

LGBTIQ rights in the EU

Iustina Ionescu, Lawyer, Romania



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

1

Topics covered

- Sexual orientation discrimination
- Intersex and transgender rights
- Same sex unions



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

2

Sexual orientation discrimination

- Directive 2000/78, Art.1: discrimination on sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
- Case-law:
 - C-249/96 Grant
 - C-122/99 D and Sweden v. Council
 - C-267/06 Maruko
 - C-147/08 Romer
 - C-81/12 Accept
 - C-267/12 Hay
 - C-507/18 NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford
 - C-356/21 TP (pending)



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

3

C-81/12 Accept, 25 April 2013

- “53. ... Articles 2(2) and 10(1) of Directive 2000/78 must be interpreted as meaning that facts such as those from which the dispute in the main proceedings arises are capable of amounting to ‘facts from which it may be presumed that there has been ... discrimination’ as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.”
- “59. ...Article 10(1) of Directive 2000/78 must be interpreted as meaning that, if facts such as those from which the dispute in the main proceedings arises were considered to be ‘facts from which it may be presumed that there has been ... discrimination’ based on sexual orientation in the recruitment of players by a professional football club, the modified burden of proof laid down in Article 10(1) of Directive 2000/78 would not require evidence impossible to adduce without interfering with the right to privacy.”



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

4

Homophobia beyond employment

- [Infringement procedures against Hungary and Poland](#) on equality and the protection of fundamental rights, launched 15 July 2021.
- Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law
- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

5

C-267/06 Maruko, 1 April 2008

- “72 If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor’s benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.”
- “73 It follows from the foregoing that the answer to the third question must be that the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor’s benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor’s benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor’s benefit provided for under the occupational pension scheme managed by the Vddb.



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

6

C-147/08 Romer, 10 May 2011

- “52 Accordingly, the answer to Questions 3 and 7 is that Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 preclude a provision of national law such as Paragraph 10(6) of the First RGG, under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if
 - – in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership such as that provided for by the LPartG, which is reserved to persons of the same gender, and
 - – there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as they are governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.”



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

7

Intersex and transgender rights

- Gender equality EU law
- Case-law:
 - C-13/94 P v S
 - C-117/01 K v B
 - C-423/04 Richards
 - C-451/16 MB
- Potential cases on legal gender recognition: Freedom of movement, EU citizenship



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

8

C-13/94, P. v. S and Cornwall County Council, 30 April 1996

“20. Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

9

Same sex unions

- Directive 2003/38: freedom of movement
- Case-law:
 - C-673/16 Coman
 - C-490/20 V.M.A.



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

10

C-673/16 Coman, 5 June 2018

“51. ... in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.”

“41 That said, it is established case-law that a restriction on the right to freedom of movement for persons, which, as in the main proceedings, is independent of the nationality of the persons concerned, may be justified if it is based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law (see, to that effect, judgments of 14 October 2008, *Grunkin and Paul*, C-353/06, EU:C:2008:559, paragraph 29; of 26 February 2015, *Martens*, C-359/13, EU:C:2015:118, paragraph 34; and of 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14, EU:C:2016:401, paragraph 48). It is also apparent from the Court’s case-law that a measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective (judgment of 26 February 2015, *Martens*, C-359/13, EU:C:2015:118, paragraph 34 and the case-law cited).”



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

11

C-490/20 V.M.A., 14 December 2021

- “69. Having regard to all of the above considerations, the answer to the questions referred is that Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter, read in conjunction with Article 4(3) of Directive 2004/38, must be interpreted as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child’s parents two persons of the same sex, the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child’s right to move and reside freely within the territory of the Member States.”



Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

12