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NEWS REPORT

Country:	Slovakia
Title:	The Constitutional Court Clarifying Some Aspects of Proving Discrimination in Civil Proceedings
Date:	21 March 2016
Expert:	Janka Debrecéniová
Issue at stake:	The Constitutional Court clarified some aspects of proving discrimination in civil proceedings, with particular focus on the requirements stemming from the concept of shift in burden of proof
Ground of discrimination:	Race/ethnic origin; all grounds
Source:	National court decision (Finding of the Constitutional Court of the Slovak Republic of 1 December 2015, No III. ÚS 90/2015-40)
Field:	Employment; social protection, social advantages, access to goods and services, education, housing
Applicable law:	Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act) ¹

Content

Case development:

On 1 December 2015, the Constitutional Court of the Slovak Republic announced a decision in a case that concerned a Roma woman claiming ethnicity-based discrimination in access to employment.²

In 2011, the plaintiff sued the town of Spišská Nová Ves ("the town") for discriminating against her by not selecting her for one of three vacant positions of terrain social workers, financed by the Social Development Fund. When compared with the applicant, the persons selected for the positions were less qualified, had less experience with terrain social work and less training, did not speak Roma language, and were of non-Roma origin. Experience with terrain social work, speaking Roma language and being of Roma origin were deemed to be advantages in the selection process (although the latter two were listed as advantages by the Social Development Fund only).

In 2012, the District Court in Spišská Nová Ves, deciding the case in the first instance, dismissed it, reasoning, *inter alia*, that the plaintiff did not submit any relevant evidence that would prove that the plaintiff was discriminated against on the ground of her

¹ Zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon)), Act No. 99/1963 Coll. Civil Procedure Act, as amended (zákon č. 99/1963 Z. z. Občiansky súdny poriadok v znení neskorších predpisov

² The legal representation of the plaintiff was arranged by the Centre for Civil and Human Rights (Poradňa pre občianske a ľudské práva), an NGO carrying out strategic litigation in cases of racial and ethnic discrimination.

ethnicity.³

The plaintiff appealed against the district court decision, arguing, *inter alia*, that the first instance court required a proof of a racial motive of the defendant's actions, which went beyond the legislative requirements of proving discrimination. The plaintiff also argued that the district court did not deal with some of her allegations concerning the circumstances of the selection process, such as doubts about independence of the selection committee members, interference of the committee's secretary with the decision-making process, or ties of the selected applicants with some of the committee members.

In 2013, the second instance Regional Court in Košice upheld the first instance court decision.⁴ The regional court emphasised that the burden of proof on the plaintiff's side required her to prove that she was disadvantaged for the reason of her ethnicity, and then it was up to the defendant to prove that the motive of his treatment did not lie in a discriminatory ground but in other grounds. The regional court reasoned that the defendant managed to rebut the plaintiff's allegations of discrimination by proving that the plaintiff did not succeed because, in the competition for the three vacant positions, she ended up in the fourth place. The court also used other formalistic arguments to justify its decision, such as that all applicants were asked the same questions or that the knowledge of Roma language was an advantage only, and not a decisive criterion.

Subsequently, the plaintiff lodged a complaint to the Constitutional Court.

Decision of the Court:

The Constitutional Court held that the regional court violated the complainant's right to a fair trial as well as her right to an effective remedy. It quashed the regional court decision and ordered it to continue conducting proceedings in the case (hence the case is not finished yet).⁵

The Constitutional Court emphasised the specificities of anti-discrimination proceedings which are very demanding in terms of evidence assessment. The Constitutional Court pointed to the specific distribution of the burden of proof where the 'plaintiff is supposed to communicate to the court the facts which give rise to a reasonable assumption (i.e. not an unquestionable settlement) that a violation of the principle of equal treatment occurred',⁶ which establishes the shift of the burden of proof on to the defendant. According to the Constitutional Court, whether the burden of proof gets shifted or not depends on the quality of the assessment of the evidence available – from the point of view of whether the deciding court has thoroughly considered all facts that emerged in the proceedings.⁷

The Constitutional Court, referring to case-law of the Czech Constitutional Court,⁸ held that 'the requirement for the plaintiff to prove that their discrimination has taken place because of their racial (ethnic) origin and not for other reason can apparently not be fulfilled since proving the motive (incentive) of the defendant is simply impossible, due to the nature of the issue itself'.⁹

³ Judgment of the District Court in Spišská Nová Ves of 18 April 2012, No 11 C 137/2011-390, in conjunction with the Supplementary Judgement of the District Court in Spišská Nová Ves of 25 April 2012, No 11 C 137/2011-406.

⁴ Judgment of the Regional Court in Košice of 18 June 2013, No 6 Co 165/2012-434.

⁵ Finding of the Constitutional Court of the Slovak Republic of 1 December 2015, No III. ÚS 90/2015-40.

⁶ This wording (except for the words in the brackets) is contained in Section 11(2) of the Anti-discrimination Act.

⁷ Finding of the Constitutional Court (*supra note 4*), p. 15.

⁸ Finding of the Constitutional Court of the Czech Republic of 26 April 2006, No Pl. ÚS 37/04.

⁹ Finding of the Constitutional Court of the Slovak Republic (*supra note 4*), pp. 17-18.

The Constitutional Court held that both the first and the second instance courts were selective in assessing the evidence submitted in the proceedings, prioritising the facts acting in favour of the defendant and ignoring the facts acting in favour of the plaintiff. The Constitutional Court emphasised that the right to a fair trial requires assessment of evidence to be carried out on a non-selective basis.¹⁰

In the context of employment-related discrimination, the Constitutional Court said that the alleged discrimination cannot be judged formalistically only against the job selection process and its results, without taking into consideration the related circumstances (in terms of time and the subject matter). With regard to the selection criteria set by the town (narrowed down as against the criteria set by the Social Development Fund), the Constitutional Court noted that the regional court has not assessed the criteria as such, although the prohibited discriminatory treatment could already be applied by the town in the stage of determining the criteria in the selection process – which were subsequently formally met in the stage of evaluation and actual selection of the candidates.

The decision is in principle applicable to all other prohibited grounds of discrimination contained in the Anti-discrimination Act and to all other fields that are falling under the material scope of the act.

Key points of analysis:

- An important decision clarifying some aspects of the shift in the burden of proof in anti-discrimination judicial proceedings, including the fact that a person allegedly discriminated against cannot be required to prove a discriminatory motive (with regard to a particular ground of discrimination) and the fact that the evidence submitted to courts cannot be assessed on a selective basis.
- The decision will have broader implications and will apply to all types of anti-discrimination proceedings, both in terms of the grounds covered and in terms of the fields in which discrimination is taking place.
- The proceedings in this particular case are still taking too long and the case is not finished – which puts the overall effectiveness of judicial remedies in cases of discrimination into question.

Internet link source: <https://www.ustavnysud.sk/vyhľadavanie-rozhodnuti#!DecisionsSearchResultView>; <http://www.poradna-prava.sk/sk/aktuality/ustavny-sud-sr-rozhodol-o-poruseni-prav-romskej-zeny-ktora-sa-marne-domahala-spravodlivosti-za-diskriminaciu/>
Last accessed 17/03/2016.

¹⁰ Finding of the Constitutional Court of the Slovak Republic (*supra* note 4), pp. 18-24.