

# **The prohibition of discrimination based on sexual orientation**

*The ECJ cases Maruko and Römer*

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# **Part I**

## **Before *Maruko...***

# ECJ *Grant*, case C-249/96

- Sexual orientation discrimination ≠ gender discrimination
  - Refusal of travel concessions to cohabitantes of the same sex
  - The refusal to allow Ms Grant the concessions is based on the fact that she does not live with a 'spouse' or a person of the opposite sex
  - Since the undertaking's regulation applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex

# ECJ Grant

- *"In the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex"*
- *"Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex"*

# ECJ *D.*, case C-122/99 (1)

- *D.*, an official of the EC of Swedish nationality, registered a partnership with another Swedish national of the same sex in Sweden.
- He claimed that his status as a registered partner should be treated as being equivalent to marriage for the purpose of a household allowance
- According to the definition generally accepted by the MS, the term 'marriage' means a union between two persons of the opposite sex.

## **ECJ *D.*, case C-122/99 (2)**

- The Staff Regulations cannot be interpreted in such a way that legal situations distinct from marriage are treated in the same way as marriage
- Only the legislature can, where appropriate, adopt measures to alter that situation
- It follows that although, in a limited number of MS, a registered partnership is assimilated to marriage (incompletely), this fact cannot have the consequence that, by mere interpretation, persons whose legal status is distinct from that of marriage can be covered by the term 'married official' as used in the Staff Regulations

# ECJ *K.B.*, case C-117/01

- A transsexual partner is not entitled to a survivor's pension payable solely to a surviving spouse
- Legislation which, in breach of the ECHR, prevents a couple from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC.
  - according to ECHR, the fact that it is impossible for a transsexual to marry a person of the sex to which he or she belonged prior to gender reassignment surgery, which arises because, for the purposes of the registers of civil status, they belong to the same sex (UK legislation not admitting of legal recognition of transsexuals' new identity), is a breach of their right to marry under Article 12 of the ECHR

# **ECHR *Karner v. Austria*, 24 July 2003**

- Applicant alleged that AT Supreme Court's decision not to recognise his right to succeed to a tenancy after the death of his companion amounted to discrimination on the grounds of his sexual orientation in breach of Article 14 of the Convention taken in conjunction with Article 8
- A difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised
- Just as for differences based on sex, differences based on sexual orientation require particularly serious reasons for justification
- The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it...

**Part II**  
**...ECJ *Maruko***  
**Case C-267/06, 1st April 2008**

# Legal framework: key elements

- Article 19 TFEU (13 EC) - no direct effect
  - the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on...sexual orientation
- Charter of Fundamental Rights of the EU
  - Any discrimination based on any grounds such as ...sexual orientation shall be prohibited
- Dir. 2000/78 (Employment, working conditions, pay)
  - Direct discrimination (no justification allowed): "*where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on ...the grounds... of sexual orientation*"
  - Indirect discrimination: "*where an apparently neutral criterion would put persons having a particular sexual orientation at a particular disadvantage compared with other persons*" = justified if legitimate aim + means of achieving that aim are appropriate and necessary

# *Maruko* - Facts

- On 8 November 2001, under German law, Mr Maruko entered into a life partnership with a male designer of theatrical costumes
- Mr Maruko's life partner had been a member of the German Theatre Pension Institution (Vddb) since 1 September 1959
- Mr Maruko's life partner died on 12 January 2005
- Mr Maruko applied to the Vddb for a widower's pension. The Vddb rejected his application on the ground that its regulations did not provide for such an entitlement for surviving life partners

# *Maruko* - Proceedings

- Mr Maruko brought an action before the Bavarian Administrative Court, the referring court
- The VddB's refusal infringes on the principle of equal treatment, given that the German legislature has placed life partnership and marriage on an equal footing
  - In particular, life partnership is to be treated as equivalent to marriage as regards the statutory widow's or widower's pension
- Life partners are treated less favourably than spouses even though, like spouses, they must support and care for one another, they are mutually committed to a lifetime union and they each accept responsibilities with regard to the other= direct discrimination alleged

# *Maruko* - Proceedings

- The referring court adds that, unlike heterosexual couples who can enter into marriage and be entitled to survivor's benefits, it was impossible for the insured person and the applicant, because of their sexual orientation, to satisfy the condition relating to marriage on which entitlement to such benefits is dependent under the pension scheme managed by the VddB
- The referring court seeks to know whether the VddB's refusal to pay survivor's benefits to a person whose life partner has died constitutes discrimination which is permissible even though it is based on sexual orientation

# ***Maruko* – answers (1)**

- Survivor's benefit such as that at issue in the main proceedings has been identified as 'pay' within the meaning of Article 141 EC and therefore falls within the scope of Directive 2000/78
  - the one criterion which may prove decisive is whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer
- Not true for statutory social security schemes!

# ***Maruko – answers (2)***

- Concept of "Comparable situation": *"...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..."*
- Direct discrimination: *"...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"*
  - According to AG Colomer, the discrimination was indirect since "The refusal to award the pension is not based on the sexual orientation of the insured"
  - + comp. with ECJ Kleist, §31: "Since the criterion used is inseparable from the workers' sex, there is... a difference in treatment directly based on sex"

# **Part III**

## **...After *Maruko***

# Direct discrimination

- **Comparison as a key element**
  - "...treated less favourably than another person who is in a comparable situation..."  
(Art. 2(2)a), Dir. 2000/78)
- **Who is to be compared with whom?**
  - Homosexual with registered partnership/married heterosexual couples
    - » Degree of comparison: identical or similar situation?
    - » Source of comparison
    - » Relevant provisions of statuses as regards the advantage claimed, not whole statuses!
    - » Ex.: conditions of termination of couple relationship are not relevant for an advantage provided during life of couple
  - Informal homo. couples (no partnership available) / married hetero. couples = depends on nature of advantage
  - Informal homo. couples / informal hetero. couples = depends on nature of advantage

# Direct discrimination

- **Comparison method applies to:**
  - Alleged discrimination against bisexuals
  - Alleged discrimination against heterosexuals
    - ex. recruitment of an employee in a "gay-oriented business company")
  - But not to discrimination based on sexual behaviour
- **Justification: occupational requirement**
  - No discrimination "*where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement...*" (Dir. 2000/78, Art. 4(1))
  - Derogation must be interpreted strictly

# Indirect discrimination

- **Scope**

- homosexuality
- bisexuality
- heterosexuality

- **Definition**

- *Where an apparently neutral criterion would put persons having a particular sexual orientation at a particular disadvantage compared with other persons...*

- **One or two categories?**

- a) Disadvantage not "inseparable from" sexual orientation

- Example: bonus provided to employees having children, increase of pension amount for retirees having children

- b) Disadvantage inseparable from sexual orientation, but gay/hetero couples not in a comparable situation?

- Induce that indirect discrimination would not be based on a comparable situation between homo. person/group and other group/person: interpretation to be rejected + criterion not neutral!

# Indirect discrimination

- **Test for justification**
  - legitimate aim and appropriate and necessary means to achieve it
  - See ECHR *Karner* :
    - aim of protecting the family in the traditional sense ruled as insufficient
    - reward for having contributed to "generation renewal" + compensation for disadvantages due to education duties?
- **If no indirect discrimination, violation of Art. 8/14 ECHR?**

# Indirect discrimination

- **Proof: usually based on statistics evidence:**
  - apparently neutral criterion is "*...at a particular disadvantage compared with other persons...*"
  - "*If the statistics available indicate that, of the workforce, the percentage of part-time workers who are women is considerably higher than the percentage of part-time workers who are men, [...] such a situation is evidence of apparent sex discrimination, unless...*" (ECJ Voß, C-300/06)
  - not relevant for sexual orientation!
- **Unnecessary to bring statistical evidence when sexual orientation is involved:**
  - "*...indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons...*" (« *est susceptible de...* » in the French version) (Art.2(2)b), Dir.2000/78)

# Indirect discrimination

- **Burden of proof**

- When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority,...
- ...facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment (Dir. 2000/78, Art. 10)

# *Römer* - Facts

- Pending case C-147/08
- Adv. Gen. Jääskinen's opinion, 15 July 2010
- Civil partnership between two men under German law
- Old age supplementary pension amount provided by the City of Hamburg is lower than if the partner had been married (€900 instead of €600), because married persons are not in the same "tax bracket"

# *Römer* - Direct discrimination

- Key question: comparison
- Situations of partners and married persons should be "sufficiently comparable" and not identical
- Comparison must be done in relation to the advantage at stake and not globally
- According to AG, situations are comparable

# ***Römer* - Indirect discrimination**

- If situations not comparable, question of indirect discrimination is raised by AG
  - Neutral criterion creating a disadvantage: marriage (since not possible for gay people), even if heterosexual non-married couples are also affected (since they can marry)
  - Legitimate aim: protection of marriage and family? No, but if so...
  - ...Proportionality test: alternative ways to promote marriage and family

# ***Römer* - General Principle of Law**

- Prohibition of discrimination based on sexual orientation = Fundamental right under ECHR = EU General Principle of Law!
- No legal argument to rule differently from *Mangold/Kücükdevici* cases
- Useful when:
  - situations fall outside scope of Dir. 2000/78
  - Problem of implementation of Dir. 2000/78 into National law