



## European network of legal experts in gender equality and non-discrimination

### NEWS REPORT

<b>Country:</b>	The Netherlands
<b>Title:</b>	NIHR: ban on donation of blood by gay and bisexual men is discriminatory
<b>Date:</b>	26 June 2015
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<b><u>Context</u></b>	
<b>Issue at stake:</b>	Donation of blood by gay and bisexual men
<b>Ground of discrimination:</b>	Sexual orientation
<b>Source:</b>	National equality body, CJEU
<b>Field:</b>	Access to goods and services / Other
<b>Applicable law:</b>	Directive 2004/33/EC; Act on the Supply of Blood ("Wet inzake bloedvoorziening"), General Equal Treatment Act.

### Content

**Case:** The Court of Justice of the European Union, in Case C-528/13 *Léger*, ruled that permanent bans on the donation of blood by gay or bisexual men may be justified by the need to ensure health protection. One week earlier, the Dutch equality body Netherlands Institute of Human Rights (NIHR) saw itself confronted with the same issue. A gay man, who was rejected as blood donor, brought a case to the equality body, arguing that the policy was discriminatory on the grounds of sexual orientation. In its decision in the case, the NIHR reversed its jurisprudence in this matter.

**Decision of the national equality body:** The NIHR's predecessor, the Equal Treatment Commission, already ruled in two highly similar cases, ETC 2006-20 and ETC 2007-85. In these two cases, the equality body found that the ban on donation by gay and bisexual blood donors was not prohibited, as the policy was justified by the (extra-legal) objective justification of ensuring health protection. The ETC, in reaching this conclusion, considered the severe consequences of the risk of blood recipients for getting HIV infected blood, for which there was no scientifically tested blood test available that was 100 % reliable on detecting HIV.

The NIHR in Decision 2015-46, referring to ETC 2007-85, largely follows its established reasoning that the possibility to donate blood has to be regarded as rendering a service in the sense of the Dutch General Equal Treatment Act, and that the policy is directly discriminatory on the ground of sexual orientation. The NIHR does however abruptly break with its established case-law when it discusses the justification for the directly discriminatory policy, and finds that the protection of public health cannot justify the measure.

The main reason for this reversal is a report published by the University of Maastricht and sent to the Dutch Second Chamber by the Minister of Health. In this report, it is found that security risks involved with allowing gay and bisexual men to donate blood are

smaller than previously thought, mainly because the non-compliance rate (i.e. the percentage that does not admit to unprotected sexual activity) is lower than previously established. The way the NIHR tests whether there is an objective justification in this case may also be important for other situations of indirect discrimination on the ground of sexual orientation.

In a reaction, Sanquin (the Dutch organisation responsible for safe and efficient blood supply) announced to study the NIHR's decision, in conjunction with the report published by the University of Maastricht. The Dutch association for LGBTI-people, COC, welcomed the decision and called upon the Minister of Health to end the discriminatory policy it has been protesting for years already.

**Key points of analysis:** While the CJEU, in *Léger*, found that permanent bans on the donation of blood by gay or bisexual men may be justified by the need to ensure health protection, the Dutch equality body NIHR has ruled otherwise and found that this policy is no longer justified.

**Internet link source:** The NIHR's decision 2015-46 may be found at:  
<https://mensenrechten.nl/publicaties/oordelen/2015-46>