IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE

The Development of Legal Instruments to Combat Racism in a Diverse Europe

Jan Niessen and Isabelle Chopin (Eds.)

Martinus Nijhoff Publishers

The Development of Legal Instruments to Combat Racism in a Diverse Europe

Edited by
JAN NIESSEN

and

ISABELLE CHOPIN

MARTINUS NIJHOFF PUBLISHERS
LEIDEN/BOSTON
2004

A C.I.P. Catalogue record for this book is available from the Library of Congress.

Printed on acid-free paper.

ISBN 90-04-13686-X

Typeset by jules guldenmund layout & text, The Hague

Brill Academic Publishers incorporates the imprint Martinus Nijhoff Publishers.
http://www.brill.nl

Printed and bound in The Netherlands

THE DEVELOPMENT OF LEGAL INSTRUMENTS TO COMBAT RACISM IN A DIVERSE EUROPE

IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE

Volume 6

Editors

Elspeth Guild
Kingsley Napley Solicitors, London,
Centre for Migration Law, Katholieke Universiteit, Nijmegen

Jan Niessen
Migration Policy Group, Brussels

The series is a venue for books on European immigration and asylum law and policies where academics, policy makers, law practitioners and others look to find detailed analysis of this dynamic field. Works in the series will start from a European perspective. The increased co-operation within the European Union and the Council of Europe on matters related to immigration and asylum requires the publication of theoretical and empirical research. The series will contribute to well-informed policy debates by analysing and interpreting the evolving European legislation and its effects on national law and policies. The series brings together the various stakeholders in these policy debates: the legal profession, researchers, employers, trade unions, human rights and other civil society organisations.

The titles published in this series are listed at the end of this volume.

Jan Niessen and Isabelle Chopin

INTRODUCTION

In post World War II equality and anti-discrimination were enshrined in international and European conventions to which most European countries are party. These conventions inspired national policies to combat all forms of discrimination. Racial and ethnic discrimination, never totally eliminated in Europe, resurfaced at a time when European societies were becoming increasingly diverse as a result of continuous intra and extra European migration. Migration and immigrant integration, of which equality formed a cornerstone, began to rank high on the national and European policy agendas.

The 1990s bore witness to a disturbing rise of acts of direct and indirect discrimination and racially motivated violence against ethnic minorities, immigrants and asylum seekers in many European countries. Aggressive nationalism and right-wing political parties using migrants as scapegoats were rising. As European governments stepped up their attempts to restrict the admission of immigrants and refugees, those already there found themselves subject to often terrifying attacks in a climate that was increasingly xenophobic.

Both the Council of Europe and the European Union quickly became aware of the urgent need to act against racism. The heads of State and government of the member States of the Council of Europe meeting at the Vienna summit in October 1993 expressed their alarm at the resurgence of racism, xenophobia and anti-Semitism, the development of a climate of intolerance, and the increase in acts of violence, notably against migrants and people of immigrant origin. They adopted a declaration and plan of action on combating racism, xenophobia, anti-Semitism and intolerance, including the creation of the European Commission against Racism and Intolerance (ECRI), and resolved to enter into political and legal commitments relating to the protection of national minorities in Europe.

Earlier that year, the European Union's Copenhagen European Council had called for an intensification of efforts to identify and root out the causes of racism and pledged to do the utmost to protect immigrants, refugees and others against expressions and manifestations of racism and intolerance. The EU Con-

Jan Niessen, Isabelle Chopin (eds.), The Development of Legal Instruments..., *vii-xi*

sultative Commission on Racism and Xenophobia was subsequently established at the European Council summit in Corfu in 1994, which vowed to develop a global strategy at Union level aimed at combating acts of racist and xenophobic violence. The European Parliament, which had been active in the fight against racism since 1984 when it commissioned the Evrigenis report to look into the rise of racism and fascism in Europe, adopted several resolutions on racism and xenophobia and warning against the dangers of right-wing violence. Harmonisation of Member States' measures to combat racism was felt to be important in establishing the principle of equal treatment, ensuring the same level of protection across the EU and also in guaranteeing an equal level of ethnic minorities and immigrants across the Union and proposals for concrete legal measures to this end were presented by the 'Starting Line Group'.

Ten years on, Europe has come a long way at least in the institutional response to racism. This book describes the responses of the Council of Europe and the European Union to the worrying trends of the 1990s, and considers the prospects for combating discrimination in Europe using tools that have emerged as a result. Part one looks at the evolution of the Council of Europe apparatus to combat discrimination and the anti-discrimination standards prescribed by its institutions. Part two considers the legislative measures recently adopted by the European Union. The contributions in part three take a comparative perspective of all measures adopted at European level to combat racial and ethnic discrimination.

In Chapter 1 Janneke Gerards sets out the content and meaning of Article 14 of the European Convention on Human Rights (ECHR) and discusses the methods used by the European Court of Human Rights in interpreting Article 14. Gerards submits that while the court has over time developed an elaborate decision model to deal with Article 14 complaints, there are inconsistencies in its application of this model. Gerards proposes amendments to the Court's doctrine that could result in an enhanced role for the non-discrimination principle in Convention law.

In Chapter 2 Jeroen Schokkenbroek, head of the Council of Europe's Human Rights Law and Policy Division of the Directorate General of Human Rights, presents an overview of the genesis of Protocol 12 to the European Convention on Human Rights, which was adopted on 26 June 2000. Although the Convention had prohibited discrimination since its adoption in 1950, the limits of Article 14 ECHR as an accessory provision that can only be invoked if the facts of the case fall within the ambit of one of the Convention's substantive provisions were well known. The European Court of Human Rights is unlikely to examine a discrimination complaint if it has already found a violation of one of the Convention's substantive provisions, and complaints of discrimination in the enjoyment of social and economic rights – which are not guaranteed under the Convention – have been excluded altogether. 50 years on, Protocol 12 seeks to fill this gap in protection, creating an encompassing general prohibition against

discrimination on grounds such as sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, at least in vertical relationships. Schokkenbroek highlights aspects of the drafting history of Protocol 12 which explain its intended content and scope, considering in particular whether it gives rise to positive obligations of member States to take active steps to prevent and remedy discrimination, including discrimination between private persons (horizontal effects).

On 13 December 2002 the Parliamentary Assembly of the Council of Europe adopted the European Commission against Racism and Intolerance General Policy Recommendation No.7 on National Legislation to Combat Racism and Racial Discrimination, as a follow up to the European Conference against Racism of 11-13 October 2000 and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance of 31 August-7 September 2001. The Policy Recommendation was considered necessary in order to elaborate ECRI's constant recommendations to governments to adopt effective legislation in their national law, and ECRI saw this as an opportune time to further the international debate on these issues. Giancarlo Cardinale of the ECRI secretariat outlines the preparation of the Recommendation, which contains comprehensive key elements of national constitutional, civil, administrative and criminal law against racism and racial discrimination.

Parallel to the intergovernmental efforts in the framework of the Council of Europe, the long campaign to convince the European Union to extend its protection against discrimination (on the grounds of sex and nationality) to victims of racism culminated in the insertion of Article 13 into the EC Treaty under the 1997 Treaty of Amsterdam, in force since 1999, and the swift enactment of Community legislation to combat discrimination, namely Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment of persons irrespective of racial or ethnic origin, and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The debates among the European Union institutions and between those institutions and civil society organisations, in particular the Starting Line group, which led to the developments at EU level, are discussed by Isabelle Chopin and Jan Niessen in Chapter 4.

In Chapter 5 Adam Tyson, who represented the European Commission in the negotiations leading to the adoption of the Racial Equality Directive, gives his account of the process, detailing the difficulties that some Member States had with individual provisions, largely based on the differing traditions Member States have had in dealing with questions of race and ethnicity. An explanation of the compromise reached to overcome these obstacles and secure unanimous agreement on the text of the Directive within 7 months – a record for Community law requiring substantive national legislative changes – follows.

In Chapter 6, Sejal Parmar reflects on the case law of the European Court of Justice in the field of sex equality which has articulated the principle of equal

treatment, and its relevance for the interpretation and implementation of the Racial Equality Directive. While the latter goes beyond the scope of existing EC sex discrimination protection in several significant ways, the cross-fertilisation of concepts across the grounds of discrimination and the fact that the origins of and inspiration for the Racial Equality Directive lie in this body of law suggest that it is likely that the court will draw on these precedents as a model for the evolution of Community anti-discrimination law on other grounds. Nevertheless, the Court should, according to Parmar, also be open to influence from other sources, namely international human rights law instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination.

In Chapter 7 Per Johansson summarises a series of reports produced in two research projects comparing national anti-discrimination law with the provisions of the Racial Equality Directive, the first initiated by the Migration Policy Group (MPG) and the European Monitoring Centre on Racism an Xenophobia in 1999 and the second undertaken in 2001 in the framework of a joint project of European Roma Rights Centre, Interights and MPG on the implementation of European anti-discrimination law. In all, the research covered twenty-six countries, fifteen EU Member States and eleven candidate countries, eight of which will become members of the EU in May 2004.

Part III seeks to analyse the recent developments at European level in the fight against racism and compare the policy and legal instruments emanating from the Council of Europe and the European Union (including Article 21(1) the EU Charter of Fundamental Rights and the proposed Framework Decision on racism and xenophobia). Mark Bell examines the efforts of both organisations to shape national legislation on racial discrimination and the approaches they have taken to this end. ECRI's model legislation goes much further than the EU instruments combined, yet it lacks the enforceability enjoyed by the EU guarantees. The EU legislation establishes strict minimum requirements, whereas ECRI purports to identify best practice to be taken up voluntarily by governments at a time when they are forced to change their laws to comply with EU obligations. To the extent that the EU and Council of Europe standards diverge, difficulties will inevitably arise, which, Bell suggests, should be overcome by accession of the EU to the ECHR.

In the final chapter, Ann Dummett provides a socio-political analysis of trends and development concerning racial and ethnic discrimination in twenty-six European states, based on the above-mentioned country reports. Dummett warns that variations in perception among the member States of what constitutes discrimination are likely to be problematic in the implementation of European standards. She calls upon governments to review their policies and practices overall for discriminatory aspects, citing immigration and asylum as typical examples of discriminatory policies.

The challenge for the years ahead is to find acceptance in European societies of the diversity to which it is now home. To secure success, the new European legal instruments to combat discrimination, which have rightly brought renewed hope to human rights advocates across the continent, must be accompanied by a change in mentality of all sectors of society and in the political will to eradicate discrimination.

Jan Niessen and Isabelle Chopin
Migration Policy Group

TABLE OF CONTENTS

PART I

COUNCIL OF EUROPE ANTI-DISCRIMINATION STANDARDS

Janneke Gerards

1. THE APPLICATION OF ARTICLE 14 ECHR BY THE EUROPEAN COURT OF HUMAN RIGHTS

1. Introduction

The principle of equal treatment has always been of comparatively little significance to the case law of the European Court of Human Rights. Article 14, containing the non-discrimination clause, has frequently been described as a toothless provision, having little to offer to individual applicants.[1] Indeed, the Court only rarely applies the provision. In most cases, it first examines complaints about substantive rights protected by the Convention, after which a complaint about unequal treatment is often considered of insufficient importance to justify separate examination. Moreover, the Court hardly ever finds a violation of Article 14, except for those cases in which the discrimination is allegedly based on a 'suspect' ground: mostly, the Court finds that the situations presented to it are not 'analogous' or 'similar', or that the discrimination is objectively and reasonably justified.

It is also remarkable that the Court does not always deal with discrimination cases in a satisfactory manner. Although in most cases it carefully tests a discrimination complaint against Article 14, the Court's case-law shows a rather large amount of more or less unconvincing applications of the provision. A curious interpretation has, for example, been given in the recent *Fogarty* case, dealing with the invocation of sovereign immunity by the American embassy in an employment dispute.[2] The applicant, a former staff member of the embassy, considered the invocation unreasonable: in her opinion, successful invocation of

1 W. Kewenig, *Der Grundsatz der Nichtdiskriminierung im Völkerrecht der internationalen Handelsbeziehungen*, 1972, p. 106.

2 ECHR 21 November 2001, *European Human Rights Cases* 2002/4.

Jan Niessen, Isabelle Chopin (eds.), The Development of Legal Instruments..., *3-60*

state immunity prevented her from instituting proceedings against her employer, whereas access to court was not restricted to employees of other organizations. With respect to this submission, the Court considered the following:

> This immunity applies in relation to all such employment related disputes, irrespective of their subject matter and of the sex, nationality, and place of residence or other attributes of the complainant. It cannot therefore be said that the applicant was treated differently from any other person wishing to bring employment-related proceedings against an embassy, or that the restriction placed on her right to access to court was discriminatory. It follows that there has been no violation of Article 14 [...].[3]

The Court found no discrimination in this case, apparently because every possible complainant – not only the applicant – would be affected by the restriction of access to court in employment related proceedings against the embassy. This reasoning is highly questionable, as would be clear if the complaint would have been based on a somewhat different set of facts. It would, for instance, be interesting to supplement the rule that no employment related proceedings could be brought against the US embassy with the hypothetical specification that this only applies to redheaded persons. In the approach chosen by the Court, such a specification would not constitute a violation of Article 14: the hypothetical rule would treat all redheaded persons wishing to institute proceedings against the embassy exactly alike, raising no problems at all from a formal equality point of view. It will however be evident that the hypothetical specification would render the rule completely arbitrary: a person's hair colour can hardly be considered of relevance for the possibility to institute employment proceedings.

Fortunately, Article 14 is not very often interpreted and applied in this unconvincing and unsatisfactory manner; in most cases, the interpretation is quite reasonable. This contribution will therefore mainly focus on the interpretation the Court usually gives to the non-discrimination provision and on the possible improvement of its interpretation methods. Such improvements would especially seem to be desirable with regard to the upcoming entry into force of Protocol No. 12, which will undoubtedly strengthen the significance of the non-discrimination principle to the European Convention of Human Rights.

Before elaborating on the methods used by the Court in interpreting Article 14, it may seem useful to provide some insight into the contents and meaning of Article 14 to enhance the appreciation and understanding of the Court's decision model. In section 2 of this contribution, attention will therefore be paid to several special characteristics of the provision, such as its accessory character and the grounds of discrimination listed in the article, and to the stance the

3 Paras 42-43.

Court has taken with respect to the distinction between formal and substantive equality and between direct and indirect discrimination. The decision model that is developed by the Court for the assessment of complaints about unequal treatment will be discussed subsequently in section 3. Section 4 will deal specifically with the way in which the Court has given effect to its margin of appreciation doctrine in discrimination cases. Finally, several proposals for amendment of the Court's doctrine will be put forward in section 5.

2. General Aspects of Article 14

2.1 The Accessory Character of Article 14

2.1.1 The Court's Approach to the Accessory Character

Article 14 of the European Convention on Human Rights provides the following

> The enjoyment of the rights and freedoms set forth in the Convention shall be secured without any discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As is apparent from this definition, the framers of the Convention did not have the intention to lay down a general and independent principle of equal treatment. The article is accessory in character and is, as such, primarily intended to guarantee effective exercise of the rights and freedoms protected by the Convention. As a consequence of the accessory character of the provision, complaints with respect to alleged violations of Article 14 would only be admissible if a sufficient relationship could be shown between the asserted discrimination and one of the rights or freedoms protected by the substantive provisions of the Convention. As a result, an individual applicant will always have to establish a clear connection between a substantive Convention provision to be able to successfully invoke the prohibition of discrimination.

Initially, the requirements regarding the connection between substantive Convention provisions and Article 14 were rather stringent. The European Commission on Human Rights adopted a strict approach, declaring complaints only admissible if it had also found a violation of the relevant substantive Convention provision.[4] As a result, the effectiveness of the prohibition on dis-

4 See e.g. Application 16/808, 8 March 1960, *Isop v. Austria*, Yearbook of the European Convention on Human Rights 5 (1962), p. 108: 'Whereas, in regard to the complaint that the said refusal constituted a violation of Article 14 of the Convention, it is to be observed that this Article, by its express terms, forbids discrimination only with regard to the enjoyment of the rights and freedoms guaranteed in the Convention; and whereas the Commission has already held above that such right is not violated in