

ECRI Annual Seminar with equality bodies

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Outline of speech for session "*Expert insights and ways forward*"

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The presentation starts with the definition in order to help understand the concept of intersectional discrimination and prevent misunderstandings or overlaps with other similar concepts. Intersectional discrimination takes place when an individual or a group of individuals are discriminated against based on grounds that are intertwined in such a way that they produce a unique and new type of discrimination. In such cases, one would not make several claims of separate cases of discrimination, but rather one case of intersectional discrimination. It has to be differentiated from multiple discrimination which refers to separate simultaneous identity-based cases of discrimination targeted at an individual.

The general anti-discrimination legislation usually does not *explicitly* provide for decision-making based on several personal grounds, nor does it explicitly prohibit such decision-making. There might be legislations that have such explicit provisions, but this is not very common. This means that equality bodies have to work with the legislation that is at their disposal.

This is also the way in which the Slovenian equality body has worked. In spite of the absence of explicit provisions that would define intersection we have issued decisions in such cases. I will provide examples of two such cases.

Case 1

The first one concerns a public tender for funding that was available to Roma Associations in Slovenia. Namely, a Roma association that was based in a municipality where Roma have been living traditionally and have a Roma councillor in the municipal council, got more points for the project comparing to Roma Associations that were based in municipalities where Roma have not been living traditionally and have no Roma councillor. This issue is related to the indigenous and non-indigenous Roma, which is a controversial way of differentiating those Roma who have settled in certain places in Slovenia many centuries ago, and those Roma who moved to Slovenia within the last 70 years.

In the case the Advocate found that the conditions were discriminatory on the grounds of the intersection of *race* and *place of residence*. It has been established that this criterion could not be met by organizations based in areas where the Roma community is not considered indigenous.

Such decision of the Advocate would not have been possible if only one personal ground was taken into account. Namely, in this case the exclusion did not take place

based on belonging to a specific Roma group – as the public call was intended for all Roma. But it differentiated between different groups of Roma, even though that was not that obvious. By granting additional points to associations having a seat in places that have Roma municipal councillors, all associations based in bigger cities on one hand and in small villages where Roma have more recently moved to on the other hand, were excluded.

The tender conditions also did not exclude on the grounds of place of residence. But when analysed, it became clear that the conditions have a disparate impact on the Roma associations that are based in the wrong place. This was particularly problematic because the funds were meant to address social problems such as school drop-outs, high unemployment etc. So it was even more important that the funds are given to well developed and justified projects that address a pressing social need – which might be even more justified in places where there is no Roma councillor.

Case 2

The second case is from this year. It concerned the permanent ban on blood donation for men who ever have had sex with men (MSM). This ban was imposed only on men with a specific sexual orientation. So it did not concern only male gender or only same-sex sexual orientation. If we had to choose between the two grounds, discrimination could not have been found. Not all men have been excluded and not all gays or lesbians. Hence, discrimination was found based on the intersectionality of male gender and sexual orientation.

In the two cases the Advocate could not find discrimination if intersectionality as a concept did not exist. It could also not do it if it was required to choose only one personal ground to adopt a decision. It was only the intersectionality that made it possible to come to a decision finding discrimination.

Hence, our experience confirms the general finding in such cases that we can read in many places: "Discrimination without an intersectional lens is often made invisible". Especially is selecting one ground only is a condition for examining the case. I personally do not think that explicit legal basis for intersectional discrimination is needed for the equality bodies and courts to find it where it exists. This is possible with the interpretation methods that the lawyers use every day. However, if the courts continued with the practice that discrimination can only be found on one ground at the time (as for example in the case *DeGraffenreid v General Motors* in one of the American courts), then legislative change would definitely be needed in such jurisdictions.