

Reversing the burden of proof: Practical dilemmas at the European and national level

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality
Unit JUST/D1

*European Commission
B-1049 Brussels*



Reversing the burden of proof: Practical dilemmas at the European and national level

European Network of Legal Experts in the Non-discrimination field
Written by Lilla Farkas and Orlagh O'Farrell

European Commission
Directorate-General for Justice and Consumers

Manuscript completed in December 2014



The text of this report was drafted by Lilla Farkas and Orlagh O'Farrell on the authority of the European Network of Legal Experts in the non-discrimination field (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), managed by:

Human European Consultancy

Maliestraat 7
3581 SH Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

Migration Policy Group

Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

For more information on publications from the European Network of Legal Experts in the non-discrimination field see:
<http://ec.europa.eu/social/main.jsp?catId=615&langId=en&moreDocuments=yes>

© Photography and design by Ruben Timman / www.nowords.nl

For any use or reproduction of photos which are not under European Union copyright, permission must be sought directly from the copyright holder(s).

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

This publication was commissioned by the European Commission under the framework programme PROGRESS (Decision 1672/2006/EC of the European Parliament and the Council, OJ L 315/1 of 15.11.2006).

For more information on PROGRESS see:

<http://ec.europa.eu/social/main.jsp?catId=327&langId=en>

LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2015

ISBN 978-92-79-44625-2

doi: 10.2838/05358

© European Union, 2015

Table of Contents

Executive Summary	5
Introduction	9
I. Origins of the burden of proof provisions	13
II. European law on equal treatment and non-discrimination	17
II.1. The gender equality provisions	18
II.2. The Equal Treatment and Non-discrimination Directives	19
III. Previous studies on the burden of proof	23
IV. Recent judgments of the CJEU relevant to the burden of proof	25
V. Theoretical underpinnings and general considerations	33
V.1. General note	34
V.2. Discovery of facts: evidence	36
V.3. The form of discrimination to be proven	38
V.4. Conduct	41
V.5. Harm	41
V.6. Protected ground	41
V.7. Comparators	44
V.8. Bias, causation, negligence and intent	45
V.9. Prima facie cases: the point of (no) return	53
V.10. Justification defence	54
V.11. Rebuttal	56
V.12. Procedural scheme	56
VI. Implementation in Member States	59
VI.1. General trends and patterns	60
VI.2. Application of the burden of proof rules in practice	60
VII. Practical concerns relating to the burden of proof rules	73
VII.1. Right to information	74
VII.2. Establishing a comparator	74
VII.3. The prima facie case	74
VII.4. Potentially different standards according to the protected ground	76
VII.5. Justification and rebuttal	76
VII.6. Different outcomes according to the legal forum used	77
VII.7. Different outcomes according to whether the litigant is an individual or an NGO	78
VIII. Possible improvements to the implementation of the burden of proof provisions	81
Conclusions	87
Bibliography	91
Table of legislation	93
List of cases	93

Naomi | 1997

Executive summary

This report examines the background to EU rules on the burden of proof, the development of principles laid down in the case law of the Court of Justice of the European Union (CJEU) and their application to the Racial and Employment Equality Directives in proceedings before civil and labour courts. Given that the bulk of this case law is related to the gender ground, it will necessarily rely on case law relating to gender discrimination. However, the focus will – as much as possible – be on judgments on race and ethnic origin, age, disability, religion and sexual orientation.

In cases dealing with discrimination, as in any legal proceedings, the relevant legal burden needs to be discharged in order for the case to succeed. If the law places the entire burden of proof throughout the proceedings upon the plaintiff, then it will be very hard for him/her to prove that there was discrimination in a particular case when the case depends on factors which lie entirely within the employer's own knowledge.

This evidentiary obstacle was tackled first in relation to *indirect* discrimination cases seeking the enforcement of a Treaty provision governing equal pay between men and women. In cases such as *Danfoss* and *Enderby* the CJEU laid down the principle of the reversal of the burden of proof, holding that once a *prima facie* case of discrimination is shown, it is for the employer to show that there are objective and non-discriminatory reasons for the difference in pay.

With a view to alleviating the practical problems of proof in discrimination cases, the CJEU and European law have played a key role in ensuring a common approach. The reversal of the burden of proof was codified in a directive governing the burden of proof in cases of gender discrimination. It was included in subsequent pieces of European legislation that broadened the personal and material scope of the non-discrimination principle.

The reversal of the burden of proof has travelled from the practice of the CJEU into that of the European Court of Human Rights, where the number of judgments finding discrimination has substantially increased over the last decade. This report will not deal with that case law, but will make references to it if and when practicable.

The report looks at the origins of the burden of proof provisions in the case law of the CJEU and subsequent European legislation. EU rules on the burden of proof have been developed in the course of the evolution of EU law in general and EU anti-discrimination law in particular. We consider the key aspects of the interpretation of the rule and its application to sex discrimination.

We examine European law relevant to the emergence of the burden of proof provisions as well as norms that codify the way the CJEU has interpreted the reversal of the burden of proof. We look at legislation on all the grounds protected under European law with a specific focus on the Racial and Employment Equality Directives. The reversal of the burden of proof rule is formulated as follows: when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. European law regulates the reversal of the burden of proof in an identical manner across the protected grounds – except for nationality, where no such provision has been enacted. The relevant provisions explicitly state that the reversal of burden of proof rule is not to apply to criminal procedures nor to proceedings in which a court or competent body has an investigatory or inquisitorial role to ascertain the facts of the case. Finally, these provisions do not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

The report assesses recent studies that have set out to examine whether the rules requiring a shift in the burden of proof function in accordance with their aim, which is to make it easier for a discrimination claim to succeed. The 2012 report by the European Agency for Fundamental Rights (the Fundamental Rights Agency or FRA) on access to

justice in discrimination cases in the EU found that the availability of class or representative group actions in anti-discrimination law improves access to courts and judgments in favour of plaintiffs. It also found that the right to fair proceedings was limited by insufficient application of EU law on shifting the burden of proof to the respondent in discrimination proceedings, due *inter alia* to lack of awareness of the concept on the part of judges or to the fact that the national law was not clear about how and when to apply the shift.

We analyse the four recent judgments – Feryn, Kelly, Meister and Accept – that are relevant when discussing the reversal of the burden of proof. They all arose in the employment context, more particularly in access to employment or vocational training, where particular difficulties occurred because the plaintiffs sought access from the outside to information held exclusively by the respondents. In each case, the CJEU was requested to assist national courts in the interpretation of the reversal of the burden of proof provisions with a view to establishing a *prima facie* case and assessing respondents’ rebuttal.

Kelly and Meister in particular again raised the issue of transparency of the employer’s practices, a question previously considered by the CJEU in Danfoss, where the lack of transparency of a system of pay was found to prevent any form of supervision by the national courts. In Kelly, the lack of transparency was not total, unlike that encountered in Danfoss and Meister. The significant difference between equal pay cases on the one hand and Feryn, Meister and Accept on the other is, however, that the former relate to a worker who is already ‘in’ and has at least limited access to information regarding the employer’s practices, whereas the plaintiffs in the latter group are ‘out’. Kelly, Meister and Accept indicate that respondents are well aware of the weakest link in the scheme created by the reversal of the burden of proof. Whether by coincidence or conscious design, they base their legal strategies on cultivating this shortcoming, namely the reluctance of courts to make disclosure orders if that could lead to the disclosure of confidential data relating to identifiable individuals who are not party to the proceedings. While the CJEU seems to be on its guard, it will probably be petitioned again to repulse challenges that attempt to prevent the supervision by national courts of cases concerning ‘access’.

Should national courts continue to refer cases on points of evidence, the CJEU may in the future have further opportunities to interpret the mismatch between the Directives not granting the plaintiffs access to information on the one hand and the lack of prohibition to access such information on the other. It is to be seen whether the CJEU further interprets the relevant provisions to maintain effective judicial protection against discrimination in a way that would aid plaintiffs’ access to information already in the phase leading up to the *prima facie* case.

The report sets out to provide a full scheme of civil proceedings that are compliant with provisions of European law in cases of discrimination. It starts out by looking at the elements of discrimination for which the plaintiffs must bring forth evidence, the conduct, the protected ground, comparators, causation, justification defences and rebuttal. It seeks to locate as precisely as possible the point in proceedings where the burden shifts. It also looks at the types of evidence relevant in cases of discrimination.

The reversal of the burden of proof does not mean that plaintiffs are exempt from convincing the court that they have a case: a set of facts that call for an explanation. In order to reverse the burden of proof they must first establish a *prima facie* case, in other words convince the court of the likeliness or probability that they suffered discrimination. Thus, the burden of proof shifts before a court can make a clear finding on causation. The burden of proof then moves to the respondent to prove that discrimination played no part in the treatment or effect complained of. If the respondent is unable to explain the treatment using objective reasons unrelated to discrimination, he will be liable for a breach of non-discrimination law. The reversal of the burden of proof applies to the various forms of discrimination. A scheme of its application has not yet been drawn up by the CJEU. In the United Kingdom, the Court of Appeal has provided such a scheme in *Igen v Wong* for employment tribunals.

At the heart of discrimination lies prejudice and bias pertaining to the ground on the basis of which less favourable treatment is meted out. The juridification and subsequent technicalisation of anti-discrimination discourse at European level may divert attention away from the underlying fundamental issue, that discrimination is an unthinking reaction to a person not because of his or her conduct, but because of his or her involuntary membership in a group. From this perspective, the unsaid assumption that indirect discrimination may be less directly linked to bias and therefore more benign than are the other forms of discrimination becomes less convincing. Indeed, the showing of bias or stereotypes is essential in cases of indirect discrimination as well, only here the focus is on the effects as opposed to the source of such sentiments. The central question of proceedings is therefore how to uncover such bias and/or such stereotypes, especially if the prejudice is not directly manifested in the case.

Finding the right comparator is part of the answer because it connects to membership in a group targeted by prejudice or bias. Comparison then completes causation. In cases of discrimination, causation is a two-tier exercise. Beyond a causal link between the conduct and the harm, another causal link between the protected ground and the conduct must also be established to show bias. In practice, this stage often poses insurmountable hurdles for plaintiffs. Therefore, it is at this point where they are most in need of effective judicial protection. The causal link between the protected ground and the conduct may vary as to the degree of severity. In general, in continental European legal systems it is enough to show that a respondent failed to meet his duty of care. However, a breach of the duty of care may take the form of negligence or intent. To judge from preliminary referrals, it would seem that national judges are grappling with this aspect of the proceedings, that is, the nature of causation in cases of discrimination.

The relevant provisions of European law are not crystal clear about the burden on parties to establish causation. The presence of a burden of proof provision does not alleviate the burden on plaintiffs to establish the causal link between conduct and harm. This link needs to be made out before the likeliness or probability of a causal link between the conduct and the protected ground is shown. Plaintiffs bear the burden of establishing facts that point to a probable causal link between the protected ground and the conduct. The key effect of the reversal of the burden of proof is that it alleviates the burden on plaintiffs to show a clear causal link between the protected ground and the harm. Consequently, the burden of proof shifts even if the causation between the protected ground and harm is only probable or likely.

The reversal of the burden of proof is a procedural rule that must be read in conjunction with the definition of the type of discrimination invoked. It connects evidence to the showing of bias and derails the course of proceedings at two distinct junctions: (i) it lowers the onus of proof (presumption) resting on the plaintiff in relation to the causal link between the protected ground and the conduct (*prima facie* case), while (ii) placing and limiting the remaining onus of proof in relation to bias on the respondent (*justification defence*).

Striking the right balance between the parties in relation to establishing the bias is a tremendous task that in optimal cases entails awareness of the functioning of societal stereotypes and power relations in the wide variety of scenarios to which European non-discrimination law pertains. Indeed, the very function of the reversal of the burden of proof is to 'factor in' such bias to the evidentiary rules for the benefit of those who suffer it.

The report also takes stock of general and country specific aspects to the transposition and the implementation of the burden of proof provisions. Most Member States have transposed the Non-discrimination Directives through civil and labour law and thus provide for the reversal of the burden of proof. A minority have transposed the Directives through criminal law, where liability for discrimination must be established beyond reasonable doubt. The Directives have been transposed for more than a decade now and national laws implementing the provisions on the burden of proof are largely compliant with the requirements of the Directives. Transposition is reasonably accurate in most cases, despite the diversity of national formulations of the burden of proof rules. There is a general scarcity of case law in many countries, which renders analysis patchy. Moreover, in many jurisdictions it is difficult to obtain

an overview of how the burden of proof shift applies in practice. Concerns have been raised in relation to practice in Bulgaria, Cyprus, Denmark, FYROM, Hungary, Slovakia and Sweden. In France, the provision has recently been amended and is now believed to be less favourable to plaintiffs.

Concerns include the access to information and establishing a comparator. The widespread view is that there is an imperfect understanding of how the rule applies in relation to establishing prima facie cases. This appears to be the case amongst judges, the legal profession and in some cases even equality body members and staff. In most States, a causal link has to be proved on the balance of probabilities before the burden of proof shifts to the respondents. There are some indications that in practice the shift may operate differently according to the nature of the case and in particular the ground of discrimination invoked – tipping the balance in favour for instance of gender discrimination, at least in pregnancy cases.

The relevant Directives do not provide concrete standards of proof by which the respondent can successfully rebut the presumption of discrimination. While the CJEU has clarified the standards of justification in gender cases and made inroads into shaping the justification of age discrimination, it has not had the opportunity to deal with the other grounds to the same degree of detail. The applicable standard of proof for rebuttal is not known for all States but seems to be too lenient in a few, such as Austria, Liechtenstein, Norway and Slovakia. As a general rule, when complaints are made to specialised national equality tribunals the outcome tends to be better for the plaintiff. There may also be differences in outcomes according to whether a litigant is an individual or an NGO.

The report formulates recommendations for possible improvements to the implementation of the burden of proof provisions. These include training of legal practitioners, as well as more guidance and a compendium of good practices. More in depth research into the differences in outcomes across the protected grounds would be useful. Difficulties relating to the access of plaintiffs to information held by respondents, particularly in cases where such information may be confidential, could be alleviated through guidance, the adoption of additional legal provisions governing such issues or a Commission Recommendation on the use of questionnaires in domestic procedures. Guidelines and good practice notes to promote the use of various types of evidence, such as statistical evidence and situation testing, would also prove useful.

The provision that exempts inquisitorial proceedings from the burden of proof rule is problematic in practice. The operation of the burden of proof rule would be improved by its application to equality bodies. It should also apply to all proceedings in which discrimination on the grounds covered by the relevant Directives is raised, whether administrative, civil or labour court proceedings.

Introduction

There has been a long-standing concern about the effectiveness of legal remedies in discrimination law. Such remedies form part of the overall right to effective judicial protection which the Court of Justice of the European Union (CJEU) has established and consistently upheld in its case law. Beyond the substantive considerations – relating to the sort of sanctions and remedies – the CJEU has dealt with the procedural aspects of the protection of the rights of individuals. The reversal of the burden of proof is a unique example of its successful endeavours.

A specific line of jurisprudence from the CJEU has addressed the need to be able to translate rights on the page into accessible rights that can benefit individuals in employment and other situations. EU law provides such a right in the form of a personal remedy for victims of discrimination.

In the early days of EU discrimination law the issue was gender equality rights, particularly in relation to equal pay. It was recognised early on that not only substantive law on equality but also a range of procedural issues arise in relation to enforcement of discrimination law. It is a reality that in order for justice to be effective, legal channels must be available to and accessible by individuals seeking vindication of their rights. For individuals to be able to enforce these rights legal proceedings must be fair and timely, remedies must be effective, and sanctions must be adequate and dissuasive.

Within this range of issues, the difficulty of proving a discrimination claim in court has led to a particular focus on problems of proof. In matters of evidence the usual rule in law in all jurisdictions is that the party making the allegation must prove a fact at issue to the required standard of proof. However, in cases claiming that there has been discriminatory treatment, unequal power relationships, such as those between an employer and an employee, mean that the normal evidentiary rule can be problematic for the plaintiff.¹ In an employment case, for instance, the employer may have access to records, facts and other evidence which are not available to the person making the claim.

Even in cases of direct discrimination, where an overt distinction is made solely on the basis of the protected ground, it may be difficult to prove this in court proceedings. The employer or supplier of a service may hold individual and sometimes even subconscious attitudes and viewpoints regarding people possessing certain characteristics or the group to which a person belongs. These attitudes influencing the behaviour of a respondent may well arise against a background of prejudice or stereotypes prevailing in a particular society generally. In cases of indirect discrimination, it may be even more difficult to prove that an action might have a disproportionately negative impact on a group possessing a protected characteristic.

For these reasons, the CJEU established that the usual rule of evidence should be modified in discrimination cases in favour of the victim of discrimination. Where, for instance, a system of pay revealed a difference in pay between male and female workers which resulted in systematically lower pay for the latter, the Court decided that as the pay system used was completely lacking in transparency, discrimination must be presumed and the burden of proof must shift to the employer to account for the pay difference by other factors unrelated to sex.² The Court further elaborated the concept of shifting the burden of proof in another gender pay case when it stated that if the pay of one group of workers is significantly lower than that of another and if the former are exclusively women while the latter are predominately men, there is *prima facie* case of sex discrimination, at least where the two jobs in question

¹ The authors will use the term ‘plaintiff’ in place of claimant, complainant or applicant throughout, and ‘respondent’ in place of defendant.

² Case C-109/88 *Danfoss* [1989] ECR I-3199.

are of equal value.³ It continued: '[w]here there is a *prima facie* case of discrimination, it is for the employer to show that there are objective and non-discriminatory reasons for the difference in pay.'

A number of procedural guarantees have been developed by the EU legislature to ensure effective access to justice in discrimination cases. The Racial and Employment Equality Directives that cover race, ethnic origin, age, disability, religion and sexual orientation on the one hand, and the Recast Gender Directive and the Goods and Services Directive on the other, reflect much of the CJEU's case law and establish a number of key principles as regards access to justice including provisions on defence of rights, the reversal of the burden of proof and the requirement for an effective, proportionate and dissuasive remedy. Specifically, EU legislation provides that in cases of alleged discrimination brought before the courts of Member States, when the plaintiff establishes 'facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'⁴

This report examines the background to EU rules on the burden of proof, the development of principles laid down in CJEU case law and their application to the Racial and Employment Equality Directives. Given that the bulk of this case law is related to the gender ground, it necessarily relies on case law relating to gender discrimination. However, the focus is – as much as possible – on judgments relating to race and ethnic origin, age, disability, religion and sexual orientation. The handful of judgments responding to questions raised by referring national courts in relation to the reversal of the burden of proof will be analysed in detail.

The reversal of the burden of proof has travelled from the practice of the CJEU into that of the European Court of Human Rights, where the number of judgments finding discrimination has substantially increased over the last decade. This report will not deal with the case law emerging under the European Convention on Human Rights and Fundamental Freedoms, but it will make references to it if and when practicable.

The report is composed of eight substantive chapters. Following the executive summary and the introduction, Chapter 3 looks at the origins of the burden of proof provisions in the case law of the CJEU and subsequent European legislation.

Chapter 4 examines European law relevant to the emergence of the burden of proof provisions as well as norms that codify the way the CJEU interpreted the reversal of the burden of proof. It looks at legislation on all the grounds protected under European law with a specific focus on the Racial and Employment Equality Directives.

Chapter 5 assesses recent studies that have set out to examine whether the rules requiring a shift in the burden of proof function in accordance with their aim, which is to make it easier for a discrimination claim to succeed. Chapter 6 analyses the four recent judgments – *Feryn*, *Kelly*, *Meister* and *Accept* – that are relevant when discussing the reversal of the burden of proof.

Chapter 7 sets out to provide a full scheme of civil proceedings that are compliant with provisions of European law in cases of discrimination. It starts out by looking at the elements of discrimination for which plaintiffs must bring forth evidence, the conduct, the protected ground, comparators, causation, justification defences and rebuttal. It seeks to locate as precisely as possible the point in proceedings where the burden shifts. It also looks at the types of evidence relevant in cases of discrimination.

³ Case C-127/92 *Enderby v Frenchay Health Authority* 1993 ECR I-05535.

⁴ See for example Article 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Chapter 8 takes stock of general and country specific aspects to the transposition and the implementation of the burden of proof provisions. Chapter 9 summarises the concerns of country experts in relation to the application of the burden of proof provisions. The widespread view is that there is an imperfect understanding of how the rule applies in relation to establishing prima facie cases. Chapter 10 formulates recommendations for possible improvements to the implementation of the burden of proof provisions, while Chapter 11 sets out conclusions.

Helmus | 1991

Part I

Origins of the burden of proof provisions

This chapter looks at the origins of the burden of proof provisions in the case law of the Court of Justice of the European Union (CJEU) and subsequent European legislation. EU rules on the burden of proof have been developed in the course of the evolution of EU law in general and EU discrimination law in particular. We consider the key aspects of the interpretation of the rule and its application that so far has focused mainly on sex discrimination.

Two important principles of EU law are relevant to the historical background of the burden of proof rules. The first is the principle of effectiveness. According to the effectiveness principle, substantive and procedural conditions governing actions for the enforcement of EU law must not be framed in such a way as to make it virtually impossible to exercise the rights conferred by EU law. In the context of directives granting rights in EU law, national implementing measures are necessary to give individuals the possibility of asserting these rights and having them protected, and implementation must therefore be correct and within the prescribed time period. In counteracting any incorrect implementation, the CJEU relies on its 'natural allies, namely the national courts, who are entrusted with the task of protecting the rights derived by individuals from the directives and giving them full effect.'⁵ In the words of one commentator,

... an assumption was made by the authors of the EC Treaty that national legal systems based on the rule of law could be relied upon to provide an adequate level of judicial protection; it was therefore sufficient to allow Community law to be enforced by national remedies in accordance with national procedural rules.⁶

In *Rewe-Zentralfinanz v Landwirtschaftskammer*,⁷ the CJEU obliged the national courts to take into account the principle of effectiveness, and to make sure that the national remedy provided was not discriminatory, was equivalent to that available in domestic actions, and did not make it impossible in practice to exercise Community law rights. In the same year, in *Comet BV v Produktschap voor Siergewassen*,⁸ the CJEU said that domestic law could lay down the procedural conditions for the protection of rights guaranteed by EU law provided that they were not discriminatory and did not make it impossible in practice to exercise those rights. The national courts in this role certainly benefit from a considerable degree of what is called 'procedural autonomy',⁹ enabling them to give effect to EU rights through the medium of their own legal system's rules and procedures.

However, a further relevant principle is the related but distinct principle of effective judicial protection. In *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, the Court held that the introduction of a free-standing action for the enforcement of EU law is not required, provided that the principle of effectiveness is observed in the national system of domestic remedies.¹⁰ In *San Giorgio* the Court disapproved the burden of proof being placed on the applicant, as it made the exercise of the rights derived from EU law virtually impossible.¹¹

In cases dealing with discrimination, as in any legal proceedings, the relevant legal burden needs to be discharged in order for the case to succeed. If the law places the entire burden of proof throughout the proceedings upon the plaintiff, then 'all the respondent needs to do in practice is to produce a colourable story which casts doubt on the plaintiff's version of events'.¹²

⁵ Case 26/62 *Van Gend en Loos* [1963] ECR 1.

⁶ Jacobs, F. (1997). 'Enforcing Community Rights and Obligations' in Lonbay and Biondi (eds) *Remedies for Breach of EC Law*. Chichester: Wiley.

⁷ Case 33/76 *Rewe-Zentralfinanz* [1976] ECR 1989.

⁸ Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043.

⁹ Craig and De Búrca (2011). *EU Law: Text, Cases and Materials*. Oxford: Oxford University Press, pp. 219-241.

¹⁰ Case C-432/05 *Unibet Ltd v Justitiekanslern* [2007] ECR I-2271.

¹¹ Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595.

¹² Ellis, E. and Watson, P. (2012). *EU Anti-Discrimination Law*. Oxford: Oxford University Press, p.157. *Colourable* is a legal term meaning appearing to be correct or justified, but in fact not so.

The problem is that it is very hard for a plaintiff to prove that there was discrimination in a particular case when the case depends on factors which lie entirely within the employer's own knowledge. If for instance an employer has chosen a 30-year-old candidate for a post on the basis that s/he has the more appropriate personality for a job than a 60-year-old interviewee with slightly better qualifications, it may be relatively easy to convince a court that this was a good reason for choosing the younger person, even if the real reason was in fact conscious or unconscious age-stereotyping on the employer's part.

This evidentiary obstacle was tackled first in relation to *indirect* discrimination cases seeking the enforcement of a Treaty provision, ex Article 141 of the EC Treaty (Article 157 of the present Treaty on the Functioning of the European Union) that governed equal pay between men and women. In the *Danfoss* case concerning equal pay, the female workers in the firm were earning on average 7% less than the male workers. The employer was operating a pay system which had this effect but it was impossible to find out if the difference was caused by discrimination or not. The CJEU said that if a system of pay reveals a difference in pay between male and female workers but the pay system used is totally lacking in transparency and statistical evidence, the burden of proof shifts to the employer to account for the pay difference by factors unrelated to sex. The *Enderby* case further elaborated the concept of shifting of the burden of proof when the CJEU stated that if the pay of one group of workers is significantly lower than that of another and if the former are exclusively women while the latter are predominately men, there is a *prima facie* case of sex discrimination, at least where the two jobs in question are of equal value'.¹³ It continued, '[w] here there is a prima facie case of discrimination, it is for the employer to show that there are objective and non-discriminatory reasons for the difference in pay.'

With a view to alleviating the practical problems of proof in discrimination cases, 'EC law has exercised a decisive influence on shaping a common approach'.¹⁴ The reversal of the burden of proof was codified in a directive governing the burden of proof in cases of gender discrimination. It was included in subsequent pieces of European law that broadened the personal and material scope of the non-discrimination principle. Following more recent legislation on gender discrimination, the Burden of Proof Directive has been repealed.

In *Seymour-Smith*, the CJEU provided more guidelines on how to establish the presumption of a *prima facie* case of indirect discrimination, stating that in indirect discrimination cases it is the respondent that needs to provide an objective justification for the indirect discriminatory criteria or practice.¹⁵ In the circumstances of that case, for instance, mere generalisations concerning the capacity of a specific measure to encourage recruitment were not enough to show that the aim of the disputed rule was unrelated to pay discrimination based on sex. In addition, it was necessary for the respondent to provide evidence on the basis of which it could be reasonably considered that the means chosen were suitable for achieving that aim.

¹³ Case C-127/92 *Enderby*.

¹⁴ D. Schiek, L. Waddington, and M. Bell (2007). *Materials, Cases and Text on National, Supranational and International Non-discrimination Law*.

¹⁵ Case C-167/97 *R v Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1999] ECR I-623.



Lucas | 1992

Part II

European law on equal treatment and non-discrimination

This chapter examines European law relevant to the emergence of the burden of proof provisions as well as norms that codify the way the CJEU interpreted the reversal of the burden of proof. It looks at legislation on all the grounds protected under European law with a specific focus on the Racial and Employment Equality Directives.

From its inception, the European Union has legislated in the field of equality and non-discrimination in relation to nationality. Non-discrimination on the basis of nationality was essential for the establishment of a common labour market in Europe. A Treaty provision prohibits discrimination on grounds of nationality in order to ensure the free movement of workers (Article 45 of the present Treaty on the Functioning of the European Union, ex Article 39 of the Treaty Establishing the European Community, EC Treaty). The CJEU held for example that the above-mentioned Treaty provision was directly applicable in the legal systems of Member States so as to render inapplicable a provision in the French Maritime Code that required a certain proportion of the crew of a French ship to be of French nationality.¹⁶

Article 19 of the present Treaty on the Functioning of the European Union (ex Article 13 of the EC Treaty) gives the European Union specific powers to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability or sexual orientation.

II.1. The gender equality provisions

Following the adoption of legislation relating to nationality, the principle of equal pay for women and men served to ensure that fair competition among employers in different Member States was not distorted by different regulatory labour standards involved in the implementation of the principle of equal pay. A Treaty provision provides for equal pay between men and women (Article 157 of the present Treaty on the Functioning of the European Union, ex Article 141 of the EC Treaty). Article 10 TFEU specifies that ‘in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’ The Charter of Fundamental Rights of the European Union is referenced in Article 6 of the Treaty on European Union (TEU), making the Charter legally binding. The Charter includes a prohibition of discrimination on any ground, including sex (Article 21). It also recognises the right to gender equality in all areas, and the necessity of positive action for its promotion (Article 23). Furthermore, it defines rights related to family protection and gender equality. The reconciliation of family/private life with work is an important aspect of the Charter, which also guarantees the right to paid maternity leave and to parental leave (Article 33).

Aware of the imbalance between the parties in disputes mainly over equal pay, in its case law the CJEU developed the principle requiring the burden of proof to shift to the respondent once a *prima facie* case of discrimination had been established by the plaintiff. In the *Danfoss* case the CJEU said victims ‘could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory.’ However, the appreciation of the facts from which it may be presumed that there has been discrimination remained a matter for the relevant national body in accordance with national law or practice.

Despite this, the aim of adequately adapting the rules on the burden of proof was not achieved satisfactorily in all Member States. It therefore became necessary to enact European legislation to ensure harmonisation. Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (the Burden of Proof Directive) had the express intention of ensuring that measures taken by Member States to implement the principle of equal treatment between men and women were made more effective. The Burden of Proof Directive

¹⁶ Case 167/73, *Commission v France* [1974] ECR-359 .

aimed at ensuring that judicial processes were available to those whose right to equal treatment had been violated.¹⁷ Central to this Directive was the concept that the burden of proving discrimination in full did not fall entirely on the plaintiffs.¹⁸ Significantly, the Directive expanded the application of the reversal of the burden of proof to cases of direct discrimination as well.

Article 4 of the Burden of Proof Directive stated that:

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

Now directives relating to sex discrimination cover the field of employment and goods and services, such as Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (the Services Directive) and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the Recast Gender Directive). The provisions of the Burden of Proof Directive were repealed and recast in the Recast Gender Directive. The Goods and Services Directive provides for the reversal of the burden of proof in Article 9.

II.2. The Equal Treatment and Non-discrimination Directives

The Council has passed two directives (hereinafter ‘the Non-discrimination Directives’), which oblige Member States to introduce measures to eliminate discrimination on grounds other than nationality and sex: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive).

As O’Cinneide observes, over the last decade, CJEU case law has established that the Racial and Employment Equality Directives ‘should be interpreted as giving specific expression to a fundamental norm of the EU legal order, namely the general principle of equal treatment. The CJEU’s interpretation of both Directives has thus been purposive’.¹⁹ With a view particularly to Advocate-General Maduro’s opinion in the Coleman case, he stresses that the Directives ‘also need to be interpreted with reference to the values of human dignity and personal autonomy’, as these values ‘animate the enabling provisions of Article 13 TEC (now Article 19 TFEU) that provide the legal basis for the Directives’.²⁰ Last, recalling that the Directives cover both the public and the private spheres, he cautions about difficulties likely to arise in the field of housing. ‘Article 3(1)(h) of the Racial Equality Directive explicitly states that the provision of housing to the public comes within its scope. Public bodies exercise many functions which relate to

¹⁷ Article 1 described its aim as being ‘to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because of the principle of equal treatment has not been applied to them to have their rights asserted by judicial process...’.

¹⁸ This was underlined in Recital 17: ‘Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that this practice is not in fact discriminatory.’

¹⁹ Colm O’Cinneide (2012). *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*. p.36.

²⁰ *Ibid.*, pp. 23 and 38.

housing, and it is not clear which of these functions will come within the scope of the Directive in the CJEU's future case law developing in this area'.²¹

While the reversal of the burden of proof applied in cases brought under a Treaty provision by way of the CJEU case law, secondary legislation expressly provides for it in relation to all the protected grounds and fields. The burden of proof provisions can now be found in the remedies and enforcement sections of the Racial Equality Directive (Article 8), Employment Equality Directive (Article 10), the Goods and Services Directive (Article 9) and the Recast Gender Directive (Article 19).²²

Article 8 of the Racial Equality Directive stipulates the following:

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

European law regulates the reversal of the burden of proof in an identical manner across the protected grounds — except for nationality, where no such provision has been enacted. Such provisions explicitly state that they are not to apply to criminal procedures and that they need not apply to proceedings in which a court or competent body has an investigatory or inquisitorial role to ascertain the facts of the case. Finally, European law pertaining to the reversal of the burden of proof does not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

²¹ *Ibid.*, p.30.

²² There are slight differences in the wording of Article 19 of the Recast Gender Directive.

Michelle | 1995

Part III

Previous studies on the burden of proof

A number of studies have set out to examine whether the rules requiring a shift in the burden of proof in a discrimination case are operating in accordance with their aim, which is to make it easier for a discrimination claim to succeed.

An overview published by the European Network of Legal Experts in the Non-discrimination Field in 2006, a few years after the transposition of the Directives pointed out that although the shift applies to cases of direct and indirect discrimination, there is a clear link between the shift and indirect discrimination.²³ Traditional ways of collecting evidence such as documentary evidence, witness statements and expert opinions are unsatisfactory in discrimination cases. The CJEU recognised in the cases of *Enderby*, *Brunnhofer* and *Nikoloudi* that statistical evidence is sufficient to shift the burden onto the employer in indirect discrimination cases. However, statistics are not always available and methods such as situation testing are not without controversy. All the indications were that in spite of the shift of the burden, proving a *prima facie* case remained a difficult obstacle for plaintiffs to overcome.

In 2011 the EU Gender Equality Network produced a report entitled *Comparative study on access to justice in gender equality and anti-discrimination law*.²⁴ In relation to the European rules on shifting the burden of proof the study found that what constitutes *prima facie* evidence or what amounts to facts from which it may be presumed that there has been direct or indirect discrimination is not always clear and lends itself to a variety of interpretations and modes of application in the different countries. As a departure from the general procedural rules it found that the new rule does not coexist easily with them and is often overlooked or misapplied.

In a 2012 report by the Fundamental Rights Agency (FRA) on access to justice in discrimination cases in the EU, a wide range of factors were identified which can limit the scope for plaintiffs to gain access to justice. These include procedural obstacles in the course of the hearing of a complaint. The research considered procedures under four headings: collective dimensions, fairness, timely resolution and effectiveness. Respondents identified the collective dimensions of procedures, such as widened legal standing and strategic litigation, as important to improve access to justice. Thus, as in other fields, the availability of class or representative group actions in anti-discrimination law improves access to courts and judgments in favour of plaintiffs. They also identified equality of arms and the shift of the burden of proof as essential requirements of fair proceedings. However, problems were reported in relation to both issues, consisting in the first case of the typically greater strength of the alleged discriminator *vis-à-vis* the plaintiff, and in the second of the low awareness and insufficient application of the shift of burden of proof by courts.

The FRA report found that the right to fair proceedings was limited by insufficient application of EU law on shifting the burden of proof to the respondent in discrimination proceedings, due inter alia to lack of awareness of the concept on the part of judges, or to the fact that the national law was not clear about how and when to apply it. It recommended support to judges in understanding and applying the shift in the burden of proof.²⁵

²³ Palmer, F (2006). 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof', *European Anti-Discrimination Law Review* 4, p.23.

²⁴ Milieu Ltd (2011). *Comparative study on access to justice in gender equality and anti-discrimination law*.

²⁵ Ellis, Evelyn and Watson, Philippa (2012). *EU Anti-Discrimination Law*. Second edition. Oxford: Oxford University Press, p 157.

Part IV

Recent judgments of the CJEU relevant to the burden of proof



Joab | 2009

Four recent judgments rendered by the CJEU appear to be relevant when discussing the reversal of the burden of proof. They all arose in the employment context, more particularly in access to employment or vocational training, where plaintiffs' access to information held exclusively by respondents is perhaps the most difficult to ensure. Indeed, these were situations not so far encountered by the CJEU in sex discrimination cases, which primarily related to pay differences between men and women or to pregnancy discrimination.²⁶ All four referrals requested the CJEU to assist national courts in the interpretation of the reversal of the burden of proof provisions with a view to establishing a prima facie case. Two related to race and ethnic origin, one to sex and one to sexual orientation. Notably, the many referrals invoking the ground of age are concerned not with establishing a prima facie case but more with the justification of age discrimination under Article 6(1) of the Employment Equality Directive.²⁷

In *Feryn* the Belgian equality body challenged in the framework of a representative action (*actio popularis*) the recruitment policy of a well-known employer who publicly stated that he would not and has not hired employees of a particular ethnic origin.²⁸ Advocate-General Maduro argued that the facts did not only reveal a potential threat of discrimination, but that such statements amounted to a 'speech act' which constituted direct discrimination based on ethnic origin. Notably, the 'speech act' in the case in question did not amount to potential but actual discrimination. It transpired from the facts that the employer had in fact refused to hire applicants of Moroccan origin, although the exact number and identity of such applicants remained unknown in the proceedings.²⁹

The questions referred appear rather complicated and telling of a clear need for guidance on the practical application of the burden of proof provision in the Racial Equality Directive. Out of the six questions referred, four dealt with establishing a prima facie case and one with the justification defence. They are listed below in a reader-friendly format to demonstrate the level of uncertainty surrounding facts on the basis of which direct race discrimination can be established. Notably, the case was brought against a well-known and well-respected businessman in Belgium on account of his continued disrespect of the principle of equal treatment on the basis of race. The use of the word 'strict' in relation to the assessment of the court, in our view, points to uncertainties in relation to the balance of probabilities test.

- (1) Is there direct discrimination where an employer, after advertising a job vacancy notice makes a public statement that excludes applicants from one particular race?
- (2) Is it sufficient for a finding of direct discrimination to establish that the employer applies directly discriminatory selection criteria?
- (3) For the purpose of establishing that there is direct discrimination, may account be taken of the recruitment of exclusively indigenous fitters by an affiliated company of the employer in assessing whether that employer's recruitment policy is discriminatory?
- (4) What is to be understood by 'facts from which it may be presumed that there has been direct or indirect discrimination'? *How strict* must a national court be in assessing facts which give rise to a presumption of discrimination?
 - (a) To what extent do earlier acts of discrimination constitute 'facts from which it may be presumed that there has been direct or indirect discrimination'?
 - (b) Does an established act of discrimination in April 2005 subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy?

²⁶ We do not discuss the latter strand of case law because comparisons are not required for pregnancy.

²⁷ Ellis, Evelyn, and Philippa Watson (2012). *EU anti-discrimination law*. Oxford: Oxford University Press, pp. 408-418; and Dewhurst, Elaine (2013). 'The Development of EU Case-Law on Age Discrimination in Employment: "Will You Still Need Me? Will You Still Feed Me? When I'm Sixty-Four"', *European Law Journal* 19.4 (2013), pp. 517-544.

²⁸ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*.

²⁹ Mr Feryn was reported to say that '[a]part from these Moroccans, no one else has responded to our notice in two weeks ... but we are not looking for Moroccans.' Cited in the Opinion of Advocate-General Poiares Maduro, Case C-54/07, 1.3.

- (c) Can a joint press release issued by an employer and the national body for combating discrimination, in which acts of discrimination are at least implicitly confirmed by the employer, give rise to such a presumption?
 - (d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants?
 - (e) *Is one fact sufficient in order to raise a presumption of discrimination?*
 - (f) Can a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer?
- (5) *How strict must the national court be in assessing the evidence in rebuttal which must be produced when a presumption of discrimination has been raised? Can a presumption of discrimination be rebutted by a simple and unilateral statement by the employer in the press that he does not or does not any longer discriminate and that fitters from ethnic minorities are welcome? (emphasis added)*

The Advocate-General noted that a ‘simple’ speech act such as that committed in *Feryn* may have graver consequences because ‘[n]obody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin, they stand no chance of being hired’.³⁰ That speech conveys a message of exclusion from the labour market and if not acted upon, the ‘most blatant strategy of employment discrimination might also turn out to be the most “rewarding”’.³¹

The CJEU found that the absence of an identifiable plaintiff does not mean that there is no direct discrimination based on ethnic origin and that the ‘speech act’ in and of itself was a fact on the basis of which it could be presumed that such discrimination in respect of recruitment had occurred, because it was ‘likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market’. Public statements ‘by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory’. The employer can justify its action ‘by showing that the undertaking’s actual recruitment practice does not correspond to those statements’. The national court’s task is to verify the justification defence by assessing the ‘sufficiency of the evidence submitted in support of the employer’s contentions that it has not breached the principle of equal treatment’.

In *Kelly* the plaintiff, a teacher, applied unsuccessfully for a place on a vocational training course. He complained of sex discrimination, saying that he was better qualified than the least-qualified female candidate to be offered a place. Whilst granting the plaintiff access to redacted information, the national court asked the CJEU whether EU law entitles an applicant for vocational training who believes himself to be the victim of discrimination to information held by the course provider about the qualifications of the other applicants, in order to establish a prima facie case of discrimination.

Significantly, the referral concerned not access to redacted information, but access to confidential data concerning individual, identifiable applicants’ qualifications. With this in mind, it is perhaps not surprising that the CJEU found the Burden of Proof Directive not to entitle plaintiffs to such confidential information. The CJEU also held that it cannot be excluded that a refusal of disclosure by the respondent ‘could risk compromising the achievement of the objective pursued by that directive and thus depriving Article 4(1) thereof in particular of its effectiveness’.³² In

³⁰ *Ibid.*, 15.

³¹ *Ibid.*, 17.

³² Case C-104/10 Patrick Kelly v National University of Ireland (University College, Dublin), para. 39.

assessing such facts, national courts 'must take into account the rules governing confidentiality which follow from European Union legal acts'.³³

Meister concerned discrimination on the grounds of sex, age and ethnic origin during a recruitment process. Meister was a Russian national, born on 7 September 1961.³⁴ She held a Russian degree in systems engineering, which had been recognised in Germany as the equivalent of a German degree awarded by a university of applied science. On 5 October 2006, she responded to a job advertisement placed in a newspaper by Speech Design Carrier Systems GmbH. In a letter of 11 October 2006, the latter rejected Ms Meister's application, without inviting her for a job interview. Soon afterwards, the company published a second job advertisement with the same content – this time on the internet. On 19 October 2006, Ms Meister reapplied but her application was again rejected. She was not invited for an interview and she was not told on what ground her application was unsuccessful. The respondent never claimed that Ms Meister's level of expertise did not correspond to that sought in the recruitment process.

In order to obtain the necessary information, Ms Meister requested the trial court to order the company to produce the file of the person who was engaged for the job. The German domestic rules of disclosure or data protection rules relating to personal data on sex, age and ethnic origin are not known from the file, but the AG's Opinion recalls that during the domestic trial, the company's representative 'was unable to explain clearly the chronology of the recruitment process'.³⁵

The German court asked the CJEU whether, where an applicant met the qualifications for a post, EU law confers a right to information as to whether the employer has engaged another person and, if so, the criteria on which that appointment was made. If the respondent refuses to provide such information, can a *prima facie* case be established?

The CJEU held that the Directives do not entitle a worker who shows that she meets the requirements listed in a job advertisement but is subsequently rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process. The respondent's 'refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination'. This is the task of the national court, taking into account all the circumstances of the case before it.

Curiously, the Meister judgment does not examine the aspects of confidentiality in the case, nor does it distinguish Meister from Kelly – despite the AG's reference to the latter – in relation to the scope of the respondent's refusal to disclose information.

A more careful analysis of all aspects of the case could have perhaps yielded more beneficial results for the plaintiff at the domestic level. As it is, however, the German Federal Labour Court rejected her claim, holding that '[t]he CJEU confirmed that there is no right to information. Moreover, it stated that the denial of information may be used as circumstantial evidence for a shift of the burden of proof. The Federal Labour Court applied these standards and held that – given the circumstances of the concrete case at hand – there were no indications that allowed the denial of information by the employer to be taken as circumstantial evidence justifying a shift of the burden of proof. Consequently, the motion was denied'.³⁶

The CJEU's finding on access to information under European law may not tally with domestic rules on disclosure in every Member State. A French judgment illustrates this: '[t]he Defendant cannot argue the insufficiency of the

³³ *Ibid.*, para. 55.

³⁴ Case C-415/10 *Meister v Speech Design Carrier Systems GmbH*.

³⁵ Opinion of Mr Advocate-General Mengozzi, C-415/10, para. 36.

³⁶ Federal Labour Court (Bundesarbeitsgericht), Judgment of 25 April 2013 No 8 AZR 287/08.

Plaintiff's evidence if he failed to communicate the documents ordered by the court. The corollary consequence of the right to have access to the evidence held by the opposing party is that failure to comply transfers the burden of proof to the Defendant'.³⁷ Notably, this ruling shows that contrary to what may be surmised from the CJEU ruling in Meister, the failure to ensure access to documents held by the respondent may indeed lead to a reversal of the burden of proof.

In Accept, a situation rather similar to that encountered in Feryn but this time based on the ground of sexual orientation was examined. Homophobic public statements relating to the recruitment of football players were challenged by a private entity, Association Accept, whose aim was to promote and protect lesbian, gay and transsexual rights in Romania.³⁸

A 'patron' of the football club Steaua București SA presented himself and was perceived by the public as playing a leading role in the respondent club. He owned shares within it at the time when he made the statement about the policy for recruiting football players. Similarly to Feryn, both the football club and its patron are well-known across Romania.

Out of the four questions referred by the national court, one related to the prima facie case and one to the justification defence.

- (2) To what extent may the public statements be regarded as 'facts from which it may be presumed that there has been direct or indirect discrimination'?
- (3) To what extent would there be *probatio diabolica* if the burden of proof were to be reversed in this case and the defendant [FC Steaua] were required to demonstrate that there has been no breach of the principle of equal treatment and, in particular, that recruitment is unconnected with sexual orientation?

The CJEU found that 'if facts such as those from which the dispute in the main proceedings arises were considered' to establish a prima facie case of direct discrimination based on sexual orientation, they could be refuted with a body of consistent evidence. However, evidence that is impossible to adduce without interfering with the right to privacy – namely to prove that LGBT players had been recruited in the past – is not required under the Directive.

Three observations need to be made in relation to the four cases discussed above. First, all four, but more particularly Kelly and Meister, bring back the issue of transparency of the employer's practices, a question previously considered by the CJEU in relation to gender pay gaps. In Danfoss, the CJEU held that a system of pay which is characterised by a lack of transparency is contrary to the principle of equal access to employment because the lack of transparency prevents any form of supervision by the national courts.³⁹ Where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that its practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men. As explained above, the evidentiary hardship caused by such lack of transparency could finally be overcome in Feryn and Accept on account of the respondent's clear and unequivocal statements of bias, i.e. of the cause of their actions. In Kelly, the lack of transparency was not 'total', unlike that encountered in Danfoss and Meister. The significant difference between equal pay cases on the one hand and Feryn, Meister and Accept on the other is, however, that the former relate to a worker who is already 'in' and has at least limited access to information regarding the employer's practices, whereas the plaintiffs in the latter group are 'out'.

³⁷ IBM v. Buscail, Court of Appeal, Montpellier, No 0200504, 25 March 2003.

³⁸ Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*.

³⁹ *Danfoss*, para. 12. Here, the CJEU also relied on its earlier finding on the matter of transparency in Case C-318/86 *Commission v France*.

Another important difference is that while employees can rely on trade unions when discovering facts – and this is true for Mr Kelly as well, who applied for a vocational training course with his employer – job seekers cannot.

Second, the uncertainties surrounding the actual application in practice of the burden of proof provisions on the new grounds of race and sexual orientation in *Feryn* and *Accept* arose in the context of proceedings against well-known and well-respected businessmen, which may have placed an additional burden on the national courts.

Third, *Kelly*, *Meister* and *Accept* indicate that respondents are well aware of the weakest link in the scheme created by the reversal of the burden of proof. Whether by coincidence or conscious design, they base their legal strategies on cultivating this shortcoming, namely the reluctance of courts to make disclosure orders if that could lead to the disclosure of confidential data of identifiable individuals who are not party to the proceedings. While the CJEU seems to be on its guard, its failure so far to analyse in detail the limitations that data protection provisions may pose on establishing a *prima facie* case or rebutting it, is noticeable. Reaffirming the principle to effective judicial protection while not countering its erosion with the gusto praised by all in relation to earlier sex discrimination case law would indeed be a regrettable development.

Cita | 1989

Part V

Theoretical underpinnings and general considerations

The reversal of the burden of proof applies in civil proceedings and may – depending on national legislation – apply in administrative proceedings where the discovery of facts is the duty of a public authority. In essence, it eases the access of the plaintiff to evidence held by the respondent and requires the latter to furnish information on the reasons of its decision leading to discrimination.⁴⁰

Discrimination can be established in a wide range of proceedings. In civil or labour cases the general rule is that each party bears the burden of proving the facts it alleges and from which it derives favourable legal consequences. While parties that hold relevant evidence may be ordered to grant access to it, they cannot be forced to reveal the reasons for their actions, nor are inferences drawn from their failure to do so. The rule of thumb in civil proceedings is that the verdict is reached on a balance of probabilities, i.e. a claim succeeds if it appears more probable than not.

On the other hand, in administrative and criminal cases it is usually for the authorities to investigate and establish the facts to different degrees of certainty. The degree of certainty is the highest in criminal cases because of the presumption of innocence and the severity of sanctions, including imprisonment. This is why in criminal cases a complaint of discrimination must be proven beyond reasonable doubt and the offender's discriminatory intent must be established. However, this is – or rather should – not be the case in civil proceedings.

Against this background, this chapter sets out to provide a full scheme of civil proceedings that are compliant with provisions of European law in cases of discrimination. It starts out by looking at the elements of discrimination for which plaintiffs must produce evidence, the conduct, the protected ground, comparators, causation, justification defences and rebuttal. It seeks to locate as precisely as possible the point in proceedings when the burden shifts. Last, it looks at the types of evidence relevant in cases of discrimination.

V.1. General note

The reversal of the burden of proof does not mean that plaintiffs are exempt from convincing the court that they have a case. 'Having a case means that plaintiffs present a set of facts that call for an explanation and one possible explanation is discrimination.'⁴¹ In order to reverse the burden of proof they must first establish a prima facie case, in other words convince the court of the likeliness or probability that they suffered discrimination. The burden of proof shifts before causation is complete. It moves to the respondent. He will not be held liable if he can prove that discrimination played no part in the treatment or effect complained of. If the respondent fails to establish that the treatment arose from objective reasons unrelated to discrimination, he will be liable for a breach of non-discrimination law.

This description is the only one compatible with Section 611a(1) of the German Civil Code, on which the European definition of the burden of proof was modelled. This provision set out that 'where an employee substantiates by prima facie evidence facts from which it may be presumed that there has been less favourable treatment on grounds of sex, it shall be for the employer to prove that this treatment is justified by objective reasons other than sex' (emphasis added).⁴²

The reversal of the burden of proof applies to the various forms of discrimination. The non-discrimination principle requires the equal treatment of an individual or group irrespective of their personal characteristic, or in other words,

⁴⁰ Fiona Palmer (2006). 'Redressing the Balance of Power in Discrimination Cases: the Shift in the Burden of Proof', *European Anti-Discrimination Law Review* 4/2006.

⁴¹ This quote is taken from Declan O'Dempsey's insightful intervention at the Legal Seminar on the Enforcement of Equality and Anti-discrimination Law held in Brussels on 28 November 2014.

⁴² The reminder and the text of the German legislation are taken from D. Schiek, L. Waddington, and M. Bell (2007), *Materials, Cases and Text on National, Supranational and International Non-discrimination Law*.

their protected ground. Equal treatment means that likes should be treated alike and unalikes should be treated unlike (the disabled worker should be reasonably accommodated to do her job). The non-discrimination principle is also used to provide protection from criteria that are seemingly unrelated to a protected ground but that produce effects which systematically disadvantage persons with the characteristic in question. Discrimination may comprise conduct that has the purpose or intent to discriminate, but also practice that may have discriminatory effect.

Despite growing demand from national courts, particularly in cases arising under the Racial and Employment Equality Directives as well as in the context of access to employment, the CJEU has not set out a procedural scheme to guide national courts in the application of the burden of proof provisions. The Court of Appeal of England and Wales has been more responsive in this respect and in *Igen v Wong* it provided guidance for employment tribunals in cases of sex discrimination in the employment context.⁴³

- (1) ... it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue ... of the ... Act, is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
- (2) If the claimant does not prove such facts he or she will fail.
- (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- (5) It is important to note the word 'could'.... At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with ... the Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within ... the Act.
- (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to ... the Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- (9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.
- (10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
- (11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

⁴³ *Igen Ltd (formerly Leeds Careers Guidance) and Others v Wong, Chamberlin and Another v Emokpae and Webster v Brunel University* (2005) IRLR 258. At para. 76. the Court warned that 'the guidance is only that and is not a substitute for the statutory language'. We reproduce the text in a manner that omits references to UK law.

- (12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
- (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Bearing in mind the CJEU’s case law and the wording of the Directives, we set out to discuss the details of civil proceedings in cases of discrimination.

V.2. Discovery of facts: evidence

Just as any civil case, actions alleging discrimination commence with the discovery of facts on the basis of which discrimination can be presumed, and the potential justification defence can be rebutted. Typical evidence in legal proceedings includes witness statements, documents or common knowledge. In all proceedings victims have the duty to provide the evidence they have. In many cases, discrimination is established simply based on respondents’ oral or written statements that can be proven through witnesses or documents.

Evidence can be direct and circumstantial. Direct evidence is capable of establishing facts without requiring the court to draw further inferences, whereas circumstantial evidence is only part of a puzzle that courts must endeavour to complete according to the rules of logic.

There are various tools and methods that can ease the requirement on plaintiffs alleging discrimination to establish their claim, including the use of statistics, situation testing, questionnaires, audio or video recordings and forensic expert opinions and the drawing of inferences from circumstantial evidence.

Situation testing is often used to uncover discriminatory practices such as denial of access to bars, restaurants or employment. It has also been used to uncover different treatment in access to rented apartments and even to a denominational school. It is suited to providing evidence for direct discrimination because it yields direct evidence enabling a comparison.

National rules on evidence in general provide for the possibility to use any evidence, including a response by the alleged discriminator to a written inquiry about their treatment. A detailed response may also provide a plausible explanation to the victim herself and persuade her that she had not suffered discrimination. Prior to starting a legal action, there may be an opportunity or obligation to contact the alleged discriminator and seek clarifications of his or her conduct through a questionnaire procedure. Answers provided to such a questionnaire – or a lack of response – allow courts to draw inferences in relation to discrimination.⁴⁴

In *Igen v Wong* the Court of Appeal of England and Wales laid down that ‘Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent

⁴⁴ In Ireland the Equality Tribunal uses the questionnaire procedure. A person who believes that they may have experienced discrimination is entitled under Section 76 of the Equality Acts to write to the person they believe may have discriminated against them, asking for certain information. A statutory form of questionnaire (Forms EE.2 and ES.1) is available from the Tribunal and can be downloaded from the website. A statutory reply form gives the person who receives the questionnaire an opportunity to set out their version of events. This form is also available (Form EE.3 and ES.2) from the Tribunal and can be downloaded from the website. The Acts state that such inferences as seem appropriate may be drawn from a respondent failing to reply, or supplying false, misleading or inadequate information.

evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice'.⁴⁵

The disclosure of documents held by respondents or the hearing of witnesses familiar with the respondent's conduct is a matter regulated by civil procedure laws across the EU and such provisions should be made full use of when plaintiffs are proceeding to establish a prima facie case. Courts most certainly need to discover the motive behind the failure to disclose. If bias cannot be ruled out, drawing inferences from such failure and reversing the burden of proof may be the only way to ensure that the respondent eventually submits the relevant evidence.

On the other hand, the scope of the request for information must neatly fit its purpose: provision of access to facts that accelerate the building of a prima facie case and as such shed light on the comparators' treatment and whether or not they have a protected ground. If the information requested goes beyond this scope, it is right to deny access. This appeared to be the case in *Kelly*, where a man bringing a claim for sex discrimination requested access to additional personal data of his potential comparators in addition to that already provided by the employer in a redacted manner.⁴⁶ As the CJEU pointed out, *Kelly* was not sufficiently analogous to *Meister*, as in *Kelly* redacted data were provided to the plaintiff.⁴⁷

Practitioners are divided over the usefulness of the questionnaire procedure, but there seems to be an agreement that it is better to have it than not, at least for the purposes of enabling trial courts to draw inferences from no or evasive answers from respondents.⁴⁸

The Non-discrimination Directives mention statistical evidence as a possible means of establishing indirect discrimination. Discussion among academics and practitioners has focused on the size of the samples, the period covered by the statistics and the level of disadvantage shown. In general, national laws do not specify statistics as a type of evidence but permit their use. In practice, prima facie cases of discrimination have been established through the use of statistics particularly in relation to unequal pay based on sex, collective redundancy based on age and segregation based on ethnicity. However, statistics are not always available and it is not a prerequisite of establishing discrimination.

In *Seymour-Smith* the CJEU suggested that the conditions associated with certain employment rights or privileges would constitute a prima facie case of indirect discrimination if available statistics indicated that a considerably smaller percentage of women than men were able to satisfy the condition.⁴⁹

Other types of evidence include audio or video recordings if permitted by law or court practice, a preliminary statement from the parties, the demonstration of a typical tendency, forensic expert opinion, and the drawing of inferences from circumstantial evidence and public statements published or broadcast.

Individuals are often dissuaded from challenging a discriminatory act or practice because they have no access to the evidence that would support their case. National procedural law governs the rules of discovery at this stage. The questionnaire procedure or any other similar measure can facilitate access to information.

⁴⁵ *Igen Ltd (formerly Leeds Careers Guidance) and Others v Wong, Chamberlin and Another v Emokpae and Webster v Brunel University* (2005) IRLR 258, para. 71.

⁴⁶ C-104/10 *Patrick Kelly v National University of Ireland (University College, Dublin)*.

⁴⁷ *Meister*, para. 44.

⁴⁸ Lustgarten, Laurence (1977). 'Problems of Proof in Employment Discrimination Cases'. *Industrial Law Journal* 6, pp. 213-214 and Allen, Dominique (2009). 'Reducing the burden of proving discrimination in Australia', *Sydney L. Rev.* 31, pp. 588-593.

⁴⁹ Case C-167/97 *Seymour-Smith and Perez*.

During the proceedings respondents are in general under a duty to provide the documents requested. Outside of civil cases, some administrative organs and the police can search the premises of respondents in order to recover documents.

V.3. The form of discrimination to be proven

In order to succeed, plaintiffs must bring evidence on all the elements that legally constitute particular harmful conducts. The mode in which the burden of proof is reversed is not uniform, as it depends on these elements. Discrimination occurs in various different forms, all codified in European law. Two types of discrimination, namely covert direct discrimination and segregation, await interpretation at the EU level. For the other forms of discrimination, the constitutive elements are clearly defined and widely interpreted by courts. However, in practice uncertainty remains as to the party by whom and the degree to which the onus of proof should be borne.

Under the post-2000 Directives the burden of proof is reversed in relation to both indirect as well as direct discrimination. Indeed, it appears reasonable to apply the same evidentiary rules to all forms of discrimination and equally reasonable to apply them to more grievous forms, such as harassment and direct discrimination.

In European law direct discrimination is when one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of his or her protected characteristic. The general definition of indirect discrimination is: where an apparently neutral provision, criterion, or practice would put persons having a protected characteristic at a particular disadvantage compared with other persons. Harassment is unwanted conduct related to a protected ground with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Even if the purpose is not to harass, establishing a hostile environment that violates a person's dignity (effect) is sufficient for a finding of harassment.

Harassment is a specific type of direct discrimination, where the less favourable treatment of a person having a protected characteristic is independent from the treatment others not having that protected ground receive. There is therefore no need for a comparator, as the bias is established on the basis of the violation of the dignity suffered by the victim. Segregation is not defined in European law. International law defines it as an independent type of discrimination, while the European Court of Human Rights defines some manifestations of segregation as direct discrimination (class and school level segregation) and others as indirect discrimination (segregation in special schools).⁵⁰ Victimisation and instructions to discriminate are supplementary conducts that lead to or arise from the other types of discrimination. Hence, establishing them is concomitant to establishing harassment, direct or indirect discrimination.

Direct discrimination can be obvious as in *Feryn* or disguised (overt or covert direct discrimination). A typical scenario of covert direct discrimination is when bars or clubs maintain a members-only entrance policy, but membership directly discriminates on the basis of a protected ground.

First on the ground of gender and then under the Employment Equality Directive, the CJEU has identified as direct discrimination cases in which a formally neutral rule (internal or legal) in fact affects one group only. In *Nikoloudi*, the CJEU examined a rule that reserved established staff positions to persons with full time jobs.⁵¹ However, not only were the part-time workers all women, but the staff regulations made it possible only for women to obtain a part-time contract for the particular job category. *Maruko* pertained to German law, which permitted life partnership to

⁵⁰ For a detailed analysis, see Lilla Farkas (March 2014), *Report on Discrimination of Roma Children in Education*, publication forthcoming.

⁵¹ Case C-196/02 *Nikoloudi v Organismos Tilepikinonion Ellados AE*, paras. 31-36.

same sex couples but did not allow marriage. Mr Maruko survived his life partner who had been making payments into an occupational pension fund. He applied for a survivor's pension from the fund but was refused. The CJEU ruled that in relation to survivor's pension paid out of an occupational pension fund life partnership between persons of the same sex was a comparable situation to that of spouses.⁵²

The common feature of covert direct discrimination based on practice and direct discrimination based on exclusive effect emanating from a formal rule is that the groups suffering the less favourable treatment, similarly to their comparator groups, are homogeneous. This also sets these types of conduct apart from indirect discrimination, where both groups are heterogeneous, even though people with a protected characteristic are overrepresented in the one suffering the particular disadvantage. On the other hand, they are underrepresented in the comparator group.

Under the Racial and Employment Equality Directives, the CJEU has ruled on one indirect discrimination case, involving age, while direct and indirect discrimination can be justified according to the same rule.⁵³ The concerns that remain relate to the degree of difference between the effects of a certain criterion or practice on the comparable groups: do all members of the protected group need to be affected or is it enough if a considerably bigger percentage of the protected group is affected, or a lesser but persistent and relatively constant disparity over a long period is shown?

The first claim involving harassment under the Non-discrimination Directives concerned a mother who was the primary care giver of a disabled child. Harassment included: the labelling of the mother as 'lazy' when she asked for time off to care for her son, even though this was granted to parents of non-disabled children; inappropriate and insulting comments made about both her and her child, whereas other employees could take time off to look after their non-disabled children without having to face such comments; and threats of dismissal when she occasionally arrived late for work due to her child's condition, which again were not made to other employees.⁵⁴

The reversal of the burden of proof did not seem to cause difficulties in these cases. However, there are uncertainties in national laws relating to the definition of a degrading environment because it can be subjective or objective, meaning that what is a degrading environment to a certain victim may not appear to be degrading more generally to people without a protected characteristic.

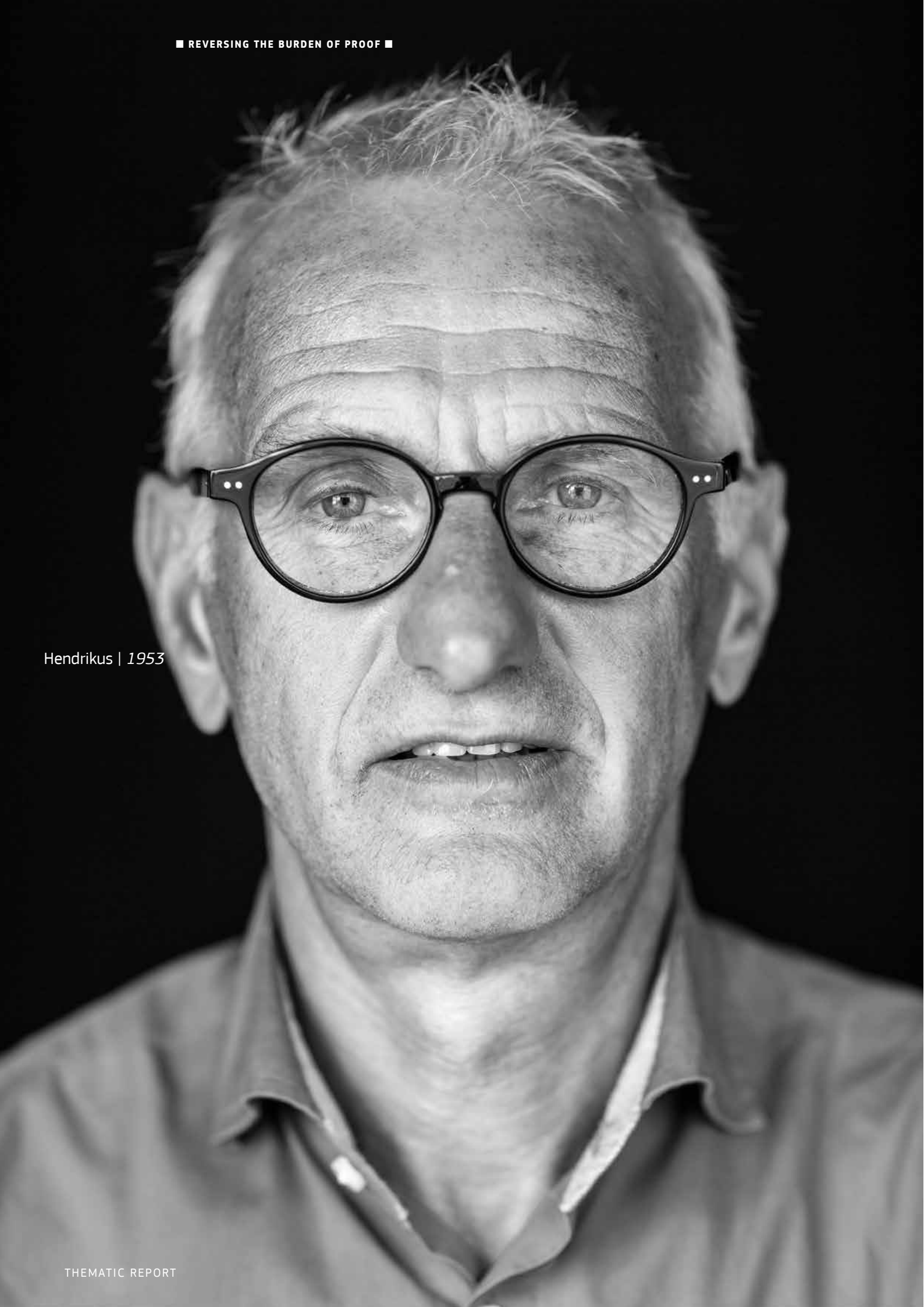
The Non-discrimination Directives define victimisation as any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment. Both Non-discrimination Directives prohibit instructions to discriminate.

The Employment Equality Directive places employers under the duty to 'take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer'. This burden is not disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned. The requirement to make reasonable accommodations for persons with disabilities is often subject to the limitation that it should not create a 'disproportionate burden' for the employer. The Directive provides an indication of three criteria to be taken into account when determining whether a particular accommodation provided is reasonable (Recital 21 of the Preamble). The three-legged test is based on: 1. the financial and other costs entailed; 2. the scale and financial resources of the organisation or company; and 3. the possibility of obtaining public funding or any other assistance. It is not clear in many national legislations whether the failure to provide reasonable accommodation is direct or indirect discrimination.

⁵² Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*.

⁵³ Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH*.

⁵⁴ Case C-303/06 *S. Coleman v Attridge Law and Steve Law*.



Hendrikus | 1953

V.4. Conduct

European law does not specifically define the types of conduct that are prohibited. The wording used suggests that not only actions but also omissions and failures to act or to give due consideration to protected grounds can lead to discrimination. The words used to describe the different types of discrimination are: treatment, provision, criterion or practice that would put persons at disadvantage, unwanted conduct, and adverse consequence.

V.5. Harm

Harm is either less favourable treatment (direct discrimination), particular disadvantage (indirect discrimination) or the violation of the dignity of a person (harassment and segregation). Discrimination may cause material as well as immaterial damage. Generally in cases of harassment and segregation, it is the feeling of inferiority and degradation that constitutes the harm done.

V.6. Protected ground

The grounds of discrimination protected under European law are not defined and they are not ranked in a formal hierarchy or subject to diverse levels of scrutiny.⁵⁵ At the same time, in the fields of nationality and gender courts in the EU may be more receptive on account of the long-standing EU level protection. A similar receptiveness may be one of the reasons for the many referrals based on the ground of age. Notwithstanding the apparent uniformity of approach, Samantha Besson notes a higher level of scrutiny in the CJEU's case law on nationality as well as age when compared to gender.⁵⁶

In contrast, the European Court of Human Rights operates a system of suspect grounds, which include gender, sexual orientation, race and ethnic origin. For instance, it characterises the status of the Roma as being particularly vulnerable. However, falling into one of the suspect grounds – especially gender – does not automatically result in the application of the reversal of the burden of proof or the same level of scrutiny pertaining to States Parties' justification defences.⁵⁷

Gender, race and disability have been shown to be social constructs, which entails that their understanding is complex and dependent on a given social context.⁵⁸ This may well be the case for other grounds as well. For instance, pregnancy-related discrimination could be perceived as giving rise to indirect gender discrimination, had the CJEU not interpreted pregnancy being a condition that not only denotes the female sex, but that is so inextricably linked to being a woman that discrimination based on pregnancy amounts to direct gender-based discrimination. This interpretation was certainly helpful in overcoming the comparator problem in cases of discrimination based on pregnancy, for men can never be pregnant. Ellis and Watson propose that the approach adopted by the CJEU in relation to pregnancy could perhaps be followed in cases of race discrimination where less favourable treatment is based on colour.⁵⁹

⁵⁵ Although some argue that the scope of protection defines a certain hierarchy: see Lisa Waddington, Mark Bell (2001), 'More Equal than Others: Distinguishing European Union Equality Directives', 38 *Common Market Law Review*, Issue 3, pp. 587-611.

⁵⁶ Samantha Besson (2008). 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?', *Human Rights Law Review*, pp. 19-21.

⁵⁷ *Ibid.*, pp. 21-27.

⁵⁸ This is true for age as well, where the ability of workers of all ages is judged on the basis of stereotypes. Sargeant, Malcolm (2012). *Age discrimination in employment*. Gower Publishing Ltd., pp. 6-8.

⁵⁹ Ellis, E. and Watson, P. (2012). *EU Anti-Discrimination Law*. Oxford: Oxford University Press, p. 167.

The lack of clear definitions complicates the identification of comparators. If the protected grounds are complex and socially constructed concepts, their definitions must necessarily be complex as well. Similarly to gender and pregnancy, the complexity of other protected grounds may have consequences with regard to whether courts find direct or indirect discrimination in a case. The issue then becomes: if only one or two aspects of such complex definitions are implicated by an apparently neutral practice, then one may be led to consider the case as indirect, rather than direct discrimination. This may be the case, for instance, in relation to ethnic origin and minority language.

The CJEU has so far examined only one case that has dealt with minority language. In *Runevič-Vardyn* the refusal by the Lithuanian authorities to use the plaintiff's Polish national language of origin in documents of civil status was challenged as a form of indirect discrimination based on ethnic origin. The CJEU held that the recording of names on civil status documents did not fall within the substantive scope of the Racial Equality Directive because it did not constitute a 'service'.⁶⁰

The issue of minority language as a protected characteristic was examined by the European Court of Human Rights (ECtHR) in *Orsus and Others v Croatia*.⁶¹ The ECtHR found discrimination, without specifying its type. The press release issued by the Registrar was entitled 'Segregating Roma children in Croatian primary schools discriminatory'.⁶² In this case, the 14 applicants at times attended separate classes that were made up of Roma pupils alone and where the curriculum was reduced by up to 30%. They were educated in segregated classes for considerable periods of their time in school, allegedly to receive catch-up education in the majority language, some being transferred to these separate classes after a spell in ordinary classes. The applicants claimed direct ethnic origin-based discrimination on account of their placement in segregated classes and the inferior quality of education, while the Croatian Government sought to use the applicant's inadequate command of the Croatian language and the lack of involvement of their parents as justification for their placement in separate classes.

The ECtHR assessed *Orsus* on the basis of its test used in cases of direct discrimination. After establishing that the applicants' protected characteristic was their ethnic origin it set out to examine 'whether there was a difference in treatment'. It found that the applicants 'attended regular primary schools and that the Roma-only classes were situated in the same premises as other classes', while the available statistics suggested that 'it was not a general policy to automatically place Roma pupils in separate classes in both schools at issue'.⁶³ However, 'the measure of placing children in separate classes on the basis of their insufficient command of the Croatian language was applied only in respect of Roma children' (emphasis added).⁶⁴

European law prohibits unequal treatment on the grounds of racial or ethnic origin, religion or belief, disability, age, sexual orientation, sex and nationality. There is no European definition of protected grounds other than sex/gender, which includes not only biological sex but also transgenderism. The CJEU reserves the right to provide a European definition of protected grounds. However, some Member States may define ethnic origin or disability very narrowly or acknowledge a group as a religious instead of an ethnic group. National laws may be divided on transgender people, protecting them under sex or sexual orientation. Some national laws may protect Scientology and certain new age religious convictions, whereas others do not

⁶⁰ Case C-391/09 *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius*, para. 46. The Court noted that the *travaux* to the Directive record that the Council refused to take into account an amendment proposed by the European Parliament whereby 'the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions' would fall within the scope of the Directive. This decision of course reduces the impact of the Race Directive significantly.

⁶¹ *Orsus and Others v Croatia*, Grand Chamber Judgment of 16 March 2010.

⁶² Press release issued by the Registrar, No 217, 16.03.2010.

⁶³ *Orsus and Others*, para. 152.

⁶⁴ *Orsus and Others*, para. 153.

Race and ethnic origin certainly includes belonging to a particular race, skin colour, national or ethnic origin. It also includes Roma, Travellers, etc. Ethnic minorities are identified both by themselves and by others as people with a shared history, culture and traditions, who possibly speak a minority language and adhere to a minority religion. One of the dividing lines between race and ethnic origin is the length of time for which a given minority group has been present in a Member State. Domestic laws focus on the following factors when legislating on ethnic minority rights: a long shared history, cultural tradition, common geographic origin or descent, common language and common religion.

The CJEU ruled that ‘illness in itself’ does not amount to disability, but that in the context of the Employment Equality Directive it must be understood as ‘a limitation resulting notably from physical, mental or psychological afflictions, hindering the participation of the person in question in professional life’.⁶⁵

Age may apply to all ages including youth and old age. Age is a protected ground in relation to employment, which in practice would in principle exclude people under 16, but in general there is no upper age limit.

Religion or belief may apply to different religious or philosophical beliefs, background, outlook or none (from deists to atheists), if the personal views or convictions are coherent and possess a certain degree of importance, force and seriousness. This means that one does not necessarily have to belong to an ‘established’ church to be protected on the ground of religion or belief.

Sexual orientation comprises gay, lesbian, bisexual or heterosexual orientation. According to national law, transgender people may be covered on this ground or the gender/sex ground.

Sex or gender denotes whether a person is a man, a woman or a transsexual person. The CJEU held that discrimination against a transsexual constituted discrimination on the grounds of sex.⁶⁶

Nationality applies to the nationality of EU citizens (nationals of a Member State) in relation to freedom of movement of workers, etc. Nationals of third countries are not protected on the ground of their nationality under the Non-discrimination Directives.⁶⁷ They may be protected, however, on the ground of their race or ethnic origin, disability, age, sexual orientation, religion or belief. They may also rely on protection arising from gender equality provisions.

In certain cases, real life comparators cannot be identified. European law permits the use of hypothetical comparators. In some Member States discrimination can be established with a view to an ideal minimum standard of treatment, for instance conduct required by a respect for human dignity.

Finally, there is another set of considerations relating to identifying the protected ground as well as the comparator. Less favourable treatment may be meted out on the basis not only of a real characteristic – when the ground perceived by a third party and identified by the plaintiff is the same – but also on an assumed or associated ground. Often, people may be assumed by others to belong to a minority ethnic or religious group or be taken to belong to the LGBT community, regardless of their self-identification. In some instances people associated with those having or being assumed to have a protected ground – as friends, spouses, etc. – are also subjected to less favourable treatment. European law provides protection in these cases and the reversal of the burden of proof applies as well.⁶⁸ The issue of multiple discrimination is less straightforward. European law is ground-specific, and thus protects

⁶⁵ Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA*.

⁶⁶ Case C-13/94 *P v S and Cornwall County Council*.

⁶⁷ See Article 3, para. 2 of both the Racial and the Employment Equality Directives.

⁶⁸ The CJEU held that the prohibition of direct discrimination and harassment in the Employment Equality Directive was not limited only to persons who were themselves disabled. This prohibition extended to an employee whose child was disabled and who was the primary care giver to her child. Case C-303/06 *Coleman*.

different grounds to different degrees. It provides different levels of protection even for the best protected grounds of race and sex, which may cause problems for the adjudication of multiple discrimination claims. The Racial Equality Directive's Preamble stresses that multiple discrimination may take place on the combined gender and race or ethnic origin grounds (Preamble, recital 14). Clearly, if the protected ground is assumed, associated or multiple, facts from which this may be presumed must be presented in the proceedings.

V.7. Comparators

Bearing in mind the definitions of discrimination, when examining how the reversal of the burden of proof is applied in practice, the essential delineation must take place between direct and indirect discrimination. Both forms turn on the demonstration of less favourable treatment of a person or group in comparison to another person or group. From the definitions, it may be surmised that while in the case of direct discrimination the person or group in the original pool have the same protected characteristic, the comparator person or group do not have this characteristic. In other words, a person or group homogenous in the sense of having the protected characteristic is compared to another person or group homogeneous in the sense of not having the said protected characteristic. In contrast, in the case of indirect discrimination a heterogeneous group is compared to another heterogeneous group. While in the original pool persons having a protected characteristic are overrepresented, they are underrepresented in the comparator group.

The significance of identifying homogenous groups when making the comparison is borne out by the CJEU's judgments in *Nikoloudi* and *Maruko*. Although this strand of the case law examined a single normative source behind the formation of homogenous groups – internal company rules such as staff regulations and national rules on marriage and civil partnership – one can make the reasonable assumption that in cases where an (apparently neutral) provision, criterion or practice resulted in the less favourable treatment of a homogenous group compared to another homogenous group, the finding would still be direct, rather than indirect, discrimination.

The issue of whether it is direct rather than indirect discrimination if an apparently neutral criterion is – on closer examination – not entirely neutral vis-à-vis the protected ground has not yet been adjudicated by the CJEU. Nor has the CJEU had occasion to deliberate on facts that reveal a difference in treatment between a homogenous group with a protected characteristic and a heterogeneous group where persons having the protected characteristic are grossly underrepresented. Examining the facts of *Orsus and Others v Croatia*⁶⁹ discussed above at 7.6. under the Racial Equality Directive, two counts of direct ethnic origin-based discrimination can be established: segregation at class level on the one hand and the provision of lower quality education on the other. True, not all Romani children were segregated at class level in all the schools under review, but the applicants had been. The criterion on the basis of which they suffered segregation was their minority language, which exclusively applied to them. What may cause difficulties in classifying this case as direct discrimination is that the ethnically homogenous group of Roma in the segregated classes had to be compared to a heterogeneous group where Roma were present, even though grossly underrepresented. However, in relation to segregation it must be noted that even if it arises due to a criterion or practice that is apparently neutral vis-à-vis the protected ground – in this case ethnic origin and/or race – its effect, the physical separation of Romani students from non-Romani students, cannot but be noticed.

Establishing a presumption of indirect discrimination seems less cumbersome. This 'numerical trade-off' is balanced out in two respects. First, plaintiffs in cases of indirect discrimination must show 'particular disadvantage' – as opposed to the less stringent 'less favourable treatment' test. Second, such lenience is also remedied at a later stage, namely during justification. While justifications for direct discrimination – except for the ground of age – are construed narrowly in European law, a wide range of justifications are available for indirect discrimination. Gender

⁶⁹ *Orsus and Others v Croatia*, Grand Chamber Judgment of 16 March 2010.

and race-based direct discrimination appear to be the most difficult to justify, justification being limited to positive action measures and genuine and determining occupation requirements. Still, the initial hurdle of making out a prima facie case of direct discrimination appears to be higher than showing a prima facie case of indirect discrimination.

In the minority of cases the respondent ‘lets it be known’, i.e. essentially confesses to the causal link between the protected ground and the conduct – as in *Feryn and Accept*. Clearly, in such cases no comparator needs to be identified because the respondent admits to the bias. However, the most common way of establishing bias is to show that another person or group that differs from the plaintiff in not possessing his/her protected characteristic is treated more favourably. Difficulties often arise in identifying the comparators and obtaining information about the treatment meted out to them because as a general rule such information is held by the respondent.

The definition of direct discrimination allows for the use of hypothetical comparators. Hypothetical comparators are used if a real life comparator cannot be identified to facilitate the establishment of facts which may give rise to a presumption of discrimination. Constructing a hypothetical comparator is not an easy task, but it must under all circumstances lead to a comparator that factors out the protected ground(s) invoked.⁷⁰ Alternatively, a hypothetical comparator can be construed on the basis of an ideal minimum standard of treatment. For instance, this may be the case if the less favourable treatment is manifested in conduct that constitutes an otherwise unprecedented or gross violation of human dignity. Furthermore, in various Member States the focus of analysis has been on the arbitrary nature of different treatment, rather than on actual comparisons. Indeed, it is suggested that ‘if it is not possible to find a comparator, a plaintiff may be able to compare the treatment suffered against a substantive ideal of human dignity or standard of treatment that is widely acknowledged’.⁷¹

The comparison is an evidentiary exercise to assist in building the causation on the part of the plaintiff up to the level of a prima facie case, i.e. when a presumption can be made.⁷² Once the comparison is made, on the balance of probabilities discrimination shall be presumed to have taken place. When courts run into difficulties in building a comparison, it may very well result from the fact that the form of discrimination under review is not direct or indirect discrimination. As explained above, in the case of harassment, no comparator is needed to show discrimination. Another difficulty may arise when a real comparator does not exist and a hypothetical comparator needs to be construed. Not being able to identify homogenous groups to be compared may also result in uncertainty. Finally, it is imperative to note that once a respondent publicly admits his bias and/or discriminatory intent, finding a comparator becomes pointless because the causation is complete.

V.8. Bias, causation, negligence and intent

At the heart of discrimination lie prejudice, bias and/or stereotypes that pertain to the ground on the basis of which less favourable treatment is meted out. The juridification and subsequent technicalisation of anti-discrimination discourse at the European level may divert attention away from the underlying fundamental issue. As Laurence

⁷⁰ On the details of constructing hypothetical comparators, see Paul Epstein QC and Dee Masters (16 June 2011). *Direct Discrimination: A Practical Guide to Comparators*. London: Cloisters Chambers.

⁷¹ Interights suggests that under the Non-Discrimination Directives such comparison is possible. See *Non-Discrimination in International Law: A Handbook for Practitioners* (2011). Interights, pp. 105-106.

⁷² As Lustgarten notes: ‘discrimination is inherently a matter of comparison’. Lustgarten, Laurence (1977). ‘Problems of Proof in Employment Discrimination Cases’, *Industrial Law Journal* 6, p. 225. We certainly agree with this statement in relation to direct and indirect discrimination. McColgan, on the other hand, calls attention to the fact that by failing to run the comparison exercise properly – partly by disregarding already existing discrimination in the relative position of the groups compared – courts may prevent claims from proceeding to the next stage, including that of justification by the respondent. McColgan, Aileen (2006). ‘Cracking the Comparator Problem: Discrimination, “Equal” Treatment and the Role of Comparisons’, *European Human Rights Law Review* 6, pp. 650-677.

Trinette | 1967

Lustgarten put it almost 20 years ago: 'discrimination is not a response to a given individual's character or behaviour, but rather a repeated and unthinking reaction to any person who possesses a particular trait'.⁷³ What follows from this is that 'discrimination is fundamentally a group wrong: a person is badly treated because he is, involuntarily, a member of a group' disliked by the respondent or by society at large.⁷⁴

From this perspective, the unsaid assumption that indirect discrimination may be less directly linked to bias and therefore more benign than are the other forms of discrimination becomes less convincing. Indeed, the showing of bias or stereotypes is essential in cases of indirect discrimination as well, only here the focus is on the effects rather than the source of such sentiments. Harm may arise on the basis of biased intent but it may equally result from widely held stereotypes that out of negligence are not reflected upon.

The central question of proceedings is therefore how to uncover that such bias is at work, especially if it is not directly manifested in the case at hand. Finding the right comparator is part of the answer because it connects to membership in a group that prejudice or bias targets.

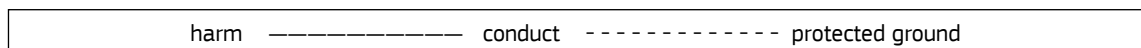
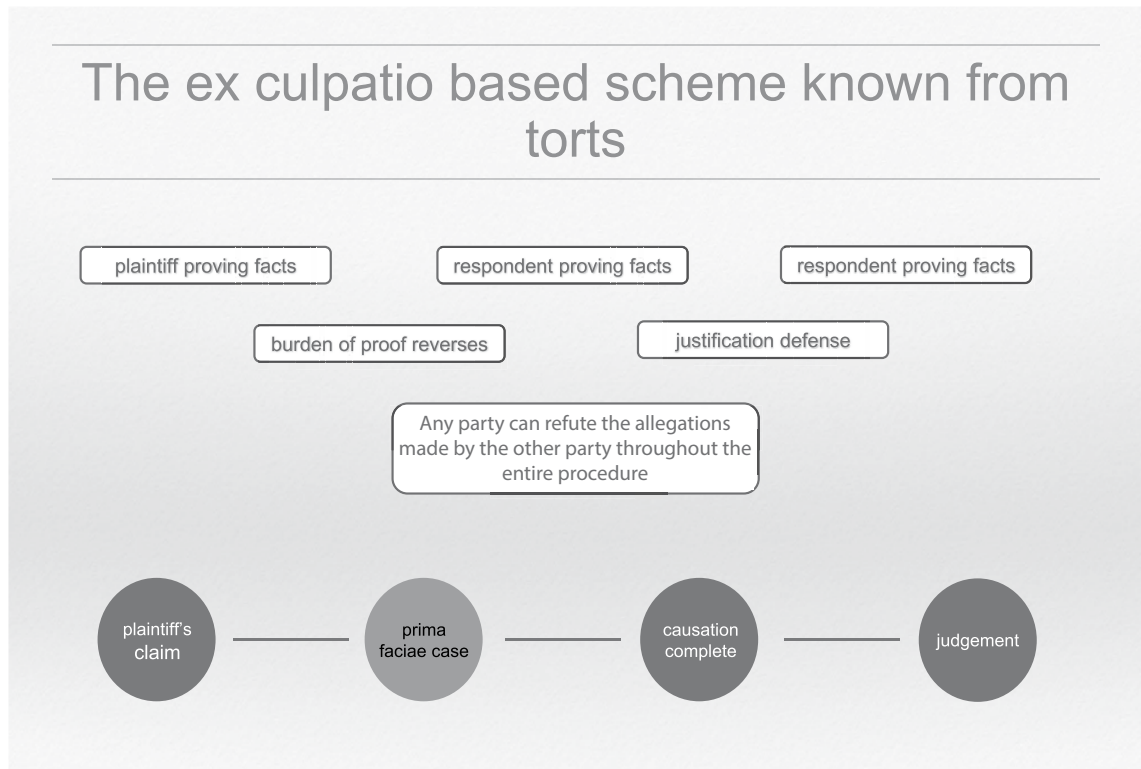
The sanction most commonly imposed in cases of discrimination is compensation. In general, in civil cases where compensation is sought, a causal link must be established between the respondent's conduct and the harm suffered by the plaintiff. If a causal link is established between the conduct and the harm, it falls to the respondent to show that he acted according to his duty of care (*ex culpatio*). This stage is equally present in cases of discrimination. Cases of discrimination are not different from torts in that before judgment is rendered, the causation must be complete. However, in cases of discrimination comparison completes causation.

In actions brought because of discrimination, causation is not a one but a two-tier exercise. Beyond a causal link between the conduct and the harm, another causal link between the protected ground and the conduct must also be established to show the bias, prejudice or stereotypes that led to a particular conduct. In practice, this stage often poses insurmountable hurdles for plaintiffs. Therefore, it is at this point where they are most in need of effective judicial protection.

The relevant provisions of European law are not crystal clear about the burden on parties in establishing causation. Plaintiffs bear the burden of establishing facts that point to a probable causal link between the protected ground and the conduct. Moreover, the burden of proof provision does not alleviate the burden on plaintiffs to establish the causal link between conduct and harm. This link needs to be made out before the likeliness or probability of a causal link between the conduct and the protected ground is shown. The key effect of the reversal of the burden of proof is that it alleviates the burden on plaintiffs to show a clear causal link between the protected ground and the harm. Consequently, the burden of proof shifts even if the causation between the protected ground and the harm is only probable or likely.

⁷³ Lustgarten, Laurence (1977). 'Problems of Proof in Employment Discrimination Cases. *Industrial Law Journal* 6: 216.

⁷⁴ *Ibid.*



Following from the structure of torts, when the bias is examined, respondents may show that they are not liable. What they need to demonstrate is that they acted within the boundaries of their duty of care when dealing with bias, prejudices or stereotypes. They can put forward ‘an innocent explanation that breaks the chain in the causal links’ and thus stops causation from becoming complete.⁷⁵ What may cause further difficulties at this stage is to arrive at a commonly held view on what constitutes a duty of care when it comes to bias – particularly if such views are widely held in a given society and are perhaps left unchallenged or unreflected upon until an action for discrimination is instituted.

The causal link between the protected ground and the conduct may vary as to the degree of severity. In general, in continental European legal systems it is enough to show that a respondent failed to meet his duty of care or that he was negligent in his conduct. However, a breach of the duty of care may also take the form of intent: willing discrimination to occur or realising that it may occur as a consequence of the respondent’s conduct. It would appear reasonable to conclude that negligent conduct may result in a finding of indirect discrimination, whereas intentional conduct may lead to a finding of direct discrimination – or of one of its alternative forms, such as harassment and, arguably, segregation.

Two observations need to be made here. First, as Ellis and Watson recall, under sex discrimination case law emerging through the teleological reading of the Treaty provision regulating equal pay, no intention or subjective motivation needed to be shown because what mattered was that employers’ practices did not have an effect that

⁷⁵ This quote is taken from Declan O’Dempsey’s insightful intervention at the Legal Seminar on the Enforcement of Equality and Anti-discrimination Law held in Brussels on 28 November 2014.

would disadvantage one sex.⁷⁶ Second, it was recognised early on that the intent-based distinction is not that straightforward at all.⁷⁷

In the context of racial discrimination, Ambrus, Busstra and Henrard call attention to a ‘mismatch’ that follows from the focus on the allocation of the burden of proof without paying due respect to the substantive concepts of direct and indirect discrimination.⁷⁸ They note that in the definition of direct discrimination the word ‘treatment’ seems to suggest that courts need to look for an ‘action’, which, however, would not be the right teleological reading of the Racial Equality Directive. Further on, they argue against the simplified understanding of direct race discrimination as resulting from a direct link between the ground of race and the conduct on the one hand and the ground of race and the harm on the other. Such a reading in their view would run the risk of classifying all instances of race discrimination where evidence pertains to the effect and not necessarily to the motive – including those of covert race discrimination – as indirect discrimination. Particularly when the focus is on the failure to accommodate the special needs of an ethnic group – a formula well-known from ECtHR case law on the Roma – the finding could only be indirect discrimination. They propose that the proper design of comparisons can alleviate such difficulties and argue that once a comparison is made between homogenous groups, only direct discrimination can be established.

Judges at the national level may also harbour doubts as to whether or not intent must be shown in order to establish direct discrimination and to the nature of causation in cases of discrimination. This is borne out by the preliminary referrals in *Feryn* and *Accept*, which query whether one public statement of clear bias in recruitment practices is enough to prove that such practice is indeed discriminatory.

Curiously, the most significant debate over the burden on plaintiffs to prove intent took place not in front of the CJEU, but before the European Court of Human Rights in *D.H. and Others*.⁷⁹ In this case the applicants alleged both direct and indirect discrimination in relation to the misdiagnosis of Romani children as mentally disabled and their subsequent segregation in special schools. While the Chamber did not find a violation of the right to equal treatment in education, precisely because the applicants failed to show intent on the side of state officials who examined the children or made decisions on their placement in special schools, on appeal the Grand Chamber reversed the judgment. While applying the reversal of the burden of proof, it found in favour of the applicants, establishing indirect discrimination on the basis of circumstantial evidence.

The two European courts’ practice regarding the allocation of the burden of proof has been portrayed as identical.⁸⁰ It should be borne in mind, however, that the Strasbourg mechanism allows for the justification of discrimination regardless of the ground and the form, i.e. whether it is direct or indirect discrimination.⁸¹ The reason why the point

⁷⁶ Ellis, E. and Watson, P. (2012). *EU Anti-Discrimination Law*. Oxford: Oxford University Press, p. 163.

⁷⁷ ‘Forms of direct sex discrimination are quite conceivable without sex being expressly mentioned in the contract of employment, pay scales or collective agreement as the criterion for the higher or lower pay. The conceptual scheme of that category makes it clear that discrimination does not even have to have been intentional.’ Opinion of Advocate-General Lenz of 14 July 1993 in Case C-127/92 *Enderby*.

⁷⁸ Monika Ambrus, Marjolein Busstra, and Kristin Henrard (2010). ‘Racial Equality Directive and Effective Protection against Discrimination: Mismatches between the Substantive Law and Its Application’, *Erasmus L. Rev.* 3 (2010), pp 165-180.

⁷⁹ *D.H. and Others v the Czech Republic*, Grand Chamber Judgment of 13 November 2007.

⁸⁰ *Handbook on European non-discrimination law* (2010). European Union Agency for Fundamental Rights 2010 and Council of Europe, pp. 125-130.

⁸¹ Based on case law up to 2008, Samantha Besson argues that the ECtHR is not consistent in applying the justification defence on the ground of gender and sexual orientation. Samantha Besson (21 October 2008). ‘Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?’, *Human Rights Law Review*, pp. 24-27. Notably, however, from *Zarb Adami v Malta* (Judgment of 20 June 2006) up to the recent judgment in *Konstantin Markin v Russia* (22 March 2012) the application of key anti-discrimination concepts has become clearer.

Jort | 1994

when the burden of proof reverses is not so evident from the case law may be that the ECtHR reaches its conclusions on the basis of all the evidence before it.⁸²

Plaintiffs in Europe thus do not bear the burden of establishing discriminatory intent in civil proceedings. However, this does not mean that they do not bear some of the burden of establishing causation between the conduct and the harm on the one hand, and the protected ground and the conduct on the other. The relevant provisions of European law are not crystal clear in this respect. What is clear, however, is that plaintiffs do not bear the entire burden of establishing the causal link between the conduct and the protected ground. They must bring forward evidence that makes it seem probable that discrimination occurred. European law provides for the reversal of the burden of proof when victims establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination. From this point on, it is for the respondent to prove that there has been no breach of the principle of equal treatment. If and when the respondent fails in his justification defence, causation will be complete.

More favourable rules can be introduced in national laws. Various Member States transposed the provisions on the reversal of the burden of proof by requiring plaintiffs to prove the existence of harm (disadvantage) and their protected characteristic – be that a real, assumed or associated ground. On the basis of these two elements, national law establishes a presumption of discrimination that can be disproved by respondents. In other words, once a plaintiff succeeds in proving harm and her/his protected characteristic, the causal link between the two is presumed to exist.

In summary, the reversal of the burden of proof is a procedural rule that must be read in conjunction with the definition of the type of discrimination invoked. It connects evidence to the demonstration of bias and derails the course of proceedings at two distinct junctions: (i) it lowers the onus of proof (presumption) resting on the plaintiff in relation to the causal link between the protected ground and the conduct (prima facie case), while (ii) placing and limiting the remaining onus of proof in relation to bias onto the respondent (justification defence).

Striking the right balance between the parties in relation to establishing the bias is a tremendous task that in optimal cases entails awareness of the functioning of societal stereotypes and power relations in the wide variety of scenarios to which European non-discrimination law pertains. Indeed, the very function of the reversal of the burden of proof is to ‘factor in’ such bias to the evidentiary rules for the benefit of those who suffer it.

While in general, ensuring access to evidence held by the respondent once a prima facie case is made appears to be straightforward in cases when the plaintiff is ‘in’ – such as equal pay, promotion and access to vocational training – national courts are awaiting clear guidance from the CJEU on cases in which the plaintiff is ‘out’ – such as recruitment and access to services including housing. This is the essential reason why questions relating to the prima facie case have been referred to the CJEU in the cases of Feryn, Kelly, Meister and Accept.

In Kelly and Meister the CJEU made it clear that the Directives do not entitle plaintiffs to information in order to establish a prima facie case. However, it is not ‘inconceivable’ that a refusal of disclosure by the respondent could have the effect of undermining the useful effect of the law. It is for national courts to ensure that the refusal of disclosure is not liable to compromise the achievement of the objectives of the Directives. Account must be taken of all the circumstances – including refusal of access to information and a job applicant’s adequate qualifications – in order to determine whether there was sufficient evidence for a finding that there was a prima facie case of discrimination.

⁸² Bernadette Rainey, Elisabeth Wicks and Clare Ovey (2014). *The European Convention on Human Rights*. Jacobs, White and Ovey, p. 590.

Should national courts continue to make referrals on points of evidence, the CJEU may in the future have further opportunities to interpret the mismatch between the Directives not granting the plaintiffs access to information on the one hand and the lack of prohibition to access such information on the other. Kelly and Meister have demonstrated that the purpose of the reversal of the burden of proof may be defeated in cases of access to employment, etc. It is to be seen whether the CJEU further interprets the relevant provisions to maintain effective judicial protection against discrimination in a way that would aid plaintiffs' access to information already in the phase leading up to the prima facie case.

Inspiration for such a step may be drawn from *Oxford v Department of Health and Social Security*, where the lack of information was examined in relation to sex discrimination. The Industrial Tribunal declined a submission of no case to answer. Phillips J gave the following reasons for the decision: 'It seems to us that the [decision] was a very proper course to have adopted, and we recommend it as being the course which is in most circumstances the right course to adopt. It further seems to us that, while the burden of proof lies upon the applicant, it would only be in exceptional or frivolous cases that it would be right for the Industrial Tribunal to find at the end of the applicant's case that there was no case to answer and that it was not necessary to hear what the respondent had to say about it' (emphasis added).⁸³ In any case, a woman needs to show that a man was accorded different treatment to have a case to answer. However, the difference does not have to be demonstrated in more detail. Certainly, information as to the sex, age and at least to the proxies of ethnic origin can be obtained from respondents in a way that does not permit the identification of an individual otherwise not party to the proceedings. This may be the first step out of the 'Meister trap'.

Notably, subsequent case law in the United Kingdom moved towards a stricter approach. As Aileen McColgan explains, 'in *Madarassy* the Court of Appeal clarified elements of the approach set out in *Igen v Wong*, stating that the burden of proof should only shift to the respondent when the claimant had provided sufficient material from which a reasonable tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. If the respondent was unable to provide an adequate explanation for the behaviour in question, this only became relevant if a prima facie case is proved by the plaintiff, i.e. the respondent's inability to give a satisfactory explanation for his conduct would only establish liability when sufficient evidence existed to shift the burden. The Court of Appeal also concluded that the same approach to the burden of proof should apply where a hypothetical comparator was used' (emphasis added).⁸⁴ We must bear in mind, however, that at the time of the *Madarassy* judgment plaintiffs in the UK had recourse to a statutory questionnaire procedure.

Significantly, the reversal of the burden of proof does not take away the right from either party to rebut or refute allegations made or evidence brought forward in the case. The course of the justification defence is the same as it would be in any claim for compensation (tort claim), while the limitations of a justification defence are provided either in the statutory definition of discrimination or the provisions pertaining to the permissible exceptions.

The following stages chart can aptly demonstrate the functioning and the dilemmas concerning the reversal of the burden of proof.

⁸³ *Oxford v Department of Health and Social Security* [1977] ICR 885.

⁸⁴ *Madarassy v Nomura International Plc* [2007] EWCA Civ 33, [2007] ICR 867, [2007] IRLR 246, 26. Aileen McColgan (January 2007). *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC* [Country report 2012, United Kingdom]. European Network of Legal Experts in the Non-discrimination Field.

V.9. Prima facie cases: the point of (no) return

A prima facie case is made once facts have been established that call for an explanation and one plausible explanation may be that discrimination has taken place. What constitutes a presumption of discrimination is the million dollar question. In order to answer this question, one needs to look to what facts constitute discrimination.

The two extremes of prima facie cases can be demonstrated through two judgments rendered by the CJEU. In *Enderby*, the court found a prima facie case when it was shown that the pay of speech therapists was significantly lower than that of pharmacists, and that the former were almost exclusively women while the latter were predominantly men.⁸⁵ The finding in *Enderby* was based on showing harm: an almost homogeneous group had a protected characteristic while a majority of a heterogeneous group did not. The comparison between the two groups could be drawn on the basis of statistical evidence. The strength of the statistical evidence substantiated a presumption of a causal link between the protected ground (gender) and the harm (lower pay).

In *Feryn*, on the other hand, an employer's public statements pertaining to his refusal to recruit any employees of a certain racial origin and the fact that he had not hired applicants from that racial origin constituted a prima facie case.⁸⁶ In essence, the finding in *Feryn* was based on the employer's confession of his racist intent and his bias against a certain racial group (Moroccans). Regarding his speech act – the instance when he publicly stated that he would not hire applicants from a certain racial group – the CJEU found that there was no need to identify an individual plaintiff who had actually suffered harm by not being hired, nor was there a need to identify an actual comparator.⁸⁷

Under European law, intent is not a constitutive element of either form of discrimination, and the CJEU seems not to consider it when dealing with cases of discrimination. However, when it comes to causation, deliberations necessarily focus on bias and hence move around intent.

Notably, under European law the burden of proof does not reverse in cases of direct discrimination at the same stage as it does for indirect discrimination. This is due to the wording of the definitions. While in the case of direct discrimination less favourable treatment must occur 'on the grounds of' the protected characteristic, in cases of indirect discrimination the particular disadvantage ought to be suffered by persons simply 'having' a protected characteristic. This compels plaintiffs alleging direct discrimination to produce facts on the basis of which it may be presumed that the conduct leading to the harm they suffered is directly linked to their protected characteristic. In other words, in order to tip the balance of probabilities in their favour they need to make a plausible submission relating to the bias – the respondent's conduct being causally linked with their protected ground. The causal link may be established in three ways: by facts that show that 1. the protected ground is the only reason leading to the conduct; 2. the protected ground is one of many reasons leading to the conduct; or 3. it cannot be ruled out that the protected ground is a reason leading to the conduct. In contrast, no such causal link between the conduct and the protected ground needs to be established in the case of indirect discrimination.

Two basic models are adopted in national laws transposing the reversal of the burden of proof provisions that provide more detailed guidance on prima facie cases. In Ireland prima facie evidence is evidence which in the absence of any credible contradictory evidence by the respondent would lead any reasonable person to conclude that discrimination had occurred. The Labour Court has laid down the extent of the evidential burden on a plaintiff to establish a prima facie case of discrimination. The plaintiff must 'establish facts from which it may be presumed

⁸⁵ Case C-127/92 *Enderby*.

⁸⁶ Case C-54/07 *Feryn*.

⁸⁷ During the proceedings before the CJEU, attention was not paid to the second confession, namely that during the period between the time when the public statement was made and when the legal proceedings were initiated, Mr Feryn had indeed turned down applicants of Moroccan origin.

that the principle of equal treatment has not been applied to them. This indicates that a plaintiff must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination. It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment' (emphasis added).⁸⁸ A 'balance of probabilities' standard means that the court needs to believe that the plaintiff's claim is 'more likely than not' to be true.

There are national laws that regulate when a presumption of discrimination is established in a more lenient manner. The Hungarian Equal Treatment Act basically defines the presumption of discrimination, which is based on the concept that establishing a protected ground and a disadvantage (harm) in itself creates a strong enough suspicion of discrimination for the burden of proof to be shifted. In the Hungarian system the causal link between the protected ground and the harm does not need to be substantiated in any way.

V.10. Justification defence

Justification means that once a prima facie case is made out, European law provides limited opportunities to respondents to prove that their actions or conduct had been legal, despite being less favourable to victims.

Direct discrimination is not always unlawful. It can be lawful when European law permits an exception, but depending on the protected ground, the potential exceptions may be different. Under jurisprudence developed by the CJEU, the general rule is that direct discrimination based on sex can never be justified. In general, ethnic origin-based direct discrimination is the most difficult to justify, while disability and age-based direct discrimination can be more easily justified.

European law permits wide ranging general exceptions to indirect discrimination. Indirect discrimination is lawful if the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The general exception asks why a certain provision, criterion or practice was adopted and what its aim is. It also asks whether the method, model or solution used in the practice is necessary and appropriate, or if the aim could be achieved in any other way. This is for respondents to answer. However, certain justifications are not acceptable:

- Purely budgetary (financial) considerations can never serve as objective justifications.
- The aim of the practice must be unrelated to discrimination and mere generalisations are not sufficient.
- Proportionality requires that the concrete measure taken in order to achieve the legitimate aim should be suitable for achieving that aim.
- Proportionality also requires the respondent to show that another measure with a less detrimental effect or even no disparate effect would not be effective.

⁸⁸ *Mitchell v Southern Health Board* (2001) Labour Court DEE011.

Exceptions to direct discrimination in European law

Type of exception	Ground
Genuine and determining occupational requirements	All grounds
Positive action	All grounds
Employers with an ethos based on religion or belief	Religion or belief
Armed forces and other specific occupations not covered	Disability and age
Family benefits	Sexual orientation
Health and safety	Disability
Exceptions related to age	Age
Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others	Disability, age, sexual orientation, religion or belief

The Non-discrimination Directives specifically provide for positive action as a justification for unequal treatment. Challenges against positive action measures usually come from members of majority groups who feel that they are unlawfully discriminated against as a result of action designed to improve the situation of protected groups. This has been the case in relation to positive action based on sex. Challenges have been made by men to positive action measures designed by some Member States to provide more equal opportunities to women.

The CJEU allows automatic preference on the basis of a protected ground in limited circumstances and only where candidates after individual assessment are deemed to have equivalent merit. The effect of CJEU jurisprudence has been to limit the scope of positive action in cases concerning sex discrimination.

The CJEU has not so far ruled in cases where positive action programmes for other grounds have been applied. It may be that the same approach to the positive action provisions will be taken as under sex equality law, but some have also argued that with regard to race and ethnic origin for instance, the CJEU may take a more lenient approach.

With regard to sex discrimination the CJEU has established several specific possible justifications in the area of employment relations. It has indicated that an employer may justify a requirement only if it demonstrates its importance to the performance of specific tasks. It has indicated that mobility could not be used independently as an indicator or proxy for quality of work. Difference in pay based on different training could be justified by showing its importance for the performance of specific tasks. The CJEU has suggested that pay differentials based on length of service required no particular justifications.⁸⁹ It has allowed another possible justification for differential pay – the need of the employer to raise pay to attract candidates because of the state of the job market.⁹⁰ The CJEU holds that European equal pay provisions override freedom of contract – equal pay is protected even if individual and collective agreements contract for unequal compensation.⁹¹

Many justification defences for discriminatory impact are economic or market-based. However, a distinction must be made between economic excuses for direct discrimination and objectively justifiable economic justifications accompanying good faith efforts at fair practice. For example, the CJEU has not given weight to arguments regarding the higher cost of ensuring equal pay between men and women for governments, national economies, or private enterprises.⁹²

⁸⁹ Case C-109/88 *Danfoss*.

⁹⁰ Case C-127/92 *Enderby*.

⁹¹ Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*.

⁹² Case C-43/75 *Defrenne*.

If the burden of proof has been shifted, a simple, unsubstantiated statement of the respondent's reasons for his conduct is not enough. In Ireland, cogent evidence is required to discharge the burden. In *Campbell Catering Ltd v Aderonke Rasaq* the Irish Labour Court indicated that evidence must be substantial and persuasive in order to successfully rebut the presumption of discrimination. 'While the Court is not bound to apply the law of evidence with the same strictness as would be found in a court of law, it cannot allow hearsay evidence in rebuttal of testimony given on oath'.⁹³

The European Court of Human Rights has held that the right not to be discriminated against on the basis of racial or ethnic origin cannot be waived even by parental consent to education in a special school.⁹⁴

V.11. Rebuttal

Often, plaintiffs need to rebut evidence produced by the respondent during the justification defence in order to succeed with their legal action. They need to ensure that exceptions are formulated narrowly and that the necessity, adequacy and proportionality of criteria and practice in cases of indirect discrimination are strictly examined. By the same token, as in any civil procedure, respondents also have the right to refute facts presented by plaintiffs.

In fact, rebuttal and justification may not be distinguished properly during court proceedings. This appears to be the case in *Feryn and Accept*, for instance. In the former, the CJEU said upon finding a prima facie case of discrimination: 'It is, thus, for that employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia, by showing that the actual recruitment practice of the undertaking does not correspond to those statements'. In fact, such a defence would have amounted to the respondent refuting his own statement in *Accept*.

V.12. Procedural scheme

The stages of establishing direct and indirect discrimination while taking into account the reversal of the burden of proof and the exceptions provided under European law can be summarised as follows.

Stages of procedure: establishing	Definition, burden of proof and exceptions	Direct discrimination	Indirect discrimination
conduct	x	treatment	provision, criterion or practice
harm	x	less favourable	particular disadvantage
person/group suffering it	x	yes	yes
does person/group have protected characteristic?	x	yes, a homogeneous group	a greater part of a heterogeneous group
access to evidence held by respondent			
person/group not suffering it = comparator	x	homogeneous group	a greater part of a heterogeneous group
does comparator have protected characteristic?	x	no	some may, but majority do not

⁹³ Equality Tribunal 2004- EED048.

⁹⁴ *D.H. and Others v the Czech Republic*, Judgment of 13 November 2007.

Stages of procedure: establishing	Definition, burden of proof and exceptions	Direct discrimination	Indirect discrimination
prima facie case: discrimination is presumed	x	depends on national law and practice – under European law causal link between protected ground and conduct must seem probable	yes
reversal of the burden of proof	x	yes	yes
causation complete	x	on the grounds of	
justification defence	x	limited (positive action, genuine and determining occupational requirement, etc.) except for age	broad: provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary
finding: discrimination or not	x		

The scheme above is based on civil procedural rules followed in actions for damages (torts). It may differ if the sanction sought does not include damages, especially in countries where the structure of civil rights claims differ from tort claims.

The golden rule is that unless there is comparison, there is no causation, but there are exceptions to this rule, particularly in cases where comparison is not necessary to establish discrimination. This is the case with pregnancy and harassment. Comparison is obviously not relevant when intent to discriminate can be established, mainly on the basis of respondent’s admission of facts or his/her unequivocal public statement. In these cases, there is in fact no need to reverse the burden of proof, because straightforward intent is at hand. However, as the CJEU pointed out in both *Feryn* and *Accept*, respondents may still seek to prove that they do not in fact discriminate by providing evidence of their practice that runs counter to their statements.

The outstanding issue that awaits resolution by the CJEU or further legislation at the EU level is how to ensure the plaintiff’s access to information necessary to make a comparison adequate for establishing a prima facie case if the respondent is unwilling or – due to confidentiality – unable to provide such information. Future case law needs to analyse not only relevant European data protection provisions and national rules on disclosure, but more importantly, it needs to clarify whether the personal data of individual(s) not party to the proceedings are at all needed to draw a comparison. Should it be established that redacted information is sufficient, data protection concerns may become obsolete.



Esther | 1994

Part VI

Implementation in Member States

There are general and country-specific aspects to the transposition and the implementation of the burden of proof provisions. This chapter sets out to take stock of such trends and patterns.

VI.1. General trends and patterns

Several Member States opted for a single piece of legislation dealing with anti-discrimination (Croatia, the Czech Republic, Finland, the Former Yugoslav Republic of Macedonia, Germany, Lithuania, Netherlands, Poland, Slovakia, Sweden and the UK) and most Member States have transposed the Non-discrimination Directives through civil and labour law – both solutions provide for the reversal of the burden of proof.⁹⁵ A minority have transposed the Directives through criminal law, where liability for discrimination must be established beyond reasonable doubt.

The Racial and Employment Equality Directives have been transposed for more than a decade now in the Member States, and national laws implementing the provisions on the burden of proof are largely compliant with the requirements of the Directives. Transposition is reasonably accurate in most cases. However, there are some gaps and technical defects in transposition of the burden of proof provisions in the case of some Member States.

In Austria the wording of the Federal Treatment Act lowering the burden of proof for the plaintiff is not strictly in conformity with that of the Directives. The Supreme Court, however, has interpreted the law in line with the Directives, by stating that ‘if the establishment of discriminatory infringements is successful, it is for the respondent to prove that he or she did not discriminate.’⁹⁶

In Latvia, judicial interpretation is required regarding the implementation of the Racial Equality Directive in certain fields of application such as social protection.⁹⁷ Therefore, the shift in the burden of proof is not applicable across all of the fields and sectors covered by the Directives but is mainly confined to employment, access of self-employed persons to goods and services, consumer rights protection, education and health.

Amongst the Candidate States and EEA States, there remain some problems in applying the EU burden of proof provisions. In FYROM the Anti-discrimination Act places the burden to a great extent on the plaintiff, as he or she must submit ‘facts and evidence from which the act or action of discrimination can be established’, contrasting with the Directives, which merely require the establishment of the facts. In Iceland the rules on the burden of proof have been incorporated into national law for gender but not for any other discrimination ground. In Liechtenstein, the plaintiff must establish the discrimination claim as ‘credible’, and against allegations of direct discrimination respondents must bring forward a ‘crucial’ reason justifying the difference in treatment. The shift in the burden of proof in Turkey only applies to a limited extent (in labour law on unfair dismissals, and in larger companies only).

VI.2. Application of the burden of proof rules in practice

In many jurisdictions it is difficult to obtain an overview of practice. This is because of a general scarcity of case law in many countries, which appears to be particularly the case for instance in the Czech Republic, Estonia, Finland, and Latvia.

⁹⁵ For details on national legislation see Isabelle Chopin and Catharina Germaine-Sahl (October 2013) *Developing Anti-discrimination Law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, particularly the tables in Annex II, pp. 146-152.

⁹⁶ Supreme Court Decision 90bA177/07f 09/07/2008.

⁹⁷ Isabelle Chopin and Catharina Germaine-Sahl (October 2013). *Developing Anti-discrimination Law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, p. 58.

This study will now look in more detail at the implementation of the burden of proof rule in a sample group of nine Member States in order to examine how it operates in practice. The countries selected are Bulgaria, Cyprus, Denmark, France, Germany, Hungary, Ireland, Spain and Sweden. The countries in question represent a geographic spread and a range of systems with diverse history, structure, scale and institutional mandate. They may also manifest some distinctive features of national legislation and/or case law.

In Bulgaria, the Protection Against Discrimination Act (PADA) requires the burden of proof to be shifted from the plaintiff onto the respondent where the plaintiff has established facts from which a conclusion for discrimination can be made. The relevant provision reads:

In proceedings for protection against discrimination, after the party claiming to be a victim of discrimination proves facts which may lead to a conclusion that discrimination is present, the respondent must prove that the right of equal treatment was not infringed.⁹⁸

This provision is considered to be confusing because of the use of the word ‘conclusion’. It is thought that judges may not fully appreciate that the plaintiff does not need to prove facts that necessarily lead to a conclusion of discrimination, but only facts that make such a conclusion possible. A draft law is now pending in Parliament that will amend the language of the provision in order to clarify that the plaintiff need only establish facts which make it possible to make an inference of discrimination. The draft provision reads:

In proceedings for protection against discrimination, after the party claiming to be a victim of discrimination establishes facts based on which it is possible to infer that discrimination is present, the respondent must prove that the right of equal treatment was not infringed.

The shift in the burden of proof in Bulgaria is applicable to both judicial proceedings and proceedings before the equality body. It is uniformly applicable to all forms of discrimination, including harassment and victimisation.

A remaining problem is that the national law only envisages a shift of the burden of proof in cases brought by a direct victim of discrimination – ‘the party claiming to be a victim of discrimination’ – and seemingly not in cases of representative actions (*actio popularis*) where an NGO seeks to establish discrimination against a group of people with the same protected characteristic. In at least one *actio popularis* court case, the judge explicitly refused to apply the shifting burden of proof, reasoning that it was only intended to benefit victims of discrimination, and not NGOs acting in the public interest. This was on the basis that, according to the judge, such NGOs had greater resources to enforce anti-discrimination law than victims of discrimination.

It is not clear whether the shifting burden of proof applies to cases of disability discrimination where the plaintiff claims that reasonable accommodation has not been provided. A denial of reasonable accommodation is not deemed under Bulgarian law to constitute discrimination. Reasonable accommodation is governed by the Protection Against Discrimination Act (PADA), and the Act stipulates that the shifting burden of proof applies ‘in proceedings for protection against discrimination’. Therefore arguably it should also apply to reasonable accommodation cases. However, only future case law will show how judges will construe this.

In 2012, the Supreme Administrative Court handed down one of the first Bulgarian rulings to properly apply the principle of the shifting burden of proof to a discrimination case. The case concerned sex discrimination against an army employee. The plaintiff claimed that over a number of years she was refused a military rank and ensuing promotion, in contrast to similarly situated male colleagues. The Court confirmed the equality body’s ruling in the case, that this constituted sex discrimination because the respondent authority had failed to prove that there was a

⁹⁸ Protection Against Discrimination Act (PADA) 2003, Art. 9.

Augushine | 1992

legitimate reason for treating the woman less favourably than her comparators. Therefore, the Court concluded, the real reason was her sex. The Court further reasoned that it was immaterial what the woman's supervisors' motives were, as long as her less favourable treatment on grounds of sex was an objective fact – express recognition by the Court of the 'irrelevance of intent' standard.

Notwithstanding the correct application of the rule in the above case, it seems that this case may not represent the general trend in case law. As the law does not specify any criteria to determine what are 'facts from which discrimination can be presumed', this is left to judges to decide in particular cases. It is felt that judges and even equality body members and staff do not fully understand the rule, and that specialised training is needed to remedy this.⁹⁹

In Cyprus, under anti-discrimination legislation the burden of proof is reversed in all judicial proceedings except criminal cases. Procedures before the equality body are excluded, availing of the derogation provided in Article 8(5) of the Racial Equality Directive.¹⁰⁰ However although the equality body has the power to carry out its own investigation, it may in practice decide not to do so for various reasons including notably lack of resources. There have been cases where the equality body did not fulfil its duty to investigate the facts: it did not examine any witness nor did it do its own fact finding, yet although there was a prima facie case of discrimination, the burden of proof was not reversed and the equality body concluded that there was not enough evidence to conclude that the party accused of discrimination was liable. In a number of complaints over recent years, the equality body found that complaints of employment discrimination in public hospitals did not have a sufficient evidence base to lead to a decision against the hospital staff.¹⁰¹ The non-application of the burden of proof rule to cases handled by the equality body is a significant gap in protection, since most discrimination cases in Cyprus are lodged with the equality body and not with the courts.

Another issue under Cypriot law is that the reversal of the burden of proof applies only to discrimination proceedings where the particular laws transposing the Anti-discrimination Directives are relied on. In Cyprus, the most regularly invoked provision is Article 28 of the Constitution, partly because it is very far reaching (covering all grounds and all fields) and partly because it is the provision that most lawyers and judges are familiar with. The courts not only do not reverse the burden of proof when applying Article 28 but according to case law Article 28 of the Constitution provides protection only from arbitrary discrimination and does not preclude 'reasonable discrimination'. As a result, in the vast majority of cases, the courts conclude that the plaintiff has failed to establish his or her case and the claim is dismissed.¹⁰² It would be an improvement if the reversal of proof was obligatory in all proceedings where discrimination is claimed, irrespective of whether the law invoked in the proceedings was the law transposing the Directives or some other law, or indeed the Constitution.

In Denmark, the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market introduced the principle of a shared burden of proof.¹⁰³ This means that if a person who considers him- or herself to be discriminated against is able to establish facts of possible discrimination, then the employer, the shop owner, landlord etc. has to prove that no discrimination has taken place. In Denmark the burden of proof is referred to

⁹⁹ Information from the Bulgarian member of the Legal Network of Experts in the Non-discrimination Field.

¹⁰⁰ According to which reversal of the burden of proof is not required where the body has the power to carry out its own investigations to establish the facts of a case.

¹⁰¹ E.g. Decision of the Anti-discrimination Authority of the Equality Body of 21 September 2012, Ref. AKR 60/2009, AKR 110/2009, AKP 32/2011, where the court found that the applicant failed to prove that there was no difference between the different police ranks so as to render the different retirement ages discriminatory.

¹⁰² E.g. Supreme Court Decision of 30 April 2012 in the case of *George Mattheou v The Republic of Cyprus through the Chief of Police and the Minister of Justice and Public Order*, Ref. 1497/2008.

¹⁰³ The Act on Ethnic Equal Treatment Section 7 and the Act on the Prohibition of Discrimination in the Labour Market etc., Consolidated Act No 1349 2008 Section 7 a.

as shared rather than shifted, but although terminologically different the provision is considered in line with the Directives. To prove discrimination according to the rule on the shared burden of proof in Danish legislation, there must be three main elements established: 1. the existence of facts; 2. the facts create a presumption that differential treatment has taken place; 3. the discriminator cannot prove that discrimination did not take place.

The shared burden of proof applies in cases of direct and indirect discrimination, harassment and instructions to discriminate, but not in cases regarding victimisation.

A judgment from the Supreme Court of 7 December 2011 illustrates the use of a shared burden of proof.¹⁰⁴ The case dealt with a woman of 55 years of age who had applied for a position in the public office of passports and drivers' licences. She was rejected for the position and received a letter from the manager of the public office stating inter alia the following: '... as a manager I'm obliged to respond to the generational change that will come up in the coming years in the current group of ... primarily elderly experienced employees.' The Supreme Court stated that this remark established facts from which it could be assumed that the age of the plaintiff was part of the reasoning for her not being hired. However, the public office could prove to the satisfaction of the Supreme Court that the rejection of the plaintiff was not because of her age, but because she did not possess the requested personal qualifications. The Supreme Court considered that the public office had not violated the Act on Prohibition of Discrimination in the Labour Market.

In many cases that arise both before the civil courts and the Board of Equal Treatment, the reasoning leading to a conclusion that discrimination did not take place is not clear. Was the reason for concluding non-violation that an employee did not establish facts creating a presumption for differential treatment (1 and 2) or was the reason that the employer proved that discrimination did not take place (3)? In individual cases it is often not clear whether the three elements of the shared burden of proof rule have been reviewed by the courts and the Board of Equal Treatment. It is felt that there is need for clarification of the three elements of the shared burden of proof rule.

In France the shift in the burden of proof provisions have been transposed by Article 4 of Law No 2008-496 (2001) and Article 158 of the Law of 17 January 2002 in matters of housing (modifying Article 1 para. 3 of Law 89-462 of 6 July 1989). It operates in two steps. First, the plaintiff must present facts leading to a presumption of direct or indirect discrimination. The judge may order any enquiry he/she considers useful. In the former French law, the plaintiff had a lesser burden and was only required to present facts, i.e. that the plaintiff was covered by the protected ground and the adverse treatment occurred. Plaintiffs at that time were not required to establish a causal link.

If the plaintiff's burden of proof is satisfied, during the second step the respondent must establish that his or her decision was justified by objective factors having nothing to do with discrimination. However, it may be noted that French law does not require the respondent to establish proportionality and necessity as is required under EU law in indirect discrimination cases.

The shift in the burden of proof applies in all non-criminal legal actions covering private and public sector employees, self-employed workers, access to goods and services in the private and public sector, and claims against state services.

For claims relating to the public sector that are brought before the administrative court, the administrative procedure is inquisitorial and is therefore covered by the derogation provided in Article 8(5) of the Racial Equality Directive and Article 10(5) of the Employment Equality Directive. Article R411-1 of the Code of Administrative Justice provides that '[the statement of claim] must set out the facts, grounds and conclusions and order requested from the judge'.

¹⁰⁴ *Weekly Law Journal* U.2012.890 H.

The plaintiff is deemed not to have the burden of proof. However, in a plenary decision of 30 October 2009, the Administrative Supreme Court spelled out indications to lower administrative courts as regards implementation of the burden of proof in discrimination cases:

It is up to the plaintiff to submit to the judge facts that could lead to a presumption of a violation of the principle of non-discrimination, while the respondent must submit all evidence establishing that the impugned decision is based on objective factors that are devoid of discrimination. The decision of the judge ... is based on this adversarial exchange. In case of doubt, the judge must complete these adversarial exchanges by ordering any investigatory measure that he or she deems necessary.¹⁰⁵

The shift in the burden of proof applicable in inquisitorial proceedings is therefore in fact very close to that of the provisions in the Directives.

In Germany Article 22 of the General Law on Equal Treatment (Allgemeines Gleichbehandlungsgesetz, AGG 2006) regulates the burden of proof. According to this provision, the plaintiff has to provide circumstantial evidence that makes it reasonable to assume unequal treatment on one of the grounds covered by the AGG. The respondent then assumes the burden of proving that no violation of the regulations protecting against discrimination has occurred.

There is some debate as to how the clause is to be interpreted. There is general agreement that three elements need to be established, namely 1. the unequal treatment; 2. causality with the characteristic; and 3. the objective reasons or justification that may be given for the unequal treatment.

Generally, it is assumed that the plaintiff has to fully prove the unequal treatment, then has to prove causality between the characteristic and the unequal treatment on the balance of probabilities. If this is achieved, the respondent has to fully prove the existence of objective or justifying reasons for the treatment. Some argue that this interpretation is too narrow and propose that prima facie evidence suffices not only for the causality of the characteristic but for the unequal treatment as well. A more precise formulation of the rules on the burden of proof would be helpful to clarify this question.

In public law proceedings, for instance concerning social benefits and education, all proceedings are inquisitorial, so that the burden of proof rules need not apply. The same applies to civil service cases under Articles 24 AGG and 22 AGG. Here, too, however, the rules are such that a preponderant probability of causality between the characteristic and unequal treatment is enough, whereas the unequal treatment and the existence of objective reasons or justification have to be proved to the full satisfaction of the court.

In Hungary, Article 19 of the Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA) provides for the shift of the burden of proof. The test for the shift of the burden of proof only requires that the allegedly injured party substantiates, rather than proves, his/her claims.

Substantiation involves a lower level of certainty: if the injured party establishes facts from which it may be presumed that a disadvantage was suffered and that the party possesses a protected feature (or that the other party must have assumed so), then the burden of proof is shifted. The provision reads as follows:

- (1) the plaintiff or party entitled to launch an *actio popularis* claim must render it probable that;
 - a) the plaintiff or group has suffered a disadvantage, or – in the case of *actio popularis* claims – there is a direct danger thereof; and
 - b) the plaintiff or group possesses – or is assumed to possess – characteristics listed in Article 8.

¹⁰⁵ Administrative Supreme Court decision No 298348 of 30 October 2009.

- (2) If the case described in paragraph (1) has been substantiated, the respondent must prove that:
- a) the circumstances substantiated by the plaintiff or party entitled to launch an *actio popularis* claim do not prevail; or
 - b) the respondent has observed or was not in the particular circumstances obliged to observe the requirement of equal treatment.

This provision is more advantageous for the victim than the wording of the Directives because in the Hungarian system the causal link between the protected ground and the disadvantage does not need to be established: it is for the respondent to prove that there is no such a link.

On 13 January 2006, the Equal Treatment Advisory Board issued guidelines (revised in March 2008) on the shift of the burden of proof, setting out in clear terms that it is not the plaintiff's obligation to prove that there was a causal link between the protected ground and the disadvantage: the burden of establishing that there was no such causal link falls on the alleged discriminator.

The shift is applicable on all grounds of discrimination, in all fields and in all types of procedures, except for criminal and petty offence proceedings. In cases involving ethnic origin, including assumed ethnic origin, Article 19 of the ETA addresses data protection concerns.

After certain misinterpretations and difficulties in the beginning, judicial practice seemed to accept the shifted burden of proof – judgments of higher courts provided positive examples of applying the difficult concept. However, as late as 2010 (i.e. five years after the coming into force of the ETA), there was a Supreme Court decision that gave rise to concerns as to the consistency of its application.

In the case, which concerned gender, the plaintiff worked on the basis of an indefinite term contract as a financial director for the respondent company until 2004, when she went on maternity leave.¹⁰⁶ In 2007 she wished to return, but her former position had been terminated by that time, and her former tasks were performed by a person employed for an indefinite term. The employer offered a lower level position to the plaintiff for a salary 15% less than the previous one. The plaintiff turned to the Equal Treatment Authority claiming that she had been discriminated against on the basis of her maternity. In its decision of 7 August 2008, the Authority established discrimination based on maternity and the ground 'other characteristic'. The employer requested judicial review by the Metropolitan Court, but the court upheld the Authority's decision on the basis that the new position offered by the employer was significantly different from the previous position which had been filled by a person employed for an indefinite term. The employer applied to the Supreme Court for review of the Metropolitan Court's decision.

In its decision dated 6 October 2010, the Supreme Court quashed the decision of the Authority and the Metropolitan Court on the basis that the Authority had failed to identify and set out in its decision the evidence proving that there was a causal link between the plaintiff's maternity and the disadvantage she had suffered.¹⁰⁷ Referring to Article 4 of Directive 97/80/EC, the Supreme Court claimed that plaintiffs are obliged to present evidence that make it at least likely that they have suffered a disadvantage because they belong to a certain group. Since the plaintiff in this case did not come up with such evidence and the Authority did not look into the issue, its decision was declared null and void, and the complaint rejected as unsubstantiated.

The Supreme Court's decision disregarded the fact that the Hungarian regulation on the shifting of the burden of proof differs from that of the Directives in a way that is more advantageous for the plaintiffs. As outlined above, the plaintiff only needs to substantiate the disadvantage and the protected ground. If that is done, a causal link between

¹⁰⁶ Decision No Kfv.II.37.053/2010/8 of the Supreme Court.

¹⁰⁷ Decision No Kfv.II.37.053/2010/8 of the Supreme Court.

the two is to be presumed, and it is up to the respondent to prove the lack of link. When the Authority did not require the plaintiff to provide evidence for the link, it proceeded in full accordance with the ETA.

It is a matter of concern that the Supreme Court based its decision on the Burden of Proof Directive instead of the Hungarian laws which provide a higher level of protection to plaintiffs. Its interpretation also seems to run counter to what the CJEU said in a recent decision, where it accepted that Member States can determine what procedural rules apply in discrimination cases, as long as they comply with the ‘principle of equivalence’, the ‘principle of effectiveness’ and the ‘principle of non-regression’.¹⁰⁸

In Ireland, the rules on the burden proof have been enshrined in section 85A(1) of the Employment Equality Acts, and extended to the Equal Status Acts through the inclusion of a similar provision in section 38A(1). The section provides that:

where, in any proceedings, facts are established by or on behalf of a complainant from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the respondent to prove the contrary.

The burden of proof shift applies to all proceedings including those arising from discrimination cases referred by the Equality Authority, and includes harassment and victimisation, but excludes proceedings relating to a criminal offence.

The statutory text and the Irish case law which has developed in this area both make it clear that the application of the test requires the assessment of a number of distinct elements in discrimination cases. In order to succeed, the plaintiff must be able to bring forward evidence establishing a link between the adverse treatment which he or she has suffered and the discriminatory ground being invoked. If the plaintiff succeeds in doing so, the burden of proof passes to the respondent to show that the treatment in question was not discriminatory. In determining whether the plaintiff has established a prima facie case of discrimination, the Equality Tribunal has commonly employed a three-stage test:

- First, the plaintiff must establish that he or she is covered by the relevant discriminatory ground.
- Second, he or she must establish that the specific treatment alleged has actually occurred.
- Third, it must be shown that the treatment was less favourable than the treatment which was or would have been afforded to another person in similar circumstances not covered by the relevant discriminatory ground.

While satisfying the first two stages of the test tends not to be problematic, this is not enough in itself to shift the burden of proof. It is generally the third stage which poses most difficulty for plaintiffs by requiring them to make the connection between the adverse treatment they complain of and the discriminatory ground which they invoke.

In *Mitchell v Southern Health Board*,¹⁰⁹ the Labour Court pointed out that the plaintiff must not only establish the primary facts upon which he or she relies but must also satisfy the Court that they are of sufficient significance to raise an inference of discrimination. The Labour Court also noted that the ‘type or range of facts which may be relied upon by a complainant can vary significantly from case to case’. Where the primary facts alleged are proved, it remains for the Labour Court or Equality Tribunal to ‘decide if the inference or presumption contended for can properly be drawn from those facts’. This entails a consideration of the range of conclusions which may appropriately be drawn to explain a particular fact or a set of facts which are proved in evidence. At the initial stage the plaintiff is merely seeking to establish a prima facie case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the proved

¹⁰⁸ Case C-246/09 *Bulicke* [2010] E.C.R. I-7003.

¹⁰⁹ *Mitchell v Southern Health Board* [2001] ELR 201.

Max | 2013



facts. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts. The Labour Court referred to the English *Madarassy* decision,¹¹⁰ noting that there was nothing to prevent the Court or Tribunal at the stage of considering whether there was a *prima facie* case from hearing, accepting or drawing inferences from the evidence adduced by the respondent which sought to dispute or rebut the plaintiff's evidence of discrimination.

The English *Madarassy* case and Irish case law following its approach show that while the distinct stages of the burden of proof shift are well recognised in theory, in practice decision-makers frequently consider both elements together. This effectively places the burden on the applicant to prove the case in total rather than simply *prima facie*. It has been acknowledged that it would be preferable for the different stages in the analysis to be individually identified and analysed.¹¹¹ However, it sometimes also happens that the plaintiff's case in the Equality Tribunal is strengthened by facts coming to light in the respondent's evidence.

Finally, whereas the situation may be considered satisfactory in the Equality Tribunal, in the cases which come to the civil courts it is clear that there is a need for a great deal more awareness of the burden of proof rule notably amongst judges. In a High Court case on Traveller discrimination in schools admissions, not only was the burden of proof rule ignored entirely as a concept but the judge displayed a basic lack of understanding of the difference between direct and indirect discrimination and the strictly delineated limits to objective justification in EU law.¹¹²

In Spain, Law 62/2003 which transposes the Directives introduces a shift of the burden of proof into the Spanish legal system, although this was already present in the employment litigation procedure for discrimination based on sex and for infringement of the freedom to join a union. For civil, administrative and labour litigation procedures, the law provides that if well-founded evidence of discrimination on the grounds of racial or ethnic origin and religion or belief, disability, age or sexual orientation (in employment) may be inferred from the allegations of the plaintiff, it is for the respondent to bring forward a reasonable and objective justification, sufficiently proven, of the measures adopted and their proportionality.

Article 36 of Law 62/2003, which deals with discrimination in employment on all grounds of the Directives, provides that:

In those civil and administrative proceedings in which from the facts alleged by the plaintiff one may conclude the existence of well-founded evidence of discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation with respect to matters falling within the scope of this section, it shall be for the respondent to give an objective and reasonable and sufficiently proven justification of the measures adopted and their proportionality.

The text of Article 32 is similar, but pertains only to the grounds of racial or ethnic origin in fields other than employment.

The Law on the Employment Litigation Procedure (Article 96) also established a shift of the burden of proof, and after the reform introduced by Law 62/2003 (Article 40), it now mentions not only discrimination on the ground of sex but also on all the grounds of the Directives. Article 96 states:

In those proceedings in which the existence of well-founded indications of discrimination for reason of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation may be inferred from allegations on the

¹¹⁰ *Madarassy v Nomura International Plc* [2007] IRLR 246.

¹¹¹ Fennelly, D. (2012). *Selected issues in Irish Equality Case Law 2008 – 2011*. Dublin: Equality Authority, p 41.

¹¹² *Stokes v Christian Brothers High School Clonmel*, High Court 3.2.12, unreported.

part of the plaintiff, it shall rest with the respondent to provide sufficient proof of the objective and reasonable justification of the measures taken and of their proportional nature.

Article 77 of the General Law on the Rights of Persons with Disabilities and Social Inclusion (RDL 1/2013) establishes a shift of the burden of proof when there is evidence of discrimination based on disability.

The Constitutional Court has established case law on the burden of proof. In order for a shift in the burden of proof to occur, it is necessary that the plaintiff to prove:

the existence of an indication that generates a reasonable suspicion, appearance or presumption in favour of such an affirmation; it is necessary on the part of the plaintiff to produce 'realistic proof'.¹¹³

In another judgment, the Court indicated the

...requirement for a principle of burden of proof revealing the existence of a general discriminatory situation or of facts that lead to a strong suspicion of discrimination....¹¹⁴

In a judgment of 2008, the High Court of Justice of Galicia supported the reversal of the burden of proof as there were signs justifying a 'reasonable suspicion' that fundamental rights had been infringed, such as the employee's right not to be discriminated against for reasons of sexual orientation (as she had married another woman) and ideological freedom (as the employee had worked for a left-wing party that is often highly critical of some of the views taken by the Catholic Church).¹¹⁵

In Sweden, a shift of the burden of proof is required in Chapter 6, Article 3 of the Discrimination Act. 'If a person... demonstrates reason to presume that he or she has been discriminated against... the respondent is required to show that discrimination or reprisals have not occurred.'

The victim of discrimination must be able to present facts that make it possible to presume that discrimination has occurred (a similar situation and disfavourable treatment). Thereafter the burden of proof is shifted to the other party, who must show that one of the requirements is not fulfilled or that the disfavourable treatment was not associated with the ground in question. No intent to discriminate is required.

Very few cases on alleged discrimination have been won. In most cases this is due to the plaintiff's failure to prove a prima facie case of discrimination in the Labour Court, whereas it seems to be less difficult to prove a prima facie case in the ordinary court system. A preliminary study for the Ministry of Integration and Equality on judgments in discrimination cases between 1999 and 2009 showed that the success rate for discrimination cases in the civil courts is 70.8%, but in the Labour Court only 19.5%. For race and ethnicity discrimination cases in the Labour Court the success rate drops to 4.3%.¹¹⁶

A difference in the approach of the civil courts and that of the Labour Court to applying the burden of proof has been identified as a possible reason for the difference in outcomes.¹¹⁷ The Supreme Court interprets a less favourable treatment in a similar situation as the fact that makes the presumption apply. Thus a lower level of proof may

¹¹³ *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 22 October 2001, 207/2001.

¹¹⁴ *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 18 December 2000, 308/2000.

¹¹⁵ High Court of Justice of Galicia, Decision 3041/2008.

¹¹⁶ Sandesjö (2010). *Domar i diskrimineringsmål 1999-2009*. Jurcom AB, p.11.

¹¹⁷ Fransson and Stüber. *The Discrimination Act Commented*. Chapter 6, Section 3. Compare Sandesjö 2010, p. 14. The success rate in cases where the rule on the burden of proof has been decisive in the general court system is 90% against 19% in the Labour Court.

apply once the plaintiff presents a similar situation and less favourable treatment. The Labour Court applies the presumption more narrowly, as there the plaintiff must always prove the similar situation and the less favourable treatment according to normal standards of proof. The presumption applies only to the causal link between these two facts and the discrimination ground.

The Labour Court seems to apply the rules on shared burden of proof restrictively, especially with regard to ethnicity. The difference between the civil courts and the Labour Court is to be analysed in a forthcoming government white paper and this investigation may produce a proposal for modifying the legal rule.¹¹⁸

It is clear from the above overview of the situation in the selected group of Member States that there is a considerable variation in how the issue of the burden of proof is handled amongst the different jurisdictions. Some general problems arise in the implementation of the burden of proof rule not just in the selected Member States but in the States as a whole.¹¹⁹

¹¹⁸ Committee Directive 2014 no. 10, p. 6.

¹¹⁹ Based on information received from the European Network of Legal Experts in the Non-discrimination Field.

Helene | 1994

Part VII

Practical concerns relating to the burden of proof rules

The country experts have identified concerns relating to the application of the burden of proof provisions that appear to be general and present across various Member States. Concerns relate to the access to information and the proper application of the burden of proof during the various stages of the proceedings.

VII.1. Right to information

Gathering evidence may be difficult for the plaintiff. Various methods may be used, including presenting statistical evidence where available, or using situation testing where this is allowed. Other methods have also been tried, including making voice recordings of an employment interview for instance. However, in many jurisdictions surreptitious voice recording or taking pictures/filming is not allowed, and may even be a punishable offence.

VII.2. Establishing a comparator

In most cases the law in Member States and other countries reviewed requires that a similar situation and less favourable treatment be established in order to establish a *prima facie* case. This is especially important in cases of direct discrimination. When it is not possible to identify an actual individual in relevant circumstances, courts use hypothetical comparators. There are common aspects to demonstrating less favourable treatment:

- a requirement for a comparison with another person in a similar situation but with different characteristics (e.g. ethnic origin, religion, sexual orientation);
- the possibility to use a comparator from the past (e.g. a previous employee) or a hypothetical comparator.

These aspects can be generally found in legislation in Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, the FYR of Macedonia, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Portugal, Slovakia, Slovenia, Sweden and the United Kingdom.

However, in some states the legal situation may not be fully satisfactory. In France, hypothetical comparison is not explicitly covered by national legislation, which may cast doubt on the compliance of national legislation with the Directives.¹²⁰ In Ireland, there is no provision for a hypothetical comparator in equal pay cases. In Poland, the definition of direct discrimination given in the Labour Code is erroneous with regard to the comparator. In Spain the law only refers to 'a comparable situation', without determining whether past and hypothetical comparators are covered.

VII.3. The prima facie case

In many of the countries studied, the problem is not so much with how the European provisions on the burden of proof have been transposed in law, as with the lack of appropriate or consistent implementation in the court proceedings. The widespread view is that there is imperfect understanding of how the rule applies in relation to establishing prima facie cases. This appears to be the case amongst judges, the legal profession and in some cases even equality body members and staff.

¹²⁰ French law refers to direct discrimination where a person is treated less favourably than another is, has been or will be treated, rather than 'would be' as required by the Directives. However, the French Supreme Court has held that 'the existence of discrimination does not necessarily imply a comparison with other workers' (Cour de cassation, Soc. 10 November 2009, No 07-42849, Bulletin).

A variety of formulas for establishing a prima facie case are found in discrimination laws in the different states. According to the various legislative provisions, the plaintiff will be required to:

- establish or substantiate facts – Austria, Bulgaria, Denmark, Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Portugal
- introduce facts from which discrimination can be inferred – Cyprus
- indicate facts – Poland
- state facts – Czech Republic, Estonia, Finland
- present facts – Romania
- communicate facts – Slovakia¹²¹
- show that there is reason to believe that discrimination has occurred – Norway
- allege facts – Spain
- demonstrate reasons to presume – Sweden
- if there are facts – UK

After the stage of introducing the facts, further variety occurs in the next steps. In the Hungarian legislation, once the plaintiff has presented facts showing he/she is covered (or assumed to be) by the protected ground, and that disadvantage occurred, the causal link between the two does not need to be proved in order for the burden to be passed to the respondent. The former French legislation was similar, but the current legislation requires a causal link to be established. In Germany and Poland the facts showing the protected characteristic need to be proved to the satisfaction of the court, following which the unequal treatment need to be fully proved. In most states, a causal link has to be proved on the balance of probabilities before the burden of proof shifts to the respondents.

In Germany, Poland and Portugal, where the protected characteristic or ground of discrimination at issue has also to be proved, this has been identified as a potential obstacle which can be unduly difficult for the plaintiff to overcome, especially when the cause of the discrimination is not obvious, for instance when it does not neatly fit under gender, age, disability, race or ethnic origin.¹²²

What seems clear in relation to prima facie cases is that if the standard for establishing the prima facie case is too high in relation to any of its elements, the purpose of the Directives in alleviating the burden on the plaintiff will be defeated.

In Greece, although transposed into anti-discrimination legislation, the burden of proof provisions have not been incorporated into the Code of Civil Procedure and the Code of Administrative Procedure. They are not applied in practice due to lack of awareness.

¹²¹ But in practice the Slovak Constitutional Court has adopted a much more restrictive attitude, according to which the plaintiff 'must ... bear the burden of proof concerning the facts' and 'must allege, and at the same time submit evidence from which it can be reasonably concluded that the principle of equal treatment has been breached.' Constitutional Court No IV. ÚS 16/09 of 30 April 2009, available at: www.concourt.sk/rozhod.do?urlpage=dokument&id_spisu=300198 (last accessed 22 March 2014).

¹²² Gonera, K. (2011). *Rozkład ciężaru dowodu w sprawach o dyskryminację w zatrudnieniu w świetle orzecznictwa Sądu Najwyższego*, [Shift of the burden of proof in discrimination cases in the light of the Supreme Court jurisprudence]. Also Coelho Moreira, T. (2013). *Igualdade e Não Discriminação – Estudos de direito do trabalho* [Equality and Non-discrimination – Studies on labour law] p 118.

VII.4. Potentially different standards according to the protected ground

There are some indications that in practice the shift may operate differently according to the nature of the case and in particular the ground of discrimination that is being invoked. For instance, it may be that the requirement of a prima facie case of discrimination is more readily satisfied in the case of gender discrimination, at least in circumstances where a pregnant employee is dismissed or otherwise unfavourably treated in the context of her employment. This appears to be the case in Ireland, where the relatively high success rates of complaints of discrimination relating to pregnancy has been noted.¹²³ It may be due to the clarity with which the CJEU has proclaimed pregnancy as a ground of direct discrimination as well as the specific characteristics of pregnancy discrimination, which often permit a link to be drawn between the ground of discrimination and the less favourable treatment with relative ease. Whether it is true to say that the burden is more readily shifted in gender cases in general is more open to question.

However, at least in Denmark and Sweden, fewer cases succeed on the race and ethnic origin ground. Further studies are needed to clarify whether this is due to a higher threshold for establishing the facts in racial and ethnic discrimination cases than in cases of other protected grounds or the higher threshold used by the particular forum – the Labour Court in Sweden and the Board of Equal Treatment in Denmark – where the majority of such cases commence. In Denmark, only four out of 26 complaints on grounds of race succeeded in 2013.¹²⁴ A study carried out for the Swedish Ministry of Integration and Equality on judgments in discrimination cases found that the success rate for ethnic discrimination cases is only 4.3%.¹²⁵ In Sweden the Labour Court appears to interpret the rules on the shared burden of proof more restrictively than civil courts. However, there is a difference between the success rate of cases relating to gender and ethnic origin-based discrimination.¹²⁶

VII.5. Justification and rebuttal

The Directives do not provide concrete standards of proof by which the respondent can successfully rebut the presumption of discrimination. They use a general formula, according to which ‘it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’ While the CJEU has clarified the standards of justification in gender cases, and made inroads into shaping the justification of age discrimination, it has not had the opportunity to deal with the other grounds to the same degree of detail. Moreover, the purpose of European legislation varies across the protected grounds, which may also play a role in shaping justification defences.

According to the diverse legislative formulations used by the different Member States, in order to rebut the presumption the respondent will be required to:

- prove that no breach has occurred – Austria, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Greece, Ireland, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey
- demonstrate that the prohibition has not been violated – Finland
- establish that his/her decision was justified by objective factors which have nothing to do with discrimination – France
- prove the existence of objective or justifying reasons for the treatment – Germany
- prove that the circumstances substantiated do not prevail, or that the respondent has observed, or was not obliged to observe, the requirement of equal treatment – Hungary

¹²³ Banks and Russell (2011). *Pregnancy Discrimination in the Workplace: Legal Framework and Review of Legal Decisions 1999 to 2008*. HSE Crisis Pregnancy Programme / Equality Authority, p 28, and Fennelly, D. (2012). *Selected issues in Irish Equality Case Law 2008 – 2011*. Dublin: Equality Authority, p 41.

¹²⁴ Information supplied by the Danish member of the European Network of Legal Experts in the Non-discrimination Field.

¹²⁵ Sandesjö, H. (2010). *Domar i diskriminieringsmål 1999 –2009*. Jurcom AB, p.11.

¹²⁶ *Ibid.*, p.7.

- prove no breach or that treatment was justified or action was based on acceptable grounds related to the nature of the work or to previous work performance and experience – Malta
- substantiate that discrimination did not in fact occur – Norway
- bring forward an objective and reasonable justification of the measures taken and of their proportionate nature – Spain
- show that discrimination or reprisals have not occurred – Sweden
- show that the legislative provision in question was not contravened – UK

In Slovakia the Constitutional Court found in a case that there was no discrimination because ‘the respondent proved that it is more likely that the discrimination has not taken place than it is likely that the discrimination has taken place’¹²⁷ and so successfully rebutted the presumption of discrimination. The Slovak court seems to imply that once the burden of proof is shifted, in order to rebut the presumption the respondent is not obliged to prove that there has been no breach of the principle of equal treatment but rather that it is sufficient to provide evidence establishing some probability of non-discrimination, provided that the probability of non-discrimination is higher than the probability of discrimination. Such an interpretation seems to be in breach of European law.¹²⁸

The applicable standard of proof for rebuttal is not known for all states but seems to be too lenient in a few, such as Austria, Liechtenstein, Norway and Slovakia

In Germany it is generally accepted that the respondent must fully prove the rebuttal. In Spain the standard of proof for rebuttal is such that the respondent must present ‘a reasonable and objective justification, sufficiently proven, of the measures adopted and their proportionality.’ This is close to the test for justified indirect discrimination under the Racial and Employment Equality Directives, with the exception of the additional concept of necessity. The French rebuttal standard is similar but less detailed (‘justified by objective factors which have nothing to do with discrimination’).

In other States the requirements and standard of proof for rebuttal seems to comply with the justification defence envisaged for direct and indirect discrimination in the Racial and Employment Equality Directives (‘objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’).

It is clear, however, that whatever the test adopted with regard to standards of proof, some additional common issues arise which may affect the prospects for a successful outcome in a discrimination claim.

VII.6. Different outcomes according to the legal forum used

As a general rule when complaints are made to specialised national equality tribunals the outcome tends to be better for the plaintiff. It could be expected that the existence of the reversed burden of proof is better understood and more satisfactorily applied in these specialised fora than in ordinary civil or labour courts. In Poland however, most discrimination claims are not taken under the Equal Treatment Act because that act limits possible compensation to material damage only. If immaterial damages are sought, the case must be taken under general civil procedural rules, with no shift of the burden of proof.

¹²⁷ Decision No II. ÚS 383/2013-16 of 10 July 2013. The decision is available at <http://portal.concourt.sk/pages/viewpage.action?pageId=1277961>.

¹²⁸ As pointed out in Milieu Ltd (2011). *Comparative study on access to justice in gender equality and anti-discrimination law*, p 23.

In some states, the shift in the burden of proof is not applied to the equality bodies because their proceedings are inquisitorial, thus they are not obliged to apply the reversal of the burden of proof provisions. This may impact on the outcomes of their proceedings. In Cyprus, for instance, the equality body is specifically excluded, the burden of proof is not reversed in cases handled by it, and a significant number of cases fail for lack of evidence. Some states avail themselves of the derogation for inquisitorial proceedings as regards equality bodies, but apply in practice an analogous shift in the burden of proof to the procedures of such bodies. Most states also avail themselves of the derogation available in the EU Non-discrimination Directives for administrative proceedings.

VII.7. Different outcomes according to whether the litigant is an individual or an NGO

NGOs with a legitimate interest may engage in proceedings provided for the enforcement of obligations under the Directives.¹²⁹ It seems logical that this should imply that the burden of proof shift should also apply in the case of proceedings taken by NGOs, where they are representing a plaintiff. However, in Bulgaria the legislation only applies the shift in cases brought by a direct victim of discrimination, and in at least one case the judge refused to apply the reversal of the burden of proof because the case was brought by an NGO.

¹²⁹ Directive 2000/43 (Race) Art.7; Directive 2000/78 (Employment) Art 9; Directive 2006/54 (Gender Recast) Art.17.



Evi | 2013

Part VIII

Possible improvements to the implementation of the burden of proof provisions

The country experts of the European Network of Legal Experts in the Non-discrimination Field covering the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation were asked whether the burden of proof rule could be improved in its implementation or operation in their state so as to produce better outcomes. A variety of views were expressed and experts called for training of practitioners, as well as more guidance and a compendium of good practices. More in depth research into the differences in outcomes across the protected grounds would also be useful. Various experts expressed concern relating to the access of plaintiffs to information held by respondents, particularly in cases where such information may be confidential. Recommendations envisaged guidance and possibly the adoption of additional legal provisions governing such issues. Last, recommendations were made in relation to guidelines and good practice notes to promote the use of various types of evidence, such as statistical evidence and situation testing.

In Austria the view was that the burden of proof rule is not a suitable entry point for improvement. The system of proof and the evaluation of evidence in civil procedure is very flexible and not very formalised in Austria. Some important decisions by the highest courts have clarified how the burden of proof rule should operate so that is not seen as very problematic. By contrast, the issue of sanctions and compensation are seen as more crucial.

In Belgium it is felt that despite the fact that the Centre for Equal Opportunities and Opposition to Racism initiated and won the famous *Feryn*¹³⁰ case, there are still shortcomings in the way judges are implementing the shift of the burden of proof. In its decisions issued in 2009 on several actions for annulment against the 2007 Federal Anti-discrimination Acts, the Constitutional Court gave a controversial insight into the shift of the burden of proof mechanism. The Court referred to the judge's power of assessment to allow the reversal of the burden of proof as if the judge had a discretionary power to allow such a reversal or not (Decision No 17/2009, para. B.93.4; Decision No 39/2009, para. B.53; Decision No 40/2009, para. B.98). More training for judges and lawyers is certainly needed and would produce better results in discrimination cases.

In Bulgaria the legislative provisions on the burden of proof are currently being amended in order to clarify that the plaintiff need only establish facts which make it possible to make an inference of discrimination. However, it is felt that a remaining limitation is that the legislation only refers specifically to a shift of the burden of proof in cases brought by a direct victim of discrimination, and not in cases of *actio popularis* where an NGO acting in the public interest seeks to establish discrimination against a class.

In Cyprus it is felt that the exclusion of equality body proceedings from the burden of proof rule is a significant gap which should be rectified, even though it is allowed by the EU Directives. The national expert also maintains that it would be an improvement if the reversal of proof was obligatory in all proceedings where discrimination is claimed, irrespective of whether the law invoked in the proceedings was the law transposing the Directives or some other law, or indeed the Constitution. But the most significant factor is that the principle of reversing the burden of proof is not widely known, either to victims or in legal and judicial circles. To address this gap, targeted and specific awareness-raising activities should become obligatory and the issue should be introduced into the syllabus for the Bar Exam.

In the Czech Republic, it is difficult to put forward improvements because of lack of case law.

In Denmark there is a need for clarification of the three elements of the shared burden of proof rule. In individual judgments from the civil courts and decisions from the Board of Equal Treatment concluding that discrimination did not take place, the reasoning is often not clear as to whether the employee did not establish facts creating a presumption of differential treatment, or whether the employer was able to prove that discrimination did not take place. In addition there seem to be different requirements for the establishment of facts with regard to the various discrimination grounds.

¹³⁰ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I—5187.

In Estonia the relevant legal provisions related to the burden of proof are considered adequate, but the scarcity of case law suggests that they are rarely used in practice. However, a legal obligation to give written explanations in response to a written request has been introduced in national anti-discrimination legislation. Where the plaintiff makes such a request the respondent is obliged to give relevant written explanations within 15 days. It is felt that this is potentially a very important innovation which may provide a victim with prima facie evidence, although unfortunately no penalty is provided for breach of the obligation so that in practice the new rule has been ignored in some cases.

In Finland the shared burden of proof is regarded as an important tool combating discrimination even though the number of discrimination cases in courts remain low, which is problematic.

In FYROM, the legal framework needs to be improved in order to bring it in line with the EU burden of proof rule. It is also felt that there should be an obligation on the national equality body to apply the burden of proof rule in order to lead in discrimination cases. It is also suggested that capacity-building for legal practitioners on the burden of proof rule should be undertaken (study visits or peer-to-peer exchange) and that a compendium of EU practices with examples from cases in the Member States should be produced. Finally, the use of evidentiary techniques such as situation testing in discrimination cases should be encouraged, by requiring or recommending their admissibility as evidence before equality bodies and the courts.

In Germany it is felt that a central problem of the regulation on the burden of proof is access to information. It is a matter of discussion whether or not the person discriminated against should have a right to information. Although in *Meister* the CJEU ruled that such a right does not arise from the EU Directives, it may be worth considering whether such a regulated right to information could improve the application of the rules on the burden of proof. Difficult questions such as legitimate interests of data protection could be accommodated by careful regulation (and limitation) of this claim.

In Greece the EU rules on the burden of proof, although transposed into anti-discrimination legislation, have not been incorporated into the Code of Civil Procedure and the Code of Administrative Procedure. They are not applied in practice due to lack of awareness. If they were applied in the future, the burden of proof rule could be improved in its implementation or operation in order to produce better results in discrimination cases.

In Hungary although the national legislative provisions are more favourable to the plaintiff as they specifically require the establishment of two elements (the protected ground and harm or disadvantage), court practice is otherwise and there are serious problems concerning the implementation of the burden of proof rule, with two recent cases appearing to ignore it.¹³¹ Although the legislation does not require a causal link to be established between the protected ground and the disadvantage, the current position of the Supreme Court indicates that the plaintiff must present evidence that makes it at least likely that they have suffered a disadvantage because they belong to a certain group. Therefore it is felt that what may be regarded as 'substantiation' of the causal link (e.g. inferences from past events, situation testing, silence of the respondent on certain issues, statistical evidence) should be outlined and also that very thorough and repeated training needs to be made available to the judiciary.

In Ireland there is a relatively strong right to demand information from the respondent and failure to supply it may result in an inference of discrimination being drawn.¹³² Plaintiffs need to be encouraged by their legal advisers to make more frequent use of the forms provided by the Equality Tribunal to ask for information which may be used in the proceedings.

¹³¹ Supreme Court (Curia), Administrative Review No EBH2010. 2272 and Kecskemét Regional Court Case No 3.Mf.21.277/2013/5. Both cases related to gender discrimination in the field of employment.

¹³² Employment Equality Act 1998-2011 section 81, Equal Status Act 2000-2012 section 35.

The view in Italy is that the kind of facts that should be proved in order to trigger the shift in the burden of proof is the key question and that guidelines or a collection of practices from different Member States would be useful.

The need for clarification is also identified by Latvia, where lower courts have been criticised for failing to shift the burden of proof. There is a need to clarify in practice at what stage of court proceedings the shift applies, in order to make it more effective.

In Liechtenstein due to the small number of discrimination cases that have come before the courts, there is no real court practice. It is felt that it would be an improvement in the operation of the national law if rules were defined and clarified that when facts are established by the plaintiff from which it may be presumed that there has been direct or indirect discrimination, the burden of proof should shift and the respondent must prove that there has been no discrimination. The use of statistical evidence could also be emphasised.

In Lithuania it is felt that the rule of the shift of the burden of proof is explicitly outlined in the Law on Equal Treatment, has been used in the few cases adjudicated so far, and is recognised by the courts. Therefore it is not felt that additional measures are required.

This is also the point of view of Luxembourg. In view of their seemingly satisfactory application in case law, the rules concerning the burden of proof are considered sufficient to produce good results in cases of discrimination.

For the Netherlands the answer is twofold. In the equal treatment legislation and its application by the equality body no improvements are necessary. In general civil law cases, where there is an element of discrimination, the experience is that judges sometimes are not aware of the special division of the burden of proof in discrimination cases and simply apply the general civil law rules in its regard. This is not a matter of legislation that would need adaptation, but a matter of training of judges.

In Norway the burden of proof as is it currently implemented by the Gender Equality and Anti-discrimination Ombud and the Gender Equality and Anti-discrimination Tribunal is considered to work quite well. The challenge in Norway is that the number of cases brought before the judiciary is marginal, so that it is unknown how the burden of proof will be implemented by the courts in discrimination cases. However, as the wording of the different pieces of anti-discrimination legislation is similar and clear on the burden of proof, it is assumed that the courts will use the legislation as their starting point.

In Poland it is felt that additional training for judges is needed. Research conducted in 2012 revealed that some judges do not apply the shift of the burden of proof in discrimination cases. A further issue is that in recent jurisprudence of the Supreme Court (based on the Labour Code) it is not sufficient for the employee to be able to substantiate the fact of unequal treatment, but he should also indicate the likely prohibited diversity criterion at issue when the cause of discrimination is not obvious, i.e. determined clearly by gender, age, disability, race or ethnic origin. This position of the Supreme Court has been criticised.¹³³

In Portugal, it is also felt that the rule should apply to a court or other body competent to carry out an investigation.

In Slovakia it is felt that the courts have difficulty in understanding and applying the burden of proof. It would therefore be important to introduce training and education for legal professionals. The shift in the burden of proof only applies in (civil) judicial proceedings and not in any other types of proceedings. Although in administrative proceedings it is

¹³³ K. Gonera [Supreme Court Judge] (2011). *Rozkład ciężaru dowodu w sprawach o dyskryminację w zatrudnieniu w świetle orzecznictwa Sądu Najwyższego [Shift of the burden of proof in discrimination cases in the light of the Supreme Court jurisprudence]*.

up to the investigating body in question to investigate the facts of the case, in practice discrimination is very rarely proved. Accordingly for bodies investigating discrimination on an ex officio basis, procedural and methodological guidelines should be introduced and on the level of legislation, the shift in the burden of proof should be introduced for administrative proceedings (such as in proceedings before labour inspectorates). A further problem relates to the need to clarify the burden of proof at the level of the rebuttal. The Constitutional Court has recently¹³⁴ upheld a regional court judgment finding that ‘the respondent proved that it is more likely that the discrimination has not taken place than it is likely that the discrimination has taken place’ thereby discharging the burden of proof or rebuttal.¹³⁵ The understanding of the court seemed to be that once the burden of proof is shifted to the respondent, he is not obliged to prove that there has been no breach of the principle of equal treatment but that it is sufficient to provide evidence establishing some probability of non-discrimination, provided that the probability of non-discrimination is higher than the probability of discrimination.

In Slovenia it is felt that the biggest problem is not the burden of proof as applied but the lack of cases that reach the courts, due to issues such as the lack of access to justice for vulnerable groups caused by procedural barriers and litigation costs.

In Spain, the legislative provisions on the shift in the burden of proof are quite satisfactory. The problem is insufficient knowledge of these standards among both public legal agents (judges and lawyers) and private professionals. Hence the recommendation would be to carry out intensive training activities in the field to specifically target these legal agents.

In Sweden the reasons why a plaintiff is more likely to win a discrimination case in the civil court system than in the labour courts are being investigated, including the possibility that the Labour Court applies the rules on the burden of proof in a narrow way. The lower success rate for race and ethnicity claims is also being examined.

¹³⁴ Decision No II. ÚS 383/2013-16 of 10 July 2013, available at <http://portal.concourt.sk/pages/viewpage.action?pageId=1277961>.

¹³⁵ Judgment of the Regional Court of Banská Bystrica No 13 Co 263/2012-208 of 27 November 2012.



Klaas | 1998

Conclusions

European law provides for the reversal of the burden of proof in the following terms: when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination (on a protected ground), it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. Rules are identical across the protected grounds, except for nationality. The reversal of the burden of proof does not apply to criminal procedures and proceedings in which a court or competent body has an investigatory or inquisitorial role to ascertain the facts of the case. European law does not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

The reversal of the burden of proof does not mean that plaintiffs are exempt from convincing the court that they have a case. In order to reverse the burden of proof they must first establish a *prima facie* case, i.e. convince the court of the likeliness or probability that they suffered discrimination. Once plaintiffs establish ‘facts that call for an explanation’ and one plausible explanation is that discrimination has occurred, the respondent must offer an ‘innocent explanation’ that is capable of breaking the chain in the causal links between the harm, the conduct and the protected ground. The burden of proof shifts before a court can make a final finding on causation. It then moves to the respondent to prove that discrimination played no part whatsoever in the treatment or effect complained of. If the respondent is unable to explain the treatment using objective reasons unrelated to discrimination, he will be liable for a breach of non-discrimination law. The reversal of the burden of proof applies to the various forms of discrimination. A scheme of its application has not yet been drawn up by the CJEU.

At the heart of discrimination lies prejudice and bias pertaining to the protected ground. Discrimination is an unthinking reaction to a person not because of her or his conduct but because she or he is a member of a group which is disliked by the individual discriminator or by society in general. Striking the right balance between the parties in establishing the bias is a tremendous task that should entail awareness of societal stereotypes and power relations in the wide variety of scenarios to which European non-discrimination law pertains. The very function of the reversal of the burden of proof is to ‘factor in’ such bias to the evidentiary rules for the benefit of those who suffer it.

The reversal of the burden of proof is a procedural rule that must be read in conjunction with the definition of the type of discrimination invoked. It connects evidence to the showing of bias and derails the course of proceedings at two distinct junctions: (i) it lowers the onus of proof (presumption) resting on the plaintiff in relation to the causal link between the protected ground and the conduct (*prima facie* case), while (ii) placing and limiting the remaining onus of proof in relation to bias onto the respondent (justification defence).

Causation is a two-tier exercise. Beyond a causal link between the conduct and the harm, another causal link between the protected ground and the conduct must also be established. The latter causal link may vary as to the degree of severity, and its establishment does not wholly fall to the plaintiff. It is at this point where the formula ‘establish facts from which it may be presumed’ needs to be applied. In continental Europe, it is enough to show that a respondent failed to meet his duty of care or that he was negligent in his conduct. On the basis of the preliminary referrals, national judges seem to grapple with this aspect: the nature of causation in cases of discrimination.

The main rule is that unless there is comparison, there is no causation. There are exceptions to this rule, particularly in cases where comparison is not necessary to establish discrimination, such as with pregnancy and harassment. Comparison is not relevant when an intent to discriminate can be established. There is no need then to reverse the burden of proof, because intent is at play.

While accessing evidence held by the respondent once a *prima facie* case is made out appears to be straightforward in cases when the plaintiff is ‘in’ – as in litigation involving equal pay, promotion and access to vocational training – national courts are awaiting clear guidance from the CJEU on cases in which the plaintiff is ‘out’ – such as in recruitment and other ‘access’ scenarios. This is the reason why questions relating to the *prima facie* case were

referred in particular in *Kelly and Meister* but also to some degree in *Feryn* and *Accept*. In the latter two cases, national courts sought guidance on drawing inferences from previous discriminatory conduct or statements.

The outstanding issue that awaits resolution by the CJEU or further legislation at the EU level is ensuring the plaintiff's access to information necessary to make the comparison if the respondent is unwilling or – due to confidentiality – unable to provide such information. Future case law needs to analyse not only relevant European data protection provisions and national rules on disclosure, but more importantly, it needs to clarify whether the personal data of individual(s) not party to the proceedings are at all needed to draw a comparison. Should it be established that redacted information is sufficient, data protection concerns may become obsolete. In order to facilitate access to information, a Commission Recommendation on the questionnaire procedure may be useful.

The Racial and Employment Equality Directives have been transposed for more than a decade now and national burden of proof provisions are largely compliant with European law. There is a scarcity of case law, which renders any extensive analysis impossible. Moreover, in many jurisdictions it is difficult to obtain an overview of whether and how the burden of proof shift applies in practice. Concerns have been raised in relation to practice in Bulgaria, Cyprus, Denmark, FYROM, Hungary, Slovakia and Sweden. In France, the provision more favourable to plaintiffs has recently been amended, which raises concerns in relation to a potential breach of the non-regression principle.

Concerns include access to information and establishing a comparator. There is an imperfect understanding of how the rule applies in relation to establishing *prima facie* cases. In most states, a causal link has to be proved on the balance of probabilities before the burden of proof shifts to the respondents. There are some indications that in practice the shift may operate differently according to the nature of the case and in particular the ground of discrimination invoked.

The Directives do not provide concrete standards of proof by which the respondent can successfully rebut the presumption of discrimination. While the CJEU has clarified the standards of justification in gender cases, and made inroads into shaping the justification of age discrimination, it has not had the opportunity to deal with the other grounds to the same degree of detail. The applicable standard of proof for rebuttal is not known for all states but seems to be too lenient in a few, such as Austria, Liechtenstein, Norway and Slovakia.

In order to improve implementation, it is recommended to train practitioners, provide guidance and a compendium of good practices, conduct in depth research into the differences in outcomes across the protected grounds, and issue guidelines and good practice notes to promote the use of various types of evidence, such as statistical evidence and situation testing. The provision that exempts inquisitorial proceedings from the burden of proof rule is problematic. Finally, as detailed above, the operation of the burden of proof rule would be improved by its application to equality bodies.

Nel | 1941

Bibliography

Allen, Dominique (2009). 'Reducing the burden of proving discrimination in Australia.' *Sydney L. Rev.* 31.

Ambrus, Mónika; Busstra, Marjolein; and Henrard, Kristin (2010). 'The Racial Equality Directive and Effective Protection against Discrimination: Mismatches between the Substantive Law and Its Application', *Erasmus L. Rev.* 3.

Banks, J. and Russell, H. (2011). *Pregnancy Discrimination in the Workplace: Legal Framework and Review of Legal Decisions 1999 to 2008*. Dublin: HSE Crisis Pregnancy Programme/Equality Authority.

Besson, Samantha (2008). 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?', *Human Rights Law Review*.

Craig and De Búrca (2011). *EU Law: Text, Cases and Materials*. Oxford: Oxford University Press.

Dewhurst, Elaine (2013). 'The Development of EU Case – Law on Age Discrimination in Employment: "Will You Still Need Me? Will You Still Feed Me? When I'm Sixty-Four"', *European Law Journal* 19.4.

Ellis, E. and Watson, P (2012). *EU Anti-Discrimination Law*. Oxford: Oxford University Press.

Epstein, Paul, QC and Masters, Dee (2011). *Direct Discrimination: A Practical Guide to Comparators*. London: Cloisters Chambers.

European Union Agency for Fundamental Rights and Council of Europe (2010) *Handbook on European non-discrimination law*.

Farkas, Lilla (March 2014). *Report on Discrimination of Roma Children in Education*. Publication forthcoming.

Fennelly, D (2012). *Selected issues in Irish Equality Case Law 2008-2011*. Dublin: Equality Authority.

Interights (2011). *Non-Discrimination in International Law: A Handbook for Practitioners*.

Milieu Ltd (2011). *Comparative study on access to justice in gender equality and anti-discrimination law*. European Commission, DG Justice.

Jacobs, F (1997). 'Enforcing Community Rights and Obligations' in Lonbay and Biondi (eds) *Remedies for Breach of EC Law*. Chichester: Wiley.

Lustgarten, Laurence (1977). 'Problems of Proof in Employment Discrimination Cases', *Industrial Law Journal* 6.

McColgan, Aileen (2013). *Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC*, [Country Report 2012 for the United Kingdom]. European Network of Legal Experts in the Non-discrimination Field.

McColgan, Aileen (2006). 'Cracking the Comparator Problem: Discrimination, "Equal" Treatment and the Role of Comparisons', *European Human Rights Law Review* 6, pp. 650-677.

O'Cinneide, Colm (2012). *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*. European Network of Legal Experts in the Non-discrimination Field.

Palmer, F (2006). 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof', *European Anti-Discrimination Law Review* 4. European Network of Legal Experts in the Non-discrimination Field, p.23.

Rainey, Bernadette; Wicks, Elisabeth; Ovey, Clare (2014). *The European Convention on Human Rights*. Jacobs, White and Ovey.

Sargeant, Malcolm (2012). *Age discrimination in employment*. Gower Publishing Ltd.

Schiek, D., Waddington, L. and Bell, M. (2007). *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*. Oxford: Hart Publishing.

Waddington, Lisa and Bell, Mark (2001). 'More Equal than Others: Distinguishing European Union Equality Directives', *Common Market Law Review* volume 38, issue 3, pp. 587-611.

Table of legislation

Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, pp. 60-65.

Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, Official Journal L 014 20/01/1998, p. 6.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 pp. 0022-0026.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000, p.0016-0022.

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal L 204, 26.7.2006, pp. 23-36.

Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services COM (2003) 657 final.

List of cases

Court of Justice of the European Union.

Case 26/62 *Van Gend en Loos* [1963] ECR 1.

Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECR 455, [1976].

Case 33/76 *Rewe-Zentralfinanz* [1976] ECR 1989.

Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043.

Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595.

Case C-109/88 *Danfoss* [1989] ECR I-3199.

Case C-127/92 *Enderby v Frenchay Health Authority* 1993 ECR I-05535.

Case C-13/94 *P v S and Cornwall County Council*, ECR 1996.

Case C-167/97 *R v Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1999] ECR I-623.

Case C-432/05 *Unibet Ltd v Justitiekanslern* [2007] ECR I-2271.

Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757.

Case C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467.

Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

Case C-246/09 *Bulicke* [2010] ECR I-7003.

Case C-391/09, *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius* [2011] ECR I-03787.

Case C-415/10 *Meister v Speech Design* [2012] ECR I-0000.

Case C-104/10 *Patrick Kelly v National University of Ireland (University College, Dublin)*, [2011] ECR I-06813.

Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH*, ECLI:EU:C:2012:329.

Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, not yet reported.

European Court of Human Rights

Zarb Adami v Malta, Judgment of 20 June 2006, Application No 17209/02.

DH and Others v the Czech Republic, Judgment of 13 November 2007, Application No 57325/00.

Orsus and Others v Croatia, Grand Chamber Judgment of 16 March 2010, Application No 15766/03.

Konstantin Markin v Russia, Judgment of 22 March 2012, Application No 30078/06.

National courts

Oxford v Department of Health and Social Security (1977) ICR 885, United Kingdom.

Mitchell v Southern Health Board (2001) Labour Court DEE 011, Ireland.

IBM v Buscail, Court of Appeal, Montpellier, (2003) No 0200504, France.

Equality Tribunal (2004) EED048, Ireland.

Igen Ltd (Formerly Leeds Careers Guidance) and Others v Wong, Chamberlin and Another v Emokpae, and Webster v Brunel University (2005) IRLR 258, United Kingdom.

Madarassy v Nomura International Plc, (2007) ICR 867, United Kingdom.

Supreme Court decision (2008) 90bA177/07f, Austria.

European Commission

Reversing the burden of proof: practical dilemmas at the European and national level

Luxembourg: Office for Official Publications of the European Union

2013 — 95 pp. — 21 × 29,7 cm

ISBN 978-92-79-44625-2

doi: 10.2838/05358

How to obtain EU publications

Our priced publications are available from EU Bookshop (<http://bookshop.europa.eu>), where you can place an order with the sales agent of your choice.

The Publications Office has a worldwide network of sales agents.

You can obtain their contact details by sending a fax to (352) 29 29-42758.

