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The Case

Tadao Maruko

Equal right to pension benefits?
Legal implications of the Maruko judgment

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I. European Court of Human Rights:

- Very essence of the convention is respect for human dignity and freedom
- Notion of personal autonomy is an important principle underlying the interpretation of the right to respect for private life
- Sexuality and sexual life are at the core of the fundamental right to protection of private life. State intervention interferes with this right; and such interferences are justified only if demonstrably necessary to avert damage from others (*pressing social need, proportionality*)
- Attitudes and moral convictions of a majority cannot justify interferences into the right to private life (or into other human rights)

(Dudgeon vs. UK 1981, *Norris vs. Ireland* 1988, *Modinos vs. Cyprus* 1993, *Laskey, Brown & Jaggard vs. UK* 1997, *Lustig-Prean & Beckett vs. UK* 1999; *Smith & Grady vs. UK* 1999; *A.D.T. vs. UK* 2000, *Christine Goodwin vs. UK* 2002, *I. vs. UK* 2002, *Fretté vs. France* 2002, *L. & V. v. Austria* 2003, *S.L. v. Austria* 2003)

- Discrimination on the basis of sexual orientation
  - is unacceptable
  - is as serious as discrimination on the ground of race, ethnic origin, religion and sex
  - differentiation requires particularly serious reasons

(Lustig-Prean & Beckett vs. UK 1999; *Smith & Grady vs. UK* 1999; Salgueiro *da Silva Mouta vs. Portugal* 1999; *L. & V. v. Austria* 2003, *S.L. v. Austria* 2003, *E.B. vs. France* 2008)

- not just negative rights to freedom from state intervention

but also

- positive rights to (active) protection of these rights in relation to the state as well as in relation to other individuals
- obligation of the state to act in case of intereference with the right to personal development and the right to establish and maintain relations with other human beings

(Zehnalová & Zehnal vs. CZ 2002*)*

II.
Pre-Maruko Case-Law of the ECJ

(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)

III.
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
-> 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)

The Judgment

(01.04.2008)

- *Recital 22:*

  (a) civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States , but

  (b) in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination

  (c) 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 <u>such as that at issue in the main proceedings</u> …“**
> (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 **<u>such as that at issue in the main proceedings</u>**, …, **<u>where</u>** …[follow criteria which the national court has to apply in determining compatibility with community law]” (emphasis added)

IV.
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)

V.
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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