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## Redefining Frontiers of EU Discrimination Law

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Shreya Atrey\*

Within the rapidly evolving field of discrimination law, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*<sup>1</sup> marks a highpoint of development in EU law—a claimant who does *not* herself possess a relevant personal characteristic can claim *either* direct or indirect discrimination on the basis of the said personal characteristic. This result lies in stark contrast with the paradigmatic case of discrimination claimed by someone who is disadvantaged because of her own personal characteristic, whether directly because of difference in treatment or indirectly due to a neutral practice which disproportionately impacts her and those with whom she shares the personal characteristic. In reimagining an ideal claimant and the boundaries between direct and indirect discrimination, the ECJ revises the precincts of discrimination law in a profound way.

The result followed from these facts: Ms Nikolova ran a grocery shop in Gizdova mahala district of Dupnitsa town in Bulgaria. CHEZ Razpredelenie Bulgaria AD supplied electricity to the town. It installed meters at a height of 1.7 meters everywhere except in Gizdova malaha where they were installed at an overhead height of about 6-7 meters, ostensibly to curtail the high incidence of tampering and electricity theft. Ms Nikolova complained of discrimination on the basis of racial or ethnic origin because Gizdova malaha was a predominantly Roma district. Two hurdles lay in the way of her claim: first, when everyone in a predominantly

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\* Max Weber Fellow, European University Institute (Florence). DPhil (Oxon), BCL (Dist) (Oxon), BA LLB (Hons) (NALSAR).

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<sup>1</sup> C-83/14 [2015] All ER (EC) 1083 (ECJ).

Roma district is affected by the impugned practice, should the claim be classified as direct or indirect discrimination on the ground of racial or ethnic origin? Secondly, could Ms Nikolova claim discrimination on that ground, given that she herself was *not* Roma? Upon reference from the Administrative Court of Sofia, the ECJ delivered its judgment in *CHEZ RB* agreeing on both counts – first, that the practice could be classified as either direct or indirect discrimination and second, that Ms Nikolova could claim discrimination despite being non-Roma under the terms of Race Directive 2000/43, which prohibited discrimination on the basis of racial or ethnic origin.

Ground-breaking as the result is, the reasoning in *CHEZ RB* is defensible only in part. While the ECJ rightly allowed the claim of direct discrimination, the same result should not have followed for indirect discrimination. This note explains why.

*Direct Discrimination*

*CHEZ RB* exemplifies the rare case where a court appreciates, what Finnis calls, ‘the basic structure of practical reasoning, intending, deciding, and acting,’ often missed in finding for direct discrimination.<sup>2</sup> The key to the ECJ’s line of reasoning on direct discrimination lies in its clarity over what constituted the following elements in the discrimination inquiry: intention, distinction, ground, impact, and justification, which were delineated as:

Intention	Distinction	Ground/Reason	Impact	Justification
Prevent Roma from stealing electricity	District	Ethnic Origin	On everyone in the district (Roma and Non-Roma) of being unable to inspect meters and stereotyped as an offender	Prevention of Electricity Theft

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<sup>2</sup> JM Finnis, *Intention and Identity* (OUP 2011) 269-276.

First and foremost, intention as in motive played no role in the Court's reasoning. Even if the electricity company wanted to particularly discriminate against Roma or to prevent them from stealing electricity by tampering with meters, such an intention was neither necessary nor dispositive in proving direct discrimination. In fact, the ECJ has never really been concerned with intentionality,<sup>3</sup> unlike for example, the US courts which continue to identify direct discrimination on this basis.<sup>4</sup> This avoids the problem of unduly burdening the claimants with proving the discriminator's animus or malicious intent, and the counterintuitive result of upholding actions which although based on a personal characteristic were not *meant* to be discriminatory.<sup>5</sup>

Secondly, the Court readily connected the impugned distinction (district) to the ground or reason for such distinction (ethnic origin). This is notable because *CHEZ RB* is unlike a typical case of direct discrimination where the impugned distinction was itself explicitly based on a ground, say, in a situation where the electric company explicitly stated that overhead meters were to be installed only in Roma households. In order to establish direct discrimination in this case, the ECJ had to extract the reason for the impugned distinction on the basis of which some people received less favourable treatment (those in Gizdova mahala) than others (everyone else in Dupnitsa town). This however was straightforward in that it was undisputed that the practice was 'introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned.'<sup>6</sup> The ECJ followed the mandate in Article 2(2)(a) of the Race Directive to find direct discrimination 'on grounds of racial or ethnic origin' such that the *grounds* (race or ethnic origin) coincided with the

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<sup>3</sup> *Coleman v Attridge Law* C-303/06 [2008] All ER (EC) 1105 (ECJ) (see esp Advocate General Maduro's opinion [19]).

<sup>4</sup> *Washington v Davis* (1976) 426 US 229, 240; *Price Waterhouse v Hopkins* (1989) 490 US 228; *Desert Palace v Costa* (2003) 539 US 90, 2153-55; *Ash v Tyson Foods, Inc* (2006) 546 US 454, 456.

<sup>5</sup> Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 203-214.

<sup>6</sup> *CHEZ RB* (n 1) [91].

*reason* for less favourable treatment. With this, a case of unstated direct discrimination, i.e. where the basis for distinction was *not* explicitly based on grounds, become a case of direct discrimination proper.

Thirdly, the Court also did not confound the justification for the impugned practice – prevention of electricity theft – with the reason for discrimination itself, thereby occluding the possibility of finding for direct discrimination. The court differentiated the reason from the justification by agreeing that though the electricity company acted in pursuance of the goal of preventing electricity theft – which was legitimate per se – it had decided to pursue this goal by targeting Bulgarian nationals of Roma origin on the basis of ‘ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds [like prevention of electricity theft].’<sup>7</sup> The presence of racial or ethnic origin-based reasoning (even if along with other justificatory grounds) was enough for the Court to identify direct discrimination. And since the justification of preventing electricity theft fit neither of the two permissible justifications for direct discrimination – genuine occupational requirement or positive action under Articles 4 and 5 of the Race Directive – the finding of direct discrimination was confirmed.

Fourthly, the ECJ recognised that though Ms Nikolova was not Roma, because she owned a shop in the Gizdova mahala district, she suffered the *same* disadvantage as people of Roma origin in that district – of being unable to inspect her electricity meter and being stereotyped as a potential perpetrator – disadvantage that was based on racial or ethnic origin since the district was singled out on that basis. This disadvantage was niftily read into direct discrimination under Article 2(2)(a) of the Race Directive — by basing direct discrimination

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<sup>7</sup> *ibid* [82].

not only on the discriminator's *reasoning* but also on the *impact* it had on the claimant and those in her position. According to the ECJ, it was important to take into account:

the compulsory, widespread, and lasting nature of the practice at issue which, because, first, it has thus been extended without distinction to all the district's inhabitants irrespective of whether their individual meters have been t[a]mpered with... and of the identity of the perpetrators of that conduct and, secondly,...the inhabitants of that district...as whole [are] considered to be potential perpetrators of such unlawful conduct.<sup>8</sup>

This reasoning does two things. In the first instance, it enmeshes the perpetrator-oriented view (based on his/her reasoning) with the victim-oriented view (based on impact) of direct discrimination.<sup>9</sup> In the second instance, it enlarges the protectorate which may claim discrimination, like Ms Nikolova, even though they do not themselves possess the personal characteristic which is the basis of discrimination, but share the disadvantage with those who suffer on the basis of that personal characteristic. The ECJ had sufficient basis in EU law to do this.

According to the Court, the concept of “discrimination on the grounds of ethnic origin”, for the purpose of Directive 2000/43 and, in particular, of Articles 1 and 2(1) thereof’ was *not* personal in nature in that it concerned not just those with a particular personal characteristic but all those who together with the former suffered less favourable treatment or particular disadvantage.<sup>10</sup> As the ECJ noted, the right to be protected from discrimination derived from the general and broader right to equality and equal treatment which extends protection to ‘all’, not just those who suffer disadvantage based on their own personal characteristics.<sup>11</sup> Had EU

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<sup>8</sup> *ibid* [84].

<sup>9</sup> Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 160-163.

<sup>10</sup> *CHEZ RB* (n 1) [60].

<sup>11</sup> Race Equality Council Directive 2000/43/EC, Preamble, Recitals 3, 16, and Articles 1, 3; Charter of Fundamental Rights of the European Union 2000/C 364/01, Article 21; Treaty establishing the

law meant to protect only disadvantaged groups from protection, it would possibly have enumerated those groups, such that equality and non-discrimination applied directly and only to Roma, Muslims, Blacks, women etc and not to everyone. Instead, the Race Directive 2000/43 proscribes discrimination ‘based on racial or ethnic origin.’ What this means is that anyone who is discriminated against *on the basis of* race or ethnic origin can claim discrimination under the Directive. The fact that direct discrimination under Article 2(2)(a) is not defined in terms of discrimination on the ground of ‘their/his/her’ race or ethnic origin supports this interpretation.

Following similar logic, the ECJ had previously extended the scope of direct discrimination to an employee who was harassed and dismissed not because of any of her own personal characteristics but because of her son’s disability.<sup>12</sup> *CHEZ RB* takes this reasoning a step further in that it does not just extend protection from direct discrimination to people personally associated with those possessing the relevant personal characteristic (*Coleman*) but someone suffering mere collateral disadvantage like Ms Nikolova. It also goes further than cases of perceived or mistaken forms of discrimination like, say, the case of a light-skin mixed race woman who considers herself Black or a Sikh man who is dismissed by his employer mistaking him for a Muslim man, both of which would also qualify as direct discrimination on the basis of race and religion against those considered as de facto members of disadvantaged groups. But Ms Nikolova neither identified herself as Roma nor was mistaken to be such<sup>13</sup>— instead, Ms Nikolova’s case was simply that she suffered the same disadvantage as persons of Roma origin because she shared the basis of distinction (membership in the Roma district) which was in turn based on racial or ethnic origin

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European Community 2006/C 321 E/37, Article 13; Treaty on the Functioning of the European Union 2012/C 326/01, Article 19.

<sup>12</sup> *Coleman* (n 3).

<sup>13</sup> *CHEZ RB* (n 1) [48].

(assuming Roma to be potential perpetrators). In allowing her claim, the ECJ extends the personal scope of direct discrimination to cases of collateral discrimination in addition to associative or perceived forms of discrimination.

### *Indirect Discrimination*

The ECJ did not conclude its findings with direct discrimination. It went on to hold that the impugned practice could, in the alternative, be classified as indirect discrimination. In contrast with the lengthy discussion on direct discrimination, its terse reasoning on indirect discrimination was that: the basis of distinction or criterion (district) could in principle be considered apparently neutral and since it disproportionately affected Roma on the basis of their ethnic origin, it constituted indirect discrimination under Article 2(2)(b). Whilst it reflects the good result of bringing about substantive equality for all persons in Gizdova mahala district, this result would have followed from the holding on direct discrimination just the same. Thus, the finding in regards indirect discrimination though incontrovertible in what it achieved, seems superfluous. But besides the fact that the ECJ did not really need to confirm the claim of indirect discrimination in order to address the disadvantage complained of by Ms Nikolova, this note seeks to show that her claim was in fact a poor fit for indirect discrimination and perhaps should not have been addressed as such at all, even in the alternative.

There are two key problems with the ECJ's reasoning on indirect discrimination: first, it is misguided in its interpretation of what constitutes neutrality in Article 2(2)(b); and secondly, it misapplies the comparator requirement for indirect discrimination. Together the two make plain that the claim was simply one of direct rather than indirect discrimination under Article



2(2)(b). On the other hand, the ECJ's readiness to extend the personal scope of indirect discrimination – to someone like Ms Nikolova who did not herself possess the relevant racial or ethnic origin which formed the basis of the claim – seems appropriate in light of the established jurisprudence as well as the framing of Article 2(2)(b). However, a third potential problem, though of a much lesser extent, could be in extending *CHEZ RB* wholesale to those who do not share the disadvantage suffered on the basis of racial or ethnic origin, especially in cases of intersectional discrimination when racial or ethnic origin is not the only basis of an indirect claim. Thus, one may welcome the broad scope of claiming indirect discrimination with an appreciation of its limitations, especially in potential cases of intersectional discrimination.

In the first instance, the ECJ was drawn into this quagmire because of the fuzzy definition in Article 2(2)(b), which defines indirect discrimination as 'taken to occur where an *apparently* neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons.' As Thomsen explains, the problem with this definition is that it would:

counterintuitively [not] label an actually (rather than apparently) neutral practice that disadvantaged persons on the grounds of group membership as indirect discrimination, and that it would label a practice that is in fact classical direct discrimination as indirect discrimination, *so long as sufficient deception is provided to make it appear neutral*.<sup>14</sup>

This is in fact what transpired. The ECJ, instead of interpreting 'apparently neutral' as 'obviously' or 'actually' neutral, confirmed Thomsen's doubt that neutrality in Article 2(2)(b) meant neutral only 'ostensibly' or 'at first glance'.<sup>15</sup> The deception in this case was the use of the apparently neutral distinction of district rather than a classification explicitly referring

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<sup>14</sup> Frej Klem Thomsen, 'Stealing Bread and Sleeping Beneath Bridges – Indirect Discrimination as Disadvantageous Equal Treatment' (2015) 2 *Moral Philosophy and Politics* 299, 300.

<sup>15</sup> *CHEZ RB* (n 1) [93].

to racial or ethnic origin. But once having pierced through it as based on the ground of racial or ethnic origin and hence constituting direct discrimination, the ECJ's turn towards considering the deception as neutral again for the purposes of indirect discrimination seems unnecessary but perhaps required by the strange framing of Article 2(2)(b).<sup>16</sup> It does not sound right in the same way as Thomsen's apt example of direct discrimination which ends up being classified as indirect discrimination under this definition:

[In the] Tamil scandal that brought down a Conservative Danish government in 1993, that the Minister in charge of granting refugee status publicly claims that the procedure for doing so treats all applicants equally and fairly, while in reality, and by the express order of the Minister claiming the opposite, the Ministry discriminates against Tamil asylum seekers. Calling this a case of indirect discrimination, as the definition would seem to require that we do, does not sound right.

This interpretation of the phrase 'apparently neutral' also sits uncomfortably with the rest of the ruling in *CHEZ RB* where the ECJ finds that Article 2(2)(b) precludes a national provision on indirect discrimination which requires an impugned measure 'to have been adopted for reasons of racial or ethnic origin.'<sup>17</sup> The classification of impugned measures when they are apparently to do with racial or ethnic origin as cases of indirect discrimination seems absurd since indirect discrimination ultimately does not require any proof of reasons based on racial or ethnic origin. So while *CHEZ RB*'s understanding of 'apparently neutral' makes claims like Ms Nikolova's to be classified as both direct and indirect discrimination, it can make other cases of indirect discrimination stand out awkwardly when they are not just apparently but actually based on a neutral measure.

Assuming the neutrality condition to be rightly interpreted and satisfied, the condition of particular disadvantage as compared to other groups under Article 2(2)(b) is misapplied

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<sup>16</sup> Thomsen (n 15) 300.

<sup>17</sup> *CHEZ RB* (n 1) [97].

because of the lack of a relevant comparator group in this case. What the ECJ missed is that the Roma in Gizdova mahala were not put at a ‘particular disadvantage compared with *other* persons,’ i.e. non-Roma in the district, because both Roma and non-Roma like Ms Nikolova suffered *alike* from the impugned practice. Indirect discrimination ceases to arise when the neutral practice does not divide the class to which it applies between those who were disadvantaged (based on a personal characteristic) versus others (who do not share that personal characteristic). The absolute coincidence of disadvantage – of being unable to inspect their electricity meters and being stereotyped as potential perpetrators – suffered by everyone in Gizdova mahala irrespective of their racial or ethnic origin undercuts the idea of comparative or relative disadvantage in Article 2(2)(b).

Even if the ECJ had in mind to compare the disadvantage of persons in Gizdova mahala with other districts in Dupnitsa town, unfortunately such a comparison would also not have worked considering the practice was not applied to other districts at all. Other districts in Dupnitsa would have been ideal comparators had Gizdova mahala not been singled out as the district to which the practice applied. In fact, the ECJ was clear that the broader and neutral purpose of preventing electricity theft and meter tempering throughout Dupnitsa was not the basis of the practice itself but its justification under Article 2(2)(b)— one which was found to be neither appropriate nor necessary in the absence of evidence presented by the electricity company.<sup>18</sup> Thus it was only those to whom the practice was applied that were relevant in assessing the ‘particular disadvantage’ against others for the purposes of proving indirect discrimination. So when everyone suffered equally and exactly in the same way on the basis of an apparently neutral criterion or practice which was in fact based on reasons of racial or ethnic origin, the case should have been better classified as direct rather than indirect

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<sup>18</sup> *CHEZ RB* (n 1) [36] [128].

discrimination. In any case, the particular disadvantage condition should not have been deemed satisfied because neither did the practice apply to other districts in Dupnitsa nor could the nature of disadvantage between Roma and non-Roma in Gizdova mahala be seen as distinct or disproportionate.

Finally, it is worth noting that the ECJ allowed indirect discrimination to be claimed by someone like Ms Nikolova who did not herself possess the relevant personal characteristic (of being Roma) which formed the basis of the claim.<sup>19</sup> Here the ECJ fortifies a long trend of decisions which extend the right to claim not just direct but also indirect discrimination on the basis of other's personal characteristic.<sup>20</sup> The ECJ has previously allowed parents of children to claim indirect discrimination on the basis of their children's nationality or disability in *Palermo-Toia*<sup>21</sup> and *Schmid*<sup>22</sup> respectively. In *CHEZ RB*, the ECJ extends the personal scope of claiming indirect discrimination to those who are not only directly related to those who possesses the relevant characteristics (as in the previous cases) but also to those like Ms Nikolova who suffer collateral disadvantage along with Roma residents in Gizdova mahala. In this respect, Article 2(2)(b) lies in stark contrast with other indirect discrimination provisions, for example Article 19(1) of the UK Equality Act 2010 which defines indirect discrimination as: 'A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory *in relation to a relevant protected characteristic of B's*.' No such limitation of a claimant herself possessing the relevant protected characteristic exists in Article 2(2)(b).

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<sup>19</sup> *ibid* [54] [60].

<sup>20</sup> *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187; *Asociatia ACCEPT v Consiliul National pentru Combaterea Discrimination* [2013] EUECJ C-81/12; *Coleman* (n 3).

<sup>21</sup> [1979] ECR 2645.

<sup>22</sup> [1993] ECR I-3011.

But it is worth considering how far the symmetry in result allows anyone (to whom an impugned measure applies) to claim indirect discrimination. It may be useful to stress that although *CHEZ RB* generously extends the personal scope of claiming indirect discrimination beyond the previous jurisprudence which was limited to persons directly related to those with the relevant personal characteristic, it retains the requirement for showing particular disadvantage associated with a ground. This is because the impugned measure did not just apply to Ms Nikolova, it also disadvantaged her in exactly the same way as Roma in the district. Since the disadvantage suffered by Roma in turn was based on racial or ethnic origin, it seems but sensible to extend the scope of claiming indirect discrimination to a non-Roma like Ms Nikolova. This shared disadvantage is what makes *CHEZ RB* an apt case for extending the personal scope of indirect discrimination. And thus, one must be judicious in interpreting *CHEZ RB* as extending to cases which are not based on shared disadvantage. The example of intersectional discrimination – based not just on shared but also unique disadvantage suffered on more than one ground – illustrates this dilemma.<sup>23</sup>

A uniform policy requiring all women in an airline crew to wear their hair straight may indirectly and disproportionately affect Black women who wear their hair natural or in braids or weaves.<sup>24</sup> Allowing a white woman with braids to claim indirect discrimination based on gender because, although not a Black woman, she suffers from the same disadvantage of not

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<sup>23</sup> See for an explanation of the character of intersectional discrimination as based on both same and different patterns of disadvantage: Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) UCLF 139; Sumi Cho, Kimberlé W Crenshaw and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38 Signs 785.

<sup>24</sup> This example is loosely based on *Rogers v American Airlines* (1981) 527 F Supp 229, 232 (SDNY) where a Black woman's claim of indirect discrimination against American Airlines' neutral policy of banning braided hairstyles was dismissed. Interestingly, the Court used the evidence of a popular white actor Bo Derek wearing braids to dismiss any racial significance of braids, thereby also undercutting the differences between the choice of hair for white women and black women based on gender. See also similar claims in *Pitts v Wild Adventures, Inc.* (2008) Civil Action No. 7:06-CV-62-HL (Middle District of Georgia Valdosta Division); *Hollins v Atlantic Company, Inc.* (1999) 188 F3d 652 (6th Cir); *Cooper v American Airlines* (1998) 149 F3d 1167 (4th Cir); *McBride v Lawstaf, Inc.* (1996) Civil Action No. 1:96-cv-0196-cc (US District Court in Atlanta); *Jenkins v Blue Cross Mutual Hospital Insurance Inc.* (1994) 538 F.2d 164 (7th Cir).

being able to wear her hair as she pleases, seems to invert the protection afforded by indirect discrimination. This protection was specifically meant to address insidious forms of disadvantage experienced by those who have historically, persistently and substantially suffered on the basis of their race, religion, gender, sexual orientation, disability and age. A white woman's choice to wear her hair in braids may not qualify because it has not been a choice that has been stereotyped and demeaned as unnatural or ugly,<sup>25</sup> or seen as undignified,<sup>26</sup> or been at the heart of prejudice against those seeking employment in the service sector, limiting their substantive freedoms<sup>27</sup> and autonomy,<sup>28</sup> or denying them social inclusion and integration.<sup>29</sup> Allowing a white woman to claim on the basis of Black women's hair incorrectly assumes that Black and white women have the same reasons for wearing braids or weaves.<sup>30</sup> In fact, the reasons for white women's versus Black women's hair choices remain highly distinguishable in that only Black women's identities have been impinged on the hair type which is considered undesirable and ugly.<sup>31</sup> Thus, though the white employee *does* suffer the disadvantage of not being able to wear her hair as she pleases, that disadvantage is *not* one which is similar to Black women's disadvantage based on race or gender.<sup>32</sup> Focussing on the white woman's claim of gender discrimination may detract from recognising Black women's intersectional disadvantage based on both race and gender, i.e. the unique historical disadvantage and specific cultural identity of Black women *as Black*

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<sup>25</sup> Deborah Hellman, *When is Discrimination Wrong?* (HUP 2008).

<sup>26</sup> Denise Réaume, 'Discrimination and Dignity' (2003) 63 LLR 1.

<sup>27</sup> Sophia Moreau, 'What is Discrimination' (2010) 38 PPA 143.

<sup>28</sup> Amartya Sen, *Development as Freedom* (OUP 1999).

<sup>29</sup> Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16.

<sup>30</sup> Deleso Alford Washington, 'The Anatomy of a "Pantsuit": Performance, Proxy, and Presence for Women of Color in Legal Education' (2009) 30 Journal of Public Law and Policy 605, 620-21.

<sup>31</sup> Angela Onwuachi-Willig, 'Another Hair Piece: Exploring New Strands of Analysis Under Title VII' (2010) 98 Georgetown Law Journal 1079, 1082, 1093-94.

<sup>32</sup> Michelle L Turner, 'The Braided Up roar: A Defense of My Sister's Hair and a Contemporary Indictment of *Rogers v. American Airlines*' (2011) 7 Cardozo Women's Law Journal 115, 132 ('White women do not attach the same cultural meaning to braided hairstyles that Black women attach'). So even if white women do end up benefiting if the policy is revoked, their claim of indirect discrimination would be one based on a mere preference or inconvenience which although may be the domain of another right like freedom of expression, does not seem to speak to 'discrimination' as disadvantage associated with grounds or personal characteristics.

women.<sup>33</sup> As the example of *Rogers v American Airlines* shows, when a Court looks at white women's experiences of wearing braids or cornrows to adjudicate on the legitimacy of a neutral airline policy of no braids, the claim not only fails for its lack of connection with race but also ends up subordinating Black women's position to that of white women.<sup>34</sup> It serves as a relevant cautionary tale in interpreting *CHEZ RB*'s generous ruling on who can claim indirect discrimination more cautiously. It holds especially true for cases of intersectional discrimination, say by Roma women, where the danger of people claiming along with or on behalf of intersectional claimants may end up masking the nature of such discrimination as based on more than one ground of discrimination.

### *Implications*

While the ECJ's trenchant account of direct discrimination allows us to appreciate Ms Nikolova's claim, its simplistic treatment of indirect discrimination fails to convince as a matter of text or logic of discrimination law. The result being that the ECJ was doubly generous towards Ms Nikolova's claim but only half as logical. Its analysis under Article 2(2)(b) shows the inconvenient interpretation it followed down the path of indirect discrimination just to reach a favourable finding; especially when a less cumbersome route of

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<sup>33</sup> See for a comprehensive discussion the seminal pieces Paulette M Caldwell, 'A Hair Piece: Perspectives on the Intersection of Race and Gender' (1991) 1991 Duke Law Journal 365 and D Wendy Greene, 'Black Women Can't Have Blonde Hair ... in the Workplace' (2011) 14 Journal of Gender, Race & Justice 405. This does not undercut the fact that white women and Black men too suffer from dominant cultures and stereotypes; the purpose is only to emphasise how a different claimant (white women or Black men) can obscure intersectional disadvantage of claimants like Black women. Turner, *ibid* 133 ('As between Black and White women, a policy that prohibited braids had an effect on Black women that was substantially different from the policy's effect on White women. While American Airlines' policy did apply to both Black and White women, only Black women lost the ability to wear a hairstyle that was unique to their culture.').

<sup>34</sup> Although *Rogers* was not claimed by a white plaintiff, the Court used the isolated instance of a white actor, Bo Derrek, wearing cornrows to determine the legitimacy of Black women's complaint of indirect discrimination due to the airline hair policy. Ayana Byrd and Lori Tharps mention one such unique case by a white woman which unsuccessfully claimed discrimination based on her braided hair. Ayana Byrd and Lori Tharps, *Hair Story Untangling the Roots of Black Hair in America* (Griffin 2002) 324; Greene, *ibid* 348; Caldwell, *ibid* 379-380.

direct discrimination had already accomplished this. A straightforward approach would have been to acknowledge that in cases like *CHEZ RB*, when everyone, Roma and non-Roma like Ms Nikolova are equally disadvantaged in exactly the same way (lack of ability to read electricity meters, stereotyped as criminals) because of a practice based on racial or ethnic origin, the claim may be better classified as one of direct rather than indirect discrimination.

For the UK discrimination law consolidated in the Equality Act 2010, the most significant implication of *CHEZ RB* is in regards who can claim indirect discrimination. The wording of Section 19(1) makes clear that indirect discrimination is personal in nature such that the victim of indirect discrimination must herself possess the necessary personal characteristic. In order to comply with EU law (so far as it continues to apply until the Brexit vote is enforced), UK domestic law under Section 19 will have to be significantly broadened, either judicially or legislatively, to include those suffering alongside those possessing the relevant personal characteristic. While *CHEZ RB* specifically concerned the protected ground of race in the context of provision of a public service, there is no reason why the logic cannot be extended to other Directives (viz. Gender Directive and the Equal Treatment Framework) and protected grounds covered within the Equality Act 2010, viz. age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, and sexual orientation, as well as to other contexts like employment and social security. Thus, in widening the net of who can bring claims of indirect discrimination, this ruling inflates the potential claims which can be brought under domestic discrimination laws like the UK. Non-Muslims who are affected by their employer's policy of compulsory work on Fridays and men who cannot take benefit of a crèche available only for children of full-time employees, may now be equally entitled to bring claims of indirect religious and sex discrimination respectively. While these claims could previously only be conceived in relation to Muslims or women under the UK law,



*CHEZ RB* opens up the possibility to claim indirect discrimination for those who share the disadvantage alongside Muslims and women. Future litigation at the domestic and EU level will reveal the extent to which collateral claimants and their lawyers will exploit these vast possibilities.

*CHEZ RB* also has some useful lessons for discrimination lawyers, especially in the UK. In relation to direct discrimination, it provides a cue for reimagining the jurisprudence following *James v Eastleigh Borough Council*<sup>35</sup> where the irrelevance of a perpetrator's motive has devolved into the irrelevance of reasons for less favourable treatment. The ECJ's balancing act of excluding the electricity company's motivation for adopting the policy (whether malicious intent towards Roma or preventing electricity theft), while recognising the reason for it as based on the racial or ethnic membership of the district avoids the paradoxical results reached by the UK courts in following 'but for' or 'inherently' discriminatory tests for direct discrimination.<sup>36</sup> The reasoning in *CHEZ RB* shows how each of the elements in the equation of direct discrimination (intention, distinction, ground, impact, and justification) needs to be delineated for a simpler and structured analysis of direct discrimination.

At the same time, *CHEZ RB*'s interpretation of the phrase 'apparently neutral' in Article 2(2)(b) can have an inadvertent constructive effect on UK discrimination law such that cases like *James* could be reclassified as indirect discrimination and could hence succeed. *James* involved a challenge to the use of pensionable age (65 years for men; 60 years for women) as a criterion for allowing free entry to a community swimming pool. The Court applied the 'but for' test ('would the complainant [a man over 60] have received the same treatment from the

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<sup>35</sup> [1990] 2 AC 751 (HL).

<sup>36</sup> See *R v Governing Body of JFS* [2009] UKSC 15; *Chief Constable of the West Yorkshire Police v Khan* [2001] 1 WLR 1947 (HL); *Nagarajan v London Regional Transport* [2000] 1 AC 502 (HL); *R v Birmingham City Council, ex p Equal Opportunities Commission* [1989] AC 1155 (HL).

defendant but for his or her sex’<sup>37</sup>) and found that the measure constituted direct discrimination on grounds of sex under Section 29 of the UK Sex Discrimination Act 1975. The Court disregarded the ‘intention or motive’ of the defendant for providing retirement benefits to people out of work and with less income.<sup>38</sup> Per *CHEZ RB*, if *James* is treated as a case of indirect discrimination based on an ‘apparently neutral’ criterion of pensionable age rather than considering the criterion ‘inherently’ sex-based,<sup>39</sup> the ‘intention or motive’ of the defendant could be reconsidered as a justification for adopting the criterion and perhaps find it lawful.

But it is interesting to note that while the EU law in *CHEZ RB* pulls in the direction of finding for both direct and indirect discrimination (albeit in the alternative); the UK law pulls in the opposite direction with its long held view, reiterated by Lady Hale in *JFS* that: ‘Direct and indirect discrimination are mutually exclusive. You cannot have both at once.’<sup>40</sup> So whilst *CHEZ RB*’s duplicative effort of finding for both direct and indirect discrimination may seem too unwieldy, it perhaps signals towards the need for both the EU law and jurisdictions like the UK to find a middle ground rooted in the actual and distinct definitions of direct and indirect discrimination to avoid rigmaroles like in *CHEZ RB* and slippages like in *James*.<sup>41</sup>

One possibility is to simply converge the classical distinction between direct and indirect discrimination by adopting a common definition of discrimination as adopted by the Canadian

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<sup>37</sup> *James* (n 43) 774.

<sup>38</sup> *ibid* 758.

<sup>39</sup> *ibid* 769.

<sup>40</sup> *JFS* (n 44) [57].

<sup>41</sup> In fact, in addition to slippages in direct discrimination, the current trend in the UK of requiring plaintiffs to show ‘the reason why’ a neutral provision, criterion or practice is indirectly discriminatory is a step backwards in almost obliterating the category of indirect discrimination which has to do with impact rather than reasons for discrimination. See *Essop and others v Home Office (UK Border Agency)* [2015] EWCA 609; *Naeem v Secretary of State for Justice* [2015] EWCA 1264. See the critique of this trend in Sandra Fredman, ‘The Reason Why: Unravelling Indirect Discrimination’ (2016) 45 *Industrial Law Journal* 231.

Supreme Court<sup>42</sup> or at least a test for adjudication which focuses mainly on impact on disadvantaged groups like the South African Constitutional Court.<sup>43</sup> Whilst the analysis of direct discrimination embedded in both the discriminator's reasoning as well as the impact on disadvantaged groups seems to suggest this, the analysis of indirect discrimination is too thin to support this move. Another possibility, as Fredman argues, would be to simply insist on direct discrimination as based on discriminatory reasons for action and indirect discrimination to do with discriminatory effects, such that the 'key issue [in indirect discrimination] is whether the practice can be justified in the light of possible alternatives, and if not, how it should be modified or replaced.'<sup>44</sup> This may fare better than finding for both direct and indirect discrimination like *CHEZ RB* in EU law or misclassifying one as the other, as common in the UK law. In fact, given the distinct definitions of direct and indirect discrimination in EU law, in the final analysis, it may be helpful to view *CHEZ RB* as maintaining this distinction at least in its scrupulous maneuvering of direct discrimination and finding indirect discrimination, only in the alternative, even if excessively.

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<sup>42</sup> *British Columbia (Public Service Employee Relations Commission) v BCGEU* (1990) Carswell BC 1907 (SCC).

<sup>43</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC); Catherine Albertyn and Beth Goldbaltt, 'Equality' in Stuart Woolman, Theunis Roux and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn, JUTA 2009) 35-46.

<sup>44</sup> Fredman (n 49) 243.