STUDIA Z PRAWA WYZNANIOWEGO | 2023
Vol. 26, 353–371
https://doi.org/10.31743/spw.16351
Received: May 31, 2023 | Accepted: Aug 20, 2023 | Published: Dec 20, 2023

The role of the Court in modelling the standard of equal treatment in employment: Analysis of the judgment of the Court of Justice in case C-344/20

Rola Trybunału Sprawiedliwości w kształtowaniu standardu równego traktowania w zatrudnieniu. Analiza wyroku Trybunału Sprawiedliwości w sprawie C-344/20

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Abstract: The aim of this commentary is to analyse the judgment of the Court of Justice in *L.F. v. S.C.R.L.*, in which the Court analysed provisions of the Equal Treatment Directive (2000/78) in light of the general prohibition of discrimination on the grounds of religion or belief. The main proceedings in the case analysed concerned a Muslim woman who wore an Islamic headscarf and was doing an office internship at S.C.R.L., a cooperative limited liability company. Due to the neutrality policy at work, she was unable to manifest her religion and brought an action for a prohibitory injunction before a domestic court. In preliminary ruling, the Court decided that she was not a victim of discrimination. The F.L. judgment is a continuation of the Court's line of judicial decisions in cases G4S and WABE referred to before. The article analyses the current case law of the CJEU and ECHR that touches on the problem of the expression of religious belief and seeks the answer to the question: Which value is more important to be protected in contemporary European society – the identity of the person or the freedom to conduct a business?

Key words: principle of equality; non-discrimination; freedom of religion; equal treatment in employment; religious symbols

Streszczenie: Celem glosy jest analiza wyroku Trybunału Sprawiedliwości w sprawie *L.F. v. S.C.R.L.*, w której Trybunał dokonał wykładni przepisów dyrektywy w sprawie równego traktowania (2000/78) w świetle ogólnego zakazu dyskryminacji ze względu na religię lub przekonania. Postępowanie krajowe dotyczyło wyznawczyni islamu, która nosiła chustę. W związku z wdrażaną polityką neutralności pracodawca odmówił jej zatrudnienia, ponieważ nie wyraziła zgody na zdjęcie chusty. W odpowiedzi na zadane pytania prejudycjalne Trybunał uznał, że w przedmiotowej sprawie nie doszło do dyskryminacji. Wyrok w sprawie L.F. stanowi kontynuację dotychczasowej linii orzeczniczej Trybunału w sprawach G4S i WABE. Artykuł analizuje orzecznictwo Trybunału Sprawiedliwości i Europejskiego Trybunału Praw

This article is an effect of the implementation of a research project "Ombudsman as a guarantor of protection of fundamental rights of migrants" No. 2020/39/B/HS5/01424 financed from the funds of the National Science Centre.

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ISSN 2081-8882 eISSN 2544-3003

Człowieka, które dotyczy manifestowania przekonań religijnych strojem i stawia pytanie, której wartości we współczesnym społeczeństwie europejskim należy przyznać pierwszeństwo – tożsamości jednostki czy wolności wykonywania działalności gospodarczej?

Słowa kluczowe: zasada równości; zasada niedyskryminacji; wolność religijna; równe traktowanie w zatrudnieniu; symbole religijne

Introduction

The aim of this commentary is to analyse the judgment of the Court of Justice (Court) in *L.F. v. S.C.R.L.*,[1] in which the Court interpreted provisions of the Equal Treatment Directive (2000/78)[2] (Directive) in light of the general prohibition of discrimination on the ground of religion or belief.

1. Union's law analysed and domestic proceedings

In the analysed case, the Labour Court in Brussels submitted a request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.[3] In European Union (EU) law, the principles of equal treatment for employment and occupation are regulated by the Directive 2000/78. Pursuant to its Article 1, the purpose of this Directive is to lay down a general framework for combating discrimination in employment and occupation, for example, on the grounds of religion.[4] The equal treatment principle refers to, in light of the provisions of the Directive, the absence of direct or indirect discrimination on grounds listed in Article 1. The Directive also defines these two types of discrimination. Pursuant to its Article 2 para 1:

[1] Judgment of the Court of Justice (Second Chamber) of 13 October 2022 in *L.F. v. S.C.R.L.*, C-344/20, ECLI:EU:C:2022:774, hereinafter: L.F. judgment.

[2] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union [hereinafter: OJ] L 303, 2.12.2000, pp. 16–22, hereinafter: Directive 2000/78.

[3] Treaty on the Functioning of the European Union, consolidated text: OJ C 202, 7.06.2016, p. 47, hereinafter: TFEU.

[4] Article 1 of the Directive 2000/78 also lists disability, age and sexual orientation as possible grounds for discrimination.

> […]
>
> a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
>
> b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
>
> that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or […].

Pursuant to Article 2 para. 5 of this Directive, its provisions shall be without prejudice to measures laid down by national law necessary for public security, for the maintenance of public order, and for the protection of the rights and freedoms of others deemed necessary for functioning in a democratic society. In terms of the application of the Union's law, this Directive applies to all employees in member states, both those in the public and private sectors (Article 3 para. 1). This does not rule out member states' introducing provisions that are more favourable and ensuring higher protection against discrimination (Article 8 para. 1).

In Belgian law, this Directive was implemented into the Law of 10 May 2007 to combat certain forms of discrimination.[5] Article 3 of this domestic act lists grounds for discrimination, and this catalogue is broader than the one enumerated in the Directive. It includes "[…] age, sexual orientation, civil status, birth, financial situation, religious or philosophical belief, political belief, language, current or future state of health, disability, physical or genetic characteristics or social origin." Under Article 4 of domestic law, reasons for discrimination were called "protected criteria."[6] Pursuant to Article 8 para. 1 of the law, derogation from protection against discrimination may be done only in the event of the occurrence of genuine and determining occupational requirements.

[5] Law of 10 May 2007 on combating certain forms of discrimination, Moniteur belge [Belgian Official Gazette] of 30 May 2007, p. 29016.

[6] Para. 10 L.F. judgment.

The main proceedings in the case analysed concerned a Muslim woman who wore an Islamic headscarf and was doing an office internship at S.C.R.L., a cooperative limited liability company whose activity consists of the letting and operating of social housing. Ms L.F. filed a request for an unpaid internship in the cooperative, which was given a positive opinion, but during the interview, she was informed that the cooperative is guided in its work by the policy of neutrality and the condition for doing the internship is to accept this policy, which effectively meant she would not be wearing the Islamic headscarf.[7] Ms L.F. offered to wear another type of head covering to work, but this was not accepted by the S.C.R.L., who argued that no type of head covering was permitted on its premises.

Ultimately, Ms L.F. decided that she was a victim of discrimination and brought an action for a prohibitory injunction before a domestic court under the provisions of domestic law. In her arguments, the applicant believed that refusal to sign a contract with her was a violation of the prohibition of discrimination. When examining the application, the domestic court doubted the correctness of the interpretation of the term "direct discrimination" adopted by the EU Court of Justice in high-profile judgments in G4S[8] and Bougnaoui.[9] In essence, in its judgment in G4S, the Court believed that it is the case of direct discrimination if the employer adopts general regulations on the prohibition of wearing religious symbols in the workplace. In paragraph 2 of the operative part of the judgment, the Court concluded that there is a possibility of indirect discrimination

> […] if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious

[7] According to the cooperative's regulations: "[…] workers undertake to respect the company's strict policy of neutrality," which will be reflected by their making sure "[…] not to manifest in any way, either by word or through clothing or any other way, their religious, philosophical or political beliefs, whatever those beliefs may be," para. 16 L.F. judgment.

[8] Judgment of the Court of Justice of 14 March 2017, C 157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, ECLI:EU:C:2017:203, hereinafter: G4S judgment. See also: Ożóg 2017, 307–334.

[9] Judgment of the Court of Justice of 14 March 2017 in *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA*. Request for a preliminary ruling from the Cour de cassation, C 188/15, ECLI:EU:C:2017:204, hereinafter: Bougnaoui judgment.

neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.

The national court noted that the operative part of the judgment in G4S does not determine whether it may assess, *in concreto*, the comparability of the situation of employees, and thus it does not know how to adjudicate in the case of Ms L.F.[10] Moreover, the domestic court had doubts about the Court's interpretation in G4S and Bougnaoui, namely whether a single protected criterion has been developed in the established line of judicial decisions, which would include religious, ideological, and political beliefs. Moreover, the referring court had doubts as to the admissibility of recognising the provisions of the domestic law that list the "protected criteria" as a more favourable provision in the understanding of Article 8 of the Directive 2000/78.[11] For this reason, the Labour Court in Brussels decided to suspend the domestic proceedings and refer a question to the Court for a preliminary ruling.

2. A question referred and the Court's rulings

Through the first question asked, which the Court reformed for the needs of the proceedings, the domestic court strived to establish a correct interpretation of Article 1 of the Directive 2000/78, that is, to determine whether the expression "religion or belief" is one or two different grounds for discrimination.

The court referred to a linguistic interpretation and noticed a certain correlation between the wording of acts of primary legislation and secondary legislation emphasising that both Article 19 TFEU that guarantees prohibition of discrimination, and Article 21 of the Charter of Fundamental

[10] Para. 21 L.F. judgment: "As the operative part of that judgment does not reproduce that important nuance, the question arises as to whether the national court retains a certain discretion or whether there is no possibility for that court to assess *in concreto* the comparability of situations when examining whether an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace is discriminatory."

[11] Para. 22 L.F. judgment.

Rights[12] list religion and belief together as one criterion. In the judicial decisions of the Court, religion and belief are treated as the same foundation of discrimination that covers both religious beliefs and philosophical or spiritual beliefs.[13] The Court did highlight, nevertheless, that the protection against discrimination in the EU law covers only the grounds which are listed in Article 1 of the Directive 2000/78 and thus does not cover "[…] political or trade union belief; nor does it cover artistic, sporting, aesthetic or other beliefs or preferences."[14]

The Court then decided to give a ruling on the third question referred, which it also reformed. The home court requested interpretation of Article 2 para. 2 of the Directive 2000/78 and asked that the Court establish whether the internal rule of a private undertaking prohibiting employees from using, for example, their clothing to express their religious or philosophical beliefs is a sign of direct discrimination towards employees who want to exercise freedom of religion by wearing visible religious symbols or clothing. The Court emphasised that direct discrimination can be cited in situations that concern a criterion that is inextricably linked to one or more specific religions or beliefs.[15] In the L.F. case, the prohibition concerned the wearing of all visible religious or philosophical symbols and applied to all employees; thus, the Court confirmed, based on the existing line of judicial decisions, that there are no grounds to confirm the occurrence of direct discrimination in the analysed case.

The adjudicating panel also invoked a situation in which the internal rule of an undertaking may lead to a difference in treatment in the case where an apparently neutral obligation puts persons adhering to a particular religion at a disadvantage. The existence of such a rule and the assessment of its possible effects rests, in such a situation, with the national court.[16] In turn, pursuant to the regulations of the Directive 2000/78, unequal treatment cannot be considered indirect discrimination if it is "[…] objectively justified

12 Charter of Fundamental Rights of the European Union, OJ C 202, 7.06.2016, pp. 389–405, hereinafter: Charter.

13 Judgment of the Court of Justice of 15 July 2021 in *IX v. WABE eV* and *MH Müller Handels GmbH v. MJ*, joined Cases C-804/18 and C-341/19, ECLI:EU:C:2021:594, para. 47; hereinafter: WABE judgment.

14 Para. 28 L.F. judgment.

15 Paras. 72–73 WABE judgment; para. 31 L.F. judgment.

16 Para. 37 L.F. judgment.

by a legitimate aim and the means of achieving that aim are appropriate and necessary."[17] The Court believed that the purpose of the employer-defendant, that is, the implementation of a neutrality policy, deserves protection since it is related to the exercise of freedom under Article 16 of the Charter, that is, freedom to conduct a business. Additionally, in any proceedings on relevant violations, the employer will bear the responsibility for implementing the neutrality policy, pursuant to the interpretation of the WABE judgment. The Court believed that having to demonstrate the need to exercise the neutrality policy by a specific employer results from general values that are essential to EU law, that is, respect for diversity and its acceptance.[18]

In the second referred question, the national court strived to establish whether in the light of Article 1 of the Directive 2000/78 provisions of national legislation that list religious, philosophical, and political beliefs as three separate grounds of discrimination should be considered more favourable in the understanding of Article 8 of the Directive.[19] The Court disagreed with that.

The Court emphasised that the Directive provides protection only in the realm of grounds enumerated in its Article 1; thus, this protection does not cover political viewpoints; therefore, religious and philosophical beliefs should be treated in EU law as one and the same ground for discrimination. Therefore, the Court narrowed down the question of the referring court and decided to investigate the scope of member states' discretion in the realm of adopting provisions that were more favourable than the provisions of the Directive 2000/78.

The Court highlighted that Member States have a certain degree of discretion "[…] taking into account the diversity of the approaches of the Member States as regards the place accorded to religion or belief within their respective systems,"[20] although the Court holds the right to inspect whether the measures adopted by states are justified in principle and proportionate. Moreover, the Court believed that Article 8 of the Directive does not preclude a national court from ascribing, in the context of balancing diverging interests (religious freedom v. freedom to conduct a business),

17 Para. 38 L.F. judgment.
18 Para. 41 L.F. judgment.
19 Para. 43 L.F. judgment.
20 Para. 48 L.F. judgment.

greater importance to those relating to religion or belief if it stems from its domestic law.

However, in its analysis of the facts in the L.F. case, the Court believed that such an interpretation cannot be applied in the analysed case because the referring court was of the opinion that religion and belief are treated as separate grounds for discrimination. According to the Court, courts of Member States cannot hold such broad discretion to divide the grounds for discrimination enumerated in the Directive.[21] In the assessment of the Court, this would lead to a violation of secondary law.

The referring court argued that the lack of division of reasons for discrimination between religion and belief (that it treats both reasons cumulatively) may lead to decreased standards of protection against discrimination. The Court held that this argument cannot be accepted because direct discrimination is not applicable in the analysed case. Moreover, as noted by the adjudicating panel, the provisions of the Directive allow the application of a broad comparison of the situation of persons with varying beliefs and who adhere to specific religions. In the Court's opinion, the correct interpretation of the provisions of the Directive means

> […] that (it) does not limit the circle of persons in relation to whom a comparison may be made in order to identify "discrimination on the [ground] of religion or belief", for the purposes of that directive, to those who do not have a particular religion or belief.[22]

3. Assessment of the judgment

The judgment in question deserves an in-depth analysis for many reasons. Importantly, the ruling confirmed a systemic order in terms of the protection of fundamental rights protected by the Union. The key principle that allows effective protection of the rights of persons that fall under the jurisdiction of the Union is the principle of equality[23] resulting from Articles 2 and 3 of

[21] Para. 54 L.F. judgment.
[22] Para. 60 L.F. judgment.
[23] See: De Schutter 2019, 694; Kälin, Künzli 2019, 335 ff.

the Treaty on European Union.[24] In its Article 20, the Charter of Fundamental Rights guarantees equality before the law, whereas in Article 21 it details the equality principle by pointing to acts that are contrary to it, thus guaranteeing prohibition of discrimination.[25] As emphasised by legal scholars and commentators, the equality principle supports the protection of fundamental rights, whereas the principle of non-discrimination is a precondition for the operation of a democratic rule of law.[26]

Moreover, prohibition of discrimination safeguarded by Article 21 para. 1 of the Charter is recognised as a claims-like right,[27] although it is not an absolute right and may be limited.[28] The presence and effectiveness of the equality principle in EU law meant that the legislator has also adopted the framework of the Directive 2000/78, which is being interpreted in the analysed judgment. Further, respect for religious freedom is guaranteed in Article 10 of the Charter and is, in the assessment of the Court of Justice, one of the pillars of a democratic society[29] while protecting believers' religious identity and concept of life.[30] Finally, Article 16 of the Charter, which is analysed in the judgment and which guarantees freedom of economic activity, covers every undertaking operating in the territory of the EU[31] and is philosophically linked with the idea of the European Economic Community and the creation of an internal market. Importantly, however, Article 16 of the Charter does not create a subjective law but is treated as a rule, thus is an example of a relative fundamental right.[32]

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24 Treaty on European Union, consolidated text: OJ C 202, 7.06.2016, pp. 13–46, hereinafter: TEU. Pursuant to Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, rule of law as well as respect for human rights, including rights of persons who come from minorities […]". Whereas pursuant to Article 3 TEU: "It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child."

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

26 Sołtys 2020, 132–133.

27 On different views of legal scholars and commentators, see: Miąsik 2022, 397.

28 Ibidem, 401.

29 Kamiński 2013, 330. See: Judgment of the European Court of Human Rights of 25 May 1993 in *Kokkinakis v. Greece*, App. No. 14307/88, HUDOC.

30 Ibidem.

31 Miąsik 2013, 615.

32 For more see: Miąsik 2022, 379 ff.

The rights and freedoms that provide a springboard in the L.F. case are interrelated and are not absolute, and the weighing of their protection rests with EU courts. The L.F. case is an example of such an assessment of interests and protection. The judgment analysed shows the exact examples that national courts face and how many doubts may be inspired by examining facts that may vary.

It is worth emphasising here that the abundant body of judicial decisions relating to equal treatment in a workplace and the problem of limitation of protection of religious freedom in the context of exposing religious symbols has been developed by the Court through questions referred by domestic courts for preliminary rulings. European Union courts (that is, the Court of Justice and national courts that apply Union law) are obliged to protect fundamental rights.[33] This is done through questions referred for preliminary rulings, which aid the application of the Union law.[34] The F.L. judgment is a continuation of the Court's line of judicial decisions in cases G4S and WABE referred to earlier. Even though the facts in the cases discussed seem to be similar, and the domestic court could recognise the existence of the *acte eclaire* rule, the Belgian labour court had doubts as to the judgment issued by the Court of Justice in WABE and decided to refer a question for a preliminary ruling.[35] This fact is proof of the specific role of national courts in the implementation of EU directives.[36]

Another important question worth discussing in the context of the judgment analysed is the assessment of the interpretation of the Directive 2000/78 made by the Court in L.F. and other cases of equal treatment in employment and the possible confirmation of discrimination on the grounds of religion and belief. In three key cases analysed here – that is, in G4S, WABE, and L.F. – the Court examined cases that concerned the functioning of workplace regulations that would prohibit the demonstration of religious symbols. The Court decided in the G4S case[37] that the internal rules of

33 Domańska 2014, 94.
34 Frąckowiak-Adamska, Bańczyk 2020, 39.
35 Domańska 2014, 103.
36 Ibidem, 114.
37 The applicant, Samira Achbita, was an employee of a private sector undertaking that provided reception services. The applicant refused to stop wearing an Islamic headscarf in connection to the introduced internal rules, which prohibited demonstration of religious beliefs. It was a Belgian tribunal that referred a question for a preliminary ruling.

a private company that prohibit the wearing of religious clothes and symbols do not constitute direct discrimination while emphasising that a neutrality policy must be implemented cohesively and systematically.

The Court also limited the possibility of the existence of indirect discrimination, recognising that it may be justified by a lawful goal, such as implementation of a religious neutrality policy in relations with clients, provided that the measures adopted by the employer are correct and necessary. The Court upheld this interpretation in the WABE judgment,[38] believing that the prohibition of wearing religious symbols in a workplace that results from the company's internal rule may be justified by the employer's willingness to create a neutral image among clients and to prevent conflicts in the workplace. The Court also emphasised that to justify the legitimacy of the existence of such an internal rule, the employer should be able to prove that a lack of a neutrality policy would mean a violation of freedom of economic activity. It is worth emphasising that all cases concerned private sector entrepreneurs.[39] However, I believe that the interpretation done by the Court raises doubts regarding the effects of the practical impact on the labour market. Ms Laila Medina, the advocate general (AG), also expressed doubts in her opinion on L.F.[40] This needs to be noted at the outset that the Court's earlier judgment in G4S is criticised in legal commentary. As Wouters and Ovadek note, in the Court's opinion, the prohibition of manifestation of one's belief is recognised as legal since the neutrality principle needs to be adhered to and since the principle of proportionality of measures adopted must be taken into account. In practice, however, such an approach leads to the conclusion that the "[…] business have the right – bolstered legally by art. 16 of the Charter – to cater to public discrimination."[41]

38 Two Muslim women employed as a nurse and cashier were applicants. The employees refused to stop wearing their Islamic headscarves at a workplace. A German court referred a question for a preliminary ruling.

39 The body of the Court's decisions on prohibition of discrimination at a workplace is abundant. The first ruling is such cases were issued as early as the 1970s; see: Judgment of the Court of Justice of 27 October 1976 in *Vivien Prais v. Council of the European Communities*, C 130–75, ECLI:EU:C:1976:142. See also: Horspool, Humphreys 2010, 152–155; Wouters, Ovádek 2021, 436.

40 Opinion of Advocate General Medina delivered on 28 April 2022 in *L.F. v. S.C.R.L.*, C-344/20, ECLI:EU:C:2022:328, hereinafter: L.F. opinion.

41 Wouters, Ovádek 2021, 440.

In her opinion on L.F., the AG noticed that the Court wrongly constructed the group of comparison to declare discrimination.[42] In the AG's assessment, it would be reasonable to construct such a group of comparisons according to the standard adopted in the case of Dr J. Babiński Clinical Hospital,[43] in which the Court examined the existence of discrimination not in the relation between different groups but within the same group.[44] Therefore, the AG believed that the consequence of the WABE judgment boils down to the fact that some employees stand before a real choice of the possibilities of perceiving religious prohibitions and working in a given company.[45] Agreeing with the AG's opinion, I would like to conclude that in many cases, this conflict will be resolved by religious persons quitting their jobs. Muslims, particularly women, are a group especially vulnerable in the labour market. I believe that the Court's interpretation of the Directive 2000/78 in the long run leads to the exclusion of Muslim women from the labour market and, as a consequence, as emphasised by the AG, to a limitation of personal development and social integration.[46]

Unfortunately, the problem is not abstract. According to a report by the European Union Agency for Fundamental Rights, *Data in Focus Report – Muslims*, 10% of respondents reported an experience of discrimination on grounds of religion within the last 12 months.[47] The number of Muslims in the EU Member States is systematically growing, and even so is the number of potential employees of the same faith in the European market. According to 2019 statistics, Muslims accounted for 4.9% of EU residents, although, for

42 Para. 50 L.F. judgment

43 Judgment of the Court of Justice of 26 January 2021 in *VL v. Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, C 16/19, ECLI:EU:C:2021:64.

44 Para. 38 L.F. judgment.

45 In her opinion, Advocate General Medina believed that the Court should apply interpretation measures that point to the anti-discrimination directive developed in the Hay judgment on discrimination on grounds of sexual orientation. Judgment of the Court of Justice of 12 December 2013 in *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, C 267/12, ECLI:EU:C:2013:823.

46 Para. 66 L.F. judgment.

47 "European Union Minorities and Discrimination Survey." 2009. In: *Data in Focus Report – Muslims*, European Union Agency for Fundamental Rights. https://fra.europa.eu/sites/default/files/fra_uploads/448-EU-MIDIS_MUSLIMS_EN.pdf [accessed: 19 May 2023].

example, in France alone, adherents to this religion amounted to as many as 8.8% of the population.[48]

Article 22 of the Charter could be a remedy for stimulating diversity and extending its legal protection, as this regulation safeguards cultural, religious, and linguistic diversity within the EU. Still, the problem lies in its character. Legal scholars and commentators emphasise that it has the nature of a principle and is a directive for carrying out the Union's competences; thus, it is not directly effective.[49] Moreover, Article 22 somewhat concerns existing diversity while not referring to questions associated with modelling a multicultural policy.[50]

The Court's existing line of decisions, as confirmed in the L.F. case, strongly upholds that if there are company by-laws on the implementation of the neutrality policy, as a rule, there is no discrimination against employees who want to express their religious beliefs by clothing or symbols. The Court believes that religious freedom may be limited if there is a supreme goal that needs to be protected.[51] The problem of weighing the interests of society as a whole and individuals has been in the orbit of interest of European courts for many decades. In the judgment in question, the Court emphasised the identity of protection safeguarded by Article 10 of the Charter with Article 9 of the European Convention on Human Rights.[52] According to the regulation of the Convention, everyone has the right to freedom of thought, conscience, and religion,[53] although freedom may be subject to limitations introduced by legislation, as long as it is necessary in a democratic society due to the need to protect "[…] public safety, for the protection of public order, health or morals, or for the protection of

48 *Europe's Growing Muslim Population*. 2017. Pew Research Center, 29 November. https://www.pewresearch.org/religion/2017/11/29/europes-growing-muslim-population/ [accessed: 19 May 2023]. See: Pędziwiatr 2007, 31; see also: Kalanges 2012.

49 Miąsik 2022, 402.

50 See: Kosińska 2018, 192.

51 See: para. 38 L.F. judgment. Unequal treatment must be objectively justified by a lawful purpose, while measures that serve to reach the goal must be appropriate and necessary.

52 Para. 35 L.F. judgment; Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, as amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2, Dziennik Ustaw [Journal of Laws] 1993, No. 61, item 284, hereinafter: the ECHR, Convention.

53 See: White, Ovey 2010, 409.

the rights and freedoms of others."[54] When deciding about the possibility of such limitations, the European Court of Human Rights (ECtHR) conducts a test of the legality, purposefulness, and necessity of the introduced restriction.[55]

Regarding the limitation of religious freedom *in forum externum*, as is the case in the L.F. judgment examined here, the purpose that rationalises and legalises the limitation may raise certain doubts. Therefore, it is worth referring to protection standards developed by the ECtHR and confronting the standards developed by the Court with the ECtHR ideal. Limitations of religious freedom in the form of not allowing the wearing of religious clothing do not raise doubts if we are dealing with safety concerns. The ECtHR has ruled numerous times that protection of public safety may require that, for example, one should wear a helmet instead of a Sikh turban while riding a motorcycle,[56] one should remove head covering when taking ID photos[57] or that one should remove head covering when in a consulate applying for a visa.[58]

In many cases concerning religious clothing, the ECtHR has also decided that there is no violation of freedom of religion in the case of prohibition of wearing religious head coverings by teachers,[59] social workers,[60] female students of a public secondary school at PE lessons,[61] or a female student during university classes.[62] The "living together" principle provides justification for modelling the ECtHR's line of decisions. The goal of this principle is to protect citizens' coexistence, which guarantees pluralism

54 Article 9 para. 2 of the Convention. See also: Sobczak 2013, 543 ff.

55 Kubala 2021, 313.

56 Commission Decision of 12 July 1978 in *X v. the United Kingdom*, App. No. 7992/77, ECLI:CE:ECHR:1978:0712DEC000799277.

57 Inadmissibility Decision of 13 November 2008 in *Mann Singh v. France*, App. No. 24479/07, ECLI:CE:ECHR:2008:1113DEC002447907.

58 Judgment of the European Court of Human Rights of 4 March 2008 in *El Morsli v. France*, App. No. 15585/06, Court's case-law No. 106.

59 Judgment of the European Court of Human Rights of 15 February 2001 in *Dahlab v. Switzerland*, App. No. 42393/98, ECLI:CE:ECHR:2001:0215DEC004239398.

60 Judgment of the European Court of Human Rights of 26 November 2015 in *Ebrahimian v. France*, App. No. 64846/11, ECLI:CE:ECHR:2015:1126JUD006484611.

61 Judgment of the European Court of Human Rights of 4 December 2008 in *Dogru v. France*, App. No. 27058/05, ECLI:CE:ECHR:2008:1204JUD002705805.

62 Judgment of the European Court of Human Rights of 10 November 2005 in *Leyla Sahin v. Turkey*, App. No. 44774/98, ECLI:CE:ECHR:2005:1110JUD004477498.

and tolerance – basic values for a democratic system. The ECtHR invoked the "living together" principle in the S.A.S. case, which addressed the prohibition of covering one's face in public places introduced by French law (which the French government also justified with security reasons).[63] As emphasised by legal scholars, the "living together" principle carries two basic functions: first, it allows social communication (face-to-face communication), ensuring the efficiency of interaction. The second function, which has a broader meaning, is described as "a pre-condition to enter society."[64]

As much as the question of prohibition of wearing in the public space of religious clothing that makes it impossible to see one's face and thus to interact socially does not raise greater controversies, doubts may be raised by the prohibition of wearing religious symbols in the workplace. The ECtHR has developed a standard of weighing up the individual interest and the general interest in the Eweida case, deciding that:

> Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.[65]

Thus, the ECtHR decided that resignation from work was not a sufficient form of ensuring the manifestation of religious feelings for adherents of a particular faith who would like to work.

Therefore, we should ask whether the standard of the Eweida ruling could be applied in cases such as that of L.F. The Court, weighing up the values that require protection, declares that it is possible in light of the provisions of the Directive 2000/78 to recognise the implementation of

63 Judgment of the European Court of Human Rights of 1 July 2014 in *S.A.S. v. France*, App. No. 43835/11, ECLI:CE:ECHR:2014:0701JUD004383511. Similarly, the ECtHR ruled non-violation of Article 9 of the Convention in the following cases: Judgment of the European Court of Human Rights of 11 July 2017 in *Dakir v. Belgium*, App. No. 4619/12, ECLI:CE:ECHR:2017:0711JUD000461912; Judgment of the European Court of Human Rights of 11 July 2017 in *Belcacemii Oussar v. Belgium*, App. No. 37798/13, ECLI:CE:ECHR:2017:0711JUD003779813.

64 Pagotto 2017, 14.

65 Judgment of the European Court of Human Rights of 15 January 2013 in *Eweida and Others v. the United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10, para. 83, ECLI:CE:ECHR:2013:0115JUD004842010. See also: Szubtarski 2016, 170.

a neutrality policy in work regulations as a supreme goal that requires protection; the Court associates this goal with Article 16 of the Charter that guarantees freedom to conduct a business.

In my opinion, the interpretation presented by the Court in the discussed ruling does not guarantee effective protection of freedom of religion and, consequently, leads to elimination from the labour market of quite a sizable group of employees. It is worth remembering that pursuant to Article 2 para. 5 of the Directive 2000/78:

> […] this Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

However, discrimination shall not be taken to occur if the "[…] provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary." In my opinion, the concept of the main social interest, which in the G4S, WABE, and L.F. cases was interpreted as the need to ensure a neutrality policy and freedom of economic activity, should be subject to reflection. There is no obstacle to updating the interpretation of these terms with reference to the current social and economic situation. It seems that the inclusion of religious persons in the labour market should be a priority; otherwise, it will result in the social exclusion and ghettoing of minority communities, which is particularly not encouraged in the case of women who are a vulnerable group. The principle of equal treatment of women and men and prohibition of discrimination on grounds of gender (Article 23 of the Charter) may also be an argument in changing the approach to interpretation of provisions of the Directive 2000/78. There is no doubt that Muslim women are in a much worse position on the labour market than men of the same faith, who do not have the obligation to wear head coverings.

Perhaps the statement from AG in case L.F. may serve as a source of inspiration for a change in the established line of decisions. AG Medina emphasised that direct protection against discrimination in light of the Court's decisions occurs where the person in question "[…] was unable to renounce an inseparable characteristic of his or her being, such as age or

sexual orientation."[66] It seems that religion and, consequently, faith are also such features because they build the identity of a given person. At the time of a particular cultural crisis and secularisation of society, which results in the disappearance of cultural diversity, it is the integration, not assimilation, of minority groups into social life, including into the labour market, that seems particularly important. This is especially the case since it involves a threat to security and public order.

Conclusions

The analysis of the judgment presented here allows for a diagnosis of fundamental and very much relevant problems associated with the implementation of non-discrimination in the labour market. In its decisions, the Court believes that the principle of neutrality requires protection and does not lead to indirect discrimination against persons who want to manifest their faith with their clothing. From a practical angle, such interpretation of provisions of the law may have a negative impact on the labour market and lead to the exclusion of female Muslim employees from it. It seems disadvantageous since the European Union has been putting great effort for years now towards a more effective integration of third-country nationals in host countries, while Muslims who reside in the EU are largely migrants themselves or second- or third-generation migrants. The European Commission emphasises in the Pact on Asylum and Migration that "[s]uccessful integration benefits both the individuals concerned, and the local communities into which they integrate. It fosters social cohesion and economic dynamism." Such integration is impossible without creating an inclusive labour market.

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[66] Para. 63 L.F. opinion.

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