

Equal Treatment Authority Advisory Board

Viewpoints 384/4/2008

Sharing the Obligation of Proof

The proof of exemption targets to facilitate the difficulties of establishing the case of discrimination in civil and administrative procedures. Given a prima facie case of discrimination the holder of the claim cannot be expected to prove the chain of causation between the disadvantage he has suffered and his protected characteristic. To prove the different sorts of discrimination the variable statutory definitions and the rules of proof shall be considered.

Beyond the facts mentioned above in public procedures of the violation of the principle of equal treatment the social organizations and the unions have to prove that they act in the quality of clients (registered, legal organizations) and establish the terms of Section 20) of Equal Treatment Act.

In case of direct discrimination of race, colour, nationality, ethnicity or illegal segregation there is no place for exemption according to general rules (Section 3 Article 7 of Equal Treatment Act). Neither is there exemption for the violation of the principle of equal pay for equal work (Section 2) 21-22 of Equal Treatment Act).

When applying the rules of the proof of exemption community law and the practice of the have to be taken into consideration. Accordingly in each case when the constitutional right of the applicant is violated, the respondent has to prove that his measure was necessary to enforce his constitutional right and it was unavoidable to reach his target.

In the procedures under the jurisdiction of the Equal Treatment Act CXXV. of 2003 the procedures of proof were different from the ones before. To interpret this the Advisory Board of the Equal Treatment Authority issued its Viewpoints 10.007/1/2006 which has to be modified after the amendment of the law in 2007.

The Rules of the Act of Administrative Procedures

According to Section 19 Para 50 of Act of Administrative Procedures CXL the Equal Treatment Authority shall clear the facts of the case to take decision. If the available data are not satisfactory a procedure shall be initiated to produce evidence. The generally and officially known facts need not be proved.

The Equal Treatment Authority is bound to establish the facts and the way and scope of proof, but it is not bound to adopt the motions of the clients when clearing the facts, however, all the important circumstances have to be taken into consideration.

The Three Sections of the Procedure

19 of the Equal Treatment Act states particular rules of evidence in the civil and administrative procedures. These procedures are listed in Section 12) of the Equal Treatment Act with the procedures of the Equal Treatment Authority among them.

Section 19 of the Equal treatment Act divides the proof into three stages:

1. Initiating a procedure: the applicant establishes a prima facie case of discrimination

2. If it is successful,, the second phase of proof starts when the respondent has to prove there was a non-discriminative reason for the acts or omissions that the applicant has complained of.
3. Following the proof of exemption, in the third phase of the procedure the applicant has to deny the respondent's proof of exemption.

Starting the procedure

Based on Section 2 Para 20 of the Equal Treatment Act if the principle of equal treatment is violated a union can initiate a public administrative procedure at the Equal Treatment Authority. In such a public procedure the union shall prove its client's quality (registered, legal organization).

According to Section 1 Para 19 the applicant has to present a prima facie case of discrimination according to the following viewpoints:

1. the discriminated person or group has suffered or suffers disadvantages
2. the discriminated person or group possessed a protected characteristic or he was supposed to have one.

When establishing or proving a prima facie case the discriminated person or group has to be given freedom whether or not publicly identify themselves. From a prima facie evidence of discrimination average people can conclude that the complaint of the applicant is based. The principle of equal treatment has been violated either the violation was based on the protected characteristic of the applicant or a supposed protected characteristic. In both cases it is necessary to investigate if the real or supposed protected characteristic can be noticed in the appearance or behaviour of the applicant. The circumstances of the location of the supposition have to be examined very carefully. If the applicant presents a prima facie case, the fact that shall be examined is not whether the act has been illegal, but the disadvantage it has caused.

The directly or indirectly discriminated person or group has to name the individual or the group of people who have been treated more favourably than the applicant. In the case of segregation, harassment or victimization, however, such an individual or group need not be mentioned.

In case of segregation the protected characteristic along with the level of segregation, in case of harassment the way the dignity has been harmed has to be established.

If the procedure is initiated by an organization has to establish a prima facie case of the violation of the principle of equal treatment or the imminent danger of violation. In each case the organization shall establish a prima facie case that the group it represents has a protected characteristic as an essential part of their personalities and the violation endangers an indefinitely large group of people. The following viewpoints can be considered to decide if a protected characteristic is the essential part of the personality:

1. The characteristic is protected by the constitution or an international agreement
2. If it is legally privileged
3. If the applicant's everyday life is defined by the grievance
4. If the applicant can change the grievance on his own intention
5. If the characteristic is visible.

Beyond the listed viewpoints the nature of the cases can necessitate other considerations as well. Based on each of the relevant viewpoints it can be established that the protected characteristic is an essential part of the personality. The person or the group who possess a protected characteristic based on the first two points is given a higher level of protection by the rule of the law, those of based on the third, fourth and fifth points are more under the discretionary jurisdiction of the Equal Treatment Authority.

Once an applicant or his representative has established facts which constitute a prima facie case, according to Section 19 of Equal Treatment Act the respondent shall establish a proof of exemption.

Proof of Exemption

The respondent shall establish a proof of exemption if the applicant or its representative has successfully established a prima facie case of discrimination. According to Section 2) Equal Treatment Act 19 the respondent can only avoid the establishment of the violation of the principle of equal treatment and its legal consequences if he proves that:

1. there was a non-discriminative reason for the act the applicant or his representative has established
2. he has met the requirements of equal treatment or he was not bound to do so.

According to Section 3) Para 7 of the Equal Treatment Act in case of discrimination based on direct discrimination of race, colour, nationality, ethnicity or illegal segregation there is no place for exemption. Further on, there is no exemption if the principle of equal pay for equal work violated according to gender, race, colour, nationality or ethnicity.

There are three ways for the respondent to be exempt from the legal responsibility:

1. He proves that the prima facie case established by the respondent is not true
2. He sustains the prima facie case, but proves that there is no dependence of the effect upon the cause between the disadvantage and the protected characteristic, he has met the requirement of equal treatment.
3. He sustains the prima facie case, but he proves that he was not bound to keep the principle of equal treatment because the Act of Equal Treatment orders him to or lets him do so to practise his constitutional right or create chances, his reasons meet the exemption requirements of Section 2) 7 of the Act of equal Treatment.

The Act of Equal Treatment sets the following hierarchy to protect the constitutional rights:

1. The exemption of the sector which gives excess rights to certain protected groups
2. Certain sectors or measures that create chances for protected groups
3. general exemption test when the respondent's constitutional right is offended
4. general exemption test when the respondent's constitutional right is not offended

In each case of exemption a thorough inquest is necessary if the exempted respondent has met his legal obligations. The exemption of the sector is based on *lex specialis derogate legi generali* which means that the exemption of the respondent shall be based on the reasons listed in points 1 and 2.

1. The causes of exemption for that sector to give excess rights to protected groups

According to Section a) Para 22 of the Equal Treatment Act the exemption in the case of employment can only be enforced in community right of real and decisive employment requirements. Coordinated with community regulations Section b) lets certain religious, national or ethnic groups employ people who exclusively belong to the group they represent. It is however, only possible if the nature of the job requires to be done by employees of that group.

It is important to remark that according to Section b) 22 of the Equal Treatment Act the employees of religious or ethnic institutions can only be selected on ethnic or religious basis.

According to 28 of the Equal Treatment Act segregation based on gender, religion, conviction, ethnicity or nationality is not illegal in education or training. According to Section 3) 28 of the Equal Treatment Act those educational institutions which target to keep the linguistic, cultural or religious identity are exempt from the Act when selecting their students.

2. General measures or those of certain sectors to create equal chances

11 of the Equal Treatment Act gives general exemption to create equal chances. Certain directives give privileges to the following sectors : Para 23 of the Equal Treatment Act – employment, Section 2) Para 25 - excess allowances within the framework of social- and health care, Para 29 certain trainees or students within or outside the school system can be given privileges. The given preference can only be cause of exemption if it is based on a government directive or the collective agreement and it is related to the members of certain protected groups.

3-4. General exemption tests

According to Section 2) Para 7 of the Equal Treatment Act the direction that limits a person's basic right to enforce another basic right does not violate the principle of equal treatment if the violation is expedient and proportional or reasonable. Coordinated with the general practice of the the Equal Treatment Act uses a different system of requirements for the violation of basic constitutional rights as well as the violation of non-basic rights. The former one is the stricter necessity-proportionality test according to which a basic right can only be limited to enforce another basic right, the limitation has to be suitable, absolutely necessary and proportionate. The latter one is the reasonability test that says that the differentiation has to be objectively reasonable.

Procedure at the Authority of Equal Treatment

As a special rule in the cases which are in force at the Equal Treatment Authority sharing the obligation of proof is enforced in the public administration procedures. Fact finding is the official duty of the Authority, the clients shall cooperate at the discovery of the evidence.

When cooperating with the clients the Authority is not bound by the prima facie case the applicant has established, but all the essential viewpoints can only be considered if all the circumstances are reported to the clients.

Para 19 of the Equal Treatment Act clearly explains that the applicant establishes a prima facie case of discrimination, however, it is the respondent's duty to prove that he has abided by the principle of equal treatment or he was not bound to do so. In the third phase of the evidence the applicant's part is emphatic.

At the proof of exemption the respondent has to call the attention of the Authority on the circumstances that are significant for the case. To define the way and the scope of the proof is the Authority's duty, but the documents and books about the operation of the respondent that have to be submitted can be different in each case, the respondents, however, have to act actively and cooperatively. To enable the respondents to do their duty the Equal Treatment Authority shall inform the respondents about the facts to be proved and the rules of the obligation of shared proof.

The consequences of the violation of the obligation of cooperation are set forth in the Act of Administrative Procedures. If the respondent refuses the appeal for declaration, the Equal Treatment Authority can base its decision on the proof they have as it is set forth in Section 1) Para 51 of the Equal Treatment Act.

When the proof is evaluated the prevailing decisions of the Supreme Court shall be taken into consideration. Their conclusion is:” to enforce the particular rules of proof because of the frequently contradictory declarations and evidence, it is necessary to evaluate each proof considering its causality and life-likeness, weighing the circumstantial evidence as well.”

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