The Cases of Maruko & Römer

Prohibition of Discrimination on Grounds of Sexual Orientation

The Anti-Discrimination Directives 2000/43 and 2000/78 in Practice

Seminar at the Academy of European Law 22-23 February 2010
I. Underlying Human Rights

II. Previous ECJ Case Law

III. The Tadao Maruko Case

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VI. Outlook
I. European Court of Human Rights:

- The central tenet of human rights is respect for human dignity and freedom.
- Recognition of personal autonomy is an important principle of interpretation when applying the right to respect for private life.
- Sexuality and sex life are core elements in the fundamental right to the protection of private life. State regulation of sexual behaviour infringes on this right; such interference is only justified if it is proven to be necessary in order to shield others from harm (pressing public need, proportionality).
- The views and values of a majority definitely cannot justify interference in the right to private life (or, indeed, other fundamental rights).

• Discrimination on grounds of sexual orientation
  – is unacceptable
  – is as serious as discrimination on grounds of race, ethnic origin, religion and sex
  – any differentiation must have particularly important reasons

• Not just negative rights to freedom from state interference
but also
• positive rights to (active) protection of these rights - from the state and from other individuals

• obligation of the state to take action in response to impairment of the right to free personal development and the right to enter into and maintain personal relationships

(Zehnalová & Zehnal v. CZ 2002)
(a) *Grant v. South West Trains* 1998 (C-249/96)
Female employee was denied benefits for her female partner that a male employee had been granted for his female partner
- No discrimination on grounds of sex pursuant to Art. 141 EC Treaty

(b) *D. & Sweden v. Council* 2001 (C-122,125/99)
No household allowance for same-sex partner (in a civil partnership registered in Sweden) of a (Swedish) public servant working for the Council, although public servants in the same situation did receive this allowance for marital partners
- No discrimination on grounds of either sex or sexual orientation
The Community legislator responded to both judgments:

1. Grant (1998) -> *Dir. 2000/78/EC*

   (Amendment to Staff Regulations):
   a. Prohibition of discrimination (Art. 1d (1))
   b. Registered civil partnership to be treated in the same way as marriage if marriage is not possible (Art. 1d (1) in conjunction with Annex VII Art. 1 (2c))
III

Tadao Maruko versus
Versorgungsanstalt der deutschen Bühnen (VddB)
(C-267/06)

Hans Hettinger:  -> costume designer
                -> member of VddB for 45 years
                -> paid fees for 45 years like his heterosexual colleagues
                -> partnership with Mr Tadao Maruko for 13 years
                -> died in 2005

VddB:  -> survivor’s pension only for marital partner
        -> no pension paid to Tadao Maruko

Tadao Maruko:  -> sued (BayrVG Munich M 3 K 05.1595)
BayrVG: reference to ECJ for a preliminary ruling
1. direct discrimination?
2. discrimination admissible under Recital 22?

Recital 22:
“This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.”

VddB & UK -> Unequal treatment of marriage and civil partnership falls outside the scope of the Directive because of Recital 22
Tadao Maruko:

1. **Direct discrimination:**
   (similar to construction on pregnancy being discrimination on grounds of sex):
   -> can be left aside here because in any case

2. **Indirect discrimination:**
   -> not only in case of civ. part. equivalent to marriage
   -> if same-sex couples are not allowed to marry:
   case constructed on marriage is always merely “apparently neutral” and puts homosexuals “at a particular disadvantage” (Art. 2 (2b))
   -> Benefit is contingent on a condition which same-sex couples can never fulfil
   -> As in **K.B. judgment** (2004) (heterosexual couple with one post-operative transgender partner unable to marry):
   Marriage requirement may not be applied to same-sex couples (as long as they are not allowed to marry)
   -> Not only in case of registered partnership equival. to marriage
   -> Otherwise: **minor discrimination** (in MS with civ. part. equivalent to marriage) is prohibited, but not (in MS without civ. part.) major discrimination (despite identically unequal treatment)
European Commission & Advocate-General Dámaso Ruiz-Jarabo Colomer:

-> No direct discrimination (as not constructed on sexual orientation)

-> Indirect discrimination & no apparent justification

-> But only if a registered partnership is equivalent to marriage (with “substantially the same effects”), otherwise lack of valid parameters for comparative purposes

Problem of comparative parameters: *Marriage – civil partnership or heterosexual – same-sex couple?*
• Recital 22:
  (a) Marital status and benefits dependent thereon fall within the competence of Member States, but
  (b) in exercising that competence Member States must comply with the Community principle of non-discrimination
  (c) Recital 22 cannot affect the application of the Directive (para. 59f)

• Direct discrimination
  -> If civil partners “in a comparable situation” to marital partners (paras. 70-73)
    Art. 2 (1a) Dir. 2000/78/EC: “direct discrimination … where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1”.

    Justifications only as defined in Art. 4 (1): “genuine and determining occupational requirement”
The “comparable situation”

(1) Formally:
   to be assessed and determined by the national court (para. 72f)

(2) Substantively:
   -> “comparable”, not “identical” (para. 69)
   -> “so far as concerns that survivor’s benefit” (para. 73)
   -> in this specific individual case, compared with the “situation … of a spouse who is entitled to the survivor’s benefit provided for under the occupational pension managed by the VddB” (para. 73)
   -> criteria of the national court (paras. 62, 69):
      (a) formally constituted for life
      (b) union of mutual support and assistance
ECJ does not oppose these criteria and explicitly reasons:

"Article 1 in conjunction with 2 of Directive 2000/78 precludes legislation such as that at issue in the main proceedings..."

(author’s emphasis)

Compare the reasoning in the Palacios case (2007):

“The prohibition on any discrimination on grounds of age ... must be interpreted as not precluding national legislation such as that at issue in the main proceedings..., where...”

(author’s emphasis)
The Resistance

Decisions on family allowance pursuant to law on civil service pay (§ 40 (1,i) BBesG)

Bundesverwaltungsgericht /Federal Administrative Court
(2 C 33.06, 15/11/2007):

Not comparable because

- civil partnership and marriage are not the same
  (differences, e.g. in social benefits for civil servants, in tax law and in adoption)

- complete or general equality neither enacted nor intended by the legislator
Bundesverfassungsgericht / Federal Constitutional Court (2 BvR 1830/06, 06/05/2008):

Not comparable because

-> no general statutory equality
   (a) equality not intended by the legislator
   (b) no blanket clause
   (c) specific rules which deviate from marriage

-> no complete equality in specific case of public service
   (differences still apply in law on pay and pensions for civil servants)

-> marital partner typically requires maintenance, civil partner typically does not

-> the fact that under civil law, maintenance obligations are the same in both cases is irrelevant to the matter in hand
Problems:

- General equality
  -> circular reasoning (if there was general equality, the question of discrimination would never have arisen)

- Specific equality (in access to social benefits) in public service
  -> circular reasoning (discrimination justified by other discrimination)

- Typical/atypical need for maintenance:
  -> approach founded on abstract categorisation conflicts with ECJ approach founded on concrete individual case
  -> family allowance does not depend on maintenance needs (it is also granted to civil servants without children whose spouses are on a higher income)
V. The Solution

Bavarian Admin. Court in Munich 30/10/2008

- Awarded survivor’s pension
- surviving civil and marital partners in comparable situations because
  (a) purpose of survivor’s pension is to provide maintenance, and
  (b) maintenance obligations are identical in civil and marital partnerships
Federal Constitutional Court
(1 BvR 1164/07, 7 July 2009)

• Quashed its own ruling and that of the Bavarian Administrative Court (para. 112)
• “More stringent control yardstick” in the case of discrimination on grounds of sexual orientation (paras. 85, 88)
• “Mere reference to marriage and its protection” is no justification (Art. 100)
• Promotion of family is not limited to married parents (para. 103)
• Number of children (2,200) in RPs (13,000) “not at all negligible” (para. 113)
• “Substantial differences” required (between & RP) (para. 93)
• “Inner connection” (“of sufficient weight”) “between the differences found and the differentiating provisions“ (paras. 86, 100)
• Actual differences must be identified on the basis of *concrete realities of life*, not by means of abstract considerations (paras. 112, 114, 115)

• No such differences (paras. 102, 111-113):
  (a) permanently assumed, legally binding responsibility
  (b) maintenance obligations
  (c) need for maintenance

• Purpose of survivor’s pension is *replace maintenance* (par. 116, 119)

  -> RPs are entitled to same survivor’s pension as married partners

  Maruko

  -> VddB withdrew appeal
  -> final judgment & Tadao Maruko receives survivor’s pension
VI.

Outlook

• Initial rulings of the Federal Administrative Court and the Federal Constitutional Court
  -> conflicted with ECJ on Maruko

• If the situation of civil and marital partners is not comparable
  -> then question of indirect discrimination (due to construction of case on the exclusively heterosexual criterion of marriage)
  -> Duty to refer to ECJ for preliminary ruling
New Case

*Römer v. Stadt Hamburg*
(C-147/08)

-> Retirement pension higher for marital partner than for civil partner
-> even if marital partner earns higher income and marriage is childless
-> even if civil partner is in need of maintenance and there are children to care for

-> Will the ECJ be more specific about the Maruko judgment?
-> Will it take a stand on indirect discrimination?