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Protection against discrimination under the European Convention on Human Rights - a second class guarantee?

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There can be no doubt that in the fifty years since the Convention was adopted the perception of what is meant by discrimination and of who can be the object of discrimination has altered significantly. The diversity of modern societies, changes in moral and social values and in the understanding of gender roles and sexual orientation, greater accessibility to services and information, increased international and national mobility, these are some of the factors that have heightened awareness of difference of treatment. The perception of discrimination as, primarily, intentional unfavourable treatment of a section of the community has given way to a broader notion embracing unintentional or even traditional differentiation and more recently recognition that discrimination may be indirect, where identical treatment has disproportionately adverse effects on members of a particular group. The Convention prides itself as being a living instrument and the case-law of the European Court of Human Rights has reflected this. Changing attitudes to unmarried mothers, children born out of wedlock and homosexuals have for example been recognised. However, the accessory nature of the Convention guarantee, which is at least in part symptomatic of how the issue was viewed at the time, has tended to mean that the discrimination aspect of such cases has remained in the background and this may have obscured the treatment of the question by the European Court of Human Rights. The Court's attitude has perhaps not been entirely coherent as to the weight to be given to the non-discrimination guarantee. The recent judgment of *Thlimmenos* is evidence of a new approach and the opening for signature of a new Protocol, No. 12, setting down a general and free-standing prohibition of discrimination will no doubt extend the scope of the protection against discrimination afforded by the Convention.

But let me start with some older cases and look more closely at the accessory nature of the Convention guarantee and the way it has operated. In the first case in which the European Court of Human Rights was called upon to consider the application of Article 14 of the Convention, the so-called *Belgian Linguistic* case[1], the Belgian Government argued that Article 14 "served no practical legal purpose and that its presence was purely psychological in intention". While this contention is now of largely historical interest, the qualified nature of the non-discrimination guarantee in the European Convention on Human Rights has over the years been the target of criticism, both inside and outside the Court. Article 14, the last of the substantive norms in the hierarchy of the Convention catalogue, is an almost parasitic provision, which has no independent existence, being linked exclusively to the enjoyment of the rights and freedoms laid down in the other substantive provisions. It therefore falls far short of a general prohibition of discrimination. It does not expressly enshrine the principles of equality before the law and equal protection of the law in the same way as for example Article 26 of the International Covenant on Civil and Political Rights. The accessory nature of the guarantee is moreover reflected in the cautious attitude evident in much of the Court's case-law. In the discussions on the European Union's Charter of Fundamental Rights last year, this deficit in the Convention protection was frequently cited. Since then Protocol No.12 has been adopted and signed by twenty-five Contracting States. It will enter into force once ten Contracting States have ratified it.

Article 14 has in no way, however, simply been a dead letter since the entry into force of the Convention. While it is plain that its dependence on the other substantive guarantees means that some instances of discrimination fall

[1] *Belgian Linguistic* case, judgment of 23.7.1968, Series A no.6

outside its protection, notably for example discrimination in relation to access to employment, the range of issues to which Article 14 has been applied is surprisingly wide. In this the Court has been helped by the fact that the grounds of discrimination listed in Article 14 are not exhaustive. On the other hand, where the Court has found a violation of another of the substantive provisions, it has tended, with some exceptions, to avoid examining additionally the issues that might be raised from the point of view of discrimination. In one sense this is hardly astonishing in view of the frequent overlap between breaches of the main substantive guarantees and of the non-discrimination provision. The thrust of the Convention as a whole is directed against unjustified arbitrariness as being inimical to the rule of law. It is moreover inherent in the rule of law that the law should be applied in an equal manner. A finding of arbitrary interference with fundamental rights will commonly imply an element of unjust difference of treatment, thus rendering to some extent superfluous a further finding as to the discriminatory nature of the interference. The Court's prudence in this area may also be explained by the fact that, according to the traditional notion of discrimination, a finding of discrimination will often be understood as attributing a degree of discreditable motivation to the authorities concerned, an allegation which may be and usually is difficult to substantiate, particularly at international level. Finally, the finding of a discrimination in some contexts will be tantamount to the finding of the existence of a practice of Convention violations, which the Court has shied away from, preferring to limit its review to the facts of the case before it.

But to begin at the beginning: the Court had first to set to rest the idea that Article 14 had no practical function whatsoever. In the *Belgian Linguistic* case, the Court rejected the Belgian Government's argument to that effect. It held that a measure, which in itself was in conformity with the requirements of the article enshrining the right or freedom in question, might infringe that Article

when read in conjunction with Article 14 on account of its discriminatory nature. The Court saw Article 14 as forming an integral part of each of the Articles laying down rights and freedoms. The Court's approach was thus expressed primarily in terms of conformity with the main Article rather than the accessory provision in Article 14.

In this first case the Court delimited the scope of the concept of discrimination as prohibited by Article 14. Not every difference of treatment qualified as discrimination. The notion of discrimination only applied when the difference of treatment could be identified by reference to bodies or groups in similar or analogous situations. Thus the basis of the violation found in the Belgian Linguistic case was the difference of treatment as between Dutch-speaking children living in a French language area in suburban Brussels, on the one hand, and French-speaking children living in a Dutch-speaking area, on the other. Whereas the Dutch-speaking children had access to Dutch-speaking schools outside their area of residence, the French-speaking children were denied equivalent access to French-speaking schools outside their area.

As the Court pertinently noted, "national authorities are frequently confronted with situations and problems, which on account of differences inherent therein, call for different situations" and "certain legal inequalities tend only to correct factual inequalities". Difference of treatment was therefore not discriminatory within the meaning of the Convention if it had a reasonable and objective justification, in other words if it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Referring to the subsidiary nature of the Convention system, the Court recognised, without yet using the term margin of appreciation, that national authorities were free to choose the measures that they considered appropriate in such matters. States thus enjoyed a certain discretion in assessing

whether and to what extent differences in an otherwise similar situation justify a different treatment in law.

Again it emerged from this early case that Article 14 could apply even when the State in question had gone beyond what was required of it under the Convention. So, as the Court noted, while Article 2 of Protocol No.1 did not impose on public authorities the obligation to create a particular kind of educational establishment, a State that did set up such an establishment had to ensure that the entrance requirements did not conflict with Article 14 or else run the risk of breaching that Article read together with Article 2 of Protocol No.1. The Court cited a further example of a State setting up a system of appeal courts, which it was not obliged to do under Article 6 of the Convention. If it did so however it would violate that Article, taken in conjunction with Article 14, if it debarred certain persons from such remedies without a legitimate reason, while making them available to others in respect of the same type of actions. This approach was illustrated in a later case, concerning the United Kingdom, that of *Abdulaziz, Cabales and Balkandali*[2]. Under immigration rules the applicants, who were lawfully resident aliens, were not allowed to have their husbands join them in the United Kingdom, whereas alien husbands lawfully settled in that country could be joined by their wives. The Court found no violation of the right to family life under Article 8 as the United Kingdom was under no obligation by under the Convention to accept spouses of alien residents. On the discrimination point, the Government argued that it was not in violation of Article 14 because it had acted more generously than it was required to do by virtue of the Convention. The Court rejected this argument: the notion of discrimination within the meaning of Article 14 included general cases where a person or group was treated, without proper justification, less favourably than another, even though the more favourable

[2] *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom,* 28.5.1985, Series A no.94.

treatment was not called for by the Convention. The applicants had been the victims of discrimination on the ground of sex, in breach of Article 14 taken together with Article 8.

The Belgian Linguistic judgment laid down the standard test for the scope of discrimination. It did not however spell out the mechanics of the relationship between Article 14 and the other substantive rights. This was done perhaps most clearly in the 1984 case of *Rasmussen* v. *Denmark*[3], which concerned a husband's complaint that he could contest the paternity of a child born during the marriage only within certain time-limits, whereas it was open to his wife to institute paternity proceedings at any time. Here the Court reiterated that Article 14 had no independent existence since it had effect only in relation to "the enjoyment of the rights and freedoms" set out in the other substantive provisions, but at the same time made clear that it did have a degree of autonomous meaning in so far as it did not necessarily presuppose a breach of those provisions. There could, however, be no room for its application unless the facts of the case fell within the ambit of one or more of those provisions. In *Rasmussen* the Court had no difficulty in finding that the facts came within the ambit of both Article 6 (as matter of family law and therefore involving a "civil" right) and Article 8 (the determination of legal relations between a father and putative child undoubtedly concerning private life if not family life). On the other hand, it concluded that the difference of treatment did pursue a legitimate aim, namely the need for legal certainty and the protection of the interests of the child, and that there was, having regard to the State's margin of appreciation, a reasonable relationship of proportionality between the aim pursued and the means employed. The difference of treatment accordingly was not discriminatory.

[3] *Rasmussen* v. *Denmark*, 28.11.1984, Series A no.87.

Rasmussen makes it possible to draw up a check list in applying Article 14, which goes as follows: Do the facts fall with the ambit of one or more of the other substantive provisions of the Convention? Was there a difference of treatment? Did the difference of treatment concern individuals or groups of individuals placed in analogous situations? Did the difference of treatment have a reasonable justification, in other words, as I have said, did it pursue a legitimate aim and was there a reasonable relationship of proportionality between that aim and the means employed to attain it?

Rasmussen also established that in order to be able to invoke Article 14 not only is it not necessary to make out a violation of one of the other substantive Articles, but it is not even necessary to claim such a violation, that is to rely on the substantive Article in isolation as well taken together with Article 14. In *Inze* v. *Austria*[4], the Court found a violation arising from the succession laws in relation to hereditary farms and the difference of treatment as between legitimate and illegitimate heirs. The applicant had not alleged a violation of the right to property under Article 1 of Protocol No. 1 in isolation, but only in conjunction with Article 14 of the Convention.

But what of cases where the Court does find a violation of a main Article and the accessory Article 14 is also relied on? The principal authority for the view that the Court should also examine the Article 14 complaint is the case of *Marckx* v. *Belgium*[5], in which the Court found that the position of unmarried mothers and illegitimate children under Belgian law gave rise to breaches of Article 8 both taken in isolation and in conjunction with Article 14. In a 1999 case, *Chassagnou and Others* v. *France*[6], concerning the operation of hunting laws in France and in

[4] *Inze* v. *Austria*, 28.10.1987, Series A. no.126
[5] *Marckx* v. *Belgium*, 13.6.1979, Series A no.31
[6] *Chassagnou and Others* v. *France*, 29.4.1999, ECHR 1999-111

particular the obligation imposed on small landowners to join hunting associations and allow hunters access to their property, the Court found violations of Article 1 of Protocol No.1 and Article 11 of the Convention, and then went on to find separate violations of both Articles taken in conjunction with Article 14. The Court repeated an explanation it had given in earlier cases, namely that where a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case. It has to be said that this distinction is a rather difficult one to draw, as the Court has found, and inevitably so given the degree of overlap which often exists between the breach of the main Article alone and taken in conjunction with Article 14. In *Airey* v. *Ireland*[7] the applicant alleged that the prohibitive cost of bringing judicial separation proceedings was not only a breach of the right of access to a court under Article 6 § 1, but also a breach of that Article taken in conjunction with Article 14 as amounting to discrimination on the ground of property. The Court, understandably, took the view that inequality of treatment was not a fundamental aspect of the case. Nor was it, apparently, in the case of *Dudgeon* v. *UK*[8], in which the Court held that the criminalisation of private, adult homosexual acts was a breach of Article 8. Addressing the Article 14 issue, the Court observed that this "concerned the same complaint, albeit from a different angle" and that examining this complaint served "no useful legal purpose". The Court has taken a similar line in more recent cases such as *Lustig-Prean and Beckett* v. *UK,* where the Court found a violation of Article 8 arising out of the automatic discharge from the armed forces of homosexual personnel and on account of the intrusive nature of

[7] *Airey* v. *Ireland,* 9.12.1979, Series A. no.32
[8] *Dudgeon* v. *the United Kingdom,* 22.10.1981, Series A no.45

the investigations aimed at establishing their homosexuality. The Court held that the complaint under Article 14 did not raise a separate issue.

On the other hand, there are cases in which the Court decides that, in view of the nature of the allegations, it is appropriate to examine the case first from the perspective of the non-discrimination guarantee. Thus in *Hoffman v. Austria*[9], the Court found a violation of Article 8 read in conjunction with Article 14 where parental rights had been awarded to a father in preference to the mother who was a Jehovah's witness. The Court held that there had been a difference of treatment based on the ground of religion and that, while it pursued a legitimate aim, the protection of the health and the rights of the children, there was not a reasonable relationship of proportionality between the means employed and that aim. The Court considered that no separate issues arose under either Article 8 or Article 9.

The Court took a similar approach in another case concerning parental rights, *Salgueiro da Silva Mouta* v. *Portugal*[10], again referring to the "nature of the applicant's allegations". In this case parental authority had allegedly been awarded to the mother exclusively on the basis of the father's homosexual orientation. The Court again looked first at Article 8 taken in conjunction with Article 14; it found that the competent national court, the Court of Appeal, had made a distinction based on considerations regarding the applicant's sexual orientation; and it held that there was no reasonable relationship of proportionality between the means employed and the legitimate aim pursued. The Court did not consider it necessary to rule on the allegation of a violation of Article 8 taken alone; the arguments advanced in this respect were, it noted, essentially the same as those examined in

[9] *Hoffinann* v. *Austria,* 23.6.1993, Series A no. 255-C
[10] *Salgueiro da Silva Mouta* v. *Portugal,* 21.12.1999, ECHR 1999-IX

respect of Article 8 taken in conjunction with Article 14. In passing it should be noted that this case illustrates the non-exhaustive nature of the list of grounds set out in Article 14[11].

Four categories of cases can, it seems, be distinguished: (i) cases where the Court examines the main Article, finds no violation, but concludes that the same Article is breached when read in conjunction with Article 14; (ii) cases where the Court finds a violation of the main Article and does not examine the Article 14 complaint; (iii) cases where the Court finds a violation of the main Article, but also examines the Article 14 complaint and finds a second violation on that basis; and (iv) finally cases where the Court prefers to examine the discrimination complaint first, finds a violation and leaves aside the main Article taken in isolation.

What then is the added value of the discrimination guarantee?

Firstly Article 14 does make it possible to censure conduct or measures that are not in themselves in breach of one of the main substantive Articles, but which do give rise to unacceptable arbitrary treatment. Secondly, it enables the Court to stress in certain cases the discriminatory features of the conduct or measures complained of, either by examining the main substantive Article both in isolation and in conjunction with Article 14, or by opting to take the main Article in conjunction with Article 14 rather than examining the breach of the main provision taken alone. That being said, it is not easy to identify a consistent approach in its use of Article 14 in this connection. One might question for

[11] Compare with the judgment of the Court of Justice of the European Communities (ECJ) in *Lisa Grant* v. *South West Trains,* Case C-24/96 [1998]ECR 1-621. Here the ECJ found that discrimination based on sexual orientation did not fa11 within the Community concept of sex discrimination.

instance why the discrimination aspect in relation to hunting rules and their application to small landowners should be more important than in respect of the application of the criminal law to homosexuals or the automatic discharge from the armed forces of homosexuals. It is not always clear what prompted the Court to consider that discrimination is the predominant aspect of the case, when, in the two parental authority cases I cited earlier, it would have been just as open to the Court to find a violation of the main Article.

No doubt part of the reason for the diversity of approach revealed by these cases lies in the place of non-discrimination in the Convention scheme and its contingent nature, together with the difficulties inherent in establishing discrimination, to which I referred earlier. These factors have to some extent prevented the Court from coming to grips with this important guarantee and may have obscured what could have been its true role. These uncertainties have not helped Article 14 to shed its second-class status.

Before turning briefly to the new Additional Protocol No.12, let me consider one more recent judgment, delivered in April 2000[12], which is perhaps evidence of a more robust attitude in relation to Article 14. In the *Thlimmenos* case, the applicant, who was a Jehovah's Witness, complained that he had been refused access to the profession of chartered accountant because of a previous criminal conviction. He had been convicted of insubordination for refusing to wear a military uniform on religious grounds. He relied on Article 9 taken in conjunction with Article 14. As the Court noted, the applicant did not complain of the distinction that the rule governing access to the profession made between convicted persons and others, but rather of the fact that no distinction was made

[12] *Thlimmenos* v. *Greece,* 6.4.2000, ECHR 2000-IV.

between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences. In essence the applicant was saying that he was discriminated against in the exercise of his freedom of religion, as guaranteed by Article 9 of the Convention, in that he was treated as a person convicted of a felony although his own conviction resulted from the very exercise of that freedom. The Court did not find it necessary to decide whether the applicant's initial conviction and the subsequent refusal to appoint him amounted to an interference with his rights under Article 9. It accepted the applicant's argument that Article 14 was relevant to his complaint. It then took its analysis of discrimination a step further, stating for the first time explicitly that the guarantee under Article 14 encompassed not only treating similarly people in similar situations but also treating people in significantly different situations differently. This was another facet of the prohibition of discrimination under Article 14. Applying the traditional test, the Court proceeded to examine whether the failure to treat the applicant differently had pursued a legitimate aim and concluded that the State had no legitimate interest in excluding from the profession of chartered accountant persons whose conviction could not imply any dishonesty or moral turpitude likely to undermine the offenders' ability to exercise this profession. There was not therefore a reasonable and objective justification for failing to treat the applicant differently.

Thlimmenos does, it seems to me, take the Court's case-law on discrimination into new territory. This is firstly because of its emphasis on a positive aspect, that is the need, at least in certain circumstances, to make special arrangements for persons in special categories. In this sense the Court stated, and I quote, "the right not be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." One obvious category of persons whose situations will

very often be different is that of disabled persons. But *Thlimmenos* is also significant because it is probably the case in which the link between the main Article and the alleged discrimination is the most remote. He was not excluded from his chosen profession because of his religious beliefs, but because he had a previous conviction, which was linked to his religious beliefs. This considerably widens the notion of ambit as hitherto understood by the Court. This more expansive approach may also, as I suggested in my introduction, reflect the fact that there has been a move away from the notion of discrimination as solely differential treatment based on a covert and usually unavowable intention to distinguish one group from another to recognition that discrimination may be indirect.

As to the question whether *Thlimmenos* represented a new departure, the officials of the Council of Europe's Directorate General of Human Rights who were piloting the draft Protocol No.12 through the different stages of the drafting process, said that they were alarn1ed at the adverse effect this judgment might have on the prospects of securing the adoption of the text. In the event it was adopted and opened for signature last November. I do not want to go into the Protocol in too much detail, nor in any way prejudge how it will be applied and interpreted by the Court. I can say, however, that it provides a clear legal basis for examining discrimination issues not currently covered by Article 14. In fact when the Court was consulted on the draft, one of its concerns was the practical one of how it would cope with the inevitable increase in case-load that would result. The explanatory report makes clear that the combined effect of the two paragraphs of Article 1 of the Protocol is that all situations where an individual might be discriminated against by a public authority are covered. There are of course unresolved issues, such as to what extent positive obligations are imposed by these provisions and whether the Protocol obliges States to take action against discrimination between private individuals. The drafters did not opt for a positive

equality clause, but nor does the formulation exclude positive obligations, particularly when read in the light of *Thlimmenos.*

Let me conclude at this point. The non-discrimination provision has been at least to some extent a second-class guarantee over much of the period in which the Convention has been in force. Its accessory nature has indeed prevented an evolution more in line with contemporary more activist and also more political understandings of discrimination. The most recent developments promise to give a new lease of life to the protection against discrimination under the Convention and a development which may well be more consistent with the complex issues of equality that arise in modern society.