

LAW AND POLITICS IN CENTRAL EUROPE

ACHIEVING EQUALITY BY SHIFTING THE BURDEN OF PROOF IN ANTI-DISCRIMINATION CASES

Monika Forejtová

*Department of Constitutional and European Law, Faculty of Law
University of West Bohemia in Pilsen*

Sady Pětatřicátníků 14, 306 14 Plzeň, the Czech Republic

forejtov@kup.zcu.cz

Abstract

Fighting discrimination by shifting the burden of proof is now integral to all European legal systems. Yet, a procedural rule, such as the reverse burden of proof, is just one step towards effectively addressing the issues of discriminatory motives and stereotypes, which as parts of human psyche produce discriminatory behaviour and cognitive bias in workplace and other areas of human interaction, including decision making in our courts of law. The EU Council directives, the judicial protection in the EU and ECHR's decisions form the important part of European protection against discrimination.

Key words: *equality, burden of proof, anti-discrimination, case-law*

INTRODUCTION

The fact that in discrimination cases plaintiffs have only very limited means to prove discrimination, and much less the motives of the discriminating person and thus the reasons for disparate treatment, is the fundamental problem in the application of the equal treatment principle. In addition, the factual circumstances and relations in which discrimination occurs are characterized by considerable asymmetries, resulting in more evidence ending up with those discriminating rather than in the hands of the party which may have been discriminated against.

For this reason, it has been established in the case law of the U.S. Supreme Court since 1970s that it is sufficient to prove only *prima facie* discrimination. In *Green v. McDonnell Douglas* (1973), and in *Texas Dept. Of Community Affaires v. Burdine* (1981), the U.S. Supreme Court ruled that the burden of proof of discriminatory behaviour will be shifted from the plaintiff to the defendant if the *prima facie* discrimination standard is met.¹ The facts of the case were that the candidate for the job, who was at the same time a member of an ethnic minority in the United

¹ OPPENHEIMER D.B., *Negligent discrimination*, Stanford Law rev. 317, 1987, p. 671.

States, had sufficient qualifications for the work, and yet she had not been offered the position, and that position remained vacant until it was offered to a person who was not a member of an ethnic minority. This shifting of the burden of proof rule was based on the following two premises:

1. Employers act rationally, and only they know or can explain the reasons for their decisions;
2. The most likely reason why an employer denied a qualified member of a minority the job offer was because he or she belonged to such a minority.

The new rule about shifting the burden of proof under the U.S. Supreme Court case law should not be a kind of an ultimate burden of persuasion, but rather an obligation to continue in the proceedings.² In proceedings involving so called *floating burden of proof*, the burden of proof shifts from plaintiff to the defendant, and *vice versa*, until the fact that, for example, the conduct of the employer in the employment dispute has not even been driven by a motive that could be considered discriminatory, is ultimately proven or refuted. Thus, the court often needs to examine whether the explanation submitted by the defendant is not concealing the actual reasons for disparate treatment of applicants for a job, or employees themselves, i.e. the reasons for discriminatory behaviour. Therefore, the term actual "discriminatory intent." is often used.³ However, it is always the allegedly discriminated person, i.e. the plaintiff, who needs to allege the discrimination first. What is then the most frequent way used by the employees or job applicants to prove their discrimination?

Plaintiffs usually rely on a combination of comparative methods (e.g. an Afro-American employee was dismissed on the grounds of misconduct, despite a white employee committing the same misconduct was not laid off; or a male job applicant was hired despite a female candidate with higher qualifications was not; or a younger employee was promoted, despite an older employee had more experience, etc.).

Various combinations of grounds for discriminatory behaviour may be usually demonstrated as follows:

- a) By proof of a fictitious reason (e.g., the employer alleges that the employee breached rules of conduct and therefore had to be dismissed);
- b) By proof of some bias of the employer or its superior employees against a certain group of people (e.g. the managing superior used, in public or private, allusions to persons of different race, gender, age, education, ethnicity, sexual orientation, etc.);
- c) By proof of discriminatory treatment of other persons (e.g., in the past the employer dismissed primarily persons of another ethnic minority or race in cases of difficult economic situation);⁴

² St. Mary's Honor Society v. Hicks, 509 U.S. 502 (1992), see SELMI, M.: *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, Georgetown Law Journal 279, 1997.

³ Reeves v. Sanderson Plumbing Products, Inc, 530 U.S. 133 (2000).

⁴ Judgment of the Court of Justice of the EU ("CJEU") (second chamber) of 10 July 2008, in case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, the operative part: "*The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June*

- d) By proof of the existence of stereotypes on the part of the employer in assessing applicants for the job or the existing employees (e.g., the human resources personnel has insulted women or persons of other ethnicity as people allegedly less able to carry out certain work);
- e) By proof by statistical data (in the context of the long-term development of case law in the field of discrimination, statistical data often serve as evidence, with the plaintiff submitting publicly available data or their own statistical data about existing or on-going discriminatory practices of the defendant).⁵

THE BURDEN OF PROOF IN THE LAW OF THE EU (DIRECTIVES AND CASES)

The European Union law provides for a principle according to which the burden of proof shifts only with regard to the facts that the plaintiff cannot have reasonable access to, or may not have them reasonably at his or her disposal. Therefore, if the plaintiff adduces a fact suggesting that there had been some direct or indirect discrimination, the burden of proof must be shifted and the defendant must prove that the breach of the principle of equal treatment did not occur. Discriminatory behaviour in the form of disparate treatment is also defined by the case law on Article 14 of the Council of Europe Convention on Human Rights,⁶ as a behaviour,

2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market. Public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment. Article 15 of Directive 2000/43 requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, even where there is no identifiable victim."

⁵ Judgment of the European Court of Human Rights, dated February 7, 2006, in case No. 57325/00 D. H. and others v. the Czech Republic, where it was in point 38 of the judgment stated that: "*The applicants maintained that if prima facie evidence of discrimination was adduced by an applicant (for example, with the help of statistical data), or if, as in the present case, it came from recent reports by international organisations, the burden of proof shifted to the respondent Government, which had to prove that the difference in treatment was justified. In that connection, the applicants referred to an opinion expressed by the Court that, in certain circumstances: "the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation" (Anguelova v. Bulgaria, no. 38361/97, § 111, ECHR 2002-IV). Since, in the applicants' submission, neither an insufficient command of the Czech language, nor a difference in socio-economic status, nor parental consent could constitute reasonable and objective justification, the national authorities had not succeeded in furnishing such an explanation. Furthermore, even supposing that the applicants' placements in special schools pursued a legitimate aim – something they categorically denied – such a measure could under no circumstances be considered proportionate to that aim. "* or see the CJEU judgment in case C-415/2010 Meister.

⁶ FMZV Communication No. 209/1992 Coll., on negotiation of the Convention on the protection of human rights and fundamental freedoms as amended by Protocols Nos. 3, 5 and 8.

which lacks objective and reasonable justification. This means any behaviour not pursuing some legitimate purpose, and for which there is no reasonable relationship between the means used and objectives pursued.

Council Directive 97/80/EC of 15 December 1997 provided for the allocation of burden of proof in cases of discrimination based on sex. This directive was in force until August 14, 2009, and was repealed by the follow-up EU legislation, which was the European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment for men and women in matters of employment and occupation. However, this directive has created room for wider protection of the rights of persons who believe their rights may have been affected by a discriminatory behaviour of, e.g., the employer.⁷ This directive is consistent with the Council Directive No. 75/117/EEC, Council Directive No. 76/207/EEC, insofar as discrimination based on gender is concerned, and Directive No. 92/85/EEC and 96/34/EC on discrimination related to pregnancy and parenthood. Article 4 (1) of the repealed Directive 97/80/EC provides for a reversed burden of proof.⁸ Although the defendant is required to prove the legitimacy and legality of how the plaintiff has been treated, the aggrieved party-plaintiff must submit some evidence as well. The Directive provides that: "*persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination*".⁹

The rules for application of the so-called reverse the burden of proof are also laid down in Council Directives 2000/43/EC and 2000/78/EC. Article 8 of the Council Directive 2000/43/EC provides: "*Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*"¹⁰

These rules of evidence do not apply in criminal proceedings, or in proceedings in which courts or public authorities do not adhere to adversarial principles. EU Member States are obliged to comply with the minimum standards for the protection of weaker parties, they may, however, offer even more protection by means of legislation.¹¹ This enhanced protection of the weaker party to the dispute

⁷ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in the cases of discrimination based on sex.

⁸ *ibid.*, Article 4 (1): "*Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*"

⁹ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in the cases of discrimination based on sex, Article 4(1).

¹⁰ Article 10 of the Council Directive 2000/78/ES is completely identical.

¹¹ The CJEU judgment in case C- 303/206 Coleman.

is also complemented by allowing associations, organizations and other legal entities to become parties to the judicial proceedings. These bodies, as soon as they can prove a legitimate interest in anti-discrimination law compliance, are allowed to intervene in the proceedings (or they even initiate the proceedings themselves) normally in support of plaintiffs, or they may provide the plaintiffs with the necessary legal assistance (legal advice, coverage of the costs of proceedings, etc.) to defend their rights against employers. It is interesting that on the side of the employers are often large companies, their groups, and/or entities, which in the case they need to pay so-called non-material damages – financial satisfaction – are usually also able to meet the costs of these intervening parties.¹²

THE BURDEN OF PROOF IN CZECH LEGAL ORDER

In Czech law, the shifting of the burden of proof is embedded in the provisions of Section 133(a) of the Act No. 99/1963 Coll., Code of Civil Procedure, as amended (hereinafter referred to as CCP).¹³ This statute implements a significant part of the anti-discrimination legislation.¹⁴

The Constitutional Court of the Czech Republic in the application for annulment of Section 133 of CCP for its alleged unconstitutionality ruled that: "*In the Constitutional Court's opinion, one cannot conclude from interpretation of § 133a par. 2 of the CPC that it is enough for a person who felt racially discriminated against when purchasing services to simply claim that discriminatory conduct occurred. That person must, in court proceedings, not only claim, but also prove, that he was not treated in the usual, non-disadvantaging manner. If he does not prove this claim, he*

¹² For example, the European Roma Rights Centre (ERRC) is an organization based in Budapest, which deals with the issues of the Roma and Sinti people in Europe. Its main activities include lobbying and training in the field of human rights. ERRC was founded in 1996 and is managed by the International Commission-<http://www.errc.org/>.

¹³ Section 133 (a) of the CPR . "*When the plaintiff pleads the facts before the court, from which it can be inferred that he/she has been subjected to direct or indirect discrimination by the defendant a) based on sex, racial or ethnic origin, religion, faith, belief, disability, age or sexual orientation in the workplace or other dependent activities including access to them, occupation, business or other self-employed activities, including access to membership in an organization of workers or employers, and membership and activities in professional chambers, b) on the basis of racial or ethnic origin in the provision of health and social care, in access to education and training, access to public procurement, access to housing, memberships in associations and interest in the sale of goods in a shop, or the provision of services, or (c) on the basis of sex in the access to goods and services, the defendant must prove that there was no breach of the principle of equal treatment.*"

¹⁴ Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to goods and services and their provision, Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to goods and services and their provision.

cannot succeed in the proceedings. He must also claim that the disadvantaging treatment was motivated by discrimination on the basis of racial or ethnic origin. Of course, he does not have to prove that motivation; it is assumed in the event of proof of different treatment, but is rebuttable, if the contrary is proved (through evidence). In any case, the requirement that the plaintiff must prove that he was discriminated against precisely and exclusively because of his racial (ethnic) origin, and not for other reasons, is quite obviously impossible to meet, because proving the defendant's motivation (*impetus*) is ruled out by the nature of the matter.

Therefore, in the Constitutional Court's opinion the petitioner's opinion will not stand – the opinion being that in proceedings cited in the contested provision of the Civil Procedure Code “the plaintiff is given an advantage, because it does not have to prove what is alleged to have happened and why it is being complained of, whereas the defendant is disadvantaged, because it is supposed to prove something that did not happen.” In reality the burden of proof does not lie only and exclusively on the defendant. The plaintiff also bears a burden of claiming and a burden of proof. If the plaintiff successfully bears these burdens, which the court must decide in the individual case, it is then up to the defendant to prove his claim that discrimination on racial (ethnic) grounds did not occur. For the foregoing reasons the Constitutional Court concluded that § 133a par. 2 of the CPC is a proportionate means for achieving the aim pursued, or that – if it is applied in the abovementioned constitutional manner – a fair balance between the requirements of the public interest of society and the requirements of protection of individual fundamental rights will be preserved.”¹⁵

Thus, according to the ruling of the Constitutional Court, reversal of the burden of proof does not mean condemning the defendant to lose, but a requirement that the defendant is able to reasonably and convincingly explain the non-discriminatory nature of its decision. “The requirement that the plaintiff must prove that he was discriminated against precisely and exclusively because of his racial (ethnic) origin, and not for other reasons, is quite obviously impossible to meet, because proving the defendant's motivation (*impetus*) is ruled out by the nature of the matter.”¹⁶ It is not, therefore, a presumption of guilt. Both the Czech and European legislation work with shared (also known as *shifting or floating burden of proof*) burden of proof, because the true reversal of the burden of proof would be inequitable in its results, as it would lead to a non-proportional impact on the defendant. In discrimination cases, therefore, rules of evidence different than in other private law disputes apply. The Constitutional Court of the Czech Republic also dealt with cases, in which the ordinary courts did not sufficiently consider the alleged discriminatory behaviour, but it noted that the Constitutional Court may not decide generally on whether the behaviour at hand is discriminatory, because it always depends on the circumstances of the particular case. However, it is necessary that ordinary courts properly address the alleged objection of a disparate treatment and do not infringe the constitutionally guaranteed right to a fair trial. If the plaintiff alleges a discriminatory behaviour and substantiates that allegation in a way, which

¹⁵ Points 73, 75 of the justification of the Judgment of the Constitutional Court of the Czech Republic in case Pl. ÚS 37/04 in the matter of the motion for annulment of the law.

¹⁶ *ibid.* Point 73.

demonstrates the discrimination *prima facie*, the application of Section 133 (a) of the CPR and thus the reversal of the burden of proof is in order.¹⁷

However, the scope of issues in which the burden of proof shifts to the defendant, does not entirely match with the provisions of Act. No. 198/2009 Coll., on equal treatment and the legal means of protection against discrimination and on amendments to certain acts (the Anti-discrimination Act). The Anti-discrimination Act prohibits discrimination on grounds of race, ethnic origin, nationality, gender, sexual orientation, age, disability, religion, faith and belief in all the areas defined in Section 1 (1) of the Act. According to Section 132 (a), however, the burden of proof may be shifted on the basis of these grounds (with the exception of the ground of nationality) only within the context of discrimination in workplace or other dependent activity, profession, business or other self-employed activity, membership in the organizations of employees or employers and professional membership and the activities in the professional chambers. Furthermore, on the basis of ethnic origin, the burden of proof also shifts in the context of provision of health and social care, in access to education and training, access to public procurement, access to housing, memberships in interest associations and in the sale of the goods in the shop or the provision of services;¹⁸ and on the basis of sex, the burden of proof shifts in the field of access to goods and services.¹⁹

The rules of the administrative procedure governing the issues of evidence in discrimination cases, are set by Section 64 of Act No. 150/2002 Coll., the Code of Administrative Justice, as amended (hereinafter referred to as "CAJ"), which provided for *mutatis mutandis* application of relevant provisions of the Code of Civil Procedure, that means also Section 133 (a). The Act No. 500/2004, the Code of Administrative Procedure, as amended, however, does not explicitly provide for any reversal of the burden of proof. When the administrative procedure, however, is conducted on the basis of the inquisitorial principle, which, as a rule it is, it is up to the administrative body to choose a proper method of investigation. Therefore, administrative bodies should proceed in a way, which is effectively identical to the concept of shared burden of proof, and which will lead to discovery of all relevant facts of the case in the course of investigation. However, in the view of current public authorities' decisional practice, it may be reasonably doubted that the administrative bodies will conduct investigation in the manner described above.²⁰

In America, whence the idea of shifting the burden of proof came, it has been increasingly criticized over the last decades. Critical voices are based on the scepticism about whether the judges deciding on merit, being just human beings themselves, resorting to so-called subconscious discrimination.²¹ The so-called cognitive bias that explains discrimination as a natural part of the human psyche,

¹⁷ Judgment of the Constitutional Court of the CR in case II. ÚS 1609/08.

¹⁸ Letters (h) to (j) of the provisions of section 1 (1) of the Anti-discriminatory Act complemented by membership in special interest associations, access to public procurement and the area of social welfare, which represents a slice of the area under the letter (f).

¹⁹ Letter (j) of the provisions of section 1 (1) of the Anti-discriminatory Act.

²⁰ ČERMÁK M., KVASNICOVÁ, J.: *Několik poznámek k českému antidiskriminačnímu právu*, Bulletin advokacie 3/2010, str. 19 (*A few notes on Czech anti-discriminatory law*, Advocacy Newsletter 3/2010, p. 19).

²¹ LAWRENCE Ch.: *The ID, the Ego, The Equal Protection: Reckoning with Unconscious Racism*, Stanford Law Rev. 317(2007).

and in which there are embedded stereotypes that have influence on decision-making, not necessarily based on any intention, may negatively affect the decision-making process. I believe that in the Czech Republic, such a stereotype may exist in the context of persistent discrimination of Roma people, as indeed the Grand Chamber of the Strasbourg Court found in the case *D. H. and others v. the Czech Republic*, using the statistics as the decisive argument, an existing discriminatory motive behind some Czech legislation. The evidence of such systemic discrimination also follows, inter alia, from all the reports of the European Commission drafted at the time when the Czech Republic was negotiating its accession to the EU.

CONCLUSION

Overall, it can be concluded that fighting discrimination by shifting the burden of proof is now integral to all European legal systems. Yet, a procedural rule, such as the reverse burden of proof, is just one step towards effectively addressing the issues of discriminatory motives and stereotypes, which as parts of human psyche produce discriminatory behaviour and cognitive bias in workplace and other arenas of human interaction, including decision making in our courts of law.

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