

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

**Summary prepared for ILGA-Europe to submit to
Mr. Thomas Hammarberg, Commissioner for Human Rights, Council of Europe**

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I. Steps in eliminating sexual orientation discrimination

- 1787 - Austria was first European country to repeal its death penalty for some forms 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
Portugal	2006	2003	2010	2010	-----	-----	2010
Iceland	1992	1996	1996	1996	2000	2006	2010
UK	2000	2003	2004	2004	2002	2002	-----
Denmark	1976	1987	1989	1989	1999	2010	-----
Finland	1998	1995	2001	2001	2009	proposed	proposed
Germany	1994	2003	2001	2004(?)	2004	proposed	-----
Austria	2002	2003	2009	2009	-----	-----	-----
Ireland	?	1993	2010	2010	-----	-----	-----
France	1982	1985	1999	-----	-----	-----	-----
Luxembourg	1992	1997	2004	proposed	proposed	proposed	proposed
Greece	?	2003	----- ⁵	-----	-----	-----	-----
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 See Law No. 3719/2008 ("common life pact") for unmarried different-sex couples; challenged in *Vallianatos & Mylonas v. Greece* (No. 29381/09) (pending).

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,⁶ 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 men to Iran, compare *F. (Fashkami) v. UK* (22 June 2004), App. No. 17341/03 (Court admissibility decision - inadmissible) with *H.J. (Iran) v. Secretary of State for Home Department*, [2010] UKSC 31 (UK Supreme Court)

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 Articles 10 and 11

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)

⁶ 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).

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) (violation 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) (violation 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.

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 ...”

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)

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, <http://scc.lexum.umontreal.ca/en/index.html> (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. ...

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)

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 8, respect for home, together with Article 14) (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*)

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

- *Schalk & Kopf* arguably 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"; but see *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* (Court judgment) (28 Sept. 2010)

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):

Şerife Yiğit v. Turkey (2 Nov. 2010) (Court judgment - Grand Chamber)

Shackell v. UK (No. 45851/99) (27 April 2000) (Court admiss. dec. - inadm.)

Saucedo Gómez v. Spain (No. 37784/97) (26 Jan. 1999) (Court admiss. dec. - inadm.)

- 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)

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")

- *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 than 7 of 47 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."

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 (EN not available; emphasis added; CJEU judgment on 10 May 2011):

"76. ... Selon moi, un cas de figure dans lequel un État membre n'admettrait aucune forme d'union légalement reconnue qui soit ouverte aux personnes de même sexe pourrait être considéré comme constituant une discrimination liée à l'orientation sexuelle, parce qu'il est possible de faire dériver du principe d'égalité, combiné avec le devoir de respecter la dignité humaine des personnes homosexuelles ..., une obligation de reconnaître à celles-ci la faculté de vivre une relation affective durable dans le cadre d'un engagement juridiquement consacré. Toutefois, cette problématique, qui concerne la réglementation de l'état civil, demeure à mon avis en dehors de la sphère d'intervention du droit de l'Union [but is not necessarily outside the European Convention on Human Rights]."

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 Portugal)
- if so, this would overrule *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)
- if only married different-sex couples enjoy this right, depends on IV.D; see *Gas & Dubois v. France* (Court hearing, 12 April 2011)

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 Portugal)
- if only married different-sex couples enjoy this right, depends on IV.D

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 and Portugal)
- if only married different-sex couples enjoy this right, depends on IV.D

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
- this is why 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 8 May 2011; 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 8 May 2011

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: 7 of 27 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/Documents/WorkingDocs/doc00/EDOC8614.HTM> (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, <http://cm.coe.int/dec/2001/765/43.htm>)
- 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)

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

(all judgments, except *P.*, 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),
http://eur-lex.europa.eu/RECH_naturel.do (Year = 1994, Number = 13)
(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", 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)

3. 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.

4. Disparity between the two European Courts' case law

- 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 arguably 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

5. Missing case law for same-sex couples in Europe (rights other than parental rights)

access to rights of unmarried different-sex couples	- <i>Karner v. Austria</i> (ECtHR, 2003)
recognition as enjoying "family life" under Article 8 EConvHR (same-sex couple without children)	- <i>Schalk & Kopf v. Austria</i> (ECtHR, 2010)
access to rights of married different-sex couples	not yet - <i>Maruko</i> (CJEU, 2008) (no obligation on member state to provide means for same-sex couples to qualify, eg, pass a registered partnership law; ILGA-Europe argued for same reasoning as in <i>K.B.</i> ; CJEU accepted narrower reasoning of Commission and Advocate General) - <i>Schalk & Kopf v. Austria</i> (ECtHR, 2010) (Article 14 and 8 EConvHR might require some alternative to legal marriage for same-sex couples, in countries where none exists; not the case in Austria at date of judgment)
access to legal marriage	not yet - <i>Schalk & Kopf v. Austria</i> (ECtHR, 2010)

6. Missing case law for same-sex couples in Europe (parental rights)

access to adoption as an unmarried individual (in countries where this opportunity exists)	<i>E.B. v. France</i> (ECtHR, 2008)
access to adoption of partner's child	not yet - possible challenge in Portugal (clearly covered by <i>Karner</i> because unmarried different-sex couples have access), <i>Gas & Dubois v. France</i> (pending; only married different-sex couples have access)
access to joint adoption of unrelated child	not yet - no pending case, possible challenge in Portugal (clearly covered by <i>Karner</i> because unmarried different-sex couples have access)
access to donor insemination for lesbian couples	not yet - no pending case, possible challenge in France or Portugal (clearly covered by <i>Karner</i> because unmarried different-sex couples have access)
access to automatic legal parenthood for second parent after donor insemination (no need for second parent to adopt child)	not yet - no pending case, possible challenge in France or Portugal (clearly covered by <i>Karner</i> because unmarried different-sex couples have access)