

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

Estonia

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Foreword

In 2010, the study was compiled by Ms Merle Haruoja (Estonian Institute of Human Rights), Ms Marianne Meiorg and Mr Kari Käsper (Estonian Human Rights Centre). The current update was compiled by Marianne Meiorg with the assistance of Ann Väljataga (Estonian Human Rights Centre).

The research team took into account all information available from publicly accessible sources. In addition, formal Letters of Inquiry were sent to public authorities including the Labour Inspectorate (*Tööinspeksioon*), the Bureau of Citizenship and Migration (*Kodakondsus- ja Migratsioonibüroo*) of the Police and Border Guard Board (*Politsei- ja Piirivalveamet*), Tallinn City Social Welfare and Health Care Board (*Tallinna Sotsiaal- ja Tervishoiuamet*), Office of the Chancellor of Justice (*Õiguskantsleri kantselei*), Bureau of Citizenship and Migration (*Kodakondsus- ja Migratsioonibüroo*) of Ministry of Social Affairs (*Sotsiaalministeerium*), Ministry of Justice (*Justiitsministeerium*) and the Supreme Court of Estonia (*Riigikohus*). Research team members also consulted with several NGOs active in the field of prevention of discrimination on the grounds of sexual orientation.

The team used comparative and analytical approaches to the research subject. Where necessary, EU and national law were compared, contrasted, and deficiencies in national law were highlighted. Relevant Estonian laws, regulations and practices were analysed.

In general, it can be said that the public authorities were forthcoming in providing information. However, as the LGBT rights have not apparently been a priority, very little statistical data is available. In addition, the laws and regulations regarding the prohibition of discrimination based on sexual orientation were recently adopted and therefore no developed practice or case law has emerged yet.

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Executive Summary

Implementation of Employment Directive 2000/78/EC

The Directive is implemented through the Equal Treatment Act (*võrdse kohtlemise seadus*)¹ that entered into force on 1 January 2009 and the new Employment Contracts Act (*töölepingu seadus*) that entered into force on 1 July 2009.²

The Employment Contracts Act requires employers to follow the principle of equal treatment referring to the more specific Equal Treatment Act. Applications on the subject can be submitted to the newly founded Gender Equality and Equal Treatment Commissioner (*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik*) and the Chancellor of Justice (*Õiguskantsler*) that can produce only non-binding opinions. Complaints can be submitted to labour dispute committee (*töövaidluskomisjon*) if they concern employment relations, or to courts.

Civil society can engage on behalf or in support of complainants as their legal representatives or legal advisors. There are no legal obstacles, as far as formal preconditions are fulfilled. Civil society cannot, however, turn to the court *in abstracto* that is without a direct victim of discrimination. This option is open only upon an application to the Equal Treatment Commissioner.

There have been no significant developments in this area. Although the number of complaints to the Equal Treatment Commissioner is steadily growing, the statistics of initiated proceedings in other institutions competent to review complaints has remained as low as before (in average, none or just one complaint). The same applies to courts, where there have been no cases of discrimination in this sector on the ground of sexual orientation.

Freedom of Movement

Directive 2004/38/EC is fully implemented by the Citizen of the European Union Act (*Euroopa Liidu kodaniku seadus*),³ which provides every citizen of any European Union Member State full freedom of movement. The accompanying right is only for spouses, children or member of household of the EU citizen, except the Estonian citizen. The Aliens Act (*Välismaalaste seadus*) applies to the family (of third-state citizenship) of the Estonian citizen.⁴ Unmarried couples or couples in civil unions or registered partnerships are not recognised as ‘spouses’. Currently there is an uncertainty as to whether same-sex marriages would be recognised as marriages for the purposes of migration laws, including for the purposes of residence permits. However, LGBT partnerships of any type may fall under the concept of ‘household’ under the EU Citizen Act but not under the Aliens Act. The latter is also confirmed by the practice of the Police and Border Guard Board (*Politsei ja Piirivalveamet*). The Chancellor of Justice has requested the Ministry of Interior (*Siseministeerium*) to amend the law, as it constitutes unequal treatment Estonian citizens and other EU citizens.

Another development potentially influencing freedom of movement is the draft of the Cohabitation Act (*Kooseluseadus*), which is currently being processed in the parliament. At this stage it is difficult

¹ Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), 11 December 2008, available at: www.riigiteataja.ee/akt/106072012022, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013066/consolide.

² Estonia, Employment Contracts Act (*Töölepingu seadus*), 17 December 2008, available at: www.riigiteataja.ee/akt/122122012030, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013061/consolide.

³ Estonia, Citizen of the European Union Act (*Euroopa Liidu kodaniku seadus*), 17 May 2006, available at: www.riigiteataja.ee/akt/129122011173, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/519122013002/consolide.

⁴ Estonia, Aliens Act (*Välismaalaste seadus*), 9 December 2009, available at: www.riigiteataja.ee/akt/123122013069, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516012014004/consolide.

to predict, what will the Act entail and whether it would be adopted at all.

In fact, it can be questioned whether Estonia has fully implemented Article 3(2)(b) of Directive 2004/38/EC, which provides that the partner with whom the Union citizen has a durable relationship, duly attested, ‘shall, in accordance with its national legislation, facilitate entry and residence for the following persons’.

Asylum and Subsidiary Protection

Directive 2004/83/EC is fully implemented by the Act on Granting International Protection to Aliens (*välismaalasele rahvusvahelise kaitse andmise seadus*).⁵ The Act does not expressly provide sexual orientation as a ground for persecution and there is no specification as to whether it could be included under ‘a particular social group’.

The Act provides for an accompanying right to asylum/subsidiary protection only to a number of persons closely connected to the applicant and that list does not include partners with whom the person is not married or has contracted a civil union or registered partnership. Prior to 2011, there has been only one application substantiated with the claims of discrimination based on sexual orientation, but this was rejected without analysis of the content. As the number of asylum seekers arriving in Estonia is very low (30 asylum applications were submitted in 2010, 66 in 2011, 77 in 2012 and 97 in 2013)⁶, no updated information on the number of asylum seekers claiming persecution on the grounds of sexual orientation can be disclosed due to confidentiality and security considerations, for the same reasons the background of the one application filed prior to 2010 is not to be discussed.⁷ Another development potentially influencing freedom of movement is the draft of the Cohabitation Act (*kooseluseadus*), which is currently being processed in the parliament. At this stage it is difficult to predict, what will the Act entail and whether it would be adopted at all.

Family Reunification

Family reunification of persons under international protection is regulated by the Act on Granting International Protection to Aliens. As in the case of accompanying right to asylum/subsidiary protection, the exhaustive list of persons considered family members for the purposes of family reunification does not include partners with whom the person is not married or has contracted a civil union or registered partnership. Although the courts have not had the chance to rule on it, the Police and Border Guard Board has stated that same-sex partnerships, whether married, registered or merely cohabiting, are not covered by the Act.

Freedom of Assembly

The trends over the past years demonstrate the more positive and consistent actions by the public authorities. They have not imposed any excessive obstacles to demonstrations promoting LGBT tolerance and the organisers of such events have assessed their cooperation with the police as positive.⁸ The police have provided protection for such events.

⁵ Estonia, Act on Granting International Protection to Aliens (*Välismaalasele rahvusvahelise kaitse andmise seadus*), 14 December 2005, available at: www.riigiteataja.ee/akt/121122013005, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516012014007/consolide.

⁶ Estonia, Police and Border Guard Board (Politsei- ja Piirivalveamet), Asylum statistics (Varjupaigastatistika), available at: www.politsei.ee/dotAsset/218156.pdf.

⁷ Estonia, Estonian Human Rights Centre (2014), Face to face interview with Ms Anni Säär, Legal expert of the Estonian Human Rights Centre’s legal clinic for asylum seekers, Tallinn, 15 April 2014.

⁸ Estonia, K. Grossthal and Meior, M. (2012) Implementation of the Council of Europe Recommendation to Member States on

At the same time, the same treatment is provided to counter-demonstrations presenting homophobic and/or transphobic sentiments. The police have been reluctant to determine them as hate incitement and there have been no court proceedings initiated to have them determined as such, thus there have been no grounds for prohibiting them.

Criminal Law, Hate Speech

Homophobic hate speech has been criminalised in Penal Code (*karistusseadustik*).⁹ However, the provision has not been applied by the authorities in practice due to the high threshold for burden of proof; therefore, its effectiveness remains unclear. A new draft amendment is under preparation in order to make the application of the hate speech provisions in the Penal Code more effective as well as adding a bias motive as an aggravating circumstance.

Transgender Issues

Transgender issues have a short history in the Estonian legal system. There is no practice, reported cases or statistics on the subject. Therefore, there has not been any opportunity to develop an approach to transgender discrimination. Provisions affecting specific transgender aspects and gender reassignment are not available in one compact legal act but rather dispersed in a number of legal acts. Full gender reassignment in medical as well as legal terms is facilitated.

There are no legal developments. The transgender issues are still under-regulated.

Miscellaneous

The Constitution of the Republic of Estonia (*Eesti Vabariigi Põhiseadus*)¹⁰ includes in its catalogue of fundamental rights the general prohibition of discrimination. In the past two years there have been only a few studies that have addressed sexual orientation issues. In 2009, the Ministry of Justice (*Justiitsministeerium*) published a study on the legal regulation concerning non-married cohabiting couples, discussing in detail also same-sex couples. The Ministry of Social Affairs (*Sotsiaalministeerium*) has financed the conducting of LGBT-related studies.

There are no laws similar or comparable to the institutional homophobia that surfaced in Lithuania. However, the Gender Equality and Equal Treatment Commissioner refers to an amendment made to a decree in a local municipality, explicitly excluding same-sex couples from municipal social benefits.

Intersex Issues

Intersex issues have an even shorter history and are characterized by complete lack of practice, case law, statistics or specific regulation. In general medical conditions related to undetermined biological gender are assessed and treated on an individual basis and there the general regulation of medical services applies. Since in the period of 1992-2012 only one person of undetermined biological sex

Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity. Compliance Documentation Report. Estonia, Estonian Human Rights Centre, p 42.

⁹ Estonia, Penal Code (*Karistusseadustik*), 6 June 2001, available at: www.riigiteataja.ee/akt/114012014010, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530012014001/consolide.

¹⁰ Estonia, Constitution of the Republic of Estonia (*Eesti Vabariigi Põhiseadus*), 28 June 1995, available at: www.riigiteataja.ee/akt/127042011002, available in English at: www.riigiteataja.ee/en/eli/ee/rhvv/act/530102013003/consolide.

has been born, there are no examples of positive nor discriminative legal or medical practices.

Good practices

The practice of the Gender Equality Department of the Ministry of Social Affairs, which has adopted an extended notion of gender equality and has become active in issues of sexual orientation, is a positive development. The Ministry has also provided financial support to activities related to LGBT topics, including the Baltic Pride 2014. Small, but significant examples of good practices also include the capacity of the Gender Equality and Equal Treatment Commissioner to hear work-related sexual orientation discrimination issues and to include discrimination on the ground of person being transgender under gender discrimination; the inclusion of homophobic hate crime provisions in the Penal Code; legal research into same-sex marriage by the Ministry of Justice and changes in national curricula allowing for discussion of sexual minorities in school.

A. Implementation of Employment Directive 2000/78/EC

Employment Directive 2000/78/EC regarding discrimination on the grounds of sexual orientation is implemented by Employment Contracts Law (*Töölepingu seadus*) adopted on 17 December 2008 and Equal Treatment Act (*Võrdse kohtlemise seadus*), which was adopted on 11 December 2008.¹¹ The Equal Treatment Act is also intended to implement Racial Equality Directive 2000/43/EC.

The Employment Contracts Law includes a general provision on the principle of equal treatment stating, “employers shall ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality in accordance with the Equal Treatment Act and Gender Equality Act.” (§3). Although the supervision over the implementation of the Act is generally within the competence of the Labour Inspectorate (*Tööinspeksioon*), the provision on discrimination is within the competence of the Gender Equality and Equal Treatment Commissioner (*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik*) (§3 of the Employment Contracts Act). In case of a dispute arising out of an employment relationship, the person may turn to the labour dispute committee (*töövaidluskomisjon*).¹²

The position of the Gender Equality and Equal Treatment Commissioner was created by the new Equal Treatment Act, the aim of which is to guarantee the protection of persons from discrimination on grounds of race, nationality, colour, religion or belief, age, disability or sexual orientation. The Act provides for the principle of equal treatment, tasks for implementing and promoting these principles and resolution of disputes.

The scope of the Equal Treatment Act is defined in §2 and it fully corresponds with the scopes of Directives 2000/78/EC and 2000/43/EC defined in their Articles 3. The Act’s scope depends on the grounds of discrimination and therefore in case of discrimination based on sexual orientation the Act applies only in the area of employment while discrimination based on nationality (ethnicity), race or colour is covered additionally in the area of health care, social security, education, access to goods and provisions of services. The Commissioner has criticised the differentiations between the grounds of discrimination: by adopting the Equal Treatment Act, Estonia has implemented the mere minimum of the norms from EU Council Directive 2000/78/EC. This is a result of the discussions in the Parliament, since the original draft of the Act foresaw prohibition of discrimination of every minority group in every area of law. The present solution in the Equal Treatment Act causes problems and creates a so-called hierarchy between the grounds of discrimination.¹³

The main features of the draft of the Equal Treatment Act:

- § 3 defines discrimination, which fully corresponds to Art 2 of Directives 2000/78/EC and

¹¹ Estonia, Employment Contracts Act (*Töölepingu seadus*), 17 December 2008, available at: www.riigiteataja.ee/akt/122122012030, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013061/consolide; and Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), 11 December 2008, available at: www.riigiteataja.ee/akt/106072012022, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013066/consolide.

¹² Estonia, Individual Labour Dispute Resolution Act (*Individuaalse töövaidluse lahendamise seadus*), 20 December 1995, available at: www.riigiteataja.ee/akt/126032013007, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/504112013010/consolide.

¹³ Estonia, Gender Equality and Equal Treatment Commissioner (*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik*) (2010), Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation (*Teemauuring homfoobia ja diskrimineerimise kohta seksuaalse sättumuse alusel*), no 3-1/005.

2000/43/EC;

- § 10 provides for exceptions to the prohibition of discrimination in the interests of public security and order, prevention of crimes, protection of health, rights and freedom of others. All measures taken must be proportional to one of the stated aims.
- The procedural provisions of the two mentioned Directives are fully transposed by the Act. For example burden of proof Articles are transposed by §9 of the Act providing for a shared burden and stating that respondent's refusal to prove his/her non-violation of an equal treatment principle is equal to admittance to discrimination;
- Chapter 4 renamed the former Gender Equality Commissioner as Gender Equality and Equal Treatment Commissioner. It also extended the Commissioner's competence for resolving discrimination complaints to include discrimination based on other grounds, such as sexual orientation.

The Commissioner is appointed by the Minister of Social Affairs for five years. The organisation of work is specified in the Statutes of the Commissioner. In 2010, the new Statutes¹⁴ entered into force and replaced the one adopted in 2005. The 2010 Statutes prescribe the organisation of work of the whole office and is more precise in describing the functions of the Commissioner.

The Commissioner is competent to consult and assist persons in pursuing their complaints about discrimination. They may also receive applications from individuals and provide an opinion as to the possible existence of discrimination (§16 of the Equal Treatment Act). These opinions are not legally enforceable but merely 'provide an assessment which...allows for an assessment of whether the principle of equal treatment has been violated in a particular legal relationship'.¹⁵ Applications to the Commissioner do not necessarily have to be submitted by the victims themselves, interested organisations or group of persons can also do that.

Complaints over discrimination based on sexual orientation in public sector can also be submitted to the Chancellor of Justice (*Õiguskantsler*). This institution was established by the Constitution. He/she is appointed by the Parliament on the proposal of the President of the Republic (*Vabariigi President*). In addition to the constitutional task of reviewing legislation's conformity with the Constitution, the Chancellor was also given the task of monitoring whether state agencies respect fundamental rights and freedoms and the principles of good governance (§ 19(1) of Chancellor of Justice Act (*Õiguskantsleri seadus*)¹⁶). In regard to private relations, such as those of employment, the Chancellor merely has the right to conduct conciliation procedures, which are voluntary to both of the parties (§19(2)).

The Chancellor and the Gender Equality and Equal Treatment Commissioner are legally separate and independent positions. The Commissioner, being a public official, can be the subject of a complaint filed with the Chancellor. One of the major differences between the two positions is that the Commissioner is specialised in discrimination issues while the Chancellor is not. Another major difference is that the Chancellor may only review cases regarding actions by 'a state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties', while the Commissioner can review cases also in regard to private persons with no public duties. When the dispute concerns only private persons, the Chancellor merely

¹⁴ Estonia, Government of the Republic of Estonia (*Vabariigi Valitsus*) (2010). Statutes of the Gender Equality and Equal Treatment Commissioner and Office (*Soolise võrdõiguslikkuse ja võrdse kohtlemise voliniku ja kantselei põhimäärus*), available at: www.riigiteataja.ee/akt/13327659

¹⁵ Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), 11 December 2008, §16, available at: www.riigiteataja.ee/akt/106072012022, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013066/consolide.

¹⁶ Estonia, Chancellor of Justice Act (*Õiguskantsleri seadus*), 25 February 1999, § 19(1), available at: www.riigiteataja.ee/akt/103072013010, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/508012014001/consolide.

has the possibility to conduct conciliation procedure if the parties agree to it.

The Chancellor's competence on equality and equal treatment matters, including equality concerning sexual orientation, is the following:

- the review of the conformity of a legal act with the constitution and laws (competence for normative review);
- the breach of the prohibition of discrimination during the exercise of public duties (competence as ombudsman);
- conciliation proceedings between private parties.

The procedure of complaints to the Chancellor is simple. The complainant must submit an application, which can also be done through the Chancellor's website.¹⁷ The Chancellor will then provide an opinion on whether or not discrimination had taken place. As in the case of the Commissioner, the opinion of the Chancellor is not legally binding. In case of a conciliation procedure, the application is forwarded to the opponent, who may respond. If no solution is reached, the parties will meet for negotiations. Any agreement reached is subject to enforcement procedure.¹⁸

In case of discrimination in employment, a person can also turn to a labour dispute committee. According to § 3 of the Individual Labour Dispute Resolution Act (*Individaalse töövaidluse lahendamise seadus*),¹⁹ a disagreement arising from the employment relationship of an employee and employer may be resolved by a labour dispute committee if they find that a labour dispute cannot be resolved by agreement. This body is not specialised in equality and discrimination matters but can be turned to in such matters.

In addition to what is stated above, victims can also turn to the court with their claims of discrimination concerning any area of life, including in employment relations.

The role of civil society is rather limited in the possibilities to initiate proceedings of discrimination. *Actio popularis* as a possibility is not recognised in Estonian courts, thus, organisations cannot turn to court when there is no clear victim whose rights have been violated. Organisations can however turn to the Equal Treatment Commissioner in those cases.²⁰

The role of the civil society is less limited when acting in support of an individual who is a direct victim of a legal act or action. According to the Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*), a person may participate in court disputes personally, through a contractual representative (§ 217) or use the help of an adviser (§ 228).²¹ According to § 217, a contractual representative can be anyone with certified knowledge of law. In the Supreme Court (*Riigikohus*) a contractual representative must be a sworn attorney.

Some organisations have gained access to financial support to represent individuals in court or act as representatives without any expenses on the victim's side. So far, only the Estonian Union of

¹⁷ Estonia, Application to the Chancellor of Justice (*Avaldus õiguskantslerile*), available in Estonian at: <http://oiguskantsler.ee/et/avaldus-oiguskantslerile>; available in English at: <http://oiguskantsler.ee/en/application-to-the-chancellor-of-justice>.

¹⁸ Estonia, Chancellor of Justice Act (*Õiguskantsleri seadus*), 25 February 1999, § 35¹⁴, available at: www.riigiteataja.ee/akt/103072013010, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/508012014001/consolide.

¹⁹ Estonia, Individual Labour Dispute Resolution Act (*Individaalse töövaidluse lahendamise seadus*), 20 December 1995, available at: www.riigiteataja.ee/akt/126032013007, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/504112013010/consolide.

²⁰ Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), 11 December 2008, §16, available at: www.riigiteataja.ee/akt/106072012022, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013066/consolide, § 17(1).

²¹ Estonia, Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*), 20 April 2005, available at: www.riigiteataja.ee/akt/106022014015, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/514022014002/consolide.

Lawyers (*Eesti Juristide Liit*)²² and the Foundation Office of Legal Services (*SA Õigusteenuste Büroo*)²³ have received such aid but neither is specifically orientated to victims of discrimination. The former provides legal assistance from law students who have no authorisation to represent clients in court and the latter provides assistance to low-income individuals.

In addition to contractual representatives, the Code of Civil Procedure foresees the possibility to use the help of an advisor that can be anyone with an active civil procedural legal capacity (§ 228).²⁴ An adviser may appear in court together with the participant in the proceeding. He/She cannot perform procedural acts or file petitions but can provide explanations and anything presented by an adviser is deemed to have been presented by the participant in the proceeding unless the participant in the proceeding immediately withdraws or corrects it. However, this possibility is rarely, if ever, used by civil society organisations and the victims of discrimination. In fact, as a result of an e-mail correspondence with one of the organisations, it seems that this possibility is not even known to the organisations or the victims.²⁵

The overview of the statistical information on discrimination cases in non-judicial bodies from 2007–2013 is found in Annex 2. According to information received from the Chancellor of Justice, there have been only one case concerning employment relations (summarised in Annex 1).²⁶ The Labour Inspectorate has no case-law in regard to discrimination on the ground of sexual orientation to report.²⁷

The case-law of Estonian courts of first and second instance is available on the database readily accessible through the Internet.²⁸ The database covers all the decisions by courts that are public. The last keyword-based search on discrimination on the ground of sexual orientation in employment sector conducted on 07.04.2014 did not give any results. The case law of the Supreme Court is similarly available online on the official webpage of the court, however there are no cases relevant to this study.²⁹

The statistics show two distinct trends developing. The number of complaints to the Equal Treatment Commissioner is growing while the number of complaints to the Chancellor of Justice on discrimination in private sector (that are the basis for the initiation of conciliation proceedings) has seized altogether. Despite the growth of complaints to the Commissioner, the proceedings in the courts and the Labour Committees still shows no sign of growth. This means that most of the cases handled by the Commissioner are discontinued and the applicants have refrained from pursuing them further to venues with more significant legal consequences to the parties.

²² Estonia, www.juristideliit.ee/new/tasuta-oigusabi/ (26.02.2014).

²³ Estonia, www.otb.ee/ (26.02.2014).

²⁴ Estonia, Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*), 20 April 2005, available at: www.riigiteataja.ee/akt/106022014015, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/514022014002/consolide.

²⁵ Estonia, Ms Lisette Kampus, member of Diversity and the executive board of ILGA Europe (*ILGA Euroopa*) (2008), E-mail correspondence, 3-4 April 2008.

²⁶ Estonia, Office of the Chancellor of Justice (*Õiguskantsleri kantselei*) (2014), Response to request for information, no. 5-3/1400948 (*Vastus teabenõudele*), 27 March 2014; Estonia, Office of the Chancellor of Justice (*Õiguskantsleri kantselei*) (2008), Response to request for information, no. 5-3/0800287 (*Vastus teabenõudele*), 4 February 2008.

²⁷ Estonia, Labour Inspectorate (*Tööspektsioon*) (2014), Overview of labour disputes by quarter, 2005-1st quarter of 2014 (*Töö vaidlused kvartalite lõikes, 2005-2014 I kvartal*), available at: <http://www.ti.ee/index.php?page=820&>.

²⁸ Estonia, State Gazette Case Law Database (*Riigiteataja kohtulahendite otsingusüsteem*), available at: www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/main.html.

²⁹ Estonia, Supreme Court of Estonia (*Riigikohus*), Case law database, available online at: <http://www.nc.ee/?id=11> (last accessed 10 July 2014)

B. Freedom of Movement

In the case of EU citizens and their family members who are not Estonian citizens, the right to move and reside within the territory of Estonia is regulated by the Citizen of European Union Act (*Euroopa Liidu kodaniku seadus*), which implements directive 2004/38/EC. The same right in the case of third-country citizens, including the family members of Estonian citizens who have a third-country citizenship, is regulated by Aliens Act (*Välismaalaste seadus*). There are remarkable inconsistencies between the two acts, which are elaborated on below.

The Citizen of European Union Act is implementing the Directive 2004/38/EC of 29.04.2004. Therefore, according to the Act, every citizen of any EU Member State has the right to stay in Estonia on the basis of a valid travel document or identity card (§ 7). This right is independent and does not depend on the citizenship of the person's partner, spouse, parent or any other family member. Such right may only be restricted if there is good reason to believe that the person poses a danger to public order, national security or the health of other persons (§ 8).

The case is somewhat different when the family member of the EU citizen is a third country citizen. According to § 3 of the Citizen of European Union Act, family members are:

- a spouse of the EU citizen;
- a child under 21 years of age or a dependent adult child of the EU citizen or of his/her spouse (dependent child);
- a dependent parent of the EU citizen or of his/her spouse; or
- any other person who, in the EU citizen's country of origin, is a dependant of the EU citizen or is a member of his/her household, or who is permanently unable to cope independently owing to health reasons or disability and it is necessary that the EU citizen personally cares for him/her.

The term 'spouse' referred to in § 3 of the Act is interpreted in the Estonian law as to only encompass a heterosexual marital partner. According to the Family Law Act, which entered into force on 1 July 2010, any marriage contracted between persons of the same sex is void (§10).³⁰ Therefore, in the Estonian legal system only heterosexual marriages can be contracted. This is strengthened by the opinion of the Chancellor of Justice, expressed in his statement on regularisation of same- sex family relations: 'Marriage as a type of family has been afforded special protection by the state, especially as a basis for the society and for the continuation and growth of the nation (§ 27 (1) of the Constitution). This means that marriage is a sustainable unit, formed from a man and a woman, who can have common descendants and who are thus the guarantors for the continuation of the society. The fact that same sex persons do not have this possibility, is a difference, which can provide a reasonable explanation for different treatment of different sex and same sex couples ... Therefore my opinion is that the unequal treatment of homosexual persons within the meaning of contracting a marriage is justified'.³¹

It is somewhat unclear whether this also affects the legal status of homosexual marriages contracted in another state once the married couple enters the territory of Estonia. It must be noted, however, that the Citizen of European Union Act merely refers to 'a spouse of the citizen of the European Union' without mentioning the legal status of the marriage in the country of origin, as opposed to a

³⁰ Estonia, Family Law Act (*Perekonnaseadus*), 18 November 2009, §10, available at: www.riigiteataja.ee/akt/127062012012, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013016/consolide.

³¹ Estonia, Office of the Chancellor of Justice (*Õiguskantsleri kantselei*) (2006), Opinion on legalising same-sex partnerships (*Seisukoht samasooliste peresuhete seadustamise kohta*), no. 6-1/060166/0600782, January 2006.

person falling under the fourth category of persons who constitute ‘family members’ because ‘in the country of origin of the citizen of the European Union, [he/she] is a dependant of the citizen of the European Union or is a member of his or her household’. To date (30 May 2014) the Police and Border Guard has not solved the question on whether same-sex marital partners qualify as spouses or household members according to the Citizen of European Union Act since there have been no cases where it would have held any significance.³²

However, according to § 55 (2) of Private International Law Act (*Rahvusvahelise eraõiguse seadus*),³³ ‘marriage contracted in a foreign state is deemed to be valid in Estonia provided that it is contracted pursuant to the procedure provided by the law of the state where the marriage is contracted and provided that the material prerequisites of the marriage are in compliance with the laws of the states of residence of both spouses’. However, in conjunction with § 7 of the same Act, the marriage would not be recognised if it is clearly in conflict with the fundamental principles of Estonian law. Whether this is the case with same-sex marriages contracted abroad, is unclear and the Chancellor of Justice has suggested turning to court for final interpretation.³⁴

The Ministry of the Interior (*Siseministeerium*) did state that they see no reason why same-sex spouses could not be considered as spouses within the meaning of the EU Citizen Act, if their marriage was contracted according to the regulations in place in their country of origin.³⁵ This approach was confirmed by the Ministry in its reply to the Chancellor of Justice’s inquiry on the topic of family migration of same-sex spouses/registered partners (please see below, page 15 for details).³⁶

It is remarkable, however, that in 2008 the former Citizenship and Migration Board (currently the Police and Border Guard Board (*Politsei- ja Piirivalveamet*)), which is a subdivision of the Ministry of Interior, responded that same-sex spouses would likely be interpreted as ‘members of a household’ (further discussed below) rather than as ‘spouses’.³⁷

In 2014 the Board however specified that this approach would be taken only in regard to the EU Citizen Act (*Euroopa Kodaniku Seadus*).³⁸ The term “spouse” in the Aliens Act (*Välismaalaste seadus*) would be interpreted more restrictively and same-sex marriages are not viewed as grounds of legal residence. This means that the term “spouse” is, at least in theory, interpreted differently whether the case concerns a same-sex spouse of a non-Estonian but EU citizen or a same-sex spouse of an Estonian citizen. There is no practice to confirm or contest this interpretation.

The answers from these institutions are somewhat contradictory and there is no legal provision, practice or decision on this question. Usually the Citizenship and Migration Board will decide the issue on the basis of its understanding of the Estonian law. If its decision is contested, it will be discussed at a higher level. It is therefore not clear under Estonian law whether same-sex spouses who have validly contracted a marriage according to the law of the country of origin will be recognized as spouses for the purposes of letter a) of Article 2(2) of the Free Movement Directive. There is no provision to this effect and the issue has not arisen to date. Indeed, the Chancellor of Justice has suggested turning to court for final interpretation.³⁹ As of 1 June 2014, there is still no

³² Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*) (2014), Reply to request of information, 13 May 2014.

³³ Estonia, Private International Law Act (*Rahvusvahelise eraõiguse seadus*), 27 March 2002, available at: www.riigiteataja.ee/akt/13242136, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513112013009/consolide.

³⁴ Estonia, Office of the Chancellor of Justice (*Õiguskantsleri kantselei*) (2011), Opinion on legalising same-sex partnerships (*Seisukoht vastuolu mittetuvastamise kohta*), no. 6-1/100737/1102413, 23 May 2011.

³⁵ Estonia, Ms Grete Kaju, legal advisor for the Department of the Migration and Border Control Policy, Ministry of the Interior (*Siseministeerium*) (2008), Telephone interview, 8 April 2008.

³⁶ Estonia, Ministry of the Interior (*Siseministeerium*) (2012), Reply to request of information on family migration, 15 November 2012.

³⁷ Estonia, former Citizenship and Migration Board (*endine Kodakondsus- ja Migratsiooniamet*) (2008), Question on Interpretation (*Küsimus tõlgendamise kohta*), 8 April 2008.

³⁸ Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*) (2014), Reply to request of information, 13 May 2014.

³⁹ Estonia, Office of the Chancellor of Justice (*Õiguskantsleri kantselei*) (2011), Opinion on legalising same-sex partnerships (*Seisukoht*

case-law on the status of same-sex marriages contracted abroad in the context of family migration and freedom of movement.

As opposed to doubts surrounding LGBT marriage, the view on registered partnerships or civil unions is clear under Estonian legislation. According to the Family Law Act, the only union between two people that brings with it rights and obligations is marriage (§ 1 (2)). This does not contradict Art 2/2/b of Directive 2004/38/EC. Therefore in general, homosexual couples, whether married or having contracted a registered partnership will fall under the category of other family members in Art 3/2 of Directive 2004/38/EC. The parliament is currently processing a draft law that would, when adopted, provide homosexual as well as heterosexual couples with the possibility to register their partnership (distinct from marriage).⁴⁰ The proceedings are in the very first stage, which means that the outcome is impossible to predict.

In regard to civil unions or civil partnerships, the Citizen of the European Union Act and the Aliens Act have taken substantially different views. Under the Citizen of the European Union Act, same-sex partners would fall under the category of “household”.⁴¹ The Act states: “any other person who, in the EU citizen’s country of origin, is a dependant of the EU citizen or is a member of his/her household” (§3), thus fully reflecting Art 3/2/a of Directive 2004/38/EC. According to § 3 (3), a member of a household is ‘the person ... who resides together with a citizen of the European Union in a shared household and has a personal income’.

The term “household” is further defined in the Official Statistics Act (Riikliku statistika seadus), whereby a household is defined as persons who live together and are linked by a common use of all available household facilities. A person living alone is also a household (§24(4)).⁴² According to the information provided by Statistics Estonia (*Statistikaamet*) in 2008, there is no reason to exclude LGBT partners from this concept if they fulfil these criteria.⁴³ Moreover, they have considered LGBT partnerships as cohabiting couples for the purposes of statistics.

The Police and Border Guard Board thus does not have information on the number and outcome of such applications.⁴⁴ In 2008, it was also noted that there was only 1-2 cases where ‘household’ has been cited as a ground for being a family member and these cases did not include LGBT partnerships. It is thus difficult to state with absolute certainty whether under Estonian legislation LGBT partnerships fall under the concept of ‘the household’ and can benefit from the right to enter and stay in Estonia as a family member of EU citizen. Although for the purpose of statistics LGBT couples are being treated as households, it still does not have much legal significance in immigration since the institutions that are responsible for regulating migration have the final say.

Thus as opposed to EU Citizens Act, the Aliens Act does not foresee a right to residence for civil partners. In practice there have only been two cases where same-sex partnerships have been attempted to cite as a ground for residence permit by an applicant. One application for residence permit on the grounds of same-sex civil partnership is still ongoing.⁴⁵ Similar application was

vastuolu mittetuvastamise kohta), no. 6-1/100737/1102413, 23 May 2011.

⁴⁰ Estonia, Cohabitation Draft Act (*Kooseluseadus*) 650 SE, available at: <http://www.riigikogu.ee/?op=ems&page=eelnou&eid=ea84e71c-291a-4c91-88b0-bd64af650d21>.

⁴¹ Estonia, Ms Liis Annus, Head of Department for Documentation of Foreigners, former Citizenship and Migration Board (*endine Kodakondsus- ja Migratsiooniamet*) (2008), Telephone interview, 27 February 2008.

⁴² Estonia, Official Statistics Act (Riikliku statistika seadus), 1 August 2010, available online in English at: www.riigiteataja.ee/en/eli/526032014002/consolide.

⁴³ Estonia, Mr Arvo Valtin, Executive Data Administrator, Department of Social Surveys Service at Statistics Estonia (*Statistikaamet*) (2008), Telephone interview, 28 February 2008.

⁴⁴ Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*) (2014), Reply to request of information, 13 May 2014.

⁴⁵ Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*) (2014), Response to request for information (*Vastus*

processed in 2012, which resulted in the memorandum of the Chancellor of Justice in November 2013.

In 2012, the Department of Citizenship and Migration of the Police and Border Guard Board refused to issue a residence permit to a same-sex partner of an Estonian citizen based on the Aliens Act. Police and Border Guard relied on the Family Law Act. The Estonian citizen, whose partner's application was rejected, turned to the Chancellor of Justice for assessment whether the absence of a ground for residence permit for same-sex couples is in conformity with the Constitution and European Convention of Human Rights. In November 2013, the Chancellor issued a memorandum⁴⁶ to the Ministry of the Interior suggesting that relevant amendments be introduced in Aliens Act. As of 24 February 2014, the Ministry has not taken any steps to bring in the amendments. Therefore, from the perspective of freedom of movement of third-state citizens, same-sex partnerships do not constitute a strong argument and in order for the right to family life of same-sex partners/spouses to be fully respected, they have to find another basis to build their residence permit application on. Since EU citizens can benefit from a wider interpretation of family, the current situation has been viewed by the Chancellor of Justice as unequal treatment.

It may be questioned whether Estonia has fully implemented Art 3/2/b of Directive 2004/38/EC, which provides that the partner with whom the EU citizen has a 'durable relationship, duly attested', 'shall, in accordance with its national legislation, facilitate entry and residence for the following persons'. The Citizen of European Union Act does not recognise any other 'durable relationship' but marriage and, to some extent applicable here, members of a household. There is no basis, thus, under which a 'durable relationship' would be a basis for entry and stay in Estonia of a partner of EU citizen.

In the context of the present study, the children and dependents of the LGBT EU citizens are the only group of individuals that can, for sure, take advantage of the provisions on the right to move and stay in Estonia. The particularities of their right to move and stay are provided in § 10 of the Citizen of European Union Act:

(1) A family member has the right to stay in Estonia together with a citizen of the European Union if he/she has a valid travel document and visa.

(2) A family member who has another legal basis for his or her stay in Estonia in accordance with the Aliens Act is not required to have a visa.

(2¹) Family member may be provided with a visa if:

- 1) he/she has a valid travel document
- 2) it is proven that he/she is travelling with a citizen of the European Union or is joining him/her, and
- 3) his/her status of family member has been proven.

(2²) A family member is not required to have a medical expense insurance policy.

(3) A family member is prohibited to stay in Estonia if he/she has no right to stay or other legal basis to stay in Estonia.

teabenõudele), 15 April 2014.

⁴⁶ Estonia, Chancellor of Justice (*Õiguskantsler*) (2013), Memorandum on the application of residence permit on the grounds of same-sex partnership, (*Õiguskantsleri märgukiri: elamisloa taotlemine samasoolisele elukaaslasele*), no 6-1/120905/1304680, available at: http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_margukiri_elamisloa_taotlemine_samasoolisele_elukaaslasele.pdf.

(4) A family member staying in Estonia on the basis of the right to stay shall, within three months after the date of entry in Estonia, apply for temporary right of residence, or leave Estonia before the expiry of such term, unless he or she has applied for temporary right of residence.

(5) The stay in Estonia of a family member who has applied for temporary right of residence is legal until the processing of his or her application for temporary right of residence has been concluded.

(6) A family member staying in Estonia on the basis of the right to stay is prohibited from employment or operation as a self-employed person in Estonia’.

The right to stay of the family member may be restricted if there is good reason to believe that the person poses a danger to public order, national security or the health of other persons (§11).

In Estonia the residence system is divided into two: temporary residence of five years and permanent residence.

Every EU citizen has a right to acquire temporary residence. For a stay that exceeds the three-month-period for which only a travel document or identity card is needed he/she must register his/her residence (§ 13). The temporary residence extends automatically for another five years if he/she continues to be registered as a resident in Estonia and there are no reasons to extinguish or terminate it. At the same time, after five years of uninterrupted residence, the EU citizen may apply for permanent residence (§ 40). Under certain conditions, the EU citizen may also apply for a permanent residence permit before the expiry of five consecutive years of residence (§ 40 (2)). These are rights that the partner of an EU citizen who is himself/herself an EU citizen can take advantage of independently of the partner.

In the case of an EU citizen’s family member who is not an EU citizen, obviously, the conditions set for the term ‘family member’ under § 3 of the Act must be satisfied. Also, there are certain additional requirements for the EU citizen with whom the person wishes to reside (§ 20 (1)).

The family member must apply for an extension of the temporary residence permit, showing the continuance of the conditions under which he/she had previously received the permit (§ 28). In case of a child § 45 (4) would also be relevant, which states that a new-born child of a family member with permanent right of residence in Estonia is entitled to permanent right of residence regardless of nationality. In case of the death of the EU citizen with right of residence in Estonia, the family member has the right to apply for a permanent residence permit under certain conditions (§ 45 (3)).

The possibility of the partners of EU citizens to take advantage of the freedom of movement and residence is mainly a question of a national legislation in every EU Member State when it comes to the aspects that have been left for them to decide. If the partner is an EU citizen, he/she has the freedom of movement already as an EU citizen, independent from his/her partner. If the partner is a third country national, the situation is somewhat stricter. Estonia does not recognise LGBT registered partnerships or civil unions as already discussed above. Thus, if according to a host state LGBT partnerships would be recognised, couples from Estonia cannot take advantage of that in the context of freedom of movement. Under Estonian law, same-sex couples also cannot marry, as already discussed.

There is no such statistical information available from the Ministry of Social Affairs or other official or unofficial sources regarding the impact/social reality of relevant legislation for LGBT persons. Similarly, based on the keyword search of the State Gazette database as of March 2014, no cases have reached any courts either. There are, however, pending cases on the national recognition of same-sex marriages registered in other countries and the issuing of a certificate of legal capacity to

contract same-sex marriage in another country.⁴⁷

⁴⁷ Estonia, Väljataga, A. (2014) E-mail correspondence with Mr Reimo Mets, head of NGO Seky, 3 March 2014.

C. Asylum and Subsidiary Protection

Council Directive 2004/83/EC of 29.04.2004 is fully implemented into Estonian national law by the Act on Granting International Protection to Aliens.

According to § 4 (1) a refugee is an alien who, owing to a well-founded fear of being persecuted or for reasons of race, religion, nationality, political opinion or membership in a particular social group, is outside his/her country of nationality and is unable or, owing to such fear, unwilling to avail himself/herself of the protection of that country and with regard to whom no circumstance exists precluding recognition as a refugee. There is no specification as to what is meant by those grounds for persecution. Nor was explanation provided in the Explanatory Note accompanying the Act's draft.⁴⁸ In practice, according to the Ministry of Interior, the notion of "particular social group" has been interpreted as also covering sexual orientation.⁴⁹

The former Citizenship and Migration Board, which was responsible for granting refugee status and subsidiary protection was reorganised in 2011 and is now part of the Police and Border Guard Board.⁵⁰ The new Board explained in its response to data request that the processing of applications for asylum does not include 'phallometry' or 'phallometric testing'.⁵¹ The asylum seeker may present any oral or written evidence to prove the circumstances referred to in the asylum application.

According to information from the newly founded Police and Border Guard Board, there was one application for asylum in 2009, which was substantiated on the alleged discrimination based on sexual orientation in the origin state.⁵² The application was rejected on the basis of §21(1) p 1, which requires rejection if another EU Member State was responsible for the review of the application.

According to § 7 of the Act on Granting International Protection to Aliens, family members of a refugee and of a person enjoying subsidiary protection are:

- his/her spouse;
- his/her and his/her spouse's unmarried minor child, including adopted child;
- unmarried minor child under his/her or his/her spouse's custody and maintained by him/her or his/her spouse, including adopted child. In case of shared custody the agreement of the other party sharing custody is required;
- his/her or his/her spouse's unmarried adult child if the child is unable to cope independently owing to his/her state of health or disability;
- a parent or grandparent maintained by him/her or his/her spouse if the country of origin does not provide support resulting from other family ties.⁵³

The above list is exhaustive; therefore, partners to whom the seekers of asylum or subsidiary protection are not legally married are excluded. The marriage must have been concluded before arriving in Estonia. Here again arises the issue over same-sex marriages already discussed under the

⁴⁸ Estonia, Ministry of Justice (*Justiitsministeerium*) Explanatory Note attached to the draft, available at:

<http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=052630010&login=proof&password=&system=ems&server=ragne11> (15.02.2008).

⁴⁹ Estonia, Estonian Human Rights Centre (2013), E-mail correspondence with Tarmo Türkson, Chancellor of the Ministry of Interior, 14 July 2012.

⁵⁰ Estonia, Police and Border Guard Act (*Politsei ja piirivalve seadus*), 6 May 2009, available at: www.riigiteataja.ee/akt/102072013018, available in English at: www.riigiteataja.ee/en/eli/512112013003/consolide.

⁵¹ Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*) (2010), E-mail correspondence, 11 January 2010.

⁵² Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*) (2010), E-mail correspondence, 11 January 2010.

⁵³ Estonia, Act on Granting International Protection to Aliens (*Välismaalasele rahvusvahelise kaitse andmise seadus*), 14 December 2005, § 7, available at: www.riigiteataja.ee/akt/121122013005, available in English at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516012014007/consolide.

Freedom of Movement heading. In addition, no other unions or relationships but legally certified marriage between two individuals are recognised. Police and Border Guard Board (*Politsei- ja Piirivalveamet*) confirms that the current regulation on international protection does not provide the option to reunite with a same-sex partner, adding that as of April 2014 no such applications have been submitted.⁵⁴

There is no such statistical information available from the Ministry of Social Affairs or other official or unofficial sources. This includes information regarding the impact/social reality of relevant legislation for LGBT persons. Similarly, no cases have reached any courts either, which is explained in detail above.

Since 2010, there have been no major political or legal developments. As the number of asylum seekers arriving in Estonia is very low (30 asylum applications were submitted in 2010, 66 in 2011, 77 in 2012 and 97 in 2013)⁵⁵, no updated information on the number of asylum seekers claiming persecution on the grounds of sexual orientation can be disclosed due to the need to protect their privacy.⁵⁶ However, there have is an evenly increasing number of persons claiming persecution on that ground in the past few years. It remains to be seen how the recent CJEU judgement in cases C-199/12, C-200/12 and C-201/12 and the enactment of the recast Qualification Directive 2011/95 are implemented with the latest applications.

⁵⁴ Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*) (2014), Response to request for information (Vastus teabenõudele), 15 April 2014.

⁵⁵ Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*), Asylum statistics (*Varjupaigastatistika*), available at: www.politsei.ee/dotAsset/218156.pdf.

⁵⁶ Estonia, Väljataga, A. (2014), Interview with Ms Anni Säär, legal expert of the Estonian Human Rights Centre's legal clinic for asylum seekers, 15 April 2014.

D. Family Reunification

The family reunification of Estonian citizens, EU citizens and third-country citizens is discussed in detail under the Freedom of Movement heading. Persons who have been granted international protection of any kind are covered by the Act on Granting International Protection to Aliens. According to § 65 of the Act, the Police and Border Guard Board decides on the reunification of families only if the persons applying for it constitute ‘family members’ of a person enjoying temporary protection. The exhaustive list of such persons is provided in § 7 (4) of the same Act:

- his/her spouse;
- his/her or his/her spouse’s unmarried minor child, including adopted child;
- other close relative who lived with him/her in the country of origin and was dependent on him/her.

Here again arises the issue over same-sex marriages already discussed under the Freedom of Movement heading. In addition, as it can be seen from § 7 (4), cohabiting or registered partners are not included in the list of ‘family members’. Therefore, registered or merely cohabiting same-sex couples will not have a right to unification.

There have been no cases on the grounds of sexual orientation within the context of family reunification.⁵⁷ There is no such statistical information available from the Ministry of Social Affairs or other official or unofficial sources. This includes information regarding the impact/social reality of relevant legislation for LGBT person. Similarly, no cases have reached any courts either, which is explained in detail above.

As of January 2014, according to the case law databases and the only legal clinic for asylum seekers in Estonia operating under the Estonian Human Rights Centre,⁵⁸ there is no relevant case law in the context of asylum proceedings. Therefore in this aspect no judicial body has issued an opinion on whether same-sex partnership counts as a legitimate basis for residence pursuant to the principle of family reunification. The Police and Border Guard Board has taken the position that it does not.⁵⁹

⁵⁷ Estonia, former Citizenship and Migration Board (*endine Kodakondsus- ja Migratsiooniamet*) (2008), Response to request for information, 4 February 2008; Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*) (2010), E-mail correspondence, 11 January 2010; Estonia, Ms Anni Säär, legal expert of the legal clinic for asylum seekers, face-to-face interview, 14 April 2014.

⁵⁸ Estonia, Väljataga, A. (2014) Ms Anni Säär, legal expert of the legal clinic for asylum seekers, face-to-face interview, 14 April 2014.

⁵⁹ Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*) (2014), Response to request for information (Vastus teabenõudele), 15 April 2014.

E. Freedom of Assembly

In general, freedom of assembly is guaranteed according to § 47 of the Constitution. More specific regulation is provided by the Public Assembly Act (*Avaliku koosoleku seadus*),⁶⁰ which sets out possible restrictions for freedom of assembly. There are no rules, which would discriminate on the grounds of sexual orientation in the Act, therefore, any discrimination that may occur is a question of the application and interpretation, rather than the text, of the law.

Inciting hatred, violence or discrimination on grounds of sexual orientation is mentioned as a basis for prohibiting a demonstration. Section 3 (3) of the Public Assembly Act declares as prohibited any assembly that incites hatred, violence or discrimination also based on the grounds of sexual orientation. Therefore there is a legal basis for prohibiting anti-LGBT demonstrations.

There has been constant public debate surrounding the yearly LGBT Pride parade that has taken place in Tallinn since 2004. During the 2006 parade counter-demonstrators attacked parade participants the police were accused of not providing sufficient protection. This also prompted Amnesty International to issue a statement calling for better protection for the freedom of assembly.⁶¹ In 2007 parade organisers issued a public statement that parade organisation ‘has turned out to be more complicated than in previous years’ and accused the public authorities of a lack of cooperation.⁶² The organisers also submitted a complaint to the Chancellor of Justice’s office. The Chancellor concluded that although the requirement by Northern Police Prefecture (*Põhja Politseiprefektuur*) to parade organisers to use a private security firm to guarantee participants’ safety is in itself legal, the refusal of the organisers to fulfil the requirement cannot be a ground for refusing to allow the parade to take place.⁶³ It also established that the Northern Police Prefecture had not followed standards of good governance by not fully cooperating with the parade organisers, as well as not correctly responding to their initial e-mails.⁶⁴

In conclusion, as pointed out by the Chancellor of Justice in his analysis of the Police Prefecture’s actions,⁶⁵ although the authorities seem to be well aware of their negative obligations not to disturb the parade, they are not so much aware of the positive obligation to provide an environment where freedom of assembly and related rights can be enjoyed (for example, by protecting protesters from counter-protesters).

In 2009, a demonstration “Marriage = Man + Woman” took place in Tartu organised by MTÜ Agape Eesti and the Union of Estonian Evangelical Students, accompanied by web-based campaign (<http://www.perekond.ee/>). The main message of the demonstration was to protest against attempts by the Ministry of Justice to regulate the relationship between same-sex couples. The demonstration was attended by circa 200 persons and received feedback and positive coverage in Estonian media.⁶⁶ Additionally, the accompanying campaign received 5754 signatures, which were forwarded

⁶⁰ Estonia, Public Meeting Act (*Avaliku koosoleku seadus*), 26 March 1997, available at: www.riigiteataja.ee/akt/123022011006, available in English at: www.riigiteataja.ee/en/eli/514112013003/consolide.

⁶¹ Estonia, Amnesty International (2006), Estonia: The right to freedom of peaceful assembly must be protected, Public statement, London, Amnesty International, 15 August 2006, available in English at: www.amnesty.org/en/library/asset/EUR51/001/2006/en/252de21b-d402-11dd-8743-d305bea2b2c7/eur510012006en.html (27.02.2014).

⁶² Estonia, Mets R. (2007), ‘Statement in regard to the organisation of Tallinn Pride 2007’ (*‘Pöördumine seoses Tallinna Pride 2007 korraldamisega seonduvalt’*), in Eesti Päevaleht Online, 12 July 2007, available at: <http://epl.delfi.ee/news/arvamus/reimo-mets-koik-erinevad-koik-vordsed.d?id=51093925> (27.02.2014).

⁶³ Estonia, Office of the Chancellor of Justice (*Õiguskantsleri kantselei*) (2007), Recommendation to observe legality and good governance (*Soovitus õiguspärasuse ja hea halduse tava järgimiseks*), September 2007.

⁶⁴ Estonia, Office of the Chancellor of Justice (*Õiguskantsleri kantselei*) (2007), Recommendation to observe legality and good governance (*Soovitus õiguspärasuse ja hea halduse tava järgimiseks*), September 2007, p. 13.

⁶⁵ Estonia, Office of the Chancellor of Justice (*Õiguskantsleri kantselei*) (2007), Recommendation to observe legality and good governance (*Soovitus õiguspärasuse ja hea halduse tava järgimiseks*), September 2007, p. 13.

⁶⁶ Estonia, Mets, R. (2009), ‘Tartlased avaldasid perekonnale toetust’, in Tartu Postimees, 26 November 2009, available at: <http://tartu.postimees.ee/193507/tartlased-avaldasid-perekonnale-toetust> (27.02.2014); Estonia, Vasli, K. (2009), ‘Tartus tuleb

to the Ministry of Justice.

There is no statistical information available from any official or unofficial sources regarding the impact/social reality of relevant legislation for LGBT persons. Similarly, there is no case-law within the freedom of assembly context in courts. The only case related to the freedom of assembly was handled by the Chancellor of Justice in 2007. This is described in detail above.

The last Baltic Pride in Tallinn took place in 2011 and the next one is scheduled for June 2014. In Estonia, the pride does not have a marching component and the pride actually means a festival with concerts and speeches. Significantly, the Pride event is partly financed by the Ministry of Social Affairs and the Gambling Tax Council. In 2013, a relatively large-scale petition was launched by the Foundation for the Protection of Family and Tradition to express concern over the future of the traditional family model. The petition gained 38046 signatures.⁶⁷ The campaign, however, did not include public demonstrations.

The trends over the past years demonstrate the more positive and consistent actions by the public authorities. They have not imposed any excessive obstacles to demonstrations promoting LGBT tolerance and the organisers of such events have assessed their cooperation with the police as positive.⁶⁸ The police have provided protection for such events. The same treatment is provided to counter-demonstrations presenting homophobic and/or transphobic sentiments. The police have been reluctant to determine them as hate incitement and there have been no court proceedings initiated to have them determined as such, thus there have been no grounds for prohibiting them. It must be noted that the counter-demonstrations have been organised by local religious organisations and churches and they have so far not been violent or aggressive towards LGBT people.

heteroparaad: Heinz Valk kiidab takka!', in Õhtuleht, 20 November 2009, available at: www.oh tuleht.ee/355832/tartus-tuleb-heteroparaad-heinz-valk-kiidab-takka (27.02.2014).

⁶⁷ Estonia, Homepage of the Foundation for the Protection of Family and Tradition, available online at: www.saptk.ee.

⁶⁸ Estonia, K. Grossthal and Meiorg, M. (2012) Implementation of the Council of Europe Recommendation to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity. Compliance Documentation Report. Estonia, Estonian Human Rights Centre, p 42.

F. Criminal Law, Hate Speech

Incitement of hatred and discrimination is prohibited by § 12 of the Constitution of the Republic of Estonia, which reads as follows:

‘...The incitement of national, racial, religious or political hatred, violence or discrimination shall, by law, be prohibited and punishable. The incitement of hatred, violence or discrimination between social strata shall, by law, also be prohibited and punishable’.

The Penal Code provides the main provisions regarding hate speech. Section 151 of the Code criminalises ‘activities which publicly incite to hatred, violence or discrimination on the basis of...sexual orientation...if this results in danger to the life, health or property of a person...’ This provision has never been used in practice against homophobic hate speech. In 2010, the Ministry of Justice (*Justiitsministeerium*) started to prepare a draft act amending the Penal Code, the version of which was published in 30 July 2012. This is further discussed below.

The Supreme Court has decided what text could be regarded as inciting to social hatred and violence, and interpreted the relevant provision of the Penal Code as follows:

‘§ 151 of the Penal Code is included in division “Offences against equality”. Violation of the right to equality means that in the case of groups that differ on the grounds of ethnic origin, race, colour, sex, language, origin, religion, political opinion, financial or social status a member of one group (“we”) denies the equality of the members of the other group (“others”). Under § 151 of the Penal Code the elements of the offence do not consist only in the denial of equality of the persons belonging to another group but also in incitement to such denial among other persons’.⁶⁹

There have been no criminal cases brought to court regarding homophobic hate speech, thus there have been no convictions and no sanctions.

Specifically, there have been no criminal proceedings instituted based on §151 of the Penal Code during the observed period since 2008. This has been confirmed by interviews with legal practitioners.⁷⁰

Homophobic motivation is not listed among general aggravating factors in § 58 of the Penal Code, although it has been stated by judges and prosecutors alike that various hate motives are all covered by the notion of “base motive”.⁷¹ According to the Penal Code, a crime is committed on aggravating conditions when its roots lie in self-interest or other base motives.⁷² Base motive, however, has not been strictly defined and in addition to social bias, motives such as jealousy, fit in the scope of the term. In practice base motive has not been applied in cases of hate crime.

In 2012, the Ministry of Justice drafted an amendment to the Penal Code to allow for hate to be

⁶⁹ Estonia, Supreme Court (*Riigikohus*) (2007), Cases of equal treatment and non-discrimination in Estonian Supreme Court practice (*Võrdse kohtlemise ja diskrimineerimise alased kaasused Eesti Vabariigi Riigikohtu praktikas*), available at: www.riigikohus.ee/vfs/682/t6lkimiseks_MEMO-%20eriraportoor%20%28L_Kanger%29.pdf (27.02.2014).

⁷⁰ Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*) (2010), E-mail correspondence, 11 January 2010; Estonia, Meior, M. and Väljataga, A. (2013), Interview with judge A. Rebane of Harju County Court at the Harju County Court Liivalaia Court House, 28 August 2013; Estonia, Meior, M. and Väljataga, A. (2013), Interview with prosecutors N. Lebed and A. Vanatoa at Harju County Court Liivalaia Court House, 17 June 2013; Estonia, Väljataga, A. (2013), Interview with deputy director general M.Arbo and head of the Tartu District J. Järva, 12 September 2013.

⁷¹ Estonia, Meior, M. and Väljataga, A. (2013), Interview with judge A. Rebane of Harju County Court at the Harju County Court Liivalaia Court House, 28 August 2013; Estonia, Meior, M. and Väljataga, A. (2013), Interview with prosecutors N. Lebed and A. Vanatoa at Harju County Court Liivalaia Court House, 17 June 2013.

⁷² Estonia, Penal Code (*Karistusseadustik*), §58, 6 June 2001, available in English at: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30068K11&keel=en&pg=1&ptyyp=RT&tyyp=X&query=penal>

considered as an aggravating circumstance for a crime and to make provisions on hate incitement more effective. The amendment aims to bring the Penal Code into conformity with Council Framework Decision 2008/913/JHA on racism and xenophobia. The current version of the draft includes sexual orientation and gender identity as protected grounds. Three roundtables with stakeholders including Estonian Women's Associations Roundtable, Estonian Internet Society, Estonian Human Rights Centre, Faculty of Law of the University of Tartu, Tallinn Law School, Estonian Bar Association, Gender Equality and Equal Treatment Commissioner *et al* were held.

The latest version of the proposed changes to the Penal Code (*Karistusseadustik*) includes hate motivation as an aggravating ground and a lower threshold for criminal responsibility for incitement to hatred.⁷³ The current draft version has removed obligation to prove the direct link between danger to life, health or property and the public statement under question. Instead either disruption to public peace or systematic nature of incitement must be proved. The list of grounds or hatred has been extended to citizenship, nationality, race, physical characteristic, health status, disability, age, gender, gender identity, language, origin, ethnic origin, religion and beliefs, sexual orientation, and property or social status. The same list has been added as grounds for bias that would be considered an aggravating circumstance for a crime. The same list of grounds was represented also in the incitement to hatred provision. However, as of April 2014 the amendments have not entered into force. Whether the amendments will be adopted with this exact wording or changes would be made, is yet not possible to predict. The draft is yet to be presented to the government and the parliament. In both stages changes in the draft may occur.

In addition to criminal law, civil law also includes a provision in the Law of Obligations Act (*Võlaõigusseadus*),⁷⁴ which prohibits defamation or dissemination of incorrect information. This provision was applied in 2011 by a claimant who had been slandered by anonymous net commentators because of his sexual orientation.⁷⁵ As of April 2014, the results of the proceedings have not been published since the judgement has not entered into force.

There is no statistical information available from any official or unofficial sources regarding the impact/social reality of relevant legislation for LGBT person. From the interviews with different stakeholders, it has however emerged that LGBT people do not consider themselves to be sufficiently protected by the current regulation.

⁷³ Estonia, Ministry of Justice (*Justiitsministeerium*) (2012), Draft Act of the Act on Amending Penal Code and Other Acts (*Karistusseadustiku ja teiste seaduste muutmise seaduse eelnõu*), available at: <http://eelvoud.valitsus.ee/main/mount/docList/80c748e0-9c4f-48d5-aea3-5f26da1de2c8#E63vbHpl>.

⁷⁴ Estonia, Law of Obligations Act (*Võlaõigusseadus*), 26 September 2001, available at: www.riigiteataja.ee/akt/129112013004, available in English at: www.riigiteataja.ee/en/eli/505122013001/consolide.

⁷⁵ Estonia, Veske, C. (2012), The Situation of Lesbian, Gay, Bisexual and Transgender Individuals (*Lesbi-, gei, biseksuaalsete ja transseksuaalsete inimeste olukord*), in Estonian Human Rights Centre (*Eesti Inimõiguste Keskus*), Human Rights in Estonia 2011 (*Inimõigused Eestis 2011*), Estonian Human Rights Centre, available at: <http://humanrights.ee/inimoiguste-aruanne-2/inimoigused-estis-2011>.

G. Transgender Issues

Transgender issues have a short history in the Estonian legal system. There is no practice, reported case-law in courts or statistics on transgender issues, including on discrimination based on a person's transsexuality. The Chancellor of Justice has been presented with one application; the case, however, was discontinued (summarised in Annex 1). The Gender Equality and Equal Treatment Commissioner has also received one application but discrimination was not identified in this particular case. Therefore, there has not been any opportunity to develop an approach to transgender discrimination. In 2011, the Supreme Court stated in a case regarding discrimination on the grounds of age that the catalogue of grounds of discrimination is not exhaustive. Therefore, there is no reason to assume that it excludes transgender identity.⁷⁶ However, no case-law in court to confirm the interpretation have emerged. The Equal Treatment Commissioner has, however, confirmed that discrimination on the ground of person being transgender, is processed by the Commissioner as gender discrimination.⁷⁷ Whether the similar approach is taken by courts is yet to be confirmed since there have been no cases in court on discrimination on the ground of person being transgender.

There are a number of legal acts that include provisions regulating specific aspects of transgender issues.

The regulation of 07.05.1999 no. 32 by the Ministry of Social Affairs Common requirements to medical acts of sex change (*Soovahetuse arstlike toimingute ühtsed nõuded*)⁷⁸ provides the basis for medical and legal acts related to gender/sex change. It is the belief of the Ministry of Social Affairs that the regulation has a somewhat vague legal status and it is mainly by tacit agreement that it is followed.⁷⁹

The regulation was enacted on the basis of § 8 (1) 6) of the Public Health Act (*Rahvatervise seadus*),⁸⁰ providing that one of the duties of the Ministry of Social Affairs is 'to plan and organise implementation of national programmes, projects and other measures for creation of a physical and social environment which is safe for health, prevention of health disorders and disease, and health promotion'. The Ministry of Social Affairs is of the opinion that the link between the general mandate given by § 8 (1) 6) and the regulation is too indirect. However, due to the lack of general unified regulation of the issues of transsexuality, the regulation was based on that provision. This does not make the regulation invalid or illegal. This provision does provide a general basis for the regulation and gender/sex change operations are not in any way legally inhibited.⁸¹ According to the Ministry of Social Affairs, there has been no need to develop a more comprehensive regulation. Scattered regulation has worked relatively well considering the small population in Estonia.

According to the regulation of 07.05.1999 no. 32, the precondition for deciding a person's gender and allowing medical acts necessary for gender/sex change is a decision by the medical expert commission appointed by the Minister of Social Affairs. The applicant must submit an application to the Ministry of Social Affairs requesting a decision by the expert commission. They must present the following evidence:

⁷⁶ Estonia, Supreme Court (Riigikohus), Judgement no 3-4-1-12-10 of 7 June 2011, p 32, available online in Estonian at: www.nc.ee/?id=11&tekst=222535250.

⁷⁷ Estonia, Gender Equality and Equal Treatment Commissioner (*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik*), Opinion no 11, 11 September 2008.

⁷⁸ Estonia, Uniform requirements for gender reassignment medical procedures (*Soovahetuse arstlike toimingute ühtsed nõuded*), 7 May 1999, available at: www.riigiteataja.ee/akt/91001.

⁷⁹ Estonia, Ministry of Social Affairs (*Sotsiaalministeerium*) (2008), E-mail correspondence, 8 February 2008.

⁸⁰ Estonia, Public Health Act (*Rahvatervise seadus*), 14 June 1995, available at: www.riigiteataja.ee/akt/120112013002, available in English at: www.riigiteataja.ee/en/eli/512122013004/consolide.

⁸¹ Estonia, Ms Helen Trelin, Advisor for the Department of Health at the Ministry of Social Affairs (*Sotsiaalministeerium*) (2008), Telephone interview, 7 April 2008.

- certification of transsexual identity during at least two years prior to the application;
- a psychiatrist's decision that excludes the possibility that the wish to undergo gender/sex change is caused by psychiatric disorder;
- compatibility of chromosomatic and gonad gender/sex certified by genetic research.

The medical expert commission's decision is the basis for a decree by the Ministry of Social Affairs, which authorises medical acts to change a person's gender/sex. At least two years must pass from the beginning of the medical treatment before the expert commission will issue a decision on the change of gender/sex. This will be a basis for subsequent legal changes necessary for a person to wholly acquire new gender.

Name change of the person is performed by the vital statistics office. This possibility is provided by § 15 of Names Act (*Nimeseadus*):⁸²

'If the gender of a person is changed, on the basis of a written application of the person, the parent(s) of the minor or of the guardian of the minor ward, a new given name shall be assigned to the person and a foreign-language surname of the person may be changed if the gender feature is reflected in the surname pursuant to the national tradition of the person'.

Section 49 of Population Register Act (*Rahvastikuregistri seadus*) regulates the formation and granting of the new personal identification code for the person who has undergone the gender/sex change, because the code is formed on the basis of a person's sex and date of birth.⁸³ According to § 52 of this Act, the new personal identification code will be formed and granted by an authorised processor 'upon amendment of the data on the sex of a person on the basis of an application of the person and a certificate of a medical institution holding a corresponding licence'.

The formation and granting of the new personal identification code is also the basis for the issuance of a new birth certificate, which will be organised by the vital statistics office (§ 52 of the Population Register Act). The birth certificate is the basis for a new passport.

In addition, the regulation of 18.01.2002 no. 28 Statute for managing the 'state pension insurance register' (*Riikliku pensionikindlustuse registri' pidamise põhimäärus*)⁸⁴ is important since it regulates the state pension insurance register. The data in this register is the basis for accounting for social tax paid by or on behalf of persons, their years of pensionable service and accumulation period, and the procedure of determining and paying their state pension and benefits (§ 4 (2)). Paragraph 31 of this regulation provides for a change of data and personal identification code upon a change of gender/sex.

The situation is more complicated for diplomas that have already been issued. The leaving certificates for primary and secondary schools are regulated by the Estonian Government Regulation on the Statute and Formats of Primary and Secondary School Leaving Certificates and the State-Examination Certificate.⁸⁵ The duplicate is issued by the headmaster of the school where the applicant was granted the leaving certificate. The leaving certificate with changed personal data could, according to some interpretations, be issued according to § 17(1.2) of the same regulation, which states that the owner can ask for an annulment of the original document and request a duplicate

⁸² Estonia, Names Act (*Nimeseadus*), 15 December 2004, available at: www.riigiteataja.ee/akt/13261875, available in English at: www.riigiteataja.ee/en/eli/508112013004/consolide.

⁸³ Estonia, Population Register Act (*Rahvastikuregistri seadus*), 31 May 2000, available at: www.riigiteataja.ee/akt/122112013002.

⁸⁴ Estonia, Statutes for maintenance of the «State pension registry» (*Riikliku pensionikindlustuse registri' pidamise põhimäärus*), 18 January 2002, available at: www.riigiteataja.ee/akt/117012014027.

⁸⁵ Estonia, Statute and Forms of the Diplomas of Basic Schools and Upper Secondary Schools and State Exams (*Põhikooli ja gümnaasiumi lõputunnistuse ning riigieksamitunnistuse statuut ja vormid*), regulation no 113 of the Government of the Republic, available at: <https://www.riigiteataja.ee/akt/13337919?leiaKehtiv>.

if inaccuracies or errors in the formalization of the original document are established. However, due to the unambiguity of the provision, the practice has been inconsistent and dependent on the particular head master.⁸⁶ This particular aspect is important, since it is a requirement to present diplomas when applying for a position in public sector and may be requested for when applying for a position in private sector.

Prior to 9 July 2014, §10(1) of the Family Law Act prescribed only that a marriage is void when persons of the same sex are married without offering a special solution for occasions when the ground of the invalidity marriage emerged during the marriage.⁸⁷ There were no special provisions for cases, where one of the spouses goes through a gender change operation. On 9 July 2014 amendments to Family Law Act entered into force, which prescribe that in such cases the marriage would not be deemed void from the beginning⁸⁸ and the annulment would not have a retroactive effect and, for example, the marital property contracts and other binding agreements would remain in force.

According to the database of court case-law, there are no cases concerning transsexuals as of January 2014. The trends over the period under review (since 2008) has demonstrated no changes. There is a consistent lack of case-law in all aspects of transgender issues and although there have been cases on discrimination, the number of these cases has remained consistently low.

Statistical information on name changes based on change of gender and number of persons who changed their gender/sex is provided in Annex 2.

Tallinn University of Technology ordered a survey to be conducted in 2012 on the attitudes of the general public towards LGBT people and different aspects of their lives.⁸⁹ One section concerned transgender people. Almost 2/3 of the respondents believed the existence of transgender condition (“Do you believe that a person who was born as a man can feel himself as a woman and vice versa – person born as a woman feel herself as a man”) but only 35% considered it acceptable while 50% considered it unacceptable (the rest did not know). This was the first time when such questions were asked from the public, thus there is no other survey to compare it to and no trends can be identified based on that.

There have been no significant legal or social developments in regard to transgender issues. The possible legal act covering all the different aspects of gender modification has still not been drafted although the Ministry of Social Affairs acknowledged the need for that already in 2008 when the first version of the present Study was compiled. The only development that could be identified is the draft amendments by the Ministry of Justice in regard to the faith of marriage contracted already before gender rectification.

⁸⁶ Estonia, K. Grossthal and Meior, M. (2012) Implementation of the Council of Europe Recommendation to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity. Compliance Documentation Report. Estonia, Estonian Human Rights Centre, p 48.

⁸⁷ Estonia, Family Law Act (*Perekonnaseadus*), 18 November 2009, available at: www.riigiteataja.ee/akt/127062012012, available in English at: www.riigiteataja.ee/en/eli/530102013016/consolide.

⁸⁸ Estonia, Family Law Act (*Perekonnaseadus*), 18 November 2009, available at: www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013016/consolide

⁸⁹ Estonia, Turu-uuringute AS (2012) LGBT thematic public opinion survey (*LGBT teemaline avaliku arvamuse uuring*), available at http://www.erinevusrikastab.ee/wp-content/uploads/2014/03/survey_LGBT.pdf.

H. Miscellaneous

It should be mentioned that the Constitution of Estonia includes in its catalogue of fundamental rights the prohibition of discrimination (§ 12): ‘Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds...’

As it is stated in the report by the Supreme Court of Estonia on cases concerning equal treatment, ‘this provision is considered to be a very modern one, as it includes inter alia discrimination on the basis of “property or social status”, *i.e.*, the ground that usually is not included in the discrimination catalogue’.⁹⁰ The list of grounds of discrimination is not exhaustive, as is indicated by the phrase ‘or other grounds’. The Supreme Court has developed and repeatedly applied a test for determining whether a treatment is unequal: ‘if there is a reasonable and appropriate ground, the unequal treatment in legislation is justified’.

Regardless of the long-time and clear constitutional prohibition of discrimination, the statistical information shows that the Estonian population is fairly ignorant with respect to discrimination based on sexual orientation.

The Ministry of Social Affairs ordered a poll in 2007 as part of the EU Equal Opportunities Year.⁹¹ Among other grounds of discrimination, sexual orientation was also included. The poll demonstrated that the Estonian population rarely considers sexual orientation to be one of the grounds of discrimination. Only 1 per cent of the people who had been discriminated against or whose acquaintances had been discriminated against recognised sexual orientation as a probable ground. However, 19 per cent of the respondents who found that discrimination occurs in Estonia often or sometimes did think that sexual orientation is also a ground of discrimination. Yet, ranking the cited grounds of discrimination by rate of incidence, sexual orientation is only 14th.

The Ministry of Justice Affairs also referred to a 2007 research project on xenophobic and racist expressions conducted with scientists from Tartu University and Tallinn University.⁹² One of the questions (no. 61) posed in that research was: *People of what specific background would you not want to work with?* One of the possibilities was homosexuals. The question’s purpose was to measure tolerance of background factors other than nationality.

Table 1. Statistics of answers by respondents of Estonian and Russian nationalities. *Ministry of Justice, Response to questions (Vastus küsimustele) (30.01.2008).*

Background	Respondents of Estonian nationality	Respondents of Russian nationality	Total
Homosexuals	37.8	48.2	41
Former prostitutes	27.1	40	31
People with criminal background, former prisoners	62.6	66.2	63.7
Drug addicts	77.4	89.3	81
HIV, AIDS carriers	51.9	52.9	52.2

⁹⁰ Estonia, the Supreme Court (*Riigikohus*) (2007), Cases of equal treatment and discrimination in the practice of the Supreme Court of the Republic of Estonia (*Võrdse kohtlemise ja diskrimineerimise alased kaasused Eesti Vabariigi Riigikohtu praktikas*), available at: <http://www.riigikohus.ee/vfs/682/>, p. 1.

⁹¹ Estonia, Ministry of Social Affairs (*Sotsiaalministeerium*) (2008), E-mail correspondence, 8 February 2008.

⁹² Estonia, Ministry of Justice (*Justiitsministeerium*) (2008), E-mail correspondence, 31 January 2008.

People with physical disabilities	2.1	7.6	3.8
People of other nationalities	3.5	1	10.8
No such people	13.7	4	10.9
Hard to say	1.3	2.9	1.8

Those over 65 are more intolerant (only 5 per cent answered that there are no people whom they would not want to work with). People aged 25-44 are more tolerant towards homosexuals. Men, as compared to women, are less tolerant towards homosexuals (48.9 per cent of men and 28.6 per cent of women). People with higher education are more tolerant (20.5 per cent answered 'no such people').

On the subject of same-sex marriages and adoption, the Ministry of Social Affairs referred to 2006 Eurostat Eurobarometer research that showed 21 per cent of Estonians thought that same-sex marriages should be allowed everywhere in Europe and 14 per cent would have given homosexuals the right to adopt.⁹³

Tallinn University of Technology ordered a survey to be conducted in 2012 on the attitudes of the general public towards LGBT people and different aspects of their lives.⁹⁴ Only 38% of the respondents considered homosexuality as acceptable while 57% considered it unacceptable. Homosexuality of the person was the least relevant where the person was a salesperson (66% did not consider sexuality relevant in a buy-sell situation) and the most relevant in the situation where the child's friend's parents are a same-sex couple (33% would not allow their child to go play in such a home).

In 2009, the Ministry of Justice published a study on the legal status and situation of non-marital cohabitations.⁹⁵ The study concentrated on non-marital cohabitations in general, analysed the problems arising from that and different solutions to them. The study did not reach a specific conclusion but does bring out the benefits of registered partnerships. The latest development on this subject is a draft of Cohabitation Act, which is currently being processed in the parliament (see page 14 above for more details).

The survey by Tallinn University of Technology demonstrated that 46% of the respondents would not mind if same-sex couples could register their relationship. At the same time, however, only 34% would allow them to marry. While 35% considered it acceptable that same-sex partner would be allowed to adopt his/her partner's child, only 26% thought they should be allowed to adopt a child not related to either of the partner (both for adopted as a couple and as a single person).

There are no laws in Estonia, which are similar or comparable to the institutional homophobia that surfaced in Lithuania. In contrast, the Ministry of Social Affairs has referred to the current national study curriculum set by the Ministry of Education and Science (*Haridus- ja Teadusministeerium*), which, in the opinion of the Ministry of Social Affairs gives a clear basis for discussions on sexual minorities.⁹⁶ The curriculum foresees that one of the aims of the human study classes be the increase of pupils' tolerance of other people's differences and their understanding of the nature of sexuality.

Although there are no laws as such that could be defined as an institutional homophobia, the Gender

⁹³ Estonia, Ministry of Social Affairs (*Sotsiaalministeerium*) (2008), E-mail correspondence, 8 February 2008.

⁹⁴ Estonia, Turu-uuringute AS (2012) LGBT thematic public opinion survey (*LGBT teemaline avaliku arvamuse uuring*), available at http://www.erinevusrikastab.ee/wp-content/uploads/2014/03/survey_LGBT.pdf

⁹⁵ Estonia, Olm, A. (2009), Non-marital cohabitation and its legal regulation (*Mitteabieluline kooselu ja selle õiguslik regulatsioon*), Tallinn, Ministry of Justice (*Justiitsministeerium*), available at www.just.ee/orb.aw/class=file/action=preview/id=44568/Partnerlussuhted_anal%FC%FCs_09.07.2009.pdf.

⁹⁶ Estonia, Ministry of Social Affairs (*Sotsiaalministeerium*) (2010), Answers to Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation (*Teemauuringu homofoobia ja diskrimineerimise kohta seksuaalse sättumuse alusel vastused*), no 15.1-1/90, January 2010.

Equality and Equal Treatment Commissioner has referred to a decree by one local municipality.⁹⁷ The local municipality amended one of its decrees concerning social benefits payable to resident-families of the municipality to explicitly exclude same-sex cohabiting couples. The case preceding the amendment was referred to the Commissioner but since the subject matter is not within her competence, she was forced to reject it. The facts of the case are summarised in Annex 1.

The case was referred to the Chancellor of Justice. The Chancellor of Justice found the initial refusal by Viimsi, the local municipality in question, to provide social benefits to be void.⁹⁸ The Viimsi municipality accepted the opinion but went on to amend the decree so as to exclude same-sex cohabiting partnerships and rejected the couple's second application as well. The applicants turned to the Tallinn Administrative Court. The court decided that the decree of the local municipality was void in the part in which it did not perceive families with same-sex parents as households. The court relied on § 56 of the Administrative Proceedings Act (*Haldusmenetluse seadus*) and declared the decree to be void due to invalid reasoning. On 15 June 2010, Tallinn Circuit Court ruled that the judgement of the first instance remains in force.⁹⁹ The Viimsi case constitutes a precedent and since then there have been no similar administrative acts issued by any municipality.

⁹⁷ Estonia, Gender Equality and Equal Treatment Commissioner (*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik*) (2010), Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation (*Teemauuring homofoobia ja diskrimineerimise kohta seksuaalse sättumuse alusel*), no 3-1/005, 11 January 2010.

⁹⁸ Estonia, Chancellor of Justice (*Õiguskantsler*) (2010), Response to questionnaire (*Vastus küsimustikule*), no 5-3/1000177, 11 February 2010.

⁹⁹ Estonia, Tallinn Circuit Court (*Tallinna Ringkonnakohus*) (2010), Judgement no 3-09-1486/33, 15 June 2010.

I. Intersex Issues

Intersex people are protected by the general equal treatment requirement,¹⁰⁰ which is stated in §12 of the Constitution, which states:

‘Everyone is equal before the law. No one may be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds.’¹⁰¹

The incitement of national, racial, religious or political hatred, violence or discrimination shall, by law, be prohibited and punishable. The incitement of hatred, violence or discrimination between social strata shall, by law, also be prohibited and punishable.’

According to the Ministry of Social Affairs, it is currently unclear whether the law covers intersex discrimination or not. This is so mostly due to lack of case law of practice both in the medical and legal sector.

However, the Ministry does not see any reasonable arguments for excluding intersex persons from the scope of the anti-discrimination provisions. There are no policies designed to explicitly tackle intersex discrimination, other than the policies and practices deriving from §12 of the Constitution. Again, there are no intersex-specific policies or practices to refer to.¹⁰²

The current regulation does not foresee any flexibility regarding intersex persons as gender (choice between male or female) is marked on every birth certificate. Although the gender could be amended later, there is no option to leave the field blank.

The necessity of surgery is assessed individually in each and every case, whereas when working with intersex patients the general rules of healthcare service contracts in §§ 758–773 of the Law of Obligations Act (*Võlaõigusseadus*) are followed.¹⁰³ Paragraph 766 of that Act foresees that healthcare services require a prior informed consent of the patient or his legal representative. In cases concerning patients of restricted legal capacity (including those under 18 years of age) these rights are attributed to his/her legal representatives in so far as the patient is unable to consider the pros and cons responsibly.

Whether or not a patient is able to reasonably assess the effects of the surgery or procedure is up to the given healthcare professional to decide. The Estonian Medical Association (*Eesti Arstide Liit*) too admitted that the necessity of surgery is assessed on an individual basis and therefore no uniform rules or protocols apply.¹⁰⁴ For example, girls with Turner’s syndrome, persons with androgen resistance or boys with hypospadias are treated in a completely different manner. There are no separate rules on procedures that guide the treatment of diagnoses, which relate to undetermined biological gender. General standards of service and rules on procedures are prescribed by professional medical associations. Different fields of medicine that deal with conditions related to undetermined biological gender are gynaecology, urology and paediatrics (the list is not exhaustive).

During the period of 1992–2012 only one child of undetermined biological gender has been born¹⁰⁵,

¹⁰⁰ Estonia, Ministry of Social Affairs (*Sotsiaalministeerium*) (2014), Chief Specialist of Health Care Department Ülle Jordan, Reply to request of information (*Vastus teabenõudele*), 28 February 2014.

¹⁰¹ Estonia, The Constitution of the Republic of Estonia (*Eesti Vabariigi Põhiseadus*), 28 June 1992, available at: www.riigiteataja.ee/akt/127042011002, available in English at: www.riigiteataja.ee/en/eli/530102013003/consolide.

¹⁰² Estonia, Ministry of Social Affairs (*Sotsiaalministeerium*) (2014), Chief Specialist of Health Care Department Ülle Jordan, Reply to request of information (*Vastus teabenõudele*), 28 February 2014.

¹⁰³ Estonia, Law of Obligations Act (*Võlaõigusseadus*), 5 June 2002, available in English at: <http://www.riigiteataja.ee/en/eli/ee/506112013011/consolide/current>

¹⁰⁴ Estonia, Ministry of Social Affairs (*Sotsiaalministeerium*) (2014), Chief specialist of health care department Ülle Jordan, Reply to request for information (*Vastus teabenõudele*), 15 April 2014.

¹⁰⁵ Estonia, Ministry of Social Affairs (*Sotsiaalministeerium*) (2014), Chief Specialist of Health Care Department Ülle Jordan, Reply to

hence there has been no urgent need for the precise regulation. This of course cannot be regarded as a justification for the general lack of clarity in every aspect of the field. However, it explains the scarcity of information relevant to this research.

request of information (*Vastus teabenõudele*), 15 April 2014. See also: Estonia, National Institute for Health Development (*Tervise Arengu Instituut*), Birth Statistics, available online in Estonian at: www.tai.ee/et/tegevused/registrid/meditsiiniline-sunniregister-ja-raseduskatkestus-andmekogu/statistika

J. Good practices

The Gender Equality Department of the Ministry of Social Affairs has opted for a wider notion of gender equality issues and participates actively in the issues of sexual minorities.¹⁰⁶ In 2009, the Department consulted with different LGBT organisations and the representative of the Department delivered a presentation at the Gay Pride Baltic in Riga. In 2013, the Ministry is partly financing the Baltic Pride. The Department worked on increasing competence in the field, which was previously ignored by the state.

There are several instances in which Estonian law goes beyond the EU acquis. The Gender Equality and Equal Treatment Commissioner has capacity to deal with cases of sexual orientation discrimination, albeit limited to work-related instances as explained in the first chapter. The Commissioner is also inhibited in her work due to limited resources available to her, which is discussed in detail in the Thematic Legal Study on the impact of the Race Equality Directive in Estonia. Homophobic hate speech has been criminalised along with other discriminatory aspects in the Penal Code, however there have been no instances of its application, which has prompted the Ministry of Justice to review and specify the provision in future.¹⁰⁷

The Equal Treatment Commissioner has also decided that any discrimination based on person being transgender would be interpreted as gender discrimination.¹⁰⁸ This interpretation is yet to be tested by the court as well but there is no reason why they should not apply the practice of the Commissioner.

The Ministry of Justice has also published a study on the legal regulation concerning non-married cohabiting couples, discussing in detail also same-sex couples.¹⁰⁹ Also, the new national study curriculum set by the Ministry of Education and Science (*Haridus- ja Teadusministeerium*) gives a clear basis for discussions on sexual minorities.¹¹⁰

In 2010, Tallinn Law School at Tallinn University of Technology (*Tallinna Tehnikäilikooli õiguse instituut*) launched the project Diversity Enriches (*Erinevus rikastab*), which is supported by the European Union Programme for Employment and Social Solidarity - PROGRESS (2007-2013). The main objectives of the project are better implementation of the legislation on non-discrimination and fostering the dissemination of information on EU and national policy and legislation in the non-discrimination field. However, the project can also be considered to have influence on the national policy to combat discrimination and promote equality beyond legislation. The project involves awareness raising and advocacy. Homophobia has been a consistent focal point and priority throughout the project.¹¹¹

Non-governmental organisation Estonian Human Rights Centre (*Eesti Inimõiguste Keskus*) compiled

¹⁰⁶ Estonia, Ministry of Social Affairs (*Sotsiaalministeerium*) (2010), Answers to Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation (*Teemauuringu homofobia ja diskrimineerimise kohta seksuaalse sättumuse alusel vastused*), no 15.1-1/90, January 2010.

¹⁰⁷ Estonia, Ministry of Justice (*Justiitsministeerium*) (2010), Reply to FRALEX questionnaire (*Vastus FRALEX-i Küsimustikule*), 4 February 2010.

¹⁰⁸ Estonia, Gender Equality and Equal Treatment Commissioner (*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik*) (2008) Opinion no 11, 11 September 2008.

¹⁰⁹ Estonia, Olm, A. (2009), Non-marital cohabitation and its legal regulation (*Mitteabieline kooselu ja selle õiguslik regulatsioon*), Tallinn, Ministry of Justice (*Justiitsministeerium*), available at www.just.ee/orb.aw/class=file/action=preview/id=44568/Partnerlussuhted_anal%FC%FCs_09.07.2009.pdf.

¹¹⁰ Estonia, Ministry of Social Affairs (*Sotsiaalministeerium*) (2010), Answers to Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation (*Teemauuringu homofobia ja diskrimineerimise kohta seksuaalse sättumuse alusel vastused*), no 15.1-1/90, January 2010.

¹¹¹ Estonia, Diversity Enriches campaign, available at: www.ernevusrikastab.ee/en/about/.

a report on the implementation of the Council of Europe's Recommendation CM/Rec(2010)5 in Member States on measures to combat discrimination on grounds of sexual orientation or gender identity.¹¹² The report, which was published in 2013, analyses the situation of LGBT people in Estonia and draws attention to the following issues:

- 1) public authorities are not sufficiently informed of the LGBT problems, there are no regular statistics kept or surveys held on the topic;
- 2) lack of resources and underfinancing of the Gender Equality and Equal Treatment Commissioner;
- 3) absence of a concrete anti-discrimination framework

The report and following advocacy activities were financed by ILGA-Europe.

As a progressive step, in 2012, the Ministry of Justice drafted a Cohabitation Act (*Kooseluseadus*) concept, which among other things includes the right for same-sex couples to register their partnership.¹¹³ This comes in response to the Chancellor of Justice's (*Õiguskantsler*) memorandum to the Minister of Justice on 23 May 2011 requiring provision of equal protection to families with non-married partners, including same-sex partners.¹¹⁴ The concept proposed a two-part-system: partners would be able to register their relationship in combination with providing certain mutual rights and obligations to factual relationships. On 7 December 2012, the decision was made to split the concept into two. Due to the strong opposition from the neo-conservative Pro Patria and Res Publica Union (*Isamaa ja Res Publica Liit*), the Ministry of Justice continued to work only on the concept of factual cohabitation, which does not cover same-sex partnerships.

¹¹² Council of Europe, Committee of Ministers (2010) Recommendation Rec(2010)5 to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010.

¹¹³ Estonia, Ministry of Justice (*Justiitsministeerium*) (2012), 'Justiitsministeerium ootab arvamusi kooseluseaduse kontseptsiooni kohta', Press release, 28 August 2012, available at: www.just.ee/57148.

¹¹⁴ Estonia, Chancellor of Justice (*Õiguskantsler*) (2011), 'Seisukoht vastuolu mittetuvastamise kohta: doc no 6-1/100737/1102413', 23 May 2011.

Conclusions

It is difficult to draw any definite conclusions from the research conducted, as the amount of available information is insufficient for informed analysis. As most laws that provide specific rights for LGBTs are relatively recent, there has not been enough time for practices to be developed.

As a result of the research, the team has found that Estonia has to great extent finalised the implementation of all relevant EU legislation. However, whether this actually will have positive impact in the status and rights of LGBTs, remains to be seen.

Although Estonia's very modern section on fundamental rights goes beyond those of many other countries, the rest of the body of laws is in need of development. For example, the Estonian legal system still does not recognise unmarried couples or couples in civil unions or registered partnerships. This severely affects the rights of LGBTs in areas of freedom of movement, asylum and subsidiary protection, including family reunification. Estonian lawmakers have explicitly excluded LGBT marriages from the definition of marriage.

Protection against hate speech, provided by law, needs to be put into practice to create an environment that raises public awareness of LGBT rights. The amendments that are being drafted in the Ministry of Justice, should be proceeded with to make the prohibition of hate speech and hate crimes more effective.

In great need of clarification and development is legislation related to transsexuals and gender/sex change. The present dispersed regulation does not sufficiently protect their interests.

There have been no instances of similar developments to the legislation adopted by Lithuania.

As a positive initiative, the drafted amendments to the Family Law Act (p 29) should be mentioned, since they demonstrate that legislators are starting to see transgender issues as real-life situations with legal consequences, rather than purely hypothetical and marginal problems.

Annex 1 – Case Law

Implementation of Employment Directive 2000/78/EC

Case title	Conciliation procedure for resolution of discrimination dispute (case no. 12/071719) ¹¹⁵
Decision date	[Confidential according to § 35 ⁸ of the Chancellor of Justice Act (25.02.1999)]
Reference details	Office of the Chancellor of Justice (<i>Õiguskantsleri kantselei</i>)
Key facts of the case	The Ministry of Social Affairs forwarded an application to the Chancellor of Justice in which the Applicant claimed that he/she had been discriminated on the grounds of his/her sexual orientation and/or his/her gender (the case involved a transsexual person). The Applicant submitted his/her application to work for two companies, but both companies refused to hire him and the applicant claims it was because of his/her transsexuality. The Chancellor of Justice requested that the Applicant specify his/her request, because the Applicant had not clearly expressed a request to initiate conciliation proceedings. The Chancellor of Justice turned to the Respondents with a request to participate in the conciliation proceedings and present their explanations and statement regarding the case as described by the Applicant.
Main reasoning/argumentation	[Confidential according to § 35 ⁸ of the Chancellor of Justice Act (25.02.1999)]
Key issues (concepts, interpretations) clarified by the case	[Confidential according to § 35 ⁸ of the Chancellor of Justice Act (25.02.1999)]
Results (sanctions) and key consequences or implications of the case	The Respondents did not wish to participate in the conciliation proceedings; therefore, the Chancellor of Justice terminated the proceedings in the present case.
Case title	No name (the case was summarised without date and reference numbers in the response from the Chancellor of Justice to request for information)
Decision date	2009 (the case was summarised without date and reference numbers in the response from the Chancellor of Justice to request for information)
Reference details	Office of the Chancellor of Justice (<i>Õiguskantsleri kantselei</i>)

¹¹⁵ Estonia, Office of the Chancellor of Justice (*Õiguskantsleri kantselei*) (2008), Response to request for information (*Vastus teabenõudele*), no. 5-3/0800287, 4 February 2008.

Key facts of the case	The applicant requested the opinion of the Chancellor on the compatibility of § 10 of the Equal Treatment Act with Directive 2000/78/EC. While discussing the draft of the Act, the representatives of the religious organisations were of the opinion that it allowed them not to employ or relieve from work persons from sexual
Main reasoning/argumentation	The Chancellor conducted an abstract normative review and found the eventual wording of § 10 of the Act to be compatible with both the Estonian constitution and Directive 2000/78/EC.
Key issues (concepts, interpretations) clarified by the case	This was the first time the Chancellor of Justice reviewed § 10 of the Equal Treatment Act.
Results (sanctions) and key consequences or implications of the case	None

Freedom of Movement

Case title	Nullity of same-sex marriages, case no nr 6-1/100737/
Decision date	23 May 2011
Reference details	Office of the Chancellor of Justice (<i>Õiguskantsleri kantselei</i>)
Key facts of the case	Applicant turned to the Chancellor asking to determine whether §10 (1) of the Family Law Act (2009 redaction) (stating that marriage can only be contracted between a man and a woman) is in conformity with the Constitution.
Main reasoning/argumentation	The Chancellor had already given an opinion on the topic in 2006 and in 2009, where he found that restricting marriage to heterosexual couples is justified distinction. The Chancellor was of the opinion that such differentiation is not discriminatory but it is problematic that there is no regulation concerning cohabitation of same sex partners.
Key issues (concepts, interpretations) clarified by the case	Whether there is a constitutional right to recognition of same-sex marriages? The Chancellor had concluded that same-sex partnerships fall under the scope of the right to respect for family and private life.

Results (sanctions) and key consequences or implications of the case	The Chancellor ruled that the current regulation whereby the concept of marriage is limited only to registered unions between a man and a woman is in conformity with the constitution and international treaties. Having confirmed that the definition of marriage provided in §10(1) of Family Law Act is in line with the constitution, the Chancellor issued a memorandum stressing the urgent need for legal regulation of same sex partnerships.
Case title	The same-sex partner's right to apply for residence permit under Aliens Act, case nr 6-1/120905 (see also cases 6-1/130202, 6- 1/130838)
Decision date	4 November 2013
Reference details	Office of the Chancellor of Justice (<i>Õiguskantsleri kantselei</i>)
Key facts of the case	In 2012, the Department of Citizenship and Migration of the Police and Border Guard Board refused to issue a residence permit to a same-sex partner of an Estonian citizen. Police and Border Guard relied on the Family Law Act, explaining that the only union recognised in Estonian law is marriage between a man and a woman and as factual cohabitation does not have any legal impact, same-sex partners cannot be considered to be neither spouses nor family members and therefore are not granted residence permit pursuant to the principle of free movement. Aliens Act does not enlist same-sex partnership among the basis of legal residence. The Estonian citizen whose partner had been refused residence permit turned to the Chancellor for review of the constitutionality of Aliens Act.
Main reasoning/argumentation	Aliens Act does not enlist same-sex partnership among the basis of legal residence whereas according to Citizen of European Union Act same-sex partners are included in the notion of household members. Considering that same-sex partnerships fall under the scope of the right to family life, this leads to unequal treatment of EU citizens and third country or Estonian nationals.
Key issues (concepts, interpretations) clarified by the case	Whether the Aliens Act is in line with the constitution and international treaties?
Results (sanctions) and key consequences or implications of the case	In November 2013, the Chancellor issued a memorandum ¹¹⁶ to the Ministry of the Interior (<i>Siseministeerium</i>) where he concluded that the current provisions are indeed not in conformity, and suggested that relevant amendments be introduced in Aliens Act.

Criminal Law, Hate Speech

¹¹⁶ Estonia, Chancellor of Justice (*Õiguskantsler*) (2013), Memorandum on the application of residence permit on the grounds of same-sex partnership, (*Õiguskantsleri märgukiri: elamisloa taotlemine samasoolisele elukaaslasele*), no 6-1/120905/1304680, available at: http://oiguskantsler.ee/sites/default/files/field_document2/õiguskantsleri_märgukiri_elamisloa_taotlemine_samasoolisele_elukaaslasele.pdf.

Case title	Clarification on refusing the application (no. 14-1/071238/0705697)
Decision date	08.08.2007
Reference details	Office of the Chancellor of Justice (<i>Õiguskantsleri kantselei</i>)
Key facts of the case	An Applicant turned to the Chancellor of Justice, requesting proceedings against a publicly expressed opinion that incited denigration of the gay movement.
Main reasoning/argumentation	Two paramount human rights collide in this particular case. On the one hand, the Constitution emphasises everyone's right to freedom of expression; on the other hand, it is an important aspect of the Constitution that everyone should respect and honour other people's rights and freedoms while exercising their own rights and freedoms and fulfilling their obligations.
Key issues (concepts, interpretations) clarified by the case	The Chancellor of Justice did not initiate proceedings based on the Application, because according to § 19 (1) of the Law of the Chancellor of Justice, everyone has the right to turn to the Chancellor of Justice to review whether any holder of public office has violated human rights. The case described by the Applicant concerned a dispute between two private individuals, for the settlement of which the Chancellor of Justice lacks
Results (sanctions) and key consequences or implications of the case	Since the Applicant did not wish to initiate the conciliation, the proceedings in this application were terminated.

Freedom of Assembly

Case title	Recommendation to observe legality and good governance (no. 7-4/071025/00706331)
Decision date	09.2007
Reference details	Office of the Chancellor of Justice (<i>Õiguskantsleri kantselei</i>)

Key facts of the case	<p>An Applicant turned to the Chancellor of Justice in regard to the activities of the Northern Police Prefecture in the preparation of the public meeting of Tallinn Pride. After two failed attempts to contact the Northern Police Prefecture by e-mail (19.03.2007 and 01.06.2007) to ask clarifications on requirements, propositions and wishes from police in regard to the planned event on 11.08.2007 and proposing to meet to discuss this in more detail, the Police finally responded on 22.06.2007 to the official enquiry (sent on 18.06.2007). The Police declared that the event cannot be organised in Tallinn Old Town as proposed by the organisers due to previous experiences and possible threats to public order and to safety of the participants. Also was noted that the event would disturb the constitutional right of other citizens to freedom of movement in the Old Town. The Police suggested a meeting with the organisers after they have found another place for the event. On 5.07.2007, the Police set additional requirements to the organisation of public meeting, which concerned traffic safety.</p>
Main reasoning/argumentation	<p>The Chancellor starts his reasoning by emphasising the importance of the freedom of assembly and expression for a democratic society, reminding that these freedoms ensure the pluralism of opinions in social and political discussions. He states that, from one side, state must refrain from interfering into the freedom of assembly, but, on the other side, state must also take positive measures to protect legal demonstrations from counter-demonstrations etc. This is especially important in case of persons of minority or who express unpopular views [para. 35]. The Chancellor rejects the position of the Police that the Pride Parade is an event in private interest and, therefore, it is the obligation of the organiser to provide the security - "If the police arrives then things are already bad. Well organised event is such where the police do not have to come at all." (para 36)</p> <p>The Chancellor also rejects the police's opinion that by using audio technology, the event turns from public meeting to public event (para 43). He reminds that the essential conditions of the concept of public meeting are multiplicity of participants, common goal, which is not merely social (e.g. entertaining concert, public gathered to see an accident etc), and internal connection (para 40).</p> <p>Considering that the freedom of assembly is a fundamental freedom, "the enjoyment of that right cannot be made dependent on conditions that make that enjoyment considerably more difficult or practically impossible. The requirement to involve security firm is undoubtedly considerable obstacle, since it brings with it additional</p>

	<p>(possibly considerable) costs for the organiser of the meeting.” (para 67)</p> <p>The Chancellor then goes on to admit that the freedom of assembly is subject to restrictions for the legitimate aim of protecting public order and security of participants when prescribed by law. And although the general obligation to ensure public order is on the police, the organiser of the meeting also has an obligation to take care that the meeting is peaceful and safe (para 69). However, it derives from the meaning of the legislation that the obligations of the organiser are restricted merely with the participants. And the participants are those who actively express the views the meeting intends to promote. Mere observers cannot be considered participants, although it might be difficult to draw the line (para 69-70). Previous negative assessment by the police on the safety of the planned meeting cannot be a basis for refusing the approval to the meeting. This also applies to not fulfilling the requirement to involve a security firm. Such a requirement can only be considered advisory (para 72). “Prohibiting a meeting because of that reasons should be <i>ultima ratio</i> and based on very compelling reasons” (para 73).</p> <p>The Chancellor concluded that considering the circumstances of the specific case, the requirement to involve a security firm was not illegal but this requirement could also not have been legally binding (para 74). The Chancellor admits that the practice does not provide a clear-cut solution as to where the obligations of the organisers of the meeting end and where the obligations of the police start. The uncertainty is further increased by the legal uncertainty of the Public Assembly Act. This is the reason why cooperation between public authorities and individuals is essential. Obviously, the finding of appropriate solutions is always dependent on the other side – organiser of the meeting – but the police can certainly help considerably with its openness, helpfulness and goodwill. (para 79)</p>
<p>Key issues (concepts, interpretations) clarified by the case</p>	<p>The Chancellor clarified the concept of public meeting. He also clarified the obligations of the police in regard to public meeting and its participants.</p>
<p>Results (sanctions) and key consequences or implications of the case</p>	<p>The Chancellor concluded that although the requirement by Northern Police Prefecture (<i>Põhja Politseiprefektuur</i>) to parade organisers to use a private security firm to guarantee participants' safety is in itself legal, the refusal of the organisers to fulfil the require cannot be a ground for refusing to allow the parade to take place.</p>

Miscellaneous

Case title	Judgement of the Tallinn Circuit Court on 15 June 2010, no 3-09-1489/33
Decision date	15 June 2010
Reference details	Tallinn Circuit Court (<i>Tallinna Ringkonnakoht</i>)
Key facts of the case	<p>A family of three children raised by a same-sex couple applied to their local government – Viimsi municipality for school and kindergarten dinner compensation according to the Viimsi council regulation no. 16 of 25 April 2007, which states that the families with three or more under age children are entitled to the aforementioned compensation: “A family member – is a person, his/her spouse or life partner, their dependent children and parents if they live in the same household, this means: use their income commonly and share a common household.”</p> <p>Prior to submitting the application the applicant specified with the municipality’s social and health care worker in a telephone conversation that the parents do not need to be married, but just have to live as a common household to qualify.</p> <p>The applicant received a reply on the day of submitting the application, which stated that Viimsi municipality refuses to pay the support, giving the following reasoning: “Viimsi municipality has sometimes as an exception done the persons a favour and accepted factual marriage or the so-called cohabitation, even though it is not regulated in legislation. But as the currently valid § 1(1) of the Family Law Act states that marriage is contracted between a man and a woman the factual cohabitation of two same-sex persons cannot be considered a family, which is why you lack the grounds for qualifying for the compensation as a minimum of three children are required for assigning the compensation.”</p> <p>The Viimsi council regulation no. 16 did not contain a restrictive provision stating that a family must consist of parents of opposite sexes and their children.</p> <p>The applicant contested the refusal in Tallinn Administrative Court, where she prevailed and the order of refusal was declared void. Following which the municipality filed an appeal in the Tallinn Circuit Court.</p>
Main reasoning/argumentation	The administrative act of Viimsi, which refused social benefits to the same-sex couple, is void. In addition, Viimsi violated the procedural rules of administrative acts, referring to legal acts that have no relevance and not referring to legal acts that do have relevance.
Key issues (concepts, interpretations) clarified by the case	Legal acts by public authorities referring to a family and including also families, where parents are not married, must also accept families, where parents are of the same sex. Otherwise there is a discrimination based on sexual orientation.
Results (sanctions) and key consequences or implications of the case	On 15 June 2010 Tallinn Circuit Court decided to let the judgment of Tallinn Administrative Court stand. According to the judgment Viimsi municipality had acted unlawfully denying travel and school dinner benefits for the children of the same-sex couple. Viimsi municipality did not make a further appeal.

Annex 2 – Statistics

Implementation of Employment Directive 2000/78/EC

Statistical information regarding the work of the equality body concerning discrimination on the ground of sexual orientation (official)

	2007	2008	2009	2010	2011	2012	2013
Total complaints of discrimination on the ground of sexual orientation	2 (freedom of speech; employment)	1 (family law)	3 (social benefits; religious organisations)	3	5	7	n/a (not yet available)
Total number of cases of confirmed discrimination	0	0	0	0	0	0	n/a
Sanctions/compensation payments issued	0	0	0	0	0	0	n/a

- Case statistics and complaint data (tribunal, courts, equality bodies, etc.) regarding Employment Directive 2000/78/EC concerning the ground of sexual orientation (official)

	2008	2009	2010	2011	2012	2013
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts, etc.): if possible, disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	0	2 (social benefits; religious organisation exemption)	3	7	11	6
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.)	0	0	0	0	3	n/a
National total 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.)	0	0	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.)	0	0	n/a	n/a	n/a	n/a

Freedom of Assembly

- Statistical information on freedom of assembly (official)

	2008	2009	2010	2011	2012	2013
Number of demonstrations in favour of tolerance of LGBTs, gay pride parades, etc.	0	0	0	1	0	0
Number of demonstrations against tolerance of LGBTs	0	1	0	0	0	0

Criminal Law, Hate Speech

- Statistical information on criminal law, hate speech (official)

	2008	2009	2010	2011	2012	2013
Number of court cases regarding homophobic hate speech initiated	0	0	0	1 (1 civil claim with multiple defendants,	0	0
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)	0	0	0	0	0	0
Range of sanctions issued for homophobic hate speech	0	0	0	0	0	0

	2010	2011	2012	2013
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing	0	0	0	0

Transgender Issues

- Statistical information on transgender issues (official)

	2008	2009	2010	2011	2012	2013
Number of name changes effected owing to change of gender ¹¹⁷	N/A	N/A	N/A	N/A	N/A	N/A
Number of persons who changed their gender/sex in your country under the applicable legislation ¹¹⁸	2	0	2	5	0	2

¹¹⁷ Estonia, Ms Eve Mitin, Advisor to the Minister of Interior on name changes (*Siseminister*) (2008), Telephone interview, 18 February 2008.

¹¹⁸ Estonia, Ms Hedy Eeriksoo, Health Care Department of the Ministry of Social Affairs (*Sotsiaalministeerium*) (2008), E-mail correspondence, 18 February 2008; Estonia, Ms Ülle Jordan, Health Care Department of Ministry of Social Affairs (*Sotsiaalministeerium*) (2010), E-mail correspondence, 15 February 2010. These numbers refer only to the number of cases for which permission to undergo the medical procedures was granted. There is no statistical information on whether these individuals actually undertook the procedures.

Table 1: Requirements for rectification of the recorded sex or name on official documents

	Intention to live in the opposite gender	Real life test	Gender dysphoria diagnosis	Hormonal treatment/ physical adaptation	Court order	Medical opinion	Genital surgery leading to sterilisation	Forced/ automatic divorce	Unchangeable	Notes
AT	✓	✓	✓	✓		✓	✗ court decision	✗ court decision		Legal changes expected to confirm court decisions
BE	✓			✓		✓	✓			Rectification of recorded sex
BE	✓			✓		✓				Change of name
BG				?	✓	✓	?	✓	✓ (birth certificate)	Only changes of identity documents are possible (gap in legislation)
CY						✓	✓	?		
CZ	✓	✓	✓	✓		✓	✓	✓		These requirements are not laid down by law, but are used by medical committees established under the Law on Health Care
DE	✓		✓		✓	✓				Small solution: only name change
DE	✓		✓	✓	✓	✓	✓	✗ court decision and law		Big solution: rectification of recorded sex
DK	✓	✓				✓	✓	?		Rectification of recorded sex
DK			✓			✓				Change of name
EE	✓	✓			✓	✓	✓	✓		The issue has been clarified in 2014, see the revised report p 30.
EL					✓	✓	✓	?		
ES			✓	✓		✓				
FI	✓	✓	✓			✓	✓	✓		Name change possible upon simple notification, also before legal recognition of gender reassignment
FR			✓	✓	✓	✓	✓	✓		Requirements set by case law, legal and medical procedures uneven throughout the country
HU						✓		✓		No explicit rules in place. Requirements descend from praxis, but unclear what is necessary in order to obtain a medical opinion. After 1

										January 2011 a marriage can be transformed into a registered partnership
IE									✓ (name change possible by Deed Poll and under Passports Act 2008)	Further changes expected following court case <i>Lydia Foy</i> (2007)
IT			✓	✓	✓	✓	✓	✓		
LT									✓ (personal code)	Legal vacuum due to lack of implementing legislation, courts decide on an ad hoc basis.
LU										No provisions in force, praxis varies.
LV							✓	✓ Change of name is possible after gender reassignment		Medical opinion is based on an intention to live in the opposite gender and on a diagnosis of gender dysphoria. For rectification of the recorded sex, currently the Ministry of Health decides case-by-case (parameters not specified). Amendments to the law were proposed but not adopted.
MT	✓	✓	✓	✓	✓	✓	✓	(only unmarried, divorce not possible)		Requirements unclear, decided by Courts on an ad hoc basis
NL	✓	✓	✓	✓	✓	✓	✓			According to Article 28a of the civil code, the requirement of physical adaptation does not apply if it would not be possible or sensible from a medical or psychological point of view. Changes are underway, forced sterilisation might be removed.
PL				✓	✓	✓	✓	✓		No legislation in place, requirements set by court practice
PT	✓		✓	✓	✓	✓	✓			Case-by-case decisions by courts, new act expected
RO				✓	✓	✓	✓			
SE	✓	✓			?	✓	✓	✓		Decision issued by forensic board
SI										No formalities for change of name
SK							✓	?		Change of name granted simply upon application accompanied by a

										confirmation by the medical facility.
UK										Change of name requires no formalities
UK	✓	✓	✓			✓		✓		Rectification of the recorded sex

Notes: This is not a table about the requirements for accessing gender reassignment treatment. This means, in particular, that gender dysphoria diagnosis might be in practice required by medical specialists as a pre-condition for a positive opinion. This situation is not captured by this table, which illustrates the conditions for legal recognition of gender reassignment.

✓= applies; ?=doubt; ✕=removed; change since 2008

Table 2: Discrimination on grounds of sexual orientation in legislation: material scope and enforcement bodies

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED ¹¹⁹	All areas of RED*		
AT		✓		✓	Two of nine provinces have not extended protection to all areas covered by RED: Vorarlberg and Lower Austria. Vorarlberg extended protection to goods and services in 2008.
BE			✓	✓	
BG			✓	✓	
CY	✓			✓	
CZ			✓		New anti-discrimination legislation adopted
DE			✓	✓	
DK	✓			✓	New equality body set up
EE	✓			✓	

¹¹⁹ Employment discrimination is prohibited in all EU Member States as a result of Directive 2000/78/EC. Directive 2000/43/EC (Racial Equality Directive) covers, in addition to employment and occupation, also social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services which are available to the public, including housing.

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED ¹¹⁹	All areas of RED*		
EL	✓			✓	
ES			✓		
FI		✓			
FR	✓			✓	
HU			✓	✓	
IE		✓		✓	
IT	✓				
LT		✓		✓	
LU		✓		✓	
LV		✓		✓	
MT	✓				
NL		✓		✓	
PL	✓				
PT	✓				
RO			✓	✓	
SE			✓	✓	
SI			✓	✓	
SK			✓	✓	

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED ¹¹⁹	All areas of RED*		
UK			✓	✓	The Equality Act 2010 replicates the sexual orientation protection offered in the Equality Act (Sexual Orientation) Regulations 2007 and the Employment Equality (Sexual Orientation) Regulations 2003 and expands protection in a number of ways. The new Equality Act is expected to enter into force October 2010.
TOTAL	9	7	11	20	

Note: ✓ = Applies; ? = doubt; x = removed; **change since 2008**

Table 3: Discrimination on grounds of gender reassignment or identity in national legislation

Country Codes	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
AT	✓			Legal interpretation and explanatory memorandum
BE	✓			Explicit provision in legislation or <i>travaux préparatoires</i>
BG			✓	
CY			✓	
CZ	✓			The new Antidiscrimination Act makes reference to ‘gender identification’.
DE			✓	Constitutional amendment proposal by opposition (‘sexual identity’)
DK	✓			Decisions by the Gender Equality Board
EE			✓	The Gender Equality and Equal Treatment Commissioner has dealt with one application and took the view that the Gender Equality Act could apply to ‘other issues related to gender’. No developments since 2010.
EL			✓	
ES			✓	The Constitutional Court held that gender identity is to be read in among the prohibited grounds of discrimination in Article 14 of the Constitution. Together with the adoption of several regional laws, a trend can be noted towards the protection of gender identity.
FI	✓			Committee for law reform proposes to explicitly cover transgender discrimination in equality legislation.
FR	✓			Case law and decisions by the equality body
HU		✓		
IE	✓			The Employment Equality Act 1998-2004 is interpreted in accordance with the case law of the Court of Justice of the EU.
IT			✓	
LT			✓	
LU			✓	
LV			✓	
MT			✓	
NL	✓			Case law and opinions of the Equal Treatment Commission

Country Codes	Form of "sex" discrimination	Autonomous ground	Dubious/unclear	Comments
PL			✓	
PT			✓	
RO			✓	
SE	✓	✓		Discrimination on grounds of gender reassignment is still considered 'sex' discrimination. The new ground 'transgender identity or expression' now covers other forms of gender variance, regardless of gender reassignment.
SI			✓	The Act Implementing the Principle of Equal Treatment contains an open clause of grounds of discrimination.
SK	✓			Explicit provision in legislation
UK		✓		The Equality Act 2010 replicates the 'gender reassignment' protection offered in the Sex Discrimination Act since 1999, but removes the requirement to be under "medical supervision" and expands protection in several ways. The new Equality Act is expected to enter into force in October 2010.
TOTAL	10	3	15	

Note: ✓ = applicable; positive development since 2008

Table 4: Criminal law provisions on ‘incitement to hatred’ and ‘aggravating circumstances’ covering explicitly sexual orientation

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
AT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
BE	✓	✓	
BG			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
CY			General provisions could extend to LGBT people.
CZ			New Criminal Code in 2009 contains no explicit recognition of homophobic hate crimes. LGBT could fall under the category ‘group of people’, but as the law entered into force in January 2010 there is no case law yet. The explanatory report of the law also does not define the term.
DE			Hate speech legislation does not explicitly extend to homophobic motive, but extensive interpretation has been confirmed by courts.
DK	✓	✓	
EE	✓		According to § 151 of the valid Penal Code (1) Activities which publicly incite to hatred, violence or discrimination on the basis of nationality, race, colour, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status if this results in danger to the life, health or property of a person are punishable by a fine of up to 300 fine units or by detention. The proposed draft act would amend these provisions. However, as of April 2014 no amendments have been introduced.
EL		✓	Article 23 of Law 3719/2008 provides for an aggravating circumstance in cases of hate crime based on sexual orientation.
ES	✓	✓	
FI		✓	According to the pertinent preparatory works, LGBT people could fall under the category ‘comparable group’. A working group has proposed that the provision on incitement be amended to explicitly cover sexual minorities (2010).
FR	✓	✓	
HU			LGBT people could fall under the category ‘groups of society’. Penal Code was amended to include hate motivated crimes against ‘certain groups of society’. Case law has shown this includes the LGBT community.
IE	✓		Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
IT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
LT	✓	✓	Homophobic motivation was included in the list of aggravating circumstances in June 2009.
LU			General provisions could extend to LGBT people.
LV			Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
MT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
NL	✓	✓	The 2009 Public Prosecution Service's Bos/Polaris Guidelines for Sentencing recommend a 50% higher sentence for crimes committed with discriminatory aspects.
PL			General provisions could extend to LGBT people
PT	✓	✓	
RO	✓	✓	Art. 317 of the Criminal Code sanctions only hate speech as 'incitement to discrimination', but includes sexual orientation. Article 369 on incitement to hatred does not mention sexual orientation explicitly, but covers incitement against a 'category of persons', without further specification. The new Criminal Code will enter into force on 1 October 2011.
SE	✓	✓	
SI	✓		Article 297 of the new Penal Code concerning provoking or stirring up hatred, strife or violence, or provoking other inequality explicitly includes sexual orientation. Homophobic intent is only considered an aggravating circumstance in the case of murder.
SK			LGBT people could fall under the category 'group of people'
UK (N-Ireland)	✓	✓	
UK (England & Wales.)	✓	✓	The Criminal Justice and Immigration Act 2008, extending provisions on incitement to racial or religious hatred to cover the ground of sexual orientation, came into force on 23.03.2010. It applies to Scotland as well.
UK (Scotland)	✓	✓	In June 2009, the Offences (Aggravation by Prejudice) (Scotland) Act was passed, entry into force on 24 March 2010, also indicating homo- and transphobic motive as an aggravating circumstance.

Note: ✓= applicable; positive development since 2008

Table 5 - Definition of ‘family member’ for the purposes of free movement, asylum and family reunification

Country Codes	Free movement ¹²⁰		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
AT		✓		✓		✓	Article 59 of the Registered Partnership Act (BGBl. I, No. 135/2009) modifies Article 9 of the Settlement and Residence Act, which now stipulates that the definition of ‘family member’ includes a registered partner. Article 57 of the Registered Partnership Act modifies Article 2/1 of the Asylum Act [Asylgesetz], which now stipulates that the definition of ‘family member’ includes a registered partner, provided that the registered partnership had already existed in the country of origin. Same-sex spouses are likely to be treated as registered partners.
BE	✓	✓	✓	✓	✓	✓	
BG							Article 7 of the new Family Code (01.10.2009) confirms that marriage is a mutual agreement between a man and a woman.
CY							
CZ		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DE		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DK	✓	✓	✓	✓	✓	✓	
EE	✓	✓	?		?		In the context of free movement and family reunification the Chancellor of Justice has declared the current regulation to be in conflict with the Constitution and international treaties and suggested that relevant amendments be introduced in the Aliens Act. It should be noted that EU citizens’ same-sex partners and spouses are considered to be family members under the free movement regulation, whereas Estonian citizens and third country nationals (including asylum seekers and refugees) are bound by the narrow concept of family of Estonian law, which recognizes only spouses as family members. Different officials give different interpretations on whether this also applies to same-sex spouses and no case law to clear the matter has emerged.
EL							
ES	✓	✓	✓	✓	✓	✓	Organic Law 2/2009 of 11 December (Spain/Ley Orgánica 2/2009 (11.12.2009)) has modified Organic Law 4/2000 in order to grant couples who have an affective relationship similar to marriage the right to family reunification. Implementing regulations to this law have not been adopted, thus the meaning of the requirement that the ‘affective relationship’ be ‘duly attested’ remains to be clarified. Article 40 of the Law 12/2009 of 30 October on the right to asylum and subsidiary protection [del derecho de asilo y de la protección subsidiaria] replaces Law 5/1984 of 26.03.1984 and, by transposing the EU acquis, confirms the notion that a family member includes the de facto partner having an affective relationship similar to marriage.

¹²⁰ In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a ‘durable relationship’ may be proven for the purposes of Art. 3 (2) of the Free Movement Directive.

Country Codes	Free movement ¹²⁰		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
FI	✓	✓	✓	✓	✓	✓	
FR	?	?	?	?	?	?	As a result of the entry into force on 14.05.2009 of a new Article 515-7-1 of the French Civil Code, inserted by law 2009-526 of 12.05.2009, foreign registered partnerships are recognised in France; the repercussions of this change for the purposes of free movement of EU citizens are still unclear. Family reunification of third country nationals depends upon the authorities' discretion, which may require additional conditions. No information available on refugees.
HU		✓		✓		?	Entry and residence rights for free movement are also granted for the unmarried <i>de facto</i> partner, subject to conditions.
IE		✓		✓		✓	Adoption of Civil Partnership Act in 2010. Immigration, Residence and Protection Bill not yet enacted, but the government intends to treat registered partners in the same way as spouses.
IT							
LT							
LU		✓		✓		✓	The new law on free movement and immigration (29.08.2008) recognises as a family member a spouse or registered partner provided the conditions set forth in article 4 of the partnership law (09.07.2004) are fulfilled. Rights concerning family reunification and asylum are restricted to registered partnerships. Same-sex spouses are likely to be treated as registered partners.
LV		✓					Article 3.4 of the Cabinet of Ministers Regulation No. 586 on Entry and Residence includes in its definition of family member a person who is a dependant of a Union citizen or his or her spouse and who has shared a household with a Union citizen in their previous country of domicile.
MT							
NL	✓	✓	✓	✓	✓	✓	
PL							
PT	✓	✓	✓		✓		Allows same-sex couples to enter into a marriage since June 2010.
RO		?					The new Civil Code (2009) includes a prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages concluded in other countries.
SE	✓	✓	✓	✓	✓	✓	Allows same-sex couples to enter into a marriage since May 2009.
SI							Provides a legal scheme for registered partnership in domestic law, but without granting entry and residence rights to registered partners
SK							Family reunification possible when the partner can prove economic or social dependence.
UK	✓	✓	✓	✓	✓	✓	
TOTAL	8	15	8	13	8	12	

Note: ✓ = applicable; ? = doubtful/unclear; positive changes since 2008; other developments since 2008.