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The ILGA-Europe EUAction Plan and other documents relating to ILGA-Europe can be found at ILGA-Europe's homepage <http://inet.uni2.dk/~steff/ilgaeur.htm>

An update of the Survey on the Legal Situation for Gays and Lesbians in Europe can be found at <http://inet.uni2.dk/~steff/survey.htm>

A description of partnership laws and other laws regarding same-sex partners can be found at <http://inet.uni2.dk/~steff/partner.htm>

LISA GRANT CASE

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[<http://europa.eu.int/cj/en/cp/cp9758en.htm>]

Opinion of Advocate General Michael B. Elmer in
Case C-249/96 Lisa Jacqueline Grant v South-West
Trains Ltd

AN EMPLOYER'S REFUSAL TO GRANT A PAY BENEFIT IN RESPECT OF A COHABITEE OF THE SAME GENDER AS THE EMPLOYEE CONSTITUTES DISCRIMINATION ON THE BASIS OF GENDER

Advocate General Michael B. Elmer recommended that the Court should hold that a provision in an employer's pay regulations under which an employee was granted pay benefit in the form of travel concessions for a cohabitee of the opposite gender to the employee, but refused such concessions for a cohabitee of the same gender as the employee, constituted discrimination on the basis of gender which is contrary to Article 119 of the EC Treaty.

Background

Lisa Grant was an employee of South-West Trains whose contract of employment included entitlement to certain free and reduced rate travel concessions. Those concessions were also available to spouses and dependents of employees. The relevant regulation provides "Privilege tickets are granted for one common-law opposite sex spouse of staff" provided that a meaningful relationship has existed for a period of two years or more.

Mr Potter, who was Lisa Grant's predecessor in post, had in his time made a statutory declaration that a meaningful relationship had existed between him and his female cohabitee for a period of two years or more, and had on that basis obtained travel concession for her.

Lisa Grant made a similar application for travel concessions for her female cohabitee, Jillian Percey, with whom she had lived for more than two years, but her application was rejected on the ground that, under the ticket regulations, travel concessions were not granted for cohabitees of the same sex.

Lisa Grant then brought a case against South-West Trains before the Industrial Tribunal, Southampton claiming that the refusal to grant those travel concessions for her female cohabitee amounted to sex discrimination when a male employee in the same circumstances would obtain travel concessions for his female cohabitee. The Industrial Tribunal stayed the proceedings and referred several questions to the Court of Justice on the interpretation of Article 119 of

the EC Treaty and of the equal pay and equal treatment directives.

The role of the Advocate General

The Advocate General, acting with complete independence and impartiality, assists the Court by analysing the circumstances and the legal issues arising in the case and makes a recommendation to the Court on the answers which, in his view, it should give to the questions submitted by the Industrial Tribunal. His recommendation is not binding on the Court.

The Advocate General first concluded that the questions referred to the Court should be answered on the basis of Article 119 of the EC Treaty and referred to the Court's judgment in case C-13/94 P v S and Cornwall County Council [April 1996] concerning an employee who had been dismissed after informing his employer that he intended to undergo gender re-assignment. In the Advocate General's view the Court had, in that judgment, taken a decisive step away from an interpretation of the principle of equal treatment based on the traditional comparison between a female and a male employee.

The Court's judgement in P v S technically concerned the equal treatment directive but, because of its general character, it has corresponding significance for Article 119 of the EC Treaty which sets out the basic principle prohibiting discrimination based on sex. In order to give effect to that principle the Advocate General stated that it was appropriate to interpret Article 119 of the Treaty as precluding forms of discrimination against employees based exclusively, or essentially, on gender. He therefore concluded that Article 119 of the Treaty covered all cases where, on an objective assessment, there was discrimination based exclusively or essentially on gender.

He then examined the question of whether or not there was gender discrimination in the present case and pointed out that the ticket regulations made no mention of sexual orientation of the employee or cohabitee, and that the question of sexual orientation, under the objective content of that clause, is thus irrelevant as far as entitlement to the concessions is concerned.

However, the regulations made the concessions conditional on the cohabitees being of the "opposite sex" to the employee. The discrimination is therefore, under the objective content of the provision, exclusively gender based. Gender was simply the only decisive criterion in the provision. Thus the grant of the pay benefit in question depended upon the gender

of the employee, (inasmuch as employees must be of the opposite sex to their cohabitantes), and upon the gender of the cohabitee (inasmuch as cohabitantes must be of the opposite sex to the employee).

The Advocate General rejected the argument that that discrimination was a consequence of the definition of "a common law spouse" and was thus a family law issue which did not fall under the EC Treaty, since neither in statute nor common law did that expression have any legal significance in England. If the expression 'common law spouses' referred exclusively to persons of different sexes, there would be no reason to refer to a 'common law opposite sex spouse'. It was South-West Trains itself which introduced that restriction, leading to gender discrimination.

Accordingly, in this case, gender discrimination was not the result of family law legislation in the Member State in question and for that reason outside the scope of Community law.

He also found that the private conceptions of morality held by the employer in question were irrelevant in this context, whether or not they corresponded to those prevailing in the United Kingdom. South-West Train's justification amounted, in reality, to nothing more than saying that on the basis of its own private conceptions of morality that employer wished to set aside a fundamental principle of Community law in relation to some people because it did not care for their life style.

Under the Treaty it is the rule of law in the Community that the Court must safeguard; it is not its task to watch over questions of morality either in the individual Member States or in the Community, nor does it have any practical possibility of or mandate for doing so.

The Advocate General emphasized that there is nothing in either the EU Treaty or the EC Treaty to indicate that the rights and duties which result from the EC Treaty, including the right not to be discriminated against on the basis of gender, should not apply to homosexuals, to the handicapped, to persons of a particular ethnic origin or to persons holding particular religious views. Equality before the law is a fundamental principle in every community governed by the rule of law and accordingly in the Community as well. The rights and duties which result from Community law apply to all without discrimination and therefore also to the approximately 35 million citizens of the Community, depending on the method of calculation used, who are homosexual.

Finally he re-affirmed that Article 119 of the EC Treaty could be relied upon by individuals in national courts and that it was therefore for national courts to ensure that the disadvantaged group of employees was treated in the same way as the favoured group.

This press release is an unofficial document solely for the use of the press. It is available in English only. For further information or for a copy of the Opinion please contact Tom Kennedy, telephone 00352 4303 3355, or Gillian Byrne, telephone 00352 4303 3366 or send a fax to 00352 4303 2500.

NEW LUXEMBOURG ANTI-DISCRIMINATION LAW LISTS "SEXUAL ORIENTATION"

by Kurt Krickler

On the occasion of the European Year against Racism, the Luxembourg Parliament voted on 17 June 1997, a Bill to "Fight against Racism, Revisionism and other Discriminations". Articles 444 and 453 to 457 of the Luxembourg Penal Code provide now for prison sentences from one month to two years and/or fines from 10.001 to 1 million Francs for incitement to hatred, discrimination and violence or acts of discrimination against physical persons, a community or corporate body based on "their origin, colour, sex, SEXUAL ORIENTATION, family status, health condition, disability, life-style, political or philosophical convictions, trade union activities, their real or assumed affiliation to a certain ethnic group, nation, race or religion. The sentences provided will be higher by one third (3 months to three years, fine up to 1,500,000 Francs) if the offence is committed by a civil servant.

The French anti-discrimination provisions have served as a model for this Bill. The new law punishes, among other things, the refusal of goods or services, the advertising of such a refusal to groups based on categories mentioned above, and the obstruction of normal economic activity whatsoever. The new law also concerns the labour market, e.g., the non-employment or sacking of persons due to one of the above-mentioned reasons.

According to these new provisions, associations fighting against racism or for the rights of the communities concerned will have the right to institute proceedings even if individual(s) concerned do not sue for discrimination.

The Bill was voted with great majority (47 votes in favour, no vote against, ten abstentions). The law was signed by the Grand-Duke of Luxemburg on 19 July and came into force, after being published in the

"Memorial", the official journal of the Grand-Duchy, on 7 August 1997.

SCANDINAVIA - ADOPTION RIGHTS FOR GAY COUPLES ON THE HORIZON

By Darren Spedale

According to the Swedish Newspaper Aftonbladet, as well as representatives at the Swedish Gay organization RFSL, the Social Democratic Party in Sweden voted at their September 13-14 general assembly to support the rights of gays and lesbians to adopt children.

The Social Democrats are currently in control of the government in Sweden and have approximately 45% of the seats in the parliament. This means that they are in a very good position to pursue the issue and can most likely have their way.

The resolution, according to the article, was directed towards the rights of gays and lesbians to adopt children not related to either partner, which is to say children without an official parent.

According to a representative of RFSL, the Social Democrats' resolution at the assembly basically stated that sexual orientation should not be a hindrance to the right to adopt in Sweden. This would mean that gay couples would also have the right to adopt children. According to Mona Sahlin, the "point woman" for the Social Democrats on family issues: "We politicians can't choose who should have the right to be parents. Many homosexuals today have children."

The most likely outcome of this resolution will be the seating of a parliamentary committee to look into the issue of gay adoption. It is also hoped that the committee will look into other issues involving parental rights for gays and lesbians, including artificial insemination and stepchild adoption (adoption of one partner's child by the non-biological partner.) According to Mona Sahlin, as well as an RFSL representative, such a report and its recommendations could be finished as early as 1999, meaning that gay couples could have parental rights, including adoption and artificial insemination, in just 2 years' time.

Furthermore, the decision by the Social Democrats in Sweden will put additional pressure on the other Nordic governments to follow suit. A long history of Nordic cooperation in the area of family law means that Sweden's lead should open the doors to gay and lesbian parental rights in its Nordic neighbors. This is especially true in Denmark, where the Social

Democrats form the largest governmental party, and the issue of gay and lesbian parental rights has been debated for some time (although gay couples recently faced a setback by the parliament's decision this summer to prohibit lesbian insemination).

DUTCH LESBIAN ADOPTION REJECTED

By Rex Wockner

Holland's Supreme Court Sept. 5 refused to allow a lesbian couple to adopt each other's children, who were conceived via artificial insemination.

The women, named in court as Van Ijzendoor and Louman, plan to appeal to the European Court of Human Rights in Strasbourg. "Our children are the victims in this affair," they said in a statement. "In everyday life, they are brother and sister but society does not grant them any rights which go with this."

The Netherlands is often considered the most gay-friendly nation in the world.

Update on the story in EuroLetter 52:

SAN MARINO REPEALS ANTI-HOMOSEXUAL LEGISLATION

by Helmut Graupner, Rechtskomitee LAMBDA, Vienna

On July, 9th the parliament of San Marino voted for the repeal of Art. 274 of its Criminal Code. Under this article homosexual contacts could be punished with imprisonment from 3 months up to one year, if they have been engaged in "habitually" and thereby caused "public scandal". A conviction under this law resulted in loss of political rights and removal from public office for a period from 9 months to 2 years.

28 MPs voted for the repeal, 21 against, one abstained.

Art. 274 CC has been introduced with the CC 1975, while the CC 1865 did not contain special provisions for homosexual behavior. After the repeal the Criminal Law again treats homo- and heterosexual contacts alike (as it did in the years 1865 to 1975).

The age of consent is equally set at 14 (Art. 173 CP; the same as in Italy, see Euroletter 43, 11). Additionally (unlike in Italy) it is an offence to "incite a minor under 18 years to sexual corruption" (Art. 177 CC). This law (as similar laws in various countries have been) could be a source for discriminatory enforcement in the case of homosexual relations.

BRITAIN OKs GAY PARTNER IMMIGRATION

By Rex Wockner

Starting in October, foreign same-sex lovers of British citizens will be welcome to settle in the United Kingdom, reported *The Times*. Unmarried heterosexual partners will be allowed to immigrate as well.

The change resulted from a Home Office review of immigration law, the newspaper said.

Same-sex-partner immigration previously has required special permission.

A MORE EFFICIENT COURT OF HUMAN RIGHTS

By Ken Thomassen

The European Court of Human Rights will soon become a more accessible and efficient, according to a article by Andrew Drzemczewski in the OSCE ODIHR bulletin vol. 5, no. 3.

The present part-time monitoring institutions, namely the European Commission of Human Rights and the European Court of Human Rights, will cease to exist. A new European Court of Human Rights, operating on a full-time basis, will be established in Strasbourg. The system will be streamlined and all applicants will have direct access to the new court.

Revision of the Convention was necessitated by the increase in the number of applicants, their growing complexity, and the broadening of the Council of Europe's membership. The convention was designed for 10 or 12 member States, and it is quite simply impossible for the present monitoring arrangements to work effectively with the expected 38 to 40 States Parties. Revision of the monitoring machinery was therefore essential to strengthen its efficiency. In brief, the new system should make the machinery more accessible to individuals, accelerate the procedure, and create greater efficiency.

Cases that are clearly without merit will be taken out of the system at an early stage by a unanimous decision of the Court, which will sit as a three-judge committee (the cases will therefore be declared inadmissible). In the great majority of cases, the court will sit as a seven-judge Chamber. Only in exceptional cases will the Court, sitting as a Grand Chamber of 17 judges, decide on the most important issues.

As under the present system, individual applications and inter-State applications will exist side by side.

The application will subsequently be registered by a Chamber of the Court and assigned to a judge-Rapporteur. The judge-Rapporteur may refer the application to a three-judge committee, which may include the judge-Rapporteur. The committee may, by a unanimous decision, declare the application inadmissible; the decision will be final.

When the judge-Rapporteur considers that the application raises a question of principle and is not inadmissible, or when the committee is not unanimous in rejecting the complaint, the application will be examined by a chamber. A Chamber composed of seven judges will decide on the merits of the application, and if necessary, on its competence to adjudicate the case. The Chamber will place itself at the parties' disposal, with a view to friendly settlement. If not a friendly settlement can be reached, the Chamber will deliver its judgement.

Once the judgement has been delivered, the parties will have three months to request that the case be referred to the Grand Chamber. A panel of five judges of the Grand Chamber will determine whether the request for a re-hearing is admissible. The Chamber's judgement will become final when there is no further possibility of a referral to the Grand Chamber. The Grand Chamber's judgement will be final and binding in international law.

The new European Court of Human Rights will enter into force one year after Protocol No. 11 to the European Convention on Human Rights has been ratified by all States Parties to the Convention. Of the 36 contracting States only Italy has not ratified the protocol.