

So, whilst the convention provisions despite being as clear as some of them are, are not directly effective under EU law-  
. There is duty of consistent interpretation. And that means that whenever there is some room for interpretation, in respect of secondary EU law, interpretation should be given, as far as possible, in line with the convention.

So far, the opportunity, the best opportunity as far as I'm concerned, the court has had in realising this principle, is in the context of the definition of disability at EU level.

A range of cases, related to this issue. Some of were before the convention.

Those that are listed in the brackets there-

, under the first bullet point, are the cases, the instances where the definition of disability has been relevant, subsequent to the convention being binding on the EU institutions.

And, in summary, the Court of Justice views disability as impairment that is long term, undefined. And which in its interaction with professional life, hinders an individual's access to participation in,

or advancement in employment. We are

going to look at the definition of disability. And the way it has been and can be implemented at national level. In the

workshop. But what I will say at this stage. This definition makes inevitable consideration of individual's limitations

actually perceived. Particularly the third subbullet point. In the interaction hinders. Participation in, or advancement in employment.

Essentially, the question is: How disabled are you? The inescapable question. I ask you to think about another ground. Your

favourite, and consider whether you can imagine the court asking an individual who is seeking protection under religious belief, how religious are you? To qualify as a person that is protected. I do

have some friends who would be happy to demonstrate to the court how latently gay they are. They love the attention. I don't think it would go down very well. I think, if you ask that question. In those terms. Why is it necessary to

demonstrate how disabled they are, in order to get protection from the personal scope, in order to come in. Not to make the argument, the merits. Just looking to

come within the personal scope. This problem has arisen at national experience. And you have situations where individuals have been fired because they are disabled. But are not able to get protection

under the law because they do not have the right type of disability.

Now, article 1 of the convention, provides the definition of disability.

Persons with disabilities include, I have emphasized 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.

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My interpretation of that definition, it provides or whether or not to include a reference to an individual's functional limitations.

The Court of Justice decided not to take that option.

Does it mean that the definition in the convention is problematic? It is not ideal.

But we need to remember the convention

is not just concerned with anti discrimination. It is concerned with different types of laws with different purposes.

The allocation of resources. Disability welfare and assistance. Assistance and insurance programs in the context of disability.

There it is appropriate to ask an individual how disabled are you. Because you have resources based on needs. In the context

of anti discrimination law it is not about needs, but about opportunity.

Which should be available to everybody.

In the Kaltoft case. Involved an individual. His employer didn't agree with his obesity. He wasn't able to make an argument

on the merits. To force the employer, to justify the treatment. He didn't come within the scope of the anti discrimination law.

And he would also come within the scope if the national court determined his obesity was significant enough to generate

functional impairment. Functional limitations.

So this is focused, pre occupation with functional limitations. Which is inappropriate at the personal scope. Functional

limitations, may be relevant at the merit's state. If I'm seeking an

accommodation. On the basis of my religion of belief.

For my sabbath I need to have that time away from work. And that work has a strict schedule. Having the sabbath will

cause a lot of problems, but doesn't fit with the usual ways. It could be a reasonable adjustment if the rest of the

workforce could work around it, for me to have time to practice my belief.

If I'm using that day to play golf, then my lack of religious adherence is actually relevant, isn't it?

Equally, if I'm seeking to be a fireman. And I can't get out of a wheelchair, then the extent of my functional limitations

is relevant to the decision not to employ me. But first, let's get past that personal scope stage and give me the

protection. It might be I'm not protected in this instance. There might not be discrimination in this case, but might be

in the future cases.