OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 12 March 2008 [1]

1. Contrary to conventional wisdom, words can hurt. But can they amount to discrimination? That, in essence, is the main question in the present case. The Arbeidshof te Brussel (Belgium) has asked the Court of Justice for a preliminary ruling concerning the interpretation of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. [2] It seeks guidance on a number of issues that have arisen in the context of proceedings between a body for the promotion of equal treatment and an employer who reportedly stated that he would not recruit persons of Moroccan origin.

I — Facts and reference for a preliminary ruling

2. NV Firma Feryn ('Feryn') is a firm specialised in the sale and installation of up-and-over and sectional doors. In early 2005, Feryn was seeking to recruit fitters to install up-and-over doors at its customers' houses. To this end, Feryn placed a large 'vacancies' sign on its premises alongside the main road between Brussels and Antwerp.

3. On 28 April 2005, the newspaper *De Standaard* published an interview with Mr Pascal Feryn, one of the firm's directors, under the heading 'Customers do not want Moroccans'. Mr Feryn was reported to have said that his firm would not recruit persons of Moroccan origin:

'Apart from these Moroccans, no one else has responded to our notice in two weeks … but we aren't looking for Moroccans. Our customers don't want them. They have to install up-and-over doors in private homes, often villas, and those customers don't want them coming into their homes.'

Similar articles appeared in the *Het Nieuwsblad* and *Het Volk* newspapers.

Mr Feryn disputes the account given in the newspapers.

1 — Original language: English.
2 — OJ 2000 L 180, p. 22.

4. On the evening of 28 April 2005, Mr Feryn participated in an interview on Belgian national television, in which he stated:

'[W]e have many of our representatives visiting customers … Everyone is installing alarm systems and these days everyone is obviously very scared. It is not just immigrants who break in. I won't say that, I'm not a racist. Belgians break into people's houses just as much. But people are obviously scared. So people often say: "no immigrants". … I must comply with my customers' requirements. If you say "I want a particular product or I want it like this and like that", and I say "I'm not doing it, I'll send these people", then you say "I don't need that door." Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? I must do it the way the customer wants it done!'

5. The Centrum voor Gelijkheid van Kansen en voor Racismebestrijding (Centre for equal opportunities and opposition to racism; 'the CGKR') is a body for the promotion of equal treatment. The CGKR was established by a Law of 15 February 1993. That law was amended by a Law of 25 February 2003 ('the Law Against Discrimination'). The Law Against Discrimination transposed Directive 2000/43 into Belgian law.

6. On 31 March 2006, after a series of exchanges with Feryn, the CGKR brought proceedings against Feryn before the President of the Arbeidsrechtbank Brussels, claiming, inter alia, that the court should declare that Feryn had infringed the Law Against Discrimination and should order Feryn to end its discriminatory recruitment policy. However, the President of the Arbeidsrechtbank held that the public statements in question did not constitute acts of discrimination; rather, they were merely evidence of potential discrimination, in that they indicated that persons of a certain ethnic origin would not be recruited by Feryn in the event they should decide to apply. The CGKR had neither claimed nor demonstrated that Feryn had ever actually turned down a job application on grounds of the applicant's ethnic origin. For those reasons, the forms of order sought by CGKR were denied by order of 26 June 2006. The CGKR brought an appeal against that order before the Arbeidshof te Brussel, which has made the present reference to the Court of Justice for a preliminary ruling.

7. The Arbeidshof te Brussel asks a number of very precise questions relating to the Directive and to the specific circumstances that are at issue in the main proceedings.[3] These questions essentially concern the concept of direct discriminationb (first and second questions), the burden of proof (third, fourth and fifth questions) and the issue of appropriate remedies (sixth question). I shall address these questions bearing in mind that, under Article 234 EC, the Court has no power to apply rules of Community law

3 — OJ 2007 C 82, p. 21.

to a particular case, but may only provide a national court with information on the interpretation of Community law which may be useful to it in assessing the effects of a provision of national law.

II — Assessment

The notion of direct discrimination

8. The aim of the Directive is 'to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment'.[4] The Directive applies in both the public and private sectors, in relation to, *inter alia*, 'conditions for access to employment … including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy …'.[5]

According to Aricle 2(1) of the Directive 'the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin'. Article 2(2)(a) provides that '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 grounds of racial or ethnic origin'.

9. The first question that falls to be decided by this Court is essentially the following: does it constitute direct discrimination for the purposes of the Directive if an employer publicly states, in the context of a recruitment drive, that applications from persons of a certain ethnic origin will be turned down?

10. The national court that dealt with the case at first instance took the view that, so long as an employer has not acted upon his own discriminatory statements, the discrimination is only hypothetical and does not come within the ambit of the Directive. The United Kingdom and Ireland have made submissions to the same effect. They argue that, in the absence of an identifiable complainant who has become the victim of discrimination, the Directive does not apply. As a result, bodies such as the CGKR cannot, in such circumstances, bring legal proceedings before the national courts alleging direct discrimination within the meaning of the Directive.

11. The CGKR takes the opposite view and argues that the prohibition on direct discrimination concerns the recruitment process as

4 — Article 1 of the Directive.

5 — Article 3(1)(a) of the Directive.

well as the eventual recruitment decision. According to the CGKR, the substantive scope of the Directive has to be determined independently from the question of who is entitled to bring legal action. In other words, the issue of the locus standi of the CGKR has no bearing on the question whether direct discrimination has occurred. The Commission and the Belgian Government share the view of the CGKR.

12. There appears to be a degree of confusion as to the connection between the concept of direct discrimination and the question whether a public interest body is entitled to seek legal redress where the principle of equal treatment has been infringed. As the United Kingdom and Ireland have emphasised, the Directive was not intended to make it possible, under the laws of the Member States, for public interest bodies to bring an action in the nature of an *actio popularis*. They refer, in that regard, to Article 7 of the Directive. That provision requires Member States to ensure that judicial procedures are available 'to all persons who consider *themselves* wronged by failure to apply the principle of equal treatment to them' [6] and to public interest bodies acting '*on behalf or in support of the complainant*'. [7]

13. However, it does not follow from that provision that Member States are precluded from granting additional possibilities for legal enforcement or redress. On the contrary, the Directive expressly provides that 'Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive' [8] and that '[t]he implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive'. [9] Thus, in principle, it is a matter of domestic law whether or not an equal treatment body such as the CGKR may bring legal action if it is not acting on behalf of a specific complainant. The Directive allows Member States to choose different methods of enforcement, provided that appropriate judicial or administrative procedures are available to persons who claim to have been discriminated against, as well as to public interest bodies that represent victim-complainants. In this respect, I agree with the United Kingdom and Ireland that the Directive does not *require* Member States to ensure that public interest bodies are recognised as having locus standi to bring judicial proceedings in the absence of a complainant who claims to have been the victim of discrimination.

14. However, that does not mean that the scope of the Directive is limited to cases in which there are identifiable victim-complainants. The forms of discrimination covered by the Directive must be inferred, above all, from its wording and its purpose, not from the remedies which the Member States are, as a minimum, required to ensure.

6 — Article 7(1) of the Directive (emphasis added).
7 — Article 7(2) of the Directive (emphasis added).
8 — Article 6(1) of the Directive.
9 — Article 6(2) of the Directive.

The range of discriminatory behaviour prohibited by the Directive is one thing; the range of enforcement mechanisms and remedies which the Directive specifically imposes is quite another. Indeed, the Directive must be understood in the framework of a wider policy 'to foster conditions for a socially inclusive labour market' [10] and 'to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin'. [11] Furthermore, as I have argued in my recent Opinion in *Coleman*, when a directive is adopted on the basis of Article 13 EC, it must be interpreted in the light of the broader values underlying that provision. [12] Admittedly, the Directive lays down minimum measures, but that is no reason to construe its scope more narrowly than a reading in the light of those values would warrant. A minimum standard of protection is not the same as a *minimal* standard of protection. Community rules for protection against discrimination may leave a margin for the Member States to ensure even greater protection, but from that we cannot conclude that the level of protection offered by the Community rules is the lowest conceivable. [13]

15. Against this background, it seems to me that an interpretation that would limit the scope of the Directive to cases of identifiable complainants who have applied for a particular job would risk undermining the effectiveness of the principle of equal treatment in the employment sector. In any recruitment process, the greatest 'selection' takes place between those who apply, and those who do not. Nobody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin, they stand no chance of being hired. Therefore, a public statement from an employer that persons of a certain racial or ethnic origin need not apply has an effect that is anything but hypothetical. To ignore that as an act of discrimination would be to ignore the social reality that such statements are bound to have a humiliating and demoralising impact on persons of that origin who want to participate in the labour market and, in particular, on those who would have been interested in working for the employer at issue.

16. Yet, in cases such as these it may be very difficult to identify individual victims, since the persons affected may not even apply for a position with that employer in the first place. At the hearing, the United Kingdom and Ireland conceded that the notion of victim should cover persons who would be interested in applying and are qualified for the job. However, that hardly solves the problem, given the difficulties in identifying such persons individually and the low incentive for them to come forward. By publicly stating his intention not to hire persons of a

10 — 8th recital in the preamble to the Directive.

11 — 12th recital in the preamble to the Directive.

12 — See my Opinion in Case C-303/06 *Coleman*, currently pending before this Court, point 7 et seq. That case concerns Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

13 — Ibid., at paragraph 24.

certain racial or ethnic origin, the employer is, in fact, excluding those persons from the application process and from his workfloor. He is not merely talking about discriminating, he *is* discriminating. He is not simply uttering words, he is performing a 'speech act'. [14] The announcement that persons of a certain racial or ethnic origin are unwelcome as applicants for a job is thus itself a form of discrimination.

17. It would lead to awkward results if discrimination of this type were for some reason to be excluded altogether from the scope of the Directive, because by implication Member States would be permitted, under the Directive, to allow employers to differentiate very effectively between candidates on grounds of racial or ethnic origin, simply by publicising the discriminatory character of their recruitment policy as overtly as possible beforehand. Thus, the most blatant strategy of employment discrimination might also turn out to be the most 'rewarding'. That would clearly undermine — rather than promote — conditions for a socially inclusive labour market. In short, it would defeat the very purpose of the Directive if public statements made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin would be turned down, were held to fall outside the concept of direct discrimination.

18. The contention made by Mr Feryn that customers would be unfavourably disposed towards employees of a certain ethnic origin is wholly irrelevant to the question whether the Directive applies. Even if that contention were true, it would only illustrate that 'markets will not cure discrimination' [15] and that regulatory intervention is essential. Moreover, the adoption of regulatory measures at Community level helps to solve a collective action problem for employers by preventing the distortion of competition that — precisely because of that market failure — could arise if different standards of protection against discrimination existed at national level.

19. I therefore suggest that the Court give the following answer to the first and second questions referred by the national court: a public statement made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin will be turned down, constitutes direct discrimination within the meaning of Article 2(2)(a) of the Directive.

14 — Searle, J., *Speech Acts*, Cambridge University Press 1969; Austin, J. L., *How to Do Things With Words*, Cambridge (Mass.) 1962.

15 — Sunstein, C., 'Why markets don't stop discrimination', in: *Free markets and social justice*, Oxford University Press, Oxford, 1997, p. 165.

The burden of proof

20. The referring court also seeks guidance as regards the burden of proof. These questions are relevant to the CGKR's allegation before the national court that Feryn continues to apply discriminatory recruitment practices.

21. The relevant provision is Article 8 of the Directive. It follows from this provision that, when facts have been established from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of the principle of equal treatment. Thus, where there is a prima facie case of discrimination, it is for the employer to prove that that principle has not been infringed.

22. This reversal of the burden of proof is consistent with Community legislation and with the Court's case-law in the field of discrimination based on sex. As the Court has stated: '[w]here there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay [as between male and female workers]. Workers would be deprived of the means of securing compliance with the principle of equal pay before national courts if evidence establishing a prima facie case of discrimination did not have the effect of imposing on the employer the onus of proving that the difference in pay is not in fact discriminatory.' [16] In this respect, what is true for cases of discrimination based on sex is true for cases of discrimination based on ethnic origin. Indeed, Article 8 of the Directive echoes word for word the text of Article 4 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. [17]

23. It is the task of the national court to apply these rules concerning the burden of proof to the specific circumstances of the case. None the less, as the Commission correctly points out, in circumstances where it is established that an employer has made the kind of public statements about its own recruitment policy that are at issue in the main proceedings, and where, moreover, the actual recruitment practice applied by the employer remains opaque and no persons with the ethnic background in question have been recruited, there will be a presumption of discrimination within the meaning of Article 8 of the Directive. It falls to the employer to rebut that presumption.

24. As regards the matter of how the national court should appraise the evidence in rebuttal submitted by the employer, it must be held that the national court should apply the relevant national procedural rules, provided, first, that such rules are not less favourable than those governing similar

16 — Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 53. See also Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 74.

17 — OJ 1998 L 14, p. 6, amended by Council Directive 98/52/EC of 13 July 1998 (OJ 1998 L 205, p. 66). See also Article 10(1) of Directive 2000/78.

domestic actions (principle of equivalence) and, secondly, that they do not, in practice, render the exercise of rights conferred by Community law impossible or excessively difficult (principle of effectiveness). [18]

25. I accordingly propose that the Court give the following answer to the third, fourth and fifth questions referred by the national court: once a prima facie case of discrimination based on racial or ethnic origin has been established, it is for the respondent to prove that the principle of equal treatment has not been infringed.

Appropriate remedies

26. Finally, the national court asks about appropriate remedies in cases where discrimination based on racial or ethnic origin has been established. More specifically, the national court asks whether a judgment establishing that discrimination took place would constitute an appropriate remedy or whether, in circumstances such as those of the present case, the national court should order the employer to put an end to its discriminatory recruitment policy.

27. On the issue of sanctions, Article 15 of the Directive provides that 'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive …' Moreover, as the Court held in *Von Colson and Kamann*, national courts have a duty to take all appropriate measures to ensure fulfilment of the Member States' obligation to achieve the result envisaged by the Directive. [19]

28. It is for the referring court to determine, in accordance with the relevant rules of domestic law, which remedy would be appropriate in the circumstances of the present case. However, in the main, purely token sanctions are not sufficiently dissuasive to enforce the prohibition of discrimination. [20] Therefore, it would seem that a court order prohibiting such behaviour would constitute a more appropriate remedy.

29. In sum, if the national court finds that there has been a breach of the principle of equal treatment, it must grant remedies that are effective, proportionate and dissuasive.

18 — See, to the same effect: Case 33/76 *Rewe* [1976] ECR 1989; Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen* [1995] ECR I-4705, paragraph 17, and Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others* [2007] ECR I-4233, paragraph 28.

19 — Case 14/83 [1984] ECR 1891, paragraph 26. See also Case 79/83 *Harz* [1984] ECR 1921, paragraph 26.

20 — See, by analogy, *Von Colson and Kamann*, paragraphs 23 and 24.

III — Conclusion

30. For the reasons given above, I am of the opinion that the questions referred by the Arbeidshof te Brussel should be answered as follows:

(1) A public statement made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin will be turned down, constitutes direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

(2) Once a prima facie case of discrimination based on racial or ethnic origin has been established, it is for the respondent to prove that the principle of equal treatment has not been infringed.

(3) Where a national court finds that there has been a breach of the principle of equal treatment, it must grant remedies that are effective, proportionate and dissuasive.