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OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 13 July 2016 (1)

Case C-188/15

Asma Bougnaoui

Association de défense des droits de l'homme (ADDH)

v

Micropole SA

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))

(Social policy — Equal treatment in employment and occupation — Directive 2000/78/EC — Discrimination based on religion or belief — Genuine and determining occupational requirement — Meaning — Direct and indirect discrimination — Wearing of the Islamic headscarf)

1. To what extent does the prohibition of discrimination based on religion or belief under EU law, and in particular under Directive 2000/78, (2) render unlawful the dismissal of an employee who is a practising Muslim on the ground that she refuses to comply with an instruction from her employer (a private-sector undertaking) that she is not to wear a veil or headscarf when in contact with the customers of the business? The Court is asked the question with reference to Article 4(1) of that directive. As I shall go on to explain, issues arising from the distinction laid down in Article 2(2)(a) and (b) between direct and indirect discrimination are also relevant in that context. (3)

Legal framework

Convention for the Protection of Fundamental Human Rights and Freedoms

2. Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') (4) states:

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

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

3. According to Article 14 of the ECHR:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without 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.'

4. Article 1 of Protocol No 12 to the ECHR is entitled 'General prohibition of discrimination'. (5) Paragraph 1 states:

'The enjoyment of any right set forth by law shall be secured without 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.'

Treaty on European Union

5. Article 3(3) TEU provides:

‘The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection …’

6. Article 4(2) TEU states:

‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.’

The Charter of Fundamental Rights of the European Union

7. Article 10 of the Charter of Fundamental Rights of the European Union (‘the Charter’) (6) is entitled ‘Freedom of thought, conscience and religion’. Paragraph 1 reads as follows:

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

8. Article 16 of the Charter, entitled ‘Freedom to conduct a business’ provides:

‘The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.’

9. Article 21 of the Charter is entitled ‘Non-discrimination’. Paragraph 1 states:

‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’

Directive 2000/78

10. The recitals of Directive 2000/78 state, in particular:

‘(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of [EU] law.

…

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

…

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the [European Union]. ….

…

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. …

…

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

…’

11. Article 1 of the directive provides that its purpose 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’.

12. Article 2 of the directive is entitled ‘Concept of discrimination’. It states, in particular:

‘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, …

…

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for 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.’

13. According to Article 3 of the directive, entitled ‘Scope’:

‘1. Within the limits of the areas of competence conferred on the [European Union], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…

(c) employment and working conditions, including dismissals and pay;

…’

14. Article 4 of Directive 2000/78 is entitled ‘Occupational requirements’. Paragraph 1 provides:

‘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.’

15. Article 4(2) deals with differences of treatment based on a person’s religion or belief in the specific context of occupational activities within churches and ‘other public or private organisations the ethos of which is based on religion or belief’.

16. Article 6 of Directive 2000/78 lays down certain derogations from the provisions of the directive as regards discrimination based on grounds of age.

17. Article 7(1) of the directive provides that, with a view to ensuring full equality in practice, the principle of equal treatment is not to prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

French law

18. Article L. 1121-1 of the Code du travail (Labour Code) provides:

‘No one may limit personal rights or individual or collective liberties by any restriction which is not justified by the nature of the task to be performed and proportionate to the aim sought.’

19. Under Article L. 1321-3 of the Labour Code, in the version in force at the material time:

‘Workplace regulations shall not contain:

(1) Provisions contrary to primary or secondary law or to the requirements laid down by the collective agreements and understandings as to working practices applicable in the undertaking or establishment;

(2) Provisions imposing restrictions on personal rights and on individual and collective freedoms which are not justified by the nature of the task to be undertaken or proportionate to the aim that is sought to be achieved;

(3) Provisions discriminating against employees in their employment or at their work, having the same professional ability, by reason of their origin, their sex, their conduct, their sexual orientation, their age … their political opinions, their trade union or works council activities, their religious beliefs, their physical appearance, their surname or by reason of their state of health or disability.’

20. Article L. 1132-1 of the Labour Code states:

‘No person may be excluded from a recruitment procedure or from access to work experience or a period of training at an undertaking, no employee may be disciplined, dismissed or be subject to discriminatory treatment, whether direct or indirect, … in particular as regards remuneration, … incentive or employee share schemes, training, reclassification, allocation, certification, classification, career promotion, transfer, or contract renewal by reason of his origin, his sex, his conduct, his sexual orientation, his age, … his political opinions, his trade union or works council activities, his religious beliefs, his physical appearance, his surname … or by reason of his state of health or disability.’

21. According to Article L. 1133-1 of the Labour Code:

‘Article L. 1132-1 shall not preclude differences of treatment arising from a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’

Facts, procedure and the question referred

22. Ms Asma Bougnaoui was employed as a design engineer by Micropole SA, a company described in the order for reference as specialising in advice, engineering and specialised training for the development and integration of decision-making solutions. Prior to working for that company as an employee, she had completed a period of end-of-studies training there. Her contract of employment with Micropole started on 15 July 2008.

23. On 15 June 2009, she was called to an interview preliminary to possible dismissal and she was subsequently dismissed by letter of 22 June 2009. That letter (‘the dismissal letter’) stated:

‘You underwent your end-of-studies training that started on 4 February 2008 and were then engaged by our company on 1 August 2008 [(7)] as a design engineer. As part of your duties, you took part in assignments on behalf of our clients.

We asked you to work for the client, Groupama, on 15 May, at their site in Toulouse. Following that work, the client told us that the wearing of a veil, which you in fact wear every day, had embarrassed a number of its employees. It also requested that there should be “no veil next time”.

When you were taken on by our company, in your interviews with your Operational Manager, […], and the Recruitment Manager, […], the subject of wearing a veil had been addressed very clearly with you. We said to you that we entirely respect the principle of freedom of opinion and the religious beliefs of everyone, but that, since you would be in contact internally or externally with the company’s clients, you would not be able to wear the veil in all circumstances. In the interests of the business and for its development we

are constrained, vis-à-vis our clients, to require that discretion is used as regards the expression of the personal preferences of our employees.

At our interview on 17 June, [(8)] we reaffirmed that principle of necessary neutrality to you and we asked you to apply it as regards our clients. We asked you again whether you could accept those professional requirements by agreeing not to wear the veil, and you answered in the negative.

We consider that those facts justify, for the aforementioned reasons, the termination of your contract of employment. Inasmuch as your position makes it impossible for you to carry out your functions on behalf of the company, as we cannot contemplate, given your stance, your continuing to provide services on our clients' premises, you will not be able to work out your notice period. Since that failure to work during the notice period is attributable to you, you will not be remunerated for your notice period.

We regret this situation as your professional competence and your potential had led us to hope for a long-term collaboration.'

24. In November 2009, Ms Bougnaoui challenged the decision to dismiss her before the Conseil de prud'hommes (Labour Tribunal), Paris, claiming that it was a discriminatory act based on her religious beliefs. The Association de défense des droits de l'homme (Association for the protection of human rights; 'the ADDH') intervened voluntarily in those proceedings. By judgment of 4 May 2011, that tribunal held the dismissal to be well founded on the basis of a genuine and serious reason, ordered Micropole to pay Ms Bougnaoui the sum of EUR 8 378.78 by way of compensation in respect of her period of notice and rejected her other claims on the merits.

25. On appeal by Ms Bougnaoui and cross-appeal by Micropole, the Cour d'appel de Paris (Court of Appeal, Paris) upheld the judgment of the Labour Tribunal by judgment of 18 April 2013.

26. Ms Bougnaoui has brought an appeal against that judgment before the referring court. Since that court is uncertain of the correct interpretation of EU law in the circumstances of the case, it has referred the following question to the Court of Justice under Article 267 TFEU:

'Must Article 4(1) of [Directive 2000/78] 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?'

27. Written observations have been submitted to the Court by Ms Bougnaoui and the ADDH, Micropole, the French and Swedish Governments and by the European

Commission. At the hearing on 15 March 2016, the same parties – with the addition of the United Kingdom Government – presented oral argument.

Preliminary remarks

Introduction

28. Taken at its most general, the issue the Court is being asked to consider concerns the impact of anti-discrimination rules under EU law on the wearing of religious apparel. It is being asked to do so with particular regard to the wearing of that apparel in the context of a private-sector employment relationship, by a woman who is a practising member of the Islamic faith. Much has changed in recent decades in terms of social customs generally and the labour market in particular. While at one time people of different religions and ethnic backgrounds might have expected to live and work separately, that is no longer the case. Issues that, relatively recently, were seen as being of no, or at most minimal, importance have now been brought into sharp and sometimes uncomfortable focus. Seen from that perspective, the context may be perceived as a relatively 'modern' one and may, in certain circles, be viewed as emotive. It is also a context involving widely differing views and practices within the European Union.

29. It is often (perhaps, generally) the case that not all of a particular religion's compendium of religious practice is perceived by someone who adheres to that religion as absolutely 'core' to his or her own religious observance. Religious observance comes in varying forms and varying intensities. What a particular person treats as essential to his or her religious observance may also vary over time. That is because it is relatively usual for levels of personal belief, and hence of personal observance associated with that belief, to evolve as a person passes through life. Some become less observant over time; others, more so. Amongst those who do adhere to a particular faith, the level of religious observance may likewise fluctuate over the course of the religious year. An enhanced level of observance – which the practitioner may feel it appropriate to manifest in a variety of ways – may therefore be associated with particular points in the religious year, (9) whilst a 'lesser' observance may seem adequate to the same person at other times . (10)

30. The issues that arise in this Opinion do not relate to the Islamic faith or to members of the female sex alone. The wearing of religious apparel is not limited to one specific religion or to one specific gender. In some cases, there are what may be termed absolute rules, although these will not necessarily apply to all adherents of the faith in question or in all circumstances. In other cases, there may be one or more styles of apparel available to adherents, who may choose to wear them either permanently (at least when in public) or at times and/or places they consider appropriate. Thus, by way of example only, nuns in the Roman Catholic and Anglican faiths were traditionally required to wear a form of habit incorporating a headdress or veil. In some orders, that distinctive apparel may now be replaced by a small discreet cross pinned to ordinary civilian apparel. Similarly, the use of the kippah (11) by male adherents to the Jewish faith is well known. While there is considerable debate as to whether there is an obligation to cover

the head at all times (rather than only when at prayer), many orthodox members of the faith will do so in practice. (12) Male adherents to the Sikh faith are, in general, required to wear a dastar (or turban) at all times and may not remove it in public. (13)

31. There may in addition be a variety of types of religious apparel available to adherents to a particular faith. Ms Bougnaoui appears to have worn what is termed a 'hijab', that is to say a type of scarf which covers the head and neck but leaves the face clear. Other apparel worn by Muslim women include the niqab, a full-face veil leaving an opening only for the eyes, the burqa, a full-body covering including a mesh over the face, and the 'chadar' or 'chador' or 'abaya', a black veil which covers the entire body from head to ankles while leaving the face clear. (14)

32. Lastly, as regards the type of head and body apparel that female adherents to the Islamic faith may elect to wear, I would observe that like nearly all other faiths, there are different schools of thought within the Islamic religion as to the precise rules to be observed by adherents. Not all of those schools impose any requirement in this regard. Some take the view that women are free not to wear any form of head or body apparel. Other schools of thought dictate that it be worn by women at all times when in public. Certain Muslim women will adopt an elective approach, choosing whether or not to wear religious apparel depending on the context. (15)

33. Nor are the issues limited exclusively to the wearing of religious apparel. The use of religious signs has also given rise to controversy and it is plain that these may vary in both size and purport. For example, the Strasbourg Court founded part of its reasoning in its judgment in the Eweida case on the fact that the cross worn by Ms Eweida was 'discreet'.(16) It appears that the cross in question was a very small one, attached to a necklace around the wearer's neck. It might therefore be perceived as relatively, although obviously not entirely, inconspicuous. Other adherents to the Christian faith may choose to wear considerably larger crosses, extending to several centimetres in length. Sometimes, however, it may not be reasonable to expect the person concerned to make a 'discreet' choice. Thus, it is difficult to conceive how a male Sikh could be discreet or inconspicuous in his observance of the requirement to wear a dastar. (17) He either wears the turban mandated by his religion or he does not.

The Member States

34. In its judgment in *Leyla Şahin v. Turkey*, the Strasbourg Court observed that 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society … and the meaning or impact of the public expression of a religious belief will differ according to time and context'. (18) There is nothing to suggest that the position has changed in the 10-odd years since that judgment was delivered.

35. As regards the spread of religious beliefs throughout the Member States, the reports of a survey requested by the European Commission in 2012 (19) record that the average percentage of those purporting to hold Christian beliefs throughout the European Union was 74%. But the figures for the different Member States varied widely. For

Cyprus, the figure was 99%, closely followed by Romania at 98%, Greece at 97%, Malta at 96%, Portugal at 93% and Poland and Ireland at 92%. By contrast, the lowest percentages were recorded in Estonia at 45% and the Czech Republic at 34%. Of those recorded as adhering to the Islamic faith, the highest percentage was recorded for Bulgaria, at 11%, followed by Belgium at 5%. The figure for 16 Member States was 0%. Of those claiming to be atheist or agnostic, the highest level was to be found in the Czech Republic, with 20% and 39% respectively, whilst 41% of the Netherlands population consider themselves to be agnostic. For Cyprus and Romania, the figure was 0% in each case. With respect to perceived discrimination on grounds of religion or beliefs within the Member States, the report states that 51% of Europeans generally thought it to be rare or non-existent while 39% considered it widespread. Discrimination on those grounds was seen as most widespread in France (66%) and Belgium (60%), while the equivalent figures for the Czech Republic and Latvia were 10%.

36. The legislation and case-law of the Member States relating to the wearing of religious apparel in an employment context also displays a wide degree of variety. (20)

37. At one end of the spectrum, certain Member States have adopted legislation imposing blanket bans on the wearing of certain types of apparel in public generally. Thus, both France (21) and Belgium (22) have enacted laws prohibiting the wearing of apparel designed to conceal the face in public places. While those laws are not specifically targeted at the employment sector, their scope is so wide that they may inevitably restrict the ability of certain persons (including Muslim women who choose to wear the burqa or the niqab) to gain access to the employment market.

38. Also relevant in that context are the principles of *laïcité* and *neutralité*, (23) which are once again particularly relevant in France and Belgium. It is on the basis of those principles that employees in the French State sector are prohibited from wearing religious signs or apparel at the workplace. (24) Public servants in Belgium are also strictly required to observe the principle of neutrality. (25)

39. Other Member States allow their public servants greater freedom. Thus, in Germany, the Bundesverfassungsgericht (Federal Constitutional Court) recently held that a prohibition on wearing religious signs in the workplace based on the risk, in the abstract, of an impairment of State neutrality in the public education sector is contrary to the freedom of faith and that to give priority to Judaeo-Christian values amounts to unjustified direct discrimination. It is only where the external appearance of school teachers may create or contribute to a sufficiently specific risk of an impairment of State neutrality or peaceful coexistence within the school system that such a prohibition may be justified. (26) In yet other Member States, there are no restrictions in principle on the wearing of religious signs or apparel by public servants. That is the case in, for example, Denmark, the Netherlands and the United Kingdom. (27) I should add that in each of those Member States the law draws no formal distinction between the legal rules applying to employees in the public sector and those in the private sector.

40. Turning to private-sector employment, there are once again wide variations between the Member States. I emphasise that there seems to be a general absence of relevant restrictions in this area. Those that I refer to below accordingly represent more the exception than the rule.

41. In France, the Full Court (*assemblée plénière)* of the French Cour de cassation (Court of Cassation) was required, in a recent case involving a private-sector crèche in a deprived area of the Yvelines department, to consider an employer's dress code prohibiting employees from wearing religious signs as part of their apparel. The deputy director had contravened that code by refusing to remove her Islamic headscarf and was dismissed. The national court held, having regard in particular to Articles L. 1121-1 and L. 1321-3 of the Labour Code, that restrictions on employees' freedom to manifest their religious beliefs must be justified by the nature of the work undertaken and proportionate to the aim it is sought to achieve. For that reason, private undertakings may not set out general and imprecise restrictions on a fundamental freedom in their conditions of employment. However, restrictions which are sufficiently precise, justified by the nature of the work undertaken and proportionate to the aim it is sought to achieve may be lawful. In that regard, the court noted that the undertaking in question had only 18 employees and those employees were or might be in contact with young children and their parents. On that basis, it upheld the restriction, while noting at the same time that it did not follow from its judgment that the principle of State secularism, within the meaning of Article 1 of the Constitution, applied to employment in the private sector not involving the management of a public service. (28)

42. Whilst the principle of *laïcité* does not in general apply to employment relationships in the private sector in France, restrictions may be imposed on the wearing of religious apparel, first, for reasons of health, safety or hygiene in order to protect the individual. (29) Second, there may be a justification where the proper functioning of the business so requires. Thus (i) an employee cannot refuse to perform certain tasks clearly set down in his contract of employment and known at the outset of the relationship, (30) (ii) it is necessary to avoid an unacceptable imbalance between the employees' rights to exercise their religious freedom and the employer's business interests and as between employees generally in terms, for example, of leave granted for religious holidays (31) and (iii) customer relationships may serve as a basis for a restriction, but only where harm to the business can be established; a mere fear that that may be the case will not suffice. (32)

43. In Germany, an employee in the private sector may, in principle, be prohibited from wearing religious signs in the workplace, either under a collective agreement or by virtue of the employer's power of management. Nevertheless, this may be done only exceptionally.(33) By contrast, in the Netherlands, the College voor de Rechten van de Mens (Institute for Human Rights) has held that a rule or an instruction expressly prohibiting the wearing of a religious sign falls to be considered as direct discrimination. (34)

44. In a number of other Member States, certain restrictions on the wearing of religious apparel and signs by private-sector employees have been accepted on the grounds of (i) health and safety (35) and (ii) the business interests of the employer. (36)

The case-law of the Strasbourg Court

45. The Strasbourg Court has ruled that freedom of thought, conscience and religion, as enshrined by Article 9 of the ECHR, represents one of the 'foundations of a democratic society' within the meaning of the ECHR (37) and that religious freedom implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, and in public. (38) It has held there to be an interference with that right where the measure at issue consists in a prohibition on wearing an Islamic headscarf. (39)

46. Of primary importance in its case-law that is relevant to this Opinion are (i) the derogation to the general right to freedom of religion laid down in Article 9(2) of the ECHR and (ii) Article 14 of the ECHR, which prohibits discrimination on a number of grounds, including religion.

47. Much of that case-law has concerned the application of national rules concerning the wearing of Islamic apparel. In such cases, having established that there has been an interference with the general right laid down in Article 9(1), the Strasbourg Court will go on to consider whether the measure was 'necessary in a democratic society' for the purposes of Article 9(2). In so doing, it will determine whether the measures taken at national level were justified in principle, that is to say, whether the reasons adduced to justify them appear 'relevant and sufficient' and are proportionate to the legitimate aim pursued. In order to rule on the last point, it must weigh the protection of the rights and liberties of others against the applicant's alleged conduct. (40) Since, for the reasons I shall outline in point 81 below, I do not intend to explore measures adopted by the State in any detail in this Opinion, I shall record the Strasbourg Court's case-law in this area only briefly. It is, however, worth outlining some of the cases in which that court has found the test of what is 'proportionate to the legitimate aim pursued' to be satisfied.

48. Thus, the Strasbourg Court has held, inter alia:

– that a ban on wearing an Islamic headscarf while teaching imposed on a teacher of children 'of tender age' in the State education sector was justified in principle and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety; it was accordingly 'necessary in a democratic society'; (41)

– that similar principles applied to a ban on head coverings (in this case an Islamic headscarf) imposed on an associate university professor who was a public servant (42) and to a similar ban imposed on a teacher of religious affairs in a public-sector secondary school; (43)

– that a ban on wearing religious apparel (in this case an Islamic headscarf) imposed on a social worker employed in the psychiatric services unit of a public-sector hospital similarly did not contravene Article 9 of the ECHR .(44)

49. By the last of these judgments, the Strasbourg Court ruled for the first time in relation to a ban imposed on public-sector employees outwith the education field. It found in that context that there was a link between the neutrality of the public hospital service and the attitude of its servants, requiring that patients should not be in any doubt as to that impartiality. The Contracting State had not exceeded its margin of appreciation under Article 9(2) of the ECHR. (45)

50. In a different context, that court has held that the protection of the health and safety of nurses and patients in a public-sector hospital constituted a legitimate objective. Assessing the requirement for protection of that kind in a hospital ward was an area where the domestic authorities must be allowed a wide margin of appreciation. A restriction on the wearing of a (Christian) cross and chain that was 'both visible and accessible' imposed on a nurse working on a geriatric ward in a psychiatric hospital was not disproportionate and was accordingly necessary in a democratic society. (46)

51. By contrast, in the context of the blanket ban on the wearing in public places of apparel designed to conceal the face, imposed by French legislation, the Strasbourg Court held, when considering the question of necessity in relation to public safety within the meaning of, inter alia, Article 9 of the ECHR that such a ban could be regarded as proportionate as regards the legitimate aim of public safety only where there was a general threat to that aim. (47)

52. In the sphere of private-sector employment, there is currently only one judgment of the Strasbourg Court that is directly relevant in the context of the wearing of religious apparel, namely *Eweida and Others v. The United Kingdom*. (48) The question before that court in the case of Ms Eweida concerned the open wearing of a cross, described as 'discreet', in breach (at the time) of her conditions of employment, which sought to project a certain corporate image. The Strasbourg Court held that that restriction constituted an interference with her rights under Article 9(1) of the ECHR. (49) In determining whether the measure in question was justified in principle and proportionate, a fair balance has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State. (50) The employer's wish to project its corporate image was a legitimate one but it required to be balanced against Ms Eweida's desire to manifest her religious belief. Since her cross was discreet, it could not have detracted from her professional appearance. Her employer had previously authorised the wearing of other items of religious apparel such as turbans and hijabs by other members of its workforce and the company had subsequently amended its dress code to allow for the visible wearing of religious symbolic jewellery. There being no evidence of any real encroachment on the interests of others, the domestic authorities – in this case the national courts which had rejected Ms Eweida's applications – had failed to protect her right to manifest her religion, in breach of the positive obligation under Article 9 of the ECHR. (51)

53. As regards the function of Islamic apparel and the role it plays in the lives of the women wearing it, I would pause to note what appears to be a shift in the Strasbourg Court's approach as between its earlier case-law and its more recent judgments.(52) In *Dahlab v. Switzerland,*(53) for example, it observed that 'the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which … is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils'. (54)

54. By contrast, in its judgment in *S.A.S v. France*,(55) the Court rejected arguments put forward by the French Government regarding gender equality in the following terms:

'119. … The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in [the second paragraphs of Articles 8 and 9 of the ECHR], unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms …

120. … However essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places. The Court is aware that the apparel in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy …'

55. The other area in respect of which I would note a change of emphasis involves the freedom available to employees to relinquish their post and, by implication, to find another job elsewhere. In an earlier decision of the European Commission of Human Rights, this was held to be 'the ultimate guarantee of [the employee's] right to freedom of religion'. (56) More recently, the Strasbourg Court itself has taken a different view, holding that 'given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate'. (57)

56. As regards alleged violations of Article 14 of the ECHR, the Strasbourg Court has held that that provision has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the ECHR and its Protocols. (58) In *Eweida and Others v. The United Kingdom*, (59) it held as regards Ms Eweida that, since it had found there to be a breach of Article 9, there was no need to examine her complaint under Article 14 separately. (60) With respect to the second applicant in that case, it stated that the factors to be weighed in the balance when assessing the proportionality of the measure under Article 14 taken in conjunction with

Article 9 would be similar and that there was thus no basis for finding a breach of the first-mentioned provision in view of the fact that there had been no finding of a contravention of Article 9. (61)

57. While the aim underlying Protocol No 12 to the ECHR is to provide enhanced protection in respect of discrimination, its relevance to date has been very limited. In particular, only nine Member States have ratified it to date (62) and there has been only minimal case-law of the Strasbourg Court concerning it. (63)

The differences between a restrictions-based approach and one based on discrimination

58. In its written observations, Micropole has emphasised what it perceives to be a fundamental contrast in this area of the law between the restriction of a right and the prohibition of discrimination. Their scope of application is different and the former is markedly more flexible than the latter. They should, it observes, be differentiated.

59. The point is an important one and merits closer examination.

60. It is indeed true that the primary approach of the Strasbourg Court in applying the ECHR has been to adopt what I might call the restrictions-based approach by reference to Article 9. As I mentioned in point 56 above, the role played by Article 14 has been an ancillary one. Since the Charter has binding effect in EU law following the entry into force of the Treaty of Lisbon, it might be anticipated that this Court would now adopt the same approach in applying the equivalent provisions under that document, that is to say, Articles 10 and 21.

61. That view seems to me too simplistic.

62. Directive 2000/78 imposes a series of prohibitions based on discrimination. In so doing, it follows the approach adopted in what is now EU law since its inception. (64) In the context of age discrimination, the Court has held that the principle of non-discrimination must be regarded as a general principle of EU law which has been given specific expression in the Directive in the domain of employment and occupation. (65) The same must apply as regards the principle of non-discrimination on grounds of religion or belief.

63. At the same time, however, there is a fundamental difference in the intellectual analysis underlying the two approaches. It is true that the position may be essentially the same in the context of indirect discrimination, inasmuch as the derogations permitted under EU legislation require there to be a legitimate aim that is proportionate, thereby mirroring the position under the ECHR. But in the context of direct discrimination, the protection given by EU law is stronger. Here, interference with a right granted under the ECHR may still always be justified on the ground that it pursues a legitimate aim and is proportionate. In contrast, under the EU legislation, however, derogations are permitted only in so far as the measure in question specifically provides for them. (66)

64. That difference in approach seems to me to be a wholly legitimate one: Article 52(3) of the Charter specifically provides that EU law may provide more extensive protection than that given by the ECHR.

65. I would observe in passing that it is clear that the rules governing indirect discrimination may be noticeably more flexible than those relating to direct discrimination. It might be objected that the application of the rules laid down by EU law to the latter category is unnecessarily rigid and that some 'blending' of the two categories would be appropriate.

66. I do not believe this to be the case.

67. The distinction between the two classes of discrimination is a fundamental element of this area of EU legislation. There is in my view no reason to depart from it, with the inevitable loss of legal certainty that would result. Because the distinction is clear, the employer is forced to think carefully about the precise rules he wishes to lay down in his workplace regulations. In so doing, he needs to give proper consideration to the boundaries he wishes to draw and their application to his workforce.

The prohibition of discrimination in EU law

68. When the Treaty of Rome was originally adopted, the only provision under its Title on Social Policy having substance was Article 119, laying down an express requirement on the Member States to ensure equal pay without discrimination based on sex. The remaining provisions in that title were limited in scope and conferred little by way of direct rights on citizens. Matters have moved on considerably in the European Union since then.

69. At the early stage, protection developed most noticeably in relation to employment, with the adoption of Directive 75/117 on the application of the principle of equal pay for men and women, (67) followed by Directive 76/207 on equal treatment for men and women in employment matters (68) and the Court's landmark judgment in *Defrenne (No 2)*. (69) As a result, there was a prohibition of discrimination on grounds of sex within the scope of the relevant legislation, coupled (by virtue of the Court's judgment) with a distinction between direct and indirect discrimination.

70. The adoption of Article 13 EC (now, after amendment, Article 19 TFEU) following the entry into force of the Treaty of Amsterdam on 1 May 1999 provided enhanced powers to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. That Treaty provision formed the basis of Directive 2000/43 on discrimination on the grounds of racial or ethnic origin (70) and of Directive 2000/78. (71) Each of those directives adopts the same structure: there is a blanket prohibition of direct discrimination, subject only to the specific derogations laid down in the legislation, coupled with a prohibition of indirect discrimination, which may however be justified where the measure in question is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (72)

71. In his Opinion in *Coleman*, (73) Advocate General Poiares Maduro noted that equality is one of the fundamental principles of EU law. In his view, the values underlying equality are those of human dignity and personal autonomy. In order for the requirement of human dignity to be satisfied, there must, as a minimum, be a recognition of the equal worth of every individual. Personal autonomy, for its part, dictates that (to use his words) 'individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options'. Characteristics such as religious belief, age, disability and sexual orientation should have no role to play in any assessment as to whether it is right to treat someone less favourably. (74) He went on to say:

'11. Similarly, a commitment to autonomy means that people must not be deprived of valuable options in areas of fundamental importance for their lives by reference to suspect classifications. Access to employment and professional development are of fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfilment and realisation of one's potential. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life.'

72. I agree entirely with those observations. They emphasise that discrimination has both a financial impact (because it may touch on a person's ability to earn a living in the employment market) and a moral impact (because it may affect that person's autonomy). I would add that anti-discrimination legislation must, in the same way as all other legislation, be applied in a way that is effective. It must also be applied in accordance with established principles.

Proselytising and behaviour at work

73. When the employer concludes a contract of employment with an employee, he does not buy that person's soul. He does, however, buy his time. For that reason, I draw a sharp distinction between the freedom to manifest one's religion – whose scope and possible limitation in the employment context are at the heart of the proceedings before the national court – and proselytising on behalf of one's religion. Reconciling the former freedom with the employer's right to conduct his business will, as I shall demonstrate, require a delicate balancing act between two competing rights. The latter practice has, in my view, simply no place in the work context. It is therefore legitimate for the employer to impose and enforce rules that prohibit proselytising, both to ensure that the work time he has paid for is used for the purposes of his business and to create harmonious working conditions for his workforce. (75) I should make it clear that I regard the wearing of

distinctive apparel as part of one's religious observance as falling squarely within the first category, and not the second.

74. I likewise draw a clear distinction between rules legitimately promulgated by an undertaking that specify certain forms of conduct that are desired ('at all times, behave courteously to clients') or that are not permitted ('when representing our company in meetings with clients, do not smoke, chew gum or drink alcohol'); and rules that intrude on the personal rights of a particular category of employees on the basis of a prohibited characteristic (whether that be religion or another of the characteristics identified by the legislature as an impermissible basis for discrimination). The pernicious nature of the argument, 'because our employee X is wearing an Islamic headscarf' (or a kippah, or a dastar) (or is black, homosexual or a woman) 'it follows that (s)he cannot be behaving appropriately towards our clients' should require no further elaboration.

Gender equality

75. Some perceive wearing the headscarf as a feminist statement, as it represents a woman's right to assert her choice and her religious freedom to be a Muslim who wishes to manifest her faith in that way. Others see the headscarf as a symbol of oppression of women. Either view may no doubt find support in individual cases and particular contexts. (76) What the Court should not do, in my view, is to adopt the view that, because there may be some occasions where the wearing of the headscarf should or could be deemed oppressive, that is so in every instance. Rather, I would adopt the attitude of the Strasbourg Court cited in point 54 above; the matter is best understood as an expression of cultural and religious freedom.

Assessment

The scope of the question referred

76. By its question, the referring court seeks guidance as to the application of Article 4(1) of Directive 2000/78 to a wish (ultimately, it would appear, leading to the employee's dismissal) expressed by a customer to an employer no longer to have the employer's services provided by an employee wearing an Islamic headscarf. It asks whether that wish may constitute a 'genuine and determining occupational requirement' within the meaning of that provision, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out.

77. A number of issues arise from the wording of that question and the background to the dispute in the main proceedings.

78. First, while the referring court uses the word 'headscarf' (*foulard*) in its question to this Court, elsewhere in the order for reference it talks of a 'veil' (*voile*). (77) In response to questions put by the Court at the hearing, it became clear that the two terms should be understood as synonyms. The apparel in question consisted of a head covering

which left the face entirely clear. I shall use the term 'headscarf' below for the sake of consistency and clarity.

79. Second, whilst Article 3(1) of Directive 2000/78 makes it clear that the scope of the directive extends to both the public and private sectors, it is beyond doubt that there can be differences, in some cases substantial ones, as regards the ambit of national rules relating to those sectors. (78) Both in its written observations and oral submissions, the French Government has placed great emphasis on the rigid separation that exists in the public sector of that Member State as a result of the application of the principle of *laïcité*. The present case involving, as it does, a private-sector employment relationship, it suggests that the Court should restrict its answer to that area alone. It should not, in other words, address issues relating to the public-sector workforce.

80. Although the French Government did accept at the hearing that the scope of Directive 2000/78 extended to the public sector, it remained adamant as to the overriding nature of the rules on *laïcité* in that area, a point of view which in its written observations it based primarily on Article 3(1) of the directive, read in the light of Article 4(2) TEU.

81. I accept that complex arguments may arise as to the precise interrelationship between the directive and national provisions, including provisions of constitutional law, in this context. In saying that, I wish to make it clear that I neither accept nor do I reject the French Government's position as regards the applicability of the principle of *laïcité* to employment in the public sector in the context of Directive 2000/78. The other parties submitting observations to the Court in this case have not addressed that issue and there has thus been no detailed discussion of the questions which would or might arise. I shall therefore restrict my observations below to the private sector only.

82. Third, the order for reference provides only limited information regarding the factual background to the case in the main proceedings. It is thus difficult to ascertain with certainty the precise context in which the question put by the referring court was raised. I shall return to this point below. (79)

Was there unlawful discrimination in the case in the main proceedings?

83. The starting point for any analysis of the question whether there was unlawful discrimination in the case in the main proceedings must be the dismissal letter. However, it is not clear from that letter precisely what the terms of the prohibition applying to Ms Bougnaoui were. Asked to comment on that point at the hearing, Ms Bougnaoui's position was that it applied to the wearing of the Islamic headscarf when in contact with customers of the employer's business. Micropole said that there was a general ban on the wearing of religious signs (including, one has to assume, apparel) when attending the premises of those customers. That ban applied to all religions and beliefs.

84. Whatever the true position, it appears plain, nonetheless, that Ms Bougnaoui's dismissal was linked to a provision in her employer's dress code that imposed a prohibition based on the wearing of religious apparel.

85. However, it may also be observed that that dismissal was not in fact implemented on the ground of her religion (that is to say, the fact that she was a member of the Islamic faith) but on her manifestation of that religion (that is to say, the fact that she wore a headscarf). Does the prohibition laid down by Directive 2000/78 extend not only to the religion or belief of an employee but also to manifestations of that religion or belief?

86. In my view, it does.

87. It is true that the directive makes no express reference to the question of manifestation. However, a perusal of Article 9 of the ECHR and Article 10 of the Charter shows that, in each case, the right to manifest one's religion or belief is to be understood as an intrinsic part of the freedom they enshrine. Thus, each of those provisions, having set out the right to freedom of religion, goes on to state that that freedom 'includes' the right to manifest it. I therefore draw nothing from the fact that the directive is silent on the point. (80) To give only one example: were the position to be otherwise, a Sikh male, who is required by his religion to wear a turban, would have the benefit of no rights as regards his particular manifestation of his beliefs and thus risk being deprived of the very protection the directive seeks to provide.

88. On that basis, it seems impossible to conclude otherwise than that Ms Bougnaoui was treated less favourably on the ground of her religion than another would have been treated in a comparable situation. A design engineer working with Micropole who had not chosen to manifest his or her religious belief by wearing particular apparel would not have been dismissed. (81) Ms Bougnaoui's dismissal therefore amounted to direct discrimination against her on the basis of her religion or belief for the purposes of Article 2(2)(a) of Directive 2000/78.

89. That being so, the dismissal would have been lawful only if one of the derogations laid down in that directive were to have applied. Since the national court has worded its question by reference to Article 4(1), I shall start by considering that provision.

Article 4(1) of Directive 2000/78

90. Article 4 is entitled 'Occupational requirements'. Where the conditions of paragraph 1 are satisfied, a difference of treatment that would otherwise amount to discrimination is removed from the scope of the directive. That is the case whether the discrimination the difference of treatment gives rise to is direct or indirect. I now turn to those conditions.

91. First, Article 4 does not apply automatically. A Member State must first have 'provided' for it to do so. (82) The referring court refers to Article L. 1133-1 of the Labour Code in its order for reference without specifically stating that that is the provision of national law that is intended to give effect to Article 4(1). I assume, though, that that is the case.

92. Second, Member States may provide that a difference of treatment does not constitute discrimination only where that difference in treatment is 'based on a characteristic' related to any of the grounds referred to in Article 1. The Court has stated that 'it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a "genuine and determining occupational requirement"'. (83)

93. In the present case, the letter terminating Ms Bougnaoui's employment states that she was dismissed because of her alleged failure or refusal to comply with the rules laid down by her employer as regards the wearing of a religious head covering when in contact with customers. Given that the wearing of the Islamic headscarf is (or at least should be accepted as being) a manifestation of religious belief, (84) a rule which prohibits the wearing of such a head covering is plainly capable of constituting a 'characteristic related to' religion or belief. That requirement too should be considered as satisfied.

94. Third, the characteristic in question must constitute a 'genuine and determining occupational requirement' by reason of the nature of the particular occupational activities concerned or the context in which they are carried out. Furthermore, the objective must be legitimate and the requirement must be proportionate.

95. The Court has held that Article 4(1) must be interpreted strictly. (85) Indeed, given the statement in recital 23 of the directive that the derogation should apply only 'in very limited circumstances', it is hard in the extreme to see that the position could be otherwise. It follows that Article 4(1) of Directive 2000/78 must be applied in a way that is specific. (86) It cannot be used to justify a blanket exception for all the activities that a given employee may potentially engage in.

96. The narrowness of the derogation is reflected in the wording of Article 4(1). Not only must the occupational requirement be 'genuine', it must also be 'determining'. That means, as the Swedish Government in my view rightly observes, that the derogation must be limited to matters which are absolutely necessary in order to undertake the professional activity in question.

97. Applying the provision in the context of age discrimination, the Court has accepted that a requirement based on age as to the possession of especially high physical characteristics may meet that test when applied to persons in the fire service whose activities are characterised by their physical nature and include fighting fires and rescuing persons. (87) It has also held that requirement to be satisfied in the case of an age-related condition for the retirement of airline pilots, on the basis that it is undeniable that physical capabilities diminish with age and that physical defects in that profession may have significant consequences. (88) Similarly, it has accepted that the possession of particular physical capabilities may satisfy the test in the context of an age-based requirement for admission to posts as a police officer, on the ground that tasks relating to the protection of persons and property, the arrest and custody of offenders and the conduct of crime prevention patrols may require the use of physical force. (89)

98. The Court has had occasion to look at an analogous derogation from the principle of equal treatment on grounds of sex contained in Article 2(1) of Directive 76/207 (90) in the context of direct discrimination on grounds of sex and service in the armed forces. The different conclusions as to the applicability of the derogation in Article 2(2) of that directive (91) reached in *Sirdar* (92) and (less than three months later) in *Kreil* (93) confirm the importance of subjecting to close scrutiny the argument that a particular characteristic is essential for the performance of a particular job. They also show that one must look at both the activity and the context (rather than one or the other in isolation) in order to determine whether a particular characteristic is really and truly essential (or, to use the wording of Directive 2000/78, a 'genuine and determining occupational requirement').

99. As regards the prohibition concerning discrimination on the ground of religion or belief, the obvious application of the derogation would be in the area of health and safety at work. Thus, for example, it would be possible to exclude, for those reasons, a male Sikh employee who insisted for religious reasons on wearing a turban from working in a post which required the wearing of protective headgear. The same could apply to a female Muslim working on potentially dangerous factory machinery and whose wearing of particular attire could give rise to serious concerns on safety grounds. Whilst I do not wish to state that there are no other circumstances in which the prohibition of discrimination based on religion or belief could fall within Article 4(1), I find it hard to envisage what they could be.

100. But I cannot see any basis on which the grounds which Micropole appears to advance in the dismissal letter for dismissing Ms Bougnaoui, that is to say, the commercial interest of its business in its relations with its customers, could justify the application of the Article 4(1) derogation. As the Commission rightly observes, first, the Court has held that direct discrimination (which I consider this to have been) cannot be justified on the ground of the financial loss that might be caused to the employer. (94) Second, whilst the freedom to conduct a business is one of the general principles of EU law (95) and is now enshrined in Article 16 of the Charter, the Court has held that that freedom 'is not an absolute principle but must be viewed in relation to its function in society … Accordingly, limitations may be imposed on the exercise of that freedom provided, in accordance with Article 52(1) of the Charter, that they are prescribed by law and that, in accordance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others'. (96) In that regard, the Court has found, in relation to safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter, that the EU legislature was entitled to adopt rules limiting the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over the contractual freedom implicit in the freedom to conduct a business. (97)

101. The same reasoning must apply here as regards the right not to be discriminated against. If nothing else, to interpret Article 4(1) in the manner proposed by Micropole

would risk ‘normalising’ the derogation which that provision lays down. That cannot be right. As I have already indicated, (98) it is intended that the derogation should apply only in the most limited of circumstances.

102. Thus, I can see no basis on which Article 4(1) of Directive 2000/78 could be said to apply to the activities undertaken by Ms Bougnaoui as an employee of Micropole. There is nothing in the order for reference or elsewhere in the information made available to the Court to suggest that, because she wore the Islamic headscarf, she was in any way unable to perform her duties as a design engineer – indeed, the dismissal letter expressly refers to her professional competence. Whatever the precise terms of the prohibition applying to her, the requirement not to wear a headscarf when in contact with customers of her employer could not in my view be a ‘genuine and determining occupational requirement’.

The remaining derogations in respect of direct discrimination

103. Before concluding my analysis of direct discrimination, I shall consider the remaining derogations that may apply to that type of discrimination under Directive 2000/78.

104. The first is Article 2(5). That provision is unusual inasmuch as its equivalent is not to be found in other EU anti-discrimination legislation. (99) The Court has held that it is intended to prevent and arbitrate a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. It has also held that, as an exception to the principle of the prohibition of discrimination, it must be interpreted strictly. (100)

105. The Article 2(5) derogation cannot apply to the case in the main proceedings. First, there is no suggestion that any relevant national legislation has been enacted in order to give effect to that derogation. Second, even if there were, I cannot see how it might be called in aid to justify discrimination of the kind at issue. I reject the idea that a prohibition on employees wearing religious attire when in contact with customers of their employer’s business may be necessary for ‘the protection of individual rights and freedoms which are *necessary for the functioning of a democratic society*’.(101) To the extent that such an argument is relevant for the purposes of Directive 2000/78, it falls to be considered in the context of the latitude which the rules governing indirect discrimination may permit (102) and not that of the derogation laid down under Article 2(5).

106. The second is the exception laid down by Article 4(2) of Directive 2000/78. That provision applies to ‘occupational activities within churches and other public or private organisations, the ethos of which is based on religion or belief’. Recital 24 of the directive shows that it was intended to give effect to Declaration No 11 on the status of churches and non-confessional organisations. (103) Given the nature of Micropole’s activities, the derogation cannot apply in this case.

107. The remaining two provisions derogating from the principle of equal treatment are those set out in Articles 6 and 7 of the directive. The first refers to certain justifications of differences of treatment on grounds of age and the second to measures maintained or adopted by Member States to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1. They plainly are not relevant to the present case.

108. In the light of all the foregoing, it is my view that a rule laid down in the workplace regulations of an undertaking which prohibits employees of the undertaking from wearing religious signs or apparel when in contact with customers of the business involves direct discrimination on grounds of religion or belief, to which neither Article 4(1) of Directive 2000/78 nor any of the other derogations from the prohibition of direct discrimination on grounds of religion or belief which that directive lays down applies. That is *a fortiori* the case if the rule in question applies to the wearing of the Islamic headscarf alone.

Indirect discrimination

109. The conclusions I have just set out could, on one view, be said to be sufficient to answer the referring court's question. However, it is possible that the Court may disagree with the analysis I have adopted. I have also indicated the difficulties the Court is faced with in terms of determining the precise scope of the dispute in the main proceedings. (104) It may be that a party to those proceedings will present supplementary facts to the national court that will suggest that the discrimination in question is indirect or that the parties are in a different legal situation. For that reason, I shall address the question of indirect discrimination and consider the application of Article 2(2)(b)(i) of Directive 2000/78 to the case in the main proceedings. I shall, however, do so only briefly.

110. In the analysis of indirect discrimination that follows, I shall assume that there exists a (hypothetical) company rule imposing an entirely neutral dress code on all employees. Thus, any item of apparel that reflects the wearer's individuality in any way is prohibited. Under such a dress code, all religious symbols and apparel are (evidently) banned – but so too is the wearing of a FC Barcelona supporter's shirt or a tie denoting that one attended a particular Cambridge or Oxford college. Those who infringe the rule are reminded of the company code and are warned that compliance with the neutral dress code is mandatory for all employees. If they persist in conduct that infringes that code, they are dismissed. The rule as here formulated is apparently neutral. It does not ostensibly discriminate against those whose religious convictions require them to wear particular apparel. It nevertheless indirectly discriminates against them. If they are to remain true to their religious convictions, they have no option but to infringe the rule and to suffer the consequences.

111. Article 2(2)(b)(i) states that a requirement that would otherwise be discriminatory and therefore unlawful may nevertheless be permitted when the relevant provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Legitimate aim

112. Directive 2000/78 does not define the concept of a legitimate aim for the purposes of Article 2(2)(b)(i). Yet it is clear that the legitimacy of an aim may find its basis in social policy, particularly if that policy has a specific echo in Treaty provisions. Thus, Article 6(1) of the directive specifies, as aims that are legitimate, 'legitimate employment policy, labour market and vocational training objectives', each of which may find their source in Article 3(3) TEU. (105)

113. In a wider context, it seems to me that it is also a legitimate aim to protect the rights and freedoms of others – thus, for example, to afford protection to those who may be mentally impressionable, such as children of a tender age and those among the elderly who may not have retained all their mental faculties and who can thus be assimilated to those in the first category. (106)

114. Next, it seems to me that where the requirement of a legitimate objective laid down by Article 4(1) of Directive 2000/78 is satisfied, for example in the case of a prohibition based on issues related to health and safety, the 'legitimate aim' test set out in Article 2(2)(b)(i) will also be met. (107) The tests in that regard will be the same.

115. I also consider that the interest of the employer's business constitutes a legitimate aim and that it is not the legislation's objective to impede that freedom any more than is appropriate and necessary. (108)

116. That aspect may, it seems to me, be particularly relevant in the following areas:

– the employer may wish to project a particular image to his clients or customers; thus, it seems to me that a policy of requiring that employees wear a uniform or a particular style of dress or maintain a 'smart' outward appearance will fall within the concept of a legitimate aim; (109)

– the same may also apply to rules governing working hours; a duty to be available to work flexible hours, including unsocial hours, where the requirements of the job so dictate is in my view legitimate; (110)

– measures taken by an employer with a view to maintaining harmony within his workforce for the good of his business as a whole.

117. I have already mentioned, however, that the Court has held that the freedom to carry on business is not an absolute principle but may be subject to limitations provided, inter alia, that they are prescribed by law. (111) In the present case, it is clear that the limitations imposed by the right to equal treatment in terms of freedom from discrimination on the grounds of, inter alia, religion or belief, are prescribed by law. They are expressly provided for in Directive 2000/78.

118. Here, I emphasise that, to someone who is an observant member of a faith, religious identity is an integral part of that person's very being. The requirements of one's faith – its discipline and the rules that it lays down for conducting one's life – are not elements that are to be applied when outside work (say, in the evenings and during weekends for those who are in an office job) but that can politely be discarded during working hours. Of course, depending on the particular rules of the religion in question and the particular individual's level of observance, this or that element may be non-compulsory for that individual and therefore negotiable. But it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not. (112)

119. These proceedings present a classic example of precisely that situation. Two protected rights – the right to hold and manifest one's religion and the freedom to carry on a business – are potentially in conflict with one another. An accommodation must be found so that the two can coexist in a harmonious and balanced way. It is with that in mind that I turn to the question of proportionality.

Proportionality

120. Article 2(2)(b)(i) of Directive 2000/78 provides that the means of achieving the aims underlying the measure in question must also be appropriate and necessary. Those means must, in other words, be proportionate.

121. In her analysis of proportionality for the purposes of Directive 2000/78 in her Opinion in *Ingeniørforeningen i Danmark* , (113) Advocate General Kokott observed that the principle of proportionality required that 'measures must not cause disadvantages which are disproportionate to the aims pursued even if those measures are appropriate and necessary for meeting legitimate objectives'. It is 'necessary to find the 'right balance' between the different interests involved'. I agree entirely.

122. In that context, it seems to me that the starting point for any analysis must be that an employee has, in principle, the right to wear religious apparel or a religious sign but that the employer also has, or may have, the right to impose restrictions. (114)

123. Thus, it seems to me that where an undertaking has a policy requiring its employees to wear a uniform, it is not unreasonable to require that employees should do as much as possible to meet it. An employer can therefore stipulate that those employees who wear an Islamic headscarf should adopt the colour of that uniform when selecting their headscarf (or, indeed, propose a uniform version of that headscarf). (115)

124. Similarly, where it is possible for an employee to wear a religious symbol discreetly, as was the case for example with Ms Eweida in the Strasbourg Court judgment, (116) it may be proportionate to require him or her to do so.

125. What is proportionate may vary depending on the size of the undertaking concerned. The bigger the business, the more likely it will be to have resources allowing it to be

flexible in terms of allocating its employees to the tasks required of them. Thus, an employer in a large undertaking can be expected to take greater steps to make a reasonable accommodation with his workforce than an employer in a small- or medium-sized one.

126. Where a particular form of religious observance is not regarded as essential by the adherent to that religion, the chances of a conflict of positions such as that which has led to the present proceedings are reduced. The employer will ask the employee to refrain from a particular practice. Because that practice was (relatively) unimportant to the employee, he or she may decide to comply. The potential conflict disappears.

127. But what should happen when the practice in question is viewed as essential by the individual employee?

128. I have already indicated that there may be instances where the particular type of observance that the employee regards as essential to the practice of his/her religion means that he cannot do a particular job. (117) More often, I suggest, the employer and employee will need to explore the options together in order to arrive at a solution that accommodates both the employee's right to manifest his religious belief and the employer's right to conduct his business. (118) Whilst the employee does not, in my view, have an absolute right to insist that he be allowed to do a particular job within the organisation on his own terms, nor should he readily be told that he should look for alternative employment. (119) A solution that lies somewhere between those two positions is likely to be proportionate. Depending on precisely what is at issue, it may or may not involve some restriction on the employee's unfettered ability to manifest his religion; but it will not undermine an aspect of religious observance that that employee regards as essential. (120)

129. There is one particular additional observation that I wish to make in respect of the issue in the present case.

130. Western society regards visual or eye contact as being of fundamental importance in any relationship involving face-to-face communication between representatives of a business and its customers. (121) It follows in my view that a rule that imposed a prohibition on wearing religious apparel that covers the eyes and face entirely whilst performing a job that involved such contact with customers would be proportionate. The balancing of interests would favour the employer. Conversely, where the employee in question is asked to work in a role which involves no visual or eye contact with customers, for example in a call centre, the justification for the *same rule* would disappear. The balance will favour the employee. And where the employee seeks to wear only some form of headgear that leaves the face and eyes entirely clear, I can see no justification for prohibiting the wearing of that headgear.

131. Both in its written and oral submissions, Micropole has placed great emphasis on the fact that the proportion of Ms Bouganoui's working time during which she was in contact with customers and thus prohibited from wearing an Islamic headscarf was not greater

than 5%. On that basis, it argues that the restriction was proportionate. Such an argument seems to me to miss the point. The amount of time in respect of which a prohibition may apply may have no bearing on the employee's reason for seeking to wear the head covering in question. Ms Bougnaoui's religious conviction as to what constitutes appropriate attire for herself as an observant Muslim woman is that she should wear an Islamic headscarf (the hijab) whilst at work. If that is the position when she is within the familiar daily environment of her employer's business, it is reasonable to suppose that it is a fortiori the position when she is away from that environment and in contact with parties external to her employer's business.

132. Whilst the question is ultimately one for the national court having the responsibility for reaching a final decision in the matter and while there may be other matters relevant to any discussion on proportionality of which this Court has not been informed, I consider it unlikely that an argument based on the proportionality of the prohibition imposed under Micropole's workplace regulations – whether the ban involved the wearing of religious signs or apparel generally or the Islamic headscarf alone – would succeed in the case in the main proceedings.

133. My final observation is this. It seems to me that in the vast majority of cases it will be possible, on the basis of a sensible discussion between the employer and the employee, to reach an accommodation that reconciles adequately the competing rights of the employee to manifest his or her religion and the employer to conduct his business. Occasionally, however, that may not be possible. In the last resort, the business interest in generating maximum profit should then in my view give way to the right of the individual employee to manifest his religious convictions. Here, I draw attention to the insidiousness of the argument, 'but we need to do X because otherwise our customers won't like it'. Where the customer's attitude may itself be indicative of prejudice based on one of the 'prohibited factors', such as religion, it seems to me particularly dangerous to excuse the employer from compliance with an equal treatment requirement in order to pander to that prejudice. Directive 2000/78 is intended to confer protection in employment against adverse treatment (that is, discrimination) on the basis of one of the prohibited factors. It is not about losing one's job in order to help the employer's profit line.

134. In the light of all the foregoing, I conclude that where there is indirect discrimination on grounds of religion or belief, Article 2(2)(b)(i) of Directive 2000/78 should be construed so as to recognise that the interests of the employer's business will constitute a legitimate aim for the purposes of that provision. Such discrimination is nevertheless justified only if it is proportionate to that aim.

Conclusion

135. I therefore propose that, in answer to the question referred, the Court should reply to the Cour de Cassation (Court of Cassation, France) as follows:

(1) A rule laid down in the workplace regulations of an undertaking which prohibits employees of the undertaking from wearing religious signs or apparel when in contact with customers of the business involves direct discrimination on grounds of religion or belief, to which neither Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation nor any of the other derogations from the prohibition of direct discrimination on grounds of religion or belief which that directive lays down applies. That is *a fortiori* the case when the rule in question applies to the wearing of the Islamic headscarf alone.

(2) Where there is indirect discrimination on grounds of religion or belief, Article 2(2)(b)(i) of Directive 2000/78 should be construed so as to recognise that the interests of the employer's business will constitute a legitimate aim for the purposes of that provision. Such discrimination is nevertheless justified only if it is proportionate to that aim.

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1 – Original language: English.

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2 – Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

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3 – A request for a preliminary ruling based on similar (though not identical) facts has been referred to the Court by the Hof van Cassatie (Court of Cassation, Belgium) in Case C-157/15 *Achbita* (pending before the Court). The question referred by that court is different in that it essentially concerns the difference between direct and indirect discrimination for the purpose of Article 2(2)(a) and (2)(b) of Directive 2000/78. My colleague, Advocate General Kokott, delivered her Opinion in that case on 31 May 2016.

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4 – Signed at Rome on 4 November 1950. All the Member States are signatories to the ECHR, but the European Union has not yet acceded as such; see Opinion 2/13, EU:C:2014:2454.

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5 – The protocol was opened for signature on 4 November 2000. Of the EU Member States, it has to date been signed by Austria, Belgium, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia and Spain.

Only Croatia, Cyprus, Finland, Luxembourg, Malta, the Netherlands, Romania, Slovenia and Spain have so far ratified it.

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6 – OJ 2010 C 83, p. 389.

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7 – It is unclear why the dismissal letter should have used this date, since there appears to be common accord between the parties that Ms Bougnaoui's employment with Micropole commenced on 15 July 2008. I do not attach any significance to the point, at least as far as the present Opinion is concerned.

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8 – While the dismissal letter uses this date, the order for reference states that an interview took place on 15 June 2009. It may of course be that two interviews took place. Whatever the position, I do not consider that anything turns on the point as far as the question referred to the Court is concerned.

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9 – See, for example, judgment of the European Court of Human Rights ('the Strasbourg Court') of 1 July 2014 in *S.A.S. v. France*, CE:ECHR:2014:0701JUD004383511, § 12.

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10 – By way of illustration: it is well known that figures for church attendance are at their highest over the Christmas period (with high spots for Midnight Mass and/or the service on Christmas Day); and many Christians 'make an effort' for Lent, before the rejoicing of Easter. A similar phenomenon may be observed in Judaism. Thus, synagogues may resort to issuing tickets in order to manage attendance at services on Rosh Hashanah (the Jewish New Year) and Yom Kippur (the Day of Atonement) – at other times of the year, such a procedure is unnecessary as there is adequate space for everyone who wishes to attend.

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11 – Known also variously as the kippa, kipoh, or yarmulke or, more colloquially, as the skull cap.

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12 – See, Oxtoby, W.G., *A Concise Introduction to World Religions*, Oxford University Press, Oxford, 2007.

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13 – See Cole, W.O., and Sambhi, P.S., *Sikhism and Christianity: A Comparative Study*, Macmillan, 1993. Male Sikh barristers in the United Kingdom have reconciled their religious obligation with the dress requirements of the profession (wig and gown for court) by replacing the normal black dastar with a distinctive white dastar.

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14 – For further information, see : *Niqab, hijab, burqa: des voiles et beaucoup de confusions*, Le Monde, 11 June 2015, available on the internet at http://www.lemonde.fr/les-decodeurs/article/2015/06/11/niqab-hijab-burqa-des-voiles-et-beaucoup-de-confusions_4651970_4355770.html#U3778UWCg7HuTisY.99.

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15 – See, for example, judgment of the Strasbourg Court of 1 July 2014 in *S.A.S. v. France*, CE:ECHR:2014:0701JUD004383511. § 12 of that judgment records that the applicant, a devout Muslim, wore the niqab in public and in private, but not systematically. She wished to be able to wear it when she chose to do so, depending in particular on her spiritual feelings. There were certain times (for example, during religious events such as Ramadan) when she believed that she ought to wear it in public in order to express her religious, personal and cultural faith. Her aim was not to annoy others but to feel at inner peace with herself.

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16 – Judgment of 15 January 2013 in *Eweida and Others v. the United Kingdom*, CE:ECHR:2013:0115JUD004842010, § 94.

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17 – See point 30 above.

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18 – Judgment of 10 November 2005 in *Leyla Şahin v. Turkey*, CE:ECHR:2005:1110JUD004477498, § 109.

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19 – See European Commission, Special Eurobarometer 393, *Report on Discrimination in the EU in 2012*, November 2012. The report does not extend to

Croatia. I should add that the figures quoted require to be read with a degree of caution. They are not based on official statistics but on replies given in response to questions asked. They do not distinguish between practising and non-practising members of a particular religious faith nor do they necessarily distinguish between religious affiliation and ethnic affiliation. I include them in order to show that there is no such thing as a 'norm' within the Member States in this context.

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20 – I should stress that the review which follows does not purport in any way to be exhaustive. In referring to some of the laws and decisions of the courts of the Member States, I seek merely to highlight certain aspects of the rules in this area which seem to me to be particularly relevant. Of necessity, such an exercise is incomplete.

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21 – Loi no 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (Law No 2010-1192 of 11 October 2010 prohibiting concealment of the face in public places).

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22 – Loi du 1er juin 2011 visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage
(Law of 1 June 2011 prohibiting the wearing of all apparel concealing the face either entirely or primarily). The ban applies to all places accessible to the public.

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23 – These may be rather loosely translated into English as '(State) secularism' and '(State) neutrality'.

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24 – See, as regards public-sector schools, loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (Law No 2004-228 of 15 March 2004 concerning, as an application of the principle of State secularism, the wearing of symbols or apparel which show religious affiliation in public primary and secondary schools) and see, more generally, Conseil d'État (Council of State) avis, 3 May 2000, *Mlle Marteaux*, No 217017.

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25 – See Arrêté royal du 14 Juin 2007 modifiant l'arrêté royal du 2 octobre 1937 portant statut des agents de l'État (Royal Decree of 14 June 2007 amending the Royal

Decree of 2 October 1937 regarding the regulations applying to public servants), Article 8.

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26 – See order of 27 January 2015, 1 BvR 471/10 and 1 BvR 1181/10.

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27 – That does not mean that there may not be restrictions based, for example, on health and safety grounds.

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28 – Cour de cassation, assemblée plénière, 25 June 2014, arrêt No 13-28.845 (‘*Baby Loup*’).

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29 – See deliberation of the Haute autorité de la lutte contre les discriminations et pour l’égalité (Equal Opportunities and Anti-Discrimination Commission) (HALDE) No 2009-117 of 6 April 2009, points 40 and 41.

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30 – See, by way of example, Cour de cassation, chambre sociale, 12 July 2010, No 08-45.509, and Cour de cassation, chamber sociale, 24 March 1998, No 95-44.738.

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31 – See deliberation of the HALDE, No 2007-301 of 13 November 2007.

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32 – For example, a saleswoman who wore full-body religious apparel at her place of employment was held to be validly dismissed where she had not worn that apparel when she was recruited (see Cour d’appel de Saint-Denis-de-la-Réunion, 9 septembre 1997, No 97/703.306). But the sole fact that the employee is in contact with customers will not justify the imposition of a restriction on that employee’s freedom to manifest his or her religion. Consequently, the dismissal of an employee who refused to remove her headscarf, which she had worn since the beginning of her employment and which had not caused any problems with the customers of the business with whom she was in contact, has been held to be unfair (see CA de Paris, 19 June 2003, No 03-30.212).

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33 – Thus, the Bundesarbeitsgericht (Federal Labour Court) has ruled that the dismissal of a member of the sales staff of a department store on the basis of her refusal to remove her headscarf could not be justified on the grounds laid down in the Kündigungsschutzgesetz (Law on protection against unfair dismissal) on the basis that she was not prevented from carrying out her work as a salesperson and that her conduct was not harmful to her employer. See judgment of 10 October 2002, 2 AZR 472/01.

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34 – Decision of the Institute for Human Rights of 18 December 2015. While the decisions of the Institute have no binding legal force, they are highly persuasive and are in most cases followed by the national courts.

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35 – These include Belgium, Denmark, the Netherlands and the United Kingdom.

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36 – Thus: (i) in Belgium, by judgment of 15 January 2008 (*Journal des tribunaux du travail*, No 9/2008, p. 140), the Cour du travail de Bruxelles (Higher Labour Court, Brussels) held that an employer might invoke objective considerations concerning the commercial image of his business in order to dismiss a shop assistant who wore the headscarf; (ii) in Denmark, the Højesteret (Supreme Court) has held that an employer may impose a dress code designed to reflect the undertaking's commercial image and not permitting the wearing of a headscarf provided that the rules under it apply to the workforce as a whole (Ufr. 2005, 1265H); (iii) the Netherlands courts have upheld employers' claims based on the priority of the professional and representative image of the business when implementing a dress code (see the analysis of the Commissie Gelijke Behandeling (Board of Equal Treatment) concerning the rules relating to police uniforms and 'life-style neutrality' (CGB-Advies/2007/08)); and (iv) it would appear that in the United Kingdom an employer may impose a dress code on his employees provided that, should the rules under that code prejudice a particular employee by reason of his religion, the employer must justify them (see Vickers, L., 'Migration, Labour Law and Religious Discrimination', in *Migrants at Work: Immigration and Vulnerability in Labour Law*, Oxford University Press, Oxford, 2014, Chapter 17).

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37 – See, for example, decisions of 15 February 2001 in *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398, and 24 January 2006 in *Kurtulmuş v. Turkey*, CE:ECHR:2006:0124DEC006550001.

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38 – Judgment of 10 November 2005 in *Leyla Şahin v. Turkey*, CE:ECHR:2005:1110JUD004477498, § 105.

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39 – See, for example, decision of 15 February 2001 in *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398.

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40 – For an example of the application of that test, see, for example, decision of 15 February 2001 in *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398.

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41 – Decision of 15 February 2001 in *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398.

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42 – Decision of 24 January 2006 in *Kurtulmuş v. Turkey*, CE:ECHR:2006:0124DEC006550001.

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43 – Decision of 3 April 2007 in *Karaduman v. Turkey*, CE:ECHR:2007:0403DEC004129604.

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44 – Judgment of 26 November 2015 in *Ebrahimian v. France*, CE:ECHR:2015:1126JUD006484611.

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45 – §§ 63 and 67. It is worth pointing out, however, that that judgment did not go without criticism from within the Strasbourg Court itself. In her partly concurring and partly dissenting opinion, Judge O'Leary observed that the Court's earlier case-law essentially concerned issues that are intimately linked to the values which educational establishments are intended to teach and that there was only little discussion in the judgment in the present case of the considerable extension of the case-law into the wider field. As regards the margin of appreciation given to Contracting States in the context of a religious head covering, she stated that such a margin of appreciation goes hand in hand with European supervision in cases where the ECHR applies and cannot simply be sidestepped by invoking that margin of appreciation, however wide. In his dissenting opinion, Judge De Gaetano stated, in support of his view that there had been a violation

of Article 9 of the ECHR, that the judgment rested on what he termed the 'false (and very dangerous) premiss … that the users of public services cannot be guaranteed an impartial service if the public official serving them manifests in the slightest way his or her religious affiliation …A principle of constitutional law or a constitutional "tradition" may easily end up being deified, thereby undermining every value underpinning the [ECHR] …'.

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46 – Judgment of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010, §§ 99 and 100.

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47 – Judgment of 1 July 2014 in *S.A.S. v. France*, CE:ECHR:2014:0701JUD004383511, § 139. Since the French Government had failed to satisfy that test, it lost on that ground. However, the measure was upheld on the basis of the separate aim of 'living together' put forward by that Government.

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48 – Judgment of 15 January 2013, CE:ECHR:2013:0115JUD004842010.

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49 – § 91.

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50 – § 84.

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51 – § 94.

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52 – I accept, of course, that the contexts are different, the earlier case-law concerning the education sector and the later case-law the public sphere.

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53 – Decision of 15 February 2001, CE:ECHR:2001:0215DEC004239398.

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54 – See also judgment of 10 November 2005 in *Leyla Şahin v. Turkey*, CE:ECHR:2005:1110JUD004477498, § 111.

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55 – Judgment of 1 July 2014, CE:ECHR:2014:0701JUD004383511.

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56 – See decision of 3 December 1996 in *Konttinen v. Finland*, CE:ECHR:1996:1203DEC002494994, approved in decision of 9 April 1997 in *Stedman v. The United Kingdom*, CE:ECHR:1997:0409DEC002910795, where the Commission noted that the applicant was 'free to resign'.

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57 – Judgment of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010, § 83.

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58 – Judgment of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010, § 85. For that reason, Article 14 of the ECHR has been described by some authors as being 'parasitic'. See Haverkort-Spekenbrink, S., *European Non-discrimination Law*, School of Human Rights Research Series, Volume 59, p. 127.

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59 – Judgment of 15 January 2013, CE:ECHR:2013:0115JUD004842010.

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60 – § 95.

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61 – § 101.

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62 – See footnote 5 above.

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63 – See, by way of example, judgments of 22 December 2009 in *Sejdić and Finci v. Bosnia and Herzegovina*, CE:ECHR:2009:1222JUD002799606, and 15 July 2014 in *Zornić v. Bosnia and Herzegovina*, CE:ECHR:2014:0715JUD000368106. The cases concerned the right of the applicants to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina.

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64 – See, further, point 68 et seq. below.

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65 – See judgment of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 38.

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66 – See further, on Directive 2000/78, point 70 below.

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67 – Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

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68 – Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

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69 – Judgment of 8 April 1976 in *Defrenne*, 43/75, EU:C:1976:56. For a fuller analysis, see Barnard, C., *EU Employment Law*, Oxford University Press, Oxford, 2012, chapter 1.

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70 – Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

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71 – It should be noted that the scope of protection of the two directives differs. For example, Article 3 of Directive 2000/43 provides that its scope extends to '(e) social protection, including social security and healthcare; (f) social advantages; (g) education; [and] (h) access to and supply of goods and services which are available to the public, including housing'. These grounds are not listed in Directive 2000/78. It will also be apparent that a measure amounting to discrimination on grounds of religion or belief may also, depending on the circumstances, represent discrimination on grounds of sex or race. While the Commission has adopted a Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final), that proposal, which would expand the scope of protection in respect of the matters covered by Directive 2000/78, has yet to be taken forward.

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72 – The same approach is adopted in the current legislation concerning sex discrimination, namely 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 (OJ 2006 L 204, p. 23).

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73 – C-303/06, EU:C:2008:61.

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74 – Points 8 to 10.

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75 – A measure prohibiting proselytising, whilst it might involve direct discrimination, would therefore, in my view, potentially be covered by the derogation in Article 2(5) of the directive as being necessary to protect the rights and freedoms of others. It would, however, require to be founded in 'measures laid down by national law': see the express text of the derogation.

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76 – Thus, the particular context of the present case is that of an educated woman seeking to participate in the labour market of an EU Member State. Against that background, it would be patronising to assume that her wearing of the hijab merely serves to perpetuate existing inequalities and role perceptions. The reader will readily call to mind other possible, different contexts in which the question of women wearing Islamic apparel might arise and where it might be more legitimate to draw such an inference.

77 – It may be thought that the word ‘veil’ always connotes an item of apparel that covers the face. That is not so; see, for example, the definition in the *Shorter Oxford English Dictionary*, which refers to fabric worn ‘over the head *or* face’ (emphasis added).

78 – See in particular, in that regard, point 38 above.

79 – See point 109 below.

80 – See also in that regard and in a different context, Opinion of Advocate General Bot in Joined Cases *Yand Z*, C-71/11 and C-99/11, EU:C:2012:224, where he observed that to require a person to conceal, amend or forego the public demonstration of his faith would be to deprive him of a fundamental right guaranteed to him by Article 10 of the Charter (points 100 and 101).

81 – I explored the distinction that falls to be made between direct and indirect discrimination in my Opinion in *Bressol and Others*, C-73/08, EU:C:2009:396, points 55 and 56. Here, it is precisely the prohibition on wearing apparel that manifests the employee’s religious affiliation that leads to the adverse treatment, namely her dismissal.

82 – See judgment of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 46, which makes it clear that the Lufthansa collective agreement providing for the automatic termination of contracts of employment at a specified age had its origins and legitimacy in Article 14(1) of the Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (Law on part-time employment and fixed-term employment contracts). It was therefore a measure ‘falling within national law’ (see paragraph 59 of the judgment).

83 – Judgment of 12 January 2010 in *Wolf*, C-229/08, EU:C:2010:3, paragraph 35.

84 – See in that regard point 75 above.

85 – See judgments of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 72, and 13 November 2014 in *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 47. Article 4(1) may, perhaps, apply more often to direct rather than indirect discrimination (an obvious example, relating to sex discrimination, would be a 'women only' rule for membership of an all-female professional sports team). However, it is not inconceivable that such discrimination might be indirect. For example, a rule that applicants for a job as a security guard must be over 1m75 in height, although ostensibly neutral, would tend to exclude more women than men and might also affect a relatively larger proportion of some ethnic groups than others.

86 – Interestingly, the key wording in Article 4(1) of Directive 2000/78 differs as between the different language versions. The English-language version uses the expression 'by reason of the particular occupational activities concerned', which is essentially followed in the German ('aufgrund der Art einer bestimmten beruflichen Tätigkeit'), Dutch ('vanwege de aard van de betrokken specifieke beroepsactiviteiten') and Portuguese ('em virtude da natureza da actividade profissional em causa') versions. The French ('en raison de la nature d'une activité professionnelle'), Italian ('per la natura di un'attività lavorativa') and Spanish ('debido a la naturaleza de la actividad profesional concreta de que se trate') language versions adopt an approach which puts less stress on the specific nature of the activities concerned. Nevertheless, it seems clear that the emphasis must be placed on the particular activities which the employee is required to undertake.

87 – See judgment of 12 January 2010 in *Wolf*, C-229/08, EU:C:2010:3, paragraph 40.

88 – See judgment of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 67.

89 – See judgment of 13 November 2014 in *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 41.

90 – Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

91 – Article 2(2) of Directive 76/207 states: ‘This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor’.

92 – Judgment of 26 October 1999, C-273/97, EU:C:1999:523. Ms Sirdar wished to be allowed to accept an offer (sent to her in error) to work as a chef in the Royal Marines, the elite commandos of the British Army. The rationale behind the policy of excluding women from service in that unit appears from paragraphs 6 to 9 of the judgment. The careful reasoning of the Court holding that the exclusion did apply appears at paragraphs 28 to 32 of the judgment.

93 – Judgment of 11 January 2000, C-285/98, EU:C:2000:2, paragraph 29. Ms Kreil wished to work in the maintenance (weapon electronics) branch of the Bundeswehr. National law permitted women to enlist only in the medical and military-music services. Citing extensively from the judgment in *Sirdar*, the Court nevertheless held that, ‘in view of its scope, such an exclusion, which applies to almost all military posts in the Bundeswehr, cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out’ (paragraph 27); and that ‘the Directive precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services’ (paragraph 32).

94 – See judgment of 3 February 2000 in *Mahlburg*, C-207/98, EU:C:2000:64, paragraph 29.

95 – Judgment of 9 September 2004 in *Spain and Finland* v *Parliament and Council*, C-184/02 and C-223/02, EU:C:2004:497, paragraph 51.

96 – Judgment of 14 October 2014 in *Giordano* v *Commission*, C-611/12 P, EU:C:2014:2282, paragraph 49.

97 – Judgment of 22 January 2013 in *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 66.

98 – See point 95 above.

99 – It appears that Article 2(5) was inserted into the directive during the final hours of negotiation (it seems at the insistence of the United Kingdom Government). See Ellis, E., and Watson, P., *EU Anti-Discrimination Law*, Oxford University Press, 2012, p. 403. See also the Fourth Report of the House of Lords Select Committee on the European Union, Session 2000-01, '*The EU Framework Directive on Discrimination*', paragraph 37, which states: '… [Article 2(5)] was added to the Directive only on 17 October, apparently at the insistence of the UK. The Minister wrote on 25 October that it was designed "to make clear that the Directive will not prevent member states acting to protect those at risk from e.g. harmful religious cults or paedophiles".'

100 – See judgment of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraphs 55 and 56.

101 – Emphasis added. As I have indicated earlier (in footnote 75), Article 2(5) might, for example, cover a rule prohibiting proselytising at the workplace.

102 – See point 109 et seq. below.

103 – Declaration No 11 is annexed to the Treaty of Amsterdam. It provides that 'the European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations'.

104 – See point 82 above.

105 – See, to that effect, judgment of 16 October 2007 in *Palacios de la Villa*, C-411/05, EU:C:2007:604, paragraph 64.

106 – See, as regards the case-law of the Strasbourg Court, decision of 15 February 2001 in *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398, referred to in point 48 above. In that decision, the Strasbourg Court described the children taught by the applicant as being 'very young'. It seems to me that children of primary school age may justifiably be described as 'impressionable'. Once they have progressed to secondary school, they may be considered more mature and thus more able to form their own views and/or to take cultural diversity in their stride.

107 – I draw nothing from the fact that Article 2(2)(b)(i) refers to a 'legitimate aim' while Article 4(1) refers to a 'legitimate objective'.

108 – See further point 100 above.

109 – See, in that regard, judgment of the Strasbourg Court of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010, § 94. Here, the obvious way of reconciling the employer's legitimate business interests and the employee's freedom to manifest his religion is to make provision for the necessary religious apparel *within* the uniform. See point 123 below.

110 – A (permissible) requirement to work 'unsocial' or 'flexible' hours should not, however, be confused with insisting that the employee must, at any price, work on a day that is of particular significance in that employee's religion (for example, requiring a committed Christian to work on Christmas Day, Good Friday or Easter Day; or an observant Jew to work on Rosh Hashanah, Yom Kippur or Pesach). The latter form of requirement would in my view be impermissible.

111 – See point 100 above.

112 – See, by way of analogy, judgment of 5 September 2012 in *Y and Z*, C-71/11 and C-99/11, EU:C:2012:518, paragraphs 62 and 63.

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113 – C-499/08, EU:C:2010:248, point 68.

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114 – As, indeed, the Strasbourg Court effectively held in its judgment of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010.

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115 – See, in that context, http://www.bbc.com/news/uk-scotland-36468441, referring to a recent proposal by Police Scotland (the Scottish national police force) to introduce a hijab as an optional part of its uniform in order to encourage Muslim women to join the force.

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116 – See judgment of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010, § 94.

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117 – See, in that regard, point 99 above.

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118 – Thus, for example, it was clear in the *Eweida* case that British Airways had indeed reached such accommodation with its Muslim employees.

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119 – See, as regards the evolution of the views of the Strasbourg Court in this context, point 55 above.

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120 – Suppose, for example, that the employee regards himself as being under an obligation to pray three times a day. Against the background of a normal office day, that is relatively easy to accommodate: prayer before and after work and prayer during the lunch break. Only the latter is during the actual working day; and it is during the official free time (the lunch break). Now suppose the obligation is prayer five times a day. The

employee argues that he needs to be allowed two more prayer times during the working day. The first question is whether that is really the case – can one or both of the additional times for prayer not also be scheduled for before or after he comes to work? But perhaps the prayer times are linked to specific times of the day. If so, perhaps there are coffee or smoking breaks during the working day that the employee can use for prayer; but probably he will have to agree to work later or arrive earlier in order to compensate the employer for his temporary absence from work in order to fulfil his religious obligation. If necessary, the employee will have to accept the additional constraint (a longer working day); the employer will have to allow him to do that rather than insisting that no accommodation is possible and dismissing the employee.

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121 – For a more detailed analysis of the importance of non-verbal communication in a business context, see Woollcott, L.A., *Mastering Business Communication*, Macmillan, 1983.