

# Sexual orientation discrimination and the ECJ cases *Maruko* and *Römer*

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Trier, 15 November 2011

# Protection against discrimination due to sexual orientation in the EU law

- Article 19 TFEU (ex Article 13 TEC) – competence clause
- Article 21 of the EU Charter of Fundamental Rights – non-discrimination principle
- Directive 2000/78/EC
  - employment, access to promotion of employment services, recruitment, organizations of employees etc.
- Proposal for a new „horizontal” directive
  - housing, social benefits, education, access to goods and services publicly offered, health services

# Scope of EU Directives

	Employment relations	Occupation, professional life	Social security	Health protection	Education	Access to public goods and services
Gender	x	x	x			x
Racial or ethnic origin	x	x	x	x	x	x
Religion or belief	x	x				
Sexual orientation	x	x				
Age	x	x				
Disability	x	x				

# EU law vs. ECHR

- protection of human rights - two „speeds” in Europe
- development of case-law under Directive 2000/78/EC
- sexual orientation as ground covered by Article 14 ECHR and Protocol No. 12
- constraints:
  - Article 14 may be used only in conjunction with other right (e.g. *Bączkowski v. Poland*, freedom of assembly)
  - Protocol No. 12 may refer to discrimination in any legal provisions (e.g. exclusion from blood donation of LGBT persons)
  - Protocol No. 12 is ratified by only a few countries (almost no jurisprudence)

# „Old” ECJ case-law concerning sexual orientation discrimination

- *Case 13/94, P v. Sand Cornwall County Council*
  - dismissal of transgender person due to a decision to change sex
  - ECJ – dismissal prohibited under sex discrimination directive
- *C-249/96, Grant v. South-West Trains*
  - Is sexual orientation discrimination one of types of discrimination due to sex?
  - No recognition by the ECJ
  - in fact good effect of a case (clear distinction between sex discrimination and sexual orientation discrimination)

# „Old” case-law

- C-117/01, *K.B. v. National Health Service*
  - Right to inherit pension after deceased transsexual partner
  - Lack of possibility, because the law did not provide for entering into marriage for a person after the change of sex
  - ECJ – discrimination due to sex (Article 141 EC Treaty)
- C-122/99, C-125/99, *D and Sweden v. Council*
  - ECJ: according to general definition accepted by most Member States marriage is a union of persons of different sex
  - Non-recognition of same-sex couples equal rights to social benefits under internal EU rules of employment

# Directive 2000/78/EC – short overview

- Sexual orientation as a prohibited ground
- Broad scope of Directive 2000/78/EC
  - not only individual cases of dismissals and lack of promotion, but also labour consequences for same-sex couples
  - announcement for work (... to employ somebody in a stable relationship, seeking for marriage to run family business...)
- Discrimination by association:
  - e.g. recognition of somebody as gay person, but in fact a person is heterosexual
  - active work for promotion of LGBT rights (*Mirosław Sielatycki* case)

Extreme rare examples of using „sexual orientation” as an objective ground

- e.g. Sweden – it is possible to recruit gay to work with HIV infected homosexual persons

# Breakthrough – *Tadao Maruko*

- C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1 April 2008
- Registered partnership of two men (under German law)
- Partner of Tadao Maruko worked in a theatre and under collective bargaining was socially insured in VddB (pension fund of German theatres)
- Partner – death in 2005; request by Tadao Maruko to give him „widow” pension
- Internal VddB provisions – lack of such possibility for registered partners - refusal
- Complaint to court – preliminary reference to ECJ



# Legal issues in *Tadao Maruko*

- Applicability of Directive 2000/78/EC to social benefits
- Directive 2000/78/EC and rights stemming from registered partnership
- Direct or indirect discrimination
- Applicability of standards to states not having registered partnership scheme

# ECJ judgment in *Tadao Maruko*

- Widow pension is strictly connected to the employment contract – „remuneration” under the Directive 2000/78/EC
- Right to widow pension after deceased partner
- Direct discrimination – surviving married partners vs. surviving partners in registered partnership
- If a legal system provides for registered partnership with rights being similar to marriage – differentiation of a legal situation of surviving partner is discriminatory (as compared to marriage)
- Instruction to German courts to consider comparability

# On the road to *Römer*

- C-144/04, *Mangold* – general principle of EC law prohibition of discrimination due to age
- C-555/07, *Seda Küçükdevici* – enhancement of the principle:
  - direct reference to Article 21 of the EU Charter of Fundamental Rights
- Report of the EU Fundamental Rights Agency on Legal Aspects of Homophobia (road map for the EU)
  - Recommendation to recognize same-sex couples' rights (even by virtue of jurisprudence)
- Viviane Reding – equal rights for travelling same-sex marriages and registered partnerships

## *C-147/08, Römer* – basic facts

- Juergen Römer – retired employee of City of Hamburg
- Since 1969 he lives in a stable partnership. In 1999 he entered into City of Hamburg's partnership scheme, and in 2001 into „life partnership” under general federal legislation
- Mr. Römer complains that his pension paid by City of Hamburg is lower than pension paid to married pensioners (difference of approx. 600 EUR)
- Law provided for a difference in pension if you have registered same-sex partnership or different sex marriage (belonginess to different basic „class” for purposes of calculation.
- Labour Court asked the preliminary question to the Court of Justice

# Opinion of the Advocate General Niilo Jääskinen in *Römer* (15 July 2010)

- Applicability of Directive 2000/78/EC to the case – may pension be regarded as a „remuneration” within the meaning of Article 141 EC Treaty
- System of pensions provided by City of Hamburg is a „second pillar”; pension depends on employment
- Preamble to the Directive – point 22 – Directive does not extend a right to pass law on civil status and relevant benefits
- Marriage and registered partnership – competence of the EU Member States – therefore point 22 is not violated
- But – in the opinion of AG – lack of any regulation concerning same-sex couples violates their dignity, but it is outside scope of EU law.

# Opinion of the Advocate General Niilo Jääskinen - ctd.

- If there is a scheme in the Member State – Directive 2000/78/EC guarantees equal treatment as regards all the employment benefits available to married couples
- Direct discrimination – if: (1) scheme is similar to marriage (comparability of rights), and (2) exclusion of some benefits for same-sex couple which are at the same time available to heterosexual marriage;
- Indirect discrimination – if (1) registered partnership is inferior to marriage, (2) exclusion of some benefits available to marriage
- Prohibition of discrimination due to sexual orientation – general principle of EU law – reference to *Kucukdevici*, *Mangold* and EU Charter of Fundamental Rights
- Consequence – applicability of the general principle to any field of application of the EC law

# *Römer*, judgment of CJ EU of 10 May 2011

- Supplementary retirement pension – „pay”
- Judgment restricted only to states which have same-sex partnerships or marriages
- Direct discrimination
- Comparability of benefits granted to registered partners and to couples in marriage (rights and obligations of spouses and partners)
- Task for the domestic courts to make a comparison of institutions (and to consider which factors may justify different treatment)
- In fact – judgment quite similar to *Maruko*

# Parallel development of the ECHR law

## ***Kozak v. Poland*, appl. no. 13102/02, judgment of 2 March 2010**

- New concept of family emerging in social life, see also „Kozak bis” case (Warsaw) and cases of Wrocław District Court

## ***Schalk and Kopf v. Austria*, application No. 30141/04, judgment of 24 June 2010**

- Applicability of concept of marriage to same-sex couples

## ***Chaplin and Charpentier v. France*, application No. 40183/07 (communicated case)**

- Right to enter into same-sex marriage

## ***X and others v. Austria*, application No. 19010/07 (communicated case)**

- Right to adopt child by stepmother (lesbian partner)



# Potential problems, cases and challenges

- Labour Code and the Law of 3 December 2011 on „equal treatment”
- Harassment by police officers due to sexual orientation
- Parental rights of homosexual parents (Wroclaw case)
- Hate speech cases
- Recognition of rights of same-sex partners
- Transborder dimension of EU law
  - *Garcia Avello* case – right not to be discriminated in exercise of personal rights when changing place of residence
  - Case decided by the Regional Administrative Court in Gdańsk (issuance of non-marry certificates)
- Importance of the British-Polish Protocol to the EU Charter

**Thank you for your attention!**

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