



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

FLASH REPORT

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| Country: | Lithuania |
| Title: | Sexual orientation, sexual identity as well as same-sex family relationships protected under Constitution, states Constitutional Court of the Republic of Lithuania in a landmark ruling |
| Date: | 22 January 2019 |
| Expert: | Gediminas Andriukaitis |
| <u>Context</u> | |
| Issue at stake: | The ruling of the Constitutional Court in the field of migration lays the foundation for the recognition of the rights of same-sex couples and explicitly adds the grounds of sexual orientation as an integral part of the Constitutional Equality clause |
| Ground of discrimination: | Sexual orientation |
| Source: | National court decision |
| Field: | All fields |

Content

Case development: On 5 December 2016 the Supreme Administrative Court of Lithuania applied to the Constitutional Court with an inquiry whether certain provisions of the Law on Legal Status of Aliens, which restrict the right of residence to married or registered partners (while national law explicitly forbids same-sex marriage and does not provide a possibility for a registered partnership), is in conformity with Articles 22 (protection from unlawful interference with a persons' private and family life), 29 (Equality clause) and 38 (protection of family, motherhood, fatherhood, and childhood) of the Constitution. The factual situation in the case was similar to the CJEU *Coman* case (C-673/16): the applicant – a citizen of Belarus - entered into marriage with a citizen of Lithuania in Denmark. The couple moved to Lithuania, however, the application for residency of a third country national was rejected due to the fact that Lithuanian law explicitly forbids same-sex marriage, hence, under the interpretation of the Law on Legal Status of Aliens by the Migration department and the court of first instance, would not recognise a same-sex couple as family members with regards to the right of residence.

Decision of the Court: On 11 January 2019, the Constitutional Court delivered a long-awaited verdict in the case, interpreting the provisions of the Constitution as well as the Law on the Legal Status of Aliens. The court, citing the case-law of CJEU (stressing in particular the significance of the *Coman* case) provided the interpretation of the Constitution, which in essence rejected the former common practice of the Migration Department under the Ministry of Interior not to issue temporary residence permits to a foreign national who has entered into a same-sex marriage or same-sex registered partnership in another state with a citizen of the Republic of Lithuania who resides in Lithuania on the grounds of public order, ruling that such interpretation is discriminatory

and unconstitutional. According to the reasoning of the Court, although a refusal to issue a residency permit may be based on the grounds of public order and public security, it cannot be based on the basis of gender identity or sexual orientation only. However, the court did not provide any elaborations on the notions of gender identity or sexual orientation.

Although the outcome of this constitutional case is not surprising (given the recent *Coman* case of the CJEU), this particular ruling of the Constitutional Court is groundbreaking in several respects.

First of all, the Court for the first time provided interpretation of Article 29 of the Constitution (Equality clause) in the light of discrimination on the ground of sexual orientation. Article 29 of the Constitution does not explicitly contain sexual orientation as a protected ground. However, the Constitutional Court stated, that the provisions of Article 29 can only be interpreted in the light of protection of personal dignity and the essence of the principle of equality before the law. Therefore, according to the Court, Article 29 does not provide a closed list of grounds and gender identity and sexual orientation therefore should be considered as an integral part of it. Moreover, the Court also said, that certain public attitudes or certain stereotypes, which are prevalent in a democratic state at a certain period of time, cannot constitutionally justify the usage of certain constitutional objectives, *inter alia* protection of public order, in order to discriminate people solely on the basis gender identity and (or) sexual orientation, thus restricting the protection of personal and family life, which is guaranteed by the Article 22 of the Constitution.

Secondly, the Court also firmly reiterated its jurisprudence on the concept of family, this time even more explicitly stating that although according to Article 38 of the Constitution of the Republic of Lithuania marriage is only possible among persons of different sexes, it does not mean that marriage is the only form of family relationship. On the contrary, the constitutional concept of family cannot be derived from the notion of marriage only, as marriage is only one of many forms of family relationships. According to the Court, the constitutional concept of family, on the contrary to the constitutional concept of marriage, is gender neutral. Therefore, a combined interpretation of Articles 38 and 29 leads to the conclusion that all family relationships, based on long-term commitment, mutual respect and emotional bonding, should be protected.

The ruling of the Constitutional Court primarily concerns the field of migration and the right to family-reunification and a final decision in the disputed case will be later delivered by the Supreme Administrative Court of Lithuania, which referred the case to the Constitutional Court for clarification. However, the progressive interpretation of certain constitutional principles and notions by the Constitutional Court place a solid foundation for further recognition of the rights of same-sex couples in Lithuania as well as solid basis for legislative initiatives, aimed at establishing legal recognition of same-sex partnerships.

Key points of analysis: According to the Constitutional Court, Article 29 does not provide a closed list of grounds and gender identity and sexual orientation therefore should be considered as an integral part of it. Although the Court did not elaborate in detail about sexual orientation or gender identity concepts as such, the wording of the court in combination with its re-affirming statement on the importance of protection of same-sex family relationship lays foundation for further recognition of the rights of same-sex couples in Lithuania.

Internet link sources:

The Supreme Administrative Court of Lithuania (Vyriausiasis administracinis teismas), 5 December 2016 inquiry no. 1B-22/2016, administrative case no. eA-4175-624/2016, available in Lithuanian at: http://www.lrkt.lt/~prasymai/22_2016.htm.

The Constitutional Court of the Republic of Lithuania (Lietuvos Respublikos Konstitucinis teismas), ruling of 11 January 2019 on the compliance of Article 43 of the Law on the Legal Status of Aliens with the Constitution of the Republic of Lithuania, available in Lithuanian at: <http://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1898/content>.