

Discrimination on grounds of race and sexual orientation: main features and CJEU case law

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Treaties and principles

I) Art. 10 TFEU

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based *inter alia* on racial or ethnic origin and sexual orientation (equality mainstreaming).

II) Art. 19 TFEU (former Art. 13 of Amsterdam Treaty) granting EU broader competences in the domain

=> Adoption of *inter alia* Directives 2000/43/EC (RED),
2000/78/EC (EED).....

III) Art. 21 Charter of Fundamental Rights of EU

"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"

Race Discrimination - Directive 2000/43/EC (RED)

I) Material scope

- Applies to all persons (public and private sectors)
- Applies in the employment domain intended broadly (i.e. also vocational training, workers' membership organisations etc.)
 - Social protection intended broadly
 - Education
- Supply of goods and services available to the public including housing

II) Other elements

- Does not extend to difference of treatment based on nationality (Art. 3.2)
- Allows for but does not require affirmative action (Art. 5)
- Requires institution of national equality bodies (Art. 13)

Race Discrimination – CJEU Case Law (1)

I) Key judgments

a) Case C-54/07, *Feryn*

i) Facts: Belgian employer declares publicly that he will not hire immigrants/Moroccans in his company – claim brought by Belgian (race) equality body

ii) Issues

- direct race discrimination
- not (permitted) nationality discrimination
 - victimless discrimination
- standing for equality body in Belgium

Race Discrimination – CJEU Case Law (2)

b) Case C-83/14 (GC), *Nikolova* [+Case C-394/11, *Belov*]

i) Facts: Bulgarian electricity company hangs electrical meters at 7 meters height in predominantly Roma neighbourhoods – claim by non-Romani woman

ii) Issues

- Direct/or indirect racial discrimination by association
- First EU case dealing with discrimination against Roma
 - Discrimination in the provision of services

Race Discrimination – CJEU Case Law (3)

c) Case C-668/15, *Jyske Finans*

i) Facts: credit institution required a customer with country of birth other than EU/EFTA Member State to produce additional identification (e.g. passport or residence permit)

ii) Issues

- National equality body had found there was racial discrimination
- CJEU found no direct racial discrimination *inter alia* because nationality discrimination not covered by RED
 - No indirect discrimination either because all third country nationals placed at a disadvantage and not just a specific group

Race Discrimination – CJEU Case Law (4)

II) Other (minor) judgments/decisions

- a) Case C-391/09, *Runevič-Vardyn*
 - Refusal by Lithuanian authorities to transcribe Polish language names into the civil registers – not within scope of RED
- b) Case C-310/10, *Agafitei* (inadmissibility)
- Romanian judges claiming discriminatory treatment as regards remuneration – claim not based on any of prohibited grounds but on socio-professional category
- c) Case C-415/10, *Galina Meister*
- Russian engineer whose job application was denied by a German company – access to documents - no violation
- d) Case C-571/10 (GC), *Kamberaj*
- Long-term Albanian resident in Italy denied housing benefit in South Tyrol – not within scope of RED
- e) Case C-457/17, *Maniero*
- Restriction of scholarships to support legal research projects or studies abroad to candidates having successfully completed a law examination in the fund-providing member state does not constitute indirect race/ethnic discrimination

Race Discrimination – CJEU Case Law (5)

III) Other case(s)

Case C-201/13 (GC), *Deckmyn*

- i) Facts: reproduction of a famous Belgian comic (*Suske en Wiske*) where some characters had been replaced by a far right party with offensive images of Muslim women and people of colour
- ii) Issues
 - RED needs to be considered when interpreting Copyright Directive (parody exception)
 - original publishers of the drawings (the plaintiffs in this case) have a legitimate interest in ensuring that their copyright is not associated with discriminatory messages

+ Employment cases by EU institutions

Case T-11/03, *Afari v. ECB* + Joined Cases F-106/13 and F-25/14, *DD v. European Union Agency for Fundamental Rights (FRA)*

- Claims of race discrimination in employment at EU institutions

Sexual orientation – Directive 2000/78/EC

I) Material scope

- Limited to employment and occupation
- Applies also to discrimination on the grounds of age, disability and religion/belief

II) Other principles

- Recital (22): “This Directive is without prejudice to national laws on marital status and the benefits dependent thereon”
- No requirement for national equality body

Sexual orientation – prior CJEU case law on sexual orientation

- Case C-13/94, *P. v. S. and Cornwall County Council*
 - Dismissal of transsexual person **constitutes sex discrimination**
- Case C-249/96, *Grant v. South-West Trains*
 - Denial of an employment related benefit to a lesbian railway employee **does not constitute sex discrimination**
- Case C-122/99 P and C-125/99 P, *D. and Kingdom of Sweden v. Council of Europe*
 - Same-sex life partners of whom one was working in the European institutions could be excluded from marriage-related benefits
- Case C-117/01, *K.B. v. National Health Service Pension Agency*
 - Denial of survivor’s pension after sex change of partner is violation of equal pay principle

Sexual orientation – CJEU case law on Directive 2000/78/EC (1)

a) Case C-267/06, *Maruko*

- Denial of survivor's pension to same sex partner constitutes *direct* discrimination on the grounds of sexual orientation
 - b) Case C-147/08, *Römer*
- Denial of supplementary retirement pension to same sex partner constitutes *direct* discrimination on the grounds of sexual orientation
 - c) Case C-267/12, *Hay*
- Exclusion of same sex partners from benefits established in collective agreements constitutes direct discrimination on the grounds of sexual orientation

Sexual orientation – CJEU case law on Directive 2000/78/EC (2)

d) Case C-443/15, *Parris*

- No survivor's pension because same-sex civil partnership entered into only after the 60th birthday of the pension scheme member (Irish legislation not allowing it earlier) is not sexual orientation or age discrimination or a combination of both
- For age discrimination exception under Article 6(2) applies and for sexual orientation Recital 22 applies arguing that EU law cannot force MS to retroactively recognize same sex couples; also no to intersectionality
 - e) Case C-81/12, *ACCEPT*
- Homophobic statements by patron of a football club (without club clearly rejecting them) indicates discriminatory recruitment policy
- Sanctions need to be proportionate and effective and mere warning of sanction is not sufficient
 - f) **Case C-507/18 (GC), *NH* (23 April 2020)**
- Homophobic statements by a person during a TV programme according to which such person would never recruit any LGBT person, even in the absence of any recruitment procedure is discriminatory, as long as the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical.

Sexual orientation – Non-EED Directive CJEU case law

- a) Joined Cases C-199/12 to C-201/12, *X and Others* (refugee status for gay men)
- Directive 2004/83 on refugee status
 - Homosexuals recognized as specific group
 - BUT criminalization per se of homosexual acts cannot count as grounds of persecution
- b) Case C-528/13, *Léger* (blanket ban of blood donation for gay men)
- Directives 2002/98, 2004/33 + Artt. 21/52(1) of CFR
 - Ban OK (protection of public health), if proportionate with current scientific prevention techniques
- c) Case C-673/16 (GC), *Coman* (freedom of movement of same sex couples)
- Directive 2004/38 + Article 21 TFEU
 - Freedom of movement of same sex couples strengthened