

ANNOTATIE

Komisija za zashtita ot diskriminatsia (HvJ EU, C-824/19) – No blanket exclusion of blind person from being employed as a juror

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Annotatie bij Hof van Justitie van de Europese Unie, 21-10-2021, ECLI:EU:C:2021:862 (EHRC-2021-0265, AR-2021-1326)

1. This case concerned the legality of excluding an individual who is blind (VA) from working as a juror under the Employment Equality Directive (2000/78). The Directive prohibits, inter alia, disability discrimination in the field of employment. In Bulgaria professional jurors are employed to sit and deliberate alongside judges. While Bulgarian legislation excludes anyone who “suffer[s] from any mental illness” (Article 67(1) of the Law on the judiciary) from working as a juror, the law is silent as to the relevance of other forms of impairments or disabilities. Nevertheless VA, who had been admitted as a juror, was not allowed to serve as a juror by judge UB, and her request to be reassigned to another judge was not acted on by judge TC. Following VA’s complaint to the Commission for the Protection against Discrimination, the two judges were found to have discriminated against VA on the ground of disability and ordered to pay fines. They unsuccessfully appealed against this decision and, ultimately, the Supreme Administrative Court made a preliminary reference to the CJEU in the case.

2. In support of their decisions, both judges relied “on the nature of the duties of jurors, the need for particular physical characteristics and the existence of a legal objective, namely compliance with the principles of the Code of Criminal Procedure” (par. 25). In essence, they argued that the ability to see was a genuine and determining occupational requirement for the work of a juror, and the failure to allow VA to serve as a juror was a justified difference of

treatment, and therefore did not constitute disability discrimination. In considering this argument Advocate General Saugmandsgaard Øe addressed the fundamental right to a fair trial, as well as its relevance for this case, in some depth, but this was not explored by the Court in its judgment.

3. The referring Bulgarian court asked whether the ability to see was indeed a genuine and determining occupational requirement under the Employment Equality Directive. In the alternative the court asked whether the Directive and the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the EU is a party, meant that it was “permissible for a person without the ability to see to be able to work as a juror” (par 30). Following the conclusion of the CRPD by the EU, the Convention has acquired the status of EU law. Hence, secondary legislation, such as Directive 2000/78, must be interpreted in a manner which is consistent with the CRPD as far as possible (par 59). The CJEU also regarded Articles 21 and 26 of the EU Charter of Fundamental Rights as relevant and interpreted the Directive in light of both the CRPD and the Charter in its judgment.

4. The Court quickly found that “activities of a juror constitute paid, professional activity” in the context of Bulgaria, meaning that the case fell within the material scope of the Employment Equality Directive, and that VA had a disability within the meaning of the Directive (pars 37 and 39). It also found that the failure to allow her to work as a juror constituted a difference in treatment directly based on disability (par 42). The case therefore turned on whether this exclusion could be justified on the basis of a genuine and determining occupational requirement, meaning the objective pursued was legitimate, and the requirement was proportionate (par 43) as well as necessary.

5. The Court found that the objective pursued, namely “ensuring full compliance with the principles of criminal procedure, including those of immediacy and direct assessment of evidence” was capable of constituting a legitimate aim and the complete exclusion of a blind juror was an appropriate means for achieving that aim (pars 53 and 55). The Court also noted that it had previously found that vision was an essential function in some situations, and specifically in the context of driving (par 51).[1] It also concluded that vision could be a genuine and determining occupational requirement for the work of a juror in certain cases involving “examination and assessment of visual evidence ... in so far as such examination, and assessment of that evidence cannot be made by means of, inter alia, medico-technical equipment” (par 52). Advocate General Saugmandsgaard Øe, in his Opinion, also noted that sight seemed to be “a necessary faculty for the proper performance of the duties of a juror ... in cases where evidence decisive to the verdict consists of photographs, video surveillance recordings, graphics, or drawings” (par 69) or when a juror may have to visit a crime scene to observe a reconstruction of the offence (par 89).

6. In determining whether the total exclusion of VA from working as a juror was necessary to achieve the pursued objective, the Court recalled the obligation on employers to make reasonable accommodations for persons with a disability to enable them “to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate burden on the employer” (par 54). This obligation is established in Article 5 of the Employment Equality Directive), and should be understood in light of the CRPD, which also provides for a reasonable accommodation duty (Articles 5(3)), and Article 26 of the Charter (pars 57-60). It also noted that VA had not been subject to “an evaluation of her individual ability to perform her duties and ... [there had been no] investigation of the possibility of rectifying any difficulties that may arise”. (par 56). The Court concluded that, subject to a determination by the referring court, the total exclusion of VA from working as a juror had gone beyond what was necessary to achieve the legitimate aim. In reaching this conclusion, the Court took into account the fact that VA, following the introduction of an electronic allocation of jurors, had successfully worked as a juror (par 63). As a result, it held that the Employment Equality Directive (Articles 2(2)(a) [prohibition of direct discrimination] and 4(1) [genuine and determining occupational requirement exception]), read in light of Articles 21 and 26 of the EU Charter of Fundamental Rights and the CRPD, “must be interpreted” as precluding “that a blind person be totally deprived of any possibility of performing the duties of a juror in criminal proceedings”.

7. The judgment makes it clear that a complete exclusion of a blind person from working as a juror is not permissible under the Directive, but that exclusion is possible for certain cases which “involve examination and assessment of visual evidence”. In determining whether a blind juror can carry out her work in such cases, an individual evaluation must take place. Moreover, reasonable accommodations should be provided, and the individual’s ability should be assessed in light of the provision of those accommodations. With regard to the latter the Court refers to “medico-technical equipment” which could enable a blind person to examine and assess evidence (par 52), while also noting the concept of reasonable accommodations should be “understood broadly”. In its ruling the Court explicitly referred to Article 5(3) CRPD, which also establishes a duty to reasonable accommodation, as well as Article 27 CRPD, which covers work and employment. Advocate General Saugmandsgaard Øe also referred to possible accommodation measures, noting that the measures “might take the form of *material* assistance, such as the provision of documents in Braille, *personal* assistance, such as the support of an impartial and certified third party, or *organisational* assistance, such as the appointment of a blind juror only to cases which do not require a visual assessment of the evidence” (italics in original, par 84). The duty to provide an accommodation is removed if doing so would result in a disproportionate burden.

8. The recognition that an individual's ability to work – in this case to work as a juror – should be assessed in light of the provision of reasonable accommodations is fully in line with both Directive 2000/78 and the CRPD, as it the requirement for an individualised analysis. This analysis should not be prejudiced by false assumptions about what a person who is blind, or indeed any person with a disability, can do. Nevertheless, there will remain certain cases where, even with accommodations, a juror who is unable to see would not be able to complete the necessary duties. This would involve cases where vision is needed to assess guilt or innocence or otherwise reach a verdict, such as when jurors need to decide whether an individual who is filmed or photographed while committing a crime is indeed the individual on trial.

9. While the Court, as is its usual practice in its judgments, did not refer to legislation or practices from other EU Member States, or adopt a comparative perspective, its approach seems to be in line with that of jurisdictions such as England and Wales, the United States and New Zealand. There too, individuals who are blind can serve as jurors, and there is an obligation to provide reasonable accommodations when this would allow them to carry out the related tasks. Jury membership of persons who are blind has attracted attention beyond the EU, and has been addressed, from a comparative perspective, in a consultation paper on *Inclusive Juries* published by the Victorian Law Reform Commission in Australia.[2] The paper reveals how legislation and practice addresses jury membership of blind individuals across a number of common law jurisdictions. In some jurisdictions, such as England and Wales, the United States and New Zealand, persons who are blind (as well as persons who are deaf) are not automatically excluded from jury membership. Supports or reasonable accommodations are provided to facilitate their participation. In some cases, judges may nevertheless exclude an individual from serving, if they conclude that a disability renders them unable to act effectively. In most Australian states and territories, disability can also be a ground for disqualification if a person is not capable of performing the relevant duties, but exclusion is not automatic. Nevertheless, in practice most individuals who are blind or have low vision, as well as most individuals who are deaf or have a hearing impairment, must ask to be excused from service, because they are not provided with the necessary supports and accommodation. In contrast, persons who are blind or deaf individuals are ineligible to serve on a jury in the Northern Territory.

10. In terms of wider implications of the judgment, two issues arise. Firstly, this case fell within the scope of EU law because being as a juror is a form of employment in Bulgaria. This is certainly not always the case and, in common law countries at least, jury membership is a civic duty, and citizens are randomly selected to serve on a jury. While expenses may be paid to jurors in such states, jury service is not a form of employment. As a consequence, any

discrimination against such jurors would fall outside the scope of the Employment Equality Directive. Advocate General Saugmandsgaard Øe notes, in his Opinion, that 21 of the 27 EU Member States involve jurors to some degree in the justice system, and 15 Member States adopt an approach similar to that found in Bulgaria, whereby jurors sit alongside judges (footnote 14). However, it is not clear whether Bulgaria is the only Member State which provides for the employment of jurors, and, as noted, the judgment in VA is only directly relevant in those states in which jurors have that status.

11. Secondly, this case concerned an individual who was blind. Quite naturally the Court did not consider the situation of individuals with other impairments. However, as the paper by the Victorian Law Reform Commission reveals, individuals who are deaf or hard of hearing also regularly face barriers to jury membership. In principle the CJEU's reasoning and approach could equally be applicable to jury membership of such individuals, where that is a form of employment. More generally, the CRPD Committee has held in two individual communications that people who are deaf should have the right to participate as jurors and that (Australian) courts should make reasonable adjustments to enable this to occur.[3] However, Advocate General Saugmandsgaard Øe noted in his Opinion that "it is in principle necessary for ... jurors be (sic) able to hear the oral argument" (par 66). Moreover, one issue which has arisen in some common law jurisdictions is the prohibition of a "13th person" being present during jury deliberations. This is intended to "preserve the confidentiality of the deliberation process and the validity of a verdict", and means that non-jurors, such as sign language interpreters, cannot be present when the jury is considering its verdict.[4] It is unclear how such a requirement would interact with the obligation to provide a reasonable accommodation, in the form of an interpreter who would also need to be present during the jury deliberation. However, it has been suggested that the "13th person" rule could be "met by an appropriate oath being taken by the signer in which he would submit himself to the same obligations of confidentiality as the rest of the other jurors".[5] On the other hand, Advocate General Saugmandsgaard Øe seemed to allude to this being a barrier to providing a reasonable accommodation in his Opinion (par 90).

12. Jury membership by a person with a psychosocial disability, linked to a mental illness, was also not at issue in this case, although the Court did note that persons with such an illness were barred from working as a juror by law in Bulgaria. It implicitly contrasted this with the situation of blind people, who were not subject to an equivalent prohibition under the relevant legislation. Advocate General Saugmandsgaard Øe explicitly referred to the fact that Bulgarian legislation did not exclude blind persons from working as jurors and concluded that this meant that Article 2(5) of the Directive, which provides that the Directive is without prejudice to measures laid down by national law which are necessary to achieve various ends, including

public order and the protection of the rights and freedoms of others, was not applicable (par 45). It is unclear whether the Court would view this provision as justifying the exclusion of persons with other disabilities, including persons with a psychosocial disability, from working as jurors.

13. This judgment is in line with the CJEU's previous case law which has addressed the duty to provide a reasonable accommodation under the Employment Equality Directive. The Court has held that an individual's ability to fulfil their work-related duties should be assessed in light of their abilities following the provision of reasonable accommodation measures, where this would be appropriate.[6] The judgment also follows the established approach of interpreting derogations from the principle of non-discrimination, including the genuine and determining occupational qualification exception, in a restrictive manner.[7] It applies these findings to the hitherto unaddressed area of jury membership and persons with disabilities.

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[1] C-356/12 *Glatzel*, EU:C:2014:350, pars 54 and 72.

[2] Victorian Law Reform Commission, *Inclusive Juries – Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision*, Consultation Paper, December 2020. Available at: https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/VLRC_Inclusive-Juries-Consultation-Paper-forweb.pdf, last accessed on 11.1.2022.

[3] Committee on the Rights of Persons with Disabilities, Views: Communication No 11/2013, 15th Session, UN Doc CRPD/C/15/11/2013 (25 April 2016) ('Beasley v Australia'); Committee on the Rights of Persons with Disabilities, Views: Communication No 13/2013, 15th Session, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) ('Lockrey v Australia').

[4] Victorian Law Reform Commission, *Inclusive Juries – Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision*, Consultation Paper, December 2020, pp. 23-24, 31, 33. Available at: https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/VLRC_Inclusive-Juries-Consultation-Paper-forweb.pdf, last accessed on 11.1.2022.

[5] Justice Carney, cited in Irish Law Reform Commission Jury Service, (Report No. 107, April 2013, par. 4.13. Available at: https://www.lawreform.ie/_fileupload/Reports/r107.pdf, last accessed 11.1.2022.

[6] Case C-795/19 *Tartu Vangla*, EU:C:2021:606.

[7] See, for example, *Prigge and Others*, C|447/09, EU:C:2011:573, par 72 and Case C-795/19 *Tartu Vangla*, EU:C:2021:606. Par 33).