

PROHIBITION OF SEXUAL ORIENTATION DISCRIMINATION IN MONTENEGRO IN THE LIGHT OF CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION

STOP

DISCRIMINATION

Dagmara Rajska, PhD

“Support to the National Institutions in Preventing Discrimination in Montenegro” (PREDIM)

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Dagmara Rajska, PhD

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INTRODUCTION

Homophobic and transphobic attitudes combined with lack of adequate legal protection against discrimination based on sexual orientation expose many LGBT people (lesbians, gays, bisexual and transgender) to human rights violations. They are discriminated against in many fields, as regards employment, medical care, social rights etc. They are victims of physical attacks and they are even killed because of their sexual orientation. There are still countries criminalizing private consensual same-sex relationships and therefore exposing the individuals to the risk of arrest, prosecution and in some countries, which are not Members States of the Council of Europe, the death penalty.

This is a comparative study of the case law of the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) and its impact and interactions, sometimes called a dialogue of judges, with the national courts, also in Montenegro. It also reflects the structure of the study, which focuses firstly on European case law and secondly on national case law, which is additionally spread throughout the whole publication.

Prohibition of discrimination based on sexual orientation is an important principle, which affects all other rights protected by international treaties, directives and other instruments established by the States in order to protect human rights. The most important among these texts are naturally the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

PART I - PROHIBITION OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights was signed on 4 November 1950 in Rome. In the context of this Convention, the European Court of Human Rights and the European Commission of Human Rights were established. Since 1 November 1988, the European Court of Human Rights has been an international permanent court. If a State recognizes a right to lodge an individual complaint, the Court is competent in dealing with individual complaints, which raise allegations of human rights violations, including allegations of discriminatory treatment in conjunction with other substantive rights protected by the Convention. Article 14 of the Convention requires: “The enjoyment of the rights and freedoms set forth in this Convention 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.”

In 2000, a Parliamentary Assembly opinion proposed that “sexual orientation” be added to the list of prohibited grounds of discrimination for Protocol 12, which establishes 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.”

Although the proposal was not taken up, it recognized the advances in attitudes that there have been toward discrimination in this particular field.

These advances have been reflected in the Strasbourg jurisprudence, which has undergone a significant evolution over the last decade.

The European Commission of Human Rights did not declare any human rights violations towards homosexual people although homosexual activities were persecuted in many countries, for example Germany. However, the Commission considered that there was no European consensus at this time to decriminalize homosexual activities.

On 22 October 1981, the European Court of Human Rights delivered a judgment *Dudgeon v. the United Kingdom* (no. 7525/76). On 26 October 1988, it delivered a similar judgment *Norris v. Ireland* (no. 10581/83). In these two cases, the applicants were subjected to a criminal investigation for their homosexual activities. The European Court of Human Rights found a violation of Article 8 (right to respect for private life). It cannot be considered that there was a “pressing social need” to consider homosexual acts as criminal offences. The public can be shocked or disturbed by homosexual activities, but that cannot justify the application of penal sanctions when consenting adults alone were involved. This case law was later confirmed in *Modinos v. Cyprus* (no. 15070/89), *A.D.T. v. the United Kingdom* (no. 35765/97), and *H.Ç. v. Turkey* (no. 6428/12).

It is worth mentioning that there must not be any difference of treatment for hetero- and homosexual persons as regards sanctions for having sexual discourse with an adolescent (*L. and V. v. Austria* (nos. 39392/98 and 39829/98)).

I Prohibition of inhuman or degrading treatment resulting from discrimination based on sexual orientation

Article 3 of the European Convention on Human Rights prohibits all kinds of torture, inhuman and degrading treatment, which is inflicted by the authorities or private individuals. The Convention is also applied horizontally, that is why the authorities have an obligation to protect each person from private third-party violence.

Homosexuals are a vulnerable group, particularly exposed to different forms of discrimination, including physical violence resulting from discrimination based on sexual orientation. It can also be the case that homosexuals have dual vulnerable status. For example, if they belong to a sexual minority and they are mentally disabled.

Many examples of a violation of the prohibition of inhuman or degrading treatment resulting from discrimination based on sexual orientation rise from the case law of the European Court of Human Rights.

1. Allegations of ill treatment by the police

The State should ensure an effective, prompt and impartial investigation particularly in a case of crimes related to sexual orientation or gender. Special attention should be paid to the the acts committed by law enforcement officials who should be pursued and, if appropriate, sentenced for acts committed, and sexual orientation or gender identity should be taken into account as an aggravating circumstance.

In *Identoba and Others v. Georgia* (no. 73235/12), the applicants took part in a peaceful demonstration in Tbilisi, organised by a non-governmental organisation to mark the International Day of Homophobia, which was

interrupted by a violent counter-demonstration. The Georgian authorities knew or ought to have known the risks surrounding the demonstration, based on various reports on the situation of lesbian, gay, bisexual and transgender people in Georgia. Therefore, the authorities had an obligation, but they failed to provide adequate protection. Sexual orientation was an aggravating circumstance in the committing of those offences, that is why it was essential that the authorities carried out an effective investigation in that specific context, but they failed to do so (concerning the failure to run an effective investigation in a case of sexual minority aggression, see also: *M.C. and A.C. v. Romania* (no. 12060/12), *Sabalić v. Croatia* (application is pending no. 50231/13)). In this case, the Court found a violation of Article 3 taken in conjunction with Article 14 of the Convention.

2. Conditions of detention

Homosexual detainees face the risk of violence, which can be accentuated by other prisoners because of their sexual orientation. If the authorities do not take the necessary measures to ensure the protection of such a person belonging to a sexual minority, s/he can allege a breach of the prohibition of inhuman or degrading treatment and discriminatory treatment (*Stasi v. France* (no. 25001/07)).

If a detainee belongs to a sexual minority and s/he is placed in solitary confinement, under the pretext of protection against violence motivated by her/his sexual orientation, it is considered as mental and physical suffering and constitutes a breach of Article 3 of the Convention and discriminatory treatment under Article 14 (*X. v. Turkey* (no. 24626/09)).

3. Risk arising from the return of homosexuals to their country of origin

A very topical problem of persons belonging to sexual minorities is a return to their countries of origin, where they risk being prosecuted for their sexual orientation. It concerns beneficiaries of international protection (asylum seekers, refugees etc.) and persons who are supposed to be extradited for other reasons.

The European Court of Human Rights rarely finds a violation in these kinds of cases, most often because either the burden of proof is incumbent upon the applicant, the asylum status that has been granted to the applicant or owing to the improvement of the situation in the country of origin of the applicant.

The European Court of Human Rights declared the case *I.I.N v. the Netherlands* (no. 2035/04) inadmissible. The applicant complained that he risked inhuman or degrading treatment if he had to return to Iran. However, he did not prove that there were grounds to believe that he would be exposed to inhuman or degrading treatment (*mutatis mutandis*: *A.N. v. France* (no. 12956/15)). In the case of *A.S.B. v. the Netherlands* (no. 4854/12)), the applicant complained about similar risks, which he would face after his extradition to Jamaica. The case was struck out of the list of cases because the applicant finally received asylum status in the Netherlands.

In two other cases, the applicants complained about the risk, which they would face as homosexuals, after their return to their countries of origin, respectively Libya and Iran. The European Court of Human Rights struck the cases out of the list of cases as the applicants were granted residence permits, respectively in Sweden and Finland (*M.E. v. Sweden* (no. 71398/12), *A.E. v. Finland* (no. 30953/11)).

In the case of *M.K.N. v. Sweden* (no. 72413/10), the applicant complained that he had to leave Iraq for his Christian beliefs. He complained that an eventual return to Iraq would expose him to a risk of inhuman or degrading treatment. However, the applicant did not prove his homosexuality or the risk in his country of origin because the situation improved. Therefore, in the applicant's circumstances, the deportation order could not be considered as a breach of Article 3 of the Convention.

II Right of liberty and security free from discrimination on grounds of sexual orientation

A State should take appropriate measures to ensure the safety and dignity of all people deprived of liberty. In particular, it should take measures to prevent any physical assault committed by inmates or staff and motivated by sexual orientation or gender identity, and to pursue those who commit such acts.

In *O.M. v. Hungary* (no. 9912/15), the applicant fled Iran because of his sexual orientation and he applied for asylum in Hungary. Between 25 June and 22 August 2014, the applicant was placed in detention by the Hungarian authorities. In October 2014, the applicant was awarded refugee status. He complained about arbitrariness and unjustified detention. As the authorities did not offer any adequate reflection on the individual circumstances of the applicant, who was a member of a vulnerable group by virtue of belonging to a sexual minority in Iran, the European Court of Human Rights declared a violation of Article 5 of the Convention.

III Right to private and family life free from discrimination based on sexual orientation

1. Adoption

The European Convention on Human Rights protects the private and family life of sexual minorities. The adoption of children by lesbian, gay, bisexual and transgender persons involves adoption by same-sex couples or by a single partner.

The case *E.B. v. France* (no. 43546/02) concerned the refusal to grant approval for the purposes of adoption because of the lifestyle of the applicant who was lesbian and lived in a homosexual relationship with another woman. The applicant complained about discriminatory treatment by the authorities during the adoption process. The European Court of Human Rights found a violation of Article 14 in conjunction with Article 8 of the Convention, because French law opens adoption to single people, it means that single homosexuals are included in this group.

In another case, *Gas and Dubois v. France* (no. 25951/07), the first applicant applied for a simple adoption order with respect to a second applicant's child. The simple adoption order enables a second legal parent-child relationship to be established in addition to the original parent-child relationship based on blood ties. The same-sex couples as well as the opposite-sex couples in civil union were not allowed to adopt a child under the French law. Therefore, there was no violation of Article 14 in conjunction with Article 8 of the Convention.

In the case of *X and Others v. Austria* (no. 19010/07), two applicants living in a homosexual relationship complained about the refusal of the Austrian courts to grant the right to adopt the son of the other partner. The European Court of Human Rights found that there was a difference in the treatment of

the applicants in comparison with unmarried different sex couples in which one partner wished to adopt the other partner's child. Therefore, it found a violation of Article 14 in conjunction with Article 8.

2. Civil unions

A civil union is a legally recognized arrangement similar to marriage. A right to enter into a civil union for lesbian, gay, bisexual and transgender persons still does not exist in all Member States of the Council of Europe.

The lack of a possibility to get married or enter into any other type of civil union for homosexual couples, contrary to different-sex couples that have the right to get married, is considered as a violation of Article 8 (*Oliari and Others v. Italy (nos. 18766/11 and 36030/11)*) or Article 14 taken together with Article 8 of the Convention (*Vallianatos and Others v. Greece (nos. 29381/09 and 32684/09)*).

However, a person who has changed gender from male to female, requested to modify her official documents in accordance with her new gender. However, the authorities refused this modification, because full recognition was possible only if the applicant had had her marriage turned into a civil partnership and this was not the case. Therefore, the European Court of Human Rights did not find a violation of Article 8 or of Article 14 in conjunction with Article 8 (*Hämäläinen v. Finland (no. 37359/09)*).

3. Discharge from the army

Lesbian, gay, bisexual and transgender persons are not allowed to serve in the army in many Member States of the Council of Europe. However, there is a trend to enable military service without discriminatory treatment based on sexual orientation.

If military personnel are discharged from the military because there is an absolute ban on homosexuals in the armed forces, this measure will not be compatible with the European Convention on Human Rights.

In *Perkins and R. v. the United Kingdom* (nos. 43208/98 and 44875/98) and *Beck, Copp and Bazeley v. the United Kingdom* (nos. 48535/99, 48536/99 and 48537/99), the Court found that the complete ban on military service based on sexual orientation for the applicants had constituted especially grave interferences with their private lives and had not been justified by “convincing and weighty reasons”.

4. Dismissal of claim for defamation

Freedom of expression in the field of sexual orientation issues, like all freedoms, stops at the limits of third-person freedoms or rights, namely the right to have a reputation respected.

In *Sousa Goucha v. Portugal* (no. 70434/12), a joke made by a third person in the media which mixed gender with the sexual orientation of the applicant was not considered as a breach of the applicant’s personal rights. The Court did not find a violation of Article 8 or of Article 14 in conjunction with Article 8 of the Convention.

5. Exclusion from giving blood

Many States have established a blanket ban on LGBT people, and in particular homosexual or bisexual men, giving blood, which is justified by different reasons, for example, sanitary reasons. However, many LGBT organisations raise the issue that these restrictions are based on homophobia. European legislators are progressively limiting the length of indefinite deferral for LGBT people to give blood from an indefinite term to one year since the last exposure (e.g. Switzerland).

In *Tosto v. Italy* (no. 49821/99), *Crescimone v. Italy* (no. 49824/99) and *Faranda v. Italy* (no. 51467/99), the applicants complained that they could not give blood because of their sexual orientation. According to the decree issued by the Ministry of Health in 1991, being a homosexual was one of the reasons of permanent exclusion from giving blood, in view of the risk of passing on infectious diseases such as AIDS or hepatitis. The applicants were refused the opportunity to become blood donors and they complained about this ban based on their sexual orientation under Article 8 and 14 of the Convention. However, the Court struck the case off of its list of cases because the 1991 ministerial decree was replaced by the decree of 26 January 2001. The legal obstacle, which prevented the applicants from giving blood, was therefore eliminated from the Italian legal order.

6. Parental authority

All legal parents, including those in LGBT families, have a right to seek custody over the children living with them, and to make decisions as regards the health, education and wellbeing of those children. They also have a responsibility to support them. In many States, a person who is not considered as the legal parent does not have any legal decision-making authority over the children. There is also an issue of availability and recognition of adoption by a second parent, which is often the subject of an allegation of discriminatory treatment raised by homosexual parents whose rights are not recognised in this area.

In *Salgueiro da Silva Mouta v. Portugal* (no. 33290/96), the applicant was deprived of child visitation rights because of his homosexuality. The Portuguese courts' decision referred largely to the sexual orientation of the applicant and they found that the child should live in a traditional Portuguese family. The European Court of Human Rights held that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

7. Parental leave

LGBT people face discrimination based on sexual orientation in many areas, and among them is the right to parental leave, which is often refused to them.

In *Hallier and Lucas v. France* (no. 46386/10), the applicant, in a same-sex relationship who had signed the French civil union agreement in 2004, complained about the refusal to grant him paternity leave on the occasion of the birth of his partner's child. The applicant raised Article 14 in conjunction with Article 8. The case was communicated to the Government and is pending before the European Court of Human Rights.

8. Refusal to register a parent on birth certificate

In many couples, including LGBT couples, a second non-biological parent cannot be included on the birth registration. This has an important impact for further recognition as a legal parent of a child and decision-making on behalf of this child.

In *Boeckel and Gessner-Boeckel v. Germany* (no. 8017/11), the Court found that the refusal to register one of the same-sex relationship partners as a parent on the birth certificate of the other partner's child, born during the time of their partnership, was not a relevantly similar situation to a married different-sex couple when it came to the issue of the entries to be made on a child's birth certificate.

9. Residence permit

LGBT people face difficulties when they request a residence permit for a partner who has foreign origins. Refusal based on homosexuality is a breach of Article 14 in conjunction with Article 8 (*Pajić v. Croatia* (no. 68453/13), *Taddeucci and McCall v. Italy* (no. 51362/09)).

10. Social protection

Discrimination based on sexual orientation also exists in the field of social security. Difference of treatment can be related to the eligibility that, contrary to married couples, a survivor has to their late homosexual partner's pension.

In *Mata Estevez v. Spain* (no. 56501/00), the European Court of Human Rights rejected the applications as inadmissible because the pertinent legislation relating to eligibility for survivors' allowances pursued a legitimate aim, which is the protection of the family, based on the bonds of marriage. This difference in treatment fell within the margin of appreciation. For the same reasons, the refusal of a reversionary pension to a survivor of a same-sex persons' civil partnership will not be considered as discriminatory treatment compared to the married person who has a right to apply and receive it (*Manenc v. France* (no. 66686/09)). The same-sex partner should have a possibility to extend his sickness insurance to the homosexual partner in accordance with the standards established in Article 14 in conjunction with Article 8 (*P.B. and J.S. v. Austria* (no. 18984/02)).

11. Succession to a tenancy

The refusal of national courts to recognise the right to succeed to a tenancy after the death of one of the partners in a homosexual relationship amounts to discrimination on grounds of his or her sexual orientation.

In the case of *Karner v. Austria* (no. 40016/98) and *Kozak v. Poland* (no. 13102/02) the European Court of Human Rights found a violation of Article 14 in conjunction with Article 8 of the Convention.

IV Freedom of thought, conscience and religion free from discrimination on grounds of sexual orientation

Safeguarding religious freedom should not come at the expense of LGBT persons' rights. For this reason, antidiscrimination rights play a very important role in the protection of this community.

In *Ladele and McFarlane v. the United-Kingdom* (no. 51671/10 and 36516/10), two applicants, employed in the Registry of Births and practising Christians, refused to carry out some of their duties as regards homosexual persons because, according to the applicants, these practices were incompatible with their personal religious beliefs. The European Court of Human Rights did not find any violation of Article 9 or 14 alone or read together. The decision to bring disciplinary proceedings against the applicants was taken in order to pursue a policy of non-discrimination against service users, and the right of non-discrimination on grounds of sexual orientation was protected by the Convention.

V Freedom of expression free from discrimination based on sexual orientation

A State should ensure that sexual minorities effectively enjoy freedom of expression with a possibility to receive and share information on the subject of sexual orientation and gender.

In the case of *Vejdeland and Others v. Sweden* (no. 1813/07) the conviction of the applicant for distributing leaflets offensive to homosexuals at an upper secondary school, was considered by national courts as agitation against a national or ethnic group. The interference of freedom of expression was

necessary in a democratic society because of the protection of reputation and the rights of others. The Court held that there was no violation of Article 10.

In the case of *Mladina D.D. Ljubljana v. Slovenia* (no. 20981/10), the applicant wrote an ironic article in response to a controversial parliamentary debate on the legal recognition of same-sex couples. As a result, in accordance with the national courts, the applicant was obligated to pay damages to the person, a parliamentarian, who had been insulted. The European Court of Human Rights found that there had been a violation of Article 10.

VI Freedom of assembly and association free from discrimination based on sexual orientation

A ban on the organization of a peaceful demonstration – for example, to promote laws on sexual minorities – without a possibility to obtain a final decision on this ban prior to the date of the planned demonstration, and without the giving of a valid reason for this ban, which would prove that it was not based on sexual orientation, is considered as a violation of freedom of assembly and association alone and in conjunction with prohibition of discrimination and right to effective remedy (Article 11, Article 13 in conjunction with Article 11 and Article 14 in conjunction with Article 11) (*Bączkowski v. Poland* (no. 1543/06), *Genderdoc-M v. Moldova*, (no. 9106/06).

VII Right to marry free from discrimination based on sexual orientation

Same-sex applicants living in a stable relationship who do not have a possibility to marry, do not suffer from discriminatory treatment or breach of the right to marry. As regards same-sex partners' right to marry, the

European Court of Human Rights does not find a violation of either Article 12 or of Article 8 in conjunction with Article 14. The same-sex relationship of the applicants fell within the notion of family life, just as a different-sex partners' relation would. However, the State is not obligated to grant a same-sex couple access to marriage (*Schalk and Kopf v. Austria* (no. 30141/04), and *Chapin and Charpentier v. France* (no. 40183/07)).

VIII Right to property free from discrimination on grounds of sexual orientation

LGBT people are also exposed to discriminatory treatment on grounds of sexual orientation as regards their pecuniary rights, for example, inheritance rights, housing or social benefits which are not recognized in all States.

In the case of *J.M. v. the United Kingdom* (no. 37060/06), the divorced mother of two children was obligated to pay child maintenance higher than that of other divorced heterosexual parents. The European Court of Human Rights found a violation of Article 14 in conjunction with Article 1 of Protocol 1 to the Convention.

PART II – PROHIBITION OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

In the founding treaties of the European Union, there was neither mention of human rights nor mention of LGBT rights.

For the first time, human rights were enshrined in the Maastricht Treaty, which was signed on 7 February 1992, and entered into force on 1 November 1993. However, the treaty still does not mention LGBT rights. The following dispositions of the Maastricht Treaty cover human rights:

- “Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law...” (Preamble)
- Article 130u (...) “2. Community Policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.”
- Article J.1 (...) “2. The Objectives of the common foreign and security policy shall be: to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.”
- Article K.2 “1. The matters referred to in Article K.1 (for example judicial cooperation, asylum and immigration policy etc.) shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by Member States to persons persecuted on political grounds.”

In the years that followed, some soft law measures were taken to protect LGBT rights, for example, a European Parliament resolution adopted in 1984, calling for an end to work-related discrimination on the basis of sexual orientation, and a European Parliament resolution adopted in 1998, stating that it will not give its consent to the accession of any country that, through its legislation or policies, violates the human rights of lesbians and gay men.

The Treaty of Amsterdam amended the founding treaties on the European Union. On 1 May 1999, Article 13 of the European Community Treaty entered into force to explicitly mention and protect sexual orientation (it is now Article 19 TFEU): “[...] the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

In December 2000, the European Council adopted a binding general Framework Directive on equal treatment in employment prohibiting direct and indirect discrimination on grounds of religion or belief, age, disability or sexual orientation (2000/78). EU Member States must implement the Directive swiftly, and those States that are in the process of accession must implement it before joining the EU.

In December 2000, the Member States of the European Union announced the EU Charter of Fundamental Rights. Although the Charter is not a binding document, it covers human rights, and explicitly covers non-discrimination provisions in Article 21 (1): “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

Finally, Article 10 of the Treaty on the European Union and the Treaty on the Functioning of the European Union (2012/C, 326/01) states that: “In

defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

I Employment and social benefits free from discrimination based on sexual orientation (Directive 2000/78 EC)

Member States should ensure effective measures to prevent discrimination based on sexual discrimination in the area of employment, including access to employment and promotion, dismissals, pay and other working conditions as well as social benefits resulting from the employment. Particular attention should be paid to the provision of effective protection to the LGBT community, which is particularly exposed to different forms of harassment and victimisation.

In the judgment of 17 February 1998, *Lisa Jacqueline Grant v. South-West Trains Ltd.* (Case C-249/96), the Court examined the principle of equal treatment of men and women and the legality of a refusal of travel concessions to cohabitantes of the same sex.

According to the Court’s interpretation of the Article 119 of the Treaty or Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, there is no discrimination if an employer refuses to allow travel concessions to a person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker’s spouse or to a person of the opposite sex with whom a worker has a stable relationship outside marriage. Firstly, the granting of the right to travel concessions of same-sex and different-sex partners is not directly based on sex, as the female partner and male partner of the worker in a same-sex relationship are treated in the same way. Secondly, European law does not require that the legislators treat

a same-sex relationship in the same way as a marriage or a different-sex relationship outside of marriage.

In a judgment of 31 May 2001, *D and Kingdom of Sweden v. Council of the European Union (C-122/99 P and C-125/99 P)*, the Court examined the right to equal treatment with regards to the household allowance of a spouse and same-sex partner in a registered partnership.

The Court commented that the principle of equal treatment applies only to persons in comparable situations. Beyond that, the Court noted that there is no consensus within the Council of Europe Member States as regards recognition of partnerships between persons of the same sex or of the opposite sex. The lack of uniform legislation or of legislative consensus in Europe, and the absence of any general assimilation of marriage and other forms of statutory union in the case of a same-sex partner, does not allow for the consideration of a situation in which a person in a registered partnership can be considered comparable to a situation in which a married person is covered by a staff regulation.

In a judgment of 14 October 2010, *W v. European Commission (Case F-86/09)*, a civil service tribunal examined the right to the extension of entitlement to household allowance to officials registered as stable, non-marital partners, including those of the same sex. This right should not be theoretical or illusory, but practical and effective.

The Preamble to Regulation No. 723/2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities establishes that this regulation should be implemented in compliance with: Article 19(1) TFEU and Article 21(1) of the Charter of Fundamental Rights of the European Union. Article 19(1) TFEU states the obligation to develop a staff policy ensuring equal opportunities for all, regardless of their sexual orientation and marital status enshrines the principle of non-discrimination. Article

21(1) of the Charter of Fundamental Rights of the European Union provides for the prohibition of any discrimination based on sexual orientation.

Furthermore, the right to respect for family and private life of the officials registered as stable, non-marital partners, including those of the same sex, as recognised in Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights should be protected and free from discrimination based on sexual orientation.

The right to the extension of entitlement to household allowance to officials registered as stable, non-marital partners, including those of the same sex becomes theoretical or illusory if it depends on an obligation to marry, but access to a legal marriage in a Member State is not practical and effective. It was the case in *W. v European Commission*, because of nationality of the defendants, not living in the State of which they are nationals, and who would be criminally sentenced for an eventual same-sex marriage by this State.

In a judgment of 1 April 2008, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen (Case C-267/06)*, the Court (GC), examined the principle of equal treatment in employment and occupation as regards survivors' benefits under a compulsory occupational pension scheme. The concept of 'pay' and, because they were same-sex partners, the refusal to pay out on the pension scheme because the persons concerned were not married, is what they considered as discrimination based on sexual orientation (Directive 2000/78/EC). The Directive applies to the deriving from employment retirement pensions, which are classified as 'pay', because the survivors' pensions concern only particular categories of workers and, moreover, their amounts are dependent on the period of the workers' memberships and how much they have paid in contributions. In a case in which marriage is restricted to different-sex couples, and life partnership to same-sex couples, restriction only to surviving spouses of the entitlement to a survivor's pension is considered as direct discrimination on grounds of sexual

orientation and whether the situation of the partners is comparable with that of the spouses.

In the case of *Parris v. Trinity College Dublin and others (C-443/15)*, the Advocate General's Opinion delivered her opinion to the Court of Justice of the European Union on 30 June 2016 in relation to the case regarding the refusal of same-sex partners' survivor's pension in case of partnership contracted before the 60th birthday of the affiliated person. The case is still pending.

In a judgment of 10 May 2011, *Jürgen Römer v. Freie und Hansestadt Hamburg (Case C-147/08)*, the Court (GC) examined the principle of treatment in employment and occupation free from discrimination based on sexual orientation, and an occupational pension scheme in the form of a supplementary retirement pension for former employees of a local authority and their survivors, as well as the method of calculating that pension which favoured married recipients over those living in a registered life partnership.

Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 establishes a general framework for equal treatment in employment and occupation.

If marriage is reserved to persons of different gender and exists alongside a registered life partnership for persons of the same gender, pensioners who have entered into registered life partnerships and receive supplementary retirement pensions lower than that granted to a married, not permanently separated, pensioners, will be considered as directly discriminated against on grounds of sexual orientation if, under national law, a life partner is in a legal and factual situation comparable to that of a married person as regards pensions.

In a judgment of 12 December 2013, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres (Case C-267/12)*, the Court

examined the principle of equal treatment in which a collective agreement that restricted a benefit with respect to pay and working conditions to employees who had married, excluded partners who had entered into a civil solidarity pact. It concluded that there had been discrimination based on sexual orientation (Directive 2000/78/EC).

A homosexual person without accessible and effective right to marry in his/her country of residence, because the national rules permit only same-sex civil partnerships, can be considered as in a comparable situation to those of a married spouse. If this is the case, in the light of Article 2(2)(a) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, a same-sex partner should therefore obtain the same benefits – such as special leave days and a salary bonus – as those granted to employees on the occasion of their marriage.

Only measures restricting this right (Article 2(5) of the Directive), and strictly interpreted, must be necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

A judgment of 25 April 2013, *Asociația Acceptiv Consiliul Național pentru Combaterea Discriminării (Case C-81/12)*, concerned equal treatment in employment and occupation free from discrimination on grounds of sexual orientation as regards the recruitment of a footballer presented as being homosexual.

Article 17 of Directive 2000/78 establishing a general framework for equal treatment in occupation and employment must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning where such a finding is made after the expiry of a limitation period of six months from the date on which

the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

II Eligibility criteria for blood donors free from discrimination based on sexual orientation

The European Commission has regularly pointed out that when implementing EU law, Member States must not discriminate on the basis of sexual orientation. Therefore, a blanket ban on blood donations by LGBT people would be illegal under EU law.

In a judgment of 29 April 2015, *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang* (Case C-528/13), the Court examined the conformity of eligibility criteria for blood donors under Directive 2004/33/EC and Articles 21(1) and 52(1) of the Charter of Fundamental Rights of the European Union. The Court examined the criteria for a permanent or temporary ban on becoming a blood donor in a situation in which a person had been exposed to a high risk of acquiring severe infectious diseases that can be transmitted through the blood. For example, a man who had had a sexual relation with another man would be considered as exposed to such a risk. The national court in charge of the case should determine if an interview with a medical professional would be able to identify whether there was evidence of behaviour presenting a risk to a person's health. Thus, the national court would be able to decide whether to apply a less severe sanction than the permanent exclusion from being a blood donor.

In a judgment of 7 November 2013, *X (C-199/12), Y (C-200/12), and Z v. Minister voor Immigratie en Asiel (C-201/12)*, the Court examined a case in the Netherlands concerning three homosexual asylum seekers coming from Sierra Leone, Uganda and Senegal. In their countries of origin, homosexuality is sanctioned by imprisonment.

According to Article 9(1) read together with Article 9(2)(c) of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, the criminalisation of homosexual acts is not considered as an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin, which has adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

In a judgment of 2 December 2014, *A, B, C v. Staatssecretaris van Veiligheid en Justitie* (Joined Cases *C-148/13 to C-150/13*), the Court clarifies the methods by which national authorities may assess the credibility of the declared sexual orientation of applicants for asylum. Directives 2004/83 and 2005/85 provide the minimum requirements that third-country nationals must fulfil in order to be able to claim refugee status, the procedures for examining applications for asylum and the rights of asylum seekers.

According to established standards, national authorities carrying out interviews in order to determine the facts and circumstances as regards the declared sexual orientation cannot ask questions concerning the details of the applicant's sexual practices, or submit the applicants to practical tests to demonstrate their homosexuality (for example, producing a film of the intimate acts). These practices are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect of private

and family life. The lack of credibility cannot be concluded on the basis that the person did not reveal his/her homosexuality from the outset.

PART III - NATIONAL RULES AND EXPERIENCE AS REGARDS PROHIBITION OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN MONTENEGRO

I Montenegrin sexual orientation discrimination legislation and national Ombudsperson competencies in this area

The European Convention on Human Rights has been binding since the ratification of the Convention by Montenegro in 2004. The European Social Charter has had legal force and effect since its entry into force in Montenegro in 2010. Since 29 June 2012, Montenegro has been negotiating its accession into the European Union; it is therefore obligated to implement the legal rules of the organisation in order to become a Member State.

According to Article 9 of the Constitution of 19 October 2007, ratified international legal instruments form an integral part of the Montenegrin internal legal system and they have supremacy over national legislation in the case of a difference in regulating relations.

The Ombudsperson institution, the so-called Protector of human rights and liberties of Montenegro, was established in Article 81 of the Constitution of 19 October 2007. The competencies of the Protector are further detailed in the Law on the Protector of Human Rights and Freedoms passed on 10 July 2003.

The Law on the prohibition of discrimination was adopted on 27 July 2010, and amended in April 2014 (Law on the prohibition of discrimination was adopted on 27 July 2010, available at <http://www.legislationline.org/topics/country/57/topic/84> visited 14

October 2016). According to this Law, the Protector of Human Rights and Freedoms of Montenegro is competent to act on complaints relating to discriminatory treatment committed by an authority, business entity, entrepreneur, natural or legal person, and can undertake measures and actions to eliminate discrimination and protect the rights of a discriminated person, if the court proceedings have not been initiated. The protector is further charged with providing advice to the complainant in this field; conciliating between parties; alerting the public about the appearances of severe discrimination; collecting data and keeping records of cases of discrimination and, finally, promoting equality and submitting reports to the Parliament of Montenegro on the activities conducted regarding protection from discrimination and promotion of equality.

For cases involving discrimination, the Ombudsperson analyses whether or not there is indeed evidence of discrimination. If there is *a priori* appearance of discrimination concerning more than one person, the Ombudsperson gets involved or initiates court proceedings with the consent of the complainants. The following groups are the most concerned by discrimination: persons with disabilities, women, LGBT persons as well as Roma and other minorities.

The Ombudsperson has intervened successfully in many cases. For example, the Ombudsperson supported LGBT people who obtained, thanks to his support, access to a basketball court.

Discrimination may also result from the actions of public institutions. The Ombudsperson receives his legal personality from the State. In this situation he cannot initiate judicial proceedings against the national authorities, he can only get involved in it. In the past two years, the Ombudsperson has been involved in four such cases.

The Ombudsperson takes a case in charge *ex officio* or following a complaint by anyone who believes that his/her rights and freedoms have been violated

(Article 28 of the Law). In the case of violations of the rights of a child, his/her parents, guardians or legal representatives may file the complaint (Article 30 of the Law).

The Ombudsperson refers complainants to the relevant institutions and provides legal advice. The Ombudsperson does not follow the cases of those persons referred to other institutions, as s/he does not have such jurisdiction. Point 2 of Article 21 of the Law on prohibition of discrimination forms the legal basis for the Ombudsperson to provide information to the complainant about his/her rights and duties, as well as about possibilities of court and other protection. It should be noted that the Ombudsperson's obligation to provide legal advice is not established by the Law on the Protector of Human Rights and Freedoms, and should be limited to cases involving discrimination.

According to Article 18 of the Law, the Protector may initiate the adoption of laws, other regulations and general acts for the purpose of harmonization with internationally recognized standards in the area of human rights and freedoms. The relevant authority shall be obliged to make a statement about this initiative. If he deems it necessary for the protection and promotion of human rights and freedoms, the Protector can recommend a legal proposal, other regulation or general act.

The Ombudsperson may initiate a proceeding before the Constitutional Court for the assessment of conformity of laws with the Constitution and confirmed and published international treaties or the conformity of other regulations and general acts with the Constitution and laws (Article 19 of the Law).

The Ministry for Human and Minority Rights is a key institution in the system of executive authority in Montenegro whose jurisdiction is protection of human rights and freedoms; protection from discrimination; analyzing

international and the EU standards on human rights and freedoms and making proposals for the harmonization of national legislations with the relevant international standards; monitoring the development of the EU acquis and international standards which relate to the protection of human rights and freedoms; performing obligations arising from the international agreements related to monitoring measures of anti-discrimination policy; and, performing other tasks in the field of human rights and freedoms regarding issues that are not within the scope of other ministries.

One of the focal points in the work of the ministry is improvement and protection of the rights and freedoms of LGBT people, where a systemic approach aims to improve the overall social situation of these vulnerable groups. This approach is seen, on the one hand through regulatory action in order to ensure legal certainty and the protection of the rights and freedoms of LGBT people, and on the other, through the implementation of activities aimed at the promotion of human rights of LGBT people and creation of a social climate of tolerance and acceptance of this population.

In the previous period, the normative activities of the Ministry for Human and Minority Rights included the initiation and development of the Law on Prohibition of Discrimination (“Official Gazette of Montenegro” no. 46/0 and 18/14), which (in Article 19) recognizes sexual orientation and gender identity as an explicit basis of non-discrimination. The law defines the jurisdiction of the Protector of Human Rights and Freedoms as an institutional mechanism for protection against discrimination, which citizens can address with a complaint, but the jurisdiction of courts, misdemeanor bodies, inspection bodies, as well as the jurisdiction of the police have also been determined. This normative act is to a large extent harmonized with the EU acquis and other international standards in this area by the adopted amendments to this Law (from April 2014).

Furthermore, this Ministry has proposed the Law on the Protector of Human Rights and Freedoms (“Official Gazette of Montenegro” no. 42/11 and

32/14), and by its amendments in 2014 its jurisdiction and competence was specified, and therefore the conditions for the improvement of the capacities aimed at providing more effective protection against discrimination was created.

In the context of the established anti-discrimination legislative framework in Montenegro other laws which are of significance for protection of the rights of LGBT people should be mentioned, such as the Law on labor, Law on media, Law on the international and temporary protection of foreigners which explicitly defines sexual orientation as an illegal basis for discrimination. Also, the amendments to the Criminal Code of Montenegro (Article 42a) has introduced as an aggravating factor for sentencing if the crime was committed out of hatred for belonging to sexual orientation or gender identity.

As part of the program activities of the Government of Montenegro regarding the protection of LGBT people the Strategy for improving the quality of life of LGBT people from 2013 to 2018 was adopted in May 2013, which represents the system's response of the Government of Montenegro to the challenges which objectively exist when it comes to exercising the rights of the LGBT community. The strategy involves coordinated, joint and synchronized efforts of the Government of Montenegro with civil society organizations in providing institutional, political and other possible support to the protection and improvement of human rights of LGBT people. The strategy is implemented through a multi-sectorial approach, i.e. the adoption of the national annual action plans containing concrete measures in different sectors (security, education, health, social welfare, culture, tourism, international cooperation, etc.) whose preparation and monitoring of implementation is coordinated by the ministry.

II Montenegrin sexual orientation discrimination case law and practice

Montenegro does not fully comply with its obligations as regards prohibition and protection from discrimination in the understanding and application of the European Convention on Human Rights.

The most common victims of discriminatory treatment on different grounds in Montenegro are the LGBT and the Roma communities. LGBT people are regularly exposed to hate speak, threats, acts of violence and discrimination, and their social centre in Podgorica has been attacked more than twenty times in recent years.

Since 1977, homosexuality has been legal in Montenegro. However, there is still no legal recognition of same-sex couples. On 27 July 2010, the Montenegrin Parliament passed a non-discrimination law, later amended, which includes sexual orientation as a prohibited ground of discrimination. This was one of the requirements to meet for its accession to the European Union.

LGBT people face strong prejudice in Montenegro. The rights of homosexual men and women have been almost completely absent from public debate until very recently. The fear of physical and other violence and rejection by their families and communities is a reason why LGBT people do not lodge official complaints when they are victims of violent attacks and hate crimes. As a consequence, the statistics do not reflect the actual level of homophobia. For example, there have been two cases of violent attacks, one of which involved police officers as perpetrators. The cases were reported to the police as homophobic hate crimes and, despite many witnesses, neither was brought to court because of the threat of further violence.

According to the NGOs, LGBT people suffer the most discriminatory treatment as regards the right to privacy, and freedom of assembly and

expression, as well as in the field of employment. The NGO, Juventas, reported that one of their beneficiaries was fired by an employer who had also used strong homophobic insults.

CONCLUSIONS

LGBT persons' rights are broadly protected by the European Convention on Human Rights, but the specific guarantees are established in Article 14 of the Convention and its Protocol No. 12. Among EU legal instruments, Article 19 of the European Community Treaty, Article 21(1) of the EU Charter of Fundamental Rights and the Directive 2000/78 EC specifically serve LGBT persons' rights' protection.

The analysed case law of the European Court of Human Rights and the Court of Justice of the European Union reveals that the protection of LGBT person' (lesbians, gays, bisexual and transgender) human rights has become stronger and more omnipresent.

The analysed case law of the European Court of Human Rights has a direct and deep impact on the national legal reality. If the European Court of Human Rights finds a violation of the rights protected by the Convention, a judgment is implemented by a legislative amendment (general measures) or by a modification of the case law, for example by reopening the proceedings (individual measures).

The Court of Justice of the European Union only delivers its interpretation of the law within the limits of the provisions of European Union treaties and the general principles of EU law. This has a very strong impact on the application of national legislation, but it does not change its shape or content.

The case law of the European Court of Human Rights law has been slowly developed as regards the rights of LGBT persons.

The restrictions of the rights of LGBT persons are still very broad in contemporary society and concern many aspects of their everyday lives. The discriminatory treatment of LGBT people can result in arbitrary and unjustified detention (*O.M. v. Hungary*), torture or inhuman or degrading

treatment inflicted by the national authorities (*Identoba and Others v. Georgia*).

The most common breach, LGBT persons' rights to private or family life, concerns a possibility to adopt a child (*E.B. v. France*), to benefit from parental authority or parental leave (*Salgueiro da Silva Mouta v. Portugal*) or to register as a parent on a birth certificate (*Boeckel and Gessner-Boeckel v. Germany*).

There are also other areas pointed out by the European Court of Human Rights in which LGBT persons' rights are concerned and discriminatory treatment can occur: freedom of religion, freedom of expression (*Mladina D.D. Lubljana v. Slovenia*), freedom of assembly (*Bączkowski v. Poland*), right to marry (*Schalk and Kopf v. Austria*) and right to property (*J. M. v. the United Kingdom*).

Resulting from the case law of the Court of Justice of the European Union, we can see that discriminatory treatment is most common in the area of employment and social benefits (*W. v. European Commission Case F-86/09*). It is worth noting that there is also case law concerning treatment clarifying rules on how to proceed with LGBT asylum seekers.

The European Convention on Human Rights (2004) and the European Social Charter (2010) are binding for Montenegro. Montenegro must implement EU rules in order to become a Member of the European Union. According to the Law on the prohibition of discrimination (2010), the Protector of Human Rights and Freedoms of Montenegro is competent to act on complaints relating to discriminatory treatment and to get involved in or to initiate court proceedings, initiate the adoption of laws, and proceed before the Constitutional Court for the assessment of conformity of laws with the Constitution. In Montenegro, according to antidiscrimination groups, the most concerning are: persons with disabilities, women, LGBT persons as well as Roma and other minorities. The Ombudsperson in Montenegro deals with

the LGBT discrimination cases, for example he succeeded in obtaining access to a basketball court for a person deprived of such access because of sexual orientation.

The Ministry for Human and Minority Rights is a key institution in the system of executive authority in Montenegro whose jurisdiction is protection of human rights and freedoms.

LGBT people suffer discriminatory treatment as regards their right to privacy, freedom of assembly and expression, as well as in the field of employment. The rights of gay men and women have been almost completely absent from public debate until very recently. The fear of physical and other violence and rejection by their families and communities is a reason why LGBT people do not lodge official complaints when they are victims of violent attacks and hate crimes. As a consequence, the statistics do not reflect the actual level of homophobia.

As part of the program activities of the Government of Montenegro regarding the protection of LGBT people the Strategy for improving the quality of life of LGBT people from 2013 to 2018 was adopted in May 2013.

Legislation has been adopted in accordance with human rights standards, particularly the European Convention on Human Rights. However, these standards have to be implemented in order to make the rights protecting LGBT people practical and effective in Montenegro.