

## VICTIMISING THIRD PARTIES: THE EQUALITY DIRECTIVES, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, AND EU GENERAL PRINCIPLES

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### Abstract

This article highlights a problem which has troubled courts in the United States in recent years, and like most equality issues arising in US litigation, it is likely to trouble Europe's courts in due course. It concerns the victimisation provisions expressed in equality legislation, such as the Civil Rights Act 1964 (US), the EU Equality Directives, or the Equality Act 2010 (UK). The problem is that none of them are expressed to prohibit the victimisation of third parties, for instance, dismissing a spouse of a worker who brought a discrimination claim. This "most ancient form of vengeance" is designed to deter the worker from pursuing the claim, and will also deter others from complaining, "the chilling effect".

This paper identifies a variety of scenarios where a third party could be victimised, highlights the shortcomings in the equality Directives, and searches for solutions in EU law and the European Convention of Human Rights. It concludes that the best *existing* solution lies in EU general principles, but for the sake of certainty, a simple amendment to the existing legislative formulas is required, which would resolve the problem without any undue side-effects.

### Introduction

When a torturer is presented with an obstinate and patriotic spy, prepared to give up his life rather than his secret, the torturer has one masterstroke left. He will threaten instead to harm the spy's spouse or children. We only have to step into the shoes of the spy for a second to realise that the pressure has been increased a hundredfold - at the least. The point for the present purpose is that sometimes a person can be more effectively coerced by a threat to *others*.

In the context of employment law, this practice has been characterised thus:

"To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." [1]

This form of victimisation has all the consequences associated with the more familiar forms of victimisation taken against the principal complainant. It will deter the complainant *and* others. The seriousness of this "chilling effect" was highlighted recently by the US Supreme Court:

"This is no imaginary horrible given the documented indications that '[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.'" [2]

In the field of discrimination, many scenarios could arise. Here, they have been grouped into three Classes.

A worker issues discrimination proceedings against her employer (the "protected act") and:

*Class No. 1: Same employer - same workplace.*

In retaliation, the employer fires the worker's fiancé (who worked for the same employer in the same workplace).

Variations on this would be that the retaliation falls short of dismissal (e.g. failure to promote,

a poor appraisal, a move to less desirable work, or to a less desirable location), or that the victim is the claimant's spouse, civil partner, relative, close friend, or a work colleague.

*Class No. 2: Same employer - different workplace.* As above, save that the fiancé worked for another business owned or managed by the same employer.

*Class No. 3: Different employer.* As above, save that the fiancé worked for an undertaking owned or managed by a friend or relative of the employer, who fired him (or otherwise retaliated) on the say-so of the employer, or tacitly, out of sympathy.

In these scenarios, the employer's action would deter either the claimant, or other workers, or both, from complaining about discrimination. The US Civil Rights Act 1964 outlaws less favourable treatment of a worker "because *he* has..." opposed discrimination or participated in discrimination proceedings.[3] There are many reported cases of third party victimisation in the United States, and with the issue yet to rise to the Supreme Court, the Circuits are split. Some have taken a purposive approach, recognising victimisation of someone "so closely related to or associated with the [plaintiff] ... that it would discourage that person from pursuing [her claim]".[4] But other Circuits have taken a literal approach and do not recognise such claims.[5] There are yet no reported cases in the ECJ or in the UK. This disparity in reported incidents is probably explained by the "fire-at-will" doctrine prevalent in the US, where there is little or no protection against unjustified dismissal. Some courts fear that recognising third party victimisation would put an abnormal burden on US employers to justify dismissals, save a dismissed worker suddenly claim to be somehow connected with the principal complainant.[6]

This article will explore: the potential to address third party victimisation by alternative claims, the EU equality Directives, the European Convention on Human Rights (ECHR), and the ECJ's general principles of effective judicial protection and equality. It concludes that the best *existing* solution lies in EU general principles, but for the sake of certainty, a simple amendment to the existing legislative formula is required, which would solve the problem without any undue side-effects.

### **Alternative Claims**

Although not generally available in the United States, an obvious alternative claim for the third party victim is a claim of unjustified dismissal, which is a statutory right provided to workers in most European states.[7] There are several drawbacks with this remedy. First and most obviously, not all victimisation will amount to a dismissal, as noted in the variations to Class 1 (above). Second, these rights normally will have a narrower application than discrimination rights. For instance, many European countries operate probationary, or qualifying, periods for these worker's rights.[8] Third, it is common for there to be a cap on compensation for a breach of these rights,[9] again, unlike discrimination law.[10] In these situations, an unjustified dismissal claim will not be available, or where it is, it will provide an incomplete remedy.

Another potential solution is that the principal complainant sues for the victimisation of, say, her husband. The logic here is that the principal victim has been harmed by his employer (through the treatment of her spouse) because she complained of discrimination. The most likely harm is of course, a fall in the household income, and perhaps injury to *her* feelings. This also presents - at best - an incomplete remedy, as a court could not award damages that would reflect fully the loss suffered by her spouse.[11]

### **European Union Equality Directives**

#### *Victimisation*

The principal equality Directives are the Race Directive, the "Framework" Directive (covering religion or belief, sexual orientation, disability, and age), and the "Recast" Gender Equality Directive.

Recital (20) of the preamble to the Race Directive 2000/43/EC[12] provides: “The effective implementation of the principle of equality requires adequate judicial protection against victimisation.” Article 9 continues:

### **Victimisation**

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

The Framework Directive 2000/78/EC [13] repeats the same Recital in its preamble, but the formula, provided by Article 11, is couched in more restrictive terms:

**Member States shall introduce ... measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.**

The formula in Recast Directive 2006/54/EC[14] is substantially the same. The history of these formulas can be traced to *Coote v Granada*.<sup>[15]</sup> The original sex discrimination Directive, the Equal Treatment Directive 76/207/EEC, did not - except for one specified instance, dismissal,<sup>[16]</sup> - expressly outlaw victimisation. However, victimisation claims falling short of dismissal could succeed under the general ambition of Article 6, which provided that member states should:

“introduce ... such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment ... to pursue their claims by judicial process ....”

In *Coote v Granada*, Ms Coote sued her employer following her dismissal for being pregnant. Subsequently, and after those proceedings were dead, the employer refused to give her a reference and Mrs Coote sued again, this time for victimisation. The issue was whether Article 6 covered retaliation against *former* employees. The ECJ found for Ms Coote, stating:

“The principle of effective judicial control laid down in Article 6 ... would be deprived of an essential part of its effectiveness if the protection which it provides did not cover measures which, as in ... this case, an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive.”<sup>[17]</sup>

It can be seen that some of the language of the first sentence (“as a reaction to”) has been repeated in the subsequent Directives. The policy supporting this, expressed in the second sentence, goes beyond the facts of *Coote*, and suggests that *any* retaliation that might deter workers from using the discrimination laws should be unlawful. This statement suggests that all three Classes of third party victimisation should be covered.

Similar broad and ambitious sentiments can be found in the legislative history. For instance, on the Race Directive, the Commission stated that the protection against victimisation was “a crucial element in allowing individuals to assert their rights”,<sup>[18]</sup> and when advancing the role of equality bodies it stated that “many victims of discrimination do not proceed to court with their complaints because of the cost and for fear of victimisation”.<sup>[19]</sup> In relation to the Framework Directive, the Commission expressed similar concern about victimisation, but appeared to envisage that the principal complainant and victim was the same person:

“Effective legal protection must include protection against retaliation. Victims may be deterred from exercising their rights due to the risk of retaliation. Since fear of dismissal is generally one of the major

obstacles to individual action, it is necessary to protect individuals against dismissal or other adverse treatment ...”[20]

The Race Directive’s formula is broadly expressed and open enough to cover all three Classes. It requires adverse treatment as a reaction to a discrimination complaint or proceedings. There is nothing else limiting in this formula. But this openness could be explained by the Directive’s reach, which, unlike the Framework and Recast Directives, covers areas beyond employment, such as the provision of goods and services.

The Framework and Recast Directives share a common, but narrower, formula. The formula envisages two categories of the “protected act”: either a *complaint within the undertaking* or *legal proceedings*. These categories differ in two ways. First, one is confined to complaints, while the other is concerned with legal proceedings. Second, one is confined to *internal* complaints (“within the undertaking”), while the other (“legal proceedings”) has no such restriction.

These differences are not easily explainable, and leaves the provisions open to three (rather complex) interpretations. One possibility is based on the premise that the drafter did not envisage third party retaliation. The phrase “within the undertaking” suggests that the victim must be employed in the place where the principal discrimination was alleged. On this basis, the wording simply states the obvious, that complaints are internal and litigation is external. This interpretation is still broad enough to cover third party retaliation against workers within the undertaking (Class 1), but not workers in another undertaking (Classes 2 and 3).

A second interpretation is a step more ambitious. It relies on separating the *complaint within the undertaking* (“internal”) from the *legal proceedings*. Here, as above, internal complaints remain confined to Class 1, but legal proceedings are not so restricted. And so, where legal proceedings are issued, retaliation by the same employer against a worker in another undertaking (presumably owned or managed by that employer) is covered (Class 2). This does not extend to retaliation by another employer (Class 3), because this formula expressly targets *the employer*. This interpretation - of course - produces an anomaly. But its merit lies in it serving, as far as the literal wording permits, the policy, expressed in *Coote*, and in some of the legislative history, to remove the fear of deterrents to using the discrimination provisions.

A third and most liberal interpretation is to disassociate *both* protected acts from “the employer”. The employer’s connection with the complaint is no more than a causal one: the employer’s treatment of the victim must have been “as a reaction to” the complaint. As such there is no need for this employer to be the one targeted by the complaint or proceedings, as Class 3 envisages. This interpretation effectively replaces the definite article in the phrase “the employer” to read “an employer”. As such, it may fulfil the purpose of the provision, but at the expense of changing the provision’s wording.

A court may be encouraged by *Coleman v Attridge Law*,[21] to take this third interpretation. In this case, the ECJ verified the seemingly elastic concept of “association discrimination”, which is a form of *discrimination* on the ground of a third party’s protected characteristic. Article 2(1)(a) of the Framework Directive provides:

“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 [of age, disability, sexual orientation, religion or belief].”

The key phrase here is *on any of the grounds*. There is no possessive adjective. It does not read, for instance, “on the ground of *his* disability”. In *Coleman*, the ECJ held that abusing a worker because of her child’s disability amounted to discrimination and harassment against the worker, even though she had no disability: it was *on the ground of* disability. In a powerful opinion, the Advocate-General in *Coleman* asserted:

“The Directive operates at the level of grounds of discrimination. The wrong that it was intended to remedy is the use of certain characteristics as grounds to treat some employees less well than others; what it does is to remove religion, age, disability and sexual orientation completely from the range of grounds an employer may legitimately use to treat some people less well.”[22]

Accordingly, discrimination on the ground of the victim's disability "is exactly the same in every material aspect"[23] as discrimination on the ground of a third party's disability. The Court came to the same conclusion, but through slightly more technical means, noting that some Articles of the Directive were confined to the victim's disability, thus squaring the decision with the *wording*, as well as the purpose, of the Directive.[24]

This theory was taken a step further by the English Court of Appeal in *English v Thomas Sanderson Blinds*,[25] where it was held that colleagues harassed the claimant *on the ground of* sexual orientation where the claimant was subjected to homophobic harassment, even though: he was not gay, his tormenters knew he was not gay, *and* the claimant knew this. Sexual orientation, plainly and crudely, was the nature of the abuse and nothing more.

The obvious difference between *Coleman* and third party victimisation is that the wording of the *victimisation* provisions (above) is not so disposed to such a liberal interpretation. Although *Coleman* was a powerful judgment, focussing on the *ground* of the treatment, rather than the victim's protected characteristic, the Court faced no technical obstacles in the wording of the legislation. But the case does illustrate that recognising third party victimisation is - conceptually - no more ground-breaking than the established notion of third party discrimination and harassment.

In the UK, the equality legislation has in the past termed victimisation as a form of discrimination.[26] The new Equality Act 2010 dispenses with this terminology, although the formulaic structure remains much the same for the present purpose. At one time, British courts, treated direct discrimination and victimisation as "parallel" causes of action, observing, "victimisation is as serious a mischief as direct discrimination".[27] This again encourages an equally adventurous approach to the victimisation provision. However, more recent authority has stepped back from making parallel interpretations of the discrimination and victimisation provisions.[28] Further, the difference between the UK statutory formulas for the present purpose is more marked than the difference between the Directives' definitions, with the definition of victimisation expressly restricted to the principal complainant. This is so even with the new Equality Act 2010, where the drafters had the opportunity to address this issue, and chose not to.[29]

### *Third party discrimination*

Instead of using the victimisation provisions, it might be argued that *Coleman's* broad sweep is enough to encompass third party victimisation cases within the more open-ended *discrimination* provisions. Where a white man is dismissed because of his black wife's racial harassment complaint, is he not suffering *discrimination* in much the same way as Ms Coleman? However, not all examples of third party victimisation compare so readily. Where the principal complainant has made an equal pay claim, it becomes less convincing to suggest that that her husband was fired because of his "association" with a *woman* (*Coleman*), although it is arguable that the victimisation was associated with sex, although nobody's in particular (*English*). The comparison becomes more tenuous when one considers that it not necessary in direct discrimination cases that the victim belongs to any protected group.[30] It might be that an employer mistreats a worker because he is *not* Jewish, or *not* black, and so on. In these cases the principal complainant simply proves he *does not* belong to the preferred group. Here, it would be even more problematic for a third party victim to show that she was victimised by association with the protected characteristic of her husband, who brought no characteristic into court himself. The comparisons suffer because of a misplaced notion that victimisation is based on a protected characteristic, rather than a protected *act*. The treatment is not because the victim's friend is black, or female, or gay, (and so on), but because the victim's friend *complained*. [31]

This leads to more sweeping objection to the "association discrimination" theory in these cases. Such an interpretation of the direct discrimination and harassment provisions would in fact encompass *all* victimisation claims, and so leave the victimisation provisions redundant, an interpretation which could not stand.

### **European Convention on Human Rights**

With these rather cumbersome options, the ECJ may wish to look further afield for an express prohibition (or authorization) of third party victimisation. The possibilities include the right to privacy under European Convention

on Human Rights (ECHR), and the ECJ's general principles of effective judicial protection and equality.

### *Article 8 - Right to Privacy*

The Right to Privacy provides a perhaps surprising home for at least some employment cases. The question, in this context of unfavourable treatment because of the victim's association with the complainant, is what is meant by "privacy"? The meaning of "private life" is notoriously vague.[32] Even the Court of Human Rights has stated that it is not "possible ... to attempt an exhaustive definition of the notion of 'private life.'"[33]

There is no case law under Article 8 directly on this victimisation issue. But there are some cases which combine to present a sketch of how Article 8 applies in this context.

First, in *Niemietz v Germany*[34] the ECtHR said that:

"Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings".[35]

This extends a person's "private life" beyond a notion of solitary, or "private", conduct, to encompass contact and relationships with others. The central issue in *Niemietz* was whether this right extended to the workplace, as a lawyer's business premises had been subjected to a police search. On this point, the Court held that a person's private life included their workplace, because:

"in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world".[36]

The Court supported this view with the observation that it was not always easy to distinguish business and social life.

This informs us that Article 8 provides a right to establish and develop human relationships in the workplace. By contrast, in *Botta v Italy*,[37] the Court held that Article 8 did not extend to a purely social right outside the workplace (access to a beach) concerning "interpersonal relations of such a broad and indeterminate scope" that there is "no conceivable link" between the State and a person's private life.

More recently, the ECtHR has built on *Niemietz*, recognizing that a lifetime ban from a chosen career could engage the Article 8, although it has not gone as far as recognizing an exclusion from a particular workplace. In *Sidabras v Lithuania*,[38] a "KGB Act" of 1998 was passed under which former KGB agents were given a lifetime ban from working in the civil service, and a ten-year ban from some parts of the private sector. The Court found that this engaged Article 8, and its discriminatory application violated Article 14 (discrimination):

"The ban has ... affected the applicants' ability to develop relationships with the outside world to a very significant degree, and has created serious difficulties for them as regards the possibility to earn their living, with obvious repercussions on their enjoyment of their private life."[39]

The widespread ban did not prevent the applicants from taking up *some* forms of work, but it did effectively bar them from their chosen professions (one was a sports instructor and the other a lawyer). This theme has been taken up in two cases from the United Kingdom. In *R (Wright) v Secretary of State for Health*,[40] those considered by the Secretary of State to be unsuitable to be employed as care workers for vulnerable adults were placed on a list, and so were barred from that occupation. The House of Lords observed that the scope of the ban was "very wide"[41] and held that, without more safeguards, it breached Article 8. Speaking for the House, Baroness Hale stated:

"There will be some people for whom the impact upon personal relationships is so great as to constitute an interference with the right to respect for private life and others for whom it may not."[42]

In *R (L) v Metropolitan Police Commissioner*[43] the claimant registered with an employment agency to supervise schoolchildren. The agency sought an enhanced criminal record certificate, which disclosed that the claimant could not control her son, refused to cooperate with social services, and that her son had once been placed on the child

protection register and later convicted of robbery and imprisoned. As a consequence, the agency removed the claimant from their books. Although no breach was found, the Supreme Court again found that Article 8 was engaged.[44] Lord Hope adapted the *Sidabras* principle:

“Excluding a person from employment in her chosen field is liable to affect her ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of her private life.”[45]

Lord Neuberger added:

“An applicant’s exclusion from a *large sector of the job* market (especially, it seems to me, a socially important and vocationally driven sector) will frequently have a significant effect on her private life, in terms of career satisfaction, development of personal relationships and ability to earn a living.”[46]

These cases show that where someone is prevented from pursuing a chosen career or working in a “large sector of the job market”, Article 8 is engaged because of the interference with a person’s right to make human relationships. None of the judgments suggested anything wider than that, to encompass, for instance, the situation of being fired from one job, but not barred from pursuing a chosen career, or participating in the job market generally. However, there is another dimension apparent from this case law which recognises the scenario where dismissal from one job may *effectively* bar a person from their chosen career.

An additional and aggravating factor for *Sidabras* was the public obloquy of being associated with a previous oppressive regime. The Court noted:

“... as a result of the publicity caused by the adoption of the ‘KGB Act’ [the applicants] ... have been subjected to daily embarrassment as a result of their past activities. ... the applicants continue to labour under the status of ‘former KGB officers’ and that fact may of itself be considered an impediment to the establishment of contacts with the outside world - be they employment-related or other - and that this situation undoubtedly affects more than just their reputation; it also affects the enjoyment of their ‘private life’”.[47]

In *Wright*, Baroness Hale observed:

“The ban is also likely to have an effect in practice going beyond its effect in law. Even though the lists are not made public, the fact is likely to get about and the stigma will be considerable.”[48]

And in *L v Metropolitan Police*, Lord Hope noted:

“She is entitled also to have her good name and reputation protected. ... the fact that a person has been excluded from employment is likely to get about and, if it does, the stigma will be considerable.”[49]

Clearly, any stigma associated with a ban or dismissal is an aggravating factor. In this context, a stigma can do two things. First, it could influence employers beyond the formal ban not to hire the victim: in some cases at least, the signal to prospective employers is that this victim was so little valued to be expendable. Second, it can damage the victim’s reputation with the resulting harm to her or his social life. Being “expendable”, for instance, could damage the victim’s self-esteem and confidence to mix socially.

The cases (*Sidabras*, *Wright*, and *L*) did not isolate precisely what role stigma, in itself, plays in an Article 8 claim. It would appear from the judgments that stigma was an aggravating factor in each case. It prompts the question whether Article 8 could be engaged where stigma is the principal or sole cause of the damage to the victim’s right to make human relationships. Take for instance, a case where the victim was fired, but with no formal restrictions (e.g. being

disbarred) on her job opportunities. However, the “expendable” stigma associated with the dismissal significantly reduced her chances of finding employment in the same occupation. If the effect of the dismissal were of a similar nature and scale as that in, say, *Sidabras*, it would seem that Article 8 should be engaged. In principle, and in the context of Article 8, the case is no different from one where a formal bar to employment similarly affects the victim’s ability to make human relationships.

The second suggestion above (“self-esteem”) envisages that only the victim’s social life (in addition to the loss of a job) was affected, but again, with the same “Article 8 effect” on her ability to make human relationships. It would seem that provided the damage were severe enough, there is no reason why Article 8 should not be engaged. The only hesitancy over this conclusion would be the limit of Article 8 expressed in *Botta*. However, the *Botta* pronouncement concerned *interpersonal* relations that were too “broad and indeterminate” to engage Article 8. This does not rule out of Article 8 all social scenarios. Access to a beach is distinguishable from a general ability to make human relationships. The Court stated in *Sidabras* that Article 8 covered “an impediment to the establishment of contacts with the outside world - be they employment-related *or other*”.[50] This presumably means social contacts, as it could hardly mean much else. In any case, it would at the least *include* social contacts.

In conclusion, none of this case law directly suggests that victimising associates of complainants should, in itself, engage Article 8. But it does suggest that Article 8 should be engaged in some cases. Claims under Article 8, thus far interpreted, would be fact-sensitive. It might be that the victim’s career lies in a particularly narrow field, or that there are relatively few employers, or it is at a time of high unemployment either within the relevant sector, or generally. Academics will be aware of some of these factors. They tend to specialise in a narrow branch of their discipline. Their places of employment (mainly universities) are thinly spread, which either narrows the opportunities further or demands relocation. Academic disciplines tend to have a nationwide, if not worldwide network, and so word will spread and any stigma could well impede job opportunities, as well as the victim’s social life. Other examples could be the police force, the private security sector, legal profession. More obvious cases here might involve the exclusion from a monopolistic trade association or qualifying body.[51] Once again, we see that certain instances of third party victimisation *could* violate, or at least engage, Article 8, depending upon the severity of the effect of the victimising act. But this is theoretical and speculative, and offers no certainty for *all* instances.

#### *Article 14 - discrimination*

Where the severity of the victimisation is enough to *engage*, but not *violate*, Article 8, Article 14 may provide a solution. The Convention gives no free-standing right against discrimination,[52] but Article 14 provides that the rights and freedoms in the Convention must be “secured” without discrimination. There is no need to prove a *violation* of a substantive right for claims of discrimination. Were it otherwise, Article 14 would serve no useful purpose, being redundant or, at best, duplicative.

The first task is to establish that Article 8 is engaged.[53] To engage a substantive Article, the general rule is that the activity must fall within its “ambit”. For the right to privacy in this context, the “ambit test” would be met by showing an interference with making human relationships at work or earning a living, or perhaps by stigmatising a person. Of course, it is not necessary to show that Article 8 was violated. But in these cases, the principles that engaged Article 8 are rooted in the severity of the effect of the treatment, which is being shut out of a large section of the job market and/or from one’s chosen career. It is a theoretical extension of the case law logic to hold that merely losing one job (but not a career) interferes, be it temporarily, with a person’s ability to make relationships or earn a living. Predicting this becomes rather speculative. A Court guarding civil and political rights may not wish to venture any further into straightforward employment disputes, which are more social and economic in nature. On the other hand, the Court has asserted in this context: “there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention.”[54] This makes it easier to argue that as privacy and equality are fundamental human rights,[55] whether they are threatened in the workplace or elsewhere is secondary to the threat itself. If Article 8 is engaged, Article 14 becomes live.

Article 14 provides that the Convention rights must 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”. Not only are the specific examples far wider than covered by the equality Directives, it is clear that the use of the phrases *such as* and *or other status* (a fortiori the French version



*toute autre situation*)[56] opens Article 14 to more grounds than those listed. Among other things, this non-exhaustive formula allows for changing values, and discrimination that was once acceptable may become unacceptable.[57] The basis for identifying other grounds for protection under Article 14 is vague but generous. The ECtHR has entertained Article 14 claims from groups as wide-ranging as owners of non-residential buildings (distinct from residential), owners of pit bull terriers (distinct from other breeds of dog), small landowners (distinct from large landowners), coastal (distinct from open sea) fishermen, foreign residence, and previous employment by the KGB.[58]

And so, to bring Article 14 into play, third party victims must be classified for protection from discrimination. Their only distinguishing feature (before the treatment) is “being associated with discrimination complainants”. This has some resonance with *Sidabras*,[59] where the ECtHR recognised for Article 14 those who were once employed by (or perhaps “associated with”) the KGB, and found a violation of Article 14 (in combination with Article 8). An association with a person by any number of personal relationships is a more nebulous concept than previous employment with a particular body. Much could turn on the type of association, with marriage and “close relative” at one end of the scale, moving along to emotional relationships and friendships. Further along the scale could be less strong, formal and “obligatory” associations, such as in-laws or work colleagues. Of course, classifying these associations is rather offensive because each could vary enormously in strength, and it is the *strength* of the relationship that motivates the persecutor. Building any sort of coherent case law around such a varying concept could be the obstacle to the ECtHR attempting it.

This tenuous theory could be avoided with a more adventurous approach. A Court could adopt the *Coleman* theory (above), of discrimination by association with the ground of the principal complaint, such as race, or sex. Then it is arguable that dismissing a third party by their association with the complainant is discrimination on one of the conventionally recognised grounds. The “sweeping objection” to the *Coleman* theory (made above)[60] diminishes here because the Convention contains no separate victimisation provision to render otiose. However, by extending discrimination law to encompass victimisation, the Court would make it more difficult for itself at some future occasion to develop a free-standing concept of victimisation.

An alternative approach would be for the ECtHR to do just that: develop a doctrine of victimisation for Article 14. It could do this relying on Article 13 (effective remedy) in much the same way as the ECJ relied on the “effective remedy” Article (6) in the Equal Treatment Directive 76/207/EEC to develop the EU doctrine of victimisation, now codified in the equality Directives.[61] In doing so, the Court will not be constrained by niceties of detailed statutory formulas.

In any of these approaches, it would be relatively easy to prove that a person in an analogous situation would not have been treated in the same way. And given the invidious nature of this victimisation, it would be most unlikely that an employer could justify such discrimination or victimisation.

In conclusion, there are difficulties in applying Article 14 to these cases. First, it might prove difficult in less severe cases to show that Article 8 is engaged. Second, bringing Article 14 into play would entail either recognising a tenuously defined group, or importing the *Coleman* theory of association *discrimination*, or developing a new strand of victimisation to Article 14.

### **General Principles of EU Law**

Given the rather cumbersome options of the equality Directive definitions, or tenuous options under the Convention on Human Rights, we return to the broader statutory formulas, found in the equality Directives. There are two complementary principles relevant here. First, the prohibition of deterrents to workers using the discrimination legislation (*Coote*).[62] Second, remedies must be sufficient to deter employers from discriminating (*Marshall*),[63] or be “dissuasive”, as the equality Directives instruct under their “Sanctions” articles.[64] It was noted above that the wording of the victimisation provisions in the Framework and Recast Directives is not broad enough to cover all the Classes, notably those involving a second employer. What is required is an overarching general principle which is not bound by the niceties of the legislative formulas. There are two possibilities.

### *Effective Judicial Protection*

In 1986, the ECJ in *Johnston v RUC*[65] expressed the view that the Equal Treatment Directive (ETD),[66] Article 6 (effective remedy), “reflects a general principle of law”.[67] We then saw *Coote* building on *Johnston* and Article 6 to establish the now-familiar rubric prohibiting victimisation, expressed in the equality Directives. *Johnston* and *Coote* concerned access to Court. *Marshall* built upon Article 6 to provide access to a *full* remedy.[68] Finally, in *Francovich*,[69] the ECJ held that a member State could be liable to an individual for failing to implement a Directive, thus denying the individual an effective remedy under EC law.[70] This shows that it is not beyond the ECJ to create a new cause of action to give effect to a general principle.

What becomes apparent is that, Article 6 (ETD), the “deterrent” principles of *Coote* and *Marshall*, the “dissuasive” principle and prohibitions against victimisation in the equality Directives, are merely specific expressions of a general principle of judicial protection.[71] As such, their precise wording should not restrict the general principle. That would be the tail wagging the dog. Quite clearly, if third party victimisation passes without redress, or with only partial redress (e.g. where the principal claimant sues also for victimisation), claimants are deterred from seeking a remedy and employers are not dissuaded from intimidating them. This applies equally across all the scenarios. This general principle provides the most solid ground for a remedy to all three Classes of third party victimisation.

As such, the victim should be permitted to sue, even if this means creating a new cause of action (*Francovich*). It may be that for some reason, the victim may not sue. This could occur where, for example, the employer merely *threatens* to dismiss the principal claimant’s spouse, should the claimant not abandon her claim. Here, principal claimant should be able to sue her employer and claim damages enough to dissuade the employer.[72]

### *General Principle of Equality*

Just as the victimisation and sanctions provisions of the equality Directives are expressions of the general principle of effective judicial protection, the main thrust of these Directives is an expression of the general principle of equality. This brings a remedy for third party victimisation a step closer for purely private disputes. In *Swedex*,[73] a *private* employer relied on a German Civil Code exception to the age discrimination principle, generally to give younger workers shorter notice periods. The exception was incompatible with the Framework Directive and of course the general principle of equality. The ECJ held that a domestic court should disapply the state exception, thus facilitating an action by the victim against the private employer. In holding so, the ECJ relied on the general principle of equality.[74]

### **Conclusion**

With the purpose of the equality Directives in mind, there are a number of factors which should push the ECJ towards recognising these claims. First, the general principle of judicial protection, which is broad enough to create a new cause of action if necessary. This factor alone should be enough. Second, the twin principles already associated with the equality Directives of removing deterrents to claimants and potential claimants (the chilling effect), and dissuading employers from intimidating them. Third, the recognition of third party victimisation is - conceptually - no more ground-breaking than the already recognised third party discrimination and harassment (*Coleman*). Last, there is potential in Article 8 and Article 14 (ECHR) to cover *some* cases.

It is clear, that to address third party victimisation, the existing definitions of victimisation require reformulating and expressed to cover all three Classes outlined in the introduction. The obvious solution is for the Framework and Recast Directives to adopt the more open formula from the Race Directive and add the scenarios as examples of victimisation covered by that formula. The phrase *as a reaction to* in that formula ensures that there must be a connection between the employer’s act and the principal complainant’s act, thus excluding any meritless claims.

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[1] *NLRB v Advertisers Manufacturing Co* 823 F 2d 1086, 1088 (7th Cir. 1987) (Posner, CJ).

[2] *Crawford v Metropolitan Government of Nashville* 129 S Ct 846, 852 (2007), citing D. Brake, “Retaliation”, (2005) 90 Minn. L. Rev. 18, 20. This case centred on those who complained of discrimination against *others*, rather than passive friends, relatives, or associates of the complainant.

[3] S. 704 (42 USC para.2000e-3).

[4] See *Thompson v NA Stainless* 520 F 3d 644 (6th Cir, 2008), citing the EEOC (the Federal enforcement body) Compliance Manual §8006. See also *De Medina v Reinhardt* 444 F Supp 573 (DCDC 1978) (appealed on other grounds: 686 F 2d 997 (W refused job by H’s employer, because H agitated about race discrimination.); *McKenzie v Atlantic Richfield* 906 F Supp 572, 575 (D Colo, 1995) (H fired because W brought discrimination claim).

[5] See *EEOC v Bojangles* 284 F Supp 2d 320, 324 (MDNC 2003) (Plaintiff’s partner refused a return from maternity leave following his complaints of racial harassment); *Holt v JTM Industries* 89 F 3d 1224 (5<sup>th</sup> Cir, 1996) (H put on leave and transferred following W’s age discrimination claim).

[6] See e.g. *Fogleman v Mercy Hospital* 283 F 3d 561, 569-570 (3<sup>rd</sup> Cir 2002), and the concurring Opinion of Alito, J in *Crawford v Metropolitan Government of Nashville* 129 Sup Ct 846, 853-855 (2007).

[7] See e.g. various ILO surveys: [ilo.org/public/english/dialogue/ifpdial/info/termination/countries/index.htm](http://ilo.org/public/english/dialogue/ifpdial/info/termination/countries/index.htm) [Accessed August 12, 2010].

[8] *Ibid.* which shows, e.g. Germany (6 months); Spain (2-6m); Sweden (6m); UK (12m); Poland’s unjustified dismissal rights applied only to employers employing at least 20 workers.

[9] *Ibid.* See e.g. Austria, Belgium, Germany, Spain, Italy, UK. In the UK, compensation is available for injury to feelings for discrimination (Equality Act 2010, ss 124(6) & 119(4)), but not unfair dismissal (*Dunnachie v Kingston-upon-Hull City Council* [2004] UKHL 36).

[10] “The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive”: 2000/43/EC, Art.15; 2000/78/EC, Art.17. See also the slightly differently worded Gender Equality “Recast” Directive 2006/54, Recital (35), Arts 18 & 25. These codified Case C-271/91 *Marshall v Southampton and South West Hampshire AHA (No 2)* [1993] E.C.R. I-4367, [24].

[11] See comment in *De Medina v Reinhardt* 444 F Supp 573 (DDC, 1978), 580: “[It] would produce absurd and unjust results, .... the “make whole” purpose of [the Civil Rights Act 1964] would be frustrated.”

[12] [2000] OJ L180/22.

[13] [2000] OJ L 303/16.

[14] [2006] OJ L 204/23.

[15] Case C-185/97, [1998] E.C.R. I-5199.

[16] Art. 7.

[17] [1998] E.C.R. I-5199, [24].

[18] Communication from the Commission to the Council and the European Parliament, “The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.” COM/2006/0643 final, at para.2.

[19] *Ibid.*, at para.3.

[20] Commission (EC), “Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation.” COM/99/0565 final CNS 99/0225 Explanatory Memorandum, 5. Explanation of Individual Articles of the Proposed Council Directive, Art.10.

[21] Case C-303/06 [2008] I.R.L.R. 722 (ECJ).

[22] Ibid, AG22.

[23] Ibid.

[24] Ibid, [39]-43].

[25] [2009] 2 C.M.L.R. 18. See also *Showboat Entertainment Centre v Owens* [1984] 1 All E.R. 836 (EAT) (white manager dismissed for disobeying order to ban black youths); *Weathersfield (t/a Van & Truck Rentals) v Sargent* [1999] I.C.R. 425 (CA) (white worker (constructively) dismissed following instruction not to hire vehicles to “coloured and Asians”).

[26] e.g. Race Relations Act 1976, ss 1 and 2.

[27] *Nagarajan v LRT* [2000] 1 A.C. 501, 521 (Lord Steyn).

[28] See e.g. *Khan v Chief Constable of West Yorkshire* [2001] UKHL 48, *St Helens v Derbyshire* [2007] UKHL 16, noted in (2007) 36(3) I.L.J. 364.

[29] Equality Act 2010, s 27: “(A) victimises ... (B) ... because ... (B) has done a protected act”.

[30] See *R (on the application of A) v Governing Body of JFS* [2009] UKSC 15, especially [152i] (Lord Clarke).

[31] There is a hint of this misplaced notion in several UK victimisation cases, including *Cornelius v University of Swansea* [1987] I.R.L.R. 141 (CA) and *Aziz v TST* [1989] Q.B. 463 (CA). See (2002) 31 I.L.J. 161, 169.

[32] “[A] sweeping phrase, which is as comprehensive as it is vague”: R. Wacks, *The Protection of Privacy* (London: Sweet and Maxwell, 1980) p.12.

[33] *Niemietz v Germany* (App. No. 13710/88) (1993) 16 E.H.R.R. 97, [29]. See also *Peck v UK* (App. No. 44647/98) (2003) 36 E.H.R.R. 41, [57].

[34] Ibid.

[35] Ibid, [29].

[36] Ibid, [29].

[37] (App. No. 21439/93) (1998) 26 E.H.R.R. 241, [35].

[38] (App. No. 55480/2000) (2006) 42 E.H.R.R. 6.

[39] Ibid, [48]. The Court has ruled that access to the civil service *per se* cannot be basis for a complaint under the Convention (*Glaser v Germany* (App. No. 9228/80) (1986) 9 E.H.R.R. 25, [49], [35], [105]; although this did not mean civil servants are excluded from Convention (*Vogt v Germany* (App. No. 17851/91) [1995] ECHR 17851/91, [43]-[44]). In *Thlimmenos v Greece* (App. No. 34369/97) (2001) 31 E.H.R.R. 15, [41], the Court stated that the right to choose a particular profession was not as such guaranteed by the Convention, but held a refusal to admit the applicant as a chartered accountant because of his conviction for failing to wear military uniform for religious reasons (Jehovah’s Witness) was disproportionate under Arts 9 & 14.

[40] [2009] UKHL 3, [2009] 2 All ER 129 (HL).

[41] Ibid, [36].

[42] Ibid. The listing process was also held to violate Art.6 (fair trial).

[43] [2009] UKSC 3, [2010] 1 All ER 113 (SC).

[44] Lord Scott dissenting.

[45] Ibid, [24] (Lord Hope DP)

[46] Ibid, [70]. Emphasis supplied.

[47] (2006) 42 E.H.R.R. 6, [49].

[48] [2009] UKHL 3, [36].

[49] [2009] UKSC 3, [24]. Citing *Turek v Slovakia* (2006) 44 E.H.R.R. 861, [109].

[50] (App. No. 55480/2000) (2006) 42 E.H.R.R. 6, [49]. Emphasis supplied.

[51] “Qualifying Bodies” fall within the scope of EC and UK equality legislation: Recast Directive, Art.14(1)(d); Race Directive, Art.3(1)(d); Framework Directive, Art.3(1)(d); (UK) Equality Act 2010, s.53. See e.g. *Bohon-Mitchell v Common Professional Examination Board* [1978] I.R.L.R. 525 (IT), (Council for Legal Education); *Couch v British Boxing Board of Control*, unreported, IT, (1998) *The Guardian*, 31 March 1998 (British Boxing Board of Control).

[52] The 12th Protocol provides a free-standing right against discrimination, but not yet been ratified. (To follow its progress, see <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=177&CM=8&DF=31/08/2010&CL=ENG> [Accessed August 31, 2010].) For a discussion of the protocol see G. Moon, (2000) 1 E.H.R.L.R. 49; J. Schokkenbroek, “Towards a stronger European protection against discrimination: the preparation of a new additional protocol to the ECHR” and J. Cooper, “Applying equality and non-discrimination rights through the Human Rights Act 1998”, both in *Race Discrimination* (Oxford: Hart, 2000); and V. Khaliq, “Protocol 12 to the ECHR: a step forward or a step too far?” [2001] P.L. 457; R. Wintemute, “Filling the Article 14 ‘gap’: Government ratification and judicial control of Protocol No.12 ECHR: Part 2” [2004] 5 E.H.R.L.R. 484.

[53] Traditionally, when entertaining a discrimination claim, if the Court finds a violation of a substantive Article, it declines to discuss the Art.14 claim, although some recent cases have departed from this practice: see e.g. *Sibabras v Lithuania* (App. No. 55480/2000) (2006) 42 E.H.R.R. 6, [41], [50], [63] and *SL v Austria* (App. No. 45330/99) (2003) 37 E.H.R.R. 39, [28], [47].

[54] *Sidabras v Lithuania* (2006) 42 E.H.R.R. 6, [47], citing *Airey v Ireland* (App. No. 6289/73) (1979-80) 2 E.H.R.R. 305, [26].

[55] *Goodwyn v UK* (App. No. 28957/95) (2002) 35 E.H.R.R. 18, [90] (associating the Convention, especially Art.8, with human dignity); *DH v Czech Republic* (App. No. 57325/00) (2008) 47 E.H.R.R. 3, [173] (linking anti-race discrimination law and human dignity); Race Directive 2000/43/EC, Recital (3) (equality is a “universal” right); Framework Directive 2000/78/EC, Recital (5) (fundamental and universal); Recast Directive 2006/54/EC, Recital 2 (fundamental); the EU Charter of Fundamental Rights, includes Title III, (“Equality”), and Art.7, (“Privacy”).

[56] “or any other situation”. Noted in *Carson v UK* (App. No. 42184/05) (2010) 51 E.H.R.R. 13, [70]; see also *RMJ v Secretary of State for Work and Pensions* [2009] 1 A.C. 311 (HL), [39].

[57] See the maturing attitude to gender reassignment in *Sheffield & Horsham v UK* (App. No. 22985/93) (1998) 27 E.H.R.R. 347 and *Goodwin v UK* (2002) 35 E.H.R.R. 18.

[58] Respectively, *Spadea v Italy* (1996) 21 E.H.R.R. 482, at paras 42-46; *Bullock v UK* (1996) 21 E.H.R.R. CD 85, at para.5; *Chassagnou v France* (2000) 7 B.H.R.C. 151, at paras 86-95; *Posti and Rahko v Finland* (2002) 37 E.H.R.R. 158, at paras 79-87; *Darby v Sweden* (App. No. 11581/85) (1990) E.H.R.R. 774; *Sidabras v Lithuania* (App. No. 55480/2000) (2006) 42 E.H.R.R. 6.

[59] (2006) 42 E.H.R.R. 6. See above, text to n.38.

[60] Text to n.29.

[61] *Coote v Granada* Case C-185/97, [1998] E.C.R. I-5199. Discussed above, text to n.15.

[62] *Ibid.*

[63] Case C-271/91 *Marshall v Southampton and South West Hampshire AHA (No 2)* [1993] E.C.R. I-4367, [24].

[64] “The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive”: 2000/43/EC, Art.15; 2000/78/EC, Art.17. See also the slightly differently worded Recast Directive 2006/54, Recital (35), Arts. 18 & 25.

[65] Case 222/84 (1986) E.C.R. 1651.

[66] 76/207/EEC. This was the predecessor to the Recast Directive 2006/54/EC.

[67] Case 222/84 (1986) E.C.R. 1651 [18]-[19].

[68] Case C-271/91 [1993] E.C.R. I-4367, [24]. Holding that the then cap of £11,000 for unfair discriminatory dismissal breached the ETD, Art.6.

[69] Case C-6/90 *Francovich v Italian Republic* [1991] E.C.R. I-05357.

[70] *Ibid*, [33]-[37]. See generally, S. Drake, “Scope of Courage and the principle of ‘individual liability’ for damages: further development of the principle of effective judicial protection by the Court of Justice” (2006) 31(6) E.L. Rev. 841; E. Szyszczak, “European Community Law: New Remedies, New Directions” (1992) 55(5) M.L.R. 690; B. Fitzpatrick and E. Szyszczak, “Remedies and Effective Judicial Protection in Community Law” (1994) 57(3) M.L.R. 434.

[71] Expressed in Art.19 TEU, Charter of Fundamental Rights of the EU, Art.47 (2007/C 303/01). See also Case C-63/08 *Pontin v T-Comalux SA* [2009] E.C.R. 0000, [41]-[42]: “Those provisions, and in particular Article 12 of Directive 92/85, constitute a specific expression, in the context of that directive, of the principle of effective judicial protection of an individual’s rights under Community law. ... although the Member States are not bound under Article 12 ... to adopt a specific measure, nevertheless the measure chosen must be such as to ensure effective and efficient legal protection, must have a genuine dissuasive effect with regard to the employer and must be commensurate with the injury suffered...”; Case C-317/08 *Alassini v Telecom Italia SpA* (2010) E.C.R. 000, [61]; Case C-12/08 *Mono Car Styling* (2009) E.C.R. 000, [47]; Case C-432/05 *Unibet* [2007] E.C.R. I2271, [37], and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] E.C.R. I0000, [335]. When drafting the Framework Directive, the Commission stated that “effective legal protection must include protection against retaliation” (COM/99/0565 final CNS 99/0225, see above, n.20).

[72] Some adjustment of time limits and/or priority will be required here, to prevent duplication.

[73] Case C-555/07 *Küçükdeveci v Swedex GmbH* (2010) 2 C.M.L.R. 33, [2010] I.R.L.R. 346 (ECJ) following Case C-144/04 *Mangold v Helm* [2005] E.C.R. I-9981, [75].

[74] *Ibid*, [27], [50]-[51].