HANDBOOK

Handbook on European non-discrimination law

FRA

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

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

The manuscript was finalised in July 2010.

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Luxembourg: Publications Office of the European Union, 2011

ISBN 978-92-871-9995-9 (CoE)
ISBN 978-92-9192-667-1 (FRA)
doi:10.2811/11978

Printed in Luxembourg by Imprimerie Centrale

Printed on elemental chlorine-free bleached paper (ECF)

This Handbook was drafted in English. The European Court of Human Rights (ECtHR) takes no responsibility for the quality of the translations into other languages. The views expressed in this Handbook do not bind the ECtHR. The Handbook refers to a selection of commentaries and manuals on the European Convention on Human Rights. The ECtHR takes no responsibility for their content, nor does their inclusion on this list amount to any form of endorsement of these publications. Further manuals on the Convention are listed on the Internet pages of the ECtHR library: echr.coe.int/Library/

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Protected grounds

4.1. Introduction

The European non-discrimination directives prohibit differential treatment that is based on certain 'protected grounds', containing a fixed and limited list of protected grounds, covering sex (Gender Goods and Services Directive, Gender Equality Directive (Recast)), sexual orientation, disability, age or religion or belief (Employment Equality Directive), racial or ethnic origin (Racial Equality Directive). The ECHR, in contrast, contains an open-ended list, which coincides with the directives, but goes beyond them. Article 14 states that there shall be no discrimination 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The category of 'other status' has allowed the ECtHR to include those grounds (among others) that are expressly protected by the non-discrimination directives, namely: disability, age and sexual orientation.

Chapter 1 noted that Article 21 of the EU Charter of Fundamental Rights also contains a prohibition on discrimination. The Charter binds the institutions of the European Union, but will also apply to the Member States when they are interpreting and applying EU law. The Charter provision on discrimination contains a combination of both the grounds of the ECHR and the non-discrimination directives, although it does not contain the open-ended ground of 'other status'.

A 'protected ground' is a characteristic of an individual that should not be considered relevant to the differential treatment or enjoyment of a particular benefit.

4.2. Sex

Sex discrimination is relatively self-explanatory, in that it refers to discrimination that is based on the fact that an individual is either a woman or a man. This is the most highly developed aspect of the EU social policy and has long been considered a core right. The development of the protection on this ground served a dual purpose: firstly, it served an economic purpose in that it helped to eliminate competitive distortions in a market that had grown evermore integrated, and; secondly, on a political level, it provided the Community with a facet aimed toward social progress and the improvement of living and working conditions. Consequently, the protection against discrimination on the ground of sex has been, and has remained, a fundamental function of the European Union. The acceptance of the social and economic importance of ensuring equality of treatment was further crystallised by the central position it was given in the Charter of Fundamental Rights. Similarly, under the ECHR protection against discrimination on the ground of sex is well developed.

While cases of sex discrimination typically involve women receiving less favourable treatment than men, this is not exclusively the case.

> Example: in the case of *Defrenne v. SABENA*, the applicant complained that she was paid less than her male counterparts, despite undertaking identical employment duties.[167] The ECJ held that this was clearly a case of sex discrimination. In reaching this decision, the ECJ highlighted both the economic and social dimension of the Union, and that non-discrimination assists in progressing the EU towards these objectives.

In the *Bilka* case, discussed above, the ECJ was faced with differential treatment based on management considerations of an employer, which justified excluding part-time workers from an occupational pension scheme by reference to incentivising full-time work to ensure adequate staffing. In this case, the ECJ did not expressly state whether it considered such a measure to be proportionate to the differential enjoyment suffered. However, it was more explicit in the following case.

> Example: in the *Hill and Stapleton* case, the government introduced a job-sharing scheme in the civil service, whereby a post could be shared by two

167 ECJ, *Defrenne v. SABENA*, Case 43/75 [1976] ECR 455, 8 April 1976.

individuals on a temporary basis, working 50% of the hours of the full-time post and receiving 50% of the regular salary.[168] Workers were entitled to then return to their post full time where these posts were available. The rules allowed individuals in full-time employment to advance one increment on the pay scale per year. However, for individuals who were job-sharing the increment was halved, with two years of job-sharing equivalent to one increment. The two complainants in the present case returned to their posts as full-time workers and complained about the means by which the increment was applied to them. The ECJ found this to constitute indirect discrimination on the grounds of sex since it was predominantly women who took part in job-sharing. The government argued that the differential treatment was justified since it was based on the principle of applying the increment in relation to the actual length of service. The ECJ found that this merely amounted to an assertion that was not supported by objective criteria (in that there was no evidence that other individuals' length of service was calculated in terms of actual hours worked). The ECJ then stated 'an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs'.

Thus, it would seem that the ECJ will not readily accept justifications of discriminatory treatment based on the ground of sex that are based simply on the financial or management considerations of employers.

Example: in the case of *Ünal Tekeli v. Turkey*, the applicant complained that national law obliged a woman to bear her husband's name upon marriage.[169] Although the law permitted a woman to retain her maiden name in addition to her husband's name, the ECtHR found that this constituted discrimination on the basis of sex, because national law did not oblige a husband to alter his surname.

Example: in the case of *Zarb Adami v. Malta*, the applicant complained that being called to jury service amounted to discrimination since the practice according to which jury lists were compiled made men inherently more likely to be called.[170]

168 ECJ, *Hill and Stapleton v. The Revenue Commissioners and Department of Finance*, Case C-243/95 [1998] ECR I-3739, 17 June 1998.

169 ECtHR, *Ünal Tekeli v. Turkey* (No. 29865/96), 16 November 2004.

170 ECtHR, *Zarb Adami v. Malta* (No. 17209/02), 20 June 2006.

Statistics showed that over 95% of jurors over a five-year period were men, and the ECtHR found that since men and women were in a comparable situation as regards their civic duties, this amounted to discrimination.

Gender identity refers to 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'.[171]

The concept of 'sex' has also been interpreted to include situations where discriminatory treatment is related to the 'sex' of the applicant in a more abstract sense, allowing for some limited protection of gender identity.

Thus, the more broadly accepted definition of gender identity encompasses not only those who undertake gender reassignment surgery ('transsexuals'), but also choose other means to express their gender, such as transvestism or cross-dressing, or simply adopting a manner of speech or cosmetics normally associated with members of the opposite sex.

Following the *P. v. S. and Cornwall County Council* case, the ground of 'sex' under the non-discrimination directives will also encompass discrimination against an individual because he/she 'intends to undergo, or has undergone, gender reassignment'. It therefore appears that the ground of sex as construed under EU law currently protects gender identity only in a narrow sense.

Example: The case of *K.B. v. NHS Pensions Agency* concerned the refusal of KB's transsexual partner a widower's pension.[172] This refusal was because the transsexual couple could not satisfy the requirement of being married; transsexuals were not capable of marrying under English law at the time.

In considering the issue of discrimination, the ECJ held that there was no discrimination on the ground of sex because, in determining who was entitled to the survivor's pension, there was no less favourable treatment based on being male or female. The ECJ then changed the direction of the consideration,

171 This widely accepted definition is taken from the 'Yogyakarta Principles on the Application of International Human Rights law in Relation to Sexual Orientation and Gender Identity', March 2007, available at: www.yogyakartaprinciples.org/principles_en.htm. The Principles were adopted by an independent body of experts in International Human Rights Law.

172 ECJ, *K.B. v. NHS Pensions Agency*, Case C-117/01 [2004] ECR I-541, 7 January 2004.

and concentrated on the issue of marriage. It was highlighted that transsexuals were never able to marry, and thus never able to benefit from the survivor's pension, whereas heterosexuals could. Consideration was then given to the ECtHR case of *Christine Goodwin*.[173] Based on these considerations, the ECJ concluded that the British legislation in question was incompatible with the principle of equal treatment as it prevented transsexuals from benefiting from part of their partners pay.

Example: similar considerations arose in the *Richards* case.[174] Richards, who was born a man, underwent gender reassignment surgery. The case surrounded the State pension entitlement in the UK, as at the time women received their State pension at the age of 60 years, while men received their State pension at the age of 65 years. When Richards applied for a State pension at the age of 60 years, she was refused, with an explanation stating that legally she was recognised as a man and therefore she could not apply for a State pension until she reached the age of 65 years. The ECJ held that this was unequal treatment on the grounds of her gender reassignment, and as a consequence this was regarded as discrimination contrary to Article 4(1) of the Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security.[175]

The ECtHR has yet to deliver a decision on whether gender identity is covered as a protected ground under Article 14, and it has yet to indicate whether this would only encompass 'transsexuals' or whether it would interpret gender identity more widely. This is not to say that it has not dealt with the issue of gender identity at all. Thus, the ECtHR has determined that gender identity, like sexual orientation, forms part of the sphere of an individual's private life, and should therefore be free from government interference.

173 ECtHR, *Christine Goodwin v. UK* [GC] (No. 28957/95), 11 July 2002.

174 ECJ, *Richards v. Secretary of State for Work and Pensions*, Case C-423/04 [2006] ECR I-3585, 27 April 2006.

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

Example: the cases of *Christine Goodwin v. UK* and *I. v. UK* concerned very similar facts.[176] The applicants, who had both undergone male-to-female gender reassignment surgery, complained that the government refused to allow amendment of their birth certificates in order to reflect their sex. Although other documents and the applicants' names could be amended, birth certificates were still used for certain purposes where gender became legally relevant, such as the area of employment or retirement, meaning that the applicants would face embarrassment and humiliation where obliged to reveal their legally recognised male gender. The ECtHR (reversing past case-law) decided that this amounted to a violation of the right to respect for private life and the right to marry under Article 12, but it did not go on to consider whether there had been a violation of Article 14.

Example: in the *Van Kück* case, the applicant, who had undergone gender reassignment surgery and hormone treatment, was refused reimbursement of her costs for this from her private medical insurance company.[177] The German Court of Appeal, which heard the applicant's claim against the insurance company, determined that the medical procedures were not 'necessary' as required under the agreement, and therefore that the applicant was not entitled to reimbursement. The ECtHR found that, considering the nature of gender identity and the gravity of a decision to undergo irreversible medical procedures, the national court's approach had not only failed to ensure the applicant received a fair trial, violating Article 6 of the ECHR, but also violated her right to respect for private life guaranteed by Article 8 of the ECHR. However, the ECtHR did not go on to examine compliance with Article 14 since essentially the same facts were at issue.

Generally speaking it appears that the law surrounding the ground of 'gender identity' requires considerable clarification both at the European and national level. Recent studies of national legislation regulating this area show no consistent approach across Europe, with States largely divided between those that address 'gender identity' as part of 'sexual orientation', and those that address it as part of 'sex discrimination'.[178]

176 ECtHR, *Christine Goodwin v. UK* [GC] (No. 28957/95), 11 July 2002; ECtHR, *I. v. UK* [GC] (No. 25680/94), 11 July 2002. Similarly, ECtHR, *L. v. Lithuania* (No. 27527/03), 11 September 2007.

177 ECtHR, *Van Kück v. Germany* (No. 35968/97), 12 June 2003.

178 FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis* (Vienna, FRA, 2009), pp. 129-144; Commissioner for Human Rights, *Human Rights and Gender Identity* (Issue Paper by Thomas Hammarberg, CoE Commissioner for Human Rights, Strasbourg, 29 July 2009), CommDH/IssuePaper(2009)2.

A series of cases relating to differences in treatment on the basis of sex in relation to retirement age show that the ECtHR will afford the State a wide margin of appreciation in matters of fiscal and social policy[179].

Example: in the case of *Stec and Others v. UK* the applicants complained that as a result of different retirement ages for men and women they had each been disadvantaged by the alteration of benefits payable to them, which had been determined according to pensionable age.[180] The ECtHR found that in principle sex discrimination could only be justified where 'very weighty reasons' existed. However, 'a wide margin is usually allowed to the State under the [ECHR] when it comes to general measures of economic or social strategy ... Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is ... manifestly without reasonable foundation'. The ECtHR found that at their origin the different pensionable ages were actually a form of 'special measures' in that they were designed to offset the financial difficulties that women might suffer by reason of their traditional role in the home, which left them without independent monetary income. It was found that the government had begun gradually to make adjustments to equalise the pensionable ages of men and women and that they had not acted beyond their margin of appreciation either in choosing to do this over a number of years, or failing to implement changes sooner.[181]

A similar approach has been adopted by the ECJ in relation to cases of differential treatment justified on the basis of broader employment-policy considerations.

Example: in the *Schnorbus* case, the practice of the Hessian Ministry of Justice to give preference to male candidates who had completed compulsory military or civilian service for practical legal training was held to be indirectly discriminatory

179 These cases also provide a useful discussion in relation to justification of the differential treatment and thus offer further elucidation of this concept to enhance the discussion on justification earlier in the Handbook.

180 ECtHR, *Stec and Others v. UK* [GC] (Nos. 65731/01 and 65900/01), 12 April 2006.

181 Similarly see: ECtHR, *Barrow v. UK* (No. 42735/02), 22 August 2006, paras. 20-24, 37; ECtHR, *Pearson v. UK* (No. 8374/03), 22 August 2006, paras. 12-13, 25; ECtHR, *Walker v. UK* (No. 37212/02), 22 August 2006, paras. 19-20, 37.

on the ground of sex.[182] However, the ECJ found that the practice was objectively justified as it was merely intended to counteract the delaying effects that undertaking the compulsory service had on male applicants' careers.

Example: the *Megner and Scheffel* case concerned German legislation that excluded minor (less than fifteen hours per week) and short-term employment from the compulsory sickness and old-age insurance schemes as well as from the obligation to contribute to the unemployment insurance scheme.[183] The rule was found to be potentially indirectly discriminatory towards women who were inherently more likely to work on a part-time or short-term basis. The ECJ accepted the government's contention that if it were to include minor and short-term employees into the scheme the costs involved would lead to an entire overhaul of the system, since it would no longer be able to be funded on a contributory basis. It also accepted that there was a demand for employees on a short-term and minor basis, which the government could only facilitate by exempting them from the social security scheme. If this approach was not taken it was likely that such jobs would be undertaken in any case but on an illegal basis. The ECJ accepted that the government was pursuing a legitimate social-policy aim, and that the State should be left a 'broad margin of discretion' in choosing what measures were appropriate to implement 'social and employment policy'. Accordingly, the differential treatment was justified.

This can be contrasted with the following case where the ECJ did not find that sex discrimination was justifiable in the context of social policy, despite the significant fiscal implications invoked by the government.

Example: the *De Weerd, née Roks, and Others* case concerned national legislation relating to incapacity benefit.[184] In 1975 national legislation had introduced incapacity benefit for men and unmarried women, irrespective of their income before becoming incapacitated. In 1979 this was amended and the benefit also made available to married women. However, a requirement that

182 ECJ, *Schnorbus v. Land Hessen*, Case C-79/99 [2000] ECR I-10997, 7 December 2000.

183 ECJ, *Megner and Scheffel v. Innungskrankenkasse Vorderpfalz*, Case C-444/93 [1995] ECR I-4741, 14 December 1995. Similarly, ECJ, *Nolte v. Landesversicherungsanstalt Hannover*, Case C-317/93 [1995] ECR I-4625, 14 December 1995.

184 ECJ, *De Weerd, née Roks, and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others*, Case C-343/92 [1994] ECR I-571, 24 February 1994.

the recipient have received a particular level of income during the preceding year was also introduced. The legislation was challenged on the ground (among others) that the income requirement discriminated indirectly against women (who were less likely to earn the required income than men). The State argued that the differential enjoyment was justified out of budgetary considerations, in order to contain national expenditure. The ECJ found that while EU law does not prevent the State from regulating which categories of person benefit from social security benefits it could not do so in a discriminatory manner.

These two cases can be reconciled on their facts, and *De Weerd, née Roks, and Others* should probably be regarded as the 'rule' with *Megner and Scheffel* as the exception. EU law does not oblige Member States to adopt particular social security regimes, but where they do so a court will not allow the exclusion of certain groups simply out of fiscal considerations, since this could severely weaken the principle of equal treatment and be open to abuse. However, differential treatment may be tolerable if it is the only means of preventing the collapse of the entire system of sickness and unemployment insurance schemes – particularly where such a measure would only have forced people into unregulated labour.

4.3. Sexual orientation

Typically cases relating to sexual orientation discrimination involve an individual receiving unfavourable treatment because they are homosexual or bisexual, but the ground also prohibits discrimination on the basis of being heterosexual.

Sexual orientation can be understood to refer to 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender'.[185]

Example: in a case before the Swedish Ombudsman against Discrimination on Grounds of Sexual Orientation ('HomO'), a heterosexual woman complained of sexual orientation discrimination when she was turned down for a job with the Swedish national federation for lesbian, gay and transgender rights as a safer sex information officer.[186] The organisation told her that they wished to

185 This widely accepted definition is taken from the 'Yogyakarta Principles on the Application of International Human Rights law in Relation to Sexual Orientation and Gender Identity', March 2007, available at: www.yogyakartaprinciples.org/principles_en.htm.

186 HomO, Decision of 21 June 2006, Dossier No. 262/06.

employ a self-identified homosexual or bisexual man in order to allow for an approach of outreach through peers. It was found either that she could not claim to be in a comparable situation to a homosexual or bisexual man for the purposes of this job (and therefore could not prove less favourable treatment), or that in any event the discrimination was justifiable on the basis of a genuine occupational requirement.

Although Article 14 of the ECHR does not explicitly list 'sexual orientation' as a protected ground, the ECtHR has expressly stated that it is included among the 'other' grounds protected by Article 14 in a series of cases.[187]

Example: in the case of *S.L. v. Austria*, the applicant complained that national law, as it stood, criminalised consensual sexual relations between men where one of the parties was under eighteen.[188] In contrast women were permitted to engage in sexual acts (both of a lesbian or heterosexual nature) from the age of fourteen. The ECtHR found this to constitute discrimination on the basis of sexual orientation.

Example: in the case of *E.B. v. France*, the applicant was refused an application to adopt a child on the basis that there was no male role model in her household.[189] National law did permit single parents to adopt children, and the ECtHR found that the authorities' decision was primarily based on the fact that she was in a relationship and living with another women. Accordingly the ECtHR found that discrimination had occurred on the basis of sexual orientation.

It should be noted that the ECtHR also protects against government interference relating to sexual orientation *per se* under Article 8 of the ECHR on the right to private life. Thus, even if discriminatory treatment based on this ground has occurred, it may be possible simply to claim a violation of Article 8 without needing to argue the existence of discriminatory treatment.

187 See, for example, ECtHR, *Fretté v. France* (No. 36515/97), 26 February 2002, para. 32.

188 ECtHR, *S.L. v. Austria* (No. 45330/99), 9 January 2003.

189 ECtHR, *E.B. v. France* [GC] (No. 43546/02), 22 January 2008.

Example: the case of *Dudgeon v. UK* concerned national legislation, which criminalised consensual homosexual sexual relations between adults.[190] The applicant complained that as a homosexual he therefore ran the risk of prosecution. The ECtHR found that of itself this constituted a violation of his right to respect for his private life, since the latter included one's 'sexual life'. It also found that, while the protection of public morality constituted a legitimate aim, it could be pursued without such a level of interference in private life.

The ECtHR has been particularly keen to ensure protection of individuals where interferences by the State relate to matters that are considered to touch core elements of personal dignity, such as one's sexual life or family life. The following case illustrates that interferences with private life where this relates to sexuality are difficult to justify.

Example: the case of *Karner v. Austria* concerned the interpretation of national legislation (section 14 of the Rent Act), which created a right for a relative or 'life companion' to automatically succeed to a tenancy agreement where the main tenant died.[191] The applicant had been cohabiting with his partner, the main tenant, who died. The national courts interpreted the legislation so as to exclude homosexual couples, even though it could include heterosexual couples that were not married. The government accepted that differential treatment had occurred on the basis of sexual orientation, but argued that this was justified in order to protect those in traditional families from losing their accommodation. The ECtHR found that although protecting the traditional family could constitute a legitimate aim the 'the margin of appreciation ... is narrow ... where there is a difference in treatment based on sex or sexual orientation'. The ECtHR went on to state that 'the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act'. The ECtHR thus made a finding of discrimination, since the State could have employed measures to protect the traditional family without placing homosexual couples at such a disadvantage.

190 ECtHR, *Dudgeon v. UK* (No. 7525/76), 22 October 1981.

191 ECtHR, *Karner v. Austria* (No. 40016/98), 24 July 2003, paras. 34-43.

4.4. Disability

Neither the ECHR, nor the Employment Equality Directive provides a definition of disability. Because of the nature of the ECJ's role, determinations of what constitutes a disability are frequently made by the national courts and presented as part of the factual background to disputes referred to the ECJ. However, the ECJ has had some opportunity to give limited guidance as to what constitutes a disability in its case-law.

Example: in the *Chacón Navas*[192] case, the ECJ were afforded the opportunity to consider the general scope of the disability discrimination provisions, and indicated that the term "disability" should have a harmonised EU definition. The ECJ indicated that a disability, for the purposes of the Employment Equality Directive, should be taken to refer to 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life' and it must be 'probable that it will last a long time'. In applying this definition to the *Chacón Navas* case, the applicant was found not to be disabled when she brought an action before the Spanish courts claiming disability discrimination after she had been dismissed for being off sick from work for a period of eight months. The ECJ made it clear that there is a distinction that must be drawn between illness and a disability, with the former not being afforded protection.

Article 1 of the UN CRPD: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

As discussed in Chapter 1, the EU is a party to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), 2006, with the result that the ECJ will most probably be guided by both the Convention itself and the interpretations given by the Committee on the Rights of Persons with Disabilities, charged with its monitoring and interpretation.[193]

Once party to the UN CRPD, the EU and its institutions (and the EU Member States when interpreting and applying EU law) will be obliged to follow this wide and inclusive approach to interpreting the meaning of 'disability'.

192 ECJ, *Chacón Navas v. Eurest Colectividades SA*, Case C-13/05 [2006] ECR I-6467, 11 July 2006.

193 UN Doc. A/RES/61/611, 13 December 2006.

Although not expressly featuring in the list of protected grounds of the ECHR, disability has been included by the ECtHR in its interpretation of 'other' grounds under Article 14.

Example: in the case of *Glor v. Switzerland*, the ECtHR found that the applicant, who was a diabetic, could be considered as a person with a disability – irrespective of the fact that national law classified this as a 'minor' disability.[194] The applicant was obliged to pay a tax to compensate for failing to complete his military service, which was payable by all those who were eligible for military service. To be exempted from this tax one either had to have a disability reaching a level of '40%' (considered equivalent to the loss of use of one limb), or be a conscientious objector. Conscientious objectors were obliged to perform a 'civil service'. The applicant's disability was such that he was found unfit to serve in the army, but the disability did not reach the severity threshold required in national law to exempt him from the tax. He had offered to perform the 'civil service' but this was refused. The ECtHR found that the State had treated the applicant comparably with those who had failed to complete their military service without valid justification. This constituted discriminatory treatment since the applicant found himself in a different position (as being rejected for military service but willing and able to perform civil service), and as such the State should have created an exception to the current rules.

As with other protected grounds under the ECHR, it is not uncommon for cases to be dealt with under other substantive rights, rather than a cumulative approach of a substantive right and Article 14, prohibiting discrimination.

Example: in the case of *Price v. UK* the applicant was sentenced to prison for a period of seven days. She suffered from physical disabilities due to ingestion of thalidomide by her mother during pregnancy, with the result that she had absent or significantly shortened limbs as well as malfunctioning kidneys.[195] Consequently she relied on a wheelchair for mobility, required assistance to go to the toilet and with cleaning, and needed special sleeping arrangements. During her first night in detention she was placed in a cell that was not adapted for persons with physical disabilities and consequently was unable to sleep adequately, experienced substantial pain and suffered hypothermia.

194 ECtHR, *Glor v. Switzerland* (No. 13444/04), 30 April 2009.

195 ECtHR, *Price v. UK* (No. 33394/96), 10 July 2001.

On transferral to prison she was placed in the hospital wing where some adaptation could be made, but she still experienced similar problems. She was also not permitted to charge her electric wheelchair, which lost power. The ECtHR found that the applicant had been subjected to degrading treatment, in violation of Article 3. Discrimination based on one of the substantive rights of the ECHR under Article 14 was not raised in this case.

Example: in the case of *Pretty v. UK* the applicant, who suffered from a degenerative disease, wished to obtain an assurance from the government that she could undergo assisted suicide without prosecution at some future date when her condition had progressed such that she was unable to carry out the act herself.[196] Under national law, assisting suicide constituted a criminal offence of itself, as well as amounting to murder or manslaughter. Among other things, the applicant argued that her right to make decisions about her own body protected in the context of the right to private life (under Article 8) had been violated in a discriminatory manner since the State had applied a uniform prohibition on assisted suicide, which had a disproportionately negative effect on those who have become incapacitated and are therefore unable to end their lives themselves. The ECtHR found that the refusal to distinguish between those 'who are and those who are not physically capable of committing suicide' was justified because introducing exceptions to the law would in practice allow for abuse and undermine the protection of the right to life.

4.5. Age

The protected ground of age relates simply to differential treatment or enjoyment that is based on the victim's age. Although age discrimination *per se* does not fall within the ambit of a particular right in the ECHR (unlike religion, or sexual orientation), issues of age discrimination may arise in the context of various rights. As such the ECtHR has, as in other areas, adjudicated on cases whose facts suggested age discrimination, without actually analysing the case in those terms – in particular in relation to the treatment of children in the criminal-justice system. The ECtHR has found that 'age' is included among 'other status'.[197]

196 ECtHR, *Pretty v. UK* (No. 2346/02), 29 April 2002.

197 ECtHR, *Schwizgebel v. Switzerland* (No. 25762/07), 10 June 2010.

Example: in the case of *Schwizgebel v. Switzerland* a 47 year old single mother complained about a refused application to adopt a child.[198] The national authorities based their decision on the age difference between the applicant and the child, and the fact that the adoption would impose a significant financial burden, given that the applicant already had one child. The ECtHR found that she was treated differently from younger women applying for adoption on the basis of her age. However, a lack of uniformity among States over acceptable age limits for adoption allowed the State a large margin of appreciation. In addition the national authorities' consideration of the age difference had not been applied arbitrarily, but was based on consideration of the best interests of the child and the financial burden that a second child might pose for the applicant, which in turn could affect the child's well-being. Accordingly the ECtHR found that the difference in treatment was justifiable.

Example: in the cases of *T. v. UK* and *V. v. UK* two boys had been tried and found guilty of a murder committed when they were 10 years old.[199] The applicants complained, among other things, that they had not been given a fair trial because their age and lack of maturity prevented them from participating effectively in their defence. The ECtHR found that when trying a minor the State should take 'full account of his age, level of maturity and intellectual and emotional capacities' and take steps 'to promote his ability to understand and participate in the proceedings'. The ECtHR found that the State had failed to do this and had accordingly violated Article 6 of the ECHR, without examining the case from the perspective of Article 14.

Example: in the cases of *D.G. v. Ireland* and *Bouamar v. Belgium* the applicants had been placed in detention by national authorities.[200] The ECtHR found that in the circumstances this violated the right not to be detained arbitrarily. In both cases the applicants also claimed that the treatment was discriminatory by comparison to the treatment of adults, since national law did not permit adults to be deprived of their liberty in such circumstances. The ECtHR found that, while there was a difference in treatment as between adults and children, this was justified since the aim behind the deprivation of liberty was to protect minors, which was not a consideration to adults.

198 Ibid.

199 ECtHR, *T. v. UK* [GC] (No. 24724/94), 16 December 1999; *V. v. UK* [GC] (No. 24888/94), 16 December 1999.

200 ECtHR, *D.G. v. Ireland* (No. 39474/98), 16 May 2002; ECtHR, *Bouamar v. Belgium* (No. 9106/80), 29 February 1988.

4.6. Race, ethnicity, colour and membership of a national minority

The breadth of the ground of 'racial and ethnic origin' appears to differ slightly as between the EU and the ECHR, in that the Racial Equality Directive expressly excludes 'nationality' from the concept of race or ethnicity. While the ECHR lists 'nationality' or 'national origin' as a separate ground, the case-law discussed below shows that nationality can be understood as a constitutive element of ethnicity. This is not because discrimination on the grounds of nationality is permitted in EU law, but because the way that EU law has evolved means that discrimination on the grounds of nationality is regulated in the context of the law relating to free movement of persons. Apart from expressly excluding nationality, the Racial Equality Directive does not itself contain a definition of 'racial or ethnic origin'. There are a number of other instruments which offer guidance as to how racial and ethnic origin should be understood. Neither 'colour', nor membership of a national minority are listed expressly in the Racial Equality Directive, but are listed as separate grounds under the ECHR. These terms appear to be indissociable from the definition of race and/or ethnicity, and so will be considered here.

The EU Council's Framework Decision on combating racism and xenophobia under the criminal law defines racism and xenophobia to include violence or hatred directed against groups by reference to 'race, colour, religion, descent or national or ethnic origin'. The CoE Commission Against Racism and Intolerance has also adopted a broad approach to defining 'racial discrimination', which includes within itself the grounds of 'race, colour, language, religion, nationality or national or ethnic origin'.[201] Similarly, Article 1 of the UN Convention on the Elimination of Racial Discrimination, 1966 (to which all the Member States of the European Union and Council of Europe are party) defines racial discrimination to include the grounds of 'race, colour, descent, or national or ethnic origin'.[202] The Committee on the Elimination of Racial Discrimination, responsible for interpreting and monitoring compliance with the treaty has further stated that unless justification exists to the contrary, determination as to whether an individual is a member of a particular racial or ethnic group, 'shall ... be based upon self-identification by the individual concerned.'[203]

201 ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, adopted 13 December 2002, paras. 1(b) and (c).

202 660 UNTS 195.

203 CERD, 'General Recommendation VIII concerning the interpretation and application of Article 1, paragraphs 1 and 4 of the Convention'.

This prevents the State from excluding from protection any ethnic groups which it does not recognise.

Although EU law does not expressly list language, colour or descent as protected grounds, this does not mean that these characteristics could not be protected as part of race or ethnicity, in so far as language, colour and descent are inherently attached to race and ethnicity. It would also seem that to the extent that factors making up nationality are also relevant to race and ethnicity, this ground may, in appropriate circumstances, also fall under these grounds.

Religion is expressly protected as a separate ground under the Employment Equality Directive. However, an alleged victim of religious discrimination may have an interest in associating religion with the ground of race because, as EU law currently stands, protection from race discrimination is broader in scope than protection from religious discrimination. This is so because the Racial Equality Directive relates to the area of employment, but also access to goods and services, while the Employment Equality Directive only relates to the area of employment.

In explaining the concepts of race and ethnicity, the ECtHR has held that language, religion, nationality and culture may be indissociable from race. In the *Timishev* case, an applicant of Chechen origin was not permitted to pass through a checkpoint, as the guards were under instructions to deny entry to those of Chechen origin. The ECtHR gave the following explanation:

> *'Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.'*[204]

Example: the case of *Sejdić and Finci v. Bosnia and Herzegovina* was the first to be decided under Protocol 12. The applicants complained that they were unable to stand in elections.[205] As part of a peace settlement to bring an end to the conflict in the 1990s, a power-sharing agreement between the three main

204 ECtHR, *Timishev v. Russia* (Nos. 55762/00 and 55974/00), 13 December 2005, para. 55.

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

ethnic groups was reached. This included an arrangement that any candidate standing for election had to declare their affiliation to the Bosniac, Serb or Croat community. The applicants, who were of Jewish and Roma origin, refused to do so and alleged discrimination on the basis of race and ethnicity. The ECtHR repeated its explanation of the relationship between race and ethnicity, above, adding that '[d]iscrimination on account of a person's ethnic origin is a form of racial discrimination'. The ECtHR finding of racial discrimination illustrates the interplay between ethnicity and religion. Furthermore the ECtHR found that despite the delicate terms of the peace agreement this could not justify such discrimination.

Example: in a case before the Austrian Equal Treatment Commission, an individual, who was a Sikh, complained that he had been refused entry to a Viennese court because he would not remove the ceremonial sword carried by members of this religion.[206] The Commission dealt with this as a case of discrimination on the basis of ethnicity. On the facts, it found that the differential treatment was justified on grounds of safety.

The ECtHR has been extremely strict in relation to discrimination based on race or ethnicity stating: 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.'[207]

A useful case study highlighting the considerations that will be taken into account when dealing with a claim of discrimination on the grounds of race under the ECHR can be found on the Council of Europe's Human Rights Education for Legal Professionals website.[208]

206 Equal Treatment Commission, Senate III. English summary available at FRA InfoPortal, Case 5-1. Original text: http://infoportal.fra.europa.eu/InfoPortal/caselawDownloadFile.do?id=5.

207 ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC] (Nos. 27996/06 and 34836/06), 22 December 2009, para. 44. Similarly, ECtHR, *Timishev v. Russia* (Nos. 55762/00 and 55974/00), 13 December 2005, para. 58.

208 Case Study 15, Arrest, pre-trial detention, ill-treatment of Roma man accessible at www.coehelp.org/course/view.php?id=18&topic=1.

4.7. Nationality or national origin

Article 2(a) of the Council of Europe's Convention on Nationality, 1996, defines it as 'the legal bond between a person and a State'. While this treaty has not received widespread ratification, this definition is based on accepted rules of public international law,[209] and has also been endorsed by the European Commission against Racism and Intolerance.[210] 'National origin' may be taken to denote a person's former nationality, which they may have lost or added to through naturalization, or to refer to the attachment to a 'nation' within a State (such as Scotland in the UK).

> Example: the *Chen* case concerned a question as to whether a child had a right to reside in one Member State when they were born in a different Member State, whilst their mother, on whom they depended, was from a non-Member State.[211] The ECJ considered that when a Member State imposes requirements to be met in order to be granted citizenship, and where those were met, it is not open for a different Member State to then challenge that entitlement when they apply for residence.

While the ECHR provides greater protection than EU law on the ground of nationality, it readily accepts that the absence of a legal bond of nationality often runs together with the absence of factual connections to a particular State, which in turn prevents the alleged victim from claiming to be in a comparable position to nationals. The essence of the ECtHR's approach is that the closer the factual bond of an individual to a particular State, particularly in terms of paying taxation, the less likely it is that it will find that differential treatment on the basis of nationality is justified.

> Example: in the case of *Zeïbek v. Greece*, the applicant was refused a pension entitlement intended for those with 'large families'.[212] While she had the requisite number of children, one of her children did not hold Greek nationality at the time the applicant reached pensionable age. This situation had resulted

209 ICJ, *Nottebohm (Liechtenstein v. Guatemala)* [1955] ICJ Reports, 4, 23, 6 April 1955: 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.'

210 ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, adopted 13 December 2002, p. 6.

211 ECJ, *Chen v. Secretary of State for the Home Department*, Case C-200/02 [2004] ECR I-9925, 19 October 2004.

212 ECtHR, *Zeïbek v. Greece* (No. 46368/06), 9 July 2009.

from the government's earlier decision to remove nationality from the applicant's entire family (which itself was tainted with irregularities) and then reissuing nationality only to three of her children (since the fourth was already married). The ECtHR found that a policy of revocation of nationality had been applied in particular to Greek Muslims, and that the refusal of the pension could not be justified on the basis of preserving the Greek nation as this reasoning itself amounted to discrimination on the grounds of national origin.

Example: the case of *Anakomba Yula v. Belgium*, a Congolese national, was unlawfully resident in Belgium.[213] Shortly after giving birth, her residence permit expired and she began the process of applying for a renewal. She was separating from her Congolese husband and both her and the natural father of her child, a Belgian national, wished to establish the child's paternity. To do so the applicant had to bring a claim against her spouse within a year of the birth. The applicant requested legal aid in order to cover the cost of the procedure, as she had insufficient funds. However, this was refused because such funding was only available to nationals of non-Council of Europe States where the claim related to establishing a right of residence. The applicant was advised to complete the renewal of her residence permit and then apply again. The ECtHR found that in these circumstances the applicant had been deprived of her right to a fair trial, and that this was based on her nationality. The State was not justified in differentiating between those who did or did not possess a residence permit in a situation where serious issues of family life were at stake, where there was a short time-limit to establish paternity, and where the individual was in the process of renewing her permit.

As discussed in Chapter 3.2., EU law prohibits nationality discrimination only in the particular context of free movement of persons. In particular, EU law on free movement grants limited rights to third-country nationals. Nevertheless, the ECHR does impose duties on all Member States of the Council of Europe (which includes all the Member States of the EU) to guarantee the rights in the ECHR to all individuals within their jurisdiction (including non-nationals). The ECtHR has maintained a balance between the State's right to control what benefits it may offer those enjoying the legal bond of nationality, against the need to prevent States discriminating against those who have formed substantial factual bonds with the

213 ECtHR, *Anakomba Yula v. Belgium* (No. 45413/07), 10 March 2009.

State. The ECtHR has applied great scrutiny in matters relating to social security, if individuals can show a strong factual tie to a State.

The entitlement of States to regulate entry and exit of their borders by non-nationals is well established under public international law and accepted by the ECtHR. In this connection, the ECtHR has primarily intervened in complaints relating to deportation of individuals where they face inhuman or degrading treatment or punishment or torture in the destination State (under Article 3),[214] or have formed strong family ties in the host State which will be broken if the individual is forced to leave (under Article 8).[215]

Example: in the cases of *C. v. Belgium* and *Moustaquim v. Belgium* the applicants, who were Moroccan nationals, had been convicted of criminal offences and were to be deported.[216] They complained that this amounted to discrimination on the basis of nationality since neither Belgian nationals, nor non-nationals from other EU Member States, could be deported in similar circumstances. The ECtHR found that the applicants were not in a comparable situation to Belgian nationals, since nationals enjoy a right to remain in their home State, which is specifically enshrined in the ECHR (under Article 3 of Protocol 4). Furthermore, the difference in treatment between third-country nationals and nationals of other EU Member States was justifiable because the EU had created a special legal order as well as EU citizenship.

These cases should be compared to situations where the applicant has developed close factual links to the host State, through a long period of residence or contribution to the State through taxation.

Example: in the case of *Andrejeva v. Latvia* the applicant was formerly a citizen of the former Soviet Union with a right to permanent residence in Latvia.[217] National legislation classified the applicant as having worked outside Latvia for the period prior to independence (despite having been in the same post

214 See, for example, ECtHR, *Chahal v. UK* (No. 22414/93), 15 November 1996.

215 Although these cases stand lower chances of success. See, for example, ECtHR, *Abdulaziz, Cabales and Balkandali v. UK* (Nos. 9214/80, 9473/81 and 9474/81), 28 May 1985.

216 ECtHR, *C. v. Belgium* (No. 21794/93), 7 August 1996; ECtHR, *Moustaquim v. Belgium* (No. 12313/86), 18 February 1991.

217 ECtHR, *Andrejeva v. Latvia* [GC] (No. 55707/00), 18 February 2009.

within Latvian territory before and after independence) and consequently calculated her pension on the basis of the time spent in the same post after independence. Latvian nationals in the same post, in contrast, were entitled to a pension based on their entire period of service, including work prior to independence. The ECtHR found the applicant to be in a comparable situation to Latvian nationals since she was a 'permanent resident non-citizen' under national law and had contributed taxes on the same basis. It was stated that 'very weighty reasons' would be needed to justify differential treatment based solely on nationality, which it said did not exist in the present case. Although it accepted that the State usually enjoys a wide margin of appreciation in matters of fiscal and social policy, the applicant's situation was factually too close to that of Latvian nationals to justify discrimination on that basis.

Example: in the case of *Gaygusuz v. Austria*, a Turkish national who had been working in Austria was refused unemployment benefit because he did not hold Austrian citizenship.[218] The ECtHR found that he was in a comparable situation to Austrian nationals since he was a permanent resident and had contributed to the social security system through taxation. It found that the absence of a reciprocal social security agreement between Austria and Turkey could not justify the differential treatment, since the applicant's situation was factually too close to that of Austrian nationals.

Example: in the case of *Koua Poirrez v. France* a national of the Ivory Coast applied for a benefit payable to those with disabilities. It was refused on the basis that it was available only to French nationals or nationals from States with which France had a reciprocal social security agreement.[219] The ECtHR found that the applicant was in fact in a similar situation to French nationals since he satisfied all the other statutory criteria for receipt of the benefit, and had been in receipt of other social security benefits that were not dependent on nationality. It stated that 'particularly weighty reasons' would be needed to justify a difference in treatment between the applicant and other nationals. In contrast to the cases examined above, where the State was accorded a wide margin of appreciation in relation to fiscal and social security matters, it was not convinced by France's argument of the necessity to balance State income and expenditure, or of the factual difference that no reciprocal agreement existed between France and the Ivory Coast. Interestingly, the benefit in

218 ECtHR, *Gaygusuz v. Austria* (No. 17371/90), 16 September 1996.

219 ECtHR, *Koua Poirrez v. France* (No. 40892/98), 30 September 2003.

question was payable irrespective of whether the recipient had made contributions to the national social security regime (which was the principal reason for not tolerating nationality discrimination in the above cases).

4.8. Religion or belief[220]

While EU law contains some limited protection against discrimination on the basis of religion or belief, the ECHR's scope is significantly wider than this, since Article 9 contains a self-contained right to freedom of conscience, religion and belief.

Example: in the case of *Alujer Fernández and Caballero García v. Spain* the applicants complained that, unlike Catholics, they were unable to allocate a proportion of their income tax directly to their Church.[221] The ECtHR found the case inadmissible on the facts since the applicant's Church was not in a comparable position to the Catholic Church in that they had not made any such request to the government, and because the government had a reciprocal arrangement in place with the Holy See.

Example: the case of *Cha'are Shalom Ve Tsedek v. France* involved a Jewish organisation which certified as kosher meat that was sold among its members' restaurants and butcher shops.[222] Since it considered that the meat slaughtered by an existing Jewish organisation no longer conformed to the strict precepts associated with kosher meat, the applicant sought authorisation from the State to conduct its own ritual slaughters. This was refused on the basis that it was not sufficiently representative within the French Jewish community, and that authorised ritual slaughterers already existed. The ECtHR found that in the circumstances there was no actual disadvantage suffered by the organisation since it was still able to obtain meat slaughtered in the required method from other sources.

220 An explanation as to the scope of Article 9 of the ECHR can be found on the CoE Human Rights Education for Legal Professionals website: Murdoch, *Freedom of Thought, Conscience and Religion,* Human Rights Handbooks, No. 2, 2007, available at: www.coehelp.org/mod/resource/view.php?inpopup=true&id=2122.

221 ECtHR, *Alujer Fernández and Caballero García v. Spain* (dec.) (No. 53072/99), 14 June 2001.

222 ECtHR, *Cha'are Shalom Ve Tsedek v. France* [GC] (No. 27417/95), 27 June 2000.

What actually constitutes a 'religion' or 'belief' qualifying for protection under the Employment Equality Directive or the ECHR has not received extensive consideration by the ECJ or ECtHR, but has been analysed thoroughly before national courts.[223]

Example: in *Islington London Borough Council v. Ladele (Liberty intervening)*, the UK Court of Appeal was asked to consider whether the claimant, who was a registrar of births, marriages and deaths, was discriminated against on the grounds of religion or belief when she was disciplined for refusing to conduct civil partnerships.[224] Her refusal was based on her Christian beliefs. The Court of Appeal held that this was not a case of direct religious discrimination, as the less favourable treatment was not based on her religious beliefs, but by her refusal to comply with a term of her employment. The indirect discrimination claim was also rejected, with the Court of Appeal indicating that it was part of the council's overarching commitment to the promotion of equality and diversity, both within the community and internally, and that such a policy did not intrude on the claimant's right to have such beliefs. The Court of Appeal also considered that to find otherwise would lead to discrimination on a different ground, that of sexual orientation; the court accepted that the individual right of non-discrimination must be balanced against the community's right to non-discrimination.

In a series of cases relating to the substantive right to freedom of religion and belief under the ECHR, the ECtHR has made clear that the State cannot attempt to prescribe what constitutes a religion or belief, and that these notions protect 'atheists, agnostics, sceptics and the unconcerned', thus protecting those who choose 'to hold or not to hold religious beliefs and to practice or not to practice a religion'. These cases also note that religion or belief is essentially personal and subjective, and need not necessarily relate to a faith arranged around institutions.[225]

223 The right to freedom of religion and belief is also protected as a free-standing right in Article 18 of the International Covenant on Civil and Political Rights, 1966 (which all the Member States of the European Union and the Council of Europe have joined). See UN Human Rights Committee, General Comment No. 22: Article 18 (Freedom of thought, conscience or religion).

224 *Islington London Borough Council v. Ladele (Liberty intervening)* [2009] EWCA Civ 1357, UK Court of Appeal, 12 February 2010.

225 ECtHR, *Moscow Branch of the Salvation Army v. Russia* (No. 72881/01), 5 October 2006, paras. 57-58; ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova* (No. 45701/99), 13 December 2001, para. 114; ECtHR, *Hasan and Chaush v. Bulgaria* [GC] (No. 30985/96), 26 October 2000, paras. 60 and 62.

Newer religions, such as Scientology, have also been found to qualify for protection.[226]

The ECtHR has elaborated on the idea of 'belief' in the context of the right to education under Article 2 of Protocol 1 to the ECHR, which provides that the State must respect the right of parents to ensure that their child's education is 'in conformity with their own religious and philosophical convictions'. The ECtHR stated:

> *'In its ordinary meaning the word "convictions", taken on its own, is not synonymous with the words "opinions" and "ideas", such as are utilised in Article 10 ... of the Convention, which guarantees freedom of expression; it is more akin to the term "beliefs" (in the French text: "convictions") appearing in Article 9 ... which ... denotes views that attain a certain level of cogency, seriousness, cohesion and importance.'*[227]

The ECtHR has recently been faced with cases related to religious freedom in the context of States wishing to maintain secularism and minimise the potentially fragmentary effect of religion on their societies. Here it has placed particular weight on the State's stated aim of preventing disorder and protecting the rights and freedoms of others.

Example: the case of *Köse and Others v. Turkey* concerned a dress code prohibiting the wearing of headscarves by girls in school, where it was claimed that this constituted discrimination on the basis of religion since wearing the headscarf was a Muslim religious practice.[228] The ECtHR accepted that the rules relating to dress were not connected to issues of affiliation to a particular religion, but were rather designed to preserve neutrality and secularism in schools, which in turn would prevent disorder as well as protect the rights of others to non-interference in their own religious beliefs. The claim was therefore considered to be manifestly ill-founded and inadmissible. A similar approach was taken in a case which related to the dress code for teachers.[229]

226 ECtHR, *Church of Scientology Moscow v. Russia* (No. 18147/02), 5 April 2007.

227 ECtHR, *Campbell and Cosans v. UK* (Nos. 7511/76 and 7743/76), 25 February 1982, para 36.

228 ECtHR, *Köse and Others v. Turkey* (dec.) (No. 26625/02), 24 January 2006.

229 ECtHR, *Dahlab v. Switzerland* (dec.) (No. 42393/98), 15 February 2001.

4.9. Language

It should be noted that both the Council of Europe Framework Convention for the Protection of National Minorities, 1995,[230] (ratified by 39 Member States) and the European Charter for Regional or Minority Languages, 1992,[231] (ratified by 24 Members States) imposes specific duties on States relating to the use of minority languages. However, neither instrument defines the meaning of 'language'. Article 6(3) of the ECHR explicitly provides for certain guarantees in the context of the criminal process, such that everyone enjoys the right to have accusations against them communicated in a language which they understand, as well as the right to an interpreter where they cannot understand or speak the language used in court.

The ground of language does not feature, of itself, as a separate protected ground under the non-discrimination directives, although it does in the ECHR. Nevertheless, it may be protected under the Racial Equality Directive in so far as it can be linked to race or ethnicity, and may also be considered by the ECtHR under this ground. It has also been protected via the ground of nationality by the ECJ in the context of the law relating to free movement of persons.[232]

The principle case before the ECtHR involving language relates to the context of education.

> Example: in the *Belgium Linguistic case* a collection of parents complained that national law relating to the provision of education was discriminatory on the basis of language.[233] In view of the French-speaking and Dutch-speaking communities in Belgium, national law stipulated that State-provided or State-subsidised education would be offered in either French or Dutch depending on whether the region was considered French or Dutch. Parents of French-speaking children living in the Dutch-speaking region complained that this prevented, or made it considerably harder, for their children to be educated in French. The ECtHR found that while there was a difference in treatment this was justified. The decision was based around consideration that regions were predominantly

230 CETS No. 157.

231 CETS No. 148.

232 ECJ, *Groener v. Minister for Education and the Dublin Vocational Educational Committee* Case C-379/87 [1989] ECR 3967, 28 November 1989.

233 ECtHR, *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium* (Nos. 1474/62 and others), 23 July 1968.

unilingual. The difference in treatment was therefore justified since it would not be viable to make teaching available in both languages. Furthermore, families were not prohibited from making use of private education in French in Dutch-speaking regions.

For further elucidation as to how the protected ground of language operates in practice it is possible to draw on two cases decided by the UN Human Rights Committee (HRC), responsible for interpreting and monitoring compliance with the International Covenant on Civil and Political Rights (which all EU Member States have joined).

Example: in the case of *Diergaardt v. Namibia* the applicants belonged to a minority group of European descent which had formerly enjoyed political autonomy and now fell within the State of Namibia.[234] The language used by this community was Afrikaans. The applicants complained that during court proceedings they were obliged to use English rather than their mother tongue. They also complained of a State policy to refuse to respond in Afrikaans to any written or oral communications from the applicants even though they had the ability to do so. The HRC found that there had been no violation of the right to a fair trial, since the applicants could not show that they were negatively affected by the use of English during court proceedings. This would suggest that the right to an interpreter during a trial does not extend to situations where the language is simply not the mother tongue of the alleged victim. Rather it must be the case that the victim is not sufficiently able to understand or communicate in that language. The HRC also found that the State's official policy of refusing to communicate in a language other than the official language (English) constituted a violation of the right to equality before the law on the basis of language. While the State may choose its official language, it must allow officials to respond in other languages where they are able to do so.

4.10. Social origin, birth and property

It is possible to view these three grounds as interconnected as they relate to a status imputed to an individual by virtue of an inherited social, economic or biological

234 HRC, *Diergaardt and Others v. Namibia*, Communication No. 760/1997, 6 September 2000.

feature[235]. As such they may also be interrelated with race and ethnicity. Aside from the ground of 'birth', few, if any, cases have been brought before the ECtHR relating to these grounds.

Example: in the case of *Mazurek v. France*, an individual who had been born out of wedlock complained that national law prevented him (as an 'adulterine' child) from inheriting more than one quarter of his mother's estate.[236] The ECtHR found that this difference in treatment, based solely on the fact of being born out of wedlock, could only be justified by particularly 'weighty reasons'. While preserving the traditional family was a legitimate aim it could not be achieved by penalising the child who has no control over the circumstances of their birth.

Example: in the case of *Chassagnou and Others v. France*, the applicants complained that they were not permitted to use their land in accordance with their wishes.[237] Laws within particular regions obliged small landowners to transfer public hunting rights over their land, while large landowners were under no such obligation and could use their land as they wished. The applicants wished to prohibit hunting on their land and use it for the conservation of wildlife. The ECtHR found that this constituted discrimination on the basis of property.

The grounds of social origin, birth and property also feature under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, 1966. The Committee on Economic, Social and Cultural Rights, responsible for monitoring and interpreting the treaty has expanded on their meaning in its General Comment 20.

According to the Committee, 'social origin', 'birth' and 'property' status are interconnected. Social origin 'refers to a person's inherited social status'. It may relate to the position that they have acquired through birth into a particular social class or community (such as those based on ethnicity, religion, or ideology), or from one's social situation such as poverty and homelessness. Additionally, the ground of birth may refer to one's status as born out of wedlock, or being adopted. The ground

235 The grounds of social origin, birth and property also feature under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, 1966 (to which all the EU Member States are party). See Committee on Economic, Social and Cultural Rights, General Comment No. 20, 'Non-Discrimination in Economic, Social and Cultural Rights', UN Doc. E/C.12/GC/20, 10 June 2009, paras. 24-26, 35.

236 ECtHR, *Mazurek v. France* (No. 34406/97), 1 February 2000.

237 ECtHR, *Chassagnou and Others. v. France* (Nos. 25088/94, 28331/95 and 28443/95), 29 April 1999.

of property may relate to one's status in relation to land (such as being a tenant, owner, or illegal occupant), or in relation other property.[238]

4.11. Political or other opinion

The ECHR expressly lists 'political or other opinion' as a protected ground, although they do not feature among the grounds protected by the EU non-discrimination directives. Presumably, where a particular conviction is held by an individual but it does not satisfy the requirements of being a 'religion or belief' it may still qualify for protection under this ground. This ground has rarely been ruled upon by the ECtHR. As with other areas of the ECHR, 'political or other opinion' is protected in its own right through the right to freedom of expression under Article 10, and from the case-law in this area it is possible to gain an appreciation of what may be covered by this ground. In practice it would seem that where an alleged victim feels that there has been differential treatment on this basis, it is more likely that the ECtHR would simply examine the claim under Article 10.

At a general level, the ECtHR established in the case of *Handyside v. UK* that the right to freedom of expression will protect not only '"information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population'.[239] While there is extensive case-law in this area this chapter will confine itself to illustrating, through two cases, how political opinion is likely to receive stronger protection than other types of opinion.

Example: in the case of *Steel and Morris v. UK*, the applicants were campaigners who distributed leaflets containing untrue allegations about the company McDonalds.[240] The applicants were sued in an action for defamation before the national courts and ordered to pay damages. The ECtHR found that the action in defamation constituted an interference with freedom of expression, but that this served the legitimate purpose of protecting individuals' reputations. However, it was also found that free speech on matters of public interest deserve strong protection, and given that McDonalds

238 Committee on Economic, Social and Cultural Rights, General Comment 20, 'Non-Discrimination in Economic, Social and Cultural Rights', UN Doc. E/C.12/GC/20, 10 June 2009, paras. 24-26, 35.

239 ECtHR, *Handyside v. UK* (No. 5493/72), 7 December 1976.

240 ECtHR, *Steel and Morris v. UK* (No. 68416/01), 15 February 2005.

was a powerful corporate entity which had not proved that it had suffered harm as the result of the distribution of several thousand leaflets, and that the damages awarded were relatively high compared to the applicants' income, the interference with their freedom of expression was disproportionate.

Example: the case of *Castells v. Spain* concerned a member of parliament who was prosecuted for 'insulting' the government after criticising government inaction in addressing acts of terrorism in the Basque country.[241] The ECtHR underlined the importance of freedom of expression in a political context, particularly given its important role in the proper functioning of a democratic society. As such, the ECtHR found that any interference would call for 'the closest of scrutiny'.

4.12. 'Other status'

As can be seen from the above, the ECtHR has developed several grounds under the 'other status' category, many of which coincide with those developed under EU law, such as sexual orientation, age, and disability.

In addition to disability, age, and sexual orientation, the ECtHR has also recognised that the following characteristics are protected grounds under 'other status': fatherhood;[242] marital status;[243] membership of an organisation;[244] military rank;[245] parenthood of a child born out of wedlock;[246] place of residence.[247]

Example: the case of *Petrov v. Bulgaria* concerned the practice in a prison of allowing inmates with spouses to telephone them twice a month. The applicant had lived with his partner for a period of four years and had a child with her before his incarceration. The ECtHR found that, although marriage

241 ECtHR, *Castells v. Spain* (No. 11798/85), 23 April 1992.

242 ECtHR, *Weller v. Hungary* (No. 44399/05), 31 March 2009.

243 ECtHR, *Petrov v. Bulgaria* (No. 15197/02), 22 May 2008.

244 ECtHR, *Danilenkov and Others v. Russia* (No. 67336/01), 30 July 2009 (trade union); ECtHR, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (no. 2)* (No. 26740/02), 31 May 2007.

245 ECtHR, *Engel and Others v. the Netherlands* (Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72), 8 June 1976.

246 ECtHR, *Sommerfeld v. Germany* [GC] (No. 31871/96), 8 July 2003; ECtHR, *Sahin v. Germany* [GC] (No. 30943/96), 8 July 2003.

247 ECtHR, *Carson and Others v. UK* [GC] (No. 42184/05), 16 March 2010.

has a special status, for the purposes of rules concerning communication via telephone, the applicant, who had established a family with a stable partner, was in a comparable situation to married couples. The ECtHR stated that '[w]hile the Contracting States may be allowed a certain margin of appreciation to treat differently married and unmarried couples in the fields of, for instance, taxation, social security or social policy... it is not readily apparent why married and unmarried partners who have an established family life are to be given disparate treatment as regards the possibility to maintain contact by telephone while one of them is in custody.' The ECtHR accordingly found the discrimination unjustified.

Key points

- Under the EU non-discrimination directives the protected grounds are expressly fixed to: sex, racial or ethnic origin, age, disability, religion or belief and sexual orientation. Under the ECHR they are open-ended and may be developed on a case-by-case basis.
- Under EU law sex may include gender identity to a limited extent, protecting individuals who intend to undergo or have undergone gender reassignment surgery. Gender identity has also been examined by the ECtHR.
- Elements such as colour, descent, nationality, language, or religion fall under the protected ground of race or ethnicity under the ECHR; however, clarification of the actual scope of this protected ground under EU law is still awaited through jurisprudence of the ECJ.
- Discrimination on the basis of nationality features as a protected ground under the ECHR. Nationality discrimination is only prohibited in EU law in the context of the Law on the free movement of persons.
- The term 'religion' should be relatively widely construed, and not limited to organised or well-established, traditional religions.
- Even in cases where discrimination may have occurred the ECtHR frequently examines complaints only on the basis of substantive Articles of the ECHR. This may alleviate the need to prove differential treatment or find a comparator.

Further reading

Boza Martínez, 'Un paso más contra la discriminación por razón de nacionalidad', *Repertorio Aranzadi del Tribunal Constitucional* (2005) 7.

Breen, *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference*, (Leiden, Martinus Nijhoff, 2006).