



**KNUT
MAZURCZAK**
ADVOCACY

PLAN

- protection against discrimination – scope, definitions,
- EU legal framework,
- CJEU case law v. ECHR case law,
- LGBTI+ discrimination cases - what do we really discuss in courts?

Scope, definitions

- LGBTI+ - Lesbian, Gay, Bisexual, Transgender, Intersex.
- Discrimination on the grounds of sexual orientation, gender identity, gender expression, gender characteristics.
- Directives and the Charter mentions only „sexual orientation” and „sex”, „gender”.

Legal framework

The EU Charter of Fundamental Rights

Article 21

Non-discrimination

1. Any discrimination based on any ground such as **sex**, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or **sexual orientation** shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Legal framework

- Council Directive 2000/78/EC of 27 November 2000 (Employment Equality Directive).
- Council Directive 2004/113/EC of 13 December 2004 – equal treatment between men and women in the access to and supply of goods and services.
- Directive 2006/54/EC of July 2006 (Gender Equality Directive – recast) – equal opportunities and equal treatment of men and women in employment, occupation and social security.

Discrimination based on gender identity is not prohibited as such, it's not in the list of one of the directives or even in the Charter,

BUT

transgender people are protected under EU law

([P v. S and Cornwall County Council](#))

EU directives

Grounds/ Fields	Employment	Education	Healthcare	Goods and Services	Other
Sex, gender identity	✓	✗	✗	✓	✗
Race and Ethnic Origin	✓	✓	✓	✓	✗
Age	✓	✗	✗	✗	✗
Disability	✓	✗	✗	✗	✗
Sexual Orientation	✓	✗	✗	✗	✗
Religion & Belief	✓	✗	✗	✗	✗

Case law of the Court of Justice of the European Union (Luxembourg)

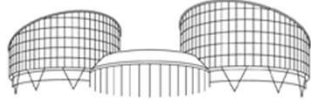
- sexual orientation, gender identity and employment,
- asylum claims based on sexual orientation,
- free movement of same-sex partners (directive 2004/38),
- sexual orientation and blood donation.



Case law of the European Court of Human Rights (Strasbourg)

- freedom from violence, prohibition of torture, asylum,
- freedom of expression, assembly and association ,
- criminal law - bans on same-sex sexual activity,
- discrimination by a public authority in employment, private and family life,
- prohibition from discrimination v. freedom of religion,
- family life – discrimination of same-sex partners, marriage equality, registered partnerships, adoption, surrogacy, access to donor insemination.





EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

vs.



What is unique about EU law for the protection of LGBTI persons' rights?

- protection against discrimination (horizontal effect),
- freedom of movement.

Case law of the Court of Justice of the European Union (Luxembourg)

Employment

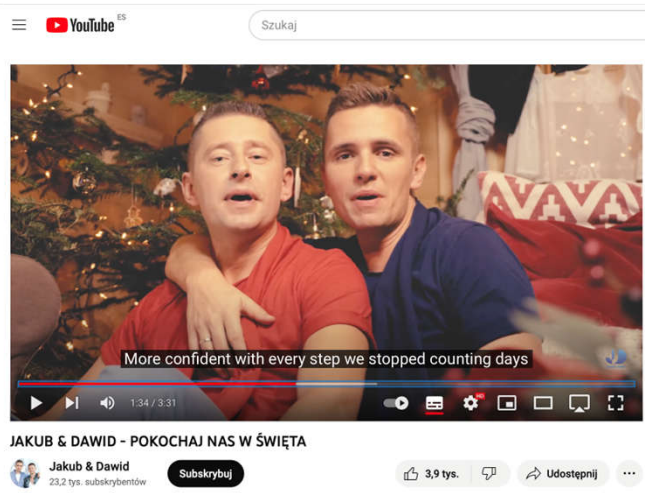
- Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (1 April 2008)
- Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg* (10 May 2011)
- Case C-81/12, *Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării* (25 April 2013)
- Case C-507/18, *NH v. Associazione Avvocatura per i diritti LGBTI — Rete Lenford* (CJEU, 23 April 2020)
- Case C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Cha*
- Case C-258/17, *E.B. v. Versicherungsanstalt öffentlich Bediensteter BVA* (15 January 2019)

Case law of the Court of Justice of the European Union (Luxembourg)

Employment

- Case C-451/16, MB v. Secretary of State for Work and Pensions (5 December 2017),
- C-117/01 , K.B., National Health Service Pensions Agency, Secretary of State for Health (7 January 2004)
- Case C-423/04 Richards v. Secretary of State for Work and Pensions (27 April 2006)

CJEU judgment of 12 January 2023 Case C-356/21, J. K. v. TP S.A.



CJEU judgment of 12 January 2023

Case C-356/21, J. K. v. TP S.A.

- self-employed activity is covered by a 2000/78 directive,
- national legislation can't exclude, on the basis of the freedom of choice of contracting parties, protection against discrimination,
- protection against discrimination covers the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract.

Freedom of movement of same-sex couples

Case C-673/16, Coman & Hamilton v. Inspectoratul General pentru Imigrări (5 June 2018).



Freedom of movement of same-sex couples with one or more children.

Case C-490/20, *V.M.A. v. Stolichna obshtina, rayon
'Pancharevo'* (CJEU, 14 December 2021)

C-2/21 *Rzecznik Praw Obywatelskich* (CJEU, 24 June 2022)



LGBTI+ discrimination cases

What do we really discuss in courts?

- protection from discrimination v. freedom of religion and freedom of choosing a contracting party,
- protection from discrimination v. no marriage equality and wide margin of appreciation, „the fact that a matter falls within the competence of the Member States”.

Discrimination by association in access to goods and services on the grounds of sexual orientation.

Printing company refuses to print a banner with an „LGBT Business Forum” logo.

- **Supreme Court** - freedom of religion < protection from discrimination (judgment of 14 June 2018, II KK 333/17).
- **Constitutional Court** – freedom of religion > protection from discrimination (judgment of 27 June 2019,



Constitutional Court

Judgment

- there is no legal obligation to serve everyone,
- fine is not an appropriate sanction – consumer expects that the service will be delivered, a fine is too harsh,
- in practice fines that are imposed are not very high – the sanction is not effective,
- there are other means of protection – civil law, consumer law.

Dissenting Opinion

- a fine is the only effective measure (antidiscrimination legislation does not cover access to goods and services and sexual orientation),
- hypothetical civil sanctions do not exclude criminal sanctions,
- this sanction is more accessible to the consumer,
- social perception of sanction – more severe is a judgment in a criminal matter than in a civil matter,
- legal costs,

Constitutional Court

Judgment

Dissenting Opinion

- many member states include criminal sanctions for discrimination,
- discrimination is not just a private matter but a public matter – it requires a response from the state, not just individual,
- we live in a democratic, plural society.

Supreme Court

Prosecutor's arguments

Judgment

- | | |
|--|--|
| <ul style="list-style-type: none">• freedom to choose a contracting party,• the right to conscientious objection,• freedom of religion is sufficient justification for refusing to provide a service,• protection from discrimination is for individuals, not NGOs,• Catholic Church is against „homosexuality” and „promoting” LGBTI movements. | <ul style="list-style-type: none">• if a person accepts a publicly available offer – a service obligation arises,• in any case – even if a contract is not yet concluded – a service obligation arises if a service is publicly offered,• freedom of religion – protection from discrimination is a fundamental principle of national and international legislation,• individual view or subjective perception of the Catholic religion is NOT a good enough reason for refusing a service,• freedom of religion is limited (!), |
|--|--|

Supreme Court

Prosecutor's arguments

Judgment

- the right to conscientious objection is reserved for resolving serious moral conflicts and it is not explicitly mentioned in any legal act regulating business activity,
- ECHR does not guarantee that you can always act in accordance with your religion – practicing religion does not include every possible behavior inspired by religion, you can manifest your religion in many different ways outside of your profession,

Supreme Court

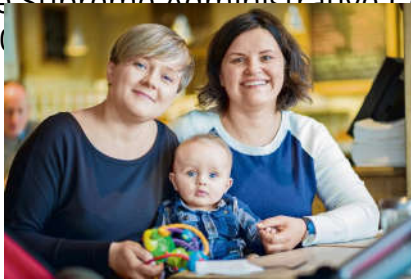
Prosecutor's arguments

Judgment

- if the service itself violates your religion – you can refuse the service, but personal characteristics are never a sufficient reason for denial of service,
- neutral, informative banner with a rainbow logo does not violate any religion,
- no artistic value in providing the printing service,
- Catholic Church requires that LGBT people be treated with „dignity, compassion and respect”.

Freedom of movement of rainbow families – registering a foreign birth certificate indicating 2 mothers.

- **Administrative Supreme Court** – national family law
< Polish birth certificate (judgment of 10 October 2018,
II OSK 2552/16).
- **Administrative Supreme Court** – national family law
> Polish birth certificate (decision of the Panel of 7
Judges of the Supreme Administrative Court of 2
December 2019).



Administrative Supreme Court 2018

Panel of 7 judges 2019

- marriage is a union between men and a women – only mother and a father are parents,
- family law falls within the competence of the Member States.

Thank you for your attention!
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