

SOME LEGAL ASPECTS OF THE JUDICIAL PROCEDURE FOR PROTECTION AGAINST DISCRIMINATION

Agim Nuhiu

Associate professor, Faculty of Law, University of Tetova
e-mail: agim.nuhiu@unite.edu.mk

Ferat Polisi

Full professor, Faculty of Law, University of Tetova
e-mail: ferat.polisi@unite.edu.mk

Abstract

We can still not talk about a case law in Northern Macedonia regarding judicial protection from discrimination. What can be concluded at this stage is the existence of raising the stance to determine the active legitimacy for initiating proceedings for judicial protection of discrimination to decide both the institution and the subject that will be done in their scope in order to express that has the prevention and protection from discrimination in both the public and private sectors.

It remains and must be clearly defined and the damaged figure that can be caused by the discriminatory action, for those who can be sued for damages.

The creation of the case prima facie, the use of a comparison, the justification and the legitimate purpose, the use of statistical indicators are characteristic of a civil litigation for protection against discrimination.

Keywords: discrimination, court, law, lawsuit, judgment

I. Creating the prima facie case

Creating a case prima facie is the obligation of the person who claims to be discriminated against. He must build the case on facts that refer to treatment differently from others as a result of a ground of discrimination. The creation of the prima facie case involves both direct and indirect discrimination. The creation of a prima facie case must have factual basis. The presentation of the facts will support the claim of the party claiming to be discriminated against. They actually refer to the circumstances or events from which the particular consequence stems. In this way the allegation of discrimination is established. Thus, the creation of the prima facie case represents the factual basis of the lawsuit. The lawsuit as a dispositive procedural action in the field of protection against discrimination must contain in itself the case created prima facie.

The plaintiff during the filing of the lawsuit, for the facts submitted, proposes means of proof. Since the party who claims to be discriminated against and who has decided to seek judicial protection from discrimination is the one who will have to create the case prima facie. In this context, the burden of proving the facts set out in the lawsuit falls on her. The plaintiff proposes the evidence and this is his duty at the stage of filing the lawsuit. The plaintiff must prove the prima facie case of discrimination. With the lawsuit filed in court, the plaintiff will have to prove the exclusion, restriction or preferences based on any grounds of discrimination. When it comes to direct discrimination, the prima facie case will have to refer to treatment less favorably in relation to another person or group of persons, in the same or similar situations. Whereas, when it comes to indirect discrimination, the prima facie case will have to refer to the provision, criterion or practice that puts a person or group of persons in unfavorable conditions in relation to another person or group of persons, on certain discrimination.

If the plaintiff manages to prove the case prima facie, then the burden of proof may shift to the potential discriminator - the respondent. It must prove that the prima facie case is unfounded.

II. Using a comparator

Within the principle of equality and non-discrimination, the concept of using a comparator has an important role. When creating the prima facie case, the person seeking protection from discrimination will need to use a comparator. He should make a comparison with any other person or group who in the same situation is treated differently, excluding or differentiating¹. The treatment of discrimination is determined by the use of a comparator. In the process of protection against discrimination, the party that has raised a claim of equality and non-discrimination must find a suitable comparator. Such a thing is not easy. There are situations where no suitable comparator can be found to create the prima facie case. In cases where a comparator cannot be found, the claim for protection against discrimination should not be dismissed by the court, if the plaintiff has raised the prima facie case by comparing his treatment within the framework of essential standards referring to equality and non-discrimination, respectively personal, political, economic, social and cultural rights provided by the Constitution, international acts, as well as by applicable laws².

¹ In the case of *Gas and Dubois v France*, (Complaint no. 25951/07), the European Court of Human Rights in Strasbourg took the comparative element as a basis. She concluded that the same-sex couple with whom they are partners and who want to adopt the other partner's child without severing the mother's legal ties with the child does not present the same or similar situation as a married couple where one spouse will to adopt the child of the other spouse.

² In the case of *Horvath and Kis v Hungary* (appeal no. 1146/1), the European Court of Human Rights in Strasbourg held that cultural differences affect the systematic diagnosis of mental disabilities of children belonging to the Roma nationality and as a result of this has led to the misplacement of Roma

III. Justification and legitimate purpose

Actions that cause direct discrimination cannot be justified. Unlike direct discrimination, in adjudicating an allegation of indirect discrimination, the concrete action or criterion may be objectively justified by a legitimate aim. Means of achieving a legitimate aim in concrete cases may be necessary and appropriate. The burden of proving justifiable objective intent falls on the person allegedly potentially discriminatory. The nature of the justification to be given by the respondent is intended to refute the presumption of indirect discrimination.

In this context, it is important to mention the existence of a reasonable relationship of proportionality between the means or criteria used and the aim claimed to be achieved³.

In cases where this relationship does not exist, it can't be a question of justification and legitimate purpose⁴.

children in special schools in Hungary and other European countries. Such a thing constitutes indirect discrimination. Thus, the principle of equality and non-discrimination also refers to diversity between certain social groups.

³ The European Court of Human Rights in Strasbourg in the case of *Glor v Switzerland* (appeal no. 1344/04), concerning the obligation to pay a sum of money on behalf of a tax to be exempted from military service for medical reasons, despite the fact that the person had a willingness to perform military service, he assessed the existence of different ways of treating persons in similar situations. The court suggested that such persons be offered the option of alternative forms of military service, which would require physical engagement in accordance with the limitations of the individual's disability. Persons incapable of performing military service who do not pay the tax in question cannot be treated in the same way as those persons who are partially unlucky to perform military service who are obliged to pay taxes, despite the fact that when they have willingness to perform military service.

⁴ The European Court of Human Rights in Strasbourg in *Case of Rasmussen v Denmark* (Complaint no. 8777/79) has ruled on the existence of discriminatory action based on the concept that a change of treatment is discriminatory if it «does not objective and reasonable justification «, if it does not pursue a) legitimate aim «, or if there is no» reasonable relationship of proportionality between the means used and the aim sought to be achieved «.

The court in this case, accordingly finds that there was a change of treatment as between Mr. Rasmussen and his ex-wife about the possibility of initiating proceedings to challenge the paternity of the child.

The reasoning of the Danish authorities was not taken into account, which was based on: a.) The respective interests of the father and mother in the procedure for challenging paternity are different. In contrast to the interests of the father, the interests of the mother generally coincide with the interests of the child and that the interests of the child should prevail; b.) It is considered necessary to set aside the time limits for initiating the procedure for opposition of paternity by the husband due to the risk that it can be used as a threat to the mother, in order to escape maintenance obligations; ...

Differentiation of treatment for the implementation of deadlines for initiating proceedings against the paternity of the child, when requested by the father or mother of the child there is no reasonable relationship of proportionality between the means used (determination only for the father) and the purpose required to be accomplished. The case represents discrimination.

IV. The burden of proof

The party who has raised a claim of equality and non-discrimination in court is obliged to present facts and propose concrete evidence to prove that equal treatment has been violated. When filing a lawsuit, the plaintiff, creating the prima facie case of discrimination, submits facts and proposes means of proof. He has the burden of creating the prima facie case of discrimination. So the burden of the claim falls on the plaintiff. This is a matter of procedural nature. Meanwhile, the respondent as a party that is a potential discriminator is charged with proving that the prima facie case of discrimination is unfounded. He must reject the plaintiff's factual claims otherwise he will be held responsible for causing discrimination. The facts and evidence to be presented by the respondent should refer to the concept that the action taken is not discriminatory, but that there is a legitimate aim. He should in no way orient his defense with the existence of the intent for non-discrimination⁵. The existence or non-existence of the intent to discriminate does not affect the judgment for protection against discrimination.

Thus, the burden of proving that there was no discrimination lies with the respondent⁶.

If the principle of review and the principle of adversarial proceedings in the contentious civil procedure are taken into account, it can be said that there is no division of the burden of proof between the plaintiff and the defendant. Each party in the civil litigation claims the claims related to the dispute based on facts. The plaintiff submits facts and evidence to prove his claim. The respondent did the same. He will challenge the plaintiff's claim by presenting facts and evidence, so each of the parties has the burden of proof for their claims. The court is interested in each of the parties having a say in their claims. The issue of sharing the burden of proof is not of a procedural nature, but of a material nature. The presentation of facts and means of proof by the parties is done by taking procedural actions, e.g. the plaintiff with the filing of the lawsuit, the defendant with the response to the lawsuit, in the

⁵ The European Court of Human Rights in Strasbourg, in the case of *Case of Koua Poirrez v. France* (Complaint no. 40892/98) concerning the right to social benefits between French nationals or nationals of a country which has signed a reciprocity agreement and other foreign nationals, which refers to the issue of refusal of the right of citizenship for a person who is a resident of France,

The Court reiterates that the reasonableness of the length of the procedure for refusing French citizenship must be assessed in the light of the circumstances of the case and with reference to the criteria laid down in national jurisprudence, in particular the complexity of the case and the conduct of the applicant and the relevant authorities. The Court assesses the existence of a difference in treatment with regard to the right to social benefits between French nationals or nationals of a country which has signed a reciprocity agreement and other foreign nationals, which was not based on any «objective justification and reasonable».

⁶ In this context Article 4 of Directive 97/80 provides that when a claimant corroborates facts from which it can be presumed that there has been direct or indirect discrimination, the burden of proof falls on the respondent to prove that he has not violated the principle of equality and non-discrimination.

preparatory session, in the session for the main examination of the case, in the phase of using the means of strike, etc. The content of the fact submitted by any party to the litigation will have to be proven by itself. The court on the basis of free evaluation of the evidence submitted by the parties or the evidence available to it will form the conviction for the concrete dispute.

V. The formed conviction of the judge

The court will examine and decide on the existence of discriminatory action by applying the concrete legal norm based on the factual basis, respectively the decisive facts. The established factual situation must correspond to reality. The activity of the court is directed towards the discovery of the truth in view of the decisive facts. Truth is an essential condition during the proceedings and the decision. The results of the reviewed evidence are freely evaluated. The factual situation should include all the circumstances that influence the content of the opinion regarding discrimination.

The party which has initiated the procedure for ascertaining discrimination, in the context of the factual situation has an active role since the filing of the lawsuit for discrimination. She presents the circumstances she is aware of the crucial facts. The Commission has the duty to clarify the factual situation accurately by seeking an answer from the opposing party regarding the allegations of discrimination as well as a statement from other persons.

The content of the truth is revealed by the court through evidence. It must be consistent with the court's conviction of the decisive facts and the objective situation⁷.

VI. Indicators and statistical data

In certain cases, indicators and statistical data can be used as a basis to ascertain a certain policy or criterion that makes an exception, differentiation or preference of a particular group compared to members of another group.

Indicators and statistical data represent data collected, systematized and processed. The data in a descriptive report will enable the Commission to make an analysis of discrimination in a particular segment. Indicators that can be presented through tables, graphs and textual descriptions, etc. are an indicator of discrimination in their respective fields. They can also serve as a database for tracking discrimination in the country and for creating policies in the fight against discrimination.

⁷ The European Court of Human Rights in Strasbourg in the case of *Marschall v Land Nordrhein-Westfalen* (Complaint C-409/95 [1997]), has considered that a national rule which has institutionalized the position that in cases where there are fewer women than at the level of leading positions in the sectors designated in public services, the female candidate will have the right of priority if she has the same qualification in terms of suitability for the leadership position, competence and professional performance, does not constitute discrimination, respectively violation of the principle of equal treatment for men and women in the field of work, training and professional promotion, etc. Thus, the national provision which gives priority to the promotion of women over men, in cases where women have equal qualifications and are under-represented represents a non-discriminatory measure for the court.

Statistical evidence to be valid in the discrimination determination procedure must meet scientific standards and can be used in certain situations. Through statistical analysis, qualitative conclusions are drawn about the shown discrimination.

VII. Judgment on protection from discrimination

The Judgment on Protection from Discrimination is a legal act that resolves a dispute with the object of obstruction and protection against discrimination. With this act the court decides on the object of the dispute. Depending on the type of defense afforded by the court, the judgment can be affirmative (declarative) and (binding) condense.

In all cases where the plaintiff will submit to the court a request to prove the discriminatory action, the court will issue a confirmatory judgment. This judgment will prove the existence of a violation of the right to equal treatment.

The verdict for protection against discrimination can also be a binding verdict (capacitor). In all cases where a claim for damages has been filed with the court, the court will issue a binding judgment (capacitor). The court will provide institutional protection to the victim from discrimination by judging the defendant who will have to give something, do something, or do or endure - dare, facere, non facere, pati.

The court is always bound by the judgment it rendered. With the passing of the judgment, the case is decided in a meritorious manner and the court rules on both the main and secondary claims.

When it comes to the judgment, it is also important to get it final. The judgment will be final if:

- a) No appeal may be filed against him;
- b) No appeal has been filed against him within the deadlines set by law;
- c) The appeal is withdrawn;
- d) The complaint filed was not accepted and
- e) The judgment of the court has been upheld, changed or terminated in the court of appeal.

When it becomes final, the judgment becomes binding on the parties, on persons with legal interests and on all the institutions of the system.

VIII. Publication of the verdict for proving discrimination in the media

The plaintiff in the judicial protection of discrimination may request the publication of the discriminatory action certified by the court, respectively the publication in the medium of the judgment by which the discriminatory action was proved. The verdict is announced in the media at the expense of the defendant.

The publication of the judgment in the media does not affect the decision to compensate the damage caused by the discriminatory action. Given the fact that

certain moral violations of man can't be expressed in money in the classical sense of the word, we can say that the publication of the judgment in the media will complement the just compensation for the damage caused by discriminatory action. The possibility of such a right can only refer to the satisfaction of the discriminated person in order to mitigate the consequences of the harm and to "satisfy" in a way his feelings. This is especially justified when the discriminated person experiences non-pecuniary damage. In no way can we say that the compensation for the damage has achieved its purpose, but in any case it is better to give a concrete reward than not to give it at all, although it may not be adequate, but it will still be a satisfaction for the discriminated.

In addition, the publication of the judgment in the media plays the role of promoting and educating equality, human rights and non-discrimination, raising and strengthening the awareness of citizens to recognize the problems of discrimination, informing the public about the protection mechanisms of discrimination.

IX. Conclusions and recommendations

Meritorious judgment on a contentious issue with the object of equality and non-discrimination is closely related to the veracity of the facts resulting from a series of procedural actions of the parties and the court itself. The court will be informed of the decisive fact through the parties. The court will urge the parties to present certain facts and evidence. Decisive facts and their proof may also be part of the procedural actions of the court itself.

The contentious procedure for protection against discrimination will initially focus on presenting the facts about the prima facie case of discrimination. It is sufficient for the plaintiff to present facts and means of proof for the presumption of discrimination. This legal concept is motivated by the idea that victims of discrimination are encouraged to seek judicial protection against discrimination. The burden of proving that there is no discriminatory action, thus the action contested as discriminatory is justifiable with legitimate intentions falls on the respondent party.

However, taking into account the fact that the parties in the contentious civil procedure have the right to undertake a series of procedural actions of a defensive and aggressive character, at different stages of the judicial process, they will have to base their claims on crucial facts. The burden of proving his claim lies with the party who submitted those facts.

In the context of the means of proof in the procedure for adjudication of discrimination, we consider that it is of interest to establish a legal infrastructure which will provide for the use of the results achieved with the means of proof in the procedure for protection against discrimination other institutions that do not have judicial jurisdiction, by the court which conducts court proceedings. This infrastructure should refer to the results of situation testing and statistical indicators.

This increases the efficiency and effectiveness of state bodies and institutions that have the competence to prevent and protect against discrimination.

BIBLIOGRAPHY

1. Alajdin Alishani, *Studies in the law of obligations I*, Prishtina, 2001
2. Andrea Nathanaili, *Civil Law of Albania*, Tirana, 1974.
3. Ardian Nuni, *Lectures on Civil Law*, Tirana, 2004.
4. Ardian Nuni, *Introduction to Civil Law*, Tirana, 2006
5. Arsen Janevski / Tatjana Zoroska - Kamilovska, *Civil Procedural Law, Book One, Contested Law*, Skopje, 2009
6. Adam Lazarevic, *Fundamentals of Civil Procedure, Civil Procedure*, Skopje, 1986
7. Alessandra Amato, Anna Costagliola, *Compendium of civil procedural law*, Maggioli Editor, 2012
8. Blandine Rolland, *Civil Procedure, 30 synthesis sheets for preparing TD and reviewing exams*, Studyrama, 2007
9. Borivoje Pozniq, *The Law of Civil Procedure, Second Edition*, Prishtina, 1980;
10. Cédric Tahri, *Civil Procedure*, Bréal, 2007;
11. *Developing Anti-discrimination Law in Europe, The 27 EU Member States, Croatia, Former Yugoslav Republic of Macedonia and Turkey compared Prepared by Isabelle Chopin and Thien Uyen Do for the European Network of Legal Experts in the Non-discrimination Field November 2011 (Based on information current to 1 January 2011 *)* Luxembourg: Publications Office of the European Union, 2012;
12. Enver Hasani, *Ne bis in idem in contentious procedure*, master thesis, Prishtina, 1991;
13. Fuga Juliana, *Civil Law, general part*, Tirana, 2000,
14. Iset Morina / Selim Nikçi, *Commentary - Law on Contested Procedure*, Prishtina, 2012;
15. Jenny Steele, *Tort law, text, cases and materials*, Oxford University Press, 2009;
16. Laura Caracciolo, *Civil Procedure Code*, 2006, Milan,
17. Nerxhivane Dauti, *Law of Obligations*, Prishtina, 2002;
18. Paolo Franceschetti, *The Civil Responsibility*, Maggioli Editor, 2009;
19. Petar Klaric & Martin Vedrish, *Gradjansko pravo*, Zagreb, 2006;
20. Stephen M. Gerlis, *Civil Procedure*, Paula Loughlin, London 2001
21. Spaic Voislav, *Osnaovi gradjanskog prava*, Sarajevo, 1957,
22. Vincenzo Galatro, *Civil Procedure Manual*, 2008, Maggioli S.p.A., San Marino
23. *Law on Prevention and Protection against Discrimination in Macedonia*;
24. *Law on Contested Procedure of Macedonia*;
25. *Law on Courts of Macedonia*.
26. *Criminal Code of Macedonia*;

Cases resolved in the Strasbourg Court

- Mata Estvez v. Spain (Complaint no. 56501/00)
- Glor v Switzerland (complaint no. 1344/04),
- Case of Rasmussen v Denmark (Complaint no. 8777/79)
- Gas and Dubois v France, (Complaint no. 25951/07),
- Horvath and Kis v Hungary (complaint no. 1146/1),
- Case of Koua Poirrez v. France (Complaint no. 40892/98)
- Marschall v North Rhine-Westphalia, (Complaint C-409/95)