

CHECK AGAINST DELIVERY

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The European Court of Justice in Times of Societal Change

I am very honoured, and indeed humbled, to be here today to accept this Madame de Staël prize for cultural values. I am conscious that in doing so I am following in the footsteps of some very distinguished people and I am extremely grateful to the All European Academies, both for the award itself, and for the opportunity that I have to address you here today.

Germaine de Staël (1766-1817) lived in an age when the old, established political and social order was under threat from new ideas and European society was in a state of enormous flux. In the early 21st century we too live in an increasingly complex and fast-changing world. The European Union faces serious threats: terrorism and the mass migration of people fleeing conflict and oppression, to name just two. Our cultural values are also being tested in other ways, not least the right to freedom from discrimination in the expression of one's religious beliefs, an issue which some seek to portray as a clash of civilisations between western democracies and their Muslim minority populations. Each of these societal challenges has found its way into the docket of the Court of Justice and I propose to touch briefly on several recent cases that are relevant to those issues.

I would like to begin with two rulings from this March concerning freedom from discrimination in respect of one's religious beliefs in which the Court was required to balance that right against the wish of an employer to forbid the wearing of religious symbols in the workplace. In those cases, which were similar in many respects yet subtly different, the Court of Justice was asked to rule on the legality of the dismissal of two Muslim women, one Belgian, one French, because of their insistence on wearing an Islamic headscarf at work.

In the Belgian case,¹ the woman's employer imposed a generally applicable prohibition on the wearing by employees of any visible signs of political, philosophical or religious beliefs. The employee, a receptionist, made clear that she would continue to wear a headscarf and was dismissed. She challenged her dismissal before the Belgian courts on grounds of discrimination and a reference was made to the Court of Justice.

The Court ruled that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking such as the one at issue, does not constitute direct discrimination based on religion or belief under EU law. Nevertheless, such a prohibition may constitute indirect discrimination if it is established that the apparently neutral obligation it imposes results, in fact, in persons of a particular religion being put at a disadvantage. Such indirect discrimination may, however, be objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of neutrality, provided that the means of achieving that aim are appropriate and necessary.

In the French case,² the woman concerned, a design engineer, was dismissed following a complaint from a customer to whom she had been assigned. The employer reaffirmed the principle that it was necessary to dress neutrally when

¹ ECJ, judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203.

² ECJ, judgment of 14 March 2017, *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204.

meeting customers and asked her not to wear a headscarf in the future but she refused.

The employee challenged her dismissal before the French courts and a reference was made to the Court of Justice. It was unclear to what extent the dismissal at issue was the consequence of a generally applicable internal rule of the undertaking concerned and the Court indicated that if such a rule existed then the same principles should apply as in the Belgian case. If, on the other hand, no such rule existed and it was simply the complaint of the customer which was behind the dismissal then the Court of Justice pointed out that it would be necessary to establish whether the willingness of the employer to take account of the customer's wish amounted to a genuine and determining occupational requirement. The Court held, in substance, that such willingness could not amount to such a requirement since any such requirement must be objectively dictated by the nature of the activities concerned or of their context and cannot cover subjective considerations such as a desire to comply with a customer's wishes.

It is important to emphasise that such issues of discrimination do not only come before the Court in respect of Islamic religious practices. In one pending case, *Egenberger*,³ in which the hearing took place in July, a German court is asking the Court of Justice whether a Protestant religious organisation, or the Protestant church itself, may authoritatively determine whether adherence by a job applicant to a specified religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer's ethos. The case concerns a job applicant who alleges that she was not considered for appointment by the organisation in question because of her lack of Christian faith. Whatever the outcome of that case, the questions raised illustrate an important point: EU anti-discrimination law applies across the board, regardless of the religion or value system concerned.

³ ECJ, Pending Case C-414/16, *Egenberger*.

The struggle against terrorism also raises difficult societal issues that require us to strike a delicate balance between competing public interests. One of our shared European values is that, in the absence of evidence giving rise to suspicions that someone has committed – or will commit – a crime, everyone is free to go about his or her business safe in the knowledge that the privacy of his or her communications will be respected. However, the police and other authorities, whose job it is to protect the public, are keen to gather as much intelligence as possible, not all of which may turn out to be useful, in order to prevent acts of terrorism.

In the *Digital Rights* case,⁴ the Court of Justice was called upon to arbitrate between those competing imperatives. The case concerned the validity of EU rules requiring Member States to oblige telecoms service providers to record certain data concerning private electronic communications, for the purpose of investigating serious crimes, including terrorism. In substance, the Court ruled that the retention of information concerning the electronic communications of persons generally, regardless of whether they were suspected of any crime, was not proportionate to the objective pursued, having regard to the right to privacy and the right to the protection of personal data. It therefore held the relevant EU rules to be invalid. More recently, in December of last year, the Court found in *Tele2 Sverige and Watson*⁵ that analogous national rules adopted in Sweden and the UK, respectively, were also incompatible with the relevant EU law provisions as interpreted in the light of those same fundamental rights.

Some doubtless consider those judgments naïve and legalistic on the basis that, in the current climate, national security must take precedence over all other interests. In that regard, I can assure you that the Court of Justice is painfully aware of the importance and difficulty of the choices that we are asked to make in such cases. We

⁴ ECJ, judgment of 8 April 2014, *Digital Rights Ireland & Others*, Joined Cases C-293/12 and C-594/12, EU:C:2014:238.

⁵ ECJ, judgment of 21 December 2016, *Tele2 Sverige and Watson & Others*, Joined Cases C-203/15 et C-698/15, EU:C:2016:572:

are however, as judges, obliged to apply the law and that is what we sought to do. Moreover, if electronic surveillance is allowed in the absence of specific evidence justifying it in a particular case then, in a sense, the terrorists have 'won' by forcing us to change our way of life and to compromise the values on which our European civilization is based.

The migration crisis has raised complex societal questions for European nations and in a very recent judgment the Court was called upon to interpret the rules that determine which Member State is responsible for handling a migrant's claim for protection in circumstances where that person entered the EU through one Member State before travelling to another one. Given the importance of this case for the EU asylum system, the Court made its ruling under the expedited procedure so that the national court waited only a matter of months for the ruling that it needed.

The judgment in question⁶ concerned two Afghan families who entered Croatia from Serbia in 2016 without an appropriate visa. The Croatian authorities organised transport for them to the Croatia-Slovenia border and they subsequently applied for international protection in Austria. Austria considered that since they had entered Croatia illegally it was for that country to examine those applications and that they should therefore have to return there. In the course of the litigation that followed, an Austrian court referred that issue to the Court of Justice.

The Court ruled that the admission of a third country national to the territory of a Member State was *not* tantamount to the issuing of a visa, even if the admission was explained by exceptional circumstances characterised by a mass influx of displaced people into the EU. Moreover, the Court considered that the crossing of a border in breach of the conditions imposed by the rules applicable in the Member State

⁶ ECJ, judgment of 26 July 2017 *Jafari*, C-646/16, EU:C:2017:586. Another judgment given on the same day, A.S. C-490/16, in the case of a Syrian national who had applied for international protection in Slovenia, also deals with many, but not all, of the same issues, A.S., C-490/16, EU:C:2017:585.

concerned must necessarily be considered 'irregular' under EU visa rules, as Austria was arguing.

However, in the course of its reasoning, the Court of Justice made two other important observations. First, the Court pointed out that the taking charge of third country nationals seeking international protection may be facilitated by the use, by other Member States, unilaterally or bilaterally in a spirit of solidarity, of the 'sovereignty clause' provided for by EU law, which enables them to decide to examine applications for international protection lodged with them, even if they are not *required* to carry out such an examination under the relevant rules. Second, the Court recalled that an applicant for international protection must not be transferred to another Member State under the applicable EU asylum rules if, following the arrival of an unusually large number of non-EU nationals seeking international protection, there is a genuine risk that the person concerned may suffer inhuman or degrading treatment if transferred. In other words, the referring national court was required to check, before transferring the individuals concerned, that Croatia was not so overwhelmed by the number of asylum seekers arriving on its territory that it was unable to receive them in conditions that were consistent with their fundamental rights.

I would like to make two remarks in respect of that judgment. The first point is that the Court of Justice did not decide that case as it did because it considered that the most appropriate course of action, *as a matter of policy*, was to return the asylum seekers concerned to Croatia. The Court decided that case as described because, on the basis of the legal analysis that it carried out, that was the correct result. In applying the rules objectively, the Court thereby upheld one of the most fundamental European values which lies at the heart of our democratic political system: the rule of law. The provisions of EU law governing asylum were adopted by the democratic representatives of the peoples of the Member States through the legislative process after careful consideration and the Court's role was to interpret

those rules, not to modify them itself to take account of the exceptional circumstances arising from the migration crisis.

My second point is that the Court of Justice does not, however, make its rulings in a vacuum and when applying the rules adopted by the legislature it must ensure that due attention is paid to other fundamental values that are recognised in the EU legal order. Thus, as I have said, given the exceptional circumstances surrounding this case, the Court highlighted the fact that the rules themselves allow Member States to show solidarity with other Member States on the EU's external border by *voluntarily* processing asylum applications themselves. Moreover, the Court also emphasised that the transfer of asylum seekers back to Croatia should not take place unless the national referring court was satisfied that Croatia could receive them in a manner that would not risk causing them to suffer inhuman or degrading treatment.

As the cases that I have mentioned illustrate, in situations where complex societal problems threaten the rights of individuals the Court of Justice has a vital role to play in ensuring that those rights are respected, particularly in situations where individuals are in a position of relative weakness, as will often be the case in their dealings with public authorities or commercial organisations. That said, such problems cannot be solved by judges alone and the search for appropriate policy solutions must involve close cooperation among those who work in a wide range of the disciplines that are covered by the All European Academies' activities. Academics and others who are involved in the historical, social, political science and economic fields, as well as those of us in the legal world, must all play our part in that search, for it is only by pooling our skills, our imagination and our intellectual resources that we can hope to develop ideas that will actually work in practice and which pay due heed to the basic European values that we share and in which Madame de Staël believed.

Thank you very much.

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