

Thematic Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation

Cyprus

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Executive Summary

Implementation of Employment Directive 2000/78/EC

Directive 78/2000/EC was transposed into Cypriot law on the eve of Cyprus' accession to the EU, copying almost verbatim the wording of the Directive. Despite this, the transposition suffers from some limited deviations from the Directive, namely regarding the reversal of the burden of proof. Its implementation also suffers from policies and practices, such as the failure to ensure that discriminatory laws and provisions are repealed; dialogue and consultation with NGOs; dissemination of information targeting the vulnerable groups; and the limited resources afforded to the equality body to enable it to adequately perform its tasks.

At the same time, a separate law was enacted purporting to comply with article 13 of Directive 43/2000/EC, appointing the Ombudsman as the national equality body with powers extending well beyond the scope of the two anti-discrimination directives. Thus, the mandate of the equality body not only includes sexual orientation discrimination in employment and occupation, but covers also the fields of medical care, education and access to goods and services including housing. The aforesaid wide provisions, however, apply only vis-à-vis the mandate of the equality body and do not give rise to any rights for the victim to apply directly to the Court, as recourse to the Court is possible by virtue of the law transposing Directive 78/2000/EC which does not extend beyond the scope of the said Directive. However, prejudices amongst society and the lack of targeted awareness raising measures have so far prevented Cypriot LGBT persons from using the equality body procedure.

Freedom of movement

The scope of the Cypriot law that transposed Council Directive 2004/38/EC (29.04.2004) does not include same sex marriages or registered partnerships. Although the regulation of this matter is left to each member state, the failure of Cyprus to regulate at all results in various forms of discrimination against LGBT persons when compared with heterosexual couples. This is contrary to the equality and non-discrimination principle as well as the law that mandates the Equality Body to investigate discrimination on the ground of sexual orientation in all the fields provided by Directive 43/2000/EC. This is particularly the case with third country LGBT nationals who are partners, children and family members of Union citizens and want to exercise their right to freedom of movement and there is one such a case pending before the Equality Body at the time of writing. Also it seems that there is discrimination against Cypriot nationals, including LGBT persons, who cannot benefit from the freedom of movement available to all other Union citizens with regard to the the right to bring over to Cyprus their partner who is a third country national; instead, as they are obliged to go via the more stringent procedure of the Migration and Aliens Law the outcome of which is entirely discretionary upon the Chief Immigration Officer.¹

¹ Cyprus/ Aliens and Immigration Law, as amended by Law 8(I)/2007 (14.02.2007).

Asylum and subsidiary protection

The state of transposition of Council Directive 2004/83/EC into Cypriot law accepts that fear of persecution on the ground of sexual orientation is a ground for obtaining asylum and/or subsidiary protection; however the law's definition of family members failed to include unmarried partners in a stable relationship, to the effect that homosexual partners are excluded from the right to family reunification. Under the current state of recording, it is not possible to determine the number of persons who applied for asylum, because the asylum service of the Interior Ministry does not classify cases according to the ground for persecution.

Family reunification

Council Directive 2003/86/EC was transposed into Cypriot law in 2007 without making use of the provision found in Article 4/3 of the Directive. The effect is that the right to family reunification is not extended to the unmarried partner of the sponsor with whom the sponsor is in a duly attested stable long-term relationship, or to a person who is bound to the sponsor by a registered partnership. The current legal framework essentially excludes homosexual partners of the sponsor, although the question remains whether the right to family reunification may cover the homosexual spouse of the sponsor, lawfully married in accordance with the laws of another jurisdiction remains open.

Freedom of assembly

Freedom of assembly is guaranteed by Article 21 of the Cypriot Constitution, which is equivalent to article 11 of the ECHR. However, in order to organise a procession or an assembly, the conditions laid down under the colonial Cyprus/Assemblies and Processions Law CAP. 32 must be observed which require prior application in the prescribed form to the police commissioner. There have never been any gay parades or homophobic demonstrations in Cyprus; in fact there is no significant gay lobby and there is general societal stigma against homosexual in the small and reclusive Cypriot society. Nevertheless, freedom of assembly can be significant for the purpose of protecting future gay activism.

Hate speech and Criminal law

There is no legislation in Cyprus addressing hate speech against homosexuals or with a homophobic motivation, although some of the more general provisions of the penal code may safely be interpreted as applying to these cases as well. There is also no case law on the subject either. Even though there are various recorded statements in the media which are homophobic, no action was ever taken against these persons, since most homosexuals in Cyprus are "closeted" and will not pursue their rights if that involves revealing their sexual orientation

Transgender issues

Information in this area is particularly scant, even though it is reported that in one case a transgender person was granted the refugee status. Although transgender persons are not explicitly covered by any laws, the authors assume that the issue would be treated as discrimination on the ground of sexual orientation rather than gender. This section also describes the procedure for changing sex and name which, although simple and straightforward, does provide that the new documentation following the change of name/gender shall not replace the previous one and that both old and new certificates shall thereafter be valid at the same time.

Miscellaneous

This section lists the research available on homosexuality in Cyprus and describes the opinion survey commissioned by the equality body, as well as other surveys and research work into the general public's attitudes towards homosexuality. It also records proxy data obtained through interviews conducted by the authors regarding instances of homophobic behaviour.

Good practice

A number of good practice measures are recorded, starting from the extensive mandate of the equality body to investigate complaints for sexual orientation discrimination in all fields, and then listing a number of awareness raising activities most of which do not focus on sexual orientation and have thus produced limited results.

1. Implementation of Employment Directive 2000/78/EC

[1]. Out of the four laws came into force on 01.05.2004 in an effort to transpose Directives 43/2000/EC and 78/2000/EC, two are relevant to the present study:

- **The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law²** which, purporting to transpose article 13 of Directive 43/2000/EC, appoints the Commissioner of Administration (or Ombudsman) as the specialised body. The scope of the law is extensive, going well beyond the requirements of article 13, and covering inter alia the grounds of both Directives 2000/43/EC and 2000/78/EC, including sexual orientation.
- **The Equal Treatment in Employment and Occupation Law³** which purports to transpose Directive 78/2000/EC and all the matters that refer to employment in Directive 43/2000/EC in a single legislation that deals with employment and work. As is the case with Directive 78/2000/EC, the law applies to all natural and legal persons in the private and public sphere⁴ but its scope is restricted to employment and occupation, covering expressly conditions of access to employment, to self-employment or occupation including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; access to vocational guidance and training, advanced vocational training and retraining including practical work experience; employment and working conditions including dismissals and pay; and membership of and involvement in trade unions or professional associations.⁵ The exceptions of the Directive regarding the differential treatment of third country nationals and stateless persons in the conditions of entry into and residence in Cyprus have been adopted in Cypriot law. Also, the Cypriot law excludes from its scope payments by state schemes including state social security and social protection schemes, with the exception of occupational social security.⁶ Finally, the law “does not affect any measures provided by national legislation which are, in a democratic society, necessary for security, the keeping of order and the prevention of criminal offences, the protection of health and the rights and freedoms of others”⁷.

[2]. The Equal Treatment in Employment and Occupation Law⁸ was amended in 2007⁹ following a request from the European Commission, which indicated

² Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004)

³ Cyprus / The Equal Treatment in Employment and Occupation of 2004 No. 58 (1)/2004 (31.3.2004).

⁴ Cyprus / The Equal Treatment in Employment and Occupation Law No. 58 (1)/2004 (31.3.2004), Section 2.

⁵ Cyprus / The Equal Treatment in Employment and Occupation Law No. 58 (1)/2004 (31.3.2004), Section 4.

⁶ Cyprus / The Equal Treatment in Employment and Occupation Law No. 58 (1)/2004 (31.3.2004), Section 5(3)(a).

⁷ Cyprus / The Equal Treatment in Employment and Occupation Law No. 58 (1)/2004 (31.3.2004), Section 5(3)(b).

⁸ Cyprus / The Equal Treatment in Employment and Occupation of 2004 No. 58 (1)/2004 (31.3.2004).

that its burden of proof provision was not in line with the Directive. Prior to its amendment, Article 11 of this law provided that: (a) the burden of proof was reversed only in civil proceedings; (b) the claimant had to *prove* facts from which a violation can be inferred and (c) the accused was absolved from liability if s/he proves that her/his violation had no negative impact on the claimant. The amendment introduced the following changes to Article 11: (a) the burden of proof is reversed in “all judicial proceedings except criminal ones”; (b) the claimant no longer has to *prove* facts from which a violation can be inferred, but merely to *introduce* them (c) the accused is no longer absolved from liability if s/he proves that her/his violation had no negative impact on the claimant. The amending law also amends Article 14 of the law by extending the aforesaid right also to trade unions or other organisations with a legal standing which are, with the victim’s permission, either suing the perpetrator in court or submitting a complaint to the Ombudsman. The amendment to Article 11 also fails to extend the principle of reversal of the burden of proof in order to cover proceedings before the Equality body. Strangely enough, however, the amendment to Article 14 of Law 58(I)/2004 expressly extends the reversal of the burden of proof to organisations engaged in judicial proceedings as well as in proceedings before the Ombudsman, presumably meaning the Ombudsman in her capacity as the Equality body. In effect therefore, the burden of proof is impliedly reversed in the procedure before the specialised body but only if the complainant is an organisation with a legal standing and not where the claimant is the victim himself/herself. Therefore, this amendment did not bring the national legislation entirely in line with Directive 2000/78/EC.

[3]. The equality body set up by the Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law has the power to investigate complaints of discrimination on the ground of, inter alia, sexual orientation (please see paragraph 6 above). The equality body’s mandate extends beyond the scope of Directive 2000/78/EC and covers social insurance, medical care, education and access to goods and services including housing.¹⁰ The equality body does not deal exclusively with sexual orientation but covers all grounds of both anti-discrimination directives; in fact it should be noted that since its inception in 2004, the equality body has only received one complaint for discrimination on the ground of sexual orientation and even that emanated from a non-Cypriot, a manifestation of the prejudices still prevalent in Cypriot society regarding homosexuality. The equality body has no mandate or capacity to offer victim-support or to assist victims in court or tribunal procedures, its mandate being limited to:

- receiving and investigating complaints of discriminatory treatment, behaviour, regulation, condition, criterion or practice prohibited by law;

⁹ Cyprus/ Law Amending the Equal Treatment in Employment and Occupation Law N. 50(I)/2007 (18.5.2007).

¹⁰ Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), article 6.

- issuing reports of findings;
- issuing orders (through publication in the Official Gazette) for the elimination, within a specified time limit¹¹ and in a specified way, of the situation which directly produced discrimination, although such right is somewhat limited by a number of exceptions;¹²
- imposing small fines (which however are too low to act as a deterrent),¹³ to issue recommendations to the person found guilty of discrimination and to supervise compliance with orders issued.¹⁴ However, all orders, fines and recommendations issued or imposed by the Commissioner under this Law are subject to annulment¹⁵ by the Supreme Court of Cyprus upon an appeal lodged by a person with a ‘vested interest.’¹⁶

[4]. The equality body has so far received only one complaint for discrimination on the ground of sexual orientation; the complaint was lodged by a U.K. national who was refused the right to have his partner join him in Cyprus. The investigation of this complaint is still pending. AKOK has informed the authors that the absence of complaints for sexual orientation discrimination is accounted by the fact that most homosexuals in Cyprus are “closeted” and prefer anonymity to pursuing their rights publicly; any problems of discrimination faced at the workplace are either not addressed or are mediated by AKOK, often resulting to amicable settlements. Only one case

¹¹ Which time limit shall not exceed 90 days from publication in the Official gazette (Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), Section 28).

¹² Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), section 14(2) and section 14(3), Part III, list the limitations to the Commissioner’s power to issue orders as follows: where the act complained of is pursuant to another law or regulation, in which case the Commissioner advises the Attorney General accordingly, who will advise the competent Ministry and/or the Council of Ministers about measures to be taken to remedy the situation [Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), Sections 39(3) and 39(4)]; and where discrimination did not occur exclusively as a result of violation of the relevant law; where there is no practical direct way of eradicating the situation or where such eradication would adversely affect third parties; where the eradication cannot take place without violating contractual obligations of persons of private or public law; where the complainant does not wish for an order to be issued; or where the situation complained of no longer subsists.

¹³ The fine to be imposed cannot exceed CYP350 (Euros 603) for discriminatory behaviour, treatment or practice [Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), Section 18(a)], CYP250 (Euros 427) for racial discrimination in the enjoyment of a right or freedom [Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), Section 18(b)], CYP350 (Euros 603) for non-compliance with the equality body’s recommendation within the specified time limit [Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), Section 26(1) (a)] and CYP50 daily for continuing non-compliance after the deadline set by the equality body [Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), Section 26(1) (b)].

¹⁴ Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), Section 24(1).

¹⁵ Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), Section 23.

¹⁶ Term used in Section 146 of the Cyprus Constitution, which sets out the procedure for appeal to the Supreme Court of Cyprus.

of discrimination at the workplace on the ground of sexual orientation was taken to court¹⁷ which however was prior to the enactment of the law transposing Directive 2000/78/EC and therefore the said law was not invoked.

- [5]. The equality body has also investigated a complaint of discrimination on the ground of marital status; the complainant did not allege discrimination on the ground of sexual orientation. The decision issued, however, found that discrimination on the ground of marital status may also amount to indirect discrimination against homosexuals, since the latter group cannot marry in Cyprus. The complaint concerned Regulation 12 of the Educational Officers (Placements, Transfers and Movements) regulations of 1987 to 1994 which set the family status of the employee (i.e. whether he/she is married and has dependent children) as one of the criteria in determining whether such employee will be transferred to a teaching post away from his/her base. The decision of the equality body found that the differential treatment of unmarried employees vis-à-vis married ones amounts to indirect discrimination against persons who remain single out of personal conviction, or who choose to co-habit with their partners outside marriage or who do not marry due to their sexual orientation, in other words it amounts to discrimination on the ground of belief and/or sexual orientation. The Equality Body recommended the revision of this regulation.¹⁸
- [6]. As a general rule, however, the equality body does not make full use of its powers, especially its powers to impose fines or issue orders, preferring to resort to mediation in order to solve disputes. Since its inception in 2004, only one fine was issued (in a gender discrimination case), presumably because the fines are in any case too low to act as a deterrent.
- [7]. Another weakness of the anti-discrimination framework, which affects its overall effectiveness, is the fact that the government has not afforded sufficient funds to the Ombudsman's office to enable it to make adequate staffing arrangements so as to cope with the additional duties bestowed upon it by its new function as equality body. In his 2006 report, the Commissioner for Human Rights of the Council of Europe Mr. Alvaro Gil-Robles expresses his regrets over the fact that the necessary increase in funding to deal with the extra work-load has not been provided and recommends that greater resources be devoted to this office to enable the Ombudswoman to deal effectively with her new competencies.¹⁹ In its third report on Cyprus, ECRI also stresses the need for resources to be made available to the

¹⁷ Cyprus/ Supreme Court case, Stavros Marangou v. The Republic of Cyprus through the Public Service Commission, Case no. 311/2001 (17.07.2002). The case is reported in Annex I – Presentation of case law, below.

¹⁸ Report of the Equality Body No. A.K.I 11/2004.

¹⁹ Office of the Commissioner for Human Rights, Council of Europe (2006), Follow-up Report on Cyprus (2003-2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights, Strasbourg, 29 March 2006, page 11.

Ombudswoman to enable her to respond to her new tasks.²⁰ The lack of resources is also the reason why little or no measures have been taken in order to bring to the attention of vulnerable groups the new legal developments and the new complaint procedures open to them. The lack of resources may also be accounted for the fact that the equality body has only used once²¹ its power to issue Codes of Good Practice regarding the activities of any persons in both the private and public sector.²²

- [8]. Cypriot law has transposed the right of organizations to file action in Court or to the equality body on behalf of and with the consent of the complainant,²³ as required by Article 9/2 of Directive 2000/78/EC. It affords this right to either workers' unions or to "organizations with vested interest" and there is no requirement that their objects must include the fight against discrimination (as is the case with the equivalent provision in the law transposing the Racial Equality Directive). No organisation has yet made use of this right on the ground of sexual orientation; the only organisation in Cyprus fighting for the rights of homosexuals is AKOK which has no resources or funding whatsoever except for the volunteer work of less than half a dozen persons. Under the circumstances it is next to impossible for AKOK to take a case to court on behalf of its member(s) although the procedure for applying to the equality body is feasible, given that it is simple, cost free and requires no particular expertise to prepare. However this procedure has not been used by AKOK either, because homosexuals in Cyprus are afraid to go public about their homosexuality.
- [9]. There is no case law in Cyprus yet invoking the law transposing Directive 2000/78/EC on any ground.

2. Freedom of movement

- [10]. In 2007 Cyprus introduced a law²⁴ purporting to bring Cypriot legislation in line with Art 45 of the Charter of Fundamental Rights²⁵ and Council Directive 2004/38/EC (29.04.2004). Under article 8 of the aforesaid Cypriot law, EU citizens are entitled to enter and reside in Cyprus and the same right is extended to their family members, defined in Art. 2 of the law as (a) the spouse who is a Union citizen; (b) "the direct descendants of a Union citizen

²⁰ Third ECRI Report on Cyprus, adopted on 16.12.2005, Strasbourg 16.05.2006, Council of Europe.

²¹ Code of good practice regarding sexual harassment in the workplace.

²² Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), Sections 40, 41 and 42, Part VI.

²³ Cyprus / The Equal Treatment in Employment and Occupation Law No. 58 (1)/2004 (31.3.2004), Section 14.

²⁴ Cyprus/ Law on the Rights of Citizens of the Union and their Family Members to Move and Reside Freely in the Territory of the Republic N. 7(1)/2007 (09.02.2007).

²⁵ This provides that every citizen of the Union has the right to move and reside freely within the territory of the Member States.

who are under the age of 21 or are dependants and those of the spouse”; (c) “the dependent direct relatives in the ascending line and those of the spouse of a Union citizen”. The wording of the Cypriot law repeats verbatim the text of the Art. 2.2(a), (c), (d) of Directive 2004/38/EC save for repeating the term “Union citizen”. However, the option to transpose the provisions of Directive Art. 2.2(b) was not taken up, to the effect that the right to entry and residence is not extended to the partner with whom the Union citizen has contracted a registered partnership.

- [11]. At the time of drafting the aforesaid legislation, the chairman of AKOK notified the authorities of the particular importance of this legislation for gay and lesbian couples.²⁶ Mr. Modinos enquired into how Cypriot law makers intended to regulate this issue given that Cyprus as a “host country” has no provision for recognizing either homosexual marriages or registered partnerships. The response of the Authorities was that the plan is to leave this matter unregulated until a complaint arises, upon which the authorities would examine how such issues are regulated in other EU countries which, like Cyprus, do not recognise same sex marriage or registered partnerships (such as Greece and others) and decide accordingly.²⁷
- [12]. The current legal situation in Cyprus may amount to indirect discrimination against LGBTs on the ground of sexual orientation. There is a complaint currently pending before the Cyprus Equality Body by a homosexual EU national whose application to have his partner, a third country national to whom he is lawfully married in accordance with UK law, join him in Cyprus. The complaint alleges that the failure to regulate the issue is discriminatory against LGBTs.
- [13]. Under Art. 2.2(b) of Directive 2004/38/EC the regulation as to how to deal with LGBTs in wedlock or registered partnership is left at the discretion of member states. However, it would be contrary to the principles of equality and non-discrimination to regulate this in a manner that may result in discrimination on any of the prohibited grounds in the fields specified by the anti-discrimination acquis. An examination of the jurisprudence from the European Court of Justice, the European Union member states, the European Court of Human Rights and other international case law reveals quite diverse approaches that when it comes to the right to family life, property rights, inheritance, adoption and matrimonial issues, residence and social benefits.²⁸ However, it would run contrary to the principle of equal treatment to allow for the discretion afforded to each member state on how to regulate same sex weddings and registered partnerships in a manner that may result in prohibited direct or indirect discrimination. This is the case of Cyprus: the

²⁶ Interview with Mr. Alecos Modinos 25.2.2008. Mr Modinos had spoken to the official of the Ministry of Interior responsible for the drafting of this law in March 2006.

²⁷ Interview with Mr. Alecos Modinos 25.2.2008.

²⁸ See David M. Beatty (2004) *The Ultimate Rule of Law*, Oxford: Oxford University Press, pp. 98-113.

current legal situation as regard freedom of movement not only may result in differential treatment in the exercise of the rights of LGBTs but may also have discriminatory consequences against LGTBs in a series of civil law matters such as property rights, inheritance, adoption and matrimonial issues, residence and social benefits. This is contrary the law on Combating of Racial and Some Other Forms of Discrimination (Commissioner) which provides the mandate of the equality body in Cyprus that extends beyond the minimum requirements of Directive 2000/78/EC and includes in its scope social insurance, medical care, education and access to goods and services including housing.²⁹

[14]. Article 4(2)(b) of the Law 7(1)/2007 allows for a Union citizen to apply for the exercise of freedom of movement for “his/her partner with whom a Union citizen has a continuous relationship properly proven”, which according to Article 4(2) of the Law 7(1)/2007 is subject to the Migration and Aliens Law.³⁰ Given that same sex marriages and registered partnerships of LGTB Union citizens are not recognised in Cyprus the above provision is the only route available to homosexual partners of EU citizens in order to claim the right of entry and residence in Cyprus. Third country nationals who are family members of EU citizens have a right of residence and permanent residence, irrespective of their nationality, under Article 4(1). It thus follows that third country national LGBT partners of EU citizens are not treated equally and do not enjoy the same rights as heterosexual partners regarding freedom of movement. Similarly the children and other family members of the LGBT partners are also not treated equally.

[15]. Art. 4(1) of Law 7(1)/2007, which provides for the scope of application of the law, stipulates that “the present law applies to all Union citizens, who arrive or resides in the Republic as well as members of their family, irrespective of their nationality who accompany him in their passage to the Republic or who arrive to the Republic to join him.” Even though this appears to include citizens of the Republic of Cyprus, this is not the case: the wording of article 3.1 of Council Directive 2004/38/EC (29.04.2004) stipulates that beneficiaries are “all Union citizens who move to or reside in a Member State other than that of which they are a national,”³¹ which in practice is interpreted as excluding Cypriot citizens. It follows that third country national or EU citizen LGBT partners of citizens of Cyprus are not entitled to benefit from the freedom of movement and residence of their partners according to Directive 2004/38/EC. Similarly, the children and other family members of the LGBT partners of citizens of Cyprus may be

²⁹ Cyprus/ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004)

³⁰ Cyprus/ Aliens and Immigration Law, as amended by Law 8(I)/2007 (14.02.2007).

³¹ Article 3.1 of the Directive reads: “This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.”

discriminated against as they are not treated equally with children and other family members of heterosexual partners. Cypriot citizens, including LGBTs, have to apply to the immigration authorities for entry and residence of their partners via the Migration and Aliens Law,³² which has more stringent rules than the freedom of movement rules under Law 7(1)/2007 and which leaves the matter entirely on the discretion of the chief immigration officer.

3. Asylum and subsidiary protection

- [16]. Council Directive 2004/83/EC of 29.04.2004 was transposed into Cypriot law in 2007, by amending the existing refugee law.³³ Article 10(1)(d) of the Directive was transposed in article 3D(1)(d)(ii) of the Refugee Law, as amended,³⁴ verbatim. Given that the Cypriot law retained the reservation of the Directive regarding “acts considered to be criminal in accordance with national law”, it should be noted that according to the Cypriot criminal code sexual intercourse between two men where one of them is under 17 years of age is a criminal offence punishable with three years of imprisonment.³⁵ Prior to the 2007 amendment of the refugee law, there was no provision in Cypriot legislation accepting sexual orientation as a ground for obtaining asylum.
- [17]. The enactment of the aforesaid law is too recent (2007) in order to be able to draw any conclusions as to its implementation, impact and social reality. The task of assessing the situation is aggravated by the fact that the asylum authorities in Cyprus do not classify the cases they deal with according to the ground of persecution and they are therefore unable to provide any figures regarding asylum applications where the applicant invoked the fear of persecution due to his/her sexual orientation. The only information which was supplied by the Asylum Service of the Interior Ministry was that since 2003, when this authority started accepting asylum applications³⁶ some asylum applications were submitted invoking fear of persecution due to sexual orientation, which were all rejected with the exception of one such application in 2007 from a transsexual person, who was granted refugee

³² Cyprus/ Aliens and Immigration Law, as amended by Law 8(I)/2007 (14.02.2007).

³³ Cyprus/ Refugee Law N.6(I)/2000 (28.01.2000), as amended by, inter alia, Law N.112(I) of 2007.

³⁴ The relevant article in the amending law N. 112(I) of 2007 is article 4.

³⁵ Criminal Code article 171; Law amending the Criminal Code N.145(I)/2002. This amendment is an improvement on the criminal code as it was up until 1998, according to which intercourse between two men irrespective of age was a criminal offence punishable with up to five years of imprisonment. The change in the law came after an ECtHR decision against Cyprus in the case of *Modinos v Republic of Cyprus*, judgement 22.04.1993, 16 EHRR 485 available at http://ius.info/EUII/EUCHR/dokumenti/1993/04/CASE_OF_MODINOS_v_CYPRUS_22_04_1993.html (26.02.2008)

³⁶ Prior to that, Cyprus did not have an asylum regime and asylum applications were examined by the Cyprus office of UNHCR.

status.³⁷ No such case has reached the courts in Cyprus; it should be noted however that according to Cypriot legislation, an asylum seeker whose application is rejected by the Asylum Service may submit an appeal to the Reviewing Authority and if the response is still negative then s/he may appeal to the Supreme Court. However, from the point of rejection by the Reviewing Authority, the asylum seeker loses his/her protection against deportation and may well be deported before s/he has the chance to apply to the Supreme Court. The high legal costs involved in such an appeal are an additional barrier for many applicants.

- [18]. Article 2/h of Council Directive 2004/83/EC was transposed into article 25(4)(a) of the Refugee law as amended, inter alia, in 2007³⁸ without incorporating the part of the Directive definition referring to “unmarried couples in a stable relationship”. In effect, the definition of “family members” includes only: the spouse of the refugee; the minor children of the refugee provided they are unmarried and dependent on the refugee; and the parents of the refugee provided they are his/her dependents. As a result, unmarried couples, whether homosexual or heterosexual, do not fall within this definition. The argument forwarded by the authorities in this respect is that there is no discrimination because heterosexual and homosexual couples are treated equally by the law;³⁹ this position however ignores several factors, like the fact that heterosexuals have the chance to marry and thus meet the law’s preconditions whilst homosexuals don’t, the fact that positive action is often necessary in order to achieve the equality principle, etc.

4. Family reunification

- [19]. On 14.02.2007 Council Directive 2003/86/EC (22.09.2003) was purportedly transposed into Cypriot law, after approximately a delay of two years, by amending the existing Aliens and Immigration Law Cap. 105. The scope of the amending law⁴⁰ covers third country nationals staying lawfully in the areas controlled by the Republic of Cyprus for at least one year, who have reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.⁴¹ The provisions of the law do not apply where the sponsor is an asylum seeker; has applied for or enjoys temporary protection; has applied for or enjoys subsidiary protection on humanitarian grounds; or is a recognised refugee under the refugee laws.⁴² The law also excludes from its

³⁷ E-mail from Kakia Demetriou, Administrative Officer at the Asylum Service, Ministry of Interior, dated 29.02.2008.

³⁸ The relevant article in the amending law N. 112(I) of 2007 is article 18(b).

³⁹ Expressed by officials of the Interior Ministry in an interview to the authors dated 29.02.2008.

⁴⁰ Cyprus/ Aliens and Immigration Law, as amended by Law 8(I)/2007 (14.02.2007).

⁴¹ Cyprus/Aliens and Immigration Law, as amended by Law 8(I)/2007 (14.02.2007), article 18KI (1).

⁴² Cyprus/ Refugee Law No. 6(I)/2002 (28.01.2000).

scope the family members of a European Union citizen⁴³ and applies without prejudice to more favourable provisions of bilateral and multilateral agreements.⁴⁴

[20]. Subject to a number of preconditions⁴⁵ the entry and residence for family reunification purposes is allowed for the following family members:

- The sponsor's spouse provided that that the marriage took place at least one year before the submission of the application for family reunification. To this effect, a marriage certificate must be produced.⁴⁶
- the minor children (i.e. unmarried and under 18 years of age) of the sponsor and of his/her spouse, including the sponsor's or the spouse's adopted children , as well as adopted children of the sponsor who are exclusively dependent on him or her;
- The minor children including adopted children of the sponsor and the children of the spouse, where the spouse has custody and the children are exclusively dependent on him or her.⁴⁷

[21]. In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the Republic of Cyprus, the family reunification of a further spouse and his/her children that s/he has with the sponsor is not allowed.⁴⁸

[22]. The Director of Immigration Department may revoke a permit or reject the application of family members for entry and residence for the purpose of family reunification for reasons of public security, public order or public health.⁴⁹ The Director may also revoke a permit or reject the application where the sponsor and his/her family members no longer live in a real

⁴³ Cyprus/Aliens and Immigration Law, as amended by Law 8(I)/2007, article 18KI (3).

⁴⁴ Between the Community or the Community and its Member States on the one hand, and third countries on the other or the European Social Charter of 18.10.1961, the amended European Social Charter of 03.05.1987 and the European Convention on the legal status of migrant workers of 24.11.1977.

⁴⁵ The preconditions are that the sponsor must be lawfully residing in the areas controlled by the Republic of Cyprus for at least two years; must have accommodation sufficient for a comparable family in the same region, which must meet the general health and safety standards and secure a decent life; must have health insurance for himself/herself and the members of his/her family; must have steady and regular financial means to support himself/herself and the members of his/her family without resort to the state social security system: Cyprus/Aliens and Immigration Law, as amended by Law 8(I)/2007, article 18LB.

⁴⁶ Cyprus/Aliens and Immigration Law, as amended by Law 8(I)/2007(14.02.2007), article 18LA(2)(c).

⁴⁷ Cyprus/Aliens and Immigration Law, as amended by Law 8(I)/2007(14.02.2007), article 18L(1).

⁴⁸ Cyprus/Aliens and Immigration Law, as amended by Law 8(I)/2007, article 18L(4).

⁴⁹ Cyprus/Aliens and Immigration Law, as amended by Law 8(I)/2007, article 18LZ(1).

marital or family relationship or where it is found that that the sponsor is married or is in a stable long-term relationship with another person.⁵⁰

- [23]. The amending law (Law 8(I)/2007) did not transpose Article 4/3 of Council Directive 2003/86/EC and does not authorise the entry and residence either of the unmarried third country national partner of the sponsor with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Directive Article 5/2. Consequently, where the sponsor is a homosexual having a duly attested stable long-term relationship or a registered partnership with a third country national, s/he will not be entitled to family reunification.
- [24]. It is interesting to note that the law recognises stable long-term relationships when it comes to revoking a permit or rejecting an application for family reunification (see paragraph no. 23 above) but not when it concerns the granting of the right to family reunification to unmarried couples (see paragraph 24 above).
- [25]. The question remains whether a homosexual marriage lawfully conducted in a country where homosexual marriages are recognised gives rise to the right of family reunification in Cyprus. It may be argued that since Cypriot law recognises marriages lawfully conducted in other jurisdictions and considers a polygamous marriage valid, (albeit granting the right to family reunification to only one of the spouses of the sponsor), a homosexual marriage which lawfully took place in another country where homosexual marriages are recognised could potentially also give rise to the right for family reunification. This assumption however, has not been tested in practice yet and the Cypriot authorities dispute the fact that the current legal framework forces them to recognise homosexual marriages conducted outside Cyprus.⁵¹

5. Freedom of assembly

- [26]. The regulation of freedom of assembly in the context of homophobia and/or discrimination on the ground of sexual orientation can be crucial for the purpose of LGBT activism such as gay pride parades or concerning the curtailing of homophobic demonstrations. However, the absence of a significant gay lobby in Cyprus and the general societal stigma in a small

⁵⁰ Cyprus/Aliens and Immigration Law, as amended by Law 8(I)/2007, article 18LST(1).

⁵¹ Interview to the authors by Interior Ministry officials dated 29.02.2008.

and reclusive society makes this matter, at least at the moment, a rather theoretical legal issue.⁵²

[27]. The essential elements of Article 21⁵³ of the Republic of Cyprus Constitution are equivalent to article 11 of the ECHR.⁵⁴ However, to organise a procession or an assembly certain procedures need to be complied with under the Assemblies and Processions Law (Cap 32),⁵⁵ which stipulates that prior application to the (police) commissioner⁵⁶ in the prescribed form is required.⁵⁷ The commissioner “may issue orders in general or specific terms for the purposes of directing the conduct of any assembly or procession.”⁵⁸ Permission is granted “if the commissioner is satisfied that such assembly or procession is not likely to prejudice the maintenance of good order”⁵⁹ and subject to the following: in the case of a procession, the conditions such as the purpose and times for such a parade, under art. 4(1)(a); in case of an assembly, the purpose, the place and time(s) as stated under art. 4(1)(b). The name of the person to whom such a permit is issued is responsible for the due observance of the conditions specified in the permit under art. 4(1)(c). Moreover, the commissioner may prohibit, cancel or stop the procession if “it appears to him to be in the interest of

⁵² Interview with the chairman of AKOK, Mr. Alecos Modinos 25.2.2008.

⁵³ Article 21 of the Constitution provides:

1. Every person has the right to freedom of peaceful assembly.
2. Every person has the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. Notwithstanding any restriction under paragraph 3 of this Article, no person shall be compelled to join any association or to continue to be a member thereof.
3. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are absolutely necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person, whether or not such person participates in such assembly or is a member of such association.
4. Any association the object or activities of which are contrary to the constitutional order is prohibited.
5. A law may provide for the imposition of restrictions on the exercise of these rights by members of the armed forces, the police or gendarmerie.
6. Subject to the provisions of any law regulating the establishment or incorporation, membership (including rights and obligations of members), management and administration, and winding up and dissolution, the provisions of this Article shall also apply to the formation of companies, societies and other associations functioning for profit.

⁵⁴ See A. Loizou (2000) *Σύνταγμα Κυπριακής Δημοκρατίας*, Nicosia, pp. 132-136. Also, K. Tornaritis (1982) *Το Πολιτειακόν Δίκαιον της Κυπριακής Δημοκρατίας*, Nicosia, pp. 163-167. According to P. Evangelides (1996) *The Republic of Cyprus and its Constitution with special regard to the constitutional rights*, PhD Dissertation, Bamerg: Difo-Druck GmH., p. 398, in general “the Constitution of the Republic is more liberal than the Convention” in that any restrictions or limitations have to be “absolutely necessary” as opposed to merely “necessary” in the interest of security or the constitutional order, or public safety or for the protection of the rights of guaranteed by the constitution. However, this ‘liberal’ constitution is working in parallel with a strict post-colonial legacy of laws, which are hardly liberal.

⁵⁵ Cyprus/ Assemblies and Processions Law CAP. 32 (17.04.1958).

⁵⁶ This is the district police officer, under Art. 2, Cyprus/ Assemblies and Processions Law CAP. 32 (17.04.1958).

⁵⁷ Art. 4, Cyprus/ Assemblies and Processions Law CAP. 32 (17.04.1958).

⁵⁸ Art. 3, Cyprus/ Assemblies and Processions Law CAP. 32 (17.04.1958).

⁵⁹ Art. 4, Cyprus/ Assemblies and Processions Law CAP. 32 (17.04.1958).

good order or public safety,”⁶⁰ or may stop the parade or assembly when some of the conditions have contravened under art. 6(1). This rather draconian legislation, a remnant from colonial times, is the main instrument for the regulation of parades and assemblies.⁶¹ A gay parade can therefore be organised; and so can, in theory, an anti-gay demonstration, but both are subject to the conditions referred to above. The purpose or results of the demonstration cannot be contrary to criminal code; for instance the demonstrations may not amount to sedition or incitement of ill feeling or hatred against any calls of persons in Cyprus. As such, it may be argued that that if the anti-gay demonstration is a homophobic assembly it is likely to be prevented, but this is a matter left to the discretion of the police commissioner.

[28]. No gay parade has ever taken place in Cyprus;⁶² nor have there been any homophobic assemblies so far. One is unable to assess whether in the hypothetical situation of a gay parade the authorities would protect the parade from interference by third parties.

[29]. There is no case law on the matter.

6. Hate speech and Criminal law

[30]. Under the Cypriot Criminal Code (Cap.154) a number of discriminatory acts are punishable offences. None of these offences refer either explicitly to homophobic motivation or generally to sexual orientation in any way. In fact, having in mind the political setting that formed the background at the time when the criminal code was being drafted, most of these provisions were clearly drafted having in mind ethnic discrimination, but some have been drafted widely enough so as to enable an interpretation that covers any type of discrimination. These are the following:

(c) Article 51A provides that whoever publicly and in any way “procures the inhabitants to acts of violence against each other or to mutual discord or foments the creation of a spirit of intolerance is guilty of a misdemeanour and is liable to imprisonment of up to twelve months or to a fine.”⁶³

The Criminal Code contains two more provisions which may, in the opinion of the Cyprus Expert of the Legal Network of Independent Experts on

⁶⁰ Article 5, Cyprus/ Assemblies and Processions Law CAP. 32 (17.04.1958).

⁶¹ It has not been amended since it was enacted just before independence.

⁶² According to AKOK, this is another manifestation of the fact that most homosexuals in Cyprus are “closeted”.

⁶³ The fines are up to 1,000 Cyprus Pounds for individuals and 3,000 pounds for legal persons [1,000 Cyprus Pounds amounts to 1,708 Euros; 3,000 Cyprus Pounds amount approximately to 5,126 Euros].

Fundamental Rights in 2006,⁶⁴ indirectly lead to a conviction for discriminatory acts:

(g) Article 105 provides that civil servants (i.e. government employees) may be held guilty for “abuse of power” and may be sentenced to imprisonment of up to two years and/or a fine of up to CYP£1,500 (Euros 2,563). Abuse of power may well include using one’s position of power to discriminate against persons in the course of their duties, although this is not stated explicitly in the law.

(h). Article 136 provides that any person who violates the law on purpose, in relation to an act involving the public or part of the public, is guilty of an offence and is liable to up to two years imprisonment and/or a fine not exceeding £1,500 CYP (approximately Euros 2,563). It can therefore be inferred that an act violating the anti-discrimination provision of the Cypriot Constitution (article 28) or of the law transposing the Employment Directive (Law N.58(I)/2004) or any other law, may constitute a criminal offence under Section 136 of the Criminal Code if committed deliberately with a homophobic motive.

- [31]. There is no case law or equality body decision regarding any of the above provisions.
- [32]. There are no provisions dealing expressly with hate speech related to homophobia and/or discrimination on the ground of sexual orientation.
- [33]. There is no provision in the Cypriot legal system regarding crimes committed with a homophobic motivation nor is such motivation recognised as an aggravating factor.

7. Transgender issues

- [34]. No case has been examined by either the equality body or the Courts in Cyprus regarding discrimination against transgender people and therefore there is no precedent as to whether this issue would be treated as falling under the prohibition of discrimination on the ground of sexual orientation or on the ground of sex. The author’s assumption, however, is that the approach most likely to be followed if and when such a case arises would be to treat it under the legal provisions regarding sexual orientation discrimination, which include provisions more directly relevant to one’s sexual orientation identity (e.g. harassment) rather than the sex

⁶⁴ See Opinion on Racial Profiling, submitted to the EU Network of Independent Experts on Fundamental Rights by the Cyprus Expert Achilleas Demetriades, 31.08.2006, pp. 4-5.

discrimination laws which are more geared towards addressing institutional discrimination against women.

- [35]. In 2007, following the transposition of Council Directive 2004/83/EC of 29.04.2004 on minimum standards for the qualification and status of persons as refugees, the status of refugee was granted to one transgender person. This implies that at least the asylum authorities in Cyprus are prepared to view transgender people as a member of a particular social group persecuted on the ground of the common characteristic of sexual orientation, as per Directive article 10/1/d and article 3D(1)(d)(ii) of the Cypriot Refugee Law of 2000, as amended. There is no evidence on how transgender people would be treated under the other laws (law transposing the employment directive, freedom of assembly, criminal law and hate speech) but there is no reason why a different treatment should be afforded than the one used in the asylum case. Regarding family reunification since the law grants this right only to “married spouses”, then it may be assumed that a person who has changed his/her gender and subsequently married a member of the opposite sex ought to qualify for this right, since this is no longer a homosexual marriage but an heterosexual one; however this has not been tested in practice.
- [36]. The procedure for notifying the authorities regarding the change of name and of sex does not require any of psychological, psychotherapeutic or psychiatric assessment or treatment or diagnosis. A person who undergoes an operation for the change of sex must submit a medical certificate about this operation, together with a sworn affidavit regarding the change of name, to the District Administration authorities. The District Administration will forward the medical certificate to the Ministry of Health for approval and once this is approved, a new passport, identity card and electoral identity booklet is issued to the applicant. The population archives department of the Interior Ministry issues a new birth certificate with the new name and the new sex but the old certificate is neither cancelled or repealed and is retained on file.⁶⁵
- [37]. The Interior Ministry maintains a record of those transsexual persons who applied for new documents to be issued, in accordance with the aforesaid procedure. It has no record of those persons who changed sex without applying to the Interior Ministry for change of their documents.

⁶⁵ Cyprus/Population-data Archives Law No. 141(I)/2002 (26.07.2002), article 40.

8. Miscellaneous

- [38]. In 2002, only two years before its EU accession, Cyprus enacted a change in the law that has decriminalised homosexuality following the ECHR decision in the case of *Modinos v Cyprus*,⁶⁶ where the ECHR ruled that the criminalisation of homosexuality, under the antiquated Cyprus Criminal code dating back to 1885, was a violation of Article 8 of the European Convention of Human Rights. The law, which outlawed homosexuality between consenting male adults, was only amended on 21.05.1998 after five years of stalling, however, the age of consent was set at 18 for homosexuals and 16 for lesbians and heterosexuals. Up until 2002 the criminal law contained discriminatory provisions against homosexual men, which were repealed only after significant pressure from the EU.⁶⁷ There was significant delay in responding to the recommendations of the European Court of Human Rights,⁶⁸ as there was strong opposition from some Christian organisations and church leaders,⁶⁹ who threatened unrepentant homosexuals with excommunication. Under pressure from the EU to equalise legislation regarding homosexuals and heterosexuals, the House of Representatives had initially planned to reduce the age of consent for homosexual males from 18 to 16, to bring it in line with legislation on heterosexuals. But the House Legal Affairs Committee decided instead to raise the age of consent for heterosexuals to 17, to avoid having to reduce the age for homosexuals to 16, therefore the age of consent for all is now 17.
- [39]. From the little research that exist on homosexuality in Cyprus it is well documented that there is widespread discrimination against LGTBs. Earlier research such as the conference proceedings of the Pancyprian Company for Mental Health,⁷⁰ a comparative study,⁷¹ reports on anti-discrimination on all

⁶⁶ Judgement 22.04.1993, 16 EHRR 485 available at http://ius.info/EUII/EUCHR/dokumenti/1993/04/CASE_OF_MODINOS_v_CYPRUS_22_04_1993.html (26.02.2008)

⁶⁷The report in the daily newspaper *Cyprus Mail* (24.11.2001) is indicative: "Cyprus has come under pressure from the European parliament to bring its human rights provisions up to scratch. Several Euro MPs warned they would oppose the island's accession until the changes were made".

⁶⁸Even after passing the law decriminalising homosexuality the parliament managed to further insult gays by retaining in the text a reference to "unnatural licentiousness", which the gay community strongly objected to. It took two years for the House to change the offending phrase to "intercourse between men": G. Psyllides (2002) in *the Cyprus Mail* (06.07.2002).

⁶⁹The late archbishop Chrysostomos, the veteran primate of Cyprus' Orthodox church, made an appeal to his womenfolk to "revolt against homosexuals", whom he called "depraved sinners". He also pledged to "personally excommunicate the perverts" if they refuse to repent their "unnatural acts ... You must stop them." (*The Guardian*, 16.10.2001).

⁷⁰ Παγκύπρια Εταιρία Ψυχικής Υγείας [Pancyprian Company for Mental Health] (1982) *Ομοφυλοφιλία* [Homosexuality].

⁷¹J. Kelley (2001) 'Attitudes towards homosexuality in 29 nations', *Australian Social Monitor*, Vol. 4, No. 1, June 2001., at http://www.international-survey.org/A_Soc_M/Homosex_ASM_v4_n1.pdf

grounds⁷² and on sexual orientation in particular,⁷³ recent books and studies⁷⁴ all show that the issue of homosexuality is a taboo subject in Cyprus and that there is widespread homophobia and discrimination against LGTBs.

[40]. Some surveys do illustrate that Cypriot society is less tolerant of homosexuals and homosexuality than the average European society and marginally better than some eastern European societies,⁷⁵ and that the practice of homosexuality is not tolerated in Cyprus by a large number of people.⁷⁶

[41]. An important measure that has located the current state of affairs as regards attitudes of the public towards homosexuality is the opinion survey on homosexuality commissioned by the Equality Body. This took place between 5-22 January 2006 and was carried out by a private firm upon instructions from the Equality Body, on attitudes towards homosexuality. The sample was 500 persons over 18 years of age, half men half women, 70 per cent residing in urban centres and 30 per cent residing in rural areas. Twenty five per cent of the sample were single, 62 per cent were married, four per cent were divorced and five per cent were widowers. The majority of the interviewees stated that they consider relationships between same-sex partners as wrong: fifty four per cent said they were 'always wrong' and 26 per cent 'usually wrong'; only three per cent said they are 'rarely wrong' and another three per cent 'never wrong'. Amongst the 54 per cent who replied that same-sex relationships are always wrong, men and persons over 45 years of age, as well as person of low education, with children, or residing in rural areas were more critical than the rest. Comparing with

⁷²See N. Trimikliniotis, N. 2003; 2005; 2007 "Report on Measures to Combat Discrimination in the EU Countries: A Comparison between council Directives and national legislation on the grounds of racial or ethnic origin, gender, sexual orientation, disabilities, age, religion or belief – Report on Cyprus", for EU Commission report on behalf of Human European Consultancy and the Migration Policy Group, at http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/cyrep07_en.pdf

⁷³ H. Kountouros (2006) "Summary of legislation implementing Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation with respect to sexual orientation in Cyprus", published on the website of the E.M. Meijers Institute of Legal Studies of the Universiteit Leiden; see www.emmeijers.nl/experts

⁷⁴A. G. Philaretou, C. N. Phellas, S. S. Karayiannis (2006) *Sexual Interactions, The Social Construction of Atypical Sexual Behaviors*, Florida: Universal Publishers.

⁷⁵A study conducted by the University of Melbourne (Melbourne Institute of Applied Economic and Social Research) with regards to the attitudes towards homosexuality in 29 countries, using data from the 1999/2000 International Social Science Survey/Australia, finds that the level of tolerance of homosexuality in Cyprus is significantly less than that of the majority of the European countries in the survey. Cyprus scores a 26/100 compared to 77/100 of the Netherlands, but it is slightly better than Northern Ireland with 25/100, Hungary 23/100, Bulgaria and Portugal 21/100 (*Australian Social Monitor*, vol.4, no.1, 2001).

⁷⁶This is confirmed by opinion polls, for what they are worth: seventy-four percent of Cypriots say homosexuality is wrong, according to a Cyprus College poll released April 7th 1998. The poll has exposed a yawning generation gap, revealing that 92 percent of Cypriots over the age of 60 oppose decriminalizing homosexuality, while 75 percent of 18- to 24-year-olds hold the opposite view. For the record, the survey also found that 45 percent of Cypriots believe women should be virgins when they marry but only 20 percent said men should avoid pre-marital sex.

another survey carried out in 2001, this survey concluded that attitudes towards homosexuality have become worse during the last two years. The percentage of persons who consider homosexual relationships ‘always wrong’ was 49 per cent in 2001, 50 per cent in 2003 and 57 per cent in 2005. The percentage of persons who consider homosexual relations ‘usually wrong’ was 18 per cent in 2001, 17 per cent in 2003 and 18 per cent in 2005. The worsening of attitudes was attributed by the researchers of the survey to the de-criminalisation of homosexuality⁷⁷ and to the fact that homosexuals have recently become more demonstrative in public. When asked how their attitudes changed towards homosexuality in recent years, 58 per cent of the interviewees replied that their attitudes have not changed at all, 15 per cent stated that they accept homosexuals less and 27 per cent that they accept them more. The last category of 27 per cent were younger persons of higher educational standard and of higher social class, whilst the 58 per cent who stated that their attitudes had not changed and had negative approach towards homosexuality were mostly older persons of lower educational standard and of lower social class. Seventy-eight per cent of interviewees disapproved of same-sex marriages and 78 per cent disapproved of homosexual couples bringing up children. Gay liberation activists such as Alecos Modinos claimed that the survey did not illuminate on something not already known and regretted the fact that despite the high levels of homophobia illustrated by the survey and AKOK’s repeated requests, the equality body failed to issue any policy recommendations or a code of conduct or launch an awareness raising campaign to address the phenomenon. In fact Mr. Modinos claims that he was repeatedly promised that such guidelines would be issues by the Equality Body.⁷⁸

[42]. In one of the latest Eurobarometer surveys,⁷⁹ Cyprus scored second in Europe in the view that discrimination on the ground of sexual orientation is widespread (72 per cent), a sharp contrast with Estonia and Denmark, for instance where only 26 per cent and 27 per cent respectively held such view. Cyprus also scored well above the European average (48 per cent) in the question whether the wide majority feels that homosexuality is a taboo: it scored 86 per cent, the highest in the EU. Similarly, in the Angus Reid Global Monitor of 2006,⁸⁰ only 14 per cent of Cypriots agreed that homosexual marriages should be allowed throughout Europe and 10 per cent

⁷⁷ In 1998, the homosexual act between consenting adults in a private space was decriminalized. In 2000 the public expression of homosexuality was decriminalized, but the ‘age of consent’ was fixed at 18 for men and 16 for women. In 2001, the ‘age of consent’ was fixed at 17 years for both homosexual men and women.

⁷⁸ Interview with Mr. Alecos Modinos 25.2.2008.

⁷⁹ Eurobarometer, Discrimination in the EU, Summary, Field work June-July 2006, Publication January 2007, available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_sum_en.pdf (26.02.2008).

⁸⁰ Angus Reid Global Monitor- Polls & Research “Eight EU Countries Back Same-Sex Marriage” (24.12.2006) available at http://www.angus-reid.com/polls/view/eight_eu_countries_back_same_sex_marriage/ (26.02.2008).

agreed with authorizing the adoption of children for homosexual couples, again scoring one of the last in the EU.

- [43]. An opinion survey was carried out in schools,⁸¹ focusing on the pupil's attitudes on sex education: the vast majority of pupils believe that the subject must be introduced at secondary school, whilst one quarter believed it should be introduced at primary school. Sexual relations appear to start very early: 73.3 per cent of boys and 68.2 per cent girls believe that most persons start before they are 16, whilst 11.1 per cent believe that most start at the age of 13. About 10 per cent of all pupils have had at least one homosexual relationship, which according to the survey exposes them to particular "sexually transmitted diseases and mental anomalies". Also pupils with no sexual relations need to be properly educated about sex and sex health. About one fifth of all children never use condoms and about half always do so. About seven per cent have contracted sexually transmitted diseases. It was suggested by pupils that teachers engage in a dialogue on sexuality issues and that parents must also be trained. Also it was stressed that Cypriot society must deal with various taboos and prejudices that characterise a small and conservative society, which result in rebellion by children and exposure to undue sexual dangers. The survey found that pupils believed that NGOs offering support and counselling on sexuality and gender relations must be supported; that modernisation and respect for diversity and open-mindedness must be promoted, whilst special care must be taken for high risk groups.
- [44]. A major problem for data collection is that there is no case of discrimination on the ground of sexual orientation decided by the equality body. The chair of the Gay Liberation Movement of Cyprus (AKOK) is adamant that there are no complaints because no homosexual would accept to be stigmatised and suffer the social, cultural and personal isolation and humiliation in a small society where there has been no campaign to inform the public about homosexuality and the rights of homosexuals.⁸² In spite of the repeated calls by AKOK for a campaign to inform the public and specific groups about this matter, particularly after the survey conducted in January 2006 by the Cyprus Anti-discrimination Body, there are only two gay persons who have "come out of the closet" in Cyprus.⁸³ A similar view was expressed by the Director of the Research Unit in Behaviour and Social Issues (RUBSI).⁸⁴
- [45]. In spite of the absence of case law on homophobia, there are a number of homophobic events and instances reported to the authoris by NGOs and trade unions. In the field of education, which employs several thousands of

⁸¹ The survey, published in November 2006 and carried out by the Cyprus Youth Board and the Cyprus Institute of Reproductive Medicine, was titled "Research into health in heterosexual relationships and sexuality".

⁸² Interview with Mr. Alecos Modinos 25.2.2008.

⁸³ Interview with Mr. Alecos Modinos 25.2.2008.

⁸⁴ Interview with Dr. Constantinos Phellas 11.1.2008. For more on RUBSI see <http://www.rubsi.org/projects1.html>

teachers, some instances of homophobia were reported. One of such cases was reported by the General Secretary of the secondary school teachers' union (OELMEK),⁸⁵ Yiorgos Zissimos,⁸⁶ the "committee of selection" of the Pedagogical Institute, which is responsible for the monitoring and approval of the on-the-job training of secondary education teachers recommended in its assessment report that a certain trainee teacher be failed on the ground that "he moves/ shakes in an odd manner,"⁸⁷ which is an indirect way of saying that he is gay.⁸⁸ The second case reported, which is indicative of the teachers' reaction towards homosexuals, occurred in 2001, when OELMEK issued a statement stating that it will endeavour to combat discrimination of all discriminated groups and referred to, inter alia, homosexuals: the union received more than 300 phone calls from teachers complaining about the inclusion of homosexuals in the list. The General Secretary of OELMEK is of the view that little has changed in terms of attitudes since then in spite of the introduction of the anti-discrimination legislation in 2004: there has not been any campaign to inform teachers, students or any other organised groups on homophobia and the rights of persons to freely choose and exercise their sexual orientation.⁸⁹ The third instance of discrimination concerns the regulations (currently under review) regarding the provision of assistance to family members of teachers who are members of OELMEK. Regulation 10 of the relevant draft defines the beneficiaries of such assistance as the "legal children born out of wedlock", the "financially dependant children", the parents and "financially dependant siblings". No mention is made of long-term or same sex partners.

[46]. Save for one complaint on freedom of movement referred to above, there has been no complaint to Cyprus Equality body on sexual orientation; however in 2003 (i.e. prior to the setting up of the equality body) there was a complaint to the Ombudsman regarding the treatment of homosexuals in the army. The Ombudsman asked the Defence Ministry to change the content of discharge papers after a homosexual was denied a driving licence based on a military assessment that he had psychological problems. Although homosexuals are - like all other men - obliged to do military service in Cyprus, they have been allowed to seek an exemption, though not on the grounds of their homosexuality. Instead, it has been standard practice in the army to grant exemptions on various psychiatric grounds, such as personality disorder or neurosis. However, such references can deny people classed in this way other basic rights, such as a driving licence. The case

⁸⁵ Οργάνωση Ελλήνων Λειτουργών Μέσης Παιδείας (OELMEK) [Association of Greek Secondary Education Teachers (OELMEK)].

⁸⁶ Interview with Yiorgos Zissimos 15.2.2008.

⁸⁷ The term often used for gay men is «κουνιστός» and the verb used in the Cypriot dialect is «κλώθεται», which can be translated as indulging in "excessive, disagreeable performance" of femininity and has even worse pejorative connotations for men, as indicated in S. Karayannis (2004) *Dancing Fear and Desire: Race, Sexuality, and Imperial Politics in Middle Eastern Dance*, Waterloo, Canada: Wilfred Laurier University Press, p.136.

⁸⁸ The case took place 1.6.2006, i.e. two years after the enactment of the anti-discrimination legislation.

⁸⁹ Interview with Yiorgos Zissimos 15.2.2008.

investigated by Ombudsman was filed by a 28-year old homosexual, who was discharged from the army after being deemed “unsuitable” for health reasons. He had been examined by a military committee and classed as being “neurotic”. He was later unable to obtain a driving licence. An official at the Road Transport Department told the media that as far as he knew when it came to issuing licences, there was no discrimination against homosexuals exempted from the army on psychological grounds.⁹⁰ The Ombudsman’s report suggested that the Defence Ministry change the discharge papers of people exempted from military service for medical reasons to avoid their personal rights being violated. She also said that the issue of homosexuals and the military needed particular attention. “Specifically, during the handling of these matters it must be taken into consideration that the sexual choices of these people attract social and moral scepticism, and consequently the voluntary or involuntary lack of action on the part of the authorities to regulate matters concerning homosexuals while at the same time they are subjected most of the time to daily discrimination,” the report said.

[47]. The issue of gay rights in the context of the army has been a bone of contention for years. In the ECHR decision in the case of *Modinos v. The Republic of Cyprus*, counsel for the Republic of Cyprus claimed that the penal sanctions against homosexuals had been long in abeyance. In response, counsel for Mr. Modinos cited the case of *Costa v. The Republic*,⁹¹ where in 1983 the accused, a 19 year-old soldier had been convicted of the offence of permitting another male person to have carnal knowledge of him contrary to section 171(b) of the Criminal Code.

[48]. Homosexuals have in the past objected to being classed as psychologically disturbed on army discharge papers and the issue was raised before the European Court of Human Rights. In August 1994, the International Association for the Protection of Human Rights in Cyprus asked the Ministry of Defence not to use the sexual orientation of the applicant Stavros Marangos as a ground for declaring him psychiatrically unsuitable for military service, as this would violate the Constitution and the country's international obligations. Six months later, the Ministry of Defence replied to the Human Rights Association that, although homosexuality was not considered a disease, the competent committee examined the presence of personality disorders. In June 1995 the newspaper *Cyprus Mail* obtained a copy of a certificate of military exemption given to a gay man, which said that “Mr. S is unsuitable for military service because he suffers from a

⁹⁰ The official is quoted saying: “We never refuse in such a case,” he said, adding that applicants in such cases were usually sent for a second opinion “to clear the case” and that “there is no discrimination”, *The Cyprus Mail*, 03.07.2003.

⁹¹ 2 Cyprus Law Reports, pp. 120-133 [1982]

sexual perversion, being a passive homosexual”.⁹² Today the situation is not as explicitly discriminatory against gays as it was before; apparently the certificate of military exemption is longer as specific. In November 2006 the Minister of Defence attempted, but, like his predecessors, failed to push through parliament legislation that allowed the issuing of certificates that contained the reasons for release of the army and to allow for “administrative” measures against those who refuse to serve such as deprivation of driving licence and to make it difficult to obtain jobs in public service.⁹³ The House of Representatives rejected this effort because of the decision of the Ombudsman in 2003, which found that the explicit reference to “psychological problems” on the certificate would have serious repercussions on the employment opportunities of persons with mental health.⁹⁴

[49]. Nevertheless, the stigma against homosexuals in the army remains largely unchanged: the landmark ECHR case of *Smith & Grady v. UK* 1999,⁹⁵ which recognised that people's sexual orientation was one of the most intimate aspects of their lives and found that no evidence that gay soldiers would somehow prejudice the morale, fighting power or operational effectiveness of the armed forces and accession to the EU has led to a more discrete approach towards gays by the Greek-Cypriot army command. It is widely believed that amongst the thousands of persons released for psychological reasons are gay men. According to figures released by the Ministry of Defence between 1992 to 2006 one in nine new army recruits was released due to psychological reasons: out of 79,376 national guards, 4,279 were released whilst another 4,693 army service were suspended due to psychological reasons.⁹⁶ Apparently this was causing concern in the army leadership and Government.⁹⁷ The Permanent Secretary of the Ministry of Defence, Mr. Kareklas, whilst admitting that there may well be homosexuals within the category of persons with psychological problems, suggests that there are no records kept due to the protection of privacy and personal data.⁹⁸ He reiterated that there is no discrimination in the army, but suggested that in practice many homosexuals may be released after they appear before a Doctors' Council.⁹⁹ Gay liberation activists dispute the allegation that there is no discrimination against homosexuals in the Cypriot army.

⁹² J. Christou (2003) “Defence Ministry under fire after gay man denied driving licence on grounds of army discharge papers” in *The Cyprus Mail* (03.07.2003)

⁹³ C. Hadjikosta (2006) “Διχάζει ο «τρελο-νόμος»”, *Η Σημερινή*, 01.11.2006.

⁹⁴ C. Hadjikosta (2006) “Διχάζει ο «τρελο-νόμος»”, *Η Σημερινή*, 01.11.2006.

⁹⁵ VI Eur. Ct. HR45, 29 EHRR 493; 31 EHRR 620.

⁹⁶ Michalis Hajistyliaou (2007) “Απολύθηκαν από την Ε.Φ. 4279 ως ψυχοασθενείς”, *Η Σημερινή*, 23.07.2007.

⁹⁷ Michalis Hajistyliaou (2007) “Απολύθηκαν από την Ε.Φ. 4279 ως ψυχοασθενείς”, *Η Σημερινή*, 23.07.2007.

⁹⁸ Interview with Mr. Kareklas, Permanent Secretary of the Ministry of Defence 13.02.2008.

⁹⁹ Interview with Mr. Kareklas, Permanent Secretary of the Ministry of Defence 13.02.2008.

9. Good practice

- [50]. Some positive measures can be reported, but only a handful of them target sexual orientation specifically or exclusively. AKOK believes that awareness raising activities on Council Directive 2000/78/EC in general do little towards combating social prejudices against homosexuals or even informing the homosexuals themselves about their rights.
- [51]. Perhaps most significant of all initiatives is the legal provision in the Cypriot law that empowers the equality body to combat discrimination on all grounds and in all fields, which extends the scope for combating discrimination beyond the sphere of employment and occupation (please see paragraph 3 above) and can serve as a useful precedent for the extension of the scope throughout the EU.
- [52]. There have been some general information campaigns to inform the public about the EU anti-discrimination acquis as implemented in Cyprus between 2004-2008. However, according to gay activists and anti-discrimination experts the issue of discrimination on the grounds of sexual orientation has been subsumed into the other issues and has not received any specific attention, given that it remains a taboo subject and there is no significant gay lobby.¹⁰⁰ An illuminating dimension of this is the fact that no complaints have yet been submitted by Cypriots (and only one complaint by a non-Cypriot) to the equality body alleging discrimination on the grounds of sexual orientation, in spite of the abundance of evidence that there is widespread discrimination on the grounds of sexual orientation and homophobia as revealed by the research survey of the specialised body itself.¹⁰¹ Gay activists claim that this is due to the absence of any significant targeted campaign to inform about the rights of LGBT persons and, according to AKOK, the apparent lack of confidence of LGBTs in the antidiscrimination mechanisms.¹⁰²
- [53]. Nevertheless, a number of general seminars on the implementation of the acquis on non-discrimination on all grounds can be reported as good practices:
- **Seminar on anti-discrimination Directives:** On 14.12.2007 the Brussels-based Assistance Information Exchange Office – TAIEX, in co-operation with the Cypriot Ministry of Justice, the Attorney General’s office, the Supreme Court and the Pancyprian Bar Association held a one-day seminar on developments in the anti-

¹⁰⁰Interview with Dr. Constantinos Phellas 11.1.2008; also interview with Mr. Alecos Modinos 25.2.2008. Moreover, the same conclusion can be drawn from the researchers’ own experience, who was present in the majority of the events, either as a speakers, trainers, coordinator or participants.

¹⁰¹ See paragraph 41 above.

¹⁰² Interview with Mr. Alecos Modinos 25.2.2008.

discrimination field and particularly on the transposition of Directives 2000/43/EC and 2000/78/EC. The language of the seminar, which targeted lawyers, judges, civil servants and NGOs, was Greek and English. The seminar was attended by 101 persons, out of whom seven judges, 19 lawyers, 21 policemen, 31 civil servants, 20 NGO representatives and three college students who are third country nationals. Focusing on EU level rather than national laws and practices, the program included presentations on: Anti-discrimination and diversity in EU law and policy, presented by a former official of the Permanent Representation of the Netherlands at the European Commission; best practices in procedural issues and enforcement, presented by an official of the Greek Court of Appeal and the Greek Police Academy; the role of the European Court of Justice in interpreting and applying anti-discrimination legislation, presented by a lecturer at the Catholic University Louvain of Belgium, etc.

- **Expression of Diversity / Equality:** On 12.12.2007, the European Institute of Cyprus organized an event to mark the closing of the European Year of Equal Opportunities in Cyprus – 2007. The event, which was funded by the European Commission, the Cypriot Ministry of Justice and from the organizers themselves, aimed at raising public awareness on the benefits of multiculturalism and diversity. The event included exhibition stands from social partners, NGOs, governmental departments etc; an evaluation / round table discussion; an official closing ceremony; events and competitions for children; special awards given to individuals who have contributed to the combating of discrimination; presentation of activities from high schools; screening of films/documentaries; photographic exhibition; exhibition of posters etc. The organisers stated that the event was participated by thousands of persons.
- **Good Practice Guide is issued by employers' association:** During 2007, the Cyprus Employers & Industrialists Federation¹⁰³ (OEV) has published a “Guide to employers for the promotion of equality and diversity at the workplace” setting out the legal obligations of employers according to the anti-discrimination legislation, listing examples of good practice and highlighting the promotion of equality and respect for diversity as factors for a healthier, more competitive and productive work environment.
- **Anti-discrimination training for NGOs and trade unions:** On 22-23.09.2007 a two-day training seminar was held in Nicosia, as part of a Europe-wide programme to develop knowledge of EU and national anti-discrimination legislation, civil society dialogue and NGO capacity building. The trainers were Greek Cypriot and Turkish Cypriot legal and non-legal persons who had undergone a “train the trainers” training. One of the trainers was the president of AKOK and well known gay activist and specific attention was placed on ensuring the participation of LGBT persons. Funded by the European Commission and designed and coordinated by the

¹⁰³ Ομοσπονδία Εργοδοτών και Βιομηχάνων (OEB)

Migration Policy Group and Human European Consultancies, this seminar comes as a continuation of a similar seminar held in 2005 (reported below) in Cyprus and contained an in-built evaluation component performed by the seminar participants. This seminar targeted NGO activists and trade unionists across Cyprus' ethnic divide, it was conducted in Greek and Turkish and was attended by approximately 25 Greek Cypriot and 15 Turkish Cypriot NGO activists and trade unionists, most of them members of vulnerable groups. This seminar forms part of a series of training seminars which will also include a follow-up session for participants who were trained in 2005 and at the September 2007 seminar, and a diversity management seminar which will take place in February 2008. The national organiser of the seminar was the NGO Symfiliosi (Reconciliation).¹⁰⁴

- **Anti-discrimination training for NGOs:** On 11-12.06.2005 the Cyprus Labour Institute INEK-PEO organised a two days seminar on the role of NGOs in Cyprus in combating discrimination on the grounds of Racial or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation. The seminar was part of a European Commission funded project: Mapping capacity of civil society dealing with anti-discrimination (VT/2004/45).¹⁰⁵ As in the 2007 training seminar, one of the trainers was the president of AKOK and well known gay activist and specific attention was placed on ensuring the participation of LGBT persons.
- **Conference on the Benefits of Diversity:** On 29-30.09.2006 the 'Stop Discrimination Campaign' organised a pan-European conference on "The Benefits of Diversity and Inclusion for Small and Medium-Sized Enterprises". This conference brought together about 130 representatives of European SMEs and those working with the SME community, offering a platform for exchanging experiences in diversity management and implementing anti-discrimination policies in small and medium sized businesses. Speakers from a business or academic background explained the challenges and benefits of diversity for smaller companies using practical examples and case studies. More case studies were presented in an exhibition during the conference.¹⁰⁶
- **Equality body seminar in 2005:** On 18.01.2005 a major conference titled "The implementation of the principle of equality in employment and occupation" was organised in Nicosia the equality Body, focusing on employment discrimination (Directive 2000/78/EC). The activity was funded by the Community Action Program for national awareness raising activities on issues of discrimination (VF/2005/0154). The main speakers were Yiota Kravitou, Law Professor at the University of Thessaloniki, who spoke on the principle of non-discrimination in the two EU

¹⁰⁴ Available at: http://ec.europa.eu/employment_social/fundamental_rights/spot/july07_en.htm#trainac (accessed on 22.10.2007).

¹⁰⁵ The project was managed by human european consultancy (www.humanconsultancy.com) in partnership with the Migration Policy Group (www.migpolgroup.com) and was carried out in the 10 new EU member states and Bulgaria, Romania and Turkey.

¹⁰⁶ See <http://www.stop-discrimination.info/?RDCT=fd6dc498e983758e3227>

Directives 43/2000 and 78/200 and Alvaro Oliveira from DG Employment and Social Affairs of the EU, who spoke on the content of Directive 2000/78/EC and its implementation. There were additional speakers from Cyprus equality body, the Ministry of Labour and the Ministry of Justice. The event was attended by Government officials and civil servants, trade unionists and employers association representatives and a number of NGOs. This was one of the largest conferences on the subject where all social partners and many stakeholders were involved (a total of 300 persons). It was the only awareness raising event organised by the specialised body on anti-discrimination laws.

- **Ministry of Justice Seminar in 2003:** A seminar titled “E.U. legislation and policies to combat discrimination” was organised by the Ministry of Justice and Public Order in June 2003, targeting NGOs, government officials and the public at large, within the framework of the Community Action Programme Against Discrimination, funded by the European Commission. Speakers included three European experts, from the Commission and from other EU member states and there was simultaneous translation from Greek to English and vice versa. It examined the concepts, content and field of implementation of the EU anti-discrimination directives. The participants were mainly stakeholders from the governmental and non-governmental sector but there was little if any representation from vulnerable groups. During the proceedings, the Ministry circulated to participants two short publications listing out the legislative framework for the combating of racism and discrimination. There was no follow up on the subject; nor was there any impact assessment on the activity or the legislation since it was implemented.

[54]. From the perspective of the NGOs¹⁰⁷ and experts¹⁰⁸ the problem with the above general training is that they fail to properly target the LGBT population. One more targeted initiative is the production of a leaflet by AKOK, the Family Planning Association and ASTARTIS with the title “Myths and Truths about Homosexuality and Sexual Orientation”, which is aimed at organised groups such as teachers, police and others. The leaflet has been published but it is still to be disseminated.¹⁰⁹

[55]. There is nothing on transgender people in terms of good practice.

¹⁰⁷ This is based on the views expressed by the Chair of the Gay Liberation Movement of Cyprus -AKOK (interview with Mr. Alecos Modinos 25.2.2008) as well as the knowledge research and training organisations such as SYMFILIOSI, INEK-PEO etc.

¹⁰⁸ Interview with Director of RUBSI, Dr. Constantinos Phellas 11.1.2008.

¹⁰⁹ Interview with Mr. Alecos Modinos, president of AKOK, 25.2.2008.

Annexes

Annex 1 – Presentation of case law

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| Case title | Stavros Marangou v. The Republic of Cyprus through the Public Service Commission |
| Decision date | 17.07.2002 |
| Reference details (type and title of court/body; in original language and English [official translation, if available]) | Ανώτατο Δικαστήριο Κύπρου Αναθεωρητική Δικαιοδοσία Υπόθεση αρ. 311/2001 Supreme Court of Cyprus Revisional Jurisdiction Case no. 311/2001 |
| Key facts of the case (max. 500 chars) | The Applicant applied to the Public Service Commission for a post at the Ministry of Interior. On the 25.01.2001, he was notified that his application was rejected because of his failure to serve in the army, pursuant to article 31(b) of the Public Service Law. ¹¹⁰ The Applicant applied to the Court seeking the annulment of this decision, arguing that article 31(b) of the Public Service Law violated the non-discrimination principle of Article 28 of the Constitution on the grounds of belief, given his particularities and personal convictions deriving from the fact that he is a homosexual. The Republic argued, by way of a preliminary objection, that the Applicant lacked legitimate interest that would enable him to file the present recourse, as his failure to discharge his military obligations meant that he did not possess the required qualifications for the post. The Court sustained the Republic's preliminary objection and rejected the applicant's recourse. |
| Main reasoning/argumentation (max. 500 chars) | The Judge stated that his judgement would be different if section 31(b) of the Public Service Law was held to be unconstitutional but that issue was not raised by the Applicant, whose argument for unequal treatment was not related directly to the constitutionality of section 31(b) of the Public Service laws, but to the constitutionality of the National Guard laws. In this case, the decision of the Public Service Commission relied on section 31(b) of the Public Service law and not on the National Guard law. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | The Court did not examine the issue of constitutionality of either the Public Service Law or the Public Guard Law. As a result, the argument of the Applicant that the obligation imposed by the Public Service Law amounts to unequal treatment on the ground of belief |

¹¹⁰ Cyprus/ Public Service Law 1990 as amended until 2000.

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| | and/or sexual orientation was left undetermined. Council Directive 2000/78/EC had not been transposed at the time and the concept of indirect discrimination on the ground of sexual orientation was not expressly provided in any other law. Neither the applicant nor the court made use of the anti-discrimination provision of the Constitution (which does not expressly cover sexual orientation but covers “any other ground whatsoever”), in spite of the fact that there is case law ¹¹¹ establishing that constitutional rights are directly enforceable. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | The appellant did not claim discrimination on the ground of sexual orientation, presumably since the law transposing 2000/78/EC had not been transposed by then. The ground of discrimination invoked was “belief as a result of the particularities and convictions of the applicant who was a homosexual”. The question of the constitutionality of the obligation of homosexuals to perform military service was not addressed. |

Original text of the decision:

ΑΝΩΤΑΤΟ ΔΙΚΑΣΤΗΡΙΟ ΚΥΠΡΟΥ
ΑΝΑΘΕΩΡΗΤΙΚΗ ΔΙΚΑΙΟΔΟΣΙΑ

Υπόθεση Αρ. 311/2001

ΓΑΒΡΙΗΛΙΔΗ, Δ.

Αναφορικά με το Άρθρο 146 του Συντάγματος

ΣΤΑΥΡΟΥ ΜΑΡΑΓΚΟΥ, εκ Λευκωσίας

Αιτητή

Και

Κυπριακής Δημοκρατίας μέσω
Επιτροπής Δημόσιας Υπηρεσίας

¹¹¹ Yiallourou v. Evgenios Nicolaou, Supreme court case, Appeal No. 9331 (08.05.2001).

Καθ' ης η αίτηση

17.7.2002

Για τον αιτητή: κ. Σ. Δράκος.

Για την καθ' ης η αίτηση: κα Γ. Ερωτοκρίτου, Εισαγγελέας της Δημοκρατίας.

ΑΠΟΦΑΣΗ

Στις 11.9.2000, ο αιτητής υπέβαλε αίτηση για διορισμό στη θέση Τεχνικού, Τμήμα Πολεοδομίας και Οίκησης, Υπουργείο Εσωτερικών.

Στις 25.1.2001, η καθ' ης η αίτηση πληροφόρησε τον αιτητή ότι αποφάσισε ότι δεν μπορούσε να του προσφέρει διορισμό στην εν λόγω θέση, αφού δεν είχε εκπληρώσει τις στρατιωτικές του υποχρεώσεις, ούτε είχε απαλλαγεί νομίμως από αυτές όπως προβλέπεται ρητά στο άρθρο 31(β) του περί Δημοσίας Υπηρεσίας Νόμου 1990 έως (Αρ.2) του 2000.

Η πιο πάνω απόφαση της καθ' ης η αίτηση είναι το αντικείμενο της προσφυγής.

Η δικηγόρος της καθ' ης η αίτηση πρόβαλε την προδικαστική ένσταση ότι ο αιτητής δεν έχει έννομο συμφέρον να προσβάλει την επίδικη απόφαση καθότι όντως δεν έχει εκπληρώσει τις στρατιωτικές του υποχρεώσεις, ούτε έχει απαλλαγεί νομίμως από αυτές, όπως προβλέπεται στο άρθρο 31(β).

Με την προδικαστική ένσταση διαφώνησε ο δικηγόρος του αιτητή. Επικαλέσθηκε αντισυνταγματικότητα του άρθρου 31(β). Σύμφωνα με την εισήγησή του, η αντισυνταγματικότητα του άρθρου έγκειται στο ότι προσκρούει στο Άρθρο 28 του Συντάγματος υπό την έννοια ότι δημιουργεί ανισότητα βάσει (α) του φύλου (άνδρας ή γυναίκα), (β) της καταγωγής (Κύπριοι, Μαρωνίτες, Αρμένιοι, κλπ), (γ) της πολιτικής άποψης του αιτητή ότι η δημιουργία της Εθνικής Φρουράς ήταν εσφαλμένη και αντισυνταγματική και (δ) των ιδιαιτεροτήτων και/ή πεποιθήσεων του αιτητή, ο οποίος είναι ομοφυλόφιλος.

Η προδικαστική ένσταση ευσταθεί. Εφόσον ο αιτητής δεν έχει εκπληρώσει τις στρατιωτικές του υποχρεώσεις, ούτε έχει απαλλαγεί νομίμως από αυτές, είναι πρόδηλο ότι δεν κατέχει τα απαιτούμενα προσόντα για διορισμό στη Δημόσια Υπηρεσία. Εκτός εάν το άρθρο 31(β) ήθελε κριθεί αντισυνταγματικό. Τέτοιο όμως ζήτημα δεν εγείρεται, στην πραγματικότητα, με την εισήγηση του δικηγόρου του αιτητή. Η περί ανισότητας εισήγηση του δικηγόρου του αιτητή, όπως εξειδικεύεται, δεν συνδέεται άμεσα με την συνταγματικότητα του άρθρου 31(β). Συνδέεται άμεσα με την συνταγματικότητα και/ή τον τρόπο εφαρμογής των περί Εθνικής Φρουράς Νόμων, θέματα τα οποία δεν υπεισέρχονται για εξέταση στην προκειμένη περίπτωση εφόσον εκείνο το οποίο εφάρμοσε η καθ' ης η αίτηση ήταν το άρθρο 31(β) και όχι τους περί Εθνικής Φρουράς Νόμους. Η περί

αντισυνταγματικότητας επιχειρηματολογία θα ήταν σχετική αν αντικείμενο της προσφυγής ήταν απόφαση για κλήση του αιτητή προς εκπλήρωση στρατιωτικών υποχρεώσεων ή άρνηση απαλλαγής του από αυτές.

Η προσφυγή απορρίπτεται ως απαράδεκτη με έξοδα εις βάρος του αιτητή.

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| Case title | Stavros Marangou v. The Republic of Cyprus through the Public Service Commission |
| Decision date | 03.11.2006 |
| Reference details (type and title of court/body; in original language and English [official translation, if available]) | Ανώτατο Δικαστήριο Κύπρου Δευτεροβάθμια Δικαιοδοσία Αναθεωρητική Έφεση αρ. 3729 Supreme Court of Cyprus Revisional Jurisdiction Appeal no. 3729 |
| Key facts of the case (max. 500 chars) | This is an appeal against the previous decision of the Supreme Court which had dismissed the Appellant's recourse to set aside the Public Service Commission's decision not to offer the Applicant a post at the Department of Road Transport. The decision was based on article 31(b) of the Public Service Law 1990 N. 1/90, which requires applicants for public posts to have lawfully discharged all military obligations. The Applicant also challenged the validity of the interim judgement of the trial Judge by which an application by the Applicant to amend the legal grounds of his recourse was rejected. The application for amendment aimed at introducing to the recourse the legal grounds that sections 4, 7 and 8 of the National Guards Laws (which set out the procedure for discharge from the army) are unconstitutional because they infringe articles 6, 8, 15, 18 and 25 of the Constitution ¹¹² on the grounds that they establish unequal treatment between citizens belonging to different social groups, because the procedure prescribed in the National Guard laws for establishing his identity as a homosexual was degrading and |

¹¹² Article 6 prohibits discrimination by any laws or any bodies against any person; article 8 provides that no person shall be subjected to torture or to inhuman or degrading punishment or treatment; article 15 guarantees the right to respect for private and family life; article 18 guarantees the right to freedom of thought and conscience; and article 25 right to practice any profession or to carry on any occupation, trade or business.

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| | humiliating. |
| Main reasoning/argumentation (max. 500 chars) | The Court reiterated that questions of unconstitutionality must be raised with sufficient clarity and in quite unequivocal terms. The motion of relief of the recourse did not contain the required specialisation that would enable the judicial review of the laws under question; the general invocation of a legal provision as unconstitutional is not sufficient. In any case the Court stated that the vague allegations contended by the Applicant were actually related to the military service in the National Guard and not to the object of the recourse at hand, which was the appointment at a public post. The Court agreed with the findings of the trial Judge. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | The Appeal Court invoked procedural reasons and did not address the issue of constitutionality of either the Public Service Law or the National Guard Law. As a result, the argument of the Applicant that the obligation imposed by the Public Service Law amounts to unequal treatment as regards his beliefs and particularities as a homosexual was not examined. The appeal failed and was dismissed by the Court. The question of the constitutionality of the obligation to perform the military service in cases of homosexuals was left undetermined. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | The Court's decision to disallow the application to change the legal basis of the appeal inevitably results in the applicant altogether losing his right to challenge the decision by which his employment application was turned down, because the Constitution (article 146) sets a 75 days' limitation for challenging administrative decisions. However, given that the application to change the legal basis was sought in order to introduce constitutional articles which had been in force since 1960, then the court's decision to disallow this application deprives the appellant of a line of argumentation which he could have brought forwarded in the first instance. Strangely enough, the appellant did not invoke Law 58(I)/2004 which had meanwhile been enacted and which transposes Directive 2000/78/EC. Had the appellant tried to introduce in his legal arguments a new law which had meanwhile come into force, then the court's decision to disallow the change of legal argumentation would have led to an injustice. |

Original text of the above decision:

ΑΝΩΤΑΤΟ ΔΙΚΑΣΤΗΡΙΟ ΚΥΠΡΟΥ
ΔΕΥΤΕΡΟΒΑΘΜΙΑ ΔΙΚΑΙΟΔΟΣΙΑ

(Αναθεωρητική Έφεση Αρ. 3729)

3 Νοεμβρίου, 2006

[ΚΩΝΣΤΑΝΤΙΝΙΔΗΣ, ΝΙΚΟΛΑΙΔΗΣ, ΗΛΙΑΔΗΣ, ΚΡΑΜΒΗΣ, ΧΑΤΖΗΧΑΜΠΗΣ, Δ/στές]

ΣΤΑΥΡΟΣ ΜΑΡΑΓΚΟΣ,

Εφεσείων

v.

ΚΥΠΡΙΑΚΗΣ ΔΗΜΟΚΡΑΤΙΑΣ, ΜΕΣΩ
ΕΠΙΤΡΟΠΗΣ ΔΗΜΟΣΙΑΣ ΥΠΗΡΕΣΙΑΣ,

Εφεσίβλητης.

Σ. Δράκος, για τον Εφεσείοντα.

Μ. Σπηλιωτοπούλου, για την Εφεσίβλητη.

ΚΩΝΣΤΑΝΤΙΝΙΔΗΣ, Δ.: Την ομόφωνη απόφαση του Δικαστηρίου θα δώσει ο Δικαστής Κραμβής.

ΚΡΑΜΒΗΣ, Δ.: Ο εφεσείων υπέβαλε χωριστές αιτήσεις για διορισμό στις θέσεις Βοηθού Λειτουργού Αεροπορικών Κινήσεων, Τμήμα Πολιτικής Αεροπορίας και Ελεγκτή Μεταφορών, Τμήμα Οδικών Μεταφορών. Η Επιτροπή Δημόσιας Υπηρεσίας (ΕΔΥ) με επιστολές της ημερομηνίας 10.7.2001 και 11.9.2001 αντίστοιχα, πληροφόρησε τον αιτητή πως δεν ήταν δυνατό να του προσφερθεί διορισμός επειδή δεν είχε εκπληρώσει τις στρατιωτικές του υποχρεώσεις ούτε και είχε νομίμως απαλλαγεί από αυτές, για να δικαιούται διορισμό στη Δημόσια Υπηρεσία, σύμφωνα με το άρθρο 31(β) του περί Δημόσιας Υπηρεσίας Νόμου του 1990, Ν. 1/90. Εναντίον των πιο πάνω αποφάσεων της ΕΔΥ ο εφεσείων άσκησε ανεπιτυχώς προσφυγή. Η υπό κρίση έφεση, έχει ως αντικείμενο την απόφαση με την οποία απορρίφθηκε η προσφυγή. Με αυτή, αμφισβητείται επίσης η ορθότητα ενδιάμεσης απόφασης με την οποία απορρίφθηκε αίτηση για τροποποίηση των νομικών λόγων της προσφυγής.

Η αίτηση για τροποποίηση, στόχευε στην εισαγωγή εισήγησης ότι οι πρόνοιες των άρθρων 4, 7 και 8 των περί Εθνικής Φρουράς Νόμων είναι αντισυνταγματικές καθότι παραβιάζουν τα άρθρα 6, 8, 15, 18 και 25 του Συντάγματος δημιουργώντας άνιση μεταχείριση μεταξύ των πολιτών οι οποίοι ανήκουν σε διαφορετικές κοινωνικές ομάδες. Ο εφεσείων, ο οποίος είναι ομοφυλόφιλος, ισχυρίστηκε προς υποστήριξη της αίτησης ότι η προβλεπόμενη από το νόμο διαδικασία προς διαπίστωση της συγκεκριμένης ιδιότητας, ενέχει το στοιχείο της ταπεινωτικής μεταχείρισης του υποκείμενου, κατά παράβαση των άρθρων 3, 8 και 9 της Ευρωπαϊκής Σύμβασης Ανθρωπίνων Δικαιωμάτων. Δήλωσε πως δεν υπέχει υποχρέωση στρατιωτικής θητείας αλλά ούτε και είναι διατεθειμένος, για τους λόγους που επικαλέστηκε, να υποβάλει αίτημα απαλλαγής, όπως προβλέπεται στον περί της Εθνικής Φρουράς Νόμο.

Η αίτηση για τροποποίηση απορρίφθηκε αφού κρίθηκε ότι αυτή στόχευε στην εισαγωγή νέων επίδικων θεμάτων που αφορούσαν στην εκπλήρωση των στρατιωτικών υποχρεώσεων του εφεσείοντα και στο δικαίωμα απαλλαγής του από την Εθνική Φρουρά, ζητήματα άσχετα με το αντικείμενο και τα επίδικα θέματα της προσφυγής.

Η ενδιάμεση απόφαση στην αίτηση για τροποποίηση, τροχοδρόμησε την κρίση επί της ουσίας της προσφυγής. Η προσφυγή απορρίφθηκε για τον προφανή λόγο ότι ο εφεσείων δεν πληρούσε βασική προϋπόθεση του νόμου για διορισμό στη Δημόσια Υπηρεσία και συνεπώς δεν μπορούσε να του είχε προσφερθεί τέτοιος διορισμός από την ΕΔΥ.

Προβάλλεται ως λόγος έφεσης ότι δεν εξετάστηκε θέμα αντισυνταγματικότητας του άρθρου 31(β) του περί Δημόσιας Υπηρεσίας Νόμου για το οποίο όμως, ο δικηγόρος του αιτητή επιχειρηματολόγησε κατά την έφεση. Το θέμα ορθά δεν εξετάστηκε αφού δεν ήταν επίδικο. Η γενική και αόριστη αναφορά στο δικόγραφο της προσφυγής ότι οι προσβαλλόμενες αποφάσεις είναι αντίθετες προς το Σύνταγμα δεν συνάδει καθόλου με ό,τι απαιτούν οι σχετικές δικονομικές διατάξεις^[1] και οι αρχές της νομολογίας^[2] που διέπουν το θέμα της εξέτασης συνταγματικότητας νόμου. Ελλείπει παντελώς από το δικόγραφο της αίτησης η αναγκαία εξειδίκευση η οποία θα καθιστούσε εφικτή την εξέταση του σημαντικού αυτού νομικού θέματος. Σύμφωνα με την πάγια νομολογία, η συνταγματικότητα νόμου ή κανονισμού, συνιστά νομικό θέμα ιδιάζουσας σημασίας και σπουδαιότητας το οποίο καθίσταται επίδικο μόνο κατόπιν επακριβούς προσδιορισμού του άρθρου του νόμου ή του κανονισμού που αμφισβητείται καθώς και της συνταγματικής διάταξης προς την οποία προσκρούει το συγκεκριμένο άρθρο ή ο κανονισμός. Η γενική επίκληση διάταξης νόμου ως αντίθετης προς το Σύνταγμα δεν είναι αρκετή. Για να καταστεί το θέμα επίδικο, πρέπει αυτό να εγείρεται σύμφωνα με τις δικονομικές διατάξεις και να αποφασίζεται ύστερα από εξαντλητική επιχειρηματολογία. Στην προκείμενη περίπτωση δεν υπήρξε καν τέτοια επίκληση. Το γεγονός ότι το θέμα είχε ακροθιγώς αναφερθεί στη γραπτή αγόρευση του δικηγόρου του αιτητή δεν το καθιστούσε εγείρομενο προς εξέταση. Η αγόρευση αποτελεί το μέσο για την έκθεση της επιχειρηματολογίας υπέρ της αποδοχής των λόγων ακύρωσης και όχι υποκατάστατο της στοιχειοθέτησής τους. Βλ. *Παπαδόπουλος ν. Ιωσηφίδη κα (2002) 3 ΑΑΔ 601* και *Λεωφ. Λευκωσίας Ατδ ν. Δημοκρατίας (1999) 3 ΑΑΔ 56*.

Για τους λόγους που έχουν ήδη εξηγηθεί, η νομική θεμελίωση των αποφάσεων που προσβλήθηκαν με την προσφυγή, παρέμεινε ανεπηρέαστη. Κάθε άλλη επιχειρηματολογία που αναπτύχθηκε από πλευράς αιτητή με άξονα την αντισυνταγματικότητα της συγκεκριμένης διάταξης και με προέκταση σε αόριστες και ασαφείς εισηγήσεις περί αντισυνταγματικότητας του νόμου περί Εθνικής Φρουράς, ήταν χωρίς νομική θεμελίωση και χωρίς συνάρτηση προς το αντικείμενο της προσφυγής, γεγονός που οδήγησε στην απόρριψη της εφόσον δεν υπήρχαν προς εξέταση άλλοι βάσιμοι λόγοι ακύρωσης.

Ο κ. Δράκος υπέβαλε εισήγηση ότι εσφαλμένα επιδικάστηκαν έξοδα σε βάρος του πελάτη του. Ανέφερε συναφώς ότι στον τομέα της Αναθεωρητικής Δικαιοδοσίας του Ανωτάτου Δικαστηρίου δεν θα πρέπει να επιδικάζονται έξοδα σε βάρος του αποτυχόντα αιτητή ο οποίος, σε κάθε περίπτωση, προσφεύγει στο Δικαστήριο με σκοπό τον έλεγχο της νομιμότητας συγκεκριμένης πράξης της διοίκησης η οποία τον επηρεάζει. Η πρακτική επιδίκασης εξόδων σε βάρος του αποτυχόντα αιτητή συνιστά γενικά τροχοπέδη στο δικαίωμα των διοικουμένων για πρόσβαση στο Δικαστήριο προς διάγνωση της νομιμότητας των πράξεων της διοίκησης και

είναι αντίθετη προς ανάλογη πρακτική του Ευρωπαϊκού Δικαστηρίου Ανθρωπίνων Δικαιωμάτων όπου σε καμιά περίπτωση επιδικάζονται έξοδα εναντίον πολιτών των οποίων το διάβημα αποτυγχάνει.

Στη *Χατζηγεωργίου v. Δημοκρατίας (1999) 3 AAD 23* συγκεφαλαιώνονται οι αρχές της νομολογίας που αφορούν στην επιδίκαση εξόδων στο πεδίο της αναθεωρητικής δικαιοδοσίας και οι παράμετροι άσκησης της διακριτικής ευχέρειας του Δικαστηρίου. Στην προκειμένη περίπτωση, ο συνάδελφος μας που εκδίκασε την προσφυγή, άσκησε τη διακριτική του εξουσία σύμφωνα με τις καθιερωμένες αρχές και θεωρούμε πως δεν δικαιολογείται οποιαδήποτε επέμβαση ούτε συντρέχουν βέβαια οι προϋποθέσεις για άλλη προσέγγιση.

Η έφεση αποτυγχάνει και απορρίπτεται με έξοδα.

Η έφεση αποτυγχάνει και απορρίπτεται με έξοδα.

^[1] *Καν. 7 του Διαδικαστικού Κανονισμού του Ανωτάτου Συνταγματικού Δικαστηρίου.*

^[2] *Δημοκρατία v. Πογιατζή (1992) 3 AAD 196*

Παφίτη v. Δημοκρατίας κα (1996) 3 AAD 522

Latomia Estate Ltd κα v. Δημοκρατίας (2001) 3(B) 672

Κλεάνθους v. Δημοκρατίας (2003) 3 AAD 256.

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| Case title | Panicos Koutsoudis v. The Police |
| Decision date | 01.11.2005 |
| Reference details (type and title of court/body; in original language and English [official translation, if available]) | Ανώτατο Δικαστήριο Κύπρου Ποινική Έφεση Αρ. 10/2005 Supreme Court of Cyprus Criminal Appeal No. 10/2005 |
| Key facts of the case (max. 500 chars) | The Appellant owned a night club with all necessary licenses for its lawful operation, including licenses for the sale of alcohol and the use of loud-speakers. The Appellant applied for the renewal of these licenses before their expiration but the competent authority (the Municipality of Larnaca) failed to renew or to issue new licenses. The Police prosecuted the Appellant for offences related to the use of loud-speakers and the sale of alcohol without a license. In the meantime, the Municipality of Larnaca issued the said licenses. The Appellant admitted the offences but was still sentenced to a fine of 1,500 Cyprus Pounds (Euros 2,563) for the use of loud-speakers and |

| | |
|--|---|
| | 350 Cyprus Pounds (Euros 598) for the sale of intoxicating liquor without a license. The Appellant then applied to the Appeal Court, seeking to set aside the judgement of the trial Court. The Appellant argued that the fines imposed on him were manifestly excessive having regard to the circumstances of the case. He also complained that the behaviour of the Municipality of Larnaca and the Police towards him was negative and hostile due to the fact that he was homosexual and that his club was frequented by homosexuals. |
| Main reasoning/argumentation (max. 500 chars) | The Court reiterated the principles justifying the interference of the Court of Appeal in an appeal against sentence, according which the Court of Appeal will only interfere with a sentence if it is apparent that the trial Court misdirected itself either on the facts or the law; or, that the Court, in considering a sentence, allowed itself to be influenced by external factors which should not affect the sentence; or, if it is made to appear that the sentence imposed is manifestly excessive in the circumstances of the particular case. In the case at hand, the Court of Appeal acknowledged that the mitigating factors of the case (i.e. the fact that the licenses had not been promptly renewed through no fault of the applicant) were not taken into account by the trial Court, pointing out that the Prosecution knew these circumstances but chose to deal with the case in an unfavourable manner. There was an erroneous judgement of facts that led to the imposition of a manifestly excessive sentence. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | The court touched upon the issue of the negative and hostile approach of the authorities towards homosexuals, although it could not under the circumstances produce a ruling of discrimination on the ground of sexual orientation, since the case was an appeal against a trial court decision. Nevertheless, the Appeal Court refrained from commenting on the general issue of state's attitude towards homosexuality and remains confined to the circumstance of the case. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | For the reasons stated above, the appeal was successful. The fines were replaced by a 1000 Cyprus Pounds' guarantee of the Appellant that he will abide by the legislation regulating the operation of entertainment clubs |

Original text of the above decision:

1 Νοεμβρίου, 2005

[ΝΙΚΟΛΑΪΔΗΣ, ΚΡΑΜΒΗΣ, ΦΩΤΙΟΥ, Δ/στές]

ΠΑΝΙΚΟΣ ΚΟΥΤΣΟΥΔΗΣ,

Εφεσείων,

v.

ΑΣΤΥΝΟΜΙΑΣ,

Εφεσίβλητης.

(Ποινική Έφεση Αρ. 10/2005)

Ποινή — Χρήση μεγαφώνων και πώληση οινοπνευματωδών ποτών χωρίς άδεια — Εφεσείων, ιδιοκτήτης κέντρου αναψυχής ζήτησε ανανέωση / έκδοση νέων αδειών πριν τη λήξη των υφισταμένων, οι αρμόδιοι παρέλειψαν να προβούν στα δέοντα παρά τις επανειλημμένες οχλήσεις του και τελικά ο εφεσείων εξασφάλισε από τον αρμόδιο Δήμο τις άδειες που ζητούσε — Οι καταγγελίες εναντίον του εφεσείοντος αφορούσαν τη χρονική περίοδο που μεσολάβησε μέχρι την έκδοση / ανανέωση των αδειών — Επιβολή ποινής προστίμου £1.500 στην κατηγορία για χρήση μεγαφώνων χωρίς άδεια και ποινών προστίμου £350 στην κατηγορία για πώληση οινοπνευματωδών ποτών χωρίς άδεια — Κρίθηκαν έκδηλα υπερβολικές, λόγω εσφαλμένης εκτίμησης γεγονότων και αντικαταστάθηκαν κατ' έφεση με δέσμευση του εφεσείοντος με εγγύηση £1000 για δύο χρόνια.

Ποινή — Επιμέτρηση — Ο προσδιορισμός της ποινής και η επιμέτρηση του ύψους της ποινής αποτελούν πρωταρχική ευθύνη του πρωτόδικου Δικαστηρίου — Προϋποθέσεις επέμβασης του Εφετείου.

Ο εφεσείων, συνιδιοκτήτης και συνδιαχειριστής του κέντρου αναψυχής "SECRETS" στη Λάρνακα, κρίθηκε ένοχος μετά από παραδοχή σε δύο κατηγορίες που αφορούσαν στη χρήση μεγαφώνων και στην πώληση οινοπνευματωδών ποτών χωρίς άδεια κατά παράβαση των σχετικών νομοθετικών και κανονιστικών διατάξεων. Στην επιμέτρηση της ποινής λήφθηκαν υπόψη ακόμα 19 υποθέσεις που αφορούσαν παρόμοια αδικήματα και διαπράχθηκαν κατά διάφορες ημερομηνίες μεταξύ Μαΐου 2004 και Σεπτεμβρίου 2004 στο ίδιο κέντρο. Στην κατηγορία για χρήση μεγαφώνων χωρίς άδεια, το Δικαστήριο επέβαλε στον εφεσείοντα ποινή προστίμου £1500 και στην κατηγορία για πώληση οινοπνευματωδών ποτών χωρίς άδεια, πρόστιμο £350.

Με την παρούσα έφεση επιδιώκεται ο παραμερισμός της πρωτόδικης απόφασης με τη δικαιολογία ότι οι χρηματικές ποινές είναι έκδηλα υπερβολικές. Ο εφεσείων υποστήριξε ότι η καθυστέρηση στην έγκαιρη έκδοση των αδειών οφειλόταν στη στάση γενικά που τήρησαν έναντι του ο Δήμος Λάρνακας και η Αστυνομία που δεν ήταν μόνο αρνητική αλλά και εχθρική επειδή ο ίδιος είναι ομοφυλόφιλος και στο κέντρο του σύχναζαν ομοφυλόφιλα άτομα.

Αποφασίστηκε ότι:

1. Ο εφεσείων έπρεπε να τύχει ευνοϊκότερου χειρισμού κάτω από τις περιστάσεις της παρούσας υπόθεσης και του πνεύματος που δημιουργούν οι αρχές της χρηστής διοίκησης. Στην παρούσα περίπτωση, ο εφεσείων δεν περιφρόνησε τις διαδικασίες που προβλέπουν ο νόμος και οι κανονισμοί ούτε και συνειδητά επέλεξε να ακολουθήσει το δρόμο της παρανομίας. Αυτά τα στοιχεία που αποτελούν σοβαρούς μετριαστικούς παράγοντες δεν λήφθηκαν δεόντως υπόψη

από το πρωτόδικο Δικαστήριο με αποτέλεσμα το Δικαστήριο να οδηγηθεί στην επιβολή έκδηλα υπερβολικών ποινών.

2. Οι ποινές προστίμου σε κάθε κατηγορία αντικαθίστανται με δέσμευση του εφεσεϊόντος με εγγύηση £1000 για δύο χρόνια από σήμερα τήρησης των νόμων και των κανονισμών που διέπουν τη λειτουργία των κέντρων αναψυχής.

Η έφεση επιτράπηκε. Οι ποινές προστίμου αντικαταστάθηκαν ως ανωτέρω. Δεν εκδόθηκε διαταγή για έξοδα.

Αναφερόμενες υποθέσεις:

Philippou v. Republic (1983) 2 C.L.R. 245,

Γεωργίου v. Αστυνομίας (1991) 2 Α.Α.Δ. 525,

Μιχαήλ κ.ά. v. Αστυνομίας (1997) 2 Α.Α.Δ. 362.

Έφεση εναντίον Ποινής.

Έφεση από τον εφεσεϊόντα, συνιδιοκτήτη και συνδιαχειριστή κέντρου αναψυχής στη Λάρνακα, εναντίον της απόφασης του Επαρχιακού Δικαστηρίου Λάρνακας (Υπόθεση Αρ. 7822/04) ημερ. 11/12/04, με την οποία βρέθηκε ένοχος, κατόπιν παραδοχής, σε δύο κατηγορίες για αδικήματα που διαπράχθηκαν στις 7.5.2004 και αφορούσαν στη χρήση μεγαφώνων και στην πώληση οινοπνευματωδών ποτών χωρίς άδεια κατά παράβαση των σχετικών νομοθετικών και κανονιστικών διατάξεων και του επιβλήθηκαν, στην κατηγορία για χρήση μεγαφώνων χωρίς άδεια, ποινή προστίμου £1500 και στην κατηγορία για πώληση οινοπνευματωδών ποτών χωρίς άδεια, πρόστιμο £350, ως ποινών έκδηλα υπερβολικών.

N. Δαμιανού για X. Κυριακίδη, για τον Εφεσεϊόντα.

E. Ζαχαριάδου, για την Εφεσίβλητη.

Cur. adv. vult.

ΝΙΚΟΛΑΪΔΗΣ, Δ.: Την ομόφωνη απόφαση του Δικαστηρίου θα δώσει ο Δικαστής Α. Κραμβής.

ΚΡΑΜΒΗΣ, Δ.: Ο εφεσεϊών ήταν συνιδιοκτήτης και συνδιαχειριστής του κέντρου αναψυχής “SECRETS” στη Λάρνακα. Για τη νόμιμη λειτουργία του κέντρου κατείχε τις απαιτούμενες άδειες, συμπεριλαμβανομένων των αδειών χρήσης μεγαφώνων και πώλησης οινοπνευματωδών ποτών οι οποίες εξ ορισμού, λήγουν πάντα τη 12η Μαρτίου. Ο εφεσεϊών ζήτησε κανονικά την ανανέωση/έκδοση νέων αδειών πριν από τη λήξη τους. Οι αρμόδιοι παρέλειψαν να προβούν στα δέοντα παρά τις επανειλημμένες οχλήσεις του εφεσεϊόντα το δε κέντρο, συνέχισε να λειτουργεί με ληγμένες τις υφιστάμενες άδειες. Ενόψει

τούτου, η αστυνομία προέβη σε αλληπάλληλες κατηγορίες εναντίον του εφεσείοντα για παραβάσεις απορρέουσες από τη μη έκδοση/ανανέωση των πιο πάνω αδειών. Πάγια θέση του εφεσείοντα ήταν ότι το κέντρο του πληρούσε όλα τα κριτήρια και προϋποθέσεις για την έκδοση των αδειών και τη συνέχιση της νόμιμης λειτουργίας του. Παρά ταύτα, ο Δήμος Λάρνακας, αρνήθηκε την έκδοση άδειας διατήρησης του υποστατικού και αρνήθηκε επίσης να συστήσει στο Επαρχιακό Συμβούλιο την έκδοση άδειας πώλησης οινοπνευματωδών ποτών. Εναντίον των πιο πάνω αποφάσεων του Δήμου, ο εφεσείων άσκησε προσφυγές στο Ανώτατο Δικαστήριο. Στη συνέχεια, περί το Σεπτέμβριο 2004, ο Δήμος Λάρνακας, ανακαλώντας ουσιαστικά τις προηγούμενες αποφάσεις του, αποφάσισε την έκδοση των αδειών που ζητούσε ο εφεσείων. Κατά τη χρονική περίοδο που μεσολάβησε μέχρι την έκδοση/ανανέωση των αδειών έγιναν οι καταγγελίες που προαναφέραμε και εναντίον του εφεσείοντα ασκήθηκε ποινική δίωξη. Το κατηγορητήριο περιλάμβανε δύο κατηγορίες για αδικήματα που διαπράχθηκαν στις 7.5.2004 και αφορούσαν στη χρήση μεγαφώνων και στην πώληση οινοπνευματωδών ποτών χωρίς άδεια κατά παράβαση των σχετικών νομοθετικών και κανονιστικών διατάξεων. Ο εφεσείων παραδέχθηκε τις κατηγορίες και κατά την επιμέτρηση της ποινής λήφθηκαν υπόψη ακόμα 19 υποθέσεις που αφορούσαν παρόμοια αδικήματα που διαπράχθηκαν κατά διάφορες ημερομηνίες μεταξύ Μαΐου 2004 και Σεπτεμβρίου 2004 στο ίδιο κέντρο. Στην κατηγορία για χρήση μεγαφώνων χωρίς άδεια, το Δικαστήριο επέβαλε στον εφεσείοντα ποινή προστίμου £1500 και στην κατηγορία για πώληση οινοπνευματωδών ποτών χωρίς άδεια, πρόστιμο £350.

Με την παρούσα έφεση, επιδιώκεται ο παραμερισμός της πρωτόδικης απόφασης με τη δικαιολογία ότι οι χρηματικές ποινές είναι έκδηλα υπερβολικές. Υποστηρίχθηκε συναφώς ότι η μη έκδοση/ανανέωση των αδειών δεν οφειλόταν σε υπαιτιότητα του εφεσείοντα ο οποίος έπραξε ό,τι νόμιμα μπορούσε να πράξει για την έγκαιρη εξασφάλιση των αδειών και ότι η καθυστέρηση οφειλόταν αποκλειστικά στην αδράνεια των αρμόδιων να προωθήσουν τις προβλεπόμενες διαδικασίες για τη διεξαγωγή των απαραίτητων ελέγχων και επιθεωρήσεων. Ο εφεσείων θεωρεί ότι η στάση που γενικά τήρησαν έναντι του ο Δήμος Λάρνακας και η αστυνομία ήταν όχι μόνο αρνητική αλλά και εχθρική επειδή ο ίδιος είναι ομοφυλόφιλος και στο κέντρο του σύχναζαν ομοφυλόφιλα άτομα. Αναφέρθηκε ενδεικτικά ότι εκκρεμούσας της εξέτασης του θέματος της έκδοσης των αδειών, ο εφεσείων συνελήφθηκε τέσσερις φορές για παρόμοιες περιπτώσεις και αδικαιολόγητα κρατήθηκε για πολλές ώρες στον αστυνομικό σταθμό παρότι σε κάθε περίπτωση, παραδεχόταν εξ αρχής τη διάπραξη των αδικημάτων.

Τα πιο πάνω γεγονότα, που ως σημειωθεί είναι αναντίλεκτα, αποτέλεσαν παράγοντες μετριαστικούς της ποινής. Στην εκκαλούμενη απόφαση αναφέρεται ότι προτού ο εφεσείων συνεχίσει τη λειτουργία του κέντρου όφειλε να εξασφαλίσει τις άδειες «... .. και σε περίπτωση που οι αρμόδιες αρχές καταχρώντο την εξουσία τους, να προσφύγει αμέσως στο Ανώτατο Δικαστήριο, πράγμα το οποίο, όπως έχω αναφέρει πιο πάνω, έχει πράξει αλλά μετά από πάροδο κάποιου χρόνου.» Παρενθετικά σημειώνουμε ότι το δικαστήριο, διέταξε

την επιστροφή των ποτών που είχαν κατασχεθεί και κρατούνταν ως τεκμήρια ενόψει του γεγονότος ότι το κέντρο λειτουργούσε πλέον κανονικά.

Ο προσδιορισμός της ποινής και η επιμέτρηση του ύψους της αποτελούν πρωταρχική ευθύνη του πρωτόδικου δικαστηρίου. Το Εφετείο επεμβαίνει για να αντικαταστήσει την πρωτόδικη κρίση με τη δική του στις περιπτώσεις όπου διαπιστώνεται,

(α) εσφαλμένη καθοδήγηση του πρωτόδικου δικαστηρίου αναφορικά με τα γεγονότα ή το νόμο ή και τα δύο, ή

(β) πρόσδοση σημασίας σε εξωγενείς παράγοντες στον καθορισμό της ποινής, ή

(γ) η ποινή εμφανίζεται έκδηλα υπερβολική ή έκδηλα ανεπαρκής εφόσον η έκδηλη υπερβολή αναδύεται εξ αντικειμένου με τη διαστολή μεταξύ αδικήματος και τιμωρίας. Βλ. *Philippou v. Republic (1983) 2 C.L.R. 245*, *Γεωργίου v. Αστυνομίας (1991) 2 A.A.Δ. 525* και *Μιχαήλ κ.ά. v. Αστυνομίας (1997) 2 A.A.Δ. 362*.

Το προβλεπόμενο από το νόμο ανώτατο όριο της ποινής είναι ένας από τους παράγοντες που προσδιορίζουν το βαθμό της σοβαρότητας του αδικήματος. Το μέγιστο ύψος της ποινής που προβλέπεται από το νόμο αποτελεί την αφετηρία για σκοπούς επιμέτρησης της ποινής. Ωστόσο, η κάθε υπόθεση πρέπει να κρίνεται με βάση τα δικά της γεγονότα και περιστατικά. Στην παρούσα υπόθεση το δεσπάζον πραγματικό γεγονός είναι ότι για τη νόμιμη λειτουργία του κέντρου “SECRETS” στη Λάρνακα, ο εφεσείων εξασφάλισε εξαρχής όλες τις προβλεπόμενες από το νόμο και τους κανονισμούς άδειες και προτού αυτές λήξουν, ζήτησε έγκαιρα την ανανέωση τους δηλώνοντας έτσι και το αυτονόητο, ότι δηλαδή, το κέντρο ήταν έτοιμο για τις αναγκαίες επιθεωρήσεις οι οποίες αποτελούσαν προϋπόθεση για την έκδοση/ανανέωση των επίδικων αδειών. Προκύπτει επίσης από τα γεγονότα ότι ο εφεσείων επανειλημμένα αποτάθηκε προς το Δήμο Λάρνακας για την προώθηση των αιτήσεων του χωρίς όμως αποτέλεσμα. Από τον ίδιο δεν ζητήθηκε να πράξει οτιδήποτε για να συμμορφωθεί προς τα απαιτούμενα και αυτός να αρνήθηκε. Προφανώς, η Κατηγορούσα Αρχή, γνώριζε ότι η καθυστέρηση που είχε μεσολαβήσει μέχρι την έκδοση των αδειών δεν οφειλόταν στον εφεσείοντα. Κάτω από αυτές τις περιστάσεις και το πνεύμα που δημιουργούν οι αρχές της χρηστής διοίκησης, θεωρούμε πως το θέμα έπρεπε να τύχει διαφορετικού χειρισμού, ευνοϊκότερου για τον εφεσείοντα. Εδώ δεν είναι η περίπτωση ατόμου που περιφρόνησε τις διαδικασίες που προβλέπουν ο νόμος και οι κανονισμοί και συνειδητά επέλεξε να ακολουθήσει το δρόμο της παρανομίας. Αυτά ακριβώς τα στοιχεία που οπωσδήποτε αποτελούν σοβαρούς μετριαστικούς παράγοντες, φαίνεται πως διέλαθαν της προσοχής του πρωτόδικου δικαστηρίου. Προδήλως υπήρξε εσφαλμένη εκτίμηση των γεγονότων που οδήγησε στην επιβολή έκδηλα υπερβολικών ποινών.

Υπό τις περιστάσεις, η έφεση επιτυγχάνει και η πρωτόδικη απόφαση παραμερίζεται. Οι ποινές προστίμου σε κάθε κατηγορία αντικαθίστανται με

δέσμευση του εφεσείοντα με εγγύηση £1000 για δυο χρόνια από σήμερα να τηρεί τους νόμους και κανονισμούς που διέπουν τη λειτουργία των κέντρων αναψυχής. Δεν εκδίδεται διαταγή για έξοδα.

Η έφεση επιτρέπεται. Οι ποινές προστίμου αντικαθίστανται ως ανωτέρω. Δεν εκδίδεται διαταγή για έξοδα.

Annex 2 – Statistics

Table 1: Implementation of Employment Directive 2000/78/EC

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|------|------|------|------|------|------|------|------------------------|
| Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | Decision still pending |
| National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.) | 0 | 0 | 0 | 0 | 0 | | 0 | 0 |
| National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination | 0 | 0 | 0 | 0 | 0 | 0 | 0 | Case still pending |

| | | | | | | | | |
|---|--|--|--|--|--|--|--|--|
| (employment, education, housing, goods and services etc.) | | | | | | | | |
|---|--|--|--|--|--|--|--|--|

Table 2: Freedom of Movement

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|------|------|------|------|------|------|------|--------------------------|
| Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC (i.e., LGBT partners having exercised their freedom of movement as granted to family members of EU citizens, whether under Directive 2004/38/EC or under previous instruments) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | No information available |
| Number of LGBT partners who claimed their right to residence but were denied this right | 0 | 0 | 0 | 0 | 0 | 0 | 0 | At least 1 |

Table 3: Asylum and subsidiary protection

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|--|------|------|------|------|------|------|------|------|
|--|------|------|------|------|------|------|------|------|

| | | | | | | | | |
|--|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation | Not known |

Table 4: Family reunification

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|--|------|------|------|------|------|------|------|------|
| Number of LGBT partners of third country nationals residing in your country benefiting from family reunification | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |

Table 5: Freedom of Assembly

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|--|------|------|------|------|------|------|------|------|
| Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Number of demonstrations against tolerance of LGBT people. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 6: Hate Speech and Criminal Law

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|------|------|------|------|------|------|------|------|
| Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | |
| Range of sanctions issued for homophobic hate speech | n/a |
| Number of non-criminal court cases initiated for homophobic statements | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

| | | | | | | | | |
|--|---|---|---|---|---|---|---|---|
| Number of non-criminal court cases initiated for homophobic statements which were successfully completed (leading to a decision in favour of the plaintiff, even if no sanctions other than symbolic were imposed) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
|--|---|---|---|---|---|---|---|---|

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|------|------|------|------|------|------|------|------|
| Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 7: Transgender issues

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Number of name changes effected due to change of gender | 1 | 1 | 0 | 0 | 0 | 1 | 1 | 0 |
| Number of persons who changed their gender/sex in your country under the applicable legislation | Not known |

