

Race discrimination and religion or belief discrimination: two divergent approaches?

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Article 10 EU Charter

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

Race and Religion or belief in Anti-discrimination Directives

Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22 (Race Directive).

Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16: (Religion or belief, Disability, Age and Sexual orientation) (Employment Equality Directive).

General principle of EU law

CJEU: both Directives are merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of European Union law, as recognised in Article 21 of the Charter.

See for example:

- For racial and ethnic origin under Directive 2000/43/EC:
 - Case C-391/09 *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija* ECLI:EU:C: 2011:29, para. 43.
 - C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* ECLI:EU:C:2015:480, para 42.
- For religion or belief under Directive 2000/78/EC:
 - Case C-414/16: *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, EU:C:2018:257, para. 76.

CJEU in C-83/14 *CHEZ*

1. Definition ethnicity:
 - a) Ethnicity has its origin in idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds (para. 46).
 - b) Applies to Article 21 Charter.
 - c) Applies to Roma people.
 - d) CJEU referred to case law of the European Court of Human Rights.
2. Direct and indirect discrimination:
 - a) direct discrimination exists where ethnicity has determined the decision for the treatment (para. 76).
 - b) indirect discrimination considers the effect of a measure, which is 'ostensibly' neutral or neutral 'at first glance' for a specific racial or ethnic group (para. 93).
3. Indirect discrimination by association is covered by Race Directive.
4. For discrimination by association under the Employment Equality Directive, see: *Coleman*, C-303/06, EU:C:2008:415, paras. 38 and 50.

Definition religion or belief

CJEU in *Achbita* and *Bougnaoui*: Directive did not give a definition of the terms 'religion' or 'belief'. CJEU referred to Article 10 Charter, which corresponds to Article 9 ECHR. CJEU concluded from this: term religion should be interpreted in a broad sense 'as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public'.

Idem AG Kokott, in *Achbita*: scope of Directive 2000/78/EC could not be interpreted restrictively.

Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV C-157/15 EU: C:2017:203, para. 25-28.

Asma Bougnaoui, Association de De'fense des Droits de l'Homme (ADDH) v Micropole Univers SA C-188/15 EU:C:2017:204, para. 27-30.

Opinion of Advocate General Kokott in *Achbita* C-157/15 EU: C:2016:382.

C-414/16 Egenberger: horizontal direct effect?

- prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (does it give horizontal direct effect to the Directives via Article 21 of the Charter?).
- Article 47 of the Charter (the right to an effective remedy and to a fair trial) has same effect.
- Thus, if national court cannot interpret national law in conformity with the Directives, it must disapply any contrary provision of national law to give full effect to Articles 21 and 47 of the Charter. (paras 76-79).
- Repeated in Case C-68/17 *IR v JQ* ECLI:EU:C:2018:696 paras 69-71.

C-414/16 Egenberger: Interpretation Article 4(2)

- Article 4(2) Directive 2000/78/EC: exception to the prohibition of discrimination on the grounds of religion or belief.
- Exception to principle of equal treatment must be interpreted narrowly.
- CJEU interpreted Article 4(2) narrowly:
 1. decision of a church or other organisation with a religious ethos to rely on Article 4(2) should be open to scrutiny by the courts (*Egenberger*, paras 50-54).
 2. CJEU introduced a proportionality test into Article 4(2): the genuine, legitimate and justified occupational requirement must comply with the principle of proportionality which is a general principle of EU law (*Egenberger*, paras 68-69, *IR v JQ*, para 54).

C-157/15 *Achbita*

- No direct discrimination: internal rule referred to the wearing of visible signs of political, philosophical or religious beliefs; thus covered any manifestation of such beliefs without distinction.
- Rule was treating all workers the same; no evidence that rule was applied differently to Ms Achbita.
- Up to referring court to ascertain whether there is direct or indirect discrimination, but CJEU gave guidance on indirect discrimination (*idem* C-188/15 *Bougnaoui*).
- Indirect discrimination not unlawful if objectively justified:
 - Must pursue legitimate aim.
 - Means used must be proportionate and necessary.

C-157/15 *Achbita* continued

- Neutrality policy was legitimate aim, as was part of the freedom to conduct a business (Article 16 EUCFR).
- Justified if:
 - genuinely pursued in a consistent and systematic manner;
 - did not make a distinction between different religions or different (religious, philosophical or political) beliefs;
 - rule was limited to customer-facing employees; and,
 - employer had considered whether the employee could be moved to a job without contact with customers.

C-157/15 *Achbita* criticism

- CJEU: prohibition is limited to what is strictly necessary if limited to employees who interact with customers.
- CJEU: employer should offer employee non-customer facing role, taking into account inherent constraints to which undertaking is subject, and without employer being required to take on an additional burden
- Would not be accepted if this was done to a black or ethnic minority person under the Race Directive.

This means that the protection provided against religion or belief discrimination is not as strong as the protection provided against discrimination on the grounds of racial or ethnic origin.

Pending cases and more information

Pending cases regarding headscarves:

- Case C-804/18 *IX v. Wabe e.V.*, OJ C 182/4, 27 May 2019;
- Case C-341/19 *MH Müller Handels GmbH v. MJ*, 12 July 2019;
- Case C-324/20 *L.F. v S.C.R.L.*, 25 September 2020.

More information and criticism of *Achbita* and *Bougnaoui* see the following articles and the literature referred to there:

- Howard, E. (2017) 'Islamic Headscarves and the CJEU: *Achbita* and *Bougnaoui*', 24, 3, *Maastricht Journal of European and Comparative Law* 348-366.
- Howard, E. (2020) 'Headscarves Return to the CJEU: Unfinished Business' *Maastricht Journal of European and Comparative Law* 27,1, 10-28.