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Case no. 22/2007

Parties to the case:

A (private sellers)

B

Administrative decision of 24 January 2008

Composition of the Equality Tribunal:

Aslak Syse, chair

Else Leona McClimans, deputy chair

Selma Ilyas

Hege Skjeie

Torkjel Nesheim

Subject-matter of the case

The question of whether the bidders' ethnicity was the reason why the sellers would not accept a bid in connection with the sale of a residential property. The question of direct discrimination pursuant to section 4 of the Anti-discrimination Act.

The facts of the case

A detached house in Fjellhamar was offered for sale in September 2006. The sellers were A.

In the sales prospectus prepared by the estate agents Notar, the estimated price was NOK 2,850,000. The estimated price was the same as the assessed value of the property. The prospectus stated that the property was situated in an established and quiet area consisting primarily of detached housing.

B decided to purchase the property. A round of bidding was concluded on 18 September after B had submitted the highest bid of NOK 3,320,000. The sellers nevertheless chose to sell the property to C, who had tendered a bid that was NOK 10,000 lower than B's offer.

The house was thus sold for the sum of NOK 3,310,000.

The case was mentioned in the newspaper *Dagsavisen* (see the article published on 25 September 2006).

B's ethnic background is from Iran.

Consideration by the Equality and Anti-discrimination Ombud and subsequent proceedings

In a letter dated 4 October 2006, B contacted the Equality and Anti-discrimination Ombud. They asked the Ombud to consider whether they had been subjected to illegal discrimination in connection with the sale of the house.

The Ombud issued an opinion in this case on 7 May 2007. The Ombud found that the sellers had acted in breach of section 4 of the Anti-discrimination Act. The Ombud found that B's ethnicity was the reason why the sellers accepted a bid that was lower than B's bid.

The Ombud considered conditions to be such that the burden of proof had passed to the seller pursuant to section 10 of the Anti-discrimination Act. In this connection, the Ombud referred to the fact that persons with an ethnic background other than Norwegian had tendered the highest bid. Reference was further made to a claim that the property was situated in an area primarily inhabited by people with a Norwegian ethnic background and that the complainants daughters had been told that the residents in the area did not want immigrants settling in the area.

In the opinion of the Ombud, the sellers had not managed to fulfil their burden of proof.

In a letter dated 21 December 2006 from assistant lawyer Birgitte Røsgaard, A complained against the Ombud's opinion.

The complaint was submitted to B, who expressed their opinion through advocate Nicolai Bjønness.

The Ombud considered the opinion on the basis of the complaint, but upheld its opinion in this case.

The Ombud submitted the case for consideration by the Equality Tribunal in a letter dated 22 November 2007.

The case was dealt with at the Tribunal's meeting on 24 January 2008 in Oslo. In its consideration of the case, the following members of the Tribunal took part: Aslak Syse (chair), Else Leona McClimans (deputy chair), Hege Skjeie, Selma Ilyas and Torkjel Nesheim.

A attended the Tribunal's negotiations together with advocate Birgitte Røsgaard. B attended the negotiations together with advocate Nicolai Bjønnes. General manager Andreas Alvenes from the estate agents Notar gave testimony on the telephone. The Equality and Anti-discrimination Ombud was represented by Åsulv Solstad. The Tribunal's secretariat was represented by Geir Helgeland.

The parties' arguments

A denies they attached importance to the bidders' ethnicity when they decided who should buy the house.

The buyers were the parents of a work colleague of A (one of the sellers). The buyers were going to move from Finnmark to Lørenskog. The sellers felt it was nice to help them find a property close to their daughters.

The buyers were unable to attend the showing, owing to the short deadline. However, the sellers had a conversation with the buyers' daughter, who was in the property before the showings and took photographs. A cousin of the buyers was at the actual showings. Apart from a brief telephone conversation, there was no direct contact between the buyers and A before the purchase.

In addition to the buyers, the sellers had a good dialogue with another couple who were interested in the property. The second couple had another ethnic background than Norwegian.

The sellers did not know who had tendered the highest bid when they decided to whom they were going to sell the property. Thus, the sellers did not know either that the ethnic background of the bidder who tendered the highest bid was not Norwegian.

The sellers were pleased with the price, which was far higher than the estimated price. One of the sellers had sold his/her childhood home a fortnight earlier, and had also obtained a good price. This had enabled the sellers to buy a new house in the county of Hedmark, where they were going to move. It was therefore not a problem for the sellers to accept a lower bid.

The sellers do not agree that Fjellhamar is an area where almost every inhabitant has a Norwegian ethnic background.

A (one of the sellers) feels she was misquoted when Dagsavisen writes that she “did not want any trouble”.

The sellers themselves have a daughter-in-law whose ethnic background is not Norwegian.

B feels that the sellers’ decision to accept a lower bid was due to B’s ethnic background from Iran.

B feels it is unlikely that the sellers did not know the name of the person who submitted the highest bid. It is common practice among estate agents to keep the seller informed of incoming bids and the names of bidders. In particular, this concerns those who compete on the highest bid at the conclusion of bidding. B also refers to the fact that they were at the showing and that the sellers therefore should have known them.

Further, B pointed out that A’s circle of acquaintances is not of crucial importance as regards whether the sellers in this specific instance have discriminated against them on the grounds of ethnicity.

The estate agent informed B that they had tendered the highest bid and that they would therefore be allowed to buy the house. Ten minutes later the estate agent called them back and said that B would not be able to buy the house, since the seller would rather sell the house to the bidder who had submitted the second highest bid.

B claims that the estate agent answered that the sellers did not want any “trouble”, when B asked why they were not allowed to buy the property. The estate agent refused to say what he meant by “trouble”.

B also refers to the fact that the background of almost everyone who lives in Fjellhamar is ethnic Norwegian. His daughters have said that the parents of their friends say they do not want immigrants living in the neighbourhood.

The Tribunal’s deliberations

The case concerned a private individual’s decision to avoid selling a property to a person whose ethnic background was not Norwegian. Pursuant to section 7 of the Anti-discrimination Ombud Act, the Tribunal has the competence to make binding administrative decisions as to whether a breach of the Gender Equality Act and the Anti-discrimination Act has occurred or not.

The Anti-discrimination Act applies in all areas of society with the exception of family life and *personal relationships*, cf. section 3 of the Anti-discrimination of Act. The Act essentially applies wherever discrimination on the grounds of ethnicity etc. may conceivably occur.

The Tribunal finds that the exception regarding family life and personal relationships is not applicable in this case. The Tribunal refers primarily to the assessment of similar facts of case number 7/2007.

Section 4 of the Anti-discrimination Act prohibits discrimination on the grounds of ethnicity, national origins, descent, skin colour, language, religion or beliefs (ethnicity etc.).

Nor is there any requirement of discriminatory intentions in order to be affected by the ban in the Act. It is sufficient that a discriminatory effect occurs, and that this is due to ethnicity etc. The ban on discrimination also includes omissions.

The question is whether it was B's ethnicity that was the reason why the seller refused to accept their bid, even though they had tendered the highest bid.

It follows from section 10 of the Anti-discrimination Act that the burden of proof passes to the seller if there are circumstances that give grounds to believe that they attached negative importance to B's ethnicity when they decided not to accept their offer on the house.

A specific assessment must be made of whether B's claim is supported by the course of events and the external circumstances relating to the case, *cf.* Proposition to the Odelsting no. 33 (2004–2005) p. 130 and the Equality Tribunal's case no. 26/2006.

The Tribunal refers to the fact that the rules concerning the burden of proof in the anti-discrimination legislation shall help provide an effective enforcement of the bans on discrimination, *cf.*, among other things, Proposition to the Odelsting no. 33 (2004–2005) p. 129.

It is uncommon for the person tendering the highest bid in a round of public bidding not to be allowed to buy the property on sale. Since the bidder who tendered the highest bid also had an ethnic background from Iran, this gives one a justified suspicion of ethnic discrimination. Even though this in itself is not enough to reverse the burden of proof, this forms a framework around the case which means that little else is required before the burden of proof would pass to the seller, *cf.* the Act's requirement concerning *reason to believe*.

B was informed by the estate agent that they had submitted the highest bid, and that the property was therefore theirs. Further, he explained that the estate agent called back ten minutes later and told them that they would nevertheless not be able to purchase the property. This course of events was also supported by the estate agent's bidding forms. According to B, the estate agent stated in a conversation that the reason for refusing the bid was that the seller did not want any "trouble". In his conversation with B, the estate agent did not want to go into any greater detail about what the sellers could have meant by this. The Tribunal found it surprising that during preparation of the case the estate agent was not willing to elaborate on the remark concerning "trouble" in respect of neither the complainant nor the Ombudsman, nor did he manage to refute it. Reference was made instead to the estate agent's duty of confidentiality, that the seller is entitled to sell to whomsoever he chooses and to the seller's declaration of 18 September 2006. Nor did the sellers comment, or refute, the remark about "trouble" in their statement of 18 September 2006, which was a response to the complainants' representation to the estate agent in which a request was made for a more detailed explanation as to why they were not allowed to buy the property. During preparation of this case for the

Ombud and the Tribunal, the sellers referred to the fact that they were misquoted when it was stated that they “did not want any trouble”.

Throughout the entire process B has stuck to their statement about the course of events. Both the seller and the estate agent repudiated B’s statement during the Tribunal meeting.

Following an overall assessment, the Tribunal finds that there are circumstances that give grounds to believe that the seller attached importance to B’s ethnicity when they decided not to accept their bid for the property.

The seller must thus substantiate that there were other reasons than B’s ethnicity why they would not accept their bid on the property.

The majority of the Tribunal, members McClimans, Ilyas, Skjeie and Nesheim, have concluded that the seller has not fulfilled his burden of proof.

Overall the explanations given by the sellers and estate agent seem to be very inconsistent. The sellers explanation has also changed as the case has progressed. In a statement made on 18 September 2006, the sellers wrote that they had good contact with the buyer. No mention was made at this stage that the buyers were the parents of a colleague at work whom the seller wished to help. Later the sellers have through a lawyer made it clear that they had no direct contact with the buyers before the sale, only through the daughter and cousin. At the Tribunal meeting, the sellers made it clear that the only contact they had with the buyers before the sale was a brief telephone conversation.

Nor have the sellers during the buying process notified the estate agent of their wish to sell the property to specific individuals. The estate agent thus had an ordinary brokering assignment with public advertisements, open showings and an open round of bidding. Nor did the sellers inform the estate agent or B that the buyers were the parents of a colleague, not even in their written statement of 18 September 2006. This information was first given verbally to the Ombud on 4 December the same year.

The majority also find it highly unlikely that the estate agent would not have informed the sellers of B’s name during the bidding process or at least when it became clear that B had tendered the highest bid. On a general basis, it must be assumed that both the sellers and the estate agent have a common interest in receiving all relevant information once the round of bidding has concluded, including the size of the bid, any reservations, financing and the name of the person who tendered the highest bid. There is nothing in the case to indicate that this was any different in this property sale. Further, the sellers have, among other things, explained that they asked the estate agent whether C (the buyers) had tendered the highest bid when the round of bidding was concluded. The majority find it not very credible that the sellers, at least at this stage, before B was notified by the sellers that they nevertheless would not be allowed to buy the property, had not been told B’s name. In this connection, it is mentioned that it is difficult to trust the sellers’ testimony given in the Tribunal meetings in which they stated that they did not know the name of the person who had the highest bid in connection with an article published in Dagsavisen several days after the round of bidding. Among other things, reference is made to the fact that the written statement made on 18 September 2006 was sent directly from the sellers to B, and that the statement was written because B had, following telephone conversations, asked the estate agent for a written explanation. It was B who in an attachment to their letter of 4 October 2006 sent the sellers’

declaration to the Ombud. The article was published in the newspaper *Dagsavisen* on 25 September.

That the sellers were only interested in how C was faring in the round of bidding, as the sellers and estate agent explained during the Tribunal meeting, also seems unlikely since the sellers during case preparations have stated that in addition to C they also "had a very good dialogue" with another couple who were interested in the property. This couple had also been involved in the round of bidding when the sellers' childhood home on the neighbouring plot had been sold shortly beforehand. It is probable that the seller via the estate agent has also kept informed about how this couple was doing in the round of bidding.

As the case has been presented, the majority do not find it substantiated that the sellers' wish to help the parents of a colleague to move closer to their daughter was of crucial importance to their decision to choose the buyer. The explanation does not correspond with the statement the sellers made on 18 September 2006 to B, in which reference was made, among other things, to the fact that "we felt we had good contact with these bidders during the showing, and that they took their time in inspecting the property" and that "it was so nice that it was precisely these bidders who bought the house". Nor is this explanation in any other way sufficiently substantiated, nor through the explanation given by the estate agent. The different explanations given at different stages differ in such a way that it appears most probable that importance has been attached to ethnicity in connection with the sale of the property. The majority cannot thus see that the seller has fulfilled his burden of proof.

The majority are of the opinion that the seller acted in breach of section 4 of the Anti-discrimination Act by not accepting the highest bid from B.

The Tribunal's minority, consisting of member Aslak Syse, has considered it such that the sellers have not managed to substantiate that the basis of the sale to C was anything else than that the highest bid was tendered by a person from Iran. Ethnicity was not therefore the reason why B, who had tendered the highest bid, was not allowed to purchase the property. Since the opinion of the minority, would have no bearing on the result, no separate conclusion has been drawn up.

The Tribunal's administrative decision was made with dissenting votes (4-1).

This decision is a final administrative decision that cannot be reviewed by means of an administrative complaint. Pursuant to section 12 of the Act on the Equality and Anti-discrimination Ombud and the Equality Tribunal (the Anti-discrimination Ombud Act) regarding review of Tribunal decisions, the decision may be brought before a court of law for a full review of the case. Legal proceedings for the review of a Tribunal decision must be brought within three months of receipt of notification of the decision. Legal proceedings regarding the validity of a Tribunal decision shall be brought against the State represented by the Tribunal.

CASE 22/2007

The Equality Tribunal has made the following administrative decision:

B was discriminated against in breach of section 4 of the Anti-discrimination Act since the seller did not accept the highest bid for a property.

Oslo, 24 January 2008

Aslak Syse
Chair

Else Leona McClimans
Deputy Chair

Selma Ilyas

Torkjel Nesheim

Hege Skjeie