

**Helmut Graupner**

# **The Maruko & Römer Cases**

**The European Court of Justice and Same-sex Partnerships**

**ECSOL-Workshop**

**LGBT families under European and international law**

Outgames Human Rights Conference

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# **Tadao Maruko gegen Versorgungsanstalt der deutschen Bühnen (Vddb) (C-267/06)**

*Hans Hettinger:* -> costume designer  
-> 45 years member of Vddb  
-> 45 years paid fees to Vddb as his heterosexual colleagues  
-> 13 years of partnership with Mr. Tadao Maruko  
-> 2001 registered their partnership  
-> died 2005

*Vddb:* -> survivors benefits only to married partners  
-> no pension to Tadao Maruko

*Tadao Maruko:* -> legal action  
(BayrVG München M 3 K 05.1595)

*BayrVG*: referral for a preliminary ruling

1. direct discrimination?
2. discrimination justified by recital 22?

**Recital 22:**

“This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.”

*Vddb & UK* -> unequal treatment of married couples and registered couples are outside of the scope of the Directive (due to recital 22)

## *European Commission*

- > no direct discrimination (no referral to sexual orientation)
- > indirect discrimination & no justification visible
- > but only: if RP is marriage-equivalent („substantially the same effects“)

## *Tadao Maruko:*

1. Direct discrimination (as referral to pregnancy is direct discrimination on the ground of sex):

-> needs not be decided, as in any case

2. Indirect discrimination:

-> not only in case of RP equivalent to marriage

-> as long as marriage is forbidden for same-sex couples:

criterion of marriage always is just „apparently neutral“ and puts homosexuals „at a particular disadvantage“ (Art. 2 par. 2 lit. b)

-> pay is made contingent upon a condition which same-sex couples never ever can fulfil

-> as in K.B. (2004) (opposite-sex couples with post-operative transgender partner were not allowed to marry):

the condition of marriage must be dropped for same-sex couples (as long as marriage is not available)

-> Otherwise: little discrimination (in MS with marriage-equivalent RP) outlawed, but big discrimination (in MS without such RP) not (despite same unequal treatment)

*Advocate General*

*Dámaso Ruiz-Jarabo Colomer:*

- > no direct discrimination (no referral to sexual orientation)
- > indirect discrimination & no justification visible
- > but only: if RP is marriage-equivalent („substantially the same effects“)

Problem of comparative parameters:

*Marriage-RP*

or

*opposite-sex couples vs. same-sex couples?*

# The Judgment

(01.04.2008)

- *Recital 22:*  
Recital 22 cannot affect the application of the Directive (par. 59f)
- *Direct Discrimination*  
-> if registered partners „in comparable situation“ as married partners (par. 70-73)

Art. 2 par. 1 lit. a Dir 2000/78/EC:

“direct discrimination ...where one person is treated less favourably than another ... in a comparable situation,”

-> Justification only possible under Art. 4 Abs. 1 („genuine and determining occupational requirement“)

## *The „comparable situation“*

(1) formally:

determination is task of the national court (par. 72f)

(2) in substance:

-> „Comparability“, not „Identity“ (par. 69)

-> „so far as concerns that survivor’s benefit“ (par. 73)

-> individual-concrete comparison with the „situation comparable to that of a spouse who is entitled to the survivor’s benefit provided for under the occupational pension scheme managed by the VddB.“ (par. 73)

-> criteria of the national court (par. 62, 69):

(a) formally constituted for life

(b) union of mutual support and assistance



-> ECJ does not object to these criteria and explicitly says :

**„The combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings ...“**

(emphasis added)

-> Compare to the judgment in *Palacios* (2007):

“The prohibition on any discrimination on grounds of age ... must be interpreted as not precluding national legislation **such as that at issue in the main proceedings**, ..., **where** ... [follow criteria which the national court has to apply in determining compatibility with community law]” (emphasis added)

# The Reaction of German High Courts

(decisions on family allowance for civil servants, § 40 Abs. 1 Nr. 1 BBesG)

**Federal Administrative Court („Bundesverwaltungsgericht“)**  
**(2 C 33.06, 15.11.2007):**

No comparability, as

- > RP and marriage are not identical  
(differences for instance regarding social benefits for civil servants, in tax legislation and joint adoption)
- > complete or general equalization was neither done nor intended by the legislator

## **Federal Constitutional Court („Bundesverfassungsgericht“) (2 BvR 1830/06 , 06.05.2008):**

No comparability, as

- > no general statutory equalization
  - (a) equalization was not the intention of the legislator
  - (b) no blanket clause
  - (c) special regulations with deviations from the law of marriage
- > no complete equalization in the law of public sector employees (still differences in remuneration and pension-rights)
- > spouses typically in need of alimony by partner; RP typically not
- > irrelevant that civil law maintenance-obligations are identical (in marriage and RP)

## *Problem:*

- General equalization
  - > circular reasoning (if general equalization would have taken place , no inequality would exist, and question of discrimination would not arise)
- equalization in social benefits for public sector employees
  - > circular reasoning (discrimination is justified with another discrimination)
- Typical/non-typical need of alimony:
  - > general-abstract approach which contradicts the individual-concrete view of the ECJ
  - > family-allowance is not dependend upon a need of alimony (also childless civil servants receive it. Even if their married partner earns more then themselves)

# Conclusion

- Case law of Bundesverwaltungs- and Bundesverfassungsgericht  
-> contradict ECJ in Maruko
- Even if this view is not shared  
-> in any way not unreasonable  
-> obligation to refer to the ECJ (asking for the criteria for the test of comparability)
- If situation of married and registered partners are not comparable  
-> then question of indirect discrimination (by referring to the exclusively heterosexual criterion “marriage”)  
-> obligation to refer to the ECJ
- Maruko could go up to the ECJ two more times

- **VG München 30.10.2008 (not final):**
  - > awarded survivors pension to Mr. Maruko
  - > surviving RP and surviving married partners in a comparable situation, as
    - (a) survivors benefits are substitutes for alimony and
    - (b) alimony-duties are the same in RP and marriage
- **New case *Römer vs. City of Hamburg* (C-147/08):**
  - > higher retirement pension for employee with married partner then for employee with RP
  - > even if married partner has higher income then employee and they have no children
  - > even if RP is in need of alimony by the employee and they have to care for children
  - > will the ECJ specify or extend the Maruko-judgment?



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