

# Compilation of Case Law



**THINK  
EQUAL**





Compilation of Case Law– Research Report

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## Foreword

The project Think Equal VS/2010/0569 was designed to stimulate debate on equality, diversity and multiple discrimination; enhance and promote a shared understanding of equality, non-discrimination, diversity and multiple discrimination; disseminate good practices; sensitise, train and empower youth to welcome and live diversity, as well as compile data upon which legislation, policy and action plans may be designed. The project targeted youth, professionals and academics having a role of influence for their potential multiplier effect and also included qualitative and quantitative studies on discrimination as well as the production of tools related to discrimination.

Indeed, in endeavoring to empower professionals working with people experiencing discrimination, the present compilation of caselaw was developed as part of Think Equal, aiming at providing supporting materials to anyone seeking relevant sources of information.

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December 2011

The objective of this Compilation of Case Law was to compile relevant decisions, opinions and conclusions delivered by the respective authorities. This includes highlights from the judgments of the European Court of Justice, European Court of Human Rights, conclusions delivered by NCPE and conclusions from other relevant bodies, as well as decisions of the Industrial Tribunal. This compilation aims at addressing the lack of availability to professionals to source materials that are clearly explained. FAQs found within this publication address queries that are raised by professionals and answered in a manner that refers to established sources including court decisions.

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# 1. Introduction

This Booklet presents a selection of key national, regional and international cases on the topic of discrimination. Following this list of cases, Frequently Asked Questions (FAQs) are also provided.

This document is intended to target professionals or organisations working in anti-discrimination, whether as lawyers, non-governmental organisations, government officers, etc. Since it is not primarily intended for use by the general public, the terminology and language adopted reflect the technical argumentation contained in most of the presented judgements. This is also evident in the style and content of the FAQs, seeking to address queries of a more specific nature. In reaching-out to a professional audience, the Booklet attempts to act as a first reference point for individuals and organisations assisting victims of discrimination in seeking redress, whether this redress is sought judicially or extra-judicially.

Clearly, the Booklet is not a comprehensive gathering of relevant jurisprudence, and in fact it is not intended to be so. In gathering a selection of cases from various fora, the Booklet not only highlights key principles and definitions established in such fora, but also provides the professional reader with an insight into their very existence and relevance.

Whereas the European Court of Human Rights seems to dominate the area of redress for human rights grievances, it ought to be noted that at the local level a number of other options exist, as for example the Office of the Ombudsman, the Industrial Tribunal, the Commission for Persons with Disability and the National Commission for the Promotion of Equality. At the regional and international level, reference must be made to the Court of Justice of the European Union and also of the United Nations human rights machinery. The selection of cases presented in the Booklet serves to underline the possible impact of these fora in the discrimination context.

Cases decided at the international and regional levels are provided in the Booklet's first section, followed by national jurisprudence. The FAQs immediately follow, as the Booklet's last section. All cases are sorted chronologically and useful reference information is provided for each case, including the forum within which the case was brought. Each case is further tagged with a number of keywords, highlighting the relevant discrimination ground, the relevant scope and also, where applicable, principles established or relied upon.

This booklet may also be seen as a possible first step in a wider and more far-reaching exercising that promotes a more coherent and harmonised approach to anti-discrimination

legislation and jurisprudence in Malta. In gathering the national cases, it was noted by the researchers that legal definitions of 'discrimination' vary considerably and that the practices of the various national monitoring agencies are consequently affected. It was also noted that the lack of a harmonised approach towards data collection, maintenance and publication results in an information vacuum with regard to a comprehensive understanding of the nature of discrimination incidents in Malta. With these considerations in mind the booklet hopes to trigger a communication process amongst the relevant stakeholders, primarily the national monitoring agencies, so as to obtain a more accurate picture of discrimination. This would certainly go a long way towards informing relevant policy and practice.

## 2. International & Regional Cases

### Case No. 1.

**Decision/Verdict Date:** 8 November 1990

**Parties:** Elisabeth Johanna Pacifica Dekker vs. Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus, Case C177/88

**Forum:** Court of Justice of the European Union

**Country (if relevant):** The Netherlands

#### Summary of the Facts:

In June 1981, Mrs Dekker applied for the post of instructor at a training centre for young adults run by the VJV. Half a month later she informed the Applications Committee that she was three months pregnant. The Committee, nonetheless, put her name forward to the Board of Management as the most suitable candidate for the job.

The VJV, however, informed Mrs Dekker that she would not be appointed. In a letter to the applicant, the VJV explained that their decision was based on the fact that she had already been pregnant at the time she submitted the application, and should they employ her they would not be able to claim back her wage from the "Risicofonds". As a result they would not be able to employ a replacement during her absence, and thus be short-staffed.

#### Summary of the Decision/Verdict:

This situation arises because, on the one hand, the national scheme equates pregnancy to sickness, and, on the other hand, relevant Dutch law contains no provision excluding pregnancy from the cases in which the "Risicofonds" is entitled to refuse reimbursement of the daily benefits. In this regard it should be observed that only women can be refused employment on grounds of pregnancy, and such a refusal constitutes a direct discrimination on grounds of sex. The refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based essentially on the fact of pregnancy, and such discrimination cannot be justified.

An employer, thus, is in direct contravention of the principle of equal treatment embodied in Council Directive 76/2007/EEC if he refuses to enter into a contract of employment with a female candidate whom he considers suitable for the job where such refusal is based on the possible negative consequences for him. However, what is most striking in the reasoning of the court is that it

scolded the public authorities' view that inability to work on account of pregnancy is on par with inability to work on account of illness.

The question also asked to the court of justice was whether an action of this nature is capable of succeeding only if it is also proved that the employer is at fault and cannot avail himself of any ground exempting him from liability.

The court noted that if the employer's liability for discrimination were made subject to proof of fault attributable to him, the practical effect of the principles of discrimination would be weakened considerably. When there is any breach of the prohibition of discrimination, the breach itself is sufficient to make the employer liable, without there being any possibility of invoking grounds of exemption provided by national law.

The VJV was, thus, held responsible for the discriminating against the applicant.

#### Keywords:

Gender, employment.

## Case No.2.

**Decision/Verdict Date:** 30 April 1996

**Parties:** P. v S. and Cornwall County Council, Case C-13/94

**Forum:** Court of Justice of the European Union

**Country (if relevant):** United Kingdom

### Summary of the Facts:

The unnamed applicant P was a manager of part of an educational unit operated by Cornwall County Council since April 1990. P claimed that she has suffered from Gender Identity Disorder since birth. In 1992, P, a biological male, claimed that she was going to undergo sex reassignment.

During the summer of 1992, P had surgical treatment while on sick leave. In September 1992, the applicant was dismissed and given three months notice. However, P was not prohibited from working in her female role. The applicant's final sex reassignment surgery was completed before the three months notice of dismissal had expired.

P complained that she was discriminated against on the grounds of sex. The industrial tribunal rejected the view that the applicant was dismissed due to redundancy measures. The industrial tribunal said that the UK Sex Discrimination Act was not as wide in interpretation as the Equal Treatment Directive, and so it made a preliminary reference to see whether unfair dismissal of a transgender persons was within the scope of the directive in the same way as a male or female is, and whether the directive contemplated discrimination on the grounds of sex in regard to a transsexual person.

### Summary of the Decision/Verdict:

The Court of Justice began by identifying exactly what is implied by the term 'transsexual', quoting that "the term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group" (judgment of 17 October 1986, in *Rees v United Kingdom*, paragraph 38, Series A, No 106).

It went on to state that the Directive, in the preamble, makes it very clear that there should not be any discrimination whatsoever on the grounds of sex. And it, by the very nature of the language used, makes it a very powerful umbrella phrase, encapsulating practically every form of behaviour

leading up to discrimination. Complementarily, the Court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure.

Accordingly, the scope of the directive is not limited to safeguarding against sex discrimination within its traditional understanding, but to apply to discrimination arising, as in this case, from the sex reassignment of the person concerned.

Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. Tolerance of such forms of discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.

Dismissal of a transgender person for a reason related to a gender reassignment is precluded under the Equal Treatment Directive, and contrary to the objective that the Union tries to achieve.

### Keywords:

Transgender, gender, employment.

## Case No. 3.

**Decision/Verdict Date:** 11 November 1997

**Parties:** Hellmut Marschall vs. Land Nordrhein-Westfalen, Case C-409/95

**Forum:** Court of Justice of the European Union

**Country (if relevant):** Germany

### Summary of the Facts:

Mr Marschall worked as a tenured teacher for 'Land', his basic salary being attached to the basic grade in career bracket A12. On February 1994 he applied for an upgrade to an A13 bracket. The District Authority, however, informed him, however, that they intended to appoint a (specifically) female candidate to a position.

He objected to this but the authority rebutted by saying that though both candidates were equally qualified, there were fewer women than men falling within the A13 bracket at the time of application. Mr Marschall consequently brought proceedings against the Land, ordering them to promote him to the post in question. It decided to stay proceedings and make a preliminary reference to the Court of Justice

### Summary of the Decision/Verdict:

The Court of Justice noted that the purpose of the Directive, as is clear from Article 1(1), is to put into effect in the member states the principle of equal treatment for men and women as regards, inter alia, access to employment, including promotion. It also made reference to Article 2(1), which states, "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly".

It then made reference to the Court's judgment in Kalanke, where it was held that where women were given priority automatically in situations where there were fewer women than men, even for the sake of equality, there was a clear breach of the principle of non-discrimination. However, it went on to state that unlike in Kalanke there was a provision in the national law which stated that women are not to be given priority if there were characteristics particular to males which made them better candidates for the job.

The Land and other governments pointed out that in the majority of cases men were favoured because unlike women, they did not have the 'obstacles' in their career lives, such as the need for pregnancy leave, breastfeeding needs, and other needs of the sort. For this reason it was pointed out that the fact that a male and female candidate were equally qualified for the job, did not mean that they stood the same chances.

Following this, the Court said that in cases where a national rule prescribes that female candidates for promotion who are equally qualified as the male candidates are to be treated preferentially in sectors where they are under-represented, that rule may fall within the scope of article 2(4). This is so long as this rule will successfully counteract against the prejudicial effect on female candidates resulting from the natural circumstances inevitably tied to their lives. However, the national rule may not guarantee absolute and unconditional priority for women when it goes beyond its limits.

### Keywords:

Gender, employment, special measures (positive discrimination).



## Case No. 4.

**Decision/Verdict Date:** 6 July 2000

**Parties:** Katarina Abrahamsson and Leif Anderson vs. Elisabet Fogelqvist, Case C-407/98

**Forum:** Court of Justice of the European Union

**Country (if relevant):** Sweden

### Summary of the Facts:

Questions relating to the equal opportunities between men and women at the workplace were raised in proceedings brought by Ms Abrahamsson and Mr Anderson against Ms Fogelqvist in relation to the appointment of the latter party as Professor of Hydrospheric Science at the University of Göteborg. In June 1996, the University of Göteborg announced a vacancy for the chair of Professor of Hydrospheric Sciences. It indicated that such appointment should contribute to the promotion of equality of the sexes and hence embraced positive discrimination. Eventually, 8 candidates applied, including Ms Abrahamsson, Ms Destouni and Ms Fogelqvist, and Mr Anderson. On the first vote taken by the Committee of the Faculty of Sciences, Mr Anderson came first while Ms Destouni came second. On the second vote, however, when account was taken into not only of the scientific merits but also of the promotion between equality of sexes, Ms Destouni came first.

The Selection Board proposed to the Rector of the University that Ms Destouni was to be appointed. In the experts report, Mr Anderson placed second and Ms Fogelqvist third. However, Ms Destouni withdrew her application, but the Selection Board held that it had already examined such case and it admitted of the considerable difference between the second and the third placed candidates. In November 1997, the Rector however appointed Ms Fogelqvist to the professional chair on the basis of positive discrimination in favour of her maintaining that this did not constitute a breach of the requirement of objectivity. Mr Anderson and Ms Abrahamsson appealed contending that the merits of both were superior to Ms Fogelqvist.

### Summary of the Decision/Verdict:

The Court held that Article 2(1) and (4) of the Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocations training and promotion, and working conditions, as well as Article 141(4) of the EC Treaty preclude national legislation which favours a candidate for a public post merely on the basis that he or she belongs to the under-represented sex. This is because appointing a candidate of the under-represented sex who possesses less merit is not objectively justified.

These same provisions also exclude any national law that allows any application of positive discrimination measures. A rule of national law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex can only occur if the candidate possesses equivalent or substantially equivalent merits. The test must always be subject to an objective assessment that takes account of the specific personal situations of all the candidates.

### Keywords:

Gender, employment, special measures (positive discrimination).



## Case No. 5.

**Decision/Verdict Date:** 1 August 2003

**Parties:** Mr. Edward Young vs. Australia,  
Communication No. 941/2000

**Forum:** Human Rights Committee (United Nations)

**Country (if relevant):** Australia

### Summary of the Facts:

The complainant was in a same-sex relationship with a Mr. C for about 38 years. When Mr. C passed away on 20th December 1998, the complainant applied for a pension on the basis of his partner's status as war veteran, claiming he was a veteran's dependant. This request was denied on the basis that the Australian government did not consider the complainant to be a dependant of Mr. C. The government argued that relevant Australian legislation defined 'dependant' as including the partner of the deceased person, where 'partner' is defined as either the spouse or the partner of the opposite sex. On the basis of this legislation, the complainant's claims before all national fora were rejected.

### Summary of the Decision/Verdict:

Mr. Young complained that Australia's refusal to provide with him pension benefits violated his right to equal treatment before the law on the basis of his sexual orientation, contrary to Article 26 of the International Covenant on Civil and Political Rights (ICCPR). He argued that whilst Article 26 does not oblige states to enact specific legislation, it does require that any adopted legislation is in conformity with the principles of equality and non-discrimination. He further argued that in its earlier jurisprudence, the Committee recognised sexual orientation as a prohibited ground of discrimination despite it not being specifically mentioned in the ICCPR.

The Committee noted how entitlements distinctions between married and unmarried heterosexual couples were reasonable and justified, since these couples enjoy the choice of whether to marry or not. It also noted that the denial of the dependant pension to the complainant was in fact based on his impossibility of fulfilling the eligibility criteria, either because he could not marry Mr. C or because he was not of the opposite sex. The Committee further pointed out that not every distinction amounts to prohibited discrimination, so long as this is reasonable and objective.

In this respect, the Committee found that Australia failed to provide arguments on how the distinction between same-sex partners and unmarried heterosexual partners is in fact reasonable and objective. The Committee concluded that the

complainant was entitled to a reconsideration of his pension application without discrimination based on his sex or sexual orientation, "if necessary through an amendment of the law."

### Keywords:

Sexual orientation, social welfare.

## Case No. 6.

**Decision/Verdict Date:** 8 July 2003

**Parties:** Sommerfeld vs. Germany, Application No. 31871/96

**Forum:** European Court of Human Rights

**Country (if relevant):** Germany

### Summary of the Facts:

The applicant was the father of a child born out of wedlock, whom he acknowledged and with whom he lived for five years. The father was separated from the mother, and as a result the mother prohibited any contact of the child with the father. The father's application for the right of access to the child was refused by the Youth Office on the ground that the child had established a close relationship with the mother's husband. After several years of proceedings, and based upon declarations of the parents and of the child herself, who claimed she did not wish to see her father, the Court concluded that it was not in the best interest of the child for the father to have contact with her.

He instituted an action before the European Court of Human Rights, claiming that the national court had discriminated against him by infringing his right to family life. He brought proceedings against the State on the basis of article 14 in conjunction with article 8.

### Summary of the Decision/Verdict:

The Court made reference to a prior case (Sahin vs. Germany, Application No. 30943/96 of 2003), in determining the matter. However, it stated that there was an additional element to be considered in the present case: the wishes of the child who, at the end of the trial, had reached the age of thirteen.

The Court found that, although the German courts appeared to have dealt with the father's claim in the same way as for a divorced father, they had explicitly adhered to the standard of whether access was "in the best interest of the child". In doing so, they had given decisive weight to the mother's initial prohibition of access and placed a burden on the applicant that was heavier than the one on divorced fathers. There had accordingly been a violation of Article 14 taken together with Article 8. It also found that there had been a further violation of Article 14 taken together with Article 8 because the applicant had been unable to lodge a further appeal, whereas a divorced father would have been able to.

The Court awarded the applicant 20,000 Euros for non-pecuniary damage and certain other sums for costs and expenses.

### Keywords:

Respect for family life, social status.

## Case No. 7.

**Decision/Verdict Date:** 7 March 2005

**Parties:** Ms. L.R. et al. (represented by the European Roma Rights Centre and the League of Human Rights Advocates) vs. the Slovak Republic, Communication No. 31/2003

**Forum:** Committee on the Elimination of Racial Discrimination (United Nations)

**Country (if relevant):** Slovak Republic

### Summary of the Facts:

The petitioners were Ms. L. R. and 26 other Slovak citizens of Roma ethnicity living in the town of Dobsina, Slovak Republic. On 20th March 2002 the town municipal councillors approved, through resolution, a plan to construct low-cost housing for the town's Roma community. This was prompted by the fact that the over 1,500 Roma lived in terrible conditions, in cardboard homes, without drinking water, toilets or drainage or sewage systems.

The resolution was opposed by the local inhabitants, and they signed a petition protesting against it and claiming that the low-cost houses would "lead to an influx of inadapted citizens of Gypsy origin." Some 2,700 inhabitants signed the petition, which was considered by the municipal council. On 5th August 2002 the council cancelled its earlier resolution regarding the construction of low-cost housing. The complainants were not able to rely on the Slovak courts as these found no violation of their human rights.

### Summary of the Decision/Verdict:

The complainants claimed a violation of the United Nations International Convention on the Elimination of all Forms of Racial Discrimination (CERD), arguing that the municipal council discriminated against them on the basis of their ethnic origin. They complained that the Slovak Republic was obliged under CERD to prohibit racial discrimination through investigation and prosecution alleging that the inhabitant's petition's wording constituted "incitement of racial discrimination." They further argued that this discriminatory act further violated their right to adequate housing.

In reaching its Conclusions, the CERD Committee highlighted that the definition of 'racial discrimination' in CERD Article 1 does not only include direct and explicit discrimination but also measures "which are not discriminatory at face value but are discriminatory in fact and effect" and which must necessarily be examined circumstantially. The Committee observed that in the context of economic, social and cultural rights (as is the right to housing), where implementation often requires a series of



administrative decisions and steps, it is necessary that all such steps and decisions are adopted in a non-discriminatory manner.

The Committee argued that when the municipal council repealed its earlier resolution, this was clearly done on grounds of the complainant's ethnic origin. Furthermore, in repealing the resolution, the definition of racial discrimination was in fact fulfilled since it put the complainants in a worse situation than they were when the municipal council adopted its housing resolution, thereby impairing the recognition or exercise on an equal basis of the human rights to housing. The Committee ordered the Slovak Republic to ensure that the complainants are placed in the position they were in prior to the repeal of the housing resolution and to ensure that such violations do not occur in the future.

**Keywords:**

Indirect discrimination, race/ethnic origin, regressive measures, housing.

## Case No. 8.

**Decision/Verdict Date:** 27 April 2006

**Parties:** Sarah Margaret Richards vs. Secretary of State for Work and Pensions, Case C-423

**Forum:** Court of Justice of the European Union

**Country (if relevant):** United Kingdom

### Summary of the Facts:

Miss Richards had had gender reassignment surgery. She applied for a retirement pension at the age of 60, the legal retirement age for women in the UK. The retirement age for men was set at the age of 65. Following her application's refusal by the Secretary of State, she turned to the Social Security Commissioner, who referred the matter to the Court of Justice to determine the compatibility of the relevant UK law with Community law on the matter in such circumstances, i.e. in the event of change of sex from male to female.

### Summary of the Decision/Verdict:

The Court of Justice said it was up to national legislation to determine under which circumstances legal recognition is given to gender reassignment surgery. However, it outlined that Directive 79/7 is embodied in the field of social security of the principle of equal treatment of men and women, which is one of the fundamental principles of Community law.

The court said that the scope of the Directive covers not only persons of either sex, but also those persons who have had sex reassignment surgery. The court elucidated the existence of discrimination by comparing transgender persons to those women "who were always women". Thus, the Court undertook a comparison "between women".

Since the unequal treatment at issue was based on Miss Richards's inability to have the new gender that she acquired following surgery recognised by pension legislation, there was a clear breach of her right protected by the Directive.

The judgment was, in substance, in line with the observations submitted by the Commission.

### Keywords:

Gender identity, social welfare.

## Case No. 9.

**Decision/Verdict Date:** 20 June 2006

**Parties:** Zarb Adami vs. Malta, Application No. 17209/02

**Forum:** European Court of Human Rights

**Country (if relevant):** Malta

### Summary of the Facts:

In this case the matter revolved around the appointment of jurors. The applicant complained that he had been the victim of a two-fold discriminatory treatment. Initially, he alleged that as a male he had been treated differently from women. This is because although women satisfied the legal requirements for jury membership, they were rarely required to fulfil jury service. Hence, the burden of jury service was discriminately and predominantly being placed on males. The applicant provided statistics in support of his claim.

Additionally, the applicant further considered that there existed a further form of discrimination vis-à-vis other men, who although were eligible for jury service had never been summoned to serve as jurors. In fact the applicant had been first appointed in 1971 and acted as a juror thrice in seventeen years.

### Summary of the Decision/Verdict:

The Court observed that it is accepted by the applicant that the difference in treatment is not dependent on the wording of the domestic provisions itself, but based on a well-established practice. In fact, statistics showed that in 1996, only five women served as jurors contrary to one hundred and seventy four men. Resultantly, the Court declared a violation of Article 14 of the Convention.

### Keywords:

Gender, indirect discrimination, statistics.

## Case No. 10.

**Decision/Verdict Date:** 16 October 2007

**Parties:** Félix Palacios de la Villa vs. Cortefiel Servicios SA, Case C-411/05

**Forum:** Court of Justice of the European Union

**Country (if relevant):** Spain

### Summary of the Facts:

By a letter of July 2005 the defendant notified the applicant of the automatic termination of his contract of employment on the ground that he had reached the compulsory retirement age provided for in the third paragraph of Article 19 of the relevant collective agreement. At the date on which his contract of employment with Cortefiel was terminated, Mr Palacios de la Villa had completed the periods of employment necessary to draw a retirement pension under the social security scheme.

In August of 2005 the applicant, operating under the impression that he was being dismissed from employment, brought an action in a tribunal in Madrid requesting it to declare the action null on the ground that it was in breach of his right to not be discriminated against on the ground of age, since the measure was based solely on the fact that he had reached the age of sixty-five.

The defendant submitted that the action was not so based, but rather it was based on an article in the collective agreement and in line with Community law. The national court said that if Community law were to be interpreted as meaning that it in fact precludes the application of the provision on non-discrimination on grounds of age in this particular case, then article 19 of the collective agreement would have no legal basis, and would therefore be invalid to the extent of its effect.

The question put to the Court of Justice was: does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age, preclude a national law pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Spanish State (and consequently all other States) for entitlement to a retirement pension under their contribution regime?

### Summary of the Decision/Verdict:

The Court stated first the premise that Directive 2000/78 is designed to lay down a general framework in order to guarantee equal treatment 'in employment and occupation' to all persons,

by offering them effective protection against discrimination on one of the grounds covered by Article 1, including age. Particularly, it followed from Article 3(1)(c) of Directive 2000/78 that it applied, within the framework of the competence conferred on the Community, "to all persons...in relation to employment and working conditions, including dismissals and pay".

The legislation at issue, requiring a person to retire at a specific age, affects the duration of the employment relationship between the parties, and more generally, it prevents a person engaged in labour from the possibility of future contributions to that market. In light of this the Court of Justice saw that Directive 2000/78 is applicable to such a situation. The Court then went on to assess whether, though the Directive was applicable, the State could be objectively and reasonably justified in allowing for the existence of such provisions in collective agreements that the applicant is claiming to be discriminatory.

Under Article 2(1) of Directive 2000/78, the principle of equal treatment means that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. Article 2(2)(a) states that direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1. And in this case there was a difference in treatment directly attributable to the age of persons.

However article 6(1) of the Directive states that such inequalities will not constitute discrimination prohibited under Article 2 "if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary".

The Court saw that the provision allowing this reality under national law was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment. This objective of the State could not be put into question. On this ground the Court concluded that national law was correct and that therefore no discrimination was exercised against the applicant.

### Keywords:

Age, employment, legitimate aim, comparator.

## Case No. 11.

**Decision/Verdict Date:** 13 November 2007

**Parties:** D.H. and Others vs. the Czech Republic, Application No. 57325/00

**Forum:** European Court of Human Rights

**Country (if relevant):** Czech Republic

### Summary of the Facts:

This case concerned discrimination of Romani children in the education system of the Czech Republic. Most children from the Roma minority in Ostrava attended special schools with simplified curriculum, forming the majority of their students.

The applicants, 18 Romani former students and then-attendants of special schools represented by the European Roma Rights Centre, had taken their case to the Constitutional Court, seeking a reversal of their placement in the remedial schools, and to order that the schools office of Ostrava provide them with compensatory schooling to return them to their position prior to their placement, i.e. their status quo ante. The Constitutional Court turned the case down, claiming two reasons for its decision. The first was that a number of the applicants had failed to exhaust the school system's appeal process for special school placement, and secondly, the Court did not find any interpretation or application of a legal provision in an unconstitutional manner, and hence it lacked the competence to determine the matter.

After this result from the Constitutional Court they submitted an application to the European Court of Human Rights in 2000 in order to examine whether the disproportionately high placement of Roma students in schools for the learning disabled ("special schools") in the Czech Republic was a violation of their right, under Article 2 of Protocol 1 read in conjunction with Article 14 of the European Convention on Human Rights.

### Summary of the Decision/Verdict:

The applicants sought individual remedies for themselves and collective remedies for all Roma students in the Czech Republic. The applicants cited the cases *Broniowski vs. Poland* and *Hutten-Czapska vs. Poland* for the proposition that individuals may request the redress of wrongs suffered by an entire group of people if they also suffered the wrong and are a member of that group. They asked that hindrances be removed to the enjoyment of rights by the Roma people.

The Second Section of the European Court of Human Rights found no evidence of discrimination against the applicants, based upon three factors. Firstly, that the system of special

schooling was not established solely to cater for Roma children, but with the legitimate aim of assisting children with slight mental disabilities to obtain a basic education. Secondly, tests for placement in the school were administered by professional psychologists, and it was not the role of the court to go behind the established facts of the case and require the government to show that individual psychologists had not adopted a discriminatory approach to these particular children. Thirdly, the applicants' parents failed to appeal against the decisions to place their children in special schools and in a number of the cases the parents had requested that their children be transferred to a special school.

The Grand Chamber held by thirteen votes to four that there had been indirect discrimination against the school children in the provision of education, finding a violation of Article 14 (prohibition of discrimination) of the ECHR read in conjunction with Article 2 of Protocol 1 (right to education). The decision held that disproportionate assignment of Roma children to special schools without an objective and reasonable justification amounted to unlawful discrimination. However, perhaps the most ground-breaking element of the court's decision was that it explicitly embraced the principle of indirect discrimination, reasoning that a prima facie allegation of discrimination shifts the burden to the defendant state to prove that any difference in treatment is not discriminatory.

The Court required the Czech Republic to adopt "general and, if appropriate, individual measures" in order to end the discrimination against Roma in the Czech education system.

### Keywords:

Race/ethnic origin, education, indirect discrimination, burden of proof.



## Case No. 12.

**Decision/Verdict Date:** 1 April 2008

**Parties:** Tadao Maruko vs. Versorgungsanstalt der deutschen Bühnen, Case C-267/06

**Forum:** Court of Justice of the European Union

**Country (if relevant):** Germany

### Summary of the Facts:

Mr Maruko's life partner had been a member of the Vddb (pension fund) since 1 September 1959 and had continued to contribute voluntarily to that institution during the periods when he was not obliged to be a member. He died on 12 January 2005. By letter dated 17 February 2005, Mr Maruko applied to the Vddb for a widower's pension. By decision of 28 February 2005, the Vddb rejected his application on the ground that its regulations did not provide for such an entitlement for surviving (gay) life partners.

Paragraph 46(4) of the German Social Security Code places life partnership and marriage on an equal footing.

Mr Maruko brought an action before the Bavarian Administrative Court in Munich, claiming that the Vddb's refusal infringed the principle of equal treatment, given that, since 1 January 2005, the German legislature had placed life partnership and marriage on an equal footing. To deny that a person whose life partner has died is entitled to survivor's benefits on the same conditions as a surviving spouse is discrimination on grounds of that person's sexual orientation. He opined that life partners are treated differently from heterosexual spouses.

### Summary of the Decision/Verdict:

The court said that civil status and benefits flowing there from are matters that fall within the competence of Member States, and Community law does not intend to neither override, nor fetter that competence. However, it noted that in exercising that competence national law must comply with Community law, and in particular with the principles relating to non-discrimination.

The purpose of Directive 2000/78, dealing with equal treatment in employment and occupation, and on which the proceedings of the case are based, is to combat certain forms of discrimination, including that on the grounds of sexual orientation. The 'principle of equal treatment' means that there is to be no direct or indirect discrimination whatsoever on the grounds relating to the subject matter of the directive. Direct discrimination occurs where one person is treated less favourably than another person who is in a comparable situation. Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put

persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

It was clear that when the LpartG (Civil Partnership Act), in its initial version, entered into force, Germany altered its law to allow same sex partners to live in union of mutual support and assistance which is formally constituted for life. The life partnership legal regime was only created as a separate regime because marriage, as an institution exists only for persons of a different sex. And now the conditions of the former regime have been made equivalent to those applicable to marriage.

However, the court observed, the Vddb regulations entitlement to that survivor's benefit is restricted to surviving spouses and is denied to surviving life partners. That being the case, those life partners are treated less favourably than surviving spouses as regards entitlement to that survivor's benefit. If the national court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, the legislation at issue in the proceedings will be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78. So the existence of discrimination or otherwise based on sexual orientation depends completely on the national court's decision on whether spouses and life partners are on equal footing at law. Unless the court finds them to be on an equal footing, the Vddb would not be discriminating, thereby making its operations legal.

### Keywords:

Sexual orientation, comparator, indirect discrimination, social welfare.



## Case No. 13.

**Decision/Verdict Date:** 22 January 2008

**Parties:** E.B. vs. France, Application No. 43546/02

**Forum:** European Court of Human Rights

**Country (if relevant):** France

### Summary of the Facts:

The applicant was a French nursery teacher and also a lesbian. The applicant had been living with other women since 1990. In February 1998 the applicant applied to the Jura Social Services Department for authorisation to adopt a child. In her application she mentioned that she was in a stable lesbian relationship with her partner. In November 1998 the adoption board made a recommendation that E.B.'s application be rejected.

The applicant lodged a successful appeal against the decision in the Besançon Administrative Court. This decision was overturned by the Nancy Administrative Court of Appeal that opined that the rejection by the adoption board had not been based on the applicant's choice of lifestyle and therefore did not violate Article 8 or Article 14 of the European Convention on Human Rights. In June 2002 the Conseil d'Etat dismissed her appeal. On 2 December 2002 an application was made to the Strasbourg Court.

### Summary of the Decision/Verdict:

The applicant argued that at every stage of her adoption application she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life. The Government argued that the case was inadmissible as the case fell outside the scope of Article 8 and subsequently Article 14.

The Court accepted the arguments of the applicant in respect to Article 14. It based its legal argument on the Fretté case, which was very similar in nature. In distinguishing between the two cases the Court set out as significant the fact that E.B. was in a stable relationship, unlike in the facts of the Fretté case, and that unlike the applicant in the Fretté case E.B. was not deemed to have "difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child".

The government carried the burden of proof and their inability to produce statistical evidence on adoption applicants' known or declared sexual orientation, necessary to discharge this burden, meant that it had failed to establish an accurate picture of their administrative practices and thereby establish an absence of discrimination.

It concluded that whilst efforts were taken by the French judicial authorities to justify taking into account the applicants' "lifestyle", the "inescapable conclusion" was that the applicants' sexual orientation was at the centre of the deliberations and that it was a decisive factor leading to the decision to refuse her authorisation to adopt. The Court ruled in the applicant's favour.

### Keywords:

Sexual orientation, adoption.

## Case No. 14.

**Decision/Verdict Date:** 10 March 2009

**Parties:** Turan Cakir vs. Belgium, Application No. 44256/06

**Forum:** European Court of Human Rights

**Country (if relevant):** Belgium

### Summary of the Facts:

The applicant was a Belgian citizen born in 1967. He lived in Belgium and was of Turkish origin. He alleged that he was subjected to ill treatment on the basis of racist prejudice during his arrest and while held in police custody.

The applicant alleged, in particular, that he had been pinned to the ground, handcuffed and struck by three police officers. He had then been dragged along the ground to a vehicle, and had been subjected to racist threats and insults during the journey to the police station. At the police station, he alleged, police officers had struck him again and hit him on the head with a seat and a telephone directory.

According to the Belgian Government, during the arrest the police officers had been required to use pepper spray and to “kick the applicant’s feet out from under him”, thus knocking him to the ground, in an attempt to control him. The applicant appeared to be under the influence of drugs and fought violently, so that it was impossible to place handcuffs on him. The police officers had been surrounded by people who began to strike and insult them. Mr Cakir himself had been kicked by those individuals.

The applicant was hospitalised for ten days and one of the police officers was declared unfit to work for one day.

The applicant later lodged a criminal complaint together with an application to join the proceedings as a civil party. At the end of those proceedings the Belgian courts issued an order that there was no juridical case, thereby dismissing it.

Following this event the applicant brought an action before the European Court of Human Rights, basing his claims on Articles 3, 6(1), and Article 13. He also brought forward Article 3 in conjunction with Article 14.

### Summary of the Decision/Verdict:

In considering the infringement of Article 3 the Court observed that the applicant had been injured. The fact that there were uncontested claims, albeit varying as to the substance, allowed the Court to determine whether the force that had been used was proportionate. The Court found that the applicant had

been hospitalised for ten days, and that his body was covered in bruises and injuries. It refused to believe that no excessive force was used. Moreover, it was observed that he was still suffering from the event’s after-effects. The Court saw that it had not been shown that the use of force by the police officers had been to an extent which was necessary. Therefore, the Court ruled that there was a violation of article 3.

In considering whether there was a violation of article 14 the Court considered the action taken by the local tribunal on the matter. It considered that the Belgian authorities had not taken all the necessary measures to ascertain whether discriminatory conduct could have played a role in the events in question, and therefore concluded that there had been a violation of Article 14 taken in conjunction with Article 3.

### Keywords:

Race/ethnic origin, police conduct, duty to investigate.



## Case No. 15.

**Decision/Verdict Date:** 16 March 2010

**Parties:** Carson and Others vs. United Kingdom, Application No. 42184/05

**Forum:** European Court of Human Rights

**Country (if relevant):** United Kingdom

### Summary of the Facts:

The applicants were 13 British nationals born between 1913 and 1937. They spent most of their working lives in the UK paying National Insurance Contributions in full. They then returned or emigrated to South Africa, Australia, or Canada. The applicants complained about the UK authorities' refusal to uprate their pensions in line with inflation. Miss Carson brought proceedings by way of judicial review, claiming that she had been a victim of discrimination as pensioners were treated differently depending on their country of residence. Her application for judicial review was dismissed in May 2002 and ultimately on appeal before the House of Lords in May 2005.

All but one judge of the House of Lords said that the situation of Miss Carson was not analogous or relevantly similar to that of a pensioner of the same age and contribution record living in the UK or in a country where uprating was available through a reciprocal bilateral agreement. Different countries had different economic conditions, for example, in South Africa, where Miss Carson lived, although there was virtually no social security, the cost of living was much lower, and the value of the rand had dropped significantly in comparison to the Sterling. The domestic courts further held that Miss Carson and those living in her position had chosen to live in economies outside the UK; to accept her arguments would be to lead to judicial interference in the political decision as to the redeployment of public funds. Miss Carson's basic state pension had been frozen since 2000.

The applicants alleged that the UK authorities' refusal to uprate their pensions in line with inflation were discriminatory and some of them had to choose between surrendering a large part of their pension entitlement or living away from their families. They relied on Article 8 (right to respect for private and family life), Article 14 (prohibition of discrimination), and Article 1 of Protocol No.1 (protection of property) to the Convention.

### Summary of the Decision/Verdict:

As regards the question of whether the applicants were in an analogous situation to British pensioners who had chosen to remain in the UK, the Court noted that the contracting states'

contracting social security system was intended to provide a minimum standard of living for those resident within its territory. So, those who chose to live outside the UK were not in an analogous situation as those who chose to live within the UK.

Furthermore, the Court could not find an analogy between applicants who lived in a 'frozen pension' country and British pensioners residing in countries outside the UK where uprating was available through a reciprocal agreement. The applicants' payment of national insurance contributions during their working lives in the UK was not any more significant than the fact they might have paid income tax or other taxes while domiciled there. Also, it was not easy to compare the respective positions of residents of states with similar economic conditions such as the US and Canada, or South Africa and Mauritius due to differences in social security provision, taxation, rates of inflation, interest, and currency exchange.

The pattern of reciprocal agreements was the result of history and perceptions as to perceived costs and benefits of such an agreement. They represented whatever the contracting state had from time to time been able to negotiate, without placing itself at an undue economic disadvantage. In the Court's view, the state did not exceed its very broad discretion to decide on matters of macro economic policy by entering into such reciprocal agreements with certain countries but not others. Moreover, the State had taken steps, in a series of leaflets, to inform UK residents moving abroad about the absence of index linking for pensions in certain countries. Hence, the Court concluded that the difference in treatment had been objectively and reasonably justified.

**Keywords:**

Comparator, social welfare.

### 3. National Cases

#### Case No. 16.

**Decision/Verdict Date:** 2 November 2001

**Parties:** Odette Federoff, widow of James Federoff vs. Permanent Secretary in the Office of the Prime-Minister, Permanent Secretary in the Office of the Minister for Justice, Advocate General, Marriage Registrar, Permanent Secretary in the Ministry of Home Affairs, Director of Public Registry, Application No. 704/99 CFS

**Forum:** Constitutional Court

**Country (if relevant):** Malta

**Summary of the Facts:**

The complainant was a widow who, when applying to marry a second time, was informed that she was unable to keep her first husband's surname as this was not permitted under Maltese law. She insisted that she did not want to adopt her future husband's surname but rather keep that of her deceased first husband. In her complaint to the Court, she noted that the provision of Maltese law that barred her from doing so was discriminatory insofar as unmarried women could choose to maintain their maiden surnames, and since widows could also keep their surnames. She alleged that the law discriminated on the ground of her social status as a widow and on the ground of her gender as a woman. She also complained that the provision constituted an unjustified intrusion into her private and family life.

Amongst the arguments raised by the respondents was the fact that 'social status' was not included in the list of prohibited grounds of discrimination contained in Article 45 of the Constitution of Malta, and that freedom from discrimination was not an independent human rights protected by the European Convention on Human Rights.

**Summary of the Decision/Verdict:**

The Constitutional judgement was mainly concerned with the allegations of a substantive violation of Article 8 of the Convention, which in fact the Court did find. In finding a violation of Article 8, the Constitutional Court refrained from delving into the discrimination claims yet made a number of relevant observations. In making its observations, the Court highlighted the comparator principle to conclude that the issue was not of discrimination based on the complainant's gender, since the treatment complained of was not extended to other women. It stopped short of entering into the discussion as to whether the legal provision discriminated against the applicant on the ground of her social status as a widow. This notwithstanding, the 17

February 2000 sentence of the First Hall Civil Court (first instance) did in fact find discrimination on this ground.

**Keywords:**

Gender, social status, comparator, private and family life.

## Case No. 17.

**Decision/Verdict Date:** 26 October 2006

**Parties:** Ritianne Bajada vs. Underwear Limited, Decision Number 1738, Case Number 2199/JB

**Forum:** Industrial Tribunal

**Country (if relevant):** Malta

**Summary of the Facts:**

The complainant was initially employed as a salesclerk, but was later given the duties of a cashier and eventually of a cleaner and storekeeper. She complained that this treatment was in violation of Article 26(2) of the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta) insofar as it prohibits “any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis martial status, pregnancy or potential pregnancy, sex, colour, disability or religious conviction, political opinion or membership in a trade union or an employers’ association.” Whilst not disputing the facts, the respondent company claimed that this treatment was not based on any discrimination but on the complainant’s poor output.

**Summary of the Decision/Verdict:**

Although the Tribunal’s decision was a short one, it is largely dedicated to presenting the definition of discrimination under the Act and of commenting on the application of this definition to the present situation. The Tribunal noted that the case fell within Article 26(1)(b) since it related to “employees already in employment of the employer...in regards to conditions of employment.” It also highlighted that discrimination should not be construed in a philosophical vacuum but must be specifically seen within a given context and using the comparator principle.

In commenting on the negligible evidence brought by the complainant, the Tribunal noted that none of the prohibited grounds were referred to by the complainant. Furthermore, when applying the comparator principle, the Tribunal did not establish a treatment that was different to other persons under her circumstances, as required by law.

**Keywords:**

Employment, comparator.

## Case No. 18.

**Decision/Verdict Date:** 1 September 2007

**Parties:** National Commission Persons with Disability (KNPD) vs. Michele Peresso Limited, Civil Appeal No. 413/2001/1

**Forum:** Court of Appeal

**Country (if relevant):** Malta

### Summary of the Facts:

On 19th April 2000 the KNPD received a complaint regarding the inaccessibility of Europharma, premises located in Psaila Street (Birkirkara) and owned by the respondent company. In accordance with its standard complaints procedure, the KNPD informed Michele Peresso Limited of the complaint on 20th April 2000 but the two parties were unable to resolve the dispute in an amicable manner.

KNPD files a case in the First Hall Civil Court on 14th March 2001, where the Court found in favour of KNPD in its judgement of 25th February 2005, declaring that Michele Peresso Limited discriminated against persons with disabilities in a manner contrary to Article 12(1)(c) of the Equal Opportunities Act (Act 1 of 2000). The Court ordered the company to request the permits necessary to carry out the works required to ensure free and adequate access to its premises by persons with disabilities.

Michele Peresso Limited appealed this decision on 16th March 2005.

### Summary of the Decision/Verdict:

The Court of Appeal overturned the first court's decision, finding no discrimination contrary to law. Yet a number of important points were made in its deliberations, also in the context of the deliberations of the First Hall, Civil Court.

In its judgement, the first court reiterated a series of principles central to cases of this nature. It disagreed with the respondent that the KNPD was not competent to bring cases to Court alleging discrimination in violation of the Equal Opportunities Act. The Court emphasised that in terms of the Act, the organisation is in fact so competent. Also disagreeing with the respondent, the Court firmly stated that the Equal Opportunities Act would be rendered useless if it only regulated buildings and premises built after its coming into force (1st October 2000).

With regard to the nature of accessibility to premises deemed to be appropriate in terms of the Act, the Court stated that not every form of access is in fact adequate. For full compliance with the Act, access for persons with disabilities ought to permit

the person's independent access from an area close to the main entrance, so as to fulfil the Act's spirit of ensuring opportunities on an equal footing with a view to leading to full social integration.

The Court reiterated the principle that in cases of discrimination, the complainant is only to show a prima facie case, resulting in a shifting of the burden of proof onto the respondent. Furthermore, service-providers attempting to highlight the burden imposed on them by compliance with the Act should not focus on aesthetic issues but on financial considerations.

The Appeal Court confirmed the retroactivity of the Equal Opportunities Act, insisting that any other interpretation "defeats the whole purpose" since a vast majority of buildings in Malta were built prior to 2000. It proceeded to provide an overview of the requirements for 'discrimination' as prescribed in the Act: the premises must be public or accessible to the public; the various scenarios envisaging discrimination in Article 12(1) and (2) require a comprehensive case by case analysis as to whether access to the premises is reasonable or not. In the Appeal Court's view, an alternative access for persons using a wheel-chair is not necessary humiliating or discriminatory, particularly in view of the fact that some buildings may not readily permit structural changes to be made to ensure compliance with the Act. An insistence that persons with disabilities use the premises' main entrance could result in an unjustified burden on the owner to the extent that several public spaces would be found not to be in compliance with the Act.

On this basis, the Appeal Court concluded that providing an alternative entrance, that is controlled and assisted, is not unreasonable and does not constitute discrimination.

### Keywords:

Disability, accessibility, retroactivity of equality legislation.



## Case No. 19.

**Decision/Verdict Date:** 2008

**Parties:** Not specified. Case A, as reported in the National Commission for the Promotion of Equality (NCPE) Annual Report 2008.

**Forum:** National Commission for the Promotion of Equality (NCPE)

**Country (if relevant):** Malta

### Summary of the Facts:

NCPE received a complaint regarding a call for employment published by a dental clinic. The call for was for dental assistant, and although the call itself was gender neutral it transpired that the dental clinic was only considering female applicants. The employer confirmed this, stating that it was standard European Union policy that chair side dental assistants were female.

### Summary of the Decision/Verdict:

The NCPE initiated an investigation into the matter and concluded that this practice constituted gender discrimination, requesting the dental clinic to refrain from its continuation.

### Keywords:

Gender, employment.

## Case No. 20.

**Decision/Verdict Date:** 2009

**Parties:** The open secret of the airline employee

**Forum:** Office of the Parliamentary Ombudsman

**Country (if relevant):** Malta

### Summary of the Facts:

A complaint was received by the Office of the Ombudsman relating to possible discrimination on the ground of sexual orientation. The complaint was lodged by an Air Malta employee, wherein he alleged that he was discriminated against when he was not selected for ab initio pilot training. In June 2006 the complainant had applied for ab initio pilot training, following which he was called for an interview before a panel of three management pilots. During the interview, the applicant was asked several technical and general questions about Air Malta. All applicants were asked the same set of questions.

In January 2007 the complainant was informed that his application was turned down.

### Summary of the Decision/Verdict:

According to the information provided by Air Malta to the Ombudsman, during the interview the complainant had demonstrated an external behaviour that, in the panel's opinion, was over-confident and at times also nonchalant. The interviewing panel also commented that the complainant had attended the interview dressed in an inappropriate manner. Furthermore, the three members of the interviewing board insisted that as they were unaware of the complainant's sexual orientation, they could not have discriminated against him on this ground.

On his part, the complainant argued that he was suitably qualified for the job and that he was sure the panel members knew of his sexual orientation due to the years he spent working with Air Malta and due to the fact that he made no effort to hide it.

In his considerations the Ombudsman referred to relevant EU Directives in highlighting how in discrimination cases the burden of proof is shifted away from the complainant once a prima facie case of discrimination is shown. In such situations, the Directives require the person/organisation complained against - in this case Air Malta - to bring evidence to show that no act of discrimination was committed. The Ombudsman noted that the complainant did indeed respond correctly to all questions put to him, and that he was in fact qualified for the position, seemingly giving rise to a prima facie case of discrimination.





Due to conflicting elements provided by the complainant and Air Malta, the Ombudsman was not able to establish whether the interviewing panel was aware of the applicant's sexual orientation, highlighting that sexual orientation cases generally do raise these challenging questions due to the often hidden nature of a person's sexual orientation.

Ultimately, the Ombudsman concluded that the complainant had not succeeded in proving a prima facie case of discrimination on the basis of his sexual orientation. In view of this, Air Malta was not required to justify its decision of not engaging him. The complaint was not accepted.

**Keywords:**

Sexual orientation, burden of proof, employment.

## Case No. 21.

**Decision/Verdict Date:** 2009

**Parties:** Ex Ufficio investigation. Case C, as reported in the National Commission for the Promotion of Equality (NCPE) Annual Report 2009

**Forum:** National Commission for the Promotion of Equality

**Country (if relevant):** Malta

**Summary of the Facts:**

When applying for a housing scheme subsidised by the Maltese government, men and women were being charged different rates, with women having to pay a higher rate. The reason given for this related to the fact that since women change their surnames upon marriage or following personal separation, their applications incurred higher expenses than those presented by men.

**Summary of the Decision/Verdict:**

In the investigation, the Commissioner highlighted the substantive application of the Access to Goods and Services and their Supply (Equal Treatment) Regulations (Legal Notice 181 of 2008) to the provision of any good or service, including that relevant to the present case. The Commissioner further emphasised that the Regulations prohibit direct discrimination together with indirect discrimination.

Basing discriminatory treatment on an element inherently linked to marriage, in this case the change in surname, was contrary to the Regulations as specifically mentioned in Regulation 2, stating that "equal treatment means the absence of discrimination, whether direct or indirect, on grounds of sex, be reference in particular to marital or family status." The Commissioner noted that no exception was made in the Act that could cover the present situation.

On this basis, the Commissioner concluded that the difference in fees based on a person's marital or family status amounted to prohibited discriminatory treatment, and advised the relevant government authority to take immediate remedial action.

**Keywords:**

Gender, housing, social welfare, indirect discrimination.

## Case No. 22.

**Decision/Verdict Date:** 2009

**Parties:** Not specified. Case F, as reported in the National Commission for the Promotion of Equality (NCPE) Annual Report 2009

**Forum:** National Commission for the Promotion of Equality (NCPE)

**Country (if relevant):** Malta

### Summary of the Facts:

NCPE received a complaint regarding alleged racial harassment in the provision of a private service relating to housing. According to the complainant, a professional of Egyptian nationality, the lessor of the premises he was leasing, engaged in racial harassment in the course of removing him from the leased premises. The property owner claimed that he acted within the law in exercising his ownership rights against a person who was residing in the property in an illegal manner.

### Summary of the Decision/Verdict:

The Commissioner's investigation revealed that the complainant's ethnic background was in fact a relevant element in the case, this having been referred to in a pejorative manner by the lessor, also in the presence of third parties.

The Equal Treatment of Persons Order (Legal Notice 85 of 2007) specifically prohibits racial discrimination in the provision and supply of goods and services, and is applicable to both the public and the private sphere. The Commissioner highlighted the definition of 'harassment' within the context of discrimination, where the Order states that "harassment shall be deemed to be discrimination when it is related to racial or ethnic origin and takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment." In this respect, the Commissioner noted how harassment may be perpetuated through verbal means, and amounts to prohibited discrimination once the elements of this definition are fulfilled.

On the basis of the above, the Commissioner concluded that the language used by the lessor did constitute harassment which amounted to prohibited discrimination.

### Keywords:

Racial harassment, housing.

## Case No. 23.

**Decision/Verdict Date:** August 2009

**Parties:** Case No. I 0466. The right of immigrants to marry.

**Forum:** Office of the Parliamentary Ombudsman

**Country (if relevant):** Malta

### Summary of the Facts:

The Ombudsman received a complaint, supported by a local non-governmental organisation, that various groups of immigrants were prevented from marrying in Malta. According to the complainant, this prohibition was effective where a failed asylum-seeker wished to marry another failed asylum-seeker, a beneficiary of subsidiary protection; a Maltese national and a person living outside of Malta. The ban also extended to marriages celebrated within the Roman Catholic faith due to the existing agreement between the State and the Church regarding the automatic recognition by the state of Church marriages. Immigrants enjoying another legal status, such as recognised refugees or beneficiaries of subsidiary protection, were not barred from marrying in Malta. According to the Director General of the Land and Public Registry Division, the rationale for this prohibition was the fact that failed asylum-seekers remain in Malta in an irregular status and were not identifiable.

### Summary of the Decision/Verdict:

In the course of the investigation, the Ombudsman discovered several situations where this prohibition had been implemented. The investigation, as reflected in the Final Opinion, explored the law, regulations and norms of good governance; interpretative jurisprudence; considerations; and conclusions and recommendations.

The Ombudsman conducted an in-depth analysis of Malta's marriage legislation, marriage under Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) seen together with the Convention's Article 14 on non-discrimination, and of Malta's asylum procedure. Research was also conducted into relevant jurisprudence of the European Court of Human Rights, with the Ombudsman commenting that "one cannot validly doubt the stand that illegality in itself cannot suspend the enjoyment of fundamental human rights, unless expressly sanctioned by constitutional or conventional provisions." The Ombudsman stated that national measures to safeguard the integrity of marriage in relation to third-country nationals, ought to be limited to preventing marriages of convenience and that such measures cannot be definition be measures of general application.

Consequently, the Ombudsman found that the Marriage Registrar's policy was a breach of the fundamental right to marry of failed asylum-seekers, contrary to Article 12 of the Convention. He further found that this policy, in terms of its formulation and implementation, was discriminatory and in violation of the Convention's Article 14.

**Keywords:**

Race/ethnic origin, marriage.

## Case No. 24.

**Decision/Verdict Date:** 1 March 2010

**Parties:** National Commission Persons with Disability (KNPD) vs. Banif Bank (Malta) p.l.c. (C41030), Application 394/2009

**Forum:** First Hall Civil Court

**Country (if relevant):** Malta

**Summary of the Facts:**

In 2008 KNPD received a complaint that a Banif Bank branch that had opened in St. Julian's did not grant appropriate access to persons with disability, despite the plans approved by the Malta Environment and Planning Authority that indicated otherwise. The Bank claimed that the section of the property where the ramp was intended to be built, to ensure appropriate access, was not actually the Bank's property. Without consulting KNPD or KNPD Guidelines, the Bank built a platform lift that failed to conform to the relevant standards due to its measurements and to the fact that the lift had a step leading into, rendering it inappropriate. In a similar situation, the Banif Bank branches later opening at PAVI Supermarket (Qormi) and in St Paul's Bay were also inaccessible to persons with disability. Furthermore, KNPD noted that the Bank's Head Office in Gzira was also inaccessible and not in compliance with KNPD Guidelines.

**Summary of the Decision/Verdict:**

KNPD requested the Court to declare Banif Bank to be in violation of the Equal Opportunities Act (Act 1 of 2000) and to establish a time limit by which the Bank should take all the steps necessary to ensure the accessibility of its Head Office and all its branches. Banif Bank argued that, with regard to its Gzira Head Office, the Bank was a mere tenant and was not in a position to perform structural alterations to the building's common areas. The Bank also claimed that alternative means of access to the Bank's premises did in fact exist. With regard to its St. Julian's branch, the Bank noted that the building's location and its classification as an Urban Conservation Area, rendered impossible the installation of a platform lift that was compliant with the KNPD Guidelines. The Bank also noted that the St. Julian's branch, as all other Banif Bank branches, was accessible to persons using wheel chairs.

In relation to the Gzira Head Office, the Court concluded that Maltese law does envisage situations where tenants are authorised to carry out structural changes to the property being rented. However, it chose not to establish whether the present case fell within these situations since it stated that it is ultimately the Bank's obligation to respect the law and therefore to ensure that, in one way or other, its premises are rendered accessible.

**Keywords:**

Disability, accessibility.

## Case No. 25.

**Decision/Verdict Date:** 1 June 2010

**Parties:** Neil John Pavia vs. Mediterranean aviation Company Limited, Decision No. 2003, Case Number 2627/LC

**Forum:** Industrial Tribunal

**Country (if relevant):** Malta

### Summary of the Facts:

The complainant worked with the respondent company as a pilot and alleged in his complaint that, despite having the same qualifications and experience as other pilots working with the company, he was paid less for performing the same tasks. This, he said, was in violation of the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta) wherein Article 27 states that “employees in the same class of employment are entitled to the same rate of remuneration for work of equal value” and that “any distinction between classes of employment based on discriminatory treatment otherwise than in accordance with the provisions of this Act or any other law shall be null and of no effect.” He alleged that non-Maltese employees were paid higher rates for performing his same tasks.

In the course of the proceedings before the Tribunal, the complainant resigned from his position with the respondent company but insisted that his complaint remained valid as he was alleging a violation that occurred when he was still employed.

### Summary of the Decision/Verdict:

The Tribunal viewed a substantial number of documents brought as evidence by both parties, including employment contracts, job descriptions and various technical details relating to descriptions of planes and pilot classes.

This was also done since the respondent company claimed that the salaries were calculated on the basis of qualifications, experience and the plane’s ‘type-rating’.

On the basis of the presented documentation, the Tribunal referred to the comparator principle and sought to locate the complainant’s salary in the light of salaries paid to colleagues in a similar situation to his own, in terms of qualifications and experience. It transpired that colleagues in a comparable situation were in fact paid higher rates than the complainant and the Tribunal found no objective or justifiable reason for these differences. In finding a violation of the complainant’s rights, the Tribunal also quantified the compensation to be granted to him in relation to the wages lost due to the discriminatory treatment, ordering a payment of €18,000 within thirty days of the decision.

It is to be noted that the Tribunal did not associate the discriminatory practice to any of the traditional grounds of discrimination, since the above-quoted article of the Employment and Industrial Relations Act does not require such a ground to be identified or even to be a substantive component of the prohibited practice.

### Keywords:

Employment, comparator.