A great deal of information on the European Union Agency for Fundamental Rights (FRA) is available on the Internet. It can be accessed through the FRA website at <fra.europa.eu>.

Further information on the case-law of the European Court of Human Rights (ECtHR) is available on the Court´s website: <echr.coe.int>. The HUDOC search portal provides access to judgments and decisions in English and/or French, translations into additional languages, monthly case-law information notes, press releases and other information on the work of the Court.

The summaries in this document do not bind the ECtHR.

This update is only a web-document supplementing the printed *Handbook on European non-discrimination law* and contains no separate identifiers. The Handbook can be found in various languages on the FRA website or on the ECtHR website.

Contents

Introduction

This first case-law update of the *Handbook on European non-discrimination law* provides summaries of the most important cases decided by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJUE)[1] in the field of non-discrimination after the finalisation of the original manuscript in July 2010. It follows the structure and the relevant headings of the Handbook.

2.2.2. A comparator

[page 23 of the Handbook]

ECtHR, *Graziani-Weiss v. Austria*
(No. 31950/06), 18 October 2011

A local district court held a list of possible legal guardians containing the names of all practising lawyers and public notaries in the district. The applicant, whose name was on the list, was appointed legal guardian for a mentally ill person in matters of management of her income and representation before the courts and other authorities. He complained that listing only lawyers and public notaries and excluding other persons who possessed certain knowledge of law from the list of potential guardians had been discriminatory. The ECtHR noted that the main activities of practising lawyers comprised of representing clients before courts and various other authorities, for which they had received special training and passed appropriate examination. Other persons who had studied law, but who were not practising lawyers, were not allowed to represent parties before the courts in cases where representation was mandatory. It was also possible that they did not work in a law-related field at all. Even though there had undeniably been a difference in treatment between practising lawyers and notaries on the one hand, and other legally trained persons on the other, for the purposes of their appointment as a guardian in cases where legal representation was necessary, those two groups were not in relevantly similar situations.

ECtHR, *Valkov and Others v. Bulgaria*
(Nos. 2033/04 and others), 25 October 2011

The applicants were pensioners, whose pensions were capped in line with the domestic legislation. They complained that they had been discriminated against *vis-à-vis* those pensioners who had held certain high political office – the President and Vice-President of the country, the Speaker of the National Assembly, the Prime Minister and the judges of the Constitutional Court – whose pensions were exempted from the statutory cap. However, the ECtHR was not prepared to draw conclusions based on the nature of the undoubtedly demanding and important tasks performed by the applicants and the tasks of the holders of the high-ranking posts at issue. Those were policy judgements which were in principle reserved for the national authorities, which had direct democratic legitimation and were better placed than an international tribunal to evaluate local needs and conditions. The ECtHR therefore concluded that there had been no discrimination against the applicants in respect of their property rights.

1 The acronym CJEU replaces the acronym ECJ, which was used in the *Handbook on European non-discrimination law.*

ECtHR, *Laduna v. Slovakia* (No. 31827/02), 13 December 2011

The applicant complained that remand prisoners did not have the same visiting rights as convicted prisoners, in that they were allowed to receive visits for a maximum of thirty minutes a month compared to the two hours allowed to convicted prisoners. Moreover, for much of the relevant period the frequency of visits and the type of contact which convicted prisoners were allowed depended on the security level of the prison in which they were being held. In contrast, remand prisoners were all subject to the same regime, regardless of the reasons for their detention and the security considerations. Since the issues complained of were of relevance to all prisoners, the ECtHR concluded that as a remand prisoner the applicant had been in a relevantly similar situation to the comparator group of convicted prisoners. However, there had been no objective and reasonable justification for the difference in treatment between the two groups. The need to ensure order, the safety of others and the protection of property did not justify restricting remand prisoners´ rights to a greater extent than those of convicted prisoners. Such practice had also been criticised by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT). Furthermore, while particular restrictions on a prisoner´s visiting rights might in some instances be justified for security reasons or to protect the legitimate interests of an investigation, those aims could be attained by other means which did not affect all detained persons. International instruments, such as the International Covenant on Civil and Political Rights and the 1987 European Prison Rules, stressed the need to respect the remand prisoner´s status as a person who was to be presumed innocent. The 2006 European Prison Rules provided that, unless there was a specific reason to the contrary, untried prisoners should receive visits and be allowed to communicate with family and other persons in the same way as convicted prisoners. Consequently, the ECtHR found the visiting restrictions imposed on the applicant disproportionate.

CJEU, *Jürgen Römer v. Freie und Hansestadt Hamburg* Case C-147/08, 10 May 2011 (Grand Chamber)

Mr Römer worked for the Hamburg administration from 1950 until he ceased work in 1990 on grounds of incapacity. Since 1969, he has lived continuously with his partner, Mr U. In October 2001, they entered into a registered life partnership and Mr Römer informed his former employer of this and later asked for his supplementary retirement pension to be recalculated on the basis of a more favourable tax deduction category. The Hamburg administration refused on the ground that Mr Römer was not ´married´ but in a registered partnership, and only ´married, [and] not permanently separated´ pensioners and pensioners entitled to claim child or an equivalent benefit were entitled to have their retirement pension recalculated on the basis requested. The referring court asked whether this situation was precluded by EU law.

The CJEU ruled that Council Directive 2000/78/EC, concerning equal treatment in employment, covered supplementary retirement pensions which constituted pay within the meaning of Article 157 TFEU. The directive precluded a provision of national law under which a pensioner who had entered into a registered life partnership received a supplementary retirement pension lower than that granted to a ´married, not permanently separated´ pensioner, if two conditions were met. The first was that in the Member State concerned, marriage was reserved to persons of different gender and existed alongside a registered life partnership, which was reserved to persons of the same gender. The second condition was that there must exist direct discrimination on the ground of sexual orientation because, under national law, that life partner was in a legal and factual situation comparable to that of a married person as regards that pension.

2.2.3. The protected ground

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CJEU, *Pensionsversicherungsanstalt v. Christine Kleist*
Case C-356/09, 18 November 2010

This reference from the Austrian court concerned the interpretation of Article 3(1)l of Council Directive 76/207/EEC (as amended by Directive 2002/73/EC) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion. Article 3(1)l prohibits any direct or indirect sex discrimination in the public and private sectors in relation to employment and working conditions, including pay and dismissals. The referring court asked whether Article 3(1)l precluded national rules which allowed a public employer to dismiss employees who could draw their retirement pension, in circumstances where men and women were entitled to such a pension at different ages. Austrian legislation stated that the pension age for women was 60, whilst for men it was 65.

The CJEU referred to the case of Marshall (C-152/84) to demonstrate that the dismissal of a female employee solely because she had passed the qualifying age for a retirement pension, when this age was different for men, was discrimination on grounds of sex. In the present case, the age at which protection from dismissal ended was inseparably linked to the employee´s gender. The Court found this to be a difference in treatment directly based on sex. Direct discrimination occurs where a person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation. In order to determine whether women aged 60 to 65 were in a comparable situation as men in the same age bracket, the Court examined the object of the national rules establishing the difference in treatment. In this case, the national rules were intended to govern the circumstances in which employees could be dismissed. The Court agreed that men and women in this age bracket were in comparable situations, as their circumstances concerning the conditions of termination of employment were identical. The CJEU therefore held that the national rules constituted direct discrimination on the grounds of sex.

2.5. Special or specific measures

[page 35 of the Handbook]

CJEU, *Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA*
Case C-104/09, 30 September 2010

The Spanish courts asked if certain entitlements to paid leave under Spanish legislation were permissible under EU gender equality rules. In particular, Spanish legislation appeared to entitle mothers and fathers to take up to an hour of leave during the working day to feed an un-weaned child, provided both parents were employed. The Court was asked whether the fact that employed fathers did not have the same entitlement when the mother was self-employed infringed the provisions of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards employment, vocational training and promotion, and working conditions.

The CJEU ruled that the paid leave affected working conditions, and Council Directive 76/207/EEC states that there cannot be sex discrimination relating to working conditions. The Court commented that the father´s right to leave relied on the employment status of the mother. Further, the Court held that the measure did not eliminate or lessen existing inequalities, as it could lead to the situation whereby a self-employed mother would have an additional burden as the father could not take leave in order to care for their child. The Court therefore concluded that the directive precluded the national legislation.

2.6.2. Breakdown of the general defence [page 43 of the Handbook]

CJEU, *Marc Michel Josemans v. Burgemeester van Maastricht*
Case C-137/09, 16 December 2010

The reference from the Dutch court asked if national regulations, concerning the access of non-residents to coffeeshops, fell wholly or partly within the scope of the Treaties. Reference was made in particular to the free movement of goods and services, and the prohibition of discrimination. With regard to the free movement of goods and services, the referring court asked if the prohibition of the admission of non-residents to coffeeshops formed a suitable and proportionate means of reducing drug tourism and the public nuisance which accompanied it. Alternatively, it asked if the prohibition of discrimination against citizens on grounds of nationality applied. If so, the court queried whether the resulting indirect distinction between residents and non-residents was justified, and the connected prohibition was suitable and proportionate for the reasons already stated.

The CJEU held that the prohibition on drugs in the EU meant that a coffeeshop owner could not rely on the principles of freedom of movement or of non-discrimination in relation to the marketing of cannabis. Freedom to provide services did apply, however, in relation to the food and non-alcoholic drinks which were also sold in coffeeshops and the coffeeshop owner could rely on Article 56 TFEU (ex-Article 49 TEC) in this context. Free movement of goods was not relevant as food and drinks would not be transported across borders. The Court considered Article 56 TFEU and concluded that national regulations allowing only residents into coffeeshops did constitute indirect discrimination, as non-residents were more likely to be foreigners. The Court found, however, that such regulations were justified in the circumstances. The combat of drug tourism, and the accompanying public nuisance related to it was part of the combat against drugs, and as such was a legitimate aim. The Court found that the measures were suitable and proportionate. They did not prevent non-residents from entering the many cafes which did not sell cannabis. In addition, other measures to limit drug tourism had proved ineffective. The CJEU acknowledged that it was not practical to run a system where non-residents could enter coffeeshops, but not purchase cannabis.

2.6.4.3. Exceptions on the basis of age [page 51 of the Handbook]

CJEU, *Gisela Rosenbladt v. Oellerking Gebäudereinigungsges. mbH*
Case C-45/09, 12 October 2010 (Grand Chamber)

This reference from the German courts asked for clarification on the boundaries of EU age discrimination legislation in relation to compulsory retirement. Mrs Rosenbladt was employed by the defendant cleaning company to clean army barracks. In May 2008, Mrs Rosenbladt´s employer sent her a letter terminating her employment at the end of that month on the grounds that she would reach the age of 65, the legal retirement age. Mrs Rosenbladt refused to accept this and challenged the decision. A collective agreement concerning the cleaning sector, which provided for the termination of contracts at the official age of retirement, was declared to be of general application by the federal minister for work in 2004. The German courts asked whether the law allowing collective agreements to set such retirement ages remained valid in light of the implementation of Council Directive 2000/78/EC. The directive outlaws various forms of discrimination in the workplace including that based on age, and its Article 6 provides for exceptions to this.

The CJEU held that under Article 6 of the directive, it was possible for a collective agreement to specify a retirement age in national legislation. This was provided that, in relation to employment

policy, such a provision pursued a legitimate aim that could be objectively and reasonably justified. In addition, the approach used to achieve the legitimate aim would need to be appropriate and necessary. Where the national legislation was implemented through a collective agreement, the agreement itself had to pursue a legitimate aim in a manner appropriate and necessary. In addition, the CJEU held that a Member State could make a collective agreement of general application, such as that concerning the cleaning sector in Germany. This would not be the case however if the collective agreement deprived the individuals concerned of protection from age discrimination.

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

This reference from the Bulgarian courts concerned a question regarding compulsory retirement. Bulgarian national law made it possible for the employer to terminate the contract of a university professor upon reaching the age of 65 and, after that age, to issue a maximum of three one-year fixed-term contracts. The Court was asked whether such legislation was prohibited under Council Directive 2000/78/EC. Under the directive, direct discrimination is believed to have occurred when one individual is treated less favourably than another, for example, on grounds of age. Differences in treatment on grounds of age may not, however, be classified as discrimination where they can be shown to be objectively and reasonably justified by a legitimate aim. Such an aim could be a legitimate policy regarding employment, the jobs market or an initiative for vocational training. The Bulgarian Government, supported by the Slovak and German Governments and the Commission, argued that the national legislation in question gave younger generations the opportunity to reach professorial positions, thus contributing to the ongoing quality of teaching and research.

The CJEU held that Council Directive 2000/78/EC permitted national legislation requiring university professors to only continue working after the age of 65 on fixed-term one-year contracts and retire by the age of 68. The Court highlighted, however, that such legislation must pursue a legitimate aim relating to labour market or employment policy, and must be achievable by appropriate and necessary means. Legitimate aims could include the aim to provide quality teaching, and the optimum allocation of posts for professors of different generations. The CJEU also noted that, as the case in question was a dispute between a public institution and an individual, the national court should apply domestic legislation which did not satisfy the provisions of the directive.

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

Under German national law, permanent civil servants must retire on reaching a certain age, set by the individual *Länder*. In this case, one of the *Länder* set a compulsory retirement age of 65, with provision that if it was in the interests of the civil service, civil servants could continue to work up to a maximum age of 68. The German courts asked whether this rule was precluded by Article 6(1) of Council Directive 2000/78/EC.

The CJEU held that the government´s aim of establishing a ´balanced age structure´ to encourage the recruitment and promotion of young people and to improve personnel management was a legitimate policy aim. It further stated that the measure requiring retirement at 65 was ´not unreasonable´ in the light of the aim pursued, and that the Directive did not preclude measures which allowed this aim to be achieved by appropriate and necessary means. On the question of the information which the Member State should produce to demonstrate that these criteria had been met, the Court stated that it was ultimately for the national court to assess whether the measure was appropriate and necessary, based on the supporting evidence and within the framework of its own judicial procedures.

CJEU, *Reinhard Prigge and Others v. Deutsche Lufthansa AG*
Case C-447/09, 13 September 2011 (Grand Chamber)

Reinhard Prigge, Michael Fromm and Volker Lambach were employed for many years by Deutsche Lufthansa as pilots then flight captains. When they reached 60 years of age their employment contracts terminated automatically, in accordance with the collective agreement. Considering themselves to be victims of discrimination on grounds of age, which is prohibited by the Employment Equality Directive (Council Directive 2000/78/EC), they brought an action before the German courts for a declaration that their employment relationships with Deutsche Lufthansa had not terminated at age 60 and an order that their employment contracts should be continued. The German Federal Labour Court (*Bundesarbeitsgericht*) asked the CJEU whether a collective agreement which provideed for an age-limit of 60 for airline pilots for the purposes of air safety was compatible with EU law.

The CJEU recalled, firstly, that the collective agreements entered into with the social partners had to, as with the national laws of the Member States, respect the principle of non-discrimination on grounds of age, which was recognised as a general principle of EU law and given specific expression by the directive in the domain of employment and occupation. The limitation of the possibility for pilots to act as pilots when they reach the age of 60 pursued the objective of guaranteeing the safety of passengers, persons in areas over which aircrafts fly, and the safety and health of pilots themselves; this may justify a difference in treatment and such a provision for limitation in a collective agreement. However, the Court noted that international and German legislation considered that it was not necessary to prohibit pilots from acting as pilots after the age of 60 but that it sufficed merely to restrict those activities. The CJEU therefore held that the prohibition on piloting after that age, provided for by the collective agreement, was not a necessary measure for the protection of public health and security. The Court moreover stated that possessing particular physical capabilities may be considered as a genuine and determining occupational requirement for acting as an airline pilot and that the possession of such capabilities was related to age. As that requirement was aimed at guaranteeing air traffic safety, it pursued a legitimate objective which may justify a difference in treatment on grounds of age. However, it was only in very limited circumstances that such a difference in treatment may be justified. In that regard, the Court noted that the international and German authorities considered that, until the age of 65, pilots had the physical capabilities to act as a pilot, even if, between 60 and 65 years of age, they may do so only as a member of a crew in which the other pilots are younger than 60. On the other hand, the Lufthansa social partners set at 60 years the age-limit at which airline pilots were considered as no longer possessing the physical capabilities to carry out their occupational activity. In those circumstances, the Court stated that the age-limit of 60 years, imposed by the social partners, to be able to pilot an airplane, constituted a disproportionate requirement in light of international and German legislation that fixed that age-limit at 65.

3.4.2.4. The European Convention and the context of welfare and education

[page 72 of the Handbook]

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

Under domestic law, only Bulgarian nationals and certain categories of aliens were entitled to primary and secondary education free of charge. The applicants were two Russian school-children, who at the material time had no permanent residence permits and had been living with their mother in Bulgaria. In their application to the ECtHR, they complained of discrimination in that they had been required to pay a fee in order to pursue their secondary education in Bulgaria, unlike Bulgarian nationals and aliens with permanent residence permits. The ECtHR accepted that a State could have legitimate reasons for curtailing the use of resource-hungry public services by short-term and illegal immigrants, who, as a rule, did not

contribute to their funding. While recognising that education was an activity that was complex to organise and expensive to run and that the State had to strike a balance between the educational needs of those under its jurisdiction and its limited capacity to accommodate them, unlike some other public services, it noted that education was a right that enjoyed direct Convention protection. It was also a very particular type of public service, which not only directly benefited those using it but also served broader societal functions and was indispensable to the furtherance of human rights. The applicants had not been in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services, including free schooling. Even without permanent residence permits, the authorities had not had any substantive objection to their remaining in Bulgaria or any serious intention of deporting them. Thus, any considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants´ case. However, the Bulgarian authorities had not taken any of these factors into account nor did the legislation provide any possibility of requesting an exemption from the payment of school fees. In the specific circumstances of the case, therefore, the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified.

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

The applicant, who had worked for lengthy periods during a total of twenty-eight years spent in prison, was not, under Austrian law, affiliated to the old-age pension system. Since 1994 he had been affiliated to the unemployment-insurance scheme in respect of periods worked in prison, and, following his release, he received unemployment benefits and emergency-relief payments. The ECtHR recalled that in the area of pensions, the States enjoyed a wide margin of appreciation and the question had to be seen as one feature in the overall system of prison work and prisoners´ social cover. There was no European consensus on social security for prisoners. While an absolute majority of Council of Europe Member States provided prisoners with some kind of social security, only a small majority affiliated them to their old-age pension systems. Some, like Austria, did so only by giving prisoners the possibility of making voluntary contributions. Furthermore, Austrian law reflected the trend of including prisoners who worked in national social-security systems in that they were provided with health and accident care and, since 1994, working prisoners were affiliated to the unemployment-insurance scheme. It was significant that the applicant, although not entitled to an old-age pension, was not left without social cover. Following his release from prison he had received unemployment benefits and subsequently emergency-relief payments supplemented by a housing allowance amounting to a total of about EUR 720, which corresponds almost to the minimum pension level in Austria. In sum, in a context of changing standards, a Contracting State could not be reproached for giving priority to the insurance scheme it considered most relevant for the reintegration of prisoners upon their release. While Austria was required to keep the issue raised by the case under review, the Court found that by not having affiliated working prisoners to the old-age pension system it had not exceeded the wide margin of appreciation afforded to it in that matter.

3.4.3.1. The European Convention and the context of goods and services, including housing

[page 76 of the Handbook]

ECtHR, *Bah v. the United Kingdom*
(No. 56328/07), 27 September 2011

The applicant, a Sierra Leonean national, was granted indefinite leave to remain in the United Kingdom. Her minor son was subsequently allowed to join her on condition that he did not have recourse to public funds. Shortly after his arrival, the applicant´s landlord informed

her that her son could not stay in the room she was renting. She then applied to her local authority for assistance in finding accommodation. The local authority agreed to assist, but, because her son was subject to immigration control, refused to grant her the priority to which her status as an unintentionally homeless person with a minor child would ordinarily have entitled her. The ECtHR found that the applicant´s differential treatment had thus resulted from her son´s conditional immigration status, not his national origin. Given the element of choice involved in immigration status, the justification required for differential treatment based on that ground was not as weighty as in the case of a distinction based on inherent or immutable personal characteristics such as sex or race. Likewise, since the subject matter of the case – the provision of housing to those in need – was predominantly socio-economic in nature, the margin of appreciation accorded to the Government was relatively wide. There had been nothing arbitrary in the denial of priority need to the applicant. By bringing her son into the United Kingdom in full awareness of the condition attached to his leave to enter, the applicant had effectively agreed not to have recourse to public funds in order to support him. It was justifiable to differentiate between those who relied for priority-need status on a person who was in the United Kingdom unlawfully or on the condition that they had no recourse to public funds, and those who did not. The legislation pursued a legitimate aim, namely allocating a scarce resource fairly between different categories of claimants. Without underestimating the anxiety the applicant must have suffered as a result of being threatened with homelessness, the ECtHR observed that she had in fact never been homeless and that there were other statutory duties which would have required the local authority to assist her and her son had the threat of homelessness actually manifested itself. In the event, she had been treated in much the same way as she would have been had she established a priority need: the local authority had helped find her a private-sector tenancy in another borough and had offered her social housing within the borough within seventeen months. The differential treatment to which the applicant was subjected had thus been reasonably and objectively justified.

3.5.1. The ´personal´ sphere: private and family life, adoption, the home and marriage

[page 79 of the Handbook]

ECtHR, *Şerife Yiğit v. Turkey* [GC] (No. 3976/05), 2 November 2010

The applicant contracted a religious marriage in 1976. Her husband died in 2002. In 2003, she brought an action, in her own name and that of her daughter, seeking to have her marriage recognised and to have her daughter entered in the civil register as her husband´s child. The district court allowed the second request but rejected the request concerning the marriage. The applicant also applied to the retirement-pension fund to have her late husband´s retirement pension and health-insurance benefits transferred to her and her daughter. The benefits were granted to the daughter but not to the applicant, on the ground that the marriage had not been legally recognised. The ECtHR noted that according to the domestic legislation and case-law, only persons married in accordance with the Civil Code could inherit their late spouse´s social-security entitlements. However, the applicant could not argue that she had a legitimate expectation of obtaining social-security benefits on the basis of her partner´s entitlement, since the rules laying down the substantive and formal conditions governing civil marriage were clear and accessible and the arrangements for contracting such a marriage were straightforward and did not place an excessive burden on the persons concerned. Moreover, the applicant had had a sufficiently long time – twenty-six years – in which to contract a civil marriage. There was therefore no justification for her assertion that the efforts she had allegedly undertaken to regularise her situation had been hampered by the cumbersome nature or slowness of the administrative procedures. Further, the fact that the applicant and her partner had opted for the religious form of marriage and had not

contracted a civil marriage had not entailed any administrative or criminal penalties such as to prevent her from leading an effective family life. Article 8 could not be interpreted as imposing an obligation on the State to recognise religious marriage, nor did it require the State to establish a special regime for a particular category of unmarried couples. Hence, the fact that the applicant did not have the status of heir, in accordance with the law, did not imply that there had been a breach of her rights under Article 8.

4.2. Sex

[page 90 of the Handbook]

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

The applicant, a father of two, complained that unlike the position with women, there was no lowering of the pensionable age for men who had raised children. The ECtHR accepted that the measure at issue pursued the legitimate aim of compensating for factual inequalities and hardship arising out of the specific historical circumstances of the former Czechoslovakia, where women had been responsible for the upbringing of children and for the household, while being under pressure to work full time. In such circumstances, the national authorities were better placed to determine the moment at which the unfairness to men began to outweigh the need to correct the disadvantaged position of women by way of affirmative action. In 2010, the Czech Government had already made the first concrete move towards equalising the retirement age by legislative amendments which removed the right to a lower pensionable age for women with one child and directed the reform towards an overall increase in the pensionable age irrespective of the number of children raised. Given the gradual nature of demographic shifts and changes in perceptions of the role of the sexes, and the difficulties of placing the entire pension reform in the wider context, the State could not be criticised for progressively modifying its pension system instead of pushing for a complete change at a faster pace. In the specific circumstances of the case, the approach of the national authorities continued to be reasonably and objectively justifiable until such time as social and economic changes removed the need for special treatment for women. The timing and the extent of the measures taken to rectify the inequality in question were not manifestly unreasonable and so did not exceed the wide margin of appreciation afforded to the States in this area.

CJEU, *Rijksdienst voor Pensioenen v. Elisabeth Brouwer* Case C-577/08, 29 July 2010

Mrs Brouwer worked between 1960 and 1998 in the Netherlands while being resident in Belgium. Having stopped working, she was entitled to a pension from the Belgian State until the age of 65, at which point responsibility passed to the Dutch State. The Belgian State granted her a pension. As she had worked in another EU Member State, however, her entitlement was calculated according to notional and flat-rate wages that had been set each year by the State. Before 1995, the amount of these notional wages differed for men and women. Mrs Brouwer challenged the amount of her pension, based on the illegality of the discrimination. The Belgian State argued there was no discrimination as the differences were justified by objective grounds – actual wages differed and thus the calculation of pension entitlement should reflect this. Council Directive 79/7/EEC, which implements the principle of equal treatment for men and women in relation to social security matters, was to be implemented by EU Member States by 23 December 1984.

By the time the case came before the CJEU, the Belgian State had conceded the unequal treatment and had highlighted the steps taken to rectify this. Nevertheless, the CJEU found

that the directive prohibited legislation, such as that in question, following the deadline for the directive´s implementation. Prior to that the implemtation deadline of the directive, the legislation in question was outside the scope of the treaty provisions governing equal pay, Article 157 TFEU (ex-Article 141 TEC). The Court also rejected the Belgian State´s argument that the temporal application of the ruling should be limited (as in the Barber case, C-262/88), but only with respect to the interest due on arrears. It found that financial considerations by themselves could not justify such a limitation. In addition, significant objective uncertainty had to exist in regard to the implications of the provisions of EU law. The CJEU held that this was not the case and that the Belgian authorities were not entitled to take the view that the disparity in wages was due to objective factors rather than simple discrimination. Nor could Belgium rely on the fact that the European Commission had not brought an infringement action against it to demonstrate the national legislation´s conformity to EU law.

CJEU, *Dita Danosa v. LKB Līzings SIA*
Case C-232/09, 11 November 2010

This reference from the Latvian courts concerned Council Directive 92/85/EEC on the health and safety at work of pregnant workers. The directive requires EU Member States to prohibit the termination of employment from the beginning of the pregnancy until the end of maternity leave. The CJEU was asked to consider whether this prohibition applied to a situation where the individual concerned was a member of the board of directors of a publicly-owned company, and whether that individual could be considered as an employee under the directive. In this regard, it was necessary to determine the role of members of a management board and the level of autonomy with which they were able to act, given that the company in question was also overseen by a shareholder assembly and a board of trustees. It was also necessary to consider Council Directive 76/207/EEC on equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The CJEU considered that a member of a company´s board of directors should be given the status of an employee if: he or she provided services to the company and was an integral part of it; the work of the board member was carried out, for a period of time, under direction or supervision of another body from the company; and the board member received remuneration for those duties. Council Directive 92/85/EEC should be interpreted as prohibiting domestic legislation which allowed a board member to be removed from her post without restriction where the individual concerned was a ´pregnant worker´. Additionally, the Court ruled that even if the worker could not be classified as a ´pregnant worker´ for the purposes of Council Directive 92/85/EEC, the removal of a board member due, or essentially due, to pregnancy, was only able to affect women and was therefore direct discrimination on grounds of sex contrary to Council Directive 76/207/EEC.

CJEU, *Association belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres*
Case C-236/09, 1 March 2011 (Grand Chamber)

Belgian law permits insurers to make use of sex as a factor in the calculation of premiums and benefits. It does so on the basis of a derogation contained in Article 5(2) of Council Directive 2004/113/EC. The claimants contended that the Belgian law which made use of this derogation was contrary to the principle of equality between men and women. The Belgian Constitutional Court asked the CJEU whether Article 5(2) of Council Directive 2004/113/EC was compatible with Article 6(2) EU and, more specifically, with the principle of equality and non-discrimination guaranteed by that provision.

The CJEU first set out the provisions of EU law which established the principle of equal treatment for men and women. It recalled that the use of actuarial factors related to sex was widespread in the provision of insurance services when the directive was adopted, so a

transitional period was appropriate. While Article 5(1) of the directive provided that the differences in premiums and benefits arising from the use of sex as a factor in the calculation thereof had to be abolished by 21 December 2007, Article 5(2) allowed some EU Member States to permit proportionate differences in individuals´ premiums and benefits indefinitely, where the use of sex was a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data. Five years after the transposition of the directive into national law – that is, on 21 December 2012 – EU Member States were required to re-examine the justification for those exemptions, taking into account the most recent actuarial and statistical data and a report to be submitted by the Commission three years after the directive´s transposition date.

The Council had expressed doubts as to whether the respective situations of men and women policyholders could be comparable, given that the levels of insured risk (which are based on statistics) may be different for men and for women. The CJEU dismissed this argument, stating that the directive was based on the premise that, for the purposes of applying the principle of equal treatment for men and women, the respective situations of men and women with regard to insurance premiums and benefits contracted by them were comparable. Accordingly, there was a risk that Article 5(2) might permit the derogation from the equal treatment of men and women to persist indefinitely. Such a provision worked against the achievement of the objective of equal treatment between men and women. The Court accordingly took the view that Article 5(2) had to be considered to be invalid upon the expiry of an appropriate period; in this case from 21 December 2012.

4.3. Sexual orientation

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ECtHR, *Schalk and Kopf v. Austria* (No. 30141/04), 24 June 2010

In 2002, the applicants, a same-sex couple, requested from the competent authority permission to get married. Under domestic law at the material time a marriage could only be concluded between persons of opposite sex and the applicants´ request was consequently dismissed. On 1 January 2010 the Registered Partnership Act entered into force in Austria, aiming to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships. The ECtHR first examined whether the right to marry granted to ´men and women´ under Article 12 of the European Convention on Human Rights (ECHR) could be applied to the applicants´ situation. Although only six of the Council of Europe Member States allowed same-sex marriages, the ECtHR noted that the provision of the Charter of Fundamental Rights of the European Union granting the right to marry did not include a reference to men and women, so allowing the conclusion that the right to marry must not in all circumstances be limited to marriage between two persons of the opposite sex. It could, therefore, not be concluded that Article 12 of the ECHR did not apply to the applicants´ complaint. At the same time the Charter left the decision whether or not to allow same-sex marriages to regulation by Member States´ national law. The ECtHR underlined that national authorities were best placed to assess and respond to the needs of society in this field, given that marriage had deep-rooted social and cultural connotations differing largely from one society to another. In conclusion, Article 12 of the ECHR did not impose an obligation on the respondent State to grant same-sex couples access to marriage and there had therefore been no violation of that provision.

Nevertheless, given the rapid evolution of social attitudes in Europe towards same-sex couples over the past decade, it would have been artificial for the ECtHR to maintain the view that such couples could not enjoy ´family life´ protected under Article 8 ECHR. It therefore concluded for the first time that the relationship of the applicants, a cohabiting

same-sex couple living in a stable partnership, fell within the notion of ´family life´, just as the relationship of a different-sex couple in the same situation did. Having regard to the conclusion reached under Article 12, the ECtHR was unable to share the applicants´ view that an obligation to grant same-sex couples the right to marry could be derived from Article 14 taken in conjunction with Article 8. What remained to be examined was whether the State should have provided the applicants with an alternative means of legal recognition of their partnership any earlier than it actually did. Despite the emerging tendency to legally recognise same-sex partnerships, this area should still be regarded as one of evolving rights with no established consensus, where States enjoyed a margin of appreciation in the timing of the introduction of legislative changes. The Austrian law reflected this evolution and the legislator could not be reproached for not having introduced the Registered Partnership Act any earlier than 2010. Finally, the fact that the Registered Partnership Act retained some substantial differences compared to marriage corresponded largely to the trend in other Member States adopting similar legislation. Moreover, since the applicants did not claim that they were directly affected by any restrictions concerning parental rights, the ECtHR did not have to examine every one of those differences in detail as that went beyond the scope of the case. It therefore concluded that there had been no breach of the applicants´ Convention rights.

ECtHR, *P.V. v. Spain*
(No. 35159/09), 30 November 2010

The applicant, a male-to-female transsexual, had previously been married and had a son. During the divorce proceedings, custody of the child was awarded to the mother, but parental responsibility was to be exercised by both parents jointly, and contact arrangements were made for the father. Two years later, the applicant´s former wife sought to have the father deprived of parental responsibility and to have the contact arrangements suspended since he was undergoing gender reassignment treatment. The ECtHR noted that in their decisions, the national courts had taken into account the applicant´s emotional instability, attested by a psychological expert report, and the risk that it might be passed on to the child, aged six years at the start of the domestic proceedings, and disturb his psychological balance. They did not deprive the applicant either of parental rights or of contact, as the mother had requested, but instead made new contact arrangements on a gradual and reviewable basis, in accordance with the recommendations made in the expert report. Their reasoning suggested that the applicant´s transsexualism had not been the decisive factor in the decision to amend the initial contact arrangements, but that the child´s best interests had prevailed, leading the courts to choose a more restrictive arrangement that would allow the child to become gradually accustomed to his father´s gender reassignment. The ECtHR therefore concluded that there had been no violation of the ECHR.

4.5. Age

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CJEU, *Ingeniørforeningen i Danmark v. Region Syddanmark*
Case C-499/08, 12 October 2010 (Grand Chamber)

This reference from the Danish courts referred to the system in Denmark whereby an employer in dismissing a salaried employee, who had been employed for 12, 15 or 18 years, had to pay an amount equivalent to one, two or three months´ salary, respectively. This compensation, however, was not to be paid to employees who, upon departure, were entitled to receive an old-age pension from a scheme which they joined before the age of 50 and to which the employer had contributed. After 27 years of service for a regional body, Mr Andersen was dismissed and a tribunal confirmed he should receive compensation. The regional body refused to pay this compensation on the basis that as a 63-year old he had

reached retirement age and was eligible for the pension scheme. The Danish Court asked whether such a regime was precluded due to the prohibition of direct or indirect discrimination on the grounds of age contained in Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

In responding to the Danish Court´s questions, the CJEU held that Council Directive 2000/78/EC precluded domestic legislation that would deprive a worker eligible for an old-age person from claiming a severance allowance in case they had joined the pension scheme before they reached the age of 50 years. The Court observed that it was more difficult for workers who could claim an old-age pension to continue to exercise their right to work, as they would not be entitled to the severance payment while they were looking for new employment. It noted that the measure therefore effectively prohibited a whole category of workers from receiving the payment. It was also possible that workers could be forced to accept a pension that was lower than it would have been were they to remain in employment for further years. This prejudiced the legitimate interests of workers and the difference of treatment between this category and those not eligible to claim an old-age pension was unjustified.

4.7. Nationality or national origin

[page 107 of the Handbook]

ECtHR, *Fawsie v. Greece* and *Saidoun v. Greece* (No. 40080/07 and No. 40083/07), 28 October 2010

The applicants, who were Syrian and Lebanese nationals, had been officially recognised as political refugees since the 1990s and were legally resident in Greece. The competent authority rejected their requests for the allowance paid to mothers of large families because they did not have Greek nationality or the nationality of one of the Member States of the European Union and they were not refugees of Greek origin. The ECtHR did not call into question the desire of the Greek legislature to address the country´s demographic problem. However, recalling that only very strong considerations could justify a difference in treatment exclusively based on nationality, it did not agree with the chosen criterion based mainly on Greek nationality or origin, especially as it was not uniformly applied at the relevant time in the prevailing legislation and jurisprudence. Furthermore, under the Geneva Convention on the Status of Refugees, to which Greece was a party, States had to grant refugees staying lawfully within their territory the same treatment with respect to public relief and assistance as was accorded their own nationals. Therefore, the refusal of the authorities to award a large family allowance to the applicants had not been reasonably justified.

CJEU, *Marie Landtová v. Česká správa socialního zabezpečení* Case C-399/09, 22 June 2011

Ms Landtová, a Czech national residing in the territory of that State, worked from 1964 until 31 December 1992 in the territory of the Federal Czech and Slovak Republic. After the dissolution of this State, Ms Landtová first worked in the territory of the Slovak Republic and then in the territory of the Czech Republic. The Czech Social Security Authority (CSSA) awarded her a partial retirement pension. The amount was set in accordance with the Social Security Agreement between the Czech Republic and the Slovak Republic, according to which the value of the period of insurance completed by Ms Landtová up until 31 December 1992 had to be determined under the rules of the Slovak social security scheme since the headquarters of her employer were in the territory of the Slovak Republic, a provision maintained in force by point 6 of Annex lll(A) to Regulation 1408/71. Ms Landtová challenged the amount of the old-age benefit, taking the view that the CSSA had failed to take into account all of the insurance periods completed by her. When this case reached the Supreme

Administrative Court, the latter wanted to ascertain whether the provisions of point 6 of Annex III(A) to Regulation 1408/71, read in conjunction with Article 7(2)(c) thereof, precluded a national rule, which provided for the payment of a supplement to old-age benefit where the amount of such benefit, awarded under the Social Security Agreement, was lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic. It also questioned whether the judgment of the Constitutional Court, which allowed the payment of the concerned supplement solely to individuals of Czech nationality residing in the territory of the Czech Republic, constituted discrimination prohibited under Article 12 EC and the combined provisions of Articles 3(1) and 10 of Regulation 1408/71.

The CJEU held that point 6 of Annex III(A) did not preclude the national rule providing for the payment of the supplement, as this did not come down to the award of a parallel Czech old-age benefit, nor one and the same period of insurance being taken into account twice. It merely resulted in the elimination of an objectively established difference between benefits from different sources. Such an approach avoided ´the overlapping of national legislations applicable´, in accordance with the objective set out in the eighth recital of the preamble to Regulation 1408/71, and did not run counter to the criterion for the allocation of competence established in the Social Security Agreement as maintained by Annex III(A). The Court, however, also ruled that the Constitutional Court judgment, by allowing the payment of the supplement only to Czech nationals residing in the Czech Republic, involved direct and indirect discrimination based on nationality, as a result of the residence test, against those who had made use of their freedom of movement. Consequently this judgment clearly ran counter to Article 3(1) of Regulation 1408/71. As to the practical consequences of its judgment, the Court instructed additionally that EU law did not, provided that the general principles of EU law were respected, preclude measures to re-establish equal treatment by reducing the advantages of the persons previously favoured. However, before such measures were adopted, there was no provision of EU law which required that a category of persons who already benefited from supplementary social protection, as was the case for Ms Landtová, should be deprived of it.

4.8. Religion or belief

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ECtHR, *Savez crkava 'Riječ života' and Others v. Croatia* (No. 7798/08), 9 December 2010

Churches of a Reformist denomination registered as religious communities under Croatian law sought to conclude an agreement with the Government regulating their relations with the State. Without such an agreement they were unable to provide religious education in public schools and nurseries and to have religious marriages celebrated by them recognised by the State. The authorities informed the applicants that they did not fulfil the cumulatively prescribed criteria for the conclusion of such an agreement, in particular that they had not been present on Croatian territory since 1941 and did not have the required 6,000 adherents. The ECtHR stated that even though the ECHR did not impose an obligation to have the effects of religious marriages recognised as equal to those of civil marriages, or to allow religious education in public schools and nurseries, once a State had gone beyond its Convention obligations and recognised such additional rights to religious communities, they could not, in the application of such rights, take discriminatory measures within the meaning of Article 14. In the applicants´ case, the authorities had refused to conclude an agreement because the applicant churches failed to satisfy the cumulative historical and numerical criteria set forth under domestic law. However, the Government had entered into such agreements with other religious communities which did not fulfil the numerical criterion either, because they had established that those churches satisfied an alternative criterion of being ´historical religious

communities of the European cultural circle´. The Government had provided no explanation as to why the applicant churches did not qualify under that criterion. Consequently, the ECtHR concluded that the criteria set forth in the domestic law had not been applied on an equal basis for all religious communities.

In examining the case under Protocol No. 12 to the ECHR, the ECtHR observed that, given the State´s discretion in deciding whether or not to conclude an agreement with a religious community, the applicants´ complaint in this respect did not concern ´rights specifically granted to them under national law´. Nevertheless, it fell within the third category specified by the Explanatory Report on Protocol No. 12 as it concerned alleged discrimination ´by a public authority in the exercise of discretionary power´. Given the finding of a violation of Article 14 taken in conjunction with Article 9, the ECtHR, however, found it unnecessary to examine separately the same complaint under Protocol No. 12.

ECtHR, *Milanović v. Serbia* (No. 44614/07), 14 December 2010

The applicant, a leading member of the Hare Krishna religious community in Serbia, was stabbed on several occasions in the vicinity of his flat. He reported the attacks to the police and said they might have been committed by members of a far-right extremist group. The police questioned witnesses and several potential suspects, but were never able to identify any of the attackers or obtain more information on the extremist group they allegedly belonged to. In one of police reports they referred to the applicant´s well-known religious affiliation and his ´rather strange appearance´. In a further report they observed that the applicant had publicised the incidents while ´emphasising´ his own religious affiliation, noting that self-infliction of the applicant´s injuries could not be excluded. The ECtHR pointed out that, as in cases of racially motivated ill-treatment, when investigating violent attacks State authorities had the additional duty to take all reasonable steps to unmask any religious motives and to establish whether or not religious hatred or prejudice might have played a role in the events, even when the ill-treatment was inflicted by private individuals. In the applicant´s case, where it was suspected that the attackers had belonged to one or several far-right organisations governed by extremist ideology, it was unacceptable for the State authorities to have allowed the investigation to drag on for many years without taking adequate action with a view to identifying and prosecuting the perpetrators. Moreover, it was obvious from the police conduct and their reports that they had serious doubts related to the applicant´s religion and the veracity of his allegations. Consequently, even though the authorities had explored several leads suggested by the applicant concerning the underlying religious motivation of his attackers, those steps had amounted to a little more than a *pro forma* investigation.

ECtHR, *O'Donoghue and Others v. the United Kingdom* (No. 34848/07), 14 December 2010

Since 2005 persons subject to immigration control who wished to get married other than in the Church of England had to apply to the Secretary of State for permission in the form of a certificate of approval, for which they had to pay a fee in the amount of GBP 295. The applicant, a Nigerian national who had sought asylum in the UK, wanted to get married but not in the Church of England, since both he and his fiancé were practising Roman Catholics and, in any event, there was no Church of England in Northern Ireland. The applicants applied for a certificate of approval and requested exemption from the fee on the grounds of poor financial status, but their application was rejected. Ultimately, they were granted a certificate of approval in July 2008 after they succeeded in raising the sum with help from friends. The ECtHR found the above scheme discriminatory on the ground of religion. The applicants had been in a relatively similar position to persons willing and able to marry in the Church of England. While such persons were free to marry unhindered, the applicants had been both unwilling (on account of their religious beliefs) and unable (on account of their residence in Northern

Ireland) to enter into such a marriage. Consequently, they were permitted to marry only after submitting an application for a certificate of approval and paying a sizeable fee. There had therefore been a clear difference in treatment for which no objective and reasonable justification had been provided.

4.10. Social origin, birth and property

[page 115 of the Handbook]

CJEU, *Zoi Chatzi v. Ipourgos Ikonomikon*
Case C-149/10, 16 September 2010

This was a preliminary reference from the Greek courts concerning Council Directive 96/34/EC on the Framework Agreement on parental leave (Framework Agreement) and the Charter of Fundamental Rights of the European Union (CFR). The reference was made during proceedings between Ms Chatzi, a mother of twins, and her employer Ipourgos Ikonomikon (the Greek Ministry of Finance). Following the birth of her twins, Ms Chatzi was granted a period of nine months paid parental leave, but was refused a second period of leave. The Court was asked whether the granting of only one period of parental leave for twins was discriminatory on the basis of birth, contrary to Article 21 CFR. If not, the Court was further asked whether the term ´birth´ under Article 2(1) of the directive should be interpreted as to mean that two successive births created the right to two periods of parental leave. If not, the Court was asked to confirm whether parental leave should be granted for one birth, irrespective of how many children were born, and that such action would not be in breach of the CFR.

The CJEU responded that the rights in the Framework Agreement were afforded to parents in their capacity as workers, in order to assist them to reconcile their parental and working responsibilities. There was no right relating to parental leave given to the child, either in the Framework Agreement or the CFR. Subsequently, there was no discrimination on the basis of birth where only one period of parental leave was given for twins. The Court further held that the Framework Agreement could not be interpreted as automatically allowing a separate period of parental leave for each child born. It was acknowledged that the Framework Agreement set down only minimum requirements and that adjustments to the rules could be made where EU Member States allowed more than the minimum three months of parental leave required. The CJEU commented, however, that EU Member States´ national legislatures must keep in mind the principle of equal treatment when adopting measures transposing the Framework Agreement and ensure that parents of twins receive treatment which takes their needs into account.

4.12. Other status

[page 118 of the Handbook]

ECtHR, *Kiyutin v. Russia*
(No. 2700/10), 10 March 2011

The applicant, an Uzbek national, arrived in Russia in 2003 and married a Russian national with whom he had a daughter. His application for a residence permit was, however, refused on the grounds that he had been tested HIV-positive. The ECtHR had previously recognised that physical disability and various health impairments fell within the scope of Article 14 and that approach was in line with the views expressed by the international community. Accordingly, a distinction made on account of health status, including HIV infection, was covered by the term ´other status´ and Article 14 in conjunction with Article 8 was applicable. The applicant was in an analogous situation to that of other foreign nationals seeking a

family-based residence permit in Russia, but had been treated differently on account of his HIV-positive status. The State´s margin of appreciation in this sphere was narrow as people living with HIV were a particularly vulnerable group who had suffered considerable discrimination in the past and there was no established European consensus for their exclusion from residence. While accepting that the impugned measure pursued the legitimate aim of protecting public health, health experts and international bodies agreed that travel restrictions on HIV-positive persons could not be justified by reference to public-health concerns. Although such restrictions could be effective against highly contagious diseases with a short incubation period such as cholera or yellow fever, the mere presence of an HIV-positive individual in the country was not in itself a threat to public health. HIV was not transmitted casually but rather through specific behaviour and the methods of transmission were the same irrespective of the duration of a person´s stay in the country or his or her nationality. Furthermore, HIV-related travel restrictions were not imposed on tourists or short-term visitors, or on Russian nationals returning from abroad, even though there was no reason to assume that they were less likely to engage in unsafe behaviour than settled migrants. Further, while a difference in treatment between HIV-positive long-term settlers and short-term visitors could be objectively justified by the risk that the former could place an excessive demand on a publicly-funded health-care system, this argument did not apply in Russia since non-Russian nationals had no entitlement to free medical assistance other than emergency treatment. A matter of further concern for the Court was the blanket and indiscriminate nature of the impugned measure. The provisions on deportation of non-nationals found to be HIV-positive left no room for an individualised assessment based on the facts of a particular case. In the applicant´s case, the domestic authorities had rejected his application solely by reference to the statutory provisions without taking into account his state of health or his family ties in Russia. In the light of all these considerations, the ECtHR found that the applicant had been a victim of discrimination on account of his health status.

5.2. Sharing of the burden of proof

[page 124 of the Handbook]

CJEU, *Patrick Kelly v. National University of Ireland (University College, Dublin)*
Case C-104/10, 21 July 2011

Mr Kelly applied for a vocational programme at the University College Dublin (UCD) and had his application refused. Mr Kelly believed he had not been granted the training due to alleged sexual discrimination and sought disclosure of the other applications; UCD disclosed redacted versions. The Irish Court made a reference in relation to Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex; Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (´Equal Treatment Directive´); and Council Directive 2002/73/EC which amended Council Directive 76/207/EEC. The Irish courts asked (i) whether Mr Kelly had a right to see full versions of the documents to establish a prima facie case under the provisions set out in Council Directives 76/207/EEC36, 97/80/EC37 and 2002/73/EC38 and (ii) if such a right was affected by national or EU laws relating to confidentiality.

The CJEU held that neither directive on the burden of proof in sex discrimination cases nor the Equal Treatment Directive generally entitled an applicant for vocational training to access information about the qualifications of the other applicants based on a suspicion of discrimination and that any disclosure would be subject to the EU rules on confidentiality of personal data. However, it was for the national court to decide whether the aim of Council Directive 97/80/EC required a disclosure of such facts in individual cases.

5.3. Role of statistics and other data

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CJEU, *Waltraud Brachner v. Pensionsversicherungsanstalt*
Case C-123/10, 20 October 2011

This preliminary reference by the Austrian courts concerned the issue of discrimination in a State pension scheme in light of Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. This scheme was based on the application of a special one-off increase designed to maintain the purchasing power of the pension in Austria. The increase was applied unless the individual´s income exceeded a set minimum level. However, the increase was not applied if the pensioner lived with a spouse and their joint incomes exceeded the minimum level. The reference has been made in proceedings between Ms Brachner, who was not entitled to receive the compensatory supplement because her pension together with the income of her spouse exceeded that minimum level, and the Austrian Pension Insurance Office.

The CJEU concluded that the scheme in question was not direct discrimination because it applied equally to all pensioners irrespective of gender. However, taking into account the statistical data produced before the referring court, proportionately more pensioners receiving the minimum level were women (57% as opposed to 25% men) as the scheme was contributory and women in Austria work for fewer years than men. This resulted in 82% of women on a minimum income not receiving the increase due to the aggregation of income rule, as opposed to 58% of men. Therefore, the referring court would be justified in taking the view that a national arrangement which leads to the exclusion from an exceptional pension increase of a significantly higher proportion of female pensioners than male pensioners, was precluded as involving indirect discrimination against women.

List of cases

Case-law of the Court of Justice of the European Union

Case-law of the European Court of Human Rights