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DISCRIMINATION ON GROUNDS OF RACE AND SEXUAL ORIENTATION

APPLYING EU ANTIDISCRIMINATION LAW,
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Dr Anna Śledzińska-Simon, University of Wrocław

Prohibition of discrimination

EU law

- EU Charter of Fundamental Rights
- EU equality directives – 2000/43/EC and 2000/78/EC
- Principle of non-discrimination as **a self-standing individual right** (*see CHEZ*)

ECHR system

- European Convention of Human Rights (with Additional Protocols)
- Prohibition of discrimination in enjoyment of rights and freedoms guaranteed in the Convention
- Principle of non-discrimination may only be invoked **in conjunction with another right or freedom**
- Protocol 12 (20 ratifications)

ECHR anti-discrimination provisions

- Art. 14 ECHR

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

- Protocol No. 12

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Hierarchy of protected grounds

	EMPLOYMENT	SOCIAL SECURITY	GOODS AND SERVICES	EDUCATION
RACE AND ETHNICITY	2000/43/EC	2000/43/EC	2000/43/EC	2000/43/EC
GENDER	2006/54/EC	79/7/EEC	2004/113/EC	
RELIGION DISABILITY AGE SEXUAL ORIENTATION	2000/78/EC			

Beyond the protection of EU directives

There is no protection against discrimination with regard to religion or belief, disability, age or sexual orientation in the areas of :

- social protection, social security and healthcare
- social advantages
- education
- access to goods and services available to public, including housing

Lack of progress regarding the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [{SEC\(2008\) 2180}](#); and its amended versions – [on hold / blocked by the Council](#)

Complementary protection:
ECHR and European Social Charter

Prohibition of discrimination in the Charter

- Article 21 CFR - Prohibition of discrimination binding EU institutions and EU MS implementing EU law
- C-528/13 *Léger* (2015) – indirect discrimination on the grounds of sexual orientation
 - domestic legislation implementing the EU law
 - Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components
 - discriminatory criterion - “a permanent contraindication to blood donation for men who have had sexual relations with other men”

Race and ethnic origin

- No definition of race and ethnic origin in the EU law
- Race and ethnic origin may overlap with national origin, language and religion
- Race and ethnicity definition used by ECtHR (*Timishev v. Russia*, 2005)

„Ethnicity and race are related and overlapping concepts; the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin color or facial characteristics, while ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds”

- **Outside the scope of application of Directive 2000/43/EC**

different treatment on the basis of nationality with regard to entry and residence of third-country nationals and their access to employment and to occupation (Article 3(2) and Recital 13 of the Preamble)

Council Framework Decision 2008/913/JHA on combating racism and xenophobia

- the following intentional acts are punishable by effective, proportionate and dissuasive penalties of a maximum of at least one to three years imprisonment:
- **public incitement to violence or hatred** directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin;
- **public dissemination or distribution** of tracts, pictures or other material containing expressions of racism and xenophobia;
- **public condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes** as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group.

Positive measures in Directive 2000/43/EC

- Article 5

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

- Preamble, Recital 17

The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.

- Further see: „Positive action measures. The experience of equality bodies”, Equinet Report, 2014 (available online)

Racial Equality Directive in practice

- Low awareness of rights among potential victims of racial discrimination
- Underreporting
- Barriers in access to justice
- Narrow mandate of equality bodies (lack of judicial functions)
- Rigid rules of participation in court proceedings for social organizations
- Lack of deterring effect of sanctions (note that anti-discrimination directives preclude symbolic sanctions – see i.e. C-81/12 ACCEPT)
- Lack of preventive approach complementing the reactive approach to racial discrimination (note positive obligations stipulated in some national laws – Ireland, UK).
- Note that additional obligations beyond EU directives follow from the CERD
- Lack of statistical data concerning discrimination with regard to race and ethnicity (sensitive data) – no obligation to collect relevant data laid down in EU directives (important for policy-making, but also for proving indirect discrimination)
- Elimination of stereotypes through education and media
- Right-wing populism

C-54/07 *Feryn* (2008)

- First preliminary judgment concerning Directive 2000/43/EC
- *Actio popularis* - the Belgian equality body - Centre for Equal Opportunities and Combating Racism - can bring legal proceedings in cases of actual or potential discrimination, even if there is no identifiable complainant
- public refusal to employ immigrants - direct discrimination
- discriminatory statements - presumption of a discriminatory policy
- for the employer to show the actual recruitment practice does not correspond with the statement
- sanctions applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.

Feryn - sanctions

„If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings..” (par. 39).

C-83/14 CHEZ Razpredelenie Bulgaria v. Nikolova (2015)

Preliminary reference made by the administrative court in Sofia (17 February 2014)

1. The meaning of the expression „**ethnic origin**” (local Roma – Bulgarian citizens).
2. The meaning of the expression „**comparable situation**”.
3. The meaning of the expression „**less favourable treatment**” in the context of the facts of the case.
4. Is it permissible that the implementation of Directive 200/43/EC requires that discrimination takes place only if there was an infringement of a statutory right or legitimate interest?
5. The meaning of the expression „**apparently neutral practice**” in the context of the case.
6. Does indirect discrimination take place if the action or practice concerns only Roma?
7. The meaning of the expression „**a particularly less favourable position**” and „**a more unfavourable position**”.
8. Is the practice in this case objectively justified by a legitimate aim (of providing the security of the electricity network and the correct recording of electricity consumption) and in the light the consumers’ right to free access to electricity meter readings?

C-83/14 *CHEZ v. Nikolova* (2015)

- **The concept of discrimination on the grounds of ethnic origin applies also to cases in which irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure.**
- Protection against discrimination established by the Directive 2000/43/EC precludes national laws which require that discrimination consists in prejudice to rights or legitimate interests
- It is for the referring court to establish that the measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned.

C-457/17 *Maniero* (2019)

- **The concept of „education” within the meaning of Article 3(1)(g) of Directive 2000/43/EC includes the award of scholarships intended to promote projects for research and studies abroad**
 - so *Maniero*, the European Commission, AG Sharpston, and the CJEU
- interpreted in the light of the purpose of Directive and the legislative history (see AG opinion, paras. 41-48).
- education includes access to education and financing by means of scholarship provided that there is a genuine link between the financing and education (CJEU, para. 44)
- (...) „A scholarship has such a link to education when it covers, for instance, enrolment and tuition fees, travel costs associated with courses that take place in another State, or maintenance costs, when the objective is to permit students to follow their courses. It is for the national court to verify those aspects” (AG opinion, para. 48).

C-457/17 *Maniero* (2019)

Indirect discrimination

- occurs only if there is an „disparate impact” on a particular protected category – persons of a particular ethnic origin are in a less favourable situation, this impact cannot be determined in an abstract and general way.

(...) „for the purposes of ascertaining whether a person has been subject to unfavourable treatment, it is necessary to carry out, not a general abstract comparison, but a specific concrete comparison, in the light of the favourable treatment in question” (*Jyske Finans*, para. 32).

no information about a particular disadvantage for persons of a particular ethnic origin resulting from a neutral condition of passing the First State Examination .

- **This condition does not amount to indirect discrimination.**

Racial and ethnic discrimination before ECtHR

Factsheets

- Racial discrimination

https://www.echr.coe.int/Documents/FS_Roma_ENG.pdf

- Roma and Travellers

https://www.echr.coe.int/Documents/FS_Roma_ENG.pdf

Sexual orientation

- No protection before the adoption of the Framework Directive

C-249/96 *Grant v South-West Trains Ltd.* (1998) – refusal of travel concessions to same-sex cohabitants

C-122/99 P and C-125/99 P. *D and Kingdom of Sweden v Council of the European Union* (2001) – refusal of household allowance to a registered partner under the Staff Regulations

- Currently: fragmented protection – focused on employment
- Further see: Krzysztof Śmiszek and Dorota Pudzianowska, *Combating Sexual Orientation Discrimination in the European Union*, 2014, http://ec.europa.eu/justice/discrimination/files/sexual_orientation_en.pdf

Employment cases

- C-267/06 *Tadao Maruko* (2008) – survivor's benefit
- C-147/08 *Römer* (2011) – supplementary benefits
- C-267/12 *Frédéric Hay* (2013) – marriage bonus
- C- 81/12 *ACCEPT* (2013) – 'no gays' in a football club
- C-443/13 *David Parris* (2016) – conditions for survivor's benefit
- C-258/17 *E.B.* (2019) – disciplinary sanctions for 'indecent' (male homosexual acts with persons under the age of 18) committed by a civil servant (resulting in the early retirement and a reduction in the pension entitlement) to be reviewed by the referring court

C-258/17 E.B.

Ratione materiae

– the concept of „pay” within the meaning of Article 157 TFEU

45. (...) „only criterion which may prove decisive is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment.”

46. (...) a pension which concerns only a particular category of workers, which is directly related to the period of service completed and whose amount is calculated by reference to the final salary comes within the scope of that article (see C-267/06 *Maruko*, para. 47-48).

48. (...) „a situation such as that created by the disciplinary decision of 10 June 1975 comes within the scope *ratione materiae* of that directive.”

C-507/18 NH v. Associazione Avvocatura per i diritti LGBTI — Rete Lenford (AG opinion)

- Remarks made by an interviewee during a radio programme stating that he would never hire a homosexual person to work in his law firm nor wish to use the services of such persons are capable of falling within the scope of Article 3(1)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, as being likely to hinder access to employment.
- When those statements are not made in the context of a current recruitment procedure, it is for the national court to assess whether the link with access to employment is not hypothetical, in the light of the status and capacity of the person who made the statements, the nature, content and context of the statements, as well as the extent to which such statements might discourage persons belonging to the protected group from applying for employment with that employer.
- The prohibition, under Article 2 and 3 of Directive 2000/78, of statements that amount to direct discrimination in relation to access to employment cannot be considered to be an interference with freedom of expression such as to violate rights guaranteed by Article 11(1) of the Charter.
- Articles 8(1) and 9(2) of Directive 2000/78 permit national legislation giving associations with a legitimate interest standing to bring proceedings for the enforcement of obligations under Directive 2000/78 in the absence of an identifiable victim. It is for national law to lay down the criteria to determine whether an association has such a legitimate interest, subject to the principles of equivalence and effectiveness.
- An association that has a legitimate interest in bringing proceedings may ask for discriminatory conduct to be sanctioned in an effective, proportionate and dissuasive manner, including by an award of damages, under the conditions laid down by national law.

Asylum cases

- C-199/12, C-200/12, C-201/12 - *X, Y, Z* (2013) – sodomy laws as a risk of persecution
- C-148/13, 149/13, 150/13 – *A, B, C* (2014) – phallometric gay testing
- C-473/16 - *F v. Bevándorlási és Állampolgársági Hivatal* (2018) – psychological gay testing

C-673/16 *Coman and others* (2019)

Citizenship of the Union- right of residence for more than three months of a third country national who is married to the Union citizen of the same sex

- Article 21 TFEU
- Articles 2(2), Article 3 and Article 7 Directive 2004/38/EC
- Article 21(1) TFEU must be interpreted as **precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.**
- Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, **a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months.** That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

C-673/16 *Coman*

- 39. „To allow Member States the freedom to grant or refuse entry into and residence in their territory by a third-country national whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that state, according to whether or not national law allows marriage by persons of the same sex, would have the effect that the freedom of movement of Union citizens who have already made use of that freedom would vary from one Member State to another, depending on whether such provisions of national law exist.” (principle of effectiveness).
 - limitation of the freedom of movement (right to return).
- 46.(...) „an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned.”
- 47. (...) „a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter.”

Case studies from Poland

- Refusal to issue identity cards or passports to children living abroad whose at least one parent is Polish but their foreign birth certificates list persons of same sex as parents
- Refusal to issue transcripts of foreign birth certificates in which persons of same sex are registered as parents
- Resolutions of local authorities on “LGBT-free zones”

Sexual orientation before ECtHR

- Factsheet
- https://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf

Future challenges

Rise of populism (risk of populist backlash against courts)

Conflicts between

- liberty (freedom of economic activity, freedom of speech, freedom to practice religion, etc)

and

- equality (prohibition of discrimination)

- *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018)

- *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 49

- *judgment of the Polish Constitutional Tribunal* of 26 June 2019, Case No. K 16/17.

Thank you for your attention!
anna.sledzinska-simon@uwr.edu.pl