

Discrimination
on grounds of race, religion
and sexual orientation:
main features and recent case law

„APPLYING EU ANTI-DISCRIMINATION LAW”
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The role of a judge in adjudicating cases concerning discrimination

- Know and apply:
 - EU law (primacy and direct effect of EU law) and CJEU case law
 - International law (UN and Council of Europe conventions) and cases of judicial and quasi-judicial organs concerning individual or group violations of human rights
- Interpret national law in accordance with EU law and international law
- Refer preliminary questions to the CJEU on validity and interpretation of EU law
- Give effect to judgments of international courts

Multi-level protection against discrimination

UNITED NATIONS

- **International Covenant of Civil and Political Rights (1966)** + individual complaint to the Human Rights Committee
- **Convention on Elimination of Racial Discrimination (1965)** + individual complaint to the Committee on Racial Discrimination
- other UN treaty bodies: CEDAW, CERD, CRPD, etc

COUNCIL OF EUROPE

- **European Convention of Human Rights (1950)**
- Protocols to the Convention, including Protocol no. 12 (2000)
+ individual complaint to European Court of Human Rights
- **European Social Charter (1996)**
+ collective complaint to European Committee of Social Rights

EU anti-discrimination law

- Art. 10 TFUE

combating discrimination with regard to sex, **race and ethnic origin, religion and belief**, disability, age and **sexual orientation** in all actions and policies of the EU

- Art. 19 TFUE

competence to take actions to combat discrimination with regard to the above grounds and **harmonize laws** of Member States in the area of anti-discrimination

- Art. 21 Charter of Fundamental Rights

prohibition of 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

EU anti-discrimination law concerning race, religion and sexual orientation

- **Racial Equality Directive** - Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- **Framework Directive** - Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
- Pending:
- Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426.
- CJEU case law concerning race, religion and sexual orientation: scarce due to a small number of cases (preliminary references)

Racial Equality Directive 2000/43/EC

- Direct and indirect discrimination
- Harrasment, incitement to discriminate
- Material scope – very broad – public and private actions
- Genuine and determining occupational requirements
- Positive actions (measures)
- Minimum requirements at the national level
- Effective remedies
- Burden of proof shift
- Prohibition of victimization
- Establishment of an equality body

Racial Equality Directive

2000/43/EC

Material scope:

- conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions
- access to vocational training
- employment and working conditions
- memberships in trade unions
- social protection, social security and healthcare
- social advantages
- education
- access to goods and services available to public, including housing

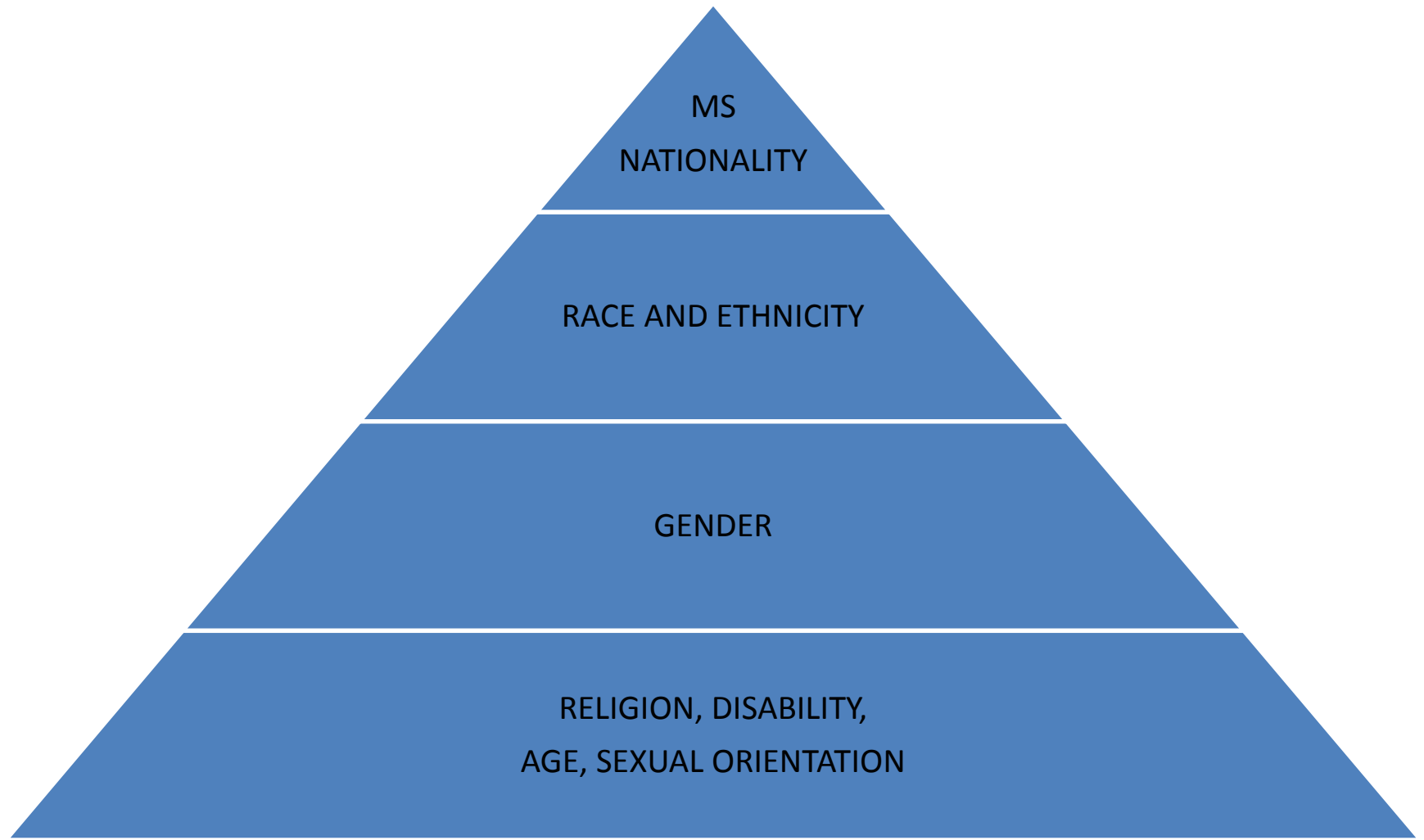
Framework Directive 2000/78/EC

- Direct and indirect discrimination
- Harrasment, incitement to discriminate
- Material scope – narrow, but covers public and private actions
- Genuine and determining occupational requirements
- Positive actions (measures)
- Minimum requirements at the national level
- Effective remedies
- Burden of proof shift
- Prohibition of victimization

Framework Directive 2000/78/EC

- Prohibition of discrimination with regard to religion or belief, disability, age and sexual orientation
- Material scope:
 - conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions
 - access to vocational training
 - employment and working conditions
 - memberships in trade unions
- No progress with regard to the horizontal directive (!)

Hierarchy of protected grounds in the EU



Hierarchy of the protected grounds

	EMPLOYMENT	SOCIAL SECURITY	GOODS AND SERVICES	EDUCATION
RACE AND ETHNICITY	2000/43/EC	2000/43/EC	2000/43/EC	2000/43/EC
GENDER	2006/54/EC	79/7/EEC	2004/113/EC	
RELIGION DISABILITY AGE SEXUAL ORIENTATION	2000/78/EC			

Consequences of the hierarchy of protected grounds in the national law

- If the national law adopts only a minimum standard required by EU directives, there is no protection against discrimination with regard to religion or belief, disability, age or sexual orientation in the area of:
 - social protection, social security and healthcare
 - social advantages
 - education
 - access to goods and services available to public, including housing
- in this Member State.

ECHR anti-discrimination provisions

- Art. 14 ECHR

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

- Protocol No. 12

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Race and ethnic origin

Race and ethnic origin

- No definition of race and ethnic origin in the EU law
- Race and ethnic origin may overlap with national origin, language and religion
- Judge-made definition of race and ethnicity by ECtHR (*Timishev v. Russia*, 2005)
- „Ethnicity and race are related and overlapping concepts; the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin color or facial characteristics, while ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds”
- **Outside the application scope of Directive 2000/43/EC:**
- different treatment on the basis of nationality with regard to entry and residence of third-country nationals and their access to employment and to occupation (Article 3(2) and Recital 13 of the Preamble)

Framework Decision on combating racism and xenophobia

- Council Framework Decision 2008/913/JHA
- the following intentional acts are punishable by effective, proportionate and dissuasive penalties of a maximum of at least one to three years imprisonment:
- **public incitement to violence or hatred** directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin;
-
- **public dissemination or distribution** of tracts, pictures or other material containing expressions of racism and xenophobia;
- **public condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes** as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group.

Problems with the Application of Racial Equality Directive

- Low awareness of rights among the potential victims of racial discrimination
- Underreporting
- Barriers in access to justice
- Narrow mandate of equality bodies (lack of judicial functions)
- Rigid rules of participation in court proceedings for social organizations
- Lack of deterring effect of sanctions (in the context of labour relations) – symbolic sanctions or merely signaling discrimination violate EU anti-discrimination directives (C-81/12 ACCEPT)
- Lack of preventive approach, instead of current reactive approach to racial discrimination
- Lack of statistical data concerning discrimination on the ground of race and ethnicity (sensitive data) – no obligation to collect equality data established in the directives, but important for policy-making, proving indirect discrimination or situation testing
- Additional obligations following from CERD
- Elimination of stereotypes through education and media

Positive actions (measures)

- Positive action reported for the Roma take place in four key sectors: employment, housing, education and healthcare (EU framework for national Roma integration strategies)
- Council Recommendation on effective Roma integration measures in the Member States adopted on 9 December 2013
- it is recommended that the Member States „with a view to promoting the full equality of Roma in practice, take effective policy measures to ensure their equal treatment and the respect of their fundamental rights, including equal access to education, employment, healthcare and housing”.
- „This goal could be achieved either by means of mainstream measures or by means of targeted measures, including specific measures to prevent or compensate for disadvantages, or by a combination of both, paying special attention to the gender dimension.”
- http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lisa/139979.pdf

C-54/07 *Feryn* (2008)

- First preliminary judgment concerning Directive 2000/43/EC
- *Actio popularis* - the Belgian equality body - Centre for Equal Opportunities and Combating Racism - can bring legal proceedings in cases of actual or potential discrimination, even if there is no identifiable complainant
- Public refusal to employ immigrants - direct discrimination
- Discriminatory statements - presumption of a discriminatory policy
- For the employer to show the actual recruitment practice does not correspond with the statement

Feryn

- **The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment** within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.
- **Public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory** within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment.
- **Article 15 of Directive 2000/43 requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.**

Feryn - sanctions

- „If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings..” (par. 39).

C-394/11 *Belov* (2013) – opinion of AG Kokott

- **The existence of direct or indirect discrimination within the meaning of Article 2(2) of Directive 2000/43 does not require an infringement of rights or interests defined in law.** Rather, any form of behaviour is sufficient in which one person is treated less favourably than another is treated on grounds of racial or ethnic origin or which could put persons of a racial or ethnic origin at a particular disadvantage compared with other persons.
- **National rules which make the existence of discrimination dependent on the infringement of rights or interests defined in law are incompatible with Directive 2000/43.** The national court must interpret domestic law in this regard in conformity with EU law and, if that is not possible, it is obliged not to apply national legislation which is contrary to the prohibition of discrimination, established as a fundamental right.
- **It is sufficient for a reversal of the burden of proof under Article 8(1) of Directive 2000/43 that persons who consider themselves wronged because the principle of equal treatment has not been applied establish facts which substantiate a prima facie case of discrimination.**
- If consumers are normally provided with free electricity meters which are installed in or on buildings, such that they are accessible for visual checks, whilst in districts inhabited primarily by people belonging to the Roma community such electricity meters are attached to electricity poles at an inaccessible height of 7 m, **there is a prima facie case of indirect discrimination based on ethnic origin** within the meaning of Article 2(2)(b) in conjunction with Article 8(1) of Directive 2000/43.
- **Such a measure may be justified if it prevents fraud and abuse and contributes to ensuring the quality of the electricity supply in the interest of all consumers, provided**
 - no other, equally suitable measures can be taken to achieve those aims, at financially reasonable cost, which would have less detrimental effects on the population in the districts concerned, and
 - the measure taken does not produce undue adverse effects on the inhabitants of the districts concerned, due account being taken of the risk of an ethnic group being stigmatised and of the consumers' interest in monitoring their individual electricity consumption by means of a regular visual check of their electricity meters.

Belov

- CJEU:
- Judgment of the Court of 31 January 2013.
- Valeri Hariev Belov v CHEZ Elektro Bulgaria AD and Others.
- No jurisdiction to rule on a preliminary question posed by an equality body with no judicial functions (Commission for the Protection against Discrimination)

C-83/14 *CHEZ Razpredelenie Bulgaria* (pending)

- Preliminary reference made by the administrative court in Sofia (17 February 2014)
 - 1) The meaning of the expression „ethnic origin” (local Roma – Bulgarian citizens)
 - 2) The meaning of the expression „comparable situation”
 - 3) The meaning of the expression „less favourable treatment” in the context of the facts of the case
 - 4) Is it permissible that the implementation of Directive 200/43/EC requires that discrimination takes place only if there was an infringement of a statutory right or legitimate interest?
 - 5) The meaning of the expression „apparently neutral practice” in the context of the case
 - 6) Does indirect discrimination take place if the action or practice concerns only Roma?
 - 7) The meaning of the expression „a particularly less favourable position” and „a more unfavourable position”
 - 8) Is the practice in this case objectively justified by a legitimate aim (of providing the security of the electricity network and the correct recording of electricity consumption) and in the light the consumers’ right to free access to electricity meter readings?

Racial discrimination before the ECtHR

Timishev v. Rosja (2005)

- no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified

Nachova and Others v. Bulgaria (2005), *Fedorchenko and Lozenko v. Ukraine* (2012)

- Violation of Article 2 in conjunction with Article 14 ECHR due to lack of effective investigation on racial motivation of killing of a Roma by a military police officer / in result of setting fire on Roma house by the major police officer

Abdu v. Bulgaria (2014)

- Violation of Article 3 in conjunction with Article 14 ECHR with regard to the lack of effective investigation concerning a violent, racially motivated attack on a Sudanese refugee and the racially motivated decision to discontinue investigation

Sejdić and Finci v. Bosnia and Herzegovina (2009)

- ineligibility to stand in elections violates Art. 14 i.c.w. Art. 1 Protocol 1 (parliamentary elections) and Protocol 12 (presidential elections)

Racial segregation of Roma before ECtHR

D.H. and others v Czech Republic (2007); *Orsus v. Croatia* (2010)

- Segregation in schools based on eligibility test or language proficiency – indirect discrimination
- „In these circumstances, the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.” (par. 188).

Horváth i Kiss v. Hungary (2013)

- Misplacement of a Roma child in a school for mentally disabled children
umieszczeniu w szkole specjalnej

Sampanis and others v. Greece (2012) ; *Lavida and others v. Greece* (2013)

- Running the only-Roma school violates Article 14 in conjunction with Art. 2 of Protocol No. 1.

Roma discrimination

Nachova and Others v. Bulgaria (2005)

- violation of Art 14 i.c.w. Art. 2 (procedural aspect) for a failure to investigate racial motives of a murder

Stoica v. Romania (2008)

- *alleged that the ill-treatment by the police and the decision not to prosecute was racially biased*
- *violation of Art. 3 (material and procedural aspects) and Art. 14 (racially biased investigation)*

Paraskeva Todorova v. Bulgaria (2010)

- Violation of Art. 14 i.c.w. Art. 6 para. 1 on account of the court's refusal to suspend the sentence for a Roma woman in order to avoid the impression of impunity among Roma

Koky and others v. Romania (2012)

- Violation of Art. 3 (procedural aspect) for a failure to investigate racial motives of an assault

No discrimination of Roma (?)

Roma women sterilization

- *V.C. v. Slovakia* (2011) – violation of Article 3 and 8 ECHR
- *K.H. v. Slovakia* (2009) – violation of Article 8 and 6 par. 1 ECHR
- No discrimination

- *A.S. v. Hungary*, CEDAW (2004) – sterilization without consent amounts to sex discrimination

Refusal to live in caravans on one's land

- *Buckey v. UK* (1996), *Chapman and others v. UK* (2001)
- Objective and reasonable justification
- No violation of Art. 1 Protocol No. 1 and no discrimination

Disparate treatment of Roma

- EU / ECSR / ECtHR

- EU
- no legal action in response to Roma evictions and expulsions in France – violation of Racial Equality Directive and Citizens’ Directive (?)
- ECSR
- *Centre on Housing Rights and Evictions v. France* (2011) – the French zero tolerance policy towards East European Roma living in illegal camps in violation of the European Social Charter.
- ECtHR
- case law on Roma evictions – violation of Art. 8 of the Convention
- *Connors v. UK* (2004)
- *Yordanova and others v. Bulgaria* (2012)
- *Winterstein v. France* (2013)

Religion

Religious exceptions to equal treatment

Art. 4 Directive 2000/78/EC

- both religion and sexual orientation can constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate
- a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.
- the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Religious exceptions – in practice

- Art. 4 Directive 2000/78/EC as a defense to unequal treatment needs to be narrowly construed
- Proportionality analysis of the post requirements

ECtHR

- *Schüth v. Germany* (2010) – dismissal of a Catholic choirmaster in violation of Article 9 of the Convention
- *Obst v. Germany* (2010)– dismissal of a PR director of the Mormon’s Church – no violation of Article 9 of the Convention
- *Siebenhaar v. Germany* (2011) – dismissal of a Catholic manager of a Protestant kindergarten who took up additional employment in another religious educational institution established by another Protestant community– no violation of Article 9 of the Convention

Religion v. sexual orientation

Vaasa Administrative Tribunal, Finland, vaasan Hallinto-oikeus - 04/0253/3.

- Finnish case – the Lutheran Church does not have the right to deny a homosexual the appointment for a chaplain, since no mention of sexual orientation in its internal rules

Eweida, Chaplin, Ladele and McFarlane v. UK (2013)

- national courts – dismissal based on the refusal to carry out the duties of a registrar, not based of religious beliefs
- otherwise the decision would amount to discrimination on the basis of sexual orientation
- balancing between individual rights of non-discrimination and the community's right to non-discrimination.

Discrimination with regard to religion or belief

Conscientious objection

- *Pichon and Sajous v France* (inadmissible) – refusal to sell contraceptives does not fall under the scope of protected religious freedom
- *Dojan and others v. Germany* (inadmissible) – mandatory sex education in public schools does not violate the right of parents to educate the children according to their faith

Exceptions for religious minority

- *Grzelak v. Poland* (2010) and *Jakóbski v. Poland* (2010)

Religious symbols in public space

- *Lautsi v. Italy* (2011)
- *Eweida and Chaplin v. UK* (2013)

Headscarf cases

- *S.A.S v. France* (pending)

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Sexual orientation

C-267/06 *Tadao Maruko* (2008)

- Directive 2000/78/EC
- Same-sex partnerships have the same right to employment-related benefits as marriages
- Survivor's benefits granted under an occupational pension scheme constitute 'pay' and fall in the material scope of the Directive
- In Germany „a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in the main proceedings.” (part. 69)
- „Mr Maruko and the Commission maintain that refusal to grant the survivor's benefit at issue in the main proceedings to surviving life partners constitutes indirect discrimination within the meaning of Directive 2000/78, since two persons of the same sex cannot marry in Germany and, consequently, cannot qualify for that benefit, entitlement to which is reserved to surviving spouses. In their opinion, spouses and life partners are in a comparable legal situation which justifies the granting of that benefit to surviving life partners.” (par. 63).
- „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.” (par. 72).

C-147/08 *Römer* (2011)

- Directive 2000/78/EC
- Supplementary pensions constitute 'pay' and fall in the material scope of the Directive
- Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 preclude a provision of national law (...), 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 (...), 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 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.

C-267/12 *Frédéric Hay*

- Directive 2000/78/EC
- Refusal to grant the days of special leave and the marriage bonus granted for staff who got married to an employee who entered the civil solidarity pact (PACS)
- Preliminary reference: does the refusal to grant the staff benefits constitute indirect discrimination and does the national law allowing only persons of different sex to marry constitutes a legitimate, appropriate and necessary aim such as to justify this discrimination?
- Preliminary question rephrased by CJEU:
- do the provisions of the Framework Directive preclude a collective agreement, under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry?

Hay

- Discrimination presupposes weighing up two comparable, but not identical situations
- the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned – it follows from *Maruko* and *Römer* that that national authorities must compare the situations on the basis of an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage
- Thus, the differences between marriage and PACS concerning property, succession or parenthood are irrelevant for this case
- Refusal to grant the benefits to employees who entered into PCS constitutes direct discrimination with regard to sexual orientation because the national law reserves the benefits only to spouses
- Direct discrimination is not subject to justification (moreover the legitimate aim was not raised in the course of national proceedings)

C- 81/12 *ACCEPT* (2013)

- Public statement about no-gay policy regarding selection of football players to the national team by the main shareholder
- Probatio diabolica if the club has to show that the actual selection contradicts the statement
- facts such as those from which the dispute in the main proceedings 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.
- 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 direct or indirect discrimination’ based on sexual orientation during 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.**
- Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret the national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

C-199/12, C-200/12, C 201/12 - X, Y, Z (2013)

- Preliminary reference made by the Dutch Council of State:
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
- The existence of criminal laws, which specifically target homosexuals, permit to consider persons of homosexual orientation as a social group
- Criminalisation of homosexual acts per se does not constitute an act of persecution, however the actual risk of imprisonment for committing homosexual acts constitutes an act of persecution
- National authorities when assessing an application for refugee status cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation

C-148/13, 149/13, 150/13 – A, B, C. (pending)

- Preliminary reference from the Dutch Council of State
- „What limits do Article 4 of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, and the Charter of Fundamental Rights of the European Union, in particular Articles 3 and 7 thereof, impose on the method of assessing the credibility of a declared sexual orientation, and are those limits different from the limits which apply to assessment of the credibility of the other grounds of persecution and, if so, in what respect?”

LGBT rights before the ECtHR

- no right to marry (*Schalk and Kopf v. Austria*, 2010)
- Right to enter in a civil union if the national law provides for civil unions only for different-sex couples (*Valianatos and others v. Greece*, 2013)
- no right to adopt a child of one's registered partner (*Gas and Dubois v. France*, 2012) – PACS not comparable to a marriage
- right to adopt a child of one's cohabitating partner (*X and others v. Austria*, 2013) – comparison to heterosexual cohabitating partners
- right to single adoption (*E.B. v. France*, 2008)
- right to succeed to a tenancy (*Karner v. Austria*, 2003 and *Kozak v. Poland*, 2010)

Same-sex couples discrimination before the ECtHR

Taddeuci and McCall v. Italy – pending

refusal to grant the family residence permit to a de facto same-sex partner, a third country national

Pajić v. Croatia – pending

refusal to grant the family residence permit to a de facto partner, a third country national, when the national law authorizes granting the family residence permit to aliens in heterosexual extramarital relationships on the ground of family reunification

Art. 8 – respect for family life covers also de facto same-sex partners - functional approach to „family”

Schalk and Kopf v. Austria

- “the relationship of the applicants, a cohabiting same - sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different - sex couple in the same situation would”. (para. 94).
- different treatment based on marital status can have the effect of discriminating on the basis of sexual orientation when same - sex couples are prohibited from marrying

Same-sex couples discrimination in the EU

- Art. 2 para. 2 b of the Citizens' Directive 2004/38/EC – right of entry and residence of family members of EU citizens – limited to *de iure* partners or spouses
- Art. 3 para. 2 requirement to facilitate entry and residence of *de facto* partners.
- Pending
- Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes

Polish cases

- Refusal to obtain a non-marry certificate
- Refusal to obtain a certificate on legal capability to enter into marriage
- Refusal of entry of same-sex partner as a family member of a third country national who has a valid residence permit in another Member State
- Non-recognition of the same-sex registered partnership or marriage concluded in another Member State

Thank you for your attention

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