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FLASH REPORT

Country:	Greece
Title:	Follow-up to the CJEU <i>Kalliri</i> case
Date:	26 March 2020
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Context	
Issue at stake:	Follow-up to the CJEU <i>Kalliri</i> C-409/16 - Common minimum height requirement to the detriment of women for access to the Police Academy entails indirect gender discrimination
Grounds of discrimination:	Sex
Field of application:	Employment
Source:	Council of State (Supreme Administrative Court) Judgment No 2055/2019 ¹
Applicable law:	Presidential Decree 4/1995 (OJ A 1/10.01.1995), as amended by Presidential Decree 90/2003 (OJ A 82/10.04.2003) ²

Content

Case: In its judgment in *Kalliri*,³ of 18 October 2017, the CJEU found that the provisions of Council Directive 76/207/EEC, as amended by Directive 2002/73/EC, must be interpreted as precluding any law of a Member State that makes candidates' admission to the competition for entry to the Member State's police school subject to a height requirement of at least 1.70 m, regardless of their sex. The Court held that the law at issue in the main proceedings put a far greater number of women in a disadvantaged position than men and that it appeared to be neither appropriate nor necessary to achieve the legitimate objective that it pursued, which it is up to the national court to determine.

Decision of the court: Following the CJEU *Kalliri* judgment, the seven-member section of the Council of State (CS) issued Judgment No 2055/2019. By a majority of five out of seven votes, the CS found that the impugned provision of Article 2(1) PD 4/1995 constitutes an indirect discrimination on the grounds of gender. However, the case was

¹ CS 2055/2019 has been published in the legal review 'Theory and Praxis of Administrative Law', vol. 12/2019, p. 1165, where its date of issue does not appear. It is still not accessible in legal data banks.

² Article 2(1) Presidential Decree 4/1995 (OJ A 1/10.01.1995), as amended by Article 1(1) of Presidential Decree 90/2003 (OJ A 82/10.04.2003), provides a common minimum height of 1.70m, without shoes, for both male and female candidates for participation in the competition for enrolment in the Greek police schools.

³ CJEU, C-409/16, *Kalliri*, 18 October 2017, EU:C:2017:767. Ms Kalliri made an application to participate in the competition, accompanied by the required supporting documents, to the competent police station. Those documents were returned to her on the ground that she was not of the minimum height of 1.70m, since she was only 1.68m tall and she was not allowed to participate in the competition in question. Ms Kalliri disputed that refusal before the Administrative Court of Appeal of Athens, which upheld her claim holding that the above provisions are contrary to the constitutional principle of equality of the sexes. The competent Ministers appealed against that decision before the Council of State (Supreme Administrative Court). By its judgment No 1420/2016, the Council of State decided to stay the proceedings and to refer to the CJEU for a preliminary ruling.

referred to the CS Full Section due to the importance of the issues raised regarding the compatibility of the impugned provisions with the Greek Constitution and with EU law.⁴ The same was decided by CS Judgments Nos 2056-2060/2019 with regard to five other similar cases.

Key points of analysis: The CS makes reference to the history of women's access to police schools and its previous case law, which had found earlier restrictions on women's enrolment in police schools to constitute direct gender discrimination.⁵

Moreover, it cites various research documents concerning the average height of men and women in Greece, including the 2011 study on 'Minimum body height requirements for police officers – an international comparison', invoked by the European Commission in its remarks to the CJEU in the *Kalliri* case. The CS found that in the period 2001-2011: (a) the minimum height requirement (MHR) of 1.70m is 7-8cm lower than the average height (AH) of men aged 18-24 years, whereas it is 6-7 cm higher than the AH of women of the same age group; (b) 80 % of the male population are of this height compared to only 19 % of the female population. Thus, it is evident that the percentage of female potential candidates (aged 18-26 years, according to the impugned provision) who are excluded for being shorter than 1.70 m is disproportionately larger than that of male potential candidates, who are excluded for the same reason.

In view of the above, the CS found by a majority of five out of seven members that the common MHR of 1.70 m for both sexes does not constitute a genuine occupational requirement and that it is not necessary and suitable to ensure the operational capacity and proper functioning of the police services. Endorsing the phrasing of the CJEU in *Kalliri*, the CS found that 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 or that shorter persons naturally lack that aptitude. In any event, the aim pursued by the law at issue can be achieved by the preselection of candidates based on specific tests allowing their physical ability to be assessed. In this respect, the CS noted that two more common athletic tests have been added to those originally provided (running 100 m in 16'' and throwing a shot put weighing 7.275 kg, which is used by male athletes). Moreover, all candidates (both male and female) have to accomplish the minimum score provided for each athletic test (common athletic requirement), which in the case of certain sports was even raised above the minimum score required for male candidates in the past. The CS made explicit reference to the remarks of the European Commission to the CJEU in the *Kalliri* case concerning the international requirements of the physical aptitude of the police force, which showed (a) that a large number of European States have abolished MHR for access to the police force, with a few exceptions regarding special corpses or specific managerial posts; (b) that at the international level there is a tendency to substitute MHR by body mass index, differentiated by gender; (c) that in the majority (51 %) of EU Member States, MHR exist, but they are set in conformity with the average height of each sex, with registered differences between MHR set for male and MHR for female candidates ranging from 2 to 10 cm (most commonly 5 cm); (d) that a common MHR is an exception among EU Member

⁴ According to Article 14(2)(b) of Presidential Decree 18/1989 (OJ A 8/09.01.1989), the CS Full Section is competent for issues or cases referred to it by judgments of the five-member or seven-member section due to their major importance. The judgment of referral is considered to be a report to be developed before the CS Full Section by the Judge Rapporteur, who is appointed by the same judgment.

⁵ An original quota of 15% to the detriment of women for enrolment to the police schools, provided by Article 1(2a) Act 2226/1994 (OJ A 122/21.7.1994), as amended by Article 12(1) Act 2713/1999 (OJ A 89/30.04.1999), was found to constitute direct gender discrimination by the CS judgment No 1917/1998. This quota was abolished by Article 20(3) Act 3103/2003 (OJ A 23/29.01.2003), which provided common physical requirements and athletic and psychotechnical tests for both sexes. Presidential Decree 4/1995 originally provided a minimum height of 1,70 m for male candidates and 1,65m height for female candidates for the police schools. For reasons of conformity with the above provision of Article 20(3) Act 3103/2003, Article 2(1) Presidential Decree 4/1995 was amended by Article 1(1) of Presidential Decree 90/2003, providing a common height requirement of 1.70m for both sexes.

States, and in most cases it is set lower than the average height of the population, so that the number of excluded candidates is limited; (e) in other European countries (except Greece), MHR for female candidates, either common, or differentiated by sex, range from 1.52 to 1.65 m and only in Greece there is a MHR for female candidates set at 1.70 m.

Internet link source:

<http://www.nbonline.gr/journals/51/volumes/1078/issues/1714/lemmas/4914529> (private data bank; no free access).