

Case Summary

CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia

Preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Bulgaria).

1. Reference details

Jurisdiction: European Court of Justice (Grand Chamber)

Date of decision: 16 July 2015

Link to full case:

http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=165912&occ=first&dir=&cid=400263

2. Facts of the case

The third party, Ms Nikolova, runs a grocer's shop in the Gizdova mahala district of the town of Dupnitsa (Bulgaria), a district inhabited mainly by persons of Roma origin. In 1999 and 2000, an electricity supply company, CHEZ Razpredelenie Bulgaria AD (CHEZ RB) installed electricity metres for all inhabitants of Gizdova mahala district on part of the overhead electricity supply network. The electricity metres were installed at a height between six and seven metres, whereas in other districts in the town, the metres were installed at a height of about 1.7 metres, making the metres more easily accessible to the consumer.

In December 2008, Ms Nikolova, who is not Roma, lodged an application with the Komisia za zashtita ot diskriminatsia (Commission for Protection against Discrimination; the KZD) arguing that the reason for installing electricity meters at height in the Gizdova mahala district was that most of the inhabitants of the district were of Roma origin and accordingly, she was suffering direct discrimination on the basis of nationality.

On 6 April 2010, the KZD found that the installation of electricity meters at height amounted to prohibited indirect discrimination on the grounds of nationality. This decision was annulled on 19 May 2011 by the Varhoven administrativen sad (Supreme Administrative Court) on the basis that, *inter alia*, "the KZD had not indicated the other nationality in relation to the holders of which Ms Nikolova had suffered discrimination". The case was referred back to the KZD, which later found that CHEZ RB had directly discriminated against Ms Nikolova on the grounds of her "personal situation" as the placement of the metres put her in a disadvantageous position compared with other CHEZ RB customers whose metres were in accessible locations.

CHEZ RB brought an appeal against the decision before the Administrativen sad Sofia-grad (Administrative Court, Sofia). In order to assist in making its decision, the Administrative Court sought a preliminary ruling from the Court of Justice of the European Union (CJEU) in February 2014.

3. Law

Regional Law

- Article 21 of the Charter of Fundamental Rights of the European Union; and
- Articles 1, 2, 3, 8(1) and Recital 16 of Directive 2000/43.

National Law

Article 4 and Paragraph 1 of the Supplementary provisions of the law on protection against discrimination - Zakon za zashtita ot diskriminatsia (ZZD).

4. Legal Arguments

Claimant's arguments

According to the applicant, the placement of electricity metres at an unattainable height represented an act of direct discrimination on the basis of nationality. Ms Nikolova argued that Gizdova mahala was the only district in the town of Dupnitsa to be affected by the issue at hand and the reason for this was that the majority of residents in the district were of Roma origin.

Respondent's arguments

CHEZ RB contended that the difference in treatment between the predominantly Roma district of Gizdova mahala and other districts in Dupnitsa was justified due to the high level of tampering with, and damage to, meters and by the numerous unlawful connections to the network in the district concerned. CHEZ RB also argued that the practice of installing electricity meters did not fall within the substantive scope of Directive 2000/43.

The Referring Court's considerations

In its order for reference to the CJEU, the Administrative Court stated that the case should be considered from the point of view of the protected characteristic of ethnicity, rather than from the point of view of nationality or personal situation. In its view, by identifying herself with the population of Roma origin of the district, Ms Nikolova defined herself as a person of Roma origin and so the KZD was incorrect to hold her ethnic origin had not been established. Although inclined to consider that the practice of installing electricity meters at height was direct discrimination, the Court was unsure if the practice amounted to either direct or indirect discrimination. Finally, if the practice did amount to discrimination, the Court took the view that it would not be justified. It submitted ten questions in relation to these points to the CJEU for its consideration:

- (1) *Is the expression "ethnic origin" used in [Directive 2000/43] and in the [Charter] to be interpreted as covering a compact group of Bulgarian citizens of Roma origin such as those living in the "Gizdova mahala" district of the town of Dupnitsa?*
- (2) *Does the expression "comparable situation" within the meaning of Article 2(2)(a) of Directive 2000/43 apply to the circumstances of the present case, in which the commercial measuring instruments are positioned in Roma districts of the town at a height of between six and seven metres whereas in other districts not densely populated by Roma they are generally positioned lower than two metres above ground?*
- (3) *Is Article 2(2)(a) of Directive 2000/43 to be interpreted so that the positioning of commercial measuring instruments in Roma districts of town at a height of between six and*

seven metres constitutes less favourable treatment of the population of Roma origin compared to the population of other ethnic origin?

- (4) On the assumption that there has been less favourable treatment, does that treatment, pursuant to the abovementioned provision, result in the circumstances of the main case in whole or in part from the fact that it affects the Roma ethnic group?*
- (5) Under Directive 2000/43 is a national provision such as Paragraph 1(7) of the Supplementary Provisions of the [ZZD] — according to which any act, action or omission which directly or indirectly prejudices rights or legitimate interests constitutes “unfavourable treatment” — permissible?*
- (6) Is the expression “apparently neutral practice” within the meaning of Article 2(2)(b) of Directive 2000/43 applicable to the practice of [CHEZ RB] of positioning commercial measuring instruments at a height of between six and seven metres? How should the phrase “apparently neutral” be interpreted — as meaning that the practice is obviously neutral or that it only seems neutral at first glance, in other words, that it is ostensibly neutral?*
- (7) For a finding that there has been indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/43, is it necessary that the neutral practice places persons in a particularly less favourable position on the ground of racial or ethnic origin, or is it sufficient that that practice affects only persons of a specific ethnic origin? In that context, under Article 2(2)(b) of Directive 2000/43 is a national provision such as Article 4(3) of the ZZD — according to which there is indirect discrimination where a person is placed in a more unfavourable position because of the characteristics set out in Article 4(1) (including ethnicity) — permissible?*
- (8) How should the expression “particular disadvantage” within the meaning of Article 2(2)(b) of Directive 2000/43 be interpreted? Does it correspond to the expression “less favourable treatment” used in Article 2(2)(a) of Directive 2000/43, or does it cover only serious, obvious and particularly significant cases of unequal treatment? Does the practice described in the present case amount to a particular disadvantage? If there has been no serious, obvious and particularly significant case of putting someone in a disadvantageous position, is that sufficient to conclude that there has been no indirect discrimination (without examining whether the practice in question is justified, appropriate and necessary in view of attaining a legitimate aim)?*
- (9) Are national provisions such as Article 4(2) and (3) of the ZZD — which for direct discrimination require “less favourable treatment” and for indirect discrimination require “placing in a less favourable position” but which do not, unlike the directive, make a distinction according to the degree of seriousness of the unfavourable treatment concerned — permissible under Article 2(2)(a) and (b) of Directive 2000/43?*
- (10) Is Article 2(2)(b) of Directive 2000/43 to be interpreted as meaning that the practice of [CHEZ RB] in question is objectively justified from the point of view of ensuring the security of the electricity transmission network and the due recording of electricity consumption? Is this practice also appropriate in the light of the defendant’s obligation to ensure that consumers have free access to the electricity meter readings? Is that practice necessary*

when, according to media publications, there are other technically and financially feasible means of securing the commercial measuring instruments?

5. Decision

The Court held that the supply of electricity is covered by Article 3(1)(h) of Directive 2000/43 and therefore the installation of an electricity meter essential to that supply necessarily also falls within the scope of the Directive.

The Court responded to the questions as follows:

Question 1

The Court concluded that the principle of equal treatment contained in the Directive “applies not to a particular category of person but by reference to the grounds mentioned in Article 1 thereof”. The principle protects not only persons who are themselves a member of a particular race or ethnic group, but also those who are not members of such a group but suffer particular disadvantage or less favourable treatment on one of those grounds. In this particular case, although Ms Nikolova is not herself of Roma origin, it is Roma origin (of those she shares a district with) which she considers to be the basis on which she has suffered a disadvantage.

Question 5

The Court concluded that a law (such as the ZZD) by which any act, action or omission which directly or indirectly prejudices rights or legitimate interests constitutes “unfavourable treatment”, restricts the scope of protection offered by the Directive. Such a law does this by limiting the less favourable treatment or particular disadvantage referred to in the Directive to acts that prejudice rights or legitimate interests.

Questions 2 to 4

The practice in question will amount to direct discrimination if it was introduced or maintained because of the ethnic origin common to most of the residents of the district, which is a matter for the Referring Court to determine. The Court was not empowered under Article 267 TFEU to apply EU law to the particular case. However, the Court noted a number of elements of the case which indicated that the practice in question displayed the characteristics of less favourable treatment on grounds of ethnicity. The treatment by CHEZ RB of placing the meters at 6-7m high in majority-Roma districts could be compared to the treatment of all those supplied by electricity by the same distributor in urban areas.

Questions 6 to 9

For a measure to amount to indirect discrimination, the measure does not need to be introduced because of any reasons relating to race or ethnic origin. It is sufficient that the measure, while using neutral criteria, “has the effect of placing particularly persons possessing that characteristic at a disadvantage”. Therefore, a national law which required such reasons to be demonstrated in order to establish indirect discrimination would restrict the scope of the Directive. If the Referring Court established that the practice of placing electricity meters at height did not amount to direct discrimination, the practice then in principle, should be considered as an apparently neutral

practice which puts persons of Roma origin at a disadvantage when compared to other persons, within the scope of Article 2(2)(b) of the Directive.

Question 10

CHEZ RB claimed that its aim in placing the meters at height was to prevent fraud and protect people's life and health by preventing them from tampering with the meters or making illegal connections. Such aims constituted legitimate aims for the Directive. However, for the practice to be objectively justified by these aims, it is not enough for CHEZ RB to contend that the tampering and theft is "common knowledge", it must establish the levels of such tampering and theft. It is then for the Referring Court to determine if other appropriate and less restrictive means exist to meet this aim, and if not, whether the disadvantage caused by the practice is disproportionate to the aim.