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Mission to Skopje



GUIDELINES ON SHIFTING THE BURDEN OF PROOF OF THE COMMISSION FOR PREVENTION AND PROTECTION AGAINST DISCRIMINATION



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GUIDELINES ON SHIFTING THE BURDEN OF PROOF OF THE COMMISSION FOR PREVENTION AND PROTECTION AGAINST DISCRIMINATION

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INTRODUCTION

The Commission for Prevention and Protection against Discrimination (hereinafter: the CPPD or the Commission), supported by the OSCE Mission to Skopje in the framework of the project “Strengthening the Rule of Law and Human Rights in North Macedonia II,” developed the Guidelines on Shifting the Burden of Proof of the CPPD in the period between August and October 2022. The Guidelines aim to clarify the procedural legal concept of shifting the burden of proof in the proceedings before the Commission to ensure effective application of the Law on Prevention and Protection against Discrimination (hereinafter: LPPD).

The systematic and analytical reflection about the general situation of shifting of the burden of proof, both in the proceedings before the Commission and in court proceedings, taking into account the existing national practice, posed a challenge in drafting the Guidelines. Hence, the Guidelines clarify the meaning, scope, and some open questions about this legal concept. They also provide examples of the case law from the Court of Justice of the European Union (hereinafter: the CJEU) and the European Court of Human Rights (hereinafter: the ECtHR), as well as comparative practices from European countries in order to assist legal practitioners, in particular the CCPD, in understanding and applying it. In addition, the Guidelines highlight some positive examples from the CCPD practice by illustrating the shifting of the burden of proof in their opinions.

These Guidelines have been drafted to elaborate on the procedural legal concept of shifting the burden of proof, introduced into the national legal system through anti-discrimination legislation. This concept applies both to court proceedings for protection against discrimination and to proceedings before the Commission. They should aid the understanding and are not intended to provide comprehensive theoretical elaboration, but rather to highlight the best methods of applying the shifting of the burden of proof in practice, whilst allowing for flexibility and evolutionary interpretation of this concept by the CPPD and other legal practitioners.

These Guidelines were developed using a combined methodology involving desk research of legal documents and case law and expert discussions with the Commission on the substance of the Guidelines. The OSCE Mission to Skopje supervised the process of developing and finalising the Guidelines.



I

THE NOTION OF SHIFTING
THE BURDEN OF PROOF

Under the LPPD, equality is the principle that all people are equal, i.e., equal in the enjoyment and exercise of all rights and freedoms. In its historical development in the legal theory, equality was first understood as a formal notion that we were all equal before the law, hence equals should be treated equally and unequal should be treated differently. According to General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities, even though formal equality can essentially assist in combating negative stereotypes and prejudices, it fails to offer a solution to the “dilemma of diversity,” as differences among human beings are neither considered nor accepted.¹ Therefore, legal theory considers it as an obsolete way of viewing equality as it fails to address the diverse forms of discrimination even though the formal legal understanding of equality is satisfied. This unquestionably brought about another way of viewing equality: substantive equality that guarantees equal opportunities and realization of full potential by ensuring equal starting positions. This may also require the application of special or affirmative measures to address historical inequality. So, substantive equality assumes a wider interpretation of the notion of equality and entails the implementation of legal equality in everyday life, whereby the results and effects arising from the application of laws, policies, and practices should not result in discrimination. This view, in particular, takes into account the diversity of designated protected groups, such as in the cases of reasonable accommodation for persons with disabilities.

Nowadays, we witness that even the substantive understanding of equality is replaced with a new notion of equality, that is, inclusive equality. Namely, General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities² points to inclusive equality as a new model of equality developed in the Convention on the Rights of Persons with Disabilities, which embraces substantive equality elaborating the four dimensions of equality. These are: (a) fair redistribution dimension to address socio-economic short-

1. See: General Comment No. 6: Article 5: Equality and non-discrimination, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/6, 9 March 2018.

2. See: General Comment No. 3: Article 6: Women and girls with disabilities, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/3, 25 November 2016. General Comment No. 6: Article 5: Equality and non-discrimination, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/6, 9 March 2018, Paragraph 11. For more information, see: Poposka, Z., *Commentary of the International Convention on the Rights of Persons with Disabilities of the United Nations, Polio Plus – Movement against Disabilities*, Skopje, 2018, page 30-31.

comings; (b) a recognition dimension to combat stigma, stereotypes, prejudices, and violence and to recognise the dignity of human beings and their intersectionality; (c) a participatory dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity (paragraph 11).

Did you know that legal theory throughout history understood equality in three different ways, each building on the other? First, as formal equality, then as substantive equality, and ultimately as inclusive equality!

According to Poposka, Mihajloski, and Georgievski, the subject matter of the burden of proof as a procedural legal concept is complex, so its elaboration should cover several theoretical and practical issues, both from substantive and procedural points of view. The legal obligation requires certain conduct by the entity, action or non-action, in the form of an imperative to behave in a prescribed manner. The legal norms must primarily to ensure that the civil legal order exercises its function and that the holders of civil subjective rights and legal obligations behave per the legal norms. When legal norms' primary effect is not achieved, and when entities fail to employ self-initiative to voluntarily and spontaneously comply with them, it is necessary to build a mechanism for additional – secondary protection, i.e., efficiency through forced execution. The state's organised mechanism achieves this, where the entity requires the mechanism to forcibly intervene to protect their right. This may involve a preventive action taken by the interested entities through extrajudicial protection, such as the procedure before the CPPD, or a repressive-restitution action of the interested entities, which is established in court proceedings (civil, criminal, administrative).³

Given the specifics of the phenomenon of discrimination, these cases pose numerous difficulties to prove discrimination when the regular burden of proof is applied, i.e., if the claimant needs to prove it. To help establish a discriminatory treatment or effect of a apparently neutral norm, criterion or practice, in cases of discrimination, the burden of proof can be shared between the applicant and the respondent. This principle, developed by the CJEU in cases of discrimination on grounds of sex, such as in the Danfoss⁴ and the

3. See: Poposka, Z., Mihajloski, Z., Georgievski, A., Guide on the Role of the Commission for Protection against Discrimination in Judicial Proceedings and Shifting the Burden of Proof, OSCE Mission to Skopje, 2013, page 30-31.

4. See: CJEU, C-109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk*

Enderby⁵ cases, is now deeply rooted in the European anti-discrimination legislation.

In general, there are two main reasons why the EU law regulates the shifting of the burden of proof:

- » To protect the weaker party in a legal relationship, and
- » To provide access to information underlying the principle of equality of arms in the proceedings.

Protection of the weaker party in a legal relationship and shifting of the burden of proof from the applicant to the respondent contributes to the achievement of one of the basic objectives of the European policy on equality of arms in the proceedings, i.e., it pursues the exercising of the legal protection of victims of inequality. In its jurisprudence, the CJEU continuously affirms that in the EU law, the social dimension, inclusive of equality of treatment, is equally or and even more important than the economic dimension⁶. The second reason concerns the availability of information. Namely, the party harmed by discrimination, as a rule, has no access to important information that affects the establishment of the violation of the right to equality in proceedings, so the burden should shift to the other party in possession of that information or data, to ensure that victims have an effective remedy at disposal.

The standard of shifting the burden of proof laid down in the EU law, i.e. anti-discrimination and gender directives, provides that: “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who have been treated in a way which is contrary to the principle of equal treatment 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.”

Worth knowing!

According to EU law, shifting the burden of proof is stipulated both in judicial and extrajudicial protection against discrimination.

Arbejdsgiverforening (acting on behalf of Danfoss), [1989] ECR I-3199.

5. See: CJEU, C-127/92, Enderby v Frenchay Health Authority and Secretary of State of Health, 1993 ECR I-05535.

6. See: CJEU, C-80/70, Defrenne I, [1971] ECR 445; SPEU, C-50/96, Deutsche Telekom v Schröder, [2000] ECR I-743, paragraph 56.

The cases of discrimination require the establishment of different and less favourable treatment (in the case of direct discrimination) or less favourable effect (in the case of indirect discrimination) on a discriminatory ground, which cannot be justified by any of the existing exceptions from direct discrimination, i.e., by the measures and actions that do not constitute discrimination or by the objective justification defence in indirect discrimination.

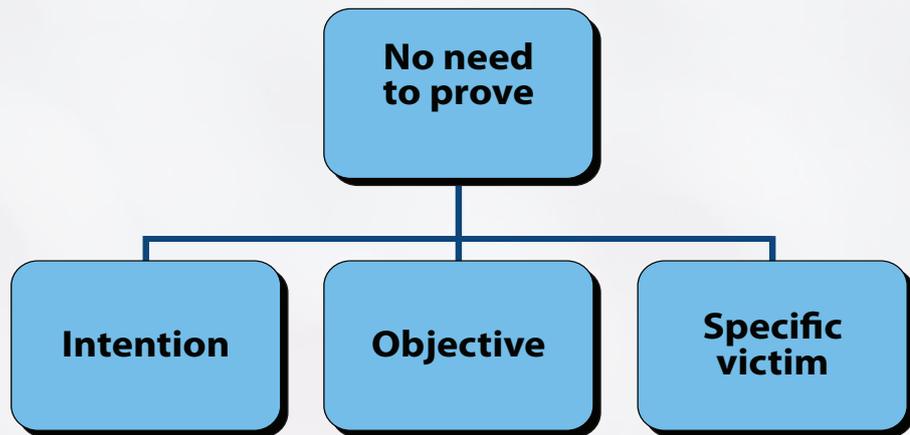
This means that it is not necessary to establish several supporting facts that occur in cases of discrimination in order to prove the case legally.

- » *First*, there is no need to establish that the respondent was motivated by prejudice, i.e., there is no need to establish prejudice against the respective person or group of persons in order to prove the case of discrimination. The law cannot regulate people's attitudes, as those are solely personal, but it can and it does regulate the actions through which such attitudes manifest. For example, in the *Feryn* case, explained below, even though the owner argued that his clients, and not himself, wanted only Belgians with white skin to work in their home, the CJEU did not consider this fact as relevant at all in deciding whether there was discrimination in the respective case.
- » *Second*, it is not necessary to show that a provision, criterion, or practice is intended to affect a group of persons less favourably. Conversely, even when shown that a particular provision, criterion, or practice is intended in good faith, but has a less favourable effect on the respective group of persons, it will still be considered discriminatory. For example, in the *D.H.* case, the state argued that the system of special schools had been put in place to help Roma pupils overcome the language barrier and lack of pre-primary education. The ECtHR considered this to be irrelevant and held that discrimination can be established by demonstrating that the Roma were disproportionately and negatively affected in the particular case compared to the majority population, even if there was no intent to discriminate⁷.
- » *Third*, in respect of the EU anti-discrimination legislation, there is no need to establish a specific identifiable victim, as demonstrated in the *Feryn* case. On the other hand, according to the ECtHR, if the specific victim does not show *locus standi*, then the case would not satisfy the criteria of admissibility under Article 34 of ECHR.⁸

7. See: ECtHR, *D.H. and Others v. the Czech Republic* [GC], Application No. 57325/00, 13 November 2007, paragraphs 175 and 184.

8. See: European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law*, 2018 edition, Publications Office of the European Union, Luxembourg, 2018, page 239-241.

This can be illustrated as in the table.



Burden of proof is a duty of a procedural entity to propose evidence that confirm the veracity of a particular claim for legally relevant facts. The burden of proof is preceded by the burden of allegation, which implies the duty of a certain procedural entity before the court or before the CPPD to present the assertions about the facts on which his/her claim is based or which refute the allegations of the opposite party. Shifting the burden of proof is of a procedural nature. Our national legislation, unequivocally stipulates it in the provisions regulating specific social relations explained below. The right to shift the burden of proof from the applicant to the respondent needs to be analysed in the context of pursuing legal protection in proceedings under the principle of equal treatment.

To shift the burden of proof from the victim (the applicant) to the alleged discriminator (the respondent), the former must present facts that make it probable that discrimination could have taken place, i.e. it should set a prima facie case of discrimination, from which it can be clearly assumed that the protected characteristic, i.e. the discriminatory ground, is the specific circumstance that led to the less favourable treatment or the effect of the treatment. Also, the applicant must show the probability of the existence of a causal link between the less favourable treatment or the effect of the treatment and the resulting injury (damage) or disproportionate adversity.

Worth knowing!

The fact that a person, unlike others, has a certain protected characteristic, does not suffice to shift the burden of proof because this distinction will always exist, and if accepted as sufficient, a prima facie case of discrimination will always be established and that creates legal nebulosus.

Despite the existence of a discriminatory ground, i.e., a protected characteristic, a presumption of discrimination requires that another fact or evidence is produced, to showcase the use of the protected characteristic as a criterion to distinguish the specific person in the respective case. For example: if a person of a certain

ethnic origin had better qualifications than another person and this other person was selected; or if Roma are not allowed to enter a restaurant while others are, then a prima facie case is already established and the burden of proof shifts to the respondent, who then needs to prove the contrary; or, when in addition to a disability, some other circumstances point to existence of negative stereotypes against persons with disabilities, on grounds of which the decision-maker based his/her decision. Such circumstances may be: comments showing intention to discriminate, former cases/policies of discrimination against persons with disabilities or a certain type of disability (most often persons with mental or intellectual disabilities) on the part of the respective natural person or legal entity, questions posed during an interview (for example, about the interviewee's type of disability), non-transparency or unexplained procedural violations, requesting additional data such as, for example, data from the health record of the person with disabilities and the like.



In other words, in order to make a prima facie case of discrimination, the applicant must show a clear causal link between the less favourable treatment and the resulting injury, but also between the less favourable treatment and the discriminatory ground, where only the causal link between the discriminatory ground and the resulting injury should be made probable.

According to Poposka, very often, a prima facie case of direct discrimination on discriminatory grounds is established if the applicant demonstrates that a certain legal entity applies a clear discriminatory policy or a rule that treats the respective persons differently from the others. Such would be the practices where female and male Roma are not admitted at the swimming pool, or elderly people are not allowed to enter a certain coffee-bar, or a restaurant has a rule not to allow people accompanied by a guide dog. This is especially important in proving cases of indirect discrimination where it should be demonstrated that a particular, seemingly neutral provision, criterion, or practice has an especially less favourable effect on a particular group of persons. The applicant must prove that this disproportionately less favourable effect results from the application of the contested specific provision, criterion, or practice. Thus, the applicant should demonstrate the causal link

between the measure being contested and the imbalance between the different groups in the enjoyment of a certain advantage⁹.

Once the burden of proof shifts from the applicant to the responding party, the latter may refute the presumption of discrimination by proving that the applicant was not actually in a similar situation with its comparator, or that the different treatment was not based on a protected characteristic, but on other objective distinction. If the responding party fails to refute the presumption of discrimination in any of the said ways, then he/she will have to provide an account for the different treatment/effect, i.e., to prove that it was objectively justified and proportionate. That is, in *prima facie* case of discrimination, the responding party must prove that the respective distinction on a discriminatory ground sought to achieve an objective and justified aim, and the distinction made was reasonable and necessary to achieve that aim.

To conclude, three aspects need to be considered in respect of shifting the burden of proof:

- » *first*, the type of facts/evidence which are admissible and required to be presented before national courts and other competent authorities and the method of presenting them is laid down in the national legislation, and this may be more rigorously defined compared to the ECtHR or the CJEU;
- » *Second*, the rules on shifting the burden of proof do not apply in criminal proceedings when the State prosecutes perpetrators of hate crimes or gender-based violence as the criminal responsibility is established using higher standards of proof¹⁰; and
- » *Third*, States may determine that rules on shifting the burden of proof would not apply in cases where courts or other competent authorities conduct investigations, given the principle of presumption of innocence as well as the principle of objectivity and impartiality.

Do you know that the EU law provides discretion to each of the States to regulate matters of shifting the burden of proof? For example, the anti-discrimination legislations of France and Belgium provide that special rules concerning the shifting of the burden of proof are applicable not only in civil proceedings, but also in administrative proceedings.

9. See: Poposka, Z., *Discrimination on the grounds of disability in international human rights law*, University «Ss.Cyril and Methodius» - Skopje, "Justinian I" Faculty of Law, Skopje, 2012, page 47-52.

10. See: European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law*, 2018 edition, Publications Office of the European Union, Luxembourg, 2018, page: 236





INTERNATIONAL AND NATIONAL STANDARDS ON SHIFTING THE BURDEN OF PROOF

The principle of shifting the burden of proof is enshrined in the law of the European Union and the case law of the CJEU, being the origin of this procedural concept, but also in the case law of the ECtHR, which is explained below. In addition, the European Committee of Social Rights established under the European Social Charter of the Council of Europe, in several of the cases it has examined, provided that the burden of proof in matters of discrimination should not rest entirely on the applicant, but should be the subject of an appropriate adjustment¹¹. According to the Handbook on European non-discrimination law, this practice is also observed in the United Nations Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination. Namely, the Committee on Economic, Social and Cultural Rights indicated that “where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.”¹²

1.

The law of the European Union

As stated above, shifting the burden of proof first appeared in the case law of the CJEU in cases of equal pay for equal work and work of equal value, i.e., in cases of direct sex discrimination. The Court closely relates this legal concept to the creation of assumptions for the effective implementation of the principle of equal treatment. That is, two legal principles of the EU law should be taken into account, one being the principle of effectiveness, according to which substantive and procedural guarantees for taking action to implement the EU law are not considered to be placed in such a way as to preclude the use of the law governed by the Union legislation. In this regard, the CJEU clearly stated in the case *Comet BV*¹³ that the national legislation provides for the procedural conditions for the protection of rights guaranteed by the Union legislation if they are not discriminatory and as long as they do not preclude persons

11. See: ECSR, *Associazione Nazionale Giudici di Pace v. Italy*, Complaint No. 102/2013, 5 July 2016, paragraph 73; ECSR, *Sud Travail Affaires Sociales, Sud ANPE and Sud Collectivité Territoriales v. France*, Complaint No. 24/2004, 8 November 2005; ECSR, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Complaint No. 41/2007, 3 June 2008.

12. See: European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law*, 2018 edition, Publications Office of the European Union, Luxembourg, 2018, page 239.

13. See: CJEU, C-45/76, *Comet v. Produktschop voor Siergewassen*, [1975] ECR 2043.

to use them in practice. The second principle is the principle of efficient judicial protection. In the case of *San Giorgio*¹⁴, the Court considered that it was not appropriate to place the burden of proof on the applicant since in that case, it would be entirely impossible to exercise the rights guaranteed by EU legislation.

One can conclude that the CJEU, in its jurisprudence, clearly points out that without sharing the burden of proof between the two parties in the proceedings, there are no preconditions for practical application of the principles of equality and prohibition of discrimination. There will be no possibility to prove the cases and thus the practice will not change. Therefore, the European Union, initially in a separate directive, Council Directive 97/80/EC on the burden of proof in cases of discrimination on grounds of sex¹⁵, and then in the two anti-discrimination directives of 2000¹⁶ and the gender directives,¹⁷ explicitly stipulated this procedural concept. Recital 8 and recital 18 of the Preamble to Directive 97/80/EC state that the shifting of the burden of proof is designed to ensure the exercising of the legal protection of victims against inequality in the proceedings.

Legal Act	Article
<i>Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation</i>	Article 10
<i>Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin</i>	Article 8
<i>Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services</i>	Article 9
<i>Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (consolidated version)</i>	Article 19

Did you know that the first cases involving shifting of the burden of proof were related to sex discrimination and concerned equal pay for equal work and work of equal value between men and women?

14. See: CJEU, C-199/82, *Amministrazione delle Finanze della Stato v. San Giorgio SpA*, [1983] ECR 3595.

15. See: Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998.

16. See: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.

17. See: Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004.

2.**European Convention on Human Rights**

Unlike the anti-discrimination law of the European Union, the European Convention on Human Rights (hereinafter: the ECHR or the Convention) does not explicitly recognise the provision for shifting the burden of proof. When the ECtHR examines cases from the perspective of evidence, the Court usually applies the principle *affirmanti incumbit probatio*, i.e., that the applicant should prove his/her claim. The Court applies the standard of proof “beyond reasonable doubt” as the usual standard for all rights established by the Convention. In the proceedings before the ECtHR, there are no procedural obstacles to the admissibility of evidence or pre-determined formulas on which their assessment is based. The Court adopts conclusions, which, in its view, are supported by the free assessment of all evidence, including conclusions that may arise from the facts and submissions of the parties to the proceedings.

However, the shifting of burden of proof is applied by the ECtHR, as is noted by its case law. For example, when the developments under consideration are entirely, or to a great extent, within the exclusive knowledge of the authorities, the burden of proof can be considered to rest with the authorities to provide a satisfactory and convincing explanation (case *Salman*, case *Anguelova*, case *Makuchyan and Minasyan*)¹⁸. The Court also shifted the burden of proof in other cases where in practice it would be extremely difficult for the applicant to prove discrimination (case *Cința*)¹⁹.

The ECtHR sees the evidence presented as a whole since most often the states have the information (facts and evidence) to confirm a claim. That is, if the Court finds the facts presented by the applicant credible and consistent with the other evidence presented, the ECtHR will accept them as proven unless the State is able to present another credible explanation. The Court will accept as facts those allegations which are “free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions... proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation

18. See: ECtHR, *Salman v. Turkey* [GC], Application No. 21986/93, 27 June 2000, paragraph 100; ECtHR, *Anguelova v. Bulgaria*, Application No. 38361/97, 13 June 2002, paragraph 111; ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, Application No. 17247/13, 26 May 2020. Council of Europe/European Court of Human Rights, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, Strasbourg*, updated on 31 August 2022, page 21-23.

19. See: ECtHR, *Cința v. Romania*, Applications No. 3891/19, 18 February 2020.

made and the Convention right at stake” (ECtHR, case Nachova, case Timishev, case D.H.).²⁰

Worth knowing!

Even though the shifting of the burden of proof is not explicitly stipulated in the ECHR, its application by the Court is noted in its case law.

Further readings

Handbook on European non-discrimination law about European anti-discrimination standards.

3. Law on Prevention and Protection against Discrimination

The Law on Prevention and Protection against Discrimination²¹ is anticipated to fill our system’s legal gaps concerning non-discrimination and facilitate the legal protection of all alleged victims of discrimination. Articles 14-31 of the Law stipulate the establishment of an equality body - the Commission for Prevention and Protection against Discrimination and set forth the proceedings taken before this body. The national system foresees three types of proceedings in cases of alleged discrimination: administrative proceedings (before the Commission for Prevention and Protection against Discrimination in accordance with Articles 23 to 31 of the LPPD and before the Ombudsperson Institution in accordance with Articles 13 to 27 of the Law on the Ombudsperson²²), civil proceedings (in accordance with Articles 32 to 40 of the LPPD) and misdemeanour proceedings (in accordance with Articles 41 to 44 of the LPPD).

Regarding the procedural provisions, the shifting of the burden of proof, both in judicial and extrajudicial proceedings, is expressly provided for in the LPPD. Namely, Article 37 provides that: The plaintiff claiming that discrimination has been committed under the provisions of this Law, shall state the facts that make the claim probable, and then the burden of proof shall shift to the respondent to prove that there was no discrimination committed. (paragraph 1). In addition, the law specifies that this provision shall not apply in misdemeanour and criminal proceedings (paragraph 2).

Shifting of the burden of proof is also regulated in the proceedings before the CPPD.

20 See: ECtHR, *Nachova and Others v. Bulgaria* [GC], Applications Nos. 43577/98 and 43579/98, 6 July 2005, paragraph 147; ECtHR, *Timishev v. Russia*, Applications Nos. 55762/00 and 55974/00, 13 December 2005, paragraph 39, and ECtHR, *D.H. and Others v. the Czech Republic* [GC], Application No. 57325/00, 13 November 2007, paragraph 178. For more information see: European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law*, 2018 edition, Publications Office of the European Union, Luxembourg, 2018, page 233

21. See: Law on Prevention and Protection against Discrimination, “Official Gazette of RNM”, No. 258/2020.

22. See: Law on the Ombudsperson, “Official Gazette” Nos. 60/03, 114/09, 181/16, 189/16 and 35/2018

Article 26 of the LPPD

The applicant claiming that discrimination has been committed under the provisions of this Law shall state all the facts making such claim probable. If the Commission shall determine that the claim is probable, then the burden of proof shall shift to the respondent.

Both provisions on shifting the burden of proof are fully aligned with the anti-discrimination standards, in particular with the EU law. However, according to Kocevski, the application of the principle on shifting the burden of proof, so far, has revealed the non-uniform practice of courts. In more than half of the analysed court decisions, the courts never stated their opinion on the burden of proof, failing to apply this principle, which significantly complicates access to effective proceedings for protection against discrimination. The reasons for such actions might be identified in the insufficient training, as well as the poor activity of higher courts in reaching harmonized application of the laws²³.

On the other hand, the analysis of the CPPD's opinions notes that the Commission generally adheres to the principle of the shifting of the burden of proof and bases its decision on the application of this procedural rule.

Worth knowing!

The Law on Prevention and Protection against Discrimination explicitly provides for the shifting of the burden of proof, both in judicial and extrajudicial proceedings before the Commission for Prevention and Protection against Discrimination, and in this regard, it is fully compliant with the anti-discrimination standards, especially with the EU law.

23. See: Kocevski, G., *Revising the burden of proof in court proceedings for protection against discrimination, Analysis of and recommendations for enhancing promoting the effectiveness of judicial court protection against discrimination, public policy paper*, Coalition "Sexual and Health Rights of Marginalized Communities" MARGINS Skopje, Network for Protection against Discrimination, Skopje, 2020, page 7.





ELEMENTS AND PHASES OF SHIFTING THE BURDEN OF PROOF IN PRACTICE

Shifting of the burden of proof from the applicant to the respondent, as a procedural concept aimed at increasing the efficiency of anti-discrimination quasi-judicial protection, as a rule, embodies several phases in the proceedings, including submission of the application, response to the application, and proving and production of evidence.

The competent authority, in this case the CPPD, within the proceedings must ascertain the truth, the factual situation, based on which it will pass a decision, or adopt an opinion. In doing so, the Commission determines the facts that are in dispute between the parties based on the proposed facts and evidence at all stages of the procedure.

In court proceedings for protection against discrimination, the Law on Civil Procedure²⁴ (hereinafter: the LCP) applies, and as in other civil proceedings, the court decides within the limits of the requirements set in the lawsuit, and the parties are obliged to state: all the facts verifying them, and the court decides on its own discretion which facts it will take as proven, based on conscientious and caring evaluation of each evidence separately and of all evidence together, and based on the results of the overall proceedings.

Under the LPPD, the CPPD has competence to act upon applications, to issue opinions, recommendations and conclusions on specific cases of discrimination (Article 21 paragraph 1 line 14), but also to initiate proceedings for protection against discrimination ex officio (Article 21 paragraph 1 line 15) if circumstances and facts, as well as information obtained through rumours, give rise to a grounded suspicion that discrimination has been committed by a competent authority on any discriminatory grounds (Article 23 paragraph 4). In doing so, unlike the court, the Commission may decide more broadly than the request in the application, i.e., it may, when analysing the facts and evidence in their entirety, find discrimination of a different form or on different discriminatory grounds than what the application originally stated, which the CPPD often does.

²⁴ See: Law on the Civil Procedure, "Official Gazette" Nos. 79/2005, 110/2008, 83/2009, 116/2010 and 124/2015.

Example: *In Case No. 0801-278²⁵, concerning an applicant who claimed discrimination on grounds of personal and social status and family and marital status against an Internet portal that published texts with untrue and disturbing content about her, after shifting the burden of proof and when analysing all facts and evidence in the case, the CPPD determined harassment on the grounds of sex, gender, marital status, and personal and social status (CPPD, Case no. 0801-278).*

1.

Elements of prima facie case of discrimination

The initial burden of proof is on the applicant to make it probable that there is a case of discrimination, i.e., to establish a prima facie case of discrimination. This is done by submitting facts, and evidence if available, which suggest that discrimination is likely to have occurred, i.e., which lead to the creation of a presumption of discrimination. This also includes listing and describing events, actions, and relations between the parties due to which the applicant believes that discrimination occurred. This is required to avoid unjustified or partial accusations of discrimination not based on any relevant facts.

Example: *In the Belov case²⁶, in which discrimination on grounds of ethnicity is alleged, the CJEU General Advocate Kokott, stated in her opinion that in order for the burden of proof to shift nothing more than a “presumption” of discrimination was required, and any stricter interpretation would jeopardise the need for practical efficiency and would mean that the rule itself would be unnecessary. In other words, it requires a presumption and not a conclusion or unequivocal evidence of discrimination.*

The principle applies equally to all forms and types of discrimination, i.e., to cases of direct and indirect discrimination (Article 8), as well as to calling, incitement, and instruction to discrimination (Article 9), harassment (Article 10), victimisation (Article 11), segregation (Article 12), as well as to cases of more severe forms of discrimination (Article 13), explained below. The LPPD implies that failures to ensure reasonable accommodation and accessibility and availability of infrastructure, goods, and services are considered discrimination (Article 6), and the shifting of the burden of proof applies in these cases as well.

25. See: Commission on Prevention and Protection against Discrimination, No. 0801-278, 5 July 2021.

26. See: CJEU, C-394/11, *Belov v CHEZ Elektro Bulgaria AG*, [2013] 2 CMLR 29.

Article 5 of the LPPD

Any discrimination based on race, skin colour, national or ethnic origin, sex, gender, sexual orientation, gender identity, belonging to a marginalised group, language, nationality, social background, education, religion or religious belief, political conviction, other beliefs, disability, age, family or marital status, property status, health status, personal and social status, or any other grounds (hereinafter: discriminatory grounds) shall be prohibited.

Grounds and area of discrimination

It is important to highlight the distinction between grounds and areas of discrimination. An area of discrimination is a field in which unequal and unlawful treatment occurs. It can be: labour relations, education, goods and services, housing, health care, social protection, etc.

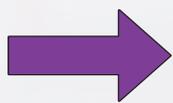
Understanding the area of discrimination is important for understanding the scope of protection against discrimination on a particular ground, and depending on the area, a particular ground may be protected (1) in one area (for example, the “age” ground may be protected only in the “employment” area), (2) in several areas (for example, “sexual orientation” may be protected in health care and employment), or (3) in all areas where there is a legal basis for this (as is the case with Article 3 paragraph 2 of the LPPD, which lists several areas for the field of application and ends with “all other areas”).²⁷

1.1. Direct discrimination

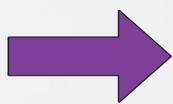
In cases of direct discrimination, the applicant should make a presumption of discrimination, showing:



less favourable treatment caused by an act or an omission,



a discriminatory ground and a causal link between the discriminatory ground and the less favourable treatment, i.e., it should show that the only reasonable explanation for the difference in treatment is the protected characteristic of the victim in accordance with Article 5 of the LPPD, and



a comparator, i.e. a comparable situation

²⁷ See: Kotevska, B., *Guide on discrimination grounds*, OSCE Mission to Skopje and Commission for Protection against Discrimination, Skopje, 2013, page 12.

As for the first element, the existence of less favourable treatment, per the LPPD's definition of discrimination (Article 6), the CPPD considers the existence of any distinction, exclusion, restriction, or preference, whether by action or omission, aimed at or resulting in preventing, restricting, recognising, enjoying or exercising the rights and freedoms of any person or group on an equal basis with others. And it should all be based on a discriminatory ground or grounds (the second element).

The applicant may claim discrimination on a discriminatory ground, i.e., protected characteristic if the characteristic is real, or the respondent perceived the applicant to possess it and treated him/her less favourably based on that perception. In addition, an applicant may be discriminated against by association because of the connection with a person or group of persons who have the protected characteristic. Likewise, a person may be discriminated against on multiple discriminatory grounds simultaneously (multiple discrimination).

When it comes to the existence of a discriminatory ground, according to Fredman, a list of marks may be established that the Commission could consider to determine whether a characteristic or status that has not been explicitly listed may be considered protected, or acknowledged as "other grounds":

- » *Immutability*, choice, and autonomy: are concerned persons able to change the characteristic or the status upon which the unequal treatment is based. Considering that such a characteristic or status is often inherent or permanent, the violations of the prohibition should be considered especially serious or grave.
- » *Access to political processes*: whether the person or the group is or has been marginalized in the context of political processes. The absence of these persons or groups from processes for adoption of laws, which, inter alia, also regulate their rights and protection, may be considered as a reason to grant them protection.
- » *Dignity (treating persons as less valuable members of society)*: does unequal treatment based on a personal characteristic or status result in violation of the dignity of the concerned persons or does it affect these persons significantly more than others?
- » *History of inequality*: does the person belong to a group that can be considered to have been exposed to unequal treatment or prejudice for a longer period of time.²⁸

When it comes to the third element, i.e., the comparator, the CPPD can sometimes also use a hypothetical comparator, if it cannot identify a real one. In cases where a hypothetical comparator is

28. See: Fredman, S., *Discrimination Law*, (2nd edn), Oxford University Press, 2011, page 110-139. See also: Kotevska, B., *Guide on discrimination grounds*, OSCE Mission to Skopje and Commission for Protection against Discrimination, Skopje, 2013, page 8-9

used, the applicant should make it plausible that a real comparator is not necessary.

Example: *When a patient is using racist comments to address a nurse/medical technician belonging to an ethnic community, it is sufficient that the technician shows that the patient was using these racist comments, without showing that they were not addressed to another nurse/medical technician belonging to the majority ethnic community.*

In addition, a comparator is not required in cases where discriminatory intent can be identified (although the intent is not a constitutive element of any form of discrimination) through irrefutable public statements made by the respondent. The CPPD follows the same logic, which is observed in their practice in dealing with complaints concerning media and public information and in relation to Internet and social media content, where the complaint itself includes the content in question which on itself creates a presumption of discrimination without any need for a comparator. In these cases, the CPPD shifts the burden of proof from the applicant to the respondent to prove otherwise.

Example: *In the case **Feryn**, which refers to direct discrimination on the ground of ethnicity, the CJEU found that the remarks by the company owner that he would not employ Moroccans evidenced a **prima facie** case of discrimination (CJEU, case **Feryn**)²⁹.*

The Belgian Federal Law on Combating Certain Forms of Discrimination contains examples of facts that enable a presumption of direct discrimination, while specifically stating two types of facts, namely:

- » *First*, elements revealing a certain recurrence of unfavourable treatment towards persons sharing a particular protected characteristic, such as: repeated reports of discrimination filed to the equality body or to civil society organisations against discrimination, and
- » *Second*, elements revealing that the situation of the applicant is comparable to that of a person who does not present the respective protected characteristic and was treated better.³⁰

In its proceedings, the CPPD decides which facts make the assertion of discrimination probable, that is, *prima facie* case of discrimination, in accordance with the national legislation and practice. The CJEU and the ECtHR hold the same stance in the proceedings before them, and consider that the national courts and other relevant bodies are to decide on these facts.

29. See: CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008.

30. See: Ringelheim, J., *The burden of proof in anti-discrimination proceedings. A focus on Belgium, France and Ireland*, in *European equality law review*, European network of legal experts in gender equality and non-discrimination, Publications Office of the European Union, Luxembourg, 2019, page 53

The applicant may enclose direct or indirect evidence. Direct evidence enables fact-finding without requiring the CPPD to draw conclusions about the evidence, while indirect evidence is only part of the puzzle that the CPPD should solve in accordance with the rules of logic.³¹

Given the nature of the subject matter of the application, the following can be evidentiary means used in the proceedings:

- » documents, if they have content related to the discrimination or relate to the specific case of the applicant,
- » reports and analyses from relevant sources,
- » witnesses to the discriminatory treatment,
- » expert testimony for the material and non-material damage due to the resulting discrimination,
- » audio and video materials and records, recorded in accordance with the law,
- » other writings, clippings of articles, postings on social networks, and the like,
- » hearing of the parties,
- » statistics,
- » situation testing, and
- » other evidence that would be relevant in the specific case, and the CPPD believes that should be taken into consideration.

For example, in case of a selection process following a published advertisement or competition, only written evidence available to the respondent may be admissible. However, if the discrimination is against an employee of the employer, witness statements regarding possible discrimination may also be considered during proceedings before the CPPD, depending on the nature of the decision. The applicant can propose witnesses, either with the complaint or during the proceedings.

Example: *In the case before the Basic Court in Brussels, in which a Belgian couple of immigrant origin claimed discrimination on the grounds of ethnicity because of the inability to rent an apartment, following the facts and witness statements, the court considered that a prima facie case of discrimination had been committed (Basic Court in Brussels, case No. 05/1289/A)³².*

The LPPD stipulates that data obtained through situation testing are admissible as evidence. Article 4, paragraph 1, item 14 of the LPPD defines what constitutes a “situation testing”, i.e., it defines it as a method of proving discrimination by involving organised testers placed in a comparable situation to investigate discrimination in various cases, processes, and areas on any discriminatory grounds. In several EU countries, such as the

31. See: Farkas, L., O’Farrell, O., Reversing the burden of proof: Practical dilemmas at the European and national level, European Commission, Brussels, 2014, page 36.

32. See: Basic Court of Brussels, No. 05/1289/A ref. T. No. 1264/05, 25 June 2005.

Netherlands, France, Denmark, Finland, Sweden, the United Kingdom, and the Czech Republic, situation testing is allowed in legal proceedings. It should be noted that the situation testing must be considered by both the CPPD and the court as confidential and final, i.e., one is to be able to reach a concrete conclusion through it. However, comparative experience from the courts shows that courts generally believe that the test results must be backed by other sources of evidence to lead to a finding of discrimination.³³

Article 38 of the LPPD

In addition to the evidence stipulated by the Law on Civil Procedure, statistical data and/or data obtained through situation testing may also be used in court proceedings for protection against discrimination.

The Commission, in accordance with its competences, may inspect documentation and premises (Article 29), collect data and information from natural and legal persons (Article 30), and cooperate with institutions acting upon applications for protection against discrimination and human rights (Article 31), and thus obtain other facts and evidence not available to the applicant that help fully establish the factual situation and find or not discrimination in a case.

Article 29 of the LPPD

(1) While performing the duties within its competence, the Commission may directly inspect the documents and premises of all legal entities, state authorities, local self-government bodies, other authorities and organisations exercising public authority, and request and obtain from them copies of any documents pertaining to any particular case concerned, as well as from public institutions and services that avail of data and information on cases and general practices of discrimination, while respecting the right to privacy.

Article 30 of the LPPD

(1) Any natural and legal entities, state authorities, local self-government bodies, other bodies and organisations exercising public powers, and any public facilities and services shall, at the Commission's request, provide information on specific cases of discrimination and general discriminatory practices within 8 (eight) days as of the date of receipt of the application.

(2) The Commission may summon for an interview any person who can provide specific information on cases of discrimination.

Article 31 of the LPPD

(1) In the performance of the activities within its competence, in specific cases of discrimination the Commission shall cooperate with institutions acting upon complaint for protection against discrimination and human rights.

³³. See: Court of Appeal in Paris, Billau v SOS Racism, decision No. 07.04974, 17 March 2008.

Several discriminatory grounds are elaborated below for illustration, supported by the existing practice of the CPPD, international judicial instances, and comparative practice.

1.1.1. Direct discrimination on grounds of sex

To establish a prima facie case of direct sex discrimination, the applicant needs to show:

- 1) less favourable treatment by act or omission,
- 2) sex as a discriminatory ground and a causal link between the applicant's sex and the less favourable treatment, and
- 3) a comparator, i.e., comparable situation, except in certain cases explained below which are in connection with pregnancy and maternity leave.

The analysing of the first element takes account of the less favourable treatment that occurred, is currently occurring, and there is also an anticipatory element of in-futuro treatment (would take place). As it was stated above, according to the case law of the CJEU, the comparator is not required in cases of pregnancy³⁴ of the applicant, maternity leave of the applicant³⁵, or applicant undergoing in vitro fertilisatio³⁶.

Example: *In the case of Wrights of Howth Seafood Bars Limited v. Murat*³⁷, the Irish Labour Court stated that the special protection of pregnant women against dismissal in the EU law requires that when a pregnant woman is dismissed, the employer bears the burden of proving that the dismissal is based on exceptional circumstances unrelated to pregnancy or maternity leave. Hence, the Court considered that in any case in which a pregnancy-related dismissal is in question, the actual combination of the dismissal and the woman's pregnancy, in itself, strictly places the burden of proof on the employer's side to prove that it is not a matter of discrimination.

Three cases concerning discrimination on the grounds of sex and related to the equal pay for equal work and work of equal value are elaborated below, which were all considered by the CJEU also referring to the shifting of the burden of proof in the specific cases.

34. See: CJEU, C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, ECR I-3941, 8 November 1990; CJEU, C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd*, ECR I-3567, 14 July 1994.

35. See: CJEU, C-191/03, *North Western Health Board v. Margaret McKenna*, 8 September 2005, paragraph 50.

36. See: CJEU, C-506/06, *Sabine Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG [GC]*, 26 February 2008.

37. See: Labour Disputes Court of Ireland, *Wright's of Howth Seafood Bars Limited v. Murat*, EDA1728, 26 October 2017.

Example: *In the Brunnhofer case, where the plaintiff made allegations of sex discrimination because she was paid less than her male colleagues who were at the same level of pay as her, the CJEU stated that the plaintiff should prove the following: first, that she received less salary than her male colleagues who were at the same work level, and second, that she was conducting work that was of equal value as the work they were doing. This would suffice to make it probable that the different treatment can only be explained because of her sex, which automatically shifts the burden of proof to the employer to prove otherwise (CJEU, Susanna Brunnhofer case).³⁸*

Example: *In the Danfoss case³⁹, the union brought a case on behalf of the female workers in a company because they earned in average 7% less than their male colleagues in the same or similar job position. In this case, the CJEU expressly stated that in cases in which the enterprise implements a system of calculation of wages that is completely non-transparent and the statistics show inequalities in paid wages between female workers and male workers, the burden of proof shifts to the employer to prove that the difference in paid wages refers to factors unrelated to the sex of the workers (CJEU, Danfoss case).*

Example: *In the Enderby case, which concerns discrimination on grounds of sex and in connection with the equal pay for work of equal value, the CJEU confirmed its earlier reasoning in the Danfoss case, comparing the salary of speech therapists who were mostly women and pharmacists who were mostly men. The Court considered that if the pay of speech therapists is significantly lower than the pay of pharmacists, and the former are predominantly women as opposed to the latter who are predominantly men, this leads to the existence of a prima facie case of discrimination on the grounds of sex. And when there is a prima facie case of discrimination, the employer is responsible to show that there is an objective reason for the difference in pay. The Court takes the opportunity to state that male and female workers will be precluded from enforcing the principle of equal pay before the national courts if proof of a prima facie case of discrimination does not enable the burden of proof to be shifted (CJEU, Enderby case).⁴⁰*

38. See: CJEU, C-381/99, Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG, 26 June 2001, paras. 51-62.

39. CJEU, C-109/88, Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting on behalf of Danfoss), [1989] ECR I-3199.

40. See: CJEU, C-127/92, Enderby v Frenchay Health Authority and Secretary of State of Health, 1993 ECR I-05535, paragraph 14 and 18

Example: *The CJEU in the Kelly case*⁴¹, in which the plaintiff alleged sex discrimination because of being rejected to participate in a professional development programme and requested the educational institution to allow him access to information on the qualifications of other applicants, clearly indicates that there is no such right under the secondary legislation of the Union. However, it is for the national courts to decide whether in the present case it is necessary to allow this data to become publicly available in order to achieve the objective of the legislation, in this case, Directive 97/80/EC⁴²

Example: *The Court of Appeal of Montpellier drew an identical conclusion in the case IBM v. Buscail*⁴³, in which the court considered that the consequence of not providing the evidence held by the respondent leads to shifting the burden of proof on its part.

Example: *CJEU, in the Richards case*⁴⁴, in which the applicant underwent gender reassignment surgery (male to female) and wanted to apply for a state pension when she turned 60, given that women in the United Kingdom were entitled to receive state pension at that age. The state refused to grant her a pension, considering that the applicant was not treated less favourably compared to others who are in a similar situation. Authorities argued that the relevant comparator in the case should be “men” because the applicant lived her life as a man. The CJEU decided that because national laws allow for gender reassignment, the relevant comparator, in this case, should be “women”. Accordingly, the applicant was treated less favourably than other women by imposing on her a higher retirement age (CJEU, Richards case).

Worth knowing!

In cases of discrimination on the grounds of sex and in connection with pregnancy, a comparator is not required.

1.1.2. Direct discrimination on grounds of ethnicity

In order to establish a prima facie case of direct discrimination on the grounds of ethnicity, the applicant needs to show:

- 1) less favourable treatment of an act or omission committed,

41. See: CJEU, C-104/10, Patrick Kelly v. National University of Ireland (University College, Dublin), 21 July 2011.

42. See: Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

43. See: Court of Appeal of Montpellier, IBM v. Buscail, No. 0200504, May 28, 2020.

44. See: CJEU, C-423/04, Richards v. Secretary of State for Work and Pensions, ECR I-3585, 27 April 2006.

- 2) ethnicity as a discriminatory ground and a causal link between the applicant's ethnicity and the less favourable treatment, and
- 3) a comparator, that is, a comparable situation.

The case law can sometimes provide answers as to what facts may be used in order to set the presumption of discrimination. For example, the Irish courts in some cases consider that one of the facts which may lead to a prima facie case of discrimination is where the conduct of the plaintiff differs from the standard practice in relation to the provision of the service in question.

Example: *In the A Nigerian National v A Financial Institution case⁴⁵, a Nigerian citizen complained that his application for a temporary loan was rejected even though he met all the criteria. This sufficed to draw a definite conclusion about the alleged discrimination on the grounds of race and ethnicity, which was not refuted by any evidence produced by the defendant.*

Also, as explained above, direct discrimination occurs in cases where the employer publicly declares that they will not employ workers of a particular ethnic group, as such statements most often would deter certain workers from applying, thereby hindering their access to the labour market, as in the Feryn case, explained above. In this case, the statement itself shifts the burden of proof, without the need for an identifiable victim. In such cases, civil society organisations would most often file complaint to the CPPD or an ex officio procedure could be initiated.

Example: *In the Makuchyan and Minasyan case, given its special characteristics where a convicted killer of an Armenian soldier was promoted and granted more benefits without any legal basis, being glorified as a hero by a number of high-ranking Azerbaijani officials, and the creation of a separate page on the President's website, in the opinion of the ECtHR, the applicants drew sufficiently strong, clear and coherent conclusions to show a compelling prima facie case in which the disputed measures under consideration were motivated by the victims' ethnic origin. Given the difficulty of the applicants to prove this bias beyond reasonable doubt, the Court, in the specific circumstances of the case, shifted the burden of proof so that Azerbaijan was obliged to refute the questionable claim of discrimination, and ultimately failed to do so (ECtHR, Makuchyan and Minasyan case).⁴⁶*

45. See: Labour Disputes Court of Ireland, A Nigerian National A v. Financial Institution, DEC-S2005-114.

46. See: ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, Application No. 17247/13, 26 May 2020.

Minority rights as opposed to their protection against discrimination in international law and practice

International law and practice, as well as academic literature, see the protection of minorities resting on two pillars. It is important that practitioners are aware of the differences between these two pillars, to be able to properly understand international law and practice, which is why they are briefly presented here.

First, the non-discrimination pillar, which covers the enjoyment of human rights and equality before the law without any discrimination, as well as the application of affirmative measures and positive measures to ensure substantive equality. Second, the identity pillar, which is composed of identity rights aimed at providing communities with the necessary conditions to transmit, maintain, and develop their culture and other essential elements of their identity.⁴⁷

1.1.3. Direct discrimination on the grounds of disability

In order to establish a *prima facie* case of direct discrimination on the ground of disability, the applicant needs to show:

- 1) less favourable treatment in an act or omission committed,
- 2) disability as a discriminatory ground and a causal link between the grounds of disability and the less favourable treatment, and
- 3) a comparator, i.e., a comparable situation, even though a hypothetical comparator is often used (if a real one cannot be found).

The ground of disability entails an evolutionary interpretation and even though no definition of disability is provided in the International Convention on the Rights of Persons with Disabilities because of the complexity of this issue, Article 1 paragraph 2 stipulates what is meant by the term “persons with disabilities”. That is, “persons with disabilities include those who have a long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” The Committee on the Rights of Persons with Disabilities in the *S.C v. Brazil* case,⁴⁸ considered the difference between illness and disability to be a difference of a degree, not of a kind. A health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity. A human rights-based model of disability requires the

47. Kotevska, B., Guide on discrimination grounds, OSCE Mission to Skopje and Commission for Protection against Discrimination, Skopje, 2013, page 25.

48. See: The Committee on the Rights of Persons with Disabilities, *S.C v. Brazil*, Communication No. 10/2013, CRPD/C/12/D/10/2013, decision of 28 October 2014.

diversity of persons with disabilities to be taken into account (preamble, paragraph (i)) together with the interaction between individuals with impairments and attitudinal and environmental barriers (preamble, paragraph (e)). T (paragraph 6.3).⁴⁹

Example: *In a case in which a fitness centre manager was dismissed the day after informing his employer and colleagues by e-mail that his newborn child had a disability, the Louvain Employment Tribunal took into account the time proximity of the statement given by the plaintiff in his email and his dismissal from work, and considered it sufficient to establish a presumption of discrimination on the grounds of disability by association.*⁵⁰

Example: *The German Federal Labour Disputes Court in Case No. 8 AZR 170/19⁵¹, in which the applicant with a serious degree of disabilities applied for employment in a public health insurance company but was not invited to an interview, considered that the mere failure to invite him to the interview was sufficient to establish the presumption that he was not taken into consideration for the job because of his disabilities. The Court considered that, by that claim itself, the burden of proof had been shifted to the respondent, who had not refuted the presumption of discrimination (German Federal Labour Disputes Court, Case No. 8 AZR 170/19).*

Worth knowing!

Discrimination by association was for the first time legally explained in the CJEU's Coleman v Attridge Law and Steve Law case,⁵² in which a mother of a child with disabilities was exposed to a series of insults at her workplace for her frequent absences from work due to her having a child with disabilities. Although she did not personally possess the protected characteristic, but the fact that her child's disability was the reason for the treatment towards her from colleagues and supervisors in the company, she initiated proceedings for direct discrimination and harassment based on her child's disabilities and their inherent relationship. The CJEU considered that her dignity was harmed, so it found that she was discriminated against on the grounds of disability by association, stressing that Directive 2000/78/EC does not protect against discrimination only the persons with disabilities, but also protects against discrimination on grounds of disability per se, including persons who are in a close and inseparable relationship with persons with disabilities.

49. See: Poposka, Z., *Commentary of the International Convention on the Rights of Persons with Disabilities of the United Nations Organization*, Polio Plus – Movement against Disabilities, Skopje, 2018, page 26.

50. See: Louvain Employment Tribunal, AR 12/1064/1, 12 December 2013. For more information see: Ringelheim, J., *The burden of proof in anti-discrimination proceedings. A focus on Belgium, France and Ireland*, in European equality law review, European network of legal experts in gender equality and non-discrimination, Publications Office of the European Union, Luxembourg, 2019, page 53-54.

51. See: German Federal Labour Disputes Court, No. 8 AZR 170/19, 25 March 2003.

52. See: CJEU, C-303/06, *Coleman v Attridge Law and Steve Law*, 17 July 2008.

Further readings

See the Commentary of the International Convention on the Rights of Persons with Disabilities of the United Nations Organization about the grounds of disability and the practice of the United Nations Committee on the Rights of Persons with Disabilities.

**1.1.4. Direct discrimination
on grounds of religion or belief**

In order to establish a *prima facie* case of direct discrimination on the grounds of religion or belief, the applicant needs to show:

- 1) less favourable treatment of an act or omission committed,
- 2) religion or belief as a discriminatory ground and a causal link between the ground of religion or belief and the less favourable treatment, and
- 3) a comparator or comparable situation.

Speaking of this ground, it should be noted that there is no definition of religion in the international law and in any of the European countries. Therefore, a review is made of the content of the right to religion or belief to determine whether this ground can be applied in a particular case. This ground includes the right to preach a religion or belief of one's own choosing, including non-affiliation with any religion or belief, which may be manifested publicly or privately through worship, practice, or preaching.⁵³

Example: *In the case before the County Court in Ljubljana, the plaintiff claimed discrimination on the grounds of religion or belief because as a candidate for medical specialization in gynaecology and obstetrics she was denied the job by the selection commission. She argued that the commission's position had changed following her announcement that she was invoking conscientious objection in cases of abortion and certain forms of contraception. She filed a lawsuit claiming she was discriminated against. The Court of first instance considered that the plaintiff made a *prima facie* case of discrimination and the burden of proof was shifted to the respondent, i.e., the Medical Society of Slovenia, which failed to prove, through the statements of the witnesses who were members of the selection commission who interviewed the candidate, that the reasons for the evaluation of the candidate were justified (Ljubljana County Court, Case No. III P 7/2021).⁵⁴*

According to Kotevska, unlike international law, where religion is usually considered as a ground for discrimination in combination with beliefs, the LPPD stipulates them as separate grounds. According to the ECtHR, belief means much more than mere opinion or deeply held feelings. It needs to be related to a spiritual or philosophical conviction which have an identifiable formal content (in the McFeeley case), that must denote

53. See: General Comment No. 20, Non-discrimination in economic, social and cultural rights, United Nations Committee on Economic, Social and Cultural Rights, E/C.12/GC/20, 2 July 2009, para. 22.

54. See: The District Court in Ljubljana, no. III P 7/2021, decision of the Court of 25 February 2021.

a certain level of cogency seriousness, cohesion and importance (in the Campbell and Cosans case). Other types of beliefs may include atheism, agnosticism, and positive non-religious beliefs. In the Kokkinakis case, the ECtHR explained in detail the freedom of thought, consciousness, and denomination, which is crucial for the grounds of religion and other religious beliefs, as well as for the basis of other types of beliefs. According to the Court, in its religious dimension, this freedom is one of the most vital elements for building the identity of believers and their concept of life, but it is also a precious assets for atheists, sceptics, and the unconcernes.⁵⁵

1.1.5. Direct discrimination on other grounds

There are a number of grounds for discrimination under the LPPD. The Commission, assessing each case separately, will determine when the burden of proof shifts. As in the above-explained grounds, in shifting the burden of proof in the case of direct discrimination regardless of the ground concerned all three constituent elements should be considered: the less favourable treatment and the injury i.e., damage suffered, the causality with the discriminatory ground, and the existence of a comparator (real or hypothetical, on a case-by-case basis).

Example: *The Commission for Prevention and Protection against Discrimination in Case No. 0801-273⁵⁶ reviewed the applicant's allegations of direct discrimination on the grounds of education against the Basic Criminal Court Skopje. Numerous facts and evidence were submitted with the complaint, which according to the CPPD made the claim for discrimination probable and therefore, the burden of proof was shifted to the respondent to prove that they did not discriminate against the applicant. In analysing all the facts and evidence in the case, the Commission found direct discrimination on the ground of education in the field of employment and labour relations (CPPD, case No. 0801-273).*

Example: *In the Maruko case, a homosexual couple entered into a "life partnership". The applicant's partner died and the applicant wanted to claim a survivor's pension from the company holding the deceased partner's pension fund. The company refused to pay him such a pension on the grounds that the family pension was paid only to spouses, and he was not married to the deceased. The CJEU accepted that non-payment of a pension is a less favourable treatment and such treatment puts the applicant in this position compared to that of the comparator "married couple". The Court found that the same-sex partnership in Germany largely creates the same rights and obligations for life partners as for spouses, especially in terms of state pension funds. Hence, in this case, the CJEU decided that life partners are in a situation similar to that of spouses, finding discrimination on the ground of sexual orientation. Hence, the fact that they were unable to marry is an inseparable part of their sexual orientation (CJEU, Maruko case).⁵⁷*

55. Kotevska, B., Guide on the discrimination grounds, OSCE Mission to Skopje and Commission for Protection against Discrimination, Skopje, 2013, page 35.

56. See: Commission for Prevention and Protection against Discrimination, No. 0801-273, 19 July 2021.

57. See: CJEU, C-267/06, Maruko v. Versorgungsanstalt der deutschen Bühnen, ECR I-1757, 1 April 2008.

Example: *In the case before the District Court in Warsaw, the plaintiff alleged discrimination by association based on sexual orientation. The case concerns an employee who worked in a store as a security guard and following his participation in the pride parade, shown on television, his employer informed him of his dismissal. His employer said they “cannot imagine a homosexual working for his company”. The Court considered that discrimination could occur whether the victim had a particular real protected characteristic or not. Therefore, the plaintiff’s sexual orientation was irrelevant. The court further found that the plaintiff was discriminated against on the grounds of his participation in the march related to the LGBTI community. They also found discrimination by association and awarded the plaintiff fair compensation (District Court in Warsaw, Case No. V Ca 3611/14)⁵⁸.*

Example: *In the Carvalho Pinto de Sousa Morais case, the applicant complained that, following a medical malpractice during a gynaecological intervention, she was prevented from having sexual relations, and therefore, in court proceedings, she sought compensation for damages. First, she was awarded 80,000 euros, and the second-instance court reduced the amount to 50,000 euros with the justification that sexuality was not such an important aspect of the life of a fifty-year-old mother of two, compared to a younger woman. Previously, a court in Portugal awarded 224,459 euros and 100,000 euros respectively to two men who were victims of a medical malpractice of a similar nature, who were 55 and 59 years of age, with the justification that the men could not have normal sexual intercourse, affecting their self-esteem and resulting in serious psychological trauma. In their justification of the ruling, domestic courts reflect the traditional idea of female sexuality that is tied to the reproduction, birth, and raising of children and neglect the importance of the physical and psychological fulfilment of the woman. This has contributed to shifting the burden of proof on the state which failed to refute the presumption of discrimination. Because of this, the ECtHR found that there was discrimination on the grounds of gender, considering it in close connection with the age of the applicant (ECtHR, Carvalho Pinto de Sousa Morais case).⁵⁹*

58. See: District Court in Warsaw (second-instance court), no. V Ca 3611/14, 18 November 2005.

59. See: ECtHR, *Carvalho Pinto de Sousa Morais v. Portugal*, Application No. 17484/15, 25 July 2017.

Example: In the *Kiyutin* case, the applicant, who is a citizen of Uzbekistan, arrived in Russia in 2003 and married a Russian citizen with whom he had a daughter. However, his application for a residence permit was rejected because he was HIV-positive. The ECtHR stated that the applicant was in a similar situation to other foreign nationals seeking a residence permit in Russia based on family status, but was treated differently due to the HIV-positive status. The scope for the state's discretionary assessment in this area is narrow because people living with HIV are a particularly vulnerable group that has suffered significant discrimination in the past, while at the level of Europe there is no consensus on exempting this group from the right of residence. While it is accepted that the criticised measure has a legitimate aim to protect public health, health experts and international bodies have agreed that limiting the travel of HIV-positive people cannot be justified by referring to the concern for public health. While such restrictions may be effective in the case of a large number of communicable diseases with a short incubation period, such as cholera or yellow fever, the presence of an HIV-positive person in the country is not, in itself, a public health threat. HIV is not transmitted generally, but through specific behaviour, and the modes of transmission of this disease are the same, regardless of the length of the person's stay in the country or his/her citizenship. Because of this and other facts considered by the ECtHR, it was concluded that the applicant was a victim of discrimination based on their health status (ECtHR, *Kiyutin* case).⁶⁰

Example: In the *B.S.* case, the applicant who is a sex worker of Nigerian descent was physically and verbally harassed by the police. Even though she requested different evidence collection means be applied, the domestic courts only requested reports, which were prepared directly by the supervisor of the officers against whom the proceedings were conducted, and the orders for release were based solely on such reports. According to the ECtHR, when investigating violent incidents, the state is obliged to take all reasonable measures to determine whether racist motives existed and whether ethnic hatred or prejudice had a bearing on the events. The domestic courts did not investigate the applicant's allegations that the officers approached her with a "get out of here black whore" and that other women who were doing the same job as the applicant were not stopped and questioned only because of their "European phenotype". Such allegations by the applicant were not sufficiently investigated by the domestic courts, which based their decisions only on the content of reports from the police chief, without conducting a more thorough investigation of the alleged racist behaviour. The Court, in deciding, emphasizes the intersection of several identity characteristics such as the applicant's race, gender, and occupation that create a specific burden for the victim and make her more vulnerable in relation to others. That is why the Court emphasises that the domestic courts did not take into account the applicant's particular vulnerability, inherent in her position as an African woman working as a sex worker, thus discriminating on the grounds of her race, gender, and work status (ECtHR, *B.S.* case).⁶¹

60. See: ECtHR, *Kiyutin v. Russia*, Application No. 2700/10, 10 March 2011.

61. See: ECtHR, *B.S. v. Spain*, Application No. 47159/08, 24 July 2012.

Example: *In the Gaygusuz case, an application for unemployment benefits submitted by a Turkish national who worked in Austria was rejected for reasons that he did not have Austrian citizenship. The ECtHR decided that the applicant was in a comparable situation with Austrian nationals because he was a permanent resident of Austria and paid contributions to the social security system through taxes. The Court found that the absence of a reciprocal social security agreement between Austria and Turkey did not justify different (less favourable) treatment, because the applicant's situation was actually similar to the situation of Austrian nationals (ECtHR, Gaygusuz case).⁶²*

Further readings!

Regarding discriminatory grounds, see the Guide on Discrimination Grounds through the case law of the ECtHR, the CJEU, and the international human rights bodies of the United Nations.

1.1.6. Multiple direct discrimination

In order to establish a *prima facie* case of direct discrimination on multiple grounds simultaneously, whether cumulative or intersectional, the applicant needs to show:

- 1) less favourable treatment of an act or omission committed,
- 2) discriminatory grounds and the causal link between the grounds and the less favourable treatment: on each ground separately for cumulative multiple discrimination, on two or more crosscutting grounds for intersectional discrimination, and
- 3) a comparator, i.e., a comparable situation, although very often a hypothetical comparator is used, especially for intersectional discrimination because it is difficult to differentiate the sub-segmentation of the group related to the discriminatory grounds concerned.

Example: *In the Meister case, the plaintiff claimed discrimination on grounds of gender, age, and ethnic origin in the employment selection process, and requested the court to instruct the employer to make public the information whether another candidate was employed at the end of the process. The CJEU considered that although the anti-discrimination directives do not provide for the right of access to this type of information, the Court cannot exclude that the respondent's refusal to give any access to information to the plaintiff may be one of the factors that would be taken into account in the context of establishing the facts from which direct or indirect discrimination can be presumed to have occurred. The CJEU states that it is for the national court to determine whether this is so in the present case, taking into account all the circumstances of the case before it (CJEU, Meister case).⁶³*

62. See: ECtHR, *Gaygusuz v. Austria*, Application No. 17371/90, 16 September 1996.

63. See: CJEU, C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH*, 19 April 2012, paragraph 45-48.

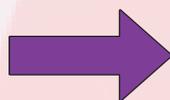
Example: *The Commission on Prevention and Protection against Discrimination in Case No. 0801-136⁶⁴, reviewed the applicant's allegations of discrimination against the Public transport company Skopje because the bus driver on city line No. 22 forcibly expelled from the bus a woman and her two underage children, one of whom was in a wheelchair all belonging to the Roma ethnic community. The CPPD considered that the applicant made the allegations of discrimination plausible and therefore shifted the burden of proof to the respondent to prove non-discrimination. In analysing all the facts and evidence in the case, the Commission found direct intersectional discrimination on the grounds of race, skin colour, social origin, ethnicity, and belonging to a marginalised group in the area of access to public goods and services by the Public transport company Skopje, Case No. 0801-136).*

1.2. Indirect discrimination

In cases of indirect discrimination, the applicant, as in cases of direct discrimination, needs to make a presumption of discrimination, showing:



less favourable position, i.e., a disproportionately negative effect of the application of apparently neutral regulations, provisions, criteria, programmes, or practices,



a discriminatory ground pursuant to Article 5 of the LPPD, and



a comparator, i.e., a comparable situation that does not apply to one person but to a group of persons.

Worth knowing!

In cases of indirect discrimination, there is no need to demonstrate the causal link between the discriminatory ground and the treatment. The effect of the treatment is what matters.

When a differentiation is made based on any legal provision, and if the effect of the implementation of this provision is contested before the CPPD, the applicant establishes a prima facie case of discrimination only by indicating this provision and its effect on the group in association with the discriminatory ground. Furthermore, the respondent is under obligation to prove that this provision is not discriminatory against the specific person or group of persons.

In the case of indirect discrimination, it is necessary to use numerous types of evidence to show the first and third constitutive elements of

⁶⁴. See: Commission for Prevention and Protection against Discrimination, No. 0801-136, 30 August 2021.

discrimination in order to create a presumption of discrimination, specifically highlighting the disproportionate impact on the group (element number 1) and the comparator (element number 3). Statistics, datasets, reports from international institutions, and national relevant sources on continuous trends, as well as other sources are used in practice.

Ringelheim, in his paper, explains a special statistical method, called the “panel method,” which was developed in France in the 1990s to serve as means of proof in cases of discrimination. Originally created in the context of discrimination based on participation in a trade union, it consisted of comparing the career development of workers employed with the same employer to determine whether one/or several particular workers experienced a decline or a difference in their career development compared to the average worker, from the moment they were elected as trade union representatives. This method was then applied *mutatis mutandis* to cases concerning discrimination on the grounds of sex and, to a lesser extent, also to cases of discrimination on the grounds of origin. This method was recognised by the Supreme Court of France and the Council of State (Conseil d’Etat) as a credible basis on which it can be concluded that there is a presumption of discrimination.⁶⁵

However, the provision of statistical evidence is not an obligation but an opportunity that can, but is not necessarily used in the present case to make a presumption of indirect discrimination. And it is not always necessary to present statistical evidence in order to create a *prima facie* case of discrimination. This is also reiterated by De Schutter, arguing that a disadvantage need not be statistically determined to demonstrate the disproportionately negative effect on the group concerned because sometimes, general knowledge is sufficient to create the presumption of discrimination.⁶⁶

Example: *A manufacturing company for car parts places a requirement on manual workers to fluently speak the Macedonian language and its Cyrillic alphabet, which generally leads to a conclusion that a person from a non-majority community will be placed in a less favourable position as opposed to someone whose mother tongue is Macedonian. In this case, if language is taken as a ground, it leads to direct discrimination, but if language is taken only as a neutral criterion, the analysis of the case may show that this is in fact indirect discrimination on the grounds of ethnicity due to the disproportionately negative effect of the application of the apparently neutral criterion to non-majority communities.*

65. See: Supreme Court of France, Section of Social Rights, P+B Fluchère, Dick and CFTD v SNCF, No. 1027, 28 March 2000; Council of State of France, No. 16-102017, 16 October 2017. For more information see: Ringelheim, J., The burden of proof in anti-discrimination proceedings. A focus on Belgium, France and Ireland, in European equality law review, European network of legal experts in gender equality and non-discrimination, Publications Office of the European Union, Luxembourg, 2019, page 58.

66. See: De Schutter, O., Methods of proof in the context of combatting discrimination, in Cormack, J. (ed), Proving discrimination. The dynamic implementation of EU anti-discrimination law: The role of specialised bodies, Migration Policy Group, Brussels, 2003, page 24.

1.2.1. Indirect discrimination on grounds of sex

In order to establish a *prima facie* case of indirect discrimination on the grounds of sex, the applicant needs to show:

- 1) less favourable position, i.e., a disproportionately negative effect of the application of apparently neutral regulations, provisions, criteria, programmes, or practices,
- 2) sex as the discriminatory grounds, and
- 3) a comparator i.e., a comparable situation that does not apply to one person but to a group of men versus a group of women.

Example: *In the Hoogendijk case, the ECtHR considered that when the applicant can show, on the basis of indisputable official statistics, a prima facie indication that a specific rule, although formulated in a neutral manner, actually clearly affects a higher percentage of women than men, it is the responsibility of the government to show that this is the result of objective factors unrelated to any discrimination on the grounds of sex (ECtHR, Hoogendijk case).*⁶⁷

Example: *In the Seymour-Smith and Perez case, which refers to unfair dismissal, which gives special protection to those who have worked for more than two years continuously with the specific employer, the CJEU considered that the conditions for obtaining certain rights from employment or privileges would constitute a prima facie case of indirect discrimination if the available statistics showed that a significantly lower percentage of women than men were able to fulfil the conditions (CJEU, Seymour-Smith and Perez case).*⁶⁸

Example: *In the Schönheit case, the pensions of part-time employees were calculated at a different rate compared to that applied to full-time employees. The application of a different rate was not based on differences in time spent at work. Hence, part-time employees received a lower pension than full-time employees, even when considering the different hours spent at work, which essentially means that part-time employees received lower pensions. The apparently neutral pension calculation rule applied uniformly to all part-time employees. However, since about 88% of part-time employees were women, the effect of this rule was disproportionately negative for women compared to men. This sets the presumption of discrimination and the burden of proof shifts to the respondent to prove that it did not discriminate (CJEU, Schönheit case)*⁶⁹.

67. See: ECtHR, Hoogendijk v. the Netherlands (dec.), Application No. 58641/00, 6 January 2005.

68. See: CJEU, C-167/97, Regina v. Secretary of State for Employment, ex parte Seymour-Smith and Perez, [1999] ECR I-623, 9 February 1999.

69. See: CJEU, C-4/02 and C-5/02, Hilde Schönheit v. Stadt Frankfurt am Main and Silvia Becker v. Land Hessen, ECR I-12575, 23 October 2003.

1.2.2. Indirect discrimination on the grounds of ethnicity

In order to have a *prima facie* case of indirect discrimination on the grounds of ethnicity, the applicant needs to show:

- 1) less favourable position, i.e., a disproportionately negative effect of the application of apparently neutral regulations, provisions, criteria, programmes, or practices,
- 2) ethnicity as the discriminatory ground, and
- 3) a comparator, i.e., a comparable situation that does not apply to one person but to a group of persons of a particular ethnic group (for example, the minority community) versus a group of persons of another ethnic group (the majority community).

Example: *In the Horváth and Kiss case, where two Roma applicants who were diagnosed as children with mild mental disabilities and were therefore placed in a “special” school, the ECtHR found that the state committed indirect discrimination (in the ECtHR this is a case of segregation). In this case, the Court has given particular consideration to whether and to what extent special safeguards have been used to prevent a misdiagnosis due to which children would end up in special schools or classes with curricula and programmes that may harm their future educational process. The court found that Roma children were the most numerous in “special” schools and that this was a consequence of an apparently neutral measure that was not specifically targeting Roma, but which disproportionately affected them as a particularly vulnerable group. The ECtHR emphasised that this was evident even when comparing what effect that practice had with other socially marginalised groups. The court found that the applicants were studying in schools for children with mild mental disabilities where simplified curricular content was followed and where they were isolated from the other population. Consequently, they obtained an education that did not offer the necessary guarantees arising from the positive obligation of the state to remove the consequences of racial segregation in “special” schools. The court also pointed out that such education may have further compounded their problems and compromised their later personal development rather than helping them integrate into regular schools and develop their abilities (ECtHR, Horváth and Kiss).⁷⁰*

70. See: ECtHR, *Horváth and Kiss v. Hungary*, Application No. 11146/11, 29 January 2013.

Example: *In a case in which the bank refuses to provide funds for the amount of a mortgage on real estate (house) located in a certain part of the city, if the applicant who was denied a loan encloses statistical data showing that the majority of residents of that part of the city belong to a certain ethnic community, that would suffice to shift the burden of proof and make a prima facie case of discrimination based on ethnicity. In the specific case, the applicant should demonstrate that: the statistics that he/she has provided are appropriate to establish facts that give rise to the presumption of discrimination and should convince the CPPD that the statistics are credible and reliable.*⁷¹

Example: *In the case of *Binderen v. Kaya*, the Supreme Court of the Netherlands considered that the applicant had shown that in the past years, the social housing company Binder had allocated 157 social apartments, of which only one to a family of immigrant origin, although the percentage of immigrant families in that city was 4.6% and in the total number of registered families for social housing, immigrant families accounted for 10.2%. Additionally, among other social housing companies, the percentage of social housing allocations to immigrant families was 7.2%. The Supreme Court considered that the attached facts were sufficient to justify a prima facie case of discrimination and shifted the burden of proof to the social housing company Binder to justify its policy as non-discriminatory towards immigrants. The evidence was not produced and therefore the Supreme Court considered that the company had committed discrimination (Supreme Court of the Netherlands, NJ 1983, 687 (*Binderen v. Kaya*)).*⁷²

Example: *In the case of *Noonan Services v. A Worker*⁷³, the Labour Court of Ireland has ruled that the requirement of English proficiency clearly places persons whose mother tongue is other than English in a disproportionately negative position relative to English native speakers. Hence, the Court considered that the mere request for English proficiency constituted a prima facie case of indirect discrimination (Labour Court of Ireland, *Noonan Services v. A Worker*).*

71. See: European Network Against Racism, *Changing Perspective: Shifting the burden of proof in racial equality cases*, Brussels, 2006, page 11.

72. See: Supreme Court of the Netherlands, *Binderen v. Kaya*, NJ 1983, 687, 10 December 1982.

73. See: Labour Court of Ireland, *Noonan Services v A Worker*, EDA1126, 29 July 2011.

1.2.3. Indirect discrimination on the grounds of disability

In order to establish a *prima facie* case of indirect discrimination on the grounds of disability, the applicant needs to show:

- 1) less favourable position, i.e., a disproportionately negative effect of the application of apparently neutral regulations, provisions, criteria, programmes, or practices,
- 2) disability as the discriminatory grounds, and
- 3) a comparator, i.e., a comparable situation that does not apply to one person but to a group of persons with disabilities (a certain type of disabilities – physical, mental, sensory, or intellectual) versus a group of persons without disabilities or with another type of disabilities.

Example: *In the case of European Action of the Disabled (AEH), the European Committee on Social Rights considered that the limited funds in the state budget in the field of social services intended for the education of children and adolescents with autism indirectly disadvantaged the persons with disabilities. The Committee considered that while limited public funding intended for social protection may equally affect everyone covered by this protection, persons with disabilities are nevertheless more likely to be dependent on community care financed through the state budget, in order to live independently and with dignity, compared to other persons. Thus, budgetary constraints on social policy place persons with disabilities in a disproportionately less favourable position. Consequently, the ECSR found that the budget constraints in the country in the field of social services constitute indirect discrimination against persons with disabilities (ECSR, European Action of the Disabled case).⁷⁴*

For example, *an employment advertisement for an administrative officer or an official requires a driver's license. In this case, the criterion thus set disproportionately affects persons with disabilities who, for the most part, cannot obtain a driver's license, together with some groups of persons with physical disabilities.*

1.2.4. Indirect discrimination on the grounds of religion or belief

In order to have a *prima facie* case of indirect discrimination on the grounds of religion or belief, the applicant needs to show:

- 1) less favourable position, i.e., a disproportionately negative effect of the application of apparently neutral regulations, provisions, criteria, programmes, or practices,

⁷⁴ See: ECSR, European Action of the Disabled (AEH) v. France, Application No. 81/2012, 11 September 2013.

- 2) religion or belief as discriminatory grounds, and
- 3) a comparator, i.e., a comparable situation that does not apply to one person but to a group of persons with a particular religion or belief (for example, a minority religious group) versus a group of persons with another religion or belief (for example, a majority religious group).

Example: *Case No. UEM-0921-1/2008-3, before the Advocate of the Principle of Equality of Slovenia, refers to an employer providing meals for employees, where such meals often included pork products or food prepared with pork fat. As an alternative to the offered meals, a Muslim employee asked for a monthly allowance for himself to buy food, which is a salary supplement that the employer paid for employees who could prove the need for an alternative diet for health reasons. The Ombudsman considered that this constituted indirect discrimination because the practice that seemed to be neutral, essentially disproportionately adversely affected Muslims who were not allowed to eat pork meat and products. Due to the circumstances of the particular case, there was no need to present statistical evidence to show that the rule disproportionately negatively affects Muslims, as it can be easily confirmed that Muslims are not allowed to eat pork meat by referring to evidence of their religious practices. The burden of proof shifted to the respondent to prove otherwise. (Advocate of the Principle of Equality, Case No. UEM-0921-1/2008-3).⁷⁵*

Example: *The Eweida case, decided by the United Kingdom Court of Appeal, concerned an employer who prohibited the wearing of jewellery (including for religious reasons) on the employees' uniforms. An employed Christian woman claimed that it constituted discrimination on the grounds of religion because she was not allowed to wear a cross. During the court proceedings and subsequent appeals, the competent courts accepted that such prohibition might constitute indirect discrimination on the grounds of religion if it can be demonstrated that wearing a cross is a prerequisite within the Christian faith. To this end, the Labour Court requested evidence from experts in Christian practices, not statistical evidence regarding the number of Christians wearing religious symbols at work. The prohibition on wearing jewellery that is neutrally placed creates a prima facie case of indirect discrimination on the grounds of religion or belief and the burden of proof shifts to the respondent to prove that they did not discriminate against (United Kingdom Court of Appeal, Eweida case).⁷⁶*

75. See: Advocate of the Principle of Equality of Slovenia, No. UEM-0921-1/2008-3, 28 August 2008.

76. See: United Kingdom Court of Appeal, *Eweida v. British Airways Plc.*, EWCA civil law case No. 80, 12 February 2010.

1.2.5. Indirect discrimination on other grounds

In order to establish a *prima facie* case of indirect discrimination on any other grounds from the LPPD, the applicant needs to show:

- 1) less favourable position, i.e., a disproportionately negative effect of the application of apparently neutral regulations, provisions, criteria, programmes, or practices,
- 2) the discriminatory ground considered to be affected in the present case, and
- 3) a comparator, i.e., a comparable situation that does not apply to one person but to a group of persons with the discriminatory ground concerned in the present case (for example, a certain age, social status, property status, etc.) versus a group of persons who do not have the ground concerned.

1.2.6. Multiple Indirect Discrimination

In order to establish a *prima facie* case of indirect discrimination on two or more grounds, the applicant needs to show:

- 1) less favourable position, i.e., a disproportionately negative effect of the application of apparently neutral regulations, provisions, criteria, programmes, or practices,
- 2) existence of two or more discriminatory grounds simultaneously (whether cumulatively or intersectionally linked), and
- 3) a comparator i.e., a comparable situation that does not apply to one person but to a group of persons, which is mostly hypothetical due to the difficulty of sub-segmentation of the group.

1.3. Other forms and types of discrimination

1.3.1. Harassment

In order to establish a *prima facie* case of harassment, the applicant needs to show:

-  an unwanted conduct (verbal, non-verbal, or physical) which has the purpose or effect of violating the dignity of the person or group of persons to which the person belongs or of creating an intimidating, hostile, degrading, or humiliating or offensive environment, approach or practice, and
-  discriminatory grounds.

Worth knowing!

When determining whether there is harassment, there is no need to identify a comparator, i.e., a comparable situation.

When determining whether there is harassment and whether the burden of proof will shift, the following should be taken into account:

- » “unwanted” treatment is essentially the same as “unwelcome” or “disapproved”,
- » unwanted treatment may include any type of behaviour, verbal or written communication or bullying, images, graffiti, physical gestures, facial expressions, mimicry, jokes, or physical contact,
- » even a single incident that is serious enough may constitute harassment,
- » the treatment will be related to a protected characteristic/discriminatory ground, if the ground is applied to the person (B) or if there is any connection with the discriminatory ground. The person (B) may have suffered harassment because it may be mistakenly regarded as a person to whom that ground applies or because of his/her connection to a person to whom that ground applies, such as a family member or friend, or because the person (B) is known for supporting persons to whom that ground applies,
- » if the person (A) is engaged in unwanted conduct with the intent to harm the dignity of the person (B) and to create a threatening, hostile, degrading or intimidating environment, in which case it shall be considered as harassment, regardless of the specific results on the person (B), and
- » even if the person (A) has no such intention, the person (A)’s unwanted action will be considered harassment *if it has that result*. In

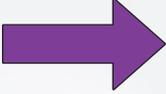
determining whether the action had that result, the court will take into account the perception of the person (B) and other relevant circumstances.

Example: *The Equality Authority of Hungary in Case No. 654/2009⁷⁷, considered the behaviour of teachers who told Roma students that their misbehaviour at school was reported to the “Hungarian Guard”, a nationalist organisation known for its actions of extreme violence against Roma. The very statements expressed by the teachers were sufficient to shift the burden of proof. Teachers were found to have implicitly supported the Guard’s racist attitudes and thus created a climate of fear and intimidation, which constitutes harassment (Hungarian Equality Authority, Case 654/2009).*

Example: *The Commission for Prevention and Protection against Discrimination in Case No. 0801-312⁷⁸, reviewed the applicant’s allegations of harassment on the grounds of sex and gender against a natural person, then a candidate for mayor of one of the municipalities in the country. In a debate show, where the applicant also participated, he used disturbing speech based on sex and gender, directly addressed to the applicant. The CPPD considered that the allegations from the application and the attached evidence, recordings of the statements made in the show, made the claim probable and therefore shifted the burden of proof to the respondent. In analysing all the facts and evidence in the case, the Commission found harassment on the grounds of sex and gender in the area of media and public information (CPPD, Case No. 0801-312).*

1.3.2. Segregation

In order to establish a *prima facie* case of segregation on a discriminatory ground, the applicant needs to show:

-  physical separation
-  discriminatory grounds,
-  a comparator, that is, a comparable situation, and
-  non-existence of a legitimate or objectively justified aim.

Article 4, paragraph 1, item 7 of the LPPD provides a definition for “a legitimate and objectively justified aim,” which requires the

77. See: Equality Authority of Hungary, No. 654/2009, 20 December 2009.

78. See: Commission for Prevention and Protection against Discrimination, No. 0801-312, December 13, 2021.

means used to achieve the aim to be appropriate to the actual needs of the specific case, to be clearly defined beforehand, to be necessary for achieving the aim, and to be proportionate to the intended effects. That is, it binds it closely to the proportionality test and its two elements: appropriate and necessary.

Example: *In the case of Oršuš and Others, which concerns the segregation of Roma children in special classes with reduced curriculum volume, the ECtHR found that it is possible to establish a claim for indirect discrimination without reliance on statistical data. In the present case, the measure of sending children to special classes based on their insufficient knowledge of the Croatian language was applied only to Roma pupils. Accordingly, this knowledge itself leads to the creation of a presumption of different, less favourable treatment, i.e., discrimination (ECtHR, Oršuš and Others case).⁷⁹*

1.3.3. Reasonable accommodation

According to the LPPD, denying reasonable accommodation constitutes discrimination. It is defined in Article 4, paragraph 1, item 4, as a necessary and appropriate modification and adjustment required in a particular case, which does not cause a disproportionate or undue burden, aimed at ensuring the exercise or enjoyment of all human rights and freedoms of persons with disabilities on an equal basis with the others.

A reasonable accommodation is also known as the obligation to make an adjustment; reasonable corrections, adaptations or measures, or effective or appropriate/suitable modifications. To provide a person with reasonable accommodation means, for example, to adapt the work environment, schooling system, health care facilities, or transport services, in order to remove barriers that hinder a person with disabilities from participating in activities or in obtaining services on the same basis as others. In the case of employment, this may also imply a physical change of conditions, procurement or modification of equipment, provision of a reader or interpreter or appropriate training or supervision, adaptation of trial or appraisal procedures, amending of standard working hours, or transfer of some marginal duties arising from the workplace to another person.

⁷⁹ See: ECtHR, Oršuš and Others v. Croatia [GC], Application No. 15766/03, 16 March 2010, paragraphs 152 and 153. For more information, see: European Union Agency for Fundamental Rights and Council of Europe, Handbook on European non-discrimination law, 2018 edition, Publications Office of the European Union, Luxembourg, 2018, page 247.

Example: *In the Michael Lockrey case, the United Nations Committee on the Rights of Persons with Disabilities states that the respondent state has not taken the necessary steps to ensure reasonable accommodation. It concludes that the refusal to provide an interpretation in the sign language “Auslan” or steno-captioning without making a thorough assessment of whether it would constitute a disproportionate or undue burden amounts to disability based discrimination in violation of Article 5 of the Convention. The Committee also points out in its decision that if a State claims that the reasonable accommodation required by the individual creates a disproportionate or undue burden (as in this case, where the State claims that the use of steno-captioning has affected the complexity, cost, and duration of the trials), it should provide “data or analysis to show that this would constitute a disproportionate or unnecessary burden” (Committee on the Rights of Persons with Disabilities, Michael Lockrey case).⁸⁰*

Example: *In the Guberina case, the ECtHR considered that the Croatian authorities failed to take into account the needs of the disabled child when they determined that the father should not be exempted from paying a transfer tax on the real estate that he bought, which is accessible to his disabled child. Namely, according to Croatian legislation, this exemption was actually available to buyers who moved in order to address their “housing needs”, i.e., when their previous property did not possess the “basic infrastructure” (i.e., it did not meet the basic sanitary and technical conditions). The applicant argued that accessibility is an element of the “basic infrastructure” and that his previous apartment did not meet his family’s housing needs. Croatian authorities, meanwhile, considered the applicant’s old apartment to have all the basic features of the infrastructure and they refused his request without taking into account his son’s special circumstances. The ECtHR reiterates the need to give a broad interpretation of the concept of non-discrimination on the grounds of disabilities, including discrimination by association, and in this case, it found that there is discrimination against the father based on the child’s disability because the Croatian authorities failed to refute the presumption of discrimination (ECHR, Guberina case).⁸¹*

80. See: Committee on the Rights of Persons with Disabilities, *Michael Lockrey v. Australia*, Application No. 13/2013, CRPD/C/15/D/13/2013, 25 April 2016, paragraph 8.5.

81. See: ECtHR, *Guberina v. Croatia*, Application No. 23682/13, 22 March 2016.

Worth knowing!

A series of factors should be taken into account when assessing whether there is reasonable accommodation or not:

- » *the effect of reasonable accommodation should help the employee with disabilities to perform their work task,*
- » *the practicality of reasonable accommodation,*
- » *the monetary or other costs of the reasonable accommodation,*
- » *the volume of financial resources of the organisation and other sources of finance,*
- » *the amount of disturbances caused,*
- » *the volume of financial or other assistance by the State to undertake reasonable accommodation, and*
- » *the nature of the activities and the size of the organisation.*

The distinction between indirect discrimination and reasonable accommodation is related to scope and access. Namely, the scope of indirect discrimination is aimed at “a wider group of people who share and have a certain protected characteristic, and they are or would potentially be disadvantaged by the contested measure,” while reasonable accommodation is aimed at the individual with disabilities in a given and concrete situation. In terms of the effect of application, indirect discrimination requires determining whether the provision, criterion, or practice has a discriminatory effect, i.e., a disproportionately negative effect. In contrast, the obligation for reasonable accommodation requires the adoption of specific measures to remove the hindrance faced by the person with disabilities in a particular ad hoc situation.

Further readings

See the Guide to Reasonable Accommodation for persons with disabilities.

On the other hand, under the LPPD, failure to provide accessibility constitutes discrimination. It is defined in Article 4 paragraph 1 point 5 as “accessibility to infrastructure, goods, and services” which implies taking appropriate measures to ensure that persons with disabilities have access, on an equal basis with others, to the physical environment, transport, information, and communication, including information and communication technologies and systems, and other public facilities and services in urban and rural areas. Unlike the reasonable accommodation explained above, the obligations to provide accessibility are general, predictable, and not based on individual requests. According to General Comment No. 2 of the United Nations Committee on the Rights of Persons with Disabilities, they should be “aligned with the standards of universal design, for example, the installation or construction of ramps or the

provision of information in Braille or easy-to-read and easy-to-understand formats.” The obligation to ensure accessibility aims at the reconstruction of the immediate and surrounding environment as a whole and the transformation of social structures.

Example: *Example: The case of R.M. v. Delchevo Municipality, filed by the Macedonian Young Lawyers’ Associations, is the first case in the national case law where the final judgment found discrimination based on mental and physical disabilities. The case is about a 17-year-old person with combined disabilities who for a long time could not leave his family house unescorted because there was no curb and sidewalk at the end of the yard, that is, the exit from the yard was directly onto a busy street. The father and grandfather of the person, between 2012 and the filing of the lawsuit in 2014, repeatedly addressed the municipality of Delchevo with a request to place curbs and sidewalks on the street around the house so that the person could leave the home without a continuous need for an escort. Despite repeated promises, the municipality had not taken steps to resolve the problem.*

In this case, the Basic Court in Delchevo found discrimination on the grounds of disability due to impeding accessibility and availability of infrastructure, goods, and services. The ruling states that the discrimination was committed due to the failure to take action (construction of a sidewalk and curbs) to adapt the infrastructure and space around the home of the plaintiff – a person with disabilities. Consequently, the court obliged the municipality of Delchevo, as a respondent, to adapt the infrastructure and space and to take all necessary adaptation measures through the construction of a sidewalk and curbs in accordance with the technical standards for accessibility.

Worth knowing!

The United Nations Committee on the Rights of Persons with Disabilities summarizes the difference between reasonable accommodation and accessibility as follows: “Accessibility refers to groups, while reasonable accommodation refers to individuals.” The Committee further points out that: “ensuring accessibility is an ex-ante obligation. States should establish accessibility standards and they should apply to all public and private institutions or organisations.” The Committee on the Rights of Persons with Disabilities affirms that States “are obliged to ensure accessibility before receiving an individual request to use the place or service.” Whereas the reasonable accommodation is an ex nunc obligation, i.e., “it is performed from the moment when the person with disabilities requires adjustment in a given situation.”

The other difference is the participation of persons with disabilities. To comply with the obligation for reasonable accommodation, a dialogue between the individual with disabilities and the obligation holder (public or private entity) is necessary. In doing so, it should be taken into account that “modifications that will result from and relate to the resolution of the specific hindrance in a manner that is appropriate for the person may imply taking of measures that would not benefit persons with the same or similar disabilities.” In terms of accessibility, a dialogue is needed between decision makers and organisations of persons with disabilities, and general measures and standards for accessibility, as well as mechanisms for implementing such measures and standards, will ensure full access to a certain physical environment, transport, information, and communications and public services.

1.3.4. Calling, incitement, and instruction to discrimination

In order to establish a *prima facie* case of calling, incitement and instruction to discrimination, the applicant needs to show:

➔ an activity that directly or indirectly includes calling, encouraging, instructing, or inciting discrimination, and

➔ discriminatory grounds.

Instruction to discrimination covers both direct and indirect calling, encouraging, giving instruction or inducing another person to commit discrimination.

Example: *The District Court in Sofia considered Case No. 2860/2006⁸², in which an MP made several statements verbally attacking the Roma, Jewish and Turkish communities, and “foreigners” in general. Namely, he stated that the listed communities prevent Bulgarians from running their own state, committing crimes and going unpunished, and deprive Bulgarians of proper health care, and urged people not to allow the state to become a “colony” of such and other similar groups. The statements themselves were sufficient to create a prima facie case of discrimination and thus shift the burden of proof to the respondent to prove that he did not discriminate. The District Court in Sofia found that such statements and behaviours constitute calling and incitement to discrimination as well as harassment (Sofia District Court, No. 2860/2006).*

Worth knowing!

Harassment and instruction to discrimination do not require the identification of a comparator to prove the existence of discrimination.

1.3.5. Victimization

Victimization is a form of discrimination manifested as the suffering of adverse consequences for taking action to protect against discrimination and includes persons who report discrimination, persons who file complaints of discrimination, as well as witnesses in cases of discrimination. In order to establish a *prima facie* case of victimization, the applicant needs to show:

➔ the suffering of harmful consequences,

➔ due to taking action to protect against discrimination.

82. See: District Court in Sofia, No. 2860/2006, 21 June 2006.

Victimization is described as any adverse measure taken by an organisation (including employers and public institutions) or an individual in retaliation for efforts to enforce anti-discrimination legislation. The most common example is when an employee complains of unequal treatment, and the employer responds by dismissing the person or not promoting them despite their merit.

1.3.6. Severe forms of discrimination

Multiple, intersectional, repeated, and continued discrimination, defined in Article 4, paragraph 1, points 10, 11, 12, and 13, are considered to be severe forms of discrimination. Any form of discrimination may be defined as severe if discrimination is committed on multiple discriminatory grounds (multiple discrimination), if it is committed on two or more discriminatory grounds that are simultaneously and inextricably linked (intersectional), if it is committed multiple times on any discriminatory grounds (repeated), and if it is committed continuously over a longer period of time (continued).

In order to establish a *prima facie* case of a severe form of discrimination, the applicant, in addition to the other constituent elements of the form of discrimination claimed, needs to show probability of the additional element:

- » continuity of action or action over a longer period of time (in the case of continued discrimination), i.e.
- » repeated commission of the act on the same discriminatory ground or grounds (in the case of repeated discrimination), or
- » existence of two or more grounds (for multiple discrimination) and which are simultaneously and inextricably linked (for intersectional discrimination).

Example: *The Commission for Prevention and Protection against Discrimination in Case No. 0801-265⁸³, reviewed the applicants' allegations of discrimination on the grounds of disabilities against the Ministry of Health, in the exercise of the right to vaccination. The complaint stated that persons with disabilities are physically prevented from accessing vaccination facilities, the information they receive about the immunization process is inadequate and the health authorities do not issue appropriate certificates to persons with disabilities who due to their health condition must not be vaccinated. The CPPD considered that the allegations stated in the complaint and the attached evidence made the claim probable and therefore shifted the burden of proof onto the respondent, the Ministry of Health, to rebut the presumption of discrimination. In analysing all the facts and evidence in the case, the Commission found direct and continued discrimination on the grounds of disabilities in the area of access to (health) goods and services related to vaccination (CPPD, Case No. 0801-265).*

83. See: Commission for Prevention and Protection against Discrimination, No. 0801-265, 9 December 2021.

Example: *In the Sejdić and Finci case, the ECtHR found discrimination, because the Constitution of Bosnia and Herzegovina stipulates that members of the House of Peoples of the Parliament and the Presidency should be members of the largest ethnic communities (as constituent peoples, that is: Bosniacs, Croats, and Serbs), which automatically excludes members of the smaller communities from being able to stand for election to the House of Peoples of the Parliament and the Presidency of this country, such as the applicants who were Jewish and Roma. Given that Bosnia and Herzegovina’s constitution has not been amended and thus discrimination has not been tackled, it implies continued discrimination (ECtHR, Sejdić and Finci case).⁸⁴*

Example: *In the Mental Disability Advocacy Centre case, the Committee found a violation of the revised European Social Charter, namely a violation of the right to education seen in accordance with Article E (non-discrimination). In its decision, the Committee openly criticised Bulgaria for the active practice of excluding children with intellectual disabilities from the education system, stating that 3,000 children with medium and severe intellectual disabilities living in 28 homes for children with mental disabilities had their right to effective education curtailed. Criticising the inadequacy of standards for inclusive education in Bulgaria, the Committee suggested that: “the mainstream education system is neither accessible nor adapted for children with disabilities residing in homes for children with mental disabilities; the training received by teachers is not appropriate and the curriculum and teaching aids are not adapted to the special educational needs of children with intellectual disabilities; the Government of Bulgaria has failed to implement the 2002 law stipulating that children staying in homes for children with mental disabilities are to be included in the educational process; as a result of the failure to implement this law, only 6.2% of children staying in homes for children with mental disabilities attend school, while the percentage of attendance at primary education of all children in Bulgaria is 94%; the difference between attendance at school by children with and without disabilities is so large that it constitutes discrimination against children with intellectual disabilities residing in homes for children with mental disabilities (ECSP, Mental Disability Advocacy Centre case).⁸⁵*

84. See: ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, 22 December 2009.

85. See: ECSR, *Mental Disability Advocacy Center v. Bulgaria*, Application No. 41/2007, 3 June 2008.

Example: *The United Nations Committee on the Elimination of All Forms of Discrimination against Women in the S.B. and M.B. case, from 2020, in which two Roma women were restricted from accessing gynaecological services because of their ethnicity, emphasizes in the decision that discrimination against women on grounds of sex and gender is inextricably linked to other factors affecting women, such as race, ethnicity, faith or belief, health, status, age, class, caste, sexual orientation, and gender identity. It also states that discrimination on the grounds of sex or gender may affect women belonging to these groups to different degrees and in different ways than men, and that States-parties must legally recognise and prohibit such multi-layered forms of discrimination and their aggregate negative impact on women concerned. The applicants were treated less favourably than other women of reproductive age who did not belong to a minority ethnic group and who needed gynaecological services at the same time. The Committee notes that in the present case, the courts had no understanding of the phenomenon of discrimination and of the vulnerability of Roma women in society and that, despite the evidence of unequal treatment, the courts omitted to find that the gynaecologist showed a discriminatory attitude and to provide legal protection against discrimination and accordingly found that the State discriminated against the applicants on the grounds of sex, gender, and ethnicity (Committee on the Elimination of All Forms of Discrimination against Women, S.B. and M.B.).⁸⁶*

⁸⁶. See: Committee on the Elimination of All Forms of Discrimination against Women, S.B. and M.B. v. North Macedonia, CEDAW/C/ 77/D/143/2019, 1 December 2020.

2. Rebuttal of the presumption of discrimination and objective justification

When the applicant establishes a *prima facie* case of discrimination, i.e., a case of discrimination is probable, the burden of proof falls on the respondent to prove that they did not discriminate by rebutting the presumption of discrimination. Uncorroborable statements regarding the reasons for the respondent's behaviour do not suffice.

Example: *The Labour Court of Ireland in the Campbell Catering Ltd v. Aderonke Rasaq*⁸⁷ case argued that the evidence must be substantiated and credible to successfully rebut the presumption of discrimination.

A respondent may rebut the presumption of discrimination in two ways, namely prove:

- » that the applicant is not actually in a similar or comparable situation to the comparator, or
- » the direct discrimination different treatment is not based on the discriminatory ground in question but on other objective factors; or in case of indirect discrimination the statistics submitted can be interpreted differently, or that the negative effect is not disproportionate to the legitimate aim and to the test of proportionality.

The same has been pointed out by the ECtHR in numerous cases, such as in the case of *Khamtokhu and Aksenchik*, the *Chassagnou* case, the *Biao* case, as well as the *Timishev* case and the *D.H.* case, explained above.⁸⁸

87. See: Equality Tribunal, *Campbell Catering Ltd v. Aderonke Rasaq*, 2004- EEDO48.

88. See: ECtHR, *Khamtokhu and Aksenchik v. Russia* [GC], Applications Nos. 60367/08 and 961/11, 24 January 2017, paragraph 65; ECtHR, *Chassagnou and Others v. France* [GC], Applications Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, paragraphs 91 and 92; ECtHR, *Biao v. Denmark* [GC], Application No. 38590/10, 24 May 2016, paragraph 114; ECtHR, *Timishev v. Russia*, Applications Nos. 55762/00 and 55974/00, 13 December 2005, paragraph 39, and ECtHR, *D.H. and Others v. the Czech Republic* [GC], Application No. 57325/00, 13 November 2007, paragraph 177.

Example: In case No. 0801-262⁸⁹, in which the applicant claimed that her son was discriminated against on the basis of vaccination status, i.e., personal status, where the municipal primary school refused to enrol the child based on a missing compulsory vaccination certificate, the Commission did not find discrimination, but made a general recommendation. In the general recommendation from 2021, the Commission states that: „The Convention on the Rights of the Child guarantees the ‚best interests of the child‘ in respect of all activities undertaken concerning children, whether undertaken by public institutions, courts, administrative bodies or legislative bodies. Additionally, in the Vavřicka case (No. 47621/13), the ECtHR notes the existence of a general consensus that vaccination is one of the most successful and cost-effective health interventions and that each country should aim to achieve the highest possible level of vaccination among its population. Furthermore, the laws, measures, recommendations, and other relevant acts aimed at preventing, treating, and controlling a situation of an epidemic, endemic, and other diseases do not constitute a violation of the right to privacy of an individual, to his personal and family life and dignity and reputation. They are aimed at guaranteeing the protection of the public good and public health of all citizens, especially children. Consequently, the Commission made a general recommendation that compulsory vaccination of children as a condition for enrolment in primary schools should not constitute discrimination on any grounds.“ (CPPD, Case no. 0801-262).

Example: In case No. 08-7⁹⁰, in which the applicant claimed discrimination on the grounds of political affiliation in the area of work and labour relations by the Agency for Administration, the CPPD shifted the burden of proof. However, the response to the complaint included explanatory facts that helped the CPPD to analyse all facts and evidence in the case and establish that the Agency for Administration rebutted the presumption of discrimination because all candidates were allowed to apply for the job and received scores in accordance with the Law on Administrative Servants (CPPD, Case No. 08-7).

Example: Similarly, in case No. 0801-269⁹¹, where the applicant alleged discrimination on the grounds of ethnicity by the Academy for Judges and Public Prosecutors, the CPPD shifted the burden of proof. In their response to the application, the respondent provided explanatory facts that helped the CPPD analyse all the facts and evidence in the case and establish that the Academy for Judges and Public Prosecutors rebutted the presumption of discrimination because it acted in accordance with the provisions of the Law on the Academy for Judges and Public Prosecutors and the bylaws of the Academy (CPPD, Case No. 0801-269).

89. See: Commission for Prevention and Protection against Discrimination, No. 0801-262, 7 July 2021.

90. See: Commission for Prevention and Protection against Discrimination, No. 08-7, 7 July 2021.

91. See: Commission for Prevention and Protection against Discrimination, No. 0801-269, 13 October 2021.

Example: *In the above-mentioned Brunnhofer case, the CJEU provided guidance on how the presumption of discrimination could be rebutted. First, if it is proved that the employed men and women are not in a similar situation because no work of the equal value was performed, i.e. the work comprises duties and tasks of a different substantive nature, and second, by establishing other objective factors that contributed to the difference in pay and are not related to the plaintiff's belonging to a particular gender, in this case to the female gender, and those are costs compensating for separated life or travel expenses, and similar (CJEU, Susanna Brunnhofer case, paragraph 51-62).*

Example: *In the Feryn case, where direct discrimination on the grounds of ethnicity is alleged, and a prima facie case of discrimination is established by the public statement of the owner of the company that he will not employ Moroccans, the CJEU finds that it can be rebutted if the respondent proves, for example, that the employment practice does not, in fact, show different treatment towards persons who did not have white skin, i.e. showing that such personnel was routinely employed (CJEU, Feryn case).⁹²*

Example: *In the Asociația ACCEPT case, concerning discrimination on the grounds of sexual orientation in the recruitment of players by a professional football club, the CJEU considered that a prima facie case of discrimination on the grounds of sexual orientation may be rebutted by a body of consistent evidence. ... such a body of evidence might include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment. The Court continued by stating that the shifting of the burden of proof would not require evidence impossible to adduce without interfering with the right to privacy (CJEU, Asociația ACCEPT case).⁹³*

92. See: CJEU, C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, 10 July 2008.

93. See: CJEU, C-81/12, Asociația Accept v. Consiliul Național pentru Combaterea Discriminării, 25 April 2013, paragraphs 58 and 59.

Example: *In the Test-Achats case, where Belgian law allows insurers to use gender as a factor in the calculation of insurance premiums and benefits based on the exception contained in Article 5(2) of Council Directive 2004/113/EC, the applicants challenged the Belgian law using this exception and argued that this was contrary to the principle of equality between men and women. The CJEU considered that the use of actuarial factors related to sex was widespread in the provision of insurance services at the time when the directive was adopted, so it was considered appropriate for it to include a certain transitional period. Although Article 5(1) of the Directive provided that differences in premiums and benefits arising from the use of sex as a factor in the calculation must be abolished by 21 December 2007 at the latest, Article 5(2) grants certain EU Member States to permit proportionate differences in individuals' premiums and benefits over an unlimited period of time, namely when the use of sex is a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data. As a result, women and men paid different amounts for private insurance policies. The Court, basing its argumentation on the Charter of Fundamental Rights of the European Union, held that this practice constituted discrimination on grounds of sex and that Article 5(2) should be held invalid upon the expiry of an appropriate transitional period, which in this case is 21 December 2012 (CJEU, Test-Achats case).⁹⁴*

94. See: CJEU, C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, ECR 2011 I-00773, 1 March 2011.

Example: *The ECtHR, in the Petrov case, considered the application of a rule practiced in a prison that married prisoners would be allowed two phone calls a month with their wives. The applicant lived with his partner for four years and had a child with her before being sentenced to prison terms, but he was not allowed two phone calls per month with his partner. The ECtHR considered the case and decided that, although marriage has a special status, for the purposes of the rules relating to communication by telephone, the applicant - who formed a family with a stable partner - was in a comparable situation to married couples. The ECtHR alleged that “may be allowed a certain margin of appreciation to treat differently married and unmarried couples in the fields of, for instance, taxation, social security or social policy... it is not readily apparent why married and unmarried partners who have an established family life are to be given disparate treatment as regards the possibility to maintain contact by telephone while one of them is in custody.” Hence, the ECtHR decided that the discrimination was unjustified (ECtHR, Petrov case).⁹⁵*

In cases of harassment, the presumption of discrimination may be refuted if the respondent proves that the action was not intended nor had any effect as to harm the dignity or create a threatening, hostile, degrading, or intimidating environment, approach or practice.

Example: *The Commission for Prevention and Protection against Discrimination in Case No. 0801-355⁹⁶, reviewed the applicant’s allegations of harassment on the grounds of sexual orientation and gender identity in the area of media and public information by a political party. The CPPD considered that the applicant made the discrimination allegations probable by submitting a print screen of the political party’s post on one of its social networks profiles and therefore shifted the burden of proof to the respondent to prove that they did not discriminate. The response to the application provided explanatory facts that helped the CPPD to analyse all facts and evidence in the case and determine that the political party has rebutted the presumption of discrimination and therefore no harassment was found (CPPD, Case No. 0801-355).*

Cases of reasonable accommodation can be rebutted if it is demonstrated that the modification and adjustment required in the particular case cause a disproportionate or undue burden.

95. See: ECtHR, *Petrov v. Bulgaria*, Application No. 15197/02, 22 May 2008.

96. See: Commission for Prevention and Protection against Discrimination, No. 0801-355, 22 June 2022.

Example: *The Administrative Court in Rouen in Case No. 0500526-3⁹⁷ decided upon a lawsuit by a person in a wheelchair filed against the Ministry of Education because the person was not selected for the job for which he applied. The job application submitted by the plaintiff was shortlisted in third place. When the first two shortlisted candidates rejected the offered job, it was offered to the fourth candidate instead of the plaintiff. In turn, the plaintiff was offered a job in another department where the work environment was already adapted for wheelchair access. The state justified this decision with the fact that investing funds to adapt the working premises did not benefit the public interest. The Court found that the Ministry of Education did not fulfil their duty to make reasonable accommodations for persons with disabilities, which cannot be justified with the reasons given by the Ministry, and therefore found discrimination (Administrative Court in Rouen, Case No. 0500526-3).*

In the case of indirect discrimination, it is quite debatable what is the share of the extent to which a group is affected by the disproportionately negative effect of the apparently neutral provision, criterion, or practice, to be sufficient to establish a *prima facie* case of discrimination, i.e., to rebut the presumption of discrimination. The CJEU has considered this issue in several cases relating to sex discrimination (such as: *Rinner-Kühn*, *Nimz*, *Kowalska*, *De Weerd and Nolte*) and took the position that a substantive figure needs to be shown in all cases. For example, in the case of *Rinner-Kühn*, that figure is 89%⁹⁸. However, the CJEU leaves it up to the national courts to assess whether a sufficient number of individuals are affected to exclude the randomness and short-termness of the allegations.⁹⁹ The same logic is followed by the ECtHR in the *Di Trizio*¹⁰⁰ case and the D.H. case, explained above.

97. See: Administrative Court in Rouen, *Bouthellier v. Ministère de l'éducation*, No. 0500526-3, 24 June 2008.

98. See: CJEU, C-171/88, *Ingrid Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG*, July 13, 1989.

99. See: CJEU, C-127/92, *Dr. Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*, 27 October 1993.

100. See: ECtHR, *Di Trizio v. Switzerland*, Application No. 7186/09, 2 February 2016.

Example: *In the case before the Dutch Equal Treatment Commission, the applicant alleged indirect discrimination on the grounds of ethnicity. Namely, the applicant changed her residence and when she moved to the south-eastern part of Amsterdam, she took her TV subscription with her. When her router went down, she called the company to send a technician to check the connection. The company rejected the request stating that there were parts of the city with certain postal numbers where they did not deploy technicians for safety reasons, i.e., because of the risk that technicians or vehicles may be robbed or stolen. The applicant supported her claim for indirect discrimination with local statistics (municipal population data) which showed that two-thirds of the population in that particular part of the city with a certain postal number were persons of minority ethnic origin and thus made it probable that such company policy had a disproportionately negative effect on the members of these minority ethnic groups. The Commission accepted that this was a prima facie case of discrimination and considered that the company had no objective justification for such action (Dutch Equal Treatment Commission, Case No. 2004-15)¹⁰¹.*

In some countries, higher judicial instances have, through their case law or independently, developed practical guidelines for the lower courts concerning the shifting of the burden of proof in practice, i.e., how the courts can assess whether the plaintiff established a *prima facie* case of discrimination and when they should shift the burden of proof to the employer so that they can provide a satisfactory explanation of their actions. Namely, as good practice one can single out the guidelines of the Court of Appeal in England and Wales in the case of *Igen Ltd v. Wong*, referring also to the cases *Chamberlin and Emizie v. Emokpae and Webster v. Brunel University*¹⁰². The guidelines explain that this should be seen as a two-tier approach in which:

- » *First*, it is for the claimant to prove on the balance of probabilities¹⁰³ facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn by the tribunal. In considering what inferences or conclusions can be drawn from primary facts,

101. See: Dutch equal Treatment Commission, No. 2004-15, decision of 1 March 2004.

102. See: Court of Appeal of England and Wales, *Igen Ltd (formerly Leeds Careers Guidance) and Others v Wong, Chamberlin and Other v Emokpae and Webster v Brunel University*, [2005] IRLR 258.

103. See: The balance of probabilities standard is understood to mean a situation in which the court believes that the plaintiff's allegations are more truthful than untruthful.

the tribunal must assume that there is no adequate explanation for those facts. Inferences may also be drawn from the responses to the questionnaire and from any failure to comply with any relevant code of practice, if such code exists.

- » *Second*, the respondent should prove, on the balance of probabilities, that he/she has not committed unlawful discrimination. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge that burden of proof on the balance of probabilities. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully the explanations for failure to deal with questionnaire procedure and/or code of practice, if any.

If the respondent cannot rebut the presumption of discrimination with counter-evidence, then it should objectively justify it. It should be noted that in cases of direct discrimination, the EU law does not allow general justification defence, but only exceptions to discrimination, and our legislation is based precisely on this legal standard. Namely, Article 7 of the LPPD outlines exceptions to discrimination, i.e., it sets out measures and actions that do not constitute discrimination, even more narrowly than the EU law. Namely, the LPPD stipulates that “Any measures and actions undertaken with the sole purpose to eliminate unequal enjoyment of human rights and freedoms until the de facto equality of any person or group is achieved shall not be considered discrimination if such differentiation is justified and fair and the means of achieving such purpose are proportionate, i.e., appropriate and necessary.” (paragraph 1). In doing so, these measures and actions should be time bound and applied until the de facto equality of persons or groups in the enjoyment of their rights is achieved (paragraph 2).

Example: *The case before the Labour Court in Cologne concerned an advertisement for employment starting with the phrase: „Women are coming to power!“ An unsuccessful candidate complained that he had been discriminated against as a man. The court dismissed the appeal by accepting the arguments of the respondent company which rebutted the presumption of discrimination. Namely, the action was justified because the company did not employ any female workers (automobile salesperson) and the purpose of the measure was to provide clients with salespersons of both sexes (Labour Court in Cologne, Case No. AZ 9 Ca 4843/15)¹⁰⁴.*

104. See: Labour Disputes Court of Cologne, No. AZ 9 Ca 4843/15, 10 February 2016.

In addition, the LPPD explicitly provides for two more exceptions, i.e., the following will not be considered discrimination:

- » *First*, different treatment of persons who are not citizens of the Republic of North Macedonia regarding the rights and freedoms provided by the Constitution of the Republic of North Macedonia, laws, and international agreements ratified according to the Constitution of the Republic of North Macedonia, and which derive directly from the Republic of North Macedonia citizenship, and
- » *Second*, different treatment of individuals based on any discriminatory grounds resulting from the nature of their occupation or activity, or from the conditions in which such occupation is performed, which constitutes a genuine and determining occupational requirement, and where the goal is legitimate and the requirement does not exceed the level required for its realisation (paragraph 3).

Example: *In the Mahlburg case, the applicant, who was pregnant, was rejected for a permanent job as a nurse whose duties were, to a large extent, to be performed in an operating room, on the grounds that exposure to hazardous substances in the operating room could harm her child. The CJEU found that since it was a permanent post, it was disproportionate to prohibit the applicant from applying for the post because her inability to perform work in an operating room would be only temporary. Although restrictions on working conditions for a pregnant woman were accepted, they should be strictly limited to duties that could harm her and must not imply a general prohibition to work (CJEU, Mahlburg case)¹⁰⁵.*

Example: *The Administrative Court in Vasa considered the case No. 04/0253/3 in which the Evangelical-Lutheran Church of Finland disqualified a candidate living in a same sex relationship for the position of chaplain (assistant priest). The court returned the decision because heterosexuality is a personal characteristic unrelated to the performance of the job. Attention was drawn to the fact that the internal rules of the Church did not correlate sexual orientation with the appointment of priests and chaplains (Administrative Court in Vasa, Case No. 04/0253/3)¹⁰⁶.*

Worth knowing!

Direct discrimination is not objectively justified, but there are only exceptions, i.e., measures and actions that do not constitute discrimination.

105. See: CJEU, C-207/98, *Mahlburg v. Land Mecklenburg-Vorpommern*, ECR I-549, 3 February 2000.

106. See: Administrative Court in Vasa, *Vaasan Halinto-oikeus*, No. 04/0253/3.

Example: *The case before the Slovenian Advocate of the Principle of Equality concerns an individual who, at the age of 70, automatically lost the right to continue his work within a sports association as a sports referee (cycling commissioner). In 2018, the Advocate of the Principle of Equality of Slovenia (the national equality body) adopted a decision, establishing that the age limit was set too generally and applied in practice without distinction, i.e., regardless of the individual's capabilities. The respondent, the Association, based its defence on the same age limit contained in the statute of an international association, but did not provide additional reasons why the age limit would be necessary. The Advocate of the Principle of Equality in their proceedings found that the rules of the international sports association, which is essentially an international NGO, did not derogate from the national legislation and EU law. The Advocate stated that the respondent did not meet their burden of proof because they did not try to determine and explain the proportionality of the measure or to indicate what the legitimate aim of that measure would be. The Advocate invoked Directive 2000/78/EC on equality in employment, as the measure limited persons aged over 70 to engage in paid work in the association (Advocate of the Principle of Equality of Slovenia, Case No. 0700-52/2020/11)¹⁰⁷.*

Example: *The Çam case concerned the refusal to enrol the applicant - a visually impaired girl - as a student at the Turkish National Music Academy. Although Ms Çam showed adequate abilities to play the Turkish flute (saz) and passed the entrance exam, she was rejected by the dean's office because the music courses were not accessible to the visually impaired and they asked her to produce a medical certificate that she could follow them. The applicant claimed to be discriminated against on the grounds of disability and complained of a violation of the Convention. By the decision, the ECtHR considered that discrimination on grounds of disability also extended to the refusal to make reasonable accommodation. The court indicated that by refusing to enrol the applicant without considering the possibility to accommodate her needs, the Turkish authorities prevented her from exercising her right to education without any objective justification (ECtHR, Çam case).¹⁰⁸*

Each case of indirect discrimination requires that discrimination is objectively justified by:

- » stating a legitimate aim, and
- » satisfying the proportionality test (appropriate and necessary).

107. See: Advocate of the Principle of Equality of Slovenia, no. 0700-52/2020/11, decision of 20 September 2021.

108. ЕСЧП, *Çam v. Turkey*, Апликација бр. 51500/08, 23 февруари 2016 година.

In order to satisfy the proportionality test, the CPPD must make sure that: there are no other means to achieve the established legitimate aim that interfere less with the right to equality. In other words, the less favourable position suffered is the minimum possible level of damage required to achieve the aim sought. At the same time, it should be shown that the aim to be achieved is important enough to justify the level of interference.

These criteria were set out by the CJEU in the *Bilka-Kaufhaus* case, which states that the measure, practice, or incident can be objectively justified on grounds other than the discriminatory one and that the department store company may justify the adoption of a pay policy excluding part-time workers from its occupational pension scheme, irrespective of their sex, to achieve the objective of employing as few part-time workers as possible, if it demonstrates that the means chosen for achieving that objective, correspond to the real need on the part of the undertaking, are appropriate with a view to achieve the objective in question and are necessary to that end.¹⁰⁹

Example: *In the case of Bilka-Kaufhaus, explained above, the Bilka department store argued that the purpose behind the different treatment was to discourage part-time work and stimulate full-time work since part-time workers opted to refuse night shift work and work on Saturdays, and thus the company had difficulty in securing a sufficient number of employees. The CJEU found that this could be a legitimate aim, but it did not answer the question of whether the exclusion of part-time workers from the occupational pension scheme was proportionate to the achievement of that aim. The condition under which the measures taken should be „necessary“ implies that there are no reasonable alternative means that would cause less interference with the right to equality. Hence, the CJEU left it to the national court to apply the law based on the facts of the case.*

Example: *In another of its cases, the CJEU alleged that the respondent should prove that the adopted measure, law, or practice is appropriate and necessary to achieve a legitimate aim and that the induced disadvantages (negative effect) are not disproportionate to the aim they seek to achieve (CJEU, *CHEZ – Nikolova case*).¹¹⁰*

The CJEU has held that purely monetary objectives are not an acceptable justification for discrimination and that objectives not linked to broader social welfare do not pass the objective justifica-

109. See: CJEU, C-170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, 13 May 1986, paragraph 37.

110. See: CJEU, C-83/14, “*CHEZ Razpredelenie Bulgaria*” AD v. Komisia za zashtita ot diskriminatsia [GC], 16 July 2015, paragraph 128.

tion threshold. In the case No. 0801225, explained below, the CPPD decided contrary to this view.

Example: *The Commission for Prevention and Protection against Discrimination in Case No. 0801-225¹¹¹ reviewed the applicant's allegations of indirect discrimination on grounds of health status, in the area of access to goods and services, by an insurance company. The CPPD considered that the applicant made the discrimination allegations probable by submitting a copy of the communication on Viber and the letter of rejection of the offer for private family health insurance because she previously had Hepatitis C. The response to the application included explanatory facts and evidence to assist the CPPD in analyzing the case. The CPPD established that although the insurance company did not rebut the presumption of discrimination, the evidence presented proved that the discrimination was objectively justified.. In its opinion, the CPPD states that in the present case, the refusal of admission to private insurance by the insurer is a proportionate and necessary means to meet the insurer's legitimate aim – avoiding any potential high risk that may lead to financial losses (CPPD, Case No. 0801-225).*

International standards contain certain principles that limit which legitimate aims can be considered acceptable, such as:

- » Budgetary (financial) considerations alone can never serve as an objective justification for discrimination.
- » The purpose of such a practice must not be linked to discrimination and generalisation is insufficient.
- » Proportionality implies that the specific measure taken to achieve a legitimate aim is appropriate to the aim it seeks to achieve.
- » Proportionality also implies that the applicant should show that another measure with lesser intrusion or no detrimental effect would not be effective.

111. See: Commission for Prevention and Protection against Discrimination, No. 0801-225, 8 October 2021.

Example: *Following the judgment of the CJEU in the Kalliri case¹¹², the Greek Council of State in its ruling No. 902/2021 unanimously decided that the police school admission requirement which mandated a height of at least 1.70 m regardless of gender was contrary to the EU directive on gender equality and constituted unjustified indirect discrimination on grounds of sex. The Council found that the Greek state, which bore the burden of proof, failed to justify whether the said minimum height was appropriate and necessary to achieve the legitimate aim, i.e., to ensure the operational capacity and proper functioning of the police. The State's allegation that the „great height“ encompasses in itself „the power of execution, and facilitates the defence and implementation of attack techniques“ cannot be accepted as an objective justification of indirect discrimination on the grounds of sex against female candidates. What is interesting in this case is that, for the first time, the Council explicitly applied the EU law for shifting the burden of proof in cases of gender equality, while referring to the case law of the CJEU on the use of statistics as evidence of the existence of indirect discrimination (the Greek Council of the State, Case No. 902/2021)¹¹³.*

Example: *The Vasil Ivanov Georgiev case, before the CJEU, concerned the issue of compulsory retirement. Bulgarian legislation allowed the employer to terminate a university professor's employment contract when he/she reach the age of 65 and to offer to him/her for a maximum of three one-year fixed-term contracts after that age. Before the CJEU, the Bulgarian government argued that the contested national legislation provides an opportunity for younger generations to reach professorships, thus contributing to maintaining quality in teaching and research work as a legitimate aim. In the analysis of the case, the CJEU found that Council Directive 2000/78/EC allows for the adoption of national laws governing that university professors may continue to work beyond the age of 65 only through one-year fixed-term contracts and retire at the age of 68. However, the Court emphasised that such a law must have a legitimate aim in relation to the labour market or employment policy and that this aim should be expected to be achieved through appropriate and necessary means. Legitimate aims under the CJEU can include ensuring quality teaching as well as optimal deployment of professorships between different generations (CJEU, Vasil Ivanov Georgiev case).¹¹⁴*

112. See: CJEU, C-409/16, Ypourgos Esoterikon and Ypourgos Ethnikis paideias kai Thriskevmaton v Maria-Eleni Kalliri, ECLI EU: C:2017:767, 18 October 2017.

113. See: Greek Council of the State, No. 902/2021. For more information, see: The European network of legal experts in gender equality and non-discrimination, European equality law review, Luxembourg, Publications Office of the European Union, September 2022, page 106-108.

114. See: CJEU, C-250/09 and C-268/09, Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv, ECR 2010 I-11869, 18 November 2010.

The ECtHR holds the same view.

Example: *In the Timishev case, the applicant claimed discrimination as he was prevented from crossing the checkpoint in a particular region because of his Chechen ethnic origin. The court found that official documents that noted the existence of a policy to restrict the movement of ethnic Chechens corroborated this claim. The ECtHR considered that, after the applicant had shown the existence of different treatment, it was incumbent on the Government to prove that it was justified. In this case, the State's explanation was found inconclusive because of inconsistencies the claim that the applicant had voluntarily left after being denied priority in the line. Accordingly, the Court concluded that the applicant was discriminated against on grounds of ethnicity (ECtHR, Timishev case)¹¹⁵.*

Example: *In 2017, for the first time, the Stockholm District Court considered a case identical to another one submitted to the general court a year earlier. In both cases, the focus was on the implementation of the concept of shifting the burden of proof. Namely, these cases concerned whether disposable sleeves were an alternative to bare forearms for Muslims who studied dentistry (district court)¹¹⁶ or Muslim dentists (labour court)¹¹⁷. The focus was on the application of occupational health and safety regulations, the desire of the concerned not to work with exposed bare forearms for religious reasons, and whether the application of this rule constituted indirect discrimination. In both cases, two expert witnesses were examined about the hygienic necessity of working with bare forearms as sanitary standards and they expressed conflicting opinions. The district court concluded that the opinions of the two expert witnesses were credible, but that in this case, it was up to the defendant to bear the burden of proof to rebut the presumption of discrimination. The respondent lost the case because they could not prove that using the protection with a disposable forearm would increase the risk of infection. On the other hand, the labour court ruled contrary, even though it decided on a case resting on substantially the same evidence. The labour court considered that with the respondent's presentation of the objective reasons behind their action, being of a sanitary nature, the burden of proof shifted back to the plaintiff or plaintiffs to rebut this claim, although both expert witnesses were considered equally credible. In this case, the Equality Ombudsman failed to rebut the claims of the respondent's expert, and therefore lost the case. The main reason for this outcome was that, with the safety of the patient in mind, the employer should be allowed a wide margin of discretion in determining the sanitary rules (försiktighetsprincipen – the principle of due care) and thus any additional doubt falls to the plaintiff.*

115. See: ECtHR, *Timishev v. Russia*, Applications No. 55762/00 and 55974/00, 13 December 2005, paragraph 57.

116. See: Stockholm District Court, *Equality Ombudsman v the Swedish State through Karolinska Institutet*, no. T 3905-15, 16 November 2016.

117. See: Labour Disputes Court of Sweden, *Equality Ombudsman v. Peoples Dentist of Stockholm County*, No. 65/2017, 20 December 2017.

3. Indication of the shifting of the burden of proof in the decision (court ruling or opinion of the CPPD)

Indicating and arguing the shifting of the burden of proof in the decision, court ruling, or opinion of the CPPD is extremely important for the effectiveness of the legislation and its efficient application. The analysis of the CPPD opinions shows that the Commission generally complies with the elements of the shifting of the burden of proof and bases its decision on the application of this procedural rule, but does not substantiate them in detail or at all. In some cases it clearly invokes Article 26 and indicates the exact moment when the burden of proof shifts, i.e., when it considers that a *prima facie* case of discrimination has been established and does not establish discrimination in cases where the respondent has rebutted the presumption of discrimination. In *ex officio* proceedings, the burden of proof generally shifts with the decision to initiate *ex officio* proceedings as the information obtained by rumours has created a high degree of probability, i.e., a presumption of discrimination.

On the other hand, court proceedings show a different practice. In his analysis, Kocevski states that the shifting of the burden of proof is observed in only 36 judgments, which is less than half of those analysed. However, it is a good practice that in some of the judgments, the courts explicitly and unequivocally base a decision by applying the rule on the burden of proof. Below are some examples, taken directly from this analysis.¹¹⁸

Example: *Considering the quoted provisions, particularly the provision from Article 38, paragraph 1 of the Law on Prevention and Protection against Discrimination, which prescribes that the burden of proof that discrimination did not occur falls to the respondent, it is the Court's opinion that the plaintiffs delivered evidence to make it probable that they suffered discrimination when they were refused to exit the country, while the respondent failed to prove that discrimination did not occur, i.e. the actions taken by the police officers were no different than actions taken with all other citizens. The plaintiffs were not allowed to leave the country by the officers employed by the respondent at the border crossing without any reason, which led them to an unequal position compared to other citizens. The respondent failed to prove justified, regulated reason not to allow the plaintiffs leave the country and that discrimination did not occur in this case. (Basic Court Bitola, P4 No. 123/17).¹¹⁹*

118. See: Kocevski, G., Revising the burden of proof in court proceedings for protection against discrimination, Analysis and recommendations for promoting the effectiveness of court protection against discrimination, public policy paper, Coalition "Sexual and Health Rights of Marginalized Communities" MARGINS Skopje, Network for Protection against Discrimination, Skopje, 2020, page 26-28.

119. See: Basic Court of Bitola P4 No. 123/17 of 30.3.2018.

Example: *Regarding the indication by the Court of Appeals that it is not clear as to how the conclusion that the respondent was going to continue the employment of the plaintiff if she had not been pregnant was reached, and considering that her employment contract was for a fixed time, pursuant to Article 38, paragraph 1 of the Law on Prevention and Protection against Discrimination, proving that discrimination did not occur falls on the burden of the respondent. In the specific case, the respondent failed to prove to the Court that the plaintiff would not have been extended even if she had not been pregnant, moreover, when the plaintiff received a document for termination of employment six other workers were employed, and the respondent failed to deliver proof that the reason to terminate the plaintiff's employment was not her pregnancy. (Basic Court Skopje 2, RO-980/17).¹²⁰*

Example: *In the first instance judgment of the Basic Civil Court Skopje, concerning discrimination on the grounds of disability due to failure to provide access to the polling station on an equal basis with the others, the court clearly pointed out that after creating a prima facie case of discrimination by the plaintiff, the respondent who bear the burden of proof in accordance with the Law on Prevention and Protection from Discrimination, within the proceedings did not propose and produce relevant evidence to establish that reasonable accommodation has been provided in the polling stations for the effective implementation in practice of their right to vote in the period after 2019, and after the reports of the associations have been prepared and the above recommendations have been made that in all polling stations in the country access of persons with disabilities has been completely prevented (Basic Civil Court Skopje, P4 No. 75/21).¹²¹*

As for equality bodies' good practices concerning written guidelines about the shifting of the burden of proof, one can highlight the guidelines of the advisory board of the Equality Authority of Hungary¹²². The guidelines state that:

- » The person initiating the proceedings (the applicant) needs to prove that s/he has suffered some damage and that s/he has a protected characteristic, but does not have to prove the causal link between the damage suffered and the protected characteristic.

120. See: Basic Court Skopje 2 RO-980/17 of 06.07.2017.

121. See: Basic Civil Court of Skopje, P4 No. 75/21, of 19.04.2022.

122. See: Position paper no. 10.007/1/2006 TT. Also see: Resolution No. 384/4/2008. III.28 TT. of the Advisory Body of the Equal Treatment Authority relating to the share of the burden of proof (Az Egyenlő Bánásmód Tanácsadó Testület 384/4/2008. III.28 TT. sz. állásfoglalása a bizonyítási kötelezettség megosztásával kapcsolatban). The Equality Authority of Hungary since 2021 has been merged with the Office of the Commissioner for Fundamental Rights of Hungary, which unites the two mandates, i.e. it is also a national human rights institution and equality body.

- » The person initiating the proceedings (the applicant) does not have to prove that s/he has suffered legal damage, but only ordinary damage. This means that the person does not have to prove that any particular legal provision has been violated by the action taken, but that it was less favourable to him/her given his/her standpoint.
- » The person against whom the proceedings are brought (respondent) proves that there is no causal link between the damage and the protected characteristic.
- » Moreover, if there is a causal link between the damage and the protected characteristic, the respondent, based on the recognition of a causal link, has the opportunity to prove that s/he was not obliged to comply with the obligation of equal treatment.





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