**Michaelmas Term**
**[2012] UKSC 59**
*On appeal from: [2011] EWCA Civ 28*

# JUDGMENT

# X (Appellant) *v* Mid Sussex Citizens Advice Bureau and another (Respondents)

**before**

**Lord Neuberger, President**
**Lord Walker**
**Lady Hale**
**Lord Mance**
**Lord Wilson**

## JUDGMENT GIVEN ON

## 12 December 2012

**Heard on 31 October and 1 November 2012**

*Appellant*
John Lofthouse
Spencer Keen
(Instructed by Charles Russell LLP)

*Respondent*
Christopher Jeans QC
Paul Michell
(Instructed by Bates Wells & Braithwaite LLP)

*Intervener (Secretary of State for Culture, Media and Sport*
Kassie Smith

(Instructed by Treasury Solicitor)

*Intervener (Equality and Human Rights Commission)*
Robin Allen QC
Declan O'Dempsey
Olivia-Faith Dobbie
(Instructed by Equality and Human Rights Commission)

*Intervener*
John Bowers QC

(Instructed by The Christian Institute)

**LORD MANCE (with whom Lord Neuberger, Lord Walker, Lady Hale and Lord Wilson agree)**

*Introduction*

1. Any responsible organisation aims to combat discrimination on the grounds of disability – or indeed any other characteristic protected by the Equality Act 2010 - and will do so for the benefit of persons serving or wishing to serve as volunteers in the organisation no less than anyone else. But the present appeal is not about this moral imperative. It is about whether, under European and domestic law, discrimination against volunteers, or some categories of volunteer, on the grounds of disability is currently unlawful and if so how the relevant volunteers are to be defined.

2. The appellant has both academic and practical qualifications in law. From 12th May 2006 she became a volunteer adviser for the respondent, the Mid Sussex Citizens Advice Bureau ("the CAB"). She did this after an interview in which it was explained that there would be no binding legal contract between her and the CAB. This was confirmed in her case by her signature of a volunteer agreement headed: "This agreement is binding in honour only and is not a contract of employment or legally binding". The Employment Tribunal concluded that no legally binding contract came into existence, and the contrary is no longer suggested.

3. The volunteer agreement stated it was "hoped that you can give at least one and half days during basic training which can last up to nine months", following which the CAB "would like you to offer at least 94 duty sessions per year", each session being usually three and a half hours. It recognised that due to changing personal circumstances this might not always be possible. It contained provisions relating to equal opportunities (stating that volunteers were expected not to discriminate against clients and colleagues and "should feel that [they] are being treated by colleagues and the Bureau fairly and with respect"), bureau practices, holidays, reimbursable expenses, retirement (stated to be normally at 70), and outside activities (asking that the manager be informed if a volunteer wished to stand for any elected public office and stating that campaign literature must not refer to experience as a CAB volunteer, but might merely state that he or she worked with an unspecified advice agency).

4. The appellant completed her training period by November 2006. As a voluntary adviser she thereafter carried out "a wide range of advice work duties", writing appeal submissions and case notes, undertaking specialist research, writing letters to third parties and giving legal advice to CAB clients. The CAB was "deferential to her ….. expertise" and she was given "considerable autonomy in welfare advice work" (see para 20 of the Employment Tribunal decision). She indicated her availability to volunteer on Tuesdays, Thursdays and Fridays, but because of health problems did not always attend and sometimes changed days. No objection was taken to this, and the CAB did not seek to control her hours or discuss her reliability. She was absent about 25% to 30% of the proposed times, and in practice attended between one and three days a week.

5. The appellant claims that on 21st May 2007 she was asked to cease to act as a volunteer in circumstances amounting to discrimination against her on the grounds of disability. The CAB denies this claim, and there has been no adjudication upon its substance. The Employment Tribunal, Employment Appeal Tribunal and Court of Appeal have held that the Employment Tribunal had no jurisdiction to hear her case, on the ground that she is, as a volunteer, outside the scope of the protection against discrimination on the grounds of disability intended to be provided under (at the relevant time) the Disability Discrimination Act 1995 and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the "Framework Directive").

6. The appellant now appeals with permission of the Supreme Court. Her appeal is supported by the Equality and Human Rights Commission as first intervener. It is resisted by the CAB, which is supported in this by the Secretary of State for Culture, Media and Sport, as second intervener, as well as by the Christian Institute, as third intervener. In addition to the third intervener, other organisations associated with volunteering have written to the respondents' solicitors to support the CAB's case that volunteers are outside the scope of protection under the Act and Framework Directive, namely the Association of Chief Executives of Voluntary Organisations, Groundwork UK and Volunteering England. Their objections are that an opposite conclusion would undermine the nature of volunteering, create practical barriers and additional costs for charities and other organisations in which volunteering occurs, and result in a formalisation they believe is unwanted by most volunteers.

*The legislation*

7. The Disability Discrimination Act 1995 provided:

> "4 (1) It is unlawful for an employer to discriminate against a disabled person—
>
> "(a) in the arrangements which he makes for the purpose of determining to whom he should offer employment. ….
>
> (2) It is unlawful for an employer to discriminate against a disabled person whom he employs –
>
> (a) in the terms of employment which he affords him;
>
> (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit;
>
> (c) by refusing to afford him, or deliberately not affording him, any such opportunity; or
>
> (d) by dismissing him, or subjecting him to any other detriment."

8. Before the Employment Tribunal and Employment Appeal Tribunal, the appellant placed some reliance upon section 4(1)(a). This failed because there was no particular link between volunteering and employment with the CAB, and, more fundamentally, it was not the purpose of the appellant's volunteering with the CAB to determine whether it might offer her employment. Her principal case rested however on section 4(2)(d), which is the relevant clause for present purposes.

9. Under section 68(1), "'employment'" means "subject to any prescribed provision, employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions are to be construed accordingly".

10. Accordingly, since the appellant did not have a contract, she does not on the face of it fall within the scope of the 1995 Act. In 2003 the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673) were made under section 2 of the European Communities Act 1972, to give effect to the Framework Directive by adding various sections to the 1995 Act. These included sections 4D, covering certain categories of office-holders some of whom would

not have contracts or remuneration, and sections 6A and 7A, covering partners and barristers. The appellant does not fall within any of these categories either.

11. The appellant's case is that the analysis changes once regard is had to the Framework Directive. The Directive shows, she submits, that volunteers, at least volunteers in her position, were intended to be covered by the protection against discrimination on the grounds of disability required by European Union law. In these circumstances, the 1995 Act can and should be read as affording her the requisite protection, pursuant to the principle in *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, by inserting the words "an occupation," into section 68 of the 1995 Act (e.g. after the words "subject to any prescribed provision" in the definition of employment). Alternatively, the general principle of equality contained in article 13(1) of the Treaty establishing the European Community ("TEC") (now replaced by article 19(1) of the Treaty on the Functioning of the European Union ("TFEU")), taken in combination with the Framework Directive which was enacted to crystallise it, gives her a direct claim. In support of this alternative, she invokes the Court of Justice's decisions in *Mangold v Helm* (Case C-144/04) [2005] ECR I-9981 and *Kücükdeveci v Swedex GmbH & Co K*G (Case C-555/07) [2010] All ER (EC) 867.

12. Article 13(1) TEC read:

> "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

Article 19(1) TFEU is in similar terms (with the difference that the Council now acts unanimously in accordance with a special legislative procedure and after obtaining the consent of the Parliament).

13. The Framework Directive commences with recitals, which include:

> "(4) …. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.
>
> ….

(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.

(7) The EC Treaty includes among its objectives the promotion of coordination between employment policies of the Member States. To this end, a new employment chapter was incorporated in the EC Treaty as a means of developing a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce.

….

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

….

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community….

….

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

….

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

….

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

….

(27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community, the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities, affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons.

….

(37) In accordance with the principle of subsidiarity set out in Article 5 of the EC Treaty, the objective of this Directive, namely the

creation within the Community of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved at Community level. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective."

14. In the light of these recitals, the Framework Directive provides:

"Article 1
**Purpose**

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

….

Article 2
**Concept of discrimination**

[Defines the concept]

Article 3
**Scope**

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

….

Article 16
**Compliance**

Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended."

*Employment and occupation*

15. The appellant focuses on the Directive's references to "occupation" in article 3(1)(a). This, she submits, is wide enough to cover her voluntary activity. She also argues that the reference to "working conditions" in article 3(1)(c) is wide enough to embrace both self-employment and occupation. There is no single definition of "worker" under European law: *Martínez Sala v Freistaat Bayern* (Case C-85/96). But the Directive was intended to afford under article 13 TEC protection against discrimination on grounds paralleling that already provided on the ground of sex by directives made under article 141 TEC (now article 157

TFEU). That intention is stated in the Commission's original proposal for the Framework Directive (COM(1999) 565 final), fifth para of the introduction:

> "The discriminatory grounds covered by this proposal coincide with those laid down by Article 13 of the Treaty with the exception of the ground of sex. Such an exclusion has a twofold justification. First, the appropriate legal basis for Community legislation on equal opportunities and equal treatment of men and women in matters of occupation and employment is Article 141 of the Treaty. Secondly, Council Directives 76/207/EEC and 86/613/EEC have already established the principle of equality of treatment between men and women in this field."

16. It is therefore relevant to see how the concepts of worker and employment have been understood in the parallel context of the right to equal pay of male and female workers. In *Allonby v Accrington & Rossendale College* (Case C-256/01) [2004] ICR 1328, the Court of Justice said (para 66) that the concept of "worker" has a Community meaning and "cannot be interpreted restrictively": But, it went on:

> "67. For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration (see, in relation to free movement of workers, in particular *Lawrie-Blum v Land Baden-Württemberg* (Case 66/85) [1987] ICR 483, 488, para 17, and *Martínez Sala*, para 32).

17. In *Lawrie-Blum v Land Baden-Württemberg* (Case 66/85) [1987] ICR 483 the Court said:

> "16. …. The concept of a 'worker' must be interpreted broadly: *Levin v Staatssecretaris van Justitie* (Case 53/81) [1982] ECR 1035).
>
> 17. That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."

18. In later case-law repeating the final sentence, the Court of Justice has expanded its explanation of the concept. As it said in *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* Case 413/01, para 26:

> "In order to be treated as a worker, a person must nevertheless pursue an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and accessory (see, in particular, *Levin* Case 53/81, paragraph 17, and *Meeusen* Case 337/97, paragraph 13)."

19. The concept of "self-employment" used in the Directive clearly refers to the rendering of services for remuneration in circumstances not involving or constituting employment.

20. The concept of occupation has not however been examined in European law in the present or any other material context. The appellant submits that it embraces her position as a volunteer. She does not contend that all volunteers can or should be said to be in or have an "occupation". "Occupation" is a protean word, which can, depending on context, cover a wide variety of activities associated with work or leisure. Volunteers also come in many forms, including the cheerful guide at the London Olympics, the charity shop attendant, the intern hoping to learn and impress and the present appellant who provided specialist legal services. The intern might well fall within article 3(1)(b), but, for like reasons to those which I have pointed out in para 8 above, the appellant did not. Hence, her invocation of article 3(1)(a).

21. Before the Court of Appeal, the appellant advanced as a working definition of "occupation" that

> "Occupation is the carrying out of a real and genuine activity which is more than marginal in its impact upon the person or entity for whom such activity is carried out and which is not carried out for remuneration or under any contract."

Before the Supreme Court, she submitted in her Case that

> "a pursuit or activity on which a person is habitually engaged can constitute an occupation, and to be occupied simply means to be busy or engaged on a pursuit or an activity"

and that the scope of the Directive

> "includes persons who have an occupation which is not remunerated, so long as that activity is not merely 'marginal' or simply the following of a hobby or lending of an occasional kindly hand, and/or (b) comes within the scope of the policy of the EU and UK legislation as something which, if excluded from protection, would create an unacceptable lacuna in the protection intended for workers."

22. The Equality and Human Rights Commission adopted an analysis of the concept of occupation modelled on the analogy of remunerated work: the more obviously voluntary work is a substitute for or supplementary to paid work or creates opportunities for a business to develop and grow, the more its economic value and the more likely it should be seen as functionally isomorphic with or analogous to employment or self-employment.

23. Both the appellant and the Commission ultimately argued for a multi-factorial assessment. They submitted that the factors pointing to a conclusion that the appellant had or was in an "occupation" included the training requirements, the regulation of her activity by the non-binding agreement and its general supervision by the CAB, her expertise, the purpose of her activity (to give free high quality legal advice) and its key role in the operations of the CAB, the number of hours and days she gave, the potential advantages of her activity in equipping her for remunerative employment and the fact that she was providing her services alongside and, save for her unremunerated volunteer status, in large measure indistinguishably from others who were providing services on an employed basis.

*Analysis*

24. The common starting point is that the Framework Directive does not cover all activities. Its scope is defined in article 3, although this falls to be read against the background of the recitals. The Framework Directive sits within a complex of measures relating to discrimination, some with wider scope. In certain areas, notably colour, race or ethnic or national origins and sex discrimination, three sets of initiatives came at the United Kingdom level, two of them well before its membership of the European Union: first, the Race Relations Acts 1965 and 1968, relating to the provision of goods and services, employment, trade union membership and housing; second, the Equal Pay Act 1970; and, third, the Sex Discrimination Act 1975, relating to employment, education and the provision of goods, services and premises. The Race Relations Act 1976 replacing the 1965 Act extended to the same fields as the Sex Discrimination Act 1975. At the European

level, Council Directive 76/207/EEC then addressed sex discrimination in the specific fields of "access to employment, including promotion, and to vocational training and as regards working conditions" and in principle (but subject to further Council legislation) social security (article 1). Article 3 explained the application of the principle of equal treatment as meaning that there should be "no discrimination …. on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts". Article 4 addressed the same principle with regard to access to vocational guidance and training, while article 5 addressed equal treatment with regard to working conditions. Council Directive 86/613/EEC extended the principle of equal treatment to those "engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity" (article 1). The Directive was thus stated (article 2) to cover "self-employed workers, i.e. all persons pursuing a gainful activity for their own account" and "their spouses, not being employees or partners, where they habitually …. participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks".

25. In 2000 the Framework Directive was issued, and in the same year article 3(1) of Council Directive 2000/43/EC (the Race Directive) prohibited discrimination on the grounds of racial or ethnic origin in relation to the same four fields, (a) to (d), as appear in article 3(1) of the Framework Directive. But in the Race Directive these were followed by four additional fields:

> "(e) social protection, including social security and healthcare;
>
> (f) social advantages;
>
> (g) education;
>
> (h) access to and supply of goods and services which are available to the public, including housing."

26. Council Directive 2002/73/EC replaced articles 3, 4 and 5 of Directive 76/207/EEC with a single reformulated article 3 applying the principle of equal treatment on grounds of sex in relation to the same four fields, (a) to (d), as appear in article 3 of the Framework Directive (with minor amendment of (c)). The four additional fields included in the Race Directive were not included in the newly formulated article 3 of Directive 76/207/EEC. The reformulated article 3 was explained by the Commission of the European Union in its report on the application of Directive 2002/73/EC (COM(2009) 409 final) as a limited expansion of the previous scope of Directive 76/207/EEC:

> "Directive 2002/73/EC broadened the scope of Directive 76/207/EEC, in particular by prohibiting discrimination in the conditions governing access to self-employment and membership of and involvement in workers' or employers' organisations or any organisations whose members carry on a particular profession, including access to the benefits such organisations provide (Article 3(l)(a) and (d)). The problems in transposing those provisions in some Member States have consisted mainly in a failure to include self-employment and membership of and involvement in workers' or employers' organisations among the areas covered by the prohibition on discrimination."

27. The Commission clearly did not have in mind voluntary activities as falling within the scope of the reformulated article 3, and the same must apply to the (for all material purposes) identically worded article 3 of the parallel Framework Directive. Finally, Directive 76/207/EEC was replaced in its entirety by Directive 2006/54/EC, article 14 of which prohibited discrimination on the grounds of sex in identical terms to the reformulated article 3 which had been inserted into its predecessor Directive 76/207/EC by Directive 2002/73/EC.

28. The conclusion to be drawn from this series of measures is that their scope was carefully defined, differing according to context and being reconsidered and amended from time to time. A further illustration of this is the Commission's proposal in 2008 (COM(2008) 426 final) for a new Directive extending the principle of equal treatment in the context of religion or belief, disability, age or sexual orientation to areas "other than in the field of employment and occupation" (Article 1) and in particular to cover the four additional fields, (e) to (h), covered by the Race Directive (para 25 above) but not presently covered by the Framework Directive. This proposal has not at least yet been acted on.

29. Secondly, it is an important strand of the case advanced by the appellant and the Equality and Human Rights Commission that the concept of "occupation" must be understood as operating alongside and at the same level as "employment" and "self-employment"; and that, accordingly, it must envisage voluntary work. But the reference to occupation must be viewed in context. It is part of a clause, article 3(1)(a) of the Framework Directive, dealing with "conditions for access" to employment, self-employment or occupation "whatever the branch of activity and at all levels of the professional hierarchy, including promotion". There are many areas in which a professional qualification of some nature or other is either required or advantageous, or a restrictive condition requires to be satisfied, if a worker is to undertake particular work or to advance in a particular sphere, whether as an employee or on a self-employed basis. They range from, for example, qualification as a doctor or lawyer to possession of a heavy goods vehicle

licence. In *Hashwani v Jivraj* [2011] UKSC 40, [2011] 1 WLR 1872, para 49, Lord Clarke accepted a submission that

> "the expression 'access . . . to self-employment or to occupation' means what it says and is concerned with preventing discrimination from qualifying or setting up as a solicitor, plumber, greengrocer or arbitrator. It is not concerned with discrimination by a customer who prefers to contract with one of their competitors once they have set up in business. That would not be denying them 'access. . . to self-employment or to occupation'."

30. That analysis remains in my view correct. The reference to "access …. to occupation" contemplates - as in the present case Burton J (para 33) and Elias LJ (paras 61-62) also thought - access to a sector of the market, rather than to particular employment or self-employment; in that sense, it covers at a higher level the latter two concepts. The word "occupational" in recital 23 is also used in an umbrella sense, as covering differences in treatment justified in relation to either employment or self-employment. Once the word "occupation" is understood in this sense, there is no imperative, and it would indeed be contradictory, to treat the concept of "occupation" as operating at the same level as "employment" and "self-employment", or as envisaging voluntary activity. It is true that there is, on this basis, a degree of overlap with article 3(1)(d), dealing with membership of and involvement in an organisation of workers or employers or whose members carry on a particular profession, but this clause by no means covers the whole area of qualifications for or restrictions of access to employment or self-employment.

31. The appellant and the Equality and Human Rights Commission submit that a different picture emerges when regard is had to other original and equally authoritative language versions of the Framework Directive, particularly the French, article 3(1)(a) of which reads:

> "les conditions d'accès à l'emploi, aux activités non salariées ou au travail, y compris les critères de sélection et les conditions de recrutement, quelle que soit la branche d'activité et à tous les niveaux de la hiérarchie professionnelle, y compris en matière de promotion;"

32. This uses the phrase "ou au travail" for "or to occupation". I do not regard that as in any way suggesting that voluntary activity was to be covered. On the contrary, in the French version of the Commission of the European Community's proposal for the Framework Directive (COM(1999) 565 final), the explanation given of the scope of draft article 1 ("en ce qui concerne l'accès à l'emploi et au

travail, y compris la promotion, la formation professionnelle, les conditions d'emploi, et l'affiliation à certaines organisations") is that

> "Cet article identifie les domaines régis par la proposition, à savoir l'accès à un emploi ou profession, la promotion, la formation professionnelle, les conditions de travail et l'affiliation à certains organismes. "

"Travail" and "profession" are thus equated. In the Spanish and Dutch versions, the phrase "or to occupation" appears as "y al ejercicio profesional" and "en tot een beroep", referring to a profession or professional activity. In the German, article 3(1)(a) reads simply (and inconsistently with the suggestion that voluntary activity was contemplated):

> "die Bedingungen — einschliesslich Auswahlkriterien und Einstellungsbedingungen — für den Zugang zu unselbständiger und selbständiger Erwerbstätigkeit, unabhängig von Tätigkeitsfeld und beruflicher Position, einschliesslich des beruflichen Aufstiegs."

33. This translates as

> "The conditions – including selection criteria and recruitment conditions – for access to dependant [employed] as well as independent remunerative activity, whatever the branch of activity and professional position, including promotion."

34. A third point, linked with the second, is that, if there had been any intention that the Framework Directive should apply to voluntary activity, one would have expected the concept of "occupation" to have been carried through expressly into article 3(1)(c), dealing with "employment and working conditions, including dismissals and pay". Similarly, a number of the Directive's further recitals focus on employment without reference to occupation or to any other term apt in context to cover voluntary activity: see e.g. recitals (7), (11) and (17). It is true that article 3(1)(c) also omits any reference to "self-employment", but the Directive may well not have envisaged that there could be discrimination in relation to "working conditions, including dismissals and pay" with regard to a self-employed person. The omission of any reference to voluntary workers, if they were intended to be protected against "dismissal" on discriminatory grounds, is however quite striking. This is notwithstanding the fact that in *Meyers v Adjudication Officer* (Case C-116/94) [1995] ECR I-2131 the Court of Justice held that a social security benefit designed to keep low income workers in employment or to encourage them into

employment was within the scope of Directive 76/207/EC, not only as being directly related to access to employment, but also on the basis that the claimants' working conditions were affected. The Court said (para 24) that: "To confine the latter concept solely to those working conditions which are set out in the contract of employment or applied by the employer in respect of a worker's employment would remove situations directly covered by an employment relationship from the scope of the directive." However, this was said in a context where there was a contract of employment for reward, and does not suggest that the words "employment and working conditions" in article 3(1)(c) cover situations of purely voluntary activity.

35. Fourthly, the phrase "employment and occupation" is carried through into article 1 of the Framework Directive from the title to the Directive and then from various recitals, starting with recital 4 which refers to Convention No. 111 of the International Labour Organisation prohibiting discrimination in that context. The preamble to Convention No. 111 refers in turn to a meeting of the General Conference of the ILO in Geneva at its 42nd Session on 4 June 1958. That meeting addressed such discrimination and it led to Report IV(1). An appendix to the Report discussed "the internationally accepted meanings of certain terms", including "employment and occupation", and the need to refer to "occupation" at all, in the following terms:

> "It has been argued that there is an overlap in this title in that 'occupation' is only a specific aspect of 'employment'. However, it is clear that the intention of the [UN] Subcommission was to direct special attention to an important aspect of the subject, namely discrimination affecting the individual's free choice of occupation. For this reason there appears to be value in retaining the words 'and occupation' and the Conference Committee rejected an amendment to delete these words.
>
> Considerable attention to terminological concepts such as 'employment' and 'occupation' has been given by successive International Conferences of Labour Statisticians and the summary of their more recent conclusions on these points may be of guidance to governments.
>
> At the Eighth International Conference of Labour Statisticians it was decided that 'persons in employment' included all persons above a specified age who were 'at work' and that the phrase 'at work' included not only persons whose status was that of employee but also those whose status was that of 'worker on own account', 'employer' or 'unpaid family worker'.

> The meaning attached by the Seventh International Conference of Labour Statisticians to the word 'occupation' was 'the trade, profession or type of work performed by the individual, irrespective of the branch of economic activity to which he is attached or of his industrial status'.
>
> It will be seen, therefore, that at the international level both words have a comprehensive meaning and that they apply to all persons at work. It appears in connection with this subject that this would coincide with the original views of the [UN] Subcommission when the ILO was invited to deal with the subject."

36. The reference in the third of these paragraphs to the "unpaid family worker" derived from an expanded definition of employment which specifically included "unpaid family workers currently assisting in the operation of a business or farm … if they worked for at least one-third of the normal working time during the specified period" (see ILO: Eighth International Conference of Labour Statisticians (1954), p 43). This specific, but very limited, extension to unpaid workers, and the language of the appendix as a whole, demonstrate a clear intention not to embrace volunteers generally. The main text of Report IV(1) addressed a proposal to delete any reference to "occupation", by recording that

> "The Representative of the Secretary-General explained that the purpose of the use of the two words 'employment' and 'occupation' in the description of the subject was to stress that it was not enough to ensure non-discrimination in access to employment but was also necessary to ensure the individual a free choice of occupation; it had been the intention of the Office to include self-employed workers since it would hardly seem right for a Convention to deal solely with the elimination of discrimination in access to wage-earning employment and not give to workers wishing to be self-employed any protection against laws, regulations or practices arbitrarily preventing them from doing so..."

37. Fifthly, the Commission's original proposal and the annexed impact assessment (COM(1999) 565 final) which led ultimately to the Framework Directive were focused exclusively on situations of employment or self-employment, and did not consider or address voluntary activity in any shape or form. The Commission, at para 4, in explaining that the legal base was Article 13 TEC, added:

> "The fact that the material scope of the provisions planned covers not only salaried employment but also self-employment and the liberal professions and that its scope rationae [sic] personae is not limited to persons excluded from the labour market, excludes recourse to Article 137 (2) of the Treaty.

Under the Commissions original proposal, article 3(1)(a) (Material scope) would have read:

> "This Directive shall apply to:
>
> (a) conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions, whatever the sector or branch or activity and at all levels of the professional hierarchy, including promotion;"

38. In the impact assessment, the proposal's impact was analysed under only three heads: (a) "on employment?" (b) "on investment and the creation of new businesses?" and (c) "on the competitive position of companies?" Under the second head, the response was that "The Directive will ease the conditions for access to employment and occupation, salaried employment, self-employment and liberal professions". Consultation was with "the representative organisations of the European level social partners and the European Platform of social non-governmental organisations". All these are recorded as having "recognised the importance of the issue and the need for a legislative approach", with different points of view being recognised on some elements. Only European Platform members "regretted the limitation … to employment and occupation", and it seems improbable that even they had in mind voluntary activity. Had the consultation or assessment covered voluntary activity, the particular concerns which voluntary organisations have expressed before us about the impact of legislation in this field would no doubt have been identified and the subject of close attention.

39. Sixthly, however, the European Parliament did during the consultation process which preceded the making of the Framework Directive propose amendments to article 3(1)(a), to make it refer to:

> "(a) conditions for access to employment, *unpaid and voluntary work, official duties*, self-employment and occupation, including selection criteria and recruitment conditions, *finding of employment by public and private employment agencies and authorities*, whatever the sector or branch of activity and at all levels of the

> professional hierarchy, including promotion;" (added words italicised)

It gave as the justification that:

> "Official duties, unpaid and voluntary work should likewise fall within the scope of this directive. It would not be right for official (i.e. public) duties to become a separate field of application: they should be covered by the definition of the term 'employment'." (A5-0264/2000 final, p 20)

40. The Commission decided to amend its proposal to take up the Parliament's suggestion (COM/2000/652 final), though with slight differences, in a form according to which article 3 would have read:

> "This Directive shall apply to *all persons in both the public and private sectors, including public authorities, with regard to*:
>
> (a) conditions for access to employment, self-employment and occupation, *unpaid or voluntary work* including selection criteria and recruitment conditions, whatever the sector or branch of activity and at all levels of the professional hierarchy, including promotion;
>
> (b) access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, *including practical work experience*;" (added words italicised)

In an Explanatory Memorandum, the Commission described such amendments as involving:

> "Clarification of the material scope of the proposal, indicating that it covers both the public and private sectors, including public authorities. It is also stated that the proposal also applies to unpaid or voluntary work and practical training ….".

41. In the event, however, the Council, while substantially accepting (with a qualification and some verbal reformulation) the amendment to the opening words and while accepting the addition to article 3(1)(b), notably did not accept the addition to cover "unpaid or voluntary work". The Equality and Human Rights

Commission suggests that was because that addition was a mere unnecessary "clarification". That is a misreading of the Commission's Explanatory Memorandum, where "clarification" is a word used only in relation to the proposed amendment of the opening words of article 3. Further, it is not credible to suggest that the reason for the Council's failure to adopt the one proposed alteration in this area which it did not adopt is that it regarded the addition of the words "unpaid or voluntary work" as unnecessary and intended that, without them, the Directive would cover voluntary activity. The appellant's and the Equality and Human Rights Commission's current case thus runs contrary to a deliberate choice made by the relevant European legislator.

42. Seventhly, and linking with the sixth point, the Commission has kept the implementation in national legal systems of the Framework Directive under review, but never suggested that the United Kingdom or any Member State has failed properly to implement this by failing to include voluntary activity. As regards the United Kingdom, the only points identified in the Commission's reasoned opinion of 20 November 2009 (IP/09/1778) relate to the absences of any clear ban on "instruction to discriminate" and of a clear appeals procedure in the case of disabled people and to the breadth of exceptions to the principle of non-discrimination on the basis of sexual orientation for religious employers. The general significance of volunteering is however a matter of which any European institution must be well aware. The years 2001 and 2011 were International Years of Volunteers; the Opinion of the Economic and Social Committee on *Hospice work — an example of voluntary activities in Europe* (2002/C 125/07) contained extensive general references to voluntary work, described as a major force in shaping social solidarity and participative democracy; the same Committee's Opinion on the *European Year of Volunteering 2011* (2010/C 128/150) suggested (para 4.1.1) a need for a "legal framework …. to secure the infrastructure required for voluntary work at local, regional, national and European level and to make it easier for people to get involved", without any suggestion that such a framework already existed in the field of discrimination; and in para 4.5 it added that "The European Year of Volunteering 2011 should not blur the difference between paid employment and unpaid voluntary activity, but rather seek to show how both are mutually reinforcing."

43. Eighthly, as I have indicated, neither the appellant nor the Equality and Human Rights Commission suggests that all voluntary activity is covered by the Framework Directive. A multi-factorial test would lead to uncertainty and disputes, and, had some but not all voluntary activity been intended to be covered, the Directive would surely have given some indication as to where the line should be drawn. The bare term "occupation" was not only used for a different purpose, as I have indicated; it would have been inadequate for the purpose of distinguishing between voluntary activities within and outside the grasp of the Directive.

44. Finally, I must address a submission made by the Human Rights Commission praying in aid the Court of Justice's bold interpretative approach to Regulation (EC) No 261/2004 of 11 February 2004 in *Sturgeon v Condor Flugdienst GmbH* (Joined cases C-402/07 and C-432/07) [2009] ECR I-10923 and in *Nelson v Deutsche Lufthansa AG* and *TUI Travel plc v Civil Aviation Authority* (Joined cases C-581/10 and C-629/10) (unreported) 23 October 2012. Those cases concerned the position of air passengers whose flights were delayed for long periods, rather than cancelled. The Regulation provided in terms for financial compensation only in relation to cancellation (and then only if any re-routing offered involved a delayed arrival at destination of more than two to four hours, depending on the length of scheduled flight): see article 5 read with article 7. Delay in terms only entitled passengers to certain assistance: see article 6 read with articles 8 and 9. Notwithstanding this, the Court of Justice said that passengers subject to delays involving arrival at destination more than two to four hours late, depending on the length of the scheduled flight, were in a comparable position to passengers whose flights were cancelled, and must be given equivalent financial compensation. It did this however with reference to the Regulation's explanatory recitals and as a matter of interpretation, and on the express basis that such an interpretation "does not disregard the EU legislature's intentions": *Nelson* and *Tui*, para 65. In the present case, those in remunerated work and volunteers are not in comparable positions, and it would contradict the European Union legislature's intention to treat the Directive as intended to cover volunteers.

45. All these considerations, and particularly the first seven, combine in my opinion to lead to a conclusion that the Framework Directive does not cover voluntary activity.

*A reference to the Court of Justice?*

46. The appellant and the Equality and Human Rights Commission submit that the correctness of any such conclusion is at the least open to reasonable doubt, and that it is incumbent on this Court, as the final United Kingdom court, to make a reference to the Court of Justice for a ruling, pursuant to the principles stated in *CILFIT Srl v Ministry of Health* (Case 283/81) [1982] ECR 3415 and reiterated in *Junk v Kühnel* (Case C-188/03) [2005] ECR I-885. We were reminded that the only relevant exception to making a reference contemplated under these principles was identified in *CILFIT* in these cautionary terms:

> "16 Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the

> courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.
>
> 17 However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.
>
> 18 To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions."

47. The question is however whether there is scope for reasonable doubt, and, when the possibility is suggested that other national courts or tribunals may not find a particular conclusion obvious, the starting point, consistent with the principle of mutual trust between different national jurisdictions which is fundamental in European law, is that other national courts will not entertain unreasonable doubts or arrive at an unreasonable conclusion. Whether a conclusion is open to reasonable doubt must, however, be assessed having regard not only to all relevant characteristic features of European law, but also to the different and equally authoritative language versions in which the relevant measure has been enacted.

48. In my opinion, there is no scope for reasonable doubt about the conclusion that the Framework Directive does not cover voluntary activity. The position having regard to the English language material is clear. None of the other language versions to which the Court was referred throw any doubt on this conclusion. On the contrary, they reinforce it.

49. Reference was made to two recommendations of the French equivalent of the Equality and Human Rights Commission, the Haute Autorité de Lutte contre les Discriminations et pour l'Egalité ("HALDE"). Both were issued by HALDE's president, M Louis Schweitzer. In the first, Ruling 2007/117, HALDE treated the exclusion of eight mothers from taking part in educational and/or school trips because they wore the hijab as covered by the Framework Directive. It based this firstly on article 9(2) of the European Convention on Human Rights but, secondly, also on a statement (in translation) that:

> "…. EC directive 2000/78 covers 'the conditions governing access to employment, non-salaried activities or work'. By means of this expression the Community legislator sought to prohibit any discrimination based on religion or convictions, and in particular with regard to access to unpaid or voluntary activities."

50. In the second, Ruling 2009/24, HALDE addressed the situation of a 41-year old member of the public, who was refused permission to appear as a contestant in a TV singing contest to identify new young talent on the grounds that the competition rules restricted entrants to those under 34. According to the Ruling the French legislator had by means of law no. 2008-496 of 27 May 2008 given effect to the requirement under the Framework Directive to combat discrimination by providing that

> "any discrimination, direct or indirect, based on ... age ….is forbidden …. in the area …. of work, including casual/self-employed or non-salaried work ....".

HALDE, after saying that this law must be interpreted in light of the Framework Directive, continued (in translation):

> "Now, according to the preparatory work [travaux préparatoires], the Community legislator understood the term work ["travail"] in a broad sense, in order to cover salaried activities, non-salaried and casual/self-employed activities and voluntary activities."

51. HALDE's two Rulings are not reasoned beyond this brief explanation. As I have indicated (paras 37 to 41 above), the travaux préparatoires in fact lead to an opposite conclusion to that which HALDE suggested. We were told by Mr Robin Allen QC on behalf of the Equality and Human Rights Commission that HALDE's recommendations that there had been unlawful discrimination were in each case accepted by the relevant Ministers to whom they were addressed. But any steps which may have been taken in that respect, about which we have no information, cannot inform the true meaning of the Directive. HALDE's two Rulings cannot carry any greater weight in the construction of the Directive than the Equality and Human Rights Commission's submissions before us. Both are entitled to serious consideration, but for the reasons given I am not persuaded that either demonstrates any scope for reasonable doubt about the true meaning and effect of the Directive.

52. The appellant also referred to Belgian Laws aimed at combating discrimination, one dated 25 February 2003 (Moniteur belge, 17 March 2003, p 12844) and the other replacing it dated 10 May 2007 (Moniteur belge, 30 May 2007, p 29031). The former was stated to cover:

> "les conditions d'accès au travail salarié, non salarié ou indépendant, y compris les critères de sélection et les conditions de recrutement, quelle que soit la branche d'activité et à tous les niveaux de la hiérarchie professionnelle, y compris en matière de promotion, les conditions d'emploi et de travail, y compris les conditions de licenciement et de rémunération, tant dans le secteur privé que public;
>
> la nomination ou la promotion d'un fonctionnaire ou l'affectation d'un fonctionnaire à un service;
>
> la mention dans un pièce officielle ou dans un procès-verbal; …
>
> l'accès, la participation et tout autre exercice d'une activité économique, sociale, culturelle ou politique accessible au public."

53. The provision relating to access does not on its face cover volunteers. Neither the appellant nor the Equality and Human Rights Commission suggests on the present appeal that voluntary activities are covered by the words in the French version of the Framework Directive "d'accès …. aux activités non salariées ….". However, an informal English translation on the website of the Centre pour l'égalité des Chances et la Lutte contre le Racisme, the Belgian equivalent of the Equality and Human Rights Commission, translates "conditions d'accès au travail salarié, non salarié ou independent" as "conditions for access to gainful, unpaid or self-employment". We were not shown any authority substantiating this translation, but, whatever the position in that regard, it is also clear from the extract above that the law of 2003 goes in some respects wider than the Framework Directive.

54. Despite this, the Belgian law of 2003 attracted some adverse comment from the European Commission and was replaced by the law of 2007 which had the overt aim of both transposing as well as going substantially wider than the Directive in various respects. The relevant Projet de loi of 26 October 2006 (Doc 51 2722/001) stated that Belgium "a affiché de grandes ambitions en matière de lutte contre la discrimination et s'est placée à l'avant-garde des États européens en la matière". Article 5.2 of the 2007 law identifies its scope as being:

> "En ce qui concerne la relation de travail, la présente loi s'applique, entre autres, mais pas exclusivement, aux : 1°conditions pour l'accès à l'emploi, y compris entre autres, mais pas exclusivement : -les offres d'emploi ou les annonces d'emploi et de possibilités de promotion, et ceci indépendamment de la façon dont celles-ci sont publiées ou diffusées; -la fixation et l'application des critères de sélection et des voies de sélection utilisés dans le processus de recrutement; -la fixation et l'application des critères de recrutement utilisés lors du recrutement ou de la nomination; -la fixation et l'application des critères utilisés lors de la promotion; -l'affiliation en tant qu'associé à des sociétés ou associations de professions indépendantes."

Nothing in this text expressly covers voluntary activity, but the Projet de loi stated that:

> "Le champ d'application ne vise pas seulement le travail salarié, mais également le travail indépendant et le bénévolat".

55. The appellant is therefore correct in submitting that, in the context of the law of 2007, the word "travail" appears to have been considered sufficiently broad to apply to volunteers. However, bearing in mind that the Belgian legislation goes substantially wider than the Framework Directive, this sheds no real light on the actual scope of the Framework Directive or on the attitude which a Belgian court, if the point could ever arise before one, would take to this.

56. It was also suggested that the United Kingdom had regarded the scope of the Directive as extending to certain voluntary activities, by virtue of the amendments which were made by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 introduced under the European Communities Act 1972 to cover office-holders generally and practical training. The latter (practical training) is however explained (as the government's explanatory notes at the consultation process explained it: para 128) by article 3(1)(b) of the Directive. But the former (office-holders) does include persons not working for remuneration or under contract, and so goes beyond the scope of the Directive as I have interpreted it. Section 2(2)(b) of the 1972 Act permits provision "for the purpose of dealing with matters arising out of or related to any such obligation or rights [i.e. European Union obligations of the United Kingdom and rights to be enjoyed under or by virtue of the European Union Treaties] …." It is unnecessary to go into the question how far this justifies regulations generally or the present regulation regarding office holders which go beyond the strict scope of European legal requirements. Suffice it to say that it is certainly not unusual for regulations to go beyond such requirements, and that it is in any event clear that no inference can be

drawn that the United Kingdom thought that the Directive applies generally to voluntary activity. The regulations were, on the contrary, accompanied by an explanatory booklet, issued by the Minister for Women, Barbara Roche, stating (para 24) that "Unpaid volunteers will not be covered".

*Conclusions*

57. It follows that I do not regard this as a case in which a reference to the Court of Justice is either required or appropriate, and I would dismiss this appeal from the concurrent decisions below on the ground that, leaving aside the subject matter of guidance, training and work experience covered by article 3(1)(b), article 3 is not directed to voluntary activity.

58. It is in these circumstances unnecessary to go into the interesting questions which would have arisen, had I concluded that article 3(1) did generally cover voluntary activity. Assuming (without expressing any view) that the principle in *Marleasing* would not have assisted the appellant, because of the unequivocal stance taken by Parliament in section 68 of the Disability Discrimination Act 1995, the question would still have arisen whether the principle in *Mangold* might not have been extended to protect the appellant (see para 11 above). That question might well have required to be referred to the Court of Justice. That need does not however, in the event, arise. The appeal falls accordingly to be dismissed as stated in para 57 above.