



Discrimination on Grounds of Race and Sexual Orientation: Main Features and CJEU Case Law

Applying EU Anti-Discrimination Law

Lisbon, 7 November 2017

Petr Polák

Office of the Public Defender of Rights

Czech Republic





Test yourself

On a scale of 1-100 %

- How much do you know about the life of national minorities or LGBT community in your respective country?
- Where does your information come from?
- Is your information enough to judge a case?
- Where can you find more information?



Race, Ethnic Origin and Sexual Orientation – What Do They Have in Common?

- history of oppression
- missing definition in the EU law
- immutable personal characteristic
- visibility (assumed identity, association)
- derogation of principle of equal treatment



Race, Ethnic Origin and Sexual Orientation – In Which Aspects Do They Differ?

- concept of sameness
- level of EU protection
- number of CJEU judgements





Racial and Ethnic Origin – CJEU judgements

- ❑ C-54/07, Firma Feryn (Belgium)
- ❑ C-415/10, Meister (Germany)
- ❑ C-571/10, Kamberaj (Italy)
- ❑ C-83/14, CHEZ (Bulgaria)
- ❑ C-668/15, Jyske Finans (Denmark)



Sexual Orientation – CJEU judgements

- ❑ C-267/06, Maruko (Germany)
- ❑ C-147/08, Römer (Germany)
- ❑ C-81/12, Accept (Romania)
- ❑ C-267/12, Hay (France)
- ❑ C-528/13, Léger (France)
- ❑ C-443/15, Parris (Ireland)



Notion of Race, Ethnic Origin and Nationality

Racial Equality Directive (RED)

Applies as regards discrimination on the grounds of 'racial or ethnic origin' (Article 1)

What does that mean?

- ❑ **Recital 6:** use of terms 'race' & 'racial' doesn't imply acceptance of theories on separate human races
- Recital 13 and Article 3(2):** doesn't apply to differences of treatment based on nationality
- ❑ **Recital 3:** reference to ICERD and ECHR



Notion of Race, Ethnic Origin and Nationality

- ❑ 'discrimination based on a person's ethnic origin constitutes a **form of racial discrimination**' (CHEZ, para 73)
- ❑ 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' (CHEZ, para 46)



Concept of Common Nationality

- ❑ **Firma Feryn** (not willing to hire Moroccans)
- ❑ CJEU **didn't define** 'racial or ethnic origin'
- ❑ RED **could be** applied to that statement on the **nationality** of potential employees (direct discrimination)



Concept of Common Nationality

- ❑ **Kamberaj** (long term resident, housing benefit, rejection – not national from MS)
- ❑ RED **could not be** applied, article 3 (2)
- ❑ differential treatment based on **nationality**

Contradiction between Firma Feryn and Kamberaj judgement?



Concept of Common Nationality CHEZ - Light at the End of Tunnel?

- ❑ Bulgarian citizen, district mainly inhabited by Roma, she was not Roma
- ❑ CJEU citing the ECtHR in Nachova and Sejdić
(Appl. Nos. 43577/98 and 43579/98, Appl. Nos. 27996/06 and 34836/06)
‘idea of societal groups marked in particular by **common nationality**, religious faith, language, cultural and traditional origins and backgrounds’
(para 46)



Nationality versus National Origin – Conclusions and Possible Overlaps

Firma Feryn

- reference to country of birth (cultural/ethnic background)
- not as legal status/citizenship

Kamberaj

- reference to nationality (legal status, citizenship)
- not as cultural/ethnic background
- nationality not covered by RED

CHEZ

- in the same line with Firma Feryn
- refers to national origin (common nationality)



What about the 'Place of Birth'?

Jyske Finans Case

- not explicitly mentioned in RED
- list of factors **not exhaustive** ('in particular')
- art. 21 of the Charter ('birth')
- credit institution, place of birth outside the EU (former Yugoslavia), requirement to provide additional identification document
- 'Ethnic origin cannot be determined on the basis of a **single criterion** but, on the contrary, is based on a whole number of factors, (...). a person's country of birth cannot, in itself, justify a **general presumption that that person is a member of a given ethnic group** (para 19 & 20)



Impact of the Jyske Finans Judgement

- ❑ less favourable treatment based solely on someone's place of birth (outside the EU) **does not amount** to direct discrimination under RED
- ❑ **BUT** national equality law – list of protected grounds can be **broader**
- ❑ example: recent adoption of new portuguese Antidiscrimination Act (Law 93/2017) – entry into force on 1st September 2017
- ❑ **extension of the list of prohibited grounds** (ancestry and territory of origin)
- ❑ Could be less favourable treatment **objectively justified** in the light of national Law against money laundering?



Can Public Statement Amount to Discrimination?

Firma Feryn

- leading judgement
- no identifiable victim, intervention of equality body
- CJEU refers to aim of the RED (para 23) and potential dissuasive effect on candidates (para 25)
- presumption of direct discrimination** in respect of recruitment (inconsistency between para 28 & para 34)





Can Public Statement Amount to Discrimination?

Accept

- public statement of person **different from employer**
- potential victim was known, intervention of NGO (actio popularis)
- statement is considered **prima facie discrimination** under FED (not discrimination as such)
- Outcome** at national level – Why does it taste **so bitter**?





Direct or Indirect Discrimination? Who is Comparator?

Maruko & Römer

- direct discrimination
- comparability test – national court

Hay

- marriage benefits and days of special leave
- not granted to PACS partners (available to same-sex and opposite-sex couples)
- CJEU does comparability test** – direct discrimination



Direct or Indirect Discrimination? Who is Comparator?

CHEZ

- National court shall assess **all circumstances and determine** the form of discrimination.
- Direct** – measure has clearly ethnic nature
- Indirect** – response to abuse in the concerned district, neutral criterion, particular disadvantage or Roma in comparison with non-Romani



Direct or Indirect Discrimination? Who is Comparator?

Jyske Finans

- Who is put in a particular disadvantage?
- Person of a **particular ethnic origin?** (para 31), identified **groups of person**
- CJEU refers to its case-law and Opinion of AG (comparability must be carried out not in a **global and abstract manner**, but in a specific and concrete manner, para 67)
- (no) danish ethnic origin – **does not amount to** indirect discrimination under RED



Justification Defence

In cases of indirect discrimination CJEU provides **guidelines** to national courts.

Legitimate aim, proportionality, necessity – **must be interpreted strictly** in cases of racial discrimination.

CHEZ (para 110 – 128)

- security of the electricity transmission network, due recording of electricity consumption
- less restrictive means do not exist
- conditions are not of an stigmatising nature, regular monitoring of consumption is enabled





Justification Defence

Léger (para 57 – 69)

- eligibility criteria for **blood donors**
- criteria for **deferral** - man who has had sexual relations with another man (**MSM**) – entire group
- the **epidemiological situation** in the country
- aim**: to minimise the risk of transmitting an infectious disease to recipients
- proportionality**: technique for detecting HIV which is less onerous (the most recent scientific and technical procedures) – ‘window period’ (para 62)
- the questionnaire and individual interview – **sexual orientation versus sexual behaviour**



Multiple and Intersectional Discrimination – Lost Chances

Firma Feryn

- ❑ gender dimension (almost invisible)

Meister

- ❑ three alleged grounds: gender, age and ethnic origin, not developed in the reasoning of judgment

Parris

- ❑ first CJEU ruling on intersections (age and sexual orientation) – unfortunately against the claimant



Public Defender of Rights
OMBUDSMAN

Thank you for your attention!

<http://www.ochrance.cz/en/>

Ombudsman Office
Údolní 39
602 00 Brno
Czech Republic