

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

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Executive summary

Implementation of Employment Directive 2000/78/EC

The United Kingdom (UK) has implemented Directive 2000/78 in the specific context of sexual orientation discrimination on time and, with certain exceptions, in compliance with its provisions. The Regulations applying to Great Britain and Northern Ireland outline in detail the personal and material scope of the law, the concepts of discrimination and harassment and exceptions to the principle of non-discrimination, as permitted by the Directive. The Regulations also include broadly compliant provisions on enforcement and remedies. The UK has extremely effective and well resourced statutory equalities commissions with responsibilities for monitoring equalities laws and supporting individuals wishing to bring complaints of unlawful discrimination. Although interest groups cannot bring actions as an alternative to individual complaints these groups are able to represent individuals before courts or tribunals and receive support from the equalities commissions.

Moreover, in 2006 and 2007, the constituent parts of the UK introduced additional legislation extending protection beyond the scope of the Directive by prohibiting sexual orientation discrimination in, inter alia, goods, facilities and services. On 8 April 2010, the new Equality Act received Royal assent and its main provisions will come into force in October 2010. The Act harmonises discrimination law in England and Wales across all the protected characteristics including sexual orientation and further strengthens the law to support progress on equality.

Freedom of movement

This section contains a summary of the present legal situation in the UK with regard to the rights of LGBT partners of EU citizens who wish to exercise their rights of free movement and residence under EU law. Particular attention is paid to the scope of the definition of a 'family member' and an 'extended family member' which closely follow the requirements of Directive 2004/38. The rights of LGBT partners and their children and other family members are also discussed in the context of the *Civil Partnership Act 2004* and the *Gender Recognition Act 2004*. The position of third-country national LGBT partners of EU citizens and their children and family members is outlined. The effect of the *Civil Partnership Act* is to create rights that are equivalent to marriage and, as such, it enables LGBT partners of UK nationals to benefit from the freedom of movement and residence of their partners in another Member State subject to

the recognition of the host State as provided in Art. 2(2)(b) of Directive 2004/38.

Asylum and subsidiary protection

This section outlines the current legislative framework in the UK and its impact on claims to refugee and subsidiary status on the ground of sexuality. Specific reference is made to the *Immigration Rules HC 395* as given statutory authority by the *Immigration Act 1971*, as well as the relationship between the *1951 Convention on the Status of Refugees*, the *Human Rights Act 1998*, the *European Convention on Human Rights* (ECHR) and European Directive 2004/83 and its transposition into UK law. Five key cases have been identified which highlight the position of LGBT asylum seekers in the current asylum system, drawing on key themes that have come out of this rapidly expanding area of asylum law. The main issues that have been addressed in these cases are:

- Lesbians and gay men as members of a ‘particular social group’.
- Permissible levels of discrimination which do not constitute persecution under the *Convention on the Status of Refugees*.
- Behaviour modification as a form of persecution.
- Internal relocation in the country of origin.
- Access to health care.
- Prosecution versus/persecution.

In addition the impact of Directive 2004/83 and its influence on legislation pertaining to subsidiary protection is discussed in light of its impact on family reunification policy and leave to remain in the UK.

Family reunification

Schedule 23 of the *Civil Partnership Act 2004* indicates the rights accrued by partners of UK nationals subject to immigration control. The Civil Partnership Act’s influence on the *Immigration Rules* has been extensive. The *Asylum and Immigration (Treatment of Claimants) Act 2004* governs entry to the UK to form a civil partnership in accordance with the *Immigration Rules* as given statutory authority by the *Immigration Act 1971* and the *Asylum and Immigration Act 2004*. The *Immigration Rules HC 395* highlight the specific requirements of entry into the UK on the basis of family reunification dependent upon the status of the relationship. The *Rules* pertaining to same-sex reunification can be found in Part 8 of the *Immigration Rules HC 395* paragraphs 277 to 295L.

Freedom of assembly

No information was found on cases of refusals or bans, or on the exercise of duties of protection by the authorities in the context of pride marches or homophobic demonstrations. However, pride marches have been taking place in the UK for over 30 years. In addition, ECHR Arts 10, 11, 14 and 17 have been incorporated into domestic law throughout the UK. The law also contains a range of statutory public order offences, as well as powers to regulate and control public meetings and processions.

Hate speech and criminal law

In 2004, the law in Northern Ireland was amended so as to criminalise acts intended or likely to stir up hatred or arouse fear on grounds of sexual orientation. As regards England and Wales, the *Criminal Justice and Immigration Act 2008* amends provisions on incitement to religious hatred in the *Public Order Act 1986*, extending them to cover hatred on the grounds of sexual orientation. At the time of writing (February 2010) these new homophobic hatred offences are not yet in force. Scotland does not have legislation covering incitement to hatred on the grounds of sexual orientation.

In the period 2003-2005, England, Wales and Northern Ireland extended hate-crime statutory aggravations to include sexual orientation. In June 2009, Scotland passed the *Offences (Aggravation by Prejudice) (Scotland) Act*, which came into force on 24 March 2010. It requires the aggravation of an offence by prejudice on the grounds of disability, sexual orientation or transgender identity to be taken into account in sentencing.

Transgender issues

In the UK, discrimination in employment or training, or in the provision of goods, facilities or services on grounds of gender reassignment is a form of sex discrimination. In addition, in Great Britain (England, Wales and Scotland) public authorities have a specific gender equality duty which places an obligation on them to promote gender equality and eliminate sex discrimination. This duty extends to gender reassignment, i.e. to those who are intending to undergo, are undergoing, or have undergone gender reassignment.

In the UK, there is no requirement to carry an identity card or other form of identification displaying one's name. Individuals are also free to use a name of their own choosing. No medical treatment of any kind is needed in order to change one's name or to change it on statutory documents such as a driving licence or a passport.

The *Gender Recognition Act 2004* (GRA), which came into force in April 2005 and applies throughout the UK, enables transgender individuals who satisfy certain criteria to apply to a Gender Recognition Panel for a *Gender Recognition Certificate*. From the date of the grant of a full Certificate an individual is afforded legal recognition in his or her acquired gender, and can obtain a new birth certificate which does not disclose the fact that he/she changed gender. A transgender person who is married cannot receive a full Certificate because, in the United Kingdom, marriage is not permitted between two members of the same sex. Where applicants are married, they will be issued with an interim Certificate. This enables them to obtain a full Certificate via a simplified procedure if they annul their marriage. The GRA does not require applicants to undergo hormonal treatment or surgery.

Miscellaneous

No relevant information.

Good practices

Seven good practices are nominated. The first three concern the reporting of homophobic and transphobic crimes; one concerns research on transgender issues; two concern transgender people and employment practices; and one concerns education on sexual orientation..

A. Implementation of Employment Directive 2000/78/EC

In accordance with the devolved government arrangements in the UK, separate legislative measures were introduced to implement Council Directive 2000/78/EC (27.11.2000) into national law in Great Britain and Northern Ireland. Specific regulations were adopted relating to each of the prohibited grounds of discrimination contained in the Directive where new laws were necessary in order to bring UK law into compliance. As there was no existing national legislation explicitly prohibiting sexual orientation discrimination in employment and occupation,¹ the *Employment Equality (Sexual Orientation) Regulations 2003* were adopted for Great Britain, coming into legal force on 1 December 2003,² and the *Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003* were adopted for Northern Ireland and entered into legal force on 2 December 2003.³ Therefore the necessary laws were adopted by the UK Government to implement Directive 2000/78 by 2 December 2003.⁴

It should be noted at the outset that these regulations were adopted by UK ministers under delegated powers derived from the European Communities Act 1972. Under these powers statutory regulations cannot have a wider material scope than the Directive.⁵ However additional regulations have subsequently been adopted under powers delegated from sections 81 and 82 of the *Equality Act 2006* (EA).⁶ These are the *Equality Act (Sexual Orientation) Regulations*

¹ Although the UK Human Rights Act 1998 has provided a basis for enforcing rights contained in the ECHR in the UK courts, a recent attempt to bring a claim of sexual orientation discrimination relying on Art. 14 ECHR was not successful in the UK House of Lords: *Secretary of State for Work and Pensions v. M* [2006] UKHL 11, available at: <http://www.publications.parliament.uk/pa/ld/judgmt.htm> (15.02.2008).

² UK/ Employment Equality (Sexual Orientation) Regulations 2003, Statutory Instrument 2003 No.1661 (01.12.2003), available at: <http://www.opsi.gov.uk/si/si2003/20031661.htm> (15.02.2008). In order to make very minor amendments to these regulations, additional legislative measures were later adopted for Great Britain by way of the Employment Equality (Sexual Orientation) Regulations 2003 (Amendment) Regulations 2003, Statutory Instrument 2004 No. 2827 (01.12.2003), available at: <http://www.opsi.gov.uk/si/si2003/20032827.htm>, and the Employment Equality (Sexual Orientation) Regulations 2003 (Amendment) Regulations 2004, Statutory Instrument 2004 No. 2519 (01.10.2004), available at: <http://www.opsi.gov.uk/si/si2004/20042519.htm> (15.02.2008).

³ UK/ Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, Statutory Rules of Northern Ireland 2003 No. 497 (02.12.2003), available at: <http://www.opsi.gov.uk/sr/sr2003/20030497.htm> (15.02.2008).

⁴ In accordance with the implementation date specified in Art.18 of the Directive.

⁵ For further explanation see UK/ House of Commons Research Paper 03/54 (2003) *Employment Equality Regulations: Religion and Sexual Orientation*, p.16, available at: <http://www.parliament.uk/commons/lib/research/rp2003/rp03-054.pdf> (15.02.2008).

⁶ See UK/ Equality Act 2006 c.3 (16.02.2006), available at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_1.htm (15.02.2008).

2007⁷ and the *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006* as amended.⁸ These regulations extend the material scope of prohibited sexual orientation discrimination in the UK beyond the fields of employment and occupation. The 2007 Regulations prohibit discrimination on grounds of sexual orientation in the provision of goods, facilities, services, education, management and disposal of premises and the exercise of public functions. The 2007 Regulations broadly follow the scope and content of the 2003 Regulations with some exceptions although there are some innovative features including specific coverage of unlawful contractual terms and instructions to discriminate. There is a temporary exemption relating to the insurance sector. Provisions also place married persons and same sex civil partners in the same position under the Regulations. The Northern Ireland Regulations have been reissued, following consultation, having been the subject of a successful judicial review challenge by a variety of Christian organisations.⁹ These organisations complained about a lack of consultation about the harassment provisions in those Regulations as these were not mentioned in the preceding consultation paper.

As mentioned, the new *Equality Act 2010*¹⁰ received Royal assent in April 2010 and its main provisions are expected to come into force in October 2010. The Act brings together and restates all existing enactments in domestic discrimination law concerning each of the ‘protected characteristics’, including the 2003 and 2007 Sexual Orientation Regulations, in order to give a single approach. Most of the existing legislation has been repealed. The Act forms part of the law of England, Scotland and Wales. The Northern Ireland Assembly has devolved powers to bring forward their own proposals. The Act aims to simplify, harmonise and consolidate discrimination law and to strengthen the law in a number of areas. The Act also contains a new power providing the ability to harmonise the legislation where changes are required as a result of European law. At the time of writing (April 2010), a complete assessment of the Act’s impact is not yet possible. However, the Act will, *inter alia*:¹¹

⁷ UK/ Equality Act (Sexual Orientation) Regulations 2007 Statutory Instrument 2007 No. 1263 (30.04.2007), available at: http://www.opsi.gov.uk/si/si2007/uksi_20071263_en_1 (15.02.2008).

⁸ The Equality Act (Sexual Orientation) (Amendment No 2) Regulations (Northern Ireland) 2007, Statutory Rules of Northern Ireland 2006 No. 439 (01.06.2007), available at: http://www.opsi.gov.uk/sr/sr2007/nisr_20070261_en_1 (15.02.2008). See below for discussion of the successful challenge to part of these Regulations in *Re Christian Institute and others’ application for judicial review* [2008] Industrial Relations Law Reports (IRLR) 36.

⁹ *Re Christian Institute and others’ application for judicial review* [2008] Industrial Relations Law Reports (IRLR) 36 (Northern Ireland Queens Bench Division).

¹⁰ Equality Act 2010 c.15, available at: http://195.99.1.70/acts/acts2010/pdf/ukpga_20100015_en.pdf (21.04.2010).

¹¹ Equality Bill: Explanatory Notes 2009, pp. 3-4, available at: http://www.publications.parliament.uk/pa/ld200910/ldbills/020/en/10020x--.htm#index_link_1.

- extend the circumstances in which a person is protected against discrimination, harassment or victimisation because of a protected characteristic;
- extend the circumstances in which a person is protected against discrimination by allowing people to make a claim if they are directly discriminated against because of a combination of two relevant protected characteristics;
- create a duty on listed public bodies when carrying out their functions to eliminate conduct which the Act prohibits; to advance equality of opportunity between persons who share a relevant characteristic and those who do not; and to foster good relations between people who share a relevant characteristic and people who do not;
- allow an employer or service provider or other organisation to take positive action so as to enable existing or potential employees or customers to overcome or minimise a disadvantage arising from a protected characteristic.

For the purpose of this part of the study we will focus on the 2003 Sexual Orientation (SO) Regulations applicable in Great Britain (GB), as the 2003 Northern Ireland (NI) Regulations are essentially similar.¹² The following elements of the 2003 GB SO Regulations will next be outlined in turn: scope; concept of discrimination; exceptions for genuine occupational requirements; positive action; and remedies, enforcement and sanctions.

The **personal and material scope** of the Regulations is consistent with the letter and spirit of Directive 2000/78. In the interpretation provisions in Reg. 2(1) the term ‘sexual orientation’ is defined as meaning a sexual orientation towards ‘(a) persons of the same sex; (b) persons of the opposite sex; or (c) persons of the same sex and of the opposite sex’. According to the Explanatory Memorandum to the Regulations, this definition covers discrimination against people of either sex in employment and occupation who are ‘lesbian’, ‘gay’, ‘bisexual’ or ‘straight’ but it ‘does not extend to sexual practices and preferences’.¹³ Nevertheless, as Directive 2000/78 is silent on the meaning of ‘sexual orientation’ this represents a broad definition of the term.

‘Employment’ under Reg. 2(3) means ‘employment under a contract of service or of apprenticeship or a contract personally to do any work’. Employment extends beyond the limited common law concept of an ‘employee’ under a

¹² Note, however, that the 2003 NI SO Regulations grant enforcement powers to the Equality Commission for Northern Ireland including the power to provide financial assistance and support to individuals, see regs. 30-32 and 40.

¹³ Employment Equality (Sexual Orientation) Regulations 2003 Explanatory Memorandum Annex B, para. 5. See also C. O’Cinneide (2007), *United Kingdom Country Report on measures to combat discrimination*, for the European Network of Legal Experts in the non-discrimination field, p.18, available at: http://www.europa.nl/employment_social/fundamental_rights/pdf/legnet/ukrep07_en.pdf (15.02.2008).

contract of service.¹⁴ It broadly encompasses casual workers, home workers, agency workers and part-time or irregular workers who are in an employment relationship. Protection against sexual orientation discrimination is also extended to contract workers,¹⁵ office holders,¹⁶ police,¹⁷ the armed forces,¹⁸ barristers,¹⁹ advocates²⁰ and partners in firms.²¹

Employers and contract principals and their agents are vicariously liable under Reg. 22 for anything done by a person ‘in the course of his employment’, whether or not it was done with their knowledge or approval. It is a defence for an employer or principal to show that he/she took such steps as were ‘reasonably practicable’ to prevent the employee from doing such an act. Similar provisions in the *Race Relations Act 1976* (RRA) have been relied on by workers who have been subjected to racial harassment by their fellow employees.²² However, the UK House of Lords has held in *Pearce v. Governing Body of Mayfield School*²³ that where harassment of a worker is by a third party the employer cannot be vicariously liable. In *Pearce* a female teacher was subjected to sex-specific homophobic taunting and abuse by pupils at a school. The Governing Body of the school was held to be not vicariously liable as the pupils were not its agents and the acts of harassment were not carried by the staff. The case was brought under the *Sex Discrimination Act 1975* (SDA), as it predated the SO Regulations, but the provisions on vicarious liability are identical in the separate legislative regimes. However, in May 2007, in *Equal Opportunities Commission v. Secretary of State for Trade and Industry*,²⁴ the England and Wales High Court (Mr Justice Burton) ruled that such a narrow approach is incompatible with the definition of ‘harassment’ in EU equalities law which requires the law to facilitate claims where an employer knowingly fails to protect a worker from repetitive harassment by a third party.

Bodies providing access to employment and self-employment are prohibited from discriminating against a person on the grounds of sexual orientation. Specified bodies include,²⁵ *inter alia*, trade organisations, qualifications’ bodies,

¹⁴ The UK House of Lords has held that casual workers are not ‘employees’ if they have no obligation to work for the employer and the employer has no obligation to provide them with work: *Carmichael v. National Power* [2000] IRLR 43. It follows that casual workers and other atypical workers are excluded from many aspects of UK employment legislation.

¹⁵ Reg. 9. Under Reg. 9(5) this would include not only agency workers but any person who is supplied to work for another person under a contract.

¹⁶ Reg. 10.

¹⁷ Reg. 11.

¹⁸ Reg. 36(2)(c).

¹⁹ Reg. 12.

²⁰ Reg. 13.

²¹ Reg. 14.

²² *Jones v. Tower Boot* [1997] IRLR 168.

²³ *Pearce v. Governing Body of Mayfield School* [2003] IRLR 512.

²⁴ *Equal Opportunities Commission v. Secretary of State for Trade and Industry* [2007] IRLR 327.

²⁵ Regs. 15-20.

providers of vocational training, employment agencies, careers guidance bodies and institutions of further and higher education.²⁶ In the main these provisions are fully consistent with, if not broader than, the scope of the Directive in Art. 3(1)(a) and (b), covering both public and private sectors, including public bodies, conditions for access to employment, to self-employment or to occupation and access to vocational guidance and training. See below, paragraphs 33-37 for discussion of ‘genuine occupational requirements’ that can be applied by professional or qualifications’ bodies.

In accordance with Art 3(1)(c) of the Directive, the Regulations apply to persons at all stages of the employment relationship, from the hiring process²⁷ through to discrimination during the period of employment including pay, or if a person is subjected to any detriment, and in the event of dismissal, including self-dismissal or constructive dismissal by reason of the employer’s conduct.²⁸ The worker is also protected from unlawful discrimination after the conclusion of the employment relationship ‘where the discrimination or harassment arises out of and is closely connected to that relationship’.²⁹

The **concept of discrimination** in the Regulations is founded on the principle of equal treatment and includes direct discrimination, indirect discrimination, victimisation and harassment as required by Art. 2 of the Directive.

Under Reg. 3(1)(a) the definition of direct discrimination is straightforward, applying where a person discriminates against another person ‘on grounds of sexual orientation’ by treating that person ‘less favourably than he would treat other persons’. The term ‘on grounds of’ has been interpreted broadly, in the context of race discrimination, and therefore should be considered to include less favourable treatment of someone because of the racial or ethnic origin of the person with whom he/she associates, for example if his or her son is gay.³⁰ Moreover, also in the context of racial discrimination, this term has been applied to protect the right of a manager or worker to refuse to carry out such an instruction against a fellow worker or client even if they are not a member of the racial or ethnic group being subjected to discrimination.³¹ This case law applies equally to sexual orientation discrimination as confirmed by the judgment of the England and Wales Court of Appeal in *English v. Thomas*

²⁶ Vocational training by schools is not included.

²⁷ Reg. 6(1) and (3).

²⁸ Reg. 6(2), (4) and (5).

²⁹ Reg. 21(1).

³⁰ See Lord Hope in *MacDonald v. Advocate General for Scotland* [2003] UKHL 34, para. 80. Discussed by C. O’Cinneide (2007), *United Kingdom Country Report on measures to combat discrimination*, for the European Network of Legal Experts in the non-discrimination field, p.22, available at: http://www.europa.nl/employment_social/fundamental_rights/pdf/legnet/ukrep07_en.pdf (15.02.2008).

³¹ *Weathersfield Van and Truck Rentals v. Sargeant* [1999] Industrial Cases Reports (ICR) 425.

*Sanderson Blinds Ltd*³² discussed below. While case-law may compensate for the absence of any reference in either the GB or NI Regulations to an ‘instruction’ to discriminate being deemed to be discrimination, as expressed in Art. 2(4) of the Directive, the requirement in Art. 2(4) should be made explicit in the Regulations in order to ensure transparency. This is also now necessary for reasons of consistency as the 2007 GB SO Regulations concerning sexual orientation discrimination in specified areas other than employment and occupation expressly prohibit instructions to discriminate albeit that enforcement of this prohibition is reserved solely for the statutory Commission for Equality and Human Rights (CEHR).³³ It should be noted also that this broad approach to the concept of equality, to include discrimination by association, has been adopted by the ECJ in *Coleman v. Attridge Law*.³⁴

The definition of less favourable treatment in Reg. 3(1)(a) is consistent with Art. 2(2)(a) of the Directive. In the context of sex discrimination, it has been held that the tribunal must simply ask whether or not the person complaining of discrimination would have received the same treatment ‘but for’ his or her sex?³⁵ Moreover, the UK courts have established, in cases concerning sex and race discrimination, that the intention or motive to discriminate is not relevant to show discrimination.³⁶ The ‘but for’ test has similarly been broadly applied in the context of harassment on the grounds of sexual orientation by the England and Wales Court of Appeal in *English v. Thomas Sanderson Blinds*,³⁷ discussed below. It is fully accepted under domestic law that direct discrimination cannot be justified. Stereotypical assumptions or perceptions about members of a group are irrelevant because the objective of the legislation is to treat every person as an individual who is not assumed to be like other members of the group. In the context of sexual orientation discrimination, where stereotyping is rife, reiteration of this approach would reinforce the position of complainants in direct discrimination and harassment cases.

The requirement for a comparator in discrimination cases is limited, under Reg. 3(2), to situations where ‘the relevant circumstances in the one case are the same, or not materially different, in the other’. Therefore the legal test is not whether the employer has treated the worker less favourably, but whether he /she has treated him/her less favourably than he/she would have treated a worker in an otherwise similar situation belonging to another group.³⁸ It follows that an actual comparator is not always necessary. The tribunal must answer two questions. Firstly, why was the claimant treated in the way in which he/she was? Secondly, was it on the proscribed ground that was the foundation of the

³² [2008] EWCA Civ 1421; [2009] IRLR 206.

³³ Reg. 11 of the UK/ Equality Act (Sexual Orientation) Regulations 2007 Statutory Instrument 2007 No. 1263 (30.04.2007).

³⁴ Case C-303/06, *Coleman v. Attridge Law* [2007] IRLR 88 (Opinion of 31 January 2008).

³⁵ *James v. Eastleigh Borough Council* [1990] IRLR 288.

³⁶ *R v. Birmingham City Council ex parte Equal Opportunities Commission* [1989] IRLR 173.

³⁷ [2008] EWCA Civ 1421; [2009] IRLR 206.

³⁸ *Zafar v. Glasgow City Council* [1988] IRLR 36.

application or was it for some other reason? If the former, there will be no difficulty in finding less favourable treatment.³⁹ This test has its source in a strict interpretation of the test required under the Burden of Proof Directive, 97/80, whereby, in the absence of an adequate explanation for less favourable treatment, the onus shifts to the employer to show that there is no discrimination whatsoever.⁴⁰ As the UK courts have recently stressed, once the worker has shown the fact of discrimination the employer must have ‘cogent evidence’ to prove that he/she did not discriminate.⁴¹

The first part of the definition of indirect discrimination in Reg. 3(1)(b) follows Art. 2(2)(b) of the Directive. Under this test indirect discrimination occurs where a ‘provision, criterion or practice’ that applies equally to all persons puts or would put persons of the same sexual orientation as the complainant ‘at a particular disadvantage when compared with other persons’. It then adds the following rider, not contained in Art. 2(2) of the Directive, whereby the ‘provision, criterion or practice’ must put the individual complainant ‘at that disadvantage’. This addition suggests that the complainant must show disadvantage not only as a member of a group that has been disadvantaged but also that he/she has suffered detriment as an individual. This additional evidential burden is difficult to reconcile with the approach of the ECJ in *JämÖ* where, in a sex discrimination case, the test for indirect discrimination was confined to showing group disadvantage. The national court should simply ask if there were ‘a substantially higher proportion of women than men in the disadvantaged group?’⁴² The UK courts have, however, established that an inference of discrimination can be drawn where there is a statistical disadvantage applying to a particular group and no satisfactory explanation for that disadvantage.⁴³

In order to justify a measure alleged to result in an indirect discrimination the author of the measure must show that the ‘provision, criterion or practice’ is a ‘proportionate means of achieving a legitimate aim’,⁴⁴ consistent with Art. 2(2)(b)(i) of the Directive. The UK courts have closely followed the ECJ’s ruling in *Bilka Kaufhaus GmbH v. Weber von Hartz*⁴⁵ whereby a provision, criterion or practice can only be justified where it corresponds to a real need on the part of the undertaking, is appropriate with a view to achieving the objectives pursued and necessary to that end.

³⁹ *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285.

⁴⁰ OJ 1997, L14/16. This directive has now been abrogated by Directive 2006/54/EC.

⁴¹ *Igen v. Wong* [2005] IRLR 258.

⁴² Case C-236/98 *JämÖ* [2000] ECR I-2189.

⁴³ *West Midlands Passenger Transport v. Singh* [1988] IRLR 186.

⁴⁴ Reg. 3(1)(b)(iii).

⁴⁵ Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607. Recently applied in the context of discrimination on the grounds of religion or belief in *Azmi v. Kirkless Metropolitan Council* [2007] IRLR 484.

Unlike under Directive 2000/78, protection against victimisation is found not under the section on ‘remedies and enforcement’ in Art. 11 but as one of the concepts of discrimination. Reg. 4 provides a basis for a claim of victimisation based on less favourable treatment ‘by reason that’ the complainant has either: (a) brought proceedings alleging discrimination under the Regulations, or (b) given evidence or information in connection with such proceedings, or (c) otherwise done anything under or by reference to the Regulations, or (d) alleged that that the complainant or any other person has committed an act which (whether or not alleged) would amount to a contravention of the Regulations, or ‘by reason that’ the person against whom discrimination has been alleged knows that the complainant intends to do any of (a-d), or suspects that they has done or intends to do any of them. In certain respects including victimisation as a concept of discrimination is useful in establishing liability. In a case under the *Race Relations Act* the House of Lords has held that the motive of the act or acts of victimisation is irrelevant.⁴⁶ It is only necessary for the tribunal to ask whether the act of victimisation amounts to less favourable treatment. However, under the Regulations, the alleged perpetrator may be able to show that the treatment was not ‘by reason that’ the complainant was protected by one of the specified acts but was for some other reason, such as to protect his/her position as a litigant.⁴⁷ The problem with this provision is that it may require the complainant to identify a real or hypothetical comparator to show less favourable treatment. Art. 11 of the Directive contains no such requirement. It is designed to forestall discrimination ‘as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment’. The provision in the Regulations does not have this preventative effect.⁴⁸

Under Reg. 5 ‘harassment’ is defined as unlawful conduct taking place where:

‘(1) ... a person (‘A’) subjects another person (‘B’) to harassment where, on grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of – (a) violating B’s dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Conduct shall be regarded as having [the effect specified in para. (1)] only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.’

⁴⁶ *Nagarajan v. London Regional Transport* [2001] AC 501.

⁴⁷ See *Chief Constable of West Yorkshire Police v. Khan* [2001] ECR 1065.

⁴⁸ See C. O’Cinneide (2007) *United Kingdom Country Report on measures to combat discrimination*, for the European Network of Legal Experts in the non-discrimination field, p.78, available at: http://www.europa.nl/employment_social/fundamental_rights/pdf/legnet/ukrep07_en.pdf (15.02.2008).

Under this definition there is no requirement for a comparator, an improvement on the previous position under the *Sex Discrimination Act 1975* (SDA) and the RRA. However, the definition raises three problems of interpretation, as outlined by Miss Dinah Rose in her submissions in a challenge before the England and Wales High Court to the near identical provisions in the amended SDA,⁴⁹ *Equal Opportunities Commission v. Secretary of State for Trade and Industry*.⁵⁰ First, the term ‘on grounds of sexual orientation’ imports causation into the concept of harassment whereas in Art. 2(3) of the Directive harassment is defined as ‘unwanted conduct related to [sexual orientation]’. Second, by emphasising the ‘perception’ of the person subjected to discrimination the language used adds an objective test into the definition of harassment. Third, as the aim of the Directive is to eliminate such unwanted conduct, the Regulations are inadequate as the employer is not vicariously liable for discriminatory acts or omissions of parties such as a client, contractor, customer or visitor where the employer him- or herself has not discriminated, as in *Pearce*, paragraph 20 above.

In partially upholding the challenge, Mr Justice Burton held, in relation to the first of these issues of interpretation, that the importation of causation into the legal test for harassment is impermissible because there is no requirement in the Directive to explain the unwanted conduct. On the second issue he held that the language used in the SDA had been objective prior to the amendment of Directive 76/207 and retaining an objective test was within the bounds of the UK Government’s discretion when implementing a directive because it was not regressive. On the third issue he held, contrary to *Pearce*, that the amended SDA did not protect the person discriminated against in circumstances in which the employer should be held liable for his/her knowing failure to take steps to prevent harassment by others. On this basis he ruled that the provisions in the SDA would have to be recast and, it follows, the same would apply to the 2003 GB and NI Sexual Orientation Regulations. Consequently the SDA has been amended to bring UK law into conformity with EU law.⁵¹

The issues of interpretation referred to in paras. 32 and 33 above have now been addressed in *English v. Thomas Sanderson Blinds*,⁵² the first significant case before the UK courts on the scope of the 2003 GB Sexual Orientation Regulations. The case concerned allegations by Mr English that he had been subjected over many years to homophobic abuse by his work colleagues arising from the fact that he had attended a boarding school and lived in Brighton. Mr English was not gay and, moreover, his colleagues did not really believe him to be gay, a point he acknowledged. The Employment Tribunal and the

⁴⁹ UK/ Sex Discrimination Act 1975 c.65 (29.12.1975), s 4A(1)(a).

⁵⁰ *Equal Opportunities Commission v. Secretary of State for Trade and Industry* [2007] IRLR 327.

⁵¹ UK Sex Discrimination Act 1975 (Amendment) Regulations 2008 No. 656, para. 3.

⁵² [2008] EWCA Civ 1421; [2009] IRLR 206.

Employment Appeal Tribunal both found that Mr English's complaint fell outside the scope of Reg. 5 on the basis of a narrow reading of the term 'on grounds of sexual orientation'. However, the England and Wales Court of Appeal allowed Mr English's appeal by a majority decision that now provides a broad interpretation of the scope of the Regulations in the context of the Directive. Lord Justice Sedley, in one of the majority judgments, observed that it did not matter whether Mr English was gay or not: 'The calculated insult to his dignity, which depended not at all on his actual sexuality, and the consequently intolerable working environment were sufficient to bring his case ... within Reg. 5'.⁵³ The key question to ask was why did the other employees harass Mr English? 'It is not necessary to look for a logician's or a lawyer's answer by looking for motive or purpose or cause and effect. If the harassment was based on his sexual orientation, whether real or imagined, the question 'Why?' is answered ... but for the sexual orientation they chose to attribute to him [Mr English's] fellow employees would not have harassed him.'⁵⁴ On this basis the complaint fell within both Reg. 5 and the Directive.

Reg. 7 sets out permitted exceptions for **genuine occupational requirements** within the framework provided for in Art. 4 of the Directive.

Reg. 7(2) contains a general exception applying to all forms of employment and occupation under which, having regard to the nature of the employment or the context in which it is carried out (a) 'being of a particular sexual orientation is a genuine and determining occupational requirement' and (b) it is 'proportionate' to apply it in the particular case and (c) either '(i) (...) the person to whom that requirement is applied does not meet it or (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it'. Unlike under Art. 4(1) there is no obligation to show that the requirement meets a 'legitimate' objective although the Government's Explanatory Memorandum states that 'a requirement which pursues an illegitimate objective would not constitute a genuine occupational requirement' under Reg. 7(2)(a).⁵⁵ O'Connell suggests that the additional test in Reg. 7(2)(c) is designed to be applied in cases where there is a dispute as to a person's sexual orientation and it acknowledges that it may be difficult to prove an individual's sexual orientation. He concludes that providing the courts apply Reg. 7(2) with sufficient strictness it should comply with Art. 4(1) of the Directive.⁵⁶

⁵³ Para. 37.

⁵⁴ Para. 40.

⁵⁵ Employment Equality (Sexual Orientation) Regulations 2003 Explanatory Memorandum Annex B, para. 23.

⁵⁶ C. O'Connell (2007), *United Kingdom Country Report on measures to combat discrimination*, for the European Network of Legal Experts in the non-discrimination field, p.56, available at: http://www.europa.nl/employment_social/fundamental_rights/pdf/legnet/ukrep07_en.pdf (15.02.2008).

Regs. 7(3) and 16(3) are more controversial. These provisions draw upon Art. 4(2) of the Directive concerning an exception for existing national practices in the case of ‘occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief’ but must also be understood as a more specific implementation of Art. 4(1). Under Reg. 7(3) this exception applies where employment is (a) ‘for purposes of an organised religion’ and (b) the employer applies a requirement ‘related to sexual orientation (i) so as to comply with the doctrines of the religion or (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers’ and (c) either ‘(i) the person to whom that requirement is applied does not meet it, or (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that the person meets it’. Reg. 16(3) contains an almost identical exception for ‘a professional or trade qualification for purposes of an organised religion’.

The legality of Reg. 7(3), Reg. 16(3) and related exceptions were challenged by seven UK trade unions in *MSF and others v. Secretary of State for Trade and Industry*.⁵⁷ Mr Justice Richards in the High Court ruled that these provisions were compatible both with the right to family and private life in the ECHR and Art. 4(1) of the Directive notwithstanding the absence of any reference to proportionality, the need to meet a legitimate objective or to apply such a requirement by reference to a person’s individual conduct. It might be added, notwithstanding the fact that Art 4(2) of Directive 2000/78/EC explicitly limits the scope of the exception to differences of treatment based on religion or belief, therefore not allowing differences of treatment on grounds of sexual orientation. The High Court held that the derogation in Art. 4(1) is wide enough to cover Reg. 7(2) even allowing for the need to construe derogations strictly.

Reg. 26 provides limited scope for **positive action** as permitted under Art. 7 of the Directive. This provision allows persons of a particular sexual orientation to be afforded access to facilities for training which would help fit them for particular work, or to encourage them to take advantage of opportunities for doing particular work. These exceptions can be applied ‘where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to sexual orientation suffered by persons of that sexual orientation doing that work or likely to take up that work.’

The Regulations also include two further exceptions. The first, in Reg. 24, would permit a discriminatory act done ‘for the purpose of safeguarding national security, if the doing of the act was justified for that purpose’. This is broadly compatible with Art. 2(5) of Directive 2000/78 but would be subject to a strict proportionality test. The second, in Reg. 25, provides that nothing in the Regulations ‘shall render unlawful anything which prevents or restricts access

⁵⁷ *MSF and others v. Secretary of State for Trade and Industry* [2004] IRLR 430.

to a benefit by reference to marital status'. In *MSF and others v. Secretary of State for Trade and Industry*,⁵⁸ Mr Justice Richards held that this Reg. 25 was compatible with Recital 22 in the preamble of the Directive allowing Member States to maintain benefit rules relating to marital status. He found that such rules were not directly discriminatory on grounds of sexual orientation and that any indirect discrimination arising from their application might be objectively justified by reference to the need to limit the costs of social security benefits.

Provisions concerning **enforcement, including remedies and sanctions**, can be found in Part V, Regs. 27- 34. An individual seeking a remedy for alleged breach of the 2003 SO Regulations must bring a complaint within three months⁵⁹ to an Employment Tribunal (ET) in Great Britain or, in Northern Ireland, to an Industrial Tribunal (IT). ETs and ITs have an Employment Judge, who must be a qualified legal practitioner, and two lay members appointed to represent the two sides of industry, one representing employers and the other representing employees. Tribunals issue binding orders with a right of appeal on a point of law to the Employment Appeal Tribunal (EAT), a body that also has a judge and two lay members, with a further right of appeal to the panels of judges in the Court of Appeal (England and Wales) or the Inner House of the Court of Session (Scotland) and to the final court of appeal, the Supreme Court. In Northern Ireland appeals are sent directly to the judges sitting on the Northern Ireland Court of Appeal and then to the Supreme Court.⁶⁰

Following the *Marshall (No. 2)*⁶¹ case before the European Court of Justice there is no upper limit on the amount of compensation that can be awarded by tribunals where a claim is well-founded under Reg. 31 and interest may also be ordered to be paid. Compensation may include a sum for injury to feelings⁶² but not aggravated damages.⁶³ Where it is 'just and equitable' to do so, tribunals have the power to issue a declaration of rights of the complainant, an order requiring the respondent to pay compensation to the complainant and a

⁵⁸ *MSF and others v. Secretary of State for Trade and Industry* [2004] IRLR 430.

⁵⁹ See Regs. 28 and 36. Six months in the case of the armed forces under Reg. 36(7). Tribunals have discretion to extend these time limits on a 'just and equitable' basis.

⁶⁰ Under Reg. 31 civil proceedings relating to matters covered by the Regulations that fall outside the jurisdiction of the ETs or ITs may be brought before a County Court (England, Wales, NI) or a Sheriff Court (Scotland). These include alleged discrimination by institutions of further and higher education and acts taking place after an employment relationship has come to an end. These courts also deal with cases of discrimination in goods, facilities and services under the 2007 SO Regulations.

⁶¹ Case C-271/91 *Marshall v. South-West Hampshire Area Health Authority* [1993] ECR I-4367.

⁶² Depending on the seriousness of the case damages for injury to feelings may be awarded between £6000 and £30,000: *Da'Bell v. NSPCC* [2009] UKEAT/0227/09.

⁶³ With the exception of actions brought before the County Court or Sheriff Court. See note 53 above. Aggravated damages compensate the victim of a wrong for mental distress (or 'injury to feelings') in circumstances in which that injury has been caused or increased by the manner in which the defendant committed the wrong, or by the defendant's conduct subsequent to the wrong. See 'Aggravated, Exemplary and Restitutionary Damages', Law Commission Report 247 (HC 346) 1997, para. 1.8.

recommendation that the respondent takes action to obviate or reduce the adverse effect on the complainant of any act of discrimination or harassment to which the complaint relates. Failure to comply with a recommendation may lead to an increase in the amount of compensation awarded. This adds a 'dissuasive' element but there is no power for tribunals to reinstate the complainant or to require the respondent to hire or promote the complainant.

The Regulations do not expressly provide for standing for interest groups under Art. 9(2) of Directive 2000/78. However, the UK courts are receptive to any organisation seeking to offer support to complainants or to intervene in a case. In Great Britain the statutory equalities body, the Commission for Equality and Human Rights (CEHR) has powers to assist an individual who is, or may become a party to, legal proceedings.⁶⁴ These include legal advice and representation in court, providing facilities for the settlement of a dispute and any other form of assistance. Trade unions frequently provide advice and representation as do voluntary or charitable bodies such as Citizens Advice Bureau or specialist organisations in the area of sexual orientation discrimination, such as Stonewall. No procedural restrictions are placed on these bodies. Third parties may bring an action for judicial review to challenge the legality of legislation or the acts of any public authority but may not submit a case directly in place of a complainant. 'Associational standing' is not recognized, so that an interest group is not authorized to file an action against discrimination that group has not been subjected to directly. However, the CEHR has a grants programme of up to £10 million in 2009/10 for grassroots organisations in all areas of equality including those dealing with sexual orientation discrimination cases. This enables organisations such as Stonewall to provide legal advice and representation.

The UK does not have a specialised ombudsman or equality body dealing with sexual orientation discrimination issues but it does have statutory bodies that have a general duty to promote equality and specific powers to monitor the effectiveness of equalities legislation and bring enforcement proceedings. In Great Britain this function is the responsibility of the CEHR, established under the *Equality Act 2006* to replace specialised bodies concerning race, sex and disability discrimination with one generic equality body covering all heads of unlawful discrimination. The CEHR monitors the law, advises government and undertakes research, including monitoring of the compliance of public bodies with the ECHR under the *Human Rights Act 1998*. In addition to its powers of legal advice and representation described above, the CEHR has enforcement powers to conduct inquiries and investigations into organisations where discrimination may be occurring⁶⁵ and to issue an 'unlawful act' notice to an organisation where it considers an act of discrimination has occurred and can

⁶⁴ Under the Equality Act, s. 28(4) the Equality Commission for Northern Ireland has similar powers.

⁶⁵ See UK/ Equality Act 2006 c.3 (16.02.2006), s16 and s20, available at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_1.htm (15.02.2008).

apply to a court or tribunal to enforce that notice.⁶⁶ The CEHR seeks to challenge endemic and institutional discrimination through its investigatory powers without the need for individual litigation. As the CEHR has had responsibility for addressing sexual orientation discrimination for a short period there have only been a relatively small number of cases in which the CEHR have been involved to date.⁶⁷ In Northern Ireland similar responsibilities fall within the remit of the Equality Commission for Northern Ireland (ECNI) which has had powers to oversee sexual orientation discrimination issues from the time when the Regulations were adopted and has been involved in providing support in a number of recent cases.⁶⁸

⁶⁶ UK/ Equality Act 2006 c.3 (16.02.2006), s21, available at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_1.htm (15.02.2008).

⁶⁷ The CEHR's mandate to address issues relating to sexual orientation discrimination only began in October 2007, and so far only two applications for legal assistance in cases of discrimination on the grounds of sexual orientation have been made to the Commission. The authors are grateful to Peter Reading of the CEHR for providing background information.

⁶⁸ For a full analysis see the joint report of the ECNI and the Equality Authority of the Republic of Ireland: J. Walsh, C. Conlon, B. Fitzpatrick and U. Hansson (2007) *Enabling Lesbians, Gay and Bisexual Individuals to Access their Rights under Equality Law*, November 2007, available at: <http://www.equalityni.org> (11.02.2008). For information on recent cases see Equality Commission for Northern Ireland 'Decision and Settlement Review' for the period 2005-2008, available at: <http://www.equalityni.org/sections/publist.asp?secid=8> (11.02.2008). The authors are grateful to Anne McKernan of the ECNI for providing background information.

B. Freedom of movement

The rights of family members of EU citizens and other European Economic Area (EEA) and Swiss nationals to enter, reside and remain in the UK under Directive 2004/38 (29.04.2004)⁶⁹ have been implemented by the *Immigration (European Economic Area) Regulations 2006*,⁷⁰ effective from the date of entry into force of the Directive, 30 April 2006. For the purpose of this part of the study the term EU citizen is taken also to include nationals of other EEA countries and Swiss nationals. The following paragraphs briefly outline the relevant provisions in these Regulations and related legislation.

To place the Regulations in context it should be noted that under the *Civil Partnership Act 2004*⁷¹ same-sex couples are able to obtain legal recognition of their relationship by forming a civil partnership. They may do so by registering as civil partners of each other provided:

- they are of the same sex;
- they are not already in a civil partnership or lawfully married;
- they are not within the prohibited degrees of relationship;
- they are both aged sixteen or over (and, if either of them is under 18 and the registration is to take place in England and Wales or Northern Ireland, the consent of the appropriate people or bodies has been obtained).

Although a civil partnership is not defined as a marriage, the legal consequences of forming a civil partnership and the rights and responsibilities of civil partners are comparable under UK law with those under a marriage between persons of the opposite sex. Therefore entering into a civil partnership under UK law enables LGBT partners of UK nationals to benefit from freedom of movement in another EEA State in accordance with Art. 2(2)(b) subject to the recognition of the host State in question.

In addition to assisting LGB same-sex couples this legislation also applies to persons who have undergone gender reassignment who wish to form a civil partnership, or have formed a civil partnership, with a person of their acquired gender. This has been made possible by the *Gender Recognition Act 2004*⁷² under which transgendered persons are entitled to a new birth certificate

⁶⁹ OJ 2004, L 158/77.

⁷⁰ UK/ The Immigration (European Economic Area) Regulations 2006, Statutory Instrument 2006 No.1003 (30.03.2006), available at: <http://www.opsi.gov.uk/si/si2006/20061003.htm> (15.02.2008).

⁷¹ UK/The Civil Partnership Act 2004 c.33 (18.11.2004), available at: http://www.opsi.gov.uk/acts/acts2004/ukpga_20040033_en_1.htm (11.02.2008). The act applies to England and Wales. Similar provisions have been introduced in Scotland and Northern Ireland.

⁷² UK/ Gender Recognition Act 2004 c.7 (01.07.2004), available at: http://www.opsi.gov.uk/acts/acts2004/ukpga_20040007_en_1.htm (11.02.2008).

reflecting their acquired gender. It should be noted also that transgendered persons are also able to marry someone of the opposite gender to his or her acquired gender and have that marriage recognised and hence be treated as a 'spouse' of an EU citizen for the purpose of Directive 2004/38 and Reg. 7(1)(a) of the *Immigration (EEA) Regulations 2006*.

Reg. 7 of the 2006 Regulations is almost identical to Article 2(2) of Directive 2004/38. Under Reg. 7 a 'family member' is defined in relation to an EU citizen as:

- his spouse or civil partner;
- direct descendant of his, his spouse or his civil partner who are:
 - under 21; or
 - dependants of his, his spouse or his civil partner;
- dependant direct relatives in his ascending line or that of his spouse or civil partner;
- a person who is [an extended family member of an EU citizen or his/her spouse or civil partner] and has been issued with an EEA family permit, a registration certificate or residence card [so long as he/she continues to satisfy the residence conditions applying to extended family members] and the permit, certificate or card has not ceased to be valid or been revoked.

This definition would include the LGBT partners of EU citizens who are in a same-sex civil partnership or marriage that is legally recognised in another EEA State consistent with Art. 2(2)(b) of Directive 2004/38. Children and family members of LGBT partners falling within this definition would also be included. The definition of civil partner is the same as applies under the *Civil Partnership Act*. It specifically excludes 'a civil partnership of convenience'.⁷³ This exclusion puts into effect the provision on 'abuse of rights' arising from such marriages of civil partnerships 'of convenience' as set out in Art. 35 of Directive 2004/38. Neither the Directive nor the Regulations define this term.

Reg. 8 is intended to put into effect the rights of 'beneficiaries' under Article 3(2) of Directive 2004/38 although it does not apply to EU citizens who are students. Under Reg. 8 an 'extended family member' might include family members such as brothers, sisters, aunts, uncles or cousins and any such person who has serious health problems which strictly require the personal care of the EU citizen. Extended family members do not have an automatic right to live in the UK but, to be considered under this category, they must be able to demonstrate that they are dependant on the EU citizen. In the case of partners

⁷³ Reg. 2(1).

who are not married or in a civil partnership with an EU citizen they must be able to show that they are in a ‘durable relationship’ with each other.⁷⁴

The rights of third country national LGBT partners who are family members of the EU citizen under the Regulations and their children and other family members are set out in Regs.9-15. Third country national family members accompanying or joining the EU citizen must be admitted to the UK if he/she produces on arrival a valid passport and an EEA family permit, a residence card or permanent residence card. If the person is a family member falling within the definition in the Regulations they must be issued with an EEA family permit. Residence cards are issued to third country national family members confirming their rights of residence under EU law. Third country nationals meeting these requirements will not need to apply for a work permit and are entitled to:⁷⁵

- accept offers of work;
- work (whether as an employee or in self-employment)
- set up a business or manage a company.

Once a third country LGBT partner who is a family member of an EU citizen has lived in the UK for a continuous period of five years he/she is entitled to acquire permanent residence in accordance with Art 18 of Directive 2004/38. Family members who have retained a right of residence on the death of the EU citizen or divorce or dissolution of a civil partnership can also acquire permanent residence.

The 2006 Regulations have now had to be amended in the light of the ECJ’s ruling in the recent *Metock* case, referred by an Irish court.⁷⁶ This was necessary because the original Regulations contained restrictions on the entry of third country national family members that have now been found not to be compatible with the Directive. In *Metock*, the first ruling on Directive 2004/38, the ECJ held that a requirement that a third country national family member of a Union citizen should have prior lawful residence in the EU before entering the host Member State was incompatible with the right of the Union citizen to be accompanied or joined by their family members in a Member State other than that of which they are a national contained in Art 3(1) of the Directive.⁷⁷

Under Reg. 9(2)(b) of the 2006 Regulations, concerning the rights of UK nationals who move back to the UK from another EEA State, there was a requirement that their family members must have been living with them in that

⁷⁴ See the guidance issued by the UK Home Office Border and Immigration Agency, available at: <http://www.bia.homeoffice.gov.uk/eucitizens> (15.02.2008).

⁷⁵ See the guidance issued by the UK Home Office Border and Immigration Agency, available at: <http://www.bia.homeoffice.gov.uk/eucitizens> (15.02.2008).

⁷⁶ Case C-127/08 *Metock and Others v. Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.

⁷⁷ Overturning its previous ruling, prior to the Directive, in Case C-109/01 *Akrich* [2003] ECR I-9607.

State before the UK national returned to the UK. Under Reg. 11, concerning the requirement for family members to have an EEA family permit, it was provided that to qualify for such a permit a family member must be lawfully resident in an EEA State or meet the requirements of UK Immigration Rules for entry as a family member. In the light of the ruling in *Metock*, the UK Border Agency issued revised guidance to the effect that the 'lawful residence requirement' in these Regulations and any related restrictions in the UK Immigration Rules would not be applied to family members entering the UK who are accompanying or joining an EU citizen.⁷⁸ This was swiftly followed by the adoption of the Immigration (European Economic Area) Amendment Regulations 2009.⁷⁹ The offending provisions have now been removed bringing the UK into compliance with the ruling in *Metock*.

⁷⁸ See the UK Border Agency's European Casework Instructions. Available at: www.bia.homeoffice.gov.uk.

⁷⁹ SI 2009/1117.

C. Asylum and subsidiary protection

C.1. Asylum Framework

Asylum claims on the basis of sexuality have had some success in UK courts. Positive determinations have developed through jurisprudential means drawing on a substantial body of international case law which has defined and redefined the parameters of ‘membership of a particular social group’ as per the *1951 Convention on the Status of Refugees*.⁸⁰ Art 1A(2) of the *Refugee Convention* defines a refugee as a person who:

‘Owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or unwilling to return to it.’

The formal requirements for gaining refugee status can be broken down into three substantive points. Firstly, an individual must be able to demonstrate an objective and subjective fear of persecution based on one of the enumerated grounds of race, religion, nationality, membership of a particular social group or political opinion.⁸¹ Secondly the individual must be outside the country of his/her nationality and the state from which the claimant is fleeing must have been unable or unwilling to provide protection from persecution; or the individual no longer has a nationality and is outside of their former residence and cannot or will not return to that place of residence. Finally, the receiving state is under an obligation not to *réfouler* the claimant to the home state if there is the real possibility that he or she may be subject to further persecution.

⁸⁰ UK/ Immigration Act 1971 c.77 (28.10.1971); UK/ Immigration Act 1988 c.14 (10.05.1988); UK/ Asylum and Immigration Appeals Act 1993 c.23 (01.07.1993); UK/ Immigration and Asylum Act 1999 c.33 (11.11.1999); UK/ Nationality, Asylum and Immigration Act 2002 c.41 (07.11.2002); UK/ Asylum and Immigration (Treatment of Claimants, etc) Act 2004 c.19 (22.07.2004); UK/ Immigration, Asylum and Nationality Act 2006 c.13 (30.03.2006), Immigration rules HC 395.

⁸¹ Persecution means an act of persecution within the meaning of Article 1(A) of the *Geneva Convention*. The existence of discriminatory legislation in an applicant’s home country will not usually be regarded as amounting to persecution of a sufficiently serious nature see *Amare and RG (Columbia)*. Only ‘[I]f the legislation does not appear to be enforced then it may sometimes be the case that the lack of enforcement has resulted in those being discriminated against changing their behaviour to avoid persecution. ...modification of behaviour may be so serious (see *Z v SSHD* [2004] EWCA Civ 1578 *HJ (Iran) and HT (Cameroon) v SSHD* [2009] EWCA Civ 172) that it amounts to persecution’ *OO (Sudan) JM (Uganda) v SSHD* [2009] EWCA Civ 1432 para 14. The (Qualification) Regulations, regulation 5 and Council Directive 2004/83/EC Article 9 provide further guidance on the meaning of persecution.

European Council Directive 2004/83EC preamble 3 identifies the *Convention* as the ‘cornerstone of the international legal regime for the protection of refugees’. The *Refugee Convention* provides the framework upon which the UK asylum system rests. The asylum system has multiple tiers composed of the various Immigration Acts, Regulations⁸² and European Directives which are administered through the *Immigration Rules* HC395.⁸³ This framework does not preclude reliance on the principles of the *European Convention on Human Rights (ECHR)* subsequent to the enactment of the UK *Human Rights Act 1998*. Furthermore the 1998 Act renders it unlawful for a public authority to act in a way incompatible with a right arising under the ECHR. A claimant can rely on the *ECHR* if appealing a negative determination. The claimant must raise their *ECHR* arguments alongside the grounds of appeal. Claims that the individual would have their *ECHR* rights violated upon return to the home state would mean that the individual may be eligible for subsidiary protection as defined under article 2 and 15 of directive 2004/83 and 339C of the immigration rules.

C.2. Jurisprudential evolution of LGBT asylum claims

LGBT individuals generally claim asylum as members of a ‘particular social group’ following the *obiter* comments of Lord Justice Steyn in *Shah and Islam*.⁸⁴ *Shah and Islam* concerned the position of two Pakistani women accused of adultery and subject to domestic abuse by their partners. In discussing the linkage between abused women as a social group and ‘homosexuals’, Lord Justice Steyn notes:

‘The unifying characteristics of gender, suspicion of adultery, and lack of protection, do not involve an assertion of persecution. The cases under consideration can be compared with a more narrowly defined group of homosexuals, namely practising homosexuals who are

⁸² *The Refugee or Persons in Need of International Protection (Qualification) Regulations 2006* together with amendments made to the Immigration Rules HC395 implemented the European Council Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons who otherwise need international protection and the content of protection granted. The parts of the directive not transposed were already present in existing UK immigration and asylum law.

⁸³ The implementation into domestic law of EC Directive 2004/83 through the 2006 Qualification Regulations alongside the explanatory memoranda provided further guidance as to the interpretation of the *Refugee Convention*. The Regulations guide the interpretation and decision making process of the Home Office and provide further details for the provision of humanitarian protection. Significantly section 6 (e) of the Regulations provides clarification on the social group definition and indicates that ‘a particular social group might include a group based on a common characteristic of sexual orientation...’.

⁸⁴ *Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another, Ex parte Shah* [1999] 2 WLR 1015, [1999] 2 AC 629.

unprotected by the state. Conceptually such a group does not in a relevant sense depend for its existence on persecution.’⁸⁵

This line of reasoning drew upon much of the established case law of the USA,⁸⁶ Australia⁸⁷ and Canada.⁸⁸ The decision drew in particular on the Canadian jurisprudence of *AG for Canada v Ward* (1993) with sexuality positioned as an innate and unchangeable characteristic, as something fundamental to human dignity that ought not to be required to be forsaken. Following the decision that lesbians and gay men could constitute members of a ‘particular social group’, numerous other questions arose navigating the territory of sexuality based asylum claims. Some of the issues raised for discussion regarded proof of sexuality.⁸⁹ Evidence for example of previous heterosexual relationships and children borne from those relationships brought the claimants credibility as a homosexual into question.⁹⁰ Many lesbians and gay men marry as an attempt to conform to heterosexual norms, enter into forced marriages or enter willingly into heterosexual marriage and then later become aware of their homosexuality.

The courts have also considered concepts of identity versus activity.⁹¹ The recent case of *SB (Uganda)* [2010] indicated that “Homosexuality is about sexual orientation or identity rather than behaviour.” The UK Lesbian and Gay Immigration Group has noted ‘sexual identity encompasses much more than having sex with a partner. It includes the ability to meet a potential partner, to socialise and to express one’s sexuality without fear of grave harm’ rather than an emphasis on homosexual acts or having sex in public places.⁹²

⁸⁵ Lord Steyn at 645. In his judgement at 643 Lord Steyn also notes ‘drawing on the case law and practice in Germany, The Netherlands, Sweden, Denmark, Canada, Australia and the USA, the refugee status authority concluded in an impressive judgement that depending on the evidence homosexuals are capable of constituting a particular social group... [t]his view is consistent with the language and purpose of Art 1A(2).’

⁸⁶ *Acosta* (1985) 19 I and n211, US Board of Immigration Appeals.

⁸⁷ *Appellant S395/2002 v Minister for Immigration and Multicultural affairs* (2003) 203 ALR 112.)

⁸⁸ *Attorney General for Canada v Ward* (1993) 2 SCR 689.

⁸⁹ *R v Secretary of State for the Home Department ex parte Vraciu* 1995 Appeal No. HX/70517/94. *NR (Jamaica) v SSHD* [2009] EWCA Civ 856; See O’Leary, Barry; ‘We cannot claim any particular knowledge of the ways of homosexuals, still less of Iranian homosexuals’: The Particular Problems of Those Who Seek Asylum on the Basis of Their Sexual Identity’ *Feminist Legal Studies* (2008) 16: 87-95.

⁹⁰ *SB (Uganda)* [2010] para. 6.

⁹¹ *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238; *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2009] EWCA Civ 172; *R (on the application of SB (Uganda)) v SSHD* [2010] EWHC 338 Admin; *NR (Jamaica) v SSHD* [2009] EWCA Civ 856. Also see UK Lesbian and Gay immigration Group ‘Failing the Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum’ <http://www.uklgig.org.uk/docs/Failing%20the%20Grade%20UKLGIG%20April%202010.pdf> (17 April 2010)

⁹² UKLGIG (2010) 4.

The courts' imposition of discretion upon same-sex relationships has also been relied on to the detriment of lesbian and gay claimant's.⁹³ The courts assume the applicant can be safely réfoiled so long as they maintain discretion in the expression of their sexual identity. If the claimant has previously lived in the sending state in a manner which is discreet, it is assumed that they will continue to live with that same level of discretion. Discretion is only assumed to be persecutory if it reaches a level that the individual could not 'reasonably be expected to tolerate'.⁹⁴

Internal relocation alternatives⁹⁵ have also been relied on by the courts. It is assumed that unmarried persons can safely move to other parts of the country away from the discrimination/persecution and live discreetly.⁹⁶ In some states there is no safe space for lesbians and gay men to move to. Moving as a single person or with someone of the same gender transgresses cultural norms, which raises the spectre of homosexuality; additionally moving to alternate parts of the country away from family is not feasible for some individuals both culturally and economically. In many states a woman leaving home prior to being married would be frowned upon and the cultural and social disapprobation of such behaviour could lead to harassment.

In order to found a negative determination the courts have also used access to health care⁹⁷ and concerns over expenditure. In *N v SSHD* [2005] the court assessed the applicant's need on the basis of the 'level of acute suffering' to be endured by the individual; 'has the applicant's medical condition reached such a critical state that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering'.⁹⁸

The question of whether prosecutory legislation in the home state can be considered sufficiently persecutory has also arisen.⁹⁹ The frequency of persecution and the penalties imposed must be seen as sufficiently severe in

⁹³ *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578 ; *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238; *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2009] EWCA Civ 172.

⁹⁴ See *J v SSHD* [2006] EWCA Civ 1238 para 10, 11; *Z v SSHD* [2004] EWCA Civ 1578 para 15-16; *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2009] EWCA Civ 172at para 31; *OO* [2009] at para 17

⁹⁵ *The Queen on the application of M v IAT* [2005] EWHC 251; *Amare v Secretary of State for the Home Department* [2005] EWCA 1600; Also see *Franklyn v Canada (Minister of Citizenship and Immigration)* 2005 FC 1249.

⁹⁶ *M v IAT* [2005] EWHC 251.

⁹⁷ *RG (Colombia) v Secretary of State for the Home Department* [2006] EWCA Civ 57;

⁹⁸ *N v SSHD* [2005] UKHL 31; *D v UK* (1997) 24 EHRR 423; *JA (Ivory Coast), ES (Tanzania) v SSHD* [2009] EWCA Civ 1353.

⁹⁹ *OO (Sudan) JM (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 1432.

order that prosecution is equivalent to persecution.¹⁰⁰ Even if prosecution is common the court may still have recourse to rely on discretion as sufficiently protective of the claimant.¹⁰¹ The presence of unenforced criminal legislation for lesbian and gay sexual activity has been relied on by the courts as an indicator of safe *réfoulement*. In relying on the unenforced status of legislation the courts have failed to take into account the social discrimination which may constitute persecution, arguing that the claimant would have recourse to state/police protection.¹⁰²

C.3. Subsidiary Protection

Subsidiary protection is brought into effect in circumstances where the claimant does not qualify as a refugee as defined in regulation 2 of the (Qualification) Regulations 2006 but where it would be unsafe to return them to their home state. In the UK subsidiary protection in the guise of humanitarian protection is incorporated into the Immigration Rules whereas discretionary leave to remain is regulated through the *Immigration Act* 1971 and the Asylum Policy Instructions.¹⁰³ Humanitarian protection and discretionary leave were incorporated into UK policy on 1 April 2003, following the abolition of the exceptional leave to remain provisions on 31 March 2003. Further amendments were made to the humanitarian provisions in 2005 following Council Directive 2004/83 on ‘minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted’ which came into effect October 2006. Directive 2004/83 established a ‘common European qualifying standards for refugees...[and] define a category of persons eligible for subsidiary protection’.¹⁰⁴ Humanitarian protection is located in the Immigration Rules 339C-N.

¹⁰⁰ *Amare v SSHD* [2005] EWCA Civ 1600; *ex parte Hoxha* [2005] UKHL 19 at para 35; *Sandralingham v SSHD* [1996] IAR 97 at 114; *RG (Columbia) v SSHD* [2006] EWCA Civ 57.

¹⁰¹ *R (Dawkins) v Secretary of State for the Home Department* [2003] EWHC 373.

¹⁰² See *DW (Homosexual men – Persecution – Sufficiency of Protection) Jamaica CG* [2005] UKAIT 00168 [para71]; *MK (Lesbians) Albania CG* [2009] UKAIT 00036; *Modinos v Cyprus* 16 EHRR 492.

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<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apunotices/hpanddl.pdf?view=Binary> (10 February 2009).

¹⁰⁴ ‘Humanitarian Protection’ Asylum Policy Instructions (October 2006), available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (accessed 10.02.2010).

C.4. Humanitarian Protection

Paragraphs 339C and D of the *Immigration Rules* outline the qualifying criteria for eligibility for the granting of humanitarian protection. An individual will be granted humanitarian protection if:

- the individual is in the UK or at a port of entry to the UK;
- the individual does not qualify as a refugee as defined in regulation 2 of the *Refugee or Person in Need of International Protection (Qualification) Regulations 2006*,¹⁰⁵
- there are substantial grounds for believing that if refouled there would be a real risk that the individual would suffer 'serious harm';
- the individual cannot or will not obtain effective protection from the authorities.

Serious harm under paragraph 339C of the *Immigration Rules* consists of:

- the death penalty or execution.
- unlawful killing.
- torture or inhuman or degrading treatment or punishment.
- serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

An individual can be excluded from the grant of humanitarian protection under paragraph 339C(iv) if one of the criteria of paragraph 339D applies to them. The criteria are:

- the individual has committed a crime against peace, a war crime or a crime against humanity;
- the individual is guilty of acts contrary to the purpose and principles of the United Nations;
- the individual constitutes a danger to the community or the security of the UK;
- prior to entering the UK the individual committed a crime that would be an imprisonable offence if committed in the UK or the individual has absconded from his country of origin in order to avoid sanctions for his or her crime.

Upon the granting of humanitarian protection Directive 2004/83 stipulates the member state shall issue a residence permit valid for at least one year and that is renewable.¹⁰⁶ UK legislation currently ensures that humanitarian protection can

¹⁰⁵ UK/ The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, Statutory Instrument 2006 No. 2525 (09.10.2006).

¹⁰⁶ Article 24 (2) Directive 2004/83EC.

be granted for at least three years.¹⁰⁷ After the permit has expired an application can be made for indefinite leave to remain if the circumstances which gave rise to the need for protection still exist.

Humanitarian protection can be revoked if one of the grounds of Paragraph 339G have been engaged:

- the circumstances which led to the granting of humanitarian protection have changed or no longer exist such that protection is no longer required.
- it has become apparent that the individual has engaged in crimes against humanity, peace and of war, and he or she has engaged in behaviour contrary to the principles of the United Nations.
- the individual constitutes a danger to community or the security of the UK.
- the individual misrepresented or omitted facts upon which the granting of protection was based.
- the individual has committed crimes in his or her state of origin which are punishable by imprisonment and for which he or she fled the country.

C.5. Discretionary Leave

An applicant who fails to qualify for asylum and humanitarian protection may be eligible for discretionary leave. Discretionary leave is often invoked in cases where return would breach Article 3 (Prohibition of torture or inhuman and degrading treatment) and Article 8 (Right to respect for private and family life) of the ECHR. If an individual is excluded from humanitarian protection he or she will usually be granted discretionary leave for a period no longer than three years. Discretionary leave falls outside the boundaries of the Immigration Rule and the Secretary of State must be sure that enforced or voluntary return is not possible.

The same grounds of exclusion for humanitarian protection apply for discretionary leave.

Initial grants of leave are for no longer than three years. An individual is eligible to apply for indefinite leave to remain after six continuous years of discretionary leave. Indefinite leave to remain can only be applied for under the long-term residence concessions. Prior to the expiration of this period, the individual must apply for an extension of discretionary leave. Extension requests are subject to review on the basis of such factors as why discretionary

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<http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (accessed 10, February 2010).

leave was granted in the first place, impact of return on family life, conditions of the country of origin and whether barriers to return still exist.¹⁰⁸

C.6. Reuniting LGBT families in the asylum system

C.6.1. UK based partner has refugee status

Paragraph 339Q(i) to 339Q(iv) of the *Immigration Rules* state that upon the granting of asylum or humanitarian protection a UK residence permit will be issued which is valid for five years and is renewable. A residence permit can be issued by the Secretary of State for a family member of the individual granted asylum or humanitarian protection. The residence permit for family members can be renewed. Family member is defined according to paragraph 349 of the *Immigration Rules* as a ‘spouse, civil partner, unmarried or same-sex partner or minor child. Leave to enter or remain as the civil or same-sex partner is for the same duration as the asylum applicant. An unmarried or same-sex partner for the purposes of paragraph 349 is a person who has been living with the principal applicant in a subsisting relationship akin to a civil partnership for two or more years.

Immigration rules relating to the civil partner of an individual who has been granted refugee status can be found in Part 11, paragraph 352A, of the *Immigration Rules HC 395*. The requirements are:

- the applicant is the civil partner of the person granted asylum.
- the civil partnership did not take place after the person granted asylum left their country in order to seek asylum.
- the applicant would not be excluded from protection by virtue of article 1F of the *Refugee Convention*.¹⁰⁹
- the parties intend to live together permanently as civil partners.
- the applicant holds a valid entry clearance visa.

The rules relating to the unmarried partner or same-sex partner of a refugee are to be found in Part 11 of the *Immigration Rules HC 395*, paragraph 352AA.

¹⁰⁸ For more see Border and Immigration Agency ‘Discretionary Leave’ Asylum Policy Instructions, available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (26.02.2008).

¹⁰⁹ Article 1F of the Convention allows for exclusion where it is found the individual has committed crimes against peace, war, humanity; committing of a non-political crime prior to admission as a refugee; or are guilty of acts contrary to the purpose and principles of the UN.

The requirements to be met by the unmarried or same-sex partner of a refugee seeking leave to enter or remain the UK are:

- the applicant is the unmarried or same-sex partner of the refugee who was granted asylum in the UK on or after 9 October 2006.
- the parties have lived together in a relationship akin to a civil partnership for two or more years.
- the relationship existed prior to the person who sought asylum left the country.
- The individual is not excluded from protection by virtue of article 1F of the *Refugee Convention*.
- the parties intend to live with one another permanently and the relationship is subsisting.
- the applicant holds a valid entry clearance visa for entry in this capacity.¹¹⁰

C.6.2. UK based partner has been granted humanitarian protection

The rules concerning entry into the UK of the same-sex partner of an individual that has been granted humanitarian protection are found in the UK Immigration Rules HC 395 Part 11 352FA. to 352FF, as given authority under section 3(2) of the Immigration Act 1971.

The requisites to be met by an individual seeking leave to enter or remain in the UK as the spouse or civil partner of a person who has been granted humanitarian protection in the UK on or after 30 August 2005 are:

- the applicant is the civil partner of a person granted humanitarian protection.
- the marriage or civil partnership had occurred prior to the person granted humanitarian protection leaving the country of former residence.
- The applicant is not excluded from a grant of humanitarian protection for any of the reasons in paragraph 339D of the Immigration rules.¹¹¹
- each of the parties intends to live permanently with the other as civil partners and the relationship is subsisting.
- the applicant holds a valid entry clearance visa.

¹¹⁰ The Immigration Rules HC 395, Part 11, available at: <http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/> (15.02.2008).

¹¹¹ Paragraph 339D Exclusion from Humanitarian Protection. 1. The individual has committed a crime against peace, humanity or a war crime 2. The individual is guilty of acts contrary to the purpose and principle of the United Nations 3. The individual constitutes a danger to the community or the security of the UK 4. Prior to admission to the UK the individual committed a crime that would be imprisonable if committed in the UK or the individual left in order to avoid penal sanctions.

The requirements to be met by a person seeking leave to enter the UK as the unmarried or same-sex partner of a person who has been granted humanitarian protection in the UK are located in paragraph 352FD.

The requirements are:

- the applicant is the unmarried or same sex partner of the individual granted humanitarian protection on or after October 9 2006.
- the parties have been living together for two years or more in a relationship akin to a civil partnership.
- the relationship existed before the individual granted humanitarian protection left the country of residence in order to seek asylum.
- each of the parties intends to live permanently with the other as his or her same-sex partner.
- the applicant holds a valid UK entry clearance for entry in this capacity.¹¹²
- the applicant is not excluded for any of the reasons held in paragraph 339D.¹¹³

The *Asylum and Immigration (Treatment of Claimants etc) Act 2004*, sections 19-25 introduced regulations which affect the marriage of non-EEA nationals in the UK irrespective of their immigration status. Those subject to immigration control must give notice of their intent to marry at one of 76 specified registry offices with their partner. If the non-EEA national does not have entry clearance specifically for the purpose of marriage¹¹⁴ he or she must obtain a Certificate of Approval from the Secretary of State Under the rules the Certificate of Approval requires that the applicant has three months leave to remain in the UK. Home Office guidance states ‘where possible the asylum claim should be decided before a certificate of approval is given for marriage. Where the asylum claim is refused, the certificate of approval should be refused, even if an appeal is lodged. Contrariwise, if the decision or appeal has been outstanding for more than 18 months, then consideration may be given to granting a certificate of approval’.¹¹⁵

¹¹² The Immigration Rules HC 395, Part 11, available at: <http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/> (15.02.2008).

¹¹³ The Immigration Rules HC 395, Part 11, available at: <http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/> (15.02.2008).

¹¹⁴ *Asylum and Immigration (Treatment of Claimants etc) Act 2004*, ss 19(3)a, 21(3)a, 23(3)a.

¹¹⁵ . A statement issued by the Home Office on the 31st of July 2009 indicates that individuals who suffered financial hardship in part due to the cost of a certificate of approval may be entitled to a refund.

D. Family reunification

Opportunities for the reunification of LGBT families is contained in the *Immigration Rules*, paragraph 277 to 295O.¹¹⁶ The immigration specifications contained in the *Civil Partnership Act 2004* have been incorporated into the *Immigration Rules*.¹¹⁷ Any individual wishing to enter the UK who is subject to immigration control must obtain prior entry clearance.

D.1. Entry as a civil partner

The requirements for the civil partner of a person present and settled in the UK to be granted leave to enter the UK under paragraph 281 are:

- the applicant is the civil partner of the person present and settled in the UK (paragraph 281(i)(a)); *or* the applicant is the civil partner of a person who has the right of abode in the UK or indefinite leave to enter or remain in the UK and is also seeking to enter the UK for settlement purposes and that the civil partnership was formed at least four years ago (paragraph 281(i)(b)(i)) since when the parties have been living together outside the UK. In addition that the applicant has sufficient knowledge of the English language and life in the UK (paragraph 281(i)(b)(ii)).
- the parties have met and intend to live together and that the relationship is subsisting (paragraph 281 (b)(ii-iii)). They will have adequate accommodation which they will occupy exclusively; and they will be able to maintain themselves without recourse to public funds (paragraph 281(b)(iv-v))¹¹⁸ and the applicant holds a valid entry clearance for entry in this capacity (paragraph 281(b)(vi)).

Under paragraph 282 of the *Immigration Rules* applicants who fall within paragraph 281(i)(a) will be admitted for a period of no more than twenty seven

¹¹⁶ The Immigration Rules HC 395, Part 8, available at: <http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/> (15.02.2008), under section 3(2) of the Immigration Act 1971. The Immigration Directorate Instructions September 2009 detail leave to enter as a civil partner of a person present and settled in the UK. Available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter8/section2/section2.pdf?view=Binary> (accessed February 10, 2010). For information on the formation and dissolution of a civil partnership as administered through the Immigration Directorate Instructions see <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter8/section2/annexh.pdf?view=Binary> (accessed 10 February, 2010).

¹¹⁷ UK/ Civil Partnership Act 2004 c.33 (18.11.2004)

¹¹⁸ Accommodation cases: [2004] UKIAT 00006, *S(Pakistan)* ILU vol. 7, no. 5.; *Sagir Ahmed* 8260; *Thompson v ECO Kingston* (17926). Third party support: *Ali* (19736) INLP vol 13(2) (1999); *Nasreen Akhtar v ECO Islamabad* [2002] UKIAT 02818.

months; those who fall within 281(i)(b)(i) will be granted indefinite leave to enter and those that fall within 281(i)(b)(i) but fail 281(i)(b)(ii) will be admitted for a period not exceeding twenty seven months.

Extension of stay as the spouse or civil partner requires confirmation of the initial grounds of entry and affirmation that the applicant has not remained in the UK in breach of immigration laws (paragraph 284(i, iv)); that the person is the civil partner of a person present and settled in the UK (paragraph 284(ii)); that the parties to the civil partnership have met (paragraph 284 (iii)) and that the civil partnership has not taken place after a decision to deport the applicant had been made (paragraph 284(v)); that the parties intend to live permanently with one another as their civil partner and that the relationship is subsisting (paragraph 284 (vi)); that there is adequate accommodation and that there will be no need for recourse to public funds to provide accommodation (paragraph 284 (vii)); that the parties will maintain themselves adequately without recourse to public funds more broadly (paragraph 284(viii)). A further two year extension period can be granted so long as the requirements of paragraph 284 are met.

In order to be granted **indefinite** leave to remain in the UK as a civil partner the requirements (see paragraph 287 Immigration Rules) are that the applicant will be admitted for a period not exceeding twenty seven months or has been given an extension of stay for a period of two years and completed a period of two years as the civil partner of a person present and settled in the UK. Alternatively that the applicant was admitted to the UK for a period not exceeding 27 months or given an extension of stay for a period of two years in accordance with paragraphs 295AA to 295F. Indefinite leave to remain may be granted if the individual during that period has formed a civil partnership with that same person and has completed two years as the same sex partner and then civil partner of the person present and settled in the UK; that the applicant is still the civil partner of the person present and settled in the UK. Additionally it is required that the parties live together permanently, that the accommodation is adequate and that they can maintain themselves without recourse to public funds. Finally the applicant must have sufficient knowledge of the English language and of life in the UK.

D.2. Entry as a 'proposed' civil partner

The requirements for entry as a proposed civil partner can be found in the *Immigration Rules HC 395*, paragraph 290.

Entry clearance as a 'proposed civil partner' enables individuals to come to the UK in order to register their partnership. Under this category of entrance there is no requirement for the partners to have lived together, but they must prove to the entry clearance officer that their relationship is genuine and subsisting. The

requirements to be met are that the applicant is seeking leave to enter the UK so as to enter into a civil partnership; and that the parties have met. Each of the parties must intend to live with the other after the fulfilment of the civil partnership; there must be adequate maintenance and accommodation for the couple without recourse to public funds both before and after the civil partnership is to take place; and that the applicant holds a valid entry clearance visa for entry in this capacity.

Paragraph 290A highlights that an ‘EEA national who possesses a registration certificate or document certifying permanent residence as issued under the 2006 EEA Regulations (including an EEA national who holds a residence permit issued under the *Immigration (European Economic area) Regulations 2000* which is treated as if it were such a certificate... by virtue of schedule 4 to the 2006 EEA Regulations) is to be regarded as present and settled in the UK’.

The ‘proposed civil partner’ status entitles the overseas national to stay in the UK for six months, but they are not allowed to work until leave to remain is given after the civil partnership is granted following registration. If the EEA sponsor does not have permanent residence they must have a UK registration certificate prior to the civil partnership application being made.

D.3. Civil partnership ‘visit’ visa

The civil partnership visit visa is used for the purpose of registering a civil partnership. The visitors’ visa is issued for six months and provides permission for non-EEA individuals to enter into a civil partnership within that time frame. Neither couple in this instance needs to be a UK citizen, but entry clearance officers must be able to confirm that non-EEA nationals will leave at the end of the specified period. Legislation pertaining to the requirement can be found in paragraph 56D Part 2 of the *Immigration Rules HC 395*.¹¹⁹

¹¹⁹ The Immigration Rules HC 395, Part 2, available at: <http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part2/> (15.02.2008).

D.4. Recognition of legal partnerships and same-sex marriages entered into abroad - Applicants applying from overseas

UK visa regulations provide a list of countries where legal partnerships can be entered into.¹²⁰

Section 214 of the *Civil Partnership Act 2004* outlines the constituent elements of a valid civil partnership or its equivalent.¹²¹

Irrespective of whether a civil partnership was entered into in the UK or abroad, the entry clearance officer must still be confident that the relationship is 'genuine and subsisting' and that there will be no recourse to public funds. There is no requirement for proof of previous cohabitation. If the sponsor is a UK citizen or permanent resident the visa will enable the applicant to reside in the UK for two years; after this period the applicant can apply for indefinite leave to remain. For the requirements of indefinite leave to remain see the *Immigration Rules HC 395*, paragraph 287.

If an individual has lived with their partner for four years outside of the UK in a relationship akin to marriage he/she may be able to apply immediately for indefinite leave to remain so long as the 'Living in the UK Test' has been passed. If this test has not been passed, two years leave to remain can be granted. The 'Living in the UK' test can be taken at any point and when passed indefinite leave to remain can be applied for.¹²²

¹²⁰ See Immigration Directorate Instructions (December 2009) Chapter 8 Section 2, Annex H on Civil Partnerships.

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter8/section2/annexh.pdf?view=Binary> (accessed 10 February, 2010)

¹²¹ UK/ Civil Partnership Act 2004 c.33 (18.11.2004)

¹²² <http://www.lifeintheuktest.gov.uk/htmlsite/index.html> (15.02.2008)

D.5. Applications for ‘leave to remain’ emanating from within the UK

If an applicant entered the UK as a proposed civil partner or has obtained a *Certificate of Approval*¹²³ he/she is entitled to apply for ‘further leave to remain as a civil partner’ following registration of the civil partnership ceremony. A ‘*Further Leave to Remain*’ visa allows the applicant to reside in the UK for two more years. At the end of this period if the relationship is still subsisting then an application can be made for indefinite leave to remain. (See section 287(i)(b) of the *Immigration Rules HC 395*).

D.6. Same-sex partners rule¹²⁴

Immigration Rule 295A (i)(a) allows the same-sex partner to obtain leave to enter, as the same-sex partner of a person living in the UK if certain requirements are met. The requirements are:

- the applicant and the sponsor are over the age of 21.
- the applicant’s partner is present and settled in the UK or is also being admitted; and the parties have lived together for two years or more in a relationship akin to a civil partnership (paragraph 295A(i)(a)); or
- if the applicants’ partner has a right of abode in the UK or indefinite leave to enter or remain in the UK and is also seeking admission to the UK for the purpose of settlement the parties must have been living together for four years or more outside of the UK in a relationship akin to marriage (paragraph 295A(i)(b)(i)).
- the applicant must have sufficient knowledge of English and life in the UK (paragraph 295A(i)(b)(ii)).
- previous or similar relationships by either partner must have permanently broken down.
- the couple must intend to live together permanently in their own accommodation and will have no recourse to public funds.

¹²³ General information on Certificates of Approval can be found at <http://www.bia.homeoffice.gov.uk/visitingtheuk/gettingmarried/certificateofapproval/> (15.02.2008). If an individual entering the UK does not have settled status they will need to apply for a Certificate of Approval from the Home Office before being able to give a registrar notice to register the civil partnership. New guidance given by the Home Office regarding changes to the Certificate of Approval can be found at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/visitingtheuk/coaguidance.pdf> (15.02.2008).

¹²⁴ Immigration Rules HC 395, Part 8, section 295A(i)(a), available at: <http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/> (15.02.2008).

- the parties are not involved in a consanguineous relationship.

The applicant's leave to enter the UK is dependent upon the requirement outlined in 295A. If the applicant's partner is present and settled in the UK he or she will be admitted for an initial period not to exceed twenty seven months. If the applicant's partner is being admitted and meets the requirement of paragraph 295A(i)(b)(i) he or she will be granted indefinite leave to remain. And finally, if he or she meets the requirement of 295A(i)(b)(i) but not 295A(i)(b)(ii) then he or she will be granted entry for a period not exceeding two years.

If the couple have been forced to live apart for various reasons proof must be shown that the relationship subsisted during this time and the reasons for the separation must be indicated.

The requirements for leave to remain under paragraph 295D as the same-sex partner of a person present and settled in the UK can be granted for a period of two years (see paragraph 295E). The requirements to be met are: the applicant has limited leave to remain given in accordance with the provisions of the Immigration Rules; that any previous civil partnership has broken down and that the applicant is the same-sex partner of a person present and settled in the UK; that the applicant is not in breach of immigration laws; and that the relationship is not consanguineous. The parties must have been living together for two years or more and the relationship must pre-date any deportation order for the applicant. The final guidelines again repeat the requirement that there will be adequate accommodation that the couple will own or occupy exclusively; and that they will be able to maintain themselves without recourse to public funds and finally that they intend to live together permanently.

The requirements for *indefinite leave* to remain will be granted by the Secretary of State under Paragraph 295H. Paragraph 295G outlines the requirements of *indefinite leave* to remain.

Indefinite leave to remain as the same-sex partner present and settled in the UK requires that:

The applicant was admitted to the UK for a period no longer than twenty seven months or given an extension of his or her stay for a period of two years and has completed that period as the same-sex partner of an individual present and settled in the UK; or was the partner of a tier 1 migrant and obtained an extension of stay under paragraphs 295AA to 295F; or was admitted under the same criteria as outlined under paragraph 295B. The applicant is still the same-sex partner of the individual he or she was initially admitted as being in a relationship with and that this relationship is ongoing. Additionally, the grounds of intent to live together permanently, adequate accommodation and maintenance without recourse to public funds as well as sufficient knowledge of the English language and life in the UK must all be met.

Indefinite leave to remain as the same-sex partner of an individual with limited leave to remain under paragraph 295J concerns immigration rules regarding reunification, employment and individuals of retirement age. The requirements of this category are that the applicant is the same-sex partner of the individual who has limited leave to enter or remain as pertaining to paragraphs 128-193; 200-239; or 263-270. The criteria that need to be fulfilled are that any other civil partnership or a relationship akin to this must have broken down; that the relationship is not consanguineous; that the parties have lived together for two or more years in a relationship akin to marriage; that the parties intend to live together; and that accommodation will be adequate and that the couple will be financially self-sustaining. And finally that the applicant does not intend to stay in the UK beyond the period of leave granted their partner and that they hold a valid entry clearance visa.

E. Freedom of assembly

The ECHR has been incorporated into domestic law throughout the UK. Public authorities (including court and tribunals, and all bodies exercising a public function) have a duty to uphold Convention rights, including ECHR Arts 10 and 11.

ECHR Art 11(1) recognises the right to peaceful assembly and imposes positive obligations on public authorities to take reasonable steps to enable individuals to exercise this right, providing protection against counter-demonstrations if necessary.¹²⁵ Interference with a peaceful assembly by the police has to be justified under the terms of ECHR Art 11(2).

In line with ECHR Arts 10 and 11, lawful counter-demonstration or protest is permitted throughout the UK. ECHR Art 17 makes it clear, however, that ECHR Arts 10 and 11 cannot be invoked in support of an act or activity 'aimed at the destruction of any of the rights set forth [in the Convention] or at their limitation to a greater extent than is provided for in the Convention'. In addition, ECHR Art 14 prohibits discrimination in respect of Convention rights.

The law in the UK contains a range of statutory public order offences, as well as powers to regulate and control public meetings and processions. These provisions and powers are not specific to gay pride parades or homophobic demonstrations; they are of general application.

Throughout the UK, where an assembly is, or is likely to be, disrupted by one or more third parties, the police can use the common law power to prevent breaches of the peace. A breach of the peace consists of physical violence or the threat of violence. There must be either a breach of the peace in progress or a reasonable apprehension of an imminent breach of the peace before preventive powers can be used. In Northern Ireland, Part III of the *Public Order (Northern Ireland) Order 1987*, as amended by the *Criminal Justice No. 2 (Northern Ireland) Order 2004*, criminalises acts intended or likely to stir up hatred or arouse fear on grounds of sexual orientation. In England and Wales, the *Criminal Justice and Immigration Act 2008*¹²⁶ amended provisions on incitement to religious hatred in the *Public Order Act 1986*¹²⁷ to cover hatred on the grounds of sexual orientation. These new homophobic hatred offences are not yet in force. At the time of writing (February 2010), Scotland does not have legislation covering incitement to hatred on the grounds of sexual orientation.

No information has been found on cases of refusals or bans, or on the exercise of duties of protection by the authorities in the context of pride marches or

¹²⁵ See, e.g., *Plattform 'Arzte fur das Leben' v. Austria* (1998) 13 EHRR 204.

¹²⁶ UK/ Criminal Justice and Immigration Act 2008 c.4.

¹²⁷ UK/ Public Order Act 1986 c.64 (07.11.1986), Part 3A.

homophobic demonstrations. The information in paragraphs 106-108 below may help to provide an understanding of the current situation in respect of gay pride parades in the UK.

The first UK Pride carnival and march through London were held 36 years ago, on 1 July 1972.¹²⁸ In recent years, very large numbers of people have turned out to enjoy Pride London: specifically, an estimated 820,000 people attended in 2008 and an estimated 1 million in 2009.

In 2010, Pride London will take place on 3 July. It will comprise a parade through central London, followed by events in Trafalgar Square, Leicester Square and throughout Soho. Pride London, a registered charity, works with the authorities, including the Metropolitan Police, Transport for London and the City of Westminster to ensure that the parade is successful and minimally disruptive for local residents and businesses.

Pride London is just one of a range of Pride marches, carnivals and events held on a regular basis in the UK. For example, the sixth LGBT History Month is running throughout February 2010, with sponsors including the Metropolitan Police, the Crown Prosecution Service (CPS), the Department of Health and the Ministry of Justice.¹²⁹

F. Criminal law

F.1. Incitement to hatred

Looking first at specific incitement to hatred offences, in Northern Ireland, Part III of the *Public Order (Northern Ireland) Order 1987*, as amended by the *Criminal Justice No. 2 (Northern Ireland) Order 2004*, criminalises acts intended or likely to stir up hatred or arouse fear on grounds of sexual orientation. The 2004 Order extended existing offences and penalties against the use of threatening, abusive or insulting words or behaviour, the display and distribution of written material, and related activities intended or likely to stir up hatred or arouse fear, to include groups defined by reference to sexual orientation or disability.

In England and Wales, section 74 and Schedule 16 of the *Criminal Justice and Immigration Act 2008*¹³⁰ amended provisions on incitement to religious hatred

¹²⁸ <http://www.pridelondon.org/parade/> (8.02.2010).

¹²⁹ <http://www.lgbthistorymonth.org.uk/> (8.02.2010).

¹³⁰ UK/ Criminal Justice and Immigration Act 2008, c.4.

in the *Public Order Act 1986*¹³¹ to cover hatred on the grounds of sexual orientation. These new offences, detailed below, are not yet in force.

Hatred on the grounds of sexual orientation is defined as ‘hatred against a group of persons defined by reference to sexual orientation, whether persons of the opposite sex, the same sex or both’ (i.e., bisexual).

The offences involve the use of words or behaviour or display of written material, publishing or distributing written material, the public performance of a play, distributing, showing or playing a recording, broadcasting or including a programme in a programme service, and possession of inflammatory material. The offences apply only to threatening words, behaviour, etc., and they apply only if the accused intends to stir up hatred on the grounds of sexual orientation.¹³²

During Parliamentary debates on the new incitement offences, the House of Lords (the upper house of Parliament) successfully introduced an amendment providing that ‘the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or to stir up hatred’. In 2009, the Government tried but failed to repeal this amendment - now section 29JA of the *Public Order Act 1986*. Stonewall, a non-governmental organisation that lobbies for LBG equality, has described the language of section 29JA as ‘deeply offensive and stigmatising’ and it is concerned that the section sends a ‘worrying message at a time when police figures show that homophobic attacks are on the increase’.¹³³ The Equality and Human Rights Commission (EHRC), an independent statutory body created by the *Equality Act 2006*,¹³⁴ has expressed concern about ‘the piecemeal manner in which incitement to hatred laws have developed’.¹³⁵ It believes that a full review of all incitement to hatred legislation is needed in order to review both their scope and effectiveness.

Prior to the *Criminal Justice and Immigration Act 2008*, a report on Stonewall’s website indicated that there was ‘widespread support’ for a change in the law in

¹³¹ UK/ Public Order Act 1986 c.64 (07.11.1986), Part 3A.

¹³² Cf. the wider protection in Northern Ireland under the Public Order (Northern Ireland) Order 1987 as amended, and, for England and Wales, the offences of racial hatred in the Public Order Act 1986, Part 3, which apply to ‘threatening, abusive or insulting’ words or behaviour and extend to circumstances where racial hatred is likely to be stirred up.

¹³³ http://www.stonewall.org.uk/what_we_do/parliamentary/2886.asp (8.02.2010).

¹³⁴ The EHRC has the responsibility to protect, enforce and promote equality in Great Britain across a range of protected grounds, including sexual orientation and gender reassignment.

¹³⁵ EHRC, *Parliamentary Briefing: Coroners and Justice Bill*, House of Commons Committee Stage, February 2009, available at: <http://www.equalityhumanrights.com/legislative-framework/parliamentary-briefings/parliamentary-briefing-coroners-and-justice-bill-house-of-commons-committee-stage-february-2009/> (8.02.2010).

England and Wales: ‘A YouGov poll of over 2000 electors, commissioned by Stonewall, demonstrates that an overwhelming majority of the public - **89 per cent** - is in favour of changing the law in this area to give gay people matching protections to those for race. The level of support remains almost unchanged among people of faith.’¹³⁶ Stonewall’s website also noted that in Northern Ireland, ‘it has been an offence since 2004 to incite hatred or arouse fear on grounds of sexual orientation. Those provisions have not proved controversial and they have not resulted in frivolous prosecutions’.¹³⁷

In Scotland, a 2002 survey of LGBT people found that nearly a quarter had been subjected to physical assault and over two-thirds to verbal abuse because they were LGBT.¹³⁸ In June 2009, the Scottish Parliament passed the *Offences (Aggravation by Prejudice) (Scotland) Act*.¹³⁹ The Act concerns aggravation rather than incitement to hatred. It deserves mention here however because aggravation could be used in association with the common law offence of breach of the peace in order to prosecute homophobic hate speech. Specifically, homophobic hate speech could be prosecuted as a breach of the peace aggravated by sexual orientation prejudice.

There are also general provisions elsewhere in the law in the UK which could be invoked against homophobic hate speech. These include the common law offence of breach of the peace, as well as a range of statutory public order and harassment offences. In recent years, antisocial behaviour legislation has been introduced in England and Wales, Northern Ireland and Scotland.¹⁴⁰ In its 2004 report, the Hate Crime Working Group noted that the (previous) Scottish Executive recognised that ‘groups who are subject to hate crime may also be more likely to experience the effects of antisocial behaviour’. It went on to emphasise that:

‘The antisocial behaviour legislation [would] complement work on hate crime as it provides additional tools to protect victims of antisocial conduct, which may involve incidents not sufficiently clear-cut to be prosecuted on a criminal basis.’¹⁴¹

Finally, ECHR Art 10 has been incorporated into the law throughout the UK. Art 10(2) permits restrictions on free speech on a range of grounds, including

¹³⁶ <http://www.stonewall.org.uk/campaigns/1961.asp> (13.02.2008).

¹³⁷ <http://www.stonewall.org.uk/campaigns/1961.asp> (13.02.2008).

¹³⁸ L. Morgan and N. Bell (2003) *First Out: Report of the findings of the Beyond Barriers national survey of LGBT people*, available at: <http://www.stonewall.org.uk> (12.02.2008).

¹³⁹ Offences (Aggravated by Prejudice) Scotland Act 2009, asp.8.

¹⁴⁰ See, respectively, UK/Anti-Social Behaviour Act 2003 c.38 (20.11.2003); UK/ Anti-Social Behaviour (Northern Ireland) Order 2004 (27.07.2004); and UK/Antisocial Behaviour etc. (Scotland) Act 2004 asp.8 (26.07.2004).

¹⁴¹ Scottish Executive (2004) *Working Group on Hate Crime Report*, p. 9, available at: <http://www.scotland.gov.uk/Publications/2004/10/20027/44264> (8.02.2010).

the prevention of crime and public disorder and the protection of the rights of others. ECHR Arts 14 and 17 are also incorporated throughout the UK.

F.2. Homophobic motivation as an aggravating factor in a common crime

In England and Wales, section 146 of the *Criminal Justice Act 2003* extended existing hate-crime statutory aggravations to include sexual orientation. This provision came into effect in April 2005. In Northern Ireland, Art 2 of the *Criminal Justice No. 2 (Northern Ireland) Order 2004*¹⁴² amended the *Public Order (NI) Order 1987* to similar effect.¹⁴³

The legislation imposes requirements on the court when it is considering the seriousness of an offence. Where an offence is aggravated by hostility, the court must treat that fact as a factor that increases the seriousness of the offence, and it must state in open court that the offence was so aggravated. An offence is aggravated by hostility if, either at the time of the offence, or immediately before or after its commission, the offender has demonstrated hostility towards the victim based on the actual or presumed¹⁴⁴ sexual orientation of the victim.¹⁴⁵ The legislation also encompasses offences motivated (wholly or partly) by hostility toward persons who are of a particular sexual orientation.¹⁴⁶ It is immaterial whether or not the offender's hostility is also based on other factors.¹⁴⁷

¹⁴² Criminal Justice No. 2 (Northern Ireland) Order 2004, No. 1991 (N.I. 15) (28.09.2004)

¹⁴³ A recent report, prepared for the Equality Commission for Northern Ireland (ECNI) and the Equality Authority (EA) in Ireland, describes Northern Ireland's homophobic hate-crime law as one of the 'notable legislative successes' that have resulted from the participatory model put in place by the statutory equality duty contained in section 75 of the Northern Ireland Act 1998. See J. Walsh, C. Conlon, B. Fitzpatrick and U. Hansson (2007) *Enabling Lesbian, Gay and Bisexual Individuals to Access their Rights under Equality* (A Report prepared for the ECNI and the EA), p. 85, available at: <http://www.equalityni.org> (8.02.2010).

¹⁴⁴ 'Presumed' membership means presumed by the offender.

¹⁴⁵ See UK/ Criminal Justice Act 2003 c.44 (20.11.2003), s. 146(2)(a)(i). In Northern Ireland, Art. 2(3)(a)(iii) refers to 'the victim's membership (or presumed membership) of a sexual orientation group'.

¹⁴⁶ See UK/ Criminal Justice Act 2003 c.44 (20.11.2003), s. 146(2)(b)(i). In Northern Ireland, Art. 2(3)(b)(iii) refers to an offence motivated (wholly or partly) by hostility towards 'members of a sexual orientation group based on their membership of that group'. Art. 2(5) defines 'sexual orientation group' as a group of persons defined by reference to sexual orientation.

¹⁴⁷ See UK/ Criminal Justice Act 2003 c.44 (20.11.2003), s. 146(4). For Northern Ireland, see Art. 2(4).

In December 2008, the Crown Prosecution Service (CPS) published its first annual hate crime report. The report includes information on CPS performance in prosecuting homophobic hate crimes in England and Wales.¹⁴⁸

As mentioned, in June 2009 the Scottish Parliament passed *the Offences (Aggravation by Prejudice) (Scotland) Act 2009*¹⁴⁹, which came into force on 24 March 2010. The Act requires the aggravation of an offence by prejudice on grounds of disability, sexual orientation or transgender identity to be taken into account in sentencing.

The new Scottish law seeks to implement the core recommendation of the previous Scottish Executive's Hate Crime Working Group. In 2004, the Group recommended that the 'statutory aggravation' which applied when any criminal offence was motivated by malice and ill-will on grounds of race or religion, should be extended to cover offences motivated by malice and ill-will on grounds of disability, sexual orientation and transgender identity:

'It is of course the case that hate crimes are already covered under Scots law. In one sense, no matter what the motivation is, sentencers can already take any aggravating factor, including a motive of malice and ill-will towards a social group, into account when determining the sentence under common law. However, it is impossible to monitor the extent to which this is currently happening, as common law aggravations are not recorded either in terms of statistics or on the offender's criminal record. We consider that the introduction of new legislation on hate crime would not prevent sentencers from continuing to take into account other aggravating factors, such as vulnerability, under the common law. Whilst not the primary objective, we also felt that the creation of clear new legislation would have an impact on the negative social attitudes and prejudices that are often at the heart of hate-motivated crime.'¹⁵⁰

A recent paper, commissioned by the Equality and Human Rights Commission, concludes that 'there remain a number of operational and strategic obstacles to successfully responding to and preventing homophobic hate crime'.¹⁵¹ It says that one such obstacle is disparities in the law on aggravated crimes: specifically, the fact that racially and religiously aggravated crimes are offences whereas homophobia is an aggravating factor rather than an offence in its own right. The paper concludes that the disparity 'has an impact on the recording and response to different incidents by police forces'.¹⁵²

¹⁴⁸ CPS (2008) *Hate Crime Report 2007-2008*, available at: http://www.cps.gov.uk/publications/docs/CPS_hate_crime_report_2008.pdf (8.02.2010).

¹⁴⁹ Offences (Aggravation by Prejudice) (Scotland) Act 2009 asp.8.

¹⁵⁰ Scottish Executive (2004) *Working Group on Hate Crime Report*, p. 20, available at: <http://www.scotland.gov.uk/Publications/2004/10/20027/44264> (8.02.2010).

¹⁵¹ S. Dick, *Homophobic Hate Crimes and Hate Incidents* (EHRC and Stonewall, 2009), p. 16, available at: <http://www.equalityhumanrights.com> (8.02.2010).

¹⁵² Ibid.

G. Transgender issues

In the UK discrimination on the grounds of gender reassignment in employment or vocational training, or in the provision of goods, facilities or services is a form of sex discrimination. Specifically, the law provides that it is unlawful to discriminate against a person because he/she intends to undergo, is undergoing, or has undergone, gender reassignment. The legislation in question is outlined below.

G.1. Discrimination against transgender people in employment, vocational training, and the provision of goods, facilities and services

In the UK, it is unlawful to discriminate on grounds of gender reassignment in employment or vocational training, and in the provision of goods, facilities or services. In what follows, we look first at employment and training, and then at the provision of goods, facilities and services.

In Great Britain, the relevant provisions outlawing discrimination on the grounds of gender reassignment in employment and vocational training are contained in the *Sex Discrimination Act 1975 (SDA)*, as amended by the *Sex Discrimination (Gender Reassignment) Regulations 1999*. In Northern Ireland, protection is conferred by the *Sex Discrimination (NI) Order 1976 (SDO)*, as amended by the *Sex Discrimination (Gender Reassignment) Regulations (NI) 1999*. The decision of the ECJ in Case C-13/94, *P v. S and Cornwall County Council* was a central influence in this area.¹⁵³ The legislation permits differences in treatment on grounds of gender in a number of limited circumstances. First, if an employer can demonstrate that there is a genuine occupational qualification (GOQ) which means that the work has to be done by someone of a particular sex and that, as a result, it is reasonable to prevent a transgender person from doing the job. Second, if the work involves conducting intimate searches pursuant to statutory powers. Third, if the post involves working in a private home where there would be close physical or social contact, or knowledge of the intimate details of a person's life, and an employer can show that people would object. Finally, the legislation does not apply to employment for the purposes of an organised religion which, for religious reasons, is restricted to those who are not undergoing and have not undergone gender reassignment.

¹⁵³ Case C-13/94 *P v. S and Cornwall County Council* [1996] ECR-I 2165.

However, where a person has a full *Gender Recognition Certificate* under the *Gender Recognition Act 2004* (GRA) it is not lawful to discriminate other than on grounds that would apply to anyone else of his or her acquired gender.¹⁵⁴ The GRA 2004 allows transgender people (who are able to satisfy the necessary evidential requirements) to apply for full legal recognition in their acquired gender. Following a successful application, the person will receive a full *Gender Recognition Certificate* and the law regards that person, for all purposes, as being of his or her acquired gender.

Turning now to discrimination in the provision of goods, facilities and services, the Equal Treatment Directive 2004/113/EC banning gender discrimination in respect of their provision had a UK implementation deadline of 21 December 2007. The UK missed this deadline but, since April 2008, discrimination on the grounds of gender reassignment in the provision of goods, facilities and services has been prohibited throughout the UK. The Directive was implemented by the *Sex Discrimination (Amendment of Legislation) Regulations 2008* (SI 2008/963), which amended both the *Sex Discrimination Act 1975* (for Great Britain) and the *Sex Discrimination (Northern Ireland) Order 1976* (for Northern Ireland). The amendments extend protection from discrimination on grounds of gender reassignment to the provision of goods, facilities and services. Such discrimination is unlawful, subject to the general exceptions in the *Sex Discrimination Act 1975*/*Sex Discrimination (Northern Ireland) Order 1976*.

A gender equality duty, extending to those who are intending to undergo, are undergoing, or have undergone gender reassignment, applies in Great Britain.¹⁵⁵ The duty was introduced by the *Equality Act 2006*, which amended the SDA. It places an obligation on public authorities to promote gender equality and eliminate sex discrimination; crucially, instead of relying on individuals making complaints of sex discrimination, the duty requires public authorities to demonstrate that they treat women and men fairly.¹⁵⁶ The Equality and Human Rights Commission is responsible for promoting and enforcing the gender equality duty.¹⁵⁷

A key issue concerning discrimination against transgender people in employment and vocational training, and in the provision of goods, facilities or services is the limited nature of the protection under the law. The legislation

¹⁵⁴ There is one exception: it is possible for an organised religion to discriminate where there are genuine religious reasons to refuse to employ a trans person even if the person has a *Gender Recognition Certificate*.

¹⁵⁵ In Northern Ireland, s. 75 of the Northern Ireland Act 1998 places a duty on designated public authorities to have 'due regard to' the need to promote equality of opportunity,

¹⁵⁶ The duties differ as between England, Scotland and Wales.

¹⁵⁷ In 2009, the EHRC published a review on equality and discrimination in relation to transgender people in Great Britain. The review 'will be used to inform future policy development and strategy in Britain': M. Mitchell and C. Howarth (2009), *Trans Research Review* (EHRC), p. 2, available at: <http://www.equalityhumanrights.com> (8.02.10).

provides that it is unlawful to discriminate against a person because he/she intends to undergo, is undergoing, or has undergone, gender reassignment. In Great Britain, section 82 of the SDA defines ‘gender reassignment’ as: ‘a process which is undertaken under medical supervision for the purpose of reassigning a person’s sex by changing physiological or other characteristics of sex, and includes any part of such a process’. The same definition is used in the SDO in Northern Ireland. This definition means that anti-discrimination legislation does not afford protection to individuals who identify as transgender or some other gender identity, and who have no intention to undergo any medical supervision related to their gender presentation, whether or not they permanently live in their preferred gender role. In other words, as Whittle, Turner and Al-Alami point out in a research project commissioned by the independent Equalities Review (ER):¹⁵⁸

‘a large majority of trans people are caught outside of the narrow protection of the legislation; cross dressers, and transvestites, people who live permanently in the gender ‘opposite’ to that on their birth certificate without any medical intervention and all those people who simply wish to present their gender differently.’¹⁵⁹

Whittle et al. recommend that: ‘the legal limitations defined under statutory law should be revised so as not to be as definitive or exclusionary, and should be extended to protect many more trans people including those not intending to undergo gender reassignment surgery’.¹⁶⁰ The Equality Commission for Northern Ireland (ECNI) made a similar recommendation for Northern Ireland in its response to a consultation document issued by the Office of the First Minister and Deputy First Minister (OFMDFM) on the draft *Sex Discrimination Order 1976 (Amendment) Regulations (NI) 2007*, designed to implement the Equal Treatment Directive 2004/113/EC. In particular, the ECNI recommended:

- an extended definition of gender to include ‘gender identity’;
- subject to narrowly construed and justifiable exceptions, that the scope of protection from gender discrimination is extended in its entirety to those who are transsexual; and

¹⁵⁸ The ER ran alongside the UK Government’s Discrimination Law Review (DLR). It was tasked with examining the underlying societal and cultural causes of disadvantage and inequality: see <http://archive.cabinetoffice.gov.uk/equalitiesreview/publications.html> (8.02.2010).

¹⁵⁹ S. Whittle, L. Turner and M. Al-Alami (2007) *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination* (A Research Project and Report commissioned by the Equalities Review), p. 74, available at: <http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/transgender.pdf> (8.02.2010).

¹⁶⁰ S. Whittle, L. Turner and M. Al-Alami (2007) *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination* (A Research Project and Report commissioned by the Equalities Review), p. 74, available at: <http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/transgender.pdf> (8.02.2010).

- that discrimination on the grounds of perception and association should be unlawful on the grounds of sex, and a person's gender reassignment.¹⁶¹

As mentioned, the *Equality Act 2010*¹⁶² received Royal assent on 08 April 2010 and its main provisions are expected to come into force in October 2010. The Act provides a single legal framework, with clear, streamlined provisions that intend to be more effective in tackling discrimination. However, at the time of writing (April 2010), a complete assessment of the Act's impact is not yet possible.

G.2. Freedom of Movement, Asylum and Subsidiary Protection, and Family Reunification

In line with the guidelines provided by the FRA, chapters B, C and D, above, outline the applicability of the legislation they discuss in the context of transgender people.

G.3. Freedom of Assembly

In the UK there are no laws dealing specifically with transgender pride parades, or transphobic demonstrations.

G.4. Criminal Law

There is currently no offence of incitement to hatred on grounds of transgender identity in any part of the UK.

In England, Wales and Northern Ireland, there is currently no specific provision for taking into account that a common crime was committed with a transphobic motivation. In Scotland, in June 2009, the Scottish Parliament passed the *Offences (Aggravation by Prejudice) (Scotland) Act 2009* which makes provision for the aggravation of offences by prejudice based on transgender

¹⁶¹ ECNI (2007) *Commission Response to OFMDFM's Consultation 'Implementing EU Equality Obligations in Northern Ireland: The Gender Goods and Services Directive'*, p. 5, available at: <http://www.equalityni.org> (8.02.2010).

¹⁶² Equality Act 2010 c.15, available at: http://195.99.1.70/acts/acts2010/pdf/ukpga_20100015_en.pdf (21.04.2010).

identity. The most notable feature of the new Scottish law is its broad definition of transgender identity: section 2(8) of the 2009 Act provides that reference to transgender identity is reference to ‘(a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004, changed gender, or (b) any other gender identity that is not standard male or female gender identity’.

Throughout the UK, transphobia is recognised by the police as a factor in hate crimes and hate incidents, and reporting is encouraged (including by means of ‘assisted’ or third-party reporting).¹⁶³ For instance, the Police Service of Northern Ireland (PSNI) defines a transphobic incident to be ‘[a]ny incident which is perceived to be transphobic by the victim or any other person’, and it has been recording transphobic incidents since March 2006.¹⁶⁴ In December 2008, the Crown Prosecution Service (CPS) published its first annual hate crime report. The report includes information on CPS performance in prosecuting transphobic hate crimes in England and Wales.¹⁶⁵ In November 2009, a rally and vigil took place in Trafalgar Square, London in memory of victims of homophobic and transphobic hate crime. Rows of candles spelt out ‘No To Hate’ and speeches took place. There was a two-minute silence in memory of victims of these hate crimes. Messages of support were read out from all the main UK political parties.¹⁶⁶

G.5. Legislation regarding names and changes of names for transgender people

In the UK, there is no requirement to carry an identity card or other form of identification displaying one’s name. In addition, individuals are free to use a name of their own choosing. No surgery is needed in order to change one’s name or to change it on statutory documents such as a driving licence or a passport.

There are two principal ways of changing one’s name:¹⁶⁷ first, to have a ‘Change of Name by Deed Poll’ executed by a solicitor;¹⁶⁸ and second, to

¹⁶³ See, below, *Good Practice*.

¹⁶⁵ CPS (2008) *Hate Crime Report 2007-2008*, available at: http://www.cps.gov.uk/publications/docs/CPS_hate_crime_report_2008.pdf (8.02.2010).

¹⁶⁶ <http://www.galop.org.uk/category/news/> (8.02.2010).

¹⁶⁷ See generally, Gender Trust, *Information Sheet: Changing Your Name and Documents*, available at: <http://gendertrust.org.uk> (8.02.2010).

¹⁶⁸ UK/ Enrolment of Deeds (Change of Name) Regulations 1994 (01.04.1994).

complete a ‘*Statutory Declaration of Change of Name*’.¹⁶⁹ The latter states the name by which an individual wishes to be known, and is witnessed by a solicitor, justice’s clerk at a magistrate’s court or other authorised officer of the court. It is sent with a copy of the individual’s birth certificate and a doctor’s or psychiatrist’s letter to allow the individual’s name to be changed on statutory documents.

Under the *Gender Recognition Act 2004 (GRA)*,¹⁷⁰ which came into force in April 2005 and applies throughout the UK, an individual who is successful in applying for a full *Gender Recognition Certificate (GRC)* can obtain a new birth certificate.

In 2007, a report commissioned by the Equalities Review, recommended that ‘a government resource be made easily accessible to trans people and others, which stipulates the legitimate protocol for name and gender changes and the legal consequences for failing to comply’.¹⁷¹ It emphasised that:

‘The arrival of the Gender Recognition Act [2004] and certificate has added another layer of complication. For many years a whole range of institutions have routinely changed people’s details on production of a doctor’s note and a formal change of name. The Gender Recognition Act has confused this process. Many organisations, including universities, the police and health authorities now falsely claim that no change of name, gender or pronouns can be made without a gender recognition certificate. There is a real need for government to provide an easily accessible point of information for employers and others to reinstate a simple process which had been in existence for many years.’¹⁷²

¹⁶⁹ UK/Statutory Declarations Act 1835 c.62 (09.09.1835).

¹⁷⁰ The cases of *Goodwin v. The United Kingdom* and *I v. The United Kingdom* (2002) 35 EHRR 18 (ECtHR) and *Bellinger v. Bellinger* [2003] 2 All ER 593 (UK House of Lords) demonstrated the need for legislation.

¹⁷¹ S. Whittle, L. Turner and M. Al-Alami (2007) *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination* (A Research Project and Report commissioned by the Equalities Review), p. 18, available at: <http://www.theequalitiesreview.org.uk> (12.02.2008).

¹⁷² S. Whittle, L. Turner and M. Al-Alami (2007) *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination* (A Research Project and Report commissioned by the Equalities Review), p. 15, available at: <http://www.theequalitiesreview.org.uk> (12.02.2008).

G.6. Legislation regarding change of gender/sex

Under the GRA, which came into force in April 2005 and applies throughout the UK, there is no requirement to undergo hormonal treatment or surgery of any kind.

Under the Act, UK citizens who satisfy certain criteria are able to apply to a Gender Recognition Panel (GRP) for a *Gender Recognition Certificate* (GRC).¹⁷³ The GRP came into existence on 4 April 2005 and certificates were able to be issued from that date. The GRP consists of a president, a deputy, three legal members and six medical members.

Applicants for a GRC must be able to demonstrate the following to the GRP: (a) that they are at least 18 years of age at the date of application; (b) that they have, or have had, gender dysphoria; (c) that they have lived in their acquired gender for two years before the date of application; and (d) that they intend to do so until death.

From the date of the grant of a full GRC, an individual is afforded legal recognition in their acquired gender. The individual can obtain a new birth certificate which does not disclose the fact that they changed gender. The individual will also be entered automatically on the Register of Transsexual People,¹⁷⁴ held by the Registrar General, and their original birth register entry will be marked to indicate that they are transsexual. Section 22 of the Act provides that it is a criminal offence for a person in an official capacity to disclose information he/she may acquire during their work with a transgender person having a GRC, applying for a GRC or anything about their previous gender to any other person.

The rules differ as between applicants who are single and those who are married. An unmarried or single transgender person who is successful in applying for gender recognition will be given a full GRC. However, a transgender person who is married cannot receive a full GRC because, in the UK, marriage is not permitted between two members of the same sex.¹⁷⁵ A transgender person who is married will be issued with an interim GRC (IGRC).

¹⁷³ If the applicant has been recognised under the law of another country or territory as having changed gender, the GRP need only be satisfied that the country or territory in question is on an approved list.

¹⁷⁴ The Register is not open to search by the public.

¹⁷⁵ This was held not to be in breach of the ECHR in the case of *Parry v UK* (2006) (App No.42971/05).

This enables them to obtain a full GRC via a simplified procedure if they annul¹⁷⁶ their marriage or their spouse dies.

G.7. Other relevant legislation

Under the *Civil Partnership Act 2004*, where a transgender person with a partner of the same gender enters into a civil partnership, the partner is entitled to benefit from company or private pension schemes. The Act also enables those who are in a pre-existing marriage to carry over their marital benefits on gender recognition by entering a civil partnership.

¹⁷⁶ In Scotland, the grant of an IGRC provides a ground for divorce rather than making the marriage voidable; in the rest of the UK, an IGRC is a ground for marriage being voidable.

H. Miscellaneous

The United Kingdom has not adopted nor is discussing the adoption of laws which are similar or comparable to the recent Lithuanian law on the protection of minors against the detrimental effects of public information.

Phallometric testing or practices of phallometry are not used in UK asylum procedures.

I. Good practices

Seven good practices are nominated. The first three concern the reporting of homophobic and transphobic crimes; one concerns research on transgender issues; two concern transgender people and employment practices; and the final one concerns education on sexual orientation. More generally, note that the *Trans Research Review*, published in 2009 by the Equality and Human Rights Commission, concludes that ‘many best practice guides exist for areas of life where little research had been conducted’ and ‘[w]hile this does not necessarily mean that the guidance they provide is inappropriate, confidence in them could be increased if they had been based on rigorous research evidence into the needs of trans people’.¹⁷⁷

I.1. Criminal law: homophobic and transphobic crimes

I.1.1. Assisted or third party reporting of homophobic and transphobic crimes

This service seeks to address the problem that victims of homophobic and transphobic crimes may be unwilling to approach the police. It allows for reporting to a named third party, typically an LGBT organisation. The service is available in various parts of the UK, including Greater London and Northern Ireland, and is advertised to the public.¹⁷⁸

I.1.2. LGBT/minority liaison officers

Many police forces in the UK have LGBT or minority liaison officers in every borough or police district. These officers have been specially trained to support victims of homophobic and transphobic incidents. They may also have an additional responsibility to engage with individuals and groups who support victims.¹⁷⁹

¹⁷⁷ M. Mitchell and C. Howarth, (2009) *Trans Research Review* (EHRC), pp. 31-2, available at: <http://www.equalityhumanrights.com> (8.02.2010).

¹⁷⁸ For Greater London, the police work with Galop, an LGBT community safety charity: details available at: <http://www.galop.org.uk> (8.02.2010).

¹⁷⁹ See, e.g., <http://www.met.police.uk/contacts/LGBT.htm> (8.02.2010).

1.1.3. Incitement to hatred on grounds of sexual orientation

On 8 May 2008 the Criminal Justice and Immigration Act 2008¹⁸⁰ was given the royal assent. Section 74 amends Part 3A of the Public Order Act 1986 (hatred against persons on religious grounds) to include hatred on the grounds of sexual orientation. This makes it an offence to use threatening words or behaviour, to display written material which is threatening, to publish or distribute written material, to publicly direct or perform a play, to distribute, show or play a recording of visual images or sounds, to broadcast or to possess inflammatory material all with the intent to stir up hatred on the grounds of sexual orientation. On indictment a person guilty of any the above offences can be imprisoned for a term not exceeding seven years, receive a fine or both.

1.2. Pioneering Public NGO Research into Homophobic and Transphobic Crimes

Filling in the Blanks, published in 2009, reports on pioneering investigation into homophobic and transphobic hate crime in London. The investigation was funded in part by the Metropolitan Police Service (MPS) and the Metropolitan Police Authority and it was undertaken by the LGBT community safety charity, Galop, in partnership with Stonewall Housing and London Lesbian and Gay Switchboard. The research aimed to increase understanding about the nature of homophobic and transphobic hate crime, and about the options for victims to report their experiences and get the support they may need. The research was approached in three phases. In the first phase the aim was to map the range of reporting and support services targeted at victims of homophobic and transphobic hate crime in London. The second phase involved a period of partnership between the three organisations, to create a collated dataset of incidents reported to each organisation. In the final phase the data that had been collected was analysed and, where possible, compared with police data. The investigation highlighted that a significant proportion of otherwise unreported homophobic or transphobic hate incidents are either informally ‘told’ or more formally reported to LGBT organisations. Such organisations, however, often do not have a system for recording information received, and even where information is recorded by the individual organisation, there is often no shared recording system and no method for wider dissemination among organisations or with the MPS. Numbers indicate that homophobic and transphobic hate crime is significantly under-reported. The research further identified some important differences in the cases reported to MPS or LGBT organisations. It was found that LGBT organisations play a vital role in providing alternative

¹⁸⁰ http://www.opsi.gov.uk/acts/acts2008/ukpga_20080004_en_9#pt5-pb3-11g74 (05.02.2010).

routes for reporting experiences, and getting appropriate advice and support, and without these services some victims would simply not report at all. For example the MPS appear to be more likely to be contacted by victims who were attacked in public areas but less likely to be contacted about incidents occurring in or near the home, which constitute a significant proportion of all incidents reported. It appears that victims are more likely therefore to approach an LGBT organisation to report domestic abuse or ongoing harassment. Furthermore, victims contacting organisations about an incident appear more likely to know the perpetrators, who are most likely to be young men under 30. Significant proportions of victims, however, make contact with LGBT organisations after already reporting to the police or other statutory service, because they need further help or advice that the police cannot provide, such as emotional support or legal advice.¹⁸¹

I.3. Transgender People and Employment

I.3.1. Job Applications and Criminal Record Information

The Criminal Records Bureau (CRB) provides access to criminal record information in order to help employers in the public, private and voluntary sectors to identify job applicants who may be unsuitable for certain work, especially positions that involve contact with children or other vulnerable members of society.¹⁸² To perform this role, the CRB has to be aware of any previous names and/or gender of job applicants. However, the CRB has created a separate application procedure (the Confidential Checking Process) which allows transgender applicants to exclude previous names from the disclosure application form. Applicants are still required to send details of their previous identity in a separate letter directly to the Sensitive Casework Manager within the CRB. The CRB then checks the data sources held against both current and previous names. This procedure avoids the need for disclosure of former name or gender history to the employer at the application stage, whilst allowing the CRB to carry out the requisite checks against any previously-held identities.

¹⁸¹ P Kelley (2009) *Filling in the Blanks: LGBT Hate Crime in London*, available at: <http://www.galop.org.uk/wp-content/uploads/2009/05/filling-in-the-blanks-low-res.pdf> (8.02.2010).

¹⁸² See <http://www.crb.gov.uk> (8.02.2010). For Scotland, see Disclosure Scotland, details available at: <http://www.disclosurescotland.gov.uk> (8.02.2010). For Northern Ireland, see Access Northern Ireland, details available at: <http://www.accessni.gov.uk> (8.02.2010).

I.3.2. 'Gender Reassignment: A Guide for Employers'

The Department of Trade and Industry funded this workplace good practice guide for employers, reflecting the changes introduced by the *Gender Recognition Act 2004* and making clear the responsibilities for employers and their staff.¹⁸³

I.4. I.4 Education on sexual orientation

I.4.1. Changes to the National Curriculum

Issues relating to discrimination, homosexuality and civil partnership are included in the government's initiatives to improve the National Curriculum. The changes will make it compulsory for all schools to teach 14 to 16 year olds about same sex relationships. The plans have seen opposition, in particular from religious schools,¹⁸⁴ however they reflect the fact that studies show Britain is becoming more tolerant towards homosexuality.¹⁸⁵

¹⁸³ The Guide is available at:
http://www.womenandequalityunit.gov.uk/publications/gender_reassignment_guide05.pdf
(8.02.2010).

¹⁸⁴ See, <http://www.guardian.co.uk/education/2008/oct/23/sexeducation-primarieschools1> and
<http://www.dailymail.co.uk/news/article-1173919/Lessons-gays-compulsory-age-11.html>
(05.02.2010).

¹⁸⁵ See,
http://www.pinke.biz/news/5500/Britons_Becoming_More_Tolerant_Towards_Homosexuality
(05.02.2010).

Annex 1 – Case law

Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case ?

Case title	<i>English v Thomas Sanderson Blinds Ltd [2008] EWCA Civ 1421</i>
Decision date	19 December 2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal, Civil Division
Key facts of the case (max. 500 chars)	In the course of employment by the defendant, the claimant alleged that he was subjected to sexual innuendos suggesting he was homosexual by colleagues. These innuendos were based on the fact the claimant had attended boarding school and lived in Brighton. However, he was a heterosexual happily married man. The claimant's case was that his colleagues' conduct drove him to leave his job. He brought a claim for harassment under Reg. 5 of the Employment Equality (Sexual Orientation) Regulations 2003. The claim had been dismissed by the Employment Tribunal and the Employment Appeal Tribunal.
Main reasoning/argumentation (max. 500 chars)	The claimant argued that someone who is subjected to "homophobic banter" is harassed within the meaning of Reg. 5 even when a) he is not gay, b) he is not perceived or assumed to be gay by his fellow workers, and c) he accepts that they did not believe him to be gay.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court of Appeal held that for conduct to be “on grounds of sexual orientation” it is irrelevant whether the claimant is actually of a particular sexual orientation. The intention of the legislature cannot have been that such a claimant must declare their true sexual orientation, which is not a matter of ‘either/or’, in order to establish harassment “on grounds of sexual orientation.” There is no precedent requiring courts to enquire whether the maker of offensive homophobic statements actually thought that the victim was homosexual.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The insult to the claimant’s dignity, caused by the behaviour of his colleagues, consequently made an intolerable working environment and was sufficient to bring his case within Reg. 5. Therefore, the appeal was upheld.

Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 1

Case title	<i>Re Christian Institute and others' application for judicial review</i> [2007] NIQB 66; [2008] IRLR 36
Decision date	11 September 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	High Court of Northern Ireland, Queen’s Bench Division
Key facts of the case (max. 500 chars)	The applicants, a number of religious organisations and a group of archbishops who represented the Catholic Church, sought judicial review of the <i>Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006</i> . Their general position was that the orthodox position of Christians was that homosexual practice was sinful, and that the 2006 Regulations imposed on those who hold such orthodox beliefs certain duties which were inconsistent with the practice of their religious beliefs. They were not opposed to the principle of equality legislation relating to sexual orientation but objected to many aspects of the content of the legislation adopted. In essence they contended that there had not been equality of treatment between the anti-discrimination measures on the grounds of sexual orientation on the one hand and orthodox Christian beliefs on the other. The applicants also claimed that there had not been proper consultation. The Office of the First Minister and Deputy First Minister (OFMDFM), supported by the Northern Ireland Human

	Rights Commission, the Equality Commission for Northern Ireland and the Coalition on Sexual Orientation, argued that the 2006 Regulations were designed to fill a significant and unsupportable gap in the framework of equality legislation and that the exemptions from the Regulations which had been introduced for all religious groups achieved a fair balance between the competing interests.
Main reasoning/argumentation (max. 500 chars)	The High Court considered whether the harassment provisions in the <i>Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006</i> relating to access to goods, facilities and services should be struck down in respect both of their content and of a lack of proper consultation prior to implementation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<ol style="list-style-type: none"> 1. In making the <i>Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006</i> the OFMDFM fell into error in relation both to consultation and to the substance of the harassment provisions. There was an absence of proper consultation in relation to the harassment provisions and the Regulations were fundamentally different from the scheme of the consultation paper. 2. As to the substance of the Regulations, whereas the outlawing of harassment in relation to race, religion and gender involves interference with freedom of speech, outlawing harassment on the ground of sexual orientation, involves not only the competing right to freedom of speech but also the right to manifest a religious belief. This had not been properly taken into account. 3. The definition of harassment contained in the Regulations went beyond that contained in Directive 2000/78.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The High Court allowed the application in part and set aside the harassment provisions in the 2006 Regulations.

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 2

Case title	<i>R (on the application of Amicus - MSF section and others) v. Secretary of State for Trade and Industry</i> [2004] EWHC 860 (Admin); [2004] ELR 311; [2004] IRLR 430; [2004] Pens. LR 261; [2007] ICR 1176
Decision date	26 April 2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	Queen's Bench Division (Administrative Court)
Key facts of the case (max. 500 chars)	The claimants, trade unions covering a wide range of occupational sectors, sought the annulment of certain of the exceptions to the prohibition of discrimination on grounds of sexual orientation in the fields of employment and vocational training in the <i>Employment Equality (Sexual Orientation) Regulations 2003</i> . The Regulations were made for the purpose of implementing Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation so far as it related to discrimination on grounds of sexual orientation, which Directive contained a derogation in Art. 4 for the purposes of occupational requirements. The claimants challenged the validity of the exceptions in regulations 7(2) and (3) and 20(3) on the grounds that they were incompatible with Directive 2000/78/EC and with Arts 8 and 14 of the ECHR.
Main reasoning/argumentation (max. 500 chars)	The Administrative Court considered whether the above exceptions in the <i>Employment Equality (Sexual Orientation) Regulations 2003</i> were compatible with the above Directive 2000/78/EC and whether they were compatible with the ECHR.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<ol style="list-style-type: none"> 1) The <i>Employment Equality (Sexual Orientation) Regulations 2003</i> should be purposively construed so as to conform so far as possible with Directive 2000/78; 2) The exception in regulation 7(2) in respect of discrimination where sexual orientation was a genuine and determining occupational requirement was intended to implement Art 4(1) of Directive 2000/78; 3) The further specific exception in regulation 7(3) where the employment was for the purposes of an organised religion also formed part of the implementation of Art 4(1) of Directive 2000/78; it was clear from parliamentary material that the exception was intended to be very narrow, and, as a derogation from the principle of equal treatment, it had to be construed strictly;

	<p>4) The exception in regulation 20(3) with respect to discrimination in training referred to training directed specifically and solely for employment to which an occupational requirement could lawfully be applied under regulation 7; it referred to vocational training rather than to training of a more general nature;</p> <p>5) The Regulations did not interfere with rights under Art 8(1) of the ECHR since they added to existing rights and they also did not produce any difference of treatment in the enjoyment of rights falling within the ambit of the Convention which might give rise to a breach of Art 14.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Application dismissed.

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 3

Case title	<i>Lacey v University of Ulster and Davidson</i> Case Ref: 970/05
Decision date	27 October 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Industrial tribunal (Decision on Pre-hearing Review)
Key facts of the case (max. 500 chars)	The appellant, a homosexual, unsuccessfully applied for an academic post with the respondent, the University of Ulster. He lodged proceedings at an industrial tribunal, claiming discrimination on grounds of sexual orientation contrary to the <i>Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003</i> . He sought assistance and advice from the Equality Commission for Northern Ireland and was asked to fill out a claim form. In this form, he suggested that his research interest in the history of homosexuality may have been the reason for discrimination, but did not state that he believed that he had been rejected because of his own sexual orientation. The Respondent denied discrimination, relying on the wording of the appellant's claim form.

Main reasoning/argumentation (max. 500 chars)	What is the correct interpretation of the coverage of the <i>Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003</i> ? Does the alleged act of discrimination have to be as a result of one's own sexual orientation?
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The tribunal concluded that the 2003 Regulations do not require the alleged act of discrimination to have been as a result of one's own sexual orientation; they also cover situations where the alleged less favourable treatment is on the grounds of another person's sexual orientation.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The tribunal held directed that the matter proceed to a full hearing on the merits.

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 4

Case title	<i>Smith v Gardner Merchant Ltd</i> [1998] 3 All ER 852; [1999] ICR 134; [1998] IRLR 510; (1998) 95 (32) LSG 29; (1998) 142 SJLB 244
Decision date	14 July 1998
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)
Key facts of the case (max. 500 chars)	The applicant, a homosexual, was employed as a barman. After complaints about his conduct by a fellow employee, T, he was suspended from work and was subsequently dismissed on the grounds of threatening and aggressive behaviour, which was considered by his employer to constitute gross misconduct. T alleged that the applicant had been abusive and threatening towards her, that he had flirted with male customers, and that he had insisted on talking in detail about his love life. The applicant denied the allegations and claimed that T disliked him because he was homosexual and that she had constantly made offensive remarks about his homosexuality. Following his dismissal, the applicant complained that he had been subjected to unlawful sex discrimination

	<p>contrary to section 1(1)(a) and section 6(2)(b) of the <i>Sex Discrimination Act 1975</i> (SDA) in that (a) T's allegations would not have been made against a homosexual woman and (b) in conducting the disciplinary process and in making the decision to dismiss the applicant rather than T, the employers had treated the applicant less favourably than they had treated her.</p> <p>Both the industrial tribunal and the Employment Appeal Tribunal concluded that the applicant's claim of discrimination on the ground of homosexuality was discrimination on the ground of sexual orientation rather than on the ground of sex and therefore did not fall within the 1975 Act. Therefore the applicant's claim was dismissed.</p>
Main reasoning/argumentation (max. 500 chars)	The Court of Appeal considered whether discrimination against the appellant on the ground of his homosexuality might not also be discrimination against him on the ground of his sex.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<ol style="list-style-type: none"> 1) Although discrimination on grounds of sexual orientation did not itself fall within the SDA, under section 1(1)(a) of the Act discrimination against a male homosexual based on his homosexuality could also be discrimination against him as a man; 2) In determining whether that was the case, the industrial tribunal had to decide what was the treatment the man had received, whether he was treated less favourably than the woman with whom he fell to be compared and whether he would have been so treated but for his sex; 3) The appropriate comparator was dependent on 'the relevant circumstances' : the appropriate comparator with regard to the applicant's first complaint, about the treatment he received from the female complainant, was a homosexual woman; the appropriate comparator with regard to the applicant's complaint about the employer's handling of the disciplinary proceedings was the female complainant herself.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal was allowed and the case was remitted to the industrial tribunal for determination of the facts.

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 5

Case title	<i>Pearce v Governing Body of Mayfield School</i> [2003] UKHL 34; [2004] 1 All ER 339; [2003] ICR 937; [2003] IRLR 512
Decision date	19 June 2003
Reference details (type and title of court/body; in original language and English [official translation, if available])	House of Lords
Key facts of the case (max. 500 chars)	The appellant was subjected to a sustained campaign of verbal abuse and harassment from pupils at the school where she was a teacher because she was a lesbian. She eventually applied for ill health retirement. She claimed before a tribunal that that treatment comprised 'direct' sex discrimination, as defined in section 1(1)(a) of the <i>Sex Discrimination Act 1975</i> (SDA), namely that a person discriminates against a woman if 'on the ground of her sex he treats her less favourably than he treats or would treat a man'. She contended that, on the ground of sex, her employers treated her less favourably than they would have treated a man. She also contended that she had been subjected to harassment of a gender specific character, in having been subjected by pupils at her school to insults of a sexually explicit character.
Main reasoning/argumentation (max. 500 chars)	The House of Lords considered the scope of the wording 'on the ground of her sex' in section (1)(1)(a) of the SDA, and discussed the appropriate comparator for making the 'less favourable treatment' comparison. The applicant contended that the SDA envisaged a simple comparison of how the claimant was treated and how a person of the opposite sex would have been treated. Had the claimant in the appeal been a man, he would not have been dismissed; she was dismissed because she was sexually attracted to women; a man in her position, sexually attracted to women, would not have been dismissed; therefore she was less favourably treated than a man in her position would have been, and she received that treatment because she was a woman. The opposing arguments focused on the need for a 'like with like' comparison, as underlined by section 5(3) of the SDA.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	(1) Section 1(1)(a) of the SDA was not to be interpreted expansively so as to include cases of discrimination solely on the ground of sexual orientation. In the context of s 1 'sex' meant gender and did not include sexual orientation. The way the claimant was treated by some of her pupils at the school was because of her sexual orientation, not her sex. In her case the appropriate comparator was a homosexual man. The school would not have treated a male

	<p>homosexual teacher who had been subjected to homophobic abuse by his pupils any differently from the way it had treated the claimant.</p> <p>(2) The fact that harassment was gender specific in form could not be regarded as of itself establishing conclusively that the reason for harassment was gender based on the ground of her sex. The words 'less favourable treatment' in section 1(1)(a) rendered the need for comparison inevitable.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	It was held that the applicant had not been discriminated against on the ground of her sex under the SDA and her appeal was dismissed.

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC¹⁸⁶

No relevant case law available.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 1

Case title	<i>Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another, Ex parte Shah</i> [1999] 2 WLR 1015; [1999] 2 AC 629
Decision date	25 March 1999
Reference details (type and title of court/body; in original language and English [official translation, if available])	House of Lords

¹⁸⁶ A comprehensive keyword-based search of the main legal databases, conducted on 08.02.2008, did not yield any case law that would be relevant in this context.

Key facts of the case (max. 500 chars)	Islam and Shah were Pakistani citizens who had been forced out of their marital homes by their husbands after being falsely accused of adultery. Both women had formerly been subjected to domestic abuse and following the allegations were subjected to the violence and social disapprobation of the community. Both women came to the UK independently on visitors visas and subsequently claimed asylum. The women feared that if returned to Pakistan they would be persecuted through physical and mental abuse, would be ostracised in their communities, would be unprotected by state authorities and might be liable to death by stoning in accordance with Sharia law.
Main reasoning/argumentation (max. 500 chars)	Did the appellants, as women, qualify as members of a 'particular social group' in the sense of the <i>Refugee Convention 1951</i> so that they were entitled to asylum if subject to a well-founded fear of persecution?
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	A 'particular social group' within the meaning of Art 1A(2) of the <i>Refugee Convention</i> had to exist independently of the persecution to which its members were subject, but that cohesiveness as a group was not an essential requirement. In the present case, because women in Pakistan were discriminated against as a group in matters of fundamental human rights, and the state gave them no protection because they were not being perceived as entitled to the same human rights as men, women in Pakistan were a 'particular social group' under the <i>Refugee Convention</i> .
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Lord Steyn, having referred to homosexuals in his judgement, reasoned by extension that homosexuals could constitute members of a particular social group, subject to discrimination because of their sexuality, following the reasoning in <i>AG of Canada v Ward</i> whereby sexuality is perceived as an innate and unchangeable characteristic that ought not to be required to change.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 2

Case title	<i>Amare v Secretary of State for the Home Department</i> [2005] EWCA Civ 1600
Decision date	20 December 2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)
Key facts of the case (max. 500 chars)	The appellant, an Ethiopian national and a lesbian claimed asylum, inter alia, because of her homosexuality. She had had a homosexual relationship with another woman in the UK in part of the period during which her application for asylum was under consideration. Homosexuality is illegal in Ethiopia with penalties of imprisonment ranging from ten days to three years according to Art 600 of the Ethiopian Penal Code. The appellant had had a partner in Ethiopia, but this relationship ended because of fear of discovery. She feared that if returned she would be persecuted because of her sexuality and be forced into a heterosexual marriage.
Main reasoning/argumentation (max. 500 chars)	The appellant argued that there had been an error of law by the adjudicator because he had acted on the basis that the appellant had no well-founded fear of persecution so as to qualify for asylum under the <i>Refugee Convention</i> because the applicant had earlier managed to have a homosexual relationship in Ethiopia in secret without detection and had given no indication that her homosexual identity required her to adopt an overt style of homosexual behaviour in the future. She argued that her removal from the UK would be a breach of the right to privacy in Art 8 ECHR.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The key issue under the <i>Refugee Convention</i> was whether the adjudicator had applied the law correctly. The issue under the ECHR was whether the removal of the appellant would be a disproportionate restriction on her right to privacy.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	It was held that the adjudicator had not erred in law. As to the <i>Refugee Convention</i> , the test that he applied was the correct one. The existence of a discriminatory legislative provision in an applicants home country will not by itself normally amount to persecution unless it has consequences of sufficient severity for that individual. More recently the case of <i>OO (Sudan) JM (Uganda) v Secretary of State for the Home Department</i> [2009] EWCA Civ 1432 Has affirmed that Amare and RG are still good law. The court maintains that the presence of prosecutory

	legislation does not necessarily amount to persecution, the level of persecution must be sufficiently severe..
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Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83EC, case 3

Case title	<i>RG (Colombia) v Secretary of State for the Home Department</i> [2006] EWCA Civ 57; 2006 WL 63658
Decision date	20 January 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)
Key facts of the case (max. 500 chars)	The appellant, RG, a gay, HIV positive Colombian, appealed against the rejection of his asylum claim. Before an adjudicator, RG claimed that he feared persecution in Colombia by death squads on account of his sexual orientation and HIV status. Moreover, RG claimed that since his mannerisms had become more overt since living in the UK he would be more likely to be identified as homosexual and face an increased risk of persecution. The adjudicator found that, in Colombia, RG had never experienced any violence or hatred on account of his homosexuality because he had kept it secret. In these circumstances, the adjudicator held that RG had not left Colombia as a result of any persecution connected to his homosexuality. Instead, he was found to have left Colombia in order to receive free antiretroviral treatment in the UK. The adjudicator found that RG's concerns regarding his mannerisms were excessive and concluded that he faced no real risk of persecution as he would modify his behaviour so as not to draw attention to himself.
Main reasoning/argumentation (max. 500 chars)	The Court of Appeal's first and most significant reason was that the alleged persecution was not sufficiently serious or life threatening, since RG had not suffered actual physical violence throughout the 13 years that he had lived as a closeted gay man in Colombia. Secondly, the court considered the real reason for RG's asylum claim was his desire to access free health care in order to treat his HIV infection. His allegations of persecution on the grounds of sexuality were viewed as a sham.

	<p>The Court determined (1) whether RG was indeed being required to modify his behaviour and (2) whether that modification would place RG in a situation of persecution. The Court found that RG failed to satisfy the first part of the test as the adjudicator had not found, and RG was not specific in his evidence, that the threat from death squads was the reason why the pattern of behaviour forced on him whilst living in Colombia was different from that which he would otherwise have adopted. With regard to the second question, the adjudicator had been entitled to find that RG would not behave, on return, significantly differently from his behaviour during the time when he lived in Colombia. Moreover, the Court's view that RG had travelled to the UK in order to get free medical treatment strongly militated against a conclusion that he had been in a situation of persecution in Colombia or would be if he was returned.</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The case confirmed the high level of distress that must be reached before a denial of freedom can be said to qualify as persecutory. The requirement that RG be returned and continue living discreetly was deemed not to be a persecutory burden. Behaviour regulation is valid so long as it is not excessively burdensome. Changes of behaviour upon residence in the UK would be masked upon return with no detrimental effect. RG's real purpose for claiming asylum was to access free health care to manage his HIV status. As to health care, reference was made to the cases of <i>N v SSHD</i> [2005] UKHL 31 and <i>SN v SSHD</i> [2005] EWCA Civ 168. A high level of distress must be reached before a finding of persecution can be made. The breaching of Convention rights cannot in itself amount to persecution.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The appeal was dismissed.</p>

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83EC, case 4

Case title	<i>Sahm Sunder Jain v Secretary of State for the Home Department</i> [1999] WL 1071267
Decision date	6 October 1999
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)
Key facts of the case (max. 500 chars)	The appellant came to the UK aged 23. At the time of his appeal he was 32 and had become a practising homosexual since his arrival in the UK. The appellant feared that if he was returned to India he would be unable to live openly in a homosexual relationship, would be forced into an arranged marriage and would incur the wrath of the local community if his sexuality was discovered and would be unable to benefit from police protection.
Main reasoning/argumentation (max. 500 chars)	Did the appellant have a well-founded fear of persecution? He feared that the illegal status of practising homosexuality in India would lead to his criminal conviction if caught; in addition the ability to form long lasting relationships would be hampered. The appellant would be expected to enter into an arranged marriage. He had not previously been persecuted and therefore might not be upon his return.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Whether the applicant had a well-founded fear of persecution because of his sexuality. Which standard of persecution was to be used, that in the UK or country of origin law or that in international law? Whether homosexuals were a 'particular social group'.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Court of Appeal dismissed the appellant's appeal against the tribunal's decision not to grant him asylum. Whereas homosexuals were a social group entitled to asylum under the <i>Refugee Convention</i> if they were subject to a well-founded fear of persecution, the appellant was subject to no such fear on the facts if returned to India. The occasional interference with the exercise of a human right does not constitute persecution; nor by itself does the presence of restrictive penal legislation or social disapprobation.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 5

Case title	<i>J v Secretary of State for the Home Department</i> [2006] EWCA Civ 1238
Decision date	26 July 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)
Key facts of the case (max. 500 chars)	J was an Iranian nation who sought asylum in the United Kingdom on the ground that, as a homosexual, he was a member of a 'particular social group' for the purposes of the <i>Refugee Convention 1951</i> and as such would be subject to persecution in Iran. He had not been the subject of sanctions in Iran before his arrival in the UK only because he had conducted his homosexual relations discreetly. He was refused asylum on the ground that he would not be persecuted in Iran if he continued to act discreetly.
Main reasoning/argumentation (max. 500 chars)	The appellant argued that there was a well founded fear of persecution in the sense of the <i>Refugee Convention</i> , so that he was entitled to asylum, if he would be persecuted if he openly acted in accordance with his sexual identity.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The key issue was whether a homosexual who could avoid persecution by acting discreetly should be expected to act in this way. Further more a question posed was whether a sufficiently serious violation of Article 8 rights might amount to persecution.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	It was first confirmed that homosexuals were members of a 'particular social group' qualifying for asylum under the <i>Refugee Convention</i> in case of a well-founded fear of persecution. It was held that a person cannot be refused asylum on the basis that he could avoid persecution by modifying his conduct if that modification, by reason of its intensity or duration, cannot reasonably be expected to be tolerated. It was a question of fact in each case whether this was so for the homosexual concerned, as it might well be in the case of a homosexual in a stable relationship with a homosexual partner.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 6

Case title	<i>OO (Sudan) and JM (Uganda) v Secretary of State for the Home Department</i> [2009] EWCA Civ 1493
Decision date	18 November 2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal, Civil Division
Key facts of the case (max. 500 chars)	Both claimants were homosexual and claimed asylum in the UK based on persecution suffered in their home states. In both states of origin homosexuality or homosexual acts were criminal by legislation but the legislation was not properly enforced. In this situation, the claimants had, at times, concealed their true sexuality until coming to the UK.
Main reasoning/argumentation (max. 500 chars)	The question arose as to whether the mere existence of legislation discriminating against homosexuals amounted to persecution under the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006, which seek to implement European Council Directive 2004/83/EC.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Despite such laws being discriminatory, it is difficult to see how unenforced legislation amounts to persecution so severe that an individual is in need of international protection. An exception to this may be when an individual has had to modify their behaviour so much that it becomes persecution despite the legislation being unenforced. The Regulations and the Directive do not widen the scope of the concept of persecution under international law, although it is up to individual states whether to view the scope more generously than this or not.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeals were dismissed as the claimants had not had to modify their behaviour in their home states so severely that it amounted to persecution. The interference caused by the change in behaviour was not severe enough to violate the claimants' right to private life under Art. 8 ECHR.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 7

Case title	<i>HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department</i> [2009] All ER (D) 103Mar
Decision date	10 March 2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal, Civil Division
Key facts of the case (max. 500 chars)	Both claimants were homosexuals claiming asylum in the UK. They argued that in their countries of origin they could not be openly homosexual and that on return from the UK they would be persecuted. The appeals were heard together as both cases raised the same issue. The claimants asked for clarity on what test should be applied when considering whether a homosexual is entitled to claim refugee status on the basis of persecution suffered due to their sexual orientation.
Main reasoning/argumentation (max. 500 chars)	The claimants asked whether it is an answer to a claim for refugee status that the applicant be required to, or otherwise would conceal, his sexual identity in order to avoid harm which would amount to persecution on return to the country of origin. The Secretary of State accepted that homosexuals are a particular social group under Art. 1A of the 1951 Refugee Convention. In reply to the claimants the Secretary of State submitted that the question is always whether the applicant can reasonably be expected to tolerate the need for discretion on return.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Refugee status cannot be denied by expecting someone to conceal aspects of identity or suppress behaviour they should be allowed to express. However the test is whether it is reasonable to expect the claimant to tolerate conditions in the home country by acting discreetly. In assessing this tribunals are entitled to take into account evidence on the views about homosexuality held and emerging from in-country evidence in a particular state. The judgment of what is reasonably tolerable must be made in the context of the particular society to which the claimant will be returned.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeals were dismissed as the Tribunal was entitled to decide on the evidence that the claimants would not suffer persecution on return to Iran and Cameroon.
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Chapter C, Asylum and subsidiary protection, case law relevant to art 2/h of Council Directive 2004/83/EC¹⁸⁷

No relevant case law available.

Chapter D, Family reunification, case law relevant to art 4/3 of the Council Directive 2003/86/EC¹⁸⁸

No relevant case law available.

Chapter E, Freedom of assembly¹⁸⁹

No relevant case law available.

Chapter F, Hate speech¹⁹⁰.

No relevant case law available.

¹⁸⁷ A comprehensive keyword-based search of the main legal databases, conducted on 08.02.2008, did not yield any case law that would be relevant in this context.

¹⁸⁸ A comprehensive keyword-based search of the main legal databases, conducted on 08.02.2008, did not yield any case law that would be relevant in this context.

¹⁸⁹ None of the consulted government agencies (CEHR, NI Equality Commission, UK Government Equalities Office) and civil society organisations (Stonewall, Equality Network) had knowledge of pertinent case law. Moreover, a comprehensive keyword-based search of the main legal databases, conducted on 08.02.2008, did not yield any case law that would be relevant in this context.

¹⁹⁰ At the time of writing, there is no offence of incitement to hatred on grounds of sexual orientation in Great Britain and Northern Ireland..

Chapter F, Hate crimes, case 1

Case title	<i>R v Pickford and Walker</i> ¹⁹¹
Decision date	16 June 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Central Criminal Court London
Key facts of the case (max. 500 chars)	Mr Dobrowski, a 24 year old gay bar manager, was brutally attacked by the defendants. Mr Dobrowski's head, neck and body were punched, kicked and stamped on. Witnesses saw and heard the sustained assault, and one who tried to intervene was warned off by the defendants. Mr. Dobrowski was punched and kicked so viciously that he died ten hours later in hospital — his face so battered that it was unrecognisable, even to his family. He had to be identified by fingerprints. The defendants were charged with murder aggravated by sexual orientation.
Main reasoning/argumentation (max. 500 chars)	The Prosecutor said the defendants were involved in a 'premeditated plan to attack a gay man' and 'shared an intent to kill', from the nature of the assault and the evidence of an eyewitness. The defendants were heard by witnesses screaming anti-gay insults as they beat the barman to death.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The question was whether this was a murder aggravated by sexual orientation, referring to section 146 of the <i>Criminal Justice Act 2003</i> .

¹⁹¹ The case has not been reported. For further information see 'Two face 30 years in jail for homophobic murder', *The Times*, 13 May 2006, available at <http://www.timesonline.co.uk/tol/news/uk/crime/article717120.ece>, and 'CPS determined to tackle homophobic crime', *CPS Press Release*, 16 June 2006, available at: http://www.cps.gov.uk/news/pressreleases/archive/2006/134_06.html (14.02.2008).

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The defendants were sentenced to life imprisonment with a minimum tariff of 28 years for the murder Mr Dobrowski.</p> <p>This was the most prominent case since the <i>Criminal Justice Act 2003</i> came into effect in 2005, requiring courts to treat 'hostility based on sexual orientation' as an aggravating factor. It is believed to be the first instance that a judge has been able to use motivation on the basis of sexual orientation as an aggravating feature when sentencing for murder.</p>
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Chapter G, Applicability of legislation on trans gender issues, case 1

Case title	<i>J v C (Void Marriage: Status of Children)</i> [2006] EWCA Civ 551; [2006] 2 FLR 1098
Decision date	15 May 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)
Key facts of the case (max. 500 chars)	<p>The applicant, Mr. J, had been born female, but lived as a male. In 1977 he purported to marry the respondent, Mrs C, without informing her that he was a transsexual. The couple lived together as husband and wife for many years, with the respondent remaining in ignorance of the fact that the applicant was a woman. Two children were conceived by means of artificial insemination by donor. The applicant did not disclose to anyone involved in the process the true reason for the failure to conceive. Only after the breakdown of the marriage, during the process of obtaining a divorce, did the respondent discover the applicant's birth certificate and realise that the applicant was a woman. Mrs C. was granted a decree of nullity on the ground that the parties were not respectively male and female, and the marriage was declared void.</p> <p>In 2000 the applicant, pursuant to section 8 of the <i>Children Act 1989</i>, sought a prohibited steps order to ensure that the children were not informed of their parentage and the reasons for the breakdown of the relationship with the mother, in particular the gender issue, until such time as a named expert advised it was appropriate to do so, and a specific issue order that the mother seek the advice of the named expert.</p>

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Court of Appeal held that under section 27 of the <i>Family Law Reform Act 1987</i> (FLRA), which was the applicable law in this case, in order to be a parent of a child born through artificial insemination by a donor, the mother's partner had to be 'the other party' to a marriage with the mother. Since marriage in English law is exclusively the union of a man and a woman 'the other party to the marriage' must be a man in order for there to be a marriage. If that other party is not a man, there is no marriage. At the relevant time, the applicant was a woman, and, as such, could not be a party to a marriage with another woman. Therefore, he could not be the parent of the child.</p> <p>The Court acknowledged that the appellant had duly obtained a <i>Gender Recognition Certificate</i> under the <i>Gender Recognition Act 2004</i> (GRA), which makes him a man for all relevant purposes as from the date stated in his Certificate. However, this does not change the fact that he was not a woman on the day he entered into the ceremony of marriage with the respondent. The recognition of the appellant's male gender under the GRA does not have retrospective effect.</p> <p>As a consequence, the appellant's claim that a lack of recognition of his acquired gender through failure to accord him the status of parent under the FLRA would violate his right to respect for private life under Art. 8 of the ECHR was not accepted. The Court determined that 'to give effect to the undoubted fact that he did not have the male gender at the relevant time cannot possibly involve a lack of respect for his male gender as subsequently acquired.'</p> <p>Moreover, the appellant's submission that to deny the status of parent infringes his right to respect for family life under Art. 8, was dismissed because in the Court's view there was no family life as the appellant had not seen the child for many years and had never been married to the respondent.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Court of Appeal agreed with the ruling in <i>Corbett v Corbett</i> [1971] where it was held that a matrimonial relationship between parties to a marriage who were of the same sex was 'a legal impossibility at all times and in all circumstances', and therefore to be declared void.</p> <p>A <i>Gender Recognition Certificate</i> granted under the GRA enables a fresh birth certificate to be obtained and thus indicates that the person's sex at birth was their more recently acquired gender. However, gender recognition does not operate retrospectively.</p>

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Appeal dismissed.
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Chapter G, Applicability of legislation on trans gender issues, case 2

Case title	<i>Bellinger v Bellinger</i> [2003] UKHL 21; [2003] 2 AC 467; [2003] 2 WLR 1174; [2003] 2 All ER 593
Decision date	10 April 2003
Reference details (type and title of court/body; in original language and English [official translation, if available])	House of Lords
Key facts of the case (max. 500 chars)	Mrs Bellinger was correctly recorded at birth as a male. Following gender reassignment therapy and subsequent surgery, she has presented herself as a female. In 1981 she went through a ceremony of marriage with a man. The couple thereafter lived together as husband and wife, although section 11(c) of the <i>Matrimonial Causes Act 1973</i> (MCA) provides that a marriage is void unless the parties are 'respectively male and female'. Mrs Bellinger wished to have her marriage declared valid or, failing that, for domestic legislation to be declared incompatible with the right to respect for private life under art 8 and the right to marry under Art. 12 of the ECHR. She contended that, at the time of the marriage, she had been 'female' within the meaning of section 11(c) of the MCA. Both the trial judge and the Court of Appeal rejected that contention, holding on the basis of the decision in <i>Corbett v Corbett</i> , that a person's sex at birth, as determined by the chromosomal, gonadal and genital tests, could not subsequently be changed for the purposes of section 11(c). Mrs Bellinger challenged that conclusion on her appeal to the House of Lords.
Main reasoning/argumentation (max. 500 chars)	The case dealt with the recognition of gender reassignment for the purposes of marriage. Since in British law a marriage is void unless the parties are 'respectively male and female', the House of Lords discussed whether, at the time of the marriage, Mrs Bellinger was 'female' within the meaning of that expression in section 11(c) of the

	<p>MCA, and therefore validly married to Mr Bellinger.</p> <p>It also considered whether section 11(c) was a continuing obstacle to the petitioner entering into a valid marriage with a man and was therefore incompatible with her right to respect for her private and family life and with her right to marry pursuant to Arts 8 and 12 of the ECHR.</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>It was held that 'male' and 'female' in section 11(c) of the 1973 Act were to be given their ordinary meaning and referred to a person's biological gender as determined at birth, so that, for the purposes of marriage, a person born with one sex could not later become a person of the opposite sex. English law did not recognise a marriage between two people who were of the same gender at birth, even if one of them had undergone gender reassignment treatment which altered the anatomical features of the body to give the appearance of those of the opposite gender. A conclusion to the contrary would represent a major change in the law, having far-reaching ramifications. It raised issues which were matters for Parliament to decide after careful deliberation rather than by judicial intervention. It followed that Mrs Bellinger, having been born male, could not be regarded as female as a result of her gender reassignment treatment and that therefore the marriage ceremony had not been valid.</p> <p>(2) The non-recognition of gender reassignment for the purposes of marriage was not compatible with Arts 8 and 12 of the ECHR, and a declaration of incompatibility was granted.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>In the case of <i>Bellinger v. Bellinger</i> the House of Lords exercised its power to make a declaration of incompatibility under section 4 of the <i>Human Rights Act 1998</i>, finding that the non-recognition of change of gender for the purposes of marriage in section 11(c) of the MCA was in breach of Arts 8 and 12 of the ECHR.</p> <p>But the House of Lords did not consider that the issues raised in the case were suitable for determination by courts and left the matter for Parliament, which has subsequently enacted the <i>Gender Recognition Act 2004</i> which enables transsexual people to be legally recognised in their acquired gender, and also to marry in that gender.</p>

Chapter G, Applicability of legislation on trans gender issues, case 3

Case title	<i>Corbett v Corbett</i> [1970] 2 WLR 1306; [1971] P 83
Decision date	2 February 1970
Reference details (type and title of court/body; in original language and English [official translation, if available])	Probate, Divorce & Admiralty Division of the High Court
Key facts of the case (max. 500 chars)	In September 1963, C, a male, and A went through a ceremony of marriage. C knew that A had been registered at birth as a male and had, in 1960, undergone a sex-change operation and had since then lived as a woman. In December 1963 C petitioned for a declaration that the marriage was null and void because A, at the time of the ceremony, was a person of the male sex.
Main reasoning/argumentation (max. 500 chars)	The case concerned the gender of a male to female transsexual in the context of the validity of a marriage. It was discussed whether A should be legally seen as male or female.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	It was held that marriage was essentially a relationship between man and woman and that to determine a person's sex for the purpose of marriage the law should adopt the chromosomal, gonadal and genital tests, and if all three were congruent, determine the sex accordingly. Any operative intervention should be ignored. The biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Applying the <i>Corbett</i> test, A was held not to be a woman for the purposes of marriage but was from birth and had remained at all times a biological male. Therefore the marriage was declared void. The <i>Corbett v Corbett</i> decision set a legal precedent regarding the status of transsexuals in the UK. The <i>Corbett</i> test was used to define the sex of transsexual people for many purposes until the introduction of the <i>Gender Recognition Act 2004</i> which ultimately defined the sex of transsexual people as whatever is stated on their birth certificate, until such point as a <i>Gender Recognition Certificate</i> corrects the birth certificate.

Chapter G, Name change and/or sex change of trans gender people, relevant case law, case ?

Case title	<i>R (on the application of AB) v Secretary of State for Justice [2009] EWHC 2220</i>
Decision date	4 September 2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	High Court, Queen's Bench Division
Key facts of the case (max. 500 chars)	The claimant was a pre-operative transgender woman who sought judicial review against the Secretary of State for Justice and the Governor of HMP Manchester to challenge the decision to keep her in a male prison and not transfer her to a female prison. The claimant had been diagnosed with gender dysphoria and had obtained a gender recognition certificate recognising her as female. She wanted to undergo gender reassignment surgery which would not be approved by the Gender Identity Clinic treating her until she spent a period living "in role" as a woman within a female prison.
Main reasoning/argumentation (max. 500 chars)	The decision of the Secretary of State and HMP Manchester not to move the claimant was based on the cost of moving her into segregation at a female prison and the precedent the move would set for others with gender dysphoria. The claimant argued that the decision to keep her in a male prison was contrary to s. 9 of the Gender Recognition Act as she was not being treated as female "for all purposes", that this violated her Art. 8 ECHR rights and that the decision was unlawful on Wednesbury grounds.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	S.9 does not require the law to presume the claimant has physical characteristics other than she possesses and the Secretary of State is to have regard to them only when they affect its responsibility for prisons. The Secretary of State failed to provide evidence that the decision was in accordance with the law and proportionate under Art 8 ECHR. The Secretary of State did not consider the implications, in terms of risk to the claimant, caused by denying her the opportunity to qualify for surgery and the likelihood of segregation in a male prison. The decision was Wednesbury unreasonable.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The High Court quashed the decision to keep the claimant in a male prison and declared that her continued detention in a male prison was in breach of Art. 8 ECHR as the claimant's autonomy was significantly and personally interfered with.
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Chapter G, Name change and/or sex change of trans gender people, relevant case law, case 1

Case title	<i>X v Brighton and Hove City Council</i> ¹⁹²
Decision date	June 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Brighton Employment Tribunal
Key facts of the case (max. 500 chars)	<p>A teacher who had undergone a process of gender reassignment registered with a teacher requirement agency in order to seek work and sought a reference from her previous manager at the Council. The manager initially delayed responding to the request for a reference. When he did respond, he faxed a secret side memo that disclosed her former name, stated her previous gender, although the appellant had requested that this should not be disclosed. He also referred to her as both 'he or she', 'him' and 'her'. In the side memo the manager also revealed that the appellant had previously initiated proceedings alleging discrimination and offered to have further telephone conversations with agency staff. It was only after the teacher had contacted the agency directly some months later, because the agency had refused to provide her with any work, that she discovered the existence of the secret fax. The defendant had failed to reveal its existence when originally asked.</p> <p>In 2005, in the absence of having received any employment, the teacher approached her previous manager for a reference again but was refused.</p> <p>The employment tribunal confirmed the claimant's claim of discrimination on grounds of transsexualism.</p>

¹⁹² This case has not been reported. Information can be found on the website of the former Equal Opportunities Commission at <http://83.137.212.42/sitearchive/eoc/Defaulta83c.html?page=19826> (14.02.2008).

	Although the defendant applied for a review of the employment tribunal's findings of discrimination and victimisation, and then lodged an Appeal, both were unsuccessful.
Main reasoning/argumentation (max. 500 chars)	The tribunal found that the manager's treatment of her request amounted to discrimination and victimisation of the teacher, for which the defendant and her previous manager were liable. The tribunal also found that both the defendant and the manager had further discriminated against and victimised the teacher by refusing the second reference request and by refusing to hear her grievance over the refusal. The defendant also failed to adopt existing Criminal Records Bureau procedures for transgender people, and ignored guidance by the Equal Opportunities Commission on the employment of transgender people.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The key issue was whether the defendant's treatment of the teacher was discrimination on grounds of transsexualism.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The employment tribunal ordered the defendant to pay compensation of £34,765.18 to the claimant. The compensation order followed the decision of the tribunal in November 2006 that the defendant, and one of its senior managers, had discriminated against and victimised the former teacher on grounds of gender reassignment. The tribunal also made a recommendation that the defendant provide any prospective employer or employment agency with a non-discriminatory reference.

Chapter G, Name change and/or sex change of trans gender people, relevant case law, case 2

Case title	<i>A v Chief Constable of West Yorkshire</i> [2004] UKHL 21; [2005] 1 AC 51; [2004] 2 WLR 1209; [2004] 3 All ER 145
Decision date	6 May 2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	House of Lords
Key facts of the case (max. 500 chars)	A was a post operative male to female transsexual. Her application to join the police force as a woman was rejected by the Chief Constable in March 1998 on the ground that she could not perform the full searching duties required

	<p>of a constable pursuant to the <i>Police and Criminal Evidence Act 1984</i> (PCEA) section 54(9) which provides that a search of persons who have been arrested or are in custody has to be carried out by a constable of the same sex as the person searched. The Chief Constable maintained that it was a genuine occupational qualification, within the meaning of section 7 of the <i>Sex Discrimination Act 1975</i> (SDA), for a constable to be capable of searching men and women, and that A could search neither given that under domestic law she was a man, but was otherwise, for all intents and purposes, a woman. A relied on the prohibition on any discrimination on grounds of sex in the Equal Treatment Directive 76/207 Art.2(1) .</p> <p>By the time the case reached the Court of Appeal, the European Court of Human Rights had decided in <i>Goodwin v UK</i> that the refusal of English law to recognise a person's gender reassignment was in breach of that person's rights under Arts 8 and 12 of the ECHR. The Court of Appeal, therefore, allowed A's appeal on the basis that the Convention jurisprudence was read into domestic law and that the Chief Constable was obliged to treat the complainant as a female and that it was not open to him to discriminate against her on the basis that she was a transsexual and that no possibility of invoking section 7 of the SDA 1975 could arise. The Chief Constable appealed.</p>
Main reasoning/argumentation (max. 500 chars)	Was the rejection of A's application unlawful discrimination on the ground of sex? Is being a man, as opposed to a woman, or vice versa, a genuine occupational qualification for the job of police officer in terms of section 7(2)(b) of the SDA ? Does the wording 'same sex' in section 54(9) of the PCEA and the references to 'woman' and 'man' in the SDA refer to a transsexual person in his or her reassigned gender?
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	It was agreed that the appeal had to turn on the rights of a transsexual under the Directive at the date when C refused to offer A employment, rather than on domestic law or the impact of the <i>Goodwin</i> decision. To give effect to the clear thrust of EC law, section 54(9) of the PCEA and section 7 of the SDA had to be interpreted as referring to the acquired gender of a post operative transsexual who was visually and for all practical purposes indistinguishable from non transsexual members of that gender.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	House of Lords, dismissing the Chief Constable's appeal, held that to refuse A's application was contrary to the SDA.

Chapter G, Name change and/or sex change of trans gender people, relevant case law, case 3

Case title	<i>Croft v Royal Mail Group plc</i> [2003] EWCA Civ 1045; [2003] IRLR 592
Decision date	18 July 2003
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)
Key facts of the case (max. 500 chars)	<p>The appellant began her employment with the Post Office in March 1987, as a man. In 1997, after consultations with a medical specialist, she decided to change her gender role, started taking feminising hormones and planned gender reassignment surgery. In August 1998, having discussed the matter with her employer, she attended work dressed as a woman. Problems arose about which toilets the appellant should use. She wished to use the female toilets, but female members of staff objected, and the appellant agreed initially to use the unisex disabled toilet. The employer agreed that the appellant would eventually be able to use the female toilets, but declined to give a firm date on which she could do so.</p> <p>The appellant resigned on 4 June, asserting that she had been discriminated against by some colleagues and by management. She stated that she had accepted the employer's repudiatory breach of contract and considered herself to have been constructively dismissed. She presented a complaint of sex discrimination and unfair dismissal to the employment tribunal contending that it was unlawful for an employer to refuse to allow a pre-operative transsexual to the female sex, who presented with a female gender, to use the female toilets, or alternatively to require her to use only a unisex toilet. The appellant referred to section 2A(1)(c) of the <i>Sex Discrimination Act 1975</i> (SDA) which provides that a person discriminates against another person if he treats that person less favourably than he would treat other persons, and does so on the ground that that person intends to undergo, is undergoing, or has undergone gender reassignment.</p> <p>The claim was dismissed, as was her appeal to the Employment Appeal Tribunal. The appellant appealed to the Court of Appeal.</p>

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Court of Appeal found that at the material time the appellant was a transsexual and was in good faith in wishing to become female. She had reached the stage of gender reassignment where she had begun, but not long begun, to present as a woman attempting a 'real life test'.</p> <p>The Court determined whether A's treatment amounted to less favourable treatment on the ground she was undergoing gender reassignment. It held that the SDA, in section 2A, provides for a category of persons who are not to be discriminated against. It acknowledged that by virtue of the definition in section 82 of the SDA, this category includes persons at all stages of gender reassignment under medical supervision, thereby covering pre-operative transsexuals. However, in considering what amounts to less favourable treatment on grounds of gender reassignment, it does not follow that all such persons are entitled immediately to be treated as members of the sex to which they aspire.</p> <p>The Court held that a formerly male employee could not, by presenting as a female, necessarily and immediately assert the right to use female toilets. The status of transsexual did not automatically entitle the employee to be treated as a woman with respect to toilet facilities. The right does not arise automatically but is acquired by making progress in the gender reassignment procedure.</p> <p>On the other hand, a permanent refusal of the choice of toilets to someone presenting as a woman could be an act of discrimination even if the person has not undergone the final surgical intervention.</p> <p>The Court of Appeal found that the employer was not guilty of direct discrimination against the appellant. The measures taken by the employer were appropriate in the circumstances. He was entitled, for a period of time, to rely on the unisex disabled toilet as being a sufficient facility.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The moment at which a person at the 'real life test' stage is entitled to use female toilets depends on all the circumstances. The employer must take into account the stage reached in treatment, including the employee's own assessment and presentation, although the employer is not bound by the employee's self-definition when making a judgment as to when the changes occurred. The employer is also entitled to take into account, though not to be governed by, the susceptibilities of other members of the workforce.</p> <p>The employer is thus given a discretionary range and time scale, especially where there is objection from other employees. The problem is to define or delimit it.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The Court of Appeal agreed with the Employment Appeal Tribunal in finding that the employers did not discriminate on grounds of sex against the applicant pre-operative transsexual by not allowing her to use a female toilet and dismissed the appeal.</p>

Chapter G, Name change and/or sex change of trans gender people, relevant case law, case 4

Case title	<i>Chessington World of Adventures Ltd v Reed</i> [1998] ICR 97; [1997] IRLR 556
Decision date	27 June 1997
Reference details (type and title of court/body; in original language and English [official translation, if available])	Employment Appeal Tribunal
Key facts of the case (max. 500 chars)	In 1987, R, a biological male, was employed by CW as a rides technician. In July 1991, R announced her change of gender identity from male to female, following which she suffered prolonged and serious harassment by a minority of her male colleagues. R went on sick leave in March 1994 and was dismissed on grounds of incapability in July 1994. No real investigation was carried out into R's difficulties and no significant steps were taken to protect her or prevent the continuation of the harassment, in spite of complaints made by R. No disciplinary action was taken against those responsible for the harassment. On her complaint to an industrial tribunal that she had been unlawfully discriminated against on the ground of her sex, contrary to sections 1(1)(a) and 6(2)(b) of the <i>Sex Discrimination Act 1975</i> (SDA), the tribunal found that the employers had known that a concerted course of harassment had taken place but had failed to act on that knowledge and that that constituted a continuous detriment amounting to direct discrimination, for which the employers were directly liable to the applicant.
Main reasoning/argumentation (max. 500 chars)	The principal question considered was whether the SDA applies in a case where the complainant relies upon less favourable treatment following notice of intention to undergo gender reassignment.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Interpreting the SDA consistently with the ruling of the ECJ in <i>P v S and Cornwall County Council</i> [1996] IRLR 347, it was held that the scope of the Act also extended to discrimination arising from gender reassignment and that there was no requirement for a male/female comparison where the reason for the less favourable treatment was the applicant's intention to undergo gender reassignment.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The tribunal applied the decision of the European Court of Justice in <i>P v S and Cornwall County Council</i> that discrimination arising from gender reassignment constituted discrimination on grounds of sex under Art 5(1) of Council Directive (EEC) 76/207 (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), and therefore precluded dismissal of a transsexual for a reason related to a gender re-assignment. The ECJ held that: 'Where a person is dismissed on the ground that he/she intends to undergo, or has undergone, gender reassignment, he/she is treated unfavourably by comparison with persons of the sex to which he/she was deemed to belong before undergoing gender reassignment.'</p> <p>Following the <i>P v S and Cornwall County Council</i> judgment, the UK adopted the <i>Sex Discrimination (Gender Reassignment) Regulations 1999</i> which amended the SDA to explicitly protect transsexual people from discrimination in employment.</p>
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Chapter I, Case law relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation

No relevant case law available.

Annex 2 – Statistics

Chapter A, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Total complaints of discrimination on the ground of sexual orientation	n.a.	n.a.	n.a.	122	734	812	980	1188	1234	n.a.
A) Employment	n.a. ¹⁹³	n.a.	n.a.	61	367	406	490	594	617	n.a.
• England, Wales and Scotland ¹⁹⁴	n.a.	n.a.	n.a.	61	349	395	470	582.	600	n.a.
• Northern Ireland ¹⁹⁵	n.a.	n.a.	n.a.	n.a.	18	11	20	12	17	n.a.
B) Goods and Services ¹⁹⁶	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	0	0	1
Total finding of Discrimination confirmed	n.a.	n.a.	n.a.	n.a.	0	14	21	29	13	n.a.

¹⁹³ N.a. = not available.

¹⁹⁴ The Employment Equality (Sexual Orientation) Regulations 2003 came into force in December 2003. The statistical information is collected according to the employment tribunal's financial year, which starts in April and finishes in March of the following year. The latest statistics for the period from April 2007 to March 2010 are not yet available. See Employment Tribunals Service, Annual Report for 2005- 06, p.28, available at: http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAR05-06.pdf (04.02.2010).

¹⁹⁵ The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 came into force in December 2003. The statistical information is collected according to the industrial tribunal's financial year, which starts in April and finishes in March of the following year. The latest statistics for the period from April 2007 to March 2008 are not yet available.

¹⁹⁶ The Equality Act (Sexual Orientation) Regulations 2007 prohibiting discrimination on grounds of sexual orientation in goods and services came into force in April 2007. After a comprehensive search of online legal databases only one case in 2009 was found which regarded provision of services under the 2007 Regulations. The case was *Islington LBC v Ladele* [2009] EWCA Civ 1357, which involved the refusal of a registrar to perform civil partnership ceremonies on religious grounds

• Employment Tribunal (for England, Wales and Scotland)	n.a.	n.a.	n.a.	n.a.	0	14	21	29.	13	n.a.
• Industrial Tribunal (for Northern Ireland)	n.a.	n.a.	n.a.	n.a.	0	0	0	0	0	0 ¹⁹⁷
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.) ¹⁹⁸	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.) ¹⁹⁹	n.a.	n.a.	n.a.	n.a.	0.	0	0	0.	0	n.a.

¹⁹⁷ In an email dated 04.02.2010 the Northern Irish Office of the Industrial Tribunals and Fair Employment Tribunal confirmed that from the period between 01.04.2009 and 31.01.2010 no complaints of discrimination on the grounds of sexual orientation had been allowed.

¹⁹⁸ The tribunals do not hold information on number and range of sanctions in their database. Such information can only be gathered on a case by case basis from the public register. Email communication with the Office of the Employment Tribunals (UK) and the Office of the Industrial Tribunals & the Fair Employment Tribunal in Northern Ireland, 29.01.2008.

¹⁹⁹ As there have been no findings of discrimination by Northern Irish industrial tribunals, as noted above, it follows that no awards of compensation have been made.

Chapter B, Freedom of movement of LGBT partners²⁰⁰

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC (i.e., LGBT partners having exercised their freedom of movement as granted to family members of EU citizens, whether under Directive 2004/38/EC or under previous instruments)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of LGBT partners who claimed their right to residence but were denied this right	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation²⁰¹

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

²⁰⁰ According to communication with the Home Office on 24.01.2008, the statistical information requested by the FRA does not exist, mainly because family members are not required to indicate whether they live in a same-sex or different-sex relationship or whether they are married or have contracted a registered partnership

²⁰¹ The Home Office does not collect data on the sexual orientation of applicants for asylum or human rights protection. (Email-communication with the Home Office, 08.02.2008).

Chapter C, Asylum and subsidiary protection, protection of LGBT partners²⁰²

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT partners of persons enjoying refugee/ subsidiary protection status residing in your country falling under Art 2/h Directive 2004/83/EC	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of LGBT partners of persons enjoying refugee/subsidiary protection status who were denied the possibility to stay with their partner	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

Chapter D, LGBT partners benefiting family reunification²⁰³

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT partners of third country nationals residing in your country benefiting from family reunification.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

²⁰² The Home Office does not collect data on the sexual orientation of applicants for asylum or human rights protection. (Email-communication with the Home Office, 08.02.2008).

²⁰³ Information on numbers of LGBT partners benefiting from family reunification is not available. (Communication by phone and email with the Home Office, 24.01.2008 and 08.02.2008).

Chapter E, LGBT people enjoyment of freedom of assembly

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc. ²⁰⁴	13	14	17	19	21	26	26	27	8	27
Number of demonstrations against tolerance of LGBT people. ²⁰⁵	0	0	0	0	0	1	1	1	1	2

Chapter F, Homophobic hate speech²⁰⁶

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions) ²⁰⁷	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Range of sanctions issued for homophobic hate speech	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

²⁰⁴ Numbers for years 2000 – 2003 have been gathered through web- research on LGBT news sites. The figures from 2003 onwards are available at: <http://www.pinkuk.com/events/pride2003Dates.asp> (14.02.2008). Figures for the year 2008 and 2009 available at : http://www.gaytoz.com/gay_pride_dates.asp (04.02.2010).

²⁰⁵ No information has been found on large demonstrations against tolerance of LGBT people. Each London Pride parade attracts a very small protest by a group called Christian Voice. This protest takes place as the parade passes, and is facilitated as lawful protest so long as the banners do not carry abusive or offensive messages. No incidences of demonstrations against tolerance of LGBT people were found to have been reported in 2008 and only one in 2009, available at: <http://www.telegraph.co.uk/news/newstopics/religion/4640967/Westboro-Baptist-Church-announces-first-anti-homosexuality-picket-in-Britain.html> (04.02.2010).

²⁰⁶ On 8 May 2008 the Criminal Justice and Immigration Act 2008 was given the royal assent. As of 4 February 2010, Section 74 which makes it an offence to incite hatred on the grounds of sexual orientation was not in force, available at http://www.opsi.gov.uk/acts/acts2008/ukpga_20080004_en_9#pt5-pb3-11g74 (04.02.2010).

²⁰⁷ The CPS Hate Crime Reports do not break criminal offences down by specific offences but groups of offences. Inciting hatred on the grounds of sexual orientation will be classed as a public order offence. For the years 2007-08 and 2008-09, respectively 34% and 36% of homophobic crime prosecutions were for public order offences.

Number of non-criminal court cases initiated for homophobic statements	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of non-criminal court cases initiated for homophobic statements which were successfully completed (leading to a decision in favour of the plaintiff, even if no sanctions other than symbolic were imposed)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

Chapter F, Homophobic crimes²⁰⁸

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of criminal court cases regarding homophobic crimes initiated (number of prosecutions)	n.a.	n.a.	n.a.	n.a.	289	518	791	988	1025	1078
• England and Wales	n.a.	n.a.	n.a.	n.a.	289	518	791	988	1025	1078
• Scotland ²⁰⁹	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
• Northern Ireland	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of convictions regarding homophobic crimes	n.a.	n.a.	n.a.	n.a.	204	375	580	759	820	868
• England and Wales	n.a.	n.a.	n.a.	n.a.	204	375	580	759	820	868
• Scotland	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
• Northern Ireland	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

²⁰⁸ The Crown Prosecution Service (CPS), which keeps data for England and Wales, collects statistical information on homophobic crime in general and does not disaggregate it according to the type of offense committed, e.g. hate speech. When prosecuting cases with a homophobic element, the CPS adopts the following definition for homophobic crime: 'Any incident which is perceived to be homophobic or transphobic by the victim'. (Email communication with the CPS, 24.01.2008, and with the Justice Department of the Scottish Government, 07.02.2008).

²⁰⁹ Scottish courts, at present, do not keep statistical information on homophobic hate crime.

Chapter F, Homophobic motivation of crimes as aggravating factor²¹⁰

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

Chapter G, Transgender issues

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of name changes effected due to change of gender ²¹¹	n.a.	n.a.	n.a.	n.a.	n.a.	1071	591	32	20	18
• England and Wales	n.a.	n.a.	n.a.	n.a.	n.a.	1013	527	n.a.	n.a.	n.a. ²¹²
• Scotland	n.a.	n.a.	n.a.	n.a.	n.a.	47	43	30	16	18
• Northern Ireland	n.a.	n.a.	n.a.	n.a.	n.a.	11	21	2	4	n.a. ²¹³

²¹⁰ In England and Wales, section 146 of the *Criminal Justice Act 2003*, which extended existing hate-crime statutory aggravating factors to include sexual orientation, came into effect in April 2005. Until April 2007 the Crown Prosecution Service did not collect information on the use of aggravating factors in sentencing, but there is one publicly known murder case where ‘hostility based on sexual orientation’ was used as an aggravating factor when sentencing for murder. This data is now collected but is not yet available to the public (email from CPS on 05.02.2010).

²¹¹ The data indicates the number of new birth certificates issued after gender recognition. The *Gender Recognition Act 2004*, which enables transsexual people to apply for a *Gender Recognition Certificate*, came into effect on 4 April 2005. Therefore statistics are only available from 2005 onwards. The data is collected according to the financial year, i.e. for the period from April of the first year to March of the following year. Information provided on enquiry by the General Register Office in England, Scotland and Northern Ireland.

²¹² By telephone conversation on 05.02.2010 the General Register Office in England stated that this information is now confidential.

²¹³ The data for 2009 is not available yet (email from General Register Officer Northern Ireland on 05.02.2010).

Number of persons who changed their gender/sex in your country under the applicable legislation ²¹⁴	54	73	81	84	99	102	n.a.	n.a.	143	n.a
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²¹⁴ Hospital Episode Statistics, Main Operations, available at: <http://www.hesonline.nhs.uk/Ease/servlet/ContentServer?siteID=1937&categoryID=215> (14.02.2008). The statistics are collected according to the financial year, i.e. from April of the first year to March of the following year. The statistical information for the period April 2009 to March 2010 is not yet available.

Chapter I, Statistics relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation

No relevant statistical information available.