An overview of the case law on the prohibition of discrimination of the ECJ and the ECtHR

The European Union and the Council of Europe both have the ambition to fight against discrimination. They have created quite a comprehensive set of rules, in particular thanks to their respective courts, the Court of Justice of the EU (ECJ) and the European Court of Human Rights (ECtHR). These provisions have developed separately, but are comparable in many aspects. Moreover, the 27 Member States of the EU are parties to the European Convention of Human Rights (ECHR), which includes 47 Contracting States, and since the Lisbon Treaty, EU accession to the ECHR is on the agenda.

The European Union has adopted a wide range of provisions aiming to prevent discriminatory conduct. Article 13 of the Treaty on the functioning of the European Union (TFEU) allows EU institutions to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". Thus, the European Council and the European Parliament have adopted several directives to implement the principle of equal treatment through the prohibition of gender-based discrimination (Gender Equality Directive N° 2006/54/EC and directive N° 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security), and racial discrimination (Racial Equality Directive n° 2000/43/EC), as well as a discrimination based on age, disability, religion and belief and sexual orientation (Employment Equality Directive N° 2000/78/EC).

These directives are only applicable within the scope of EU law and those matters they expressly govern. The Employment Equality directive only covers issues of employment and work conditions, while the Gender Equality Directive governs access to social security schemes. In addition to these issues, the Racial Equality Directive governs access to goods and services, including supply of housing.

While the EU has established an exhaustive list of prohibited grounds, the ECHR does neither preclude claims for discrimination based on unmentioned grounds, nor impose a limited context of applicability, such as employment or access to social security schemes. However, Article 14 only prohibits discriminatory conducts related to the other rights guaranteed by the Convention. Indeed, this Article states that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination". As such, the applicability of the principle of non-discrimination under the ECHR is limited.

To remedy this weakness, Article 1 of Protocol 12 adopted on November 4 2000 establishes a general prohibition on discrimination of the enjoyment of any right, including those protected under national law. However, this Protocol has not yet been ratified by all Contracting States and is therefore not applicable to all of them.[1]

All these provisions have been clarified in the case law of both courts, giving information to determine whether a situation is discriminatory or not. First of all, the judge will determine if there is an illegal differential treatment, before deciding if such a treatment can be justified. Examples of the case law will be developed for each ground of discrimination.

1. The notion of discrimination according to case law

1.1 Differential treatment

[1] 18 ratifications in May 2012
http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=24/05/2012&CL=ENG

Differential treatment may, in particular, result from direct discrimination: this happens when two persons or groups of persons in the same situation are treated differently. Discrimination may also be indirect. In the Thlimmenos case[2], the ECtHR recognised that a conduct may be discriminatory if two persons are treated alike while their situations are significantly different. For example, in D.H. and others v Czech Republic[3], the state was the author of indirect discrimination for failing to adapt to Roma pupils tests to determine in which kind of schools children were to be sent, according to their level. Indeed, the authorities had shaped this test to the mainstream Czech population, without regard to the specificities of Roma people, leading them to be more likely to fail.

The EU directives also govern indirect discrimination, which involves a neutral rule, applied without distinction to people in different situations.

1.2 Comparator

To identify discrimination, either direct or indirect, it is necessary to refer to a comparator in order to assess if other persons or groups in a similar situation have suffered the same negative effects.

The ECtHR has stated that Belgian lawyers – *avocats* –, who were required to provide free legal service to indigent people, were in a different situation than the medical practitioners and veterinaries (who did not bear such duty) because of their different status, regarding the conditions to enter the profession and nature of functions (Van Der Mussele[4]).

In Johnston[5] case, an Irish applicant claimed he was discriminated against because he could not get divorced in Ireland since divorce was forbidden there, while Irish people residing in another country could obtain the recognition of their divorce granted abroad. The ECtHR stated that this was not a comparable situation and therefore the prohibition of divorce was not discriminatory.

In the case of Moustaquim v Belgium[6], the ECtHR considered that a Moroccan who was to be deported after a criminal conviction was not in the same situation as a Belgian who could not be deported because under the Convention's provisions states cannot expel their own nationals. However, he was in a similar situation as other EU nationals who could not be expelled either, but the Court found the differential treatment to be justified since it was legitimate and proportionate and for reasons to safeguard the public order.

In the Richards case[7] the applicant had undergone male-to-female gender reassignment surgery. She claimed her pension when she turned 60, like women are entitled to in the UK. The State refused to grant her pension. She claimed she was being discriminated against, but the State had regarded her as a man, not a woman. The ECJ found that she had been discriminated against and should have been considered as a woman, because the UK allows gender change.

1.3 Justification

Both EU law and the ECHR allow justification to discrimination.

[2] No 34369/97
[3] No 57325/00
[4] No 8919/80
[5] No 9697/82
[6] No 12313/86
[7] C-423/04

The ECHR allows a defence based on general justification, both for direct and indirect discrimination. The ECtHR's case law has established the criteria for such defence: in order to be justified, a differential treatment must have an objective and reasonable justification, pursue a legitimate purpose, as well as satisfy the proportionality test. (James Case[8]). The ECtHR distinguishes between cases where Member States are given a margin of appreciation and other cases that require a closer scrutiny.

In some cases the Contracting States have a wide margin of appreciation that mitigates the applicability of Article 14 ECHR. Indeed, in the Rasmussen case[9], the ECtHR found, concerning the right to contest one's paternity which was more favourable to the mother than to the alleged father, that Contracting States enjoy a wide margin of appreciation and are entitled to take measures allowing a longer period to the mother to contest the paternity of her child. The ECtHR stated that the scope of the margin of appreciation depends on the circumstances, the subject matter and the existence of common grounds between the laws of the Contracting States. In the absence of such common ground they enjoy a wider margin of appreciation.

The subject matter is of high importance to determine if Member States have a margin of appreciation and can easily or not justify a discriminatory conduct. Some grounds of a less favourable treatment are very hard to justify because of their nature. In those cases only "very weighty reasons" can be advanced. This applies to discrimination on grounds of sex. In the Abdulaziz, Cabales and Balkandali cases[10] the ECtHR stated that the necessity to protect the labour market is not sufficient to adopt stricter immigration rules for women than men. In addition, discrimination based on religion is "not acceptable" according to the case of Hoffmann[11], or requires at least a "strict scrutiny" under the Thlimmenos case[12]. Differences based on sex orientation moreover require particularly serious scrutiny (S. L. V v Austria case[13]), but adoption refusals addressed to homosexuals can be justified by the interest of the child (Fretté case[14]). Discrimination on the ground of nationality is also strictly supervised, except when it comes to the entrance and expulsion of aliens (Moustaquim case[15]). To finish, "a special importance should be attached to discrimination based on race" (Cyprus v Turkey case[16]).

The EU only permits general justification in cases of indirect discrimination if the unfavourable treatment has a legitimate aim is necessary and "appropriate" (which means proportionate). Specific justification is admissible in cases of direct discrimination. EU directives acknowledge "genuine and determining occupational requirements", and the Employment Equality Directive moreover accepts that religious organisations impose conditions on their employees based on their religious beliefs, and that employment policies allow differential treatment on grounds of age if the measure is necessary and proportionate.

For example, in Commission v. France the ECJ found that in certain circumstances it can be justified to reserve positions for men in male populated prisons and conversely, if the sex of the worker "constitutes a determining factor" according to the nature or the context of the

[8] No 8793/79
[9] No 8777/79
[10] No 9214/80 ; 9473/81 ; 9474/81
[11] No 12875/87
[12] No 12875/87
[13] No 45330/99
[14] No 45330/99
[15] No 45330/99
[16] No 25781/94

activity. Such derogation must be adapted to social development and be sufficiently transparent to permit supervision by the Commission. In this case France breached the latter condition since the Commission's monitoring on the necessity and proportionality of the measure was impeded[17].

In the Mahlburg case a pregnant woman who was already working as a nurse in a hospital under a fixed-term contract applied for an operating-theatre nurse position for an indefinite period. German law prohibits employers to assign work to pregnant woman in operating-theatre to avoid any risk of infection. As a result, the hospital refused to hire her on the ground of this legal prohibition. The Court stated that this conduct was discriminatory, because even if the legal prohibition was objectively justified, it was only temporary while the duration of the contract was unlimited[18].

2. The grounds of discrimination

Other examples will be given on each ground of discrimination to emphasize how a differential treatment on the ground of sex, age and racial origin can be justified.

2.1 Age

Discrimination on the ground of age cannot be connected to any rights guaranteed under the ECHR. However, it can arise in many issues involving other rights. Article 14 does not expressly refer to age discrimination. However, the list is not exhaustive and age can be included in "others status" referred to in this Article.

Thus, the ECtHR has noticed several cases of discrimination on the ground of age. Among them the denial of a fair trial to a boy convicted for a murder committed while he was 10 years old. The fact that he was treated as an adult prevented him from benefitting from an adequate defence, because of his lack of maturity and understanding abilities (Case V v UK[19]).

Discrimination on the ground of age is not part of the issues in which the ECtHR only allows "very weighty reasons" for justification, and a margin of appreciation is granted to national authorities to assess the importance of public interest as compared to the potentially discriminatory measure. Indeed, in the Schiwzgebel v Switzerland case a 47 years old woman had been refused to adopt a child because she was too old. The ECtHR found that it was discrimination on the ground of age, but justified by the child interest and not arbitrarily applied, given that the authorities also referred to the financial burden such an adoption would pose[20].

EU law expressly addresses the issue of age discrimination in the Employment Equality Directive which is only applicable in the field of employment. In the case of Kücükdeveci[21] the ECJ stated that non-discrimination on the ground of age was a general principle of law. It is applicable in individual relations, even if it has not been implemented into national legislation before the expiry of the transposition period, provided that it falls under the scope of EU law (which means in the area of employment). This decision mitigates the previous decision of the ECJ, stating that national courts must set aside any provision of

[17] 318/86
[18] C-207/98
[19] No 24888/94
[20] No. 24724/94
[21] C-555/07

national law which may be in conflict with the general principle of non-discrimination, even if the transposition period has not yet expired (Mangold case,[22]). In Bartsch[23] the ECJ reversed this decision, refusing to apply the directive before the expiry of the transposition period, the directive being the source of this general principle of law (Kücükdeveci).

According to the ECJ national legislation allowing the exclusion of professional experience acquired before the age of 18 while determining employees' grading is not justified and constitutes age discrimination (David Hütter case[24]). In addition, setting a maximum age of 68 for practising as a panel dentist is discriminatory given that the same requirement is not imposed to non-panels (private) dentists and that the only aim of such a measure is to protect the health of patients against the decline in performance of those practitioners (Dominica Petersen case[25]). The directive moreover precludes national legislation providing that periods of employment completed before the age of 25 are not to be taken into account while establishing the dismissal notice (Kücükdeveci).

On the contrary, a maximum age of 30 for the recruitment to a post in the fire service involving front line duties is not prohibited by the directive. Indeed, physical fitness constitutes a genuine and determining occupational requirement (Wolf v Stadt case[26]). Age can thus constitute an occupational requirement when necessary and appropriate. Furthermore, the directive allows national provisions setting an automatic termination of an employment contract as soon as the employee has reached the mandatory retirement age, as long as they are reasonable to fulfil a legitimate aim, and that the means are appropriate and necessary (Gisela Rosenbladt case[27]). In Bulicke case, a national procedural rule imposed the victim of discrimination a two months deadline to make a claim against the perpetrator. According to the ECJ, such time limit is not precluded by the directive, provided it is not less favourable than the one applying to other similar claims in domestic law and does not make the exercise of this right excessively difficult.[28]

2.2 Sex

Equality between men and women is a fundamental principle of the EU as stated in Article 2 TEU. When it comes to the ECtHR, it stated that "the advancement of equality of sex is today a major goal in the Member States of the Council of Europe". This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention" (Abdluaziz, Cabales and Balkandi v. the United Kingdom). Therefore, in both legal orders, discrimination on the ground of sex is hardly justifiable.

The notion of sex has been broadly interpreted to include not only the biological differences between men and women but also the notion of gender identity, protecting to those who have undergone gender reassignment surgery.

[22] C-144/04
[23] C-427/06
[24] C-88/08
[25] C-341/08
[26] C-229/08
[27] C-45/09
[28] C-246/09

2.2.1. Differential treatment between men and women

The ECtHR found it discriminatory and unjustified to establish harsher restrictions on the immigration of wives joining their spouses than to husbands, on the ground that statistically, women were less likely to seek work than men. The need to protect the labour market could be a legitimate aim but this statistical evidence is inconclusive and not likely to constitute a "very weighty reason" to justify such a differential treatment (Abdulaziz, Cabales and Balkandali v. the United Kingdom). Moreover, the deprivation of an invalidity pension to a woman was unjustified: the authorities tried to defend this differential treatment by claiming she had a child and would therefore be unlikely to seek a job. (Schuler-Zraggen v. Switzerland, European Commission of Human Rights[29]). A provision requiring a woman to bear her husband's surname is discriminatory given that men do not bear this duty regardless of her ability to retain her own name. (Ünal Tekeli v. Turkey[30]).

Men can also be the victim of a differential treatment. In the Van Raalte v. the Netherlands case[31] the ECtHR found that it was discriminatory to oblige childless men aged over 45 to pay a contribution whereas this duty did not concern women. However, the judge seems not to be so strict when it comes to men treated less favourably in a public sphere. Indeed, in the Rasmussen case where a different deadline to challenge the paternity applied to men and women, the ECtHR stated that the authorities have a wider "margin of appreciation" and therefore able to take such measures. The same conclusion was reached in Petrovic v. Austria[32] where contrary to mothers; fathers were not entitled to parental leave allowance. This decision is moderated by the ECtHR itself, which highlights that at the time of the facts (late 80's); no common ground between Member States in this field did exist. However, since sex equality has become a landmark principle of the Council of Europe it is probable that the ECtHR would give a different statement nowadays.

In the field of social security and fiscal matters, the ECtHR allows a wide margin of appreciation to national authorities. Indeed, in Stec and others v. UK[33] the justifiability of the five-year difference in the legal retirement age between men and women was questioned. The ECtHR stated that even if only "very weighty reasons" can allow such a differential treatment, a "wide margin of appreciation...when it comes to measures of economic or social strategy" is granted to national authorities. Thus, such a measure is justified given that this benefit granted to women is "intended to compensate for reduced earning capacity", and that the government has begun the move towards equality, reducing progressively the gap between men and women.

The ECJ is also more likely to admit differential treatment in the field of social security and fiscal policy, even if a Member State can never exclude a group simply out of fiscal reasons. In theory a less favourable treatment is admissible if it is the only way to prevent the social security scheme to collapse, but the ECJ, for example, has admitted that minor and short-term employment can be excluded from the social security scheme, even if it affected women more than men, women being more likely to be in precarious employment (Megner and Scheffel case[34]). In the Brouwer case[35], the ECJ has firmly refused a justification concerning differential treatment between men and women when it comes to the calculation

[29] No 14518/89
[30] No 29865/96
[31] No 29865/96
[32] No 20458/92
[33] No 65731/01
[34] C-444/93
[35] C-355/11

of retirement pensions. Mrs Brouwer was a Belgian who worked from 1960 to 1998 in the Netherlands. When she stopped working she was entitled to get a pension in Belgium until she reaches 65 after which she would be covered by the Dutch social security scheme. Her Belgian pension has been calculated according to the average wage set by the state each year. But before 1995 the average wage was lower for women than men. The complainant claimed she had been discriminated against on the ground of sex. The ECJ ruled that this conduct was discriminatory, despite the effort later made by the state to put an end to this differential treatment. Belgium established different wages for equal work or work of equal value which is contrary to the principle of equal treatment, applicable in the field of social security since the expiry of the implementation period of the directive 7/79/EC of 1978, in 1984.

The landmark case of the ECJ on gender discrimination is the Defrenne case[36], which states that "the principle that men and women should receive equal pay, which is laid down by Article 119, may be relied on before the national courts". Mrs Defrenne was an air hostess and her employment contract stipulated that women reaching the age of 40 shall be dismissed. The ECJ found that this was discriminatory since men are not subjected to this treatment. Moreover, the ECJ is not willing to admit differential treatment on the ground of financial burden or management pressure faced by employers. Indeed, in the case of Hill[37] the ECJ considered that harsher conditions for increment of part-time employees accessing full-time employment, compared to those of full-time employees were discriminatory on the ground of sex, because more women than men were engaged in part-time jobs.

In the Kreil case[38] a woman applied for a voluntary service position as an electronic engineer, involving duties in weapon electronic maintenance. German law prohibited access to women in military posts involving the use of arms, limiting their access to medical and musical service. The ECJ considered that "such an exclusion, which applies to almost all military posts in the Bundeswehr," It is not possible to exclude women from all military posts on the ground that they need a greater protection against risks than men. It is however possible to exclude women from some positions if the measure is legitimate as regard to public security and proportionate. For example, in the Sirdar case[39] the ECJ stated that the exclusion of women from special combatants unit of the Royal Marine can be justified to ensure fighting efficiency.

2.2.2 Transgender discrimination

Both EU law and the ECHR provide protection against discrimination on the ground of gender identity. This has been developed through the case law of the ECJ and ECtHR.

The most famous case of the ECtHR on this matter is the case of Mrs Goodwin[40]. The applicant, who was married to a woman and had two children had undergone a male to female reassignment surgery. She divorced from her wife and lived with a new male-partner. She complained of the fact that she has been denied the recognition of her new legal situation by the authorities: she has been refused, for example to be eligible for retirement pension at the age of 60 (the legal retirement age was 60 for women and 65 for men) as well as to get married. The ECtHR held that Article 8 of the Convention on the right to private and family life was violated, as well as Article 12 securing the right of a man and a woman to marry and

[36] C-149/77
[37] C-243/95
[38] C-285/98
[39] C-273/97
[40] No. 28975/95

to found a family. Indeed, the refusal of such a recognition would prevent transsexuals to marry a person of the previous same sex, and thus to marry at all. The ECtHR did not find necessary to see if Article 14 has been violated. This was a clear case of discrimination whereby trans-gendered people faced differential treatment compared to other people, deprived of the right to marry. In Van Kück[41] the applicant was refused reimbursement of her costs for reassignment surgery from her medical insurance company, on the ground that this surgery was not necessary. The German appeal court gave a ruling in favour of the insurance company. On the contrary, the ECtHR stated that, having regard to the gravity and irreversibility of this surgery, such a decision was a violation of the right to private life.

In P. V. v Spain[42] a divorced father of one child lost custody rights when he decided to undergo gender reassignment surgery. The ECtHR did not find it discriminatory because the decision was not taken on the ground that he was a transsexual. An expert report revealed that the father was emotionally instable, it was moreover necessary to allow the child some time to get used to his father's new gender. Therefore, given that the treatment was not based on the gender of the applicant, and that the interest of the child has to be taken into account, the ECtHR held that there was no discrimination.

The ECJ made a similar statement concerning male to female reassignment surgery and the right to pension. Mrs Richards has been refused the payment of a retirement pension at the age of 60 because she was considered a man. The ECJ found that it was discriminatory and that it violated Directive 79/7/EC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Richards case,[43]).

2.3. Sexual orientation

Sexual orientation is not expressly referred to in Article 14 of the ECHR. However, it falls under its scope thanks to the terms "other status" which provides for an extension of the list of the protected grounds. Under EU law, discrimination on the ground of sexual orientation is prohibited by the Employment Equality Directive and thus applies in the field of employment.

In the case of Salgueiro da Silva Motta v. Portugal[44] a man who had a child with his former wife was now living with another man. He was refused the custody of his child by a Court of Appeal on the ground that "the child should live in a family environment, a traditional Portuguese family, which was certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife." The Court of Appeal even considered that the father "had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria." The ECtHR stated that is was a violation of the right to private life (Article 8 of the Convention), but also a discrimination in violation of Article 14. In addition, the Court held that sexual orientation was a "suspect case" requiring a strict scrutiny and only justifiable with "very weighty reasons".

In the S. L. v Austria case[45] a man considered he was victim of discrimination because the Austrian law criminalised sexual relations between young men between 14 and 18 and adults, whereas lesbians and heterosexual did not suffer such a prohibition. The ECtHR held that it

[41] No. 35968/97
[42] No. 35159/09
[43] C-423/04
[44] No 33290/96
[45] No 45330/99

was a discriminatory conduct on the ground of sexual orientation, combining Article 14 and the right to private life (Article 8). In J. M. v the UK[46] a woman did not obtain the custody of her children after her divorce and had to participate financially to their upbringing. When she started living with a woman she asked for a reduction in the child maintenance. This was refused, because the provision allowing a reduced participation when entering into a new relationship was only applicable to heterosexuals, married or not. Consequently, the ECtHR found that this provision was discriminatory.

The requirement of "very weighty reasons" seems to be watered down if the interests of a third person are involved, as seen above in the Fretté case[47]. The interest of the child can be a valid justification to refuse to grant an adoption approval. However, if national law allows a single person to adopt a child, taking into the homosexuality of the applicant as a determining factor for refusal is discriminatory (E. B. v France[48]). In Gas & Dubois v France[49] a woman wanted to adopt the child of her female spouse. The ECtHR stated that the refusal was not discriminatory, since the situation of these two women was not comparable to that of a married couple. Moreover, heterosexual couples in civil partnerships were likewise prohibited from obtaining a simple adoption order and therefore homosexuals were not treated less favourably.

In the field of employment the ECtHR held that excluding the applicants from the army only because of their homosexuality was a serious breach of their right to private life (Cases of Lustig-Prean & Beckett v Royaume-Uni[50]).

The ECtHR also protects against discrimination in exercising the right to assembly and the freedom of association under Article 11 of the Convention. The repeated rejections of gay-rights activists' requests to organise gay-pride marches is not justified in a democratic society and constitutes discrimination (Alekseyev v. Russia[51]).

The prohibition of discrimination on the ground of sexual orientation does not mean that Member States have to allow same-sex couples to marry. However, the ECtHR acknowledged that a cohabiting same sex couple in a stable relationship falls under the scope of Article 8 protecting the right to private and family life (Schalk & Kopf v Austria[52]).

There are not many rulings from the ECJ available concerning discrimination on the ground of sexual orientation. However, it has carried out a strict scrutiny in very recent cases dealing with pensions.

In Maruko case[53] a man who was in a life partnership with another man, was refused a widower's pension when his partner died. German law however places partners and spouses in a comparable situation concerning survivor's benefit. Therefore the ECJ, which only requires a comparable and not similar situation, stated that such refusal was a discriminatory and unjustified conduct. In Römer case[54] a man who was engaged in a life partnership with another man requested his former employer to recalculate the amount of his retirement

[46] No 37060/06
[47] No 36515/97
[48] No 43546/02
[49] No 25951/07
[50] No 31417/96 & 32377/96
[51] No. 4916/07, 25924/08 & 14599/09
[52] No 30141/04
[53] No C-267/06
[54] No C-147/08

pension on the ground of the Hamburg's land law allowing married people to be granted their pension on a more favourable mode of calculation. His employer refused to do so, pointing out the fact that this provision was only applicable to married couple but not couples engaged in a partnership. However, same-sex couples are not allowed to marry and only have the possibility to enter a life partnership. As a consequence, the ECJ stated that such differential treatment was discriminatory given that the regime of registered life partnership has gradually been harmonised with that of marriage, resulting in the absence of legal difference between them.

2.4 Disability

Article 14 of the ECHR does not refer to disability. However, like sexual orientation, discrimination on this ground is prohibited thanks to the non-exhaustive nature of the list provided in the Convention. This kind of discrimination is prohibited under EU law in the field of employment. The ECJ has given a definition of disability that does not include any kind of sickness, but only physical, mental or psychological impairment which it probable to last for a long time (Chacon Navas case, C-13/05[55]).

In the Price v. UK case (No 33394/96[56]) the ECtHR ruled that the disabled person had been subjected to degrading treatment although no discrimination was found. Indeed, she was sentenced to seven days of imprisonment but the administration did not provide any adaptation to her conditions of detention. Therefore, given that she relied on a wheelchair for mobility and that she had shortened limbs and malfunctioning kidney, she needed special sleeping arrangements. These arrangements have not been provided and consequently she could not sleep properly and suffered hypothermia and pain.

When it comes to the ECJ, in the Coleman case[57] a mother complained that she was treated less favourably than her colleagues after her maternity leave because her son was disabled. She was for example not reinstated when she returned from maternity leave, contrary to her colleagues. She was moreover denied schedule flexibility by her employer, whereas her female colleagues were entitled to adapt their timetable to their family life. She also asserted that she has suffered offensive comments about her and her son. The ECJ admitted that it was a direct discrimination, even if she was not disabled herself. Indeed, it held that "an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee."

2.5 Religion or beliefs

While EU law only protects against discrimination on the ground of religion in the field of employment, the ECHR has a much broader scope of application under Article 9 of the Convention which guarantees the freedom of religion, and the ECtHR can also refer to Article 8 on the right to private and family life combined with Article 14.

In Hoffman v Austria[58] the applicant, a Jehova's Witness was denied custody of her children. The Austrian Supreme Court granted the custody to the father, stating that the interest of the children requires such a decision, given that this belief often puts its members on the fringes of society and that their refusal to have recourse to blood transfusion could

[55] C-13/05
[56] No 33394/96
[57] C-303/06
[58] No 12875/87

endanger the children's life. The ECtHR found that this statement was a violation of Article 14, combined with Article 8. Indeed, it considered that even if the Supreme Court was pursuing a legitimate aim (protecting the children's interests), the means were not reasonable and proportionate because "notwithstanding any possible argument to the contrary, a distinction based essentially on a difference in religion alone is not acceptable". Thus the ECtHR shows that discrimination on the ground of religion is hardly justifiable, but no reference was made either to "the margin of appreciation" of Member States or to the requirement of a defence based on "very weighty reasons". In the case of Canea Catholic Church v Greece[59] the Church was prevented from bringing or defending legal proceedings since national courts refused to recognize it as a legal person, whereas on the contrary the Orthodox Church and Jewish community were recognized as such. The ECtHR stated that it was a violation of the right to a court under Article 6 combined with Article 14, constituting religious discrimination. In the Thlimmenos case a Jehovah's Witness refused to wear the military uniform at time of general mobilisation claiming that his beliefs prohibited the use of weapons. He has been sentenced to four years of imprisonment for insubordination and released on parole after two years. Later he applied for an accountant position where he came second out of sixty applicants in the public examination. The administration nevertheless refused to appoint him because he had been convicted. The ECtHR disclosed a violation of Article 9 on the freedom of religion combined with Article 14, because "unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession". Moreover, the applicant had served his sentence for the offence. Imposing an additional sentence preventing the applicant to obtain the position was therefore unreasonable and disproportionate. In the case of Grzelak v Poland[60] the parents of a child were agnostic and denied their son to attend the class of religion. They complained of the fact that the school did not provide an ethics class instead. Indeed, during the period of his schooling he did not have any mark on his school certificates in the space reserved for "religion/ethics". The ECtHR stated this absence led to an unwarranted stigmatisation amounting to discrimination, in combination with a breach of his right not to manifest his religion.

The ECtHR however, does not always apply such a strict scrutiny, especially not when the case concerns the relationship of religions and a state. In the case of the Holy Monasteries v Greece[61] the ECtHR reached the conclusion that Article 14, combined with the right to court, the freedom of religion and the freedom of association, had not been violated. The Greek authorities had adopted an Act providing for compulsory transfer of property of the Holy Monasteries owned by the Greek Church to the state, while the Act did not affect other churches. The ECtHR held that this difference in treatment was legitimate as regards the close relationship between the state and the Greek Church. In Shalom Ve Tsedek v France[62] a Jewish community has not been granted the authorization to proceed to ritual slaughter on the ground that it was not representative of Jewish communities and it was possible for them to get their meat slaughtered in accordance with their ultra-orthodox requirements by importing food from Belgium. The Court found that such treatment was legitimate to protect public health and order, its scope was limited and it did not prevent the applicant from manifesting its religion.

[59] No 25528/94
[60] No 7710/02
[61] No 13092/87 & 13984/88
[62] No 27417/95

EU law covers discrimination on the basis of religion or beliefs in the field of employment only. The Employment Equality Directive establishes exceptions to the rule of non-discrimination "where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos". Therefore, religious organisations are allowed to require the fulfilment of certain conditions to their employees, like refusing to hire female priests if it contradicts their beliefs.

2.6 Race or ethnic origin

Race or ethnic origin is the motive for discrimination that receives the broadest protection under EU law, which covers employment, as well as access to social security scheme and to goods and services supply. The ECtHR considers that racial discrimination "is a particular affront to human dignity and requires from the authorities special vigilance and vigorous reaction" (Nachova & others v Bulgaria case[63]).

Even if the ECtHR does not explicitly require the existence of "very weighty reasons" for the justification of racial discrimination, it has nonetheless stated that "a special importance should be attached to discrimination based on race" (Cyprus v Turkey case). Therefore, many discriminatory conducts have been disclosed on this basis. For example, in the Timichev case the applicant had been refused to enter the territory of Kabardino-Balkaria on the ground of his Chechen origin. The Court stated that it was a discriminatory measure in violation of the right to free movement under Article 2 of Protocol 4. Moreover, the ECtHR has noticed many discriminatory conducts without making any reference to Article 14. In the case of 35 East African Asians[64] the European Commission on Human Rights found that racial discrimination could amount to degrading treatment under Article 3 of the Convention. The applicants, of Asian origin were restricted to enter and remain in the United Kingdom although they were British citizens. They were residents of former British dependencies (Tanzania, Uganda and Kenya) and given that they suffered increasing and often illegal difficulties in those countries, they decided to establish themselves in the UK. However, the Commission has held that even if the applicants has been treated as "second class citizens", no further action was called for, given that they have been later admitted to the UK.

However, some argue that the ECtHR circumvents claims of racial discrimination in cases where applicants do not bring enough evidence for the seriousness of such a charge. As a result the ECtHR seems to require very strong evidence to establish such discrimination, making it very difficult for the applicant. Once the applicant however has shown he was indeed subjected to differential treatment the burden of proof is borne by the state (Timichev v Russia case[65]). But the ECtHR seems to deny that Member States could be able of such unacceptable behaviour. For example, in Abdulaziz, Cabales & Balkandali v the UK an immigrant women had faced serious obstacles to enter the UK and the ECtHR held that the applicant has been discriminated against on the ground of sex, not race.

2.7 Nationality

Discrimination based on nationality can be closely related to discrimination based on race and ethnic origin, and can moreover refer to the difference of status between nationals and foreigners, especially when they come from outside the EU. These two situations lead to

[63] No 43577/98 & 43579/98
[64] No 4626/70
[65] No 55762/00 & 55974/00

different rulings both from the ECtHR and the ECJ. Indeed, the protection offered by the ECHR is in theory broader than in EU law. Discrimination on the ground of nationality under EU law is covered by the Directive on free movement of persons (2004/38/CE), which is limited in scope to EU citizens and their family members. Under the ECHR the protection is broader and as for all other grounds of discrimination, is only limited to the scope of the rights protected under the Convention. But the ECtHR seems to distinguish between different situations.

Nationality as a badge for discrimination requires strict scrutiny and according to the case of Gaygusuz v Austria[66] only "very weighty reasons" can justify it. The applicant, a Turkish national who has been working in Austria for many years had sought an unemployment pension. The Austrian State has refused to grant him this pension on the sole ground that he was not an Austrian national. The Court held that this decision amounted to discrimination because the applicant had contributed to the insurance fund and satisfied all legal conditions. Strict scrutiny is therefore required in cases of nationality, racial or ethnicity discrimination. For example, in the Zeibek v Greece case[67] a Greek national was seeking a pension especially intended for large families. The authorities refused to grant it since one of the children was not a Greek national, despite the applicant having the required number of children. Furthermore, the authorities decided to withdraw the nationality to the whole family because it presented some irregularities. The ECtHR found that the revocation of their nationality was based on the sole fact that the applicant was a Muslim and was therefore discriminatory. The authorities could moreover not justify this by invoking the necessity to protect the Greek nation, which is a discriminatory criterion based on national origin. In Koua Poirrez v France[68] the applicant, an Ivory Coast national had been declined benefits for the disabled since only French nationals had the prerogative to enjoy such benefits. The ECtHR held that this decision was discriminatory because it was only based on national origin and all legal criteria to get this benefit were satisfied. In this decision, the ECtHR seems to conduct an even stricter scrutiny, because contrary to the Gaygusuz case, the applicant had a right to the benefit irrespective of whether or not he had contributed to the social security scheme.

The scrutiny is more flexible when the differential treatment is related to the regulation of the entry and exit of states' borders by non-nationals. Indeed, the Convention does not preclude policies imposing restrictions to the admission and expulsion of aliens, or, in general, to their activities as long as some conditions are fulfilled. For example, Protocol 7 provides procedural safeguards relating to expulsion, such as the right to have one's case reviewed and in addition EU law provides EU citizens with particular rights, such as the right to petition, the free movement of persons, and the right to vote in European elections. This differential treatment is not prohibited by the ECtHR, because nationals (or EU citizens) are not deemed to be in similar situations. In Moustaquim v Belgium[69] a Moroccan national had been convicted for criminal offences and was to be deported, whereas neither Belgian nor EU nationals can be deported. The Court, as stipulated above, held that this differential treatment was legitimate and proportionate.

In Zhu & Chen[70] the ECJ did not expressly deal with discrimination as such. Yet, this judgement shows that the ECJ carries out a rigorous scrutiny when it comes to national origin. Mrs Chen, a Chinese national entered the UK while she was six months pregnant. She went to

[66] No 17371/90
[67] No 46368/06
[68] No 40892/98
[69] No 12313/86
[70] C-200/02

Northern Ireland and gave birth. Then, she and her baby moved to the UK. Under Irish law, the child had Irish nationality and as an EU national, should be entitled to move freely within the EU. However, since the child was financially and emotionally dependant on its mother, granting it the right to free movement and to reside in another Member State would involve giving this right to its mother as well. The ECJ stated that, as long as the child "is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State",it has a right to reside for an indefinite period in that State. Moreover, "in such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State." Therefore, in order not to deprive the child from its right, the mother benefits from this right too. The ECJ has a very broad interpretation of the right to family reunification, without even checking if this is or not an abuse of right (Mrs Chen has not contradicted the UK government's allegation that it was a way to get round the Chinese one-child policy). Nationality becomes an irrelevant criterion if a link to an EU national is established. Therefore, in such circumstances, it becomes a prohibited ground for a differential treatment.

2.8. Grounds of discrimination protected under the ECHR

As mentioned above the ECHR, contrary to EU law does not give an exhaustive definition of the grounds of discrimination. The ECtHR thus provides a broader protection than the ECJ in some aspects. Only a few examples are presented below.

2.8.1 Illegitimacy

Illegitimacy refers to children born out of wedlock and is a ground for discrimination which is submitted to the "very weighty reasons" test, given that children have no control over the circumstances of their birth. For example, in the case of Mazurek v France[71] the applicant could not inherit more than 25 percents of her mother's assets because he was born out of wedlock. The ECtHR found that this provision was discriminatory. The need to preserve traditional families' model is as such legitimate, but this particular measure is not proportionate to reach it. In Camp and Bourimi v The Netherlands[72] an illegitimate child had been excluded from the inheritance of his alleged father because he was born out of wedlock and had not been recognised (his father died during his partner's pregnancy). The ECtHR held that he had been discriminated against not only compared to children born in wedlock, but also to children born out of wedlock who had been recognised by their fathers.

The ECtHR does not apply such strict scrutiny when the differential treatment is suffered by unmarried fathers as compared to married fathers. McMichael v the United Kingdom[73] case dealt with the need for unmarried fathers to go to Court to establish their parental rights while married fathers were automatically granted these rights. The ECtHR held that the aim pursued by this legislation was legitimate because it permitted to protect the interests of both children and mothers. Thanks to this procedure national courts can

[71] No 34406/97
[72] No 28369/95
[73] No 16424/90

distinguish between "meritorious" fathers and those who are indifferent and ignorant. The ECtHR therefore stated that this conduct was not discriminatory. The circumstances of the case can however lead to a completely different solution. In Hoffman v Germany[74], the national legislation treated differently fathers of children born out wedlock and divorced fathers. German courts only granted access to child on an exceptional basis to fathers of illegitimate children. Contrary to the previous case the ECtHR applied a strict scrutiny, and found that the burden of proof was particularly heavy on the side of the father and therefore held that this measure was discriminatory.

2.8.2 Property

Discrimination can also result from property. In Chassagnou v France[75], national provisions imposed on small landowners the duty to transfer public hunting rights over their land, while large landowner were not obliged to do so. But the applicants were anti-hunting activists and refused to comply with this obligation. The ECtHR stated that this duty was discriminatory because it only allowed large landowners to use their land in accordance with their opinions.

2.8.3 Membership of an organisation

In Danilenkov and others v Russia[76] the ECtHR held that Article 14 has been violated in combination with Article 11 (freedom of association) because Russia failed to ensure "effective and clear judicial protection against discrimination on the ground of trade union membership".

2.8.4 Military rank

In Engel and others v the Netherlands[77] the ECtHR allowed Member States a wide margin of appreciation concerning the different treatment between servicemen. The disciplinary sanction of strict arrest was served by officers in their dwellings tents or quarters whereas non-commissioned officers and ordinary servicemen were locked in a cell. The ECtHR stated that "the hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere. Such inequalities are traditionally encountered in the Contracting States and are tolerated by international humanitarian law." Therefore, such differential treatment was legitimate and proportionate.

To conclude the case law of both the ECtHR and the ECJ permitted to clarify the notion of discrimination, its scope and effects. It points out in particular the margin of appreciation enjoyed by national authorities to take discriminatory measures. For example both Courts seem to be more willing to admit justification when the interests of a third person

[74] No 34045/96
[75] No 25088/94
[76] No 67336/01
[77] No 5100/71

are involved (a child in particular) or when the less favourable treatment is related to the social security scheme. This has been reiterated by a recent ruling of the ECtHR: in Andrle v Czech Republic[78] the applicant was a man who had raised his children. He complained on the fact that only women could benefit from a lowering of their pensionable age if they have brought up children. The ECtHR stated that national authorities were better placed to determine how to apply positive action to correct the disadvantaged position of women as compared to men and insisted on the fact that the State has progressively started to equalize pensionable age.

Such comprehensive case law cannot however prevent all risks of legal uncertainty for applicants. The solution given by the courts is indeed highly dependent on the facts of the case. Courts can moreover always reverse their position (as seen above in the field of age discrimination, with the ECJ's ruling in the case of Kücükdeveci).

[78] No 6268/08