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**INDIRECT DISCRIMINATION BY ASSOCIATION –
AN ANALYSIS OF THE COURT OF JUSTICE OF THE
EUROPEAN UNION’S JUDGEMENT IN “CHEZ RB”
(C-83/14)**

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Abstract

This paper deals with EU anti-discrimination law. On the basis of the ECJ’s judgment in “CHEZ RB” the paper examines the distinction between direct and indirect discrimination and analyses the scope of the concept of discrimination by association, acknowledged, for the first time, in the ECJ’s judgment in “Coleman”. Emphasis will be put on the question whether the ECJ has established discrimination by association as a general concept in EU anti-discrimination law, valid for all types of discrimination, direct or indirect, and irrespective of the referred ground or the degree of association.

Word length

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Subjects and Topics

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
Discrimination on grounds of ethnic origin (Roma people);
Concept of “direct discrimination”/“indirect discrimination” and possible justification;
Discrimination by association.

I Introduction

According to Art 2 of the Treaty on European Union (“TEU”)¹ the European Union (“EU”) is founded on the value of, *inter alia*, equality, including the rights of persons belonging to minorities. Equality is a value “common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. As laid down in Art 19(1) of the Treaty on the Functioning of the European Union (“TFEU”)² one objective of the EU is to combat discrimination on, *inter alia*, racial or ethnic origin. In implementation of Art 19(1) TFEU (ex-Art 13 of the Treaty Establishing the European Community, “TEC”), the Council of the European Union has adopted four directives on non-discrimination³, including Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“Directive 2000/43” or “Racial Equality Directive”)⁴. Its enactment was primarily driven by the Commission’s concern about discrimination in parts of Central and Eastern Europe, especially with regard to Roma people.⁵ The interpretation of Directive 2000/43 is subject to the Court of Justice of the European Union’s (“ECJ”) judgment in *CHEZ RB*.⁶ By expanding the approach in *Coleman*⁷, this judgment constitutes another milestone in European anti-discrimination law. The ECJ defines the dividing line between direct and indirect discrimination more thoroughly and deals with the question whether Directive 2000/43 prohibits (indirect) discrimination of a person who, although not of a certain ethnic origin himself/herself, is put at a particular disadvantage compared with other persons because he/she is associated with a member of a certain ethnic community.

¹ OJ C326/13.

² OJ C326/47.

³ D Schiek, L Waddington and M Bell *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, Oxford and Portland, 2007) at 11-13; see also European Union Agency for Fundamental Rights and European Court of Human Rights - Council of Europe *Handbook on European Non-discrimination Law* (2010) European Union Agency for Fundamental Rights <http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf> at 14.

⁴ OJ L180/22.

⁵ E Ellis and P Watson *EU Anti-Discrimination Law* (2nd ed, Oxford University Press, Oxford, 2012) at 31-32; see also MH Ram “Anti-Discrimination Policy and the Roma: Assessing the Impact of EU Enlargement” (2007) 3 CYELP 491.

⁶ Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot discriminatsia* [2015] OJ C311/8 [*CHEZ RB*].

⁷ Case C-303/06 *Coleman v Attridge Law and Steve Law* [2008] ECR I-5603 [*Coleman*].

In the following, I will briefly report the ECJ’s judgment in *CHEZ RB* including the facts, proceedings, and legal context. A closer analysis of the judgment, in consideration of former judgments, will show that the decision confirms the established dividing line between direct and indirect discrimination. However, the ECJ, once more, has broadened the scope of European non-discrimination law in three-party-relationships.

II The Case “CHEZ RB”

A Factual Background

Ms Nikolova, the plaintiff in the main proceedings, runs a grocery store in the “Gizdova mahala” district in Dupnitsa, Bulgaria. That district, commonly referred to as the largest “Roma district”, is predominantly inhabited by people of the Roma community, although Ms Nikolova is not of Roma origin herself. CHEZ RB, the defendant in the main proceedings, is an electricity distribution undertaking responsible, *inter alia*, for the electricity supply in Dupnitsa.

In 1999 and 2000, CHEZ RB installed the electricity meters for all the consumers of the “Gizdova mahala” district on concrete pillars forming part of the overhead electricity supply at a height of six to seven meters, whereas in the other districts of the town the meters were placed at a height of 1.70 meters, usually in the consumer’s property, on the façade or on the wall around the property (“the practice at issue”). CHEZ RB contested that this practice was established in response to the increased frequency of tampering with and damage to electricity meters and numerous unlawful connections to the network in the district concerned. The practice was said to be designed to ensure the security of the electricity transmission network and the due recording of electricity consumption. The location of the electricity meters at a height of six to seven made it impossible for the final consumers to check and monitor their consumption.

B Proceedings

In December 2008, Ms Nikolova lodged an application with the *Komisia za zashtita ot dikriminatsia* (Commission for Protection against Discrimination; “the KZD”) contending that the practice at issue is based on the Roma origin of most of the inhabitants and that she was accordingly suffering direct discrimination on the grounds of nationality. In its decision issued on 6 April 2010, the KZD held that the practice at issue constituted prohibited indirect discrimination on the grounds of nationality under Bulgarian law.

By judgment of 19 May 2011, the *Varhoven administrativen sad* (Supreme administrative Court) annulled that decision and remit the case to the KZD, stating, in particular, that the

KZD had not indicated the other nationality in relation to the holders of which Ms Nikolova had suffered discrimination.

On 30 May 2012, the KZD issued a new decision finding that the practice implemented by CHEZ RB constitutes direct discrimination against Ms Nikolova on the grounds of her “personal situation” under Bulgarian anti-discrimination law, as the location of her business puts her in a disadvantageous position compared to CHEZ RB’s other customers whose meters were placed at an accessible height.

CHEZ RB lodged an appeal against that decision before the *Administrativen sad Sofia-grad* (Administrative Court, Sofia). In its request for a preliminary ruling under Art 267 TFEU, made by decision of 5 February 2014, the *Administrativen sad Sofia-grad* has asked the ECJ, among other things, whether Art 2(2)(a) and (b) of Directive 2000/43 must be interpreted in such a way that the contested practice amounts to prohibited direct or indirect discrimination of Ms Nikolova on the grounds of ethnic origin.⁸

C Legal Context

1 Directive 2000/43/EC

The request for a preliminary ruling concerns the interpretation of Art 1 and Art 2(1) and (2)(a) and (b) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.⁹ As provided in Art 1, “[t]he purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment”. Art 2, headed “Concept of discrimination”, prohibits any direct or indirect discrimination based on racial or ethnic origin for the purpose of the Directive. According to Art 3(1)(h), defining the “Scope”, the Directive shall apply to all persons in relation to, inter alia, “access to and the supply of goods and services which are available to the public (...”).

2 Charter of Fundamental Rights of the European Union

Council Directive 2000/43 is a special expression of the general principle of equality in EU law¹⁰ which derives from the constitutional traditions common to the Member States and Art 14 of the European Convention on Human Rights (“ECHR”).¹¹ The principle of

⁸ For the exact wording of the questions referred for a preliminary ruling see Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* Request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria) lodged on 17 February 2014 [2014] OJ C142/18.

⁹ OJ L180/22.

¹⁰ See, for example, Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143 at [18].

¹¹ E Ellis and P Watson, above n 5, at 99-110.

equality and non-discrimination is explicitly recognised in Arts 20, 21 of the Charter of Fundamental Rights of the European Union (“the Charter”)¹². Art. 21(1) of the Charter provides that any discrimination based on any ground such as, *inter alia*, race, ethnic or social origin, shall be prohibited. The Charter, since the entry into force of the Lisbon Treaty, has legal status (Art 6(1) TEU), and addresses the Union’s institutions and bodies as well as the Member States when implementing EU law (see Art 51(1) of the Charter).

3 Directive 2006/32/EC and Directive 2009/72/EC

There are two directives in EU legislation dealing with the final customer’s right to check their actual electricity consumption. Recital 29 in the preamble to Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC¹³ states that “[i]n order to enable final consumers to make better-informed decisions as regards their individual energy consumption, they should be provided with a reasonable amount of information thereon and with other relevant information (...). In addition, consumers should be actively encouraged to check their own meter readings regularly.” According to Art 13(1) all final customers for electricity are provided with individual meters that reflect their actual energy consumption.

Art 3(3) and (7) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC¹⁴ provide, *inter alia*, a reasonable and transparent price structure and compel the member states to take appropriate measures to protect final consumers. As laid down in para 1(h) and (i) of Annex I to Directive 2009/72, those measures include to ensure that customers “have at their disposal their consumption data” and “are properly informed of actual electricity consumption and costs frequently enough to enable them to regulate their own electricity consumption”.

III Findings of the Court

A Scope of Directive 2000/43

The ECJ first states that the practice at issue falls within the personal and substantive scope of Directive 2000/43.¹⁵ Art 3(1) makes general reference to “access to and supply of goods and services which are available to the public”. Following the opinion of Advocate General

¹² OJ C364/1.

¹³ OJ L114/64.

¹⁴ OJ L211/55.

¹⁵ CHEZ RB, above n 6, at [38]-[60].

Kokott¹⁶, the ECJ notes that the installation of electricity meters at the final consumer’s property is inseparably linked to the supply of electricity and therefore subject to observance of the principle of equal treatment irrespective of racial or ethnic origin as laid down in the Directive.

In terms of the personal scope, the ECJ considers to be established that the concept of ethnicity, in the sense of “societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds”, applies to the Roma community.¹⁷ The question at issue is whether the principle of equal treatment also applies to persons who are not themselves a member of the ethnic group concerned, but who suffer together with people of that ethnic origin a less favourable treatment or particular disadvantage on account of a discriminatory measure.¹⁸ The ECJ notes that Ms Nikolova, who explicitly declared to be of Bulgarian origin, does not assimilate herself to the Roma community by the simple fact of her complaint of ethnic discrimination in the main proceedings.¹⁹ However, it can be concluded from the legal context, the general scheme and the aim of Directive 2000/43 that the “principle [of equal treatment] is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds”.²⁰

B Discrimination

Addressing the question whether the practice at issue constitutes (direct or indirect) discrimination, the ECJ states that it amounts to unfavourable treatment or a particular disadvantage to the detriment of the inhabitants concerned because of its offensive and stigmatizing nature and the fact that the installation of the electricity meters at a height of six to seven metres makes it extremely difficult if not impossible for the inhabitants to monitor and check their electricity consumption.²¹

1 Direct discrimination

With regard to the concept of direct discrimination as laid down in Art 2(2)(a) of Directive 2000/43, the question at issue is, whether this less favourable treatment occurs “on grounds of racial or ethnic origin”. The fact that also people of non-Roma origin live in the district

¹⁶ Opinion of Advocate General Kokott delivered on 12 March 2015, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] OJ C311/8.

¹⁷ *CHEZ RB*, above n 6, at [45] and [46].

¹⁸ At [50].

¹⁹ At [49].

²⁰ At [55]-[60].

²¹ At [86]-[90] and [108].

concerned does not in itself preclude that the practice at issue was imposed on account of the ethnic origin shared by most of that district’s inhabitants.²² For there to be indirect discrimination, it is sufficient that the practice at issue has in fact been imposed for reasons of ethnic origin.²³ It is for the Bulgarian court to assess all the circumstances surrounding the practice to determine whether or not this is the case.

2 Indirect discrimination

Assuming that the Bulgarian court were not to hold that the practice at issue amounts to direct discrimination, the ECJ notes that the practice could still, in principle, constitute indirect discrimination.²⁴ The ECJ “is not in doubt” that the practice at issue, which has only been established in a district where numerous incidents of abuse have been recorded, would be based on an apparently neutral criterion (residence in the district concerned) while actually affecting persons of Roma origin in considerably greater proportions. Thus, it would put persons of Roma origin at a particular disadvantage compared with other persons not possessing such an ethnic origin.²⁵

However, it is for the national court to assess whether the practice could be objectively justified in the light of Art 2(2)(b) of Directive 2000/43. The protection of the security of the electricity transmission network and the due recording of electricity consumption constitute legitimate aims capable, in principle, of justifying a difference in treatment, provided that CHEZ RB can prove that the abuse has in fact been committed in the district concerned and that the risk of such abuse still remains.²⁶ Yet, the Bulgarian court, on the basis of its definitive factual assessments, has to evaluate if the practice at issue is appropriate and necessary to achieve those aims²⁷ or if the disadvantages caused by the practice at issue are disproportionate to the aims pursued and to the legitimate interests of the inhabitants of the district concerned, firstly, in the light of its offensive and stigmatising effect and, secondly, with regard to the fact that it is imposed for a very long time and without distinction to the inhabitants of an entire district making it impossible for them to check and monitor their electricity consumption regularly.²⁸

²² At [75].

²³ At [76].

²⁴ At [105].

²⁵ At [106]-[107].

²⁶ At [113]-[117].

²⁷ At [119]-[122].

²⁸ At [123]-[126].

IV Analysis

The ten questions referred to the ECJ by the *Administrativen sad Sofia-grad* boil down to two main legal issues: What is the dividing line between direct and indirect discrimination on grounds of racial or ethnic origin (B)? Can there be discrimination by association in connection with indirect discrimination (C)? The legal basis to answer these questions is Directive 2000/43 which gives special expression to the general principle of equality predominating EU law (A).

A Renunciation from *Mangold*?

In the first instance, it is remarkable that in renunciation of the judgments in *Mangold*²⁹ and *Küçükdeveci*³⁰, the relevant law in *CHEZ RB* is Directive 2000/43 rather than the general principle of equality in EU law underlying the prohibition of discrimination based on racial or ethnic origin. In its ruling in *Mangold*, the ECJ held:³¹

“[T]he sole purpose of the directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation, the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States. The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law.”

In *CHEZ RB*, however, the ECJ takes a different path without even referring to its former judgments: The practice at issue is examined in the light of Directive 2000/43. The general principle of equal treatment and the Charter of Fundamental Rights are merely used as a tool to interpret the directive. The ECJ repeatedly emphasises that Directive 2000/43 gives “specific expression [to the principle of non-discrimination] in the substantive fields that it covers”.³² In that regard, *CHEZ RB* once again illustrates the ECJ’s tendency to withdraw from its approach in *Mangold* and *Küçükdeveci*.³³

²⁹ Case C-144/04 *Mangold v Helm* [2005] ECR I-9981 [*Mangold*].

³⁰ Case C-555/07 *Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365 [*Küçükdeveci*].

³¹ *Mangold*, above n 29, at [74] and [75].

³² See *CHEZ RB*, above n 6, at [42], [58] and [72].

³³ See also Case C-391/09 *Runevič-Vardyn v Wardyn* [2011] ECR I-3787 at [43]; Case C-529/13 *Felber v Bundesministerin für Unterricht, Kunst und Kultur* [2015] OJ C107/10; and Case C-530/13 *Schmitzer v Bundesministerin für Inneres* [2014] OJ C16/8 at [23].

B Concept of Direct and Indirect Discrimination

All European directives on non-discrimination share the same concept of direct and indirect discrimination. Direct discrimination “shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation” on any of those grounds protected by the particular directive.³⁴ Indirect discrimination “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having [any of the protected characteristics] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.³⁵ The precise qualification of a discriminatory measure as direct or indirect discrimination is important as direct discrimination, in principle, cannot be justified.³⁶ The ECJ does not itself decide whether the contested practice amounts to direct or indirect discrimination, as this is a matter of evidence to be assessed by the national court, but gives a detailed guideline for the distinction between direct and indirect discrimination.

1 Belov-Case

The question, whether the practice at issue amounts to direct or indirect discrimination in terms of Art 2(2) of Directive 2000/43 has been brought up before the ECJ once before.³⁷ The reference for a preliminary ruling in *Belov* referred to the exact same practice which is subject of the preliminary ruling in *CHEZ RB*. However, the ECJ, took no decision on the substance of the case, as it declined its jurisdiction to answer the questions referred by the KZD.³⁸ According to the opinion of the Advocate General Kokott in *Belov*, direct discrimination exists where the less favourable treatment is “based on the ethnic origin (...) or is connected with a factor which is inseparably linked to [the victim’s] ethnic origin”.³⁹ She assumed that the contested practice affects consumers solely by reason of their status as local resident and, consequently, denied any direct discrimination based on ethnic origin.

³⁴ Eg Art 2(2)(a) of Directive 2000/43 or Directive 2000/78.

³⁵ Eg Art 2(2)(b) of Directive 2000/43 or Directive 2000/78. The concept of indirect discrimination was first recognized by the ECJ in Case C-170/84 *Bilka Kaufhaus GmbH v Weber von Hartz* [1986] ECR I-1607.

³⁶ Eg Case C-356/09 *Pensionsversicherungsanstalt v Kleist* [2010] ECR I-11939 at [41]; Case C-614/11 *Niederösterreichische Landes-Landwirtschaftskammer v Kuso* [2014] 1 CMLR 32 at [50] and [51]; see also E Howard “Indirect Discrimination 15 Years On” (2015) 4 E-Journal of International and Comparative Labour Studies 1 at 20-25.

³⁷ Case C-394/11 *Belov v CHEZ Elektro Bulgaria AD and Others* [2013] OJ C86/4 [*Belov*].

³⁸ According to the ECJ, the KZD is no national court or tribunal under Art 267 TFEU.

³⁹ Opinion of Adocate General Kokott delivered on 20 September 2012, Case C-394/11 *Belov v CHEZ Elektro Bulgaria AD and Others* [2013] OJ C86/4 at [97].

2 Direct discrimination

The referring court in *CHEZ RB* hesitates whether the practice at issue amounts to direct discrimination as *CHEZ RB* denies that it has been implemented on ethnic grounds but on the abuse (allegedly) taking place in Roma districts. For there to be direct discrimination, the discriminator does not necessarily need to refer explicitly to one of the protected grounds. It is sufficient that the contested practice is based on another factor that is inseparably linked to a protected ground.⁴⁰ For example, in its judgment in *Hay*, the ECJ stated that a “difference in treatment based on the employees’ marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed”.⁴¹ This means an apparently neutral practice can amount to direct discrimination if it *solely* affects people possessing a protected characteristic.⁴² In *CHEZ RB*, however, the practice at issue, although implemented in districts predominantly inhabited by people of the Roma community, also concerned inhabitants of non-Roma origin as Ms Nikolova. The alleged determining factor, that is the place of residence in the “Gizdova mahala” district, is not inseparably linked to Roma origin. Yet, the practice at issue may be qualified as direct discrimination, if it can be proved that an apparently neutral criterion such as the residency in a certain district has in fact been imposed on account of the ethnic origin of the majority of its inhabitants.⁴³ The ethnic origin must have determined *CHEZ RB*’s decision to impose the practice.

3 Indirect discrimination

In order to prevent any circumvention of prohibited direct discrimination⁴⁴, the European anti-discrimination directives also prohibit apparently neutral practices which are not based on the protected characteristics but, in fact, have a detrimental impact on persons possessing one of those suspected characteristics (see, for example, Art 2(2)(b) Racial Equality Directive). Assuming that the practice at issue does not amount to direct discrimination, it has in any event to be qualified as indirect discrimination (subject to a

⁴⁰ European Union Agency for Fundamental Rights and European Court of Human Rights - Council of Europe, above n 3, at 26.

⁴¹ Case C-267/12 *Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2013] OJ C52/12 at [44]; see also Case C-267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757 at [62]-[72].

⁴² By contrast, a practice amounts to indirect discrimination if it affects people of a protected group in considerably greater proportions: European Union Agency for Fundamental Rights and European Court of Human Rights - Council of Europe, above n 3, at 30.

⁴³ *CHEZ RB*, above n 6, at [76] and [95].

⁴⁴ D Schiek, L Waddington and M Bell, above n 3, at 325.

possible justification). The apparently neutral criterion is the residency in the “Gizdova mahala” district. As this district is predominantly inhabited by Roma, the practice affects people of that ethnic origin in considerably greater proportion.

The question at issue is whether Ms Nikolova, although not of Roma origin herself, has the right to invoke the prohibited discrimination.

C Discrimination by Association

Directly targeting a person with a certain racial or ethnic background is just one way of discriminating against him/her. There are other, more subtle and obvious ways of doing so, eg by targeting a third person who is not himself/herself of the ethnic origin at issue but in a certain way associated with members of that ethnic community.⁴⁵ This form of discrimination is mainly known as “discrimination by association”⁴⁶, but also referred to as “transferred discrimination”⁴⁷, “associative discrimination”⁴⁸ or “discrimination in triangular relationships”⁴⁹. According to M Gruenberg, discrimination in a triangular relationship exists “if six criteria are met: (1) a party allegedly discriminates based on one or more ‘suspect classifications’; (2) the injured party is subject to that discrimination; but (3) does not carry the characteristic that may not be discriminated against upon which the act was based; and (4) a third person; (5) actually holding the characteristic at issue; and (6) with whom the injured party is associated”.⁵⁰

⁴⁵ See Opinion of Advocate General Maduro delivered on 31 January 2008, Case C-303/06 *Coleman v Attridge Law and Steve Law* [2008] ECR I-5603 at [12] with regard to Directive 2000/78; according to GN Toggenburg “Discrimination by Association: A Notion Covered by EU Equality Law?” (2008) 3 European Law Reporter 82 at 85, discrimination by association is “an especially disdainful form of discrimination” because of its subtle character.

⁴⁶ D Schiek, L Waddington and M Bell, above n 3, at 169; E Ellis and P Watson, above n 5, at 146; C Karagiorgi “The Concept of Discrimination by Association and its Application in the EU Member States” (2014) 18 European Anti-Discrimination Law Review 25; GN Toggenburg, above n 45, at 82; and L Waddington “Protection for Family and Friends: Addressing Discrimination by Association” (2007) 5 European Anti-Discrimination Law Review 13.

⁴⁷ M Pilgerstorfer and S Forshaw “Transferred Discrimination in European Law: Case C-303/06, *Coleman v Attridge Law* [2008] ICR 1128, [2008] IRLR 722 (ECJ)” (2008) 37 Ind Law J 384.

⁴⁸ T Connor “Discrimination by Association: “A Step in the Right Direction“ (2010) 32 Journal of Social Welfare & Family Law 59.

⁴⁹ M Gruenberger “The Principle of Equal Treatment in Triangular Relationships” (2009) <www.uni-koein.de/jur-fak/bhgg/personen/gruenberger/Gruenberger_Triangular_Relations.pdf>.

⁵⁰ At 54-55; see also the examples in L Waddington, above n 46, at 14.

1 Coleman-Case

The question of discrimination in triangular relationships where the person subject to a discriminatory measure and the person possessing the protected characteristic fall apart, is not new⁵¹: For example, in 1969, the US Supreme Court ruled that a white owner of shares in a community park in Fairfax County, Virginia, who had been expelled from the corporation after assigning his membership share to a black tenant, is entitled to monetary damages under 42 U.S.C. § 1982.⁵² The Court’s justification is mainly based on an effective implementation of the prohibition of racial discrimination. However, the concept of discrimination by association has first been recognized under EU equality law in 2008 in *Coleman v Attridge Law and Steve Law*⁵³. The ECJ had to decide whether the prohibition of discrimination covers cases where a person, although not himself/herself possessing a protected characteristic, is treated less favourably because of his/her association with a person holding such a characteristic. The reference for a preliminary ruling in *Coleman* concerned the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation⁵⁴ in order to, *inter alia*, combat discrimination on grounds of disability. Ms Coleman, the claimant in the main proceedings and primary carer of her disabled child, alleged to have suffered less favourable treatment by her employer in comparison to other employees with non-disabled children.

The ECJ found that the prohibition of direct discrimination and harassment on grounds of disability as laid down in Art 1 and 2(1), (2)(a) and (3) of Council Directive 2000/78 is not limited to people who are themselves disabled but includes employees who are treated less favourably or suffer harassment based on the disability of their child. According to the ECJ, “[t]he principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1”.⁵⁵ That conclusion is not affected by the fact that Directive 2000/78 includes a number of provisions which, as is apparent from their wording, apply to disabled people only. Those provisions concern either positive discrimination measures in favour of disabled people (Art 7), or specific measures to be taken by the employer in order to facilitate and promote the integration of disabled people into the working environment, such as reasonable accommodation for disabled persons (Art 5), and, therefore, by their nature can relate to

⁵¹ See M Gruenberger, above n 49, at 4-6.

⁵² *Sullivan v Little Hunting Park, Inc* 396 US 229 (1969).

⁵³ *Coleman*, above n 7.

⁵⁴ OJ L303/16.

⁵⁵ *Coleman*, above n 7, at [50]; see also L Waddington, above n 46, at 15.

disabled people only.⁵⁶ The objectives of Directive 2000/78 to lay down a general framework for combating discrimination as regards employment and occupation on grounds of, *inter alia*, disability would be undermined if employees who are not themselves disabled but associated with a disabled person could not rely on the prohibition of direct discrimination and harassment in terms of Art 2(2)(a) and (3) of that directive.⁵⁷

2 General concept of discrimination by association?

While the judgment in *Coleman* deals with discrimination by association in the context of direct discrimination and harassment based on disability, the issue for the ECJ in *CHEZ RB* was whether a person, although not himself/herself member of a certain ethnic community, can claim to be the victim of unlawful indirect discrimination because he/she is associated with another person of a certain ethnic origin. The two main questions are: Can there be discrimination by association in connection with indirect discrimination? Does the concept of discrimination by association apply to other grounds than disability? Moreover, the judgment in *CHEZ RB* permits conclusions to be drawn regarding the degree of proximity required between the victim of the discriminatory act and the person possessing the protected characteristic.

(a) Indirect discrimination by association

In his opinion in *Coleman*, Advocate General Maduro emphasizes the “exclusionary mechanism” of the prohibition of direct discrimination and harassment in order to show why at least those prohibitions include protection against associative discrimination.⁵⁸ Directive 2000/78 removes certain characteristics, such as religion, age, disability or sexual orientation, from the range of grounds an employer may legitimately rely on to treat some employees differently.⁵⁹ It is this reliance on suspected grounds that is prohibited by the principle of equal treatment, irrespective of the person affected. For there to be direct discrimination or harassment, it is irrelevant whether the person affected by a discriminatory measure holds a protected characteristic himself/herself or is merely associated to a third part holding such a characteristic.⁶⁰ Indirect discrimination, in contrast, is not characterized by an obvious difference in treatment but takes into account the

⁵⁶ *Coleman*, above n 7, at [39]-[43].

⁵⁷ *Coleman*, above n 7 at [47]-[51].

⁵⁸ Opinion of Advocate General Maduro, above n 45, at [19].

⁵⁹ At [22].

⁶⁰ At [19].

different effect of an apparently neutral practice⁶¹ and, therefore, “operates as an inclusionary mechanism (by obliging employers to take into account and accommodate the needs of individuals with certain characteristics)”.⁶² This comment might lead to the conclusion that discrimination by association cannot apply to indirect discrimination.⁶³ However, Advocate General Maduro does not explicitly reject the concept of associative discrimination in cases of indirect discrimination, as this question was not relevant to the case.

Excluding associative discrimination from the scope of prohibited indirect discrimination is contradictory to the concept of non-discrimination directives and their legal basis in primary legislation, ex-Art 13 TEC (Art 19 TFEU). The wording of Art 2(2)(b) of Directive 2000/43 (“persons of racial or ethnic origin”) might indeed suggest that the affected person must be of that ethnic origin himself/herself.⁶⁴ As pointed out by the ECJ, there is a divergence between the language versions some of which appear to apply only to persons who themselves are of a certain ethnic origin.⁶⁵ It is argued that “the phrasing of the provision of indirect discrimination (...) does not allow for a purposive interpretation so as to offer protection against indirect discrimination by association”.⁶⁶

However, what determines whether the discriminator’s conduct is acceptable or not, or, in other words, triggers the law’s intervention, according to the concept of Directive 2000/43 is not the kind of person being affected, but the ground of discrimination⁶⁷, irrespective of direct or indirect discrimination.⁶⁸ Recitals 9, 12, 19, 24 in the preamble to Directive 2000/43 as well as Art 1 and Art 2(1) thereof generally refer to “discrimination based on

⁶¹ European Union Agency for Fundamental Rights and European Court of Human Rights - Council of Europe, above n 3, at 30.

⁶² Opinion of Advocate General Maduro, above n 45, at [19].

⁶³ C Karagiorgi, above n 46, at 30.

⁶⁴ L Waddington, above n 46, at 15; see also L Waddington “Case C-303/06, S. Coleman v. Attridge Law and Steve Law, Judgment of the Grand Chamber of the Court of Justice of 17 July 2008, not yet reported” (2009) 46 Common Market Law Review 665 at 675; T Connor, above n 48, at 65; and GN Toggenburg, above n 45, at 86, all with regard to the wording of Art 2(2)(b) of Directive 2000/78 (“persons having a particular ... disability”).

⁶⁵ CHEZ RB, above n 6, at [53].

⁶⁶ C Karagiorgi, above n 46, at 35; see also A Eriksson “European Court of Justice: Broadening the Scope of European Nondiscrimination Law” (2009) 7 International Journal of Constitutional Law 731 at 752.

⁶⁷ See Opinion of Advocate General Maduro, above n 45, at [16].

⁶⁸ To this end, the legal definition of direct and indirect discrimination in para 3(1) and (2) of the German *Allgemeines Gleichbehandlungsgesetz* (General Act on Equal Treatment) implementing the EU directives on non-discrimination into national legislation generally refer to the suspected grounds mentioned in para 1 (“wegen eines in § 1 genannten Grundes”) without any reference to the person being affected and, thereby, allowing for an interpretation that covers indirect discrimination by association.

racial or ethnic origin” with no distinction between direct and indirect discrimination. Recital 13 explicitly states that “any direct or indirect discrimination based on racial or ethnic origin … should be prohibited” (my emphasis). According to recital 16, “[i]t is important to “protect all natural persons against discrimination on grounds of racial or ethnic origin” (my emphasis). This phrase is taken up in Art 3 according to which “this Directive shall apply to all persons” (my emphasis).⁶⁹ The reference to “persons of a particular racial or ethnic origin” in recital 17 concerns positive discrimination measures which, by their nature, can only affect persons who are of a certain racial or ethnic origin themselves. As is apparent from recital 3 in the preamble to Directive 2000/43, the right to equality before the law and protection against discrimination for all persons is a universal right protected at various levels under EU law. According to recital 4, this fundamental right explicitly includes the “right to freedom of association”.⁷⁰

This broad understanding of unlawful indirect discrimination is supported by the wording of ex-Art 13 EC (now Art 19 TFEU), which constitutes the legal basis for all European equality directives, and the principle of non-discrimination on grounds of race and ethnic origin enshrined in Art 21 of the Charter, to which Directive 2000/43 gives specific expression within its scope of application.⁷¹ Directive 2000/43 is part of the EU’s secondary law and therefore to be interpreted in the light of the primary law. A “robust” and effective (see Art 4(3) TEU) concept of equality, a general principle in EU law⁷², requires to include subtle, less obvious forms of discrimination in the prohibition not only of direct but also of indirect discrimination, as they, too, might affect persons possessing the protected characteristic.⁷³ Turning the attention away from the person actually targeted towards the person possessing the suspect characteristic, one might notice that his/her human dignity and equal worth is equally affected “by seeing someone else suffer discrimination merely by virtue of being associated with him”.⁷⁴ For those reasons, the expression “persons of a racial or ethnic origin” has to be interpreted as including “persons associated with persons of a racial or ethnic origin”.⁷⁵

Expanding the protection against discrimination to three-party relationships is not contradictory to the judgment in *Chacón Navas v Eurest Colectividades SA*⁷⁶ where the ECJ, adopting a narrow interpretation, held that a dismissal on account of sickness is no

⁶⁹ CHEZ RB, above n 6, at [57].

⁷⁰ L Waddington, above n 46, at 16.

⁷¹ CHEZ RB, above n 6, at [58].

⁷² *P v S and Cornwall County Council*, above n 10, at [18].

⁷³ See Opinion of Advocate General Maduro, above n 45, at [12].

⁷⁴ At [13].

⁷⁵ L Waddington, above n 46, at 15.

⁷⁶ Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467 [*Chacón Navas*].

discrimination on grounds of disability under Directive 2000/78. The judgment in *Chacón Navas* deals with the scope of grounds determining the employer’s conduct. It does not address the scope *ratione personae*, including the issue of associative discrimination.⁷⁷

(b) Referred grounds

As the judgment in *Coleman* was limited to discrimination on grounds of disability, it was uncertain whether the concept of discrimination by association would be applicable to other grounds and in other fields than those protected by Directive 2000/78.⁷⁸ The judgment in *CHEZ RB* is the long-awaited answer required by E Ellis and P Watson⁷⁹: The ECJ transfers the concept of discrimination by association set up in *Coleman* to a discriminatory practice based on ethnic origin in the context of the supply of goods and services. This leads to the conclusion that discrimination by association is not limited to discrimination on grounds of disability in employment and occupation but a general concept, prohibited in all situations and on all grounds.⁸⁰ All European anti-discrimination directives are “sister directives” similar in wording, structure and purpose.⁸¹ They have been enacted on the basis of ex-Art 13 TEU in order to implement the general principle of equality in different areas and with regard to different grounds. Due to this common concept and background, their scope of protection should be interpreted uniformly.

(c) Degree of association

Finally, the judgment in *CHEZ RB* (re-)affirms that for there to be discrimination by association, no close personal relationship between the person targeted and the third person holding the protected characteristic is required. While in *Coleman*, the person affected by the discriminatory measure (Ms Coleman) and the person possessing the protected characteristic (her disabled child) had a close personal relationship, the only link between Ms Nikolova and the Roma people in *CHEZ RB* is the location of her grocery shop in the “Gizdova mahala” district that is predominantly inhabited by people of Roma origin. It has been argued that in its judgment in *Coleman*, the ECJ has “inadvertently established a concept of ‘primary’ and ‘secondary’ carer with respect to disability discrimination law”.⁸² Therefore, one might conclude that only strong personal bonds are protected under EU

⁷⁷ See *Coleman*, above n 7, at [44]-[46]; M Gruenberger, above n 49, at 29.

⁷⁸ C Karagiorgi, above n 46, at 27-29; T Connor, above n 48, at 64.

⁷⁹ E Ellis and P Watson, above n 5, at 147.

⁸⁰ A Eriksson, above n 66, at 751.

⁸⁰ *Runevič-Vardyn v Wardyn*, above n 33, at [43].

⁸¹ T Conner, above n 48, at 64 and 68; M Pilgerstorfer and S Forshaw, above n 47, at 389.

⁸² T Connor, above n 48, at 64.

discrimination law.⁸³ However, those who read the judgment in *Coleman* carefully might reveal that the ECJ, even back then, did not require a close relationship but, in context with the burden of proof, deemed to be sufficient “any association which that employee has with a disabled person” (my emphasis).⁸⁴ As Advocate General Kokott in her opinion in *CHEZ RB* points out, discrimination by association may also arise from the contested practice itself which “because of its wholesale and collective character, to affect not only the person possessing one of the characteristics mentioned in Art 21 of the Charter of Fundamental Rights and in the anti-discrimination directives, (...) – as kind of ‘collateral damage’ – includes other persons”.⁸⁵ This interpretation is consequent given that the ECJ in its judgment in *Feryn* held that the existence of (direct) discrimination does not require an identifiable complainant claiming to have been the victim of the discriminatory measure at all.⁸⁶ As mentioned before, the European anti-discrimination directives including Directive 2000/43 give specific expression to the principle of equality which is anchored in primary law (Art 19 TFEU, Art 21 of the Charter). In order to ensure full effectiveness of the principle of equality in terms of Art 4(3) TEU, their scope cannot be defined restrictively.⁸⁷

D Implications and Outlook

Regarding the concept of direct and indirect discrimination, the judgment in *CHEZ RB* yields nothing new. The ECJ simply states that, in accordance with the wording of Art 2(2)(a) of Directive 2000/43 (“on grounds of”), in order for there to be direct discrimination the less favourably treatment must, either obviously or *de facto*, be based on racial or ethnic origin. That is a matter of provability. The ECJ’s former approach, according to which direct discrimination requires an overt conduct whereas indirect discrimination is linked with disguise⁸⁸, has been abandoned long ago.⁸⁹ It is for the national court to assess whether the practice at issue has in fact been imposed on racial or

⁸³ L Waddington “Case C-303/06, S. Coleman v. Attridge Law and Steve Law, Judgment of the Grand Chamber of the Court of Justice of 17 July 2008, not yet reported”, above n 64, at 672; A Eriksson, above n 66, at 751 requires a „sufficiently close“ relationship such as that between spouses, life partners, or siblings.]

⁸⁴ *Coleman*, above n 7, at [55]; see M Gruenberger, above n 49, at 57.

⁸⁵ Opinion of Advocate General Kokott, above n 16, at [58]. The Irish Equality Tribunal has deemed to be sufficient that a group of six were refused admittance to a public house because of the disability of one of its members: DEC-S2004-009-014 *Six Complainants v A Public House* (2004).

⁸⁶ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187 at [24] and [25]: see A Eriksson, above n 66, at 746-749.

⁸⁷ *Runevič-Vardyn v Wardyn*, above n 33, at [43].

⁸⁸ See Case C-43/75 *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455 at 473; Case C-129/79 *Macarthy's Ltd v Smith* [1980] ECR 1275 at [10].

⁸⁹ E Ellis and P Watson, above n 5, at 144-145.

ethnic grounds, which is why the ECJ restricts itself to providing guidelines on which matters might be taken into consideration.⁹⁰

However, the judgment in *CHEZ RB*, once again, broadens the scope of European anti-discrimination law. Following the judgment in *Coleman*, it has been doubted that the ECJ had established the concept of discrimination by association as a general principle in European anti-discrimination law.⁹¹ Since the judgment in *CHEZ RB*, it is commonly held that discrimination by association is a general principle applicable to all anti-discrimination directives (with regard to their similar format) and all protected characteristics irrespective of the nature of association. It is not limited to direct discrimination and harassment but may also occur in form of indirect discrimination. This reasoning is further reinforced by the fact that the European Parliament in its legislative resolution on the Commission’s proposal for a Directive on implanting the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation⁹² proposed an amendment to Art 2(2) providing that “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, a particular disability, a particular age or a particular sexual orientation, *or persons who are or who are assumed to be associated with such a person*, at a particular disadvantage compared with other persons, ...”.⁹³ Against this backdrop, it is reasonable to expect that the concept of discrimination by association will become an integral component of European non-discrimination law.⁹⁴

The ECJ’s broad understanding of the European non-discrimination directives in *Coleman* and *CHEZ RB*, according to which the prohibition of discrimination applies to the grounds protected by the respective directive, not to a particular category of persons, suggests that other sets of circumstances, eg where a person, although not actually possessing one of the protected characteristics, is treated less favourably because the discriminators, mistakenly

⁹⁰ *CHEZ RB*, above n 6, at [79]-[85]; see also Case C-415/10 *Meister v Speech Design Carrier Systems GmbH* [2012] OJ C165/4 at [37].

⁹¹ T Connor, above n 48, at 63-64.

⁹² Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation COM(2008) 426 final; see E Ellis and P Watson, above n 5, at 372-379.

⁹³ European Parliament Legislative Resolution of 2 April 2009 on the Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS) OJ (2010) C137E/68 Amendment 38.

⁹⁴ M Gruenberger, above n 49, at 31.

or knowingly, attributes a protected characteristic to him/her (attribution cases), might as well fall within the scope of European non-discrimination directives.⁹⁵

V Conclusion

Under EU anti-discrimination law, the victim of a discriminatory practice and the person possessing the suspected characteristic do not have to be identical. As ruled in *Coleman* and *CHEZ RB* the victim of unlawful discrimination does not necessarily need to be targeted on account of his/her own disability or ethnic origin (or any other suspected characteristic) but can claim to be mistreated on account of the suspected characteristic owned by an associated person. This principle of “discrimination by association” applies within the scope of all European anti-discrimination directives, regardless of the nature of the discrimination (direct or indirect), the suspected ground and the degree of connection.

⁹⁵ M Pilgerstorfer and S Forshaw, above n 47, at 392.

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