

BRIEFING

Headscarves and Discrimination before the Court of Justice of the European Union

On Tuesday, March 14, the Court of Justice of the European Union will decide whether dismissing a woman from her employment for wearing an Islamic headscarf constitutes direct discrimination under EU law or not. This briefing paper sets out the background to the issues in the cases of *Samira Achbita & Anor v. G4S Secure Solutions NV* and *Asma Bougnaoui v. Micropole SA*.

Background

The rights of Muslim women to wear a headscarf at work could be guaranteed by a judgment of the Court of Justice of the European Union (CJEU) on 14 March. Many workplaces have no problem with the Islamic headscarf, with employers including it in uniforms issued to staff. But other employers have dismissed women for choosing to wear the headscarf, even though it does not affect their ability to do their job. The CJEU has announced it will give a ruling on two cases brought by women affected: Ms Samira Achbita, from Belgium and Ms Asma Bougnaoui, from France. The cases have generated diametrically opposed opinions from legal experts and the final judgement is awaited with great suspense.

Why are these cases important?

This is the first case on religious discrimination to be decided by the EU's highest court. The court could rule that it is illegal in the EU for an employer to dismiss a woman for choosing to wear the headscarf, or to discriminate when considering recruitment or promotion. The women argue that this is "direct discrimination". The court's rulings are legally binding in all 28 Member States of the European Union, regardless of national laws. Women affected by discrimination have the right to seek re-instatement and compensation.

What are the facts of the cases?

Ms Achbita worked as a receptionist for G4S in Belgium. She wasn't required to wear a uniform. When she decided to wear her Islamic headscarf at work, G4S claimed to have an informal rule barring all employees from wearing clothing expressing a religious, philosophical, or political belief. When she refused to take off her headscarf, G4S dismissed Ms Achbita. The next day, G4S adopted a written rule.

Ms Bougnaoui worked as an engineer with Micropole SA in France. She wore the headscarf as part of her business clothes, without objection from her employer. Her employer directed her not to wear the headscarf at meetings with a customer who didn't like it. Ms Bougnaoui was dismissed when she refused to stop wearing the headscarf.

Why is the EU involved?

The EU's Employment Equality Directive 2000/78 requires all EU Member States to bar employers from discriminating on the grounds of "religion or belief, disability, age or sexual orientation". The CJEU rules on the meaning and effect of EU Directives, when a national court asks it to. The highest courts in Belgium and France—the Courts of Cassation—asked the CJEU to rule on the Employment Equality Directive in these cases.

Does dismissal for wearing the headscarf count as discrimination?

The basic issue in each case is whether the Directive allows for dismissal of an employee on the grounds of wearing the Islamic headscarf. The CJEU will consider the legal issues underlying this.

The women argue that the dismissal was direct discrimination, because they were treated less favorably than a woman who did not wish to wear a headscarf for religious reasons. Direct discrimination cannot be justified, but the exceptions may apply.

If the court rules that there was no direct discrimination, the court will decide whether there was indirect discrimination, because the employer's approach was more likely to affect Muslims than non-Muslims. The court will also consider if the employers can justify this impact. This requires a reason which is not based on religion. The only argument here is that the employer wanted to appear "neutral" on the question of religion. The women argue that a rule which bans religious clothing is not neutral: it is partisan against employees who hold a religious belief expressed through what they wear. It is therefore based on religion and cannot be a justification for indirect discrimination.

Can an employer rely on the exceptions that allow discrimination?

France and Belgium did not have laws allowing private employers to dismiss staff for wearing religious clothing. This means the employers cannot rely on the exceptions for national law allowed under Article 4 of the Treaty of Lisbon, signed in 2007, which established the current constitutional structure of the EU.

Under Article 5 of the treaty, an employer can impose a genuine occupational requirement to have a characteristic related to religion. For example, a University could require a lecturer in religion to have a special knowledge of Christianity, because this is important to their work. This rule is already applied to allow for other kinds of discrimination, for example, on age in the case of strenuous work.

In these cases, the employer does not argue that the headscarf interfered with the ability of the women to carry out their work, or that the work could not be undertaken by Muslims. G4S claimed that it wanted to appear "neutral" on the question of religion (see above).

Who are the Advocates-General and what are their opinions?

The CJEU's Advocates-General are distinguished lawyers who give public opinions on the legal issues raised in its cases. These opinions are *not* binding on the court. The court's judges—in this case 13 forming a Grand Chamber—decide the issues independently of the Advocates-General.

Extremely unusually, these cases have two Advocates General with opposing opinions. AG Eleanor Sharpston (appointed to the CJEU by the UK) considered the *Bougnououi* case and concluded that dismissing a woman for wearing an Islamic headscarf is direct discrimination and does not fall under the exception. AG Juliane Kokott (appointed by Germany) was of the opinion in *Achbita* that the dismissal was only indirect discrimination and, anyway, fell under the exception.

How will a win for the women affect other Muslim women who want to wear the headscarf?

Muslim women are the most targeted group in Europe for the visible expression of their faith in public, and in particular at work. A ruling in favour of these women will guarantee their legal rights to take up employment without needing to abandon their religious practice. It will free these women to participate fully in the work-place and make the same choices as other people about their public interactions. This freedom will strengthen their economic and social engagement and that of their families and communities. This is essential in an already diverse Europe. It also encourages integration of women newly arriving, for example as refugees. The ruling would help counter racist stereotypes that women who wear the headscarf are not full members of society.

Will the ruling matter more in some parts of Europe?

The ruling will apply in all EU member states, not only in Belgium and France. All future cases about employment discrimination on the ground of religion in every EU member state will be affected by what comes out of this judgement.

But it will affect some countries more than others. Only in a few European countries is there legal encouragement for barring women from wearing the headscarf at work. France and Belgium were the first European governments, after Turkey, to ban religious clothing of employees in the public sector. These “headscarf bans” targeted and mostly affected Muslim women. These rules encouraged private sector employers to reject Muslim women with headscarves. Heated headscarf debates spilled over to other EU countries.

But in many other European countries, individual employers practice anti-Muslim discrimination by refusing to employ women who wear the headscarf. A ruling in favour of the women will confirm this is illegal and warn these employers of the financial and reputational risks they run by breaking the law.

Will the ruling only affect Muslim women?

No. The judgment will matter for all people who express their faith through clothing, like Sikhs who wear a turban, Jews who wear a kippa, and Christians who wear the cross. The same rules that apply to employment of Muslim women will apply to employment of these groups and any other people who express their religion through clothing.

Could the ruling ban employers from dismissing anyone because of what they wear?

No. Employers continue to have the power, under contract, to require employees to wear uniforms or appropriate clothing. Many employers, including the police and other Government bodies have already incorporated the headscarf into uniforms. Governments will still have the power to make national laws requiring clothing that is suitable for health and safety reasons.

What political impact would a ruling in favor of the women have?

Opponents of women who wear the headscarf may call for changes to national law to allow discrimination to continue. This is impossible, so long as states remain in the European Union. National governments cannot make rules that breach EU law.

These opponents may also call for a change to EU law, for example, to the Employment Equality Directive. This is very unlikely to happen, because it would require wide agreement within the EU law making bodies: the Commission, the Council of the EU and the European Parliament. Only in a few countries are there noisy opponents of women who wear the headscarf. The procedures to change the Directive are slow, and even if it were made, the Court of Justice would have to decide whether the changes are allowed by the Treaty of Lisbon. If the court rules for the women, their opponents may be required to choose between accepting the ruling and the extreme alternative of withdrawing from the EU.

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What judgment does the Open Society Foundations want to see?

The Open Society Justice Initiative [submitted arguments to the CJEU in the Achbita case](#), arguing that it should advise national courts that when an employer singles out religious clothing this is direct discrimination, and such an aim is not neutral.

We hope the Court of Justice rules that treating an employee less favourably because she wears a headscarf for religious reasons is direct discrimination, and that these cases do not fall under any exception. The supposed “neutrality” is really discrimination, making the false claim that employers who allow staff to wear the headscarf are in some way not neutral.

Judgment for the women is essential to give effect to the values of pluralism and equality that the European Union holds so dear. The ruling would defend and support the many employers who already practice this equality, welcoming staff of all faiths, upholding their practices as a standard for the whole of Europe. Faced with the revival of a vicious and aggressive far-right in Europe, such a judgment would also send a clear message that Europe today is not the Europe of the 1930s. The judges can show the politicians that Europe has evolved to protect—not persecute—people because of their faith.

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C.
