

**SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION:
THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS
AND THE COURT OF JUSTICE OF THE EUROPEAN UNION**

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3 June 2015

I. Steps in eliminating sexual orientation discrimination

- 1787 - Austria was first European country to abolish the death penalty for any form of consensual same-sex sexual activity; the following countries followed by no later than the indicated dates: France (1791), Belgium and Luxembourg (1792), the Netherlands (1811), Spain (1822), England, Wales, Ireland (1861)

| European Union (first 15 member states) plus Norway, Iceland, Russia (year law passed) | equal age of consent to sexual activity (no exceptions) | legislation against discrimination: employment ¹ or services | same-sex couples: register + some rights | same-sex couples: register + equal rights ² | same-sex couples: adoption (child of partner) | same-sex couples: joint adoption (child not related to either partner) | same-sex couples: register + equal rights + same name (marriage) |
|---|---|---|---|---|--|---|---|
| Netherlands | 1971 | 1991 | 1997 | 1997 | 2000 | 2000 (2008) ³ | 2000 |
| Belgium | 1985 | 2003 | 1998 | 2003 | 2006 | 2006 | 2003 |
| Spain | 1988 | 1995 | 1998-03 ⁴ | 2005 | 2005 | 2005 | 2005 |
| Norway | 1972 | 1981 | 1993 | 1993 | 2001 | 2008 | 2008 |
| Sweden | 1978 | 1987 | 1994 | 1994 | 2002 | 2002 | 2009 |
| Iceland | 1992 | 1996 | 1996 | 1996 | 2000 | 2006 | 2010 |
| Denmark | 1976 | 1987 | 1989 | 1989 | 1999 | 2010 | 2012 |
| UK(Eng/Wales) | 2000 | 2003 | 2004 | 2004 | 2002 | 2002 | 2013 |
| France | 1982 | 1985 | 1999 | 2013 | 2013 ⁵ | 2013 | 2013 |
| Luxembourg | 1992 | 1997 | 2004 | 2014 | 2014 | 2014 | 2014 |
| Finland | 1998 | 1995 | 2001 | 2001 | 2009 | 2015 | 2015 |
| Ireland | 2006 ⁶ | 1993 | 2010 | 2010 | 2015 | 2015 | 2015 |
| Portugal | 2006 | 2003 | 2010 | 2010 | ----- | ----- | 2010 |
| Germany | 1994 | 2003 | 2001 | 2004(?) | 2004 | ----- | ----- |
| Austria | 2002 | 2003 | 2009 | 2009 | 2013 | ----- | ----- |
| Greece | ----- ⁷ | 2003 | ----- ⁸ | ----- | ----- | ----- | ----- |
| Italy | 1889 | 2003 | ----- | ----- | ----- | ----- | ----- |
| Russia | 1997 | ----- | ----- | ----- | ----- | ----- | ----- |

¹ National legislation or, for the public sector, Directive 2000/78/EC (in force 2 Dec. 2003).

² Perhaps excluding certain parental rights (adoption, medically assisted procreation).

³ International joint adoption.

⁴ Laws in the *comunidades autónomas* (regions).

⁵ No access to donor insemination for married lesbian couples, unlike unmarried different-sex couples.

⁶ Unequal marriage exception removed in 2015.

⁷ See Article 347 of the Greek Penal Code.

⁸ See Law No. 3719/2008 ("common life pact") for unmarried different-sex couples; violation in *Vallianatos & Others v. Greece* (Grand Chamber judgment of 7 Nov. 2013).

II. "Basic Rights" (rights to be free from violence and to campaign for legal reforms) under the European Convention on Human Rights

- by "Basic Rights", I mean "general human rights" of concern to every person (including heterosexual and non-transgender persons) that are well-established and not legally controversial
- in particular, "Basic Rights" include the right to be free from violence by state actors (and to state protection against violence by private actors), and the right to campaign for legal reforms; under each Article below, there is a list of clear or potential violations
- all cases cited in Part II. are judgments of the European Court of Human Rights,⁹ unless otherwise indicated

Article 2 – Right to life; Article 3 – Prohibition of torture, inhuman or degrading treatment or punishment; Protocols No. 6 and No. 13 on abolition of death penalty

- deportation of asylum-seeker to a country (anywhere in the world) where they might be killed or physically abused, by state officials or private individuals (*Soering v. UK*, 1989, *Chahal v. UK*, 1996); the Court could extend this principle to deportation to face the death penalty using Protocols No. 6 and No. 13; on deporting gay or bisexual men to Iran or Iraq, compare *F. (Fashkami) v. UK* (22 June 2004), App. No. 17341/03 (Court admissibility decision - inadmissible) and *M.K.N. v. Sweden* (27 June 2013) (Court judgment – no violation of Article 3) with *H.J. (Iran) v. Secretary of State for Home Department*, [2010] UKSC 31 (UK Supreme Court); see also *M.E. v. Sweden* (26 June 2014, referred to Grand Chamber) (Court judgment – no violation of Article 3; applicant may be required to return to Libya to apply for residence permit based on same-sex marriage)

Halat v. Turkey (8 Nov. 2011) (Court judgment) (violation of Art. 3, procedural aspect) (failure to investigate alleged mistreatment of trans woman by police)

Zontul v. Greece (17 Jan. 2012) (Court judgment) (violation of Art. 3, substantive and procedural aspects; anal rape of man by male coast guard official was torture)

X v. Turkey (9 Oct. 2012) (Court judgment) (violations of Art. 3, substantive aspect, and Art. 14 combined with Art. 3) (gay prisoner placed in solitary confinement and denied outdoor exercise)

Identoba and Others v. Georgia (12 May 2015) (Court judgment) (violation of Art. 3 combined with Art. 14) (failure to protect LGBTI demonstrators and failure to investigate homophobic motives for attack by anti-LGBTI counter-demonstrators)

⁹ All judgments and admissibility decisions of the European Court of Human Rights are available at <http://www.echr.coe.int> (HUDOC), as are many reports and admissibility decisions of the former European Commission of Human Rights (which ceased to take new cases on 1 Nov. 1998). Type the applicant's name after "Case Title", or type in the application number, and tick "Reports" or "Decisions" on the left if you are looking for one of these rather than one of the Court's "Judgments" (it is safer to tick both English and French; some documents are published only in one language).

Articles 10 and 11 – Freedom of expression, assembly and association

- state interference (or failure by the state to protect against private interference) with lesbian, gay, bisexual and transgender (LGBT) books, magazines, newspapers, films, videos, meetings, marches, parades and demonstrations, or the establishment and operation of LGBT associations, should normally violate Arts. 10 and 11, but laws prohibiting anti-LGBT hate speech do NOT violate Art. 10

Vejdeland v. Sweden (9 Feb. 2012) (Court judgment) (NO violation of Art. 10) (criminal convictions and fines for anti-LGB hate speech, ie, distributing anti-LGB leaflets in a school)

“Homosexual Propaganda ...

In the course of a few decades society has swung from rejection of homosexuality and other sexual deviances ... to embracing this deviant sexual proclivity ... Your anti-Swedish teachers know very well that homosexuality has a morally destructive effect on the substance of society ... and will willingly try to put it forward as something normal and good.

-- Tell them that HIV and AIDS appeared early with the homosexuals and that their promiscuous lifestyle was one of the main reasons for this modern-day plague gaining a foothold.

-- Tell them that homosexual lobby organisations are also trying to play down ... paedophilia, and ask if this sexual deviation ... should be legalised.”

54. ... In the Court’s opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations.

55. Moreover, the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner ... In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour” ...

59. ... the Court considers that the conviction of the applicants and the sentences imposed on them were not disproportionate to the legitimate aim pursued ... The interference with the applicants’ exercise of their right to freedom of expression could therefore reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others.

Molnar v. Romania (23 Oct. 2012) (Court admissibility decision) (Article 17 on abuse of rights applied to anti-Roma and anti-LGB posters)

Scherer v. Switzerland (No. 17116/90) (14 Jan. 1993) (report of the former European Commission of Human Rights) (applicant’s conviction of publishing obscene material for showing a video in a gay sex shop violated Article 10); (30 March 1994) (Court judgment) (struck out of the Court’s list because the applicant had died)

Plattform "Ärzte für das Leben" v. Austria (21 June 1988) (police have a "positive obligation" to protect a demonstration against counter-demonstrators who try to disrupt it)

Stankov and the United Macedonian Organisation Ilinden v. Bulgaria (2 Oct. 2001)
 86. ... Freedom of assembly ... in Article 11 ... protects a demonstration that may annoy or give offence to persons opposed to the ideas ... it is seeking to promote ...
 107. ... The national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular they may be.

United Macedonian Organisation Ilinden and Ivanov v. Bulgaria (20 Oct. 2005)
 115. ... [T]he authorities appeared somewhat reluctant to protect the members and followers of Ilinden from a group of counter-demonstrators. As a result, some of the participants in Ilinden's rally were subjected to physical violence from their opponents ... The authorities were ... bound to take adequate measures to prevent violent acts directed against the participants in Ilinden's rally, or at least limit their extent. ...

Bączkowski v. Poland (3 May 2007) (violations of Art. 11. and Art. 14 combined with Art. 11) (refusal to permit LGBT Pride March in Warsaw in June 2005)

Alekseyev v. Russia (21 Oct. 2010) (violations of Art. 11 and Art. 14 combined with Art. 11) (refusal to permit LGBT Pride events in Moscow in 2006, 2007, 2008)

81. ... it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical ...

82. ... it was not the behaviour or the attire of the participants that the authorities found objectionable but the very fact that they wished to openly identify themselves as gay men or lesbians ... The Government admitted... that the authorities would reach their limit of tolerance towards homosexual behaviour when it spilt over from the strictly private domain into the sphere shared by the general public ...

84. ... conferring substantive rights on homosexual persons is fundamentally different from recognising their right to campaign for such rights. There is no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly. ...

87. ... the ban on the events organised by the applicant did not correspond to a pressing social need and was thus not necessary in a democratic society.

109. ... the main reason for the ban imposed on the events organised by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality ... the Court cannot disregard the strong personal opinions publicly expressed by the mayor of Moscow and the undeniable link between these statements and the ban. In the light of these findings the Court also considers it established that the applicant suffered discrimination on the grounds of his sexual orientation and that

of other participants ... the Government did not provide any justification showing that the impugned distinction was compatible with the standards of the Convention.

Genderdoc-M v. Moldova (12 June 2012) (Court judgment) (violations of Art. 11 and Art. 14 combined with Art. 11) (refusal to authorise a peaceful demonstration in front of the National Parliament in 2006)

Identoba and Others v. Georgia (12 May 2015) (Court judgment) (violation of Art. 11 combined with Art. 14) ("the domestic authorities failed to ensure that the march of 17 May 2012 ... could take place peacefully by sufficiently containing homophobic and violent counter-demonstrators")

III. "Individual Rights" (ie, equal rights for LGBT individuals) under the European Convention on Human Rights

- by "Individual Rights", I mean "LGBT human rights" (rights of concern mainly to LGBT individuals) that are mostly well-established in the case law of the European Court of Human Rights, because they are about "equal rights for LGBT individuals", as opposed to "equal rights for same-sex couples"

A. Criminal law

1. Total bans on same-sex sexual activity violate Article 8 (private life)

- *Dudgeon v. United Kingdom* (22 Oct. 1981) (Court judgment)
- *Norris v. Ireland* (26 Oct. 1988) (Court judgment)
- *Modinos v. Cyprus* (22 April 1993) (Court judgment)

2. Ages of consent to male-female, male-male and female-female sexual activity must be equal under articles 8 (private life) and 14 (non-discrimination)

- *Sutherland v. U.K.* (1 July 1997) (Commission report)
- *L. and V. v. Austria, S.L. v. Austria* (9 January 2003) (Court judgments); see *S.L.* para. 37:

“the Court reiterates that sexual orientation is a concept covered by Article 14 ... Just like differences [in treatment] based on sex, ... differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification ...”

- *E.B. v. Austria* (7 Nov. 2013) (Court judgment) (convictions based on unequal age of consent should not have been maintained on applicants' criminal records)

3. Non-sado-masochistic group sexual activity in private cannot be prohibited under Article 8 (private life)

- *A.D.T. v. UK* (31 July 2000) (Court judgment) (non-sado-masochistic)
- *Laskey v. UK* (19 Feb. 1997) (Court judgment) (sado-masochistic can be prohibited if more than minor physical injury results); or is the test now consent? see *K.A. v. Belgium* (17 Feb. 2005) (woman withdrew her consent)

4. Other discrimination against (private, non-commercial) same-sex sexual activity by the criminal law

- probably violates Article 8 (private life), on its own or with Article 14 (non-discrimination)

B. Legal recognition of gender reassignment

- *B. v. France* (25 March 1992) (Court judgment) (violation of Article 8, private life) (France required to change legal sex on birth certificate)
- *Christine Goodwin v. UK, I. v. UK* (11 July 2002) (Court judgments) (violation of Article 8, private life; see IV.A below for Article 12) (UK required to change legal sex on birth certificate)
- *Grant v. UK* (23 May 2006) (Court judgment) (violation of Article 8, private life) (UK required to grant pension to post-operative transsexual woman at same age as other women)
- *L. v. Lithuania* (11 Sept. 2007) (Court judgment) (violation of Article 8, private life) (absence of legislation, no compensation required if legislation passed within 3 months of judgment)
- *Y.Y. v. Turkey* (10 March 2015) (Court judgment) (violation of Article 8, private life) (sterilisation cannot be a condition of access to gender reassignment surgery)

C. Insurance coverage for medical expenses related to gender reassignment

- *van Küick v. Germany* (12 June 2003) (Court judgment) (violation of Article 8, private life) (where insurance plan covers "medically necessary" treatment, gender reassignment must be included)
- *Schlumpf v. Switzerland* (8 Jan. 2009) (Court judgment) (violation of Article 8, private life) (national court should have considered exception to rule requiring two years of non-surgical treatment before cost of surgery could be reimbursed)

D. Employment

- *Smith & Grady v. UK, Lustig-Prean & Beckett v. UK* (27 Sept. 1999, violation, 25 July 2000, compensation) (Court judgments) (violation of Article 8, private life) (dismissal from armed forces); see *Grady*, para. 97:

“To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes [of heterosexual members of the armed forces] cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the [lesbian and gay members’] rights ... any more than similar negative attitudes towards those of a different race, origin or colour.”

E. Other discrimination by a public authority against LGBT individuals

- probably violates Article 8 (private life), on its own or with Article 14 (non-discrimination) (but see V. below)
- applies to custody of an LGBT individual's genetically-related children after a divorce: *Mouta v. Portugal* (21 Dec. 1999) (Court judgment) (violation of Articles 8, family life, with Article 14) (sexual orientation and gender identity, *per se*, cannot be

cited as negative factors in deciding which parent should have custody of a child after a different-sex marriage ends in divorce); see para. 36:

“the [Lisbon] Court of Appeal made a distinction based on considerations regarding the applicant’s sexual orientation, a distinction which is not acceptable under the Convention [like distinctions based on religion] (see, *mutatis mutandis*, ... *Hoffmann* ... [Jehovah’s Witness mother] ...).”

- *Mouta* was distinguished in *P.V. v. Spain* (No. 35159/09) (30 Nov. 2010) (Court judgment); the Court noted (at para. 30) that "transsexuality" is covered by Article 14, but (at para. 36) that it was the applicant's emotional stability that was the main reason for restricting her right to visit her child, not her transsexuality

- applies to adoption of children by unmarried individuals: *E.B. v. France* (22 Jan. 2008) (Court judgment) (violation of Article 14 combined with Article 8, private or family life, by 10 votes to 7 on the facts, 14 to 3 on the principle); see para. 96:

"the domestic authorities made a distinction based on considerations regarding [the applicant's] sexual orientation, a distinction which is not acceptable under the Convention (see ... *Mouta*, ... para. 36)."

- see also Judge Costa's dissent:

"... the message sent by our Court ... is clear: a person seeking to adopt cannot be prevented from doing so merely on the ground of his or her homosexuality. ... our Court [the majority] considers that a person can no more be refused authorisation to adopt on grounds of their homosexuality than have their parental responsibility withdrawn on those grounds (*Salgueiro da Silva Mouta*). I agree."

- implicitly overrules *Fretté v. France* (26 Feb. 2002) (Court judgment) (no violation of Article 14 combined with Article 8, by 4 votes to 3)

- the same principle should apply to access to donor insemination and other forms of medically assisted procreation, when they are made available to unmarried heterosexual individuals

F. Discrimination by private parties against LGBT individuals

- can argue that every member state has a positive obligation under Articles 8 (private life or family life) and 14 (non-discrimination) to pass legislation prohibiting sexual orientation discrimination in the private sector; argument accepted by the Supreme Court of Canada in *Vriend v. Alberta*, [1998] 1 Supreme Court Reports 493 (but see V. below); compare *Danilenkov v. Russia* (30 July 2009) (Court judgment):

123. ... the totality of the measures implemented to safeguard the guarantees of Article 11 should include protection against discrimination on the ground of trade union membership ...

136. ... the State failed to fulfil its positive obligations to adopt effective and clear judicial protection against discrimination on the ground of trade union membership. ...

G. Exemptions from anti-discrimination legislation for religious individuals

- if anti-discrimination legislation exists, the Convention does not require that religious individuals serving LGBT individuals or same-sex couples in non-religious contexts be granted exemptions
- *Eweida & Others v. United Kingdom* (15 Jan. 2013) (Court judgment) (two Christian employees, Ladele and McFarlane, one in the public sector and one in the private sector, refused to serve same-sex couples)

IV. "Couple Rights" (ie, equal rights for same-sex couples) under the European Convention on Human Rights

- by "Couple Rights", I mean "LGBT human rights" (rights of concern mainly to LGBT persons) that have so far been recognised only to a limited extent by the case law of the European Court of Human Rights, because they are about "equal rights for same-sex couples", rather than "equal rights for LGBT individuals"

A. Right of a transsexual person to contract a different-sex legal marriage

- *Sheffield & Horsham v. UK* (30 July 1998) (Court judgment), para. 66 (no violation of Article 12, right to marry, by 18 votes to 2: "the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex")
- *Sheffield overruled by Christine Goodwin v. UK, I. v. UK* (11 July 2002) (Court judgments) (violation of Article 12 by 17 votes to 0) (U.K. required to permit transsexual persons to marry a person of the sex opposite to their reassigned sex)
- *Hämäläinen v. Finland* (16 July 2014) (Court judgment, Grand Chamber) (trans spouse not allowed to convert her different-sex marriage into a same-sex marriage through legal confirmation of her gender, especially because confirmation would automatically convert her marriage into a same-sex registered partnership)

B. Rights of transsexual parents

- *X, Y & Z v. UK* (22 April 1997) (Court judgment), para. 52 ("Article 8 cannot ... be taken to imply an obligation for the respondent State formally to recognise as the father of a child a person who is not the biological father")
- for practical purposes, overruled in the UK by *Christine Goodwin* and *I.*, because recognition of transsexual men as legal fathers, where their non-transsexual female partners have undergone donor insemination, will follow from recognition of transsexual men as legal men

C. Discrimination against unmarried same-sex partners (compared with unmarried different-sex partners)

- *Karner v. Austria* (24 July 2003) (Court judgment) (violation of Article 14 together with Article 8, respect for home) (only unmarried different-sex and not same-sex partners could succeed to a tenancy after the death of the official tenant)

- *Schalk & Kopf v. Austria* (24 June 2010) (Court judgment): "94. ... [T]he 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."

- *Karner* clearly overrules the following six admissibility decisions of the former European Commission of Human Rights (on which the Court of Justice of the EU relied in *Grant v. South-West Trains*, Case C-249/96, [1998] E.C.R. I-621):

X & Y v. UK (No. 9369/81) (3 May 1983), 32 Decisions and Reports (D.R.) 220,
5 European Human Rights Reports (E.H.R.R.) 601 (immigration claim by
same-sex partner)

W.J. & D.P. v. UK (No. 12513/86) (11 Sept. 1986) (immigration)

C. & L.M. v. UK (No. 14753/89) (9 Oct. 1989) (immigration)

B. v. UK (No. 16106/90) (10 Feb. 1990) (immigration)

S. v. UK (No. 11716/85) (14 May 1986) (same issue as *Karner*)

Rösli v. Germany (No. 28318/95) (15 May 1996) (same issue as *Karner*)

- *Schalk & Kopf* (para. 94, as approved by the Grand Chamber in *X & Others v. Austria*, para. 95, and in *Vallianatos & Others v. Greece*, para. 73) overrules all statements in the six Commission decisions listed above, as well as in *Mata Estevez v. Spain* (10 May 2001) (Court admissibility decision), that same-sex couples enjoy only "private life", and not "family life"; compare *Manenc v. France* (No. 66686/09) (21 Sept. 2010) (Court admissibility decision - inadmissible) (Court cited *Mata Estevez* rather than *Schalk & Kopf*; no need to comment on merits because no attempt to exhaust domestic remedies)

- *Karner* followed in *Kozak v. Poland* (2 March 2010) (Court judgment), *P.B. & J.S. v. Austria* (22 July 2010) (Court judgment), *J.M. v. UK* (28 Sept. 2010) (Court judgment)

- *Vallianatos & Others v. Greece* (7 Nov. 2013) (Court judgment, Grand Chamber) (violation of Article 14 together with Article 8, private life and family life) (a new institution of civil union was created for unmarried different-sex couples only)

D. Discrimination against unmarried same-sex partners compared with married different-sex partners (issues other than adoption)

- the Court has generally not been sympathetic to claims by unmarried different-sex partners who chose not to marry or neglected to contract a civil or legal marriage (as opposed to a religious marriage):

van der Heijden v. Netherlands (3 April 2012) (Court judgment – Grand Chamber)
Şerife Yiğit v. Turkey (2 Nov. 2010) (Court judgment - Grand Chamber)

- however, because same-sex partners do not have this choice in most countries, it can be argued that they should be exempted from having to marry to qualify for a particular right or benefit; the Court has rejected this argument in two cases, but they could be seen as about the non-retroactivity of the UK's Civil Partnership Act 2004:

Courten v. U.K. (No. 4479/06) (4 Nov. 2008) (Court admissibility decision - inadmissible) (surviving same-sex partner ineligible for inheritance tax exemption; death after 2004 Act but before it came into force)

M.W. v. U.K. (No. 11313/02) (23 June 2009) (Court admissibility decision - inadmissible) (surviving same-sex partner ineligible for bereavement benefits; death in 2001, before 2004 Act)

Taddeucci & McCall v. Italy (No. 51362/09) (pending case, communicated on 10 Jan. 2012) (refusal to grant a family-member residence permit to a same-sex partner from outside the EU; only married different-sex partners were eligible)

E. Discrimination between registered same-sex partners and married different-sex partners (issues other than adoption)

- no Court decisions yet; but see Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (1 April 2008) (Court of Justice of EU) (pension for surviving different-sex spouse must also be provided to surviving same-sex registered partner "if registration places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit"); see also at VII.2 below Case C-147/08; *Jürgen Römer v. Freie und Hansestadt Hamburg* (10 May 2011)

- *Maruko* implicitly overrules the reasoning in Joined Cases C-122/99 P, C-125/99 P, *D. & Sweden v. Council* (31 May 2001) (Court of Justice of EU) (Swedish registered partnership did not have to be treated as equivalent to a marriage for the purpose of an employment benefit provided by an EU institution)

F. Discrimination between married same-sex partners and married different-sex partners (issues other than adoption)

- no Court decisions yet, but principle of *Karner* should apply, where a member state has voluntarily decided to open up marriage to same-sex partners

G. Equal access to legal marriage for same-sex partners

- language in *Christine Goodwin* and *I.* (see IV.A. above) suggests that the Court could eventually (when more Council of Europe Member States have granted equal access to legal marriage to same-sex partners) change its interpretation of Article 12 and find that Article 12 guarantees access to marriage regardless of the sexes of the partners; see para. 98 of *Goodwin*:

“the Court observes that Art. 12 secures the fundamental right of a man and woman [1] to marry and [2] to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to [marry]”

- the Court was not ready to do so in 2006; two legally male-female but factually female-female couples (the female partner who was born male had undergone gender reassignment) wished to have the gender reassignment legally recognised and remain married, rather than divorce and register a same-sex civil partnership:

Wena & Anita Parry v. United Kingdom (No. 42971/05) (28 Nov. 2006) (Court admissibility decision - inadmissible) (couple from England).

R. and F. v. United Kingdom (No. 35748/05) (28 Nov. 2006) (Court admissibility decision - inadmissible) (couple from Scotland)

- in *Schalk & Kopf v. Austria* (24 June 2010) (Court judgment) (no violation of Article 12), the Court was still not ready to do so, but made it clear that this is because of insufficient European consensus, rather than the reference to "men and women" in Article 12: "61. Regard being had to Article 9 of the [EU] Charter [of Fundamental Rights, which does not refer to 'men and women'], ... the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex."

- in *Hämäläinen v. Finland* (16 July 2014) (Court judgment), which reached the same conclusion as *Wena & Anita Parry* and *R. and F.*, the Grand Chamber did not cite para. 61 of *Schalk & Kopf*: "96. The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 ... enshrines the traditional concept of marriage as being between a man and a woman. While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see *Schalk and Kopf* ... § 63)."

H. Access to an alternative registration system

- *Schalk & Kopf v. Austria* (24 June 2010) (Court judgment) (no violation of Art. 14 combined with Article 8, respect for "family life"): 3 dissenting judges would have found a violation because Austria failed to introduce a registered partnership law for same-sex couples before 1 Jan. 2010; the 4 judges in the majority found no obligation on Austria to introduce such a law earlier than 1 Jan. 2010, but stressed: "103. ... Given that at present it is open to the applicants to enter into a registered partnership [in Austria], the Court is not called upon to examine whether the lack of any means of

legal recognition for same-sex couples [in another country] would constitute a violation of Art. 14 taken in conjunction with Art. 8 if it still obtained today."

- on 15 July 2010, in Case C-147/08, *Römer v. Freie und Hansestadt Hamburg*, Advocate General Jääskinen of the Court of Justice of the European Union delivered his Opinion (CJEU judgment on 10 May 2011):

"76. It is the Member States that must decide whether or not their national legal order allows any form of legal union available to homosexual couples, or whether or not the institution of marriage is only for couples of the opposite sex. In my view, a situation in which a Member State does not allow any form of legally recognised union available to persons of the same sex may be regarded as practising [indirect?] discrimination on the basis of sexual orientation, because it is possible to derive from the principle of equality, together with the duty to respect the human dignity of homosexuals, an obligation [a positive obligation?] to recognise their right to conduct a stable relationship within a legally recognised commitment. However, in my view, this issue, which concerns legislation on marital status, lies outside the sphere of activity of Union law."

- *Vallianatos & Others v. Greece* (7 Nov. 2013) (alternative registration system for unmarried different-sex couples only, contrary to the principle of *Karner*)

- *Oliari & Others v. Italy* (No. 18766/11), *Orlandi & Others v. Italy* (No. 26431/12) (pending cases, communicated on 3 Dec. 2013) (absence of an alternative registration system for same-sex couples who attempted to marry in Italy, or married outside of Italy and sought recognition of their marriages in Italy)

I. Adoption by same-sex partners of each other's genetic children (second-parent adoption) or joint parental authority where one partner is a genetic parent

- the principle of *Karner* should apply if unmarried different-sex partners already enjoy this right (as in, eg, Andorra, Austria, parts of Bosnia and Herzegovina, Liechtenstein, Portugal and Romania)

- *X & Others v. Austria* (19 Feb. 2013) (Court judgment - Grand Chamber) (step-parent adoption legally impossible for a same-sex couple; possible for an unmarried different-sex couple; violation of Article 14 combined with Article 8)

- *X & Others* overrules *Kerkhoven v. Netherlands* (No. 15666/89) (19 May 1992) (Commission admissibility decision) (no parental authority for lesbian mother's female partner over their child by donor insemination where unmarried male partner would have qualified in the same situation)

- *Gas & Dubois v. France* (15 March 2012) (Court judgment) (no discrimination where second-parent adoption restricted to married different-sex couples, and unmarried different-sex couples treated in the same way as unmarried same-sex couples)

J. Joint adoption by same-sex partners of an unrelated child

- the principle of *Karner* should apply if unmarried different-sex couples already enjoy this right (as in, eg, Portugal)
- if only married different-sex couples enjoy this right, see *Gas & Dubois v. France*

K. Access to donor insemination for female-female couples

- the principle of *Karner* should apply if unmarried different-sex couples already enjoy this right (as in France, Italy and Portugal)
- if only married different-sex couples enjoy this right, see *Gas & Dubois v. France*

L. Automatic parenthood for female partner of mother of child born after donor insemination (eliminating the need for a second-parent adoption)

- *Boeckel v. Germany* (7 May 2013) (Court admissibility decision - inadmissible) (no violation of Article 8, taken alone or combined with Article 14, because the presumption of parenthood does not apply to two female registered partners after one gives birth as a result of donor insemination, as it would to different-sex spouses)

M. Recognition of the genetic father of a child born to a surrogate mother

- *Mennesson v. France* (26 June 2014) (Court judgment) (violation of Article 8, private life; refusal to recognise the genetic link between two children born to a surrogate mother in California and their genetic father, who is French)

V. Cases that might fall outside the Convention (Protocol No. 12 is needed)

- if the facts of the case do not fall "within the ambit" of another Convention right, Article 14 (prohibition of discrimination) cannot be invoked
- I would argue that "private life" in Article 8 is affected in every case of sexual orientation or gender identity discrimination, and that Article 14 can always be invoked (as Article 9 can be invoked in every case of discrimination based on religion, see *Thlimmenos v. Greece*, 6 April 2000, Court judgment) but the Court has not clearly accepted this argument to date:

Robert Wintemute, "'Within the Ambit': How Big Is the 'Gap' in Article 14 European Conv. on Human Rights?", [2004] *European Human Rights Law Review* 366

Robert Wintemute, "Filling the Article 14 'Gap': Government Ratification and Judicial Control of Protocol No. 12 ECHR", [2004] *European Human Rights Law Review* 484

- as a result, there could be some cases where the Court will hold that Article 14 does not apply and that Protocol No. 12 is needed
- *F. v. Switzerland* (No. 11680/85) (10 March 1988) (Commission admissibility decision) (ban on same-sex but not different-sex prostitution could not be challenged under Article 14 because prostitution does not fall within "private life" in Article 8)
- *Fretté v. France* (see III.E above) - 3 of 7 judges thought Article 14 did not apply
- but see *I.B. v. Greece* (3 Oct. 2013) (Court judgment) (dismissal of HIV-positive man violated Article 14 combined with Article 8); *Emel Boyraz v. Turkey* (2 Dec. 2014) (same where employee dismissed for being a woman)

- to avoid the uncertainty regarding the applicability of Article 14, every Council of Europe Member State should sign and ratify Protocol No. 12 (general right to non-discrimination that does not require that the facts of the case fall "within the ambit" of another Convention right)

(Optional) **Protocol No. 12** to the Convention (opened for signature 4 Nov. 2000, in force 1 April 2005, only in the 18 Member States that have ratified as of 17 March 2015; 19 Member States have signed but not ratified; 10 have yet to sign; text and Explanatory Report at <http://conventions.coe.int>, Search, Treaties, CETS No. 177):

Article 1 – General Prohibition of Discrimination

(1) 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.

(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1." (emphasis added)

Protocol No. 12 to the Convention, Signatures/Ratifications as of 3 June 2015

| Ratified (18 Member States) | Signed (19 Member States) | No Action (10 Member States) |
|---|--|--|
| Albania Andorra Armenia Bosnia & Herzegovina Croatia Cyprus Finland Georgia Luxembourg Macedonia Montenegro Netherlands Romania San Marino Serbia Slovenia Spain Ukraine (EU: 8 of 28 member states) | Austria Azerbaijan Belgium Czech Republic Estonia Germany Greece Hungary Iceland Ireland Italy Latvia Liechtenstein Moldova Norway Portugal Russia Slovakia Turkey | Bulgaria Denmark France Lithuania Malta Monaco Poland Sweden Switzerland United Kingdom |

VI. Texts of the Parliamentary Assembly of the Council of Europe (PACE) and the Committee of Ministers (CM)

- PACE, Opinion No. 216 (2000),

<http://assembly.coe.int/Documents/AdoptedText/ta00/EOP1216.htm> (26 Jan. 2000) (“‘sexual orientation’ should be added”), Report of Committee on Legal Affairs and Human Rights, Doc. 8614, <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=8823&Language=EN>

(14 Jan. 2000)

- PACE, Recommendation 1470 (2000) on the "Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe",

<http://assembly.coe.int/Documents/AdoptedText/ta00/EREC1470.htm> (30 June 2000)

- PACE, Recommendation 1474 (2000) on the "Situation of lesbians and gays in Council of Europe member states",

<http://assembly.coe.int/Documents/AdoptedText/ta00/EREC1474.htm> (26 Sept. 2000)

- CM, Reply to PACE Recommendation 1474 (Decision, Item 4.3, 765th meeting, 19 Sept. 2001,

<https://wcd.coe.int/ViewDoc.jsp?id=224579&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>)

- PACE, Recommendation 1686 (2004) on "Human mobility and the right to family reunion", para. 12.iii.a

<http://assembly.coe.int/Documents/AdoptedText/ta04/EREC1686.htm>

- CM, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (31 March 2010), <https://wcd.coe.int/ViewDoc.jsp?id=1606669>

- PACE, Resolution 1728 (2010) on "Discrimination on the basis of sexual orientation and gender identity" (29 April 2010),

<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1728.htm>

- PACE, Recommendation 1915 (2010) on "Discrimination on the basis of sexual orientation and gender identity" (29 April 2010),

<http://assembly.coe.int/Documents/AdoptedText/ta10/EREC1915.htm>

- CM, Reply to PACE Recommendation 1915, CM/AS(2011)Rec1915 final (30 March 2011), <https://wcd.coe.int/ViewDoc.jsp?id=1770121&Site=CM>

- PACE, Resolution 2048 (2015) on "Discrimination against transgender people in Europe" (22 April 2015),

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21736&lang=en>

VII. Case law of the Court of Justice of the European Union (Luxembourg)

(all judgments at http://curia.europa.eu/jcms/jcms/j_6/)

1. Gender identity and employment

- Case C-13/94, *P. v. S. and Cornwall County Council* (30 April 1996),

(dismissal of transsexual employee was sex discrimination contrary to Council Directive 76/207/EEC)

- Case C-117/01, *K.B. v. National Health Service Pensions Agency* (7 Jan. 2004) (ineligibility of transsexual male partner of non-transsexual female employee for survivor's pension, because they are currently unable to marry, was in principle sex discrimination contrary to Article 141 of the EC Treaty)

- Case C-423/04, *Richards v. Secretary of State for Work and Pensions* (27 April 2006) (Council Directive 79/7/EEC requires that a post-operative transsexual woman be granted a retirement pension at 60, like other women, not 65, as in the case of men)

2. Sexual orientation and employment

- Case C-249/96, *Grant v. South-West Trains* (17 Feb. 1998) (no sex discrimination contrary to Article 141 EC where employment benefit denied to female employee's unmarried female partner but male employee's unmarried female partner qualified)

- Joined Cases C-122/99 P, C-125/99 P ["P" means *pourvoi* or appeal to CJEU but is not part of case no.], *D. & Sweden v. Council* (31 May 2001) (failure to treat a Swedish registered partnership as equivalent to a civil marriage for the purpose of an employment benefit was neither sex nor sexual orientation discrimination)

- Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (1 April 2008) (Council Directive 2000/78/EC banning sexual orientation discrimination in relation to all aspects of employment, including pay, "preclude[s] legislation ... under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though [if], under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit [but no EU law obligation to introduce a registered partnership law for same-sex couples]", despite Recital 22: "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.") (see IV.E above; issue similar to that in *M.W. v. UK* and *Schalk & Kopf*, IV.D. and IV.H. above)

- Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg* (10 May 2011) (same issue as *Maruko*, except that the employee is still alive and receives a smaller monthly pension because he has a same-sex registered life partner, rather than a different-sex spouse; the CJEU explains that "comparable" in *Maruko* does not mean an identical legal situation; it is enough if the "relevant" legal rights and obligations of registered partners and spouses are the same; it is not necessary to show that "national law generally and comprehensively treats registered ... partnership as legally equivalent to marriage"; rather it is enough to show that registered partners "have [legal] duties towards each other, to support and care for one another and to contribute adequately to the common needs of the partnership by their work and from their property, as is the case between spouses"; this could be important in member states such as France, the Czech Republic and Slovenia, where registered same-sex partners have mutual support obligations, but appear to be excluded from survivor's pensions)

- Case C-81/12, *Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării* (25 April 2013) ("Directive 2000/78/EC ... must be interpreted as meaning that 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 ... [and] as meaning that, 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 [to rebut the non-conclusive presumption .. it is unnecessary for a defendant to prove that persons of a particular sexual orientation have been recruited in the past]”)

- Case C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* (12 December 2013) (same issue as *Maruko* and *Römer*, except that the benefits were special leave and a bonus for employees who marry, and the employee denied the benefits was in a *pacte civil de solidarité*, which is also open to different-sex couples; “43. The fact that the PACS, unlike the registered life partnership ... in *Maruko* and *Römer*, is not restricted only to homosexual couples is irrelevant and, in particular, does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage. 44. The difference in treatment based on the employees’ marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.”)

3. Asylum claims based on sexual orientation or gender identity

- Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v. Minister voor Immigratie en Asiel* (7 Nov. 2013) (“[T]he existence of criminal laws ..., which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group. ... [T]he criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment ... which is actually applied in the country of origin must be regarded as ... disproportionate or discriminatory and thus constitutes an act of persecution. ... The competent authorities 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.”)

- Joined Cases C-148/13, C-149/13 and C-150/13, *A, B and C v. Minister voor Immigratie en Asiel* (2 Dec. 2014) (“[S]tatements made by applicants for asylum with respect to their declared sexual orientation [are not an established fact and] may require confirmation. ... Directive 2004/83/EC ... and ... Directive 2005/85/EC ... must be interpreted as precluding, in the context of the assessment ... of ... the declared sexual orientation of an applicant ... an assessment ... founded on questions based only on stereotyped notions concerning homosexuals. ... Directive 2004/83, read in the light of Article 7 of the Charter ... , must be interpreted as precluding ... detailed questioning as to the sexual practices of an applicant ... Directive 2004/83, read in the

light of Article 1 of the Charter ..., must be interpreted as precluding ... the acceptance ... of evidence such as the performance by the applicant ... of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or ... the production by him of films of such acts. ... Directive 2004/83 and ... Directive 2005/85 must be interpreted as precluding ... the competent national authorities from finding that the statements of the applicant ... 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.“)

4. Free movement of same-sex partners

- no case law yet interpreting Directive 2004/38/EC (free movement of EU citizens):

Article 2 - Definitions

(2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; ...

(3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3 - Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(b) the partner with whom the Union citizen has a durable relationship, duly attested. The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

5. Sexual orientation and blood donation

- Case C-528/13, *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes* (29 April 2015):

65. ... a permanent deferral from blood donation for the whole group of men who have had sexual relations with other men is proportionate only if there are no less onerous methods of ensuring a high level of health protection for recipients.

67. ... the referring court [the Administrative Court of Strasbourg, France] must verify in particular whether the specific questions concerning the period which has elapsed since the prospective donor's most recent sexual relations in relation to the length of the 'window period', the stability of the relationship of the person concerned, or whether sexual relations were protected, enable an evaluation of the level of risk presented by each individual donor on account of his own sexual behaviour.

68. ... if ... less onerous methods than the permanent deferral of blood donation for the entire group of men who have had sexual relations with other men ensure a high level of health protection to recipients, such a permanent contraindication would not respect the principle of proportionality, within the meaning of Article 52(1) of the Charter.

6. Does the CJEU wait for the ECtHR to lead?

- it can be argued that, to date, the Court of Justice of the European Union (CJEU) has done nothing for LGBT individuals, with regard to a particular issue, unless the European Court of Human Rights (ECtHR) had already provided some protection
- *P.* (CJEU, 1996) was made possible by *B. v France* (ECtHR, 1992), which was cited by the Advocate General in *P.*
- *K.B.* (CJEU, 2004) and *Richards* (CJEU, 2006) were made possible by *Christine Goodwin* (ECtHR, 2002)
- *Grant v. South-West Trains* (CJEU, 1998) and *D.* (CJEU, 2001) failed because there was not yet any favourable case law from the ECtHR on couples that are factually and legally same-sex (ie, where neither partner has undergone gender reassignment)
- *Karner v. Austria* (ECtHR, 2003) makes it almost certain that the CJEU will interpret Council Directive 2000/78/EC as requiring (unlike *Grant*) that employment benefits for unmarried partners be the same whether the partners are different-sex or same-sex (this form of equal treatment should also apply to different-sex and same-sex registered partners and different-sex and same-sex married partners)
- the reasoning in *Maruko* (CJEU, 2008) and *Roemer* (CJEU, 2011) is narrow because the ECtHR has yet to find discrimination where there are differences in treatment between registered or unregistered same-sex partners and married different-sex partners (see *M.W. v. UK* and *Schalk & Kopf*, IV.D. and IV.H. above), and the CJEU seems to be afraid of trespassing on national competence over family law
- an exception is the area of asylum, in which there was no favourable ECtHR judgment for the CJEU to follow in *X, Y and Z* (2013) and *A, B and C* (2014)

For a more detailed discussion, see Robert Wintemute, "In Extending Human Rights, which European Court is Substantively 'Braver' and Procedurally 'Fitter'? The Example of Sexual Orientation and Gender Identity Discrimination" in Sonia Morano-Foadi & Lucy Vickers (eds.), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart Publishing, 2015).