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The Cases of

Maruko & Römer

Prohibition of Discrimination on Grounds of Sexual Orientation

The Anti-Discrimination Directives

2000/43 and 2000/78 in Practice

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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).

(*Dudgeon v. UK* 1981, *Norris v. Ireland* 1988, *Modinos v. Cyprus* 1993, *Laskey, Brown & Jaggard v. UK* 1997, *Lustig-Prean & Beckett v. UK* 1999; *Smith & Grady v. UK* 1999; *A.D.T. v. UK* 2000, *Christine Goodwin v. UK* 2002, *I. v. UK* 2002, *Fretté v. France* 2002, *L. & V. v. Austria* 2003, *S.L. v. Austria* 2003)

- 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

(Lustig-Prean & Beckett v. UK 1999; Smith & Grady v. UK 1999; Salgueiro da Silva Mouta v. Portugal 1999; L. & V. v. Austria 2003, S.L. v. Austria 2003, E.B. v. France 2008)

- 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)

II

Previous ECJ Case Law

(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*
2. D. & Sweden (2001) -> *Reg. (EC, EURATOM) 723/2004*
(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

-> 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

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))

-> 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?*

The Judgment

(01/04/2008)

- *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)*

IV

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?



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