

Helmut Graupner

Sexual Orientation & Gender Identity in the ECJ's Rulings

EQUINET Legal Seminar

EUROPEAN CONCEPTS OF EQUALITY

ROLE OF THE EUROPEAN COURT OF JUSTICE

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I.

Gender Identity

(a) *P. vs. S. & Cornwall County Council* 1996 (C-13/94)

P. informed employer of the intention to undergo gender reassignment -> dismissal

- Dir 76/207/EEC precludes dismissal of a transsexual for a reason related to a gender reassignment

(b) *K.B. vs. National Health Service Pensions Agency* 2004 (C-117/01)

K.B. (female) & R (male after gender reassignment) banned from marriage

- Such legislation precluded by Art. 141 EC

(c) Sarah Margaret Richards v Secretary of State for Work and Pensions 2006 (C-423/04)

Male-to-female transsexual was denied pension at pension age for women

- discrimination on the ground of sex (Dir 79/EEC)

II. Sexual Orientation

(a) *Grant vs. South West Trains* 1998 (C-249/96)

Female employee was denied social-benefits for her female partner, which benefits a male employee for his (unmarried) female partner did receive

- no discrimination on the ground of sex (Art. 141 EC)

(b) *D. & Sweden v. Council* 2001 (C-122,125/99)

No household-allowance for same-sex partner (registered in Sweden) of a Swedish employee of the Council, while employees with a married partner in the same situation received the allowance

– Neither discrimination on the basis of sex nor on the basis of sexual orientation

The EU-legislator reacted to both judgments:

1. Grant (1998) -> *Dir 2000/78/EC*

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

(Amendment of Staff Regulations):

a. Ban of discrimination (Art. 1d par. 1)

b. Equal rights for registred partnerships as for marriage, if marriage is not available (Art. 1d par. 1 & Appendix VII Art. 1 par. 2 lit. c)

Tadao Maruko gegen Versorgungsanstalt der deutschen Bühnen (VddB) (C-267/06)

Hans Hettinger: -> costume designer
-> 45 years member of VddB
-> 45 years paid fees to VddB as his
heterosexual colleagues
-> 13 years of partnership with Mr. Tadao
Maruko
-> 2001 registered their partnership
-> died 2005

VddB: -> survivors benefits only to married partners
-> no pension to Tadao Maruko

Tadao Maruko: -> legal action
(BayrVG München M 3 K 05.1595)

BayrVG: referral for a preliminary ruling

1. direct discrimination?
2. discrimination justified by recital 22?

Recital 22:

“This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.”

VddB & UK -> unequal treatment of married couples and registered couples are outside of the scope of the Directive (due to recital 22)

Tadao Maruko:

1. Direct discrimination (as referral to pregnancy is direct discrimination on the ground of sex):

-> needs not be decided, as in any case

2. Indirect discrimination:

-> not only in case of RP equivalent to marriage

-> as long as marriage is forbidden for same-sex couples:

criterion of marriage always is just „apparently neutral“ and puts homosexuals „at a particular disadvantage“ (Art. 2 par. 2 lit. b)

-> pay is made contingent upon a condition which same-sex couples never ever can fulfil

-> as in K.B. (2004) (opposite-sex couples with post-operative transgender partner were not allowed to marry):

the condition of marriage must be dropped for same-sex couples (as long as marriage is not available)

-> Otherwise: little discrimination (in MS with marriage-equivalent RP) outlawed, but big discrimination (in MS without such RP) not (despite same unequal treatment)

*European Commission &
Advocate General Dámaso Ruiz-Jarabo Colomer:*

- > no direct discrimination (no referral to sexual orientation)
- > indirect discrimination & no justification visible
- > but only: if RP is marriage-equivalent („substantially the same effects“)

Problem of comparative parameters:

Marriage-RP or opposite-sex couples vs. same-sex couples?

The Judgment

(01.04.2008)

- *Recital 22:*
Recital 22 cannot affect the application of the Directive (par. 59f)
- *Direct Discrimination*
-> if registered partners „in comparable situation“ as married partners (par. 70-73)

Art. 2 par. 1 lit. a Dir 2000/78/EC:

“direct discrimination ...where one person is treated less favourably than another ... in a comparable situation,”

-> Justification only possible under Art. 4 Abs. 1 („genuine and determining occupational requirement“)

The „comparable situation“

(1) formally:

determination is task of the national court (par. 72f)

(2) in substance:

-> „Comparability“, not „Identity“ (par. 69)

-> „so far as concerns that survivor’s benefit“ (par. 73)

-> individual-concrete comparison with the „situation comparable to that of a spouse who is entitled to the survivor’s benefit provided for under the occupational pension scheme managed by the VddB.“ (par. 73)

-> criteria of the national court (par. 62, 69):

(a) formally constituted for life

(b) union of mutual support and assistance

-> ECJ does not object to these criteria and explicitly says :

„The combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings ...“

(emphasis added)

-> Compare to the judgment in *Palacios* (2007):

“The prohibition on any discrimination on grounds of age ... must be interpreted as not precluding national legislation **such as that at issue in the main proceedings**, ..., **where** ... [follow criteria which the national court has to apply in determining compatibility with community law]” (emphasis added)

The Reaction of German High Courts

(decisions on family allowance for civil servants, § 40 Abs. 1 Nr. 1 BBesG)

Federal Administrative Court („Bundesverwaltungsgericht“)
(2 C 33.06, 15.11.2007):

No comparability, as

- > RP and marriage are not identical
(differences for instance regarding social benefits for civil servants, in tax legislation and joint adoption)
- > complete or general equalization was neither done nor intended by the legislator

Federal Constitutional Court („Bundesverfassungsgericht“) (2 BvR 1830/06 , 06.05.2008):

No comparability, as

- > no general statutory equalization
 - (a) equalization was not the intention of the legislator
 - (b) no blanket clause
 - (c) special regulations with deviations form the law of marriage
- > no complete equalization in the law of public sector employees (still differences in remuneration and pension-rights)
- > spouses typically in need of alimony by partner; RP typically not
- > irrelevant that civil law maintenance-obligations are identical (in marriage and RP)

Problem:

- General equalization
 - > circular reasoning (if general equalization would have taken place , no inequality would exist, and question of discrimination would not arise)
- equalization in social benefits for public sector employees
 - > circular reasoning (discrimination is justified with another discrimination)
- Typical/non-typical need of alimony:
 - > general-abstract approach which contradicts the individual-concrete view of the ECJ
 - > family-allowance is not dependend upon a need of alimony (also childless civil servants receive it. Even if their married partner earns more then themselves)

Conclusion

- Case law of Bundesverwaltungs- and Bundesverfassungsgericht
-> contradict ECJ in Maruko
- Even if this view is not shared
-> in any way not unreasonable
-> obligation to refer to the ECJ (asking for the criteria for the test of comparability)
- If situation of married and registered partners are not comparable
-> then question of indirect discrimination (by referring to the exclusively heterosexual criterion “marriage”)
-> obligation to refer to the ECJ
- Maruko could go up to the ECJ two more times

- **VG München 30.10.2008 (not final):**
 - > awarded survivors pension to Mr. Maruko
 - > surviving RP and surviving married partners in a comparable situation, as
 - (a) survivors benefits are substitutes for alimony and
 - (b) alimony-duties are the same in RP and marriage
- **New case *Römer vs. City of Hamburg* (C-147/08):**
 - > higher retirement pension for employee with married partner then for employee with RP
 - > even if married partner has higher income then employee and they have no children
 - > even if RP is in need of alimony by the employee and they have to care for children
 - > will the ECJ specify or extend the Maruko-judgment?

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