

Case Reports

2021/28

Kalliri follow-up: Minimum height requirement for admission to police school found discriminatory (GR)

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Summary

Following up on the ECJ's judgment in the *Kalliri* case, the Greek Council of State (Conseil d'État) held in a Plenary Session decision that a legal provision of Presidential Decree 90/2003 requiring that candidates for admission to the Greek Officers and Policemen School must be at least 1.70 m, independently of their sex, was indirectly discriminatory against female candidates. It based its decision on Directive 76/207/EEC as well as principles of the Greek constitution.

Facts

In accordance with the provisions of Presidential Decree 90/2003, by virtue of a decision of the Greek police chief, a competition notice for enrolment in the Officers and Policemen School for the academic year 2007–2008 was published. Clause II.6 of the competition notice required that candidates be at least 1.70 m without shoes.

Ms Kalliri submitted her application to the police department of Vrachati to participate in this competition, accompanied by all the required supporting documents. Her application was rejected as she was too short – 1.68 m.

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Proceedings

The claimant disputed the following acts and decisions before the Athens Administrative Court of Appeal:

- the acts of the local police department by which her participation to the admission exams had been rejected, namely that she did not have the required height;
- the decision of the Ministry of Education and Religious Affairs by which the lists of the successful candidates had been approved; and
- the decision of the Ministry of the Interior/Public Order by which the successful candidates were being called to study at the police school.

The Administrative Court of Appeals upheld her claim (decision 734/2008), holding that Article 1(1) of Presidential Decree 90/2003 was contrary to the constitutional principle of equality of sexes, as well as to Directive 76/207/EEC and requested the Administration to act accordingly in order to remedy this situation.

The Minister of the Interior and the Minister of Education and Religious Affairs appealed such decision before the Conseil d'État, which decided to stay the proceedings and to refer the following question to the ECJ for a preliminary ruling (decision 1420/2016):

Is Article 1(1) of Presidential Decree 90/2003, which amended Article 2(1) of Presidential Decree 4/1995 and provides that civilian candidates for the Officers' School and the School for Policemen of the Police Academy must, amongst other qualifications, "be of a height (in the case of men and women) of at least 1.70 m", compatible with Directives 76/207/EEC, 2002/73/EC and 2006/54/EC, which prohibit any indirect discrimination on grounds of sex as regards access to employment, vocational training, promotion and working conditions, in the public sector (unless that ultimate different treatment is attributable to factors which are objectively justified and are unrelated to any discrimination on grounds of sex and does not go beyond what is appropriate and necessary in order to serve the objective pursued by the measure?

The ECJ (case C-409/16) held that the provisions of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 Septem-

ber 2002, must be interpreted as precluding a law of a Member State, such as that at issue in the main proceedings, which makes candidates' admission to the competition for entry to the police school of that Member State subject, whatever their sex, to a requirement that they are of a physical height of at least 1.70 m, since that law works to the disadvantage of a far greater number of women compared with men and that law does not appear to be either appropriate or necessary to achieve the legitimate objective that it pursues, which it is for the national court to determine.

Following the ECJ decision, the *Conseil d'État* proceeded to further refer the case to its Plenary Session due to its importance on the unconstitutionality of the legal provision at hand (decision 2055/2019).

Judgment

The Conseil d'État, in its Plenary Session, rejected all grounds of appeal of the Ministry of the Interior and of the Ministry of Education and Religious Affairs (decisions 902 – 907/2021).

The Court considered scientific and statistical data for the years 2001 to 2009, according to which:

- the average height of men aged between 18–24 years is 1.77–1.78 m, while the height of women in the same age range is 1.63 m;
- 20% of the male population has a height lower than 1.70 m;
- 19% of the female population has a height of 1.70 m and above.

The Court concluded that the percentage of female candidates excluded from the possibility of access to the police school due to a height lower than that requested appeared disproportionately bigger (quadruple) to the percentage of the male candidates who were excluded for the same reason. Furthermore, it did not result from any legal provisions nor from any compelling reasons related to the specific requirements of the police officers duties or their exercise conditions underlining as a necessary qualification for the female candidates, common to both sexes and importantly higher (i.e. 7 cm) than the average female height.

Consequently, the *Conseil d'État* concluded that such legal provision was indirectly discriminatory against female candidates, according to the notion of Directive 76/207/EEC, and was unjustified as regards the adequacy and necessity of the above minimum limit. The constitutional principles of equality of sexes and proportionality were thus violated. According to the opinion of four members of the Court, the provision in question was predominantly contrary to the constitutional principles of equality of sexes and meritocracy, because while it pursued a legal purpose (combination of physical strength, speed and endurance capacities reasonably connected to the normal police officers duties), it was not adequate for serving such purpose, given that these

physical qualifications are not linked to a specific minimum height.

Commentary

The Conseil d'État by such decisions (the one referring this case to its Plenary Session and the Plenary Session decision) has put an end to a legal issue which started more than 14 years ago.

By such lengthy and detailed decisions, it was remarkably elaborate on the exceptions allowed to the principle of equality and meritocracy. It gave equal weight to both the Greek constitution and EU law. It underlined that it is up to the national judge of a Member State to decide whether the purposes set by the law are irrelevant to any sex discrimination and whether such provisions may contribute to the realization of specific purposes. It repeatedly referred to the ECJ case law (cases C-273/97 (Sirdar), C-243/95 (Hill), C-187/00 (Kutz-Bauer) and C-196/02 (Nikoloudi)).

The Court further extensively reviewed all the statistical data and information submitted and the survey on 'Minimum body height requirements for police officers – An international comparison' of 2011 and focused on the existing status of admission into the police force in European countries. In the end, the Greek government's plea that physical qualifications were crucial for the performance of the Greek police's task – among others being the safeguarding of public peace and order, the prevention and suppression of crime, the safeguarding of public demonstrations and the management of emergencies – proved unsuccessful. In fact, it concluded that the requirement on a minimum height limit constituted a discrimination that cannot be justified by public interest reasons.

Comments from other jurisdictions

Austria (Hans Georg Laimer and Melina Peer, Zeiler Floyd Zadkovich): This is an interesting judgment for Austria as well, since in Austria there are some professions in the public and private sector where the achievement of a certain minimum height is required for admission. For example, an Austrian airline requires a minimum height of 165 cm for pilot training. The Linz professional fire brigade also requires a minimum height of 165 cm. For admission to the Austrian police, a minimum height requirement existed as well. Women had to be taller than 163 cm and men taller than 168 cm. However, as of January 2012, this minimum height requirement was abolished.

Based on the decision of the ECJ, minimum height requirements as a prerequisite for access to a certain profession have to be reconsidered. If the aim of such a minimum height requirement is to ensure sufficient

physical fitness, other measures than minimum height requirements, such as individual testing of physical fitness, appear to be more appropriate.

Gender-neutral minimum height requirements may only be permissible if statistical or scientifically objective proof can be provided that the work equipment essential for the occupation can only be operated with a certain height or that essential parts of the activity can only be performed with a certain height.

Germany (Leif Born, Luther Rechtsanwaltsgesellschaft mbH): In Germany, there is a peculiarity that – due to the federal system – the 16 federal states recruit police officers independently and have different recruitment requirements. For example, in North Rhine-Westphalia the minimum body height for applicants to the police service is 1.63 m, in Saxony 1.60 m, in Bremen there is no height requirement and in Lower Saxony applicants smaller than 1.63 m must pass a special sports test. This already shows the uncertainty and disagreement on this legal issue.

In 2018, the Higher Administrative Court of Münster (*Oberverwaltungsgericht*, the ‘OVG’) ruled that a minimum body height of 1.63 m for applicants to the police service, irrespective of gender, was lawful. The OVG emphasised that the measure could be indirectly discriminatory as it disadvantages a higher number of women than men. However, in the OVG’s view, any indirect discrimination would be objectively justified, since it should ensure the proper performance of the police service and the functioning of important state institutions. An important factor in the Court’s decision was a scientific study, which came to the conclusion that only a minimum height of 1.63 m could guarantee the fitness and ability to complete most of the police duties. In conclusion, the Court saw no contradiction with the ECJ’s *Kalliri* decision. (A more detailed commentary on this case can be found in *EELC 2019/15*.)

In 2019, the OVG Saxony ruled that the minimum body height of 1.60 m applicable in Saxony was not lawful. The Court reasoned that such a restriction of the fundamental rights of applicants could only be made by parliament. The regulation at issue had been enacted by the government. The Court did not comment on the question of gender discrimination.

Despite these contradictory decisions, most of the German courts tend to consider the requirement of a minimum body height to be justified. However, it should be noted that no federal court has yet ruled on this issue and thus – unlike in Greece – an end to the discussion is not yet in sight.

Hungary (Gabriella Ormai, CMS Cameron McKenna Nabarro Olswang LLP Magyarországi): In Hungary, the requirement of equal treatment, especially in connection with labour law, serves to ignite heated debates in legal circles. In this case, similarly to the decision of the Greek Council of State, in Hungary an indirect discrimination based on height might not be acceptable regarding admittance to educational institutions, however, it

might be accepted with regard to the employment of the person in question.

Article 14(2) of Directive No. 2006/54/EC enables the Member States to accept differentiations regarding working circumstances based on gender, if the differentiation has a reasonable cause regarding the nature of work and if the differentiation is proportionate. However, this is not related to the admittance to educational institutions, but only for the employment of the person in question. But, as a matter of course, a person would only attend a police school if he/she intends to work in associated jobs in the future.

The relevant Hungarian law implemented the above rule in the Hungarian legal system, according to which the circumstances of a job profile shall be examined on a case-by-case basis as to whether a minimum height requirement can be accepted as a prerequisite of employment. Based on such an examination, it may be lawful in Hungary to prescribe that police officers have a minimum height as a prerequisite of their employment if the nature of work justifies this, but, in the absence of this, (e.g. for regular office workers), such a discrimination would also be discriminatory in Hungary.

In summary, the Hungarian authorities (e.g. the Equal Treatment Authority or the courts) would have come to the same conclusion regarding the admittance to the school, whereas they might come to a different conclusion regarding the employment of the person in question, based on the exact type of work. However, the ECJ decision, subject to this case, might have an impact on the adjudgment of this issue in the future in Hungary as well.

Subject: Gender Discrimination

Parties: Maria-Eleni Kalliri (and other claimants in 5 similar cases) – v – Ministry of the Interior and Ministry of Education and Religious Affairs
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