The Fragility of Proportionality Review

Egenberger Revisited

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The latest decision in Egenberger illustrates both the importance of the EU framework for protecting against discrimination on the grounds of religion and belief as a mechanism for protecting religious freedom, and at the same time its fragility. Since the CJEU decision, two German courts have taken turns at assessing the proportionality of the Church's refusal to employ Ms Egenberger, with different results: one ruled that the Church should have employed her, the second, and latest, ruled that it was entitled not to. The fact that two courts could consider the same facts and reach opposite conclusions without either seeming to have misapplied the law shows how flexible the law can be. This flexibility is, of course, a great strength, allowing decisions of nuance and fact sensitivity. But it is also a great weakness, demonstrating the fragility of the protection against discrimination on grounds of religion and belief in EU law.

The autonomy to decide and proportionality

The original decision in Egenberger involved a church looking to employ a member of the protestant religion to write a human rights report and undertake associated tasks. Vera Egenberger was not appointed to the role and claimed that she had been discriminated against on grounds of religion. The relevant German equality law (AGG) did not directly match Directive 2000/78. Under Article 4(2) of the Directive, employers may impose occupational requirements of religious loyalty on their staff where legitimate and justified, having regard to the organisation's ethos. In contrast, under the AGG, the employer had autonomy to decide whether loyalty was needed "in accordance with their self-perception", giving total freedom to religious employers to employ in accordance with their religious rules. The question for the CJEU was whether the self-determination test in the AGG was compatible with Article 4(2).

The case effectively sets two significant interests against each other: the right of religious organisations to religious autonomy versus the right of individuals to equality and non-discrimination on grounds of religion. In common with other situations in which fundamental rights conflict, the CJEU's response was to undertake a balancing exercise, in which the competing rights and interests were weighed against each other. Significantly, in confirming the need to undertake a balancing exercise, the Court did not only apply the wording of Article 4(2) but also relied on general principles of Community law to rule that any requirement should be subject to the test of proportionality. It was clear that the CJEU was recognizing and respecting the legal obligations in EU law to uphold religious autonomy, but also firm that this had to be held in balance with the principle of equality.

The strengths and weaknesses

The original CJEU decision has been noted as a positive step towards upholding the EU's equality-agenda. From a reading of the CJEU decision, one might well have predicted that, when the case returned to the domestic court, the outcome would be a ruling in favour of Egenberger: the role of report writer did not appear to have sufficient link to church doctrine for a requirement to be a member of the protestant denomination to be proportionate. And indeed, this was the decision of the Federal Labour Court when it heard the case again.

However, while this outcome might have been expected, it is equally clear that the outcome was not inevitable. The decision of the CJEU merely required that the need for occupational requirements had to be

subject to external review. Hence, it did not mandate any particular outcome of that review. As a result, the outcome of the FCC judgment is also consistent with the outcome of the CJEU decision: Article 4(2) applies and adequate weight must be given to the interest in religious autonomy in the proportionality review. The decision provides a clear example of the strength and weakness of the proportionality approach as a mechanism for protecting equality.

The strength of proportionality review

The concept of proportionality is firmly embedded as a principle of EU law. It provides a clear language in which to advocate for the protection of rights, and allows for a fact-sensitive, nuanced assessment of a wide range of contextual factors. In the context of religious freedom and employment in religious organisations, proportionality can ensure that religious autonomy is not given automatic priority but is counterbalanced with the right to non-discrimination and equality on grounds of religion.

Proportionality provides a mechanism by which one can challenge whether the result is correct, particularly if an important element is left out of the equation. For example, as the FCC noted in Egenberger, the fact that the role involved not only producing the report but also representing the employer when disseminating and discussing the report had not been treated as significant in earlier decisions in the case. Leaving the representational role of the report writer out of the balance could affect the outcome of the balancing process as more weight would be given to the autonomy interests of the organisation if the job had a religious function.

The ability of proportionality review to take into account both case facts and wider context, including the national context, means that it is rightly the standard mechanism for reconciling competing interests in EU law, and unsurprisingly read into Article 4(2) by the CJEU. However, as seen in the most recent FCC decision, this very flexibility is also its greatest weakness.

The weakness of proportionality review

Although adopted in EU and human rights law as the means of resolving conflicts between rights, the proportionality approach is of course highly problematic. Proportionality review can result in inconsistency, uncertainty, and false objectivity. The use of mathematical terminology suggests that the balancing is objective, but inevitably subjective judgments are made as to the relative importance of the different interests. Effectively, unless one or other of the interests is declared trumps, the metaphorical balancing can continue ad infinitem, with no clear outcome being inevitable. The result is huge uncertainty for the parties, as illustrated in the Egenberger story where two courts followed the same set of rules, but reached different conclusions.

Decisions on proportionality depend not only on whether the right factors were put into the balance at all, but also the relative metaphorical weight of those factors. Again, this is illustrated clearly in Egenberger: both courts considered religious autonomy and equality, but the FCC gave greater weight to religious autonomy compared to the Federal Labour Court. Indeed, it is arguable that before the FCC, the notion of religious autonomy was overvalued, with its significant focus on the self-determination of the religious organisation.

Overvaluing religious autonomy

Religion and belief include both individual and collective elements, and so for religious autonomy to be protected adequately, there clearly needs to be a collective or corporate dimension to the right. Yet the theoretical basis for that collective dimension is contested. On one view (the soft view), collective rights gain their validity and value from the individuals who make up the collective, as they maximise their ability to act on their religious choices. A second, stronger, collective religious autonomy claim can be made which encompasses an independent interest in collective autonomy which amounts to more than the sum of the individual autonomy interests of a religious community. This strong version of religious autonomy advocates not only for autonomy over doctrine, but

also self-determination with regard to the internal governance of the organisation.

This strong form of religious autonomy is threatened by the equality-agenda, as religious groups' freedom to organise their internal affairs is restricted when they are required to comply with equality law in relation to those they employ. The decision of the FCC in Egenberger reflects this stronger form of autonomy, with the considerable weight it afforded to the autonomy and self-determination of the Church.

However, such an approach to religious autonomy remains hard to justify. It is not clear whether the collective interests have a separate independent existence, nor whether group rights should be protected in the absence of individual members supporting the views of the church leadership. For example, it is unclear whether ordinary members of the church in Germany would support the need for all Church employees, including report writers, to be Church members; and if many of them would not, why this would be required in the name of "religious autonomy".

The "soft" view is easier to justify, as it is based on the aggregate interests of the church membership, and it is also sufficient to ensure that religious organisations' interests are protected when balanced against equality. Indeed, it is arguable that it is easier to undertake such a balancing exercise when both interests are understood as aspects of the same underpinning principle of individual dignity and autonomy, for then the competing interests are no longer entirely incommensurable. They are potentially easier to weigh against each other as they share a common denominator of individual dignity and autonomy. With such an approach, religious autonomy is taken into account, but equality is less likely to be outweighed.

Alternative approaches

The use of proportionality to determine the rights of religious organisations is clearly imperfect. Its flexibility allows for fact-sensitive and nuanced review, but at the same time leaves courts and parties uncertain not only as to which facts should be taken into account but also unclear about the relative weight of their fundamental rights. As a result, the protection of equality remains in a fragile state.

Although far from perfect, it is unclear that any alternative would lead to an improvement in the protection for equality. The alternative to undertaking a balancing exercise is that a prior decision would have to be taken as to which of the incommensurable interests of autonomy and equality should prevail. If equality, this could severely limit the scope for religious freedom. To take an extreme example, it would mean that equality law could forbid the Catholic Church to require that its priests be male Catholics. If autonomy were to be given precedence, it would enable religious organisations to reserve large numbers of jobs for religious adherents, regardless of the nature of the job. Clearly legal systems that recognise both the right to religious freedom and the right to non-discrimination have to accept some form of balance, albeit imperfect.

Reflections

In the case of Egenberger, we see two courts reach two different decisions on one set of facts. One court gave significant weight to the equality rights of the report author; the other gave heavy weight to church autonomy, recognising it as a prevailing right which tipped the balance firmly in favour of the Church employer. Thus, from an equality-perspective, the outcome is disappointing. It demonstrates the fragility of the proportionality principle, providing a prime example of its potential to mean all things to all people, or at least different things to different people.

Nonetheless, the case also demonstrates the impossibility of any other approach. While the approach does not mandate any particular answer, it does make absolutely clear that there has to be a process of review, and that all elements of any case have to have a chance to be put in the balance. The approach also provides the language and process by which reasoned debate about which elements should be weighed in the balance can take place, including debate over the theoretical underpinnings of religious autonomy itself.

The alternative to the approach in Egenberger, for all its imperfections in terms of certainty and clarity,

as well as disappointment from an equality-perspective, would be for one interest to prevail in all cases, to the exclusion of the other. Where both the right to religious freedom and the right to equality have standing as international human rights, that conclusion is clearly unacceptable. While the decision of the FCC provides an excellent illustration of its fragility, a balancing approach remains the only realistic option for courts when dealing with an issue which is not only deeply contested, but which is also a key aspect of national identity in many EU Member States.

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