



A TOURIST FACILITY WITH A BAN ON CHILDREN PLAYING: THE PRINCIPLE OF NON-DISCRIMINATION AND THE STATEMENT OF THE BULGARIAN COURT

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ABSTRACT

Recently, both in Bulgaria and abroad, it is increasingly common to find accommodation, restaurants and entertainment facilities that advertise and offer a wide range of services. However, these are not intended for general consumers but only those who have reached maturity (excluding minors and the under-aged). According to press publications hotels and restaurants that pre-select their guests based on their age are mainly concentrated on the Bulgarian Black Sea coast and in the mountains or they specialize in spa and balneo procedures. It turns out that consumers find it easier to stay with a pet, albeit at an extra cost, than go on vacation with their teenage children. Such practices adopted by representatives of the tourism industry raise some questions of a moral, ethical and legal nature. The current article traces the development of a specific administrative and judicial proceeding initiated to establish the presence of discrimination against consumers in a tourist facility – a restaurant. An overview of the claims and arguments of the claimant is made as well as an analysis of the reasons and considerations given by the competent administrative and judicial authorities. The author's opinion on the issue is expressed.

KEYWORDS

discrimination, unequal treatment, law on tourism, anti-discrimination law

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1. CONCEPT OF DISCRIMINATION LEGISLATION AND INTERPRETATION

In its preamble, in art. 6, para. 2, the *Constitution of the Republic of Bulgaria (Konstitutsia na Republika Bulgaria, 1991)* declares the equality of citizens as a fundamental principle of civil society. The principle of equality under the law manifests itself in two varieties: a ban on arbitrary inequality and an obligation of equal treatment. In other words, the principle means equality

of rights but also an obligation for equal treatment of citizens by public authorities.

Equality of rights requires the creation of a favorable environment and the same conditions for citizens so that they can develop in all areas of public life. Equal treatment is expressed in the obligation of state authorities to treat all persons who are affected or might be affected by their actions equally. Both in modern legal doctrine and in the practice of the Constitutional Court, the understanding of equality is permanently maintained as relative rather than absolute (*Reshenie*



Nº 12/2018 na Konstitutsionnia sad na Republika Bulgaria po konstitucionno delo Nº 1/2018).

The basic law creates inadmissibility for the unfavorable treatment of individual citizens based on certain characteristics such as race, nationality, origin, ethnicity, etc. The stated constitutional principle of universal equality under the law, similar to the multiple principles that make up the basic law, is both generally and abstractly formulated. This requires consistent development and concretization in the *Anti-discrimination law (Zakon za zashtita ot discriminatsia, 2003)* providing an absolute ban. The law regulates the means of protection when exercising individual civil rights, the state authorities specialized in the prevention of discrimination as well as the proceedings for administrative and judicial protection. From the adopted classification, the *Anti-discrimination law* plays the role of a general (framework) law, its rules are applicable in all cases for which there is no regulation in another normative act.

According to the meaning of this law, discrimination manifests itself in direct and indirect ways. Art. 4, para. 1 (*Zakon za zashtita ot discriminatsia, 2003*) outlines although not in details a wide range of protected features where less favorable treatment of a specific person, i.e. placing them in a non-equal position is inadmissible. The concept of “non-equal treatment” in its key meaning in the studied case is explicitly defined in para. 1, p. 7 of the additional provisions to the law as a

Deed, action or inaction that lead to less favorable treatment of one person compared to another person on the grounds of the features under art. 4, para. 1 or they can place a person/persons, bearers of a feature according to art. 4, para. 1 in a particularly unfavorable position compared to other persons (*Zakon za zashtita ot discriminatsia, 2003*).

The phrase “protected features” used in the *Anti-discrimination law* is not legally defined but judicial practice has comprehensively clarified the content of this concept. Protected features are interpreted as legally defined personal/social qualities related to their presence in a particular person whose presence is excluded from being a prerequisite for different treatment of this person in exercising rights or fulfillment of obligations, comparable to another person who lacks these qualities.

The principle objective of the *Anti-discrimination law (Zakon za zashtita ot discriminatsia, 2003)* enshrined in its art. 1 which should be a guide for the law enforcement authorities is the establishing and sanctioning of anyone placed in an unequal position not only according to the features listed in this law but also according to any other features mentioned in a special law or international treaty that is in force in Bulgaria. This

leads to the expansion of the scope of action of the *Anti-discrimination law*, also including special cases or specific hypotheses subject to a separate regulation. The latter undoubtedly ensures a more comprehensive protection of the rights and interests of citizens.

When examining and resolving legal disputes regarding manifestations of discrimination, the Bulgarian court accepts as a basic postulate that each participant in social life must provide an opportunity for all other persons who meet certain conditions, determined by the nature of the benefit offered, to use it. In this sense, it is inadmissible to exclude anyone from the circle of potential consumers on the grounds of features specified in art. 4, para. 1 of the *Anti-discrimination law (Zakon za zashtita ot discriminatsia, 2003)*. The effective protection of equal treatment implies both a ban on direct reference to such a feature, direct discrimination, as well as a ban on a policy which although pointing to ensured equality, actually leads to the same result denied by the legal order, indirect discrimination (*Reshenie Nº 1031/2023 po grazhdansko delo Nº 7195/2023 na Sofiyski rayonen sad*).

The rule on the inadmissibility of discrimination declares the latter as incompatible with the principles and foundations on which a democratic society is built as well as with the establishment of equality between people as the base of civilized societies (*Reshenie Nº 4281/2023 po grazhdansko delo Nº 8999/2023 na Sofiyski rayonen sad*).

The issue of the prerequisites on the grounds of which an act or behavior can be qualified as discriminatory has been extensively discussed in court practice. The supreme judges state that in order for there to be a manifestation of direct discrimination, it is necessary to have committed a specific violation that constitutes a real composition with certain elements: different treatment or unwanted behavior towards the person and a direct causal link between the unfavorable treatment and its reason expressed in a feature under art. 4 from the *Anti-discrimination law (Zakon za zashtita ot discriminatsia, 2003)*.

However, in the practice of the court, not every unequal treatment is recognized as discrimination, but only that which is based on at least one of the legally established features. If it is not proven in the case that the claimant corresponds to such a feature that distinguishes him/her from other persons treated more favorably, a causal connection between illegal actions and a specific protected feature cannot then be found. Even if such actions were carried out, the court accepts that they do not constitute discrimination within the meaning of the law.

Whether one person is placed in a more unfavourable position compared to others cannot be considered discrimination, since the meaning of the protection against discrimination is that the different treatment

is comparable to another person or a group of persons in a similar situation (*Reshenie № 2/2019 po grazhdansko delo № 3203/2018 na Varhoven kasacionen sad, 3-to grazhdansko otdelenie*). In other words, in order to conclude discrimination based on any of the legal features, a comparison should be made between the way the person claiming to be discriminated against is treated and the way other persons who are in the same or similar situation, i.e. where there are present comparable similar circumstances (*Reshenie № 5959/2012 po administrativno delo № 1526/2012 na Varhoven administrativen sad*).

Therefore, in each individual case of discrimination, a protected feature must be established for the person, a causal link between the disputed treatment and the corresponding protected feature. It is sufficient to establish that this feature constitutes a main, significant reason for the less favorable treatment (*Reshenie № 5970/2021 po administrativno delo № 14588/2019 na Varhoven administrativen sad*).

There is anti-discrimination legislation in European Union law with particular emphasis on preventing gender discrimination in employment (European Commission, Directorate-General for Justice and Consumers, 2015). In this direction, Directive 2006/54/EC of the European Parliament and of the Council *On the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)* was adopted (published in the Official Journal L 204/23) (Craig, 2007; Krizsan et al., 2012). Another important line is the fight against discrimination based on racial or ethnic origin, Directive 2000/43/EC *On the implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* (published in the Official Journal L 180/22) (Fibbi et al., 2021).

Considering the importance of this sphere of public relations for modern states, the concept of “discrimination” is subject to clarification by acts of international law (*Handbook on European non-discrimination law*, 2018). In international conventions, discrimination is defined as a difference, exception, limitation or preference of an individual according to specific characteristics, aiming to violate equality of treatment (Fredman, 2011; Khaitan, 2015).

2. FACTS AND CIRCUMSTANCES OF THE CASE

A complaint was submitted to the Commission for Protection against Discrimination (CPD) (Komisiya za zashtita ot diskriminatsiya, n.d.) by Zh. A. demanding an investigation to establish a violation of the anti-discrimination legislation and its termination, as well as imposing the appropriate sanction on the violators. The complaint claims that in June 2015 the claimant

visited “Bizar bar & dinner” restaurant managed by “Expert 007” LTD, in the city of Stara Zagora. A sticker was placed prominently on the menu with the following text: “Welcome! A restaurant without a playground! Children not allowed to play! In case of violation, the bill will be 50% higher! (minimum BGN 20)”. The claimant was forced to leave the restaurant because she could not guarantee that her three children, aged 8, 10 and 12 respectively, would refrain from playing. The situation stressed her and left her feeling insulted, hurt and humiliated for having to leave the restaurant from which she was in practice kicked out for being a mother.

In exercising its authority as provided for in the law, the CPD creates a file and conducts an investigation where it applies the opinions and evidence of the participants in the proceedings. With *Decision № 115/2016 (Reshenie № 115/2016 na Komisiyata za zashtita ot diskriminatsia)*, the CPD established that by “Expert 007” LTD, represented by T.G. and L.Sh., there was no discrimination based on “family status” on the grounds of art. 4, para. 1 of the *Anti-discrimination law (Zakon za zashtita ot diskriminatsia, 2003)*. The administrative body accepts that the text written in the menu introducing a ban on playing does not constitute unequal treatment on the grounds of “family status” of the complainant in her capacity as a mother of three children, since she was not denied access to a service, nor was she provided service of a lower quality or under less favorable conditions with the specific cause of being a mother of the children. According to the CPD, in this particular case it is rather a condition set by the managers of the restaurant aiming to protect both the health of customers, regardless of their age, as well as to ensure normal working in the facility. The sticker in the menu is considered as an instruction aiming to prevent accidents unfavorable both for the trader and the consumers. The CPD considers that the sign does not create a restriction to a certain type of service related to the family status of the customers in the restaurant, nor is there a refusal to provide a service under less favorable conditions. It concerns a requirement regarding the behavior of children who are under the supervision of accompanying adults. The decision was signed with a specific opinion of one of the members of the commission according to whom the mere presence of such a sign in the menu is sufficient to suggest unequal treatment of a discriminatory nature.

Dissatisfied with the decision, Zh. A. contested it in court. The administrative court in the city of Stara Zagora stated (*Reshenie № 3074/2019 po administrativno delo № 56/2019 na Administrativen sad – Stara Zagora*) that the discussed measure is disproportionate, since even if it is accepted that it aims to protect the life and health of children, it goes beyond what is necessary to achieve it. Despite the above conclusion, the court does not find

the measure discriminatory. The reasons are that the case lacks a protective feature that would be grounds for less favorable treatment, as well as that there are no actions against Zh. A. representing different treatment. Therefore, what happened to the person is not considered as a form of direct discrimination under art. 4, para. 1 of the *Anti-discrimination law (Zakon za zashtita ot discriminatsia, 2003)*.

Zh. A. appealed to the Supreme Administrative Court (SAC) that the decision was illegal and without foundation. The cassation authority, after discussing the collected evidence in the case, and the opinions and arguments of the parties, reached the following conclusion (*Reshenie № 1944/2019 na Varhoven administrativen sad*) if non-compliance with the condition for not allowing children to play is sanctioned with a figure that is linked to the bill (according to the text written in the menu) it follows that if a representative of the restaurant considers that a violation has been committed, different, higher prices are introduced for the corresponding category of visitor, compared to those for other customers. This undoubtedly places the mentioned visitors in a more unfavourable situation. In this way, on the one hand, the ban introduced in the law on tourism on the provision of tourist services, being on a different scale compared to individual consumers, is violated and at the same time there is less favorable treatment based on "family status", constituting a form of direct discrimination.

In its reasons (*Reshenie № 1944/2019*), the court notes that the assessment of the existence of discrimination rests on an objective criterion and does not depend on the subjective attitude of the person who made it where in the specific case such a fact was realized. Therefore, the issue of whether the prohibitive condition is set for the safety of the children, or for the protection of the facility's property during play, should not be discussed. It was concluded that the label in the menu introduces a disproportionate measure and its consequence is discriminatory. It is stated that the administrative court did not ascertain the lack of reasons in part of the decision of the CPD (*Reshenie № 115/2016*), nor did it comment the application of art. 37 of the *Anti-discrimination law (Zakon za zashtita ot discriminatsia, 2003)* in the assessment of the specific facts and conditions. According to the SAC, the noted omissions of the court of first instance led to the formation of an erroneous legal conclusion regarding the legality of the appealed decision. Guided by the above, the SAC cancels the decision as incorrect and orders instead that a new decision be made on the merits of the dispute, which will cancel the decision of the CPD. The case shall be returned to the administrative body for a new statement.

Finally, the file was returned to the CPD and the case proceedings were resumed. The rapporteur

prepares a conclusion in which it is assumed that the circumstances of the dispute are fully clarified from the factual and legal side. Following the instructions given by the court on the interpretation and application of the law, the administrative body reaches a new ruling. With the new decision the CPD considers it proven that the restaurateur discriminated against the claimant, and that this constitutes a violation of the law. A pecuniary sanction of BGN 1,000 was imposed on the trader (*Reshenie № 5190/2020 na Komisiyata za zashtita ot diskriminatsia*).

My opinion is that in the presented case, the position of the chief justices and the arguments in its support must be shared. The above facts point to establishing and functioning of a vicious practice in a commercial facility, a restaurant. This commercial practice was introduced by the restaurateur under the seemingly legitimate pretext of ensuring working processes and the health of visitors but the actual result of its application is unequal treatment of a specific group of citizens. Along with the above, it is necessary to highlight several important points: in accordance with what was noted by the court, it is imperative to discuss the text of art. 37, para.1 of the *Anti-discrimination law (Zakon za zashtita ot discriminatsia, 2003)* in order to clarify the legal side of the dispute. The provision refers to a specific hypothetical protection when exercising specific subjective rights, as it exclusively prohibits the provision of goods or services of lower quality or under less favorable conditions based on any of the features under art. 4, para. 1. Since the current case concerns a service in the public sector, the provision of art. 37 of the *Anti-discrimination law (Zakon za zashtita ot discriminatsia, 2003)* must find direct application.

The *Tourism act (Zakon za turizma, 2013)*, as a specific compared to a general law, defines in art. 37, para. 1 of the *Anti-discrimination law* the prohibition on equal relations in tourism introduced there. In particular, art. 3, para. 4 of the *Tourism act (Zakon za turizma, 2013)*, obliges hoteliers and restaurateurs to announce the same prices for services offered to all visitors and unequal treatment of tourists or placing some of them in a less favorable position is totally unacceptable. The cited provision of the law is a special anti-discrimination norm aiming to specifically protect the consumers' interests for tourist services along with the provisions of the *Anti-discrimination law* without excluding its application. In a comparative interpretation of the two norms, it becomes clear that art. 3, para. 4 of the *Tourism act (Zakon za turizma, 2013)*, achieves greater detail and refinement of the hypothetical discrimination in the field of public relations, regulated by it, since the provision of art. 3, para. 4 of the *Tourism act (Zakon za turizma, 2013)*, forwards to art. 4, para. 1 of the *Anti-discrimination law (Zakon za zashtita ot discriminatsia, 2003)*

on the content of features of discrimination. That is why the prohibition of discrimination provided for by the *Tourism act* is an additional protection for persons who have been discriminated against in the field of tourist services, in addition to the one regulated in the *Anti-discrimination law*.

Moreover, when it comes to offering and providing restaurant services, the rule of art. 3, para. 4 from the *Tourism act* (*Zakon za turizma*, 2013) is maximally detailed in the provision of art. 117, para. 4. The restaurateurs are obliged when preparing menus to have the same prices for culinary products and drinks for all tourists. The non-fulfillment of the obligation or its fulfillment but not in the specified manner, entails property liability for the trader, the amounts of which vary from BGN 500 to BGN 2000.

In addition to these considerations, one more may be mentioned. In para. 1, p. 1 the additional provisions of the *Tourism act* (*Zakon za turizma*, 2013), define the concept of “tourist” as a physical person who visits a destination outside his permanent residence for a certain period (shorter than one year) for the purpose of tourism. Nowhere does the text mention reaching a minimum age as a necessary and mandatory condition for acquiring identity as a “tourist”. Therefore, it is reasonable to assume that minors and under-aged children are tourists and they have the same rights to access and use tourist services as other category of visitor.

3. CONCLUSION

The legal case discussed confronts us with a situation that will not be excluded in the future and is more likely to be repeated. On the one hand, the reason for this can be found in the ever-increasing demands and expectations of consumers of tourist services who nowadays have become more demanding and picky and are driven by the belief that they are entitled to the highest possible level of comfort as long as they can afford it. At the same time, representatives of tourist businesses – who strive to meet increased public needs and being motivated by the desire to attract more and more wealthy customers, introduce and implement new forms of service in their tourist facilities. The result is a collision between two seemingly divergent interests. One is the interest of families who, although on vacation, remain focused on the care and needs of their children. The other is the group of consumers of middle and older age, financially secure, who have enough free time to look for peace, privacy and isolation from the mass of the people to fully experience their vacation. There is an opposition between two categories of citizen each

of which has the same legal interest in using tourist services. This situation is as undesirable from legal position as it is unacceptable for society. Is it possible to find a fair solution?

It is hardly realistic to expect that the application of such practices by hoteliers and restaurateurs will be discontinued in the future. On the other hand, it is undoubtedly irrational to build and operate tourist facilities only for certain category of consumers. One acceptable solution is to build or separate a room (hall, corner, sector) on the territory of the facility or the place of accommodation intended for families and visitors with children. Thus, both groups will have the opportunity to access the offered services during their stay without making it inconvenient for the rest. However, it should be noted that although in practice possible, this kind of approach would provoke quite a few objections by entrepreneurs in the tourist sector. The latter would oppose with the reason that such readjustment in their facility in most cases will need significant organization, material and personnel resources or that it is impossible to be realized. The issue discussed in this research remains in disput.

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