

FRA

Legal Study on Homophobia and
Discrimination on Grounds of Sexual
Orientation, report on Bulgaria

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Executive summary

Implementation of Employment Directive 2000/78/EC

- [1]. Discrimination on the grounds of sexual orientation is now banned in principle in every part of the social sphere in Bulgaria. However, pre-existing legislation has not been made consistent with this universal ban. The *Закон за защита от дискриминация (ЗЗД)* [Protection Against Discrimination Act (PADA)]¹ is a single equality act transposing all EC equality directives, including the Employment Equality Directive (2000/78/EC). It bans discrimination uniformly on any ground mentioned under international law or domestic legislation, explicitly including sexual orientation.² In a number of respects, the PADA goes beyond the provisions of the EC equality acquis, including Employment Equality Directive 2000/78/EC. Both its personal and its material scopes are universal. The PADA is explicitly applicable to the exercise of any right recognised by law, similarly to Protocol No.12 to the European Convention on Human Rights (ECHR).³ Forms of discrimination explicitly banned as such and defined include inter alia direct and indirect discrimination; harassment; incitement to discrimination; and victimisation.⁴ On the negative side, the definition of victimisation is not entirely compatible with that under the EC acquis, including Directive 2000/78/EC, as it requires a comparator.⁵ The PADA also features specific illustrative prohibitions of typical discriminatory conduct in key fields, including employment, education, membership of professional organisation and

¹ Bulgaria/*Закон за защита от дискриминация (ЗЗД)* [Protection Against Discrimination Act (PADA)], (01.01.2004).

² Bulgaria/PADA/ Art. 4.

³ Bulgaria/PADA/ Art. 6. 'The prohibition of discrimination in the exercise and protection of the rights and freedoms provided for in the Constitution and legislation of the Republic of Bulgaria applies to all persons'.

⁴ Bulgaria/PADA/ Art. 4 and 5.

⁵ 'Less favourable treatment' language is contained in the provision, rather than the neutral 'adverse consequence or reaction' of the Directives. While the wording of the domestic provision does not specify a comparator, leaving thus a broad scope for liberal construction, including of a hypothetical comparison with the person her/himself as s/he would have been treated were it not for the action against discrimination (perceived to have been) taken, it still compounds the test for proving victimisation by adding one additional element that is not there in the wording of the Directives.

the provision of goods and services.⁶ As with the general provisions, these particular bans are uniformly applicable to all protected grounds, including sexual orientation.

- [2]. The PADA established a specialised single equality authority, the *Комисията за защита от дискриминация (КЗД)* [Protection Against Discrimination Commission (PADC)], with a mandate to provide protection on all grounds uniformly, including sexual orientation. The PADC is an independent collegiate body consisting of nine members, five of whom are elected by Parliament, the others appointed by the President. Their term of office is five years and their powers include: receiving and investigating complaints by victims, as well as third parties without limitation; issuing binding rulings declaring discrimination and imposing financial sanctions; issuing binding instructions to prevent, stop or require abstention from discrimination and/or restore the status quo ante; carrying out surveys and publishing independent reports; bringing court action and joining court proceedings in an *amicus curiae* capacity; making recommendations to other authorities to reform legislation or practice; giving opinions on draft legislation; and providing independent assistance to victims of discrimination.
- [3]. NGOs and trade unions have broad standing to engage in anti-discrimination proceedings before both the equality body, the PADC, and the courts. At present there is only one active lesbian, gay, bisexual and transgender (LGBT) NGO which has the resources to do so: *Българската гей организация "Джемини"* [the Gemini Bulgarian Gay Association (BGO Gemini)]. Over the period 2004-2008 LGBT NGOs have brought two court cases of sexual orientation discrimination, as well as three cases before the PADC. One of the court cases and one of the PADC cases were filed by NGOs on their own behalf. PADC had not initiated any ex officio proceedings.
- [4]. One interesting case was that of a private company selling plane tickets which, after the intervention of an LGBT NGO and the media, changed its discriminatory policy towards gay couples who were initially deprived of the right to benefit from a promotion.

Freedom of movement

- [5]. Domestic legislation on foreigners does recognise family grounds as eligible for granting and permitting residence in Bulgaria. Requirements for family members of nationals are in general more

⁶ Bulgaria/PADA/ Art. 12 to 39.

favourable in comparison to those for alien couples. Since EU accession on 01.01.2007, citizens of the European Union are no longer considered foreigners under national legislation and the rights to family reunification benefiting nationals were extended to EU citizens.

- [6]. As of 01.01.2007 specific legislation⁷ regulates the residence requirements for EU citizens and their spouses. Thus, the concept of ‘family member’ granted a derived right to family reunification was extended as regards all citizens of the European Union, as well as nationals of Iceland, Liechtenstein, Norway and Switzerland, to include: 1. the spouse or currently cohabiting partner of the citizen of the European Union; 2. descendants of a citizen of the European Union under 21 years of age and dependent on him/her, including the direct descendants of the spouse; 3. ascendants who are maintained by the citizen of the European Union or by his/her spouse.⁸
- [7]. The legal definitions in the *Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства* [Entry, Residence and Exit of EU Citizens and Accompanying Members of Their Families Act] does not specify the gender of the person entitled to the rights. Thus the law does not explicitly exclude LGBT family members from the right to enjoy the residence privileges of their spouses or cohabitants who are EU citizens. In practice, the researchers did not find registered cases of either the granting or the refusal of visas and/or residence permits LGBT spouses or cohabitants.
- [8]. LGBT third country nationals who are spouses of EU citizens are entitled in principle to exercise their rights of freedom of movement and to reside within the territory of the Member States. As yet, however, there have been no known examples of this right being exercised in Bulgaria. Under the understanding Bulgarian courts have of international public policy same-sex marriage will not be a valid reason for family reunification in Bulgaria. The reporter as an experienced human rights NGO participated in discussions among judges, NGO representatives and legislative bodies for the new draft of amendments to the Family Code and legislation regarding foreigners in Bulgaria in 2006 and 2007. Then its observations were

⁷ Bulgaria/ *Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства* [Entry, Residence and Exit of EU Citizens and Accompanying Members of Their Families Act] (01.01.2007).

⁸ Bulgaria/Entry, Residence and Exit of EU Citizens and Accompanying Members of Their Families Act, Additional provisions, Art. 1, para.1.

that same-sex marriages would not be interpreted in a way allowing benefiting from regulations concerning family reunification.

Asylum and subsidiary protection

- [9]. Only one case is known to the reporter of an asylum seeker basing his application for refugee status on the grounds of persecution of a group based on a common characteristic of sexual orientation and seeking to be considered a victim of persecution ‘for reasons of membership of a particular social group’ for the purpose of obtaining refugee status. The application was rejected solely because the allegations made were considered to lack credibility. There are no other cases known to the reporter.
- [10]. According to § 1 (3) of the Asylum and Refugees Act ‘members of the family’ are: a) the spouse or the person with whom s/he is in a proven stable and long-term relationship; and b) children under 21 years of age who are not married. Thus, the law does not recognise LGBT partners as family members for the purpose of obtaining derivative status – refugee status or a subsidiary form of protection, i.e. humanitarian status. The research did not find any statistics on this.

Family reunification

- [11]. Article 34, para.1 of the *Закон за убежището и бежанците* [Asylum and Refugees Act]⁹ entitles the refugee or the person recognised as deserving a form of subsidiary protection the right to claim family reunification in Bulgaria granted by the asylum authority, the State Agency for the Refugees. Para. 1(3) of Additional Provisions of the same act defines as a family member ‘...the spouse or the person with whom s/he is in a proven stable and long-term relationship and their minor and non-married children’. However, paragraph 5 of the same article requires the family reunification applicant to provide official documents evidencing the matrimonial state or the relationship. Nevertheless, if the applicant for family reunification cannot present official documents proving the matrimonial state or the relationship, he or she may provide evidence about the links to the joining family members through a written declaration or in another way. This seems to open up the possibility for cohabiting same-sex partners to benefit from family reunification.

⁹ Bulgaria/*Закон за убежището и бежанците* [Asylum and Refugees Act] (1.12.2002), last amendment in SG 52/07.

However, no cases are known to the reporter of reunification being requested for LGBT partners. The reporter (the Bulgarian Helsinki Committee, the only non-governmental human rights organisation established in 1992 to protect the rights of refugees and migrants) and state authorities in charge of granting the legal status of asylum have been working closely together since 1999. Based on the experience from this working relationship, the reporter can state that official statistics are not kept and no such cases have been recorded.

Freedom of assembly

- [12]. Freedom of assembly is recognised as a basic citizen's right in the Bulgarian Constitution of 1992. The *Закон за събранията, митингите и манифестациите* [Assemblies, Meetings and Marches Act (AMMA)]¹⁰ provides for a notification regime for public assemblies in Bulgaria. It is interpreted and applied in a rather incoherent way by the municipal authorities and the national courts. The notification procedure requires prior notification to be submitted to the municipal authorities 48 hours before meetings (rallies) and five days before marches. Within 24 hours of being notified the mayor may ban the event or propose a different timing and/or place. Otherwise, the event is allowed to be held according to the notification. The bans may be appealed before the regional courts, which are obliged to decide the case within a 24-hour time limit. The court decision cannot be subject to further appeal.
- [13]. LGBT events happen very rarely – only on 17 May every year since 2004. The municipal authorities and the police usually cooperate with the organisers of these events. However, the researchers found one case where a mayor banned the opening of an information centre for several days in the centre of the city of Varna in 2005. BGO Gemini filed a complaint against the ban before the PADC. The Commission found indirect discrimination in the case and a €250 fine was imposed on the Varna municipality.¹¹ The Commission's reasoning for why this was indirect discrimination was that the municipality's decision to ban the event resulted in 'a discriminatory practice by implementing a seemingly neutral provision'. The mayor appealed the Commission's decision before the *Върховен административен съд* [Supreme

¹⁰ Bulgaria/*Закон за събранията, митингите и манифестациите* [Assemblies, Meetings and Marches Act (AMMA)], (02.02.1990).

¹¹ Bulgaria / *Комисия за защита срещу дискриминацията* [Protection Against Discrimination Commission (PADC)], Decision No.46 (17.10.2006).

Administrative Court].¹² The first instance three-member jury confirmed the Commission's decision. However, the second instance five-member jury revoked the decision, finding that there was no indirect discrimination.¹³ The court returned the case to the Commission and the procedure is still pending.

Hate speech and criminal law

- [14]. The Bulgarian *Наказателен кодекс* [Criminal Code] provides for sanctioning of hate speech but only on two grounds – race and religion. These provisions are not enforced¹⁴. The Criminal Code does not envisage punishment for homophobic hate speech because it does not in itself constitute a crime. The research therefore did not find any case of such hate speech being subject to criminal prosecution. It is possible to sanction homophobic hate speech within the framework of the system of 'administrative punishments' under the PADC and there is only one such case pending before the courts now.¹⁵
- [15]. The cases of violence motivated by homophobic prejudices are never reported to the authorities and are very seldom reported to NGOs because of societal stigma and fear of the victims. In 2006 there were several cases of organised violence against individual victims.¹⁶ In many of the cases in 2006 the perpetrators used the internet to identify the victim as LGBT and to organise themselves. The perpetrators pretend to be LGBT people in search of a partner.
- [16]. The reaction of the authorities is usually inadequate. They do not accept or file the complaints or are reluctant to believe in the existence of a homophobic motive for the crime. The victims themselves are often unwilling to file complaints due to the societal stigmas they face. This results in the absence of any criminal proceedings against the perpetrators.¹⁷

¹² Bulgaria / *Върховен административен съд, три-членен състав* [Supreme Administrative Court, three-member jury], Decision No.4752 on case No.11478/2006 (15.5.2007).

¹³ Bulgaria / *Върховен административен съд, пет-членен състав* [Supreme Administrative Court, five-member jury], Decision No.11295 on case No.6407/2006 (16.11.2007).

¹⁴ Bulgaria/Национален статистически институт [National Statistical Institute NSI] (1997-2006), *Crime and Sentenced People*, Sofia.

¹⁵ Bulgaria/Софийски районен съд/Ахиния Guencheva and others v Volen Siderov, case No 2014/06 (30.11.2006), pending before *Софийски градски съд* [Sofia Regional Court].

¹⁶ Source: BGO Gemini, www.bgogemini.org

¹⁷ ENAR(2006), *Shadow Report: Bulgaria 2006*. Also available at: http://cms.horus.be/files/99935/MediaArchive/national/Bulgaria_2006.pdf

Transgender issues

- [17]. Domestic anti-discrimination legislation (the PADA, see above) bans discrimination on sexual orientation grounds and equality of treatment between women and men is guaranteed under Bulgarian law. However, neither of these pieces of legislation make any mention of transgender people.
- [18]. There are as yet no legal cases brought under anti-discrimination legislation on behalf of such people and no case law to interpret the applicability of the legislation to transgender people. Therefore, anti-discrimination law is unspecific concerning transgender people, giving so far no indication whether discrimination against them is to be considered on sexual orientation grounds or on grounds of gender.
- [19]. There is no legal definition of the concept of transsexuality in any Bulgarian law. Bulgarian legislation also lacks any regulations and procedures concerning the establishment of the status of a person who wishes to undergo sex reassignment surgery or hormonal treatment to that effect. The Bulgarian law does not prohibit hormonal treatment and surgery with the aim of sex reassignment. Gender and name alteration should be recognised by the court in two different procedures, which are not specifically provided for in the legislation.

Miscellaneous

- [20]. The way the prison administration collects and uses data on the sexual orientation of prisoners is unacceptable and humiliating. One reason is that this procedure is not clearly legally regulated.

Good practices

- [21]. No good practices have been identified by the reporter.

A. Implementation of Employment Directive 2000/78/EC

Implementation of Employment Directive 2000/78/EC

- [22]. Bulgarian anti-discrimination legislation, the *Закон за защита от дискриминация* [Protection Against Discrimination Act (PADA)]¹⁸ is a single equality act transposing all the EC equality directives, including 2000/78/EC. PADA leaves no gaps in the implementation of the Directives. Indeed, it goes well beyond their requirements. The PADA is explicitly applicable to the exercise of any legal right, similarly to Protocol No.12 to the European Convention on Human Rights (ECHR).¹⁹ Therefore, discrimination on sexual orientation grounds is banned in any area. Sexual orientation as a protected ground is expressly defined to include heterosexual, homosexual and bisexual orientation.²⁰ Multiple discrimination is specifically referred to.²¹ The legislation applies uniformly to all areas of social life, including but not limited to education, public goods and services, etc.
- [23]. On the negative side, the definition of victimisation is not entirely compatible with that under the EC acquis, including Directive 2000/78/EC, as it implies a necessity for a comparator.²² Further, incitement to discrimination, which encompasses an instruction to discriminate, is defined as direct and wilful encouragement by a person who is in a position to influence their audience – a more restrictive approach than that of the Directives, which ban any instruction to discriminate regardless of the intent, or standing of the perpetrator.

¹⁸ Bulgaria/*Закон за защита от дискриминация (PADA)*, (1.01.2004).

¹⁹ Bulgaria/PADA/Art. 6. 'The prohibition of discrimination in the exercise and protection of the rights and freedoms provided for in the Constitution and legislation of the Republic of Bulgaria applies to all persons'.

²⁰ Bulgaria/PADA/Additional Provision, § 1.10.

²¹ Bulgaria/PADA/ Additional Provision, § 1.11.

²² 'Less favourable treatment' language is contained in the provision, rather than the neutral 'adverse consequence or reaction' of the Directives. While the wording of the domestic provision does not specify a comparator, leaving thus a broad scope for liberal construction, including of a hypothetical comparison with the person her/himself as s/he would have been treated were it not for the action against discrimination (perceived to have been) taken, it still compounds the test for proving victimisation by adding one additional element that is not there in the wording of the Directives.

- [24]. The PADA established a specialised single equality authority, the *Комисията за защита от дискриминация (КЗД)* [Protection Against Discrimination Commission (PADC)], with a mandate to uniformly provide protection on all grounds, including sexual orientation. The PADC is an independent collegiate body consisting of nine members, five of whom are elected by Parliament, the others appointed by the President. Their term of office is five years and their powers include: receiving and investigating complaints by victims, as well as third parties without limitation; issuing binding rulings declaring discrimination and imposing financial sanctions; issuing binding instructions to prevent, stop or require abstention from discrimination and/or restore the status quo ante; carrying out surveys and publishing independent reports; bringing court action and joining court proceedings in an *amicus curiae* capacity; making recommendations to other authorities to reform legislation or practice; giving opinions on draft legislation; and providing independent assistance to victims of discrimination. The PADC has quasi-investigative powers, including accessing any testimony, documents or facilities for on-site inspections, which allow it to be proactive in gathering evidence, thus relieving the victim. Its proceedings are exempt from any fee or cost and can also be initiated *ex officio*. The equality body has initiated no *ex officio* proceedings in favor of LGBT people.
- [25]. The PADA provides for concrete duties for certain key actors, such as employers, educators and service providers, in addition to their general duties implicit in the general bans on discrimination under the law. Thus, employers and educators are under specific obligation to prevent all forms of discrimination in the workplace or place of study, jointly with trade unions in the case of the former.²³ Under the PADA, NGOs and trade unions have broad standing to engage in anti-discrimination proceedings before both the equality body, the PADC, and the courts. Any party, including any NGO or trade union, has standing to initiate proceedings before the PADC in any case of discrimination, including on sexual orientation grounds.²⁴ There is no limit under the law on the number of parties who may jointly bring proceedings before the PADC, implicitly authorising collective proceedings. NGOs engaged in public interest activities have explicit standing under the PADA to represent victims, as well as to join proceedings as *amicus curiae* on their own behalf.²⁵ Furthermore, public interest NGOs and trade unions have express standing to bring *actio popularis* litigation on their own behalf where the rights of many

²³ Bulgaria/PADA/Art. 18.

²⁴ Bulgaria/PADA/Art. 50.3.

²⁵ Bulgaria/PADA/Art. 71, para.2.

parties are affected.²⁶ Undoubtedly, these standing possibilities under the PADA are of significant value in the fight against sexual orientation discrimination nationally. In practice, to date LGBT NGOs have brought two court cases on sexual orientation discrimination and three cases before the PADC. One of the court cases and one of the PADC cases were filed by NGOs on their own behalf as *actio popularis* litigants alleging the issues involved were of general importance.

- [26]. While any NGO is legally authorised to engage in sexual orientation discrimination proceedings, on its own behalf as well as on behalf or in support of victims, at present there is only one active LGBT NGO which has the resources to do so: *Българската гей организация "Джемини"* [the Gemini Bulgarian Gay Association (BGO Gemini)]. However, there are other human rights NGOs with a general anti-discrimination mandate which have the means, both institutionally and in terms of expertise, to bring litigation in sexual orientation discrimination cases.
- [27]. To date, there have been no legal cases of sexual orientation discrimination in the employment field. In fact, there have only been five legal cases of sexual orientation discrimination altogether. Two of these concern homophobic hate speech and are considered below, in Chapter F.1. Hate Speech and Criminal Law. One of the remaining three cases concerns access to non-education services provided by a university (reported in Annex 1 below); another concerns a refusal by a public authority to permit a peaceful LGBT public assembly and is reviewed in Chapter E. Freedom of Assembly; and the last concerns police harassment in the street of a gay man (reported in Annex 1 below).
- [28]. In January 2005, Bulgaria Air, the national carrier, announced a promotion for St. Valentine's Day – two air tickets for the price of one for any couple in love. The company sent out a written instruction to all tour operators selling its tickets to make the offer available only to heterosexual couples. BGO Gemini became aware of this fact early on and obtained a copy of the instruction. It was notified of a case in which an individual gay customer was refused access to the offer on explicit sexual orientation grounds. BGO Gemini then sought advice from lawyer with the Bulgarian Helsinki Committee concerning possible legal action and they prepared the necessary set of evidence documenting the case. They also sought assistance from journalists at a rights-sensitive radio station, Radio Net (no longer broadcasting), who undertook situational testing by phone with the company,

²⁶ Bulgaria/PADA/Art. 71, para.3.

requesting two tickets for the price of one for a gay couple. A company employee made an explicit refusal motivated by sexual orientation. The journalist then contacted the company's Sales Manager seeking confirmation as to whether this was official company policy and was expressly informed that it was. The journalist then advised the manager that he might want to consider the possibility of the company being taken to court under anti-discrimination law over this. Just days later the company issued a new written instruction notifying all sales offices to provide customers with equal access to the offer irrespective of their sex.

- [29]. The case sets a precedent. First, it involves a private sector entity revoking a discriminatory act of its own accord, without coercion from any authority. Secondly, it illustrates the pre-emptive power of anti-discrimination law. Thirdly, it is an example of civil society cooperation and civil society / media cooperation. And fourthly, it shows how situational testing can be used to document breaches of anti-discrimination rights.

B. Freedom of movement

- [30]. According to Article 45 of the Charter of Fundamental Rights, every citizen of the European Union has the right to move and reside freely within the territory of the Member States. According to Directive 2004/38/EC (29.04.2004), family members of European Union citizens who accompany or join them also benefit from the right to move and reside within the territory of the Member States under certain conditions.
- [31]. Domestic legislation related to foreigners does recognise family ties as giving rise to a derived right to residence in Bulgaria. The conditions imposed on family reunification for the family members of nationals are in general more liberal than those imposed on family members of foreigners. However, after EU accession on 01.01.2007 citizens of the European Union are no longer considered foreigners under national legislation. Pursuant to Article 2 of the *Закон за чужденците в Република България* [Act on Foreigners in the Republic of Bulgaria],²⁷ ‘foreigner in the sense of this law shall be any person who is not a Bulgarian citizen or is not a citizen of another Member State of the European Union, of a state party to the Agreement on the European Economic Area or of the Swiss Confederation’.
- [32]. As of 01.01.2007, specific legislation (*Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства* [Entry, Residence and Exit of EU Citizens and Accompanying Members of Their Families Act])²⁸ regulates the residence requirements for EU citizens and their spouses. Thus, the concept of family members was extended for all citizens of the European Union, as well as for nationals of Iceland, Liechtenstein, Norway and Switzerland, to include: 1. the spouse or current cohabitant of the citizen of the EU; 2. the descendants of a citizen of the European Union under 21 years of age and still dependent on him/her, including the direct descendants of the spouse; 3. ascendants

²⁷ Bulgaria/*Закон за чужденците в Република България* [Act on Foreigners in the Republic of Bulgaria] (23.12.1998), amended regarding this provision in State Gazette 29 and enforced on 10.04.2007.

²⁸ Bulgaria/*Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства* [Entry, Residence and Exit of EU Citizens and Accompanying Members of Their Families Act], (01.01.2007).

who are maintained by the citizen of the European Union or by his/her spouse.²⁹

- [33]. The legal definition of §1 (1) does not specify the gender of the person entitled to rights under the Entry, Residence and Exit of EU Citizens and Accompanying Members of Their Families Act. Thus the law does not explicitly exclude LGBT family members from the right to enjoy the residence privileges of their EU spouses or cohabitants. In practice, there are no registered cases of either the granting or of the refusal of visas and/or residence permits LGBT spouses or cohabitants.
- [34]. All EU citizens and their family members who wish to reside in Bulgaria for more than 90 days are issued with a long-term or permanent residence certificate by the National Police Service. Long-term residence is for a maximum period of five years. A long-term residence permit is issued on several other grounds, such as employment or self-employment, retirement, etc. Where a European Union citizen submits an application for a long-term residence certificate in his or her capacity as a family member of another European Union citizen, the sole condition is to prove that he or she is a family member of or is currently cohabiting with the European Union citizen. Nothing regarding LGBT people is mentioned in the law, nor in practice there are cases to discuss and/or study. LGBT partners of EU citizens are not specifically entitled to enjoy family rights in relation to freedom of movement according to the Bulgarian legislation
- [35]. LGBT third country nationals who are spouses of EU citizens are entitled in principle to exercise their rights of freedom of movement and to reside within the territory of the Member States, though this entitlement is not yet supported by any evident cases of practical implementation. It emerges from the fact that the legal definition of §.1(1) of the Entry, Residence and Exit of EU Citizens and Accompanying Members of Their Families Act does not specify the gender of the person entitled to rights under the law and thus does not explicitly exclude LGBT family members from the right to enjoy the same residence privileges as their EU spouses or cohabitants. Again, no recorded cases were found of either the granting or the refusal of visas and/or residence permits for LGBT spouses or cohabitants. Bulgarian immigration law and practice of implementation and judicial interpretations are quite poor as actual immigration to Bulgaria started in the middle of 1990s. Academic views, comments or analysis are missing.

²⁹ Bulgaria/Entry, Residence and Exit of EU Citizens and Accompanying Members of Their Families Act, Additional provisions, Art. 1, para.1.

- [36]. The Bulgarian national legal system does not recognise same-sex couples either as spouses or as cohabitants. During discussions about the new draft of the Family Code and other legislation regarding foreigners (which took place in 2006 and 2007) there were no indications that ‘cohabitation’ would be interpreted in any other way than as a ‘marriage-like relationship’, i.e. as the union between a man and a woman. Under Article 7 of the Family Code, a marriage can be agreed between a man and a woman upon mutual consent declared explicitly before a civil registration clerk. The code was adopted in 1985 and has not been changed since, except in relation to international adoptions. Thus, there is no existing legal mechanism in order to officially recognise the rights of LGBT couples. No references in the literature could be provided, as there was no relevant literature found by the research. Nevertheless, under Article 75, para. 3 of the International Private Law Code, a marriage which was concluded in another state according to the rules and criteria set in the national legislation of that state is recognised by the Bulgarian authorities if the couple established their habitual residence in the given state in conjunction with Article 79, para. 2 of the Code.
- [37]. The research did not find any statistics available. The reporter (the Bulgarian Helsinki Committee, the only non-governmental human rights organisation established in 1992 to protect the rights of refugees and migrants) and the state authorities in charge of granting the legal status of asylum, dealing with migrants and refugees, have been working closely together since 1999. On the strength of this experience, we can attest that official statistics are not kept and that no such cases have been recorded. Specific requests for information required for this research were not made, as the length of time before a reply might be expected would be much longer than the time estimated for the research and because of the past practice by state authorities of not responding to data requests.

C. Asylum and subsidiary protection

- [38]. According to Article 10(1)(d) of Council Directive 2004/83/EC (29.04.2004) 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 (the ‘Qualification Directive’), persecution of a group based on a common characteristic of sexual orientation might be considered to be persecution ‘for reasons of membership of a particular social group’ for the purpose of obtaining refugee status. According to Bulgarian legislation, it is unclear whether transgender people could be recognised as belonging to a ‘social group’ and, if so, which.

- [39]. Since Bulgaria established a procedure to process claims for asylum there has been only one case where an asylum seeker based his application on the grounds of persecution of a group based on a common characteristic of sexual orientation and sought to be considered a victim of persecution ‘for reasons of membership of a particular social group’ for the purpose of obtaining refugee status. The application was rejected, but solely due to the lack of credibility of the claimant’s allegations. The court accepted in principle that sexual orientation could constitute a ground for persecution under Article 1A of the 1951 Geneva Convention Related to the Status of Refugees (Decision N12294 of 30.12.2003 of the *Върховен административен съд* [Supreme Administrative Court]).
- [40]. No statistical information was found by the researchers. The reporter (the Bulgarian Helsinki Committee) and the state authorities in charge of granting the legal status of asylum have been working closely together since 1999. On the strength of this experience, we can attest that official statistics are not kept and that no such cases have been recorded. Specific requests for information needed in this research were not made, as the length of time before a reply might be expected would be much longer than the time estimated for the research and because of the past practice by state authorities of not responding to data requests.
- [41]. According to Article 2(h) of Council Directive 2004/83/EC of 29 April 2004 (the ‘Qualification Directive’), family members in the context of asylum and/or subsidiary protection include unmarried partners in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens.

According to § 1 (3) of the Asylum and Refugees Act ‘family members’ are: a) the spouse or the person with whom s/he is in a proven stable and long-term relationship and their non-married children under 21 years of age. Thus, the law does not recognise LGBT partners as family members for the purpose of obtaining derivative status – refugee status or subsidiary form of protection, i.e. humanitarian status. Art.7 of the Family Code regulates the marriage as mutual agreement between a man and a woman. The practice on the relevant provision (Art.24, Para 1, item 14 of the Act on Foreigners in the Republic of Bulgaria) followed the concept of heterosexual cohabitation as a ground to obtain residence, temporary or permanent. The adoption of the Entry, Residence and Exit of Citizens of the EU and Accompanying Members of Their Families Act on 01.01.2007 introduced the obligation to prove that the cohabitation was formally registered in the country of origin or the habitual residence of the couple. It brings an interesting opportunity to interpret the law in a way that acknowledges LGBT couples as cohabitants for the purposes of the Law on Foreigners in the Republic of Bulgaria or the Entry, Residence and Exit of

Citizens of the EU and Accompanying Members of Their Families Act, if they can prove that their cohabitation was recognised in a formal manner by the relevant authority of their country. There is no practice yet to confirm this interpretation. Nonetheless, this option would not be applicable for asylum or refugee couples as by definition they cannot be asked to provide evidence originating from their country of origin and often, if not in principle, this is the case.

[42]. The research did not find any relevant statistics or any cases that had been recorded.

D. Family reunification

- [43]. According to Article 4(3) of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Member States may authorise the entry and residence of the unmarried partner, who is a third country national with whom the sponsor is in a duly attested, stable, long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership.
- [44]. Article 34, para. 1 of the Asylum and Refugees Act ³⁰ entitles the refugee or the person benefiting from subsidiary protection the right to claim family reunification in Bulgaria granted by the asylum authority, the State Agency for the Refugees. Para. 1(3) of the Additional Provisions of the same act defines as a family member ‘...the spouse or the person with whom s/he is in a proven stable and long-term relationship and their minor and non-married children’. However, paragraph 5 of the given article requires the family reunification applicant to provide official documents evidencing the matrimonial state or the relationship. Despite this, if the family reunification applicant cannot present official documents proving the matrimonial state or the relationship, the existence of a proven stable and long-term relationship may be evidenced by a written declaration or in another way. In practice, no cases where reunification was requested for LGBT partners have been recorded to the knowledge of the reporter. The reporter (the Bulgarian Helsinki Committee) and the state authorities in charge of granting the legal status of asylum have been working closely together since 1999. On the strength of this experience, we can attest that official statistics are not kept and that no such cases have been recorded. Specific requests for information needed in this research were not made, as the length of time before a reply might be expected would be much longer than the time estimated for the research and because of the past practice by state authorities of not responding to data requests.
- [45]. A third country national may enter the territory of Bulgaria if s/he holds valid documents, namely a valid passport, or another document for travel abroad substituting the passport, and an entry authorisation (transit visa or residence visa). Visas are not required where Bulgaria and the country whose nationality the foreigner holds have concluded a treaty on visa-free entry clearance. A residence permit is issued to a foreigner who intends to reside in the country for a period exceeding 180 days. The person must first apply for a long-stay visa (visa D)

³⁰ Bulgaria/Закон за убежището и бежанците [Asylum and Refugees Act] (came into force on 01.12.2002, amended SG 31/05; last amended in SG 52/07).

abroad, then enter the country on the basis of the visa D and submit an application for a long-term residence permit (continuing – up to one year, or permanent – indefinite).

- [46]. For the purpose of family reunification, a family member of a Bulgarian citizen or of an EU citizen, may be: 1. a spouse; 2. unmarried minor relatives in the descending line; 3. relatives in the descending line over 21 years of age who are unable to provide for themselves due to serious health problems; 4. relatives in the ascending line; 5. other members of his/her household who have been reliant entirely on his/her support in their state of origin or in their state of customary residence and whose serious state of health enforces the Bulgarian/EU citizen to take personal care of them.³¹
- [47]. The research did not find any relevant statistics to demonstrate the impact/social reality of the relevant legislation for LGBT people.
- [48]. In 2005 a case was recorded of a gay couple who were recognised partners in Iceland and then sought recognition of their registered partnership before the Bulgarian authorities.³² One of the partners was a Bulgarian national, the other an Icelandic national. They first tried to report the marriage before the Bulgarian consulate abroad, rather unsuccessfully. Later, the Icelandic partner obtained a short-term entry visa for Bulgaria on a different ground and the couple managed to enter the country. However, the Icelandic partners attempt to prolong his stay in Bulgaria by obtaining a long-term stay permit on the basis of a registered partnership with a Bulgarian citizen failed. The police migration authorities politely explained to them that it would be useless to accept his application and subsequently refused to register the attempt to submit the application.

E. Freedom of assembly

- [49]. Freedom of assembly is stipulated as a basic citizen's right in the Bulgarian Constitution of 1992. There is a notification regime for public assemblies in Bulgaria, as provided by the *Закон за събранията, митингите и манифестациите* [Assemblies, Meetings and Marches Act (АММА)].³³ In spite of being outdated, the Act is generally considered to be balanced and relatively liberal,

³¹ Bulgaria/Act on Foreigners in the Republic of Bulgaria, Art.2, para.2.

³² Source: *Български хелзинки комитет* [Bulgarian Helsinki Committee]: www.bghelsinki.org.

³³ Bulgaria/*Закон за събранията, митингите и манифестациите* [Assemblies, Meetings and Marches Act] (02.02.1990).

according to the Organisation for Security and Co-operation in Europe and as illustrated by certain cases presented to the European Court of Human Rights. Nonetheless, it is interpreted and applied in a rather incoherent way by the municipal authorities and the national courts.

- [50]. The notification procedure, prescribed in the AMMA, requires prior notification to be submitted to the municipal authorities. The deadline is 48 hours prior to meetings (rallies) and five days before marches. Within 24 hours of being notified the mayor may ban the event or propose a different timing and/or place. Otherwise, the event is supposed to be held according to the notification. The bans may be appealed before the regional courts, which are obliged to decide the case within a 24-hour time limit. The court decision cannot be subject to further appeal.
- [51]. Very few LGBT events have been organised in recent years. The organisers are usually the main LGBT NGOs in Bulgaria: *Българска гей организация 'Джемини'* [Gemini Bulgarian Gay Association (BGO Gemini)], *Куйър* [Queer], *Спортен клуб 'Тангра'* [Tangra Sport Club], as well as some LGBT clubs and lounges. Most of the events were organised by BGO Gemini. They describe the authorities' attitude towards their events as good, with some exceptions. The municipal authorities usually cooperate with the organisers to ensure the smooth course of the event. In some cases the mayors have not agreed to the time and place notified and proposed new ones, but these acts were considered reasonable by the organisers. The police usually provide a reliable and non-obtrusive presence at the events.
- [52]. Since 2004, each year on 17 May BGO Gemini has organised an event to mark that date as the International Day Against Homophobia. In 2007 no public event was held, but in 2005 and 2006 big marches took place on 17 May in Sofia. In 2006 other public arts events were organised during the day, in addition to the march. The municipal authorities in Sofia cooperated with the organisers.
- [53]. In the summers of 2005, 2006 and 2007, BGO Gemini organised national information campaigns under the title Pink Point. These events have included a marquee at a central location in a city where volunteers distribute information brochures and leaflets and answer questions during the day. In 2006 and 2007 Pink Point events were held only in Sofia. In 2005, when the campaign was launched for the first time, it was implemented as a tour of events around the country, covering the main cities: Sofia, Plovdiv, Stara Zagora, Bourgas and Varna. In each city the information point was maintained in the central square for three or four days and the attendance rate was about 100-150 people per day. The Royal Embassy of the Kingdom of the Netherlands financially supported the campaign tour in 2005. There

was no trouble during the campaign tour in 2005, with the exception of Varna, where the tour was supposed to end.

- [54]. Three events were planned for Varna on 24-27 August 2005: the Pink Point information marquee in the central square; an open stage in front of the night club Alexander; and a beach volleyball tournament at the central city beach, organised by the Tangra Sport Club. All these events were banned by the mayor. The bans were imposed more than a month after the 24-hour deadline had expired. In fact, the ban was issued on 23 August, i.e. one day before the event. Thus, in accordance with the AMMA, the organisers could legally set up the events, regardless of the mayor's ban. Nevertheless, the organisers decided to avoid confrontation with the authorities and held the Pink Point at a private lounge at the central beach, though with a very low rate of attendance – only a few visitors came. The sporting event and the open stage performance were cancelled. All the regional media approved the mayor's decision. Thus, the organisers did not appeal the ban before the Varna Regional Court, due to the overwhelming media attention. The only reaction came from BGO Gemini, who lodged a complaint before the Protection Against Discrimination Commission against the ban imposed on the Pink Point event. The NGO argued that the mayor of Varna had explicitly expressed his prejudices and that there was no equal treatment, since he had allowed a huge pornography festival to take place on 9-13 August 2005. BGO Gemini alleged the presence of indirect discrimination in the mayor's ban before the Commission and that allegation was fully accepted by the anti-discrimination body. However, the facts suggest a clear case of covert direct discrimination, according to Bulgarian anti-discrimination law. The Commission found indirect discrimination in the case and a €250 fine was imposed on the Varna municipality.³⁴ The mayor appealed the decision before the Supreme Administrative Court.³⁵ The first instance three-member jury confirmed the Commission's decision. However, the second instance five-member jury revoked the decision, finding that there was no indirect discrimination in the case and that the Commission's reasoning did not stand up to scrutiny and was incomplete.³⁶ The court returned the case to the Commission and, at the time of writing, the procedure is still pending.

³⁴ Bulgaria / Комисия за защита от дискриминацията [Protection Against Discrimination Commission], Decision No.46 (17.10.2006).

³⁵ Bulgaria / Върховен административен съд, три-членен състав [Supreme Administrative Court, three-member jury], Decision No.4752 on case No.11478/2006 (15.5.2007).

³⁶ Bulgaria / Върховен административен съд, пет-членен състав [Supreme Administrative Court, five-member jury], Decision No.11295 on case No.6407/2006 (16.11.2007).

- [55]. On 25-29 October 2006 the International Lesbian and Gay Association Europe (ILGA)³⁷ Annual Conference was held in Sofia where representatives of all the LGBT NGOs in Europe gathered for four days. The multi-day event was supposed to end with an LGBT march through the streets of the city centre on the last day, 29.10.2006. BGO Gemini duly notified the municipal authorities and no ban was imposed within the 24-hour deadline for banning. Nonetheless, later on the municipality contacted the organisers, serving them a banning order for the event. The ban was justified by the lack of sufficient police resources, as the presidential elections were being held on the same day. The ban was imposed after the 24-hour deadline had expired. Thus, in accordance with the AMMA, the organisers could legally have held the march, regardless of the mayor's ban. Nevertheless, the organisers decided that it would be too risky to march through the streets without a police presence. BGO Gemini cancelled the event.

³⁷ International Lesbian and Gay Association, European Region: www.ilga-europe.org.

F. Criminal law

- [56]. The Bulgarian *Наказателен кодекс* [Criminal Code] provides for criminal sanctions for people who use hate speech in a limited number of circumstances. These include hate speech, which incites hatred on the grounds of nationality, race and religion or incites discrimination on the basis of race. Article 162, para.1 envisages up to three years of imprisonment and a public reprimand for a person ‘who propagates or incites racial animosity or hatred or racial discrimination’.³⁸ Article 164 envisages similar punishment and compulsory work for a person who propagates religious hatred.³⁹ According to the official statistics, no-one has been sentenced for such crimes for the past ten years.⁴⁰
- [57]. The Criminal Code does not make homophobic hate speech a crime in any way. However, the Bulgarian system does make extensive use of ‘administrative punishments’, including some for hate speech. Under the PADA the Commission may ex officio find that an utterance constitutes harassment and impose a sanction on the author. In addition, the law makes possible the institution of proceedings before civil courts in cases of hate speech.⁴¹

F.1. Hate speech and criminal law

- [58]. Under the civil law PADA, hate speech, as well as non-verbal expressions of hatred, is governed by the concepts of harassment and incitement to discrimination. The PADA bans harassment on a number of grounds, including, explicitly, sexual orientation. Harassment, including harassment on sexual orientation grounds, is explicitly stated to constitute a form of discrimination.⁴² It is defined as unwanted conduct [on grounds of sexual orientation] expressed physically, verbally or in any other manner, having the purpose or effect of violating the dignity of a person and of creating a hostile,

³⁸ Bulgaria/*Наказателен кодекс* [Criminal Code], Art. 162, para.1 (2 April 1968, with numerous amendments, the latest one from 19 December 2006).

³⁹ Bulgaria/Criminal Code, Art.164.

⁴⁰ Bulgaria/Национален статистически институт [National Statistical Institute NSI] (1997-2006), *Crime and Sentenced People*, Sofia.

⁴¹ Bulgaria/PADA/Art. 71, para.1 in connection with Art. 5 (in cases of homophobic hate speech) provides for the protection of victims of discrimination who did not file complaint before the Commission, allowing them to file a complaint before the civil courts. The victims can ask the court: 1. to establish the violation; 2. to enjoin the perpetrator to stop the violation and to restore the status quo ante and abstain from further violation; 3. to allow for the compensation of damages.

⁴² Bulgaria/PADA, Art. 5 (01.01.2004).

offensive or intimidating environment.⁴³ Therefore, harassment under the PADA encompasses unwelcome offending verbal and other homophobic expression, or hate speech in a broad sense. In addition, hate speech, including homophobic hate speech, is covered in certain cases by the ban on incitement to discrimination under the PADA. Incitement too, like harassment, is explicitly proclaimed as a form of discrimination under the PADA.⁴⁴ It is defined as the direct and deliberate encouragement, instruction, exertion of pressure or persuasion of someone to commit discrimination, where the inciting party is in a position to influence the incited one.⁴⁵ Therefore, it encompasses homophobic hate speech by influential parties who may be shown directly to promote discrimination against LGBT people.

- [59]. There is a single case in which homophobic hate speech has been challenged in court, making use of the civil law PADA provisions on harassment and incitement to discrimination. It concerns extremist homophobic propaganda by a right-wing political party leader and Member of Parliament, Volen Siderov. Mr Siderov was taken to court jointly by LGBT individuals and NGOs specialising in LGBT rights and general human rights organisations over public statements he had made, demeaning homosexuals in general and calling for their exclusion from the political process. The claimants in the case alleged that these statements constituted both harassment on sexual orientation grounds and incitement to discrimination on sexual orientation grounds. The trial court in Sofia dismissed the case on factual grounds, failing to accept that the proof adduced by the claimants was sufficient to establish the facts of the impugned statements. The court made no pronouncement on the substantive issue, i.e. whether or not such statements constituted illegal hate speech. The failure of the court to deal with the substantive issue on evidential pretexts is symptomatic of a certain lack of will and firmness to tackle high-profile homophobic statements by a mainstream politician. The court's refusal to accept as conclusive the evidence produced by the plaintiffs is hardly defensible, given that the statements were made and recorded in Parliament and on TV broadcasts. The case is now pending before the higher court where the claimants have lodged an appeal. A ruling is expected in the second half of 2008.
- [60]. There was, in addition, one legal case of homophobic hate speech brought before the PADC. It was brought by an NGO (BGO Gemini) as a public interest complainant against the *Duma* daily newspaper over an article alleged to incite discrimination against LGBT people. The case was settled, with the newspaper recognising that some of the

⁴³ Bulgaria/PADA, Additional provision § 1.1 (01.01.2004).

⁴⁴ Bulgaria/PADA, Art. 5 (1.01.2004).

⁴⁵ Bulgaria/PADA, Additional provision § 1.5 (1.01.2004).

language in the article in question was ‘too extreme’ and ‘not bona fide’, and expressly undertaking to abstain from publishing any similar material in the future. The settlement agreement was sanctioned by a decision from the PADC.

- [61]. In another case before the PADC, brought by the same NGO, the complainant alleged that a local mayor’s refusal to allow a public LGBT rights event constituted incitement to discrimination, as well as, cumulatively, discrimination. The reason was that a religious association, in which the mayor was directly involved, publicly issued a homophobic statement around the same time that the mayor’s refusal to allow the LGBT event was made public in the media. A wave of homophobic statements being published ensued. However, neither the PADC, nor the two courts of appeal in the case ever discussed this allegation of incitement or made a ruling on it. Rather, they concentrated on the allegation of discrimination, with no mention of the incitement issue. The complainant NGO also failed to pursue the incitement matter. Thus, the proceedings in the case bear no reflection of hate speech as an issue.

F.2. Violence

- [62]. As in the case of hate speech, the Bulgarian Criminal Code envisages criminal sanctions for hate-related violence, but only on the grounds of race, ethnic origin, religion or political opinion. Article 162, paras. 2-4 stipulate different terms of imprisonment for the use of violence against individuals because of their race, ethnic origin, religion or political opinion and for forming, leading or participating in an organisation or group that aims to commit such crimes.⁴⁶ Article 163 envisages different terms of imprisonment for people who participate, lead or instigate crowds formed to attack groups of people, individuals or their property because of their nationality or race.⁴⁷ None of these provisions have been enforced recently and, according to the official statistics, no-one has been punished for such acts for the past ten years.
- [63]. Outside this limited material scope, nothing in Bulgarian criminal justice legislation prompts the authorities to take into consideration and to investigate possible motives of hatred in the perpetration of other crimes. The European Court of Human Rights in Strasbourg issued two judgments against Bulgaria, finding violations of Articles 2 and 14 of the ECHR for the failure of the authorities to investigate and

⁴⁶ Bulgaria/Criminal Code, Art. 162, para. 2-4.

⁴⁷ Bulgaria/Criminal Code, Art. 163.

prosecute racially-motivated offences and to make the required distinction of these offences from ordinary crimes. In the case of *Nachova and others v. Bulgaria*⁴⁸ these failures arose in the case of a racially-motivated offence by public officials and in the case of *Angelova and Ilieva v. Bulgaria*⁴⁹ these failures came about in the case of a racially-motivated offence perpetrated by private assailants.

- [64]. Some cases of homophobia-motivated violence have occurred in recent years. However, there may be many more such incidents, as the victims do not, as a rule, report them.
- [65]. There is a clear stigma and prejudice against people with different sexual orientation in Bulgarian society. The stigma results in a very strong determination by the victims not to identify themselves as LGBT. Thus, the cases of violence motivated by homophobic prejudices are never reported to the authorities and are very seldom reported to NGOs.
- [66]. The very few cases reported to the NGOs are communicated under the strict understanding that the privacy of the victims will be respected and that personal data related to the case will not be divulged. Thus, we are not in a position to provide any details of particular cases.
- [67]. Between 2002 and 2004, organised attacks against LGBT venues and clubs were not infrequent in Bulgaria.⁵⁰ Usually they were spontaneous attacks in big cities by small groups of young people under the influence of alcohol. In 2006 such mass attacks were not as prevalent as before and the few incidents were on a very low scale. In 2007 there were no such incidents.
- [68]. In 2006 there were several cases of organised violence against individual victims.⁵¹ In many of these cases the perpetrators used the internet to identify the victim as LGBT and to organise themselves. The identification of the LGBT people as a future target of homophobic violence is usually done using the instant message and chat facilities on the internet, as well as dating-service web portals. The perpetrators pretend to be LGBT people in search of a partner. This method is particularly used in smaller towns and cities.
- [69]. The reaction of the authorities is usually inadequate. They do not accept or file the complaints or are reluctant to believe in the existence

⁴⁸ ECHR/*Nachova and Others v. Bulgaria* [GC]/43577/98 (2005).

⁴⁹ ECHR/*Angelova and Ilieva v. Bulgaria*/55523/00 (2007).

⁵⁰ ENAR, *Shadow Report: Bulgaria 2006*. Also available at: http://cms.horus.be/files/99935/MediaArchive/national/Bulgaria_2006.pdf

⁵¹ Source: BGO Gemini, www.bgogemini.org.

of a homophobic motive for the crime. The victims themselves are often unwilling to file complaints due to the societal stigmas they face. When added to the lack of trust in the authorities felt by the LGBT victims, it results in an absence of any criminal proceedings against the perpetrators.⁵²

- [70]. Only one case of homophobia-motivated violence was reported in 2007. In November 2007 two lesbian girls were attacked in the late evening and suffered physical injuries. The perpetrators were described as two ‘mob thugs’ (*‘mympu’*). The victims were known for not hiding their relationship in public places. The homophobic motivation for the crime was clear also because of the offensive language used during the attack. At time of writing the authorities had not started investigating the case.⁵³
- [71]. There were also cases of the police profiling LGBT people in stop-and-search activities around known LGBT venues and clubs. In some cases the profiling amounted to clear harassment, since some police officers besieged some of the clubs on a daily basis. In 2007 this practice concentrated around Stamboliysky blvd. in Sofia, where most of the LGBT clubs and lounges are located.
- [72]. There were also a few reports of police profiling and verbal abuse and harassment by police officers towards trans-sexual people. The officers usually stop all such people to check their ID cards and to harass them under the pretext that the personal information collected about them contains contradictions, as a result of their gender reassignment.

⁵² ENAR, *Shadow Report: Bulgaria 2006*. Also available at: http://cms.horus.be/files/99935/MediaArchive/national/Bulgaria_2006.pdf

⁵³ Source: BGO Gemini, www.bgogemini.org.

G. Transgender issues

- [73]. The domestic anti-discrimination legislation (the PADA mentioned above in Chapter A, Implementation of Employment Directive 2000/78/EC), which bans discrimination on sexual orientation grounds, as well as on any other ground, makes no mention of transgender people. As yet no legal cases have been brought under anti-discrimination legislation on behalf of transgender people and no case law exists to interpret the legislation's applicability to them. Therefore, anti-discrimination law is unspecific concerning transgender people, so far giving no indication as to whether discrimination against them is to be considered on sexual orientation grounds or on grounds of gender. As a result, transgender people are insufficiently protected under Bulgarian anti-discrimination law.
- [74]. However, it may be surmised that, as the PADA prohibits discrimination on an open-ended list of grounds, with the only requirement being that such grounds are stipulated under an international treaty or legislation, transgender status could be construed under case law as 'another ground', provided that there is at least one explicit mention of it under law. To date this is not the case, but it may have become so by the time domestic judges or equality body adjudicators come to deal with transgender cases. No articles or legal analysis had been found by the research to discuss the transgender people's rights and their protection against discrimination.
- [75]. There is no legal definition of the concept of transgender/transsexuality in any Bulgarian law. Bulgarian legislation also lacks any regulations and procedures concerning the establishing of the status of a person who wishes to undergo sex reassignment surgery or hormonal treatment to that effect.
- [76]. The sole document containing mention of this term is a regulation issued by the Ministry of Defence.⁵⁴ This regulation treats transsexuality as a sexual disorder, making transgender people unfit for military service.⁵⁵ For the purposes of this regulation, the establishment of transsexuality requires the gathering of 'an

⁵⁴ Bulgaria/Заповед № ОХ-217 за обявяване на разписание на болестите и физическите недостатъци, издадена от Министерството на отбраната (08.06.1996). [Regulation No. ОХ-217 on the announcement of a list of disorders and physical deficiencies issued by the Ministry of Defence (08.06.1996)].

⁵⁵ The Regulation does not list all diseases – somatic, psychological and behavioural disorders rendering an individual unfit for military service. This is not an automatic conclusion but one based on objective data on the actual manifestation of the condition. The Regulation stipulates that 'any disorders of a sexual nature are to be established in a military medical institution using Kinsey's 6-level scale and by gathering objective information'.

objectified anamnesis of the life of the person certified clearly showing that the psychopathologic manifestations are of a lasting and continuous nature'.⁵⁶ In view of collecting objective information, the said regulation refers to the following sources: school records, employment records, health and performance records, psychological tests, conclusions by a medical institution. This regulation is still in force. Its existence poses a problem with regard to qualifying this condition as a psychological problem or a physical disorder.

- [77]. A review of the *Национални рамкови договори* [National Framework Agreements]⁵⁷ for the period 2000-2007 reveals a total lack of commitment on the part of institutions providing medical care for Bulgarian citizens of transsexual orientation. Medical activities aimed at hormonal treatment of transsexual individuals and sex reassignment surgical interventions are not provided for by the National Health Fund.
- [78]. Bulgaria also lacks specific regulations as regards diagnosis, criteria for good practices or rules to guide the undertaking of hormonal treatment and/or surgery, although other forms of medical treatment are defined with great detail in the legislation.⁵⁸ There are no provisions regulating the observation and tracking of the individual's

⁵⁶ Reference to this text is made on p. 302 of the above Regulation concerning the establishment of the objectivity of an individual's condition.

⁵⁷ Earlier and current National Framework Agreements (between the State Health Insurance Agency and the unions of physicians, dentists and other specialists) mostly open with an identical Article 1 stating the subject of the agreement, namely:

'Art. 1. Para.1 The subject of this National Framework Agreement (NFA) is the rights and obligations concerning medical and dental care, within the framework of Art. 55 of the Law on Health Insurance (LHI), regarding: 1. the National Health Fund; 2. the Bulgarian Medical Association and the Association of Dentists in Bulgaria; 3. the medical assistance providers; 4. the dental assistance providers; 5. the liable health insured individuals.'

⁵⁸ For the purposes of comparison, we shall take the following excerpt from the National Framework Agreement concerning medical issues resulting from hysterectomy, which contains a detailed review of the methods of treatment and the risks involved, as well as other relevant details: 'In the event of the removal of the ovaries where these are still functioning, conditions may arise which will require hormonal treatment. In the case of abdominal access, the surgery must be performed under full anaesthesia and would normally last between one and two hours. In the case of vaginal access, a more frequent approach would be local (or spinal) analgesia. In view of modern conditions, complications and the risks to health and life of this surgery should be minimal but cannot be fully excluded. Possible post-surgery complications involve bleeding, injuries to neighbouring organs, possible disturbance of vital functions related to the application of anaesthesia and/or the existence of accompanying disorders. During the post-surgery period, there is a possibility of infectious complications concerning the abdominal cavity, the surgery wound or other organs, including thromboses, arterial or venal vascula and related consequences. Complications during the surgery itself or the post-surgery period may delay the recovery or incur permanent consequences. Blood or other biological product transfusions may become necessary before, in the course of, or following the surgery. The options for influencing the conditions requiring uterus extirpation through alternative treatment methods vary for each specific medical condition.'

medical condition following interventions of this type. There is no medical standard to guarantee compliance with certain best practices for individuals undergoing procedures of gender alteration.

[79]. Despite the aforementioned legislative gaps regarding medical interventions and follow-up activities concerning gender alteration, Bulgarian law does not prohibit hormonal treatment and sex reassignment surgery. This can be deduced from the *Закон за българските документи за самоличност* [Bulgarian Identity Documents Act] where Article 9, para. 1,⁵⁹ specifically stipulates the obligation of individuals who have altered their gender to apply for new identity documents. The *Правилник за прилагане на Закона за българските документи за самоличност* [Rules on the Issuing of Bulgarian Identity Documents] also contain such a provision. According to Article 21, para. 7, in order for an identity document to be issued to an individual following gender alteration, an ‘official document issued by the relevant competent authorities’ must be provided.

[80]. Thus, Bulgarian legislation does recognise transsexuality as a phenomenon leading to specific changes in an individual’s life. But because medical aspects of gender alteration are not legally provided for several risks are at hand:

- Proceeding to medical manipulations related to gender reassignment without clear establishment of the individual’s condition;
- Performance of medical manipulations not as a result of medical, emotional or psychological necessity on the part of the individual but based on the financial interest of medical staff;
- Medical malpractice which would never be officially revealed; and
- Inconsistency of follow-up rehabilitation or complete lack thereof.

[81]. The Bulgarian Identity Documents Act and the regulations for its application introduce the requirement to change identity documents following gender alteration, as well as the rules on how this should be done. In order for a new identity document to be issued, the individual will need to present an ‘official document confirming the alteration, as well as a certifying document from the local municipal administration to substantiate the change in the personal registration card, where the

⁵⁹ “In case that the name, personal identification number, gender, citizenship are changed or when essential and durable alterations of the face of the person are in place, the person is obliged to obtain new identity documents within 30 days after the changes or alterations. “

amendment was not entered in the National 'Population' Database'.⁶⁰ Such official document can be only a court decision in the case of gender alteration. According to the *Закон за гражданската регистрация* [Citizen Registration Act] the change of the name in case of gender alteration is to be done only through a civil court proceeding.⁶¹ The proceeding can be initiated (according to Article 19, para. 1 of the Citizen Registration Act) when there is a 'significant change of circumstances' and gender alteration can be presented as such. In order to establish the presence of such circumstances, full evidence must be presented to the court. Also, because of the name-gender interrelation, two petitions must be filed with the court. Therefore, along with the change of name, a request must be filed to legalise the gender alteration.⁶² In the process of substantiation, a myriad of evidential material is gathered including but not limited to: sexological and psychological conclusion by a sexology psychologist familiar with the individual's condition; a document from the local psychiatric clinic certifying that the individual has no record; criminal record; witness testimony, etc. Gender alteration also entails amendment to the Personal Identification Number. Transsexual individuals are then expected to proceed to amending trade registrations (if any), have their employment contract (if any) re-endorsed and have a new driving licence and a new passport issued. There is currently no special provision for the entry of an amendment to the birth certificate. Insofar as an individual's sex is one of the elements which must be entered for citizen registration⁶³ and present on the birth certificate,⁶⁴ there should also be special provisions for amendments to the birth certificate. As a whole, there is a gap concerning specific regulations, which may lead to various difficulties for individuals who change their biological gender and controversial court practices in the event of court proceedings and rulings.

⁶⁰ Bulgaria/*Правилник за прилагане на Закона за българските документи за самоличност*/Art. 21, para. 1, rule 3.

⁶¹ The Citizen Registration Act provides for some exceptions from this rule but the change of name due to gender alteration is not among these exceptions.

⁶² The Regulations for the Issuing of Bulgarian Identity Documents stipulate that, in order for a document with an amended entry under sex to be issued, an 'official document by the relevant competent authorities' must be presented. Insofar as no other document is specified, this document would therefore have to be issued by a court and have the power of an effective court decree.

⁶³ Bulgaria/*Закон за гражданската регистрация* [Citizen Registration Act] Art. 8, para. 1, rule 3.

⁶⁴ In accordance with Regulation No. RD-02-14-226 dated 07.02.2000 on the Minister of Regional Development and Public Matters approving the sample forms of civil status certificates (14.04.2000)/*Заповед № РД-02-14-226 от 7.02.2000 г. за утвърждаване на образци на актове за гражданско състояние, издадена от министъра на регионалното развитие и благоустройството и министъра на правосъдието*, (14.04.2000), in addition to the individual's names, the birth certificate must also contain his or her biological sex.

- [82]. Bulgaria's national legislation lacks specific provisions for matters relating to divorce, marriage and inheritance for transsexual individuals. According to Article 7 of the Family Code, a marriage is contracted by mutual consent between a man and a woman. Normative acts regulating the contracting of marriages do not stipulate restrictions to the marriage following gender alteration, as long as the partners are of different sex at the time of the marriage. If the partners are formally of the same sex, there are no legal grounds for entering a marriage. In cases of gender alteration of an already married person, the marriage should be dissolved - due to the presence of objective grounds (according Art.99, para. 2 of the Family Code) - two people of the same gender are not allowed to stay married. In this case investigation of the issue of guilt in the termination of the marriage does not take place. However, there is no specific legislative act provided for to this effect, which means individuals who have changed gender are faced with the unpredictability of court proceedings.
- [83]. Bulgarian legislation poses no obstacles or limitations to transsexual individuals as regards inheritance. Nevertheless, in certain circumstances, if there are any impediments to the partners' civil marriage, they will be in a disadvantaged position regarding inheritance from the deceased partner or partner's relatives, in comparison with a heterosexual couple in a civil marriage.
- [84]. NGO lawyers and the jurisprudence of the Sofia Regional Court and the Protection Against Discrimination Commission were interviewed in searching cases of transgender people and no cases had been found.

H. Miscellaneous

- [85]. The prison system collects information regarding the sexual orientation of prisoners. Any such information is fed into the risk assessment of the detainee. In an actual case observed by the Bulgarian Helsinki Committee (human rights NGO) at the Sliven prison concerning a female prisoner of bisexual orientation, conclusions about her sexual orientation – wrongly determined to be homosexual, were included in the ‘Accommodation’, ‘Family Relations’, ‘Lifestyle and Contacts’, ‘Emotional Status’ and ‘Mindset and Behaviour’ sections. These sections also stated that prior to her imprisonment, the individual was cohabiting with another female (whose name was explicitly stated) with whom she had an intimate relationship; also, that the prisoner had a ‘masculine behavioural pattern’ and ‘masculine appearance’. The prisoner herself was never questioned about her sexual orientation. The information and details contained in her risk assessment as an offender was accessible to any third party legally entitled to access prisoner records – the courts, prosecutor’s office, etc. – for the purposes of determining the rights ensuing from a prisoner’s behaviour during the term of imprisonment.

I. Good practices

[86]. The reporter has not identified any examples of good practice.

Annex 1 – Case law ⁶⁵

Chapter A, Implementation of the ban on discrimination in relation to sexual orientation outside the scope of Employment Directive 2000/78/EC: provision of public services: policing, case 1

Case title	Ilir Ayeti v. Dimitar Spasov
Decision date	13.10.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Комисия за защита срещу дискриминация</i> [Protection Against Discrimination Commission (PADC)] (equality body)
Key facts of the case (max. 500 chars)	The complainant, a gay man of Albanian ethnic origin, was detained by the police in the early hours of the morning of 24 October 2005 in the street near a night club frequented by LGBT patrons. One of the policemen allegedly used offensive language with respect to the complainant's ethnicity and sexual orientation. The complainant was later detained for 12 hours. He alleged he was beaten and verbally assaulted while in detention.
Main reasoning/argumentation (max. 500 chars)	The PADC held that the complainant had been subjected to verbal harassment by one of the police officers. It reasoned that this was established based on a failure by the respondent to adduce any proof to rebut the inference of discrimination arising from the evidence in the case. However, the PADC found the complainant's allegations that he had been ill-treated while in detention to be unsubstantiated.

⁶⁵ The research found only 5 cases of sexual orientation discrimination in Bulgaria.

DISCLAIMER: This study has been commissioned as background material for a comparative report on homophobia and discrimination on grounds of sexual orientation by the European Union Agency for Fundamental Rights. The views expressed here do not necessarily reflect the views or the official position of the FRA. The study is made publicly available for information purposes only and does not constitute legal advice or legal opinion.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Multiple discrimination on sexual orientation and ethnicity grounds; verbal harassment by law enforcement personnel; shift of the burden of proof requiring the defendant to rebut a factual presumption of discrimination arising from the facts presented to the court by the plaintiff.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Monetary sanction imposed on the individual police officer found liable for harassment of BGN 250 (approx. 115 Euro).

Chapter A, provision of public services: context of education, case 2

Case title	Queer Foundation et al. v. Sofia University
Decision date	21.04.2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Софийски районен съд, 33 граждански състав</i> [Sofia District (trial) Court (civil division, 33-rd panel)]
Key facts of the case (max. 500 chars)	Gay NGO jointly with affected individuals alleged that members of a non-incorporated gay sports club were banned from access to the Sofia University sauna by a doorman on explicitly homophobic grounds. An activist from the claimant NGO later sought an explanation from the university rector, who openly supported the ban on explicitly homophobic grounds. Threatened with legal action by the activist, the rector issued a formal ban ostensibly barring all non-students and non-faculty members from access to the facility. Situational testing, however, revealed that other non-university parties were freely admitted, while members of the gay club were not. In court, the claimant NGO alleged the impugned ban constituted direct discrimination based on sexual orientation.
Main reasoning/argumentation (max. 500 chars)	The court declared the ban on admission to the sauna to be an act of direct discrimination based on sexual orientation, for which the university was liable. The court confirmed the standing for public interest NGOs to bring lawsuits in their own capacity, as well as in support and on behalf of victims.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<i>Actio popularis</i> claim brought by public interest NGO in its own capacity and as representative of victims; express recognition of NGO standing in reasoning; <i>obiter dictum</i> interpretation of the principle of the shifting burden of proof and of the vicarious pecuniary liability of organisations for acts of discrimination perpetrated by their employees regardless of those employees' organisational roles and decision-making powers.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Compensation awarded to four individual victims of BGN 500 (approx. 250 Euro) each. High profile case – first sexual orientation discrimination case brought under the PADA; gay case against the foremost national university.

Chapter E: Freedom of Assembly

Case title	BGO Gemini v. Varna municipality
Decision date	17.10.2006 (PADC); 15.05.2007 and 16.11.2007 (Supreme Administrative Court)
Reference details (type and title of court/body; in original language and English [official translation, if available])	Protection Against Discrimination Commission (PADC) (equality body) (Комисия за защита срещу дискриминация), Supreme Administrative Court (Върховен административен съд)
Key facts of the case (max. 500 chars)	[87]. On 24-27 August 2005 an information marquee, an open stage and a beach volleyball tournament at the central beach were planned by the LGBT organisation in Varna. All events were banned by the mayor illegally (according to Bulgarian law) one day before they were to take place. Thus, the organisers could legally set up the events, regardless of the mayor's ban. The organisers held the information marquee at a private lounge at the central beach with a very low rate of attendance. The other two events were cancelled. All the regional media vastly commented the mayor's decision. Thus, the organisers did not appeal the ban before the Varna Regional Court, due to the overwhelming media attention. The BGO Gemini lodged a complaint before the PADC against the ban imposed on the information marquee arguing that the mayor of Varna had explicitly expressed his prejudices and alleging the presence of indirect discrimination in the mayor's ban. The facts suggest a clear case of covert direct discrimination,

	according to Bulgarian anti-discrimination law.
Main reasoning/argumentation (max. 500 chars)	PADC held that the complainant had been subjected to indirect discrimination. The Commission's reasoning for why this was indirect discrimination was that the municipality's decision to ban the event resulted in 'a discriminatory practice by implementing a seemingly neutral provision'.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Both the complainant and PADC wrongly identified the mayor's bans as indirect discrimination on sexual orientation. The first court instance confirmed the PADC legal qualification, rather incorrectly. The last court instance, however, found that indirect discrimination is not present, but failed to provide any legal interpretation while returning the case to the PADC.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	[88]. Monetary sanction imposed on Varna municipality in the amount of BGN 500 (approx. 250 EURO). The mayor appealed the decision before the Supreme Administrative Court. The first instance three-member jury confirmed the Commission's decision on 15 May 2007. The second instance five-member jury revoked the decision on 16 November 2007, finding that there was no indirect discrimination in the case and that the Commission's reasoning did not stand up to scrutiny and was incomplete. The court returned the case to the Commission and the procedure is still pending.

Chapter F, Hate speech, case 1

Case title	Axinia Guencheva et al. v. Volen Siderov
Decision date	30.11.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Софийски районен съд, 29 граждански състав</i> [Sofia District (trial) Court (civil division, 29-th panel)]

Key facts of the case (max. 500 chars)	A large group of NGOs and individual victims jointly filed a PADA civil lawsuit against MP and political party leader Volen Siderov for radical public hate speech against gay people, among others. The allegations were that remarks which were so widely broadcast (on television, in Parliamentary plenary sessions and at public rallies) by an official constituted harassment and incitement to discrimination. The remedy sought was a declaration of discrimination, a ban on the respondent making such statements publicly again and an order for him to make a public apology to the LGBT community for subjecting them to harassment and incitement to discrimination.
Main reasoning/argumentation (max. 500 chars)	The court failed to rule on the merits of the case, irrationally refusing to accept that the adduced evidence was sufficient to consider the impugned statements established as facts.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	No reasoning on the substantive provisions of anti-discrimination law; procedural scholasticisms concerning the weight of various types of evidence.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	No declaration of discrimination; no remedy.

Chapter F, Hate speech, case 2

Case title	Bulgarian Gay Organisation Gemini v. <i>Duma</i> daily newspaper
Decision date	28.06.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Комисия за защита срещу дискриминация</i> [Protection Against Discrimination Commission (PADC)] (equality body)

Key facts of the case (max. 500 chars)	A homophobic article written by an individual was published in the daily newspaper, <i>Duma</i> . A complaint was filed by the public interest gay NGO, BGO Gemini, against the newspaper, alleging incitement to discrimination. Settlement approved by the PADC, including a recognition on the part of the paper that some of the impugned material was generally wrong and a commitment to abstain from publishing similar material in the future.
Main reasoning/argumentation (max. 500 chars)	N/A
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	N/A
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Precedent of seeking legal liability of a newspaper for a homophobic article; precedent of settlement involving express recognition of fault and commitment to abstain from further such conduct.

Annex 2 – Statistics⁶⁶

Chapter A, Implementation of the ban on discrimination in relation to sexual orientation outside the scope of Employment Directive 2000/78/EC

	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the grounds of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)						1 (access to public services by educational institution)	2 (police; freedom of assembly)	
Total finding of discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)						1	2	

⁶⁶ The reporter collected the data from interviews with BGO Gemini, human rights lawyers, and the Protection Against Discrimination Commission.

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.)									1	2	
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.)									250 Euro pp (compensation)	115-250 Euro (fine)	

Chapter B, Freedom of movement

[89].	[90].	2 0 0 0	[91].	2 0 0 1	[92].	2 0 0 2	[93].	2 0 0 3	[94].	2 0 0 4	[95].	2 0 0 5	[96].	2 0 0 6	[97].	2 0 0 7
[98]. Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC	[99].	N A	[100].	N A	[101].	N A	[102].	N A	[103].	N A	[104].	N A	[105].	N A	[106].	N A

Chapter C, asylum 1

[107].	[108].	[109].	[110].	[111].	[112].	[113].	[114].	[115].
[116].	Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the grounds of sexual orientation	[121].	[126].	[130].	[134].	[138].	[142].	[146].
		[117].	[127].	[131].	[135].	[139].	[143].	[147].
		[118].	[128].	[132].	[136].	[140].	[144].	[148].
		[119].	[129].	[133].	[137].	[141].	[145].	[149].
		[120].						
		[125].						

Chapter C, asylum 2

[150].	[151].	[152].	[153].	[154].	[155].	[156].	[157].	[158].
[159].	Number of LGBT partners of persons enjoying refugee/ subsidiary protection status residing in your country falling under Art 2h Directive 2004/83/EC	[161].	[162].	[163].	[164].	[165].	[166].	[167].

Chapter D, family reunification

[168].	[169].	[170].	[171].	[172].	[173].	[174].	[175].	[176].
Number of LGBT partners of third country nationals residing in your country benefiting from family reunification	[177].	[178].	[179].	[180].	[181].	[182].	[183].	[184].

Chapter F, Homophobic hate speech

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court cases initiated regarding homophobic hate speech (number of prosecutions)								
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)								
Range of sanctions issued for homophobic hate speech								
Number of non-criminal court cases initiated for homophobic statements							2	
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)							?sett leme nt?	