

'Racial & Ethnic Origin' in EU Equality law

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Outline

1. The concept of 'racial or ethnic origin'
 - a. Wording of the RED
 - b. 'Ethnicity' as defined in *CHEZ*

Focus on 2 aspects of the concept of 'ethnicity':

2. National origin & nationality
 - a. *Firma Feryn*
 - b. *Kamberaj*
 - c. *CHEZ*
3. Religious faith

'Racial or ethnic origin' in the RED (I)

Directive 2000/43 (Racial Equality Directive, 'RED'):

- Applies as regards discrimination on the grounds of **'racial or ethnic origin'** (art 1)
- **What does that mean?**
 - ✓ No definition
 - ✓ Recital 6: use of terms 'race' & 'racial' doesn't imply acceptance of theories on separate human races
 - ✓ Recital 13 & art 3(2): doesn't apply to differences of treatment based on nationality

‘Racial or ethnic origin’ in the RED (II)

Recital 3 RED: reference to **international conventions**, including:

- International Convention on the Elimination of all forms of Racial Discrimination (ICERD)
- European Convention of Human Rights (ECHR)

↳ Possible sources of inspiration to interpret ‘racial or ethnic origin’ for the purposes of the RED

‘Ethnicity’ in *CHEZ*

Approach taken by the **CJEU** in **Case C-83/14, *CHEZ***:

- According to **art 1 ICERD**:

‘discrimination based on a person’s **ethnic origin** constitutes a form of racial discrimination’

(*CHEZ*, para 73)

- According to **art 14 ECHR**, as interpreted by the **ECtHR**, the concept of **ethnicity**:

‘has its origin in the idea of societal groups marked in particular by **common nationality**, religious faith, language, cultural and traditional origins and backgrounds’

(*CHEZ*, para 46, citing the ECtHR in *Nachova*, Appl. Nos. 43577/98 and 43579/98; *Sejdić*, Appl. Nos. 27996/06 and 34836/06)

‘National origin’ & ‘nationality’ (I)

Case C-54/07, *Firma Feryn*:

- Firm’s director stated that he was not willing to hire **Moroccans**
- CJEU didn’t define ‘racial or ethnic origin’
- BUT: accepted that the RED could be applied to that statement on the **nationality** of potential employees
- Ruling: amounts to direct discrimination

'National origin' & 'nationality' (II)

Case C-571/10, *Kamberaj*:

- A long-term resident requested a housing benefit
- Was rejected on the ground that he was **not a national** from that MS
- **CJEU**: the RED was inapplicable
- Reason: differential treatment based on **nationality**

Contradiction between *Firma Feryn* and *Kamberaj*?

‘National origin’ & ‘nationality’ (III)

Case C-83/14, *CHEZ*:

- Bulgarian citizen living in a district mainly inhabited by Roma
- But not a Roma herself



Source: <https://urban-energy.org/2013/09/10/the-rise-of-the-networked-ghetto/>

- **CJEU: ‘Ethnicity’** should be understood as referring to

‘societal groups marked in particular by **common nationality**, religious faith, language, cultural and traditional origins and backgrounds’

(*CHEZ*, para 46, citing the ECtHR in *Nachova* and *Sejdić*)

'National origin' & 'nationality' (IV)

So how should '**common nationality**' be interpreted?

- Both in *Firma Feryn* and *Kamberaj*: references to national origin/nationality, but subtle differences:

Firma Feryn

Reference to country of birth:

- ✓ As **ethnic/cultural background**
- ✓ Not as citizenship/legal status



CHEZ ('common nationality'):

- ✓ Refers to '**national origin**'
- ✓ As in *Firma Feryn*

Kamberaj

Reference to nationality:

- ✓ As **citizenship/legal status**
- ✓ Not as ethnic/cultural origin



- ✓ *Kamberaj* refers to '**nationality**'
- ✓ Not covered by the RED -art 3(2)

‘National origin’ & ‘nationality’ (V)

BUT difference between ‘*nationality*’ & ‘*national origin*’ is not always obvious:

- Clear overlaps between both concepts

Example:

- ✓ A TCN moves to a MS to study
- ✓ Then applies for a position in a consultancy firm in that MS
- ✓ The application is rejected because ‘he is not a *national*’
- ↳ Would the real reason for rejection be linked to:
 - His ethnic/cultural origin (= *Firma Feryn*)
 - The need of a visa → legal citizenship (= *Kamberaj*)?

‘Religious faith’ (I)

- The ECtHR refers to ‘religious faith’ as **an element of ethnicity**
(*Nachova*; *Sejdić*; *Timishev*, Appl. Nos. 55762/00 & 55974/00)
- **CJEU in CHEZ** → ‘**Ethnicity**’ should be understood as referring to
‘societal groups marked in particular by common nationality, **religious faith**, language, cultural and traditional origins and backgrounds’
(*CHEZ*, para 46, citing the ECtHR in *Nachova* and *Sejdić*)

‘Religious faith’ (II)

- ECRI General Policy Recommendation No. 7:
Racial discrimination is defined as ‘differential treatment based on a ground such as race, colour, language, **religion**,...’
- Framework Decision 2008/913/JHA against **racism and xenophobia**:
Art 1(1) - Applies to conducts directed at:
‘persons or a member of such a group defined by reference to race, colour, **religion**, descent or national or ethnic origin’
Art 1(3) – applies to religion, *at least*, when religion is used as a pretext for inciting to violence, etc. (**covert racism**)

'Religious faith' (III)

- Sometimes: blurry line between ethnic and religious discrimination (e.g. headscarf cases)
- Anti-Muslim prejudice as a form of **cultural racism** [Modood (2005); Bamforth et al (2008); Bell (2009)]
- Concept of '**ethnicity**' also refers to: '**cultural backgrounds**'
- In the field of Employment: Directive 2000/78
- ***But beyond employment?***
- Religious discrimination cases could be covered by the RED in areas beyond employment for:
 - ✓ Covert racial discrimination & cultural racism
 - ✓ Religious groups who are also ethnic groups



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Concluding remarks

- **National origin and nationality**

- ↳ 'National origin' is covered by the RED; 'nationality' isn't
- ↳ BUT exception in art 3(2) RED should be narrowly interpreted
- ↳ Deciding whether case is a '*Firma Feryn*' or a '*Kamberaj*' case may depend on factual evidence → ***lack of legal certainty?***

- **Religious faith**

- ↳ Another element of the concept of 'ethnicity'
- ↳ Religious discrimination cases could be covered by the RED in areas beyond employment for:
 - ✓ Covert racial discrimination & cultural racism
 - ✓ Religious groups who are also ethnic groups
- ↳ ***Caveat: what about religious groups who are not ethnic groups?***