



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

### FLASH REPORT

<b>Country:</b>	Greece
<b>Title:</b>	Higher minimum height for male candidates
<b>Date:</b>	23 March 2020
<b>Expert:</b>	Panagiota Petroglou
<b><u>Context</u></b>	
<b>Issue at stake:</b>	Higher minimum height for male candidates to the Fire Brigade does not entail gender discrimination
<b>Grounds of discrimination:</b>	Sex
<b>Field of application:</b>	Employment
<b>Source:</b>	Council of State (Supreme Administrative Court) Judgment No 2099/31.10.2019 <sup>1</sup>
<b>Applicable law:</b>	Presidential Decree 5/1995 OJ A 2/10.01.1995

### Content

**Case:** Article 1(5) Presidential Decree (P.D.) 5/1995 (OJ A 2/10.01.1995) requires a minimum physical height of 1.70 m for male candidates to the Fire Brigade and of 1.65 m for female candidates. In 2006, a male candidate was rejected on the basis of his height (1.66 m). The documents supporting his candidature were returned to him and he was not allowed to participate in the relevant selection procedure. He lodged a petition for annulment, arguing *inter alia* that the differentiation of the minimum height between male and female candidates is contrary to EU law as well as national law. Following the rejection of his petition by Judgment No 1483/2009 of the Administrative Court of Appeal of Athens, the male candidate appealed before the Council of State (CS) in 2009. The issue of his appeal being considered of major importance, the case was referred to the seven-member section of the CS, which by its Judgment No 8/2005 adjourned its decision until the publication of the CJEU judgment in the *Kalliri* case.<sup>2</sup> The appeal was eventually heard on 1 November 2018.

**Decision of the court:** In CS Judgment No 2099/2019, the case was referred to the Full Section of the CS<sup>3</sup> due to the importance of the issues raised regarding the compatibility of the impugned provision with the Greek Constitution and EU law and the relevance of the case to the *Kalliri* case (CS Judgment No 2055/2019), which has also been referred to the CS Full Section by its seven-member section,<sup>4</sup> and Judgments No 2056-2060/2019 in five cases similar to *Kalliri*.

<sup>1</sup> Although dated 31.10.2019, the judgment appeared in the data bank 'NOMOS' and the legal review 'Theory and Praxis of Administrative Law' vol. 12/2019, and was thus made accessible to the public in the first semester of 2020.

<sup>2</sup> CJEU, C-409/16, *Kalliri*, 18 October 2017, EU:C:2017:767.

<sup>3</sup> 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 the report to be developed before the CS Full Section by the Judge Rapporteur, who is appointed by the same judgment.

<sup>4</sup> See Flash Report of 23 March 2020 'Follow-up to the CJEU *Kalliri* C-409/16 - Common minimum height requirement to the detriment of women for access to the Police Academy entails gender discrimination'.

According to the Court, women were first granted access to the Greek Fire Brigade by P.D. 5/1995, as requested by the Council of State in the exercise of its competence of elaboration of the above presidential decree.<sup>5</sup> Originally, the minimum height was set at 1.70 m for male candidates and at 1.60 m for female candidates, but the latter was raised to 1.65 m by P.D. 397/1998 (OJ A 276/8.12.1998). The above minimum heights (1.70 male, 1.65 female) are still contained in the Regulation at issue (P.D. 19/2006 OJ A 16/07.02.2006), which also provides other entry criteria, such as common athletic requirements for both sexes (already found to be objectively justified as genuine occupational requirements by CS judgments No 978-980/2016), written exams, interviews and psychotechnical tests. A quota of 10 % to the detriment of women introduced by Article 12(2) Act 2713/1999 (OJ A 89/30.4.1999) was subsequently abolished by Article 12(3) Act 3387/2005 (OJ A 224/12.9.2005) in light of the relevant CS jurisprudence (CS 1917/1998 Full Section) concerning women's access to the Police Academy.

**Key points of analysis:** By construing the applicable national law in light of the CJEU's *Kalliri* case, the CS found that when fixing a minimum height requirement for access to special corps like the Fire Brigade, the national legislator has to sufficiently justify that this is necessary, appropriate and in conformity with the principle of proportionality. Moreover, such a requirement should not largely deviate from the average height of the population according to up to date scientific research, in order to avoid that an exceptionally large number of eventual candidates are excluded. On the other hand, the biological difference between men and women regarding height should also be taken into account in order to avoid an *a priori* exclusion of a disproportionately bigger percentage of female candidates as compared to male candidates of the same age. In the view of the above, the Court stated that the legislator may opt (a) for a different minimum height requirement for male and female candidates following the average height differential between sexes according to common knowledge and relevant scientific research or (b) for a common minimum height requirement for both sexes, which however should not exclude a disproportionately bigger percentage of female potential applicants than that of male potential applicants on the basis of this requirement. Otherwise, this would constitute indirect discrimination in accordance with the findings of the CJEU in the *Kalliri* case. In the context of the current case, the Court found that the impugned provision providing a shorter minimum height requirement for female candidates is not in breach of the constitutional provision on gender equality but *a contrario* seeks to restore real gender equality regarding access to employment by the Fire Brigade in conformity with EU law and the Greek Constitution (Article 4(2)<sup>6</sup> and 116(2)<sup>7</sup> of the Greek Constitution), given that the average height of Greek men aged 18 years is 1.77 m compared to 1.63 m for women of the same age. This was stated in the CS Judgment 1420/2016, which submitted the preliminary reference to the CJEU in the *Kalliri* case. In this regard, the CS also made explicit reference to the judgment of the *Cour Administrative d'appel de Paris* of 11 May 2006, which found that the relevant French provision setting a minimum height requirement for access to the Police of 1.68 m for male candidates and 1.60 m for female candidates does not constitute gender discrimination to the detriment of men.

**Internet link source:** <https://lawdb.intrasoftnet.com> (private data bank; no free access); <http://www.nbonline.gr/journals/51/volumes/1078/issues/1714/lemmas/4914529> (private data bank; no free access).

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<sup>5</sup> According to Article 15 of Presidential Decree 18/1989 (OJ A 8/09.01.1989), all the regulatory decrees have to be sent in draft by the competent Minister to the Council of State for elaboration. The opinion of the CS is of an advisory character.

<sup>6</sup> Article 4(2) of the Greek Constitution reads 'Greek men and women have equal rights and obligations.'

<sup>7</sup> Article 116(2) of the Greek Constitution states that 'Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities existing in practice, in particular those detrimental to women'.