



# Discrimination with regard to race and sexual orientation: main features and CJEU case-law

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## Plan of the presentation

- 1) Race and sexual orientation as discrimination grounds
- 2) Prohibition of discrimination with regard to race and ethnic origin
- 3) Prohibition of discrimination with regard to sexual orientation

# 1) Race and sexual orientation as discrimination grounds

## Race and sexual orientation as discrimination grounds

The history of oppression, stigmatization, and intolerance against persons belonging to racial or sexual minorities:

- Racism => racial segregation and discrimination
- Racially motivated crimes and hate speech
  
- Protection of public morality => criminal sodomy laws
- Homophobia => discrimination on the basis of sexual orientation
- Homophobic crimes and hate speech
  
- Protection of traditional marriage and family => denial of equal protection of laws to same-sex couples
- Anti-gay propaganda laws (Russian Federation and several countries in Europe)

Outcome: a white straight man setting the standard of legal protection

## Race and sexual orientation as discrimination grounds

- Immutable personal characteristics

### Race:

- Usually entails also national and ethnic origin
- Sometimes intersects with religion
- Problematic standing of the right to self-identification with regard to race, national and ethnic origin
- More recently: targets of anti-terrorist policies and laws

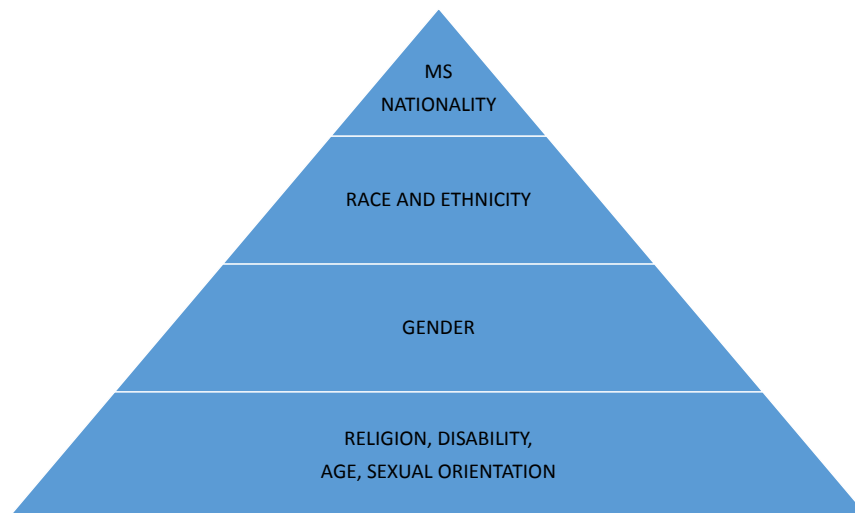
### Sexual orientation:

- Protection of traditional family values and moral descency – see i.e. teachings of the Roman Catholic Church, difference between homosexuality and homosexual acts, curable (?) disorder
- Homosexuality is not a mental illness (since 1974 removed from the Diagnostic and Statistical Manual Of Mental Disorders by the Americal Psychiatric Association)
- More recently: relevance of LGBT protection in asylum law

## Race and sexual orientation as discrimination grounds in the EU

- Unevenly treated as prohibited discrimination grounds
- Different material scope of Directive 2000/43/EC and Directive 2000/78/EC
- No progress with regard to the horizontal directive (Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181})

## Race and sexual orientation as discrimination grounds in the EU



## Direct discrimination

- less favourable treatment is prohibited unless
  - (1) it is not less favourable, or
  - (2) it falls in the scope of a derogation
- Four types of derogations envisioned in EU equality directives
  - (1) genuine and determining occupational requirements,
  - (2) religious institutions,
  - (3) positive actions,
  - (4) age discrimination.

Additionally, special conditions applicable to the armed forces and police, prisons and emergency services
- Otherwise, direct discrimination is not subject to justification under the EU equality regime

## Indirect discrimination

- It is subject to objective justification
- Justification requires showing that unequal treatment serves a legitimate interest and is appropriate and necessary
- conditions of appropriateness and necessity follow the standard proportionality test, which implies that a measure is appropriate and necessary when there are no other appropriate and less restrictive measures to achieve the aim, and the disadvantages caused are not disproportionate to the objectives thereby pursued
- it is for the national court to determine whether there are other appropriate and less restrictive means enabling the aims to be achieved.

## 2) Race and ethnic origin as discrimination grounds

## Race and ethnic origin as discrimination grounds

- No definition of race and ethnic origin in the EU law
- Race and ethnic origin may overlap with national origin, language and religion
- Race and ethnicity definition used 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 scope of application 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)

## Race and ethnic origin as discrimination grounds in the EU

Race Equality Directive – Directive 2000/43/EC

- Direct and indirect discrimination
- Harassment, 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
- Prohibition of victimization
- Establishment of equality body

## Race and ethnic origin as discrimination grounds in the EU

Race Equality Directive – Directive 20/43/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**

## Scope of application of the Race Equality Directive

- C-571/10 - Kamberaj (2012) – Albanian national with a long-term resident status, complained about the rejection of his application for the housing benefit in Bolzano
- Difference in treatment occurred not because of racial or ethnic origin but because of nationality (status of third-country nationals)
- Directive is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned
- Less favourable treatment of third-country nationals who are long-term residents if compared to treatment of nationals of a MS and citizens of the Union who reside in that MS may only be considered in the light of Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

## Race Equality Directive in practice

- Low awareness of rights among potential victims of racial discrimination
- Underreporting of racial discrimination (hate speech, hate crimes)
- 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 (note that EU equality directives preclude symbolic sanctions – see i.e. C-81/12 ACCEPT)
- Lack of preventive approach complementing the reactive approach to racial discrimination (note the concept of positive obligations incorporated in some national laws – Ireland and UK)
- Lack of statistical data concerning discrimination with regard to race and ethnicity (sensitive data) – no obligation to collect relevant data laid down in EU directives (important for policy-making, but also for proving indirect discrimination)
- Ineffective due to racial stereotypes perpetuated and reinforced in education and media
- „Dormant” litigation potential of the prohibition of harassment (even in cases concerning *de facto* segregation)

## 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* – judgement of 31 January 2013

- No jurisdiction to rule on a preliminary question referred by an equality body with no judicial functions (Commission for the Protection against Discrimination in Bulgaria)

## *C-83/14 CHEZ Razpredelenie Bulgaria v. Nikolova*

- 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 of the consumers’ right to free access to electricity meter readings?

## *CHEZ*

- The concept of indirect discrimination under Directive 2000/43/EC
- precludes a national provision according to which, in order for there to be indirect discrimination on the grounds of racial or ethnic origin, the particular disadvantage must have been brought about for reasons of racial or ethnic origin;
- – the concept of an ‘apparently neutral’ provision, criterion or practice as referred to in that provision means a provision, criterion or practice which is worded or applied, ostensibly, in a neutral manner, that is to say, having regard to factors different from and not equivalent to the protected characteristic;
- – the concept of ‘particular disadvantage’ within the meaning of that provision does not refer to serious, obvious or particularly significant cases of inequality, but denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the provision, criterion or practice at issue;
- – assuming that a measure, such as that described in paragraph 1 of this operative part, does not amount to direct discrimination within the meaning of Article 2(2)(a) of the directive, such a measure is then, in principle, liable to constitute an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons, within the meaning of Article 2(2)(b);
- – such a measure would be capable of being objectively justified by the intention to ensure the security of the electricity transmission network and the due recording of electricity consumption only if that measure did not go beyond what is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives thereby pursued. That is not so if it is found, a matter which is for the referring court to determine, either that other appropriate and less restrictive means enabling those aims to be achieved exist or, in the absence of such other means, that that measure prejudices excessively the legitimate interest of the final consumers of electricity inhabiting the district concerned, mainly lived in by inhabitants of Roma origin, in having access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly.

## Positive action (measures)

- Article 5 Directive 2000/43/EC
- With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.
- Preamble, Recital 17
- The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.
- Further see: „Positive action measures. The experience of equality bodies“, Equinet Report, 2014 (available online)

## Positive action (measures) for Roma

- EU Framework for National Roma Integration Strategies adopted by the European Commission in 2011 invites Member States to take positive actions in four key sectors: employment, housing, education and healthcare
- Council Recommendation on effective Roma integration measures in the Member States adopted on 9 December 2013
- Member States shall „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.“

## 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
- **Racial discrimination only in conjunction with a violation of other Convention rights or freedoms unless Protocol 12 to the ECHR applies**
- *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)
- Prohibition of racial discrimination and positive obligation to investigate racial motives in criminal cases
- *Nachova and Others v. Bulgaria* (2005) - 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
- **Towards a substantive approach to equality (recognition of vulnerability of minority groups)**

## Indirect racial discrimination before the ECtHR

*D.H. and others v Czech Republic* (2007)

- Segregation in schools based on eligibility test or language proficiency
- „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).

*Biao v. Denmark* (2016)

- refusal to grant family reunion to a Ghanaian couple in Denmark based on the restrictive attachment requirement
- Grand Chamber found that a 28 years rule constituted indirect discrimination as it placed a disadvantage on persons who acquired Danish nationality later in life or who were of ethnic origins other than Danish
- Unequal treatment of Danish nationals due to the form of acquiring nationality was not justified
- „In conclusion, having regard to the very narrow margin of appreciation in the present case, the Court finds that the Government have failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. That rule favours Danish nationals of Danish ethnic origin, and places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish (para. 138).”

### 3) Sexual orientation as a discrimination ground

#### Sexual orientation as a discrimination ground

- No protection before the adoption of Directive 2000/78/EC
- C-249/96 *Grant v South-West Trains Ltd.* (1998) – refusal of travel concessions to same-sex cohabitees
- C-122/99 *P* and C-125/99 *P. D and Kingdom of Sweden v Council of the European Union* (2001) – refusal of household allowance to a registered partner under the Staff Regulations
- Currently: fragmented protection – focussed on employment (see C-528/13 *Léger* (2015))
- Further see: Krzysztof Śmiszek and Dorota Pudziańska, *Combating Sexual Orientation Discrimination in the European Union*, 2014, [http://ec.europa.eu/justice/discrimination/files/sexual\\_orientation\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/sexual_orientation_en.pdf)

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

- 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.” (par. 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)

- 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 *Frédérick Hay*

- 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 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. (2014)

- Preliminary reference from the Dutch Council of State
- Article 4(3)(c) 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 Article 13(3)(a) of Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status, must be interpreted **as precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities, founded on questions based only on stereotyped notions concerning homosexuals.**
- Article 4 of Directive 2004/83, read in the light of Article 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as **precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum.**
- Article 4 of Directive 2004/83, read in the light of Article 1 of the Charter of Fundamental Rights of the European Union, must be interpreted as **precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts.**
- Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as **precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.**

## Sexual orientatin in asylum law

- An increasing numer of cases lodged by asylum-seekers alleging persecution on the ground of sexual orientation
- *M.B. v Spain* (15109/15) – pending before the ECtHR
- the applicant, a Cameroonian national, complains in particular that, if removed to Cameroon, her life and physical integrity would be at risk because of her sexual orientation

## C-528/13 *Léger* (2015)

- Point 2.1 of Annex III to Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components must be interpreted as meaning that the criterion for permanent deferral from blood donation in that provision relating to sexual behaviour covers the situation in which a Member State, having regard to the prevailing situation there, provides for a permanent contraindication to blood donation for men who have had sexual relations with other men where it is established, on the basis of current medical, scientific and epidemiological knowledge and data, that such sexual behaviour puts those persons at a high risk of acquiring severe infectious diseases and that, with due regard to the principle of proportionality, there are no effective techniques for detecting those infectious diseases or, in the absence of such techniques, any less onerous methods than such a counter indication for ensuring a high level of health protection of the recipients. It is for the referring court to determine whether, in the Member State concerned, those conditions are met.
- Note the „unnoted“ case of different treatment between men who have had sexual relations with other men and other categories of people engaging in „unsafe“ sexual relations resulting in permanent deferral from blood donation

## LGBT rights before the ECtHR

- no right to marry (*Schalk and Kopf v. Austria*, 2010) derivative from the protection of family life, but
- violation of the Convention if national law prohibits same-sex couples to enter marriage and civil unions (*Oliari and Others v. Italy*, 2015)
- violation of the Convention if the national law provides for civil unions only for different-sex couples (*Valianatos and others v. Greece*, 2013)
- no violation of the Convention if national law prevented step-parent adoption in case of partners registered in civil unions (*Gas and Dubois v. France*, 2012) – PACS not comparable to a marriage
- violation of the Convention if national law prohibits adoption of a child of one’s cohabitating same-sex partner, but allows adoption for children in case of different-sex cohabitating partners (*X and others v. Austria*, 2013)
- violation of the Convention if national authorities prevent single adoption exclusively on the basis of sexual orientation (*E.B. v. France*, 2008)
- violation of the Convention if national authorities prevent a surviving partner from succession to tenancy (*Karner v. Austria*, 2003 and *Kozak v. Poland*, 2010)

## Discrimination with regard to sexual orientation before the ECtHR

- *Taddeuci and McCall v. Italy* (2016)

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

„la situation des requérants ne saurait cependant être considérée comme analogue à celle d'un couple hétérosexuel non marié. À la différence de ce dernier, les intéressés n'ont pas, en Italie, la possibilité de se marier. Ils ne peuvent donc pas être qualifiés d'« époux » selon le droit national. Dès lors, une interprétation restrictive de la notion de « membre de la famille » ne constitue un obstacle insurmontable à l'octroi du permis de séjour pour raison familiale que pour les couples homosexuels. Ces derniers ne pouvaient pas non plus obtenir un mode de reconnaissance juridique autre que le mariage, étant donné qu'à l'époque des faits, le système juridique italien ne prévoyait pas, pour les couples homosexuels ou hétérosexuels engagés dans une relation stable, la possibilité d'avoir accès à une union civile ou à un partenariat enregistré attestant leur statut et leur garantissant certains droits essentiels. (para. 83)”

- *Pajić v. Croatia* (2016)

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

- *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).

## Discrimination with regard to sexual orientation 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.
- Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, [COM\(2011\)0126](#)
- Further see i.e.: Jacqueline Gray, Pablo Quinzá Redondo, Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU private international law instruments on family matters and succession <http://www.bjutijdschriften.nl/tijdschrift/fenr/2013/11/fenr-d-13-00008/fullscreen>)

## Discrimination with regard to sexual orientation in Poland

- 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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