

## **UPDATE ON THE RECENT EQUALITY AND NON-DISCRIMINATION CASE-LAW OF THE CJEU**

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### **INTRODUCTION**

The CJEU’s case-law during the last year (late 2017-late 2018) has featured fewer cases relating to the core elements of the EU non-discrimination directives than usual (including a merciful decrease in the volume of age discrimination cases coming before the Court). Instead, the Court’s case-law has struck out into new directions, often involving the intersection of EU discrimination law with other elements of European law.

In what follows, I try to give a brief summary of key cases. My presentation will focus in particular on the most important judgments, namely *Egenberger* relating to ‘religious ethos’ exceptions, the gender reassignment/marital status case of *KB*, *Coman* relating to the family unification rights of same-sex spouses, and the pregnancy cases of *Porrás Guisado* and *González Castro*.

### **CASES RELATING TO THE APPLICATION OF THE CORE PROVISIONS OF EU EQUALITY LAW**

#### ***Gender***

Case C-409/16, *Ypourgos Esoterikon v Kalliri*, Judgment of 18 October 2017, concerned police height requirements, challenged on the basis they indirectly discriminate on grounds of sex. The CJEU’s judgment indicated that such requirements were problematic, and clarified the application of the indirect discrimination test:

36 It should be recalled that the Court has already held that the concern to ensure the operational capacity and proper functioning of the police services constitutes a legitimate objective...

37 It must, however, be ascertained whether a minimum height requirement, such as provided for in the law at issue in the main proceedings, is suitable for securing the attainment of the objective pursued by that law and does not go beyond what is necessary in order to attain it.

38 In that regard, while it is true that the exercise of police functions involving the protection of persons and goods, the arrest and custody of offenders and the conduct of crime prevention patrols may require the use of physical force requiring a particular physical

aptitude, the fact remains that certain police functions, such as providing assistance to citizens or traffic control, do not clearly require the use of significant physical force (see, to that effect, the judgment of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraphs 39 and 40).

39 Furthermore, even if all the functions carried out by the Greek police required a particular physical aptitude, it would not appear that such an aptitude is necessarily connected with being of a certain minimum height and that shorter persons naturally lack that aptitude...

42 In any event, the aim pursued by the law at issue in the main proceedings could be achieved by measures that are less disadvantageous to women, such as a preselection of candidates to the competition for entry into Schools for Police Officers and Policemen based on specific tests allowing their physical ability to be assessed...

44 In those circumstances, the answer to the question referred is that the provisions of Directive 76/207 must be interpreted as precluding a law of a Member State, such as that at issue in the main proceedings, which makes candidates' admission to the competition for entry to the police school of that Member State subject, whatever their sex, to a requirement that they are of a physical height of at least 1.70m, since that law works to the disadvantage of a far greater number of women compared with men and that law does not appear to be either appropriate or necessary to achieve the legitimate objective that it pursues, which it is for the national court to determine.

As Shreya Atrey has put it, in *Kalliri* the CJEU confirms a shift 'away from its initial view on indirect sex discrimination as capable of being justified when based on factors unrelated to sex (Case 170/84, *Bilka-Kaufhaus v Weber's Von Hartz* (1986)), by demanding justifications to not only be unrelated to sex but also to be narrowly tailored in terms of achieving legitimate aims through the most appropriate and necessary means. In this way, *Kalliri* demands a greater "fit" between employment selection criteria and the aim for which they are instituted, thus tightening the proportionality test for sustaining indirect sex discrimination.'<sup>1</sup>

### ***Disability***

In Case C-270/16, *Ruiz Conejero*, Judgment of 18 January 2018, the CJEU concluded that Article 2(2)(b)(i) of Council Directive 2000/78/ precluded national legislation permitting employers to dismiss a worker on the grounds of his intermittent absences from work in situations where those absences were justified and the consequence of sickness attributable to a disability suffered by that worker - unless the provisions of that legislation can be justified on the basis that they do not go beyond what is necessary to achieve the legitimate aim of combating absenteeism.

In this case, a worker subject to a disability (obesity and associated conditions) had suffered various periods of sickness related to his disability. He was subsequently dismissed under Article 52(d) of the Spanish Workers' Statute on the ground that the cumulative duration of his absences had exceeded

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<sup>1</sup> S. Atrey, 'CJEU in *Kalliri*: Solidifying Indirect Sex Discrimination', *Oxford Human Rights Hub*, 24 October 2017, <http://ohrh.law.ox.ac.uk/cjeu-in-kalliri-solidifying-indirect-sex-discrimination/>

the limits laid down in that provision, namely, 20% of working time during March and April 2015, and that during the previous 12 months he had been absent for 5% of working time.

In considering whether these provisions of the Workers' Statute complied with EU law, the CJEU first referred to its judgment in Case C-354/13, *Kaltoft*, which had concluded that obesity could qualify as a disability for the purposes of EU law. It then noted that, although the Workers' Statute treated disabled and non-disabled workers alike, 'a worker with a disability is, in principle, more exposed to the risk of being dismissed under Article 52(d) of the Workers' Statute than a worker without a disability' [39].

As such, the CJEU then considered whether this disparate impact could be objectively justified. It concluded at [44] that 'combating absenteeism at work may be regarded as a legitimate aim'. However, it also noted that 'in assessing whether the measures provided for by Article 52(d) of the Workers' Statute are proportionate, the risks run by persons with disabilities, who generally face greater difficulties than persons without disabilities in re-entering the labour market, and have specific needs in connection with the protection their condition requires, should not be overlooked' [51].

The matter was referred back to the national courts, with the CJEU drawing attention to a number of specific provisions of the Statute which exempted certain illnesses from the effect of Article 52(d) and other provisions making particular provision for the situation of persons with disabilities. (Again, Sharpston AG's Opinion could be read as suggesting a more demanding approach than that set out by the Court in its guidance to the Spanish courts.)

This emphasis on the specific situation of persons with disabilities is striking, and can also be seen in the Court's judgment in Case C-312/17, *Bedi v Bundesrepublik Deutschland*, Judgment of 19<sup>th</sup> September 2018. here the Court applied its existing disability discrimination case-law as set out in cases such as C-152/11, *Odar* to a situation where severely disabled workers derived less benefit from a system of 'bridging payments' before becoming entitled to a pension when compared to non-disabled workers who had also been made redundant.

The Court concluded that this reduced level of benefit amounted to a 'disadvantage' when the treatment of the two sets of workers was compared, and thus formed the basis for a claim of indirect disability discrimination. In concluding that such disparate impact could not objectively justified, the Court took note of the specific situation of severely disabled workers, adopting a contextual analysis developed by Sharpston AG in her Opinion – which is perhaps the most notable feature of this judgment.

53 In those circumstances, the Court finds that, in circumstances such as those of the case in the main proceedings, the effect of Paragraph 8(1)(c) of the TV SozSich is that the income of a severely disabled worker, for the period during which he receives early payment of a retirement pension, is lower than that of a non-disabled worker. It is thus apparent that the rule laid down in that provision is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78.

56 The advantage granted to severely disabled workers consisting in entitlement to claim a retirement pension as from a younger age than non-disabled workers does not place them in a different situation in relation to those workers (see, to that effect, judgment of 6 December 2012, *Odar*, C-152/11, EU:C:2012:772, paragraph 62).

57 In the present case, the application of Paragraph 8(1)(c) of the TV SozSich concerns workers approaching retirement age who have been made redundant. Consequently, severely disabled workers are in a situation comparable to that of non-disabled workers in the same age bracket in the light of Article 2(2)(b) of Directive 2000/78.

58 Therefore, in accordance with that provision, it is necessary to examine whether the difference in treatment between those two groups of workers is objectively and reasonably justified by a legitimate aim, whether the means relied on to achieve that aim are appropriate and whether they do not go beyond what is necessary to achieve the aim pursued...

73 It is true that a severely disabled worker might find himself in a situation where, for his own reasons, he prefers to receive early payment of a retirement pension, even if, as is apparent from paragraph 52 of this judgment, the result of the application of Paragraph 8(1)(c) of the TV SozSich is, in principle, that that worker's income, when he becomes entitled to such a retirement pension, is not equivalent to that of a non-disabled worker who receives bridging assistance.

74 However, as observed by the Advocate General in point 54 of her Opinion, unlike a non-disabled worker, a severely disabled worker, even if he might wish to do so, cannot elect to stay in work and also receive bridging assistance until he becomes entitled to full payment of a retirement pension.

75 It should also be noted that severely disabled persons have specific needs stemming both from the protection their condition requires and the need to anticipate possible worsening of their condition. Regard must therefore be had to the risk that severely disabled persons may have financial requirements arising from their disability which cannot be adjusted and/or that, with advancing age, those financial requirements may increase (see, to that effect, judgment of 6 December 2012, *Odar*, C-152/11, EU:C:2012:772, paragraph 69).

### Age

In Case C-482/16, *Stollwitzer*, Judgment of 14 March 2018, the CJEU concluded that the Directive did not preclude national legislation which, in order to end previous practices which had been tainted by age discrimination, had abolished a previous age limit of 18 before which experience was not taken into account and replaced it with a provision permitting only experience acquired with other undertakings operating in the same economic sector to be taken into account. The Court took the view that any differences of treatment this would cause as between different categories of worker was not linked to age *per se*.

In Case C-46/17, *John*, Judgment of 28 February 2018, the CJEU had to deal with the relationship between Clause 5(1) of the Framework Agreement on fixed-term work concluded on 18 March 1999 ('the Framework Agreement') and the age discrimination provisions of Directive 2000/78/EC. The

Court concluded that neither instrument precluded national legislation which made the postponement of the date of termination of employment of workers who have reached the legal qualifying age for a retirement pension subject to the consent of the employer, who was entitled to give such consent only for a (renewable) fixed time period. The Court reasoned that such provision gave much-needed flexibility to employers and workers using to keep an employment relationship going beyond retirement – and little evidence existed that such arrangements were open to systemic abuse.

### **‘RELIGIOUS ETHOS’ EXCEPTIONS**

Two very important judgment have shed light on the controversial ‘religious ethos’ exception set out in Article 4(2) of Directive 2000/78/EC - C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, Judgment of 17 April 2018, and C-68/17 *IR v JQ*, Judgment of 11 September 2018.

In *Egenberger*, the facts and legal questions at stake were as follows:

24 In November 2012 Evangelisches Werk published an offer of fixed-term employment for a project for producing a parallel report on the United Nations International Convention on the Elimination of All Forms of Racial Discrimination.

25 The offer of employment also specified the conditions to be satisfied by candidates. One of these read as follows: ‘We presuppose membership of a Protestant church or a church belonging to the [Working Group of Christian Churches in Germany] and identification with the diaconal mission. Please state your church membership in your curriculum vitae.’

26 Ms Egenberger, of no denomination, applied for the post offered. Although her application was shortlisted after a preliminary selection by Evangelisches Werk, she was not invited to an interview. The candidate who was eventually successful had stated with respect to his church membership that he was a ‘Protestant Christian active in the Berlin regional church’...

30 The Bundesarbeitsgericht (Federal Labour Court, Germany) considers that the outcome of the dispute in the main proceedings depends on whether the differentiation according to church membership by Evangelisches Werk was lawful under Paragraph 9(1) of the AGG. However, that provision must be interpreted in conformity with EU law. The outcome of the dispute therefore depends on the interpretation of Article 4(2) of Directive 2000/78, which Paragraph 9 of the AGG was intended to transpose into national law. The referring court observes that the difference of treatment must also comply with the constitutional provisions and principles of the Member States and with the general provisions of EU law and Article 17 TFEU.

31 ...The referring court observes that, according to the express intention of the German legislature, Article 4(2) of Directive 2000/78 was transposed into German law in Paragraph 9 of the AGG in such a way that the legal provisions and practices in force at the time of adoption of the directive were maintained. The legislature took that decision in the light of the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) on the churches’ privilege of self-determination. In accordance with that case-law, judicial review

should be limited to a review of plausibility on the basis of the church's self-perception...The question arises, however, of whether that interpretation of Paragraph 9(1) of the AGG is consistent with EU law.

The CJEU ruled as follows:

59. Article 4(2) of Directive 2000/78, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case.

68. The requirement in Article 4(2) of Directive 2000/78 must comply with the principle of proportionality. While that provision, unlike Article 4(1) of the directive, does not expressly provide that the requirement must be 'proportionate', it nonetheless provides that any difference of treatment must take account of the 'general principles of Community law'. As the principle of proportionality is one of the general principles of EU law...the national courts must ascertain whether the requirement in question is appropriate and does not go beyond what is necessary for attaining the objective pursued.

69. In the light of those considerations, the answer to Question 3 is that Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.

In other words, the Court concluded that (i) organisations seeking to make use of the 'religious ethos' exception provided for in Article 4(2) had to demonstrate such a requirement was necessary and proportionate by virtue of the specific nature of the activity or circumstances at issue and its potential impact on the maintenance of the ethos of the organisation concerned, and (ii) that a subjective belief that this test was satisfied was not enough.

The Court went on to decide that this interpretation of Article 4(2) was not precluded by the protection of the right to religious freedom set out in Article 17 of the EU Charter of Fundamental Rights. Furthermore, significantly, the Court affirmed that the horizontal effect of the general principle of equal treatment – as affirmed in *Mangold* – also applied in such 'religious ethos' cases, and that the right to effective judicial remedies as recognised by Article 47 of the Charter formed part of this horizontally applicable principle:

76 The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47)...

78 Secondly, it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.

79 Consequently, in the situation mentioned in paragraph 75 above, the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

80 That conclusion is not called into question by the fact that a court may, in a dispute between individuals, be called on to balance competing fundamental rights which the parties to the dispute derive from the provisions of the FEU Treaty or the Charter, and may even be obliged, in the review that it must carry out, to make sure that the principle of proportionality is complied with. Such an obligation to strike a balance between the various interests involved has no effect on the possibility of relying on the rights in question in such a dispute...

In the *IR v JQ* case, the Court adopted a similar line of reasoning, this time in relation to 'religious ethos' requirements applied in relation to specific management posts within the structure of an organisation with a distinct religious ethos. In its judgment, the Court clarified the application of the proportionality test in this context, emphasising the need to show a clear connection between the employment role in question and the maintenance of the ethos/autonomy of the religious organisation in question.

23 IR is a limited liability company established under German law. Its purpose is to carry out the work of Caritas (the international confederation of Catholic charitable organisations), as an expression of the life and nature of the Roman Catholic Church, through, among other things, the operation of hospitals. IR is primarily a non-profit organisation and is subject to the supervision of the Archbishop of Cologne (Germany).

24 JQ is of the Roman Catholic faith. He trained as a doctor and began working in 2000 as Head of the Internal Medicine Department of an IR hospital pursuant to an employment contract concluded on the basis of the GrO 1993.

25 JQ was married in accordance with the Roman Catholic rite. His first wife separated from him in 2005, and their divorce was granted in March 2008. In August 2008, JQ married his new partner in a civil ceremony without his first marriage having been annulled.

26 Having learned of the second marriage, IR dismissed JQ, by letter dated 30 March 2009, with effect from 30 September 2009.

7 JQ brought an action against the dismissal before the Arbeitsgericht (Labour Court, Germany), claiming that his remarriage was not a valid ground for the dismissal. In JQ's view, the dismissal was an infringement of the principle of equal treatment because, under the GrO 1993, the remarriage of a head of department of the Protestant faith or of no faith would not have had any consequences for the employment relationship between that person and IR.

28 IR asserted that JQ's dismissal was socially justified. Given that JQ occupied a managerial post within the meaning of Article 5(3) of the GrO 1993, by entering into a marriage that is invalid under canon law, he had clearly infringed his obligations under his employment contract with IR.

31 The Bundesarbeitsgericht (Federal Labour Court) considers that the outcome of the dispute in the main proceedings depends on whether JQ's dismissal by IR is lawful under Paragraph 9(2) of the AGG. However, that court observes that that provision must be interpreted in accordance with EU law and that, consequently, the outcome of the dispute depends on the interpretation of the second subparagraph of Article 4(2) of Directive 2000/78, which was transposed into national law by Paragraph 9(2) of the AGG...

55 It follows...that a church or other public or private organisation the ethos of which is based on religion or belief can treat its employees in managerial positions differently, as regards the requirement to act in good faith and with loyalty to that ethos, depending on their affiliation to a particular religion or adherence to the belief of that church or other organisation only if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief is a genuine, legitimate and justified occupational requirement in the light of that ethos...

57 In the present case, the requirement at issue in the main proceedings concerns the respect to be given to a particular aspect of the ethos of the Catholic Church, namely the sacred and indissoluble nature of religious marriage.

58 Adherence to that notion of marriage does not appear to be necessary for the promotion of IR's ethos, bearing in mind the occupational activities carried out by JQ, namely the provision of medical advice and care in a hospital setting and the management of the internal medicine department which he headed. Therefore, it does not appear to be a genuine requirement of that occupational activity within the meaning of the first subparagraph of Article 4(2) of Directive 2000/78, which is, nevertheless, a matter for the referring court to verify.

59 The finding that adherence to that aspect of the ethos of the organisation concerned cannot, in the present case, constitute a genuine occupational requirement is corroborated by the fact, which was confirmed by IR during the hearing before the Court and referred to by the Advocate General in point 67 of his Opinion, that positions of medical responsibility entailing managerial duties, similar to that occupied by JQ, were entrusted to IR employees who were not of the Catholic faith and, consequently, not subject to the same requirement to act in good faith and with loyalty to IR's ethos.



60 ...it is for the referring court to verify whether IR has established that, in the light of the circumstances of the main proceedings, there is a probable and substantial risk of undermining its ethos or its right of autonomy (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 67).

Significantly, both judgments require German courts to depart from an established case-law position set out by the *Bundesverfassungsgericht* relating to the autonomy rights of religious organisations.<sup>2</sup>

### **MB – LEGAL RECOGNITION OF GENDER REASSIGNMENT**

In Case C-451/16, *MB v Secretary of State for Work and Pensions*, Judgment of 26 June 2018 (GC), the Court concluded that a refusal to grant a pension to person who has undergone a male-to-female change of gender and reached the retirement age for women, on the basis that the change of gender had not been legally recognised because the person in question had not had their previously existing marriage annulled, constituted direct discrimination on the grounds of sex contrary to the requirements of Directive 79/7/EEC of 19 December 1978.

The Grand Chamber of the Court, in tandem with the Opinion delivered by Bobek AG, emphasised that member states retained the authority to regulate the gender reassignment process and to define marital status – but that access to social security was subject to EU non-discrimination requirements. UK arguments that its legislation complied with the ECHR, as confirmed by the ECtHR, did not change the situation: different legal standards were applicable under the ECHR and EU frameworks.

Paragraphs 41-47 of the judgment also had some interesting things to say about identifying relevant comparators, highlighted in the extract below.

16 MB was born a male in 1948 and married in 1974. She began to live as a woman in 1991 and underwent sex reassignment surgery in 1995.

17 MB does not, however, hold a full certificate of recognition of her change of gender, since, pursuant to the national legislation at issue in the main proceedings, in order for that certificate to be granted her marriage had to be annulled. She and her wife wish to remain married for religious reasons.

18 In 2008 MB, having reached the age of 60 — that is to say, the age at which women born before 6 April 1950 may, under national law, receive a ‘Category A’ retirement pension from the State — applied for such a pension as from that age by virtue of the contributions paid into the State pension scheme while she was working.

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<sup>2</sup> For more on this, see Ronan McCrea, ‘Salvation outside the church? The ECJ rules on religious discrimination in employment’, EU Law Blog, 18 April 2018, <http://eulawanalysis.blogspot.com/2018/04/salvation-outside-church-ecj-rules-on.html>

19 Her application was rejected by a decision of 2 September 2008 on the ground that, in the absence of a full gender recognition certificate, MB could not be treated as a woman for the purposes of determining her statutory pensionable age...

23 Before the referring court, the Secretary of State for Work and Pensions submitted that, according to the Court's case-law resulting from the judgments of 7 January 2004, *K. B.* (C-117/01, EU:C:2004:7, paragraph 35) and of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256, paragraph 21), it is for the Member States to determine the conditions under which a person's change of gender may be legally recognised. He submitted that those conditions cannot be limited to social, physical and psychological criteria but may also include criteria relating to marital status....

27 As a preliminary point, it must be noted that the case in the main proceedings and the question referred to the Court concern only the conditions for entitlement to the State retirement pension at issue in the main proceedings. Accordingly, the Court is not being asked to consider, generally, whether the legal recognition of a change of gender may be conditional on the annulment of a marriage entered into before that change of gender...

34 As is clear from Article 2(1)(a) of Directive 2006/54, there is direct discrimination based on sex if one person is treated less favourably on grounds of sex than another person is, has been or would be treated in a comparable situation. That concept must be understood in the same way in the context of Directive 79/7.

35 In accordance with the Court's settled case-law, the scope of the latter directive, in view of its purpose and the nature of the rights which it seeks to safeguard, is also such as to apply to discrimination arising from gender reassignment (see, to that effect, judgment of 27 April 2006, *Richards*, C-423/04, EU:C:2006:256, paragraphs 23 and 24 and the case-law cited)...

37 It appears...that that national legislation treats less favourably a person who has changed gender after marrying than it treats a person who has retained his or her birth gender and is married.

38 Such less favourable treatment is based on sex and may constitute direct discrimination within the meaning of Article 4(1) of Directive 79/7.

39 It is further necessary to establish whether the situation of a person who changed gender after marrying and the situation of a person who has retained his or her birth gender and is married are comparable...

41 In that regard, it must be noted that the requirement relating to the comparability of situations does not require those situations to be identical, but only similar (see, to that effect, judgments of 10 May 2011, *Römer*, C-147/08, EU:C:2011:286, paragraph 42, and of 19 July 2017, *Abercrombie & Fitch Italia*, C-143/16, EU:C:2017:566, paragraph 25 and the case-law cited).

42 The comparability of situations must be assessed not in a global and abstract manner, but in a specific and concrete manner having regard to all the elements which characterise

them, in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue, as well as, where appropriate, in the light of the principles and objectives pertaining to the field to which that national legislation relates...

43 ... it appears that the State statutory retirement pension scheme at issue in the main proceedings protects against the risks of old age by conferring on the person concerned the right to a retirement pension acquired in relation to the contributions paid by that person during his or her working life, irrespective of marital status.

44 Thus, in the light of the subject matter of the retirement pension and the conditions under which it is granted, as set out in the previous paragraph, the situation of a person who changed gender after marrying and that of a person who has kept his or her birth gender and is married are comparable....

46 Moreover, the purpose of the marriage annulment condition invoked by that Government — namely, to avoid marriage between persons of the same sex — is unrelated to that retirement pension scheme. As a result, that purpose does not affect the comparability of the situation of a person who changed gender after marrying and that of a person who kept his or her birth gender and is married, in the light of the subject matter and the conditions under which that retirement pension is granted, as set out in paragraph 43 of this judgment.

47 That interpretation is not invalidated by the case-law of the European Court of Human Rights, to which the United Kingdom Government also refers in order to contest the comparability of the situation of those persons. As the Advocate General stated in point 44 of his Opinion, the European Court of Human Rights, in its judgment of 16 July 2014, *Hämäläinen v. Finland* (CE:ECHR:2014:0716JUD003735909, §111 and §112), assessed whether or not the situation of a person who had undergone gender reassignment surgery after marrying was comparable to the situation of a married person who had not changed gender, in the light of the subject matter of the national legislation at issue, which concerned the legal recognition of a change of gender with regard to civil status. By contrast, as has been noted in paragraph 27 of the present judgment, what is at issue in the present case is the comparability of the situations of the persons concerned in the light of legislation the subject matter of which is specifically entitlement to a State retirement pension.

48 Therefore, it must be held that the national legislation at issue in the main proceedings accords less favourable treatment, directly based on sex, to a person who changed gender after marrying, than that accorded to a person who has kept his or her birth gender and is married, even though those persons are in comparable situations...

#### **COMAN - THE FAMILY REUNIFICATION RIGHTS OF SAME-SEX SPOUSES**

In the already famous case, Case C-673/16, *Coman*, Judgment of 5 June 2018, the Grand Chamber of the CJEU in a reference from the Romanian Constitutional Court concluded that (i) the provisions of the Citizens' Rights Directive 2004/38/EC must be interpreted as meaning that a same-sex spouse of a Union citizen enjoys the same derived residence rights

as those enjoyed by other ‘family members’, even if the host state does not legally recognise same-sex marriage – and that (ii) any such derived rights must not be subject to stricter conditions than those applied to other family members in line with Article 7 of Directive 2004/38/EC – meaning in essence that any decision relating to the extension of such rights beyond the initial three-month residence period must be based on objective criteria and an examination of the relevant personal circumstances, comply with the Directive’s requirements relating to the ‘facilitation’ of family reunion in the host state, and not be based on the sexual orientation of the person concerned.

The key paragraphs of the judgment are as follows:

37 [A] person’s status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States and EU law does not detract from that competence...The Member States are thus free to decide whether or not to allow marriage for persons of the same sex (judgment of 24 November 2016, *Parris*, C-443/15, EU:C:2016:897, paragraph 59).

38 Nevertheless, it is well-established case-law that, in exercising that competence, Member States must comply with EU law, in particular the Treaty provisions on the freedom conferred on all Union citizens to move and reside in the territory of the Member States...

39 To allow Member States the freedom to grant or refuse entry into and residence in their territory by a third-country national whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that state, according to whether or not national law allows marriage by persons of the same sex, would have the effect that the freedom of movement of Union citizens who have already made use of that freedom would vary from one Member State to another, depending on whether such provisions of national law exist...

40 It follows that the refusal by the authorities of a Member State to recognise, for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national to a Union citizen of the same sex, concluded, during the period of their genuine residence in another Member State, in accordance with the law of that State, may interfere with the exercise of the right conferred on that citizen by Article 21(1) TFEU to move and reside freely in the territory of the Member States. Indeed, the effect of such a refusal is that such a Union citizen may be denied the possibility of returning to the Member State of which he is a national together with his spouse.

41 That said, it is established case-law that a restriction on the right to freedom of movement for persons, which, as in the main proceedings, is independent of the nationality of the persons concerned, may be justified if it is based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law...

45 The Court finds, in that regard, that the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law...

46 Accordingly, an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned...

56 ...[I]n circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

Note, as with the religious ethos cases, *Coman* generates some tension with national constitutional provisions – but to a lesser degree than with *Egenberger* and *IR*.

#### **PREGNANCY – DISMISSAL BY WAY OF COLLECTIVE REDUNDANCY/BURDEN OF PROOF AND RISK ASSESSMENT**

In Case C-103/16, *Porras Guisado*, Judgment of 22 February 2018, the CJEU clarified the requirements of the Pregnant Workers Directive on dismissals. In response to a series of questions from a Spanish court, the Court concluded that the Directive (i) did not preclude national legislation permitting the dismissal of a pregnant worker as part of a collective redundancy measure (as defined by Article 1(1)(a) of Directive 98/59/EC of 20 July 1998); (ii) did not require the provision of additional reasons to justify the redundancy other than those justifying the collective dismissal, provided that the objective criteria chosen to identify the workers to be made redundant were cited; and (iii) did not require states to give pregnant or breastfeeding workers priority status in relation to being either retained or redeployed before a collective redundancy (even though states were not precluded from introducing such a higher level of employment protection).

In so concluding, the Court drew a distinction between dismissals ‘taken for reasons essentially connected with the worker’s pregnancy’ and those ‘taken during the period from the beginning of pregnancy to the end of the maternity leave for reasons unconnected with the worker’s pregnancy’: see [46]-[49]. The Court did find that national legislation which did not prohibit the dismissal of pregnant workers but only provided for *ex post facto* reparation was precluded: it took the view that the Directive required that protection be afforded against both dismissal ‘by way of prevention’ and also against the consequences of such a dismissal.

Interestingly, Sharpston AG had suggested a more restrictive approach in her Opinion, arguing that dismissal of pregnant workers by way of collective redundancy should only be permissible in certain limited circumstances – such as when a worker cannot be ‘plausibly be reassigned to another suitable work post in the context of a collective redundancy’.

In Case C-41/17, *González Castro v Mutua Umivale, Prosegur España SL, Instituto Nacional de la Seguridad Social (INSS)*, Judgment of 19 September 2018, the CJEU considered the interaction of the burden of proof provisions set out in Article 19 of Directive 2006/54/EC (‘the Recast Equal Treatment Directive’) and the requirements of Articles 4, 5 and 7 of Council Directive 92/85/EEC (‘the Pregnant Workers Directive’) relating to the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

The Court concluded that Article 19(1) of Directive 2006/54 must be interpreted as applying to a situation where a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and thus did not receive a suitable risk allowance, challenges the adequacy of this risk assessment before a court or tribunal and is able to adduce factual evidence suggesting that the risk assessment did not adequately take her individual situation into account. It based this conclusion on a finding that a failure to carry out such an adequate assessment would constitute direct sex discrimination – thereby triggering the application of the burden of proof requirements. (In so doing, the Court applied the logic of its existing case in this field, as set out in C-531/15, *Otero Ramos*, Judgment of 19 October 2017.)

## FUTURE ISSUES

See the interesting opinions by (i) Saugmandsgaard AG in Case C-372/16, *Sahyouni* on Regulation (EU) No 1259/2010 relating to enhanced cooperation in the area of the law applicable to divorce and legal separation and the impact of non-discrimination requirements; and (ii) Sharpston AG in Case C-457/17, *Maniero*, on whether the concept of ‘education’ within the meaning of Article 3(1)(g) of the ‘Race Equality Directive’ 2000/43/EC includes the award of scholarships intended to promote projects for research and studies abroad.

*Egenberger/IR* and *Coman* were controversial, in different ways. Is the reach of EU law into terrain traditionally governed by national constitutional law and/or established legislative standards reflecting embedded cultural norms becoming too great?

Note in this regard Bobek AG’s Opinion in the forthcoming case of C-193/17, *Cresco Investigation v Achatzi*, which concerns Austrian legislation making Good Friday a paid public holiday for the members of four Christian churches only – and also note his suggestion post-*Egenberger* at [114]-[149] that the ‘direct horizontal effect’ of the equal treatment principle be reined in as it applies between private individuals/bodies.

What about the CJEU’s lurking problems in this field – such as the (terrible?) judgment in Case C-668/15, *Jyske Finans*, Judgment of 6 April 2017, its uncertain age case-law, and the newly emerging ‘abuse of rights’ doctrine set out in Case C-423/15, *Kratzer*? Time will tell.

