Court. As to the postal expenses, the Government argued that the documents provided by the applicant showed neither the sender and recipient, nor the purpose of the payment.
75. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers that the applicant's claims should be allowed in full.

C. Default interest
76. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court, unanimously,
1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 261.63 (two hundred and sixty-one euros and sixty-three cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

309

Terugroepen diplomate vanwege haar zwangerschap geen discriminatie

Europees Hof voor de Rechten van de Mens
20 oktober 2020, nr. 33139/13,
ECLI:CE:ECHR:2020:1020JUD003313913
(mr. Grozev, mr. Motoc, mr. Ranzoni, mr. Mourou-Vikström, mr. Ravarani, mr. Schukking, mr. Paczolay)
Noot mr. A.G. Veldman

Beëindiging uitzending als diplomate vanwege zwangerschap. EVRM niet geschonden. Objectieve rechtvaardiging. Voortgang consulaire taken.

[EVRM art. 1; EVRM Protocol nr. 12 art. 14]

Verzoekster heeft de Roemeense nationaliteit en woont in Boekarest. Zij is werkzaam als diplomaat. In maart 2007 was zij geplaatst in Ljubljana, Slovenië. Daar hield zij zich met name bezig met hulp aan Roemeense burgers in noodsituaties, zoals detentie, gebrek aan identiteitspapieren en ziekenhuisopnames. In april 2007 is verzoekster getrouwd met een Sloveen en in juni 2008 en juli 2009 zijn hun twee kinderen geboren. Tijdens de eerste zwangerschap is verzoekster gedurende drie maanden afwezig geweest wegens zwangerschapsklachten. Na aankondiging van haar tweede zwangerschap is verzoekster teruggeroepen naar Boekarest, omdat zij haar werk niet zou kunnen doen vanwege afwezigheid op medische gronden en zwangerschapsverlof. In september 2015 heeft zij haar werk in Boekarest hervat. Verzoekster stelt dat de beëindiging van haar uitzending als diplomaat in 2009 discriminatie vormt op grond van haar zwangerschap. De Roemeense rechter heeft dit standpunt afgewezen op de grond dat de terugroeping noodzakelijk was in verband met het functioneren van de ambassade in Ljubljana. Verzoekster heeft een klacht ingediend bij het EHRM.
Het EHRM toetst aan het discriminatieverbod van art. 1 Protocol nr. 12. Dit is een algemeen verbod, terwijl art. 14 EVRM discriminatie verbiedt bij de uitoefening van de rechten en vrijheden genoemd

in het Verdrag. De in het kader van art. 14 ontwikkelde rechtvaardigingstoets geldt echter ook bij art. 1 Protocol nr. 12. Het Hof stelt vast dat verzoekster inderdaad anders is behandeld dan andere diplomaten vanwege haar geslacht (zwangerschap). Deze andere behandeling was echter gerechtvaardigd, nu deze noodzakelijk was om het functioneren van de consulaire afdeling van de ambassade te waarborgen en daarmee de belangen van Roemenen in Slovenië die hulp nodig hadden. Tijdens de eerste zwangerschap was gebleken dat de afwezigheid van verzoekster in dit opzicht problemen veroorzaakte. Verzoekster heeft geen concreet nadeel geleden door het terugroepen. Zij is bij het ministerie van Buitenlandse Zaken in dienst gebleven en heeft nog promotie gemaakt. Het discriminatieverbod is daarom niet geschonden.

NB. Het EVRM kent in zoverre een ander discriminatieverbod dan het Unierecht en het Nederlandse recht, dat ook directe discriminatie onder omstandigheden gerechtvaardigd kan worden. Lidstaten hebben in dit opzicht echter niet veel ruimte. Vgl. EHRM, «JAR» 2015/39 (Boyraz/Turkije) en «JAR» 2018/207 (Demirel/Turkije). Ook in het Unierecht kan een werkneemster tijdens haar zwangerschap overigens andere taken opgedragen krijgen. Zij heeft dan wel het recht om na afloop van het zwangerschapsverlof naar haar eigen functie of een gelijkwaardige functie terug te keren (art. 15 Richtlijn 2006/54/EG).

Napotnik
tegen
Roemenië.

Introduction
1. The application concerns the immediate termination of the applicant's diplomatic posting in Ljubljana, Slovenia, allegedly because of her pregnancy.

The facts
2. The applicant was born in 1972 and lives in Bucharest. She was represented by S.C.A. Ionescu and Sava, a law firm in Bucharest.
3. The Government were represented by their Agent, most recently Ms O.F. Ezer, of the Ministry of Foreign Affairs.
4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. The applicant's work in the consular section of the Romanian embassy in Ljubljana
5. The applicant is a Romanian diplomat. On 1 October 2002 she started working for the Ministry of Foreign Affairs (hereinafter "the MFA").
6. The applicant sat a competitive examination for a four-year post as a consular officer at the Romanian embassy in Ljubljana. Following the examination, she was nominated for the post by an order of the Minister of Foreign Affairs issued on 9 February 2007. At the time, she held the diplomatic rank of third secretary. Her diplomatic posting started on 2 March 2007, and since 1 January 2006 the post had been held by diplomats sent on temporary assignments.
7. When the applicant arrived to take up her post, the embassy's diplomatic staff consisted of the ambassador and two junior diplomats: the applicant, who was in charge of consular duties (about 70% of her work), and another individual, whose main tasks were diplomatic and political cooperation and who had received no consular training. The diplomatic staff also included an economic officer, sent from the Ministry of Economy.
8. The applicant's consular work consisted mainly in providing help to Romanian nationals who found themselves in emergency situations in Slovenia, notably in police detention, without identity papers, or hospitalised.

A. The first pregnancy
9. In april 2007 the applicant married a Slovenian official. A few months later she became pregnant with their first child. In november 2007 she was absent from work for a few days because of health problems linked to her pregnancy. On 27 november her obstetrician ordered that she should have bed rest. On the next day she informed the ambassador about her medical condition. She also asked to take her annual leave in the period from december to January 2008.
10. On 6 december 2007 the ambassador sent an internal report on the applicant's absence from work to the MFA, accompanied by a note written in the following terms:
"please find attached a communication from the embassy in Ljubljana which presents the act of insubordination [*actul de indisciplină*] committed by Mrs Oana Napotnik..."
11. The ambassador described in detail the applicant's absence from work and asked for a replacement to be sent for the month of December, when

requests for consular assistance were high. As no replacement was sent from the MFA, the consular section was closed during the applicant's absence and requests for assistance were redirected to the embassies of Zagreb, Vienna or Budapest. The applicant resumed work in February 2008.
12. The applicant returned to work during her leave, on 14 and 17 december 2007, in order to deal with urgent consular matters.
13. In december 2007 the applicant was promoted to second secretary, upon being recommended for this position by her superiors.
14. The applicant, who gave birth to her child on 16 June 2008, was on maternity leave from 2 June 2008 until 19 October 2008. She then took annual leave until 5 december 2008.
15. The consular section of the embassy was closed from 2 until 15 June 2008, when a replacement was found for the applicant; that person was on a temporary assignment.
16. Between 17 and 19 July 2008, after the start of the applicant's maternity leave, the MFA organised an audit at the Ljubljana embassy. According to the ensuing report, deficiencies were found in the consular activity at the embassy. In particular, it was found that consular requests and official documents had been improperly recorded in the embassy records. Some original documents issued by the consular section had not been archived or had simply been lost. Some documents had been recorded on the wrong date or had not been signed by the relevant parties. The audit team made recommendations, without proposing sanctions. The relevant parts of the report read as follows:
"Several deficiencies have been identified in the consular activity, despite the low volume of work. One of the reasons is linked to the parameters of Mrs Oana Napotnik's professional activity, including the fact that during the first half of 2008, owing to her pregnancy, she was absent from work for long periods of time."
17. On 27 February 2009 the applicant sent an answer to the MFA, pointing out in particular that the audit team had generalised some particular situations where errors had been made, and that she had been made responsible for the conduct of the diplomats who had preceded her and those who had replaced her during her absence. She also found it regrettable that she had not been invited to talk to the inspectors while the audit team had been in Ljubljana.

B. The second pregnancy
18. The applicant returned to work on 5 december 2008. The ambassador considered that, as the applicant had worked very little that year, it would be more appropriate to postpone her annual work performance evaluation by six months. On 14 January 2009 the ambassador informed the MFA of that decision.
19. On 19 January 2009 the applicant informed the ambassador that she was pregnant and was due to give birth in the second half of July 2009.
20. On the same day the ambassador concluded the applicant's annual performance evaluation for 2008. The overall assessment read as follows:
"Although the overall assessment is that 'the performance met the job requirements', in Mrs Oana Napotnik's case, bearing in mind the short period of time which she spent working in 2008, because of her maternity leave and because of frequent absences due to medical appointments from February to June, these circumstances mean that she is not best suited for consular activity, which has a certain specificity, particularly since Mrs Napotnik is the head of the consular section."
21. The applicant was informed of this report on 23 January 2009. She disagreed with the assessment.

C. Termination of the applicant's posting
22. On 20 January 2009 the ambassador discussed the applicant's situation with his superiors. In an internal note for the attention of the Minister of Foreign Affairs, the ambassador reiterated that the applicant had been absent repeatedly, owing to her first pregnancy, and it was to be expected that she would be absent again in connection with the new pregnancy. It was concluded that she was of little use to the diplomatic mission in Ljubljana. She created additional costs for the MFA because of the need to replace her on a temporary basis (notably costs with regard to lodging the replacement diplomat in Ljubljana). The note also reiterated that the audit team had found "deficiencies in the applicant's consular activity". It was proposed that the applicant's posting be terminated.
23. In a separate communication sent to the MFA on 20 January 2009, the ambassador reiterated that the applicant's prolonged and repeated absences due to her pregnancies had meant that she was of little use to the diplomatic mission in Ljubljana. The ambassador added that she represented an additional security risk because of her

marriage to a Slovenian national: the applicant's husband drove the applicant's car, which was registered with diplomatic plates.
24. By a ministerial order of 20 January 2009 the applicant's posting to Ljubljana was terminated. The next day the Ljubljana embassy was given notice of the order. The applicant was informed that her mission had been terminated and that she was expected to return to the Bucharest office on 14 February 2009. She immediately requested parental leave (see Article 27 of Law no. 269/2003, quoted in paragraph 33 below).
25. At the applicant's request, her work contract was suspended by orders of the Minister of Foreign Affairs, firstly in respect of her parental leave (from 14 February 2009 to 15 May 2010 for the first child, and from 15 May 2010 to 22 July 2011 for the second child), and then in order to allow her to accompany her husband on his permanent diplomatic posting abroad (lasting four years, starting from 22 July 2011). She was not paid salary by her employer while her contract was suspended.
26. On 1 september 2015 the applicant resumed her work at the MFA. On 20 september 2016 she was promoted to first secretary. On the date of the last information received from the parties in this regard (the Government's observations of 14 June 2019) she was still working for the MFA, in Bucharest.

II. Civil action against the termination of the applicant's diplomatic posting in Slovenia
27. On 28 september 2009 the applicant lodged a civil action against the MFA concerning the termination of her posting abroad. She complained mainly that the reason for the act in question had been her pregnancy. In her view, that reason was discriminatory and thus unlawful.
28. On 21 March 2012 the Bucharest County Court dismissed the action. It reiterated that the Minister of Foreign Affairs had the discretion to organise foreign representation and terminate postings abroad whenever necessary, on serious grounds. The court concluded that the applicant's posting had not been terminated on discriminatory grounds. The relevant parts read as follows:
"The court considers that the termination [of the applicant's posting was] allowed in the specific sphere of diplomatic activity and [did] not constitute a disciplinary measure... it is within the discretion of [the MFA] to decide, in order to ensure the renewal [of the diplomatic corps], when to begin a diplomat's new posting and when to terminate [the postings] of others, in order to ensure and maintain the functional capacity of diplomatic missions.
...
In so far as discrimination is concerned, the court notes that decisions to terminate a posting are taken by [the MFA] with regard to all diplomats, irrespective of their sex; when [the applicant] argues that her posting should not have been terminated on these grounds, [she] is using her pregnancy in order to obtain preferential treatment."
29. The applicant appealed before the Bucharest Court of Appeal. She maintained her arguments that her diplomatic posting had been terminated on discriminatory grounds related to her pregnancy.
30. In a final decision of 8 november 2012, the Court of Appeal dismissed the appeal and upheld the decision rendered by the County Court on 21 March 2012 (see paragraph 28 above). In addition, it found as follows:
"The Labour Code does not limit an employer's right to organise the activity of its pregnant employees, the sole prohibition being that their work contract may not be terminated...
... [the applicant] did not prove that she had been discriminated against by [the MFA], as the decisions to terminate her posting had been taken by the MFA lawfully and within the scope of its discretion, with a view to ensuring the functioning of the MFA; such a measure can be taken in respect of all employees of the MFA, irrespective of sex or pregnancy."

Relevant legal framework and practice
(...)

THE LAW

Alleged violation of Article 1 of Protocol No. 12 to the Convention

A. Scope of the case
50. In her initial application to the Court, the applicant complained that she had been discriminated against at work, in so far as her posting at the Romanian embassy in Ljubljana had been terminated because of her pregnancy without any valid reason being presented to her. She relied on Article 1 of Protocol No. 12 to the Convention.

51. In her submissions in reply to the Government's observations, the applicant further complained of violations of Articles 6 and 8 of the Convention as a result of the same facts which she had brought to the Court's attention in her initial application.
52. Having regard to the substance of the applicant's complaints, and regardless of whether the above-mentioned complaints and/or arguments raised under Articles 6 and 8 of the Convention fall to be examined within the context of the present application, the Court, which is master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, ECHR 2018), will examine the application from the standpoint of Article 1 of Protocol No. 12 to the Convention alone.
That provision reads as follows:
"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

A. Admissibility
(...)

B. Merits
(...)

4. The Court's assessment

(a) The general principles
69. Notwithstanding the difference in scope between Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention, the meaning of the notion of "discrimination" in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraphs 18 and 19 of the Explanatory Report to Protocol No. 12). In applying the same term under Article 1 of Protocol No. 12, the Court therefore sees no reason to depart from the established interpretation of "discrimination" (see *Sejdić and Finci*, cited above, § 55).
70. It can be inferred that, in principle, the same standards developed by the Court in its case-law concerning the protection afforded by Article 14 are applicable to cases brought under Article 1 of Protocol No. 12.
71. In this vein, the Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without objective and reasonable justification, of individuals in analogous, or relevantly similar, situations. In other words, the requirement to demonstrate an analogous position does not require that the comparator groups be identical. For the purposes of Article 14, a difference in treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised (see *Molla Sali v. Greece* ([GC], no. 20452/14, §§ 133 and 135, 19 december 2018).
72. The Court has also established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (see *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 september 2017).
73. Moreover, Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct "factual inequalities" between them. Indeed, the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 51, ECHR 2006-VI; and *Guberina v. Croatia*, no. 23682/13, § 70, 22 March 2016). The prohibition deriving from Article 14 will therefore also give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different (see *J.D. and A. v. the United Kingdom*, nos. 32949/17 and 34614/17, § 84, 24 October 2019 with further references, notably *Thlimmenos*, cited above, § 44). In this context, relevance is measured in relation to what is at stake, whereas a certain threshold is required in order for the Court to find that the difference in circumstances is significant. For this threshold to be reached, a measure must produce a particular-

ly prejudicial impact on certain persons as a result of a protected ground, attaching to their situation and in light of the ground of discrimination invoked (see *J.D. and A. v. the United Kingdom*, cited above, § 85).

74. The Court has acknowledged in its case-law, albeit indirectly, the need for the protection of pregnancy and motherhood (see, *mutatis mutandis*, *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 82, 24 January 2017; *Konstantin Markin v. Russia* [GC], no. 30078/06, § 132, ECHR 2012 (extracts); *Alexandru Enache v. Romania*, no. 16986/12, §§ 68 and 76-77, 3 October 2017; and *Petrovic v. Austria*, 27 March 1998, § 36, *Reports of Judgments and Decisions* 1998-II).

75. The Court has also held that the advancement of the equality of the sexes is a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference in treatment on the grounds of sex could be regarded as being compatible with the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94, and *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, § 46, 25 July 2017). Consequently, where a difference in treatment is based on sex, the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances (see *Emel Boyraz v. Turkey*, no. 61960/08, § 51, 2 december 2014).

(b) Application of those principles to the facts of the present case

76. Turning to the facts of the present case, the Court notes that it was considered that the applicant would be unable to carry out her work because of absences for medical appointments and maternity leave (see paragraphs 20, 22 and 23 above). The decision to recall her to Bucharest was taken as soon as she had announced her second pregnancy (see paragraphs 19 and 24 above). In their submissions, the Government also accepted that the applicant's condition had played a role in the decision to terminate her diplomatic assignment (see paragraph 65 above). Consequently, the Court considers it established that the applicant experienced such treatment mainly because of her pregnancy.

77. The Court observes that only women can be treated differently on grounds of pregnancy, and for this reason, such a difference in treatment will amount to direct discrimination on grounds of sex if it is not justified. On this point, the Court cannot but note that a similar approach was also taken by the CJEU in its case-law (see paragraphs 44 and 46 above), and that the approach is consistent with domestic law (see paragraph 31 above) and practice (see paragraphs 34-36 above).

78. Having established that the applicant was treated differently on grounds of sex, the Court must determine whether the reasons adduced by the authorities – the MFA, the domestic courts and the Government – to justify the treatment applied to the applicant were relevant and sufficient, notwithstanding the narrow margin of appreciation afforded to States in cases such as the present one (see paragraph 75 above).

79. The Government argued that the decision to recall the applicant from her posting abroad had pursued the legitimate aim of the protection of the rights of others, notably Romanian nationals in need of consular assistance in Slovenia (see paragraphs 67-68 above). The Court accepts this assertion. It must then be established whether the measure was proportionate to this aim.

80. In this respect, it is to be noted that the domestic authorities and the Government considered that the early termination of the applicant's posting abroad had been justified by the fact that her absence would have jeopardised the functional capacity of the embassy's consular section (see paragraphs 22, 23, 28, 30 and 68 above). The Court observes that during the applicant's absence from the office consular services were suspended and requests for assistance were redirected to neighbouring countries (see paragraphs 11 and 15 above). It is thus clear that, bearing in mind the nature of her work and the urgency of the requests she was called upon to deal with (see paragraph 8 above), the applicant's absence from the office seriously affected consular activity in the embassy.

81. The Court also notes that domestic law does not prevent as such the early termination of a diplomatic posting abroad (see paragraph 33 above), a fact also affirmed by the domestic courts (see paragraphs 28 and 30 above and, *mutatis mutandis*, paragraph 37 above). In addition, domestic law allows an employer to organise the activity of pregnant employees, the sole prohibition

being that their work contract may not be terminated (see paragraph 30 above).
82. In this vein, the Court notes that although her work conditions changed because of the early termination of her posting abroad, the applicant was not dismissed from her work as a diplomat in the MFA (see, in contrast, the case-law of the CJEU, quoted in paragraphs 43 to 48 above). That change in circumstances cannot be equated with a loss of employment (see also, for reference, the domestic case-law quoted in paragraph 35 above).
83. The Court therefore considers it established that the consequences for the applicant of the early termination of her posting abroad were not of the same nature as those expressly prohibited by the domestic equal opportunity laws (see paragraphs 31-32 above) and the State's international commitments in the field of protection of pregnancy and maternity (see paragraphs 39-42 and 49 above).
84. Moreover, despite her extended absence owing to maternity leave and parental leave, the applicant continued to be promoted by her employer, first in december 2007 while she was absent during her first pregnancy (see paragraph 13 above), and again in september 2016, about a year after her return to work (see paragraph 26 above). Consequently, it appears that she did not suffer any significant long-term setbacks in her diplomatic career.
85. Lastly, it is to be noted that the domestic courts expressly reiterated that the decision to terminate the applicant's posting had not been a disciplinary measure (see paragraph 28 above). The Court has no reason to question that finding. It thus concludes that while the decision was motivated by the applicant's pregnancy, it was not intended to put her in an unfavourable position.
86. In the light of the above findings, the Court considers it established that the early termination of the applicant's diplomatic posting abroad was necessary for ensuring and maintaining the functional capacity of the diplomatic mission, and ultimately the protection of the rights of others. Notwithstanding the narrow margin of appreciation afforded to them, the domestic authorities provided relevant and sufficient reasons to justify the necessity of the measure.
87. There has accordingly been no breach of Article 1 of Protocol No. 12 to the Convention.

For these reasons, the Court, unanimously,
1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 1 of Protocol No. 12 to the Convention.

NOOT

In deze zaak lijkt het Europese Hof voor de Rechten van de Mens (verder: EHRM) zwangerschapsdiscriminatie te rechtvaardigen. Binnen het Europese Unierecht zou dit directe seksediscriminatie opleveren, waarvoor geen objectieve rechtvaardiging kan worden gegeven (art. 2 lid 2 onder c Richtlijn 2006/54/EG). Betekent dit dat het Straatsburgse Hof coulanter is in de toetsing van zwangerschapsdiscriminatie dan het Luxemburgse Hof? Of klopt dit niet?
Het EHRM (h)erkent wel de vormen van directe en indirecte discriminatie (nr. 34369/97 (*Thlimmenos*)) maar laat voor beide de mogelijkheid van een objectieve en redelijke rechtvaardiging toe. Dat geldt zowel onder het (accessoire) discriminatieverbod van art. 14 EVRM, als het (zelfstandige) verbod van art. 1 van Protocol nr. 12. Maar zoals het Europese Hof van Justitie (verder: HvJ EU) seksediscriminatie strikt toetst door geen objectieve rechtvaardiging toe te staan (HvJ EU 4 oktober 2001, «JAR» 2001/220 (*Tele Danmark*)), zo toetst het EHRM strikt door de lidstaten slechts een nauwe beoordelingsruimte (*margin of appreciation)* te laten bij de beantwoording van de vraag of er een gerechtvaardigde grond is voor het sekseonderscheid.
Het is vaste rechtspraak van het EHRM dat seksediscriminatie alleen kan worden gerechtvaardigd in het geval van 'very weighty reasons' (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Series A, nr. 94). In de hier betreffende zaak van de Roemeense, zwangere diplomate oordeelt het EHRM dat de beëindiging van haar buitenlandse uitzending noodzakelijk is voor het functioneren van de consulaire dienst en uiteindelijk de bescherming van de rechten van anderen, namelijk die van Roemenen in het buitenland die dringend consulaire hulp nodig hebben (par. 79). Daarnaast weegt het EHRM expliciet mee dat de overplaatsing geen ontslag of disciplinaire maatregel betreft en de diplomate tot twee maal toe een promotie heeft gekregen, waarmee ze over de langere termijn gezien niet nadelig is behandeld (par. 84-85). Zou dit oordeel

anders luiden onder het Unierechtelijke verbod op directe seksediscriminatie?
Op het eerste gezicht lijkt dat wel zo. Het is de (te verwachten) afwezigheid van de zwangere diplomate die leidt tot de overplaatsing naar Boekarest. In onder meer *Dekker* (HvJ EU 8 november 1990, ECLI:EU:C:1990:383) werd aangenomen dat ontslag wegens afwezigheid als gevolg van zwangerschap gelijkgesteld moet worden met de zwangerschap zelf. Het vormt dus een directe seksediscriminatie. Uit *Lewen* (HvJ EU 21 oktober 1999, «JAR» 1999/278) volgde dat bij de vaststelling van een bonus, deze directe seksediscriminatie moet worden voorkomen door de periode van afwezigheid wegens zwangerschap gelijk te stellen aan een tijdvak van arbeid.
Maar juist bij zwangerschap doorbreekt het HvJ EU de vaste lijn dat direct sekseonderscheid niet gerechtvaardigd kan worden. In onder meer *Mckenna* (HvJ EU 8 september 2005, «JAR» 2005/236) wordt, op basis van een vergelijking met de afwezigheid van een zieke werknemer, aangenomen dat een lagere beloning als gevolg van afwezigheid wegens zwangerschap of zwangerschapsgerelateerde ziekte geen discriminatie oplevert. Of het HvJ EU de overplaatsing van de diplomate als een verboden directe discriminatie zou opvatten, is dus geen uitgemaakte zaak. Als van een zieke werknemer de buitenlandse detachering beëindigd zou kunnen worden vanwege de te verwachten afwezigheid, zou dat in het geval van zwangerschap misschien ook kunnen indien *Mckenna* wordt gevolgd.
Bij een vergelijking van de Straatsburgse en Luxemburgse aanpak kan het nog interessant zijn of het verschil zou maken voor de zwangere diplomate in kwestie, wanneer bij de beoordeling van de rechtvaardigingsgrond het arbeidsomstandighedenrecht bij zwangerschap specifieker zou zijn meegewogen. Het HvJ EU baseerde *McKenna* mede op Zwangerschapsrichtlijn 92/85/EEG en ook het EHRM wijst op deze richtlijn bij de opsomming van het relevante rechtskader. Volgens art. 11 lid 1 van de genoemde richtlijn moeten de rechten verbonden aan de arbeidsovereenkomst gewaarborgd blijven wanneer beschermingsmaatregelen worden getroffen bij zwangerschap. De overplaatsing van de zwangere diplomate is niet ingegeven door haar veiligheid maar door het belang van de werkgever zelf. Maar zou dan niet te meer gelden dat de arbeidsvoorwaarden van de zwangere werknemer behouden moeten blijven? Struikelblok kan hier zijn dat de buitenlandse detachering geen (overeengekomen) 'recht verbonden aan de arbeidsovereenkomst' hoeft te zijn maar uit het eenzijdig instructierecht van de werkgever kan voortvloeien. Maar zou het wel een arbeidsvoorwaarde betreffen dan is hiermee, ook onder het Unierecht, niet elke wijziging die rechtstreeks berust op de zwangerschap uitgesloten. Uit *Parviainen* (HvJ EU 1 juli 2010, «JAR» 2010/200) bleek bijvoorbeeld dat in het geval van een tijdelijke overplaatsing van een zwangere werkneemster wel recht bestaat op behoud van het basissalaris maar niet op de volledige beloning die werd ontvangen vóór de overplaatsing.
Biedt het deels vergelijkbare art. 15 Gelijkebehandelingsrichtlijn 2006/54 tot slot meer soelaas? Het gaat hier om het recht van de werkneemster om na het zwangerschapsverlof 'onder niet minder gunstigere voorwaarden en omstandigheden terug te mogen keren naar haar baan of gelijkwaardige functie'. Zou de diplomate hieruit een terugkeerrecht naar de post in Slovenië hebben kunnen afleiden, wat de (voortijdige) beëindiging van de detachering disproportioneel maakt? Of voorkomt de zinsnede 'of gelijkwaardige functie' dat zij zonder meer recht heeft om ongeacht haar zwangerschap haar post in Slovenië te behouden? Hier ligt misschien wel de crux van de uitspraak. Het lijkt niet zozeer dat de bescherming tegen zwangerschapsdiscriminatie uiteenloopt onder het EVRM en het Unierecht, maar dat het EHRM aanneemt dat er per saldo geen nadelige behandeling van de diplomate heeft plaatsgevonden. Het terughalen van de diplomate naar Boekarest lijkt door het EHRM toch hooguit als 'ongemak' gezien te worden. Vooral met het oog op de promoties die ze heeft gekregen, ziet het EHRM geen nadelen voor haar beroepsloopbaan. Of die nadelen er zouden zijn geweest, is echter moeilijk te zeggen. De feiten van de zaak werken niet mee. Immers, de diplomate heeft in feite eieren voor haar geld gekozen. Ze heeft zodra haar detachering in Slovenië wegens zwangerschap werd beëindigd, aaneensluitende arbeidsverloven opgenomen en is pas na zesenhalf jaar teruggekeerd in actieve dienst te Boekarest.

mr. A.G. Veldman
universitair docent arbeidsrecht aan de Universiteit Utrecht

Cursusoverzicht

Arbeidsrecht

Zorg dat je altijd up-to-date blijft.

Ons aanbod sluit aan bij uw behoefte

Keuze uit ruim 350 opleidingen, congressen, masterclasses en webinars per jaar

Ons aanbod wordt continu aangepast naar de laatste ontwikkelingen

Scan de QR code voor het gehele aanbod

Altijd op de hoogte blijven van het laatste aanbod binnen uw rechtsgebied(en)

Ga naar onze website en schrijf u in voor uw persoonlijke cursusaanbod

www.sdujuridischeopleidingen.nl

Sdu

Arbeidsrecht in de praktijk (12e druk)

Auteurs:
D.M. van Genderen
P.S. Fluit
M.E. Stefels
J.P. Volk
D.J.B. de Wolff

De twaalfde druk van *Arbeidsrecht in de praktijk* geeft de stand van zaken in het arbeidsrecht en socialezekerheidsrecht per juni 2020 weer. In deze herziene druk is er uiteraard aandacht voor de wetten die in 2020 in werking zijn getreden, zoals de Wet arbeidsmarkt in balans (Wab), de Wet compensatie transitievergoeding en de Wet normalisering rechtspositie ambtenaren (Wnra).

Arbeidsrecht in de praktijk beschrijft de dagelijkse praktijk van het arbeidsrecht. De hoofdstukken volgen in grote lijnen de verschillende fasen van de arbeidsovereenkomst, vanaf het moment waarop het aanbieden van een arbeidsovereenkomst wordt overwogen tot en met de afwikkeling van een inmiddels beëindigde arbeidsovereenkomst. Door deze opzet is het boek niet alleen geschikt voor juristen, maar ook voor niet-juristen die regelmatig met vragen over het arbeidsrecht te maken hebben, zoals hr-adviseurs, bedrijfs- en verzekeringsartsen, arbeidsdeskundigen en accountants.

Ga om te bestellen of meer informatie naar
sdu.nl/arbeidsrechtindepraktijk

Sdu

Sdu Uitgevers bv, t.a.v. bureauredactie JAR, Postbus 20025, 2500 EA Den Haag, e-mail: arbeidsrecht@sdu.nl. U hoeft geen processtukken mee te sturen. Aankondiging publicatie is niet mogelijk.

Abonnementen en -administratie
«JAR» verschijnt 17 maal per jaar op papier en online via opmaat.sdu.nl. «JAR» is ook beschikbaar via contentintegratie. Toegang tot «JAR» via de Sdu Tijdschriften App (Stapp, te downloaden in de App Store en via Google Play) maakt ook onderdeel uit van het abonnement. Stapp is geschikt voor zowel iOS (Apple) als Android (Google).

Voor actuele prijzen, abonnementsvormen en onze leveringsvoorwaarden verwijzen wij u naar sdu.nl of kunt u contact opnemen met onze klantenservice. Abonnementen kunt u afsluiten via sdu.nl of via Sdu Klantenservice. Postbus 20025, 2500 EA Den Haag; tel: (070) 378 98 80; e-mail: sdu@sdu.nl.

Vanwege de aard van de uitgave gaat Sdu uit van een zakelijke overeenkomst; deze overeenkomst valt onder het algemene verbintenissenrecht. Uw persoonlijke gegevens worden door ons zorgvuldig behandeld en beveiligd. Wij verwerken uw gegevens voor de uitvoering van de (abonnements)overeenkomst en om u op uw vakgebied van informatie te voorzien over gelijksoortige producten en diensten van Sdu Uitgevers B.V.. Voor het toesturen van informatie over (nieuwe) producten en diensten gebruiken wij uw e-mailadres alleen als u daarvoor toestemming heeft gegeven. Uw toestemming kunt u altijd intrekken door gebruik te maken van de afmeldlink in het toegezonden e-mailbericht. Als u in het geheel geen informatie wenst te ontvangen over producten en/of diensten, dan kunt u dit laten weten aan Sdu Klantenservice: informatie@sdu.nl. Abonnementen gelden voor minimaal één jaar en hebben een opzegtermijn van twee maanden. Onze uitgaven zijn ook verkrijgbaar in de boekhandel. Voor informatie over onze leveringsvoorwaarden kunt u terecht op www.sdu.nl.

©Sdu Uitgevers B.V. 2020
Alle rechten voorbehouden.

Behoudens de door de Auteurswet gestelde uitzonderingen, mag niets uit deze uitgave worden verveelvoudigd (waaronder begrepen het opslaan in een geautomatiseerd gegevensbestand) of openbaar gemaakt, op welke wijze dan ook, zonder voorafgaande schriftelijke toestemming van de uitgever. De bij toepassing van art. 16b en 17 Auteurswet wettelijk verschuldigde vergoedingen wegens fotokopiëren, dienen te worden voldaan aan de Stichting Pro, Postbus 3060, 2130 KB te Hoofddorp (www.stichting-pro.nl). Voor het overnemen van een gedeelte van deze uitgave in bloemlezingen, readers en andere compilatiewerken op grond van art. 16 Auteurswet dient men zich tevoren tot de uitgever te wenden. Hoewel aan de totstandkoming van deze uitgave de uiterste zorg is besteed, aanvaarden de auteur(s), redacteur(en) en uitgevers geen aansprakelijkheid voor eventuele fouten of onvolkomenheden.

Het al dan niet op verzoek van de redactie aanbieden van uitspraken of artikelen aan «JAR» impliceert toestemming voor openbaarmaking en verveelvoudiging t.b.v. de elektronische ontsluiting van (delen van) «JAR» in enige vorm.

mvw
media voor vak
& wetenschap

Jurisprudentie
Arbeidsrecht

Redactie
mw. mr. dr. M.S.A. Vegter
mw. mr. R.D. Rietveld
prof. mr. E. Verhulp

Ereredacteur
prof. mr. P.F. van der Heijden

Vaste annotatoren
prof. mr. B. Barentsen
mr. E.L.I. Bruyninckx
mr. dr. A.F. Bungener
mr. E. Cremers-Hartman
mr. N.T. Dempsey
mr. J. Dop
mr. M. van Eck
mr. dr. E.J.A. Franssen
mr. C.G.M. Fruytier
mr. H.J. Funke
prof. mr. drs. M. Heemskerk
mr. drs. A.M. Helstone
mr. E.M. Hoogeveen
mr. dr. P. Hufman
mr. C.M. Jakimowicz
mr. I. Janssen
mr. B.C.L. Kanen
mr. C.S. Kehrer-Bot
mr. E. Knipschild
mr. M.W. Koole
mr. dr. E. Koot-van der Putte
mr. I.J. de Laat
mr. C. Nekeman
mr. M.L.G. Otto
mr. dr. J. van der Pijl
mr. S. Said
mr. M.A.N. van Schadewijk
mr. dr. A. Stege
mr. S.J. Sterk
mr. C.F.J. van Tuyll van Serooskerken
mr. K. Wiersma
mr. dr. A. van Zanten-Baris
mr. C.C. Zillinger Molenaar
mr. J.P.H. Zwemmer

Uitgever
mr. N.A. Bergers, n.bergers@sdu.nl

ISSN: 0928-1886
opmaat.sdu.nl

Citeertitel
«JAR» 2020/x (volgnummer uitspraak)

Advertentieacquisitie
Cross Media Nederland
Tim Lansbergen
010-7607324
tim@crossmedianederland.com

Redactiesecretariaat voor inzenden van uitspraken
Met «JAR» wordt beoogd zo veel mogelijk interessante uitspraken op het gebied van het arbeidsrecht te publiceren. Indien u beschikt over uitspraken die naar uw oordeel (mogelijk) geschikt zijn voor publicatie in «JAR», verzoekt de redactie u deze te sturen naar:

Stapp
Sdu

Sdu