European Court of Justice Rules Collective and Inaccessible Electrical Metres Discriminate against Roma: CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia

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Litigation and related action to challenge discrimination against Roma is a major feature of human rights developments in Europe over the past two decades. Major watersheds include European Court of Human Rights judgements such as Nachova v. Bulgaria (2004), D.H. and Others v. Czech Republic (2007),[1] as well as system-wide comprehensive guidance such as General Comment 27 on Discrimination Against Roma by the United Nations Committee on the Elimination of Racial Discrimination (CERD). The adoption in 2000 of two European Union directives in the area of discrimination – one setting out an EU law ban on discrimination based on race or ethnicity in named social areas, and the other covering a range of grounds in the field of employment – set the stage for legal advances in these areas in EU Member States and candidate countries. However, the relatively complicated procedures for accessing the European Court of Justice (ECJ) – the final arbiter of EU law – has meant that jurisprudence concerning Roma has been slow in coming from this supranational instance. A July 2015 ruling by the ECJ Grand Chamber has begun to change this state-of-affairs.

The 16 July 2015 judgment in the case "CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia" by a Grand Chamber of the European Court of Justice (ECJ) is ECJ's first substantive ruling in a case concerning racial discrimination against Roma. The ECJ ruling in the CHEZ case is important for a number of reasons, including for recognizing that the ban on discrimination by association applies also to cases of indirect discrimination. Its most significant contribution however is its reflections on the role of stigma in driving discrimination based on racial or ethnic origin. Also of note is its rejection of a number of approaches used in national law – in Bulgaria and elsewhere --, as incompatible with European Union anti-discrimination law. The judgment is among the most important ECJ rulings to date on discrimination. The current article discusses some of the noteworthy aspects of the case.

Background

The CHEZ case concerns the placement of electrical metres in Roma neighborhoods in Bulgaria, at a height six-seven metres off the ground, different from practices in non-Romani neighborhoods in Bulgaria. ECJ had previously, in 2013, declined to hear a near-identical case on formal grounds, ruling that the Bulgaria's equality body – which initially referred the case – did not have standing before ECJ to do so.[2] The CHEZ case concerns Ms. Amelia Nikolova, who owned a food shop in the Gizdova Mahala district of the town of Dupnitsa, a Roma neighborhood. The entire area of Dupnitsa is provided with electricity by one of the several electrical companies operating in Bulgaria, a Czech-owned company called CHEZ. However, differently from electricity provided in other areas of Dupnitsa – but similar to all electricity provided in the Gizdova Mahala – Ms. Nikolova's electrical metre was mounted at a height of six-seven metres, and was effectively inaccessible to her. She complained to the Commission for

[1] On the European Court of Human Rights, Roma and racial discrimination, see Cahn, Claude, "Triple Helix: The Jurisprudence of the European Court of Human Rights, Roma and Racial Discrimination", in Cahn, Claude, *Human Rights, State Sovereignty and Medical Ethics,* Brill, 2014, pp.106-148.
[2] C-394/11, EU:C:2013:48

Protection from Discrimination – Bulgaria's equality body – that she suffered direct discrimination on grounds of her "nationality" *(narodnost)*.[3] The Commission ruled that she had suffered direct discrimination on grounds of "nationality", in violation of several provisions of Bulgaria's anti-discrimination law, but that decision was annulled by the Supreme Administrative Court on grounds that she had not provided a comparator. The Commission subsequently issued a new decision holding that Ms. Nikolova suffered direct discrimination on ground of her "personal situation", namely that her business was located in an area where electricity metres are placed at inaccessible levels, by comparison with other customers of CHEZ. CHEZ challenged this decision at the Sofia Administrative Court, and it was this body which referred the case to ECJ for preliminary ruling, together with not less than ten detailed questions.

The questions at issue relate in part to two directives related to energy and electricity -- Directives 2006/32/EC and 2009/72/EC respectively – but hinge primarily on Directive 2000/43/EC concerning equal treatment between persons irrespective of racial or ethnic origin.[4] Within this wider examination, the Court grapples with two core definitions of discrimination included in Directive 2000/43:

(1) "Direct discrimination", defined under Article 2(2)(a) of Directive 2000/43 as occurring "where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin"
(2) "Indirect discrimination", defined under Article 2(2)(b) as occurring "where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin 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".

In a very detailed ruling issued on 16 July 2015, ECJ sitting as a Grand Chamber held both that the case falls within the ambit of EU law as a result in particular of Directive 2000/43/EC, i.e. that it concerns discrimination on the basis of racial or ethnic origin. The Court issued detailed guidance to the Bulgarian referring court on a number of conceptual matters at issue in Directive 2000/43/EC, stopping just short of an actual instruction to find in Ms. Nikolova's favour.

Personal Scope: Victim and Protection

An initial question concerned Ms. Nikolova's status as a victim of discrimination based on racial or ethnic origin. In her third-party statement to the Court, she stated explicitly that she was not Romani. In its earlier jurisprudence in the Coleman case, ECJ had ruled that a person could suffer "discrimination by association".[5] Coleman concerned a single parent who was constructively dismissed from her job after being denied flexible hours to care for her child with a disability. In that case, ECJ ruled that Ms.

[3] Largely unreformed from the Communist era, the term "narodnost" – nationality – generally in the countries of the former Communist block does not have its international law meaning – i.e. as the external face of citizenship – but rather is frequently an approximate synonym for "ethnicity". This legal imprint results from Stalin nationality policies, according to which each "nationality" would have a "national home" in the form of a Soviet republic, a theoretical basis which was widely replicated also in parts of the Communist block outside the Soviet Union.
[4] Cases to date concerning Directive 2000/43/EC, i.e. concerning discrimination based on racial or ethnic origin, are Feryn C-54/07, Meister C-415/10, and Runevic-Vardyn and Wardyn C-391/09.
[5] C‑303/06, EU:C:2008:415

Coleman was a victim of direct discrimination on ground of disability, notwithstanding the fact that she herself had no disability.

In its petition, CHEZ argued that discrimination by association could only take place in a case of direct discrimination,[6] while Advocate General Kokott in her opinion deemed that sufficient evidence of direct discrimination was lacking.[7] Advocate General Kokott concluded – explicitly disagreeing with CHEZ – that at issue was indirect discrimination in the sense of Article 2(2)(b) of the Directive, by association: "In a district which is inhabited predominantly by people from a certain ethnic group, other persons residing there who do not themselves belong to that ethnic group may rely on the prohibition of discrimination based on ethnic origin where they suffer discrimination by association as a result of a measure on account of its wholesale and collective character."

In its judgment in the CHEZ case, holding that the scope of Directive 2000/43 "cannot, in light of its objective and the rights which it seeks to safeguard, be defined restrictively", ECJ ruled that "it is indeed Roma origin, in this instance that of most of the other inhabitants of the district in which she carries on her business, which constitutes the factor on the basis of which she considers that she has suffered less favourable treatment or a particular disadvantage." As a result, everyone affected by the practices of high placement of electrical metres in Gizdova Mahala and similar Roma neighborhoods suffers discrimination in the sense of Directive 2000/43: "the concept of discrimination on the grounds of ethnic origin', for the purpose of Directive 2000/43 must be interpreted as being intended to apply in circumstances such as those at issue before the referring court — in which, in an urban district mainly lived in by inhabitants of Roma origin, all the electricity meters are placed on pylons forming part of the overhead electricity supply network at a height of between six and seven metres, whereas such meters are placed at a height of less than two metres in the other districts — irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure."[8]

Review of National Law

Among the many noteworthy features of the CHEZ judgment is ECJ's willingness to review the conceptual basis of Bulgarian national anti-discrimination law. After first noting that it does not have this power, the Court holds that it "does have jurisdiction to provide the national court with all the guidance as to the interpretation of EU law necessary to enable that court to rule on the compatibility of national rules with EU law",[9] and thereafter proceeds to overturn or otherwise reshape multiple concepts in Bulgaria's anti-discrimination law and adjudication. In this sense, CHEZ is a judgment of a

[6] Opinon of Advocate General Kokott, delivered on 12 March 2015, Case C-83/14 CHEZ Razpredelenie Bulgaria AD, Request for a preliminary ruling from the Administrativen sad Sofia-grad, Bulgaria (hereinafter "Kokott"), para. 103.
[7] Kokott, para. 87.
[8] Judgment (Grand Chamber), Court of Justice of the European Union, Case C-83/14 (hereinafter "Judgment"), Paras. 56-60
[9] Judgment, para. 62.

different order than any of the judgments preceding it under either Directive 2000/43 or its "sister Directive"[10] 2000/78.

A first area in which ECJ takes issue with national law concerns the Bulgarian law linking the "unfavourable treatment" at issue in discrimination as "any act, action or omission which directly or indirectly prejudices rights or legitimate interests".[11] Reiterating her previous opinion in Belov, Advocate General Kokott took unequivocal objection to this understanding of the harm at issue in discrimination: "The only material factor is that there is less favourable treatment or a disadvantage, irrespective of the subject of that treatment or disadvantage, whether rights or interests are infringed and, if so, which rights or interests. … For discrimination to have occurred, it is … sufficient that a person or group of persons is treated less favourably than another is, has been or would be treated. The imposition of additional conditions not provided for in Directive 2000/43 is not compatible with the high level of protection desired by the EU legislature."[12] The Advocate General added, as an aside, "Merely for the sake of completeness, I would add that the present case quite clearly concerns rights and legitimate interests of persons living in Gizdova mahala in connection with their electricity supply."[13]

ECJ agrees with Advocate General Kokott on this matter. ECJ reiterates, now for the second time in the judgment, that the scope of Directive 2000/43 cannot be defined restrictively, holds that the national provision is indeed more restrictive, and concludes, "Directive 2000/43, in particular Article 2(1) and (2)(a) and (b) thereof, must be interpreted as precluding a national provision which lays down that, in order to be able to conclude that there is direct or indirect discrimination on the grounds of racial or ethnic origin in the areas covered by Article 3(1) of the directive, the less favourable treatment or the particular disadvantage to which Article 2(2)(a) and (b) respectively refer must consist in prejudice to rights or legitimate interests."[14]

A second area of comment on national interpretation concerns ECJ's response to the referring court's 8th question, in which the Sofia Administrative Court sought to know whether the term "particular disadvantage" included in Directive 2000/43's definition of indirect discrimination corresponded to the expression "less favourable treatment" used in Article 2(2)(a) of Directive 2000/43, defining direct discrimination, or whether it covered "only serious, obvious and particularly significant cases of unequal treatment". The Sofia Administrative Court further sought to know, "Does the practice described in the present case amount to a particular disadvantage? If there has been no serious, obvious and particularly significant case of putting someone in a disadvantageous position, is that sufficient to conclude that

[10] The wording belongs to Advocate General Kokott, para. 56. Directive 2000/43 addresses discrimination based on racial or ethnic origin, and covers the areas of employment (various aspects), education and vocational training, health care, social protection and social advantages, and public goods and services, including housing. Directive 78/2000 covers discrimination in employment and occupation, covering the grounds of religion or belief, disability, age or sexual orientation.
[11] Judgment, para. 14.
[12] Kokott, paras. 76-77.
[13] Ibid., para. 79.
[14] Judgment paras. 69 and 129.

there has been no indirect discrimination (without examining whether the practice in question is justified, appropriate and necessary in view of attaining a legitimate aim)?"[15]

ECJ firmly declined to allow any interpretation of discrimination as banned under the Directive whereby it would take place only in cases of "serious, obvious and particularly significant" unequal treatment: "It follows neither from the words 'particular disadvantage' used in Article 2(2)(b) nor from the other detail contained in that provision that such a disadvantage would exist only where there is a serious, obvious and particularly significant case of inequality. … the concept of 'particular disadvantage' within the meaning of that provision does not refer to serious, obvious or particularly significant cases of inequality, but denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the provision, criterion or practice at issue."[16]

"Common Knowledge" and Stigma

The CHEZ judgment would be far-reaching if it stopped there, limiting itself to guidance on EU law for the national court. Its most significant contribution however, is its extensive comment on the workings, mechanics and impact of racial discrimination in practice, and by extension its assertion that correcting these are matters of EU law. This thoughtful probing takes place in particular in two areas of the judgment. First of all, it appears in the Court's rejection of reliance on "common knowledge" as a basis for objective and reasonable justification for determining legitimacy of aim and proportionality of means. As set out in the definitions of discrimination above, an apparently neutral provision, criterion or practice with a disparate impact on one ethnic group will constitute indirect discrimination unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Thus, if indeed placement of electrical metres in Roma neighborhoods at the height of six metres is indirect and not direct discrimination, then the basis for assessing the legitimacy of measure becomes important. Secondly, the Court sets out detailed reflections on the role of stigma in racial discrimination.

In national proceedings, CHEZ justified the practice, which was not used by other electricity companies in Bulgaria, with reference to "a vast number of unlawful connections and cases of damage and metre tampering". However, ECJ notes that CHEZ withdrew its initial applications before the equality body seeking the production of an expert report and a hearing of witnesses, and instead chose to rely finally on "common knowledge".[17]

The question of "common knowledge" does not feature in the Sofia Administrative Court's list of questions. Advocate General Kokott did not explicitly address the issue in her opinion, although she comments extensively on omissions by CHEZ in the determination of legitimate aim, in keeping with her view that the acts indeed constitute indirect discrimination.[18] The Court however takes up the question of relying on purported "common knowledge" vigorously: "CHEZ RB failed to adduce evidence of the alleged damage, meter tampering and unlawful connections, asserting that they are common knowledge."[19] Situating the question within a determination as to burden of proof, ECJ holds that "CHEZ

[15] Judgment, para. 37(8).
[16] Judgment, paras. 99-100 and 129.
[17] Judgment, para. 36.
[18] Kokott, para. 115.
[19] Judgment, para. 83.

RB cannot merely contend that such conduct and risks are 'common knowledge', as it seems to have done before the referring court."[20]

Rejecting "common knowledge" as a basis for assessing legitimacy of aim opens the door for the Court to comment on the ultimate driver of racial discrimination, identity stigma and its affiliate partner, doctrines of racial superiority – doctrines which as a result of decades of work to combat racial discrimination are frequently not expressed in law or policy, but which nevertheless play out vividly in social relations. Advocate General Kokott hones in powerfully on this aspect – her opinion includes variants on the term stigma not fewer than 14 times, and she opens her opinion by framing matters as follows:

> Discussion of discrimination problems sometimes focuses on the specific fate of one individual. That is not the situation in this case, which concerns the prohibition of discrimination based on ethnic origin under EU law. The case does ultimately stem from a complaint lodged by one individual; however, the centre of interest is the wholesale and collective character of measures which affect an entire community and are liable to stigmatise all the members of that community and their social environment.[21]

In framing the matters at issue as centring on stigma, Advocate General Kokott follows a lead set by a number of United Nations Special Rapporteurs in beginning to assess the role played by stigma in creating pariah treatment, resulting in severe human rights abuse. Two particularly notable moves in this regard are the groundbreaking 2013 report of UN Special Rapporteur on Torture Juan Mendez on torture in health care settings, a report which followed extensive global consultation. In that report, among three "interpretative and guiding principles", Special Rapporteur Mendez includes "Stigmatized identities", noting that "Many policies and practices that lead to abuse in health-care settings are due to discrimination targeted at persons who are marginalized. Discrimination plays a prominent role" because "bias commonly underlie[s] such violations".[22] This thread was extended to social and economic rights areas by the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation Catarina de Albuquerque devoted an entire report to "Stigma and the Realization of the Human Rights to Water and Sanitation",[23] and this preoccupation was subsequently taken up by other actors within the human rights system.[24]

Advocate General Kokott extends this general attention to the link between stigma and human rights violations to a particular exploration of the nature of these stigmatizing measures in the given instance. She notes, first, that, above and beyond the very tangible practice burdens of being unable to read one's own electricity metre, "The impression may … be created that all or at least many of the inhabitants of Gizdova mahala are embroiled in fraudulent practices, tampering or other irregularities in relation to their electricity supply, which amounts to a general suspicion and encourages stigmatisation of the population in that district."[25] This "produces a humiliating environment for the persons concerned, from

[20] Judgment, para. 117.
[21] Kokott, para. 1
[22] A/HRC/22/33, paras. 36-38.

[23] A/HRC/21/42.
[24] See for example A/HRC/26/28/Add.2.
[25] Kokott, para. 132, recapitulating similar passages in para. 95.

which predominantly the members of a certain ethnic group have to suffer".[26] As a result, "the threat of stigmatisation of an ethnic group appreciably outweighs purely economic considerations".[27]

ECJ endorses the reasoning of Advocate General Kokott, noting both the practical difficulty of the inhabitants of Gizdova Mahala to check their electricity metre, but additionally the practice's "offensive and stigmatising nature".[28] The Court ultimately situates the duty to avoid such offensive and stigmatizing acts within its ruling on objective justification and legitimacy of aim, which is so constructed as effectively to preclude any interpretation whereby the measure could be deemed legal: "such a measure would be capable of being objectively justified by the intention to ensure the security of the electricity transmission network and the due recording of electricity consumption only if that measure did not go beyond what is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives thereby pursued. That is not so if it is found, a matter which is for the referring court to determine, either that other appropriate and less restrictive means enabling those aims to be achieved exist or, in the absence of such other means, that that measure prejudices excessively the legitimate interest of the final consumers of electricity inhabiting the district concerned, mainly lived in by inhabitants of Roma origin, in having access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly."[29]

Direct or Indirect Discrimination?

Under dispute throughout the proceedings is the question of – if indeed Ms. Nikolova suffered discrimination – whether that discrimination was direct or indirect within the meanings provided by Directive 2000/43. This has opened the conceptual space as to precisely what distinguishes those acts or omissions. ECJ has advanced our understanding in this area. It is unclear whether its answers are the final word on the subject.

As noted above, Ms. Nikolova initially alleged that the treatment to which she was subjected constituted direct discrimination. Bulgaria's equality council, in its first decision, disagreed and qualified them as indirect discrimination. In its second decision however it reversed this approach and decided that they constituted direct discrimination. Advocate General Kokott took the position that direct discrimination was not established, but that the acts constituted a clear example of indirect discrimination. Why the difficulty? What is at issue?

Exposed are several dilemmas. First of all, for the purposes of EU law, as is evident from the two definitions set out above, direct and indirect discrimination are distinguished not least by the fact that, if a difference of treatment is one of direct discrimination, then no justification can be brought in its defense; whereas if a difference of treatment is indirect discrimination, then it can in principle be considered legitimate if it is "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". Noteworthy for the European legal order is that this distinction is not drawn for the purposes of the jurisprudence of the European Court of Human Rights, according to which all examination of the merits of discrimination claims are subject to legitimacy tests. The

[26] Kokott, para. 133.
[27] Kokott, para. 139.
[28] Judgment, para. 87.
[29] Judgment, para. 129.

European Court of Human Rights does not in all cases dwell on the distinction between "direct" and "indirect" discrimination. However, in one key case also – not coincidentally it seems -- related to Roma, it has explicitly relied on EU law as the basis for its understanding of indirect discrimination.[30]

Secondly, it has never been particularly clear whether, on the one hand, direct and indirect discrimination constitute two distinct phenomenon, to be understood separately and distinctly or if, by contrast, indirect discrimination is a kind of evidentiary fall-back option for those cases in which direct discrimination cannot be proven sufficiently. In the case of Singh v. France, a case before the United Nations Human Rights Committee, the former understanding seems to be dominant. Mr. Singh was barred by the French authorities from wearing a turban in the photograph for his official identity document. He argued that the turban was an intrinsic component of his personality as a result of his being a member of the Sikh religion, and that to force him not to wear the turban was indirect discrimination on grounds of religion. The Human Rights Committee found in his favor.[31] There was no question in that case, however, that the unequal treatment was anything other than what is set out in the EU law definition: a neutral rule or policy, with a disparate impact on a particular group, in that case practicing Sikhs. In the European Court of Human Rights case mentioned above – D.H. and Others v. Czech Republic – the view that at issue are genuinely neutral rules is far more debatable; in that case, Romani children were systematically placed in separate schools or classes for the mildly mentally disabled, in a manner which appeared far from "neutral" from the point-of-view of any one of the 18 individual cases at issue in the overall D.H. and Others complaint.

In its ruling in CHEZ, ECJ avoids explicitly taking a position on whether the difference of treatment at issue constitutes direct or indirect discrimination, preferring instead to provide guidance to the national court in evaluating that question. The case concerns direct discrimination, according to ECJ, "if that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned".[32] ECJ appears to prefer that measures are understood to be directly discriminatory, rather than indirectly discriminatory, insofar as its guidance goes as far as to doubt fundamentally the neutrality of the measure: "the concept of an 'apparently neutral' provision, criterion or practice as referred to in that provision means a provision, criterion or practice which is worded or applied, ostensibly, in a neutral manner, that is to say, having regard to factors different from and not equivalent to the protected characteristic".[33] However, if the national court prefers to apply the definition of indirect discrimination then, in the view of ECJ, it will be close to impossible to arrive at criteria where by this apparently neutral difference of treatment is objectively justifiable, as noted above in the section related to stigma, supra at footnote 27.

Several items merit comment here: first of all, ECJ's page-long explanation at least implicitly supports the sense that the distinction between direct and indirect discrimination is more one of legalistic formality than one referring to objectively different phenomena. If the phenomena are objectively different, then why would it be so difficult for batteries of very close observers to agree on which type of discrimination is at issue? One reason for the elaborate jurisprudential pyrotechnics in this area of the CHEZ case and the ECJ judgment is that discrimination against Roma is in fact a widespread, pervasive and relied-upon set of practices – almost standard at the level of lived behaviour in most if not

[30] *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV.
[31] CCPR/C/102/D/1876/2009
[32] Judgment, para. 129(3).
[33] Judgment, para. 129(4).

all European societies. At the same time, the development of international and European law to counter discrimination has undermined the legitimacy of that state-of affairs. As a result, racial discrimination against Roma is generally denied, even where – as in this case – it is very obvious.

Secondly, there is one potentially flawed move in the ECJ's effort to draw distinctions in this area, namely: in its effort to set out criteria for a the national court to decide that the measure is directly discriminatory, by holding that that will be so if the measures were "introduced and/or maintained for reasons relating to … ethnic origin", the Court has come perilously close to allowing the return of intent back into European anti-discrimination law.[34] It is one of the salient features of European anti-discrimination law – and one of the elements which makes it currently clearly superior in quality to anti-discrimination law in the United States – that intent is explicitly not a matter for evaluation. That much is clear *inter alia* from the definitions set out under Directive 2000/43, set out above. The irrelevance of intent is similarly a salient feature of European Court of Human Rights jurisprudence in this area. By introducing a standard involving "for reasons relating to ethnic origin", ECJ potentially damages that well-wrought edifice.

Conclusion

The caveat in the paragraph above notwithstanding, CHEZ is a judgment of a different order – in a positive sense -- from the judgments rendered to date by ECJ on the "sister" Directives: 2000/43 and 2000/78. In its judgments to date on the ground of age – which constitute circa half of the judgments rendered to date in this area – ECJ has remained within strict confines, reviewing the narrow detail of national rules in areas such as the legitimacy of not counting work experience under the age of 25 for the purposes of dismissal,[35] the conclusion of collective agreements with mandatory retirement provisions,[36] the legitimacy of limited contracts for workers over 65,[37] etc. On the ground of sexual orientation, ECJ corrected scandalously bad interpretation by Romania's equality body.[38] As concerns discrimination on ground of race or ethnic origin, primary rulings to date have simply set out that national rules on the spelling of names for the purposes of civil documents do not fall within the scope of Directive 2000/43,[39] or have concerned important but narrow questions in employment.[40]

By contrast, the ECJ judgment in CHEZ is probing of the meaning, practice and fact of racial discrimination against Roma, including its deeply deformative impact on people and societies. Its abandonment of formalism, and its exploration of the forces thwarting the human rights of millions of Europeans, heralds a step forward in ECJ as an institution willing to go well beyond being a mere

[34] Relevant international law makes clear that intent is not a matter for evaluation in cases of racial discrimination, in particular as a result of the definition of racial discrimination set out under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), according to which "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."
[35] Case C-555/07.
[36] Case C-388/07.
[37] Case C-411/05.
[38] Case C‑81/12.
[39] Runevic-Vardyn and Wardyn C-391/09
[40] Feryn C-54/07 and Meister C-415/10.

technician in the regulation of the European common market, and responsive instead to the need to safeguard human rights in Europe. As such, the CHEZ judgment is a very welcome development. It will be interesting to see what follows next from the Court, in its clarification of the scope and content of European law anti-discrimination law. Perhaps more importantly, it will be important to see what meaning the CHEZ judgment is given in the Member States, and if and how it changes national and local practices in the treatment of Roma throughout Europe.

The ECJ ruling in CHEZ joins a complex of developments in efforts to tackle discrimination against Roma in Europe. This year, the much-touted Decade of Roma Inclusion (2005-2015) ended with many critical voices commenting that successes on the ground were few and far between.[41] The European Commission has increasingly aimed to move Roma inclusion, through measures including an EU-wide Framework for National Roma Integration Strategies,[42] as well as through concrete action such as opening infringement proceedings against the Czech Republic and Slovakia for violating EU law by segregating Romani children in education.[43] These developments however all against the wider backdrop of the manifest failure by the Union to take serious action to challenge very troubling human rights developments in the Member States – and in particular in Hungary and France – and the weaknesses this has exposed in the willingness and ability of the EU to act as enforcer of its own human rights law. ECJ has – for good – now thrown its weight behind those forces aiming to bring about genuine change in communities. Time will tell to what extent this effort is successful.

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[41] See for example https://www.opendemocracy.net/can-europe-make-it/bernard-rorke/end-of-decade-what-happened-to-roma-inclusion

[42] http://ec.europa.eu/justice/discrimination/roma/eu-framework/index_en.htm

[43] https://www.opensocietyfoundations.org/press-releases/european-commission-targets-slovakia-over-roma-school-discrimination