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FLASH REPORT

Country:	Greece
Title:	Minimum height for female candidates to Port Police
Date:	27 March 2020
Expert:	Panagiota Petroglou
<u>Context</u>	
Issue at stake:	Successive increase and decrease of minimum height requirement for female candidates to Port Police makes doubtful whether the set height of 1.65 m is a genuine occupational requirement
Grounds of discrimination:	Sex
Field of application:	Employment
Source:	Council of State (Supreme Administrative Court) Judgment No 2353/28.11.2019 ¹ (dissenting opinion)
Applicable law:	Article 2(d) of the Ministerial Decision 1211.2/18/07/25.9.2007 (OJ B 1958/04.10.2007)

Content

Case: Article 2(d) of the Ministerial Decision 1211.2/18/07/25.9.2007 (OJ B 1958/04.10.2007) of the Minister of Maritime Affairs and Insular Policy provides a minimum physical height of 1.70 m for male candidates and of 1.65 m for female candidates to the Port Police. In 2008, a female candidate was rejected because of her height (1.63 m). The documents supporting her candidature were returned to her and she was not allowed to participate in the relevant selection procedure. She lodged a petition for annulment, arguing *inter alia* that the minimum height requirement (hereinafter MHR) for female candidates (1.65 m) was set at least 2cm higher than the average height of women in Greece (1.63 m), whereas the MHR for male candidates (1.70 m) was considerably lower than the average height of men in Greece (1.78 m), in breach of EU law as well as national law. She also argued that in other competitions (both in previous years and in the years to follow) the MHR for female candidates to the Port Police was 1.60 m and that its successive increase and decrease puts in doubt whether it is a necessary and appropriate means to ensure the pursued aim.

Following the rejection of her petition by Judgment No 598/2009 of the Administrative Court of Appeal of Piraeus, the female candidate appealed before the Council of State (CS) in 2010. The issue of her appeal being considered of major importance, the case was referred to the seven-member section of the CS, which by its Judgment No 1426/2016 adjourned its decision until the publication of the CJEU judgment in the *Kalliri* case.² The appeal was eventually heard on 1 November 2018.

¹ Although dated 28.11.2019, the judgment appeared in the data bank 'NOMOS' and was thus made accessible to the public in the first semester of 2020.

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

Decision of the court: In CS Judgment No 2353/2019, the case was referred to the Full Section of the CS³ 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 CS's *Kalliri* case, which by CS Judgment No 2055/2019⁴ had also been referred to the CS Full Section. CS Judgments No 2056-2060/2019, in five cases similar to the *Kalliri* case, and CS judgment No 2099/2019, concerning higher minimum height for male candidates to the Fire Brigade, had also been referred to the CS Full Section for the same reason.⁵

According to the Court, Article 4 Act 1009/1980 (OJ A 25/29.1.1980) granted women access to the Port Police for the first time, albeit limited to certain work posts. This provision was abolished by Article 18(1) Act 2329/1995 (OJ A 172/22.08.1995). The Code of Personnel of the Port Police, in its Article 5(1), as amended by Article 2(3) Act 3569/2007 (OJ A 122/08.06.2007), provides that requirements for access to the Port Police are defined by Ministerial Decision. Thus, Ministerial Decision 1211.2/18/07/25.9.2007 (OJ B 1958/04.10.2007) of the Minister of Maritime Affairs and Insular Policy set the MHR at 1.70 m for male candidates and at 1.65m for female candidates to the Port Police. This MHR was required in the competition of the year 2008, together with 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 and health checks.

Key points of analysis: According to the majority opinion of the Court (six out of seven members), the MHR for male (1.70 m) and female (1.65 m) candidates to the Port Police does not entail direct or indirect discrimination on the grounds of gender in that: (a) the difference of 5cm of the MHR for male and female candidates is in line with the biological difference between men and women whereas the legislator is not obliged to set the MHR in total correspondence to the average height of each sex; (b) the MHR for female candidates was rather low in that it exceeded the average height of women (1.63 m) by only 2 cm, without excluding a far larger percentage of women than men as it did in the *Kalliri* case (1.70 m for both sexes). According to the data provided by the Greek State, in the competition at issue 3 223 female and 4 048 male candidates did satisfy the impugned MHR, out of whom 316 female and 292 male candidates were successful.

However, a very interesting and pertinent dissenting opinion was expressed by one member (out of seven) of the Court regarding whether the MHR of 1.63 m for female candidates constituted a genuine occupational requirement. The dissenting judge noted that over a short period of time, the MHR for female candidates to the Port Police had undergone an unjustified increase and decrease by various other ministerial decisions: originally, in 1996, it was set at 1.63 m (for men at 1.70 m), in the years between 1997 and 2001, it was raised to 1.65m (for men it remained at 1.70 m), in the year 2003 it was decreased to 1.60 m (for men it was decreased to 1.65 m), and in the year at issue, 2007, it was again raised to 1.65 m (for men it was raised to 1.70 m). Finally, in the years 2011, 2014 and 2015, the MHR for female candidates was decreased again to 1.60m (for men it remained at 1.70 m). The dissenting judge argued that this shows a total lack of cohesion and raises doubts whether the MHR for female candidates at issue (1.65 m) constitutes an appropriate means for the accomplishment of the aim pursued. To that effect, the dissenting judge recalled the CJEU case law according to which 'national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a

³ 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 judgements 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.

⁴ 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'.

⁵ CS judgment No 2099/2019 was also referred to the SC Full Section for the same reasons. See flash report of 23 March 2020 'Higher minimum height for male candidates to the Fire Brigade does not entail indirect gender discrimination'.

concern to attain it in a consistent and systematic manner' (see cited CJEU judgments C-169/07, *Hartlauer*,⁶ paragraph 55, C-168/14, *Grupo Itevelesa and Others*,⁷ paragraph 76, C-157/15, *G4S Secure Solutions*,⁸ paragraph 40, C-634/15, *Sokoll-Seebacher and Others*,⁹ paragraph 27).

Internet link source: <https://lawdb.intrasoftnet.com> (private data bank; no free access).

⁶ CJEU (Grand Chamber) Case C-169/07 *Hartlauer* [2009] ECLI:EU:C:2009:141, paragraph 55.

⁷ CJEU C-168/14 *Grupo Itevelesa and Others* [2015] ECLI:EU:C:2015:685, paragraph 76.

⁸ CJEU (Grand Chamber) Case C-157/15 *G4S Secure Solutions* [2017] ECLI:EU:C:2017:203, paragraph 40.

⁹ CJEU Case C-634/15 *Sokoll-Seebacher and Others* [2016] ECLI:EU:C:2017:203, paragraph 27.