

EQUALITY AND NON-DISCRIMINATION

Class #2

SCHEDULLE

Discrimination based on nationality, race and ethnicity

- Legal framework
- Retrospective overview and current issues
- Case-law

LEGAL FRAMEWORK - UN

*„Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as **race**, colour, sex, language, religion, political or other opinion, **national** or social **origin**, property, birth or other status.*

Art. 2 (1) International Covenant on Civil and Political Rights

„States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races (...).”

Art. 2 International Convention on the Elimination of All Forms of Racial Discrimination

LEGAL FRAMEWORK - CoE

*„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.”*

Art. 14 European Convention for the Protection of Human Rights and Fundamental Freedoms

European Commission against Racism and Intolerance (ECRI)

LEGAL FRAMEWORK - EU

*„1. Any discrimination based on any ground such as sex, **race**, colour, **ethnic** or social **origin**, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

*2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of **nationality** shall be prohibited.”*

Art. 21 Charter Of Fundamental Rights Of The European Union

*„(...) any direct or indirect discrimination based on **racial or ethnic origin** as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.”*

Recital 13 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

LEGAL FRAMEWORK – NATIONAL LAW

„No one shall be discriminated against in political, social or economic life for any reason whatsoever”

Art. 32 (2) The Constitution Of The Republic Of Poland

„No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability”

Art. 3 (3) Basic Law for the Federal Republic of Germany

LEGAL FRAMEWORK – LEGAL DEFINITIONS

Nationality

„nationality means the legal bond between a person and a State and does not indicate the person's ethnic origin”

Art. 2(a) European Convention on Nationality

Race

„The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories.”

Recital 6 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Ethnicity

„[T]he concept of ethnicity (...) has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds (...)”

CJEU judgment of 16 July 2015, CHEZ v Nikolova, C-83/14, ECLI:EU:C:2015:480

LEGAL FRAMEWORK – LEGAL DEFINITIONS

“Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, 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.”

ECHR Judgement of 13 December 2005, Timishev v. Russia, 55762/00 and 55974/00

CURRENT ISSUES

- Racial profiling
- Systemic racism
- Racial and ethnic discrimination in health care
- Discrimination in employment
- Refugee integration strategy
- Discrimination against Roma

DRAGAN DURMIC V SERBIA AND MONTENEGRO

Dragan Durmic v Serbia and Montenegro (Communication No. 29/2003)

- Decision of The Committee On The Elimination Of Racial Discrimination (CERD)
- CERD monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties.
- CERD may consider individual petitions alleging violations of the Convention by States parties who have made the necessary declaration under article 14 of the Convention.

DRAGAN DURMIC V SERBIA AND MONTENEGRO

Basic information

- **Submitted by:** Mr. Dragan Durmic (represented by the European Roma Rights Center and the Humanitarian Law Center)
- **State party:** Serbia and Montenegro
- **Date of adoption of Opinion:** 6 March 2006
- **Subject matter:** Denial of entry to a club based on Roma origin, access to effective mechanisms of protection

Procedural issues

- *Ratione temporis* - Serbia and Montenegro as a successor of Socialist Federal Republic of Yugoslavia (SFRY)?
- Exhaustion of domestic remedies

DRAGAN DURMIC V SERBIA AND MONTENEGRO

Convention on the Elimination of All Forms of Racial Discrimination

Art. 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (...)

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Art. 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISMEBESTRIJDING V FIRMA FERYN NV

Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV

- CJEU Judgment of 10 July 2008, C-54/07, ECLI:EU:C:2008:397
- Reference for a preliminary ruling - interpretation of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- **Applicant in the main proceeding:** Centrum voor gelijkheid van kansen en voor racismebestrijding (Centre for equal opportunities and combating racism)
- **Defendant in the main proceeding:** Firma Feryn NV
- **National court:** Arbeidshof te Brussel (Labour Court, Brussels)
- **Subject matter:** Discriminatory criteria for selecting staff

CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISMEBESTRIJDING V FIRMA FERYN NV

Questions

1. Is there direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin where an employer, after putting up a conspicuous job vacancy notice, makes public statements.

2. Is it sufficient for a finding of direct discrimination in the conditions for access to paid employment to establish that the employer applies directly discriminatory selection criteria?

Art. 2 (2)(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin

CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISMEBESTRIJDING V FIRMA FERYN NV

„I must comply with my customers’ requirements. If you say “I want that particular product or I want it like this and like that”, and I say “I’m not doing it, I’ll send those people”, then you say “I don’t need that door”. Then I’m putting myself out of business. We must meet the customers’ requirements. This isn’t my problem. I didn’t create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!”

“Apart from these Moroccans, no one else has responded to our notice in two weeks ... but we aren’t looking for Moroccans. Our customers don’t want them. They have to install up-and-over doors in private homes, often villas, and those customers don’t want them coming into their homes.”

Public statements made by Mr Pascal Feryn, one of the firm’s directors

CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISMEBESTRIJDING V FIRMA FERYN NV

Questions

3. For the purpose of establishing that there is direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/43/EC, may account be taken of the recruitment of exclusively indigenous fitters by an affiliated company of the employer in assessing whether that employer's recruitment policy is discriminatory?
4. What is to be understood by 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of Directive 2004/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?
5. How strict must the national court be in assessing the evidence in rebuttal which must be produced when a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 has been raised?

CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISMEBESTRIJDING V FIRMA FERYN NV

Art. 8

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISMEBESTRIJDING V FIRMA FERYN NV

Questions

6. What is to be understood by an 'effective, proportionate and dissuasive' sanction, as provided for in Article 15 of Directive 2000/43? Having regard to the facts in the main proceedings, does the abovementioned requirement of Article 15 of Directive 2000/43 permit the national court merely to declare that there has been direct discrimination?

Art. 15 Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive (...)

IRAKLIS HARALAMBIDIS V CALOGERO CASILLI

Iraklis Haralambidis v Calogero Casilli

- CJEU Judgment of 10 September 2014, C-270/13, ECLI:EU:C:2014:2185
- Reference for a preliminary ruling - interpretation of TFEU, Directive 2006/123/EC on services in the internal market and Charter of Fundamental Rights of the European Union
- **Applicant in the main proceeding:** I. Haralambidis
- **Defendant in the main proceeding:** C. Casilli
- **National court:** Consiglio di Stato
- **Subject matter:** Freedom of movement for workers, Employment in the public service

IRAKLIS HARALAMBIDIS V CALOGERO CASILLI

Questions

1. Given that:

- the derogation laid down in Article 45(4) TFEU does not appear to apply to the present case [which concerns the appointment of a national of another Member State of EU as President of a Port Authority, a legal entity which can be classed as a body governed by public law] in that it relates to employment in the public service [which is not an issue in the present case] and
- the fiduciary role of President of Port Authority may nevertheless be regarded as an “employment activity” in the broad sense,

does the provision reserving that post exclusively to Italian nationals constitute discrimination on grounds of nationality prohibited by Article 45 TFEU?

IRAKLIS HARALAMBIDIS V CALOGERO CASILLI

Questions

2. Alternatively, may the holding of the office of President of an Italian Port Authority by a national of another Member State of the European Union be regarded as falling within the scope of the right of establishment laid down in Article 49 et seq. TFEU and, if so, does the prohibition laid down in national law on non-Italian nationals holding that office constitute discrimination on grounds of nationality, or would such a finding be precluded by Article 51 TFEU?

3. As a further alternative, in the event that the holding of the office of President of an Italian Port Authority by a national of another Member State of the European Union may be regarded as the provision of “services” for the purposes of Directive 2006/123, is the exclusion of port services from the scope of that directive relevant in the present case and, if not, does the prohibition under national law in relation to the holding of that office constitute discrimination on grounds of nationality?

IRAKLIS HARALAMBIDIS V CALOGERO CASILLI

Questions

4. As a yet further alternative, in the event that the holding of the office of President of an Italian Port Authority by a national of another Member State of the European Union does not fall within the scope of any of the above provisions, may it nevertheless be regarded, more generally, in accordance with Article 15 of the Charter, as a prerogative coming under the right of Community citizens to “work, to exercise the right of establishment and to provide services in any Member State”, irrespective of the specific “sectoral” provisions laid down in Article 45 and Article 49 et seq. TFEU, and in Directive 2006/123 and is the prohibition under national law in relation to the holding of that office accordingly inconsistent with the equally general prohibition of discrimination on grounds of nationality laid down in Article 21(2) of that Charter?

IRAKLIS HARALAMBIDIS V CALOGERO CASILLI

Article 45 TFEU

- 1. Freedom of movement for workers shall be secured within the Union.*
- 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*
- 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
 - (a) to accept offers of employment actually made;*
 - (b) to move freely within the territory of Member States for this purpose;*
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.*
- 4. The provisions of this Article shall not apply to employment in the public service.*

NEXT MEETING

Discrimination based on religion

- CJEU Judgement of 14 March 2017, Samira Achbita v G4S Secure Solutions NV, C-157/15.
- CJEU Judgement of 22 January 2019, Cresco Investigation, C-193/17.