Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

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Question(s) at stake:

Whether 1) the civil law prohibition of discrimination on the basis of ethnic origin under Section 19 of the German General Act on Equal Treatment (AGG) already applies in the run-up to the conclusion of a contract; 2) the use of the so-called "testing procedure" is permissible as an indication of unequal treatment in the context of the assessment of evidence; 3) an exception to the prohibition of discrimination to "create and maintain balanced cultural conditions" applies.

Outcome of the ruling:

1. The civil law prohibition of discrimination on the basis of ethnic origin already applies in the run-up to the conclusion of a contract; 2) the so-called "testing procedure" can be used as an indication in the assessment of evidence; 3) an exception to "create and maintain balanced cultural conditions" does not apply, since it is only possible in the case of "positive measures" if interpreted in accordance with the relevant EU Directives.

Topic(s):

- Liability: contractual and non-contractual

Keywords:

- Landlords
- Tenants
- Compensation / Damages
- Non-discrimination
- Race, colour and ethnic origin

Tag(s):

- Turkish
- Social housing
- Unequal treatment
- “Testing procedure”
- Balanced cultural conditions
- EU-Directive 2000/43/EC
- EU-2004/113/EC

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Official citation:

Local Court Hamburg-Barmbek, Judgment of 3 February 2017, 811b C 273/15 (AG Hamburg-Barmbek, Urteil vom 3. Februar 2017, 811b C 273/15)

No link available.

ECLI:

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Date:

03 February 2017

Jurisdiction / Court / Chamber:

Regional Court Hamburg-Barmbek

Remedy / Procedural stage:

Judgment (final)

Previous stages:

None

Subsequent stages:

None

Branches / Areas of law:

Private law, Non-Discrimination Law

Facts:

The plaintiff was of Turkish origin and had a Turkish name. She was looking for a flat for herself and her youngest son in Hamburg and was the holder of a certificate of eligibility for social housing within the meaning of the relevant provision of the German Controlled Tenancy Act (*Wohnungsbindungsgesetz*). The defendant was the owner of several publicly subsidized flats.

The plaintiff, represented by her son, sent an email expressing interest in a vacant flat owned by the defendant after this flat was advertised on an internet portal. In the email, she did not mention her certificate of eligibility for social housing or how many people she would be moving in with. She received an email from the defendant on the same day stating that she was not invited to view the apartment, as the capacity for viewings had allegedly been exhausted. The plaintiff sent another enquiry to the defendant for a different flat, which was again rejected immediately.

The son then sent further expressions of interest in flats of the defendant, sending an enquiry either with a fictitious German or a fictitious Turkish name and providing exactly the same information in each case. Whereas all the German-sounding prospective tenants were invited to viewings, all the Turkish-sounding ones were not. The plaintiff then filed a lawsuit for damages under the German General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*), as she felt discriminated against because of her ethnic origin.

The defendant stated that the prohibition of discrimination was not applicable in the run-up to the conclusion of the contract. Furthermore, the flat could not have been allocated to the plaintiff anyway, as the defendant assumed – due to a lack of additional information – that she did not have a certificate of eligibility for

social housing and that she would move in alone, while the flat was intended for two renters. Publicly subsidized flats can only be allocated to holders of a certificate of eligibility for social housing within the meaning of the relevant provision of the German Controlled Tenancy Act (WoBindG). The defendant also argued that there had been no discrimination because the flat was ultimately rented out to a Turkish tenant. Due to the high demand, the defendant claimed, it was not possible to invite all interested parties for a viewing, and as the aim was to create and maintain stable social and cultural conditions within the meaning of Section 19 (3) AGG, about half of the persons invited had German-sounding names and the other half foreign-sounding names. Therefore, the prospective tenants with German-sounding names were invited preferentially, as more requests came from prospective tenants with foreign-sounding names.

Ruling:

The court considered the claim admissible and well-founded. The plaintiff was entitled to compensation from the defendant.

The court first clarified that the prohibition of discrimination under civil law applies – contrary to the defendant’s view – even prior to the conclusion of the contract.

In the eyes of the court, the plaintiff was able to present evidence that justifies the assumption that she was not invited to a viewing solely because of her Turkish name, i.e. her ethnic origin. The son’s procedure of sending the same enquiries with different fictitious names, i.e. the so-called “testing procedure”, was expressly permissible in the area of tenancy law according to the official justification of the AGG (BT-Drucksache 16/1780: 47) and the literature. This presumption of discrimination could not be disproved by the defendant’s argument that the flat could not have been rented to the plaintiff anyway on the basis of the information from the plaintiff’s enquiry. Although the defendant was in fact unaware of the plaintiff’s certificate of eligibility for social housing and that she wanted to move in with her youngest son, they had nevertheless invited interested parties with a German-sounding name who had also not provided any

of this information.

According to the court, the fact that the flat was ultimately allocated to a Turkish tenant and that half of the people invited to view the flat had foreign names does not refute the discrimination that the plaintiff experienced in this case.

Finally, the defendant could not rely on the claim that they wanted to create and maintain culturally balanced conditions within the meaning of Section 19 (3) AGG. When interpreted in accordance with Directive 2000/43/EC and Directive 2004/113/EC, Section 19 (3) can only be understood to mean that “positive measures” in favour of certain groups of people should be made possible, which does not justify excluding people from something on the basis of their ethnic origin.

For these reasons, the plaintiff was entitled to damages from the defendant for discrimination in the amount of 1,008.00 €, which was equal to three times the net “cold rent” (without utilities).

Main quotations on cultural or religious diversity:

“The plaintiff has been discriminated against. Direct discrimination exists if a person is ‘treated less favourably than another person in a comparable situation’ for the reasons stated in Section 1 AGG (Section 3 (1) AGG). The prohibition of discrimination under civil law also applies – contrary to the opinion of the defendant – before the conclusion of a contract […]. The plaintiff has succeeded in presenting and proving circumstantial evidence that justifies the assumption that she did not receive an invitation to view the flat in […] [omission by the court]. An indication in this respect is Annex K 3. It follows from the documents submitted that applicants with German-sounding names received an invitation to view the apartment, while applicants with foreign-sounding names did not. Furthermore, the plaintiff provided the same information in each application. The court is convinced that this follows from the testimony of the witness […] [omission by the court: the son of the plaintiff, who sent out the enquiries]. The witness stated that he always provided the same information when requesting an appointment to view the apartment, regardless of whether a (fictitious) German

name or a (fictitious) Turkish or foreign-sounding name was used. He had given a first name, a surname, and an address. He had also left the information ‘Appointment for viewing desired’. He did not provide any information about a certificate of eligibility for social housing or the number of people moving in. […] A so-called ‘testing procedure’ is also expressly admissible in the area of residential leases […]. Therefore, there is a prima facie case for discrimination against the plaintiff on the basis of her Turkish name, i.e. her ethnic origin. The defendant was not able to disprove this presumption (§ 22 AGG).” (para. 12)

Main legal texts quoted in the decision:

- Sections 19 (2), (3); 21; 22 of the German General Act on Equal Treatment (AGG)

Cases cited in the decision:

None

Commentary

Proof and Justification of Discrimination Based on Ethnic Origin When Looking for Housing under the German General Act on Equal Treatment (AGG)

The case described above is the first of two in Germany in which a landlord was successfully ordered to pay damages under the AGG due to their discriminatory rejection of a potential new tenant within a typical mass application process, without the landlord having expressly stated that they did not want any foreign tenants to move in. Before these, there had only been one successful case where a prospective tenant was rejected after the viewing (see Regional Court Mönchengladbach, Judgment of 27 May 2016, 11 O 99/15), and no decisions to the contrary have since been issued. The case thus broke new legal ground in three respects and clarified the interpretation of the AGG, which implements the EU Directives 2000/43/EC and 2004/113/EC. (1) The local court clarifies that, in the establishment of civil law obligations, the prohibition of discrimination on the basis of ethnic origin also applies in the pre-contractual phase, meaning that no contract negotiations or the like need to have begun. The prohibition of

discrimination therefore already applies to invitations to viewings. This is the only way it can apply in typical cases where a large number of prospective tenants contact a landlord in order to view the apartment on offer, because if one were to restrict the prohibition of discrimination only to situations where the parties already entered contract negotiations, its effect would be severely limited. The court explained that discrimination on the grounds of ethnic origin usually takes place within the selection process of people who are interested in viewing the apartment; thus, the affected parties usually never reach the stage of negotiations. (2) Furthermore, it is the first case in residential tenancy law in which the so-called “testing method” used here by the plaintiff has been confirmed by a court as a way of providing evidence that there has been an act of discrimination on the basis of name and ethnic origin, and that such evidence justifies the presumption of discrimination. This is the most significant part of the decision, because it seems highly unlikely that landlords would openly justify a refusal or non-invitation to a viewing by stating that a person has a certain ethnic origin; they more would likely claim that there are too many interested parties, or give other reasons why the interested party is not eligible for the apartment in question, as was done here with the arguments of apartment size and the required certificate of eligibility for social housing (similar Hoffmann and Bierlein 2021: 291). The discriminatory disadvantage thus only becomes apparent in comparison with interested parties whose ethnic origin is not recognized as non-German on the basis of their name, appearance, or language skills. It therefore requires a certain amount of effort and time to apply for the same apartments twice with different names, as the plaintiff’s son did in this case. At the same time, this is the most viable way to prove the discrimination in court. Furthermore, it can be assumed that a discriminatory practice based on ethnic origin in the allocation of housing occurs more frequently in reality than the few cases before German courts would suggest. This is the first time a case like this entered the courtroom after the AGG came into force in 2006, and it has only been followed by one similar case in Berlin in 2020 (see below). But the experiences of many migrant people in Germany show that discrimination occurs quite frequently (see Federal Anti-Discrimination Agency 2020: 5). This

discrepancy may be explained by the difficulty of proving discrimination as well as by the fact that prospective tenants are often unaware that the discriminatory allocation of housing is prohibited by civil law, entitling them to claim compensation. This lack of awareness is exacerbated by the fact that the legal requirements for such claims in the AGG are rather unclear, as they derive from the interaction of various paragraphs and their interpretation against the background of EU directives (Hoffmann and Bierlein 2021: 289). (3) Finally, against the background of the relevant directives, the regional court interpreted the exception to the prohibition of discrimination under Section 19 (3) AGG – namely to create and maintain “balanced cultural conditions” – to mean that it only applies to “positive measures”. The court therefore does not consider the landlord to have a legally recognized interest in creating and maintaining such “balanced cultural conditions” if this means ensuring that fewer people with a non-German ethnic origin live in a residential building. This clarification is particularly important to prevent landlords from invoking this exception to justify discrimination against disadvantaged groups. Here, the court confirmed the already very uniform opinion in the legal literature. It therefore created legal certainty for the prospective tenants concerned and clearly prioritized their interest in the non-discriminatory allocation of housing. This is significant, as the interpretation of the wording of Section 19 (3) AGG could also lead to the conclusion that the exception is intended to enable landlords to strive for a certain “cultural mix” when allocating housing. However, if one looks at the relevant EU Directives (Directive 2000/43/EC and Directive 2004/113/EC), it becomes clear that they do not recognize such exceptions, but only allow positive measures in Arts. 4 and 5 of the Antiracism Directive. This refers to affirmative action quotas, intended to give those with certain characteristics an advantage over those without those characteristics so as to compensate for existing inequalities and thus create substantive equality (Thüsing and Vianden 2020: 26). This interpretation is also supported by the legislator’s official explanatory notes on the act, which state that “it goes without saying that the underrepresentation of certain groups is by no means to be justified” (“selbstverständlich keineswegs die Unterrepräsentanz bestimmter Gruppen zu rechtfertigen sei”) (BT-DS

16/1780: 42). This clarifying interpretation is likewise enormously important to ensure that the prohibition of discrimination under civil law has any effect at all, as otherwise the landlord would generally be free to argue that he merely wants to create and maintain “balanced cultural conditions” if “German” tenants are not already in the majority in a residential building. In this context, reference should also be made to a 2020 decision in a similar case by the Berlin-Charlottenburg Local Court. In this case, the landlord was a large housing company with a correspondingly large administration. The employee in question, who selected which prospective tenants were invited to a viewing, stated as a witness in court that she made sure that there was a “healthy mix” in the apartment building, whereby origin also played a role. By questioning other employees, it emerged during the proceedings that the company did not give its employees any instructions as to whom they should invite – i.e., they themselves chose who was given a viewing appointment. The court then ruled that the company should have given its employees criteria for selecting prospective tenants in order to prevent discrimination in the allocation of housing. This point is important as it shows that larger companies must proactively ensure that their employees are not discriminating to avoid accusations of discrimination; otherwise they are at least acting negligently and can therefore be held responsible for committing discrimination in the sense of Section 21 (2) AGG together with Section 276 (1) of the German Civil Code (BGB) – while it is of course highly questionable if the requirement of a responsibility within Section 21 (2) AGG is in accordance with the relevant EU Directives (see Thüsing 2021: § 21 AGG paras. 39–47).

Literature related to the main issue(s) at stake:

Legal publications addressing the case:

- Antidiskriminierungsstelle des Bundes. 2024. “Entschädigung – keine Rechtfertigung gem. § 19 Abs. 3 AGG bei Ablehnung aufgrund der ethnischen Herkunft auf dem Wohnungsmarkt”. In *Ausgewählte Entscheidungen deutscher Gerichte zum Antidiskriminierungsrecht*, 361, available on the website of the German Federal Anti-Discrimination Agency.

- Herlitz, Carsten. 2018. “Allgemeines Gleichbehandlungsgesetz: Entschädigung bei Verletzung des Benachteiligungsverbots bei der Wohnungsvergabe”. *jurisPR-MietR* 1/2018: Remark 1.
- Regarding the later decision of the Local Court Berlin-Charlottenburg, see Wagner, Thomas. 2020. “Ethnische Diskriminierung bei Wohnungssuche wird teuer!”. *IMR* 03/2020: 107.

General legal literature on the topic:

- Klose, Alexander and Anna Braunroth. 2022. “§ 19 AGG rec. 54 – 62”. In Wolfgang Däubler and Thorsten Beck (eds), *Allgemeines Gleichbehandlungsgesetz*, 5th edition. Baden-Baden: Nomos.
- Fervers, Matthias. 2024. “Before § 535 BGB rec. 285 – 309”. In Ulf Börstinghaus (ed), *Schmidt-Futterer Mietrecht*, 16th edition. München. C.H. Beck.
- Häublein. 2023. “Before § 535 BGB rec. 83 – 90; § 19 AGG rec. 63 – 88”. In Franz Jürgen Säcker et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 9th edition. München: C.H. Beck.
- Thüsing, 2021. “§ 21 rec. 39 – 47”. In Franz Jürgen Säcker et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 9th edition. München: C.H. Beck.
- Thüsing, Gregor and Sabine Vianden. 2020. “Rechtsfreie Räume? Die Umsetzung der EU-Antidiskriminierungsrichtlinie im Wohnungsbereich”. *Gutachten im Auftrag der Antidiskriminierungsstelle des Bundes*: 25–30.
- Börstinghaus, Ulf. 2018. “Die Entwicklung des Mietrechts seit der Mietrechtsreform 2001”. *NZM* 9/2018: 297–315.
- Hoffmann, Jochen and Johanna Bierlein. 2021. “Die Anwendung des AGG auf Diskriminierungen beim Zugang zu Wohnraum”. *ZfPW* 1/2021: 286–309.

- Antidiskriminierungsstelle des Bundes. 2020. “Rassistische Diskriminierung auf dem Wohnungsmarkt, Ergebnisse einer repräsentativen Umfrage”, available on the website of the German Federal Anti-Discrimination Agency: 5–16.

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