



UNIVERSITY  
OF MACEDONIA

# JEAN MONNET CENTRE OF EXCELLENCE

## THE GAY BLOOD DONOR CONTROVERSY IN THE ECJ: DISCRIMINATION OR HEALTH PROTECTION?

A much awaited judgment delivered by the European Court of Justice triggered the question of blood donation and homosexuality, an issue that perpetuates the debates about human rights and sexual orientation at national, European and international level.

The *Léger* case concerned the compatibility of blanket exclusions of blood donations by men

who had or have sexual relations with other men with the law of the European Union.

The case sheds light to a broad range of socio-legal questions of equality and exclusion. Moreover, the case highlights the pivotal role of scientific evidence on a court's assessment and the dynamics between legal discourse, scientific knowledge and biased assumptions.

# JM

CONSTITUTIONAL  
VALUES  
OBSERVATORY



RESEARCH NOTE  
No.1

## THE “MEN WHO HAVE SEX WITH MEN” BLOOD DONOR CONTROVERSY

The “men who have sex with men blood donor controversy” refers to the dispute over prohibitions on donations of blood or tissue for organ transplants from men who have sex with men. Those restrictions (or donor deferrals) vary from country to country as significant amount of European states impose a complete restriction on any man who has had sex with another man, while a small amount of states operate time limited restrictions.

The ban had been questioned both on equality and medical grounds. In the early 1980s, donor deferrals targeting men who have sex with men and other high-risk groups were implemented in response to the outbreak of HIV/AIDS<sup>1</sup>. Three decades later two primary arguments are used by those who advocate for change: (i) the policy is not based on current scientific knowledge and practice, and (ii) the policy discriminates against gay and bisexual men. Those who have defended maintaining longer deferral periods for gay and bisexual men have argued that the safety of the blood supply is of utmost importance and this safety could be jeopardized if gay men were allowed to donate blood since there is a concern of an infected unit entering the blood supply through failures in the screening process such as false negatives or administrative errors. It is also proclaimed that it is essential to maintaining the safety of the blood supply in the future and the confidence of the public, even at the expense of equality<sup>2</sup>.

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<sup>1</sup> Wilson, Kumaran et al., Three decades of MSM donor deferral policies. What have we learned?, *International Journal of Infectious Diseases*, Volume 18, 1 – 3.

<sup>2</sup> Germain, M. & Sher, G. (2002). Men who have had sex with men and blood donation: Is it time to change our deferral criteria? *Journal of the International Association of Physicians in AIDS Care*, 1(3): 86-88.

The issue came to the attention of the European Parliament a question submitted by MEPs to the European Commission, raising the question of unfair discrimination. The European Commission replied that it would consult with the EU Member States on the issue, which did by exporting the conclusion that Member States should establish the criteria for blood donors with the principle of proportionality and based on current epidemiological data<sup>3</sup>.

The European Court of Human Rights considered this issue in the complaint in *Tosto v Italy*<sup>4</sup>, which concerned the then blanket ban in Italy on homosexual donors. The Court struck the complaint from its list because, shortly after the application was submitted, Italy adopted a new policy on screening blood donors. As a result, the question of whether differentiating between potential donors on the grounds of sexual orientation constitutes discrimination contrary to Article 14 of the Convention has never been determined by the Court<sup>5</sup>.

The judgment under examination was a response to a request for a preliminary ruling made to the ECJ from the Tribunal administrative, Strasbourg. The question referred arose in proceedings brought by Mr Geoffrey Léger against the French Blood Agency and the French Minister for Social Affairs, Health and Women's Rights, challenging the refusal

## THE FACTS OF THE LÉGER CASE

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<sup>3</sup> E-0910/09EN, Answer given by Ms Vassiliou on behalf of the Commission, (1.4.2009).

<sup>4</sup> *Tosto v Italy*, requête no 49821/99.

<sup>5</sup> Blood bans based on sexual orientation: do they violate Convention rights?  
<http://echrs.blogspot.gr/2013/04/blood-bans-based-on-sexual-orientation.html>

of the blood donation on the ground that Mr Léger had had sexual relations with another man<sup>6</sup>.

The doctor responsible for donations based his decision on the Decree laying down the selection criteria for blood donors. The relevant law in France implements two EU Directives on blood donation (Directive 2002/98/EC which imposes safety standing on the collection of blood for therapeutic use and Directive 2004/33/EC as regards temporary deferral criteria for donors of allogeneic blood donations) which lay down specific conditions regarding eligibility. The Decree provided for a permanent contraindication to blood donation for a man who has had sexual relations with another man<sup>7</sup>.

Mr Léger brought an action against that decision before the Tribunal administratif de Strasbourg. The French administrative court referred the matter to the CJEU, asking for guidance on what was meant by the combination of the two relevant Directives.

According to the Directive 2002/98/EC *“The availability of blood and blood components used for therapeutic purposes is dependent largely on Community citizens who are prepared to donate. In order to safeguard public health and to prevent the transmission of infectious diseases, all precautionary measures*

## THE LEGAL BACKGROUND

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<sup>6</sup> A. Tryfonidou, Block exclusion on blood donation by gay and bisexual men: a disappointing CJEU, ruling <http://eulawanalysis.blogspot.gr/2015/04/block-exclusion-on-blood-donation-by.html>

<sup>7</sup> C-528/13, Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes; Etablissement français du sang, OJ C 213, 29.6.2015, p. 7–7.

during their collection, processing, distribution and use need to be taken making appropriate use of scientific progress in the detection and inactivation and elimination of transfusion transmissible pathogenic agents”<sup>8</sup>. Also, article 19 of that directive, entitled “Examination of donors”, states that “An examination of the donor, including an interview, shall be carried out before any donation of blood or blood components. A qualified health professional shall be responsible, in particular, for giving to and gathering from donors the information which is necessary to assess their eligibility to donate and shall, on the basis thereof, assess the eligibility of donors”.

The Directive 2004/33/EC excludes permanently from eligibility those donors “whose sexual behaviour puts them at high risk of acquiring severe infectious diseases that can be transmitted by blood”<sup>9</sup>.

The ECJ considered the question in the light of the European Charter of Fundamental Rights and Freedoms, under which any discrimination based on sexual orientation is prohibited in matters involving EU law (Article 20).

The Court began its judgement by noticing differences between the language versions of the Directive’s disputed provisions. It noted that “persons whose sexual behaviour puts them at risk’ of acquiring infectious diseases used

## THE ECJ’S ASSESSMENT

<sup>8</sup> Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC (OJ 2003 L 33, p. 30, preamble, par. 2).

<sup>9</sup> It is worth noting that the Directive refers to “sexual behaviour” and not “sexual orientation”. Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components, OJ L 91, 30.3.2004, p. 25–39, ANEX III, point 2.1.

*in point 2.1 of Annex III to Directive 2004/33 does not precisely determine the persons or categories of persons concerned by that deferral, which leaves a margin of discretion to the Member States in the application of that provision*"<sup>10</sup>. The Court explained that the main question is whether a man who has had sexual relations with another man satisfies the requirement of a 'high risk' which justifies the imposition of a permanent ban on blood donation, while respecting the fundamental rights recognised by the EU legal order.

According to the Court, this question requires a two-tier analysis. In the first place, as regards the assessment of whether there is a high risk of acquiring severe infectious diseases that can be transmitted by blood, the domestic court must take into account the epidemiological situation in France and in particular to ascertain "*in light of current medical, scientific and epidemiological knowledge*"<sup>11</sup>. In the second place, if the referring court concludes, in particular in the light of those data, that the national authorities could reasonably consider that, in the case of a man who has had sexual relations with another man, there is a high risk of acquiring severe infectious diseases that can be transmitted by blood, it must be determined whether, and under what conditions, a permanent deferral from blood donation, such may be compatible with the fundamental rights recognised by the EU legal order<sup>12</sup>.

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<sup>10</sup> C-528/13, par. 39. Gay Blood: Bad Blood? A Brief Analysis of the Léger case [2015] C-528/13, <http://europeanlawblog.eu/?p=2823>

<sup>11</sup> C-528/13, par. 44. A. Tryfonidou, Block exclusion on blood donation by gay and bisexual men: a disappointing CJEU, ruling <http://eulawanalysis.blogspot.gr/2015/04/block-exclusion-on-blood-donation-by.html>

<sup>12</sup> C-528/13, par. 45.

The Court pointed out that the French law may discriminate on grounds of sexual orientation as it *“determines the deferral from blood donation on the basis to the homosexuality of the male donors who, on account of the fact that they have had homosexual sexual relations, are treated less favourably than male heterosexual persons”*<sup>13</sup>. Therefore, the Court assessed whether the discrimination can be justified in accordance with article 52 par. 1 of the Charter. That provision states that any limitation on the exercise of the rights and freedoms recognised by it must be provided for by law and respect the essence of those rights and freedoms. In addition, that article provides that, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

In the disputed case, the Court noted that the permanent deferral from blood donation aims to minimise the risk of transmitting an infectious disease to recipients. That deferral thereby contributes to the general objective of ensuring a high level of human health protection i.e. it serves a legitimate aim<sup>14</sup>.

Regarding the principle of proportionality, the ECJ pointed out that principle is respected only where a high level of health protection for the recipients cannot be ensured by effective techniques for detecting HIV which are less onerous than the permanent deferral from blood

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<sup>13</sup> C-528/13, par. 49.

<sup>14</sup> C-528/13, par. 57.

donation for the entire group of men who have had sexual relations with other men<sup>15</sup>. More importantly the ECJ stressed out that the domestic court must verify whether scientific or technical progress in the field of science or health, taking account in particular of the cost of systematic quarantining of blood donations from men who have had sexual relations with other men or the cost of the systematic screening for HIV for all blood donations, allows a high level of health protection for recipients to be ensured without the resulting burden being excessive as compared with the objectives of protecting health<sup>16</sup>.

The Court concluded that *“that the criterion for permanent deferral from blood donation in that provision relating to sexual behaviour covers the situation in which a Member State, having regard to the prevailing situation there, provides for a permanent contraindication to blood donation for men who have had sexual relations with other men where it is established, on the basis of current medical, scientific and epidemiological knowledge and data, that such sexual behaviour puts those persons at a high risk of acquiring severe infectious diseases and that, with due regard to the principle of proportionality, there are no effective techniques for detecting those infectious diseases or, in the absence of such techniques, any less onerous methods that such a counter indication for ensuring a high level of health protection of the recipients. It is for the referring court to determine whether, in the Member State concerned, those conditions are met”*<sup>17</sup>.

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<sup>15</sup> C-528/13, par. 59.

<sup>16</sup> C-528/13, par. 64.

<sup>17</sup> C-528/13, par. 69.

The Court's decision is rather ambiguous and open to different interpretations. On the one hand, the Court does admit that blanket bans on blood donation which are purely based on the fact that a man has had sex with another man are discriminatory unless justified. On the other hand, according to the Court's reasoning EU governments may be justified in banning gay men if there are no other ways to protect recipients. *"The reasoning seems however confusing, as techniques such as quarantining of the blood and the systematic screening of blood donations are already available and implemented by some countries. It seems therefore that a Member State can hardly satisfy the first part of the proportionality test"*<sup>18</sup>.

Also, as noted *"Despite its progressive tone, this case reinforces in fact the idea that HIV is a 'gay disease'. This may seem particularly surprising in light of the Court's willingness to fight homophobia as a matter of direct discrimination in the labour context"*<sup>19</sup>. Indeed, the Court's reasoning perpetuates stereotypical assumptions about the sexual behaviour of gay and bisexual men, which contribute to the biased stigmatisation gay and bisexual men<sup>20</sup>.

At the very bottom of the ruling is the fact that the Court does not have the capacity to apply a "technically perfect" proportionality test due to the lack of the medical knowledge. Since the European Court of Justice is not equipped to manage scientific uncertainty, this part of the

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<sup>18</sup> Gay Blood: Bad Blood? A Brief Analysis of the Léger case [2015] C-528/13, <http://europeanlawblog.eu/?p=2823>

<sup>19</sup> Gay Blood: Bad Blood? A Brief Analysis of the Léger case [2015] C-528/13, <http://europeanlawblog.eu/?p=2823>

<sup>20</sup> A. Tryfonidou, Block exclusion on blood donation by gay and bisexual men: a disappointing CJEU, ruling <http://eulawanalysis.blogspot.gr/2015/04/block-exclusion-on-blood-donation-by.html>

proportionality test was left for the domestic courts to handle.

This case comes at a time when a number of countries – both within and outside the EU – have relaxed, or consider relaxing, their blanket bans on blood donation by gay and bisexual men<sup>21</sup>. Unfortunately, the Court's decision does not provide clarification.

The ability of being a blood donor is a particularly important option for the self-determination of a person, as it defines its moral status. This was certainly the conclusion reached by the applicant in *Tosto v Italy*, who argued that excluding him from donating blood because he was a homosexual interfered with his Article 8 rights (right to a private and family life) because it affected his personal dignity and prevented him from developing his personality as a donor and being socially useful<sup>22</sup>. Recognizing this aspect of the blood donation decision, it is certain that it is a choice on the most intimate sphere of a person's private sphere<sup>23</sup>.

There are invariably ethical and moral dimensions that must be considered when making decisions in this area. These aspects of policymaking must be considered in combination with the scientific evidence but should not

**FINAL REMARKS: IS  
BLOOD DONATION A  
HUMAN RIGHT?**

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<sup>21</sup> A. Tryfonidou, Block exclusion on blood donation by gay and bisexual men: a disappointing CJEU, ruling <http://eulawanalysis.blogspot.gr/2015/04/block-exclusion-on-blood-donation-by.html>

<sup>22</sup> Blood bans based on sexual orientation: do they violate Convention rights? <http://chrso.blogspot.gr/2013/04/blood-bans-based-on-sexual-orientation.html>

<sup>23</sup> [http://elawyer.blogspot.gr/2010/06/blog-post\\_14.html](http://elawyer.blogspot.gr/2010/06/blog-post_14.html)

preclude re-evaluation of policies in the face of changing scientific evidence<sup>24</sup>.

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<sup>24</sup> Wilson, Kumanan et al., Three decades of MSM donor deferral policies. What have we learned?, International Journal of Infectious Diseases , Volume 18 , 1 – 3.