Equality Law in Practice

Comparative analysis of discrimination cases in Europe

An Equinet Report

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Equinet brings together 38 organizations from 31 European countries which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

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AGAINST DISCRIMINATION

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Preface

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

One aspect of the Group's work is using real-life cases to analyse how the EU Equal Treatment Directives and relevant national legislation are applied in practice. This method permits a comparison of the different national legal solutions to the cases which in turn achieves a number of objectives: identifying patterns in the way in which Directives have been implemented and applied in national laws; identifying potential gaps in protection or provisions in the EU Directives requiring further clarification; and identifying potential and existing legislative gaps in national legal systems.

The first case analysed in this report concerns a claim of associative sex discrimination on grounds of the pregnancy of the claimant's partner and it offered an opportunity for the working group to compile valuable information on the relevant national laws to an Equinet Member representing the claimant in the case currently awaiting a preliminary ruling at the Court of Justice of the European Union.

The second case concerns a claim of discriminatory dismissal of older workers and can be also seen as the working group's contribution to the 2012 European Year for Active Ageing and Solidarity between Generations.

The third and fourth cases concern discrimination on the ground of nationality or citizenship, providing an analysis of the limits of legal protection awarded to third-country nationals by the EU as well as national legislation. This analysis is also expected to bear relevance in the context of the report on the application of the Race Equality Directive currently being prepared by the European Commission.

The summary of the findings for each case contains a number of conclusions and lessons learned (highlighted in bold) which we hope will be of practical value for National Equality Bodies, national governments, the European institutions and other stakeholders in their work on European anti-discrimination law. An appendix with all replies received from working group members to questions regarding the cases will also be made available on the current report's webpage in the *Equinet Publications* section of the Equinet website (www.equineteurope.org).

It is to be noted that the conclusions are based solely on the work of staff members of sixteen National Equality Bodies. As a result the conclusions may not represent the definitive position either in an individual Member State or on the effect of the Directives. In addition, the conclusions do not necessarily represent the official position or opinion of the National Equality Bodies either that have been involved in preparing this report or the other National Equality Bodies that are members of Equinet.

On behalf of all Equinet members, we would like to thank all of those who devoted their time, energy and expertise and contributed to this report.

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1. Case study on pregnancy discrimination

The case

Mr Kulikauskas alleged that he and his partner were both dismissed from their jobs in a shellfish processing factory when their employer saw him helping his partner by lifting heavy weights for her and upon establishing that she was pregnant.

Mr Kulikauskas brought proceedings in the Employment Tribunal alleging (among other things) that his dismissal constituted an act of sex discrimination. The Tribunal refused to accept Mr Kulikauskas's claim for sex discrimination as it considered it had no power to determine it under the domestic sex discrimination provisions. The domestic provisions set out in s1 Sex Discrimination Act 1978 defined direct discrimination as follows:

- *'a person discriminates against a woman if on the ground of her sex he treats her less favourably than he treats or would treat a man'.*
- *'a person discriminates against a woman if at the time in a protected period, and on the ground of the woman's pregnancy, the person treats her less favourably....'*

Mr Kulikauskas appealed it to the Employment Appeal Tribunal and was again unsuccessful. He appealed that decision to the Court of Session which referred two questions to the European Court of Justice:

1. With reference to the Recast Directive (2006/54/EC) is it unlawful discrimination to treat a person (A) less favourably on the grounds of a woman's (B) pregnancy.
2. With reference to the Recast Directive (2006/54/EC) is it unlawful discrimination to treat a person (A) less favourably on the grounds of the pregnancy of a woman (B) who is (i) his partner or (ii) otherwise associated with him?

The Equality and Human Rights Commission (EHRC) argued that:

1. Article 2(1) (a) of the Recast Directive is intended to prohibit direct discrimination “on grounds of sex”. This prohibition ought to make it unlawful for A to be treated less favourably on grounds of B’s sex.

On the basis of the assumed facts - that the Claimant’s partner was pregnant and that the Claimant was treated less favourably as a result by being dismissed from his job - the Respondents’ treatment of the Claimant constituted direct discrimination “on grounds of sex”.

Hence the conduct of which the Claimant complains would (if proven) constitute a breach of Article 2(1) (a) of the Recast Directive.

In appropriate circumstances it will be unlawful discrimination to treat a man less favourably on grounds of a woman’s pregnancy. (This will be without prejudice to the special treatment afforded to women in connection with pregnancy or maternity.)

Therefore, in EHRC's view, the answer to both questions was yes in light of the above reasons.

The EHRC's detailed submissions:

1. To give full effect to the principle of equal treatment and other values fundamental to the Community, the Recast Directive should be construed as prohibiting discrimination by association "on grounds of sex" in appropriate circumstances.
2. The Court of Justice has already established in Coleman v. Attridge Law that discrimination by association is prohibited in the context of disability.
3. The decision in Coleman serves to prohibit discrimination by association in the context of less favourable treatment on grounds of religion or belief, age, or sexual orientation as it was based on the Framework Directive (2000/78/EC).
4. In order to preserve the coherence of Union law on equal treatment, the Race Directive and Recast Directive should also be interpreted so as to offer similar protection from discrimination by association in appropriate circumstances.
5. The material language of the Recast Directive is substantively the same as that of the Framework Directive and Race Directive. It ought not to be construed inconsistently.
6. The natural meaning of the words "on grounds of sex" supports the Claimant's case.
7. Less favourable treatment of a man on grounds of the pregnancy of his partner is a form of less favourable treatment "on grounds of sex".
8. The fact that the Recast Directive gives special protection to women does not exclude protection from discrimination by association in appropriate circumstances.

Outcome

The case was settled before it was heard by the CJEU.

However, given that important and interesting legal questions were thus left yet unanswered by the CJEU, below we will attempt to give an overview of the state of play in some EU Member States.

Questions

1. Would this case fall within the scope of any anti-discrimination legislation in your country and if so, which legislation?
2. What is the impact of EU legislation and case law on Member States' domestic legislation relating to discrimination by association?
3. Are there any court cases or cases of your equality body dealing with discrimination by association or pregnancy association discrimination?

Legislation

Recast Directive (2006/54/EC)

The definition of direct discrimination under the Recast Directive in Article 2(1) (a) is as follows:

> *"... Where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation".*

Relevant case-law of the Court of Justice of the European Union (CJEU)

The leading case of the Court of Justice is (Case C-303/06) *Coleman v. Attridge Law*[1]. There, the claimant alleged that she had been discriminated against by reason of the disability of her child. The Court of Justice held that an interpretation of Council Directive of 27 November 2000 (2000/78/EC) which limited its application only to people who were themselves disabled was liable to deprive the Framework Directive of an important element of its effectiveness, and to reduce the protection which it was intended to guarantee. Hence the Court of Justice held that discrimination by association was prohibited in the context of disability.

National legislation

Section 1 Sex Discrimination Act 1978 referred to above (which was in force at the time of the case) has been replaced by s13 Equality Act 2010 and now defines direct discrimination more broadly:

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

Although discrimination by association is not explicitly referred to in the legislation the explanatory notes state:

> *This definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief).*

The explanatory notes do not have the force of law but it is generally accepted that discrimination by association is prohibited following the Coleman judgement and this is reflected in the Equality and Human Rights Commission's statutory Codes of Practice on the legislation.

Summary of the issues and findings

The case relates to discrimination by way of association with a pregnant woman and raises several key issues:

[1] [2008] 3 CMLR 27

- There is a broad understanding among the National Equality Bodies of the responding Member States that discrimination by way of association with someone with a protected characteristic is prohibited by the Equality Directives because of the Coleman decision.
- However, express protection is only provided in four Member States.
- There is relatively little case law on this issue, despite the fact that it represents a very significant expansion of protection against discrimination.
- There is some inconsistency of protection in domestic legislation: with some making express provisions, but most not; and one providing express protection to the parents of disabled children only and two providing protection on alternative grounds of paternity/pregnancy in the employment sphere only.
- A minority of National Equality Bodies state that it is unclear whether or not discrimination by way of association is covered by domestic legislation.
- It appears that protection by way of association requires the development of case law to clarify/confirm the scope of this protection and also to highlight that protection is provided.

Information regarding associative discrimination in the context of sex and pregnancy has been compiled from 24 EU member states with the help of the working group. This information was sent to the UK's Equality and Human Rights Commission in 2012 to form part of its Observations to the CJEU in the case of Kulikauskas v UK. Information in the **Appendix on Countries**[2] marked with "*****" is sourced from various country reports of the European Network of Legal Experts in the Non-Discrimination Field available at: http://www.non-discrimination.net/countries/

1. Would this case fall within the scope of any anti-discrimination legislation in your country and if so, which legislation?

In 20 out of 24 countries, the National Equality Bodies / country reports indicate that their domestic legislation would cover discrimination by way of association with protected characteristics. Also, that the express or implied prohibition on sex discrimination by association would cover the situation where a man is treated less favourably because his partner is pregnant.

Express protection against discrimination by association on all grounds was provided in 4 countries (Austria, Bulgaria, Croatia, and Ireland) and for parents of disabled children in France. Croatia and Austria noted that the nature of the association required to fall within these provisions was not defined. However, the preparatory works of the Austrian legislation gave some guidance as to the nature of relationships covered. The Croatian National Equality Body noted that there had been no case law on the scope of these provisions at the time of their report.

In 15 countries the National Equality Bodies reported that even though there was no express provision in their domestic legislation, the wording was sufficiently broad enough to cover

[2] The appendix contains all replies received from working group members and used in the preparation of this report. The appendix is available on the webpage of the current publication found in the *Equinet Publications* section of the Equinet website: http://www.equineteurope.org/-Equinet-publications-

discrimination by way of association[3]. The preparatory works in Sweden and Belgium clearly specify that discrimination by way of association is covered by the legislation.

It also appears from the broad definition of discriminatory treatment in the Employment and Relations Act in Malta that discrimination 'on the basis of ... pregnancy...' may also cover discrimination by way of association with a pregnant woman/other protected characteristics.

Four respondents noted that in their view it was not clear whether or not domestic legislation covered discrimination by association:

- In Denmark the National Equality Body reported that on the face of the legislation it appears that anyone could bring a claim for discrimination on the grounds of pregnancy: the equality legislation provides that 'for the purpose of this Act equal treatment of men and women means that there shall be no discrimination on ground of sex. ...in particular by reference to pregnancy or ... family status'. However, the preparatory works only refer to less favourable treatment of women related to pregnancy. It appears to the equality body, therefore, that there might be no protection for discrimination by association with pregnancy.
- Although domestic legislation in Poland appears to potentially encompass discrimination by association (direct discrimination is defined as occurring when a 'person because of gender ... is treated less favourably ...') the National Equality Body reported that *'discrimination by association is not regulated and remains still rather unknown concept'.* Similarly, Cyprus and the Luxembourg country reports stated that it was unclear whether domestic legislation would cover discrimination based on association with persons with particular characteristics.

Protection on grounds of paternity

In 7 countries express protection was provided by reason of fatherhood/paternity (Czech Republic, Denmark[4], Hungary) or family/other status (Croatia, Slovenia, Slovakia); further, in Slovenia there is also a prohibition in the employment sphere of *'less favourable treatment of workers in connection with pregnancy ...*'. The circumstances of this case are likely to be covered by all of these provisions, in addition/as an alternative to the protection provided by discrimination by association, where that applies.

Lessons learned

- **There is a broad understanding that discrimination by way of association, including pregnancy associative discrimination, is covered by domestic law and the Equality Directives, even where this is not explicitly stated in domestic law, as a result of the Coleman decision.**
- **Only 4 countries had made express provisions prohibiting associative discrimination.**

[3] Belgium, Czech Republic, Finland, France, Great Britain, Germany, Hungary, Lithuania, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.
[4] In Denmark, protection against paternity discrimination applies in the employment sphere.

- **There is an inconsistency of protection, including some countries providing protection in a limited way: in France the express prohibition on association discrimination only applies to parents of disabled children and it was only case law, not domestic legislation, which gave rise to the understanding that associative discrimination was prohibited more generally. Further, in Malta, it appears that protection from discrimination by reason of association with a pregnant woman/other grounds and, in Denmark, protection against paternity discrimination is only provided in the employment sphere.**
- **Further, in a minority of countries there was some doubt as to whether associative discrimination was covered by domestic legislation, notwithstanding the fact that the wording of the legislation was as broad as in other member states where associative discrimination was thought to be covered.**
- **Protection in a case such as Kulikauskas may also be provided under other provisions relating to fatherhood/paternity/family or other status.**
- **Domestic legislation which does not allow for associative discrimination claims might not, in the view of the working group, be compliant with the Recast Directive.**

2. What is the impact of EU legislation and case law on Member States' domestic legislation relating to discrimination by association?

Respondents were not asked to address this question specifically, however, a number of the reports cited the Coleman decision (based on the Framework Directive) as the reason for protection against associative discrimination in domestic legislation (Austria, Belgium, Croatia, Great Britain, France and Germany). A number of Member States considered the Coleman decision to have an effect reaching beyond the limits of the Framework Directive and the grounds of discrimination protected therein.

Furthermore, legislation in all Member States was intended to implement the EU Equality Directives and thus domestic legislation must be interpreted in compliance with those Directives and the case law of the CJEU.

3. Are there any court cases or cases of your equality body dealing with discrimination by association or pregnancy association discrimination?

Most countries were not able to identify any case law relating to associative discrimination and none referred to any cases relating to pregnancy association discrimination.

There were a few reported cases on discrimination by way of association from the following countries:

The UK's Equality and Human Rights Commission referred to the following associative discrimination cases in its observations to the CJEU in the Kulikauskas case: *Zarczynska v Levy* [1978] IRLR 532, [1979] ICR 184 (EAT); *Showboat Entertainment Centre Ltd v Owens* [1984]

IRLR 7, [1984] ICR 65, (EAT); W*eathersfield Ltd v Sargent* [1998] IRLR 14 (EAT); [1999] IRLR 94, [1999] ICR 425 (CA).

It also referred to cases which post-dated the Court of Justice's decision in *Coleman v. Attridge Law*, and which relied on that decision: *EBR Attridge Law LLP (formerly Attridge Law) v. Coleman* [2010] 1 C.M.L.R. 28 [2010] I.C.R. 242 (EAT); *Saini v All Saints Hague Centre* [2009] 1 C.M.L.R. 38; [2009] IRLR 74, EAT; *English v Thomas Sanderson Blinds* [2008] EWCA Civ 1421, (CA).

The French National Equality Body reported a 2008 case[5] concerning associative discrimination on ground of union activity. In this case, a female worker was discriminated against due to association with her partner's union activity. She was dismissed in order to put pressure on her companion who had union responsibility in the same workplace. The National Equality Body made observations at the tribunal, based on the 2000/78/EC and the 2000/43/EC directives and the arguments put forward in the Coleman case. The tribunal upheld the discriminatory nature of the dismissal, and pronounced the dismissal invalid. Although the French National Equality Body notes that the legislation does not appear to allow associative claims, it considers that this decision (and that of Coleman in the CJEU) allows the courts to consider discrimination based on association on the 18 legal grounds covered by the French law.

In the Austrian report it was noted that at the time of their report there had been no decisions of the Equal Treatment Commission (ETC) on discrimination by association in employment. However, in relation to services, the ETC had decided that an Austrian woman who wanted to enter a club with her Kurdish fiancé was discriminated against by association with him.[6]

The Belgian country report also refers to the van Themsche case decided on 10 October 2007 by the court of Assizes of Antwerp.

The Dutch and Slovenian reports also refer to case law on association, but provided no specific details.

Lessons learned

- **The lack of case law is notable and may be due to the fact that only four of the Member States have expressly prohibited associative discrimination and so, perhaps, people are not aware that they are protected.**
- **There is an understanding amongst equality experts that domestic legislation should be interpreted in light of the Coleman decision, however, this very significant extension of protection for those people who face discrimination because they are associated with someone with a protected characteristic does not appear to be widely known in light of the paucity of case law.**
- **Identifying test cases on associative discrimination where there is no express prohibition may be an area which National Equality Bodies may wish to consider as such protection is not widely known/understood.**
- **Identifying test cases on discrimination on grounds of paternity, fatherhood and family status may also be an area National Equality Bodies may wish to consider in order to work towards the achievement of gender equality.**

[5] *Enault vs. SAS ED, Conseil de Prud'hommes de CAEN*, 11/25/2008, F06/00120 – see Annex
[6] GBK III/41/09

2. Case study discrimination on the ground of citizenship in the field of employment

The case

The facts in 2009

In 2009, the Austrian Ombud for Equal Treatment reported a discriminatory job advertisement of the casino company x to the authorities. The authority of first instance closed the proceedings by stating that the casino company x did not commit an administrative infringement since they acted conformingly to section 27 paragraph 1 Gambling Act, which provides that only people with citizenship from the EU area may be employed by casinos.

In its appeal to the Independent Administrative Tribunal (henceforth IAT), the Ombud for Equal Treatment argued that section 27 paragraph 1 Gambling Act is contradictory to the Austrian Equal Treatment Act (ETA) and the directive 2000/43/EC and has to remain unapplied.

The IAT rejected the appeal on formal grounds without deciding on the merits, by stating that the authority of first instance did not set any act of prosecution within the expiry period set up in the Administrative Penal Act, so that there was no valid decision against which the Ombud for Equal Treatment could have appealed.

The facts in 2010

In 2010, the Austrian Ombud for Equal Treatment reported to the administrative authority a job advertisement from the casino company X, relating to a job as a cleaner. The post had been limited to people with EU citizenship. The Austrian Ombud for Equal Treatment argued that having a specific citizenship was not a necessary characteristic for the job as cleaner, since neither the nature of the particular occupational activity nor the context in which it is carried out gave any reason to regard it as a genuine and determining occupational requirement.

The Authority of first instance decided that there was no discrimination by referring to the nationality exemption under section 17 paragraph 2 ETA. After that, the Ombud for Equal Treatment appealed against this decision to the IAT.

In its appeal the Ombud for Equal Treatment argued that the job advertisement violated the principle of non-discriminatory job advertisements and that the nationality exemption under section 17 paragraph 2 ETA is an exception only in favour of the public authority with regard to the handling of third country nationals, but is not a general justification for private persons. Further the Ombud for Equal Treatment argued that following the principle of interpretation of national law in accordance with the directives and the primacy of application of European law, section 27 paragraph 1 Gambling Act should remain unapplied. Finally, the Ombud for Equal Treatment argued that the casino company X was able to realize the unlawful character of its doing, since the company was already informed in 2009 on the conflict between section 27 paragraph 1 Gambling Act and Section 17 paragraph 2 ETA in the course of the previous procedure with regard to a discriminatory job advertisement.

The casino company tried to justify their job advertisement by referring to the exemption according to section 17 paragraph 2 ETA and to section 27 paragraph 1 Gambling Act. Further the casino company x argued that they cannot be held liable for the application of the Gambling Act and a possible conflict with the ETA or the directive 2000/43/EC. Finally, the casino company x stated that public entities such as the Ombud for Equal Treatment cannot refer to the primacy of application of EU law.

The IAT decided that the casino company x had violated the principle of non-discriminatory job advertisements, since the job advertisement excluded persons who are perceived as aliens due to nationality requirements. The IAT stated that the nationality exemption under section 17 paragraph 2 ETA is not applicable for private persons and is limited to the handling of the public authority with regard third country nationals. Differences of treatment based on nationality are permissible as long as they are objectively justified. In that case there was no objective justification for the limitation of the position as a cleaner to people with citizenship from the EU. By referring to the case law of the ECJ in the case Seda Kücükdeveci/Swedex GmbH & Co. KG (ECJ, C-555/07, 19.1.2010), the IAT stated that section 27 paragraph 1 Gambling Act should remain unapplied because of its conflict with community provisions. The casino company x is liable for the violation of the provision of non-discriminatory job advertisements, since it was already informed in 2009 about the conflict between the Gambling Act and the ETA and could have made convenient inquiries at the Ministry for Finance on this topic.

The casino company x appealed against this decision to the supreme administrative court. The proceedings are still ongoing.

Questions

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

1. Does this case fall within the scope of any anti-discrimination legislation in your country?
2. Does this case fall within the scope of the Race Directive 2000/43/EC? In your answer please explain whether differences of treatment based on nationality is covered by the anti-discrimination legislation in your country.
3. Would you consider this case as direct or indirect discrimination on the ground of race/ethnic origin or nationality under your national legislation?
4. If you find that the case leads to direct or indirect discrimination on grounds of race, ethnic origin or nationality is there an objective justification or exception?
5. If there is no justification or exception, what could be the sanctions or remedies under your national legislation?
6. If any, what would be the level of compensation awarded?
7. Could a company be held responsible for a discriminatory job advertisement?
8. Which court, tribunal, equality body or organisation would be competent?

9. Do you consider the provision in the Gambling Act as conforming to (a) the Race Directive 2000/43/EC or (b) your anti-discrimination legislation?

10. Is it possible for your organisation to challenge the national legislation in front of the court/constitutional court?

11. Would you assess the case differently if the Gambling Act would solely exclude persons with a specific citizenship from an employment at the casino company (for example people with Albanian or Turkish citizenship)? If yes, why?

Legislation

Domestic legislation

Austrian Equal Treatment Act

Section 17 provides:

> *(1) In the context of employment relationships no person shall be subject to discrimination on grounds of ethnic origin, religion or belief, age or sexual orientation either directly or indirectly;*
>
> *(2) Paragraph 1 shall not apply to the provisions and conditions governing the entry of third-country nationals or stateless persons or their residence as well as to any treatment resulting from the legal status of third-country nationals or stateless persons.*

Section 19 provides:

> *(1) Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on one of the grounds specified in Section 17.*
>
> *(2) Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice may put persons belonging to an ethnic group or persons having a particular religion or particular belief, or a particular age or a particular sexual orientation at a particular disadvantage compared with other persons, unless such provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*

Section 23 ETA provides:

> *Employers or private placement agencies as defined in Section 4 and following of the Labour Market Promotion Act, Federal Law Gazette no. 31/1969, or public legal entities entrusted with job placement tasks may not advertise a position publicly or within a company in a discriminatory manner, or have such job advertisements placed by third parties, unless the special characteristic is a vital and decisive prerequisite for performing the activity concerned because of the type of occupational or professional activity and provided that it serves a lawful purpose and constitutes a reasonable requirement.*

According to Federal Act Governing the Equal Treatment Commission and the Ombud for Equal Treatment the Austrian Ombud for Equal Treatment has the right to report discriminatory job advertisements to the administrative authority. The authority has to impose an administrative

penalty against the person responsible for the job advertisement. If it is the first time this person has published a discriminatory job advertisement, the penalty has to be a warning; from the second time onwards it has to be a penalty up to € 360.

Section 27 paragraph 1 of the Gambling Act provides that only people with citizenship from the EU area may be employed by casinos. The Gambling Act provision has the same status in national law as the ETA.

EU legislation

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

Recital 13

> *To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.*

Article 2

> *1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.*
>
> *2. For the purposes of paragraph 1:*
>
> *(a) direct discrimination shall be 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;*
>
> *(b) 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 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.*

Article 3

> *Scope*
>
> *1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:*
>
> *(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;*

2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country

nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Summary of issues and findings

The case relates to discrimination on the ground of nationality in employment. In a number of countries the ground of citizenship is used instead of the ground of nationality. In this report we will follow the wording of the Race Directive and will use the ground of nationality, however, this is understood as also covering the ground of citizenship.

There are several key issues raised by the case:

- Whether or not discrimination on the ground of citizenship is covered by Race Directive 2000/43/EC and the national anti-discrimination legislation;
- Whether or not a difference of treatment based on nationality can be considered as discrimination on the ground of ethnic origin;
- Whether or not equality bodies can challenge national legislation allowing for different treatment of foreign citizens in front of the court/constitutional court;
- Whether or not national legislation allowing for different treatment of foreign citizens may justify discrimination.
- Whether companies can be held responsible for discriminatory job advertisements.

The answers provided by the National Equality Bodies, which are summarized below, showed that nearly all of the Member States' domestic anti-discrimination legislation prohibited discriminatory job advertisements.

Several EU member countries prohibit discrimination on the ground of nationality in the area of employment in their domestic anti-discrimination legislation even though the Race Directive 2000/43/EC does not do so.

A number of National Equality Bodies in countries where nationality is not a protected discrimination ground consider that difference of treatment based on nationality might amount to indirect discrimination on the ground of ethnic origin. Nevertheless the disparity in the answers provided, particularly those with regard to the application of the nationality exemption in Race Directive 2000/43/EC and in domestic anti-discrimination legislation, shows that there is a need to clarify, at EU level, the scope of the prohibition on ethnic origin discrimination where there is a potential overlap with nationality discrimination.

The answers further indicated that only a limited number of National Equality Bodies can challenge potentially discriminatory national legislation and claim for compensation for discrimination victims.

1. **Does this case fall within the scope of any anti-discrimination legislation in your country? In your answer please explain whether differences of treatment based on nationality is covered by the anti-discrimination legislation in your country.**

Answers were provided by 15 National Equality Bodies from 13 EU member states and one member of the European Economic Area: Austria, Belgium, Great Britain (GB), Croatia, Czech Republic, Germany, Greece, Netherlands, Norway, Poland, Romania, Slovenia and Sweden. In case of Denmark, answers were provided by both the Danish Institute for Human Rights and the secretariat of the Danish Board of Equal Treatment.

Nearly all National Equality Bodies indicated that discriminatory job advertisements are covered by their domestic anti-discrimination legislation. The Swedish National Equality Body stated that the Swedish anti-discrimination legislation does not cover discriminatory job advertisements and that the scope of protection of its legislation starts when someone enquires or applies for a job. The Swedish legislation therefore does not appear to be compliant with Article 2(2)(a) and Article 3(1)(a) of the Race Directive 2000/43/EC and with the finding of the European Court of Justice in the case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV[7].

Nine respondents (Belgium, Croatia, Czech Republic, Greece, GB, Poland, Romania, Slovenia and the Netherlands) reported that their anti-discrimination legislation explicitly prohibits discrimination on the ground of nationality or national origin in the area of employment, therefore the present case falls within the scope of their domestic legislation. The Slovenian equality body also referred to a number of international human rights documents from the UN and Council of Europe systems supporting the view that discrimination on the ground of nationality has to be covered in domestic legislation.

The National Equality Bodies from Austria, Norway and Sweden pointed out that their anti-discrimination legislation does not prohibit discrimination on the ground of nationality. However, they said that a difference of treatment based on nationality can amount to indirect discrimination on the ground of ethnic origin and can therefore be covered by their domestic anti-discrimination legislation.

The National Equality Bodies from Denmark and Germany stated that discrimination based on nationality/citizenship is not covered by the domestic anti-discrimination legislation or the directive, unless the use of a nationality/citizenship criterion could be regarded as indirect discrimination based on race or national or ethnic origin.

Conclusions

The anti-discrimination legislations of nearly all of the countries of the National Equality Bodies that responded to the questionnaire prohibit discriminatory job advertisements. Several countries

[7] The court found:
1. The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim of that discrimination.
2. Public statements by which an employer lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements.

of the National Equality Bodies cover the discrimination ground nationality. In these countries this case seems to be covered by the scope of application of the anti-discrimination legislation.

The National Equality Bodies of those countries where there is no explicit protection from discrimination on the ground of nationality follow different approaches with regard to this case. The National Equality Bodies from Austria, Norway and Sweden consider that difference of treatment based on nationality might amount to indirect discrimination on the ground of ethnic origin and therefore the present case should be covered by their anti-discrimination legislation. The Danish equality bodies remain doubtful about this approach, while the German Federal Anti-Discrimination Agency clearly indicates that the prohibition of discrimination on grounds of race and ethnic origin cannot be extended to a prohibition that includes nationality, unless the criterion nationality is used as an instrument to exclude intentionally a certain ethnic origin or puts persons of a certain origin at a particular disadvantage. The general exclusion of all non EU-citizens does not affect a certain ethnic origin.

Lessons learned

There are different levels of protection with regard to discrimination on the ground of nationality in the domestic anti-discrimination legislation in the countries discussed: more than half explicitly prohibit discrimination on the ground of nationality; however, there is a lack of clarity in the countries where nationality is not covered regarding whether or not difference of treatment on the ground of nationality might amount to indirect discrimination on the ground of ethnic origin.

2. Does this case fall within the scope of the Race Directive 2000/43/EC?

The Danish Institute for Human Rights as well as the National Equality Bodies from GB, Poland and Germany were of the opinion that this case is not covered by the Race Directive 2000/43/EC.

The National Equality Bodies from Austria, Croatia, Czech Republic, Netherlands, Norway, Slovenia and Sweden considered that the case might amount to indirect discrimination on the ground of ethnic origin, notwithstanding the fact that the Race Directive 2000/43/EC sets out that it does not cover difference of treatment based on nationality. In that context the National Equality Bodies from Austria and Croatia pointed out that, there is a need to interpret the Race Directive 2000/43/EC in a way that differences of treatment based on nationality amounting to disguised forms of discrimination on grounds of racial or ethnic origin are covered by the directive. Further the Austrian (by referring to two decisions of the Austrian Independent Administrative Tribunals) and Dutch National Equality Bodies argued that the nationality exemption in their domestic legislation is not applicable for private persons and is limited to the exercise of public authority with regard to third country nationals.

The GB report states that the travaux preparatoires for the Directive set out MEPs' understanding of the extent to which the Directive provides protection to third country nationals. For example, when proposing (unsuccessful) amendments the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs said that even though discrimination on grounds of nationality was not covered nevertheless *'nationals of third countries are covered by the Directive insofar as the discrimination they experience falls within the scope of the Directive and is not based solely on*

their being a non-EU national' and further that *discrimination on grounds of nationality must not be used as a covert form of discrimination on grounds of race or ethnic origin'.* Therefore, it appears that non EU citizens are protected by the Directive where nationality is used as a covert form of discrimination on grounds of race or ethnic origin or where ethnicity or race discrimination form part of the reasons for the less favourable treatment.

The National Equality Bodies from Belgium, Greece as well as the secretariat of the Danish Board for Equal Treatment could not give a definite answer on whether or not they would consider this case covered by the Race Directive 2000/43/EC. The Equality Body from Germany considers this case is not covered by the Race Directive 200/43/EC. It thinks that the nationality exemption only covers cases where nationality is used as an instrument to exclude intentionally a certain ethnic origin or cases where a certain ethnic origin is put at a particular disadvantage. The general exclusion of all non EU-citizens does not affect a certain ethnic origin.

Conclusions

Discrimination purely on the grounds of nationality is not covered by the Directive. However, it appears that non EU citizens are protected by the Directive where nationality is used as a covert form of discrimination on grounds of race or ethnic origin or where ethnicity or race discrimination form part of the reasons for the less favourable treatment.

The relationship between the nationality exception and the prohibition of discrimination on grounds of racial/ethnic origin could be made clearer. Based on the outline facts of the case provided above, the National Equality Bodies from GB, Poland and Germany as well as the Danish Institute for Human Rights consider this case not covered by Race Directive 2000/43/EC, whereas the National Equality Bodies from Austria, Croatia, Czech Republic, Netherlands, Norway, Slovenia and Sweden considered that differences of treatment based on nationality might amount to an indirect discrimination on the ground of ethnic origin.

The outcome of the case would turn on whether the detailed reasons for the policy of non recruitment of non EU citizen's was tainted with race or ethnic minority discrimination or whether it was purely on the grounds of nationality.

Lessons learned

There is a need to clarify at EU level that protection is provided against race and ethnic minority discrimination where this is disguised as nationality discrimination or where they form part of the reasons for the less favourable treatment, along with nationality.

It would be helpful to have test cases in this area to confirm the reach of the Directive.

3. **Would you consider this case as direct or indirect discrimination on the ground of race/ethnic origin or nationality under your national legislation?**

The answers provided by the National Equality Bodies were very diverse:

- The bodies from Austria, Norway and Sweden indicated that they would consider this case as indirect discrimination on the ground of ethnic or national origin under domestic legislation.
- The bodies from Czech Republic, Greece, GB, Poland, the Netherlands and Romania considered this case as direct discrimination on the ground of nationality.
- The body from Belgium stated that this case could be considered as direct or indirect discrimination on the ground of nationality. The Croatian body considered this case as direct or indirect discrimination on the ground of ethnic origin.
- The bodies from Denmark could not provide a definite answer on whether or not they would consider this case as direct or indirect discrimination.
- The Body from Slovenia considered the case direct discrimination on the ground of nationality and indirect discrimination on the ground of race and ethnicity.
- Finally the German body stated that this case is neither direct nor indirect discrimination since the general criteria of non EU citizenship does not refer to a certain ethnic origin.

Conclusions

Most of the National Equality Bodies consider the exclusion of non-EU citizens in the job advertisements as discriminatory under their domestic law. However there are large differences among the National Equality Bodies on whether or not differences of treatment based on nationality might amount to direct or indirect discrimination on the ground of nationality or ethnic origin.

Lessons learned

The disparity of the answers provided as well as the apparent uncertainty on how to handle discrimination cases related to the criteria of nationality shows that there is a need to further clarify this issue at EU level.

4. If you find the case leads to direct or indirect discrimination on grounds of race, ethnic origin or nationality is there an objective justification or exception?

The National Equality Bodies from GB and Poland pointed out that there is an exception in their anti-discrimination legislation which permits differential treatment on grounds of nationality in the rules regulating, for example, the conditions for the entry and stay in the country as well as to the rules for working permits. Further, the National Equality Bodies from Belgium and the Netherlands stated that in this case the exclusion of non-EU citizens would be justified by the nationality exception of their anti-discrimination legislations.

The National Equality Bodies from Austria and Croatia stated that the nationality exceptions set out in their domestic anti-discrimination legislation would not or probably not be applicable to this case. The Austrian body highlighted that the nationality exemption in its domestic anti-

discrimination legislation is limited to public authorities' dealings with third country nationals, and does not apply to private persons' dealings with third country nationals. Further the Austrian body is of the view that the casino company could not justify the criteria in reliance on the domestic Gambling Act, since this provision conflicts with Article 3(2) Race Directive 2000/43/EC.

The secretariat of the Danish Board for Equal Treatment and the National Equality Bodies from Sweden, Slovenia and Czech Republic were of the view that there would probably be no objective justification for restricting a job as a cleaner in a casino to EU citizens if this case was regarded as indirect discrimination on the ground of ethnic origin.

The National Equality Bodies from Greece and Norway could not give a definite answer on whether or not the nationality exemption provided in their domestic anti-discrimination legislation would be applicable to this case

Conclusions

Two National Equality Bodies from Belgium and the Netherlands considered the nationality exemption in their domestic anti-discrimination legislation applicable to this case; Poland and GB also noted that there were exceptions for differential treatment on grounds of nationality in employment in their domestic legislation; whereas the bodies from Austria and Croatia thought that their domestic exceptions would not apply in this case.

The National Equality Bodies from Greece and Norway could not give a definite answer on whether or not the nationality exemption provided in their domestic anti-discrimination legislation would be applicable to this case.

Lessons learned

The disparity of the answers provided as well as the apparent uncertainty on the application of the nationality exemptions in domestic anti-discrimination legislations shows that there is a need to further clarify the relationship between the prohibition of discrimination and the nationality exemption in the Race Directive 2000/43/EC.

5. If there is no justification or exception, what could be the sanctions or remedies under your national legislation? If any, what would be the level of remedies awarded?

Apart from the Danish Board of Equal Treatment the National Equality Bodies indicated that they are not entitled to award compensation and that compensation claims have to be decided in front of civil courts. Some bodies however, such as the Croatian one, are entitled to issue warnings or recommendations.

Most of the National Equality Bodies stated that they cannot give a well-founded evaluation on the amount of the compensation which could be awarded to the discrimination victim in that case because of the lack of jurisprudence in such or comparable matters.

The National Equality Bodies from Austria, Czech Republic, Slovenia and Romania further indicated that a fine could be imposed against the authors of the job advertisement either by the equality body or another state body, such as the labour inspectorate. The National Equality Body in Norway indicated that the company would be ordered to stop the advertisement and be given a fine if it didn't comply with this order.

6. If any, what would be the level of compensation awarded?

See the answer to question 5.

7. Could a company be held responsible for discriminatory job advertisement?

Apart from the Swedish National Equality Body, all other bodies said that their domestic anti-discrimination legislation explicitly prohibit discriminatory job advertisements. Some bodies indicated that their anti-discrimination legislation made provision for a fine for discriminatory job advertisements while other Member States made provision for compensation for losses arising from discriminatory advertisements.

8. Which court, tribunal, equality body or organisation would be competent?

Apart from the secretariat of the Danish Board of Equal Treatment, all National Equality Bodies indicated that they are not entitled to award compensations or to impose fines. Compensation claims have to be decided in front of civil courts while administrative fines have to be decided by the authorities.

The body competent to consider a complaint is dependent on the powers of the National Equality Bodies and their relationship with courts, tribunals and other domestic National Equality Bodies. Some National Equality Bodies indicated that they can make recommendations and intervene in order to stop the discriminatory advertisements.

9. Do you consider the provision in the Gambling Act as conforming to (a) the Race Directive 2000/43/EC or (b) your anti-discrimination legislation?

- The National Equality Bodies from Austria, Belgium, Croatia, the Netherlands, Poland, Romania, Slovenia and Sweden considered that the provision in the Gambling Act is not objectively justified and therefore probably amounts to indirect discrimination on grounds of ethnic origin under the Race Directive 2000/43/EC. On the other hand the National

Equality Bodies from GB, Czech Republic, Germany and Norway were of the opinion that the nationality rule in the Gambling Act is covered by the nationality exemption under article 3(2) Race Directive 2000/43/EC and is therefore not contrary to the Directive.

- The National Equality Bodies from Austria, GB, Czech Republic, Croatia, the Netherlands, Poland, Romania, Slovenia and Sweden considered that the provision in the Gambling Act does not conform to their domestic anti-discrimination legislation while the equality bodies from Belgium and Germany considered that their domestic anti-discrimination allows the nationality rules in the Gambling Act.

Lessons learned

The responses showed that the domestic anti-discrimination legislation of some EU countries prohibit discrimination on grounds of nationality (whilst making provision for specified exceptions to this prohibition) while other responses indicated that nationality discrimination could only be pursued under the Race Directive as indirect ethnic origin discrimination.

There seems to be a lack of clarity as to what extent the nationality exemption in the Race Directive 2000/43/EC and in domestic anti-discrimination legislations allow EU member countries to exclude non EU nationals from the access to the labour market.

10. Is it possible for your organisation to challenge the national legislation in front of the court/constitutional court?

The National Equality Bodies from Croatia, Poland and Sweden are empowered to challenge discriminatory legislation in their own name. In general, the bodies from Britain, Czech Republic, Slovenia and Norway could either act as amicus curiae, co-counsel or interested party in a case brought by someone directly affected by a discriminatory law or could challenge national legislation by supporting an individual complainant. The secretariat of the Danish Board for Equal Treatment stated that the Board cannot act as a party in a case before the courts since it cannot take up cases ex officio. However, the Board can decide cases regarding national legislation and their conformity with the national anti-discrimination legislation, if it receives a complaint. The remaining bodies indicated that they are not entitled to challenge, in front of their courts/constitutional courts, domestic legislation.

Lessons learned

There is a disparity on the competences of National Equality Bodies to challenge discriminatory domestic legislation in front of their courts/constitutional courts. While some bodies are entitled to challenge domestic discriminatory legislation by their own action, however, most other bodies have no competence to participate to procedures challenging domestic legislation.

The EU may wish to consider whether, in its report on the application of the Race Directive, it should recommend that the competencies of the National Equality Bodies

should include the right to challenge domestic legislation which is not compliant with EU equality law.

11. **Would you assess the case differently if the Gambling Act would only exclude persons with a specific citizenship from employment at the casino company (for example people with Albanian or Turkish citizenship)? If yes, why?**

Nearly all National Equality Bodies stated that the exclusion of persons with a specific citizenship from employment would amount to direct discrimination on the grounds of nationality or ethnic origin. In that context the Croatian body indicated that such a regulation could even be considered as harassment according to its domestic anti-discrimination legislation.

The German National Equality Body considered this scenario as an indirect discrimination on the ground of ethnic origin, which is likely not to be objectively justified.

The Belgian National Equality Body indicated that such a regulation would be covered by the nationality exemption of domestic Belgian anti-discrimination legislation. However this regulation could be challenged under the Belgian constitution.

Lessons learned

Regulations excluding persons with a specific citizenship from employment are likely to be considered as direct discrimination by most respondents.

3. Case study discrimination on the ground of citizenship with regard access to public housing

The case

The guidelines for the allocation of public housing by a municipality (produced by the municipality itself) provide that solely EU Citizens and long term residents according to Council Directive 2003/109/EC may have access to public housing. The guidelines are not legally binding.

Based on the relevant provisions in the guidelines, the municipality refuses the rent of a public apartment to a person with Albanian citizenship, who has been living and working for 3 years in the municipality but does not have a long-term resident status. Given that he does not possess a long-term resident status, the provisions of Directive 2003/109/EC prohibiting discrimination against long-term residents and the Kamberaj judgment of the Court of Justice of the EU (Case C-571/10) do not seem to directly apply to the case.

Questions

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

1. Does this case fall within the scope of any anti-discrimination legislation in your country, and the Race Directive 2000/43/EC? In your answer please consider whether differences of treatment based on nationality is or can be covered by the anti-discrimination legislation in your country, and the Race Directive 2000/43/EC?
2. Which court, tribunal, equality body or organisation would be competent?
3. Would you consider this case as direct or indirect discrimination on the ground of race/ethnic origin or nationality under your national legislation?
4. If you find the case leads to direct or indirect discrimination on grounds of race, ethnic origin or nationality is there an objective justification or exception? In your answer please consider the effect of having national legislation allowing for different treatment of foreign citizens.
5. Is it possible for your organisation to challenge, in front of the court/constitutional court, national legislation allowing for different treatment of foreign citizens?
6. If there is no justification or exception, what could be the sanctions or remedies under your national legislation? If any, what would be the level of compensation awarded?
7. Would you assess the case differently if the guidelines would solely exclude persons with a specific citizenship from public housing (for example people with Albanian or Turkish citizenship)? If yes why?

8. Would you assess the case differently, if an association funded by private donors, would rent housing facilities based on the same criteria as mentioned above? If yes why?

Legislation

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

Article 4

1. *Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application.*

Article 11

1. *Long-term residents shall enjoy equal treatment with nationals as regards:*

   (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing.

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

Recital 13

To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation

Article 2

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be 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;

(b) 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 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.

Article 3

Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Summary of issues and findings

The case relates to discrimination on the ground of nationality in the provision of public social housing. In a number of countries the ground of citizenship is used instead of the ground of nationality. In this report we will follow the wording of the Race Directive and will use the ground of nationality, however, this is understood as also covering the ground of citizenship.

There are several key issues raised by the case:

- Whether or not discrimination on the ground of nationality is covered by Race Directive 2000/43/EC and the national anti-discrimination legislation;
- Whether or not a difference of treatment based on nationality can be considered as discrimination on the ground of ethnic origin;
- Whether or not National Equality Bodies can challenge national legislation allowing for different treatment of foreign citizens, in front of the court/constitutional court;
- Whether or not there are different criteria for public and private persons when assessing if a difference of treatment based on nationality is discriminatory.

The answers provided by the National Equality Bodies, which are summarized below, showed that several EU Member States prohibit discrimination on the ground of nationality in the access to housing in their domestic anti-discrimination legislation even though the Race Directive 2000/43/EC does not prohibit discrimination on the ground of nationality. Most of the National Equality Bodies of countries where nationality is not a protected discrimination ground consider that difference of treatment based on nationality might amount to indirect discrimination on the ground of ethnic origin. Nevertheless the disparity of the answers provided, particularly those with regard to the application of the nationality exemption in Race Directive 2000/43/EC and in domestic anti-discrimination legislation shows that there is a need to clarify at EU level, to what extent EU member countries are allowed to exclude non EU citizens from the access to public housing.

The answers further indicated that only a limited number of National Equality Bodies can challenge potentially discriminatory national legislation and claim for compensation for discrimination victims.

Finally the answers also showed that the domestic anti-discrimination legislation in the countries of most National Equality Bodies applies both to private and public legal subjects.

1. **Does this case fall within the scope of any anti-discrimination legislation in your country, and the Race Directive 2000/43/EC? In your answer please consider whether differences of treatment based on nationality is or can be covered by the anti-discrimination legislation in your country, and the Race Directive 2000/43/EC?**

Answers were provided by 15 National Equality Bodies from 13 EU member states and one member of the European Economic Area: Austria, Belgium, Great Britain (GB), Croatia, Czech Republic, Germany, Greece, Netherlands, Norway, Poland, Romania, Slovenia and Sweden. In case of Denmark, answers were provided by both the Danish Institute for Human Rights and the secretariat of the Danish Board of Equal Treatment.

All the answers indicated that discrimination in the access to housing is covered by the anti-discrimination legislation of the countries of the National Equality Bodies.

Nine respondents (Belgium, GB, Croatia, Czech Republic, Greece, Poland, Romania, Slovenia and the Netherlands) reported that their anti-discrimination legislation explicitly prohibits discrimination on the ground of nationality or national origin with regard to housing, therefore the present case falls within the scope of their domestic legislation.

The National Equality Bodies from Austria, Norway and Sweden pointed out that their anti-discrimination legislation does not prohibit discrimination on the ground of nationality. Nevertheless the present case could be covered by their anti-discrimination legislation, on the basis that a difference of treatment on the ground of nationality could amount to indirect discrimination on the ground of ethnic origin.

The National Equality Bodies from Denmark stated that discrimination on the ground of nationality is generally not covered by the Danish anti-discrimination legislation and that they cannot give a clear answer on whether or not difference of treatment based on nationality might amount to an indirect discrimination on the ground of ethnic origin. The German Federal Anti-Discrimination Agency indicated that in principle German anti-discrimination legislation does not cover discrimination on the ground of nationality and that the prohibition on grounds of race and ethnic origin cannot be extended to include nationality. However a difference of treatment on the ground of nationality could amount to indirect discrimination on the ground of ethnic origin. This can be the case when nationality is used as an instrument to exclude intentionally a certain ethnic origin or when persons of a certain ethnic origin are put at a particular disadvantage. The general exclusion of all non EU citizens does not affect a certain ethnic origin.

The National Equality Bodies from GB, Czech Republic, Belgium and Germany were of the opinion that this case is not covered by the Race Directive 2000/43/EC. The bodies from Austria, Slovenia and Croatia considered the case might amount to an indirect discrimination on the ground of ethnic origin, even though the Race Directive 2000/43/EC sets out that the directive does not cover difference of treatment based on nationality.

The Austrian and GB reports noted the extent to which the Directive provided protection for third country nationals was considered by the European Parliament in the travaux preparatoires. The GB report refers to (unsuccessful) amendments put forward by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs which said in the justification for the proposed amendment that even though discrimination on grounds of nationality was not covered, nevertheless 'nationals of third countries are covered by the Directive insofar as the discrimination they experience falls within the scope of the Directive and is not based solely on their being a non-EU national' and further that discrimination on grounds of nationality must not be used as a covert form of discrimination on grounds of race or ethnic origin'. Therefore, this indicates that MEPs were of the view that non EU citizens are protected by the Directive where nationality is used as a covert form of discrimination on grounds of race or ethnic origin or where ethnicity or race discrimination form part of the reasons for the less favourable treatment.

Conclusions

All of the National Equality Bodies reported that their countries' anti-discrimination legislation prohibited discrimination in the area of housing. The anti-discrimination legislation of Belgium, GB, Croatia, Czech Republic, Greece, Poland, Romania, Slovenia and the Netherlands prohibit discrimination on the ground of nationality or/and national origin. In these countries this case seems to be covered by the anti-discrimination legislation.

The National Equality Bodies of those countries where nationality is not an explicit discrimination ground follow different approaches with regard to this case. The bodies from Austria, Norway, Slovenia and Sweden consider that a difference of treatment based on nationality might amount to indirect discrimination on the ground of ethnic origin and therefore the present case may be covered by their anti-discrimination legislation. The two bodies from Denmark remain doubtful about this approach while the German Federal Anti-Discrimination Agency pointed out that a difference of treatment based on nationality can only amount to indirect discrimination on the ground of ethnic origin if persons of a certain ethnic origin are put at a particular disadvantage. The general group of non EU citizens does not represent an ethnic origin.

Similarly the National Equality Bodies follow different approaches with regard to the applicability of the Race Directive 2000/43/EC to the present case. The bodies from GB, Czech Republic, Belgium and Germany considered this case not covered by the Race Directive 2000/43/EC, whereas the bodies from Austria, Slovenia and Croatia considered the case might amount to indirect discrimination on the ground of ethnic origin under the Race Directive.

Discrimination purely on the grounds of nationality is not covered by the Directive. However, it appears that non EU citizens are protected by the Directive from discrimination on grounds of race and ethnicity (as there is no explicit exclusion of the scope of the directive ratione personae) and also where nationality is used as a covert form of discrimination on grounds of race or ethnicity or where ethnicity or race discrimination form part of the reasons for the less favourable treatment. It appears that the outcome of the case in question would therefore turn on whether the detailed reasons for the policy of denying non EU citizen's access to social housing was tainted with race or ethnic minority discrimination or whether it was purely on the grounds of nationality.

Lessons learned

There are different levels of protection against discrimination on the ground of nationality in the domestic anti-discrimination legislation in the countries of the National Equality Bodies: More than half explicitly cover discrimination on the ground of nationality. However for the rest, a lack of clarity remains as to whether or not a difference of treatment on the ground of nationality might amount to indirect discrimination on the ground of ethnic origin.

There is a need to clarify at EU level that protection is provided against race and ethnic minority discrimination where this is disguised as nationality discrimination or where they form part of the reasons for the less favourable treatment, along with nationality

It would be helpful to have test cases in this area to confirm the reach of the Directive.

2. Which court, tribunal, equality body or organisation would be competent?

Which body is competent to consider this complaint is dependent on the powers of the National Equality Bodies and their relationship with courts, tribunals and other domestic National Equality Bodies. Equality bodies that are Ombudsmen or similar structures, can generally not award damages but can deliver non-binding decisions and make recommendations. In addition, courts or tribunals could determine the complaint and issue binding decisions.

3. Would you consider this case as direct or indirect discrimination on the ground of race/ethnic origin or nationality under your national legislation?

The answers provided by the National Equality Bodies were very diverse:

- The bodies from Austria, Czech Republic, Norway and Sweden indicated that they probably would consider this case as indirect discrimination on the ground of ethnic or national origin.
- The answers provided by the bodies from Greece and the Netherlands stated that they would consider this case as indirect discrimination on the ground of nationality. In GB the fact that the guidelines set a requirement for long term residency in order to qualify for social housing was considered to amount to indirect discrimination which would need to be objectively justified to be lawful.
- The Polish and GB bodies considered this case as direct discrimination on the ground of nationality.
- The Body from Slovenia considered the case direct discrimination on the ground of nationality and indirect discrimination on the ground of race and ethnicity.
- The body from Belgium stated that this cased could be considered as direct or indirect discrimination on the ground of nationality as well as direct discrimination on the ground of ethnic origin. The Croatian body found this case might amount to direct or indirect discrimination on the ground of ethnic origin.

- Similarly the Danish Institute for Human Rights and the secretariat of the Danish Board of Equal Treatment indicated that they are unsure on whether or not this case falls within the scope of application of the Danish antidiscrimination legislation therefore they could not provide a definite answer on whether or not this case should be considered as direct or indirect discrimination.
- Finally, the German body stated that this case is neither a direct nor an indirect discrimination since the criteria of long term residency and non EU citizenship are not linked to a certain ethnic origin.

Conclusions

Most of the National Equality Bodies consider the guidelines of the municipality as discriminatory. However there are large differences among the bodies on whether or not differences of treatment based on long term residency criteria or nationality amount to direct or indirect discrimination on the ground of nationality or ethnic origin.

Due to a lack of legal certainty in that area the National Equality Bodies from Denmark could not provide a clear answer on whether or not this case amounts to direct or indirect discrimination. The German body clearly indicated that this case is neither a direct nor an indirect discrimination.

Lessons learned

The disparity of the answers provided shows that there is a need to further clarify to what extent discrimination cases related to the criteria of nationality might be covered by the Race Directive 2000/43/EC on EU level.

4. **If you find the case leads to direct or indirect discrimination on grounds of race, ethnic origin or nationality is there an objective justification or exception? In your answer please consider the effect of having national legislation allowing for different treatment of foreign citizens.**

The National Equality Bodies from Austria, GB, Czech Republic, Greece, Romania and the Netherlands stated that the nationality exceptions set out in their domestic anti-discrimination legislations would not be applicable to this case.

The National Equality Bodies from Belgium, Croatia, Greece, Norway and Sweden indicated that they would consider the exclusion of non-EU Citizens and short term residents from the allocation of public housing as not justified and their nationality exception was not applicable to this case. Further, the body from Greece indicated that in the light of the anti-discrimination provisions of the EU Charter of Fundamental Rights (specifically Articles 21(1) and 34(2)) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (specifically Article 14 and Protocol no. 12 as well as case law of the European Court of Human Rights) the nationality exemption in its anti-discrimination legislation had to be interpreted as not applicable.

The National Equality Bodies from Denmark, and Poland could not give a definite answer on whether or not their nationality exemption is applicable to this case or if there is an objective and

proportionate justification for the exclusion of non-EU Citizens and short term residents from the allocation of public housing because of the lack of legal certainty on that matter.

The National Equality Bodies from Czech Republic and Norway further indicated in their responses that if there was a shortage of public housing in a specific municipality, a prioritization of its own nationals (including EU citizens) could be legitimate and proportionate in principle. However in any case an individual assessment of the legitimacy and proportionality requirements would need to be done.

Conclusions

The National Equality Bodies from Austria, Belgium, Croatia, Czech Republic, GB, Greece, Netherlands Norway and Sweden considered the exclusion of non-EU Citizens and short term residents from the allocation of public housing as not, or probably not, objectively justified and their nationality exception as not, or probably not, applicable to this case.

Due to a lack of legal certainty the National Equality Bodies from Denmark and Poland could not provide a clear answer on whether or not the nationality and long term residency requirements set out in the guidelines for the allocation of public housing were objectively justified or whether their nationality exception would apply to this case.

The National Equality Bodies from Czech Republic, Slovenia and Norway considered that prioritization of its own nationals (including EU citizens) can under specific circumstances be justified / permitted under their domestic anti-discrimination legislation.

Lessons learned

The disparity of the answers provided as well as the apparent lack of legal certainty on the application of the nationality exemptions in the domestic anti-discrimination legislations and in Race Directive 2000/43/EC shows that there is a need to further clarify to what extent EU member countries can exclude non EU citizens from public housing at EC level.

The answer from the Greek National Equality Body argued that the anti-discrimination provisions of the EU Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms could be used to interpret domestic anti-discrimination legislation and the EU anti-discrimination directives.

5. Is it possible for your organisation to challenge, in front of the court/constitutional court, national legislation allowing for different treatment of foreign citizens?

The National Equality Bodies from Croatia, Poland and Sweden are empowered to challenge discriminatory legislation in their own name. The bodies from GB, Czech Republic and Norway could either act as amicus curiae, co-counsel or interested party in a case brought by someone directly affected by a discriminatory law or could challenge national legislation by supporting an individual complainant. The secretariat of the Danish Board for Equal Treatment stated that it cannot act as a party in a case before the courts since it cannot take up cases ex officio. However, the Board can decide cases regarding national legislation and their conformity with the

national anti-discrimination legislation, if it receives a complaint. The bodies from Austria, Belgium, Germany, Greece, Netherlands, Slovenia and Romania as well as the Danish Institute for Human Rights indicated that they are not entitled to challenge legislation, in front of their courts/constitutional courts, domestic legislation.

Lessons learned

There is a disparity on the competences of National Equality Bodies to challenge discriminatory domestic legislation in front of their courts/constitutional courts. For example while the bodies from Croatia, Poland and Sweden are entitled to challenge domestic discriminatory legislation by their own action, the bodies from Austria, Belgium, GB, Germany, Greece, Netherlands and Romania, Slovenia as well as the Danish Institute for Human Rights have no competence to participate to procedures challenging domestic legislation.

The EU may wish to consider whether, in its report on the application of the Race Directive, it should recommend that the competencies of the National Equality Bodies should include the right to challenge domestic legislation which is not compliant with EU equality law.

6. **If there is no justification or exception, what could be the sanctions or remedies under your national legislation? If any, what would be the level of compensation awarded?**

Apart from the Danish Board of Equal Treatment, the National Equality Bodies indicated that they are not entitled to award compensation and that compensation claims have to be decided in front of civil courts. Some bodies however, such as the Croatian equality body are entitled to issue warnings or recommendations. Most bodies stated that they cannot give a serious evaluation on the amount of the compensation which could be awarded to the discrimination victim in that case because of the lack of jurisprudence in such or comparable matters.

7. **Would you assess the case differently if the guidelines would solely exclude persons with a specific citizenship from public housing (for example people with Albanian or Turkish citizenship)? If yes why?**

Nearly all National Equality Bodies stated that they would consider the exclusion of persons with a specific citizenship in the guidelines for the allocation of public housing as direct discrimination on the grounds of nationality or ethnic origin. In that context the Croatian body indicated that such a regulation could even be considered as harassment according to its domestic anti-discrimination legislation.

In its response the Norwegian National Equality Body indicated that the Convention on the Elimination of All Forms of Racial Discrimination (CERD) allows different treatment of citizens and non-citizens, but that Article 1 section 3 CERD prohibits discrimination against any particular nationality. The secretariat of the Danish Board of Equal Treatment stated that excluding persons

with a specific citizenship from access to public housing seems graver than "just" excluding persons without EU-citizenship and that it would be even harder to think of how such a regulation could be justified.

The Slovenian equality body pointed to the recent judgment of the ECtHR in the case of Kurić and others v. Slovenia (GC) (Application no. 26828/06) ruling that differentiation on the grounds of selected nationality statuses amounted to discrimination on the grounds of ethnicity (race).

The German National Equality Body considered this scenario as an indirect discrimination on the ground of ethnic origin, which is likely not to be objectively justified.

Lessons learned

Regulations excluding persons with a specific citizenship from public services are likely to be considered as direct discrimination by nearly all National Equality Bodies of the member states.

8. Would you assess the case differently, if an association funded by private donors, would rent housing facilities based on the same criteria as mentioned above? If yes why?

Nearly all National Equality Bodies indicated that they would not consider the case differently if an association funded by private donors, would rent housing facilities based on the same criteria as mentioned above, since their domestic anti-discrimination legislation applies to private and public legal subjects.

The Belgian National Equality Body stated however that the objective justification test would be more complex and probably less strict with private owners than with a public authority. The private owner could justify the difference of treatment invoking his right of property and the general prescriptions of civil rent contract law. It is not clear whether the less strict justification test for the private sector in Belgian law is compatible with Art 3(1) of the Race Directive and the EC may wish to consider this issue when reporting on the implementation of the Directive in 2013.

The National Equality Body from Czech Republic noticed that since the municipality has duties towards persons who have legal residency in their district, there could be a different result of the objective justification test depending on the local situation.

Lessons learned

The domestic anti-discrimination legislations in the countries of the National Equality Bodies apply to private and public legal subjects, however, the justification test for private persons is more complex and easier to meet for private bodies in Belgium. It is not clear whether the Belgian approach is consistent with the Race Directive.

4. Case study on age discrimination

The case

Facts of the case

Due to the economic crisis SAS was forced to terminate employment contracts. Based upon an agreement with the labour union SAS decided to terminate the employment contracts for those who due to their age already were entitled to pension benefits from a private pension fund (as opposed to the public pension provided by the state).

This concerned 49 employees. All of them were 60 years old or were about to turn 60 within the next months and were thus entitled, or about to be entitled, to full pension benefits from the private pension fund.

In addition, and in accordance with an agreement with the labour union, none of those 49 employees were entitled to reemployment with SAS at a later stage. 25 of the employees concerned filed a complaint with the Swedish Equality Ombudsman.

The Equality Ombudsman argued that:

- SAS had discriminated the 25 employees whose employment contract had been terminated on the basis of their age (all of them were between 59 and 63 years old).
- The termination of the employment contracts were also not in accordance with the Law on Employment Protection according to which an employer has to terminate employment contracts according to who was employed most recently ("last in, first out").
- The prohibition of reemployment was also discriminatory based upon age.

SAS argued that:

- It chose to terminate the contracts of those who were entitled to their pension benefits since they had their income secured. They were consequently not disadvantaged.
- Had SAS instead terminated the employment contracts of those employees who had been employed most recently, 125 employees would have been affected as compared to 49 employees.
- SAS held that seen from the perspective of the collective the measure was therefore the least intrusive.
- SAS also held that the employees concerned were not in a comparable situation with the other employees since the other employees did not have their income secured in form of pension benefits.
- SAS also held that it was not age but entitlement to pension benefits that determined whose contract was terminated.

The Labour Court held that:

- The 25 employees had been disadvantaged since their employment contracts had been terminated.
- The termination of the employment contract only affected employees of a certain age and concluded that this was direct discrimination. The Court referred to the *Andersen* case (C-499/08).
- The 25 employees were in a comparable situation with those whose contracts were not terminated.
- The 25 employees were not disadvantaged concerning their right to reemployment since there had been no case of SAS deciding on employment (i.e. no job opportunities arose) where the 49 employees could have applied for re-employment.

The Court then went on to consider whether the measure adopted would fall within the exception formulated in Article 6.1 of the EU General Framework Directive and chapter 2 para. 2.4 of the Swedish Discrimination Act.

The Court held that:

- It was in accordance with the EU directive to set an age according to which an employment can be terminated.
- The argument brought forward by SAS that the aim was to secure the income of all employees was legitimate.
- However, the termination of the employment contracts was not appropriate and necessary.
- This since the termination of the employment contracts were in violation of the provision of the Law on Employment Protection according to which an employee has the right to remain employed until the age of 67. An agreement that stipulates differently is null and void.
- Consequently, the court held that the termination of the employment contract was in violation of the Discrimination Act and the prohibition of discrimination based upon age.

The court awarded 125 000 SEK[8] to each and every one of the 25 employees. The court also declared the termination of the employment contract null and void and the employees were allowed to remain employed.

Questions

1. Would this case fall within the scope of any anti-discrimination legislation in your country and if so, which legislation?
2. Does it fall within the scope of Directive 2000/78/EC?

[8] Approx. 14.550€.

3. Does your National Equality Body have a competence to deal with cases of age discrimination in employment?
4. Would you consider this case as direct or/and indirect discrimination against the complainants on the ground of their age?
5. If you find the case leads to direct or indirect discrimination on the ground of age is there an objective justification or exception?
6. Does your country provide a provision on justification of difference of treatment on grounds of age in the employment sphere?
7. If the answer is yes to the previous question, in which law is this regulated and how is the provision formulated, e.g. does it provide examples of what such justified difference of treatment may include?
8. If there is no justification or exception, what could be the sanctions or remedies under your national legislation? If any, what would be the level of compensation awarded?
9. Are there any court cases or cases of your equality body dealing with justified reasons for difference in treatment on the ground of age in the employment sphere? If yes, what was the decision by the court or National Equality Body?
10. What is the age of pension in your country?
11. Could you give details of any court decisions relating to the age of pension and discrimination?

Legislation

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

Recital (11)

Discrimination based on [age] may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

Recital (12)

To this end, any direct or indirect discrimination based on [age] as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.

Recital (25)

The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore

require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

Article 6: Justification of differences of treatment on grounds of age

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

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

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

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

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

Relevant case-law of the Court of Justice of the European Union (CJEU)

Palacios de la Villa, 16 October 2007[9]

The Directive applies to national measures governing the conditions for termination of employment contracts where the retirement age has been reached. National measures that lay down mandatory retirement ages are directly discriminatory on grounds of age.

Age Concern England, 5 March 2009[10]

Article 6(1) of the Directive allows Member States to adopt measures that derogate from the principle of non-discrimination on grounds of age if those measures are aimed at achieving legitimate 'social policy objectives', such as those relating to employment policy, the labour market or vocational training. These objectives are of public interest.

[9] C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, 16 October 2007.
[10] C-388/07, *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.

Andersen, 12 October 2010[11]

The exclusion of certain employees from the benefit of severance allowance based on their entitlement to an old-age pension constitutes direct discrimination on grounds of age.

National legislation

The Swedish *Discrimination Act* (2008:567) entered into force on 1 January 2009, implementing the prohibition of age discrimination into national law in accordance with Directive 2000/78. Chapter 2 §2.4 of the Act implements Article 6(1) of the Directive, following the same wording regarding the requirements of legitimate justification of direct or indirect age discrimination.

The Swedish *Employment Protection Act* (1982:80) gives a right to all employees to remain employed until the age of 67. Any agreement that states differently would be null and void.

Summary of the issues and findings

The case relates to discrimination on the ground of age by a private employer against a group of employees. The case raises several key issues:

- Whether a difference of treatment of employees based on their entitlement to benefit from a private pension fund constitutes direct or indirect age discrimination;
- Whether there is an objective justification or exception to direct discrimination on the ground of age in the jurisdictions of the equality bodies;
- What sanctions or remedies would be applied to a case of direct age discrimination that does not fall under any justification or exception.

The answers provided by the National Equality Bodies show that a difference of treatment of employees of a certain age because of their entitlement to benefit from a private pension fund constitutes direct discrimination on the ground of age. The implementation at national level of the Framework Equality Directive 2000/78/EC differs however regarding the possible objective justifications for such discrimination, and the answers of the National Equality Bodies reveal great discrepancies regarding the sanctions applied in such a case.

Fifteen National Equality Bodies from fourteen countries provided answers to the case study: Austria, Belgium, Croatia, Czech Republic, Denmark, Germany, Great Britain, Greece, Lithuania, the Netherlands, Norway, Poland, Romania and Slovenia. In the case of Denmark both the Danish Institute for Human Rights and the Board of Equal Treatment provided answers. The case was also discussed by members of Equinet's legal working group at two meetings in 2012.

1. Would this case fall within the scope of any anti-discrimination legislation in your country and if so, which legislation?

[11] C-499/08, *Ingeniorforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark*, 12 October 2010.

The answers provided showed that the case would fall within the scope of national anti-discrimination legislation in all fourteen countries. In several countries the case would also be covered by labour legislation.

2. Does it fall within the scope of Directive 2000/78/EC?

The answers indicated a full consensus among the responding National Equality Bodies that the case would fall under the scope of the Framework Equality Directive.

3. Does your equality body have a competence to deal with cases of age discrimination in employment?

The answers provided showed that all but one of the responding National Equality Bodies are vested with a competence to deal with cases of age discrimination in the field of employment, in accordance with the requirement of the Framework Equality Directive. The Polish body however is limited in its powers to cases related to actions and omissions of public authorities and can therefore not handle cases of discrimination where private parties are concerned. Although the body does have the power to ask the Labour inspectorate to investigate such cases, this limitation illustrates a discrepancy in the level of protection depending on the sector.

The Belgian National Equality Body indicated that according to a long-standing agreement between the national trade unions on the one hand and the body on the other, all cases relating to discrimination in the employment field should in the first place be handled by the trade unions. The body would take over the case if the trade unions proved unable to protect the rights of the victim of discrimination.

4. Would you consider this case as direct or/and indirect discrimination against the complainants on the ground of their age?

All but one[12] of the answers indicated that the facts of this case would be qualified as direct discrimination on the ground of age.

The complainants undoubtedly find themselves in a comparable situation to that of their (younger) colleagues, and their dismissal thus constitutes less favourable treatment than that which is given to their colleagues who remain employed. Some National Equality Bodies consider that this difference of treatment is based directly on their age, making it a case of direct age discrimination.

Other National Equality Bodies underline that the difference of treatment depends on the criterion of entitlement to the benefit of a private pension fund, and not directly on the age of the employees. However, they consider that although the different treatment is only indirectly based on age, it is too inextricably linked to the age of the complainants for the measure to be

[12] The answer provided by one equality body was not clear on this issue.

considered as "apparently neutral". Therefore these National Equality Bodies agree that this case would amount to direct and not indirect age discrimination.

The Austrian National Equality Body and the German Federal Anti-Discrimination Agency indicated that the case could be considered as either direct or indirect discrimination, depending on the criteria adopted by the private pension fund for the entitlement to pension benefits, as such entitlement is the criterion adopted by the employer for the difference of treatment. If the private pension fund bases the entitlement to benefits solely on the age of the concerned persons, the dismissals by the employer of the employees who benefit from the pension fund would amount to direct discrimination. If that entitlement is based on another, apparently neutral, criterion such as years of contribution to the fund, the dismissals would amount to indirect age discrimination.

The Danish Board of Equal Treatment which is a predominantly quasi-judicial National Equality Body indicated that it has handled cases bearing strong resemblance to the case at hand, also involving a group of older pilots whose employment contracts were terminated. The body itself qualified the measure in these cases as indirect discrimination, as the criterion of entitlement to pension benefits was 'apparently neutral'[13]. However, when the case reached the district court it was qualified by the court as direct discrimination, as the criterion used for dismissal was "*undoubtedly directly and inextricably and inseparably connected with the age of the defendants*"[14]. Since this court decision the Danish National Equality Body has reviewed its position on such cases, and would now consider a discriminatory measure based on the entitlement to pension benefits as direct age discrimination.

***Lessons learned*:**

- **Whether a difference of treatment is based directly on age or on an element which is inextricably linked to age it can be qualified as direct age discrimination as long as this element is not an "*apparently neutral criterion*".**
- **The notion of an "apparently neutral criterion" (and thereby indirect discrimination) is narrowly construed in the majority of the Member States.**

5. If you find the case leads to direct or indirect discrimination on the ground of age, is there an objective justification or exception?

General overview

The age ground is distinct from other prohibited discrimination grounds because of the extended possibilities of justifying and exempting age discrimination. On this ground the Directive provides an extended list of possible exceptions and most importantly allows for not only indirect but also direct discrimination to be objectively justified, whenever the discriminatory measure pursues a legitimate aim and is appropriate and necessary to reach that aim. Considerable space is also left

[13] Decisions of the Equal Treatment Board of June 10th 2009 in the cases 2500052-09, 2500053-09, 2500054-09, 2500055-09, 2500056-09, 2500057-09

[14] Decision of the district court in the joint cases on April 4th 2011, no. BS 32C-1356/2010. The amount of compensation awarded was appealed to the Eastern High Court (decision of June 13th 2012 in B-1271-11) and is at the time of writing pending before the Supreme Court.

for flexibility regarding positive action measures to promote and/or protect employment of both older and younger workers.

As the EU legal framework regarding the justification of age discrimination leaves a broad margin of interpretation to the national legislators, there is room for important differences among the Member States, leading to a certain lack of clarity. This fact is well illustrated by the National Equality Bodies' responses to the case at hand and the possibilities of justifying the directly discriminatory dismissals.

The answers indicated very interesting differences between the national legislations and the National Equality Bodies' interpretation of this case with regards to the possibilities of objectively justifying the direct age discrimination, or of finding an applicable exception. There seems to be a general feeling among the National Equality Bodies that the employer in this case could have adopted less intrusive measures but there is still a doubt as to whether or not the dismissal of the claimants was justified.

The National Equality Bodies are almost evenly divided between bodies indicating that they believed there would be an objective justification of the discriminatory dismissals, bodies believing there would not be such a justification and bodies unable to indicate an answer. Several of the responding bodies indicate a general lack of case-law to clarify the national legislation, thus making the legal situation in such cases relatively unpredictable.

Elements of justification

For the discriminatory dismissals to be qualified as objectively justified under national anti-discrimination legislation implementing the exception of Article 6(1) of Directive 2000/78 the aim pursued by the employer would have to be considered as legitimate and the measure of dismissing the group of older employees would also have to be considered as appropriate and necessary to achieve that aim. One National Equality Body underlined that although there were no national case law precedents to refer to it was clear that the proportionality test would have to be stricter than for public authorities adopting general employment policies as some objectives would be considered as legitimate if pursued by such authorities but not when invoked by a private employer. It was also indicated by several National Equality Bodies that specific facts and circumstances of the case would have to be taken into account to determine the possibility of objectively justifying the discrimination.

Most of the National Equality Bodies did not provide information indicating a clear distinction between the definition of a 'legitimate aim' and that of 'appropriate and necessary means', but rather provided general elements potentially justifying the discriminatory dismissals. However, a significant number of the bodies indicated that they consider the aim of the employer to dismiss the employees who would be the least affected by the measure as a legitimate social policy objective. Other possible aims considered as legitimate were the balance of age groups represented in the work force and ensuring the economic security of those affected.

Regarding the question of whether the means used to achieve the pursued objectives were appropriate and necessary, one element that was taken into account by several National Equality Bodies was the comparative gravity of the impact which the dismissals would have had if the age discrimination had not taken place. It was for instance underlined to this effect that the employment market for young pilots was very difficult, making it problematic for them to find new employment had they been the ones to be dismissed. The Dutch National Equality Body referred

to a similar case judged by the Supreme Court where the expensive training paid for by the future pilots was taken into account to qualify a measure that was discriminatory to older pilots as necessary and appropriate.

In this regard, one National Equality Body indicated that the case-law of the CJEU seems to show that salary and pension benefits should be considered as distinct, neither of them replacing the other in the evaluation of discriminatory dismissals. To this end, the *Kleist* case[15] decided by the Court in 2010 was mentioned, in which the dismissal of an employee entitled to pension benefits was qualified as direct discrimination on the ground of gender, the retirement age being lower for women than for men, without any elements showing that pension benefits could replace a salary. This case should however be read in relation to a recent case[16] of the European Court of Justice, judged in an infringement procedure against Hungary regarding this country's retirement reform for judges and notaries. In this case the Court clearly took into account the low levels of pension benefits compared to the salaries of the concerned public servants when judging that the retirement reform was not a proportionate measure to achieve the pursued aim.

Lessons learned

- **Interpretations of the possibility to objectively justify measures amounting to direct age discrimination differ greatly between the National Equality Bodies, and there is a general lack of clarity among them regarding the application of objective justifications of direct age discrimination.**
- **The application of such justifications depends to a large extent on specific facts of each case, creating a lack of legal certainty regarding measures such as those at hand in this case.**
- **There seems to be an agreement that in general the appropriateness and necessity of the measures needs to be further scrutinised if there could have been less intrusive means to reach the legitimate aim.**
- **The proportionality test for acts of private employers needs to be stricter than for public authorities adopting general employment policies.**

6. Does your country provide a provision on justification of difference of treatment on grounds of age in the employment sphere?

The answers showed that such provisions exist in the national legislation of all concerned countries.

The Danish Board of Equal Treatment indicated that there is no exception as such in the legislation, but that the provisions on the shift of the burden of proof would have to be applied, giving the employer the opportunity to prove that the discriminatory measure did not breach the principle of equal treatment. This could for instance mean proving that the discrimination was objectively justifiable, pursuing a legitimate aim. The other Danish National Equality Body

[15] C-356/09, *Pensionsversicherungsanstalt v Christine Kleist*, 18 November 2010.
[16] C-286/12, *Commission v Hungary*, 6 November 2012.

however mentioned a provision in national legislation which gives the social partners a possibility to adopt collective agreements applying Article 6(1) of the Directive.

7. If the answer is yes to the previous question, in which law is this regulated and how is the provision formulated, e.g. does it provide examples of what such justified difference of treatment may include?

In most of the national legislations concerned the justifications and exceptions for discrimination on the age ground are formulated either within the 'genuine occupational requirement' provision and/or within particular provisions on possible justifications for age discrimination, following more or less exactly the wording of Article 6(1) of the Directive. There are also in several of the concerned States exceptions implementing Article 6(2) and provisions regarding positive action measures.

Examples of justified differences of treatment seem only very rarely to be provided by the legislation, as the majority of national anti-discrimination legislations give 'open' provisions on justification. However, when they are provided they include for instance the promotion of the inclusion of younger or older workers; minimum conditions of age, seniority or experience; and maximum ages for recruitment. The German legislation is however an example of legislation providing a very extensive list of justified differences of treatment on the ground of age. This list is 'open-ended' as it states that the provided examples are not exhaustive, leaving a seemingly large margin for justified differences of treatment particular to the ground of age.

8. If there is no justification or exception, what could be the sanctions or remedies under your national legislation? If any, what would be the level of compensation awarded?

In most national legislations the only sanction applied in cases of direct age discrimination in the employment field would be the payment of damage compensation, for economic loss and/or personal damage. In Denmark compensation for discriminatory dismissals generally corresponds to 6, 9 or 12 months' salary, depending on the duration of the employment of the complainant, and in the UK compensation levels range between 6.000 and 30.000£[17]. In Poland the minimum level of compensation for discrimination in the employment field is equivalent to the minimum wage[18]. This can however be complemented by damage compensation for material damage. In Germany damages can be awarded corresponding to the economic loss, and for immaterial damages at a level not exceeding three monthly salaries in cases of discriminatory non-recruitment. In practice the levels of awarded compensation range between one and three monthly salaries.

In some countries the payment of compensation can be complemented by other sanctions, such as the payment of an administrative fine. The levels of such fines vary greatly between countries, ranging for instance between 400 and 800 lei[19] in Romania, between 2.500 and 40.000€ in

[17] Approx. between 7.500 and 37.500€.
[18] Currently 1.500 PLN, approx. 363€.
[19] Approx. between 88 and 1770€.

Slovenia and reaching a maximum of 600€ in Lithuania. It is to be noted however that these are the minimum and maximum legal levels for such fines and that none of the concerned National Equality Bodies indicated the actual levels being applied in cases of discrimination. The Slovenian body said that in practice even fines reaching the minimum level are almost unheard of.

In a small number of jurisdictions the discriminatory act, provision or decision can also be overturned and in others actions can be taken to eliminate the discriminatory effects of the act, provision or decision. In Slovenia criminal sanctions can also be adopted in cases of intentional discrimination.

One National Equality Body stated that it was unable to give information on levels of sanctions and compensation, as remedies are generally decided upon through settlements out of Court between the parties, where the equality body itself does not take part.

In comparison to these sanctions the Swedish court awarded compensation of 125.000 SEK[20] to each of the discriminated employees. In accordance with national law the court also invalidated the discriminatory dismissals, allowing for the complainants to regain their employment.

Lessons learned

- **Sanctions applied in cases of directly discriminatory dismissals are mainly limited to payment of compensation. In some countries other forms of sanctions may be applied, such as administrative fines or the invalidation of the discriminatory act.**
- **European, national legislators and National Equality Bodies could usefully monitor and analyse whether the sanctions applied in age discrimination cases fulfil, both in theory and in practice, the conditions of effectiveness, dissuasiveness and proportionality as required by Article 17 of the Directive. According to the information provided by National Equality Bodies there appears to be a wide variance in levels of compensation awarded in age discrimination claims.**

9. Are there any court cases or cases of your equality body dealing with justified reasons for difference in treatment on the ground of age in the employment sphere? If yes, what was the decision by the court or equality body?

The answers indicated that there have been cases related to justified reasons for difference in treatment on the ground of age in the employment field in all concerned countries, before the courts and/or before the National Equality Body.

The Danish quasi-judicial National Equality Body presented a case it had handled where a 34-year old was refused a trainee position due to the application of a collective agreement imposing a higher salary to trainees over the age of 25. The body decided that the aims pursued by the defendant were not legitimate as they were not social political aims such as purposes of general interest, but purely individual interests of the employer such as cost-cutting.

[20] Approx. 14.550€.

The Dutch tribunal type National Equality Body handled a difficult case regarding an age criterion for joining the military police. The aims pursued by the ministry of defence in its role of employer – the need for a broad availability of staff and creating career prospects – were considered by the equality body as legitimate. However, as the ministry could not justify why less discriminatory measures were not adopted to reach the same objectives, the National Equality Body declared that the age criterion was not proportionate to the legitimate aim and was therefore qualified as unjustified discrimination on grounds of age.

The Greek National Equality Body reported having dealt with a case where maximum age limits were imposed for the application to the position of air traffic controller. After a mediation process, the body decided that such age limits can only be adopted and applied if they are well justified. Following this decision the Ministry for transportation issued a decision justifying an age limit of 30 years for the application to such positions. Three elements of justification were presented: the long duration of the training; the obligation of annual medical checks after the employee reaches the age of 40; and the effectively early retirement age due to hard working conditions and a gradual loss of the necessary physical capacities.

Lessons learned

- **The experiences of National Equality Bodies of cases regarding justification of discrimination on grounds of age vary greatly between the Member States, as do the courts' case-law practices, creating very different levels of predictability of the law.**

10. What is the age of pension in your country?

The answers showed that five of the fourteen concerned countries have different pension ages for men and for women. In four of these countries (Austria, Croatia, Romania and Slovenia) the pension age for men is 65 and for women 60, although in three of these countries reforms are ongoing to equalise the pension age at 65. In Slovenia, where there are differences not only according to gender but also according to number of years of pensionable service, there is an ongoing political debate on the need for a reform. In the Czech Republic a very complex system is in place where the age of pension depends not only on the gender but also (for women) on the number of children raised. This system was examined by the national courts and brought before the European Court of Human Rights[21], and is now being progressively replaced by an equalised pension age at 67 for both men and women, independently of the number of children.

In three other countries there are reforms in place to progressively equalise and elevate the pension age for all at 67. Thus, in two of these countries the pension ages differ for those born before a certain date, with an equalised pension age for those born after that date (1955 in Denmark and 1946 in Germany). In Poland this reform will be implemented from 2013 onwards, the pension age for the moment being 60 for women and 65 for men.

In five of the countries the pension age is equalised, at 65 in Belgium, Lithuania and the Netherlands and at 67 in Norway and in Greece. In the latter country this retirement age is the

[21] *Andrle v Czech Republic*, application n° 6268/08, 17 February 2011.

result of recent reforms adopted in response to the financial crisis, and will be in place from 1 January 2013. However, interim measures apply to public servants, so as to reduce their number through early retirement, in application of the previous legal framework for pension age.

Finally, in the UK the equalised retirement age was set at 65, but was abolished in 2011. Since that date, any employer wanting to impose a retirement age must objectively justify this measure under national anti-discrimination legislation with regards to discrimination on the ground of age. Thus, they must prove that they are pursuing a legitimate social policy aim and that the retirement age is an appropriate and necessary measure to achieve that aim.

Lessons learned

- **All but one of the concerned countries have a pensionable age, which sometimes differs between men and women although the general direction in these countries leads towards a standardisation of the pension age.**
- **The reform put in place in the UK in 2011 should be seen as an example of good practice, as it enforces the rules regarding objective justification of discrimination on the ground of age in all cases of imposed retirement.**

11. Could you give details of any court decisions relating to the age of pension and discrimination?

Only two out of fifteen National Equality Bodies reported not knowing of any cases of this kind having been judged in their respective countries, while the remaining bodies gave more or less detailed accounts of such cases. Three of the reported cases related to discrimination on grounds of gender as regards different pension ages for women and men. In Poland such national legislation, providing for different pension ages for women and men, was for instance declared in compliance with the Constitution by the Constitutional tribunal.

The Belgian National Equality Body reported a case where the labour tribunal found discrimination on grounds of age where a collective agreement protected employees from dismissal only until they reached a certain 'base age'. This discriminatory act was not justified because the 'base age' was lower than the pensionable age, leaving the employees unprotected from loss of remuneration when they reached the 'base age'. The collective agreement was therefore declared null and void on this point.

The Danish Board of Equal Treatment, which is a quasi-judicial National Equality Body, explained having judged several cases of fixed retirement ages. National legislation allows collective agreements where a fixed retirement age is set at 70, but in the concerned cases the Board found there had been age discrimination as the employers had decided individually to set a fixed retirement age at 70, without entering into an agreement with the employees' representatives.

In Slovenia the Constitutional court found in 1999 that the provision in the Labour code setting a compulsory retirement age[22] was unconstitutional because it created unjustified sex and age

[22] Based on meeting the conditions for entitlement to a full old age pension

discrimination[23]. It is worthwhile to mention that five years earlier the Constitutional Court considered the same provision and at that time dismissed the petition as evidently unfounded[24].

The German anti-discrimination agency presented several cases related to the same issue of age discrimination in social plans due to a difference of levels of compensation awarded to employees of a certain age, and thus in general having right to high levels of compensation due to many years' service. One such case was referred to the European Court of Justice by the labour court in Munich, and the judgment was delivered on 6 December 2012[25]. In this case the Court found that the difference of calculation of the compensation constituted direct discrimination on grounds of age, but that this measure was justified. One of the main aspects brought forward by the Court in its assessment of the legitimate aims pursued by the employer was the objective of distributing a limited amount of financial means between all employees, and that of compensating for the future those employees who would be in pursuit of new employment. However, the Court found that the difference of calculation of compensation due to the entitlement of the employee to a disability pension constituted indirect discrimination on grounds of disability, which was not justified.

Finally, the British National Equality Body presented a case brought recently by the body to the Supreme Court, regarding the compulsory retirement of a partner in a law firm. In this landmark case the Supreme Court thoroughly examined the facts and circumstances of the case with the case-law of the CJEU regarding age discrimination, and came to the conclusion that there had been discrimination but that it was justified by a legitimate social policy aim and the measure applied was both necessary and appropriate to achieve that aim.

[23] Ruling No. U-I-49/98, dated 25 November 1999
[24] Ruling No. U-I-32/94, dated 30 June 1994
[25] C-152/11, *Johann Odar v Baxter Deutschland GmbH*, 6 December 2012.

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