"Not disabled enough": how European Courts filter non-discrimination claims through a narrow view of disability[1]

« Pas suffisamment handicapé » : comment les cours européennes filtrent les actions en discrimination par une appréhension étroite de la notion de handicap

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Abstract

By adopting a narrow definition of disability courts can effectively filter out non-discrimination claims by finding that the alleged victim is not entitled to protection under the law. In such cases the focus is on the characteristics of the applicant, rather than on the question of whether discrimination or adverse treatment has occurred. This paper will explore how European courts have used this approach to limit the protection provided from disability discrimination. The paper begins by discussing the asymmetrical nature of disability non-discrimination law, before proceeding to an analysis of case law in which courts have applied narrow interpretations of the concept of disability and thereby excluded applicants from the protection of the law. The paper then reflects on the model of disability which underlies such decisions, making a comparison between the minor-

Résumé

En adoptant une définition étroite de la notion de handicap, les juridictions peuvent réellement filtrer les actions en discrimination, en concluant que la victime alléguée ne rentre pas dans le champ de la protection offerte par le droit. Dans de tels cas, l'accent est mis sur les caractéristiques du requérant, plutôt que sur la question de savoir si une discrimination ou un traitement défavorable s'est produit. Cet article examine comment les juges européens ont utilisé cette approche pour restreindre la protection prévue contre la discrimination en raison du handicap. Il débute par une discussion de la nature asymétrique du droit de la non-discrimination en matière de handicap, avant de procéder à une analyse de la jurisprudence dans laquelle les tribunaux ont interprété étroitement la notion de handicap, excluant ainsi les requérants de la protection juridique. Une réflexion est ensuite livrée sur le modèle du handicap

[1] A first draft of this paper was presented at the Third Annual International Conference of the Berkeley Comparative Antidiscrimination Law Study Group, Global Challenges and New Perspectives on Equality Law, IAP Human Rights Integration Project, 5-6 May 2014, co-organised by Professors Emmanuelle Bribosia and Isabelle Rorive, Institute for European Studies and Perelman Center for Legal Philosophy, Université libre de Bruxelles (ULB). I am grateful to the participants at the conference for their feedback on the paper, to an anonymous peer reviewer and, in particular, to Professor Anna Lawson of Leeds University for her helpful comments. I am also grateful to Professor Emmanuelle Bribosia for translating the abstract of the article into French. This article was completed in early July 2014, and updated in December 2014 to take account of the CJEU judgment in case C-354/13 *FOA acting on behalf of Karsten Kaltoft v. KL*, and does not take account of developments after that date.

ity group model and the universalist model. Lastly the paper reflects on whether alternative approaches to the interpretation and application of disability non-discrimination law may allow for a wider recognition of the processes which underlie disability discrimination and a refocusing on the alleged act of discrimination rather than on the characteristics of the alleged victim.

sous-jacent à toutes ces décisions, moyennant une comparaison entre le modèle du groupe minoritaire (minority group model) et le modèle universaliste (universalist model). Il est enfin question de savoir si des approches alternatives à l'interprétation et l'application du droit de la non-discrimination en matière de handicap peuvent permettre une reconnaissance plus large des procédés qui sous-tendent la discrimination en raison du handicap et un recentrage sur l'acte présumé de discrimination plutôt que sur les caractéristiques de la victime alléguée.

I. Introduction

The law provides a number of tools and approaches which can be used to limit claims of, and limit protection from, discrimination. Legislation can provide for exceptions to the general principle of non-discrimination which allow for (adverse) differential treatment in some cases, or it can exclude certain fields (such as goods and services) or grounds (such as trade union affiliation) from the material or personal scope of the law altogether. The area of disability discrimination, perhaps more than any other ground covered by non-discrimination law, provides evidence of another means of limiting protection from discrimination: namely through adopting a limited definition of the protected ground itself. By adopting a narrow definition of disability courts can effectively filter out non-discrimination claims by finding that the alleged victim is not entitled to protection under the law. In such cases the focus is on the characteristics of the applicant, rather than on the question of whether discrimination or adverse treatment has occurred. This paper will explore how European courts (the Court of Justice of the European Union (CJEU) and national courts) have used this approach to limit the protection provided from disability discrimination by the Employment Equality Directive[2] and related national law. A number of different ways in which courts have filtered out claims, by adopting a narrow definition of disability, are identified.

One of the key factors which allows courts to adopt such an approach is that, unlike other forms of EU non-discrimination law, disability non-discrimination law is asymmetrical, meaning that it only protects people from discrimination on the grounds of disability, and not discrimination on the ground that an individual lacks a disability or has no connection to disability. Therefore, if a court finds that

[2] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, (*O.J.* L 303, 2 December 2000, p. 16).

an individual does not have a disability, this can lead to the conclusion that the alleged adverse treatment must have *ipso facto* been based on some other criteria, although this conclusion is not always explicit in the judgment.

In deciding whether an individual has a disability courts, consciously or not, draw on their own perception of what a disability is. The understanding of disability is a topic which has been well explored in the literature,[3] and recent years have seen a paradigm shift in this understanding for the purposes of legislation and policy-making.[4] For many years the understanding of disability was based on the medical or individual model. This model holds that the problems related to disability result from the physical, psychological or intellectual impairment that an individual has, and are largely unconnected to the surrounding environment. In contrast stands the social-contextual model of disability. This is based on a socio-political approach which argues that disability stems primarily from a failure of the social environment to adjust to the needs and aspirations of people with impairments, rather than from the inability of people with impairments to adapt to the environment. The argument here is that it is discrimination, in both the physical and attitudinal environment, prejudice, stigmatisation, segregation and a general history of disadvantage, which we have come to associate with impairment – but which need not be associated with impairment –, which is the major problem. According to this perspective, the difficulties confronting disabled people arise from the disabling environment rather than from the individual's impairment. This model therefore holds that the hostile and inaccessible environment, in all its various forms, disables people, rather than disability being the direct result of a medical condition (or impairment).

This paper begins by discussing the asymmetrical nature of disability non-discrimination law, before proceeding to an analysis of case law in which courts have applied narrow interpretations of the concept of disability and thereby excluded applicants from the protection of the law. The paper then reflects on the model of disability which underlies such decisions, making a comparison between the minority group model and the universalist model. Both models are compatible with the social-contextual model of disability discussed above, but nevertheless sometimes reach different conclusions regarding who is to be regarded as disabled. Lastly the paper reflects on whether alternative approaches to the interpretation and application of disability non-discrimination law may allow for a wider recognition of the processes which underlie disability discrimination and a refocusing on the alleged act of discrimination rather than on the characteristics of the alleged victim. The paper will seek to make comparisons between case law of the CJEU and case law at the national level, and frame that within a discussion of the implications of the UN Convention on the Rights of Persons with Disabilities (CRPD).

[3] For a discussion of the shift in disability theory from the individual or medical model to the social-constructionist model, see T. Shakespeare (ed.), *Disability Rights and Wrongs*, Routledge, 2006.
[4] This paradigm shift is reflected in the UN Convention on the Rights of Persons with Disabilities, which is discussed further in this article.

It therefore takes into account the multi-layered nature of non-discrimination law's legal sources.

II. The asymmetrical nature of disability non-discrimination law

Non-discrimination law is, in general, symmetrical, meaning that it protects from discrimination both the majority or advantaged group, and the minority or disadvantaged group.[5] Consequently, EU gender equality law[6] protects both men and women from discrimination, whilst EU racial equality law[7] protects all individuals from discrimination on the grounds of ethnic origin. In practice, women and ethnic minorities are far more likely to experience discrimination on the grounds of gender or ethnic origin than men or ethnic majorities, but the law also allows for claims by men and ethnic majority groups. As noted above disability non-discrimination law, in contrast, is generally asymmetrical in nature,[8] meaning that it only protects from discrimination persons with disabilities and (possibly) persons who experience discrimination on the ground of disability. Therefore, in order to claim protection from discrimination under the law, an individual must first be perceived as having a disability,[9] or at least as having a connection to a person with a disability, with that connection being the cause of the alleged discrimination. This is a threshold requirement, and individuals who do not meet the required standard are automatically denied protection, irrespective of the nature or cause of the adverse treatment they experienced. Non-disabled people who receive adverse treatment in comparison with a person a disability also have no right, in general, to claim that they have experienced discrimination on the grounds of disability. This asymmetrical nature of disability law is reflected in both the UN Convention on the Rights of Persons with Disabilities[10] and the EU Employment Equality Directive.[11]

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[5] This section is an expanded discussion of a shorter text found in L. Waddington, "Fine-tuning Non-Discrimination Law: Exceptions and Justifications Allowing for Different Treatment on the Ground of Disability", *International Journal of Discrimination and the Law*, n° 1-2, 2015 (forthcoming).

[6] Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (*O.J.* L 204, 26 July 2006, p. 23) and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (*O.J.* L 373, 21 December 2004, p. 37).

[7] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin (*O.J.* L 180, 19 July 2000, p. 22).

[8] One exception to this is Dutch disability non-discrimination law, which protects both persons with disabilities and persons without disabilities from disability-related discrimination.

[9] In some jurisdictions individuals who have been disabled in the past or who are likely to become disabled in the future are also protected from disability discrimination.

[10] See F. Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?", *Human Rights Quarterly*, vol. 30, 2000, p. 494. Article 5(2) of the Convention, on Equality and non-discrimination, requires States Parties to "prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds". Whilst the second requirement is clearly limited to persons with disabilities (as are many other provisions in the CRPD), the Convention does not explicitly say that States Parties should prohibit discrimination on the basis of disability only with regard to people who are disabled.

[11] On the asymmetry of the directive in the context of disability, and particularly in the context of indirect disability discrimination, see L. Waddington, "Implementing the Framework Employment Directive", in A. Lawson and C. Gooding (eds.), *Disability Rights in Europe, From Theory to Practice*, Oxford and Portland, Oregon, Hart Publishing, 2005, p. 107 at pp. 113-117. In general, EU Member States have adopted an asymmetrical approach when transposing the directive.

One can speculate on why disability non-discrimination law, in contrast to all other grounds covered by EU equality law, should provide for this one-sided protection. One possible reason is that the legislator may simply not foresee a situation when a non-disabled person could be discriminated against in comparison with a person with a disability. However, more likely reasons may be the assumption that a person without a disability could not legitimately claim to be in a comparable position with a person with a disability, and the need to protect the various measures which are targeted at people with disabilities[12] from challenges that they discriminate against non-disabled people. However, as noted above, one consequence of applying this asymmetrical approach to disability non-discrimination law is that it can allow for the exclusion of claims by individuals who the courts do not regard as having a disability – in essence, such individuals can be seen as 'not disabled enough' or 'not disabled at all' and can therefore be excluded from the protection of the law. In contrast, an individual claiming protection from discrimination on the grounds of sex or ethnic origin does not first have to establish that they have a sex or ethnic origin – the question is rather whether any adverse treatment they experienced was related to sex or ethnic origin.

III. The filtering of non-discrimination claims through a narrow view of disability – Examples from case law

As noted above, by adopting a narrow view of disability, and classifying a claimant as not having a disability, courts can exclude claimants from the protection of disability non-discrimination law. This was already recognised by Harlan Hahn almost 20 years ago, when he wrote: 'the outcome of cases of alleged discrimination against disabled individuals could be determined by the assumptions that judges make in selecting different definitions of disability. A firm adherence to medical concepts of disability may tend to focus undue emphasis on diagnosed conditions instead of acts of discrimination'.[13] Where a judgment turns on the plaintiff's disabled status, the focus is not on whether discrimination as such has occurred, but on whether the individual has a disability and can claim protection under the law. In this respect Anna Lawson has argued that 'the disability definition requirement risks distracting judicial and other attention from the behaviour of the alleged discriminator and focusing it instead on the functional limitations of the victim'.[14] In spite of, or perhaps because of, the restrictive nature of this approach, it has been argued that narrow interpretations of the concept of disa-

[12] Such as priority and reduced rate parking, reduced fees or charges for various social activities, and priority schemes for employment and training.
[13] H. Hahn, "Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective", *Behavioral Sciences and the Law*, vol. 14, 1996, p. 41 at p. 56. I am grateful to Anna Bruce of Lund University for providing me with copies of relevant papers by Hahn.
[14] A. Lawson, "Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated", *Industrial Law Journal*, vol. 40, 2011, p. 359 at p. 362.

bility in the context of discrimination claims are common across jurisdictions.[15] A comparative analysis of case law in Europe reveals a number of ways in which courts have limited protection in this way. These are examined below.[16]

A. Exclusion of Individuals who have an Illness

The connection between illness and disability is not always clear cut. Long-term and chronic illnesses can lead to significant restrictions, and expose people to the risk of discrimination. In short, one can view such illnesses as leading to disabilities, and therefore a protected ground under non-discrimination law, or as a protected ground from discrimination in themselves. However, in the former situation protection from discrimination can be limited where courts take a narrow view of disability and exclude all forms of illness from falling into this category. This can be illustrated by the decision of the CJEU in *Chacón Navas*.[17] This case concerned an individual who was ill and had not been able to work for some time. She was dismissed after a period of absence and challenged this decision on the grounds that it was incompatible with the Employment Equality Directive. The CJEU was called upon to consider whether someone who was dismissed because she was ill was protected under the Directive.

The CJEU held that there is nothing in the Directive 'to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness'.[18] The Court's approach raised a number of questions, which were only addressed in its later judgment of *HK Danmark* (*Ring and Skouboe Werge)*.[19] Specifically, it was not clear if illness could sometimes be equated with a disability[20] or whether there was a clear distinction between the two categories, with individuals who were ill never being able to qualify as disabled. In the latter case long-term and chronic illness, however defined, would not be included within the concept of disability, and therefore protection from discrimination would not be extended to people who fall into this category. The judgment therefore reveals the potential to exclude individuals from the protection from disability non-discrimination based on a seemingly arbitrary distinction between 'disability' and 'sickness' or illness.

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[15] See V.E. Perju, "Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States", *Cornell International Law Journal*, vol. 44, 2011, p. 101 at p. 109.

[16] For an extensive discussion of why courts adopt narrow interpretations of the concept of disability and, in particular, why courts rely on a medicalised view of disability, rather than a view based on the 'social model', see V.E. Perju, "Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States", *Cornell International Law Journal*, vol. 44, 2011, p. 101 at pp. 139-170.

[17] Case C-13/05 *Chacón Navas v. Eurest Colectividades SA* [2006] *ECR* 1-6467. For further commentary on this case see L. Waddington, "Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006", *Common Market Law Review*, vol. 44, 2007, p. 487. The aforementioned article by V.E. Perju pays particular attention to understanding the reasoning of the CJEU in this case, and why it chose to make a distinction between disability and sickness.

[18] Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, paragraph 46 of judgment.

[19] Joined cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge),* judgment of 11 April 2013.

[20] An approach explicitly favoured by the Court in its later judgment of *Ring and Skouboe Werge*.

B. Exclusion of Individuals who only have a 'mild' Impairment

Where a courts' view of disability assumes a certain minimum degree of impairment or disadvantage, however measured, it may opt to exclude individuals who have only a lesser degree of impairment from protection under the law. This approach to the filtering of claims can be illustrated through cases from Denmark and the United Kingdom.

Two early Danish cases under the Act on Differential Treatment on the Labour Market, which transposed the disability provisions of the Employment Equality Directive, turned on the concept of disability recognised by the Western High Court.[21] The cases concerned claims from women who had, respectively, multiple sclerosis and post-traumatic stress syndrome.[22] Both claimants were employed in 'flex jobs', which meant that they worked reduced hours, account had to be taken of their reduced working capacity and the state subsidised their employment. The Court applied the Act on Differential Treatment and found that, in order to qualify as 'disabled', an individual had to have a 'physical, mental or intellectual impairment, which results in the need for compensation in order for the person in question to be able to function on an equal footing with other citizens in a similar life situation'.[23] The Court found that the applicant with multiple sclerosis had an impairment, but that this did not amount to a disability for the purposes of the relevant statute because it 'only required additional compensation in the form of a further reduction of her working time'.[24] As a result, the applicant was not entitled to claim protection from disability discrimination following her dismissal. A similar finding was reached in the second case. Maria Ventegodt Liisberg has commented on these cases and argued that these judgments :

> required both an impairment and a reduced working capacity, which entailed a far-reaching need for compensation. Interestingly, it was not sufficient to receive substantial compensation in the form of a special employment contract with reduced working hours, special consideration for low productivity, and wage subvention from the State, i.e. 'flexjob'-positions.[25]

Whilst subsequent Danish cases have evidenced a step back from this hardline approach, concerns regarding the correct understanding of the concept of disability, and a required minimum degree of severity, also lay behind the preliminary reference from the Danish Supreme Court in what led to the judgment of the

[21] I draw on M. Ventegodt Liisberg, *Disability and Employment, A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy*, Antwerp, Intersentia, 2011, for information on these cases.
[22] Danish Western High Court, judgment of 11 October 2007, published in UFR2008.306V (multiple sclerosis) and Danish Western High Court, judgment of 11 October 2007, No. B-2722-06, unpublished (post-traumatic stress syndrome).
[23] Quoted in M. Ventegodt Liisberg, *Disability and Employment, A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy*, Antwerp, Intersentia, 2011, at p. 172.
[24] M. Ventegodt Liisberg notes that almost identical reasoning was applied in the second case.
[25] M. Ventegodt Liisberg, *Disability and Employment, A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy*, Antwerp, Intersentia, 2011, at pp. 172-173.

CJEU in joined cases C-335/11 *HK Danmark* (*Ring and Skouboe Werge)*. In that respect one of the preliminary questions referred to the Luxembourg court was:

> Should a permanent reduction in functional capacity which does not entail a need for special aids or the like but means solely or essentially that the person concerned is not able to work full-time be regarded as a disability in the sense in which that term is used in [Directive 2000/78]?[26]

The Court's response to this question is discussed below.

The British case, *Chief Constable of Lothian and Borders Police* v. *Cumming,*[27] also concerned a complainant who was ultimately not regarded as disabled, and therefore unable to rely on protection from disability discrimination. The complainant's application to become a police constable was rejected on the ground that she had a slightly reduced vision in one eye, although this did not require correction through glasses or contact lenses. She claimed that this slight impairment amounted to a disability, since it substantially affected her participation in professional life, as it meant she was prevented from joining the police force. Whilst initially successful before an Employment Tribunal, the Employment Appeals Tribunal found the condition did not amount to a disability under the Disability Discrimination Act, as it did not substantially impact on her ability to carry out normal day to day activities.[28] The Tribunal held 'the status of disability cannot be dependent on the decision of the employer as to how to react to the employee's impairment'.[29]

In all of these cases the claimants had some degree of impairment, albeit a seemingly very mild impairment in the case of *Chief Constable of Lothian and Borders Police* v. *Cumming*, but were not regarded as 'disabled enough' to claim protection under disability non-discrimination law, and their claims were, as a consequence, unsuccessful.

C. Exclusion of individuals who have a 'temporary' disability

Individuals can experience a 'temporary' disability following the onset of illness or injury. Where an individual is expected to recover within a matter of weeks, it may make sense to exclude them from the protection from disability non-discrimination law. Any adverse treatment such individuals experience, such as dismissal, may be better addressed through other legal means. However, individuals can also experience long-term serious conditions which are disabling. Where a court

[26] Joined cases C-335/11 *HK Danmark (Ring and Skouboe Werge),* paragraph 26, question 2.
[27] *Chief Constable of Lothian and Borders Police* v. *Cumming*, Employment Appeal Tribunal, 29 July 2009, UKEATS/0077/08 [2010] IRLR 109.
[28] This was important since the relevant statute stated that 'a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out *normal day to day activities*.' (emphasis added). Section 1 of the Disability Discrimination Act 1995.
[29] Paragraph 36.

only regards individuals with a permanent condition, which is not expected to be 'cured' or 'ameliorated', as having a disability, this will exclude individuals with long-term but potential curable or recoverable conditions from protection.

This issue can be illustrated by a Danish case, *F (HK) v. Danish Crown (DI)*,[30] which concerned a butcher who, following a work-related injury, was absent from work for a period of time and was subsequently only able to work part-time. When it became clear that the butcher could not work full-time in the foreseeable future, she was dismissed. She subsequently claimed that the dismissal was based on her disability. During the court case, a doctor submitted evidence to the effect that, in the long-run, the butcher had a reasonably good prospect of making a full recovery, and the employer therefore argued that she was not disabled, but only had an illness, which was itself the reason for the dismissal. The Danish Western High Court, referring to the preparatory works to the Danish Act on the Prohibition of Discrimination in the Labour Market, held that disability should be understood as a situation where a person has a physical, mental or intellectual impairment which causes a need for compensation in order for the person to be able to function equally well to other individuals in a similar situation. Since the applicant was expected to recover in the long-term the Court found that she did not have a disability and was not protected from discrimination under the relevant act. The Court therefore required that an impairment be permanent in nature for it to be regarded as a disability. Long-term conditions, and conditions where the ultimate prospects of a recovery are uncertain, would therefore be excluded from the concept of disability, and therefore protection from disability discrimination, under this approach.

It is worth noting that, once again, the Danish Supreme Court referred a preliminary question concerning this matter to the CJEU in joined cases C-335/11 *HK Danmark* (*Ring and Skouboe Werge)*:

> Can a condition caused by a medically diagnosed temporary illness be covered by the concept of disability within the meaning of the directive?[31]

The Court's response is discussed further below.

D. Exclusion from protection from employment-related discrimination of individuals who have a disability which does not impact on employment, but which impacts on another area of life

Where non-discrimination law is confined to the field of employment, as EU disability non-discrimination law is at present, this may open the door to courts only allowing protection for individuals who are regarded as having an impairment

[30] *F (HK) v. Danish Crown (DI)*, Western High Court, 20 March 2009, Weekly Law Journal U.2009.1966V.
[31] Joined cases C-335/11 *HK Danmark (Ring and Skouboe Werge)*, paragraph 26, question 1C.

which impacts on employment-related skills, and not to conferring protection on individuals who have an impairment which only impacts on other areas of life. An example of such a case is *Z v. A Government Department and the Board of Management of a Community School*.[32] This case concerned a woman who, as a result of an impairment, was unable to carry and give birth to a child naturally. She arranged for a surrogate mother to carry her child using her own genetic material. Following the birth of her child her employer denied her the right to a paid leave of absence equivalent to maternity or adoption leave, on the grounds that she had neither given birth nor adopted a child and, as a result, no legal entitlement to leave existed. One question that arose was whether this amounted to disability discrimination as prohibited under the Employment Equality Directive.[33]

In responding to this question, both the CJEU and the Advocate General noted that the concept of disability had to be interpreted in line with the UN Convention on the Rights of Persons with Disabilities, and the Court's earlier judgment in *HK Danmark* (*Ring and Skouboe Werge)*, which had similarly drawn on the UN Convention.[34] The Court went on to imply that Z's condition could possibly amount to a disability within the meaning of the UN Convention, stating:

> Having regard to the concept of 'disability'... it is not disputed that such a condition constitutes a limitation which results in particular from physical, mental or psychological impairments, or that it is of a long-term nature. In particular, it cannot be disputed that a woman's inability to bear her own children may be a source of great suffering for her.[35]

This paragraph resonates with many of the elements which determine whether a person has a disability, as established by Article 1 UN CRPD.[36] However, the Court concluded that for a person to be covered by the Employment Equality Directive their disability needed to impact on their ability to participate in professional life. The Court stated:

> ... the concept of 'disability' within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers.[37]

[32] Case C-363/12 *Z v. A Government Department and the Board of Management of a Community School*, judgment of the Court (Grand Chamber), 18 March 2014. The opinion of Advocate General Wahl delivered on 26 September 2013.
[33] Question 3.
[34] Paragraphs 75-76 of judgment and paragraphs 79-81 of opinion.
[35] Paragraph 79 of judgment. This is similar in tone to the finding of the Advocate General who stated: 'a condition such as the one from which Ms. Z suffers may constitute a long-term limitation, which 'results in particular from physical, mental or psychological impairments'. ... Indeed, under the more expansive societal understanding of disability which follows from the UN Convention, it is conceivable that, in certain circumstances, that impairment may hinder a person's full and effective participation in society'. Paragraph 93 of the opinion.
[36] Art. 1 CRPD reads: Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.
[37] Paragraph 80 of judgment.

As a result, and following the advice of the Advocate General, the Court found that 'the inability to have a child by conventional means' did not prevent Z from 'having access to, participating in or advancing in employment' and there was no evidence that Z's condition 'made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity'.[38] The Court therefore concluded that Z's condition 'does not constitute a "disability" within the meaning of Directive 2000/78'.[39]

In short, Z may have had a disability within the meaning of the UN Convention, to which the EU is a party, and there was at least an indirect link between this disability and her request to take paid leave following the birth of her child. Her employer rejected this request, thereby denying her access to an employment-related benefit, which falls within the scope of the directive. Nevertheless, according to the Court, Z was not entitled to claim protection from employment-related discrimination on the grounds that her impairment did not impact in any way on her ability to work. She may have been disabled, but not 'in the right way', and so was therefore excluded from claiming protection from disability discrimination in the context of employment. This judgment focuses very much on the impact of the impairment, rather than reflecting on environmental factors. This is ironic given that the Advocate General began his considerations on this point by noting that disability is 'as much a social construct as a medical fact'[40] and the UN Convention moves away from a 'narrow, individual centred definition' of disability.[41]

E. Exclusion of individuals whose condition is caused partially by an impairment and partially by other factors

Disability is a complex phenomenon caused by an interaction between an impairment and the environment. To add to the complexity, individuals can be exposed to discrimination on the basis of disability or on the basis of disability plus some other characteristic. Where this other characteristic is also a 'protected' ground of discrimination, such as sex or ethnic origin, the law should be capable of addressing the alleged discrimination, either in terms of single ground discrimination e.g. considering the discrimination on the grounds of disability and discrimination on the grounds of sex as two separate entities[42] or, preferably, considering the intersectionality or multiple nature of the discrimination.[43] However, it is possible that individuals may be exposed to discrimination because of a condition which is

[38] Paragraph 81 of judgment.
[39] Paragraph 82 of judgment.
[40] Quoting R.D. Kelemen, *Eurolegalism : The Transformation of Law and regulation in the European Union*, Cambridge Mass., Harvard University Press, 2011, p. 202 in paragraph 85 of opinion.
[41] Paragraph 85 of opinion.
[42] Although it should be recognised that this approach may fail to recognise the extent or nature of the alleged discrimination in its entirety.
[43] However, note that the case of *Z* discussed above could also be regarded as an example of intersectional discrimination, combining gender and disability discrimination, and the CJEU failed to address this completely.

partly related to a disability and partly related to other characteristics or factors which are not protected by non-discrimination law. The situation becomes even more complex when the condition which is alleged to amount to a disability is partly caused by an impairment, and partly reflects other factors, such as life style or personal choice. Where such conditions are not regarded as capable of leading to a disability, the individual will be excluded from the protection of non-discrimination law. The reason why such conditions may not be regarded as a disability is because of a perceived lack of a sufficient link to an impairment.[44]

One such condition may be obesity, which could be the result of an impairment, understood as an underlying medical condition which itself leads to excessive weight gain, or could be caused by life style or personal choices, or could be a combination of these two factors. If courts only regard as disabilities those conditions caused mainly or exclusively by a medically diagnosed impairment, then the cause of the obesity may itself be important for determining whether a person has a disability or not. In the alternative, obesity as such could be regarded as an impairment irrespective of its causes and, in combination with environmental factors, as amounting to a disability. This is an issue which the CJEU considered in *FOA acting on behalf of Karsten Kaltoft* v. *KL* (henceforth *Kaltoft*).[45] The Court held that the concept of 'disability' 'does not depend on the extent to which the person may or may not have contributed to the onset of his disability'.[46] This reflects the Court's ruling in *HK Danmark (Ring and Skouboe Werge)* that it 'would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability'.[47] In *Kaltoft* the Court also held that obesity 'does not in itself constitute a "disability"'.[48] However, applying its earlier judgment in *HK Danmark (Ring and Skouboe Werge)*, the Court found that obesity does constitute a 'disability' for the purposes of the Employment Equality Directive 'where it entail a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.[49] The Court said this would be the case if the obesity hindered participation in professional life 'on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity'.[50] Therefore, according to the Court, the cumulative conditions which need to be met for obesity to be regarded as

[44] A further reason might be a policy choice not to extend protection from disability discrimination to people whose impairment is closely linked to undesirable behaviour, such as alcoholism, or manifests itself in anti-social or criminal behaviour, such as pyromania or pedophilia. I am grateful to Professor Anna Lawson for making this point. See also J.E. Bickenbach, "Minority Rights or Universal Protection", in M. Jones and L.A. Basser Marks (eds), *Disability, Divers-ability and Legal Change*, Leiden, Martinus Nijhoff Publishers, 1999, p. 101 at p. 107 who notes that the ADA prevents "'unworthy' people with disabilities from benefitting from its protection".
[45] Case C-354/13 *FOA, acting on behalf of Karsten Kaltoft* v. *KL*, judgment of 18 December 2014.
[46] Para. 56 of judgment.
[47] C-337/11 *HK Danmark (Ring and Skouboe Werge),* paragraph 40.
[48] Paragraph 58 of judgment.
[49] Ruling, paragraph 2.
[50] Paragraph 60 of judgment.

a 'disability' are: 1. existence of an impairment (other than the obesity itself – although the impairment can be linked to the obesity); 2. which leads to a limitation; and 3. which, in interaction various barriers, hinders the full and effective participation of the person concerned in professional life on an equal basis with others. However, an individuals' own actions, which may have contributed to the obesity and any related impairment, are irrelevant in accessing the existence of a disability.

In short, the view one takes of impairment and the necessary causes of any impairment can influence the determination of who is regarded as disabled. Where a narrow view is taken, conditions which clearly lead to impaired function, such as obesity, but also significantly below or above average height, but which are not linked to a medically identified condition, may not be regarded as a disability, even though an individual may experience significant functional impairment in interaction with environmental barriers. It seems that such individuals might be regarded as 'disabled' under the Court's definition of disability in the *Kaltoft* case, although the exact determination would depend on the meaning attributed to 'impairment', which was not really explored by the Court. Moreover, where the requirement exists that conditions are exclusively linked to a medically identified impairment, and not partly to such an impairment and partly to other factors, such as life style, this will also lead to a restrictive interpretation of the concept of disability. This does not seem to be the stand point of the Court of Justice in *Kaltoft*.

IV. Not just an European experience – the US courts and the definition of disability

It is notable that the experience described above is not unique to Europe. In 2008,[51] in response to the repeated findings of US courts that individuals were not disabled[52] and therefore did not benefit from protection from discrimination

[51] Harlan Hahn, who initially supported using non-discrimination legislation to protect and enhance the position of disabled people, has expressed severe criticism of the judgments of US courts. As early as 2001 he wrote: "In general, appellate judges have relied on a narrow reading of statutory and constitutional provisions to reach decisions unfavourable to disabled Americans in the preponderance of cases" (p. 62). He also noted that "judges [have] decided ... to embrace the traditional notion of disability as a 'functional limitation'" (p. 74). He concludes "Disabled people must not abandon the possibility of achieving progress through litigation; but they also need to explore alternative strategies to attain their objective. Perhaps the most fruitful of these approaches is represented by the concept of empowerment." (p. 78) and argues that "without a massive campaign to re-educate judges and lawyers, the likelihood that the disability movement can achieve significant progress through litigation now appear relatively remote." (p. 64). H. Hahn, "Chapter 6, Adjudication of empowerment: contrasting experiences with a social model of disability", in Len Barton (ed.), *Disability Politics & The Struggle for Change*, London, David Fulton Publishers Ltd, 2001. See also H. Hahn, "Chapter 9, Academic Debates and Political Advocacy: The US Disability Movement", in C. Barnes, L. Barton and M. Oliver (eds.), *Disability Studies Today*, Cambridge and Oxford, Polity, 2002, p. 162 at p. 172.

[52] See S.F. Befort, "Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the 'Regarded As' Prong of the Statutory Definition of Disability", *Utah Law Review*, n° 4, 2010, p. 993, who discusses four decisions of the US Supreme Court which narrowed the protected class of "disabled" employees at pp. 1001-1003. See also V.E. Perju, "Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States", *Cornell International Law Journal*, vol. 44, 2011, p. 101 for a discussion of US case law which adopted a limited view of disability under the ADA.

under the Americans with Disabilities Act (ADA),[53] Congress adopted the ADA Amendments Act (ADAAA) which required the judiciary to interpret the concept of disability so as to cover a broader group of individuals.[54] In doing so they 'dismissed the judiciary's interpretation of disability as an individual's functional incapacity that results from a medical impairment'.[55] Chai Feldblum has argued that US courts used three main methods to limit the interpretation of disability under the ADA: courts required that a plaintiff was substantially limited in the major life activity of working, even when the plaintiff's impairment should have been understood as limiting some activity other than working; courts required that an impairment not simply 'affect' a life activity, but that it had to seriously hamper that life activity; and courts required that, in order to be perceived as having a disability, an individual had to be perceived to be limited in a major life activity other than the activity, e.g. job, for which the individual was excluded by the defendant.[56] The first two trends have also been revealed in the discussion of European case law above, whilst EU law does not explicitly prohibit discrimination based on a perceived disability. Two US cases which typified this narrow approach are *Sutton* v. *United Air Line Inc*.[57] and *Toyota Motor Manufacturing* v. *Williams*.[58] In *Sutton* the Supreme Court held that mitigating devices, such as glasses or medication, should be taken into account in determining whether a person was disabled for the purposes of the ADA,[59] meaning that functional ability with the assistance of any mitigation devices or measures should be considered by courts in assessing whether a person is disabled or not. This meant that the plaintiffs in this case, whose impaired vision was corrected by glasses, were not regarded as disabled. The Court also held that a person is only to be regarded as disabled if the employer perceives the plaintiff as having an impairment which substantially limits a major life activity.[60] In *Williams* the US Supreme Court once again explored the requirement that an individual had to experience a 'substantial limitation' in a 'major life activity' in order to be disabled. The Court held that 'to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of

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[53] See C.R. Feldblum, "Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?", *Berkeley Journal of Employment & Labor Law*, vol. 21, 2000, p. 91 at p. 93. See also section V of Feldblum's article (pp. 139-160).

[54] In fact the ADAAA did not alter the definition of disability found in the ADA, but instead instructed the courts to "construe (the definition of disability) in favor of broad coverage of individuals ..., to the maximum extent permitted by this chapter". ADA Amendments Act of 2008, paragraph 4. Cited in V.E. Perju, "Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States", *Cornell International Law Journal*, vol. 44, 2011, p. 101 at p. 119. See also S.F. Befort, "Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the 'Regarded As' Prong of the Statutory Definition of Disability", *Utah Law Review*, nº 4, 2010, p. 993, for a discussion of the history to the ADAAA and the changes it aimed to bring about.

[55] V.E. Perju, "Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States", *Cornell International Law Journal*, vol. 44, 2011, p. 101 at p. 102.

[56] See C.R. Feldblum, "Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?", *Berkeley Journal of Employment & Labor Law*, vol. 21, 2000, p. 91 at pp. 140-141.

[57] *Sutton v. United Air Line Inc*. 527 US 471 (1999).

[58] *Toyota Motor Manufacturing v. Williams*, 534 US 184, 197 (2002).

[59] *Sutton v. United Air Line Inc*, at 482. As noted in S.F. Befort, "Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the 'Regarded As' Prong of the Statutory Definition of Disability", *Utah Law Review*, no. 4, 2010, p. 993 at p. 994.

[60] *Sutton v. United Air Line Inc,* at 489. As noted in S.F. Befort, "Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the 'Regarded As' Prong of the Statutory Definition of Disability", *Utah Law Review*, no. 4, 2010, p. 993 at p. 994.

central importance to most people's daily lives',[61] and that the plaintiff, who was unable work with her hands and arms when they were extended at shoulder level for long periods, was not disabled, since this was not an important part of most people's daily lives. The Court said its narrow definition was intended to 'create ... demanding standard[s] for qualifying as disabled'.[62]

Vlad Perju has argued that US courts, as well as the CJEU in its *Chacón Navas* judgment, have favoured 'narrow, medicalised approaches to disability',[63] and that this approach allowed them to 'craft manageable standards and filter out what they perceived as abusive claims'.[64] It is submitted that this understanding, namely that disability is a direct result of an impairment which can be medically diagnosed, also lies at the heart of the other judgments discussed above. This approach can be contrasted with a perception of disability which recognises that disability results from an interaction between impairments and socially created barriers which lead to exclusion and disadvantage (a social-contextual model of disability). The risk of equating disability with medically diagnosed impairment was identified by Hahn in the mid-90s when he wrote 'advocates of disability rights still confront the possibility that the interpretation of these statutes [US disability anti-discrimination law LW] might be undermined by definitions and values derived from the earlier understanding of disability as a problem stemming primarily from functional impairments'.[65] The impact of environmental factors, such as an inaccessible environment and prejudice and false assumptions, as well as other attitudinal barriers, in creating disability is not recognised or considered in the judgments discussed above. Adopting this individualised or medical approach has enabled courts to use the concept of disability as a tool to exclude claims which courts do not regard as justified. An alternative approach, which recognises the role which environmental factors play in creating disability, would refocus the view of the causes of disability, and recognise its complexity. Moreover, by regarding impairment, and moreover a specific degree of impairment, as the sole cause of disability, courts have been able to view disability / lack of disability as a binary concept, with individuals falling into one category or another. The consequences of this approach, and an alternative universalist model of disability, are discussed in the next section.

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[61] *Toyota Motor Manufacturing v. Williams*, at 198. Quoted in V.E. Perju, "Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States", *Cornell International Law Journal*, vol. 44, 2011, p. 101 at p. 138.
[62] *Toyota Motor Manufacturing v. Williams*, at 197. Quoted in V.E. Perju, "Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States", *Cornell International Law Journal*, vol. 44, 2011, p. 101 at p. 138.
[63] V.E. Perju, "Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States", *Cornell International Law Journal*, vol. 44, 2011, p. 101 at p. 104.
[64] V.E. Perju, "Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States", *Cornell International Law Journal*, vol. 44, 2011, p. 101 at p. 105.
[65] H. Hahn, "Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective", *Behavioral Sciences and the Law*, vol. 14, 1996, p. 41 at p. 42.

V. Distinguishing the minority group model of disability from the universalist model of disability[66]

It is notable that all of the cases discussed above have proceeded on the assumption that there is a discreet and insular group of people with disabilities, who can be distinguished from all other members of society. The courts have found that the individuals in question fell on the wrong side of this disabled / non-disabled line and consequently did not merit protection from disability discrimination. This reflects a minority group model of disability which adopts a binary view and holds that the population can be divided into disabled and non-disabled people. This view can be contrasted with the universalist model, which recognises that disabilities and abilities exist on a continuum and we are all more or less able at different times, in different contexts and in light of the ongoing ageing process. The universalist model therefore does not divide human beings into two separate groups, consisting of people who are disabled and people who are not disabled respectively, but recognises that everyone can potentially be disabled. A universalist approach to disability would therefore not ask the question whether a person is disabled or not, and, only if the answer is in the affirmative, proceed to an analysis of whether they have been the victim of disability discrimination. Instead, the universalist approach would assume that potentially anyone can be disabled and, it is argued here, by extension potentially anyone can be the victim of discrimination on the basis of disability.

By using the term 'minority group model', I am not seeking simply to refer the Minority Group Model of disability as developed by Harlan Hahn.[67] Rather, I have in mind all models or approaches to disability which assume that there exists a discrete and insular group of persons with disabilities, which can be identified and distinguished from other members of society. In fact, most of the main approaches to disability, including the much heralded social model of disability, are based on this assumption,[68] although the characteristics recognised as

[66] For a somewhat old, but nevertheless still relevant discussion on the minority rights model view of disability in comparison with a universalist approach, see J.E. Bickenbach, "Minority Rights or Universal Protection", in M. Jones and L.A. Basser Marks (eds.), *Disability, Divers-ability and Legal Change*, Leiden, Martinus Nijhoff Publishers, 1999, p. 101. The distinction between the minority and the universalist model is also briefly discussed by R. Kayess and P. French in "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities", *Human Rights Law Review*, vol. 8, nº 1, 2008, p. 1 at pp. 9-11.

[67] See e.g. H. Hahn, "Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective", *Behavioral Sciences and the Law*, vol. 14, 1996, p. 41. Whilst Hahn is a proponent of the Minority Group Model, he has also recognised that the "notion of universalism ... is founded on the fundamentally accurate premise that nearly everybody now has or will experience some form of disability during their lifetimes". He nevertheless rejects the universalist approach to disability on political grounds, arguing that such an definition could "dilute the message of the disability movement" and may result in "additional neglect of the interests and needs of citizens with major disabilities". H. Hahn, "Chapter 6, Adjudication of empowerment: contrasting experiences with a social model of disability", in L. Barton (ed.), *Disability Politics & The Struggle for Change*, London, David Fulton Publishers Ltd., 2001, p. 59 at p. 72.

[68] For a detailed discussion on this point with regard to four approaches to disability: the International Classification of Impairment, Disability and Handicap (ICIDH), the Social Model of Disability, the Minority Group Model of Disability, and the International Classification of Functioning (ICF), see A. Bruce, *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents*, Ph.D. thesis, Lund, Lund University, 2014, Chapters 2-5. Bruce concludes that all but ICF view persons with disabilities as a separate and minority group, with only the ICF adopting a universalist view of disability.

distinguishing individuals as disabled differ according to the approach or model favoured. Whilst some approaches or models focus on the functional impairment of an individual,[69] and this is evidenced in some of the case law discussed above, other approaches, such as the social model[70] and Hahn's Minority Group Model, focus on the role the environment plays in disabling people and, in some cases, self-identification as a person with a disability or some related category such as a disabled person or a person with an impairment. Nevertheless, whilst the dividing line between the disabled and non-disabled population is different for these various approaches, they are all premised on the belief that such a line does exist and it is possible to identify a discrete group of disabled people. As seen in the discussion of case law above, where such an approach is applied to non-discrimination law, it has significant consequences for those people who seek protection from disability discrimination, but who are regarded as falling on the wrong side of the dividing line. Moreover, given that discrimination is itself a form of environmental or societal barrier which disables people, the failure to prohibit disability discrimination with regard to all potential victims can itself lead to the continuance of disabling practices which cannot be challenged through the law.[71]

VI. Alternatives to filtering claims through a narrow view of disability

The judicial approach to adopting a limited concept of disability, which thereby limits legitimate discrimination claims, will now be contrasted with two approaches which, in combination, may allow for a wider recognition of the processes which underlie disability discrimination and a refocusing on the alleged act of discrimination rather than on the alleged victim.

A. Adopting a Broad View of Disability

The cases discussed above were based on a limited view of disability. The claimants were regarded as not being 'disabled enough', and were therefore excluded from the protection of disability non-discrimination law. A first step away from such an approach would simply be to adopt a broad, rather than a narrow, view of disability. In this respect, the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which is now the globally dominant disability human rights instrument, may provide some guidance.[72] The negotiators of the

[69] This approach is reflected in the International Classification of Impairments, Disabilities, and Handicaps (ICIDH) developed by the World Health Organization in 1980.

[70] See e.g. M. Oliver, *The Politics of Disablement*, Oxford, Macmillan Press (1990), M. Oliver, *Understanding Disability*, Oxford, Macmillan Press, 1996 and M. Oliver, "The Social Model of Disability : Thirty Years On", *Disability & Society*, vol. 28, n° 7, 2013, p. 1024.

[71] I am grateful to Professor Anna Lawson for making this point.

[72] For an alternative view of how to adopt a broad view of disability see C.R. Feldblum, "Definition of Disability Under Federal Anti-Discrimination Law : What Happened ? Why ? And What Can We Do About It ?", *Berkeley Journal of Employment & Labor Law*, vol. 21, 2000, p. 91 at pp. 101-102 in which she discusses how Section 504 of the US Rehabilitation Act of 1973 could have simply prohibited discrimination based on a physical or mental impairment,

CRPD deliberately decided not to define the concept of disability,[73] but did include guidance on who should be regarded as a person with a disability. Article 1 of the Convention provides:

> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The intention of the drafters was to throw a wide net and adopt an inclusive approach, as well as to stress the role the environment plays.[74] Moreover, Article 1 provides that persons with disabilities 'include' individuals who meet the stated criteria,[75] allowing for other individuals to be included and regarded as disabled as well, although no guidance is provided here. Anna Bruce has argued that the guidance given in Article 1 could have been even broader by, for example, explicitly recognising that chronic illness can be an impairment category alongside 'physical, mental, intellectual or sensory' impairment, and recognising that conditions and illness, alongside impairment, can lead to a disability.[76] Nevertheless, based on an extensive analysis of Article 1 and the drafting history of the Convention, Anna Bruce concludes that 'the coverage of Article 1 remains deliberately open-ended, leaning towards inclusion rather than exclusion …'.[77] Rosemary Kayess and Phillip French have criticised the way in which the CRPD conflates impairment and disability throughout its text, arguing that 'the CRPD perpetuates, and perhaps now irrevocably entrenches, the contemporary conceptual confusion between impairment and disability'. They conclude that this 'logically means that the human rights protection provided by the CRPD is not triggered by impairment, but disability; that is, protection is post facto – only available to those persons with impairments who are already subject to discrimination and oppression, rather than those persons who may be at risk of it'.[78]

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however mild. She argues that if this were the case, "almost any person would have been able to invoke the protection of the law" because "[m]ost people presumably have some physical or mental impairment, albeit perhaps a minor one" at p. 101.

[73] The negotiators were split on the issue of whether to include a definition of disability or not. Some countries and NGOs argued that it would be impossible to agree on an acceptable definition, any definition would soon become outdated, and a closed definition would necessarily exclude some individuals. On the other hand, others argued that, without a definition, some States would continue to rely on narrow national definitions of disability, thereby excluding large groups of people from the protection of the Convention. See S. Trömel, "A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities", in G. Quinn and L. Waddington (eds), *European Yearbook of Disability Law*, vol. 1, Antwerp, Intersentia, 2009, p. 115 at p. 121.

[74] [74]

[75] See on this S. Trömel, "A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities", in G. Quinn and L. Waddington (eds), *European Yearbook of Disability Law*, vol. 1, Antwerp, Intersentia, 2009, p. 115 at p. 122, who argues that the non-exhaustive approach allows States to use wider definitions.

[76] A. Bruce, *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents*, Ph.D. thesis, Lund, Lund University, 2014, pp. 304-307.

[77] A. Bruce, *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents*, Ph.D. thesis, Lund, Lund University, 2014, p. 315

[78] R. Kayess and P. French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities", *Human Rights Law Review*, vol. 8, nº 1, 2008, p. 1 at p. 21.

In spite of this criticism, the CRPD, and Article 1 in particular, has now set the tone for how disability is defined within the context of EU law and, in particular, EU non-discrimination law. The EU is a party to the Convention, and consequently bound by it to the extent of its competences.[79] Moreover, the Court of Justice is under an obligation to interpret relevant EU law in a manner which is compatible with the Convention.[80] In light of this the Court has adapted its definition of disability for the purposes of the Employment Equality Directive as developed in *Chacón Navas*, and explicitly sought to bring it into line with Article 1 CRPD. As a consequence, in *HK Danmark (Ring and Skouboe Werge)* the Court held that the concept of 'disability' must be understood as:

> a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.[81]

The Court also held that a curable or incurable illness which led to the required degree of limitation on a long-term basis fell within the concept of 'disability' within the meaning of the Directive.[82] It stressed that a disability does 'not necessarily imply complete exclusion from work or professional life'[83] and noted that a 'disability' must be understood as a 'hindrance' to the exercise of professional life, and a person with a disability who was only able to work part-time was capable of being covered by the concept.[84] The Court also held that there was no requirement that an individual require accommodation measures, such as the use of special equipment, in order to be regarded as disabled.[85] It noted that the Directive does provide an obligation to make a reasonable accommodation to disabled individuals, and stated that accommodation measures are 'therefore the consequence, not the constituent element, of the concept of disability'.[86]

This definition and the accompanying guidance does address many of the limitations identified above in the discussion of case law and clarify that such limited views of the concept of disability are not compatible with EU disability non-discrimination law. Illnesses are clearly covered by the definition of disability where they lead to the specified degree of limitation, long-term as well as permanent

[79] See L. Waddington, "The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences", *Maastricht Journal of European and Comparative Law* 2011, p. 431.
[80] See D. Ferri, "The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective", in L. Waddington and G. Quinn, *European Yearbook of Disability Law*, vol. 2, Antwerp, Intersentia, 2010, p. 47 at pp. 66-68 in particular. In brief, and as stated by the Court in joined cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, under Art. 216(2) TFEU international agreements concluded by the EU are part of EU law and are binding on its institutions and prevail over acts of the EU. In addition, given the primacy of international agreements over instruments of EU secondary law, such law must be interpreted in a way which is consistent with international agreements as far as possible.
[81] Paragraph 38 of judgment.
[82] Paragraph 41 of judgment.
[83] Paragraph 43 of judgment.
[84] Paragraph 44 of judgment.
[85] Paragraph 45 of judgment.
[86] Paragraph 46 of judgment.

impairments can lead to a disability, and there is no need for an individual to require a particular form of compensation or reasonable accommodation in order to qualify as disabled. On the whole, the CJEU, under the guidance of the CRPD, has now opted for a fairly broad view of the concept of disability, and this can be expected to influence interpretation and application at the national level.

Nevertheless, as the *Z* and *Kalthof* cases reveal, the judgment in *HK Danmark (Ring and Skouboe Werge)* has not, contrary to what one might has expected,[87] closed the door to limited interpretations of the concept of disability for the purposes of the Employment Equality Directive, and a dialogue between the CJEU and, in particular, Danish courts continues to explore this issue. In *Z* the Court indicated that only individuals who have an impairment which impacts on their ability to participate in professional life will be regarded as disabled for the purposes of the Employment Equality Directive, thereby excluding other disabled individuals who may nevertheless experience employment-related discrimination. This seems to be contrary to the UN Convention, which refers to an impairment which, in interaction with various barriers, hinders participation in *society*. This seems to be one restriction on the concept of disability as understood for the purposes of EU non-discrimination law. However, the Court has made it clear that a chronic illness can, under certain conditions, be regarded as a disability, but has not clarified whether 'conditions', as well as impairments and illnesses, can lead to a disability. Presumably the former term would be capable of embracing obesity, as well as other conditions which are not necessarily directly related to an impairment or illness, but which, in interaction with environmental barriers, nevertheless hinder participation in society and professional life on an equal basis with others. In short, the CJEU has gone some way towards embracing a broad approach to disability, but there remains scope to expand the concept.

B. Focusing on whether the alleged discrimination was on the ground of disability or not, and not whether the plaintiff is disabled or not

The judgments identified above relied on a minority group view of disability and found that the individual claimants did not fall into the category of disabled persons and were therefore not entitled to claim protection from discrimination on the ground of disability. As a result the question of whether or not they had been the victim of discrimination on the ground of disability was not considered at all. However, as illustrated by the *Coleman* case of the European Court of Justice,[88] it is not only people with disabilities who can be the victim of discrimination on the ground of disability.

[87] Based on its reliance on Article 1 CRPD.
[88] Case C-303/06 *S. Coleman v. Attridge Law and Steve Law*, [2008] ECR I-5603.

Coleman concerned the alleged discrimination of a woman, who was the mother of a disabled child, at work. She claimed that she had been discriminated against because she was the primary carer of a disabled child and sought protection under the Employment Equality Directive. The Directive prohibits direct discrimination and harassment 'on ... the grounds' of religion or belief, disability, age or sexual orientation (Article 1). Protection is not explicitly confined to individuals who possess these grounds or characteristics themselves, and Ms. Coleman's lawyers argued that, by virtue of using this language, the Directive prohibited 'associative discrimination' with regard to direct discrimination and harassment, and the relevant British legislation[89] should also be interpreted in this way.

In its judgment the Court began by recalling the purpose of the Directive, which it found to be 'to combat all forms of discrimination on grounds of disability' with regard to employment and occupation.[90] Following its Advocate General, it noted that the 'principle of equal treatment ... applies not to a particular category of person but by reference to the grounds mentioned in Article 1'.[91] In light of this, the Court concluded that, when an employee suffers direct discrimination on the ground of disability, an interpretation of the Directive which limited its application only to people who had a disability themselves 'is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee'.[92] Turning to the matter of harassment by association, the Court applied a similar line of reasoning as with regard to direct discrimination, and concluded its judgment by ruling that the protection from direct discrimination and harassment[93] found in the Employment Equality Directive is not limited to people who are themselves disabled, but also applies when an employer directly discriminates against or harasses an employee, where that discrimination or harassment is based on the disability of the employee's child, whose care is provided primarily by the employee.

In essence, in this judgment, the Court directed attention away from the question of whether the alleged victim of discrimination was a disabled person or not, and focused on the issue of whether the impugned act amounted to discrimination on the ground of disability. Whilst the Court only did this in the specific case of a mother who had been discriminated against because of her link to her disabled child, the approach can be applied in a much broader context. Indeed, such a refocussing may have also been the aim of the ADAAA which sought to ensure 'that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a

[89] The Disability Discrimination Act (Amendment) Regulations 2003, which came into force on 1 October 2004.
[90] Paragraph 38 of judgment.
[91] Paragraph 38 of judgment.
[92] Paragraph 51 of judgment.
[93] The Court was not called upon to consider whether discrimination by association was also prohibited in the context of indirect discrimination in this case.

particular person is a "person with a disability"'.[94] This broad approach could be a step away from the minority group view of disability[95] and towards embracing a universalist view. This view would be universalist not only in that it would recognise that potentially anyone can be disabled, and it makes no sense to attempt to divide the population into two groups of disabled and non-disabled people, but also in the sense that it would recognise that potentially anyone can be the victim of discrimination on the ground of disability, and it also makes no sense to establish a dividing line between those who are subject to disability discrimination and those who are not. In principle, under this broad universalist approach anyone can be the victim of discrimination on the ground of disability, and the actual characteristics of the claimant become irrelevant for determining whether the individual is protected or not. In brief, everyone is protected from discrimination on the ground of disability, and the question is whether such discrimination has actually occurred or not.

In some cases this approach will lead to a very different result from those court judgments which are based on a narrow minority group view of disability. This is particularly so where the claimant does not claim that they currently have a disability which was somehow related to the alleged discrimination. One clear example, as illustrated by *Coleman*, concerns someone who is the victim of discrimination on the grounds that they associate with a second person who does have a disability. Other examples include individuals who are discriminated against on the grounds that they are wrongly assumed to have a disability, individuals who are discriminated against on the grounds that they had a disability in the past, but no longer have that disability, and individuals who are discriminated against on the grounds that they are expected to develop a disability in the future, but do not have one yet.

However, it is far less clear that this approach, focusing on the act of discrimination rather than characteristics of the victim, will lead to a different result when the alleged victim claims that he or she currently has a disability and that this was somehow related to the alleged discrimination. For example, in the case considered above of the individual with slightly impaired vision,[96] there will probably be no practical difference in terms of the final judgment if the focus is on whether the claimant actually has a disability, or whether the impugned act was on the ground of disability. In both instances, the case will turn on the understanding

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[94] 154 CONG.REC. S8347 (daily ed. Sept. 11 2008). Quoted in S.F. Befort, "Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the 'Regarded As' Prong of the Statutory Definition of Disability", *Utah Law Review*, no. 4, 2010, p. 993 at p. 1022.

[95] Such an approach would probably be rejected by Harlan Hahn who has argued that "'the minority group model' was originally conceived both because it comprised the most accurate framework for the study of disability and because it might help the courts comprehend arguments about disability discrimination. But the fact that judges decided instead to embrace the traditional notion of disability as a 'functional limitation' does not comprise an excuse to abandon the paradigm". H. Hahn, "Chapter 6, Adjudication of empowerment: contrasting experiences with a social model of disability", in L. Barton (ed.), *Disability Politics & The Struggle for Change*, London, David Fulton Publishers Ltd, 2001, p. 59 at p. 74.

[96] *Chief Constable of Lothian and Borders Police v. Cumming*, Employment Appeal Tribunal, 29 July 2009, UKEATS/0077/08 [2010] IRLR 109.

of disability – whether it be in terms of the characteristics of the individual or in terms of when adverse treatment is on the grounds of disability or on some other ground. Assuming that treating someone differently on the grounds that they have slightly impaired vision does not amount to disability discrimination, the claim will still not be successful and the subsequent question of whether this treatment was based on a genuine occupational requirement will still not arise. Similar results can be expected in some of the other cases considered above, involving individuals who are not regarded as disabled because their impairment was regarded as temporary or not sufficiently severe / limiting – even if the focus is on the adverse treatment, the final result will not differ if adverse treatment on these grounds is not perceived as discrimination on the ground of disability.

Anna Lawson has recognised the risk of such an approach, and argued that people who are currently disabled could avoid some of these difficulties if they could frame their claims as discrimination on the basis that they were perceived to be disabled. She argues: 'Discrimination by perception ... has the potential to circumvent, at least in direct discrimination cases, the hazards of the definitional gateway through which claimants have previously had to pass'.[97] However, Chai Feldblum, in an analysis of case law under the ADA, has revealed how this approach can also be subject to a limited judicial interpretation. She stated 'In employment cases, courts consistently reasoned that for plaintiffs to be covered under the third prong of the definition [i.e. "regarded as having" a disability LW], they would have to demonstrate that the employer regarded them as being limited in a wide range of jobs, and could not extrapolate such a perception simply from the fact that plaintiffs had been fired from, or not hired for, a particular job'.[98] The ADAA aimed to make changes in this respect and to lower the hurdle for an individual to claim protection from disability discrimination on the ground that they were 'regarded as' disabled.[99]

Moreover, one must consider how to apply such an approach to indirect discrimination, when any adverse treatment is not directly related to disability. The Employment Equality Directive defines indirect discrimination as occurring where 'an apparently neutral provision, criterion or practice would put persons having ... a particular disability ... at a particular disadvantage compared with other persons ...'. The definition seems to provide protection from indirect discrimination only for 'persons having ... a particular disability ...' who are disadvantaged. As a consequence, it seems difficult to argue that an individual who

[97] A. Lawson, "Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated", *Industrial Law Journal*, vol. 40, December 2011, p. 359 at p. 374.
[98] C.R. Feldblum, "Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?", *Berkeley Journal of Employment & Labor Law*, vol. 21, 2000, p. 91 at p. 158. Nevertheless, Feldblum also concludes "a broad interpretation of the third prong does represent the best public policy choice" at p. 160.
[99] S.F. Befort, "Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the 'Regarded As' Prong of the Statutory Definition of Disability", *Utah Law Review*, no. 4, 2010, p. 993, at pp. 1016-1017, who argued that, under the ADAA, "the 'regarded as' prong encompasses any individual who is treated adversely because of an actual or perceived impairment, without regard for whether that impairment poses any functional limitation on the individual's activities" at. pp. 1017-1018, footnotes not included.

is disadvantaged not because they have a disability, but for some other reason, such as their association with a disabled person or having a previous disability, is protected from indirect discrimination under EU law. Nevertheless, it is argued that the prohibition of disability-based indirect discrimination can also be framed from a universalist perspective of disability, albeit not in the case of the Employment Equality Directive as currently worded. If indirect discrimination is understood as 'an apparently neutral provision, criterion or practice which is likely to put at a particular disadvantage a particular group of people on the ground of disability', the requirement that any victims of indirect disability discrimination have to possess a disability no longer exists, and the focus is once again moved to whether the disadvantage is related to disability in some way. However, once again, this would not necessarily imply any advantage for individuals who claim that they currently have a disability, and are indirectly discriminated against for this reason, as long as the courts do not make a link between their situation and disability.

In short, the universalist approach to disability is compatible with non-discrimination law, and would lead to a refocusing of the question courts ask from 'does this person have a disability', to 'was this adverse treatment / discrimination on the grounds of disability'. However, this would not necessarily address the issue of courts limiting protection from discrimination in cases where the alleged victims claims to be a person who currently has a disability and the courts do not accept this because they adopt a narrow view of disability. For this reason, this universalist approach needs to be combined with a broad view of the concept of disability if it is to offer protection to all individuals who could potentially experience discrimination on the ground of disability.

VII. Conclusion

This article has revealed that there is ample scope and precedent for courts to adopt a limited definition of the concept of disability. Since courts generally hold that only individuals with a disability can claim protection from disability based discrimination, such an approach excludes from protection those individuals who are found to be on the wrong side of the disabled / non-disabled dividing line. It is submitted that this approach leads to an unjustified 'filtering' of claims relating to disability discrimination, and this is reinforced by a failure to consider whether discrimination on the grounds of disability has actually occurred. Victims are potentially left without protection or a remedy. The article argues that a dual approach is needed to redress the situation. Firstly, it is necessary for courts to adopt a broad view of the concept of disability. The CJEU, inspired by Article 1 of the CRPD, has gone down this path to some extent in its 2013 ruling in *HK Danmark (Ring and Skouboe Werge)*. However, it is submitted that, as evidenced by is judgment in *Z*, the CJEU is still adopting an unduly restrictive approach. Secondly, courts should adopt a universalist approach to disability, and recog-

nise that potentially anyone can be the victim of discrimination on the grounds of disability. The key question should not be whether the alleged victim has a disability or not, but whether the impugned act amounted to discrimination on the grounds of disability or not. Such an approach can potentially be adopted with regard to direct discrimination, harassment and indirect discrimination although, in the latter case, the wording of the Employment Equality Directive does not presently seem to allow for this. However, whilst there is clear evidence that, under the guidance of the CRPD, the CJEU has moved towards a broader understanding of disability, there is little evidence that, with the exception of 'associative' discrimination, European courts are ready to refocus their judgments away from the question whether the plaintiff has a disability or not, and onto the question whether discrimination on the grounds of disability has occurred.

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