AMNESTY INTERNATIONAL

WEARING THE HEADSCARF IN THE WORKPLACE

OBSERVATIONS ON DISCRIMINATION BASED ON RELIGION IN THE ACHBITA AND BOUGNAOUI CASES

AMNESTY INTERNATIONAL

On 12 June 2006, G4S Secure Solutions NV (G4S), a private undertaking in Belgium, dismissed Samira Achbita, who had been working as a receptionist since February 2013, because she informed the company of her intention to start wearing the headscarf in the workplace. G4S employees are not permitted to wear any visible religious, political or philosophical symbols in the workplace. That prohibition constituted an unwritten rule until June 2006. As of 13 June 2006, a specific written rule was added to the employees' code of conduct.

In another case, on 22 June 2009, Micropole SA, a private undertaking based in France, dismissed Asma Bougnaoui, who had been working as a design engineer for the company since 15 July 2008, because she wanted to continue wearing the headscarf when providing services to the company's clients. Micropole SA pointed out in the letter of dismissal that a client, whom Ms Bougnaoui had provided services to, complained about her headscarf and asked the company to ensure that she would not wear it at her next onsite visit. Micropole SA argued that employees had to respect a policy of neutrality vis-à-vis its clients.

Two preliminary rulings of the Court of Justice of the European Union (CJEU) are pending in the two cases: Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV (case C-157/15) and Asma Bougnaoui and Association de défense des droits de l'Homme (ADDH) v Micropole SA (case C-188/15).

The Court of Cassation of Belgium has asked the CJEU the following question regarding the case of Ms Achbita (case C-157/15):

- *Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?*

The Court of Cassation of France has asked the CJEU the following question regarding the case of Ms Bougnaoui C-188/15:

- *Must Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?*

Directive 2000/78/EC, on which these questions to the CJEU were based, states as follows:

Article 1 - Purpose

> The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2 - Concept of Discrimination

> 1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
>
> 2. For the purposes of paragraph 1:
>
> > (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
> >
> > (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
> >
> > > (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary [...].

Article 4 - Occupational requirements

> 1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

On 31 May 2016 Advocate General Kokott delivered her opinion regarding the case of Ms Achbita (C-157/15).[1] Advocate General Kokott argued that the prohibition to wear the headscarf in the workplace, based on an internal rule implemented by the employer, G4S, and prohibiting all visible religious, philosophical and political symbols, did not constitute direct discrimination on grounds of religion or belief against Ms Achbita.

Advocate General Kokott highlighted that: "it must be borne in mind, after all, that a company rule such as that operated by G4S is not limited to a ban on the wearing of visible signs of religious beliefs, but, at one and the same time, also explicitly prohibits the wearing of visible signs of political or philosophical beliefs. The company rule is therefore an expression of a general company policy which applies without distinction and is neutral from the point of view of religion and ideology."[2]

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[1] http://curia.europa.eu/juris/document/document.jsf?text=&docid=179082&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=885214.

[2] Para 51 of the general opinion, http://curia.europa.eu/juris/document/document.jsf?text=&docid=179082&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=885214.

Furthermore, she concluded that the ban did not constitute indirect discrimination as it pursued a legitimate aim – that is, implementing a policy of neutrality– and it was a necessary and proportionate mean for achieving that aim.

On 13 July 2016 Advocate General Sharpston delivered her opinion regarding the case of Ms Bougnaoui (C-188/15).[3] She concluded that the wish expressed by a company's client to cease to purchase the services it provided, because Ms Bougnaoui wore a headscarf, was not a genuine and occupational requirement. Therefore, the dismissal of Ms Bougnaoui constituted direct discrimination on grounds of religion or belief.

Under international and European human rights law, discrimination is a difference of treatment, based on a protected characteristic, which is not reasonably and objectively justified. Amnesty International and ENAR submit that both the measures imposed by G4S Solutions NV and Micropole SA on their employees constitute a difference of treatment based on religion or belief, a protected characteristic, that are not objectively and reasonably justified and thus discriminatory.

Amnesty International and ENAR do not share the views of Advocate General Kokott in particular with regard to the assessment that the aim pursued by the ban imposed by G4S was legitimate, necessary and proportionate. Amnesty International and ENAR submit that the dismissal of Ms Achbita on the basis of an internal company policy that prohibited religious, philosophical and political symbols constitutes direct discrimination on grounds of religion or belief under Article 2(2)(a) of Council Directive 2000/78/EC.

Amnesty International and the ENAR share the views of Advocate General Sharpston that the dismissal of Ms Bougnaoui constituted direct discrimination on grounds of religion and belief. In particular, the expressed wishes of clients not to avail themselves of the services of a company, on the basis that the employee providing them wears the headscarf, is not a genuine and determining occupational requirement under Article 4.1 of Directive 2000/78/EC.

The following observations will first draw conclusions on whether the differences of treatment imposed on Ms Achbita and Ms Bougnaoui constitute discrimination under international and European human rights law. They will then focus on whether those differences of treatment constitute direct discrimination under EU law.

[3] http://curia.europa.eu/juris/document/document.jsf?text=&docid=181584&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=885580.

1. INTERNATIONAL HUMAN RIGHTS LAW

1.1 A DIFFERENCE OF TREATMENT ON GROUNDS OF RELIGION, POLITICAL OPINION OR OTHER OPINION

The UN Human Rights Committee -- the independent body which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) – has clarified that discrimination encompasses "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[4]

Under international and European human rights law, religion or belief, and political or other opinion are protected characteristics.[5] Amnesty International and ENAR submit that, in line with international and European human rights law, the difference of treatment imposed by the company G4S could constitute discrimination on grounds of religion or belief as well as political opinion, should it not be objectively and reasonable justified.

The general ban on visible religious, philosophical and political symbols imposed by the company G4S Solutions NV on its employees constitutes a difference of treatment between those employees who manifest their religion, belief or political opinion by wearing visible symbols or dress and those who do not. Similarly, the request imposed by the company Micropole SA on Ms Bougnaoui not to wear the headscarf whenever in direct contact with clients constitutes a difference of treatment between her, as an employee who manifests her religion or belief by wearing the headscarf, and another employee who does not manifest her or his religion or belief by wearing a visible religious symbol or dress.

Employees who manifest their religion, belief or political opinion by wearing specific symbols or dress not only exercise their rights to freedom of religion or belief and to freedom of expression but may also be expressing a component of their identity. The measures imposed by G4S and Micropole restrict the rights of that group of employees and prevent them from expressing their identity. The measures do not apply to other employees who could continue to express other components of their identity such as gender identity and expression, ethnic origin or nationality by wearing specific symbols or dress. Therefore, under international and European human rights law, the measures constitute a difference of treatment on grounds of religion or belief and political opinion.

1.2 NO OBJECTIVE AND REASONABLE JUSTIFICATION

Under international and European human rights law, a difference of treatment will not constitute discrimination if it is objectively and reasonably justified. The Human Rights Committee has held that: "A difference of treatment may be considered as having an objective or reasonable justification if it is for a legitimate purpose compatible with the human rights obligations of the state."[6] Furthermore, the Human Rights Committee has observed that a difference of treatment does not constitute discrimination "if the criteria for such differentiation are reasonable and objective and if the aim is to

[4] Human Rights Committee, General Comment 18: Non Discrimination, para 7. http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9(Vol.I)_(GC18)_en.pdf.

[5] See Articles 2 and 26 of the ICCPR (religion, political or other opinion), Article 2 of the International Covenant on Social, Economic and Cultural Rights (ICESCR- religion, political or other opinion), Article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR- religion, political or other opinion).

[6] Human Rights Committee (HRC) General Comment No. 18 on non-discrimination, para 13.

achieve a purpose which is legitimate under the Covenant [on Civil and Political Rights]."[7] Under the ICCPR, states can restrict some specific rights, including the rights to manifest thought, conscience and religion and to freedom of expression, but only for certain specific legitimate purposes: to protect national security or public safety, public health or morals, or the rights and freedoms of others.

In its General Comment 22 on the right to freedom of thought, conscience and religion, the Committee has held that the permissible aims for restricting the right to freedom of conscience, thought and religion should be interpreted strictly and that restrictions are permissible exclusively to achieve the aims listed by Article 18.3 of the Covenant– that is public safety, order, health, or morals or the fundamental rights and freedoms of others.[8]

The ban on visible religious, philosophical and political symbols imposed by G4S on its employees is aimed at pursuing a policy of neutrality within the company. However, neutrality is not among the legitimate purposes for which states can restrict the human rights set out by the ICCPR. Therefore, Amnesty International and ENAR submit that neutrality does not constitute an objective and reasonable justification for treating differently employees who manifest their religion or belief and political opinion by wearing visible symbols or dress and those who do not. If neutrality constituted a reasonable and objective justification, that would have the effect of normalizing a derogation to the principle of non-discrimination as virtually any employer could rely on neutrality to impose unjustified differences of treatment on grounds of religion or belief and political opinion.

That is not to say that private undertakings could not impose dress requirements, including uniforms, on their employees or aim at satisfying their clients' wishes. However, this must be done in a way that ensures respect for the employees' human rights, including the right to be free from discrimination. If private undertakings were given carte blanche to pursue any policy to promote a specific corporate image or to satisfy their clients' wishes, the principle of non-discrimination could be undermined.

Furthermore, in order for a difference of treatment to qualify as objective and reasonable it should also be proportionate and necessary to the aim it seeks to achieve. For example, regarding the claim that work safety requirements for the wearing of a helmet indirectly discriminated against Sikhs because religious custom requires them to wear a turban, the UN Human Rights Committee (HRC) held in its case *Karnel Singh Bhinder v. Canada* that the protection of workers' safety was an objective justification and that the requirement imposed on workers to wear a safety helmet was proportional. Therefore, it did not violate the principle of non-discrimination.[9]

The European Court of Human Rights held in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom* that "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'".[10] Furthermore, in its judgment in the case of *D.H. and Others v. Czech Republic*, the Court held that, "[d]iscrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations…".[11]

The European Court of Human Rights has been insistent on the fact that a difference of treatment based on prohibited grounds will require particularly weighty justification to be compatible with the

[7] Ib. para 13.

[8] GC 22, para 8, file://intsec.amnesty.org/data/users/mperolini/Downloads/G9318602.pdf

[9] HRC, Karnel Singh Bhinder v. Canada, (No. 208/1986).

[10] Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, para 72.

[11] D.H. and Others v. the Czech Republic, no. 57325/00, judgment of 13 November 2007, para 175.

principle of non-discrimination.[12] For example in its case *D.H and Others v. the Czech Republic,* the Court held that "the notion of objective and reasonable justification must be interpreted as strictly as possible" in instances where a difference of treatment is based on race, colour or ethnic origin.[13] Amnesty International and ENAR submit that the same principle should apply to other prohibited grounds of discrimination, including religion or belief and political opinion.

The consequences faced by Ms Achibta and Ms Bougnaoui resulting from the imposition of the general ban on wearing visible religious or political symbols or dress by G4S and Micropole raise concern regarding the proportionality of the measure. In particular, the ban resulted in the dismissal of Ms Achbita and Ms Bougnaoui, which amounted to a restriction of their right to work, without any attempt on the part of the employers to propose alternative solutions that could have resulted in a less disproportionate restriction of their human rights.

2. DIRECT DISCRIMINATION UNDER EU LAW

Article 21 of the Charter of Fundamental Rights of the European Union, which is binding for the EU and for Member states when implementing EU law and policies, prohibits discrimination on, among others, grounds of "religion or belief, political or any other opinion".[14]

However, Article 19 of the Treaty on the Functioning of the European Union lays the legal basis for European institutions to take measure to combat discrimination on a limited number of grounds, including religion or belief but not political opinion.[15] Therefore, Directive 2000/78 provides protection against discrimination only on a limited number of grounds –that is, age, disability, religion or belief and sexual orientation.

EU anti-discrimination law explicitly sets out different definitions for direct and indirect discrimination. For instance, Directive 2000/78 defines "direct discrimination" as an instance "where one person is treated less favourably than another is, has been or would be treated in a comparable situation", on any of the grounds protected by the directive, including religion or belief.[16]

The same Directive defines "indirect discrimination" as an instance "where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless; i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary […]."[17]

Advocate Kokott's conclusion that the ban does not constitute direct discrimination was based on comparing the situation of employees who manifest their religion or belief with those who manifest their political opinions. She observed that those two categories of employees are treated equally – that

[12] See, for example, Hoffman v Austria, para 36; Abdulaziz, Cabales and Balkandali v United Kingdom, para 78; Inze v Austria; Gaygusuz v. Austria, para 42; Karner v. Austria, para 37.

[13] D.H. and Others v. the Czech Republic, para 196.

[14] http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

[15] […] the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

[16] Article 2.2 (a)

[17] Article 2.2 (b)

is, they respectively cannot manifest their religion or belief or their political opinion in the workplace. Accordingly, she concluded that the ban imposed by G4S was a neutral provision which equally prohibited the wearing of symbols or dress manifesting religion or belief and symbol or dress expressing political opinion, and so did not constitute direct discrimination on grounds of religion or belief.

However, Amnesty International and ENAR submit that, in order to answer to the question asked by the Court of Cassation of Belgium, the situation of employees who manifest their religion or belief by wearing a visible symbol or dress should be compared to the situation of employees who do not. On the basis of that comparison, the difference of treatment introduced by G4S constitutes direct discrimination on grounds of religion or belief. Amnesty International and ENAR call for this approach on the basis of two main considerations.

First, the CJEU has clarified that direct discrimination occurs where a measure introduces a difference of treatment which is explicitly based on a protected ground or on a characteristic linked to a protected ground.[18] The Court has adopted a broad interpretation of the notion of direct discrimination. For example, in *Chez Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, the Court reached the conclusion that the installation of electricity meters in a neighbourhood predominantly inhabited by Roma at a much higher height than usual constituted direct discrimination on grounds of racial or ethnic origin. Whilst the measure did not explicitly refer to the ethnic or racial origin of the individuals who lived in the neighbourhood, the Court found that the measure was determined by their ethnic and racial origin and thus constituted direct discrimination.[19]

The ban imposed by G4S refers to two characteristics– i.e. wearing visible religious or political symbol (or dress) – linked to two grounds of discrimination: religion or belief and political opinion. Under Directive 2000/78, only religion or belief is a prohibited ground of discrimination. However, it is undeniable that the measure imposed by G4S explicitly refers to religion or belief and introduces a difference of treatment on that ground irrespective of the fact that political opinion is not a prohibited ground of discrimination under the Directive.

A G4S employee who manifests his or her religion or belief by wearing a visible religious symbol or dress is treated less favourably than an employee who does not manifest his or her religion or belief by wearing a visible symbol or dress. The measure puts the former employee in a less favourable situation than the latter precisely on grounds of religion or belief. Therefore, the ban imposed by G4S constitutes direct discrimination on grounds of religion or belief unless the prohibition to wear any visible religious symbol or dress is a genuine and determining occupational requirement (see following section).

Second, Advocate General Kokott's observations (paragraph 45) that there is stronger protection against discrimination on grounds that constitute "immutable physical features or personal

[18] See, for example, the judgments in Dekker (C-177/88, paras 12 and 17), Handels- og Kontorfunktionærernes Forbund (C-179/88, para 13), Busch (C-320/01, para 39), Kiiski (C-116/06, para 55), Kleist (C-356/09, para 31), Ingeniørforeningen i Danmark (C-499/08, para 23 and 24), Maruko (C-267/06, para 72), Römer (C-147/08, para 52) and Hay (C-267/12, paras 41 and 44).

[19] CHEZ Razpredelenie Bulgaria (C-83/14, paras 76 and 91), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d51e793f1095ff473a916ef10f44b0d723.e34KaxiLc3eQc40LaxqMbN4Pa3qOe0?text=&docid=165912&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1017710.

characteristics" such as gender, age or sexual orientation, than on those which are "modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering" do not duly reflect international and European human rights law, which accords a similar level of protection against discrimination on grounds of racial or ethnic origin, sex and religion or belief. Those constitute explicitly prohibited grounds of discrimination in the ICCPR (Articles 2 and 26 referring to, among other grounds, race, colour, sex, religion and political or other opinion), the International Covenant on Economic and Social Rights (Article 2 referring to, among other grounds, race, colour, sex, religion and political or other opinion), the ECHR (Article 14 referring to, among other grounds, race, colour, sex, religion and political or other opinion) and the EU Charter on Fundamental Rights (Article 21 referring to, among other grounds, race, colour, sex, religion or belief and political or other opinion).

Moreover, Advocate Kokott's opinion disregards international law and standards on the right to freedom of religion of belief by arguing that manifesting one's religion or belief is "a mode of conduct based on a subjective decision or conviction".

The right to freedom of thought, conscience and religion or belief is enshrined in both international and regional human rights treaties including the ICCPR (Article 18) and the ECHR (Article 9). It includes both the right to hold a religion or a belief and the right to manifest it, individually or in community with others and in private or public through worship, observance, practice and teaching.

In its General Comment 22, the Human Rights Committee held that: "The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group."[20]

The UN Special Rapporteur on freedom of religion or belief has underlined that the right to freedom of religion or belief includes "freedom to positively express and manifest one's own religion or belief".[21] Manifesting a religion or belief by wearing visible religious symbols or dress is a component of the right to freedom of religion or belief and could constitute a component of a person's inherent identity. Therefore, the prohibition of discrimination on grounds of religion or belief should fully protect those who manifest their religion or belief by wearing distinctive symbols or clothing.

In case C-188/15, originating from France, Micropole SA dismissed Ms Bougnaoui on the basis of her refusal to abide by a company rule according to which employees should respect the principle of neutrality vis-à-vis its clients. The dismissal followed a specific complaint brought to the attention of the company by one of its clients. It is unclear from the facts of the case available to Amnesty International and ENAR whether Micropole SA had a written policy in place relating to neutrality vis-à-vis its clients and whether that policy entailed a prohibition on wearing symbols or dress expressing philosophical or political opinions, as well as symbols or dress manifesting religion or belief. Notwithstanding the lack of specific information, and on the basis of the arguments presented above regarding the case of Ms Achbita (Case C 157/15), the policy implemented by Micropole SA treats

[20] HRC, Comment No. 22: the right to freedom of thought, conscience and religion, para 4.

[21] http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-53.pdf, para 39.

employees who manifest their religion or belief less favourably than those who do not and, thus, can constitute direct discrimination under Article 2 (2) of Directive 2000/78 unless the prohibition to wear visible religious symbols (or dress) is a genuine and determining occupational requirement.

2.1 THE BAN ON RELIGIOUS SYMBOLS IS NOT A GENUINE AND DETERMINING OCCUPATIONAL REQUIREMENT

Under Directive 2000/78, a measure treating a person less favourably than another in a comparable situation on the grounds of religion or belief does not constitute direct discrimination if either the two following exceptions apply:

1. Where it results from measures laid down by national law which are necessary to achieve public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others (Article 2.5);

2. Where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, it constitutes a genuine and determining occupational requirement (Article 4.1);

The ban on visible religious, philosophical symbols at stake in case C157-15 was introduced by a private undertaking, G4S. Similarly, in case C118-15 the ban on religious symbols and dress for employees in direct contact with clients was imposed by a private undertaking. Obviously, those measures have not been laid down by national law for the purpose of achieving public security, public order or of preventing the perpetration of criminal offences. Therefore, the first exception foreseen by Article 2.5 of Directive 2000/78 and mentioned above does not apply in the present cases.

Therefore, the only circumstances in which the measures applied by the two companies would not amount to direct discrimination under Directive 2000/78 would be if those measures constituted a genuine and determining occupational requirement.

Advocate General Sharpston concluded in regard to case C188/15 that the requirement not to wear a headscarf when in contact with clients does not constitute a genuine and determining occupational requirement (para 100). Amnesty International and ENAR agree with those conclusions.

Advocate General Kokott, however, taking a different view, concluded that a private undertaking can legitimately pursue a policy of neutrality and impose on its employees a duty not to manifest any religion, belief or political opinion in the workplace (para 76). She concluded that Ms Achbita's position within the company required abiding by the dress code laid down by the employer (para 84).

Amnesty International and ENAR submit that a blanket requirement imposing on all employees to abide by a strict policy of religious and political neutrality, without taking into account the specific nature or the context of their occupation, does not meet the criterion for a determining occupational requirement under article 4.1 of Directive 2000/78.

Advocate General Kokott's conclusions do not sufficiently take into account that both Directive 2000/78 and the case-law of the CJEU call for a strict interpretation of the notion of genuine and determining occupational requirement. Moreover, that notion should be interpreted in view of international and European law and standards on discrimination.

According to recital 23 of Directive 2000/78, a difference of treatment on the grounds of religion or belief can be justified "in very limited circumstances" where a characteristic related to religion or

belief constitutes a genuine and determining occupational requirement and the objective pursued "is legitimate and the requirement is proportionate".

In its case-law on discrimination on grounds of age and sex, the European Court of Justice has called for a narrow interpretation of the notion of genuine and determining occupational requirement. For example, in *Prigge and others v Deutsche Lufthansa AG,* the Court held that "in so far as it allows a derogation from the principle of non-discrimination, Article 4(1) of that directive [2000/78] must be interpreted strictly".[22] Furthermore, in its cases *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*[23] and *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*[24], the Court held that Article 2.2 of Directive 76/207[25]– on the basis of which a difference of treatment on grounds of sex does not constitute discrimination if sex is a "determining factor"– is a derogation from the right to non-discrimination and, thus, "should be interpreted strictly".

The Court has scrutinized whether a difference of treatment based on a characteristic related to a protected ground is justified on the basis of Article 4.1 of Directive 2000/78 by taking into account whether the specific characteristic at stake constituted a determining and genuine occupational requirement in respect of the nature or the context of each specific occupation. For example, in *Wolf v Stadt Frankfurt,* the Court held that: "To examine whether the difference of treatment based on age in the national legislation at issue in the main proceedings is justified, it must be ascertained whether physical fitness is a characteristic related to age and whether it constitutes a genuine and determining occupational requirement for the occupational activities in question or for carrying them out, provided that the objective pursued by the legislation is legitimate and the requirement is proportionate." The Court concluded that physical fitness was a characteristic related to age that constituted a genuine and determining occupational requirement in respect of the specific occupational activities of fire fighters in their intermediate career.

In addition, the Court held that the principle of proportionality must be applied in considering any difference of treatment based on a characteristic that constitutes a genuine and determining occupational requirement. For example, in *Wolf v Stadt Frankfurt* the Court held that the proportionality of the difference of treatment on grounds of age required an examination of whether "that [age] limit is appropriate for achieving the objective pursued and does not go beyond what is necessary to achieve it".[26] In *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary,* the Court highlighted that the principle of proportionality: "requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public safety which constitute the decisive factor as regards the context of the activity in question."[27] In *Perez v Ayuntamiento de Oviedo*, the Court concluded that a blanket age restriction imposed as a condition for accessing all the available positions within the local police force was disproportionate. The Court highlighted that physical ability may constitute a genuine and determining occupational requirement for some, but not all, tasks performed by police and that rigorous tests carried out during the recruiting phase already attained the objective of ensuring that local police officers had the physical abilities to

[22] http://curia.europa.eu/juris/document/document.jsf?text=&docid=109381&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=438503, para 72.

[23] http://curia.europa.eu/juris/showPdf.jsf?text=&docid=93487&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=440309, para 36.

[24] http://curia.europa.eu/juris/document/document.jsf?text=&docid=44803&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=439326, para 23.

[25] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31976L0207:EN:HTML

[26] Para 42.

[27] Para 38.

perform the tasks associated with the specific position they were recruiting for.[28] Similarly, in *Prigge and Others v Deutsche Lufthansa AG*, the Court held that the automatic retirement age fixed at 60 by the Lufthansa collective agreement was disproportionate as international and national authorities considered that pilots had the physical abilities to work until they reached the age of 65.[29]

Furthermore, under international and European human rights law, a difference of treatment may be considered as having an objective or reasonable justification if it is established for a legitimate purpose compatible with the human rights obligations of the state.[30] As outlined above, a legitimate purpose could be related to public policy concerns such as health, safety or security. Furthermore, in order for a difference of treatment to qualify as objective and reasonable it should also be proportionate to the aim it seeks to achieve.

The notion of genuine and determining occupational requirement should be interpreted consistently with international and European law and standards on discrimination. In particular, a genuine and determining occupational requirement constitutes an objective and reasonable justification only insofar as it is introduced to pursue a legitimate aim under international human rights law and it is necessary and proportionate to the achievement of that aim.

Pursuing a neutral corporate image or satisfying clients' wishes are not legitimate aims under international and European human rights law to restrict human rights. This does not mean that employers should always refrain from pursuing them; it means that they must respect the human rights of their employees while pursuing those aims and cannot rely on those aims to reasonably and objectively justify differences of treatment on religion or belief or on any other prohibited ground of discrimination.

CONCLUSIONS

European societies are very diverse and composed of citizens and residents who are members of many different religious and ethnic minorities. European governments must ensure that all of them are able to enjoy human rights without discrimination. Some manifest their origin, religion or ethnicity by wearing religious and cultural symbols and dress. Imposing restrictions on those expressions to ensure a particular concept of neutrality disregards that very diversity. Erasing religious or cultural expressions from the workplace or other areas of life is not a neutral project. It risks alienating and discriminating against some groups – particularly those who are already marginalized.

In recent years, some European states, including France and Belgium, from where the two cases discussed in this paper originate, have adopted several restrictions on wearing religious or cultural symbols and dress in key areas of life such as employment and education. Those restrictions have a disproportionate impact on Muslim women. Those who wear the headscarf are subjected to widespread discrimination both in access to employment and in the workplace. Amnesty International and ENAR's research points out that those women are discriminated against because they are perceived as Muslim, especially because of their clothing.[31]

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[28] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CJ0416&from=EN, Paras 54 and 55.

[29] http://ec.europa.eu/dgs/legal_service/arrets/09c447_en.pdf

[30] Human Rights Committee (HRC) General Comment No. 18, para 13.

[31] Amnesty International, Choice and Prejudice. Discrimination against Muslims in Europe, Index: 01/001/2012, https://www.amnesty.org/fr/documents/document/?indexNumber=eur01%2F001%2F2012&language=en, ENAR, Forgotten Women: the impact of Islamophobia on Muslim women, http://www.enar-

In 2013, according to the Collective Against Islamophobia in France, nearly 19% of reported complaints of discrimination in France arose in the context of employment; the vast majority of the victims were Muslim women wearing a headscarf.[32]

In Belgium, according to the equality body UNIA, 44% of employers agree that wearing the headscarf can negatively influence the selection of candidates for a job. In 2014, according to their survey and studies, the civil society organization Muslim Right Belgium recorded 696 cases of Muslims who perceived themselves as victims of discrimination. One fourth of those cases concerned the workplace. In total, around two-thirds of the complaints came from Muslim women and 41% of those women wore a headscarf.[33]

The Court's judgments in the two cases discussed in this paper must fully be in line with EU law and ensure non-discrimination for all members of Europe's diverse and pluralist society. Otherwise, there is a risk restrictions on the wearing religious symbols will flourish in the private sector, furthering the exclusion of Muslim women from employment opportunities, thereby restricting their right to work.

Giving private employers carte blanche to introduce general restrictions on religious and cultural symbols and dress with the aim of pursuing what they regard as neutrality or accommodating their clients' wishes, and justifying those restrictions by construing them as occupational requirements, will empty EU law of its substance and its very purpose, which is protecting religious minorities from discrimination based on religion or belief.

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eu.org/IMG/pdf/forgottenwomenpublication_lr_final_with_latest_corrections.pdf

[32] http://www.enar-eu.org/IMG/pdf/forgotten_women_report_france_-_final.pdf, p. 30

[33] http://www.enar-eu.org/IMG/pdf/forgotten_women_report_belgium_-_final.pdf, p. 21