referred to his statement given in an interview that he would never hire a homosexual player. The CJEU observed that, although the patron did not have a legally binding capacity in recruitment matters, he publicly claimed to play an important role in the management of the football club. In this situation, the patron's statements could have given rise to a liability for that club. For this reason, the burden of proof that it did not have a discriminatory recruitment policy could have been shifted onto the football club. However, The CJEU stressed that in this context it was not necessary to prove that persons with a specific sexual orientation had been recruited in the past, because it could have interfered with the right to privacy of the persons concerned. It would have been sufficient for the club to have distanced itself from the discriminatory public statements and proved the existence of express provisions in its recruitment policy aimed at ensuring compliance with the principle of equal treatment.

Similarly**,** the principle of sharing of the burden of proof applies **in international law**. An example can be found in jurisprudence of the Committee on the Elimination of Racial Discrimination.[671] A Slovakian national of Roma origin filed an application for the position of a teaching assistant. Her candidacy was refused and a person less qualified and less experienced than the petitioner was hired. The Committee on the Elimination of Racial Discrimination found a violation of the State Party's obligation to guarantee equality in respect of the right to work without distinction as to race, colour, national or ethnic origin. This was because the state had not satisfactorily replied to the petitioner's allegations and did not provide persuasive arguments to justify the differential treatment of the petitioner when disregarding her job application. The Committee considered that the courts' insistence that the petitioner prove discriminatory intent was inconsistent with the Convention's prohibition of conduct having a discriminatory effect, and also with the procedure of shifted burden of proof introduced by the State Party. Since the State Party has adopted such a procedure, its failure to apply it properly amounts to a violation of the petitioner' s right to an effective

670 CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013.

671 UN, CERD (2015), *Communication No. 56/2014*, CERD/C/88/D/56/2014, 4 December 2015.

remedy, including appropriate satisfaction and reparation for the damage suffered.

The Committee on Economic, Social and Cultural Rights pointed out that "where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively."[672]

The CERD also recommends to State Parties to "[r]egulate the burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a non-citizen has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment".[673]

6.2. Circumstances irrelevant for the finding of discrimination

Certain issues of fact that often accompany examples of discrimination, such as the existence of prejudice, or an intention to discriminate, are not actually of relevance to determining whether the legal test for discrimination has been satisfied. What must be proved in a case of discrimination is simply the existence of differential treatment based on a prohibited ground, which is not justified. This means that several ancillary facts surrounding situations of discrimination do not need establishing to prove a claim.

There is no need to prove that the defendant is motivated by prejudice. Thus, there is no need to prove the defendant has 'racist' or 'sexist' views to prove race or sex discrimination. General law cannot regulate individuals' attitudes since they are entirely internal. Rather, it can only regulate actions through which such attitudes may manifest themselves.

672 UN, Committee on Economic, Social and Cultural Rights (2009), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2 July 2009.

673 UN, CERD (2005), *General Recommendation No. 30 on discrimination against non-citizens*, para. 24.

Example: In *Feryn* case,[674] the owner of the company said that he applied this rule because his customers (rather than he himself) only wanted white Belgians to perform the work. The CJEU did not treat this as relevant to deciding if discrimination had occurred. Usually, it is not necessary to prove a discriminatory motive unless there is an attempt to prove the commission of a 'hate crime', since criminal law has higher thresholds of evidence.

Furthermore, it is not necessary to show that the rule or practice in question is intended to result in differential treatment. That is to say, even if a public authority or private individual can point to a well-intentioned or good faith practice, if the effect of that practice is to disadvantage a particular group, this will amount to discrimination.

Example: In *D.H. and Others v. the Czech Republic*,[675] the government argued that the system of 'special' schools was established to assist in the education of Roma children by overcoming language difficulties and redressing the lack of pre-school education. However, the ECtHR found that it was irrelevant whether the policy in question was aimed at Roma children. To prove discrimination, it was necessary to show that they were disproportionately and negatively affected by comparison to the majority population, not that there existed any intention to discriminate.[676]

Moreover, in relation to a case on race discrimination and sexual orientation, the CJEU found that there was no need to prove that there is actually an identifiable victim,[677] and presumably this has equal application for other grounds of discrimination in similar circumstances. While under EU law there may be no requirement for an identifiable victim, this is not the case for accessing the ECtHR, where such a claim would not meet the criteria for admissibility under Article 34 of the ECHR.

674 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008.

675 ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007, para. 79.

676 *Ibid*, paras. 175 and 184.

677 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008; CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013.

Example: In *Feryn*,[678] it was not possible to show that someone had tried to apply for a job and been turned down, and it was not possible to find someone who said that they had decided not to apply for the job on the basis of the advert. In other words, there was no 'identifiable' victim, and the case was brought by Belgium's equality body. The CJEU said that it was not necessary to identify someone who had been discriminated against. This was because it was clear from the wording of the advert that 'non-whites' would be deterred from applying because they knew in advance that they could not be successful. According to this, it would be possible to prove that legislation or policies were discriminatory, without needing to show an actual victim.

Example: In cases of 'situation testing', individuals often take part in the knowledge or expectation that they will be treated less favourably. Their main aim is not to actually access the service in question, but to collect evidence. This means that these individuals are not 'victims' in the traditional sense. They are concerned with ensuring enforcement of the law rather than seeking compensation for harm suffered. In a case brought in Sweden, where a group of law students conducted situation testing at nightclubs and restaurants, the Supreme Court found that those involved in testing were still able to bring proceedings for discriminatory treatment. At the same time the damages they were awarded could be reduced to reflect the fact that they had not been denied something that they actually wanted (i.e. entry to particular establishments).[679] However, it seems that the CJEU adopted a different approach to 'situation testing'.

Example: The case of *Nils-Johannes Kratzer v. R+V Allgemeine Versicherung AG*[680] concerns a lawyer who had applied for a job solely to bring a discrimination complaint rather than with a view to obtaining that position. The CJEU ruled that such a person could not rely on the protection offered by the Employment Equality Directive (2000/78/EC) and the Gender Equality Directive (recast) (2006/54/EC) because such a situation does not fall within the definition of 'access to employment, to self-employment or to occupation'. The CJEU also found that such an application could be considered as an abuse of rights.

678 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008.

679 Sweden, Supreme Court, *Escape Bar and Restaurant v. Ombudsman against Ethnic Discrimination* T-2224-07, 1 October 2008. For an English summary, see European Network of Legal Experts on the Non-Discrimination Field (2009), 'Sweden', *European Anti-Discrimination Law Review*, No. 8, July 2009, p. 68.

680 CJEU, C-423/15, *Nils-Johannes Kratzer v. R+V Allgemeine Versicherung AG*, 28 July 2016.

6.3. Role of statistics and other data

Statistical data can play an important role in helping a claimant give rise to a presumption of discrimination. It is particularly useful in proving indirect discrimination, because in these situations, the rules or practices in question are neutral on the surface. Where this is case, it is necessary to focus on the effects of the rules or practices to show that they are disproportionately unfavourable to specific groups of persons by comparison to others in a similar situation. The production of statistical data works together with the shift of the burden of proof: where data shows, for example, that women or disabled persons are particularly disadvantaged, it will be for the state to give a convincing alternative explanation of the figures. The **ECtHR** spelt this out in the case of *Hoogendijk v. the Netherlands*:

> "[T]he Court considers that where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex."[681]

When considering statistical evidence, the courts do not appear to have laid down any strict threshold requirement that needs to be evidenced in establishing that indirect discrimination has taken place. The **CJEU** does emphasise that a substantial figure needs to be achieved. A summary of CJEU case law is presented in the Opinion of Léger AG in the *Nolte* case, where he stated in relation to sex discrimination:

> "[I]n order to be presumed discriminatory, the measure must affect "a far greater number of women than men" [*Rinner-Kühn*[682]] or "a considerably lower percentage of men than women" [*Nimz*,[683] *Kowalska*[684]] or "far more women than men" [*De Weerd*[685]].

681 ECtHR, *Hoogendijk v. the Netherlands* (dec.), No. 58641/00, 6 January 2005.

682 CJEU, C-171/88, *Ingrid Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG*, 13 July 1989.

683 CJEU, C-184/89, *Helga Nimz v. Freie und Hansestadt Hamburg*, 7 February 1991.

684 CJEU, C-33/89, *Maria Kowalska v. Freie und Hansestadt Hamburg*, 27 June 1990.

685 CJEU, C-343/92, *M. A. De Weerd, née Roks, and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others*, 24 February 1994.

> Cases suggest that the proportion of women affected by the measure must be particularly marked. In *Rinner-Kühn*, the Court inferred the existence of a discriminatory situation where the percentage of women was 89 %. In this instance, *per se* the figure of 60 % [...] would therefore probably be quite insufficient to infer the existence of discrimination."[686]

Accordingly, when assessing statistics, national courts have to determine if they cover enough individuals to exclude fortuity and short-term developments.[687]

Example: A case[688] from Denmark concerns dismissals made in a government agency due to the need to reduce the workforce. All of the dismissed employees were above 50 years of age. The two complainants claimed that they had been discriminated against because of their age. The Supreme Court stated that statistical information could establish an assumption for discrimination because of age. However, the court found that a number of employees in the government agency who were older than the claimants had not been dismissed during the process of reducing the workforce. On this basis, the court concluded that, in this case, the statistical data regarding the age of the dismissed employees, as well as information about the age composition in the government agency, did not establish any facts which amounted to possible discrimination.

Example: In *Hilde Schönheit v. Stadt Frankfurt am Main* and *Silvia Becker v. Land Hessen,*[689] a part-time employee alleged that she was discriminated against on the basis of her sex. The difference in payable pensions, which was not based on differences in the time worked, meant that part-time employees were, effectively, paid less than full-time employees. Statistical evidence was brought to show that 87.9 % of part-time employees were women. As the measure, although neutral, negatively affected women disproportionately to men, the CJEU accepted that it gave rise to a presumption of indirect discrimination on the basis of sex. Similarly, a disadvantage to part-time

686 Opinion of Advocate General Léger of 31 May 1995, paras. 57-58 in CJEU, C-317/93, *Inge Nolte v. Landesversicherungsanstalt Hannover,* 14 December 1995.

687 CJEU, C-127/92, *Dr. Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*, 27 October 1993.

688 Denmark, Supreme Court, Case 28/2015, 14 December 2015, see the English summary in: *European Equality Law Review* (2016), vol. 1, p. 84.

689 CJEU, Joined cases C-4/02 and C-5/02, *Hilde Schönheit v. Stadt Frankfurt am Main* and *Silvia Becker v. Land Hessen*, 23 October 2003.

workers, where 87 % of these were women was accepted as sufficient in the *Gerster* case.[690]

Example: In *Lourdes Cachaldora Fernández v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*,[691] the claimant had paid contributions to the Spanish social security scheme for almost forty years. During that period, she had mostly been engaged in full-time employment, except between 1998 and 2005, when she had first been employed part-time and had then been unemployed. In 2010, she had applied for invalidity pension. According to the relevant law, invalidity pension was calculated on the basis of a period of eight years prior to the occurrence of the event giving rise to the invalidity. Workers who had engaged in part-time work during a period immediately preceding a period of unemployment were granted a reduced invalidity pension. The reduction came about as a result of applying the part-time work coefficient. Consequently, through this method of calculation, the claimant's invalidity pension had been significantly reduced. The referring court had asked whether the relevant national provision could have been considered as discriminatory towards workers who had engaged in part-time work during a period immediately prior to an interruption of their contributions to the Spanish social security scheme. It had referred to the fact that, given that there are far more female part-time workers in Spain than male part-time workers, women would be particularly affected by this provision. The CJEU noted, however, that these provisions were not applicable to all part-time workers. They applied only to a limited group of workers, including the claimant, who, after a period of part-time employment had a gap in their contributions during the reference period of eight years. Consequently, global statistical data concerning part-time workers taken as a whole were not relevant when establishing whether or not women are more affected by the provisions of Spanish law than men.

Example: The *Seymour-Smith* case[692] concerns UK law relating to unfair dismissal, which gave special protection to those who had been working for longer than two years continuously with the particular employer. The complainant alleged that this amounted to indirect discrimination based on sex, since women were less likely than men to satisfy this criterion. This case

690 CJEU, C-1/95, *Hellen Gerster v. Freistaat Bayern*, 2 October 1997.

691 CJEU, C-527/13, *Lourdes Cachaldora Fernández v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [GC], 14 April 2015.

692 CJEU, C-167/97, *Regina v. Secretary of State for Employment, ex parte Seymour-Smith and Perez*, 9 February 1999.

is interesting because the CJEU suggested that a lower level of disproportion could still prove indirect discrimination "if it revealed a persistent and relatively constant disparity over a long period between men and women". However, on the particular facts of this case, the CJEU indicated that the statistics that were presented, which indicated that 77.4 % of men and 68.9 % of women fulfilled the criterion, did not prove that a considerably smaller percentage of women could comply with the rule.

A similar approach can be found in the jurisprudence of the **ECtHR**.

Example: In *Di Trizio v. Switzerland*,[693] the applicant, who had been working full-time, was obliged to stop working due to back pain. She was granted a disability allowance which was discontinued after she gave birth. The competent authorities based the decision regarding her entitlement to the allowance on the 'combined' method. They had assumed that, even without her disability, she would not have been employed full-time after the birth of her children. The ECtHR noted that the applicant would probably have received partial disability allowance if she had worked full time or had devoted her time entirely to her household. Furthermore, it relied on statistics proving that 97 % of persons affected by the combined method were women who wished to reduce their working hours after birth of a child. Consequently, the statistics provided sufficient reliable information to establish a presumption of indirect discrimination.

Example: The case of *D.H. and Others v. the Czech Republic*[694] involved complaints by Roma applicants that their children were excluded from the mainstream education system and placed in 'special' schools intended for those with learning difficulties, on the basis of their Roma ethnicity. The allocation of Roma children to 'special' schools was based on the use of tests designed to test intellectual capacity. Despite this apparently 'neutral' practice, the nature of the tests made it inherently more difficult for Roma children to achieve a satisfactory result and enter the mainstream education system. The ECtHR found this to be proved by reference to statistical evidence showing the particularly high proportion of pupils of Roma origin placed in 'special' schools. The data submitted by the applicants relating to their particular geographical region suggested that 50 to 56 % of special school

693 ECtHR, *Di Trizio v. Switzerland*, No. 7186/09, 2 February 2016.

694 ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007.

pupils were Roma, while they only represented around 2 % of the total population in education. Data taken from inter-governmental sources suggested between 50 to 90 % of Roma attended special schools in the country as a whole. The ECtHR found that while the data was not exact it did reveal that the number of Roma children affected as 'disproportionately high' relative to their composition of the population as a whole.[695]

Example: In *Abdu v. Bulgaria,*[696] the applicant and his friend, both Sudanese nationals, had been involved in a fight with two Bulgarian youths. According to the applicant, they had been attacked by the two young men who had verbally insulted them with racist remarks. The proceedings against the attackers were discontinued on the basis that it was not possible to ascertain who had initiated the fight and their motives. The authorities had not questioned the witnesses and had not interrogated the alleged attackers about the possible racist motive of their actions. The ECtHR found that the authorities had been in possession of evidence of a possible racist motive, and they had failed to conduct an effective investigation into it. In its judgment, the ECtHR referred to national and international reports on racist violence in Bulgaria, which revealed that the Bulgarian authorities generally did not investigate the racist nature of those cases.

It seems that it may be possible to prove that a protected group is disproportionately affected even where no statistical data is available, but the available sources are reliable and support this analysis.

Example: The case of *Opuz v. Turkey* involved an individual with a history of domestic violence who had brutalised his wife and her mother on several occasions, eventually murdering the mother.[697] The ECtHR found that the state had failed to protect the applicant and her mother from inhuman and degrading treatment, as well as the latter's life. It also found that the state had discriminated against the applicants because the failure to offer adequate protection was based on the fact that they were women. It came to this conclusion in part based on evidence that victims of domestic violence were predominantly women, and figures illustrating the relatively limited use the national courts had made of powers to grant orders designed to

695 *Ibid*. paras. 18 and 196-201.

696 ECtHR, *Abdu v. Bulgaria*, No. 26827/08, 11 March 2014.

697 ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009.

protect victims of violence in the home. Interestingly in this case, there were no statistics presented to the ECtHR showing that victims of domestic violence were predominantly women, and indeed it was noted that Amnesty International stated that there were no reliable data to this effect. Rather, the ECtHR was prepared to accept the assessment of Amnesty International, a reputable national NGO and the UN's Committee on the Elimination of Discrimination Against Women that violence against women was a significant problem in Turkey.

Note that statistical data may not always be necessary to prove cases of indirect discrimination. Whether statistics are necessary to prove a claim will depend on the facts of the case. In particular, proof as to the practices or beliefs of others belonging to the same protected category may be enough.

Example: In *Oršuš and Others v. Croatia,*[698] certain schools had established classes which dealt with reduced curricula as compared to normal classes. It was alleged that these classes contained a disproportionately high number of Roma students and therefore amounted to indirect discrimination on the basis of ethnicity. The government contended that these classes were constituted on the basis of competence in Croatian, and that once a student reached adequate language proficiency, they were transferred to the mainstream classes. The ECtHR found that unlike the *D.H.* case, the statistics alone did not give rise to a presumption of discrimination. In one school 44 % of pupils were Roma and 73 % attended a Roma-only class. In another school 10 % were Roma and 36 % of them attended a Roma only class. This confirmed that there was no general policy to automatically place Roma in separate classes. However, the ECtHR went on to state that it was possible to establish a claim of indirect discrimination without relying on statistical data. Here, the fact that the measure of placing children in separate classes on the basis of their insufficient command of Croatian was only applied to Roma students. Accordingly, this gave rise to a presumption of differential treatment.

It is also important to note that data and statistics can only be compared when they are available. In this context, **under EU law**, the Commission published

698 ECtHR, *Oršuš and Others v. Croatia* [GC], No. 15766/03, 16 March 2010, paras. 152-153.

a recommendation[699] in March 2014, focusing on pay transparency. The recommendation aims to propose measures for the Member States to facilitate wage transparency in companies, such as improving the conditions for employees to obtain information on pay or the establishment of pay reporting and gender neutral job classification systems from companies, among others.

Also according to the **ECSR**, States Parties must promote positive measures to narrow the pay gap, including measures to improve the quality and coverage of wage statistics.[700]

6.4. Enforcement of non-discrimination law

Key points

- Anti-discrimination law can be enforced by initiating civil, administrative or criminal proceedings against the alleged discriminator.
- Applicable sanctions must be effective, proportionate and dissuasive; however, Member States are free to choose between different adequate measures.

Anti-discrimination laws can be enforced through civil, administrative or criminal proceedings. In civil proceedings the victim of discrimination can obtain reparation whereas the aim of criminal proceedings is the criminal punishment of discriminators.

Under EU law, the non-discrimination directives require the Member States to establish judicial and/or administrative procedures allowing individuals to enforce their rights under the directives.[701] Moreover, it is provided that the sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.[702] The CJEU stressed on several occasions the need of effective sanctions, which is an important tool to deter and sanction cases of discrimination. The severity of sanctions must be commensurate to the

699 European Commission Recommendation 2014/124/EU of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, OJ L 69, 8.3.2014.

700 ECSR, Conclusions XVII-2 (2005), Czech Republic.

701 Employment Equality Directive, Art. 9 (1); Gender Equality Directive (recast), Art. 17 (1); Gender Goods and Services Directive, Art. 8 (1); Racial Equality Directive, Art. 7 (1).

702 Employment Equality Directive, Art. 17; Racial Equality Directive, Art. 15.

gravity of the breaches. However, the directive does not prescribe a specific sanction; it leaves the Member States free to choose between the different solutions suitable for achieving its objective.[703] Nevertheless, if a Member State chooses to penalise discrimination the award of compensation, it must be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation to ensure that it is effective and that it has a deterrent effect.

The applicable sanctions must be effective, proportionate and dissuasive, even in cases when there is no identifiable victim.[704] This means that the EU approach to remedies goes beyond traditional, individual-rights-based legal approach.

In some cases, it is considered that the adequate legal protection against discrimination requires criminal measures.

Example: In *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*[705] (discussed in Sections 4.1, 5.3 and 6.1), concerning discriminatory comments made by a patron of a football club, the CJEU held that that a purely symbolic sanction cannot be regarded as compatible with the requirement of effective, proportionate and dissuasive sanctions. It was however for the national court to establish whether in the circumstances of the case, the written warning fulfilled the criteria. The CJEU also stressed that each remedy available under national provisions in cases of discrimination should individually fulfil the criteria of effectiveness, proportionality and dissuasiveness.

Example: In *María Auxiliadora Arjona Camacho v. Securitas Seguridad España, SA*,[706] the national proceedings concern the award of punitive damages to Ms Arjona Camacho following her dismissal constituting discrimination on grounds of sex. The CJEU held that the compensation has to cover in full the loss and damage sustained. However, damages which go beyond full

703 CJEU, Case 14/83, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, 9 April 1984.

704 CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013, para. 36; CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008, paras. 23-25.

705 CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013.

706 CJEU, C-407/14, *María Auxiliadora Arjona Camacho v. Securitas Seguridad España, SA*, 17 December 2015.

compensation for the loss and damage are allowed but not required under the Equal Treatment Directive.

Under the ECHR, States are required to enable applicants to obtain adequate and sufficient enforcement of domestic court decisions. Accordingly, failure to enforce a judgment may amount to a violation of the ECHR.

Example: In *García Mateos v. Spain*,[707] the applicant's request for a reduction in her working time to look after her son was refused. The Spanish Constitutional Court confirmed that the applicant was discriminated against on grounds of sex and remitted the case to the Employment Tribunal, which again dismissed the applicant's case. Subsequently, the Constitutional Court found that its previous judgment had not been properly enforced, and declared null and void the second judgment delivered by the Employment Tribunal. It decided, however, that there was no need to remit the case to the lower court as in the meantime the applicant's son had reached the age of six and the new judgment would be pointless. Moreover, it noted that an award of compensation was not provided for in relevant national legislation. The ECtHR stressed that in spite of two judgments in the applicant's favour, the domestic court had not provided redress and found a violation of Article 6 (1) in conjunction with Article 14 of the Convention.

Example: In *Hulea v. Romania*,[708] the applicant was refused parental leave. The Constitutional Court held that the legislative provision in question infringed the principles of non-discrimination on grounds of sex but refused to grant him compensation. The ECtHR found that there had been a violation of Article 14 in conjunction with Article 8 of the ECHR, as the courts had not advanced sufficient reasons for its decision not to award compensation.

Similarly, failure to enforce a judgment delivered by the ECtHR finding a violation of the ECHR may amount to a new violation of Convention.

707 ECtHR, *García Mateos v. Spain*, No. 38285/09, 19 February 2013.

708 ECtHR, *Hulea v. Romania*, No. 33411/05, 2 October 2012.

Example: In *Sidabras and Others v. Lithuania*,[709] the three applicants complained about Lithuania's failure to repeal legislation banning former KGB employees from working in certain spheres of the private sector, despite previous ECtHR judgments in their favour.[710] In respect of the third applicant, the ECtHR noted that the domestic courts had acknowledged that his dismissal had been contrary to the Convention and explicitly stated that while the KGB Act remained in force, the question of reinstating him might not be favourably resolved. In light of that statement and lack of reasoning, the state had not convincingly demonstrated that the domestic courts' reference to the KGB Act had not been the decisive factor forming the legal basis on which the third applicant's claim for reinstatement had been rejected. As such, there had been a violation of Article 14 in conjunction with Article 8. In contrast, the ECtHR found that the first and second applicants had not plausibly demonstrated that they were discriminated against after the ECtHR's judgments in their previous case. The first applicant was unemployed for justified reasons, specifically because he lacked the necessary qualifications, whereas the second applicant never attempted to obtain other private sector jobs.

Furthermore, in the context of the right to life and freedom from torture, inhuman or degrading treatment or punishment, Articles 2 and 3 of the ECHR also create a duty of the state to effectively investigate allegations of ill treatment, which includes also allegations that the ill treatment was itself discriminatory, being motivated for example by racism.[711] This is discussed in Section 2.6 on hate crime.

709 ECtHR, *Sidabras and Others v. Lithuania*, Nos. 50421/08 and 56213/08, 23 June 2015.

710 ECtHR *Sidabras and Džiautas v. Lithuania*, Nos. 55480/00 and 59330/00, 27 July 2004 and ECtHR, *Rainys and Gasparavičius v. Lithuania*, Nos. 70665/01 and 74345/01, 7 April 2005.

711 ECtHR, *Turan Cakir v. Belgium*, No. 44256/06, 10 March 2009.

Case law

Selected case law of the European Court of Human Rights and the Court of Justice of the European Union

Equality and non-discrimination

ECtHR

Khamtokhu and Aksenchik v. Russia [GC], Nos. 60367/08 and 961/11, 2017 (imposition of life imprisonment)

Pichkur v. Ukraine, No. 10441/06, 2013 (payment of pension dependent from place of residence)

Savez crkava "Riječ života" and Others v. Croatia, No. 7798/08, 2010 (religious community denied certain rights)

CJEU

Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres [GC], C-236/09, 2011 (circumstances differences in the insurance premiums and benefits between men and women)

Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others [GC], C-571/10, 2012 (refusal of housing benefits to third-country nationals)

Direct discrimination

ECtHR

Burden v. the United Kingdom [GC], No. 13378/05, 2008 (denial to grant inheritance tax exemption to cohabiting siblings)

Guberina v. Croatia, No. 23682/13, 2016 (discriminatory treatment on account of the disability of applicant's child)

ECSR

Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 91/2013, 2015 (discrimination of medical practitioners who did not raise conscious objection to provide abortion services)

CJEU

Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment, C-256/01, 2004 (different working condition resulting from employment in an external company)

Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, C-267/12, 2013 (exclusion of same-sex partners in civil unions from benefits restricted to married employees)

P v. S and Cornwall County Council, C-13/94, 1996 (dismissal following gender reassignment)

S. Coleman v. Attridge Law and Steve Law [GC], C-303/06, 2008 (unfavourable treatment of an employee - mother of disabled child)

Sarah Margaret Richards v. Secretary of State for Work and Pensions, C-423/04, 2006 (age of entitlement to retirement pension in a case of a trans woman)

Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen [GC], C-267/06, 2008 (exclusion of partners civil partnership from survivors pension)

Wolfgang Glatzel v. Freistaat Bayern, C-356/12, 2014 (different conditions for different categories of driving licence)

Indirect discrimination

ECtHR

D.H. and Others v. the Czech Republic [GC], No. 57325/00, 2007 (placement of Roma children in special schools)

ECSR

European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, 2013 (limited state funds for the education of children and adolescents with autism)

CJEU

"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia [GC], C-83/14, 2015 (placement of electricity meters in Roma-populated district)

Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social, Tesorería General de la Seguridad Social, C-385/11, 2012 (restricted right of a part-time worker to pension)

Johann Odar v. Baxter Deutschland GmbH, C-152/11, 2012 (flexible redundancy compensation paid to disabled workers under social plan)

Multiple and intersectional discrimination

ECtHR

B.S. v. Spain, No. 47159/08, 2012 (failure to comply with duty to carry out a thorough investigation of allegations of police ill-treatment)

Carvalho Pinto de Sousa Morais v. Portugal [GC], No. 17484/15, 2017 (discriminatory decision to reduce compensation awarded to a 50-year-old woman for a medical error)

S.A.S. v. France [GC], No. 43835/11, 2014 (ban on wearing face covering)

CJEU

David L. Parris v. Trinity College Dublin and Others, C-443/15, 2016 (payment of a survivor's benefit to the same-sex civil partner)

Harassment and instruction to discriminate

ECtHR

Catan and Others v. the Republic of Moldova and Russia [GC], Nos. 43370/04, 18454/06 and 8252/05, 2012 (harassment of pupils)

Đorđević v. Croatia, No. 41526/10, 2012 (harassment of a disabled man and his mother)

CJEU

Carina Skareby v. European Commission, F-42/10, 2012 (psychological harassment psychological harassment by a hierarchical superior)

CQ v. European Parliament, F-12/13, 2014 (psychological harassment)

Q v. Commission of the European Communities, F-52/05, 2008 (psychological harassment)

S. Coleman v. Attridge Law and Steve Law [GC], C-303/06, 2008 (unfavourable treatment of an employee – mother of a child with disabilities)

Specific measures

ECtHR

Çam v. Turkey, No. 51500/08, 2016 (refusal of a music school to enrol a student on the grounds of her visual disability)

Horváth and Kiss v. Hungary, No. 11146/11, 29 January 2013 (placement of Roma children in special schools)

ECSR

The Central Association of Carers in Finland v. Finland, Complaint No. 71/2011, 2012 (pricing system of long-term care providing services for elderly persons in Finland)

CJEU

Eckhard Kalanke v. Freie Hansestadt Bremen, C-450/93, 1995 (priority to female candidates for posts or promotions)

Hellmut Marschall v. Land Nordrhein-Westfalen, C-409/95, 1997 (priority to female candidates for posts or promotions)

Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist, C-407/98, 2000 (priority to female candidates for posts or promotions)

Maurice Leone and Blandine Leone v. Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales, C-173/13, 2014 (early retirement for female civil servants)

Hate crime / Hate speech

ECtHR

Delfi AS v. Estonia [GC], No. 64569/09, 2015 (liability of online news portal for offensive comments made by anonymous third parties)

Halime Kiliç v. Turkey, No. 63034/11, 2016 (domestic violence)

Identoba and Others v. Georgia, No. 73235/12, 2015 (homophobic attacks on participants of an LGBT assembly)

M'Bala M'Bala v. France (dec.), No. 25239/13, 2015 (expression of hatred and anti-Semitism)

Perinçek v. Switzerland [GC], No. 27510/08, 2015 (denial of genocide of the Armenian people by the Ottoman Empire)

Škorjanec v. Croatia, No. 25536/14, 2017 (racially motivated violence)

Virabyan v. Armenia, No. 40094/05, 2012 (ill treatment on account of political opinion)

Justification for less favourable treatment

CJEU

Abercrombie & Fitch Italia Srl v. Antonino Bordonaro, C-143/16, 2017 (automatic dismissal at age 25)

Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA [GC], C-188/15, 2017 (wearing of an Islamic headscarf at work)

Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84, 1986 (refusal to a female police officer to renew her contract and to grant her training in firearms)

Mario Vital Pérez v. Ayuntamiento de Oviedo, C-416/13, 2014 (age limit of 30 for recruitment of local police officers)

Silke-Karin Mahlburg v. Land Mecklenburg-Vorpommern, C-207/98, 2000 (restrictions on the working conditions of pregnant women)

Tanja Kreil v. Bundesrepublik Deutschland, C-285/98, 2000 (limitation of access by women to military posts involving the use of arms)

Ute Kleinsteuber v. Mars GmbH, C-354/16, 2017 (calculation of early retirement pension for part-time worker)

Employment

ECtHR

Danilenkov and Others v. Russia, No. 67336/01, 2009 (harassment in the workplace due to trade union)

I.B. v. Greece, No. 552/10, 2013 (dismissal of a HIV-positive employee)

CJEU

Asociația Accept v. Consiliul Național pentru Combaterea Discriminării, C-81/12, 2013 (homophobic remarks made by financial patron of a football club)

C., C-122/15, 2016 (supplementary tax on income from a retirement pension)

Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, C-267/12, 2013 (exclusion of partners entering into a same-sex civil union from special benefits which was restricted only to employees on occasion of their marriage)

J.J. de Lange v. Staatssecretaris van Financiën, C-548/15, 2016 (tax treatment of vocational training costs)

Jennifer Meyers v. Adjudication Officer, C-116/94, 1995 (method of calculation of the eligibility of single parents for family credit)

Julia Schnorbus v. Land Hessen, C-79/99, 2000 (priority for a training post to male candidates who had completed their military service)

Jürgen Römer v. Freie und Hansestadt Hamburg, C-147/08, 2011 (supplementary retirement pensions available only for married couples)

Nadežda Riežniece v. Zemkopības ministrija and Lauku atbalsta dienests, C-7/12, 2013 (dismissal after taking parental leave)

Welfare and social security

ECtHR

Andrle v. the Czech Republic, No. 6268/08, 2011 (different retirement age for men and women)

Bah v. the United Kingdom, No. 56328/07, 2011 (refusal of accommodation assistance due to immigration status)

Gouri v. France (dec.), No. 41069/11, 2017 (disability benefit dependent on place of residence)

Stummer v. Austria [GC], No. 37452/02, 2011 (work performed in prison)

CJEU

Anita Cristini v. Société nationale des chemins de fer français, Case 32/75, 1975 (refusal to grant travel passes for large families because of foreign nationality)

Elodie Giersch and Others v. État du Grand-Duché de Luxembourg, C-20/12, 2013 (financial aid for higher education studies granted dependent from place of residence)

Vestische Arbeit Jobcenter Kreis Recklinghausen v. Jovanna García-Nieto and Others, C-299/14, 2016 (refusal to grant subsistence benefits during first three months of residency in Germany)

X., C-318/13, 2014 (different level of disability allowance granted to men and women)

Education

ECtHR

Çam v. Turkey, No. 51500/08, 2016 (refusal of a music school to enrol a student on the grounds of her visual disability)

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Note on citation

The above case law provides the reader with comprehensive information that will enable them to find the full judgment of the case concerned. This may be deemed useful should the reader want to delve deeper into the reasoning and analysis applied before the respective court in reaching the decision concerned.

Much of the cases referred to in this publication are either cases decided before the CJEU or the ECtHR; so, they constitute the focus of the remainder of the discussion. Similar techniques can, nonetheless, be used when using national case-law databases.

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A great deal of information on the European Union Agency for Fundamental Rights is available on the internet. It can be accessed through the FRA website at fra.europa.eu.

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COUR EUROPÉENNE DES DROITS DE L'HOMME

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European non-discrimination law, as constituted in particular by the EU non-discrimination directives, and Article 14 of and Protocol 12 to the European Convention on Human Rights, prohibits discrimination across a range of contexts and grounds. This handbook examines European non-discrimination law stemming from these two sources as complementary systems, drawing on them interchangeably to the extent that they overlap, while highlighting differences where these exist. It also contains references to other Council of Europe instruments, in particular the European Social Charter, as well as to relevant United Nations instruments. With the impressive body of case law by the European Court of Human Rights and the Court of Justice of the European Union in the non-discrimination field, it seems useful to present, in an accessible way, a handbook intended for legal practitioners – such as judges, prosecutors and lawyers, as well as law-enforcement officers – in the EU and Council of Europe member states and beyond.

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