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Case C-507/18 NH v AC

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diritti LGBTI Rete Lenford:

Homophobic speech and EU

anti-discrimination law

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Case C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford: Homophobic speech and EU anti-discrimination law*

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Abstract

In the *NH* case – which can be characterised as a sequel to the *Asociația Accept* ruling delivered in 2013 – the Court of Justice of the European Union was confronted, once more, with an incident of homophobic speech. In this case, like in *Asociația Accept*, the Court was asked to interpret Directive 2000/78 and to examine the terms in which it can prohibit homophobic speech in the area of employment. Although the ruling in *NH* is not particularly ground-breaking given that it mostly affirms the principles established in *Asociația Accept*, it nonetheless offers useful clarifications. This note will, therefore, present the facts of the case and the Court's ruling and will then explore its importance, while considering whether the Court has missed an opportunity to do more to protect lesbian, gay, and bisexual persons from homophobic speech in the area of employment.

Keywords

EU law, LGB rights, discrimination based on sexual orientation, homophobic speech, Directive 2000/78

1. Introduction

In the *NH* case¹ – which can be characterised as a sequel to the *Asociația Accept* ruling delivered in 2013² – the Court of Justice of the European Union (hereinafter ‘CJEU’ or ‘the Court’) was

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1. Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, EU:C:2020:289.
 2. Case C-81/12 *Asociația Accept*, EU:C:2013:27.

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confronted, once more, with an incident of homophobic speech. In this case, like in *Asociația Accept*, the Court was asked to interpret Directive 2000/78³ and to examine the terms in which it can prohibit homophobic speech in the area of employment. Although the ruling in *NH* is not particularly ground-breaking given that it mostly affirms the principles established in *Asociația Accept*, it, nonetheless, offers useful clarifications. This note will, therefore, present the facts of the case and the Court's ruling and will then explore its importance, while considering whether the Court has missed an opportunity to do more to protect lesbian, gay, and bisexual (hereinafter 'LGB') persons from homophobic speech in the area of employment.

2. Facts

NH is a senior lawyer associated with an Italian law firm. During an interview in a radio programme in Italy, NH stated that he would never hire a gay person to work in his law firm, nor wish to use the services of such a person. At the time when NH made those statements, there was no recruitment procedure open at his law firm. In response to those remarks, the Associazione Avvocatura per i diritti LGBTI – Rete Lenford ('the Associazione') – an Italian association of lawyers that defends the rights of LGBTI persons in court proceedings – decided to bring proceedings against NH before the Tribunale di Bergamo, asking that he be ordered to publish a section of the order in a national daily newspaper, to establish an action plan to eliminate discrimination, and to pay damages to the Associazione for non-material loss. The argument was that the statements made by NH during the interview amounted to discrimination on the grounds of sexual orientation and thus were contrary to the Italian legislation (Legislative Decree No 216⁴) which implemented Directive 2000/78.⁵ The Tribunale found that NH had acted illegally by engaging in discrimination based on sexual orientation in the context of employment and, thus, made the publication order requested and ordered him to pay EUR 10,000 to the Associazione in damages. NH then appealed against this order to the Corte d'appello di Brescia and, after his appeal was dismissed, to the Corte suprema di cassazione. The latter decided to stay the proceedings and to refer two questions for a preliminary ruling to the CJEU.

The questions regarded the interpretation of Directive 2000/78 and concerned the material scope of this instrument as well as the standing of an association of lawyers to bring an action in circumstances such as those at issue in the main proceedings. In particular, the first question was whether Article 9(2) of the Directive must be interpreted as meaning that, in the absence of an identifiable victim, an association such as the Associazione constitutes a representative entity for the purposes of this provision and, thus, must automatically be deemed to have standing to bring judicial proceedings in order to enforce the prohibition laid down in the Directive.⁶ The second question was whether homophobic remarks such as those at issue on the facts of the case fall within

3. Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

4. Decreto legislativo n. 216 – Attuazione della direttiva 2000/78 per la parità di trattamento in materia di occupazione e di condizioni di lavoro, GURI No 187, of 13 August 2003, p. 4.

5. Directive 2000/78/EC.

6. Article 9(2) of Directive 2000/78/EC provides: 'Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive'.

the material scope of the Directive, even if they do not relate to any current or planned recruitment procedure by the interviewee.

3. CJEU judgment

The Court⁷ examined the second question referred first, that is, whether a situation such as that in the main proceedings falls within the material scope of Directive 2000/78.

It was, firstly, noted that Article 3(1)(a) of the Directive, which provides that it is to apply ‘in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions’, does not refer to the law of the Member States for the purpose of defining those terms and, as such, those terms must be given an autonomous and uniform interpretation throughout the EU.⁸ The Court then explained that given that the Directive is a specific expression of the general prohibition of discrimination laid down in Article 21 of the EU Charter of Fundamental Rights⁹ (hereinafter ‘EUCFR’ or ‘the Charter’),¹⁰ its scope of application cannot be interpreted restrictively.¹¹ The Court’s ruling in *Asociația Accept*¹² was then recalled,¹³ before proceeding to note that in cases where homophobic statements are made when there is no current or planned recruitment procedure, the situation can still fall within the material scope of Directive 2000/78, provided that the link between those statements and the conditions for access to employment and to occupation with that employer must not be hypothetical, which is a question for the national court hearing the case to decide.¹⁴ The Court then listed the three criteria that must be taken into account for determining whether the link between the statement made and the conditions for access to employment and occupation is not hypothetical, almost quoting word for word the Advocate General’s Opinion on this point.¹⁵ First, the person making the statement must either be the potential employer or must be, in law or in fact, capable of exerting a decisive influence on the recruitment policy or a recruitment decision of a potential employer, or, at the very least, must be perceived by the public or the social groups concerned as capable of exerting such influence.¹⁶ Second, the statements made must relate to the conditions for access to employment or to occupation with the employer concerned and establish the employer’s intention to discriminate on one of the grounds laid down in Directive 2000/78.¹⁷ Third, the context in which the statements at issue were made – in particular, their public or private character, or the fact that they were broadcast to the public, whether via traditional media or social networks – must be taken into consideration.¹⁸

7. The CJEU in its judgment followed closely the Opinion of Advocate General Sharpston and, for this reason, the Opinion will not be analysed separately in this piece.

8. Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 31.

9. Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391.

10. Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 38.

11. Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 39.

12. Case C-81/12 *Asociația Accept*.

13. Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 40–42.

14. *Ibid.*, para. 43.

15. Opinion of Advocate General Sharpston in Case C-507/18 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, EU:C:2019:922, para. 53–56.

16. *Ibid.*, para. 44.

17. *Ibid.*, para. 45.

18. *Ibid.*, para. 46.

The Court, then, proceeded to examine the possible clash between the prohibition imposed by Directive 2000/78 on discrimination based on sexual orientation and the freedom of expression, which is protected under Article 11 EUCFR. It concluded – again, in line with the Advocate General’s Opinion¹⁹ – that the limitations on the freedom of expression which ensue from the prohibition laid down in the Directive are justified as they are provided for by law (given that they result from the Directive),²⁰ and ‘respect the essence of the freedom of expression, since they are applied only for the purpose of attaining the objectives of Directive 2000/78, namely to safeguard the principle of equal treatment in employment and occupation and the attainment of a high level of employment and social protection.’²¹ Moreover, the limitations respect the principle of proportionality, since the interference with the exercise of the freedom of expression does not go beyond what is necessary to attain the objectives of the Directive in that only statements that constitute discrimination in employment and occupation are prohibited,²² and since they are necessary to guarantee the rights in matters of employment and occupation of persons who belong to groups of persons characterised by one of the prohibited grounds under the Directive.²³

Next, the Court examined the first question referred, which asked whether the Associazione must automatically be deemed to have standing to bring judicial proceedings in order to enforce the Directive. The Court’s reasoning in this part of the judgment is rather brief and, once more, follows the (detailed) suggestions of the Advocate General.²⁴ It was, in particular, pointed out that although Article 9(2) of the Directive²⁵ does not require an association such as the Associazione to be given standing where no injured party can be identified,²⁶ Article 8(1) of the Directive,²⁷ read in the light of recital 28,²⁸ indicates that Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the Directive.²⁹ In line with this, the Court had already held – in *Asociația Accept* – that Member States can grant the right to associations with a legitimate interest in ensuring compliance with the Directive to bring proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant.³⁰ The Court, then, explained that when a Member State chooses to give standing to associations where there is no identifiable injured party, it is for that Member State to decide whether the for-profit or non-profit status of the association can affect its standing to bring such proceedings and to specify the

19. Opinion of Advocate General Sharpston in Case C-507/18 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 60–71.

20. Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 50.

21. *Ibid.*, para. 51.

22. *Ibid.*, para. 52.

23. *Ibid.*, para. 53.

24. Opinion of Advocate General Sharpston in Case C-507/18 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 78–110.

25. For the text of this provision see n. 6 above.

26. Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 61.

27. Article 8(1) of Directive 2000/78/EC provides: ‘Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive’.

28. Recital 28 of Directive 2000/78/EC provides: ‘This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State’.

29. Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 62.

30. *Ibid.*, para. 63. See also Case C-81/12 *Asociația Accept*, para. 37.

sanctions that may be imposed at the end of it, provided that the sanctions are – as required by Article 17 of the Directive – effective, proportionate and dissuasive.³¹

4. Comments

The *NH* case is – effectively – a sequel to the *Asociația Accept* ruling, delivered by the Court in 2013,³² and hailed as a positive step towards the protection of LGB rights under EU law.³³ In that case, it was held that homophobic statements in relation to the recruitment of gay footballers by a Romanian professional football club, which were made in an interview given to Romanian media by someone who presented himself, and was considered by public opinion, to play a leading role in that club, could amount to direct discrimination based on sexual orientation, contrary to Directive 2000/78. Like in the case under examination, in *Asociația Accept*, the claim was not brought by a victim of the discrimination complained of: it was brought by a non-governmental organisation (*Asociația Accept*) whose aim is to promote and protect LGBT rights in Romania. Relying on the previous *Feryn* case³⁴ – which concerned the prohibition of racial discrimination laid down in Directive 2000/43³⁵ – the Court in *Asociația Accept* noted that in order for a finding of direct discrimination under Directive 2000/78 to be made, it is not necessary for there to be an identifiable complainant who claims to have been the victim of such discrimination,³⁶ and, as noted above, Member States can give standing to associations with a legitimate interest in ensuring compliance with the Directive, when they do not act in the name of a specific complainant or in the absence of an unidentifiable complainant.³⁷ Finally, the fact that the employer associated with the person who made the statements might not have started any negotiations with a view to recruiting someone presented as being gay, does not preclude the possibility of establishing facts from which it may be inferred that that employer has been guilty of discrimination.³⁸

Asociația Accept and, now, *NH*, are, without a doubt, landmark rulings which seek to achieve substantive – rather than formal – equality for LGB individuals. With these rulings, the Court ensures that even potential obstacles to access to the employment market which are liable to occur as a result of the employer's homophobia which is demonstrated by oral statements made in public, are prohibited – and this is so even in the absence of a *formal* recruitment policy which discriminates against LGB persons.³⁹ The Court's analysis in both cases demonstrates that the examination

31. Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 64.

32. Case C-81/12 *Asociația Accept*.

33. See, among others, U. Belavusau, 'A Penalty Card for Homophobia from EU Non-discrimination Law: Comment on *Asociația Accept* (C-8/12)', 21 *CJEL* (2015), p. 353; A. Tryfonidou, 'Discrimination on the Grounds of Sexual Orientation and Gender Identity', in S. Vogenauer and S. Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart, 2017), p. 386–387; R. Wintemute, 'In Extending Human Rights, which European Court is Substantively "Braver" and Procedurally "Fitter"?: The Example of Sexual Orientation and Gender Identity Discrimination', in S. Morano-Foadi and L. Vickers (eds.), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart, 2015), p. 192.

34. Case C-54/07 *Firma Feryn*, EU:C:2008:397.

35. Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22.

36. Case C-81/12 *Asociația Accept*, para. 36.

37. *Ibid.*, para. 37.

38. *Ibid.*, para. 52.

39. A. Tryfonidou, 'The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU law', in U. Belavusau and K. Henrard (eds.), *EU Anti-Discrimination Law Beyond Gender* (Hart, 2019), p. 238.

is no longer confined to a consideration of whether a specific person has been discriminated against in comparison with another person in similar circumstances at a particular instance. Rather, it, more broadly, considers whether a certain practice or action of a person or body is such as to create a discriminatory climate against a segment of the population which shares a prohibited characteristic under Directive 2000/78, which results in a potential obstacle to the employment market.⁴⁰ The approach in these two cases should, therefore, be applauded as it demonstrates the Court's desire to be sensitive to the specific considerations that pertain to LGB individuals. By allowing actions to be brought by bodies such as *Asociația Accept* and the *Associazione* and not by an identifiable individual, the CJEU has ensured that homophobic statements can be condemned under the Directive, without requiring LGB individuals who do not wish to 'come out' by bringing an action claiming that they have been the victims of discrimination based on sexual orientation to do so, something which is especially important for individuals who live in Member States where homophobia is still prevalent.⁴¹

The ruling in *NH* does not establish novel rules or principles and, thus, it is unsurprising that it did not attract scholarly or media attention when it was delivered: the Court followed closely, and affirmed, its ruling in *Asociația Accept*. Therefore, faced with the question of what the ruling in *NH* has added to the panoply of rights that EU law bestows on LGB persons, one could say: 'not much'.

The ruling did, however, engage with two issues, which the Court did not consider in *Asociația Accept*.

The first concerns the outer limits of the material scope of Directive 2000/78. In particular, in *NH*, the CJEU for the first time laid down three criteria that must be taken into account by the national court when determining whether, in cases where there is no current or planned recruitment procedure (as was the case in both *NH* and *Asociația Accept*), the link between the contested statements and the conditions for access to employment with a specific employer is purely hypothetical. In this way, it sought to sketch the contours of the material scope of Directive 2000/78 – which applies only in the area of employment⁴² – by ensuring that homophobic statements are only caught by the Directive when they are made in the context of employment and, in particular, when they have a *real link* with *access* to employment. Such a clearer delimitation of the instances in which Directive 2000/78 can apply was, after all, called for by the parties to the case and the referring court itself and is important in ensuring that the Court is not castigated for over-expanding the scope of application of EU law, especially in a context where – as we shall see below – there is allegedly a clash with another fundamental right, namely, the freedom of expression.

Nonetheless, the Court's reading of the facts in both *NH* and *Asociația Accept* as involving, merely, discriminatory obstacles to *access* to employment is myopic. Although, indeed, the contested statements in both cases indicated that LGB persons would not be hired and, thus, at first glance, they appeared to be discriminatory against LGB persons with regard to *access to employment*, considering that the potential impact of such statements ends there is short-sighted. This is because the negative impact that such statements can have on *existing employees* is ignored. If

40. *Ibid.*, p. 239.

41. *Ibid.*, p. 239. See also U. Belavusau, 21 *CJEL* (2015), p. 369–370.

42. Discrimination on the grounds of sexual orientation in areas outside employment would have been prohibited if the Commission's Proposal for a Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, COM(2008) 426 final became law. The proposal remains in legal limbo for the last 12 years. However, there is another – primary – source of a prohibition of discrimination based on sexual orientation outside employment, and this is Article 21 EUCFR.

someone becomes aware that their employer would not have hired them if he knew they are LGB, then they can probably expect that if their employer finds out about their sexuality, he will discriminate against them with regard also to other issues such as pay and career progression or they may even lose their job – these matters are clearly covered by ‘employment and working conditions’, which, as we know from Article 3(1)(c) of Directive 2000/78, fall within its material scope; in any event, the overall homophobic climate that will prevail at the workplace following such statements will probably also constitute harassment, within the meaning of Article 2(3) of the Directive, which also amounts to discrimination based on sexual orientation for the purposes of the Directive.⁴³ Accordingly, the Court should have noted this in its judgment, even if merely as an *obiter dictum*.

The second issue with which the Court engaged for the first time in *NH* is the need to balance, on the one hand, the freedom of expression, with, on the other hand, the right to equality and to be free from discrimination on the grounds of sexual orientation, which are both rights protected under the EUCFR (Articles 11 and 21 respectively). This issue was not mentioned at all in *Asociația Accept*. In *NH*, however, the referring court questioned ‘the limits imposed on the exercise of the freedom of expression by the legislation combating discrimination in matters of employment and occupation’,⁴⁴ asking whether ‘mere statements which do not have, at the very least, the characteristics of a public offer of employment are protected by the freedom of expression’.⁴⁵

As we saw earlier, when examining the judgment, the Court found that reading the Directive as prohibiting homophobic statements in situations such as those in the main proceedings constituted a justified interference with the right to freedom of expression. And although the Court’s approach to this issue has been characterised as ‘lopsided’,⁴⁶ favouring the protection of the right to non-discrimination over the freedom of expression, in my view, on the contrary, it does not go far enough in the protection of the right to be free from discrimination based on sexual orientation. This is because it seems to imply that the freedom to engage in homophobic speech needs to be protected as an aspect of the freedom of expression which means that it can be deemed acceptable under certain circumstances. The CJEU in *NH*, in fact, followed the approach of the European Court of Human Rights (ECtHR) in *Vejdeland and others v. Sweden*,⁴⁷ albeit without making any reference to that or any other ECtHR case-law on the matter. In *Vejdeland* the ECtHR found that Sweden was not in violation of Article 10 of the European Convention on Human Rights (ECHR) (which provides for the right to freedom of expression), when a criminal prosecution was brought against a number of persons who went to an upper secondary school and distributed leaflets containing homophobic speech. The ECtHR recalled previous rulings where it held that ‘attacks

43. Article 2(3) of Directive 2000/78/EC provides: ‘Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.’

44. Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, para. 25.

45. *Ibid.*, para. 26.

46. J. Miller, ‘In a Tight Spot, the Court of Justice Delivers a Lopsided Judgment: *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*’, *EU Law Live* (2020), <https://eulawlive.com/op-ed-in-a-tight-spot-the-court-of-justice-delivers-a-lopsided-judgment-nh-v-associazione-avvocatura-per-i-diritti-lgbti-rete-lenford-by-jeffrey-miller/>.

47. ECtHR, *Vejdeland v. Sweden*, Judgment of 9 February 2012, Application No. 1813/07. This was more recently confirmed in ECtHR, *Lilliendahl v. Iceland*, Judgment of 12 May 2020, Application No. 29297/18.

on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner', and then proceeded to point out that 'discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour"'.⁴⁸ It then went on to balance the right to freedom of expression with the need to protect the rights and reputation of others, and found that *on the facts of the case* the latter prevailed as the interference with the freedom of expression was justified.⁴⁹

Nonetheless, in a democratic society which is based on the protection of fundamental human rights and equality, there should be zero tolerance for homophobic (or any other type of hate) speech, and thus the right to freedom of expression should, simply, be read as not protecting homophobic speech, *under any circumstances*.⁵⁰ As Judge Yudkivska, who was joined in her concurring opinion in the *Vejdeland* case by Judge Villiger, has argued:

cases like the present one should not be viewed merely as a balancing exercise between the applicants' freedom of speech and the targeted group's right to protect their reputation. Hate speech is destructive for democratic society as a whole, since 'prejudicial messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups', and therefore it should not be protected.⁵¹

Accordingly, the correct approach for the CJEU would have been to simply rule that homophobic speech is not protected under Article 11 EUCFR as the EU should have zero tolerance for this. This would mean that whenever the Court is confronted with homophobic speech, it will not need to engage in the balancing exercise between the right to freedom of expression (which should be read as *not* protecting homophobic speech) and the right to be free from discrimination based on sexual orientation. It is true that in this way the CJEU would be affording more protection from homophobic speech under the EUCFR than the ECtHR does when interpreting the ECHR, however, this is not problematic, given that Article 52(3) EUCFR provides that in so far as the Charter contains rights which correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR, *without this, however, preventing Union law from providing more extensive protection*.

48. ECtHR, *Vejdeland v. Sweden*, para. 55.

49. In the recent case ECtHR, *Beizaras and Levickas v. Lithuania*, Judgment of 14 January 2020, Application No. 41288/15, the ECtHR went further and held that Lithuania was in breach of Article 8 ECHR (which provides the right to respect for private and family life), read in conjunction with Article 14 ECHR (which prohibits discrimination on, inter alia, the grounds of sexual orientation with regard to the enjoyment of the rights provided in the ECHR) as a result of failing to fulfil its positive obligation to LGB individuals to effectively investigate, prosecute, and punish homophobic hate speech which took the form of homophobic comments and threats made on a picture depicting a same-sex couple kissing, which was posted (as a public post) on Facebook by the couple. For comments on the case see I. Milkaite, 'A Picture of a Same-Sex Kiss on Facebook Wreaks Havoc: Beizaras and Levickas v. Lithuania', *Strasbourg Observers* (2020), <https://strasbourgothers.com/2020/02/07/a-picture-of-a-same-sex-kiss-on-facebook-wreaks-havoc-beizaras-and-levickas-v-lithuania/>.

50. For a similar view see P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2014), p. 176–181.

51. Para. 9 of the Concurring Opinion of Judge Yudkivska in ECtHR, *Vejdeland v. Sweden*.

5. Conclusion

Although the ruling in *NH* is not particularly ground-breaking given that it mostly affirms the principles established in *Asociația Accept*, it nonetheless offers useful clarifications regarding the application of Directive 2000/78 in situations involving homophobic speech. At the same time, it constitutes a missed opportunity for the CJEU to take a clear, decisive stance against homophobic speech in the area of employment. On the one hand, the Court seems to have taken a rather restrictive approach as to who can be affected by homophobic statements such as those made on the facts of the case: such statements give rise to discrimination based on sexual orientation not merely in relation to access to employment but, by creating a homophobic climate in the work environment, they can amount to discrimination based on sexual orientation as regards employment and working conditions, which, are, also, covered by the material scope of the Directive. On the other hand, the Court – following its Strasbourg counterpart – sought to balance the right of LGB persons not to be discriminated against on the grounds of their sexuality with the right to freedom of expression of the persons uttering homophobic statements. As explained, the CJEU should be bolder and should hold that homophobic speech is not protected by the freedom of expression. In this way, in cases involving homophobic speech, the Court would not need to engage in the balancing exercise between the right to freedom of expression and the right to be free from discrimination based on sexual orientation.

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