



## Reports of Cases

Case C-507/18

NH

v

**Associazione Avvocatura per i diritti LGBTI — Rete Lenford**

(Request for a preliminary ruling from the Corte suprema di cassazione)

**Judgment of the Court (Grand Chamber), 23 April 2020**

(Reference for a preliminary ruling — Equal treatment in employment and occupation — Directive 2000/78/EC — Article 3(1)(a), Article 8(1) and Article 9(2) — Prohibition of discrimination based on sexual orientation — Conditions for access to employment or to occupation — Concept — Public statements ruling out recruitment of homosexual persons — Article 11(1), Article 15(1) and Article 21(1) of the Charter of Fundamental Rights of the European Union — Defence of rights — Sanctions — Legal entity representing a collective interest — Standing to bring proceedings without acting in the name of a specific complainant or in the absence of an injured party — Right to damages)

1. *Social policy — Equal treatment in employment and occupation — Directive 2000/78 — Scope — Conditions for access to employment or to occupation — Concept — Autonomous and uniform interpretation — Broad interpretation (Council Directive 2000/78, Art. 3(1)(a))*

(see paragraphs 31, 39)

2. *Social policy — Equal treatment in employment and occupation — Directive 2000/78 — Scope — Conditions for access to employment or to occupation — Concept — Statements made by a person during an audiovisual programme, ruling out the recruitment or employment of persons of a certain sexual orientation in his undertaking — No current or planned recruitment procedure — Included — Condition — Existence of a non-hypothetical link between those statements and the conditions for access to employment or to occupation within the undertaking — Determination by the national court (Council Directive 2000/78, Art. 3(1)(a))*

(see paragraphs 40-46, 56-58, operative part 1)

3. *Fundamental rights — Freedom of expression — Limitations — Conditions (Charter of Fundamental Rights of the European Union, Art. 11 and Art. 52(1); Council Directive 2000/78, Arts 1 and 3)*

(see paragraphs 47-55)

4. *Social policy — Equal treatment in employment and occupation — Directive 2000/78 — Commencement of legal or administrative proceedings — Association representing a collective interest not acting in the name of a specific complainant or acting in the absence of an injured party — Whether permissible (Council Directive 2000/78, Art. 8 and Art. 9(2))*

(see paragraphs 61-65, operative part 2)

### **Résumé**

**Homophobic statements constitute discrimination in employment and occupation when they are made by a person who has or may be perceived as having a decisive influence on an employer's recruitment policy**

**In such a case, national law may provide that an association has the right to bring legal proceedings in order to claim damages even if no injured party can be identified**

In the judgment in *Associazione Avvocatura per i diritti LGBTI (C-507/18)*, delivered on 23 April 2020, the Court held that statements made by a person during an audiovisual programme, according to which that person would never recruit persons of a certain sexual orientation to that person's undertaking or wish to use the services of such persons, fall within the material scope of Directive 2000/78<sup>1</sup> ('the anti-discrimination directive') and, more particularly, within the concept of 'conditions for access to employment ... or to occupation' within the meaning of Article 3(1)(a) of that directive, even if no recruitment procedure had been opened, nor was planned, at the time when those statements were made, provided, however, that the link between those statements and the conditions for access to employment or to occupation within the undertaking is not hypothetical.

In the present case, a lawyer had stated, in an interview given during a radio programme, that he would not wish to recruit homosexual persons to his firm nor to use the services of such persons in his firm. Having taken the view that that lawyer had made remarks constituting discrimination on the ground of the sexual orientation of workers, an association of lawyers that defends the rights of lesbian, gay, bisexual, transgender or intersex (LGBTI) persons in court proceedings brought proceedings against him for damages. The action having been successful at first instance and that ruling having been upheld on appeal, the lawyer appealed in cassation, against the judgment delivered in the appeal, before the Corte suprema di cassazione (Supreme Court of Cassation, Italy), which then sought a preliminary ruling from the Court of Justice on, inter alia, the interpretation of the concept of 'conditions for access to employment ... and to occupation', within the meaning of the anti-discrimination directive.

After recalling that that concept must be given an autonomous and uniform interpretation and cannot be interpreted restrictively, the Court interpreted that concept by reference to its judgment in *Asociația Accept*.<sup>2</sup>

<sup>1</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16). That directive is a specific expression, within the field that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter of Fundamental Rights of the European Union.

<sup>2</sup> Judgment of the Court of 25 April 2013, *Asociația Accept*, (C-81/12, Press Release 52/13).

Thus, the Court, *inter alia*, made clear that statements suggesting the existence of a homophobic recruitment policy do fall within the concept of ‘conditions for access to employment ... or to occupation’, even if they come from a person who is not legally capable of recruiting staff, provided that there is a non-hypothetical link between those statements and the employer’s recruitment policy.

Whether such a link exists must be assessed by the national courts on the basis of all the circumstances characterising those statements. Relevant criteria in that regard are the status of the person making the statements and the capacity in which he or she made them, which must establish that that person has or may be perceived as having a decisive influence on the employer’s recruitment policy. The national courts must also take into account the nature and content of the statements concerned and the context in which they were made, in particular their public or private character.

According to the Court, the fact that that interpretation of ‘conditions for access to employment ... or to occupation’ may entail a possible limitation to the exercise of freedom of expression does not call that interpretation into question. The Court noted, in that regard, that freedom of expression is not an absolute right and that its exercise may be subject to limitations, provided that these are provided for by law and respect the essence of that right and the principle of proportionality. That principle involves verifying whether those limitations are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Those conditions are met in the present case, given that the limitations result directly from the anti-discrimination directive and are applied only for the purpose of attaining its objectives, namely to safeguard the principle of equal treatment in employment and occupation and the attainment of a high level of employment and social protection. In addition, the interference with the exercise of freedom of expression does not go beyond what is necessary to attain the objectives of that directive, in that only statements that constitute discrimination in employment and occupation are prohibited. Furthermore, the limitations arising from the anti-discrimination directive are necessary to guarantee the rights in matters of employment and occupation of the persons covered by that directive. The very essence of the protection afforded by that directive in matters of employment and occupation could become illusory if statements falling within the concept of ‘conditions for access to employment ... and to occupation’, within the meaning of that directive, fell outside its scope because they were made in the context of an audiovisual entertainment programme or constitute the expression of a personal opinion of the person who made them.

Last, the Court ruled that the anti-discrimination directive does not preclude Italian legislation which automatically gives standing to bring proceedings for the enforcement of obligations under the directive and, where appropriate, to obtain damages, to an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, on account of that objective and irrespective of whether it is a for-profit association, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party.

The Court made clear in that regard that although the directive does not require an association such as that at issue in the main proceedings to be given such standing where no injured party can be identified, it does give the Member States the option of introducing or maintaining provisions which are more favourable to the protection of the principle of equal treatment than those which it contains. It is therefore for the Member States which have chosen that option to

decide under which conditions an association may bring legal proceedings for a finding of discrimination and for a sanction to be imposed. It is in particular for them to determine whether the for-profit or non-profit status of the association is to have a bearing on the assessment of its standing to bring such proceedings, and to specify the scope of such an action, in particular the sanctions that may be imposed at the end of it, such sanctions being required, in accordance with Article 17 of the anti-discrimination directive, to be effective, proportionate and dissuasive, regardless of whether there is any identifiable injured party.