

The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?

Angela WARD*

Référendaire, Court of Justice of the European Union, Luxembourg

Abstract

This article explores the influence of Articles 20 and 21 of the Charter of Fundamental Rights of the European Union in the development of EU equal treatment law, with emphasis on forms of discrimination precluded by Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. The author contends that although Articles 20 and 21 are primary measure of EU law, their impact in the development of case law elaborated pursuant to the Directives is relatively muted. This may have stunted the development of jurisprudence on the relationship between Articles 20 and 21 of the Charter, and rules contained in Title VI of the Charter governing its interpretation and application, such as Article 52(3) on the relationship between the Charter and the European Convention on Human Rights, and Article 52(1) on justified limitations. The author forewarns against the emergence of incoherence in the case law in this context, and with respect to the role of Articles 20 and 21 in disputes over the meaning of Directives 2000/43 and 2000/78 and calls for fuller reflection on Charter rules in disputes based on an allegation of discrimination.

Keywords: fundamental rights, Charter, discrimination, equal treatment

I. INTRODUCTION

As we approach the tenth anniversary of the attainment of legally binding status for the Charter of Fundamental Rights of the European Union (‘Charter’), it is timely to assess its impact on a core area of EU fundamental rights protection, namely anti-discrimination law. Once the Charter acquired legally binding status in December of 2009, the prohibitions on discrimination provided for in Article 21 of the Charter—which is a ‘particular expression’ of the rule guaranteeing equality before the law

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under Article 20 of the Charter¹—might reasonably have been expected to act as a motor for broader, deeper, and firmer enforcement of EU anti-discrimination measures.

Articles 20 and 21 of the Charter have undoubtedly raised the profile of the rights they protect, and in all likelihood thereby enhanced the incidence of their enforceability. However, the broader case law of the Court of Justice of the European Union ('CJEU') on the legal effects of the Charter is yet to play a significant role in either the development of prohibitions on discrimination, or the broader principle of equal treatment, beyond the parameters established under secondary EU law. In contrast with other primary measures of EU law, such as Article 157 of the Treaty on the Functioning of the European Union ('TFEU'), which provides for equal pay for equal work between men and women, Articles 20 and 21 of the Charter have, to date, had a muted impact on the evolution of EU equality law.² This has been particularly evident with respect to the Race Discrimination Directive³ and the Framework Equality Directive,⁴ which were the measures passed by the EU legislature to combat discrimination beyond the realm of equal treatment between men and women, once it acquired competence to do so under the Amsterdam Treaty in 1999.⁵

Inertia is evidenced first, by rigorous policing by the CJEU of the categories of discrimination that are protected under EU law, with the boundaries set by Article 51(2) of the Charter and Article 6(1) Treaty on European Union ('TEU') with respect to EU competence trumping all and every request to safeguard against discriminatory treatment that cannot be fitted into one of the categories listed in Article 21(1) of the Charter.⁶ Second, to the extent to which a right listed in Article 21(1) of the Charter is additionally supported by a principle, as is the case with respect to the

¹ Hereafter referred to as 'equal treatment law' or 'equality law'.

² See similarly G de Búrca, *The Decline of EU Anti-Discrimination Law?* (19 Oct. 2016) Note for the Colloquium on Comparative and Global Public Law, available at http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Decline%20of%20the%20EU%20Anti-Discrimination%20Law.pdf, which assesses the CJEU's role in the development of discrimination law post the Race Discrimination Directive and the Framework Equality Directive. Professor de Búrca concludes that the CJEU has adopted a guarded and cautious interpretation of these directives.

³ Council Directive (EC) No 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin: [2000] OJ L180/22. For an overview, see T Jones, 'The Race Directive: Redefining Protection from Discrimination in EU Law' (2003) 5 *European Human Rights Law Review* 515; F Brennan, 'The Race Directive: Recycling Racial Inequality' (2003) 5 *Cambridge Yearbook of European Legal Studies* 311.

⁴ Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation: [2000] OJ L303/16.

⁵ Article 13 of the EC Treaty introduced by the Amsterdam revision is now Article 19 TFEU.

⁶ See *C, C-122/15, EU:C:2016:391; FOA (Kaltoft), C-354/13, EU:C:2014:2463; Betriu Montull, C-5/12, EU:C:2013:571*. For a discussion of the potential for Article 21 of the Charter to have been interpreted differently, see notably L Flynn, 'The Implications of Article 13 EC – After Amsterdam, Will Some Forms of Discrimination Be More Equal than Others?' (1999) 36 *Common Market Law Review* 1127. The author contends at page 1151 that the 'inability to take an expansive approach to non-discrimination claims need no longer persist, given the introduction of Article 13 EC' (now Article 19 TFEU).

prohibition on discrimination on the basis of disability, the CJEU has interpreted the relevant provision—that is Article 26 of the Charter on the integration of persons with disabilities—in such a way that its influence in relevant litigation is light.⁷ Third, it is not uncommon in judgments concerning discriminatory treatment, and which were issued after December 2009, for no reference to be made at all to Articles 20 or 21 of the Charter, despite their status as primary measures of EU law. This may be creating problems in terms of coherence and legal certainty. These developments will be explored in Part II.

In Part III, an analysis will be made of the principal exception to this trend. After a faltering start,⁸ the CJEU has embraced the horizontal enforcement between private parties of fundamental rights protected under the Charter beyond the field of age discrimination,⁹ the substantive field in which horizontal impact of the Charter was pioneered. However, it will be contended that this has been effected in a way that may end up imperilling the *effet utile* of the new rules created. This case law too is not devoid of difficulties in terms of coherence, thereby casting a shadow over whether it will graft smoothly into the matrix of EU constitutional law, through unqualified support from the courts of the Member States.¹⁰

Nor are the justifications for the prohibitions encapsulated by Articles 20 and 21 of the Charter easy to understand. With regard to discriminatory treatment and Article 21(1) of the Charter, the distinction between the range of justifications available with respect to direct and indirect discrimination, which is a cornerstone of the Race Discrimination Directive,¹¹ and the Framework Equality Directive,¹² is of no relevance when it is alleged by a litigant that an EU measure itself is discriminatory, or when a Member State is acting outside of the scope of the Race Discrimination Directive or the Framework Equality Directive, but is alleged to be engaging in unlawful discrimination, still within the scope of application of EU law.¹³ In these contexts, irrespective of whether the discrimination is direct or indirect, the justification test provided by Article 52(1) of the Charter applies,¹⁴ although Article 52(1) bears closer resemblance to the broad justification test applicable under the Race

⁷ *Glatzel*, C-356/12, EU:C:2014:350.

⁸ See eg *AMS v CGT*, C-176/12, EU:C:2014:2. See further the analysis of Advocate General Tanchev in *King*, C-214/16, EU:C:2017:439.

⁹ See notably *Egenberger*, C-414/16, EU:C:2018:257. Age discrimination in EU law has been the subject of vast commentary. See eg D Schiek, 'Age Discrimination Before the ECJ—Conceptual and Theoretical Issues' (2011) 48 *Common Market Law Review* 777; E Muir, 'Of Ages in—and Edges of—EU Law' (2011) 48 *Common Market Law Review* 39.

¹⁰ See discussion of the reaction to the ruling of the Danish Supreme Court to *Dansk Industri (DI) Acting for Ajos A/S v The Estate Left by A*, C-15/2014, EU:C:2016:278, by R Holdgaard, D Elkan and G Krohn Schaldemose, 'From Cooperation to Collision: the ECJ's *AJOS* Ruling and the Danish Supreme Court's Refusal to Comply' (2018) 55 *Common Market Law Review* 17.

¹¹ See note 3 above.

¹² See note 4 above.

¹³ Eg *Léger*, C-528/13, EU:C:2015:288

¹⁴ *Werner Fries*, C-190/16, EU:C:2017:513.

Discrimination Directive¹⁵ and the Framework Equality Directive¹⁶ in the event of indirect discrimination. This seems questionable when direct discrimination is only excusable under the Race Discrimination Directive and the Framework Equality Directive on specifically elaborated grounds,¹⁷ and in light of the fact that it has long been established in CJEU case law that the ‘protection of the rights which individuals derive from [EU] law cannot vary depending on whether a national authority or a [EU] authority is responsible for the damage’.¹⁸

With regard to equal treatment under Article 20 of the Charter, coherence is here problematic because the CJEU does not turn to Article 52(1) of the Charter at all in order to decide whether unequal treatment can be justified, but rather refers to the conventional pre-Charter basis of objective justification.¹⁹ At the same time, there is no explanation in the case law as to why this approach has outlived the attainment by the Charter of legally binding force in December of 2009, including Article 52(1) of the Charter. Why is it that Article 52(1) has not become the standard for assessing whether a limitation on equality before the law Article 20 of the Charter is justifiable? Part IV will therefore explore the issues here described on justification for unequal treatment.

II. SUBSTANTIVE SCOPE OF ARTICLE 21

A. *Article 21(1) of the Charter v. Article 51(2) of the Charter: A Case of No Contest?*

The text of Article 21(1) states that ‘[A]ny discrimination based on grounds *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’,²⁰ while Article 21(2) states that ‘*[w]ithin the scope of application of the Treaties* and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited’.²¹ The italicized words represent both the hope, and the dashing of it, inherent in Article 21. The use of the words ‘such as’ might have been interpreted as imbuing Article 21 of the Charter with the potential to protect categories of discrimination going beyond those listed in Article 21(1), provided the dispute concerned falls within the scope of application of EU law within the meaning of Article 51(1) of the Charter.²²

¹⁵ See note 3 above.

¹⁶ See note 4 above.

¹⁷ See below Part IV.

¹⁸ *Bergaderm and Goupil v Commission*, C-352/98 P, EU:C:2000:361, para 41.

¹⁹ See eg *Soukupová*, C-401/11, EU:C:2013:223.

²⁰ My emphasis.

²¹ My emphasis.

²² For more, see for example, my analysis of Article 51(1) of the Charter in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), p 1413. See also E Spaventa ‘The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures’

Moreover, Article 14 of the European Convention on Human Rights ('ECHR') states that 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*'. The second italicized phrase has been interpreted broadly by the European Court of Human Rights, so as to signify 'a personal characteristic ... by which persons or groups of persons are distinguishable from each other'.²³ In consequence, Article 14 provides a truly non-exhaustive list of grounds of discrimination that can be relied on in the enforcement of rights protected under the ECHR. All that is necessary is for the discriminatory treatment to be based on 'personal characteristics' in a very wide sense²⁴ before a litigant can rely on the 'any other status' element of Article 14.

While the substantive rights protected under Article 21(1) of the Charter are, due to Article 52(3), guaranteed at minimum to the standard set in the case law of the European Court of Human Rights (see further below Part II(C)) the CJEU is not in any way constrained to interpret the words 'such as' in Article 21(1) of the Charter in the same way as the European Court of Human Rights has interpreted 'any other status' in Article 14 of the ECHR. The EU is not a signatory to the ECHR, and is not likely to become so in the near future.²⁵ In consequence, the ECHR remains only a source of inspiration for fundamental rights in the European Union.²⁶

Nonetheless, it is striking that the approach of the CJEU to the interpretation of the material scope of Article 21(1) of the Charter has been as restrictive as the case law of the European Court of Human Rights and the material scope of Article 14 has been facilitative. Most notably, the CJEU is yet to adopt an approach pursuant to which an assessment is first made as to whether a substantive provision of EU law applies to a dispute, and then allowing categories of discrimination concerning the application of that provision of EU law to be prohibited going beyond the list in Article 21(1), on the basis of the presence in that provision of the words 'such as'.²⁷ As explained by

(Footnote continued)

(European Parliament, Directorate-General for Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs, 2016) Study for the PETI Committee, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU%282016%29556930_EN.pdf.

²³ See eg *Kjeldsen, Busk Madsen and Pedersen v Denmark* (Application nos 5095/71, 5920/72, 5926/72) (1976) 1 EHRR 711, para 56; see also eg *Sidabras and Džiautus v Lithuania* (Applications nos 55480/00, 59330/00) (2006) 42 EHRR 6.

²⁴ C Nikolaidis, *The Right to Equality in European Human Rights Law* (Routledge, 2015), p 55.

²⁵ *Accession of the European Union to the ECHR*, Opinion 2/13, EU:C:2014:2454.

²⁶ Article 6(3) TEU.

²⁷ This would also be consistent with a view expressed in the recent Opinion of Advocate General Bot in Joined Cases *Bauer*, C-569/16 and C-570/16, EU:C:2018:337 (judgment EU:C:2018:871) where the Advocate General argues, particularly at paragraphs 82 and 83, that relevant provisions of the Charter require no supplementary measure to be adopted in order directly to produce effects as regards individuals. The term 'such as' might equally be concluded as not requiring supplementary measures.

Advocate General Jääskinen in his Opinion in Case C-354/13 *FAO (Kaltoft)*,²⁸ in order to determine whether a Member State is ‘implementing’ EU law under Article 51(1) of the Charter, it is first necessary to identify a provision of EU law *other than the Charter* that is relevant to the resolution of a dispute. Once identified, can forms of discrimination falling within the parameters of ‘such as’ then be prohibited?

An opportunity might arise for this to be considered, for example, if there were a weight restriction on accessing an EU training grant that discriminated against people who are clinically obese,²⁹ or an impediment framed on the basis of membership of a certain socio-professional category. Once a provision of EU law is relevant to a dispute, could it not be argued that opening up the protection of Article 21(1) to categories not listed in Article 21(1) in no way extends the competence of the EU under Article 6(1) TEU and 51(2) of the Charter?³⁰ The CJEU has already held that both membership of a socio-professional category³¹ and obesity³² (on which see further below) are not grounds of discrimination protected under EU law, because they amount to a category of right that is additional to those protected under Article 1 of the Framework Equality Directive. However, this was decided in a context in which no other provision of EU law was relevant to the dispute, aside from the Framework Equality Directive itself. If another provision of EU law is applicable to a dispute, such as one setting up a system of grants, is there any reason why categories of discrimination not listed in Article 21 could not be relied on, given that Article 21(1) employs the words ‘such as’? This approach would also be consistent with cases concerned with equal treatment, as protected under Article 20 of the Charter, in which a litigant seeks to argue that they have been treated differently from someone in comparable circumstances. The first step in such litigation is identification of the relevant provision of EU law.³³ It would also be in step with the important development (discussed below in Parts II(C) and IV) in Case C-528/13 *Léger*,³⁴ in which the CJEU established that Member State laws implementing EU directives are to comply with the categories protected under Article 21(1), even in

²⁸ EU:C:2014:2106, paras 20–22. Advocate General Jääskinen refers to a ‘dual identification exercise’.

²⁹ Obesity is a relatively new frontier in discrimination law but one of growing significance. See eg I Solanke, ‘A Legal Remedy for Corpulent Women of Colour’ in D Schiek and A Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate, 2011), p 209. For a brief discussion of forms of discrimination that have fallen outside of the Race Discrimination Directive or the Equal Treatment Directive, see G Zaccaroni, ‘Differentiating Equality? The Different Advancements in the Protected Grounds in the Case Law of the European Court of Justice’ in L S Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer, 2017), pp 176–77.

³⁰ Note, however, the delicacy of the boundary between crafting rules securing the effective enforcement of the Charter, and respecting the prohibition on recourse to the Charter to expand EU competence. See Holdgaard et al., note 10 above, and the response of the Danish Supreme Court to the ruling of the CJEU in *Dansk Industri*, note 10 above.

³¹ *Agafitei and Others*, C-310/10, EU:C:467:2011, para 32.

³² *C*, note 6 above; *FOA (Kaltoft)*, note 6 above.

³³ Eg *Soukupová*, note 19 above.

³⁴ Note 13 above.

disputes falling outside of the scope of Race Discrimination Directive and the Framework Equality Directive, subject to objective justification pursuant to Article 52(1) of the Charter.

However, other threads in the case law of the CJEU to date may not be sufficiently open-ended for the law to develop in this direction. On the facts presented to it thus far, the CJEU has rather focused first on whether *other* substantive provisions of EU law already protect the category of right being invoked in determining whether it is protected by Article 21(1) of the Charter.³⁵ Thus, Case C-5/12 *Marc Betriu Montull v INSS*³⁶ concerned paternity leave rights under the combined effects of Directive 76/207 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,³⁷ and Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.³⁸ It concerned whether Spanish law on paternity leave was compatible with the obligations derived from these directives. The CJEU held, in the light of the Opinion of the Advocate General,³⁹ that ‘at the time of the facts in the main proceedings, there was no prohibition in the EC Treaty, in any European Union directive or on any other provision of European Union law of discrimination between the adoptive father and the biological father in relation to maternity leave’.⁴⁰ Such a right did not therefore form a feature of EU law.

In Case C-354/13 *FOA (Kaltoft)*, the CJEU held, again in the light of the Opinion of the Advocate General,⁴¹ that there was no general principle of EU law on non-discrimination on the grounds of obesity as regards employment and occupation to protect a worker like Mr Kaltoft who had allegedly been dismissed on this basis. The CJEU held that no primary rule of EU law⁴² or secondary legislation⁴³ lays down such a rule, and in particular Directive 2000/78 did not mention obesity as a ground of discrimination.⁴⁴ According to the settled case law, ‘the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof ... obesity cannot as such be regarded as a

³⁵ Cf, however, the Opinion of Advocate General Bot in *Bauer*, note 27 above.

³⁶ C-5/12, EU:C:2013:571.

³⁷ [1976] OJ L39/40.

³⁸ [1992] OJ L348/1. See also Directive 96/34 on the Framework Agreement on parental leave concluded by UNICE, CEEP, and the ETUC: [1996] OJ L145/4.

³⁹ Advocate General Wathelet concluded at paragraph 84 of his Opinion, that ‘the difference in treatment in question ... does not fall within the scope of Directive 76/207, which concerns only discrimination between men and women. In the present case, the difference in treatment is between male workers’. See EU:C:2013:230.

⁴⁰ EU:C:2013:571, para 73.

⁴¹ Advocate General Jääskinen, EU:C:2014:2106.

⁴² *FOA (Kaltoft)*, note 6 above, paras 33–34.

⁴³ *Ibid*, para 35.

⁴⁴ *Ibid*.

ground in addition to those in relation to which Directive 2000/78 prohibits discrimination'.⁴⁵ Advocate General Jääskinen took the view that Article 51(2) of the Charter and Article 6(1) TEU 'set an outer-boundary' to EU fundamental rights law⁴⁶ which precluded the interpretation of EU law advocated by Mr Kaltoft.

Further, the Opinion of the Advocate General and the ruling of the CJEU in Case C-668/15, *Jyske Finans A/S* might be viewed as attenuating the material scope of Article 21(1) of the Charter, when compared with prior relevant rulings of the CJEU (see further below Part II(C)).⁴⁷ Even though Article 21(1) of the Charter expressly precludes discrimination on the basis of birth, neither the Advocate General nor the CJEU viewed this as relevant in interpreting the meaning of 'ethnic origin' under Article 1 of the Race Discrimination Directive, the hierarchy of norms between primary and secondary EU law notwithstanding. Advocate General Wahl rather viewed Article 21(1), and its specific reference to a prohibition on discrimination on the basis of birth, as justifying a restrictive interpretation of the term 'ethnic origin' in Article 1 of the Race Discrimination Directive. He stated that 'that separate enumeration merely reinforces the idea that the concepts of "ethnic origin" and "birth" differ'.⁴⁸

Thus, the emphasis in the case law to date has been on whether the basis of discrimination relied on has already been protected by either EU legislative measures or primary EU law. This may have rendered the words 'such as' in Article 21(1) of the Charter devoid of any jurisprudential effect in the absence of such measures.

B. The Role of Principles Supporting an Article 21(1) Non-discrimination Right

The extent to which the presence of a principle in the Charter can reinforce the enforcement of a Charter right arose for consideration in Case C-356/12 *Glatzel*.⁴⁹ Mr Glatzel, who was denied a driver's license in the category of heavy vehicles due to vision problems, challenged the validity of the relevant part of Directive 2006/126 on driving licenses.⁵⁰ The Fifth Chamber of the CJEU held that the order for reference required it to determine (1) whether the EU legislator infringed, in the relevant part of Directive 2006/126, the prohibition on discrimination on the basis of disability in Article 21(1) of the Charter, including the possible effects of the UN

⁴⁵ Ibid, paras 36–37. See also paragraphs 49 and 50 of *Kamberaj*, C-571/10, EU:C:2012:233, where it was held that discrimination on the basis of third country nationality is not protected by Article 1 of the Race Discrimination Directive.

⁴⁶ EU:C:2014:2106, para 19. At paragraph 24, the Advocate General further refers to the explanations to the Charter concerning Article 21. They state that, in contrast with Article 19 TFEU, 'the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law'.

⁴⁷ See further S Atrey, 'Race Discrimination in EU Law after *Jyske Finans*' (2018) 55 *Common Market Law Review* 625.

⁴⁸ EU:C:2016:914, para 43.

⁴⁹ Note 7 above.

⁵⁰ [2006] OJ L403/18. Namely Point 6.4 of Annex III to that Directive.

Convention on Disabilities;⁵¹ (2) whether Article 26 of the Charter, which enshrines the principle of integration of persons with disabilities, precluded the provision impugned for invalidity; and (3) whether it was contrary to Article 20 of the Charter, according to which everyone is equal before the law, that drivers of certain heavy goods vehicles do not have the opportunity to show, by means of individual medical examination, that they are fit to drive such vehicles, even in the absence of certain physical capacities required by Directive 2006/126, whereas other drivers of certain other types of vehicles have such a possibility.⁵²

The CJEU ruled that it was not necessary to decide whether Mr Glatzel suffered from a ‘disability’ under Article 21(1) of the Charter, because the difference in treatment consisting of not issuing him with a driver’s license with respect to certain categories of vehicles on the ground that his visual acuity is insufficient could be objectively justified in the light of overriding considerations of road safety.⁵³ With regard to Article 26 of the Charter, which states that the Union is to recognize and respect the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community, the CJEU acknowledged that Article 26 was relevant because Directive 2006/16 was a legislative act of the Union implementing the principle contained in Article 26 and intended to be applied in the proceedings before it.⁵⁴ The CJEU held it was ‘clear in particular from the wording of Recital 14 in the preamble thereto that “[s]pecific provisions should be adopted to make it easier for physically disabled persons to drive vehicles”’. Likewise, Article 5(2) of that directive refers to the conditions for the issue of driving licences to drivers with disabilities, in particular as regards the authorisation to drive adapted vehicles.’⁵⁵

However, the CJEU nonetheless reached the conclusion that Article 26 of the Charter did not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, the CJEU held, it must be given more specific expression in European Union or national law. Accordingly, Article 26 of the Charter cannot itself confer on individuals a subjective right which they may invoke as such.⁵⁶ The reasoning of the CJEU on the pertinence of Article 26 of the Charter to the proceedings is fuller than that of the Advocate General, who undertook no analysis of Article 26 of the Charter, but the judgment is still brief on this point. In deciding that Article 26 applied to the main proceedings, the CJEU held it was clear from Article 52(5) and (7) of the Charter, on the legal effect of the explanations to the Charter that, ‘reliance on Article 26 thereof before the Court is allowed for the interpretation and review of the legality of legislative acts of the European Union

⁵¹ See generally F Benoît-Rohmer, ‘Lessons from the Recent Case Law of the EU Court of Justice on the Principle of Non-Discrimination’ in L S Rossi and F Casolari (eds), note 29 above, pp 154–57.

⁵² Note 7 above, para 40.

⁵³ *Ibid*, para 48.

⁵⁴ *Ibid*, paras 74–76.

⁵⁵ *Ibid*, para 75.

⁵⁶ *Ibid*, para 78, citing *Association de médiation sociale*, C-176/12, EU:C:2014:2, paras 45, 47.

which implement the principle laid down in that article, namely the integration of persons with disabilities'.⁵⁷

Yet Article 26 did not feature in any of the CJEU's reasoning on objective justification; an area in which Article 26 might have been expected to bite on the facts of the case. Article 26 was potentially pertinent in the context of proportionality review.⁵⁸ Was preclusion from driving heavy vehicles impeding Mr Glatzel's occupational integration, and how onerous were the consequences for him if it did? Given that consideration of objective justification was part of the interpretation made by the CJEU of the pertinent provisions of Directive 2006/16, the absence of reference to Article 26 in undertaking proportionality review is difficult to understand, particularly when the national referring court expressed doubts, after the taking of expert evidence, as to whether the relevant provision of Directive 2006/16 was appropriately adapted to achieving its goal.⁵⁹

The ruling of the CJEU in *Glatzel* on the impact of Article 26 of the Charter on disputes concerned with disability discrimination and equal treatment minimizes the provision's role by placing fuller emphasis on the absence of further legislative measures that might be taken with respect to Article 26 but which had not yet occurred. This arguably diminished the impact in law Article 26 of the Charter might otherwise have had.⁶⁰ With regard to Article 20 of the Charter, it was held that Glatzel was not in a comparable position to drivers of certain categories of vehicles who did have the opportunity to show, by means of individual medical examination, that they were fit to drive such vehicles even in the absence of certain physical capacities.⁶¹ The reasoning of the Advocate General was similar.⁶²

One commentator has argued that, in comparison with the Race Discrimination Directive and the Framework Equality Directive, 'a general principle of equal treatment grants a much lower level of protection. It only "requires that similar situations shall not be treated differently unless different treatment is objectively justified". This means that policymakers and also economic actors can justify any different treatment on any ground as long as they find a good reason, and the differentiation is proportionate to that reason'.⁶³ The *Glatzel* case therefore represents a lost opportunity to explore the differences in the protection afforded by the Framework Equality Directive and the general principle of equal treatment.⁶⁴

⁵⁷ Ibid, para 74.

⁵⁸ See further on proportionality review and *Glatzel*, Part IV below.

⁵⁹ Note 7 above. See in particular paragraphs 31–33.

⁶⁰ For a detailed critique, see C O'Brien, 'Driving Down Disability Equality? Case C-356/12, *Wolfgang Glatzel v Friestaat Bayern*' (2014) 21(4) *Maastricht Journal of European and Comparative Law* 723. At page 727 the author argues that 'the content or implications of Article 26 of the Charter went unexamined', and at page 731 that more 'expansive interpretations of the provision are possible'.

⁶¹ Note 7 above, paras 80–86.

⁶² EU:C:2013:505, paras 59–76.

⁶³ Schiek, note 9 above, p 784, citing *Arcelor Atlantique*, C-127/07, EU:C:2008:728, paras 23–57.

⁶⁴ Cf *Milkova*, C-406/15, EU:C:2017:198.

C. Absence of Reference to the Charter in Disputes Concerning Discrimination and/or Unequal Treatment—Why Does It Matter?

Not infrequently Articles 20 and 21 of the Charter do not rate a mention in CJEU judgments concerning the Race Discrimination Directive, the Framework Equality Directive, and the general principle of equal treatment.⁶⁵ This occurs across the fields of race and ethnic origin,⁶⁶ religious belief,⁶⁷ disability,⁶⁸ sex⁶⁹ and sexual orientation,⁷⁰ and age discrimination.⁷¹ It can even happen when a national referring court has sent a question concerning Article 21 of the Charter.⁷² The practice of omitting references to primary law in the form of the Charter has been particularly pronounced in the field of sexual orientation discrimination.⁷³

On its face, this might seem to be of no consequence. After all, an omission of a reference to the provisions of the Charter underpinning the right in issue may not be relevant because the problem at hand is easily resolvable by reference to the relevant directives, particularly in a highly evolved field, in terms of volume of legislation, such as discrimination on the basis of sex.⁷⁴ Or indeed, a fundamental rights remedy

⁶⁵ Eg *Persidera SpA*, C-112/16, EU:C:2017:597.

⁶⁶ Eg *Firma Feryn*, C-54/07, EU:C:2008:397; *Jyske Finans A/S*, C-668/15, EU:C:2017:278. Cf *CHEZ*, C-83/14, EU:C:2015:480, in which much reliance was placed by the Court on Article 21 of the Charter. See further below.

⁶⁷ Eg *G4S Secure Solutions*, C-157/15, EU:C:2017:203; *Boungaoui*, C-188/15, EU:C:2017:204. In both of these cases, the CJEU referred to Article 10 of the Charter on freedom of religion but not Article 21(1). In *G4S Secure Solutions*, reference was also made to freedom to conduct a business under Article 16 of the Charter. The Opinion of Advocate General Wathelet in *IR v JQ*, C-68/17, EU:C:2018:363 referred to Article 21 of the Charter in a dispute concerning discrimination on the basis of religion, and reference to Article 21 of the Charter was made by all three Advocates General in *Egenberger*, EU:C:2017:851 (Tanchev), *G4S Secure Solutions*, EU:C:2016:382 (Kokott), and *Boungaoui*, EU:C:2016:553 (Sharpston).

⁶⁸ Eg *Ruiz Conejero*, C-270/16, EU:C:2018:17. Cf *Glatzel*, note 7 above; *Kaltoft*, note 6 above.

⁶⁹ Eg *Kleinstuber*, C-354/16, EU:C:2017:539.

⁷⁰ See eg *Parris*, C-443/15, EU:C:2016:897. Cf *Léger*, note 13 above.

⁷¹ See eg *Sorondo*, C-258/15, EU:C:2016:873; *Kratzer*, C-423/15, EU:C:2016:604; *Lesar*, C-159/15, EU:C:2016:451.

⁷² Eg *Kleinstuber*, note 69 above.

⁷³ The only cases in which Article 21 of the Charter has been mentioned in the judgment concerning a dispute involving discrimination on the basis of sexual orientation are *Léger*, note 13 above, and *Coman*, C-673/16, EU:C:2018:385. Otherwise, Article 21 of the Charter has made no impact in litigation concerning this form of discrimination. See eg *Maruko*, C-267/06, EU:C:2008:179; *Römer*, C-147/08, EU:C:2011:286; *Dittrich and Others*, C-124/11, C-125/11, C-143/11, EU:C:2012:771; *Hay*, C-267/12, EU:C:2013:823; *Asociația Accept*, C-81/12, EU:C:2013:275. De Búrca, note 2 above, states that, at the time of writing in 2016, among the small group of five cases referred on this topic, there had been ‘no path-breaking cases or legal principles established, but the Court ruled positively in favour of the litigant in all 5’. See further M Rhimes, ‘The “Gay Marriage” Case that Never Was: Three Thoughts on *Coman*, Part 2’ (*UK Human Rights Blog*, 6 June 2018).

⁷⁴ Eg Directive (EU) No 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity: [2010] OJ L180/1; Directive (EU) 2010/18 implementing the revised framework agreement on parental leave: [2010] OJ L68/13; Directive (EC) 2006/54 on the implementation of the principle of equal opportunities and equal treatment of

may have been achieved via an alternative route, such as reliance on EU citizenship rules.⁷⁵ However, Articles 20 and 21 of the Charter are provisions of EU primary law, and absence of full consideration of the pertinence of the Charter in a dispute concerning discriminatory treatment can mean that legal principles relevant to the resolution of the dispute end up either not being fully ventilated or entirely overlooked. This is exemplified by comparing the judgment of the Grand Chamber of the CJEU in C-83/14 *CHEZ*⁷⁶ with that of the First Chamber in C-668/15 *Jyske Finans A/S*,⁷⁷ both of which were preceded by Case C-54/07 *Firma Feryn*,⁷⁸ the first ruling in which the CJEU interpreted the substance of the Race Discrimination Directive.

The Race Discrimination Directive has the widest material scope of all equality Directives, encompassing, pursuant to Article 3(1), employment and self-employment, social protection including health care, housing and access to supply of other goods and services that are available to the public, education, and vocational training. It also had fewer exceptions as compared with discrimination on the basis of sex, disability, sexual orientation, religion, or age.⁷⁹ Yet it has been the subject of strikingly few references for preliminary rulings.⁸⁰ Only nine have been adjudicated upon to date,⁸¹ and only three of these featured facts warranting interpretation and detailed analysis of the Race Discrimination Directive.⁸²

(*F*'note continued)

men and women in matters of employment and occupation (recast): [2006] OJ L204/23; Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in access to and supply of goods and services: [2004] OJ L373/37; Directive (EC) 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding: [1992] OJ L348/1; Directive (EC) 79/7 on the progressive implementation of the principle of equal treatment for men and women in matter of social security: [1979] OJ L6/24.

⁷⁵ Eg *Coman*, note 73 above. See generally M Bell, 'Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law' (2012) 60 *American Journal of Comparative Law* 127. See also, in the context of discrimination on the basis of disability, A, C-679/16, EU:C:2018:601.

⁷⁶ Note 66 above.

⁷⁷ Note 66 above.

⁷⁸ Note 66 above.

⁷⁹ See Atrey, note 47 above, p 625, citing M Bell and L Waddington, 'More Equal than Others: Distinguishing European Union Equality Directives' (2001) 38 *Common Market Law Review* 587, pp 597–601.

⁸⁰ S Benedi Lahuerta, 'Ethnic Discrimination, Discrimination by Association and the Roma Community: *CHEZ*' (2016) 53 *Common Market Law Review* 797.

⁸¹ Atrey, note 47 above, p 626. *Vajnai*, C-328/04, EU:C:2005:596; *Firma Feryn*, note 66 above; *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291; *Ministerul Justiției Și Libertăților Cetățenești v Ștefan Agafitei and Others*, C-310/10, EU:C:2011:467; *Kamberaj*, note 45 above; *Meister*, C-415/10, EU:C:2012:217; *Belov*, C-394/11, EU:C:2013:48; *CHEZ*, note 66 above; *Jyske Finans*, note 66 above.

⁸² There is one case pending before the CJEU: *Maniero*, C-457/17.

Case C-54/07 *Firma Feryn*,⁸³ on racially discriminatory recruitment policies, made no reference to Article 21(1) of the Charter, probably because at that stage the Charter had not acquired legally binding status. In any event, a robust judgment was issued setting out broad parameters for identification of incidences of direct discrimination, the presumption of the existence of a discriminatory policy and the sanctions applicable when the Race Discrimination Directive is breached. Advocate General Maduro commenced his Opinion by noting that contrary to ‘conventional wisdom, words can hurt. But can they amount to discrimination?’ The Advocate General then went on to consider whether the director of a firm which placed a ‘vacancies’ notice on its premises seeking new staff—reported in several newspapers, but disputed by the director himself, as having said the firm would not recruit persons of Moroccan origin due to customer preferences—had placed the firm in breach of the Race Discrimination Directive.

The Belgian Centrum voor Gelijkheid van Kansen en voor Racismebestrijding (Centre for Equal Opportunities and Opposition to Racism) brought proceedings against Feryn before the President of the Arbeidsrechtbank Brussels which were unsuccessful. It was there found that the public statements were only evidence of potential discrimination and not actual discrimination, such as turning down a job application on the basis of ethnic origin. The Centre for equal opportunities and opposition to racism appealed to the Arbheidshof te Brussels, which sent a reference for a preliminary ruling to the CJEU.

Advocate General Maduro first dealt with whether or not the Race Discrimination Directive left Member States with a discretion to allow organisations like the Centre for Equal Opportunities to bring proceedings against entities like Feryn NV, or whether such proceedings could only be brought by victims. In concluding that such a discretion existed, the Advocate General referred, *inter alia*, to Article 6(2) of the Race Discrimination Directive, which states that the ‘implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive’.⁸⁴ Advocate General Maduro took the position that the scope of the Directive was not confined to cases in which there were ‘identifiable victim complaints’, and that the ‘forms of discrimination covered by the [Race Discrimination] Directive must be inferred, above all, from its wording and purpose’,⁸⁵ and that directives passed on the basis of Article 13 EC (now Article 19 TFEU) were to be interpreted ‘in the light of the broader values underlying that provision’.⁸⁶ Against this background, the Advocate General concluded that ‘an interpretation that would limit the scope of the Directive to cases of identifiable complainants who have applied for a particular job would risk undermining the

⁸³ Note 66 above.

⁸⁴ Opinion in *Firma Feryn*, EU:C:2008:155, para 13.

⁸⁵ *Ibid.*, para 14.

⁸⁶ *Ibid.* The Advocate General also refers to his Opinion in *Coleman*, C-303/06 EU:C:2008:61, point 7, *et seq.*

effectiveness of the principle of equal treatment'.⁸⁷ All of this was adopted by the Second Chamber of the CJEU,⁸⁸ which found, among other things, on the further recommendation of Advocate General Maduro, that public statements of the kind in issue in *Feryn* constituted direct discrimination under Article 2(2)(a) of the Race Discrimination Directive.

Case C-83/14 *CHEZ*,⁸⁹ concerned a practice by the supplier of an essential service (electricity) in a Bulgarian town that was alleged to have been discriminatory against Roma. Mrs Nikolova ran a shop in the relevant district and was affected by the policy, but was not of Roma origin herself. She brought a claim to the *Komisija za zashtita ot diskriminatsia* (Commission for Protection Against Discrimination) arguing that the practice of installing electricity meters for all consumers of her district at a height of between six and seven metres on concrete pylons, when the metres installed by CHEZ in other districts were placed at a height of 1.70 metres, constituted direct discrimination on the basis of nationality. The Commission for Protection Against Discrimination issued a decision concluding that indirect discrimination had occurred, but this was annulled by the Supreme Administrative Court. Eleven days later, the Commission for Protection Against Discrimination issued a fresh decision to the effect that indirect discrimination had taken place, which was appealed to the Administrative Court, Sofia. It sent a series of questions to the CJEU, including one on the meaning of 'ethnic origin', and which further allowed for exploration of the difference between direct discrimination under Article 2(2)(a) of the Race Discrimination Directive and indirect discrimination under Article 2(2)(b) of the Race Discrimination Directive.

Article 21(1) of the Charter was a prominent feature of both the judgment of the Grand Chamber of the CJEU and the Opinion of Advocate General Kokott, both of which were also preoccupied with the *effet utile* of the principle of equal treatment, the purposes underlying the Race Discrimination Directive, and potential for the measure or practice impugned to stigmatize on the basis of race. The Advocate General noted the status of Article 21 of the Charter as primary EU law.⁹⁰ She relied on Article 21 in determining the meaning of 'racial or ethnic origin';⁹¹ in the formulation of her proposals with respect to discrimination by association (which was relevant under the facts arising in *CHEZ*);⁹² in deciding whether a practice needs to be ethnically motivated to amount to discrimination based on racial or ethnic origin;⁹³ and in reaching conclusions as to when a practice is indirectly discriminatory under the Charter,⁹⁴ which she considered to be the case in *CHEZ*. Like the Second

⁸⁷ *Ibid*, para 15.

⁸⁸ Note 66 above.

⁸⁹ Note 66 above.

⁹⁰ EU:C:2015:170, para 43.

⁹¹ *Ibid*, para 53.

⁹² *Ibid*, paras 57–58, 64–65.

⁹³ *Ibid*, para 82.

⁹⁴ *Ibid*, paras 107–08.

Chamber of the CJEU and Advocate General Maduro in *Firma Freyn*,⁹⁵ Advocate General Kokott adopted an approach that tended toward a broad material scope for the Race Discrimination Directive, pointing out for example that neither Article 21(1) of the Charter nor the various language versions of the Race Discrimination Directive restricted the application of the principle of equal treatment to persons who suffer discrimination on the basis of ‘their own’ ethnic origin.⁹⁶ The Advocate General took the view that this wording was not by chance, and referred to the judgment of the CJEU in Case C-391/09 *Runevic-Vardyn and Wardyn*⁹⁷ in support of the contention that the prohibition on discrimination based on race or ethnic origin cannot be interpreted restrictively.⁹⁸ For discrimination to occur, it was ‘sufficient that a person or group of persons is treated less favourably than another is, has been, or would be treated’,⁹⁹ with the Advocate General noting that, pursuant to Recital 28 of the Race Discrimination Directive, its objective is to ‘ensure protection against discrimination as effectively as possible and to achieve the highest possible level of protection’.¹⁰⁰

The Grand Chamber of the CJEU held that the Race Discrimination Directive is merely an expression of the principle of equality, which is one of the general principles of EU law recognized in Article 21 of the Charter. As such, the Race Discrimination Directive cannot be interpreted restrictively;¹⁰¹ that the first question appertained to the meaning of ‘ethnic origin’ within the meaning of Directive 2000/43 and Article 21 of the Charter, such that Articles 1 and 2(1) of the Race Discrimination Directive were to be read ‘in conjunction with Article 21 of the Charter’;¹⁰² and that, in accordance with the Opinion of the Advocate General, the Race Discrimination Directive gives specific expression to the principle of non-discrimination on the grounds of race and ethnic origin in the substantive field that the Directive covers.¹⁰³ The Grand Chamber of the CJEU concluded, while also providing guidance, that it was for the national referring court to decide whether direct discrimination had occurred,¹⁰⁴ including the question of objective justification in the event of indirect discrimination having occurred.¹⁰⁵ The Grand Chamber placed emphasis on Recital 12 of the Race Discrimination Directive, and the need to ‘ensure the development of democratic and tolerant societies which allow the

⁹⁵ EU:C:2008:397.

⁹⁶ EU:C:2015:170, para 53 (emphasis in original).

⁹⁷ EU:C:2011:291, para 43.

⁹⁸ EU:C:2015:170, para 54.

⁹⁹ *Ibid*, para 77.

¹⁰⁰ *Ibid*, para 91.

¹⁰¹ Note 66 above, paras 28, 42. See also the Opinion of the Advocate General, EU:C:2015:170, para 56.

¹⁰² *Ibid*, para 50.

¹⁰³ *Ibid*, paras 58, 72.

¹⁰⁴ *Ibid*, para 80.

¹⁰⁵ *Ibid*, paras 110–28.

participation of all persons irrespective of racial or ethnic origin'.¹⁰⁶ The Grand Chamber confirmed that the scope of the Race Discrimination Directive cannot be defined restrictively,¹⁰⁷ and referred to Recital 16 of the Race Discrimination Directive and Article 3(1), 'according to which the protection against discrimination on grounds of racial or ethnic origin which the directive is designed to guarantee is to benefit "all" persons'.¹⁰⁸

Finally, when the wording of the Race Discrimination Directive did not resolve the question of whether discrimination by association fell within the material scope of the Race Discrimination Directive, the Grand Chamber of the CJEU—in finding that it did—reverted to its classic rules of interpretation and considered the context, purpose and general aim of the Race Discrimination Directive.¹⁰⁹ What mattered, ultimately, was that the law impugned adversely affected the Roma ethnic group,¹¹⁰ the fact that Mrs Nikolova was not part of that group did not put the dispute outside of the scope *ratione materiae* of the Race Discrimination Directive.

Not much of this was taken up by either the Advocate General or the First Chamber of the CJEU in *C-668/15 Jyske Finans A/S*.¹¹¹ One commentator has argued *Jyske Finans A/S* 'subverts the strides made in *Feryn* and *CHEZ*',¹¹² and the judgment features no reference to Article 21 of the Charter, or the hierarchy of norms in EU law. Advocate General Wahl, as noted above, made only a passing acknowledgment of Article 21, and then in order to justify a restrictive interpretation of the term 'ethnic origin'.

In *Jyske Finans A/S*, Mr Ismar Huskic—a Danish national who had been born in Bosnia and Herzegovina and subsequently naturalized—was asked by a credit institution to provide additional proof of his identity, aside from a Danish driver's license, when applying with his Danish born partner for a car loan. The credit institution argued that a Danish driver's license was sufficient identification for Mr Huskic's partner, but not him, because it was simply complying with laws to prevent money laundering when requesting an additional identity check. These checks were said to be imposed by Article 13 of Directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.¹¹³

Mr Huskic won a claim for discrimination before the Equal Treatment Board and before the District Court of Viborg in Denmark after the decision of the Equal Treatment Board was appealed by Jyske Finance. On further appeal by Jyske Finance to the High Court of Western Denmark, questions were referred to the CJEU on whether a practice that required only persons born outside of Nordic countries, the EU and Switzerland and Lichtenstein, to produce identification was excluded by

¹⁰⁶ Ibid, para 40.

¹⁰⁷ Ibid, paras 42, 66.

¹⁰⁸ Ibid, para 57.

¹⁰⁹ Ibid, para 55.

¹¹⁰ Ibid, para 76.

¹¹¹ Note 66 above.

¹¹² Atrey, note 47 above, p 627.

¹¹³ [2005] OJ L309/15.

either the prohibition on direct discrimination under Article 2(2)(a) of the Race Discrimination Directive, indirect discrimination under Article 2(2)(b) of the Race Discrimination Directive (unless objectively justified by a legitimate aim and proportionate) and whether, if indirectly discriminatory, the practice was an appropriate and necessary means of safeguarding the enhanced customer due diligence requirements of Directive 2005/60.

In a pithy judgment, the First Chamber of the CJEU held that Mr Huskic had not been discriminated against either directly or indirectly, and for that reason it was not necessary to answer the third question on Article 13 of Directive 2005/60 on money laundering. Both the Advocate General and the CJEU were directly critical of the reasoning of the District Court of Viborg, who had found in favour of Mr Huskic. The judgment of the CJEU and the Opinion of the Advocate General are perplexing for several further reasons. First, the practical consequence of the decision of the High Court of Western Denmark to send the order for reference was removal of a fundamental rights remedy that had been afforded to Mr Huskic under Danish law, both before the Equal Treatment Tribunal and the District Court of Viborg. If referral to the CJEU results in loss of a fundamental rights remedy already provided under Member State law, comprehensive reasoning might be expected for so doing, given that, under the rule established in the *Melloni* case,¹¹⁴ the national referring court is precluded from applying higher national standards for the protection of discrimination on the basis of ethnic origin, if to do so results in diminution of the primacy, unity, and effectiveness of EU law.¹¹⁵ Neither this consequence, nor a provision of the Race Discrimination Directive related to it, and which, as noted above, had been viewed as important by Advocate General Maduro in *Firma Feryn*, were considered by the Advocate General or the First Chamber of the CJEU. Article 6(2) of the Race Discrimination Directive, states that the ‘implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive’.¹¹⁶

Second, and unusually, there was a preoccupation in *Jyske Finans*—commenced in the Opinion of the Advocate General,¹¹⁷ then adopted by the First Chamber of the CJEU¹¹⁸—with criticising the reasoning of the District Court, Viborg, rather than interpreting the parts of the Race Discrimination Directive on which questions were referred by the Court of Appeal of Western Denmark. This meant that the premise on which the Opinion was based, and then adopted by the First Chamber of the Court, was that place of birth was the *only* criterion that led the domestic authorities to find discrimination grounded in ethnic origin.¹¹⁹

Third, the approach taken to the resolution of the dispute by the Advocate General in *Jyske Finans*, and followed down the line by the CJEU, opened up loopholes for

¹¹⁴ C-399/11, EU:C:2013:107.

¹¹⁵ *Ibid.*, paras 58–63.

¹¹⁶ *Firma Feryn*, note 66 above, para 13 of the Opinion of the Advocate General, EU:C:2008:155.

¹¹⁷ EU:C:2016:914, paras 37 and 46–50.

¹¹⁸ Note 66 above, paras 22–23.

¹¹⁹ *Ibid.*, paras 18, 21, 34.

evasion of the Race Discrimination Directive as interpreted in previous CJEU case law. For example, the preoccupation of both the CJEU¹²⁰ and the Advocate General with identification of a *particular* ethnic group that has suffered discrimination before the Race Discrimination Directive can bite, and which does not appear in the wording of Article 2 of the Race Discrimination Directive itself, is inconsistent with the parameters set in *CHEZ*¹²¹ and *Feryn*, detailed above, in which the Directive was afforded a broad scope *ratione materiae*.

What Article 2(2)(b) of the Race Discrimination requires is ‘particular *disadvantage*’ (my emphasis) before indirect discrimination can occur, the text of Article 2(2)(b) does not refer to disadvantage of a ‘particular’ ethnic group. Indeed, the wording of Article 2(2)(b) suggests the contrary. It refers to ‘*persons of a racial or ethnic origin*’, rather than persons of an identifiable ethnic origin.¹²² In Article 2(a) on direct discrimination, the emphasis is on unequal treatment being ‘*on grounds*’¹²³ of racial or ethnic origin (causative) but again makes no reference to identification of a ‘particular’ ethnic group.

In light of the approach employed by the Grand Chamber of the CJEU in *CHEZ*, and its preoccupation with securing the *effet utile* of the Race Discrimination Directive, it is difficult to understand the basis upon which the Advocate General was able to insert the bracketed word ‘certain’ in front of ‘ethnic origin’, when quoting from the judgment of the Grand Chamber in *CHEZ*. The paragraph relied on in *CHEZ* refers to possession by the person concerned of a protected characteristic as a touchstone for determining whether indirect discrimination has occurred.¹²⁴ It does not discuss identification of a ‘certain’ or ‘particular’ ethnic group. Precise identification of a group effect by a neutral practice was relevant in *CHEZ* due to its special facts. The applicant was not a member of any disadvantaged group, but was affected by the impugned practice. This is the context in which, it would seem, the ruling in *CHEZ* needs to be read,¹²⁵ and the scant references in that judgment to a ‘particular’ or ‘certain’ ethnic origin.¹²⁶

¹²⁰ Ibid, paras 26, 27, 31.

¹²¹ For a detailed discussion, see Atrey note 47 above. See also Benedi Lahuerta, note 80 above.

¹²² My emphasis.

¹²³ My emphasis.

¹²⁴ Paragraph 57 of the Opinion of the Advocate General, EU:C:2016:914, referring to paragraph 96 of the Judgment of the Grand Chamber of the CJEU in *CHEZ*, note 66 above. Paragraph 96 of the Judgment of the Grand Chamber in *CHEZ* states as follows: ‘By contrast, indirect discrimination on the grounds of racial or ethnic origin does not require the measure at issue to be based on reasons of that type. As is apparent from the case-law recalled in paragraph 94 of the present judgment, in order for a measure to be capable of falling within Article 2(2)(b) of Directive 2000/43, it is sufficient that, although using neutral criteria not based on the protected characteristic, it has the effect of placing particularly persons possessing that characteristic at a disadvantage’.

¹²⁵ This is born out in particular by paragraphs 50 and 56 of the Judgment of the Grand Chamber in *CHEZ*, note 66 above.

¹²⁶ These are detailed in the Opinion of Advocate General Wahl. See EU:C:2016:914, paragraphs 61–63, wherein the text of Recital 17 of the Race Discrimination Directive is also referred to, but no other recital. The Advocate General relies on paragraph 100 of the Judgment in *CHEZ*, as did the First

The Opinion of the Advocate General and the judgment of the First Chamber in *Jyske Finans* diminishes the *impact* of a measure that is neutral on its face as the touchstone for determining whether indirect discrimination has occurred; an approach that is so ingrained in the case law of the CJEU that it might be viewed as having constitutional status. Advocate General Wahl asserted, with reliance on a passage on the Opinion of Advocate General Kokott in *CHEZ*,¹²⁷ that ‘the practical effect of the practice at issue does not suffice to establish an instance of direct discrimination’.¹²⁸ Does this miss the point that an impact analysis is generally applied to indirect discrimination? The absence of any forensic investigation of impacts is also dissonant with the breadth of the concept, inherent in indirect discrimination law, of protected groups, such as women (roughly half the planet), and the fact that protected groups can also be ephemeral, such as minorities.¹²⁹ It is additionally difficult to reconcile with Recital 12 of the Race Discrimination Directive, which shows that its goal is to ‘ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin’.

Thus, even if the measure impugned in *Jyske Finans* was not directly discriminatory under Article 2(2)(a) of the Race Discrimination Directive, the following question might well have been asked. *Does not the practical application of the law in question adversely impact persons who are not ethnically Danish to a greater degree than persons who are?*¹³⁰ As one leading commentary has observed, ‘broadly speaking, indirect discrimination occurs where an unjustified adverse *impact* is produced for a protected class of persons by an apparently class-neutral action’.¹³¹ It is questionable whether emphasizing identification of the relevant

(*F*note continued)

Chamber at paragraph 27 of the Judgment in *Jyske Finans*, note 66 above, but the context of that paragraph is the Grand Chamber of the Court ruling against an interpretation of Article 2(2)(b) that would provide for its application only in the event of serious, obvious, and particularly significant case of inequality. Reference is also made by the Advocate General to paragraph 31 of the Judgment in *Firma Feryn*, note 66 above, the context of which was whether the facts that were relevant to that case gave rise to a presumption of a discriminatory recruitment policy. At footnote 26, the Advocate General points out that all cases before the CJEU to date on the Race Discrimination Directive have factually concerned disadvantage to a particular ethnic group. At paragraph 67, the Advocate General refers to paragraph 107 of *CHEZ*, note 66 above, in which the relevance of a ‘particular’ or ‘certain’ ethnic origin does not arise.

¹²⁷ EU:C:2016:914, n 17, where the Advocate General states: ‘See, similarly, the Opinion of Advocate General Kokott in *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:170, point 87’.

¹²⁸ EU:C:2016:914, para 55.

¹²⁹ H Collins and T Khaitan, ‘Indirect Discrimination Law: Controversies and Critical Questions’ in H Collins and T Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018), p 3.

¹³⁰ Atrey, note 47 above, p 637, argues that *Jyske Finans* was a ‘typical case of race discrimination’.

¹³¹ E Ellis and P Watson, *EU Anti-Discrimination Law* (2nd ed, OUP, 2012), p 148. My emphasis. Mention might also be made of the foundations of indirect discrimination elsewhere. Chief Justice Burger famously declared in *Griggs v Duke Power Co*, 401 US 424 (1971), that Congress had legislated with respect to ‘practices that are fair in form, but discriminatory in operation’. See Collins and Khaitan note 129 above, p 2. See generally G de Búrca, ‘The Trajectories of European and American Antidiscrimination Law’ (2012) 60 *American Journal of Comparative Law* 1.

group at the expense of the impact of the measure impugned is consistent with the objectives of the Race Discrimination Directive in combatting xenophobia,¹³² and misses the moral wrong that underlies the law of discrimination, and indeed the Charter itself¹³³—namely lack of respect for dignity, equality, and equal respect.¹³⁴

The potential for evasion of the Race Discrimination Directive is exacerbated by the fact that the First Chamber of the CJEU did not specifically address the other side of the coin to disadvantage grounded on ethnic origin. That is, unjustified advantage.¹³⁵ On the analysis of the Advocate General, as adopted by the First Chamber of the CJEU, an undertaking that states that it will employ only persons having a neutral quality that *advantages*, rather than disadvantages, a particular ethnic group (eg the ability to speak the Swedish language) will fall outside of the scope *ratione materiae* of the Race Discrimination Directive. This is so because, in such circumstances, the *particular* ethnic groups suffering disadvantage will be impossible to identify, even though identification of the advantaged group is straightforward. Does not a rule or practice applicable to persons born in Denmark overwhelmingly, in its impact, advantage persons of Danish ethnicity, in the same way as discrimination in *CHEZ* on the basis of residence overwhelmingly disadvantaged Roma? Yet the Advocate General expressed the view that Article 2(2)(b) of the Race Discrimination Directive ‘cannot be understood to confer (negative) protection against measures which arguably place a given ethnic group at an advantage, without also identifying a specific ethnic origin which is put at a disadvantage.’¹³⁶

Granted, discrimination on the basis of birth is one of the prohibitions mentioned in Article 21(1) of the Charter that is not expressly referred to in either the Race Discrimination Directive or the Equal Treatment Framework Directive. In this sense, it is in the company of ‘colour’, ‘social origin’, ‘genetic features’, ‘language’, ‘political or any other opinion’, ‘membership of a national minority’, and ‘property’. However, once established rules for the interpretation of EU laws are applied to the Race Discrimination Directive, an approach that was employed by the Grand Chamber of the CJEU in *CHEZ*, is there any basis on which it can be inferred that ‘ethnic origin’ is to be interpreted in such a way as to facilitate the exclusion, as opposed to the inclusion, of those falling within these categories of Article 21(1) of

¹³² Atrey, note 47 above, p 639, discusses the roots of Article 19 TFEU as a measure to combat the rise of xenophobia in Europe. This is mentioned in Recitals 7, 10, and 11 of the Race Discrimination Directive.

¹³³ See the second recital to the Charter.

¹³⁴ See recently H Collins, ‘Justice for Foxes: Fundamental Rights and Justification of Indirect Discrimination’ in Collins and Khaitan, note 129 above, p 255. See more broadly and with emphasis on the harmful effects of discrimination, S Moreau, ‘The Moral Seriousness of Indirect Discrimination’ in Collins and Khaitan, note 129 above.

¹³⁵ See recently in the context of the guarantee of equal treatment under Article 20 of the Charter, *Milkova*, C-406/15, EU:C:2017:198, para 66: ‘Disadvantaged persons must therefore be placed in the same position as persons enjoying the advantage concerned (Judgment of 11 April 2013, *Soukupová*, C-401/11, EU:C:2013:223, para 35)’.

¹³⁶ EU:C:2016:914, para 60.

the Charter from the protection afforded by discrimination on the basis of ethnic origin under the Race Discrimination Directive?

Fourth, exploration of the consequences of removing a remedy that had been afforded by a Member State court (here the District Court of Viborg) in terms of whether or not Mr Huskic might seek redress against Denmark before the European Court of Human Rights, was not a strong feature of the reasoning elaborated in *Jyske Finans*. Such an exercise might have been warranted due to Article 52(3) of the Charter, which states that in respect of rights under the Charter that correspond to rights under the ECHR, ‘the meaning and scope of those rights shall be the same’. In any subsequent claim brought by Mr Huskic before the European Court of Human Rights, there will be a ‘presumption’ that he was afforded ‘equivalent protection’ before the CJEU, but it is rebuttable.¹³⁷ Best practice, then, would seem to suggest that any potential Strasbourg angle is comprehensively explored by the CJEU, before a fundamental rights ‘win’ before a Member State court is removed by a judgment issued in the context of an order for reference.

However, this formed no part of the reasoning of the First Chamber of the CJEU.¹³⁸ Advocate General Wahl dealt with this aspect of the case as follows.

That view [the need for specific comparability between particular ethnic groups] is not called into question by an argument, relied on by the Kingdom of Denmark at the hearing, that the [European Court of Human Rights] has recently held, by a majority, that national rules on family reunion which generally affect persons of ‘foreign ethnic origin’ unfavourably are in breach of Article 8 of the European Convention on Human Rights, read in conjunction with Article 14 thereof. That case concerned a difference in treatment of a State’s own citizens based on the duration of their citizenship, and therefore a matter in respect of which Directive 2000/43 affords no greater protection than as concerns a person’s place of birth. Moreover, whereas the wording of those convention provisions—in particular Article 14—does not suggest that it is necessary to identify a particular ethnic origin targeted by a discriminatory measure, that is not the case for Article 2(2)(b) of Directive 2000/43.¹³⁹

This succinct reasoning seems to suggest that the European Union is authorized under the treaties to ‘legislate over’ fundamental rights standards established under the ECHR, as interpreted by the European Court of Human Rights, so as to diminish the protection afforded under that instrument. This would not, however, be consistent with the Court’s interpretation of Article 52(3) of the Charter to date. EU law can provide only higher, and not lower, protection than the law of the ECHR.¹⁴⁰

Finally, and perhaps most importantly, neither the Advocate General nor the First Chamber of the CJEU considered an additional and important dimension to the dispute in *Jyske Finans*. The defendant argued in that case that it was bound by

¹³⁷ See *Avotins v Latvia* (Application no 17502/07) (2017) 64 EHRR 2, para 112.

¹³⁸ Compare the careful consideration of relevant case law of the European Court of Human Rights by the Grand Chamber of the Court in *Coman*, note 73 above, paras 49–51.

¹³⁹ EU:C:2016:914, para 65. See discussion by Atrey, note 47 above, pp 637–39

¹⁴⁰ Eg *Ardic*, Case C-571/17 PPU, EU:C:2017:1026.

Article 13 of Directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing¹⁴¹ to impose further identification requirements on Mr Huskic. But does not Article 21(1) of the Charter require interpretation of Directive 2005/60, and Member State measures implementing it, in conformity with the prohibition on discrimination on the basis of birth, irrespective the Race Discrimination Directive, in the same way as the CJEU reviewed Member State compliance with the prohibition on discrimination on the basis of sexual orientation under Article 21(1) of the Charter when a Member State was implementing an EU Directive on technical requirements relating to blood and blood components in *C-528/13 Leger*, subject only to objective justification as provided by Article 52(1) of the Charter?¹⁴² This question was left unaddressed in *Jyske Finans*, even though Recital 48 of Directive 2005/60 stated¹⁴³ that this Directive ‘respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Nothing in this Directive should be interpreted or implemented in a manner that is inconsistent with the European Convention on Human Rights’.

The First Chamber of the CJEU therefore concluded that Article 2(2)(a) and (b) of Directive 2000/43 was to be interpreted as not precluding the practice of a credit institution which requires a customer whose driving license indicates a country of birth other than a Member State of the European Union or the European Free Trade Association to produce additional identification in the form of a copy of the customer’s passport or residence permit.¹⁴⁴ Advocate General Wahl added that, if question 3 had to be answered, at which point I note the stigmatizing effects of the law might have been further explored, he would have advised the CJEU to rule that the practice of *Jyske Finans* of requiring additional documentation due to place of birth was neither objectively justified or necessary to prevent the financing of terrorism or money laundering.

III. HORIZONTAL APPLICATION OF THE CHARTER AND COHERENCE

While both the Race Discrimination Directive and the Framework Equal Treatment Directive have been subject to interpretation in disputes involving private parties *inter se*,¹⁴⁵ the CJEU recently took this case law further by finding that, if it is impossible to interpret a provision of Member State law in conformity with the Framework Equality Directive, both Article 47 of the Charter and Article 21(1) of the

¹⁴¹ [2005] OJ L309/15.

¹⁴² Note 13 above.

¹⁴³ Directive 2005/60 is no longer in force.

¹⁴⁴ Note 66 above, para 37.

¹⁴⁵ See eg *G4S Secure Solutions*, note 67 above; *Bouagnaoui*, note 67 above; *Derkmyn*, C-201/13, EU:C:2014:2132. For a discussion of the horizontal effects of the Race Discrimination Directive, see Zaccaroni, note 29 above, pp 178 ff.

Charter become fully applicable, notwithstanding the prohibition on horizontal direct effect of directives.¹⁴⁶

In Case C-414/16 *Egenberger*,¹⁴⁷ the applicant applied unsuccessfully for a post with an organization of protestant churches in Germany, entailing preparation of a race discrimination report. The advertisement for the post stated that it was open only to specified groups of Christians. The applicant complained that, as an atheist, she had been discriminated against on the basis of her belief, and queried the compliance of German rules of constitutional law restricting judicial review of decisions of religious organisations with Article 47 of the Charter on the prohibition on discrimination based on religion or belief. The defendant argued that they were entitled in law not to entertain an application from an atheist due to their right to autonomy in the expression of their religion, and, in so far as this was protected by German law, it was preserved by Article 17 TFEU on the status of churches and other religious organizations. Interestingly, both parties relied on the right to freedom of religion and belief under Article 21 of the Charter. The case otherwise largely concerned interpretation of the Framework Equality Directive, and the circumstances in which religion or belief is a ‘genuine and determining’ occupational requirement under Article 4 of the Framework Equality Directive, thereby allowing a difference of treatment.

But perhaps most importantly for present purposes, the national court sent a specific question on the consequences arising if it was impossible to interpret Member State law in conformity with Article 4 of the Framework Equality Directive. On this point the Grand Chamber of the CJEU held as follows:

[I]t must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.

Consequently, in the situation mentioned in paragraph 75 above, [if it is impossible to interpret Member State law in conformity with the Directive,] the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

That conclusion is not called into question by the fact that a court may, in a dispute between individuals, be called on to balance competing fundamental rights which the parties to the dispute derive from the provisions of the FEU Treaty or the Charter, and may even be obliged, in the review that it must carry out, to make sure that the principle of proportionality is complied with. Such an obligation to strike a balance between the

¹⁴⁶ For a discussion of the challenges entailed in vesting Charter rights with horizontal direct effect, see eg J R de la Tour, ‘La mise en oeuvre de la Charte: l’Invocabilité dans les litiges entre particuliers’ (2015) *Revue annuelle des avocats au Conseil d’Etat et à la Cour de Cassation* 436; E Carpano, ‘La représentation des travailleurs à l’épreuve de l’article 27 de la Charte des droits fondamentaux de l’Union: précisions sur l’invocabilité horizontale du droit de l’Union CJEU 15 janvier 2014, *Association de médiation sociale, aff. C-176/12*’ (2014) *Revue de droit du travail* 312.

¹⁴⁷ Note 9 above.

various interests involved has no effect on the possibility of relying on the rights in question in such a dispute. ...

Further, where the national court is called on to ensure that Articles 21 and 47 of the Charter are observed, while possibly balancing the various interests involved, such as respect for the status of churches as laid down in Article 17 TFEU, it will have to take into consideration the balance struck between those interests by the EU legislature in Directive 2000/78, in order to determine the obligations deriving from the Charter in circumstances such as those at issue in the main proceedings.¹⁴⁸

The CJEU thereby extended the horizontal effect of Charter rights from the foundational area of age discrimination under Article 21(1) of the Charter, to freedom of religion and belief under Article 21(1) of the Charter and to the right to an effective remedy and a fair trial under Article 47, even though the *Mangold*¹⁴⁹ line of case law on age discrimination has been described as ‘one of the most criticized lines of case law in the Court’s recent history’.¹⁵⁰ Here only a few remarks will be made, and all are concerned with the theme of coherency.

As already noted, the defendant relied on its right as a religious organization to autonomy as protected under Article 9 of the ECHR and Article 21(1) of the Charter (as an element of freedom of religion) and the applicant her right to freedom of belief under Article 9 ECHR and Article 21(1). It remains to be seen how easy it will be for national courts to undertake the balancing exercise set down by the Grand Chamber of the CJEU in its ruling in *Egenberger*, when what is being balanced is different components of the same right. In addition to this, the absence of discussion of where the subsisting prohibition on the horizontal direct effect of directives¹⁵¹ fits in with the horizontal enforcement of freedom of religion under Article 21(1) of the Charter and the right to an effective remedy and to a fair trial under Article 47 of the Charter was also unfortunate in terms of coherency. *Egenberger* represented a lost opportunity to gather up and reconcile these distinct but related threads in the CJEU’s case law.¹⁵²

Finally, one Advocate General has recently explored in detail the challenges associated with conferring rights protected under the Charter with horizontal direct effect. Advocate General Bobek in his Opinion in Case C-193/17 *Cresco Investigation GmbH* has examined the problems that can arise in identifying the appropriate comparators in horizontal cases involving discriminatory treatment.¹⁵³ He has underscored the difference between disputes in which a private sector actor treats like cases differently of their own volition, and when differential treatment results

¹⁴⁸ *Ibid.*, paras 78–81.

¹⁴⁹ *Mangold*, C-144/04, EU:C:2005:709.

¹⁵⁰ Holdgaard et al., note 10 above, p 36.

¹⁵¹ *Farrell*, C-356/05, EU:C:2007:229.

¹⁵² At paragraphs 140–46, Advocate General Kokott in her Opinion in *CHEZ*, EU:C:2015:70, wrote in favour of the application of the prohibition on discrimination on the basis of religion or belief in disputes between private parties even in the face of contrary national legislation.

¹⁵³ EU:C:2018:614

from a direct application of a positive law of a Member State. The Advocate General also queries whether, in the latter type of case, the case law of the CJEU has ever actively required an effective remedy from a private sector actor engaged in unlawful discrimination,¹⁵⁴ and concludes in favour of a remedy in state liability for damages. The judgment of the CJEU is pending.

IV. A JUMBLE OF JUSTIFICATIONS?

There are three different sets of rules in EU equal treatment law on justified limitations on discrimination. Identification of which of them applies to a given factual context will depend on the entity against whom unequal treatment is being alleged, and whether the case against them is based on Article 20 or Article 21(1) of the Charter.¹⁵⁵

Both the Race Discrimination Directive and the Equal Treatment Framework Directive imported into EU law the distinction which finds its roots in EU equal pay law between direct and indirect discrimination.¹⁵⁶ Pursuant to the Race Discrimination Directive, direct discrimination can only be excused by reference to Member State measures concerning genuine and determining occupational requirements (Article 4), and Member State measures with respect to positive action (Article 5). With respect to indirect discrimination, in addition to this, an apparently neutral provision, criterion or practice can be objectively justified by a legitimate aim; provided that the means of achieving that aim are appropriate and necessary (Article 2(2)(b)).¹⁵⁷ The same applies under the Equal Treatment Framework Directive for indirect discrimination.¹⁵⁸ The latter instrument is different, however, from the Race Discrimination Directive, in that further grounds specified therein for justification of both direct and indirect discrimination are broader. This Directive includes more extensive provisions concerning occupational requirements (Article 4), provisions concerning age (Article 6), along with provisions concerning reasonable accommodation of disabled persons (Article 5). This, therefore, is the paradigm that applies with respect to justified limitations of rights protected by Article 21(1) of the Charter when a person, or persons, are alleging before Member State courts discrimination by either an emanation of the state or a private legal entity under the Race Discrimination Directive and the Equal Treatment Directive.

The inapplicability to cases of direct discrimination of the objective justification test of the Race Discrimination Directive and the Equal Treatment Directive that is relevant to indirect discrimination has prompted one Advocate General to observe

¹⁵⁴ The principles of effectiveness and equivalence had long since been applied by the CJEU against private actors acting in breach of EU consumer directives. See eg *Sales Sinués*, C-381/14, C-385/14, EU:C:2016:252. The jurisprudential basis of this has, however, never been fully articulated.

¹⁵⁵ For a detailed analysis of the differences between EU directives aimed at combatting discrimination, see Bell and Waddington, note 79 above.

¹⁵⁶ For an overview see *ibid.*

¹⁵⁷ For a detailed discussion of the difference between direct and indirect discrimination under the Race Discrimination Directive, see the Opinion of Advocate General Kokott in *CHEZ*, EU:C:2015:170.

¹⁵⁸ Article 2(b)(i) of the Framework Equality Directive.

that in ‘the context of direct discrimination, the protection given by EU law is stronger’¹⁵⁹ than that afforded by Article 14 of the ECHR and the rights to which it attaches, and that the difference of approach is ‘wholly legitimate’, given that ‘Article 52(3) of the Charter specifically provides that EU law may provide more extensive protection than that given by the ECHR’.¹⁶⁰

However, this higher standard of protection may be inoperative when the entity accused of breaching the rights appearing in Article 21(1) is alleged to be an EU institution, or a Member State implementing EU law in a subject area falling outside of either the Equal Treatment Framework Directive or the Race Discrimination Directive. In these circumstances, no investigation will be entered into by the CJEU with respect to whether the discrimination in issue is direct or indirect. Justified limitations will be determined by Article 52(1) of the Charter. This provision states as follows.

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Thus, Case C-190/16 *Werner Fries*¹⁶¹ involved a challenge to the validity of EU legislation by reference to age discrimination that was patently direct, but which was resolved by reference to Article 52(1) of the Charter.¹⁶²

As already mentioned, Case C-528/13 *Léger*¹⁶³ concerned the interpretation of Commission Directive 2004/33 as regards certain technical requirements for blood and blood components¹⁶⁴—Point 2.1 of Annex III thereof precluded blood donations from ‘persons whose sexual behaviour puts them at high risk of acquiring severe infectious diseases than can be transmitted by blood’. This had been interpreted under French law, as entailing ‘permanent contraindication to blood donation for a man who has had sexual relations with another man’.¹⁶⁵ On any analysis, this amounted to discrimination on the basis of sexual orientation under Article 21(1) of the Charter which was direct by nature.¹⁶⁶

¹⁵⁹ Advocate General Sharpston, *Bougnaoui*, note 67 above, para 63.

¹⁶⁰ *Ibid*, para 64.

¹⁶¹ Note 14 above.

¹⁶² In the context of direct age discrimination, the objective justification test is applicable in any event due to Article 6 of the Equal Treatment Framework Directive. See eg *Specht*, C-501 to 506/12, C-540/12, C-541/12, EU:C:2014:2005.

¹⁶³ Note 13 above.

¹⁶⁴ Commission Directive 2004/33 regarding certain technical requirements for blood and blood components: [2004] OJ L91/25.

¹⁶⁵ *Léger*, note 13 above, para 26, referring to the French Decree laying down the selection criteria of blood donors (JORF of 18 January 2009, p 1067).

¹⁶⁶ Pursuant to Article 2(2)(a) of the Equal Treatment Framework Directive, direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been, or would be

However, because the Equal Treatment Framework Directive was not relevant to the dispute, no consideration was given as to whether the conduct in issue was directly or indirectly discriminatory. The basis of justification that is applicable for indirect discrimination under those directives was effectively applied, given that it closely resembles Article 52(1) of the Charter. This included considering whether the French law in issue met an objective of general interest within the meaning of Article 52(1) of the Charter and whether, if in the affirmative, it respected the principle of proportionality within the meaning of that provision.¹⁶⁷

The aforementioned ruling in *Glatzel*¹⁶⁸ provides a final example. Glatzel challenged the validity of Point 6.4 of Annex III to Directive 2006/126 on driving licenses,¹⁶⁹ which required, without derogation, that applicants for categories C1 and C1E driving licenses have a minimum visual acuity of 0.1 in their worse eye even if those persons use both eyes together and have a normal field of vision when using both eyes together, for being incompatible with Articles 20, 21(1), and 26 of the Charter. Here too, this would appear to amount to direct discrimination,¹⁷⁰ on the basis of disability although, as was the case in *Léger*, whether the discrimination was direct or indirect was irrelevant on the facts of *Glatzel*. The Court, referring to Article 52(1) of the Charter,¹⁷¹ held that it was not necessary for the purposes of determining the validity of Directive 2006/126 to determine whether Glatzel had a disability within the meaning of Article 21(1) of the Charter, because refusing a driver's license in categories C1 and C1E on the ground that his visual acuity was insufficient was objectively justified in the light of over-riding considerations of road safety.¹⁷² However, earlier, in Case C-236/09 *Test Achats*,¹⁷³ the Court made no reference to Article 52(1) of the Charter in deciding whether EU legislation of was invalid for breach of Article 21(1) of the Charter for non-compliance with discrimination on the basis of sex, referring only briefly to the general principle of objective justification.¹⁷⁴

There is a final additional twist when Article 20 of the Charter is in dispute, and situations in which like cases have not been treated the same. In completing its reasoning in *Glatzel*, discussed above, the CJEU noted that Article 20 of the Charter entitled 'equality before the law' aims to ensure, *inter alia*, that comparable

(Footnote continued)

treated in a comparable situation, on any of the grounds referred to in Article. Mr Léger was treated less favourably than other blood donors.

¹⁶⁷ *Léger*, note 13 above, para 55.

¹⁶⁸ Note 7 above.

¹⁶⁹ Directive 2006/126/EC of the European Parliament and Council on driving licences: [2006] OJ L403/18, as corrected and amended.

¹⁷⁰ Pursuant to Article 2(2)(a) of the Equal Treatment Framework Directive, Mr Glatzel was treated less favourably than other applicants for a class C driver's license on the basis of his (visual) disability.

¹⁷¹ Note 7 above, para 43.

¹⁷² *Ibid*, para 48.

¹⁷³ C-236/09, EU:C:2011

¹⁷⁴ *Ibid*, para 28.

situations do not receive different treatment.¹⁷⁵ The Court decided that the situation of drivers in different parts to Annex 3 of the Directive on driver's licenses were not comparable, and so did not go on to consider justified limitations. However, prior to *Glatzel*, in Case C-401/11 *Soukupová*,¹⁷⁶ in deciding that discriminatory treatment on the basis of gender with respect to the calculation of normal retirement age for the payment of early retirement support under the Regulation 1257/1999 on support for rural development under the European Agriculture Guidance and Guarantee Fund,¹⁷⁷ the CJEU referred to the test conventionally applied in disputes concerning the general principle of equal treatment by considering whether the national measure impugned was 'objectively justified',¹⁷⁸ after deciding that the Member State concerned had been 'implementing' EU law within the meaning of Article 51(1) of the Charter.¹⁷⁹ There was no analysis of whether the unequal treatment had been direct or indirect and no mention was made of Article 52(1) of the Charter. All this re-begs an often-posed question: is the pain endured in seeking coherence in the distinction between direct and indirect discrimination worth any tangible and guaranteed gain?¹⁸⁰

V. CONCLUSION

Coherence is central to the mission of the CJEU and the courts of the Member States in upholding the rule of (EU) law.¹⁸¹ It can be concluded from the above analysis that, for the moment, the categories of rights protected by Article 21(1) of the Charter are closed, and supplemented minimally by Charter principles. Further, in relative terms, the low profile that Articles 21(1) and 20 of the Charter have had, in comparison with other primary provisions of EU law, in the development of the prohibition on unequal treatment has occasionally resulted in gaps and inconsistencies in the norms that have evolved via case law to secure their enforcement, and lost opportunities to illuminate areas that might be ripe for development. It has also led to disconnect in the relationship between Articles 20 and 21 of the Charter, and important Charter provisions governing the rules for its enforcement, such as Article 52(3) of the Charter on the relevance of the ECHR to levels of protection, and Article 52(1) on justified limitations on Charter rights.

¹⁷⁵ Note 7 above, para 81.

¹⁷⁶ Note 19 above.

¹⁷⁷ [1999] OJ L160/80.

¹⁷⁸ Note 19 above, para 29.

¹⁷⁹ *Ibid*, para 28.

¹⁸⁰ For a recent discussion, see eg S Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide?' in Collins and Khaitan, note 129 above. See also J Bowers and E Moran, 'Justification in Direct Sex Discrimination Law: Breaking the Taboo' (2002) *Industrial Law Journal* 307. The difficulties of determining when discrimination is direct as opposed to indirect is well illustrated by the ruling of the Court and the Opinion of the Advocate General in *CHEZ*, EU:C:2015:170.

¹⁸¹ K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *Common Market Law Review* 1625, p 1659.

In a Union founded on respect for individual rights, comprehensive reasoning is essential to the continuing legitimacy of the CJEU as a fundamental rights tribunal.¹⁸² It is here merely suggested that enhancement of the rigour with which Articles 20 and 21 of the Charter are treated as umbrella provisions for the protection of fundamental rights in the European Union, and more reflection on the relationship between them and both EU legislation aimed at implementing rights protected by Article 21(1), and provisions of the Charter dedicated more broadly to securing its enforcement, may contribute to improving coherency.

¹⁸² See the comprehensive analyses appearing in A Tizzano, J Kokott and S Prechal, *50th Anniversary of the Judgment in Van Gend en Loos (1963–2013)* (Europe Direct, Conference Proceedings, 2013).