

Discrimination on grounds of race and sexual orientation

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Legal provisions in the EU

- Race Directive: Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22
- Employment Equality Directive: Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16: (religion or belief, disability, age and sexual orientation)

Differences between the Directives

- Protection against racial/ethnic origin discrimination stronger than protection against discrimination on grounds of religion/belief, disability, age, sexual orientation
- Race Directive: employment and occupation (art.3(a)-(d)) social protection, including social security and health care (e); social advantages (f); education (g); access to and supply of good and services which are available to the public, including housing
- Employment Equality Directive (art. 3) covers: employment and occupation
- Proposal COM (2008) 426 for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

Definition sexual orientation

A person's sexual orientation to:

- persons of the same sex (homosexuality)
 - persons of the opposite sex (heterosexuality)
 - persons of either sex (bisexuality)
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- not necessary to give actual proof of the sexual orientation

Definition race and racial or ethnic origin

- Absent from Race Directive
- International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) (United Nations) covers: race, colour, descent or national or ethnic origin
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): race, colour, national origin, association with a national minority
- Preamble to Race Directive, Recital 3 refers to the ICERD and the ECHR

Feryn

C-54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV ECLI:EU:C:2008:397

- Not wanting to employ 'immigrants' fell under Directive
- a policy where members of certain racial or ethnic groups are not considered for employment is directly discriminatory on the grounds of racial or ethnic origin
- under EU law, a complaint can be made without there being a direct individual victim
- The statements made in public were enough for a presumption of discrimination, thus burden of proof shifted to employer who had to prove that recruitment policy was not discriminatory (art 8 Race Directive)

Broad Interpretation of Directive

Case C-391/09 *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija* ECLI:EU:C: 2011:29

- in the light of the objective of the Directive and the nature of the rights which it seeks to safeguard, and in view of the fact that that directive is merely an expression of the general principle of equality, the scope of that directive cannot be defined restrictively;
- suggests broad interpretation of Directive, including term 'racial or ethnic origin'
- but CJEU then gave narrow interpretation to the term 'services'
- Could limit protection provided for victims

Meaning ethnic or racial origin not addressed

Case C-415/10 *Galina Meister v Speech Design Carrier Systems GMBH* ECLI:EU:C:2012:217:

- The case revolved around whether a person making a discrimination claim after being turned down for a job, had a right to receive info on successful applicants
- CJEU: there is no such right but it could not be ruled out that refusal by employer of such a request may be factor to be taken into account to establish a *prima facie* case/ presumption of discrimination leading to shift in the burden of proof; was up to national court to decide

Case C-394/11 *Valeri Hariiev Belov v CHEZ Elektro Bulgaria AD and others* ECLI:EU:C:2013:48: rejected on procedural grounds

Third country nationals

Case C-571/10 Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others ECLI:EU:C:2012:233

- discrimination in this case was based on status of being a third-country-national; this did not fall within the scope of the Race Directive.
- Art 3(2): This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons

CHEZ

C-83/14 CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia ECLI:EU:C:2015:480

- ethnicity has its origin in idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds
- This applies to Roma and discrimination against a person because they are Roma is against the Race Directive
- This means that it also falls under race discrimination in national law
- CJEU referred to Article 1 ICERD

CHEZ

- direct discrimination exists where ethnicity has determined the decision for the treatment, where treatment was by reason of ethnicity
- indirect discrimination considers the effect of a measure, which is 'ostensibly' neutral or neutral 'at first glance' for a specific racial or ethnic group
- Indirect discrimination by association is covered by the Race Directive
- Direct discrimination by association also covered by EU anti-discrimination directives: Case C-303/06 *S. Coleman v. Attridge Law and Steve Law*, ECLI:EU:C:2008:415

Further cases

C-668/15 *Jyske Finans A/S v Liegebehandlingsnaevnet*
ECLI:EU:C:2017:278:

- Repeated definition of ethnicity from CHEZ
- difference in treatment based solely a person's country of birth, does not fall under the definition of ethnicity

C-457/17 *Heiko Jonny Maniero v Studienstiftung des Deutschen Volkes eV*, ECLI:EU:C:2018:912:

- broad interpretation to the term 'education' in article 3 Race Directive
- No (indirect) discrimination because the measure here was not capable of causing a disadvantage to a specific racial or ethnic group

CJEU and sexual orientation discrimination

- C-267/06 *Tadao Maruko v Versorgungsanstalt der Deutschen Bühnen* ECLI:EU:C:2008:179
- C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg*, ECLI:EU:C:2011:286
- C-124/11 *Dittrich*, C 125/11 *Klinke* and C 143/11 *Muller v Bundesrepublik Deutschland* ECLI:EU:C:2012:771
- C-267/12 *Frédéric Hay v Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres*, ECLI:EU:C:2013:823

CONCLUSION

- Member States remain free to decide whether or not to institute and recognise legally recognised same-sex partnerships
- However, once national law recognises such relationships as comparable to that of spouses then the principle of equal treatment applies

Coman and Others

C-673/16 *Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*
ECLI:EU:C:2018:385

- concerned the right of residence in Romania of a same sex partner of a Romanian man who had married his partner in Belgium
- Referred question: does term “spouse” in Article 2(2)(a) Citizens’ Directive (2004/38/EC) include a non-EU national that is legally married to an EU citizen in another Member State?
- CJEU: the term “spouse” is indeed gender neutral and may therefore include spouses of the same sex. Therefore, Romania could not rely on its national law as justification to refuse the recognition of a marriage between two persons of the same sex legally concluded in another Member State for the granting of residence rights. Such a refusal would mean different applications of the EU citizen’s freedom of movement among its Member States, depending on whether or not national law allows same-sex marriage

Limitations *Coman and Others*

- So: in relation to residence rights, Member States must recognise a same-sex marriage validly contracted in another Member State.
- decision is quite narrow in scope:
- CJEU made clear that EU Member States are free to bar same-sex couples from marrying on their territory
- judgment applies to same-sex spouses but not to registered partners (see Article 2(2)(b) Citizens' Directive)
- judgement concerns only couples married in an EU Member State and is confined to questions of free movement of persons

ACCEPT

- Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării* ECLI:EU:C:2013:275
- facts were capable of amounting to facts from which a court could presume discrimination (follows *Ferijn*: statements made in public are enough for a presumption of discrimination and thus burden of proof shifts)
- club could rebut presumption by distancing itself from discriminatory statements and/or by including provisions in its recruitment policy to comply with the equal treatment principle
- Case C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*

CJEU and multiple discrimination

C-443/15 *Parris v Trinity College Dublin*

ECLI:EU:C:2016:897: rejection of claim on combined grounds

CJEU:

- no sexual orientation discrimination;
- no age discrimination;
- where discrimination on the basis of each ground –in this case age and sexual orientation - taken in isolation does not exist, no new category of discrimination resulting from the combination of more than one of those grounds may be found to exist



THANK YOU

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