

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

United Kingdom

January 2014 Update

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# Executive summary

## Implementation of Employment Directive 2000/78/EC

The United Kingdom (UK) has implemented Directive 2000/78 in the specific context of sexual orientation discrimination on time and, with certain exceptions, in compliance with its provisions. On 8 April 2010, the new *Equality Act* received Royal Assent and its main provisions came into force on 1 October 2010<sup>1</sup>. The Act harmonises discrimination law in Great Britain across all nine protected characteristics including sexual orientation and further strengthens the law to support progress on equality. The Act outlines in detail the personal and material scope of the law, the concepts of discrimination and harassment and exceptions to the principle of non-discrimination, as permitted by the Directive. It also includes broadly compliant provisions on enforcement and remedies. . The Act establishes a public sector equality duty, whereby public bodies are under a duty to eliminate prejudicial and discriminatory conduct as well as advance equality and foster good relations between persons of different protected characteristics.<sup>2</sup> The newly introduced public sector equality duty has been the subject of case law which considered the scope of the duty and the need to balance the protection of non-discrimination with other fundamental rights such as freedom of expression. Similarly, within an employment context, recent case law has considered the interpretation of harassment in the workplace environment and the extent to which the conduct of employees will be taken into account when determining whether or not an individual was harassed due to harassment on the basis of their sexual orientation. There is scope for exceptions to the principle of non-discrimination, for example, an employer is entitled to assert additional requirements that may discriminate against a person's sexual orientation or identity. It is also possible to implement positive action in relation to recruitment and promotion in an employment context.

The UK has statutory equalities commissions with responsibilities for monitoring equalities laws and supporting individuals wishing to bring complaints of unlawful discrimination. Although interest groups cannot bring actions as an alternative to individual complaints these groups are able to represent individuals before courts or tribunals and receive support from the equalities commissions.

## Freedom of movement

When determining the rights of LGBT partners of EU citizens who wish to exercise their rights of free movement and residence under EU law particular attention is paid in this section to the scope of the definition of a 'family member' and an 'extended family member' which closely follow the

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<sup>1</sup> [UK] Parliament (2010) , The Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010, available at: [www.legislation.gov.uk/uksi/2010/2317/made](http://www.legislation.gov.uk/uksi/2010/2317/made) [last accessed 12.05.2014].

<sup>2</sup>[UK] Parliament (2010), The Equality Act 2010, section 149, available at: [www.legislation.gov.uk/ukpga/2010/15/section/149](http://www.legislation.gov.uk/ukpga/2010/15/section/149) [last accessed 12.05.2014].

requirements of Directive 2004/38. The rights of freedom of movement of LGBT partners and their children and other family members are discussed in the context of the *Civil Partnership Act 2004*<sup>3</sup> and the *Gender Recognition Act 2004*.<sup>4</sup> This analysis of the legal situation, also considers the position of third-country national LGBT partners of EU citizens and their children and family members. The effect of the *Civil Partnership Act* is to create rights that are equivalent to marriage and, as such, it enables LGBT partners of UK nationals to benefit from the freedom of movement and residence of their partners in another Member State subject to the recognition of the host State as provided in Art. 2(2)(b) of Directive 2004/38. The rights of LGBT partners and their children and other family members will also be governed by the *Marriage (Same Sex Couples) Act 2013*, which received Royal Assent on 17 July 2013; its main provisions came into force on 13 March 2014.<sup>5</sup> Overall, it is an amending Act, and changes apply to the following legislation: the *Equality Act 2010*, the *Civil Partnership Act 2004* and the *Gender Recognition Act 2004*.<sup>6</sup> The 2013 Act extends the right to marry to same sex couples in England and Wales, with the same rights as in marriage between opposite sex couples. Even though the Act allows for civil partnerships to be converted into marriages, it does not remove the availability of civil partnerships to same-sex couples. A Bill with similar effects has been under discussion by the Scottish Parliament and reached the second stage in the legislative process in December 2013.<sup>7</sup> In 2012, in order to give effect to the ECJ's judgement in *Rahman*,<sup>8</sup> the *Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012* removed the requirement previously contained in Reg. (2)(a) that an extended family member must have resided in a country in which the EEA national also resides.<sup>9</sup> Despite the lack of case law and statistics which consider the freedom of movement of LGBT partners (either third country nationals, EEA or EU citizens), the legislative framework allows for the freedom of movement of LGBT partners and family members.

## Asylum and subsidiary protection

This section examines the current legislative framework in the UK and its impact on claims to refugee and subsidiary status on the ground of sexuality. Specific reference is made to the

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<sup>3</sup> [UK] Parliament (2004) Civil Partnership Act 2004, available at: [www.legislation.gov.uk/ukpga/2004/33/contents](http://www.legislation.gov.uk/ukpga/2004/33/contents) [last accessed 12.05.2014].

<sup>4</sup> [UK] Parliament (2004) Gender Recognition Act 2004, available at: [www.legislation.gov.uk/ukpga/2004/7/contents](http://www.legislation.gov.uk/ukpga/2004/7/contents) [last accessed 12.05.2014].

<sup>5</sup> [UK] Parliament (2014) The Marriage (Same Sex Couples) Act 2013 (Commencement No. 2 and Transitional Provision) Order 2014, available at: [www.legislation.gov.uk/uksi/2014/93/made](http://www.legislation.gov.uk/uksi/2014/93/made) [last accessed 12.05.2014].

<sup>6</sup> [UK] House of Commons (2013) Marriage (Same Sex Couples) Bill Explanatory Notes, para. 14, available at: [www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/en/2013126en.htm](http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/en/2013126en.htm) [last accessed 12.05.2014].

<sup>7</sup> [UK] Scottish Parliament (2014) Marriage and Civil Partnership (Scotland) Bill, available at: [www.scottish.parliament.uk/parliamentarybusiness/Bills/64983.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/64983.aspx) [last accessed 12.05.2014].

<sup>8</sup> [UK] European Court of Justice (2012) Case C-83/11 Secretary of State for the Home Department v Rahman, available at:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d6eb3c10c448df43689978eefeb741a6b8.e34KaxiLc3eQc40LaxqMbN4OaxuTe0?text=&docid=126362&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=254155> [last accessed 12.05.2014].

<sup>9</sup> [UK] Parliament (2012) The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012, Statutory Instrument No. 2560, available at: [www.legislation.gov.uk/uksi/2012/2560/made](http://www.legislation.gov.uk/uksi/2012/2560/made) [last accessed 12.05.2014].

*Immigration Rules HC 395* as given statutory authority by the *Immigration Act 1971*,<sup>10</sup> as well as the relationship between the *1951 Convention on the Status of Refugees*, the *Human Rights Act 1998*, the *European Convention on Human Rights (ECHR)* and European Directive 2004/83 and its transposition into UK law. Six key cases have been identified which highlight the position of LGBT asylum seekers in the current asylum system, drawing on key themes that have come out of this rapidly expanding area of asylum law.

The legislative and jurisprudential framework in the UK has recognised that LGBT persons may be considered members of a particular social group, based upon a common characteristic of sexual orientation. However, the existence of discriminatory legislation in the individual's country of origin is not in itself sufficiently serious to be regarded as amounting to persecution. Where the persecutory legislation is unenforced, then it was considered as an indicator of safe *réfoulement*. In addition to this, the judiciary's analysis of behaviour modification as a form of persecution meant that individuals could be safely returned to their countries if they were able to implement internal relocation alternatives. The courts relied upon a discretion test by which an individual, at risk of persecution because of their sexual orientation, would be expected to exercise discretion in the expression of their sexual identity. However, the jurisprudence has shifted towards recognition of identity rather than behaviour. In 2010, the UK Supreme Court held that a person cannot be expected to suppress or hide their sexual orientation as this would be to deny them their fundamental right to be what they are.

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

## **Family reunification**

Schedule 23 of the *Civil Partnership Act 2004* indicates the rights accrued by partners of UK nationals subject to immigration control. The *Civil Partnership Act's* influence on the *Immigration Rules* has been extensive. The *Asylum and Immigration (Treatment of Claimants) Act 2004*<sup>11</sup> governs entry to the UK to form a civil partnership in accordance with the *Immigration Rules* as given statutory authority by the *Immigration Act 1971* and the *Asylum and Immigration Act 2004*. The *Immigration Rules HC 395* highlight the specific requirements of entry into the UK on the basis of family reunification dependent upon the status of the relationship. The *Rules* pertaining to same-sex reunification can be found in Part 8 of the *Immigration Rules HC 395* paragraphs 277 to 295L. The *Marriage (Same Sex Couples) Act 2013* recognises any same sex marriage entered into outside of the United Kingdom and will permit individuals who wish to enter the UK for the purposes of a same sex marriage to do so.<sup>12</sup> No information was found on cases related to family reunification.

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<sup>10</sup> [UK] Parliament (1971) *Immigration Act 1971*, available at: [www.legislation.gov.uk/ukpga/1971/77](http://www.legislation.gov.uk/ukpga/1971/77) [last accessed 12.05.2014].

<sup>11</sup> [UK] Parliament (2004) *Asylum and Immigration (Treatment of Claimants) Act 2004*, available at: [www.legislation.gov.uk/ukpga/2004/19/contents](http://www.legislation.gov.uk/ukpga/2004/19/contents). [last accessed 12.05.2014]

<sup>12</sup> [UK] Parliament (2013) *Marriage (Same Sex Couples) Act 2013*, c. 30, s. 10 and sch. 2, available at: [www.legislation.gov.uk/ukpga/2013/30](http://www.legislation.gov.uk/ukpga/2013/30). [last accessed 12.05.2014]

## Freedom of assembly

No information was found on cases of refusals or bans, or on the exercise of duties of protection by the authorities in the context of pride marches or homophobic demonstrations. There have been a small number of disruptions and protests that occurred prior to or alongside pride marches, however, these have not been of much consequence in disrupting such marches. Pride marches have been taking place in the UK for over 30 years and there is evidence that there has been a huge increase in the number of gay pride events. In addition, ECHR Arts 10, 11, 14 and 17 have been incorporated into domestic law throughout the UK. The law also contains a range of statutory public order offences, as well as powers to regulate and control public meetings and processions.

## Hate speech and criminal law

In 2004, the law in Northern Ireland was amended so as to criminalise acts intended or likely to stir up hatred or arouse fear on grounds of sexual orientation. As regards England and Wales, the *Criminal Justice and Immigration Act 2008*<sup>13</sup> amends provisions on incitement to religious hatred in the *Public Order Act 1986*, extending them to cover hatred on the grounds of sexual orientation. These new homophobic hatred offences came into force in March 2010. The first prosecution for this offence occurred in February 2012, in the case of *R v Ihjaz Ali, Razwan Javed and Kabir Ahmed*.<sup>14</sup> Scotland does not have legislation covering incitement to hatred on the grounds of sexual orientation.

In the period 2003-2005, England, Wales and Northern Ireland extended hate-crime statutory aggravations to include sexual orientation. In June 2009, Scotland passed the *Offences (Aggravation by Prejudice) (Scotland) Act*,<sup>15</sup> which came into force on 24 March 2010. It requires the aggravation of an offence by prejudice on the grounds of disability, sexual orientation or transgender identity to be taken into account in sentencing.

The findings of the Stonewall Gay British Crime Survey 2013 suggest that a large number of persons experience homophobic hate crime but reporting of these incidents is very low due to the victim's reluctance to come forward.<sup>16</sup>

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<sup>13</sup> [UK] Parliament (2008) Criminal Justice and Immigration Act 2008, available at: [www.legislation.gov.uk/ukpga/2008/4/contents](http://www.legislation.gov.uk/ukpga/2008/4/contents). [last accessed 12.05.2014]

<sup>14</sup> [UK] Derby Crown Court (2012) Sentencing Remarks of HHJ Burgess: *R v Ihjaz Ali, Razwan Javed and Kabir Ahmed*, available at: [www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf). [last accessed 12.05.2014]

<sup>15</sup> [UK] Parliament (2009) *Offences (Aggravation by Prejudice) (Scotland) Act 2009*, available at: [www.legislation.gov.uk/asp/2009/8/contents](http://www.legislation.gov.uk/asp/2009/8/contents). [last accessed 12.05.2014]

<sup>16</sup> [UK] Stonewall (2013) Homophobic Hate Crime: The Gay British Crime Survey 2013, available at: [www.stonewall.org.uk/documents/hate\\_crime.pdf](http://www.stonewall.org.uk/documents/hate_crime.pdf). [last accessed 12.05.2014]



## Transgender issues

In the UK, discrimination in employment or training, or in the provision of goods, facilities or services on grounds of gender reassignment was formerly a form of sex discrimination but, since the introduction of the *Equality Act 2010*, is an independent ground of discrimination covered by law.<sup>17</sup> In addition, in Great Britain (England, Wales and Scotland) public authorities have a general public sector equality duty, which places an obligation on them to promote equality and eliminate discrimination related to all of the protected characteristics under the *Equality Act 2010*, including gender reassignment.<sup>18</sup> There is some significant case law which outlines the extent to which transgender persons have been treated less favourably in an employment context as a result of their gender reassignment. This has occurred particularly in relation to the harassment and victimisation endured by an individual whose previous gender was disclosed to a prospective employer by a former employer,<sup>19</sup> less favourable treatment as a person undergoing gender reassignment when undergoing the ‘real life test’<sup>20</sup> and a refusal to employ a post-operative male to female transsexual as a result of failing to recognise the individual’s reassigned gender was unlawful discrimination.<sup>21</sup> Other case law has reviewed the treatment of transgender prisoners and the extent to which they have been provided with less favourable treatment than other members of the prison population<sup>22</sup>.

There is currently no offence of incitement to hatred on grounds of transgender identity in any part of the UK. In England, Wales and Scotland, transphobic motivation is an aggravating factor of offences to be considered in sentencing. The relevant legal instruments have been in force since March 2010 in Scotland and December 2012 in England and Wales. In 2011, the Transgender Equality Action Plan was published as part of the governments overall Equality Strategy – Building a Fairer Britain.<sup>23</sup> One of the most significant changes emanating from this action plan was outlined

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<sup>17</sup> [UK] Parliament (2010) Equality Act (2010) section 7, available at: [www.legislation.gov.uk/ukpga/2010/15/section/7](http://www.legislation.gov.uk/ukpga/2010/15/section/7). [last accessed 12.05.2014]

<sup>18</sup> [UK] Parliament (2010) Equality Act (2010) section 149, available at: [www.legislation.gov.uk/ukpga/2010/15/section/149](http://www.legislation.gov.uk/ukpga/2010/15/section/149). [last accessed 12.05.2014]

<sup>19</sup> [UK] Employment Tribunal (2007) X v Brighton and Hove City Council June 2007 This case has not been reported. Information can be found on the website of the Equality and Human Rights Commission: [www.equalityhumanrights.com/advice-and-guidance/your-rights/transgender/transgender-case-decisions/](http://www.equalityhumanrights.com/advice-and-guidance/your-rights/transgender/transgender-case-decisions/). [last accessed 12.05.2014].

<sup>20</sup> [UK] House of Lords (2004) A v Chief Constable of West Yorkshire [2004] UKHL 21, available at: [www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040506/chief-1.htm](http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040506/chief-1.htm) [last accessed 07.07.14].

<sup>21</sup> [UK] Court of Appeal (2003) Croft v Royal Mail Group plc [2003] EWCA Civ 1045; [2003] IRLR 592, available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2003/1045.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2003/1045.html) [last accessed 07.07.14].

<sup>22</sup> [UK] High Court (2013) Green, R (on the application of) v Secretary of State for Justice [2013] EWHC 3491 (Admin), available at: [www.bailii.org/ew/cases/EWHC/Admin/2013/3491.html](http://www.bailii.org/ew/cases/EWHC/Admin/2013/3491.html) [last accessed 07.07.14]; [UK] High Court (2009) R (on the application of AB) v Secretary of State for Justice [2009] EWHC 2220, available at: [www.bailii.org/ew/cases/EWHC/Admin/2009/2220.html](http://www.bailii.org/ew/cases/EWHC/Admin/2009/2220.html) [last accessed 07.07.14].

<sup>23</sup> [UK] Government Equalities Office (2011) Advancing transgender equality: a plan for action, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85498/transgender-action-plan.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85498/transgender-action-plan.pdf). [last accessed 12.05.2014]

in the *Legal Aid, Sentencing and Offenders Act 2012*.<sup>24</sup> The new Act provides for a mandatory uplift in sentences for those convicted of hate crime directed at transgender people.

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

The *Gender Recognition Act 2004* (GRA), which came into force in April 2005 and applies throughout the UK, enables transgender individuals who satisfy certain criteria to apply to a Gender Recognition Panel for a Gender Recognition Certificate. From the date of the grant of a full Certificate an individual is afforded legal recognition in his or her acquired gender, and can obtain a new birth certificate, which does not disclose the fact that he/she changed gender. A transgender person who is married could not until recently receive a full Certificate because, in the United Kingdom, marriage was not permitted between two members of the same sex. Where applicants were married, they would be issued with an interim Certificate. This enabled them to obtain a full Certificate via a simplified procedure if they annulled their marriage. The *Marriage (Same Sex Couples) Act 2013*, extending the right to marry to same sex couples in England and Wales, states that a person will no longer need to end their marriage in order to obtain a full Certificate, provided that they have the consent of their spouse. The *Marriage and Civil Partnership (Scotland) Bill*, which is currently being discussed by the Scottish Parliament, provides a similar framework. The GRA does not require applicants to undergo hormonal treatment or surgery. The main case law in this area relates to the situation prior to the introduction of the *Marriage (Same Sex Couples) Act 2013* which considered the validity of a marriage following one of the individuals affecting a gender change. The case law shows that there has been a shift from the courts considering that "the biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means" meaning that English law did not recognise a marriage between two people who were of the same gender at birth, even if one had undergone gender reassignment. However, the Courts stated that non-recognition of gender reassignment for the purposes of marriage was not compatible with article 8 and article 12 of the European Convention on Human Rights.

## Miscellaneous

No relevant information. There are no other issues regarding LGBT protection not covered in other sections.

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<sup>24</sup> [UK] Government Equalities Office (2011) Advancing transgender equality: a plan for action, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85498/transgender-action-plan.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85498/transgender-action-plan.pdf). [last accessed 12.05.2014]

## Intersex

For the purposes of this study, we will consider *intersex* as a separate category where it does not overlap with the protections already conferred by anti-discrimination law on the grounds of sex, sexual orientation and gender reassignment. Therefore, we are taking in consideration the cases where:

- A person is born with sexual characteristics, externally manifested or not, that do not fit the typical definition of male or female and/or;
- A person does not identify with a particular gender.

Intersexuality is not explicitly protected under non-discrimination legislation in the UK, as it is not one of the protected characteristics in the *Equality Act 2010*. Nevertheless, in Scottish law Section 2(8) of the *Offences (Aggravation by Prejudice) (Scotland) Act 2009*, affords express protection to intersex people through statutory aggravation of offences for hostility, by providing a broad definition of ‘transgender identity’ that includes ‘intersexuality’ and ‘gender identity that is not standard male or female’.<sup>25</sup>

Reference is made in a number of key instruments of Government policy to concepts linked to intersexuality, such as ‘intersex’, ‘intersexuality’ or ‘non-gendered’.

In the UK every person is assigned a particular gender identification, either male or female, which is recorded upon the registration of the child after birth. As a general rule, the registration of a child should be done in a short period of time and may be delayed for a period no longer than 42 days in England, Wales and Northern Ireland, and 21 days in Scotland.

There is currently no prohibition in UK law regarding the performance of sex assignment surgical procedures or other medical interventions on intersex people. Informed consent to the procedures must be given by the adult being treated or by the persons who hold parental responsibility over the child subject to treatment, usually his or her parents. The age of consent for medical treatment throughout the UK is set at 16. Children under the age of 16 may be able to give consent to the procedure, if they are considered to have sufficient maturity and judgment to enable them fully to understand what is proposed. If two persons hold parental responsibility over the child and only one of them consents to the treatment, the health professional may still accept the consent and perform it.

## Good practices

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

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<sup>25</sup> [UK] Parliament (2009) Offences (Aggravation by Prejudice) (Scotland) Act 2009, available at: [www.legislation.gov.uk/asp/2009/8](http://www.legislation.gov.uk/asp/2009/8). [last accessed 12.05.2014]

and one concerns government policy. All good practices have been updated to reflect current political and legal approaches to LGBT equality.

# 1 Implementation of Employment Directive 2000/78/EC

In accordance with the devolved government arrangements in the UK, separate legislative measures were introduced to implement Council Directive 2000/78/EC (27.11.2000) into national law in Great Britain and Northern Ireland. In 2003, specific regulations were adopted relating to each of the prohibited grounds of discrimination contained in the Directive where new laws were necessary in order to bring UK law into compliance. In order to make very minor amendments to these regulations, additional legislative measures were later adopted for Great Britain.<sup>26</sup> In 2007, the material scope of these regulations was then extended beyond the fields of employment and occupation to include the prohibition of discrimination on the grounds of sexual orientation in the provision of goods, facilities, services, education, management and disposal of premises and the exercise of public functions.<sup>27</sup>

<sup>28</sup> The 2007 Regulations broadly followed the scope and content of the 2003 Regulations with some exceptions although there were some innovative features including specific coverage of unlawful contractual terms and instructions to discriminate. There was a temporary exemption relating to the insurance sector. Provisions also placed married persons and same sex civil partners in the same position under the Regulations. The Northern Ireland Regulations were reissued, following consultation, having been the subject of a successful judicial review challenge by a variety of Christian organisations.<sup>29</sup> These organisations complained about a lack of consultation about the harassment provisions in those Regulations, as these were not mentioned in the preceding consultation paper.

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<sup>26</sup> [UK] Parliament (2003) Employment Equality (Sexual Orientation) Regulations 2003, Statutory Instrument 2003 No.1661, available at: [www.legislation.gov.uk/ukxi/2003/1661/contents/made](http://www.legislation.gov.uk/ukxi/2003/1661/contents/made); [UK] Parliament (2003) Employment Equality (Sexual Orientation) Regulations 2003 (Amendment) Regulations 2003, Statutory Instrument 2003 No. 2827, available at: [www.legislation.gov.uk/ukxi/2003/2827/contents/made](http://www.legislation.gov.uk/ukxi/2003/2827/contents/made); [UK] Parliament (2004) Employment Equality (Sexual Orientation) Regulations 2003 (Amendment) Regulations 2004, Statutory Instrument 2004 No. 2519, available at: [www.legislation.gov.uk/ukxi/2004/2519/contents/made](http://www.legislation.gov.uk/ukxi/2004/2519/contents/made).; [UK] Parliament (2003) Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, Statutory Rules of Northern Ireland 2003 No. 497, available at: [www.legislation.gov.uk/nisr/2003/497/contents/made](http://www.legislation.gov.uk/nisr/2003/497/contents/made) [last accessed 12.05.2014]

<sup>27</sup> [UK] Parliament (2007) Equality Act (Sexual Orientation) Regulations 2007 Statutory Instrument 2007 No. 1263, available at: [www.legislation.gov.uk/ukxi/2007/1263/contents/made](http://www.legislation.gov.uk/ukxi/2007/1263/contents/made); [UK] Parliament (2007) Equality Act (Sexual Orientation) (Amendment No. 2) Regulations (Northern Ireland) 2007, Statutory Rules of Northern Ireland 2006 No. 261, available at: [www.legislation.gov.uk/nisr/2007/261/contents/made](http://www.legislation.gov.uk/nisr/2007/261/contents/made) [last accessed 12.05.2014]. See below for discussion of the successful challenge to part of these Regulations in [UK] Northern Ireland Queens Bench Division (2008) Re Christian Institute and others' application for judicial review, available at: [www.bailii.org/nie/cases/NIHC/QB/2007/66.html](http://www.bailii.org/nie/cases/NIHC/QB/2007/66.html). [last accessed 12.05.2014].

<sup>28</sup> [UK] House of Commons (2003) Employment Equality Regulations: Religion and Sexual Orientation, 16, available at: [www.parliament.uk/briefing-papers/RP03-54/employment-equality-regulationsreligion-and-sexual-orientation](http://www.parliament.uk/briefing-papers/RP03-54/employment-equality-regulationsreligion-and-sexual-orientation). [last accessed 12.05.2014]

<sup>29</sup> [UK] Northern Ireland High Court, Queens Bench Division (2008) Re Christian Institute and others' application for judicial review, available at: [www.bailii.org/nie/cases/NIHC/QB/2007/66.html](http://www.bailii.org/nie/cases/NIHC/QB/2007/66.html). [last accessed 12.05.2014]

- The *Equality Act 2010*<sup>30</sup> received Royal Assent in April 2010 and its main provisions came into force on 1 October 2010. The Act brings together and restates all existing enactments in domestic discrimination law concerning each of the ‘protected characteristics’, including the 2003 and 2007 Sexual Orientation Regulations, in order to give a single approach. As a result, the 2003 and 2007 Sexual Orientation Regulations have now been revoked under Schedule 27 of the *Equality Act 2010*.<sup>31</sup> The Act forms part of the law of England, Scotland and Wales. The Northern Ireland Assembly has devolved powers to bring forward their own proposals. The Act simplifies, harmonises and consolidates discrimination law and strengthens the law in a number of areas. The Act also contains a new power providing the ability to harmonise the legislation where changes are required as a result of European law. At the time of writing (May 2014), a complete assessment of the Act’s impact is not yet possible, as some of its provisions have not yet come into force and are unlikely to do so, under the current administration: The Government Equalities Office has produced publicly available information and guidance on the Equality Act 2010, including age discrimination and public sector Equality Duty. The guidance provides information about who is protected from discrimination, the types of discrimination under the law and the action an individual can take if they feel that they have been unfairly discriminated against. In addition, the guidance outlines the Equality Act provisions that the government has decided not to take forward, these include: Section 1 public sector socio-economic duty – in November 2010, the Coalition announced that section 1 of the Equality Act which places duties on public bodies to act in respect of socio-economic disadvantage would not be brought into force.<sup>32</sup> In addition to the public sector equality duty, public authorities would also have a socio-economic duty. The duty would require these authorities, when making strategic decisions, to take into account the need to reduce socio-economic disadvantage.<sup>33</sup> It has been recognised that an individual’s socio-economic background can very often reinforce and increase the inequalities associated with particular protected characteristics. Therefore, the duty is designed to tackle and address entrenched inequalities in a systematic way by all government departments and key public bodies.<sup>34</sup>
- Section 78 on equal pay audits – the Coalition government’s equality strategy “Building a Fairer Britain” stated that a voluntary approach would be implemented and in the meantime section 78 of the Equality Act would not be brought into force, amended or repealed.<sup>35</sup> In June 2014, the government published their response to a consultation which sets out the

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<sup>30</sup> [UK] Parliament (2010) Equality Act 2010 c. 15, available at: [www.legislation.gov.uk/ukpga/2010/15/contents](http://www.legislation.gov.uk/ukpga/2010/15/contents). [last accessed 12.05.2014]

<sup>31</sup> [UK] Parliament (2010) Equality Act 2010, Schedule 27, available at: <http://www.legislation.gov.uk/ukpga/2010/15/schedule/27>. [last accessed 12.05.2014]

<sup>32</sup> [UK] Parliament (2010) Hansard, Oral Answers to Questions, Column 1057, 18 November 2010, available at: [www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101118/debtext/101118-0001.htm#10111862000005](http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101118/debtext/101118-0001.htm#10111862000005). [last accessed 12.05.2014]

<sup>33</sup> [UK] Parliament (2010) Equality Act 2010, section 1, available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/1>.

<sup>34</sup> The Equality Bill: Duty to reduce socio-economic inequalities A Guide, page 9, available at: <http://sta.geo.useconnect.co.uk/pdf/Socio%20Economic%20pre-guidance%20guidancev2%2008012010.pdf>.

<sup>35</sup> [UK] Government Equalities Office (2010) The Equality Strategy - Building a Fairer Britain, page 14, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85299/equality-strategy.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85299/equality-strategy.pdf); [UK] Parliament (2012) Hansard, Written answers to questions, Column 274W, 16 October 2012, available at: [www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121016/text/121016w0001.htm](http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121016/text/121016w0001.htm). [last accessed 12.05.2014]

government's commitment to introduce regulations for mandatory equal pay audits in the specific circumstances where an employment tribunal finds a clear breach of equal pay law. This consultation explores further the details of equal pay audits and the likely contents of impending legislation which, it is hoped, will come into force in 2014. Conducting an Equal Pay Audit following an employment tribunal finding is considered to be an effective way for employers to establish whether their pay structures are robust and free from gender bias. They provide the employer with the opportunity to eliminate any pay inequalities which are tainted by sex discrimination.<sup>36</sup>

• Section 14 on combined discrimination - dual characteristics.<sup>37</sup> Under the Equality Act it is against the law to discriminate against someone because of age, being or becoming a transsexual person, being married or in a civil partnership, being pregnant or having a child, disability, race including colour, nationality, ethnic or national origin, religion, belief or lack of religion/belief, sex or sexual orientation. These are all protected characteristics.<sup>38</sup> The Act provides for protection against combined discrimination, which is where a person will be discriminated against by another because of a combination of two relevant protected characteristics.<sup>39</sup>

As explained in its Explanatory Notes, the Act is intended to, inter alia:<sup>40</sup>

- extend the circumstances in which a person is protected against discrimination, harassment or victimisation because of a protected characteristic;
- create a public sector equality duty on listed public bodies (and private bodies exercising public functions) (section 149) when carrying out their functions to eliminate conduct which the Act prohibits; to advance equality of opportunity between persons who share a relevant characteristic and those who do not; and to foster good relations between people who share a relevant characteristic and people who do not;<sup>41</sup>
- allow an employer or service provider or other organisation to take positive action so as to enable existing or potential employees or customers to overcome or minimise a disadvantage arising from a protected characteristic.

The public sector equality duty has been considered by the courts in a case regarding discrimination on grounds of sexual orientation. In *Core Issues Trust v Transport for London*, the High Court ruled that allowing the display of an advertisement on Transport for London's buses that reflected

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<sup>36</sup> [UK] Government Equalities Office (2014) *The Government's Response - Equal Pay Audits: A Further Consultation*, 19 June 2014, paragraph 2.3, available at: [www.gov.uk/government/consultations/equal-pay-audits-a-further-consultation](http://www.gov.uk/government/consultations/equal-pay-audits-a-further-consultation) [last accessed 26.06.14].

<sup>37</sup> [UK] Government Equalities Office (2013) *Equality Act 2010: Guidance*, available at: [www.gov.uk/equality-act-2010-guidance](http://www.gov.uk/equality-act-2010-guidance). [last accessed 12.05.2014]

<sup>38</sup> [UK] Equality and Human Rights Commission (2014) *Protected Characteristics*, available at: [www.equalityhumanrights.com/private-and-public-sector-guidance/guidance-all/protected-characteristics](http://www.equalityhumanrights.com/private-and-public-sector-guidance/guidance-all/protected-characteristics) [last accessed 26.06.14].

<sup>39</sup> [UK] Parliament (2010) *Equality Act 2010*, section 14, available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/14> [last accessed 26.06.14].

<sup>40</sup> [UK] House of Lords (2009) *Equality Bill: Explanatory Notes*, available at: [www.publications.parliament.uk/pa/ld200910/ldbills/020/en/10020x--htm#index\\_link\\_1](http://www.publications.parliament.uk/pa/ld200910/ldbills/020/en/10020x--htm#index_link_1), [last accessed 12.05.2014]

<sup>41</sup> [UK] High Court of Justice, Queen's Bench Division (2013) *Core Issues Trust v Transport for London*, available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2013/651.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2013/651.html). [last accessed 12.05.2014]

the view that homosexuality can be medically treated would be a breach of the duty imposed by s. 149 of the *Equality Act 2010*. The ruling has been highly controversial, some commentators have criticised it as placing a significant restriction on freedom of expression around the sensitive topics of sexuality and religion. Commentators have suggested that, regardless of the offensiveness and increased risk of prejudice caused by the advertisement, freedom of expression should have prevailed.<sup>42</sup>

For the purpose of this part of the study we will focus on the new provisions contained in the *Equality Act 2010*. The following elements of the *Equality Act 2010* will next be outlined in turn: scope; concept of discrimination; exceptions for occupational requirements; positive action; and remedies, enforcement and sanctions.

## 1.1 Equality Act Personal and Material Scope

The personal and material scope of the *Equality Act 2010* is consistent with the letter and spirit of Directive 2000/78. In the interpretation provisions in Section 12 the term ‘sexual orientation’ is defined as meaning a person’s sexual orientation towards: (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex. In relation to the protected characteristic of sexual orientation— (a) a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation; and (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation. The *Equality Act 2010 Explanatory Notes* states that this definition is designed to replicate the definition of the *Employment Equality (Sexual Orientation) Regulations 2003* and the *Equality Act 2006*.<sup>43</sup>

‘Employment’ under Section 83 of the *Equality Act 2010* means ‘employment under a contract of service or of apprenticeship or a contract personally to do any work’.<sup>44</sup> This includes employers on a zero hours contract.<sup>45</sup> Employment extends beyond the limited common law concept of an ‘employee’ under a contract of service. It broadly encompasses casual workers, home workers, agency workers and part-time or irregular workers who are in an employment relationship. Protection against sexual orientation discrimination is also extended to contract workers,<sup>46</sup> office

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<sup>42</sup> [UK] Human Rights Blog (2013) Ban on ‘ex-gay, post-gay and proud’ bus advert criticised but lawful, available at: <http://ukhumanrightsblog.com/2013/03/23/ban-on-ex-gay-post-gay-and-proud-bus-advert-criticised-but-lawful/> [last accessed 12.05.2014].

<sup>43</sup> [UK] Parliament (2010) *Equality Act 2010 Explanatory Notes* available at: [www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/9](http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/9) [last accessed 12.05.2014].

<sup>44</sup> [UK] Parliament (2010) *Equality Act 2010*, section 83, available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/83> [last accessed 12.05.2014].

<sup>45</sup> [UK] Advisory, Conciliation and Arbitration Service (2014) Zero hours contracts, available at: [www.acas.org.uk/index.aspx?articleid=4468](http://www.acas.org.uk/index.aspx?articleid=4468) [last accessed 12.05.2014].

<sup>46</sup> [UK] Parliament (2010) *Equality Act 2010*, section 41, available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/5/chapter/1> [last accessed 12.05.2014].



holders,<sup>47</sup> police,<sup>48</sup> barristers,<sup>49</sup> advocates<sup>50</sup> and partners in firms.<sup>51</sup> With regards to casual workers the UK House of Lords has held that casual workers are not ‘employees’ if they have no obligation to work for the employer and the employer has no obligation to provide them with work.. It follows that casual workers and other atypical workers are excluded from many aspects of UK employment legislation.<sup>52</sup>

Employers and contract principals and their agents are vicariously liable under Section 42 for anything done by a person ‘in the course of his employment’, whether or not it was done with their knowledge or approval. It is a defence for an employer or principal to show that he/she took such steps as were ‘reasonably practicable’ to prevent the employee from doing such an act. The *Equality Act 2010* provides that an employer will be liable for third party harassment, unless he has taken reasonable steps to prevent that harassment and provided he knows that his employee has been harassed at least twice in the course of his employment.<sup>53</sup> However, in 2013 Section 40(2) and (4) of the *Equality Act 2010* were repealed by the *Enterprise and Regulatory Reform Act 2013*<sup>54</sup>, completely depriving employers of protection against third party harassment. This option has been justified on the basis that the provisions were unnecessary and confusing for business and there was a need to remove burdens on business.<sup>55</sup> There was also reference to the government being aware of only one case of such harassment being found before the tribunals. In a debate of the Grand Committee of the House of Lords, Baroness Thornton criticised the contradictory logic for the repeal.<sup>56</sup>

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<sup>47</sup> [UK] Parliament (2010) Equality Act 2010, section 49 and 50, available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/5/chapter/1> [last accessed 12.05.2014].

<sup>48</sup> [UK] Parliament (2010) Equality Act 2010, section 42 and 43, available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/5/chapter/1> [last accessed 12.05.2014].

<sup>49</sup> [UK] Parliament (2010) Equality Act 2010, section 47, available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/5/chapter/1> [last accessed 12.05.2014].

<sup>50</sup> [UK] Parliament (2010) Equality Act 2010, section 48, available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/5/chapter/1> [last accessed 12.05.2014].

<sup>51</sup> [UK] Parliament (2010) Equality Act 2010, section 44-46, available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/5/chapter/1> [last accessed 12.05.2014].

<sup>52</sup> [UK] House of Lords (2000) Carmichael v. National Power, available at: [www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd991118/car.htm](http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd991118/car.htm) [last accessed 12.05.2014].

<sup>53</sup> [UK] Parliament (2010) Equality Act 2010 c. 15, s. 40, available at: [www.legislation.gov.uk/ukpga/2010/15/contents](http://www.legislation.gov.uk/ukpga/2010/15/contents). [last accessed 12.05.2014].

<sup>54</sup> [UK] Parliament (2013) Enterprise and Regulatory Reform Act 2013, c. 24, s. 65, available at: [www.legislation.gov.uk/ukpga/2013/24/section/65](http://www.legislation.gov.uk/ukpga/2013/24/section/65) [last accessed 12.05.2014].

<sup>55</sup> [UK] Parliament (2013) Hansard debates, Column 227-228, available at: [www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121016/debtext/121016-0003.htm#12101642002491](http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121016/debtext/121016-0003.htm#12101642002491) [last accessed 12.05.2014].

<sup>56</sup> [UK] Parliament (2013) Hansard debates Column GC123, available at: [www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130114-gc0001.htm](http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130114-gc0001.htm) [last accessed 12.05.2014].

Bodies providing access to employment and self-employment are prohibited from discriminating against a person on the grounds of sexual orientation. Specified bodies include,<sup>57</sup> *inter alia*, trade organisations, qualifications' bodies and employment service providers. In the main these provisions are fully consistent with, if not broader than, the scope of the Directive in Art. 3(1)(a) and (b), covering both public and private sectors, including public bodies, conditions for access to employment, to self-employment or to occupation and access to vocational guidance and training. The worker is also protected from unlawful discrimination after the conclusion of the employment relationship where 'the discrimination arises out of and is closely connected to a relationship which used to exist between them'.<sup>58</sup>

The concept of discrimination in the *Equality Act 2010* is founded on the principle of equal treatment and includes direct discrimination, indirect discrimination, victimisation and harassment as required by Art 2 of the Directive. The *Equality Act 2010* also created the category of combined discrimination (i.e., discrimination based on the combination of two of the protected characteristics). Under the Equality Act it is against the law to discriminate against someone because of age, being or becoming a transsexual person, being married or in a civil partnership, being pregnant or having a child, disability, race including colour, nationality, ethnic or national origin, religion, belief or lack of religion/belief, sex or sexual orientation. These are all protected characteristics.<sup>59</sup> The Act provides for protection against combined discrimination, which is where a person will be discriminated against by another because of a combination of two relevant protected characteristics.<sup>60</sup> but, as indicated above on page 11, it appears that the relevant provision (section 14) will not be brought into force.<sup>61</sup>

Under Section 13 of the *Equality Act 2010* the definition of direct discrimination is straightforward, applying where a person discriminates against another person 'because of a protected characteristic' by treating that person 'less favourably than he would treat other persons'.<sup>62</sup>

. In the context of sex discrimination, it has been held that the tribunal must simply ask whether or not the person complaining of discrimination would have received the same treatment 'but for' his or her sex?<sup>63</sup> Moreover, the UK courts have established, in cases concerning sex and race

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<sup>57</sup> [UK] Parliament (2010) Equality Act 2010, section 53-57, available at: [www.legislation.gov.uk/ukpga/2010/15/contents](http://www.legislation.gov.uk/ukpga/2010/15/contents) [last accessed 12.05.2014].

<sup>58</sup> [UK] Parliament (2010) Equality Act 2010, section 108, available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/108> [last accessed 12.05.2014].

<sup>59</sup> [UK] Equality and Human Rights Commission (2014) Protected Characteristics, available at: [www.equalityhumanrights.com/private-and-public-sector-guidance/guidance-all/protected-characteristics](http://www.equalityhumanrights.com/private-and-public-sector-guidance/guidance-all/protected-characteristics) [last accessed 27.06.14].

<sup>60</sup> [UK] Parliament (2010) Equality Act 2010, section 14, available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/14> [last accessed 27.06.14].

<sup>61</sup> [UK] Government Equalities Office (2013) Equality Act 2010: Guidance, available at: [www.gov.uk/equality-act-2010-guidance](http://www.gov.uk/equality-act-2010-guidance) [last accessed 12.05.2014].

<sup>62</sup> [UK] Parliament (2010) Equality Act 2010, section 13, available at: [www.legislation.gov.uk/ukpga/2010/15/section/13](http://www.legislation.gov.uk/ukpga/2010/15/section/13). [last accessed 12.05.2014]

<sup>63</sup> [UK] House of Lords (1990) James v. Eastleigh Borough Council, available at: [www.bailii.org/uk/cases/UKHL/1990/6.html](http://www.bailii.org/uk/cases/UKHL/1990/6.html) [last accessed 12.05.2014].

discrimination, that the intention or motive to discriminate is not relevant to show discrimination.<sup>64</sup> The ‘but for’ test has similarly been broadly applied in the context of harassment on the grounds of sexual orientation by the England and Wales Court of Appeal in *English v. Thomas Sanderson Blinds*<sup>65</sup>. It is fully accepted under domestic law that direct discrimination cannot be justified. Stereotypical assumptions or perceptions about members of a group are irrelevant because the objective of the legislation is to treat every person as an individual who is not assumed to be like other members of the group. In the context of sexual orientation discrimination, where stereotyping is rife, reiteration of this approach would reinforce the position of complainants in direct discrimination and harassment cases.

The requirement for a comparator in discrimination cases is limited under Section 23 of the *Equality Act 2010*, to situations where there is ‘no material difference between the circumstances relating to each case.’<sup>66</sup> Therefore the legal test is not whether the employer has treated the worker less favourably, but whether he /she has treated him/her less favourably than he/she would have treated a worker in an otherwise similar situation belonging to another group.<sup>67</sup> It follows that an actual comparator is not always necessary. The tribunal must answer two questions. Firstly, why was the claimant treated in the way in which he/she was? Secondly, was it on the proscribed ground that was the foundation of the application or was it for some other reason? If the former, there will be no difficulty in finding less favourable treatment.<sup>68</sup> This test has its source in a strict interpretation of the test required under the Burden of Proof Directive, 97/80, whereby, in the absence of an adequate explanation for less favourable treatment, the onus shifts to the employer to show that there is no discrimination whatsoever.<sup>69</sup> As the UK courts have outlined, once the worker has shown the fact of discrimination the employer must have ‘cogent evidence’ to prove that he/she did not discriminate.<sup>70</sup>

The first part of the definition of indirect discrimination in section 19 of the *Equality Act 2010* follows Art. 2(2)(b) of the Directive. Under this test indirect discrimination applies to ‘a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of the complainant.’ In order to justify a measure alleged to result in an indirect discrimination the author of the measure must show that such a ‘provision, criterion or practice’ is a ‘proportionate

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<sup>64</sup> [UK] House of Lords (1989) *R v. Birmingham City Council ex parte Equal Opportunities Commission*, IRLR, 173.

<sup>65</sup> [UK] England and Wales Court of Appeal (2008) *English v. Thomas Sanderson Blinds Ltd*, available at: [www.bailii.org/ew/cases/EWCA/Civ/2008/1421.html](http://www.bailii.org/ew/cases/EWCA/Civ/2008/1421.html) [last accessed 12.05.2014].

<sup>66</sup> [UK] Parliament (2010) *Equality Act 2010*, section 23, available at [www.legislation.gov.uk/ukpga/2010/15/section/23](http://www.legislation.gov.uk/ukpga/2010/15/section/23) [last accessed 12.05.2014]

<sup>67</sup> [UK] House of Lords (1997) *Zafar v. Glasgow City Council*, available at: [www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd971127/zafar.htm](http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd971127/zafar.htm). [last accessed 12.05.2014]

<sup>68</sup> [UK] House of Lords (2003) *Shamoon v. Chief Constable of the Royal Ulster Constabulary*, available at: [www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030227/sham-1.htm](http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030227/sham-1.htm). [last accessed 12.05.2014]

<sup>69</sup> [EU] Council of the European Union (1997) *Directive 97/80/EC*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0080:EN:HTML>. This directive has now been abrogated by [EU] European Parliament and Council of the European Union (2006) *Directive 2006/54/EC*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF>. [last accessed 12.05.2014]

<sup>70</sup> [UK] England and Wales Court of Appeal (2005) *Igen v. Wong*, available at: [www.bailii.org/ew/cases/EWCA/Civ/2005/142.html](http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html). [last accessed 12.05.2014]

means of achieving a legitimate aim',<sup>71</sup> consistent with Art. 2(2)(b)(i) of the Directive. The UK courts have closely followed the ECJ's ruling in *Bilka Kaufhaus GmbH v. Weber von Hartz*<sup>72</sup> whereby a provision, criterion or practice can only be justified where it corresponds to a real need on the part of the undertaking, is appropriate with a view to achieving the objectives pursued and necessary to that end.

A couple of recent cases have outlined the impact of conduct in the workplace of employees in revealing their sexual identity to work colleagues. In *Grant v HM Land Registry & Anor*, the Court of Appeal took into account the fact that the employee had revealed their sexual orientation willingly to colleagues in the workplace; any further disclosure of that sexual orientation by others at a different workplace did not constitute direct discrimination or harassment. The court held that it was unreasonable and unjustified for the employee to have any grievance about the information being disseminated to other colleagues.<sup>73</sup> Similarly, the case of *Smith v Ideal Shopping Direct Ltd*, not only provided further guidance on the definition of harassment but also illustrated that the conduct of the employee and the context of the workplace environment is of great importance when determining whether words or conduct, by others towards the employee, should constitute harassment. In particular, the court took into account the use of derogatory terms and nicknames that had been used by the employee themselves whilst in the workplace: the court's judgement confirmed that this conduct will be taken into account.<sup>74</sup>

Unlike under Directive 2000/78, protection against victimisation is found not under the section on 'remedies and enforcement' in Art. 11 but as one of the concepts of discrimination. The *Equality Act 2010* adopts a similar approach to the previous legislative provisions framing protection against victimisation as 'other prohibited conduct', along with harassment, after the definition of which practices constitute 'discrimination'<sup>75</sup>. Although the framework of the provision has been restructured and simplified, its content is essentially the same as the one contained in the 2003 Regulations. Section 27 of the Equality Act refers to subjecting the complainant to a 'detriment', where Reg. 4 spoke of less favourable treatment. It is still to be defined whether this distinction has any consequence in the protection afforded by the new Act. (In certain respects including victimisation as a concept of discrimination is useful in establishing liability. In a case under the *Race Relations Act* the House of Lords held that the motive of the act or acts of victimisation is irrelevant.<sup>76</sup> It is only necessary for the tribunal to ask whether the act of victimisation amounts to less favourable treatment. However, under the current legislation, the alleged perpetrator may be able to show that the treatment was

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<sup>71</sup> [UK] Parliament (2010) Equality Act 2010, section 19 (2) (d), available at: [www.legislation.gov.uk/ukpga/2010/15/section/19](http://www.legislation.gov.uk/ukpga/2010/15/section/19) [last accessed 12.05.2014].

<sup>72</sup> [UK] European Court of Justice (1986) Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61984J0170:EN:PDF>. [last accessed 12.05.2014]

<sup>73</sup> [UK] Court of Appeal (2011) *Grant v HM Land Registry & Anor*, available at: [www.bailii.org/ew/cases/EWCA/Civ/2011/769.html](http://www.bailii.org/ew/cases/EWCA/Civ/2011/769.html) [last accessed 12.05.2014].

<sup>74</sup> [UK] Employment Appeal Tribunal (2013) *Smith v Ideal Shopping Direct Ltd* [2013] Eq. L.R. 943, available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKLAT/2013/0590\\_12\\_1605.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKLAT/2013/0590_12_1605.html) [last accessed 12.05.2014].

<sup>75</sup> [UK] Parliament (2010) Equality Act 2010, c. 15, s. 27, available at: [www.legislation.gov.uk/ukpga/2010/15/contents](http://www.legislation.gov.uk/ukpga/2010/15/contents) [last accessed 12.05.2014].

<sup>76</sup> [UK] House of Lords (1999) *Nagarajan v. London Regional Transport*, available at: [www.bailii.org/uk/cases/UKHL/1999/36.html](http://www.bailii.org/uk/cases/UKHL/1999/36.html) [last accessed 12.05.2014].

not 'by reason that' the complainant was protected by one of the specified acts but was for some other reason, such as to protect his/her position as a litigant.<sup>77</sup> The problem with this provision is that it may require the complainant to identify a real or hypothetical comparator to show less favourable treatment. Art. 11 of the Directive contains no such requirement. It is designed to forestall discrimination 'as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment'.

Under Section 26 of the *Equality Act 2010*, 'harassment' is defined as unlawful conduct taking place where:

*1) A person (A) harasses another (B) if—*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) the conduct has the purpose or effect of—*

*(i) violating B's dignity, or*

*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*(2) A also harasses B if—*

*(a) A engages in unwanted conduct of a sexual nature, and*

*(b) the conduct has the purpose or effect referred to in subsection (1)(b).*

*(3) A also harasses B if—*

*(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*

*(b) the conduct has the purpose or effect referred to in subsection (1)(b), and*

*(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.<sup>78</sup>*

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<sup>77</sup> [UK] House of Lords (2001) *Chief Constable of West Yorkshire Police v. Khan*, available at: [www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011011/khan-1.htm](http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011011/khan-1.htm) [last accessed 12.05.2014].

<sup>78</sup> [UK] Parliament (2010) *Equality Act 2010*, section 26(1-3), available at: [www.legislation.gov.uk/ukpga/2010/15/section/26](http://www.legislation.gov.uk/ukpga/2010/15/section/26). [last accessed 12.05.2014]

. Sexual orientation is included as a relevant ‘protected characteristic’.<sup>79</sup> In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a)the perception of B; (b)the other circumstances of the case; (c)whether it is reasonable for the conduct to have that effect.<sup>80</sup>

In the case of *Lisboa v Realpubs Ltd (2011)*, an initiative aimed at attracting non-gay customers to the establishment was considered to impact negatively upon the LGBT community as the initiative was likely to increase discrimination as LGBT customers (including staff members) were treated less favourably than non-gay members of staff.<sup>81</sup>

## 1.2 Equality Act Occupational Requirements

Schedule 9 of the *Equality Act 2010* sets out permitted exceptions for **occupational requirements** within the framework provided for in Art. 4 of the Directive. These requirements relate to the protected characteristics: sexual orientation and gender reassignment.

Section 1 of Schedule 9 contains a general exception applying to all forms of employment and occupation under which, ‘a person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work— (a)it is an occupational requirement, (b)the application of the requirement is a proportionate means of achieving a legitimate aim, and (c)the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).<sup>82</sup>e.

Schedule 9 Part 1 section 1 draws upon Art. 4(2) of the Directive concerning an exception for existing national practices in the case of ‘occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief’ but must also be understood as a more specific implementation of Art. 4(1). An employer is entitled to apply an employment requirement where a) the employment is for the purposes of an organised religion, or (b) the application of the requirement engages the compliance or non-conflict principle.<sup>83</sup> These exceptions apply to training, employment and promotion. The compliance principle is engaged where an employment requirement is in compliance with the doctrines of the religion or belief and the non-conflict principle determines that the employment requirement must not conflict with strongly held convictions of a significant number of the religion’s followers. The Act

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<sup>79</sup> [UK] Parliament (2010) Equality Act 2010, section 26 (5), available at: [www.legislation.gov.uk/ukpga/2010/15/section/26](http://www.legislation.gov.uk/ukpga/2010/15/section/26). [last accessed 12.05.2014]

<sup>80</sup> [UK] Parliament (2010) Equality Act 2010, section 26 (4), available at: [www.legislation.gov.uk/ukpga/2010/15/section/26](http://www.legislation.gov.uk/ukpga/2010/15/section/26). [last accessed 12.05.2014]

<sup>81</sup> [UK] Employment Appeal Tribunal (2011) *Lisboa v Realpubs Ltd* [2011] Eq. L.R. 267; (2011) 155(2) S.J.L.B. 30, available at: [www.bailii.org/uk/cases/UKCAT/2011/0224\\_10\\_1101.html](http://www.bailii.org/uk/cases/UKCAT/2011/0224_10_1101.html). [last accessed 12.05.2014]

<sup>82</sup> [UK] Parliament (2010) Equality Act 2010, schedule 9, available at: [www.legislation.gov.uk/ukpga/2010/15/schedule/9](http://www.legislation.gov.uk/ukpga/2010/15/schedule/9). [last accessed 12.05.2014]

<sup>83</sup> [UK] Parliament (2010) Equality Act 2010, Schedule 9, available at: [www.legislation.gov.uk/ukpga/2010/15/schedule/9](http://www.legislation.gov.uk/ukpga/2010/15/schedule/9). [last accessed 12.05.2014]

outlines the employment requirements that are permissible: to be of a particular sex; not to be a transsexual person; not to be married or a civil partner; not to be married to, or the civil partner of, a person who has a living former spouse or civil partner; a requirement relating to circumstances in which a marriage or civil partnership came to an end; and a requirement related to sexual orientation.<sup>84</sup> For instance, a church can specify that it will not have a priest who is female or one who has re-married while his first wife was still alive.<sup>85</sup>

Section 158-159 of the *Equality Act 2010* provides for positive action as permitted under Art. 7 of the Directive. In comparison to the previous sexual orientation regulations, the *Equality Act 2010* appears to provide a broader scope for positive action, which is now defined generally in relation to all protected characteristics and specifically in regards to recruitment and promotions in employment.<sup>86</sup>

The Equality Act 2010 ensures that a person does not contravene the Act, so far as relating to sexual orientation, by doing anything which prevents or restricts a person who is not married from having access to a benefit, facility or service.<sup>87</sup> In *MSF and others v. Secretary of State for Trade and Industry*,<sup>88</sup> Mr Justice Richards held that this exception (then in the 2003 Regulations) was compatible with Recital 22 in the preamble of the Directive allowing Member States to maintain benefit rules relating to marital status. He found that such rules were not directly discriminatory on grounds of sexual orientation and that any indirect discrimination arising from their application might be objectively justified by reference to the need to limit the costs of social security benefits.

The *Equality Act 2010* introduced a new general exception applicable to Charities. In Section 193 the Act provides that restricting the provision of benefits to persons who share a particular protected characteristic is not discriminatory if that restriction 1) pursues a charitable instrument, and 2) is a proportionate means of achieving a legitimate aim, or 3) is for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.<sup>89</sup> The scope of this exception has been recently interpreted by the courts in a case regarding the provision of goods and services. In *Catholic Care v The Charity Commission for England and Wales*,<sup>90</sup> a Christian adoption agency intended to legitimise a policy of restricting access to its services to heterosexual couples, arguing that the policy would fulfil the legitimate aim of increasing the number of children

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<sup>84</sup> [UK] Parliament (2010) Equality Act 2010, Schedule 9, paras 2 (4)(a)-(f), available at: [www.legislation.gov.uk/ukpga/2010/15/schedule/9](http://www.legislation.gov.uk/ukpga/2010/15/schedule/9). [last accessed 12.05.2014]

<sup>85</sup> [U] Equal Rights Trust (2014) *The Equality Act 2010: Main Concepts* – Sue Ashtiany, page 29, available at: [www.equalrightstrust.org/ertdocumentbank/Sue%20Ashtiany.pdf](http://www.equalrightstrust.org/ertdocumentbank/Sue%20Ashtiany.pdf). [last accessed 12.05.2014]

<sup>86</sup> [UK] Parliament (2010) Equality Act 2010, c.15, s. 158 and 159, available at: [www.legislation.gov.uk/ukpga/2010/15/contents](http://www.legislation.gov.uk/ukpga/2010/15/contents). [last accessed 12.05.2014]

<sup>87</sup> [UK] Parliament (2010) Equality Act 2010, Part 9, Section 18, Benefits dependent on marital status, etc. available at: [www.legislation.gov.uk/ukpga/2010/15/schedule/9](http://www.legislation.gov.uk/ukpga/2010/15/schedule/9). [last accessed 12.05.2014]

<sup>88</sup> [UK] England and Wales High Court, Queen's Bench Division (2004) *MSF and others v. Secretary of State for Trade and Industry*, available at: [www.bailii.org/ew/cases/EWHC/Admin/2004/860.html](http://www.bailii.org/ew/cases/EWHC/Admin/2004/860.html). [last accessed 12.05.2014]

<sup>89</sup> [UK] Parliament (2010) Equality Act 2010, c. 15, s. 193, available at: [www.legislation.gov.uk/ukpga/2010/15/contents](http://www.legislation.gov.uk/ukpga/2010/15/contents). [last accessed 12.05.2014]

<sup>90</sup> [UK] Upper Tribunal (2011) *Catholic Care v the Charity Commission for England and Wales*, available at: [www.bailii.org/uk/cases/UKUT/TCC/2012/395.pdf](http://www.bailii.org/uk/cases/UKUT/TCC/2012/395.pdf). [last accessed 12.05.2014]

who would be placed in an adoptive family. The Upper Tribunal ruled that there was not enough evidence that the policy would be likely to achieve its aim, although the aim was legitimate, so that, the discriminatory practice could not be justified under Section 193.

### 1.3 Equality Act Enforcement for Employment

Provisions concerning **enforcement, including remedies and sanctions for employment**, can be found in Part 9, Chapter 3 of the *Equality Act 2010*. An individual seeking a remedy for alleged breach of the Part 5 of the Equality Act 2010 must bring a complaint within three months.<sup>91</sup> In Great Britain, the Employment Tribunal (ET) has jurisdiction to determine an application by a responsible person (as defined by Section 61) for a declaration as to the rights of that person and a worker in relation to a dispute about the effect of a non-discrimination rule.<sup>92</sup> ETs have an Employment Judge, who must be a qualified legal practitioner, and two lay members appointed to represent the two sides of industry, one representing employers and the other representing employees. Tribunals issue binding orders with a right of appeal on a point of law to the Employment Appeal Tribunal (EAT), a body that also has a judge and two lay members, with a further right of appeal to the panels of judges in the Court of Appeal (England and Wales) or the Inner House of the Court of Session (Scotland) and to the final court of appeal, the Supreme Court. In Northern Ireland applications go to an Industrial Tribunal and appeals are sent directly to the judges sitting on the Northern Ireland Court of Appeal and then to the Supreme Court

Enforcement of the Employment Directive was initially implemented domestically by the Employment Regulations (2003) and since October 2010 by the Equality Act 2010. The number of complaints of discrimination on the ground of sexual orientation received by the Employment Tribunal in England, Wales and Scotland and the Industrial Tribunal in Northern Ireland since 2003 has varied. In 2007 and 2008 a large number of complaints were received. The rise in claims was thought to have been as a result of an increase in multiple claims and also due to the economic climate. Multiple claims are those where two or more people bring claims usually against a single employer (but not necessarily so) arising from the same or similar circumstances. These claims are processed, managed and heard together in their multiple grouping.<sup>93</sup> The complaints data shows that there has been an increase in claims from 2004-2008; however there has subsequently been a downward trend (see Annex 2). Despite this trend, the number of claims that were successful has been relatively static, with a peak in 2007 at 29 claims successful at hearing; the lowest was in 2008 with 13 successful claims at hearing. On average, 20.8 claims are successful at hearing per year. The data shows that in approximately half of successful claims for cases with sexual

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<sup>91</sup> [UK] Parliament (2010) Equality Act 2010 Part 9, Chapter 3, available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/9/chapter/3>. [last accessed 12.05.2014].

<sup>92</sup> [UK] Parliament (2010) Equality Act, 2010, section 120, available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/120>. [last accessed 12.05.2014]

<sup>93</sup> United Kingdom, Ministry of Justice (2014) Employment Tribunal and EAT statistics 2009-10 (GB), 1 April 2009 to 31 March 2010, page 2, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218501/tribs-et-eat-annual-stats-april09-march10.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218501/tribs-et-eat-annual-stats-april09-march10.pdf).



orientation discrimination jurisdiction compensation is awarded by the tribunals. The highest amount (£163,725) was awarded in 2009 where the average award was £20,384.<sup>94</sup> In 2010 the average award was £11,671 and the maximum award was £47,633.<sup>95</sup> In 2011, the average award was £14,623 and the maximum award was £27,473.<sup>96</sup>

## 1.4 Implementation of Article 9/2 of Directive 2000/78

The *Equality Act 2010* does not expressly provide for standing for interest groups under Art. 9(2) of Directive 2000/78. However, the UK courts are receptive to any organisation seeking to offer support to complainants or to intervene in a case. In Great Britain the national human rights institution, the Equality and Human Rights Commission (EHRC), has powers to assist an individual who is, or may become a party to, legal proceedings (under the Equality Act, s. 28(4) the Equality Commission for Northern Ireland has similar powers.) These include legal advice and representation in court, providing facilities for the settlement of a dispute and any other form of assistance. Trade unions, such as Unison provide free legal advice and representation<sup>97</sup> as do voluntary or charitable bodies such as Citizens Advice Bureau or specialist organisations in the area of sexual orientation discrimination, such as Stonewall. No procedural restrictions are placed on these bodies. However, there is no evidence of any interventions by civil society organisations who engage on behalf of complainants. Stonewall indicate useful contacts for seeking legal advice and representation, and provide an overview of workplace discrimination and of employment protection for lesbian, gay and bisexual people.<sup>98</sup>

Third parties may bring an action for judicial review to challenge the legality of legislation or the acts of any public authority but may not submit a case directly in place of a complainant. 'Associational standing' is not recognized, so that an interest group is not authorized to file an action against discrimination that group has not been subjected to directly. Since 2010, the budget of the EHRC has been significantly reduced as a result of the austerity measures implemented by

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<sup>94</sup> United Kingdom, Ministry of Justice (2014) Employment Tribunal and EAT statistics 2009-10 (GB) 1 April 2009 to 31 March 2010, page 9, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218501/tribs-et-eat-annual-stats-april09-march10.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218501/tribs-et-eat-annual-stats-april09-march10.pdf).

<sup>95</sup> United Kingdom, Ministry of Justice (2014) Employment Tribunal and EAT statistics 2009-10 (GB), 1 April 2009 to 31 March 2010, page 9, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218501/tribs-et-eat-annual-stats-april09-march10.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218501/tribs-et-eat-annual-stats-april09-march10.pdf).

<sup>96</sup> United Kingdom, Ministry of Justice (2014) Employment Tribunals and EAT Statistics, 2011-12 1 April 2011 to 31 March 2012, page 13, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218497/employment-trib-stats-april-march-2011-12.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218497/employment-trib-stats-april-march-2011-12.pdf).

<sup>97</sup> [UK] Unison (2014) About Legal Support, available at: [www.unison.org.uk/get-help/getting-help/about-legal-support/](http://www.unison.org.uk/get-help/getting-help/about-legal-support/). [last accessed 12.05.2014]

<sup>98</sup>[UK] Stonewall (2014) What to do if you have been discriminated against at work, available at: [https://www.stonewall.org.uk/at\\_work/individuals/workplace\\_discrimination/default.asp](https://www.stonewall.org.uk/at_work/individuals/workplace_discrimination/default.asp); [UK] Stonewall (2014) An overview on employment protections for lesbian, gay and bisexual people, available at: [www.stonewall.org.uk/documents/an\\_overview\\_on\\_employment\\_protections.pdf](http://www.stonewall.org.uk/documents/an_overview_on_employment_protections.pdf). [last accessed 12.05.2014]

the Coalition government.<sup>99</sup> As part of the cost-cutting measures the EHRC has closed the grants programme, which formerly funded voluntary sectors organisations who were legally constituted to work in one or more of the equality mandate areas and which had a strong direct link to their beneficiaries – either individuals or communities.<sup>100</sup>

## 1.5 National Human Rights Institution – Equality and Human Rights Commission

The UK does not have a specialised ombudsman or equality body dealing with sexual orientation discrimination issues but it does have statutory bodies that have a general duty to promote equality and specific powers to monitor the effectiveness of equalities legislation and bring enforcement proceedings. In Great Britain this function is the responsibility of Equality and Human Rights Commission, the national human rights institution, to replace specialised bodies concerning race, sex and disability discrimination with one generic equality body covering all heads of unlawful discrimination. The EHRC monitors the law, advises government and undertakes research, including monitoring of the compliance of public bodies with the ECHR under the Human Rights Act 1998. In addition to its powers of legal advice and representation described above, the EHRC has enforcement powers to conduct inquiries and investigations into organisations where discrimination may be occurring<sup>101</sup> and to issue an ‘unlawful act’ notice to an organisation where it considers an act of discrimination has occurred and can apply to a court or tribunal to enforce that notice.<sup>102</sup> The EHRC seeks to challenge endemic and institutional discrimination through its investigatory powers without the need for individual litigation. The EHRC has responsibility for addressing sexual orientation discrimination and in this capacity has been involved in three cases: *Bivonas LLP & Ors v Bennett* (Sexual Orientation Discrimination or Transsexualism)

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<sup>99</sup> [UK] Equality and Human Rights Commission (2013) Annual Report and Accounts, page 25, available at: [www.equalityhumanrights.com/uploaded\\_files/ehrc\\_2012\\_13\\_annual\\_report\\_final\\_for\\_web.pdf](http://www.equalityhumanrights.com/uploaded_files/ehrc_2012_13_annual_report_final_for_web.pdf). [last accessed 12.05.2014]

<sup>100</sup> [UK] Equality and Human Rights Commission (2013) Annual Report and Accounts, page 4 and page 50, available at: [www.equalityhumanrights.com/uploaded\\_files/ehrc\\_2012\\_13\\_annual\\_report\\_final\\_for\\_web.pdf](http://www.equalityhumanrights.com/uploaded_files/ehrc_2012_13_annual_report_final_for_web.pdf). [last accessed 12.05.2014]

<sup>101</sup> [UK] Parliament (2006) Equality Act 2006 c.3, S. 16 and S. 20, available at: [www.legislation.gov.uk/ukpga/2006/3](http://www.legislation.gov.uk/ukpga/2006/3). [last accessed 12.05.2014]

<sup>102</sup> [UK] Parliament (2006) Equality Act 2006 c.3, S. 21, available at: [www.legislation.gov.uk/ukpga/2006/3](http://www.legislation.gov.uk/ukpga/2006/3) [last accessed 12.05.2014].

[2011],<sup>103</sup> *Grant v HM Land Registry* [2011],<sup>104</sup> and *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales & Anor* [2010]<sup>105</sup>

In Northern Ireland similar responsibilities fall within the remit of the Equality Commission for Northern Ireland (ECNI) which has had powers to oversee sexual orientation discrimination issues from the time when the Regulations were adopted and has been involved in providing support in a number of cases relating to sexual orientation discrimination in the workplace and in the provision of goods and services.<sup>106</sup> In all of the three cases, the ECHR intervened as it considered the cases to have a significant impact. The ECHR seeks out public interest cases which raise issues affecting vulnerable groups, seeking to clarify or challenge important questions of law, involving serious matters of public policy or general public concern, and/or concerning systematic default or abuse by a public body.<sup>107</sup>

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<sup>103</sup> [UK] Employment Appeal Tribunal (2011) *Bivonas LLP & Ors v Bennett (Sexual Orientation Discrimination or Transsexualism)* [2011] UKEAT 0254\_11\_3101 (31 January 2012), available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKEAT/2012/0254\\_11\\_3101.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKEAT/2012/0254_11_3101.html). [last accessed 12.05.2014]

<sup>104</sup> [UK] Court of Appeal (2011) *Grant v HM Land Registry* [2011] EWCA Civ 769 (01 July 2011) ([2011] EWCA Civ 769, [2011] ICR 1390, [2011] IRLR 748, available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2011/769.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2011/769.html)). [last accessed 12.05.2014]

<sup>105</sup> [UK] High Court (2010) *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales & Anor* [2010] EWHC 520 (Ch) (17 March 2010) available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2010/520.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2010/520.html). [last accessed 12.05.2014]

<sup>106</sup> [UK] J. Walsh, C. Conlon, B. Fitzpatrick and U. Hansson (2007) *Enabling Lesbians, Gay and Bisexual Individuals to Access their Rights under Equality Law*, available at: [www.equalityni.org/sections/default.asp?secid=8&cms=Publications\\_Sexual+Orientation\\_research+reports&cmsid=7\\_40\\_538&id=538](http://www.equalityni.org/sections/default.asp?secid=8&cms=Publications_Sexual+Orientation_research+reports&cmsid=7_40_538&id=538) [last accessed 12.05.2014]; [UK] Equality Commission for Northern Ireland (2012) *Promoting Sexual Orientation Equality Priorities and Recommendations*, page 7 and page 20, available at: [www.some-ni.co.uk/content-directory/uploads/2013/10/ECNI\\_SexualOrientation\\_PolicyPriorities.pdf](http://www.some-ni.co.uk/content-directory/uploads/2013/10/ECNI_SexualOrientation_PolicyPriorities.pdf) [last accessed 12.05.2014]; [UK] Equality Commission for Northern Ireland, *Decisions and Settlements Review for the period 2005-2012*, available at: [www.equalityni.org/sections/publist.asp?secid=8](http://www.equalityni.org/sections/publist.asp?secid=8) [last accessed 12.05.2014]. The authors are grateful to Anne McKernan of the ECNI for providing background information.

<sup>107</sup> [UK] Equality and Human Rights Commission (2014) *Legal Powers*, available at: <http://www.equalityhumanrights.com/legal-and-policy/at-the-commission/legal-powers>.

## 2 Freedom of movement

The rights of family members of EU citizens and other European Economic Area (EEA) and Swiss nationals to enter, reside and remain in the UK under Directive 2004/38 (29.04.2004)<sup>108</sup> have been implemented by the *Immigration (European Economic Area) Regulations 2006* as amended,<sup>109</sup> effective from the date of entry into force of the Directive, 30 April 2006. For the purpose of this part of the study the term EU citizen is taken also to include nationals of other EEA countries and Swiss nationals. The following paragraphs briefly outline the relevant provisions in these Regulations and related legislation.

To place the Regulations in context it should be noted that under the *Civil Partnership Act 2004*<sup>110</sup> same-sex couples are able to obtain legal recognition of their relationship by forming a civil partnership. They may do so by registering as civil partners of each other provided:

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

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

Legislation has since been enacted that allows for same-sex couples to obtain recognition of their relationship by marriage in England and Wales. The *Marriage (Same Sex Couples) Act 2013*, which entered into force on 13 March 2014, extends to same-sex couples the same legal consequences, rights and responsibilities under UK law as those under a marriage between persons of the opposite sex. The Act provides for the possibility of converting a same-sex civil partnership into marriage, and maintains the availability of civil partnerships for same sex couples<sup>111</sup>. LGB spouses of UK

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<sup>108</sup> [UK] European Parliament and Council of the European Union (2004) Directive 2004/38, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>. [last accessed 12.05.2014]

<sup>109</sup> [UK] Parliament (2006) The Immigration (European Economic Area) Regulations 2006, Statutory Instrument No. 1003, available at: [www.legislation.gov.uk/ukxi/2006/1003/made](http://www.legislation.gov.uk/ukxi/2006/1003/made). [last accessed 12.05.2014]

<sup>110</sup> [UK] Parliament (2004) Civil Partnership Act 2004 c.33, available at: [www.legislation.gov.uk/ukpga/2004/33](http://www.legislation.gov.uk/ukpga/2004/33). The act applies to England and Wales. Similar provisions have been introduced in Scotland and Northern Ireland. [last accessed 12.05.2014]

<sup>111</sup> [UK] Parliament (2013) Marriage (Same Sex Couples) Bill Explanatory Notes, available at: [www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/en/2013126en.htm](http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/en/2013126en.htm). The continued availability of civil partnerships will, nevertheless, be subject to review in the future, as it will become an exclusive possibility for same sex couples: [UK] Government Equalities Office (2014) Marriage (Same Sex Couples) Act: a Fact Sheet, available at:

nationals will, therefore, benefit from freedom of movement in another EEA State in the same conditions as someone married to a person of the opposite sex, under Art. 2(2)(a) of the Directive. The *Marriage and Civil Partnership (Scotland) Bill*,<sup>112</sup> which is under discussion by the Scottish Parliament, has similar effects.

Regulation 8 facilitates the entry of extended family members and provides that extended family members may be issued with a permit to join or accompany an EEA national. As stated above, registered civil partners or married LGBT partners may enter as of right. However, under Regulation 8(5) if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national then a family permit may be issued.<sup>113</sup>

In addition to assisting LGB same-sex couples this legislation also applies to persons who have undergone gender reassignment who wish to form a civil partnership, or have formed a civil partnership, with a person of their acquired gender. This has been made possible by the *Gender Recognition Act 2004*<sup>114</sup> under which transgendered persons are entitled to a new birth certificate reflecting their acquired gender. It should be noted also that transgendered persons are also able to marry someone of the opposite gender to his or her acquired gender and have that marriage recognised and hence be treated as a 'spouse' of an EU citizen for the purpose of Directive 2004/38 and Reg. 7(1)(a) of the *Immigration (EEA) Regulations 2006*. Following the entry into force of the *Marriage (Same Sex Couples) Act 2013* on 13 March 2014, transgendered persons are able to marry a person of the same gender to his or her acquired gender and be recognised as his or her spouse for the purposes of the relevant legislation. Additionally, a person who is currently married to another person of the opposite sex no longer needs to end their marriage in order to undergo the gender reassignment process.<sup>115</sup>

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

- 7(1) his spouse or civil partner;
- (2) direct descendant of his, his spouse or his civil partner who are:
  - (i) under 21; or
  - (ii) dependants of his, his spouse or his civil partner;
- (3) dependant direct relatives in his ascending line or that of his spouse or civil partner;
- 7(3) a person who is [an extended family member of an EU citizen or his/her spouse or civil partner] and has been issued with an EEA family permit, a registration certificate or residence

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[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270230/140107\\_M\\_SSC\\_Act\\_factsheet.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270230/140107_M_SSC_Act_factsheet.pdf). [last accessed 12.05.2014] [last accessed 12.05.2014]

<sup>112</sup> [UK] Parliament (2013) *Marriage and Civil Partnership (Scotland) Bill*, available at: [www.scottish.parliament.uk/parliamentarybusiness/Bills/64983.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/64983.aspx). [last accessed 12.05.2014]

<sup>113</sup> [UK] Parliament (2006) *The Immigration (European Economic Area) Regulations 2006*, Statutory Instrument No. 1003, available at: [www.legislation.gov.uk/uksi/2006/1003/made](http://www.legislation.gov.uk/uksi/2006/1003/made). [last accessed 20.06.2014]

<sup>114</sup> [UK] Parliament (2004) *Gender Recognition Act 2004* c.4, available at: [www.legislation.gov.uk/ukpga/2004/7](http://www.legislation.gov.uk/ukpga/2004/7). [last accessed 12.05.2014]

<sup>115</sup> [UK] Parliament (2013) *Marriage (Same Sex Couples) Bill Explanatory Notes*, para. 12, available at: [www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/en/2013126en.htm](http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/en/2013126en.htm). [last accessed 12.05.2014]

card [so long as he/she continues to satisfy the residence conditions applying to extended family members] and the permit, certificate or card has not ceased to be valid or been revoked.

This definition would include the LGBT partners of EU citizens who are in a same-sex civil partnership or marriage that is legally recognised in another EEA State consistent with Art. 2(2)(b) of Directive 2004/38. Children and family members of LGBT partners falling within this definition would also be included. The definition of civil partner is the same as applies under the *Civil Partnership Act*. It specifically excludes ‘a civil partnership of convenience’.<sup>116</sup> This exclusion puts into effect the provision on ‘abuse of rights’ arising from such marriages of civil partnerships ‘of convenience’ as set out in Art. 35 of Directive 2004/38. Neither the Directive nor the Regulations define this term.

Reg. 8 is intended to put into effect the rights of ‘beneficiaries’ under Article 3(2) of Directive 2004/38 although it does not apply to EU citizens who are students. Under Reg. 8 an ‘extended family member’ might include family members such as brothers, sisters, aunts, uncles or cousins and any such person who has serious health problems which strictly require the personal care of the EU citizen. Extended family members do not have an automatic right to live in the UK but, to be considered under this category, they must be able to demonstrate that they are dependant on the EU citizen. In the case of partners who are not married or in a civil partnership with an EU citizen they must be able to show that they are in a ‘durable relationship’ with each other.<sup>117</sup> Giving effect to the ECJ’s judgement in *Rahman*,<sup>118</sup> the *Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012* removed the requirement previously contained in Reg. (2)(a) that an extended family member must have resided in a country in which the EEA national also resides.<sup>119</sup>

The rights of third country national LGBT partners who are family members of the EU citizen (including a United Kingdom national) under the Regulations and their children and other family members are set out in Regs. 9-15. Third country national family members accompanying or joining the EU citizen must be admitted to the UK if he/she produces on arrival a valid passport and an EEA family permit, a residence card or permanent residence card. If the person is a family member falling within the definition in the Regulations they must be issued with an EEA family permit. Residence cards are issued to third country national family members confirming their rights

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<sup>116</sup> [UK] Parliament (2006) The Immigration (European Economic Area) Regulations 2006, Statutory Instrument No. 1003, Reg. 2(1) available at: [www.legislation.gov.uk/ukSI/2006/1003/made](http://www.legislation.gov.uk/ukSI/2006/1003/made). [last accessed 12.05.2014]

<sup>117</sup> [UK] UK Border Agency (2014) Guidance on EU, EEA and Commonwealth Immigration, available at: [www.ukba.homeoffice.gov.uk/eucitizens/](http://www.ukba.homeoffice.gov.uk/eucitizens/). [last accessed 12.05.2014]

<sup>118</sup> [EU] European Court of Justice (2012) Case C-83/11 Secretary of State for the Home Department v Rahman, available at:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d6eb3c10c448df43689978eefeb741a6b8.e34KaxiLc3eQc40LaxqMbN4OaxuTe0?text=&docid=126362&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=254155>. [last accessed 12.05.2014]

<sup>119</sup> [UK] Parliament (2012) The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012, Statutory Instrument No. 2560, available at: [www.legislation.gov.uk/ukSI/2012/2560/made](http://www.legislation.gov.uk/ukSI/2012/2560/made). [last accessed 12.05.2014]

of residence under EU law. Third country nationals meeting these requirements will not need to apply for a work permit and are entitled to:<sup>120</sup>

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

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

The 2006 Regulations have now had to be amended in the light of the ECJ's ruling in the recent *Metock* case, referred by an Irish court.<sup>121</sup> This was necessary because the original Regulations contained restrictions on the entry of third country national family members that have now been found not to be compatible with the Directive. In *Metock*, the first ruling on Directive 2004/38, the ECJ held that a requirement that a third country national family member of a Union citizen should have prior lawful residence in the EU before entering the host Member State was incompatible with the right of the Union citizen to be accompanied or joined by their family members in a Member State other than that of which they are a national contained in Art 3(1) of the Directive

Under Reg. 9(2)(b) of the 2006 Regulations, concerning the rights of UK nationals who move back to the UK from another EEA State, there was a requirement that their family members must have been living with them in that state before the UK national returned to the UK. Under Reg. 11, concerning the requirement for family members to have an EEA family permit, it was provided that to qualify for such a permit a family member must be lawfully resident in an EEA State or meet the requirements of UK Immigration Rules for entry as a family member. In the light of the ruling in *Metock*, the UK Border Agency issued revised guidance to the effect that the 'lawful residence requirement' in these Regulations and any related restrictions in the UK Immigration Rules would not be applied to family members entering the UK who are accompanying or joining an EU citizen.<sup>122</sup> This was swiftly followed by the adoption of the Immigration (European Economic Area) Amendment Regulations 2009.<sup>123</sup> The offending provisions have now been removed bringing the UK into compliance with the ruling in *Metock*.

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<sup>120</sup> [UK] UK Border Agency (2014) Apply for an EEA family permit, available at: [www.ukba.homeoffice.gov.uk/eucitizens/](http://www.ukba.homeoffice.gov.uk/eucitizens/). [last accessed 12.05.2014]

<sup>121</sup> [EU] European Court of Justice (2008) Case C-127/08 *Metock and Others v. Minister for Justice, Equality and Law Reform*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0127:EN:HTML>. [last accessed 12.05.2014]

<sup>122</sup> [UK] UK Visas and Immigration (2014) Visas and immigration operational guidance - collection European casework instructions - European casework instructions and policy notices, available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/). [last accessed 12.05.2014]

<sup>123</sup> [UK] Parliament (2009) Immigration (European Economic Area) Amendment Regulations 2009, Statutory Instrument No. 1117, available at: [www.legislation.gov.uk/ukSI/2009/1117/schedules/made](http://www.legislation.gov.uk/ukSI/2009/1117/schedules/made). [last accessed 12.05.2014]

Despite the lack of relevant case law to provide an overview of how the courts interpret the *Immigration (European Economic Area) Regulations 2006* and related legislation,<sup>124</sup> the legislative framework makes it clear that a third country national LGBT partner of an EU citizen is entitled to freedom of movement in the UK.

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<sup>124</sup> [UK] UK Contractor (2014) Substantial searches have been conducted using Westlaw, lexis nexis, and Baillii databases to identify case law. No relevant case law has been identified.



## 3 Asylum and subsidiary protection

### 3.1 Asylum Framework

Asylum claims on the basis of sexuality have had some success in UK courts. Positive determinations have developed through jurisprudential means drawing on a substantial body of international case law, which has defined and redefined the parameters of ‘membership of a particular social group’ as per the 1951 *Convention on the Status of Refugees*.<sup>125</sup> Art 1A(2) of the *Refugee Convention* defines a refugee as a person who:

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

The formal requirements for gaining refugee status can be broken down into three substantive points. Firstly, an individual must be able to demonstrate an objective and subjective fear of persecution based on one of the enumerated grounds of race, religion, nationality, membership of a particular social group or political opinion. Persecution means an act of persecution within the meaning of Article 1(A) of the Geneva Convention, however, the cases of *Amare v Secretary of State for the Home Department* (2005)<sup>126</sup> and *RG (Colombia) v Secretary of State for the Home Department* (2006)<sup>127</sup> highlighted that the existence of discriminatory legislation in an applicant’s home country will not usually be regarded in itself as amounting to persecution of a sufficiently serious nature. In, *OO (Sudan) JM (Uganda) v SSHD* [2009] EWCA Civ 1432 the Court of Appeal further ruled that even ‘[I]f the legislation does not appear to be enforced then it may sometimes be the case that the lack of enforcement has resulted in those being discriminated against changing their behaviour to avoid persecution. ... modification of behaviour may be so serious that it amounts to persecution’<sup>128</sup> Further guidance on the meaning of persecution is also available in Regulation of 5, of the Refugee or Persons in Need of International Protection (Qualification) Regulations

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<sup>125</sup> [UK] Parliament (1971) Immigration Act 1971, c. 77; [UK] Parliament (1988) Immigration Act 1988, c. 14; [UK] Parliament (1993) Asylum and Immigration Appeals Act 1993, c.23; [UK] Parliament (1999) Immigration and Asylum Act 1999, c.33; [UK] Parliament (2002) Nationality, Asylum and Immigration Act 2002, c. 41; [UK] Parliament (2004) Asylum and Immigration (Treatment of Claimants, etc) Act 2004, c.19; [UK] Parliament (2006) Immigration, Asylum and Nationality Act 2006, c.13; [UK] Parliament (1994) Immigration rules HC 395.

<sup>126</sup> [UK] England and Wales Court of Appeal (2005) *Amare v Secretary of State for the Home Department*, available at: [www.refworld.org/docid/47fd5b0.html](http://www.refworld.org/docid/47fd5b0.html). [last accessed 12.05.2014]

<sup>127</sup> [UK] Court of Appeal (2006) *RG (Colombia) v Secretary of State for the Home Department*, EWCA Civ 57, available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/57.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/57.html).

<sup>128</sup> [UKI] Court of Appeal (2009) *OO (Sudan) JM (Uganda) v SSHD* [2009] EWCA Civ 1432 para 14. available at: <http://www.refworld.org/docid/4ba775c52.html>. [last accessed 12.05.2014]

2006.<sup>129</sup> Secondly the individual must be outside the country of his/her nationality and the state from which the claimant is fleeing must have been unable or unwilling to provide protection from persecution; or the individual no longer has a nationality and is outside of their former residence and cannot or will not return to that place of residence. Finally, the receiving state is under an obligation not to *réfouler* the claimant to the home state if there is the real possibility that he or she may be subject to further persecution.

European Council Directive 2004/83EC preamble 3 identifies the *Convention* as the ‘cornerstone of the international legal regime for the protection of refugees’. The *Refugee Convention* provides the framework upon which the UK asylum system rests. The Refugee or Persons in Need of International Protection (Qualification) Regulations 2006 together with amendments made to the Immigration Rules HC395 implemented the European Council Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons who otherwise need international protection and the content of protection granted. The parts of the directive not transposed were already present in existing UK immigration and asylum law.<sup>130</sup> The asylum system has multiple tiers composed of the various Immigration Acts, Regulations and European Directives, which are administered through the *Immigration Rules HC395*. The implementation into domestic law of EC Directive 2004/83 through the 2006 Qualification Regulations alongside the explanatory memoranda provided further guidance as to the interpretation of the Refugee Convention. The Regulations guide the interpretation and decision making process of the Home Office and provide further details for the provision of humanitarian protection. Significantly Regulation 6 (e) of the Regulations provides clarification on the social group definition and indicates that ‘a particular social group might include a group based on a common characteristic of sexual orientation’.<sup>131</sup>

This framework does not preclude reliance on the principles of the *European Convention on Human Rights* (ECHR) subsequent to the enactment of the UK *Human Rights Act 1998*. Furthermore the 1998 Act renders it unlawful for a public authority to act in a way incompatible with a right arising under the ECHR. A claimant can rely on the ECHR if appealing a negative determination. The claimant must raise their ECHR arguments alongside the grounds of appeal. Claims that the individual would have their ECHR rights violated upon return to the home state would mean that the individual may be eligible for subsidiary protection as defined under article 2 and 15 of directive 2004/83 and 339C of the immigration rules.

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<sup>129</sup> [UK] Parliament (2006) Refugee or Persons in Need of International Protection (Qualification) Regulations 2006, Statutory Instrument No. 2525, available at: [www.legislation.gov.uk/ukxi/2006/2525/made](http://www.legislation.gov.uk/ukxi/2006/2525/made). [last accessed 12.05.2014]

<sup>130</sup> [UK] Parliament (2006) The Refugee or Persons in Need of International Protection (Qualification) Regulations 2006, Regulation 5, Statutory Instrument No. 2525, available at: [www.legislation.gov.uk/ukxi/2006/2525/made](http://www.legislation.gov.uk/ukxi/2006/2525/made).

<sup>131</sup> [UK] Parliament (2006) The Refugee or Persons in Need of International Protection (Qualification) Regulations 2006, Regulation 6(e), Statutory Instrument No. 2525, available at <http://www.legislation.gov.uk/ukxi/2006/2525/regulation/6/made>. [last accessed 12.05.2014].

## 3.2 Jurisprudential evolution of LGBT asylum claims

LGBT individuals generally claim asylum as members of a ‘particular social group’ following the *obiter* comments of Lord Justice Steyn in *Shah and Islam*.<sup>132</sup> *Shah and Islam* concerned the position of two Pakistani women accused of adultery and subject to domestic abuse by their partners. In discussing the linkage between abused women as a social group and ‘homosexuals’, Lord Justice Steyn notes:

*‘The unifying characteristics of gender, suspicion of adultery, and lack of protection, do not involve an assertion of persecution. The cases under consideration can be compared with a more narrowly defined group of homosexuals, namely practising homosexuals who are unprotected by the state. Conceptually such a group does not in a relevant sense depend for its existence on persecution.’*<sup>133</sup>

In his judgement, Lord Steyn also notes ‘drawing on the case law and practice in Germany, The Netherlands, Sweden, Denmark, Canada, Australia and the USA, the refugee status authority concluded in an impressive judgement that depending on the evidence homosexuals are capable of constituting a particular social group... [t]his view is consistent with the language and purpose of Art 1A(2).’<sup>134</sup>

This line of reasoning drew upon much of the established case law of the USA,<sup>135</sup> Australia<sup>136</sup> and Canada.<sup>137</sup> The decision drew in particular on the Canadian jurisprudence of *AG for Canada v Ward* (1993) with sexuality positioned as an innate and unchangeable characteristic, as something fundamental to human dignity that ought not to be required to be forsaken. Following the decision that lesbians and gay men could constitute members of a ‘particular social group’, numerous other questions arose navigating the territory of sexuality based asylum claims. Some of the issues raised for discussion regarded proof of sexuality.<sup>138</sup>

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<sup>132</sup> [UK] House of Lords (1999) *Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another, Ex parte Shah*, available at: [www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm](http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm).

<sup>133</sup> [UK] House of Lords (1999) *Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another, Ex parte Shah*, Lord Steyn at 645, available at: [www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm](http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm). [last accessed 12.05.2014]

<sup>134</sup> [UK] House of Lords (1999) *Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another, Ex parte Shah*, Lord Steyn at 643, available at: [www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm](http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm). [last accessed 12.05.2014]

<sup>135</sup> [UK] Board of Immigration Appeals (1985) *Acosta*, available at: [www.justice.gov/eoir/vll/intdec/vol19/2986.pdf](http://www.justice.gov/eoir/vll/intdec/vol19/2986.pdf). [last accessed 12.05.2014]

<sup>136</sup> [UK] High Court of Australia (2003) *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*, available at: [www.austlii.edu.au/au/cases/cth/HCA/2003/71.html](http://www.austlii.edu.au/au/cases/cth/HCA/2003/71.html). [last accessed 12.05.2014]

<sup>137</sup> [UK] Supreme Court of Canada (1993) *Attorney General for Canada v Ward* (1993), available at: [www.canlii.org/en/ca/scc/doc/1993/1993canlii105/1993canlii105.html](http://www.canlii.org/en/ca/scc/doc/1993/1993canlii105/1993canlii105.html). [last accessed 12.05.2014]

<sup>138</sup> [UK] (1995) *R v Secretary of State for the Home Department ex. parte Vraciu* 1995 Appeal No. HX/70517/94. [UK] Court of Appeal (2009) *NR (Jamaica) v SSHD*, available at: [www.bailii.org/ew/cases/EWCA/Civ/2009/856.html](http://www.bailii.org/ew/cases/EWCA/Civ/2009/856.html)

Evidence for example of previous heterosexual relationships and children borne from those relationships brought the claimants credibility as a homosexual into question.<sup>139</sup> Many lesbians and gay men marry as an attempt to conform to heterosexual norms, enter into forced marriages or enter willingly into heterosexual marriage and then later become aware of their homosexuality.

Internal relocation alternatives<sup>140</sup> have also been relied on by the courts. It is assumed that unmarried persons can safely move to other parts of the country away from the discrimination/persecution and live discreetly. In some states there is no safe space for lesbians and gay men to move to. Moving as a single person or with someone of the same gender transgresses cultural norms, which raises the spectre of homosexuality; additionally moving to alternate parts of the country away from family is not feasible for some individuals both culturally and economically. In many states a woman leaving home prior to being married would be frowned upon and the cultural and social disapprobation of such behaviour could lead to harassment.

In order to found a negative determination the courts have also used access to health care<sup>141</sup> and concerns over expenditure. In *N v SSHD* [2005] the court assessed the applicant's need on the basis of the 'level of acute suffering' to be endured by the individual; 'has the applicant's medical condition reached such a critical state that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering'.<sup>142</sup>

The question of whether prosecutory legislation in the home state can be considered sufficiently persecutory has also arisen.<sup>143</sup> The frequency of persecution and the penalties imposed must be seen as sufficiently severe in order that prosecution is equivalent to persecution.<sup>144</sup>

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;[UK] O'Leary, Barry; "We cannot claim any particular knowledge of the ways of homosexuals, still less of Iranian homosexuals": The Particular Problems of Those Who Seek Asylum on the Basis of Their Sexual Identity' *Feminist Legal Studies* (2008) 16: 87-95. [last accessed 12.05.2014]

<sup>139</sup> [UK] High Court of Justice, Queen's Bench Division (2010) *SB (Uganda) v. Secretary of State for the Home Department*, para. 6, available at: [www.bailii.org/ew/cases/EWHC/Admin/2010/338.html](http://www.bailii.org/ew/cases/EWHC/Admin/2010/338.html). [last accessed 12.05.2014]

<sup>140</sup> [UK] England and Wales Court of Appeal (2005) *Amare v Secretary of State for the Home Department*, available at: [www.refworld.org/docid/47fdfb5b0.html](http://www.refworld.org/docid/47fdfb5b0.html); Also see [Canada] (2005) *Franklyn v Canada (Minister of Citizenship and Immigration)*, FC 1249. [last accessed 12.05.2014]

<sup>141</sup> [UK] Court of Appeal (2006) *RG (Colombia) v Secretary of State for the Home Department*, available at: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/57.html>. [last accessed 12.05.2014]

<sup>142</sup> [UK] House of Lords (2005) *N v Secretary of State for the Home Department*, available at: [www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050505/home-1.htm](http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050505/home-1.htm); [UK] European Court of Human Rights (1997) *D v UK*, available at: [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-58035#{"itemid":\["001-58035"\]](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-58035#{); [UK] Court of Appeal (2009) *JA (Ivory Coast), ES (Tanzania) v Secretary of State for the Home Department*, available at: [www.refworld.org/docid/4b2f6f3e2.html](http://www.refworld.org/docid/4b2f6f3e2.html). [last accessed 12.05.2014]

<sup>143</sup> [UK] Court of Appeal (2009) *OO (Sudan) JM (Uganda) v Secretary of State for the Home Department*, available at: [www.refworld.org/docid/4ba775c52.html](http://www.refworld.org/docid/4ba775c52.html). [last accessed 12.05.2014]

<sup>144</sup> [UK] Court of Appeal (2005) *Amare v Secretary of State for the Home Department*, available at: [www.bailii.org/ew/cases/EWCA/Civ/2005/1600.html](http://www.bailii.org/ew/cases/EWCA/Civ/2005/1600.html); [UK] House of Lords (2005) *ex parte Hoxha*, para 35, available at: [www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050310/hox-1.htm](http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050310/hox-1.htm); [UK] High Court of Justice, Queen's Bench Division (1996) *Sandralingham v Secretary of State for the Home Department*, 114, available at: [www.refworld.org/docid/3ae6b65410.html](http://www.refworld.org/docid/3ae6b65410.html); [UK] Court of Appeal (2006) *RG (Colombia) v Secretary of State for the Home Department*, EWCA Civ 57, available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/57.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/57.html). [last accessed 12.05.2014]

Even if prosecution is common the court may still have recourse to rely on discretion as sufficiently protective of the claimant.<sup>145</sup> The presence of unenforced criminal legislation for lesbian and gay sexual activity has been relied on by the courts as an indicator of safe *réfoulement*. In relying on the unenforced status of legislation the courts have failed to take into account the social discrimination, which may constitute persecution, arguing that the claimant would have recourse to state/police protection.<sup>146</sup>

The courts have also considered concepts of identity versus activity.<sup>147</sup> In *SB (Uganda)* [2010] indicated that “Homosexuality is about sexual orientation or identity rather than behaviour.” The UK Lesbian and Gay Immigration Group has noted ‘sexual identity encompasses much more than having sex with a partner. It includes the ability to meet a potential partner, to socialise and to express one’s sexuality without fear of grave harm’ rather than an emphasis on homosexual acts or having sex in public places.<sup>148</sup>

Until recently the courts imposed a requirement of discretion upon same-sex relationships to the detriment of lesbian and gay claimants.<sup>149</sup> The courts assumed the applicant could be safely *réfouled* so long as they maintained discretion in the expression of their sexual identity. If the claimant had previously lived in the sending state in a manner which was discreet, it was assumed that they would continue to live with that same level of discretion. Discretion was only assumed to be persecutory if it reached a level that the individual could not ‘reasonably be expected to tolerate’.<sup>150</sup> In July 2010 the UK Supreme Court overruled the ‘reasonably tolerable test’, stating that ‘[t]o pretend that [a person’s sexual orientation] does not exist, or that the behaviour by which

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<sup>145</sup> [UK] High Court (2003) *R (Dawkins) v Secretary of State for the Home Department*, EWHC 373.

<sup>146</sup> [UK] Asylum and Immigration Tribunal (2005) *DW (Homosexual men – Persecution – Sufficiency of Protection) Jamaica v Secretary of State for the Home Department*, para 71, available at: <https://tribunalsdecisions.service.gov.uk/utiac/decisions/38034>; [UK] Asylum and Immigration Tribunal (2009) *MK (Lesbians) Albania v Secretary of State for the Home Department*, available at: [www.bailii.org/uk/cases/UKIAT/2009/00036.html](http://www.bailii.org/uk/cases/UKIAT/2009/00036.html); European Court of Human Rights (1993) *Modinos v Cyprus*, available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57834#{"itemid":\["001-57834"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57834#{). [last accessed 12.05.2014]

<sup>147</sup> [UK] Court of Appeal (2006) *J v Secretary of State for the Home Department*, available at: [www.refworld.org/docid/47fdfaeed.html](http://www.refworld.org/docid/47fdfaeed.html); [UK] Court of Appeal (2009) *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, available at: [www.bailii.org/ew/cases/EWCA/Civ/2009/172.html](http://www.bailii.org/ew/cases/EWCA/Civ/2009/172.html); [UK] High Court of Justice, Queen’s Bench Division (2010) *R (on the application of SB (Uganda)) v SSHD*; [UK] England and Wales Court of Appeal (2009) *NR (Jamaica) v SSHD*, available at: [www.bailii.org/ew/cases/EWCA/Civ/2009/856.html](http://www.bailii.org/ew/cases/EWCA/Civ/2009/856.html). [UK] UK Lesbian and Gay Immigration Group (2010) *Failing the Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum*, available at: [www.uklgig.org.uk/docs/publications/Failing%20the%20Grade%20UKLIG%20April%202010.pdf](http://www.uklgig.org.uk/docs/publications/Failing%20the%20Grade%20UKLIG%20April%202010.pdf).

<sup>148</sup> [UK] UK Lesbian And Gay Immigration Group (2010) *UKLIG Annual Report 2010*, available at: [www.uklgig.org.uk/docs/annual\\_reports/Annual\\_Report\\_2010\\_web.pdf](http://www.uklgig.org.uk/docs/annual_reports/Annual_Report_2010_web.pdf). [last accessed 12.05.2014]

<sup>149</sup> [UK] Court of Appeal (2004) *Z v Secretary of State for the Home Department*, available at: [www.refworld.org/docid/43fc2eb00.html](http://www.refworld.org/docid/43fc2eb00.html); [UK] England and Wales Court of Appeal (2006) *J v Secretary of State for the Home Department*, available at: [www.refworld.org/docid/47fdfaeed.html](http://www.refworld.org/docid/47fdfaeed.html); [UK] England and Wales Court of Appeal (2009) *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, available at: [www.bailii.org/ew/cases/EWCA/Civ/2009/172.html](http://www.bailii.org/ew/cases/EWCA/Civ/2009/172.html). [last accessed 12.05.2014]

<sup>150</sup> [UK] Court of Appeal (2006) *J v Secretary of State for the Home Department*, para 10, 11; [UK] England and Wales Court of Appeal (2004) *Z v Secretary of State for the Home Department*, para 15-16; [UK] England and Wales Court of Appeal (2009) *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, para 31; [UK] England and Wales Court of Appeal (2009) *OO (Sudan) JM (Uganda) v Secretary of State for the Home Department*, para 17, available at: [www.refworld.org/docid/4ba775c52.html](http://www.refworld.org/docid/4ba775c52.html). [last accessed 12.05.2014]

it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are'.<sup>151</sup> The Court reasoned that 'the fact that [the applicant] could take action to avoid persecution does not disentitle him from asylum if in fact he will not act in such a way as to avoid it (...) even if to fail or to refuse to avoid it would be unreasonable'. The Court's reasoning brings focus to a new question: what will the applicant do if he is returned to his country of nationality? If the asylum seeker does not intend to modify his or her behaviour to conceal his or her sexual orientation, then refugee status should be granted. Additionally, refugee status should also be attributed to those persons who would intend to 'live discreetly' upon return to the country of their nationality, if that decision was determined by a well-founded fear of persecution, and not simply in reaction to social and/or family pressure.<sup>152</sup> This latter case demonstrates a shift in the court's approach to the severity of persecution endured by the individual who was originally required to maintain their same sex relationships in a discretionary manner. The Court of Appeal had on a number of occasions suggested that modified behaviour would constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. However, the Supreme Court has since rejected the Court of Appeal's approach and applied a new test. It held that if a gay person would have to conceal aspects of their sexuality and live discreetly if returned because of a real fear of persecution they should be granted asylum. No relevant case law has been identified which outlines the interpretation of the concept of family member.<sup>153</sup>

### 3.3 Subsidiary Protection

Subsidiary protection is brought into effect in circumstances where the claimant does not qualify as a refugee as defined in regulation 2 of the (Qualification) Regulations 2006 but where it would be unsafe to return them to their home state. In the UK subsidiary protection in the guise of humanitarian protection is incorporated into the Immigration Rules whereas discretionary leave to remain is regulated through the *Immigration Act 1971* and the Asylum Policy Instructions.<sup>154</sup> Humanitarian protection and discretionary leave were incorporated into UK policy on 1 April 2003, following the abolition of the exceptional leave to remain provisions on 31 March 2003. Further amendments were made to the humanitarian provisions in 2005 following Council Directive 2004/83 on 'minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted' which came into effect October 2006. Directive 2004/83 established a 'common European qualifying standards for refugees...[and] define a category of

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<sup>151</sup> [UK] Supreme Court (2010) HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department, available at: [www.bailii.org/uk/cases/UKSC/2010/31.html](http://www.bailii.org/uk/cases/UKSC/2010/31.html). [last accessed 12.05.2014]

<sup>152</sup> [UK] Supreme Court (2010) HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department, paragraph 22, Lord Hope, available at: [www.bailii.org/uk/cases/UKSC/2010/31.html](http://www.bailii.org/uk/cases/UKSC/2010/31.html). [last accessed 12.05.2014]

<sup>153</sup> [UK] UK Contractor (2014) Substantial searches have been conducted using Westlaw, lexis nexis, and Baillii databases to identify case law. No relevant case law has been identified.

<sup>154</sup> UK] UK Border Agency (2006) 'Humanitarian Protection' Asylum Policy Instructions (October 2006), available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/).

persons eligible for subsidiary protection'.<sup>155</sup> Humanitarian protection is located in the Immigration Rules 339C-N.

### 3.4 Humanitarian Protection

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

- the individual is in the UK or at a port of entry to the UK;
- the individual does not qualify as a refugee as defined in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006;<sup>156</sup>
- there are substantial grounds for believing that if refused there would be a real risk that the individual would suffer 'serious harm';
- the individual cannot or will not obtain effective protection from the authorities.
- Serious harm under paragraph 339C of the *Immigration Rules* consists of:
  - the death penalty or execution.
  - unlawful killing.
  - torture or inhuman or degrading treatment or punishment.
  - serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

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

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

Upon the granting of humanitarian protection Directive 2004/83 stipulates the member state shall issue a residence permit valid for at least one year and that is renewable.<sup>157</sup> UK legislation currently

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<sup>155</sup> [UK] UK Border Agency (2006) 'Humanitarian Protection' Asylum Policy Instructions (October 2006), available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/). [last accessed 12.05.2014]

<sup>156</sup> [UK] Parliament (2006) The Refugee or Persons in Need of International Protection (Qualification) Regulations 2006, Statutory Instrument No. 2525, available at: [www.legislation.gov.uk/ukSI/2006/2525/made](http://www.legislation.gov.uk/ukSI/2006/2525/made). [last accessed 12.05.2014]

<sup>157</sup> [EU] Council of the European Union (2004) Directive 2004/83/EC, Article 24 (2).

ensures that humanitarian protection can be granted for at least three years.<sup>158</sup> After the permit has expired an application can be made for indefinite leave to remain if the circumstances which gave rise to the need for protection still exist.

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

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

### 3.5 Discretionary Leave

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

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

Initial grants of leave are for no longer than three years. An individual is eligible to apply for indefinite leave to remain after six continuous years of discretionary leave. Indefinite leave to remain can only be applied for under the long-term residence concessions. Prior to the expiration of this period, the individual must apply for an extension of discretionary leave. Extension requests are subject to review on the basis of such factors as why discretionary leave was granted in the first place, impact of return on family life, conditions of the country of origin and whether barriers to return still exist.<sup>159</sup>

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<sup>158</sup> [UK] UK Border Agency (2013) Asylum Policy Instructions, available at: [www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/](http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/). [last accessed 12.05.2014]

<sup>159</sup> [UK] Home Office (2014) 'Discretionary Leave' Asylum Policy Instructions, available at: [www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/](http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/). [last accessed 12.05.2014]



## 3.6 Reuniting LGBT families in the asylum system

Paragraph 339Q(i) to 339Q(iv) of the *Immigration Rules* state that upon the granting of asylum or humanitarian protection a UK residence permit will be issued which is valid for five years and is renewable. A residence permit can be issued by the Secretary of State for a family member of the individual granted asylum or humanitarian protection. The residence permit for family members can be renewed. Family member is defined according to paragraph 349 of the *Immigration Rules* as a 'spouse, civil partner, unmarried or same-sex partner or minor child. Leave to enter or remain as the civil or same-sex partner is for the same duration as the asylum applicant. An unmarried or same-sex partner for the purposes of paragraph 349 is a person who has been living with the principal applicant in a subsisting relationship akin to a civil partnership for two or more years. There is no data available which outlines the number of LGBT individuals benefiting from asylum/subsidiary protection due to persecution on the ground of sexual orientation or the number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation.<sup>160</sup>

### 3.6.1 UK based partner has refugee status

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

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

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

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

- the applicant is the unmarried or same-sex partner of the refugee who was granted asylum in the UK on or after 9 October 2006.
- the parties have lived together in a relationship akin to a civil partnership for two or more years.
- the relationship existed prior to the person who sought asylum left the country.

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<sup>160</sup> [UK] The Home Office does not collect data on the sexual orientation of applicants for asylum or human rights protection. (Email-communication with the Home Office, 08.02.2008). Follow up by telephone and email communication with the Home Office (last contact on 17.01.2014) unsuccessful.

- The individual is not excluded from protection by virtue of article 1F of the Refugee Convention.
- the parties intend to live with one another permanently and the relationship is subsisting.
- the applicant holds a valid entry clearance visa for entry in this capacity.<sup>161</sup>

### **3.6.2 UK based partner has been granted humanitarian protection**

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

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

- the applicant is the civil partner of a person granted humanitarian protection.
- the marriage or civil partnership had occurred prior to the person granted humanitarian protection leaving the country of former residence.
- The applicant is not excluded from a grant of humanitarian protection for any of the reasons in paragraph 339D of the Immigration Rules –
  - Exclusion from Humanitarian Protection. 1. The individual has committed a crime against peace, humanity or a war crime 2. The individual is guilty of acts contrary to the purpose and principle of the United Nations 3. The individual constitutes a danger to the community or the security of the UK 4. Prior to admission to the UK the individual committed a crime that would be imprisonable if committed in the UK or the individual left in order to avoid penal sanctions
- each of the parties intends to live permanently with the other as civil partners and the relationship is subsisting.
- the applicant holds a valid entry clearance visa.

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

The requirements are:

- the applicant is the unmarried or same sex partner of the individual granted humanitarian protection on or after October 9 2006.
- the parties have been living together for two years or more in a relationship akin to a civil partnership.

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<sup>161</sup> [UK] Home Office, The Immigration Rules HC 395, Part 11, available at: [www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/](http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/). [last accessed 12.05.2014]

- the relationship existed before the individual granted humanitarian protection left the country of residence in order to seek asylum.
- each of the parties intends to live permanently with the other as his or her same-sex partner.
- the applicant holds a valid UK entry clearance for entry in this capacity.<sup>162</sup>
- the applicant is not excluded for any of the reasons held in paragraph 339D.<sup>163</sup>

The *Asylum and Immigration (Treatment of Claimants etc) Act 2004*, sections 19-25 introduced regulations which affect the marriage of non-EEA nationals in the UK irrespective of their immigration status. Those subject to immigration control must give notice of their intent to marry at one of 76 specified registry offices with their partner. If the non-EEA national does not have entry clearance specifically for the purpose of marriage<sup>164</sup> he or she must obtain a Certificate of Approval from the Secretary of State. Under the rules the Certificate of Approval requires that the applicant has three months leave to remain in the UK. Home Office guidance states ‘where possible the asylum claim should be decided before a certificate of approval is given for marriage. Where the asylum claim is refused, the certificate of approval should be refused, even if an appeal is lodged. Contrariwise, if the decision or appeal has been outstanding for more than 18 months, then consideration may be given to granting a certificate of approval’.<sup>165</sup>

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<sup>162</sup> [UK] Home Office, The Immigration Rules HC 395, Part 11, available at: [www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/](http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/). [last accessed 12.05.2014]

<sup>163</sup> [UK] Home Office, The Immigration Rules HC 395, Part 11, available at: [www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/](http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/). [last accessed 12.05.2014]

<sup>164</sup> [UK] Parliament (2004) Asylum and Immigration (Treatment of Claimants etc) Act 2004, c. 19, ss 19(3)a, 21(3)a, 23(3)a, available at: [www.legislation.gov.uk/ukpga/2004/19](http://www.legislation.gov.uk/ukpga/2004/19). [last accessed 12.05.2014]

## 4 Family reunification

Opportunities for the reunification of LGBT families is contained in the Immigration Rules, paragraph 277 to 295O - A statement issued by the Home Office on the 31<sup>st</sup> of July 2009 indicates that individuals who suffered financial hardship in part due to the cost of a certificate of approval may be entitled to a refund. The immigration specifications contained in the *Civil Partnership Act 2004* have been incorporated into the *Immigration Rules*.<sup>166</sup> Any individual wishing to enter the UK who is subject to immigration control must obtain prior entry clearance.

### 4.1 Entry as a civil partner

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

- the applicant is the civil partner of the person present and settled in the UK (paragraph 281(i)(a)); or the applicant is the civil partner of a person who has the right of abode in the UK or indefinite leave to enter or remain in the UK and is also seeking to enter the UK for settlement purposes and that the civil partnership was formed at least four years ago (paragraph 281(i)(b)(i)) since when the parties have been living together outside the UK. In addition that the applicant has sufficient knowledge of the English language and life in the UK (paragraph 281(i)(b)(ii)).
- the parties have met and intend to live together and that the relationship is subsisting (paragraph 281 (b)(ii-iii)). They will have adequate accommodation which they will occupy exclusively; and they will be able to maintain themselves without recourse to public funds (paragraph 281(b)(iv-v))<sup>167</sup> and the applicant holds a valid entry clearance for entry in this capacity (paragraph 281(b)(vi)).

Under paragraph 282 of the *Immigration Rules* applicants who fall within paragraph 281(i)(a) will be admitted for a period of no more than twenty seven months; those who fall within 281(i)(b)(i) will be granted indefinite leave to enter and those that fall within 281(i)(b)(i) but fail 281(i)(b)(ii) will be admitted for a period not exceeding twenty seven months.

Extension of stay as the spouse or civil partner requires confirmation of the initial grounds of entry and affirmation that the applicant has not remained in the UK in breach of immigration laws (paragraph 284(i, iv)); that the person is the civil partner of a person present and settled in the UK (paragraph 284(ii)); that the parties to the civil partnership have met (paragraph 284 (iii)) and that the civil partnership has not taken place after a decision to deport the applicant had been made

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<sup>166</sup> [UK] Parliament (2004) Civil Partnership Act 2004 c.33, available at: [www.legislation.gov.uk/ukpga/2004/33](http://www.legislation.gov.uk/ukpga/2004/33). [last accessed 12.05.2014]

<sup>167</sup> [UK] Immigration Appeal Tribunal (2004) AS (Adequate Accomodation\_Question of fact) Pakistan, available at: <https://tribunalsdecisions.service.gov.uk/utiac/decisions/2004-ukiatic-6>; Sagir Ahmed 8260; Thompson v ECO Kingston (17926). Third party support: Ali (19736) INLP vol 13(2) (1999); Nasreen Akhtar v ECO Islamabad [2002] UKIAT 02818.

(paragraph 284(v)); that the parties intend to live permanently with one another as their civil partner and that the relationship is subsisting (paragraph 284 (vi)); that there is adequate accommodation and that there will be no need for recourse to public funds to provide accommodation (paragraph 284 (vii)); that the parties will maintain themselves adequately without recourse to public funds more broadly (paragraph 284(viii)). A further two year extension period can be granted so long as the requirements of paragraph 284 are met.

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

## **4.2 Entry as a ‘proposed’ civil partner**

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

Entry clearance as a ‘proposed civil partner’ enables individuals to come to the UK in order to register their partnership. Under this category of entrance there is no requirement for the partners to have lived together, but they must prove to the entry clearance officer that their relationship is genuine and subsisting. The requirements to be met are that the applicant is seeking leave to enter the UK so as to enter into a civil partnership; and that the parties have met. Each of the parties must intend to live with the other after the fulfilment of the civil partnership; there must be adequate maintenance and accommodation for the couple without recourse to public funds both before and after the civil partnership is to take place; and that the applicant holds a valid entry clearance visa for entry in this capacity.

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

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

## Civil partnership ‘visit’ visa

The civil partnership visit visa is used for the purpose of registering a civil partnership. The visitors’ visa is issued for six months and provides permission for non-EEA individuals to enter into a civil partnership within that time frame. Neither couple in this instance needs to be a UK citizen, but entry clearance officers must be able to confirm that non-EEA nationals will leave at the end of the specified period. Legislation pertaining to the requirement can be found in paragraph 56D Part 2 of the *Immigration Rules HC 395*.<sup>168</sup>

### 4.3 Recognition of legal partnerships and same-sex marriages entered into abroad- Applicants applying from overseas

UK visa regulations provide a list of countries where legal partnerships can be entered into.<sup>169</sup> Section 214 of the Civil Partnership Act 2004 outlines the constituent elements of a valid civil partnership or its equivalent.<sup>170</sup> Under the Civil Partnership Act 2004 and the Immigration Directorate Instructions, these legal partnerships and marriages entered into abroad are to be recognised as civil partnerships in the UK.<sup>171</sup> The *Marriage (Same Sex Couples) Act 2013* provides that any same-sex marriage entered into under the law of any part of the UK other than England and Wales or the law of a country or territory outside of the UK will not be prevented from recognition as a marriage in England and Wales.<sup>172</sup> These provisions came into force on 13 March 2014.<sup>173</sup>

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<sup>168</sup> [UK] Home Office (2014), The Immigration Rules HC 395, Part 2, available at: [www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part2/](http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part2/). [last accessed 12.05.2014]

<sup>169</sup> [UK] Home Office (2014), Immigration Directorate Instructions, Chapter 8, Section 2, Annex H on Civil Partnerships. [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter8/section2/annexh.pdf?view=Binary](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter8/section2/annexh.pdf?view=Binary). [last accessed 12.05.2014]

<sup>170</sup> [UK] Parliament (2004) Civil Partnership Act 2004 c.33, available at: [www.legislation.gov.uk/ukpga/2004/33](http://www.legislation.gov.uk/ukpga/2004/33). [last accessed 12.05.2014]

<sup>171</sup> [UK] Home Office, , Immigration Directorate Instructions, Chapter 8, Section 2, Annex H available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter8/section2/annexh.pdf?view=Binary](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter8/section2/annexh.pdf?view=Binary). [last accessed 12.05.2014]

<sup>172</sup> [UK] Parliament (2013) Marriage (Same Sex Couples) Act 2013, c. 30, s. 10 and sch. 2, available at: [www.legislation.gov.uk/ukpga/2013/30](http://www.legislation.gov.uk/ukpga/2013/30). [last accessed 12.05.2014]

<sup>173</sup> [UK] Parliament (2014) The Marriage (Same Sex Couples) Act 2013 (Commencement No. 2 and Transitional Provision) Order 2014, available at: [www.legislation.gov.uk/uksi/2014/93/made](http://www.legislation.gov.uk/uksi/2014/93/made). [last accessed 12.05.2014]

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

If an individual has lived with their partner for four years outside of the UK in a relationship akin to marriage he/she may be able to apply immediately for indefinite leave to remain so long as the ‘Living in the UK Test’ has been passed. If this test has not been passed, two years leave to remain can be granted. The ‘Living in the UK’ test can be taken at any point and when passed indefinite leave to remain can be applied for.<sup>174</sup>

#### **4.4 Applications for ‘leave to remain’ emanating from within the UK**

If an applicant entered the UK as a proposed civil partner<sup>175</sup> he/she is entitled to apply for ‘further leave to remain as a civil partner’ following registration of the civil partnership ceremony. A ‘Further Leave to Remain’ visa allows the applicant to reside in the UK for two more years. At the end of this period if the relationship is still subsisting then an application can be made for indefinite leave to remain.<sup>176</sup> From 13 March 2014, the same rules will apply to an applicant entering the UK to marry a person of the same sex, as the *Marriage (Same Sex Couples) Act 2013* extends the right to marry with the same effects to same-sex couples.

#### **4.5 Same-sex partners rule<sup>177</sup>**

As long as the applicant and the sponsor are over the age of 18,<sup>178</sup> Immigration Rule 295A (i)(a) allows the same-sex partner to obtain leave to enter, as the same-sex partner of a person living in the UK if certain requirements are met. The requirements are:

- the applicant’s partner is present and settled in the UK or is also being admitted; and the parties have lived together for two years or more in a relationship akin to a civil partnership (paragraph 295A(i)(a)); or

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<sup>174</sup> [UK] Home Office, Life in the UK Test, available at: [www.gov.uk/life-in-the-uk-test](http://www.gov.uk/life-in-the-uk-test).

<sup>175</sup> Since 9 May 2011 it’s no longer necessary to obtain a Certificate of Approval from the Home Office before marrying or registering a civil partnership. See: [www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/marriageandcivilpartnership/eligibility/](http://www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/marriageandcivilpartnership/eligibility/).

<sup>176</sup> [UK] Home Office, Immigration Rules HC 395, s. 287(1)(b), available at: [www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/spouses\\_civil\\_partners/](http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/spouses_civil_partners/).

<sup>177</sup> [UK] Home Office (2013), The Immigration Rules HC 395 Part 8, section 295A(i)(a), available at: [www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/](http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/). [last accessed 12.05.2014]

<sup>178</sup> [UK] Home Office (2013), The Immigration Rules HC 395 Part 8, section 295AA, available at: [www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/](http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/). [last accessed 12.05.2014]

- if the applicants' partner has a right of abode in the UK or indefinite leave to enter or remain in the UK and is also seeking admission to the UK for the purpose of settlement the parties must have been living together for four years or more outside of the UK in a relationship akin to marriage (paragraph 295A(i)(b)(i)).
- the applicant must have sufficient knowledge of English and life in the UK (paragraph 295A(i)(b)(ii)).
- previous or similar relationships by either partner must have permanently broken down.
- the couple must intend to live together permanently in their own accommodation and will have no recourse to public funds.
- the parties are not involved in a consanguineous relationship.

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

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

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

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

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

The applicant was admitted to the UK for a period no longer than twenty seven months or given an extension of his or her stay for a period of two years and has completed that period as the same-sex partner of an individual present and settled in the UK; or was the partner of a tier 1 migrant and obtained an extension of stay under paragraphs 295AA to 295F; or was admitted under the same criteria as outlined under paragraph 295B. The applicant is still the same-sex partner of the individual he or she was initially admitted as being in a relationship with and that this relationship



is ongoing. Additionally, the grounds of intent to live together permanently, adequate accommodation and maintenance without recourse to public funds as well as sufficient knowledge of the English language and life in the UK must all be met.

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

There is no data available which outlines the number of LGBT partners of third country nationals residing in the UK benefiting from family reunification or the number of LGBT partners of third country nationals residing in the UK who were denied the right to benefit from family reunification.<sup>179</sup> In addition, there is no relevant case law that has been identified to assist in the identification of trends regarding the family reunification of LGBT partners.

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<sup>179</sup> [UK] Information on numbers of LGBT partners benefiting from family reunification is not available. (Communication by phone and email with the Home Office, 24.01.2008 and 08.02.2008). Follow up by telephone and email communication with the Home Office (last contact on 17.01.2014) unsuccessful.

## 5 Freedom of assembly

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

ECHR Art 11(1) recognises the right to peaceful assembly and imposes positive obligations on public authorities to take reasonable steps to enable individuals to exercise this right, providing protection against counter-demonstrations if necessary.<sup>180</sup> Interference with a peaceful assembly by the police has to be justified under the terms of ECHR Art 11(2).

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

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

Throughout the UK, where an assembly is, or is likely to be, disrupted by one or more third parties, the police can use the common law power to prevent breaches of the peace. A breach of the peace consists of physical violence or the threat of violence. There must be either a breach of the peace in progress or a reasonable apprehension of an imminent breach of the peace before preventive powers can be used. In Northern Ireland, Part III of the *Public Order (Northern Ireland) Order 1987*, as amended by the *Criminal Justice No. 2 (Northern Ireland) Order 2004*, criminalises acts intended or likely to stir up hatred or arouse fear on grounds of sexual orientation. In England and Wales, the *Criminal Justice and Immigration Act 2008*<sup>181</sup> amended provisions on incitement to religious hatred in the *Public Order Act 1986*<sup>182</sup> to cover hatred on the grounds of sexual orientation although there is a controversial freedom of expression exception. These new homophobic hatred offences came into force in March 2010. At the time of writing (January 2014), Scotland does not have legislation covering incitement to hatred on the grounds of sexual orientation.

No information has been found on cases of refusals or bans, or on the exercise of duties of protection by the authorities in the context of pride marches or homophobic demonstrations. In contrast to the celebration of LGBT equality in the UK, counter demonstrations may occur, for example, a small protest group Christian Voice have used pride events to protest against

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<sup>180</sup> [UK] European Court of Human Rights (1988) Plattform ‘Ärzte für das Leben’ v. Austria, available at: [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57558#{"itemid":\["001-57558"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57558#{). [last accessed 12.05.2014]

<sup>181</sup> [UK] Parliament (2008) Criminal Justice and Immigration Act 2008 c.4, available at: [www.legislation.gov.uk/ukpga/2008/4](http://www.legislation.gov.uk/ukpga/2008/4). [last accessed 12.05.2014]

<sup>182</sup> [UK] Parliament (1986) Public Order Act 1986 c.64, Part 3A, available at: [www.legislation.gov.uk/ukpga/1986/64](http://www.legislation.gov.uk/ukpga/1986/64). [last accessed 12.05.2014]

homosexuality.<sup>183</sup> This protest takes place as the parade passes, and is characterised as lawful protest so long as the banners do not carry abusive or offensive messages. No incidences of demonstrations against tolerance of LGBT people were found to have been reported in 2008 and only one in 2009.<sup>184</sup> The Derby Gay Pride event has attracted a couple of small scale anti-pride protests. One in 2010 attracted 14 protesters and again in 2012, a Muslim group, Derby Muslim Action Force, announced that they planned an anti-pride protest.<sup>185</sup> A member of this group had previously been convicted under section 4A of the Public Order Act 1986, which makes it an offence to cause harassment, alarm or distress with threatening language or behaviour for his appearance at the 2011 pride march.<sup>186</sup> No other information has been found on large demonstrations against tolerance of LGBT people since then.<sup>187</sup>

The first UK Pride carnival and march through London were held 42 years ago, on 1 July 1972.<sup>188</sup> In recent years, very large numbers of people have turned out to enjoy Pride London: specifically, an estimated 820,000 people attended in 2008 and an estimated 1 million in 2009. On average the event attracts approximately 800,000 participants.<sup>189</sup>

From 2004 to 2012, the London Pride Parades were organised by Pride London, a registered charity, who worked with the authorities, including the Metropolitan Police, Transport for London and the City of Westminster to ensure that the parade is successful and minimally disruptive for local residents and businesses.

After the dissatisfaction shown towards the scaled-back celebrations in 2012, the Pride in London Festival was handed over to a new team entitled London LGBT+ Community Parade.<sup>190</sup> In 2013, the festival took place over the course of a week, starting on 23 June. The event was organised around the theme ‘Love and Marriage’, as the *Marriage (Same Sex Couples) Bill* was passing its final stages in Parliament. The 2013 festival comprised activities like film screenings, photography exhibitions, panel events on health and campaigning, and a parade that started in Baker Street and came to a close at Trafalgar Square on 29 June. Pride in London partnered with UK Black Pride,

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<sup>183</sup> [UK] Christian Voice (2012) Tesco-funded Gay Pride ‘shambles’ snakes through London, 7 July 2012, available at: [www.christianvoice.org.uk/index.php/tesco-funded-gay-pride-shambles-still-shames-london/](http://www.christianvoice.org.uk/index.php/tesco-funded-gay-pride-shambles-still-shames-london/).

<sup>184</sup> [UK] Telegraph (2009) Westboro Baptist Church announces first anti-homosexuality picket in Britain, 15 February 2009, available at: [www.telegraph.co.uk/news/religion/4640967/Westboro-Baptist-Church-announces-first-anti-homosexuality-picket-in-Britain.html](http://www.telegraph.co.uk/news/religion/4640967/Westboro-Baptist-Church-announces-first-anti-homosexuality-picket-in-Britain.html). [last accessed 12.05.2014]

<sup>185</sup> [UK] Pink News (2012) Derby: Muslim group plans ‘biggest ever’ Pride protest despite gay hate convictions, 12 July 2012, available at: [www.pinknews.co.uk/2012/07/04/derby-muslim-group-plans-biggest-ever-pride-protest-despite-gay-hate-convictions/](http://www.pinknews.co.uk/2012/07/04/derby-muslim-group-plans-biggest-ever-pride-protest-despite-gay-hate-convictions/).

<sup>186</sup> [UK] Pink News (2012) Derbyshire Pride anti-gay protester guilty of distress charge, 11 June 2012, available at: [www.pinknews.co.uk/2012/06/11/derbyshire-pride-anti-gay-protester-guilty-of-distress-charge/](http://www.pinknews.co.uk/2012/06/11/derbyshire-pride-anti-gay-protester-guilty-of-distress-charge/)

<sup>187</sup> [UK] As a result of extensive keyword searches in news databases and relevant LGBT organisations, including BBC news, Guardian news, Pink news, Stonewall, Galop, Christian Voice, National Front.

<sup>188</sup> [UK] LGBT History Project, London Pride, available at: [www.lgbthistoryuk.org/wiki/index.php?title=London\\_Pride](http://www.lgbthistoryuk.org/wiki/index.php?title=London_Pride) [last accessed 12.05.2014]

<sup>189</sup> [UK] Greater London Authority (2013) Request for Mayoral Decision – London Pride 2013-2017, available at: [www.london.gov.uk/sites/default/files/MD1124%20Pride%202013%2017%20PDF.pdf](http://www.london.gov.uk/sites/default/files/MD1124%20Pride%202013%2017%20PDF.pdf). [last accessed 12.05.2014]

<sup>190</sup> [UK] Pink News (2013) London City Hall announces winner of gay pride bid, available at: [www.pinknews.co.uk/2013/01/18/london-city-hall-announces-winner-of-gay-pride-bid/](http://www.pinknews.co.uk/2013/01/18/london-city-hall-announces-winner-of-gay-pride-bid/) and [www.bbc.co.uk/news/uk-england-london-18722279](http://www.bbc.co.uk/news/uk-england-london-18722279). [last accessed 12.05.2014]

who held their own celebrations in Golden Square.<sup>191</sup> Half a million people are estimated to have taken part in the Parade alone.<sup>192</sup> In 2014, Pride in London will begin on 22 June and follow the theme 'Freedom to...'.<sup>193</sup>

Pride in London is just one of a range of Pride marches, carnivals and events held on a regular basis in the UK. For example, every year in February LGBT History Month takes place, with sponsors including the Metropolitan Police, the Crown Prosecution Service (CPS), the Department of Health and the Ministry of Justice. The 2012 LGBT History Month, coinciding with the London Olympics, was dedicated to sports; in 2013 the theme was maths, science and engineering; and in 2014 the focus will be on music.<sup>194</sup> The statistics demonstrate that there has been a huge increase in the number of gay pride events held throughout the UK, these events are now increasingly being organised to include a wide range of activities to be held as part of the event, including arts festivals, theatre festivals, film festivals and workshops.<sup>195</sup> In London 2013, the Gay Pride festival coincided with the passing of the Same Sex Marriage Act 2013, and received political support and recognition of the necessity to ensure that the legal framework is supportive of same-sex marriage.<sup>196</sup>

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<sup>191</sup> [UK] Pride in London (2013), available at: <http://prideinlondon.org/>. [last accessed 12.05.2014]

<sup>192</sup> [UK] Pride in London (2013) Pride in London Parade 2013, available at: <http://prideinlondon.org/festival/whats-on/2013/pride-parade/>[last accessed 12.05.2014]

<sup>193</sup> [UK] Pride in London (2013) Date and Theme of Pride in London 2014 announced, available at: <http://prideinlondon.org/news/2013/12/date-theme-pride-london-2014-announced/>. [last accessed 12.05.2014]

<sup>194</sup> [UK] LGBT History Month, available at: <http://lgbthistorymonth.org.uk/>. [last accessed 12.05.2014]

<sup>195</sup> [UK] Gay to Z Directory (2014) available at: [www.gaytoz.com/gay\\_pride\\_dates.asp](http://www.gaytoz.com/gay_pride_dates.asp) [last accessed 26.06.14].

<sup>196</sup>[UK] BBC News (2013) Thousands march in London Pride parade, 29 June 2013, available at: [www.bbc.co.uk/news/uk-england-london-23113245](http://www.bbc.co.uk/news/uk-england-london-23113245) [last accessed 26.06.14].

## 6 Criminal law

### 6.1 Incitement to hatred

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

In England and Wales, section 74 and Schedule 16 of the *Criminal Justice and Immigration Act 2008*<sup>197</sup> amended provisions on incitement to religious hatred in the *Public Order Act 1986*<sup>198</sup> to cover hatred on the grounds of sexual orientation. These new offences, detailed below, came into force in March 2010. Hatred on the grounds of sexual orientation is defined as ‘hatred against a group of persons defined by reference to sexual orientation, whether persons of the opposite sex, the same sex or both’ (i.e., bisexual).

The offences involve the use of words or behaviour or display of written material, publishing or distributing written material, the public performance of a play, distributing, showing or playing a recording, broadcasting or including a programme in a programme service, and possession of inflammatory material. The offences apply only to threatening words, behaviour, etc., and they apply only if the accused intends to stir up hatred on the grounds of sexual orientation.<sup>199</sup> For England and Wales, the offences of racial hatred in the *Public Order Act 1986*, Part 3, which apply to ‘threatening, abusive or insulting’ words or behaviour and extend to circumstances where racial hatred is likely to be stirred up.

*R v Ihjaz Ali, Razwan Javed and Kabir Ahmed*<sup>200</sup> was the first case brought under these new offences and resulted in the conviction of the defendants in January 2012. The three defendants had distributed leaflets that, under the heading ‘Death penalty?’, portrayed an image of a wooden mannequin hanging from a noose and stated that the death sentence is the only way to end homosexuality in society. The decision made clear that the offence would not be committed by

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<sup>197</sup> [UK] Parliament (2008) *Criminal Justice and Immigration Act 2008* c.4, available at: [www.legislation.gov.uk/ukpga/2008/4](http://www.legislation.gov.uk/ukpga/2008/4). [last accessed 12.05.2014]

<sup>198</sup> [UK] Parliament (1986) *Public Order Act 1986* c.64, Part 3A, available at: [www.legislation.gov.uk/ukpga/1986/64](http://www.legislation.gov.uk/ukpga/1986/64). [last accessed 12.05.2014]

<sup>199</sup> [UK] Parliament (1987) *Public Order (Northern Ireland) Order 1987* as amended, available at: [www.legislation.gov.uk/nisi/1987/463/made](http://www.legislation.gov.uk/nisi/1987/463/made). [last accessed 12.05.2014]

<sup>200</sup> [UK] Derby Crown Court (2012) Sentencing Remarks of HHJ Burgess: *R v Ihjaz Ali, Razwan Javed and Kabir Ahmed*, available at: [www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf). See also the media coverage of the case: [UK] *The Guardian* (2012) *Three Muslim men convicted over gay hate leaflets*, available at: [www.theguardian.com/world/2012/jan/20/three-muslims-convicted-gay-hate-leaflets](http://www.theguardian.com/world/2012/jan/20/three-muslims-convicted-gay-hate-leaflets); [UK] *BBC News* (2012) *Derby men guilty over gay hate leaflets*, available at: [www.bbc.co.uk/news/uk-england-derbyshire-16656679](http://www.bbc.co.uk/news/uk-england-derbyshire-16656679). [last accessed 12.05.2014]

mere adverse criticism of homosexuality. The conviction must rely on the basis that the material distributed was threatening and that by distributing it the defendants intended to stir up hatred against homosexuals.<sup>201</sup>

During Parliamentary debates on the new incitement offences, the House of Lords (the upper house of Parliament) successfully introduced an amendment providing that ‘the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or to stir up hatred’. In 2009, the Government tried but failed to repeal this amendment - now section 29JA of the Public Order Act 1986. The recent *Marriage (Same Sex Couples) Act 2013* further adds to section 29JA that ‘any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred’.<sup>202</sup> Stonewall, a non-governmental organisation that lobbies for LBG equality, has described the language of section 29JA as ‘deeply offensive and stigmatising’ and it is concerned that the section sends a ‘worrying message at a time when police figures show that homophobic attacks are on the increase’.<sup>203</sup> The Equality and Human Rights Commission (EHRC), an independent statutory body created by the *Equality Act 2006*, has expressed concern about ‘the piecemeal manner in which incitement to hatred laws have developed’.<sup>204</sup> It believes that a full review of all incitement to hatred legislation is needed in order to review both their scope and effectiveness. Prior to the *Criminal Justice and Immigration Act 2008*, a report on Stonewall’s website indicated that there was ‘widespread support’ for a change in the law in England and Wales: ‘A YouGov poll of over 2000 electors, commissioned by Stonewall, demonstrates that an overwhelming majority of the public - 89 per cent - is in favour of changing the law in this area to give gay people matching protections to those for race. The level of support remains almost unchanged among people of faith.’<sup>205</sup> Stonewall’s website also noted that in Northern Ireland, ‘it has been an offence since 2004 to incite hatred or arouse fear on grounds of sexual orientation. Those provisions have not proved controversial and they have not resulted in frivolous prosecutions’.<sup>206</sup> A survey carried out by Stonewall in 2013 on a sample of 2,500 LGB people across Britain found that one in six had experienced a hate crime incident in the previous three years, only one third of those who experienced hate crime incidents reported them, and half of the people who reported an incident were not satisfied with the way the case was handled by the police.<sup>207</sup> Stonewall emphasised that, even though the figures related to homophobic hate

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<sup>201</sup> [UK] Derby Crown Court (2012) Sentencing Remarks of HHJ Burgess: R v Ihjaz Ali, Razwan Javed and Kabir Ahmed, p. 2, available at: [www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf). [last accessed 12.05.2014]

<sup>202</sup> [UK] Parliament (2013) Marriage (Same Sex Couples) Act 2013, c.30, sch. 7, para. 28, available at: [www.legislation.gov.uk/ukpga/2013/30/contents](http://www.legislation.gov.uk/ukpga/2013/30/contents). [last accessed 12.05.2014]

<sup>203</sup> [UK] Stonewall, Incitement to Hatred, available at: [www.stonewall.org.uk/what\\_we\\_do/parliamentary/2886.asp](http://www.stonewall.org.uk/what_we_do/parliamentary/2886.asp). [last accessed 12.05.2014]

<sup>204</sup> [UK] EHRC (2009) Parliamentary Briefing: Coroners and Justice Bill, House of Commons Committee Stage, February 2009, available at: [www.equalityhumanrights.com/legal-and-policy/parliamentary-briefings/parliamentary-briefing-coroners-and-justice-bill-house-of-commons-committee-stage-february-2009/](http://www.equalityhumanrights.com/legal-and-policy/parliamentary-briefings/parliamentary-briefing-coroners-and-justice-bill-house-of-commons-committee-stage-february-2009/). [last accessed 12.05.2014]

<sup>205</sup> [UK] Stonewall, available at: [www.stonewall.org.uk/campaigns/1961.asp](http://www.stonewall.org.uk/campaigns/1961.asp). [last accessed 12.05.2014] the web-link is no longer functioning and no replacement could be found]

<sup>206</sup> [UK] Stonewall, available at: [www.stonewall.org.uk/campaigns/1961.asp](http://www.stonewall.org.uk/campaigns/1961.asp). [last accessed 12.05.2014] the web-link is no longer functioning and no replacement could be found]

<sup>207</sup> [UK] Stonewall (2013) Homophobic Hate Crime: The Gay British Crime Survey 2013, available at: [www.stonewall.org.uk/documents/hate\\_crime.pdf](http://www.stonewall.org.uk/documents/hate_crime.pdf). [last accessed 12.05.2014]

crime have been decreasing overall in recent years, there are issues surrounding under-reporting and police response to the cases that do get reported that need to be addressed by state authorities. Despite the fact that the Stonewall survey findings suggest that homophobic hate crime is a serious issue, the Crime Survey England and Wales data indicates that there has been a drop in hate crime incidents in 2012-2013 (39,000) in comparison to 2011-2012 (50,000).<sup>208</sup>

In Scotland, a 2002 survey of LGBT people found that nearly a quarter had been subjected to physical assault and over two-thirds to verbal abuse because they were LGBT.<sup>209</sup> In June 2009, the Scottish Parliament passed the *Offences (Aggravation by Prejudice) (Scotland) Act*, which came into force in 24 March 2010.<sup>210</sup> The Act concerns aggravation rather than incitement to hatred. It deserves mention here however because aggravation could be used in association with the common law offence of breach of the peace in order to prosecute homophobic hate speech. Specifically, homophobic hate speech could be prosecuted as a breach of the Peace aggravated by sexual orientation prejudice. There have been a number of instances since 2010, where individuals have been arrested for committing breaches of the peace with a homophobic element, under the Scottish legislation.<sup>211</sup>

There are also general provisions elsewhere in the law in the UK which could be invoked against homophobic hate speech. These include the common law offence of breach of the peace, as well as a range of statutory public order and harassment offences. In recent years, antisocial behaviour legislation has been introduced in England and Wales, Northern Ireland and Scotland.<sup>212</sup> In its 2004 report, the Hate Crime Working Group noted that the (previous) Scottish Executive recognised that ‘groups who are subject to hate crime may also be more likely to experience the effects of antisocial behaviour’. It went on to emphasise that:

*‘The antisocial behaviour legislation [would] complement work on hate crime as it provides additional tools to protect victims of antisocial conduct, which*

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<sup>208</sup> [UK] Ministry of Justice (2013) An overview of hate crime in England and Wales: appendix tables, Table 1.01, available at: [www.gov.uk/government/publications/an-overview-of-hate-crime-in-england-and-wales](http://www.gov.uk/government/publications/an-overview-of-hate-crime-in-england-and-wales). [last accessed 12.05.2014]

<sup>209</sup> [UK] L. Morgan and N. Bell (2003) First Out: Report of the findings of the Beyond Barriers national survey of LGBT people, available at: [www.stonewall.org.uk/documents/First\\_Out\\_PDF\\_Report.pdf](http://www.stonewall.org.uk/documents/First_Out_PDF_Report.pdf). [last accessed 12.05.2014]

<sup>210</sup> [UK] Parliament (2009) Offences (Aggravated by Prejudice) Scotland Act 2009 asp. 8 available at: [www.legislation.gov.uk/asp/2009/8](http://www.legislation.gov.uk/asp/2009/8). [last accessed 12.05.2014]

<sup>211</sup> [UK] Buteman News (2013) Arrests following homophobic breaches of the peace, 6 August 2013, available at: [www.buteman.co.uk/news/community-news/arrests-following-homophobic-breaches-of-the-peace-1-3031604](http://www.buteman.co.uk/news/community-news/arrests-following-homophobic-breaches-of-the-peace-1-3031604); [UK] Dailymail (2010) Gay rights campaigner Peter Tatchell defends 'homosexuals are sinners' preacher and slams £1,000 fine as heavy-handed, 30 April 2010, available at: [www.dailymail.co.uk/news/article-1262310/Gay-rights-campaigner-condemns-1-000-fine-preacher-said-homosexuality-sin.html](http://www.dailymail.co.uk/news/article-1262310/Gay-rights-campaigner-condemns-1-000-fine-preacher-said-homosexuality-sin.html); [UK] The Courier (2014) US street preacher challenging Dundee breach of the peace charge, 1 April 2014, available at: [www.thecourier.co.uk/news/local/dundee/us-street-preacher-challenging-dundee-breach-of-the-peace-charge-1.296492](http://www.thecourier.co.uk/news/local/dundee/us-street-preacher-challenging-dundee-breach-of-the-peace-charge-1.296492); [UK] The Scotman (2014) US preacher may sue police over homophobia claims, 17 June 2014, available at: [www.scotsman.com/news/scotland/top-stories/us-preacher-may-sue-police-over-homophobia-claims-1-3445799](http://www.scotsman.com/news/scotland/top-stories/us-preacher-may-sue-police-over-homophobia-claims-1-3445799).

<sup>212</sup> [UK] Parliament (2003) Anti-Social Behaviour Act 2003 c.38, available at: [www.legislation.gov.uk/ukpga/2003/38](http://www.legislation.gov.uk/ukpga/2003/38); [UK] Parliament (2004) Anti-Social Behaviour (Northern Ireland) Order 2004, available at: [www.legislation.gov.uk/nisi/2004/1988](http://www.legislation.gov.uk/nisi/2004/1988); and [UK] Antisocial Behaviour etc. (Scotland) Act 2004 asp.8, available at: [www.legislation.gov.uk/asp/2004/8](http://www.legislation.gov.uk/asp/2004/8). [last accessed 12.05.2014]

*may involve incidents not sufficiently clear-cut to be prosecuted on a criminal basis.*<sup>213</sup>

The Crown Prosecution Service Hate Crime and Crimes Against Older People Report 2012-2013 demonstrates that the vast majority of prosecutions for homophobic hate crimes are allocated a principal offence category as an indication of the type and seriousness of the charges brought. The statistics demonstrate that the most common homophobic crimes (51.8%) were offences against the person and public order offences.<sup>214</sup> The Ministry of Justice overview of hate crime in 2012-2013 also states that the majority of sexual orientation (homophobic and transphobic) hate crimes involved violence against the person (42%) or public order offences (43%).<sup>215</sup>

Finally, ECHR Art 10 has been incorporated into the law throughout the UK. Art 10(2) permits restrictions on free speech on a range of grounds, including the prevention of crime and public disorder and the protection of the rights of others. ECHR Arts 14 and 17 are also incorporated throughout the UK.

## **6.2 Homophobic motivation as an aggravating factor in a common crime**

In England and Wales, section 146 of the *Criminal Justice Act 2003* extended existing hate-crime statutory aggravations to include sexual orientation. This provision came into effect in April 2005. In Northern Ireland, Art 2 of the *Criminal Justice No. 2 (Northern Ireland) Order 2004*<sup>216</sup> amended the *Public Order (NI) Order 1987* to similar effect. A recent report, prepared for the Equality Commission for Northern Ireland (ECNI) and the Equality Authority (EA) in Ireland, describes Northern Ireland's homophobic hate-crime law as one of the 'notable legislative successes' that have resulted from the participatory model put in place by the statutory equality duty contained in section 75 of the Northern Ireland Act 1998.<sup>217</sup>

The legislation imposes requirements on the court when it is considering the seriousness of an offence. Where an offence is aggravated by hostility, the court must treat that fact as a factor that increases the seriousness of the offence, and it must state in open court that the offence was so

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<sup>213</sup> [UK] Scottish Government (2004) Working Group on Hate Crime Report, p. 9, available at: [www.scotland.gov.uk/Publications/2004/10/20027/44264](http://www.scotland.gov.uk/Publications/2004/10/20027/44264). [last accessed 12.05.2014]

<sup>214</sup> [UK] Crown Prosecution Service (2013) Hate crime and crimes against older people report 2012-2013, page 25, available at: [www.cps.gov.uk/publications/docs/cps\\_hate\\_crime\\_report\\_2013.pdf](http://www.cps.gov.uk/publications/docs/cps_hate_crime_report_2013.pdf). [last accessed 12.05.2014]

<sup>215</sup> [UK] Ministry of Justice (2013) An overview of hate crime in England and Wales, page 25, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/266358/hate-crime-2013.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266358/hate-crime-2013.pdf); [UK] Ministry of Justice (2013) An overview of hate crime in England and Wales: appendix tables, Table 2.03, available at: [www.gov.uk/government/publications/an-overview-of-hate-crime-in-england-and-wales](http://www.gov.uk/government/publications/an-overview-of-hate-crime-in-england-and-wales). [last accessed 12.05.2014]

<sup>216</sup> [UK] Parliament (2004) Criminal Justice No. 2 (Northern Ireland) Order 2004, Statutory Instrument No. 1991 (N.I. 15), available at: [www.legislation.gov.uk/nisi/2004/1991](http://www.legislation.gov.uk/nisi/2004/1991). [last accessed 12.05.2014]

<sup>217</sup> [UK] J. Walsh, C. Conlon, B. Fitzpatrick and U. Hansson (2007) Enabling Lesbian, Gay and Bisexual Individuals to Access their Rights under Equality (A Report prepared for the ECNI and the EA), p. 85, available at: [www.equalityni.org/archive/pdf/RESKM050603SOFINAL200308\(1\).pdf](http://www.equalityni.org/archive/pdf/RESKM050603SOFINAL200308(1).pdf). [last accessed 12.05.2014]



aggravated. An offence is aggravated by hostility if, either at the time of the offence, or immediately before or after its commission, the offender has demonstrated hostility towards the victim based on the actual or presumed ('presumed' membership means presumed by the offender) sexual orientation of the victim.<sup>218</sup> The legislation also encompasses offences motivated (wholly or partly) by hostility toward persons who are of a particular sexual orientation.<sup>219</sup> It is immaterial whether or not the offender's hostility is also based on other factors.<sup>220</sup>

In December 2008, the Crown Prosecution Service (CPS) published its first annual hate crime report. The report includes information on CPS performance in prosecuting homophobic hate crimes in England and Wales.<sup>221</sup> The CPS annual reports on hate crime for England and Wales<sup>222</sup> show a steady increase on the number of prosecuted criminal cases regarding homophobic and transphobic hate crime since 2006, with a small decrease in prosecutions and convictions in 2011. The latest figures available for the period 2012/13<sup>223</sup> illustrate a decrease in the number of cases referred to the CPS by the police, a rise in the volume of prosecutions and a slight decrease in convictions. The report highlights a low rate of actual reporting of the crimes by the victims, which may suggest a lack of trust in the criminal justice process and the need to explore confidence-building measures within the communities. The Ministry of Justice overview of sexual orientation hate crime indicates that the total number of hate crimes recorded by the police in 2012-2013 was 4,267 which is a slight decrease compared to the previous year 2011-2012 where 4,362 hate crimes were reported.<sup>224</sup>

As mentioned, in June 2009 the Scottish Parliament passed the *Offences (Aggravation by Prejudice) (Scotland) Act 2009*<sup>225</sup>, which came into force on 24 March 2010. The Act requires the aggravation of an offence by prejudice on grounds of disability, sexual orientation or transgender identity to be taken into account in sentencing.

The Scottish law seeks to implement the core recommendation of the previous Scottish Executive's Hate Crime Working Group. In 2004, the Group recommended that the 'statutory aggravation' which applied when any criminal offence was motivated by malice and ill-will on grounds of race

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<sup>218</sup> [UK] Parliament (2003) Criminal Justice Act 2003 c.44, s. 146(2)(a)(i), available at: [www.legislation.gov.uk/ukpga/2003/44](http://www.legislation.gov.uk/ukpga/2003/44). In Northern Ireland, Art. 2(3)(a)(iii) refers to 'the victim's membership (or presumed membership) of a sexual orientation group'. [last accessed 12.05.2014]

<sup>219</sup> [UK] Parliament (2003) Criminal Justice Act 2003 c.44, s. 146(2)(b)(i). In Northern Ireland, Art. 2(3)(b)(iii) refers to an offence motivated (wholly or partly) by hostility towards 'members of a sexual orientation group based on their membership of that group'. Art. 2(5) defines 'sexual orientation group' as a group of persons defined by reference to sexual orientation.

<sup>220</sup> [UK] Parliament (2003) Criminal Justice Act 2003 c.44, s. 146(4). For Northern Ireland, see Art. 2(4).

<sup>221</sup> [UK] Crown Prosecution Service (2008) Hate Crime Report 2007-2008, available at: [www.cps.gov.uk/publications/docs/CPS\\_hate\\_crime\\_report\\_2008.pdf](http://www.cps.gov.uk/publications/docs/CPS_hate_crime_report_2008.pdf). [last accessed 12.05.2014]

<sup>222</sup> [UK] Crown Prosecution Service, Hate Crime and Crimes Against Older People, available at: [www.cps.gov.uk/publications/equality/hate\\_crime/index.html](http://www.cps.gov.uk/publications/equality/hate_crime/index.html). [last accessed 12.05.2014]

<sup>223</sup> [UK] Crown Prosecution Service (2013) Hate Crime and Crimes Against Older People, p 19-23, available at: [www.cps.gov.uk/publications/docs/cps\\_hate\\_crime\\_report\\_2012.pdf](http://www.cps.gov.uk/publications/docs/cps_hate_crime_report_2012.pdf).

<sup>224</sup> [UK] Ministry of Justice (2013) An overview of hate crime in England and Wales, page 19, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/266358/hate-crime-2013.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266358/hate-crime-2013.pdf).

<sup>225</sup> [UK] Parliament (2009) Offences (Aggravation by Prejudice) (Scotland) Act 2009 asp.8, available at: [www.legislation.gov.uk/asp/2009/8](http://www.legislation.gov.uk/asp/2009/8). [last accessed 12.05.2014]

or religion, should be extended to cover offences motivated by malice and ill-will on grounds of disability, sexual orientation and transgender identity:

‘It is of course the case that hate crimes are already covered under Scots law. In one sense, no matter what the motivation is, sentencers can already take any aggravating factor, including a motive of malice and ill-will towards a social group, into account when determining the sentence under common law. However, it is impossible to monitor the extent to which this is currently happening, as common law aggravations are not recorded either in terms of statistics or on the offender’s criminal record. We consider that the introduction of new legislation on hate crime would not prevent sentencers from continuing to take into account other aggravating factors, such as vulnerability, under the common law. Whilst not the primary objective, we also felt that the creation of clear new legislation would have an impact on the negative social attitudes and prejudices that are often at the heart of hate-motivated crime.’<sup>226</sup>

A recent paper, commissioned by the Equality and Human Rights Commission, concludes that ‘there remain a number of operational and strategic obstacles to successfully responding to and preventing homophobic hate crime’.<sup>227</sup> It says that one such obstacle is disparities in the law on aggravated crimes: specifically, the fact that racially and religiously aggravated crimes are offences whereas homophobia is an aggravating factor rather than an offence in its own right. The paper concludes that the disparity ‘has an impact on the recording and response to different incidents by police Forces’.<sup>228</sup>

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<sup>226</sup> [UK] Scottish Government (2004) Working Group on Hate Crime Report, p. 20, available at: [www.scotland.gov.uk/Publications/2004/10/20027/44264](http://www.scotland.gov.uk/Publications/2004/10/20027/44264). [last accessed 12.05.2014]

<sup>227</sup> [UK] S. Dick (EHRC and Stonewall) (2009) Homophobic Hate Crimes and Hate Incidents, p. 16, available at: [www.equalityhumanrights.com/uploaded\\_files/research/research38\\_so\\_hatecrime.pdf](http://www.equalityhumanrights.com/uploaded_files/research/research38_so_hatecrime.pdf)[last accessed 12.05.2014]

<sup>228</sup> [UK] S. Dick (EHRC and Stonewall) (2009) Homophobic Hate Crimes and Hate Incidents, p. 16, available at: [www.equalityhumanrights.com/uploaded\\_files/research/research38\\_so\\_hatecrime.pdf](http://www.equalityhumanrights.com/uploaded_files/research/research38_so_hatecrime.pdf). [last accessed 12.05.2014]

## 7 Transgender issues

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

### 7.1 Discrimination against transgender people in employment, vocational training, and the provision of goods, facilities and services

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

In England, Wales and Scotland, the relevant provisions outlawing discrimination on the grounds of gender reassignment in employment and vocational training are contained in the *Equality Act 2010*, which replaced the *Sex Discrimination Act 1975* from 1 October 2010. In Northern Ireland, anti-discrimination law is devolved to the Northern Ireland Assembly where protection is conferred by the *Sex Discrimination (NI) Order 1976* (SDO), as amended by the *Sex Discrimination (Gender Reassignment) Regulations (NI) 1999*. The *Sex Discrimination (Amendment of Legislation) Regulations 2008* which introduced protection from direct discrimination on grounds of gender reassignment in the provision of goods, facilities, services or premises, also extends to Northern Ireland under section 1(3).<sup>229</sup> The decision of the ECJ in Case C-13/94, *P v. S and Cornwall County Council* was a central influence in this area.<sup>230</sup> The legislation permits differences in treatment on grounds of gender in a number of limited circumstances. First, if an employer can demonstrate that there is a genuine occupational qualification (GOQ) which means that the work has to be done by someone of a particular sex and that, as a result, it is reasonable to prevent a transgender person from doing the job. Second, if the work involves conducting intimate searches pursuant to statutory powers. Third, if the post involves working in a private home where there would be close physical or social contact, or knowledge of the intimate details of a person's life, and an employer can show that people would object. Finally, the legislation does not apply to employment for the purposes of an organised religion which, for religious reasons, is restricted to those who are not undergoing and have not undergone gender reassignment.

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<sup>229</sup> [UK] Parliament (2008) Sex Discrimination (Amendment of Legislation) Regulations 2008 Section 1(3), available at: [http://www.legislation.gov.uk/uksi/2008/963/pdfs/ukxi\\_20080963\\_en.pdf](http://www.legislation.gov.uk/uksi/2008/963/pdfs/ukxi_20080963_en.pdf). [last accessed 12.05.2014]

<sup>230</sup> [EU] European Court of Justice (1996) Case C-13/94 P v. S and Cornwall County Council, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994J0013:EN:HTML>. [last accessed 12.05.2014]

However, where a person has a full *Gender Recognition Certificate* under the *Gender Recognition Act 2004* (GRA) it is not lawful to discriminate other than on grounds that would apply to anyone else of his or her acquired gender - there is one exception: it is possible for an organised religion to discriminate where there are genuine religious reasons to refuse to employ a trans person even if the person has a *Gender Recognition Certificate*. The GRA 2004 allows transgender people (who are able to satisfy the necessary evidential requirements) to apply for full legal recognition in their acquired gender. Following a successful application, the person will receive a full *Gender Recognition Certificate* and the law regards that person, for all purposes, as being of his or her acquired gender.

There is some significant case law which outlines the extent to which transgender persons have been treated less favourably in an employment context as a result of their gender reassignment. This case law has particularly related to the harassment and victimisation endured by an individual whose previous gender was disclosed to a prospective employer by a former employer,<sup>231</sup> less favourable treatment as a person undergoing gender reassignment when undergoing the 'real life test'<sup>232</sup> and a refusal to employ a post-operative male to female transsexual as a result of failing to recognise the individual's reassigned gender amounted to unlawful discrimination.<sup>233</sup> In *X v Brighton and Hove*, the Employment Tribunal held that the disclosure of a person's previous gender was discriminatory and the individual had been victimised as a result. In *A v Chief Constable of West Yorkshire*, the House of Lords held that non-recognition of the individual's reassigned gender amounted to unlawful discrimination, which was in line with the European Court of Human Rights decision in *Christine Goodwin v UK* that the refusal of English law to recognise a person's gender reassignment was in breach of that person's rights under Arts 8 and 12 of the ECHR.<sup>234</sup> However, in *Croft v Royal Mail Group Plc* it was held that an employer must consider all circumstances when determining the requirements of a pre-operative transsexual to the female sex, who presented with a female gender. The employer must take into account the stage reached in treatment, including the employee's own assessment and presentation, although the employer is not bound by the employee's self-definition when making a judgment as to when the changes occurred. The employer must also take into account, though not to be governed by, the susceptibilities of other members of the workforce. In the present case, the Court of Appeal dismissed the appeal as they held that the employers had not discriminated on grounds of sex against the applicant pre-operative transsexual as they had acted reasonably taking into account all the circumstances.

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<sup>231</sup> [UK] Employment Tribunal (2007) *X v Brighton and Hove City Council* June 2007 This case has not been reported. Information can be found on the website of the Equality and Human Rights Commission: [www.equalityhumanrights.com/advice-and-guidance/your-rights/transgender/transgender-case-decisions/](http://www.equalityhumanrights.com/advice-and-guidance/your-rights/transgender/transgender-case-decisions/). [last accessed 12.05.2014].

<sup>232</sup> [UK] House of Lords (2004) *A v Chief Constable of West Yorkshire* [2004] UKHL 21, available at: [www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040506/chief-1.htm](http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040506/chief-1.htm) [last accessed 07.07.14].

<sup>233</sup> [UK] Court of Appeal (2003) *Croft v Royal Mail Group plc* [2003] EWCA Civ 1045; [2003] IRLR 592, available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2003/1045.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2003/1045.html) [last accessed 07.07.14].

<sup>234</sup> [UK] European Court of Human Rights (2002) *Christine Goodwin v UK* Application no. 28957/95 available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596#{"itemid":\["001-60596"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596#{).

Turning now to discrimination in the provision of goods, facilities and services, the Equal Treatment Directive 2004/113/EC banning gender discrimination in respect of their provision had a UK implementation deadline of 21 December 2007. The UK missed this deadline but, since April 2008, discrimination on the grounds of gender reassignment in the provision of goods, facilities and services has been prohibited throughout the UK. The Directive was implemented by the *Sex Discrimination (Amendment of Legislation) Regulations 2008 (SI 2008/963)*, which amended both the *Sex Discrimination Act 1975* (for Great Britain) and the *Sex Discrimination (Northern Ireland) Order 1976* (for Northern Ireland). The Equality Act 2010 revoked the *Sex Discrimination (Amendment of Legislation) Regulations 2008 (S.I. 2008/963)* so sex discrimination is now one of the protected characteristics included in the new equalities legislation.<sup>235</sup>

A public sector equality duty, extending to those who are intending to undergo, are undergoing, or have undergone gender reassignment, applies in Great Britain - In Northern Ireland, s. 75 of the *Northern Ireland Act 1998* places a duty on designated public authorities to have 'due regard to' the need to promote equality of opportunity. The duty was established in Section 149 of the *Equality Act 2010*<sup>236</sup> and places an obligation on public authorities to promote equality and eliminate discrimination related to all the protected characteristics in the Act. Crucially, instead of relying on individuals making complaints of discrimination, the duty requires public authorities to demonstrate that they treat women and men fairly. The Equality and Human Rights Commission is responsible for promoting and enforcing the equality duty. In 2009, the EHRC published a review on equality and discrimination in relation to transgender people in Great Britain. The review 'will be used to inform future policy development and strategy in Britain':<sup>237</sup>

A key issue concerning discrimination against transgender people in employment and vocational training, and in the provision of goods, facilities or services is the limited nature of the protection under the law. The legislation provides that it is unlawful to discriminate against a person because he/she intends to undergo, is undergoing, or has undergone, gender reassignment. In Great Britain, Section 7 of the *Equality Act 2010* defines 'gender reassignment' as: 'a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'. This definition means that anti-discrimination legislation does not afford protection to individuals who identify as transgender or some other gender identity, and who have no intention to undergo any medical supervision related to their gender presentation, whether or not they permanently live in their preferred gender role. In other words, as Whittle, Turner and Al-Alami point out in a research project commissioned by the independent Equalities Review (ER)

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<sup>235</sup> [UK] Parliament (2010) Equality Act, Schedule 27, available at: <http://www.legislation.gov.uk/ukpga/2010/15/schedule/27> [last accessed 12.05.2014]

<sup>236</sup> [UK] Parliament (2010) Equality Act 2010, c. 15, s. 149, available at: [www.legislation.gov.uk/ukpga/2010/15](http://www.legislation.gov.uk/ukpga/2010/15) [last accessed 12.05.2014]

<sup>237</sup> [UK] M. Mitchell and C. Howarth (2009), Trans Research Review (EHRC), p. 2, available at: [www.equalityhumanrights.com/uploaded\\_files/trans\\_research\\_review\\_rep27.pdf](http://www.equalityhumanrights.com/uploaded_files/trans_research_review_rep27.pdf). [last accessed 12.05.2014]

which ran alongside the UK Government's Discrimination Law Review (DLR) and was tasked with examining the underlying societal and cultural causes of disadvantage and inequality.<sup>238</sup>

*'a large majority of trans people are caught outside of the narrow protection of the legislation; cross dressers, and transvestites, people who live permanently in the gender 'opposite' to that on their birth certificate without any medical intervention and all those people who simply wish to present their gender differently.'*<sup>239</sup>

Whittle et al. recommend that: 'the legal limitations defined under statutory law should be revised so as not to be as definitive or exclusionary, and should be extended to protect many more trans people including those not intending to undergo gender reassignment surgery'.<sup>240</sup> The Equality Commission for Northern Ireland (ECNI) made a similar recommendation for Northern Ireland in its response to a consultation document issued by the Office of the First Minister and Deputy First Minister (OFMDFM) on the draft *Sex Discrimination Order 1976 (Amendment) Regulations (NI) 2007*, designed to implement the Equal Treatment Directive 2004/113/EC. In particular, the ECNI recommended:

- an extended definition of gender to include 'gender identity';
- subject to narrowly construed and justifiable exceptions, that the scope of protection from gender discrimination is extended in its entirety to those who are transsexual; and
- that discrimination on the grounds of perception and association should be unlawful on the grounds of sex, and a person's gender reassignment.<sup>241</sup>

In tune with the recommendations mentioned above by the independent Equalities Review and the ECNI, the *Equality Act 2010* changed the definition of gender reassignment, eliminating the requirement for 'medical supervision'. The new Act provides that 'a person has the protected characteristic of gender reassignment if [he or she] is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'.<sup>242</sup> This means that the protection afforded by the Act is given regardless of the person's intention of undergoing gender reassignment surgery.

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<sup>238</sup> [UK] Equalities Review (2007) *Fairness and Freedom: The Final Report of the Equalities Review*, available at: <http://webarchive.nationalarchives.gov.uk/20100807034701/http://archive.cabinetoffice.gov.uk/equalitiesreview/>. [last accessed 12.05.2014]

<sup>239</sup> [UK] S. Whittle, L. Turner and M. Al-Alami (2007) *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination* (A Research Project and Report commissioned by the Equalities Review), p. 74, available at: [www.pfc.org.uk/pdf/EngenderedPenalties.pdf](http://www.pfc.org.uk/pdf/EngenderedPenalties.pdf). [last accessed 12.05.2014]

<sup>240</sup> [UK] S. Whittle, L. Turner and M. Al-Alami (2007) *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination* (A Research Project and Report commissioned by the Equalities Review), p. 74, available at: [www.pfc.org.uk/pdf/EngenderedPenalties.pdf](http://www.pfc.org.uk/pdf/EngenderedPenalties.pdf). [last accessed 12.05.2014]

<sup>241</sup> [UK] ECNI (2007) Commission Response to OFMDFM's Consultation 'Implementing EU Equality Obligations in Northern Ireland: The Gender Goods and Services Directive', p. 5, available at: [www.equalityni.org](http://www.equalityni.org). [last accessed 12.05.2014]

<sup>242</sup> [UK] Parliament (2010), *Equality Act 2010*, c. 15, s. 7(1), available at: [www.legislation.gov.uk/ukpga/2010/15](http://www.legislation.gov.uk/ukpga/2010/15). [last accessed 12.05.2014]

Making the definition of gender reassignment clear, the Act also states that it includes ‘a transsexual person’.<sup>243</sup> In a recent case, the High Court of Justice interpreted and applied the new definition of gender reassignment under the *Equality Act 2010*. In *Green, R (on the application of) v Secretary of State for Justice*<sup>244</sup>, a prisoner in a male prison began to identify as female. He was not able to obtain a GRC, since he had not been openly living in the female gender for at least two years. The prisoner complained of discrimination, since he was not given access to certain items he considered essential to express his new gender identity, such as a wig or hair removal products, for security reasons. The Court reasoned that until a GRC was actually granted, the prisoner could not be regarded as female and, therefore, the adequate comparator in the determination of discrimination would be a male prisoner who did not intend to change gender. Using this criterion, the Court ruled that the prisoner was not only not being discriminated against, but he was actually in a more advantageous position, since he was allowed certain benefits that the rest of the prisoners did not have access to. The Court adopted a restrictive interpretation of the protected characteristic of gender reassignment, following previous jurisprudence on the issue,<sup>245</sup> but the protection afforded by the new *Equality Act 2010* appears to be broader.

The current government’s equality strategy entitled *The Equality Strategy - Building a Fairer Britain* outlined the main initiatives with regards to combatting discrimination against transgender persons. These included the development of a cross-government Transgender Equality Action Plan.<sup>246</sup> This Action Plan was published in 2011 and outlines the cross-government approach to improving the lives of transgender people and support businesses and public bodies so they have the right tools to support transgender people.<sup>247</sup>

## **7.2 Freedom of Movement, Asylum and Subsidiary Protection, and Family Reunification**

In line with the guidelines provided by the FRA, chapters 3, 4 and 5, above, outline the applicability of the legislation they discuss in the context of transgender people.

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<sup>243</sup> [UK] Parliament (2010), *Equality Act 2010*, c. 15, s. 7(2), available at: [www.legislation.gov.uk/ukpga/2010/15](http://www.legislation.gov.uk/ukpga/2010/15). [last accessed 12.05.2014]

<sup>244</sup> [UK] High Court of Justice, Queen’s Bench Division (2013) *Green, R (on the application of) v Secretary of State for Justice*, available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2013/3491.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2013/3491.html) [last accessed 12.05.2014].

<sup>245</sup> [UK] England and Wales Court of Appeal (2003) *Croft v Royal Mail Group Plc*, available at: [www.bailii.org/ew/cases/EWCA/Civ/2003/1045.html](http://www.bailii.org/ew/cases/EWCA/Civ/2003/1045.html).

<sup>246</sup> [UK] Government Equalities Office (2010) *The Equality Strategy - Building a Fairer Britain*, page 24, available at: [www.gov.uk/government/publications/equality-strategy](http://www.gov.uk/government/publications/equality-strategy).

## 7.3 Freedom of Assembly

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

## 7.4 Criminal Law

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

In Northern Ireland, there is currently no specific provision for taking into account that a common crime was committed with a transphobic motivation. In Scotland, in June 2009, the Scottish Parliament passed the *Offences (Aggravation by Prejudice) (Scotland) Act 2009* which makes provision for the aggravation of offences by prejudice based on transgender identity. The most notable feature of the new Scottish law is its broad definition of transgender identity: section 2(8) of the 2009 Act provides that reference to transgender identity is reference to ‘(a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004, changed gender, or (b) any other gender identity that is not standard male or female gender identity’. In England and Wales, the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* amended the *Criminal Justice Act 2003*, providing for the aggravation of offences motivated by hostility based on transgender identity and establishing a sentencing starting point of 30 years imprisonment for murders with the same motivation. In addition to this, the new Act also ensures that where any offence is shown to be motivated by hostility towards the victim on the grounds of transgender, sentences must be increased. This means that the law will equally reflect all five hate crime strands, including gender reassignment as well as race, religion, sexual orientation, and disability. These provisions came into force in 3 December 2012.<sup>248</sup> In line with the government’s commitment to ensuring equality for transgender people in the UK, the uplift in sentences for those convicted of hate crime directed at transgender people has been one of the key developments since the introduction of the Transgender Equality Action plan.<sup>249</sup>

The Crown Prosecution Service Hate Crime and Crimes Against Older People Report 2012-2013 demonstrates that the vast majority of prosecutions for transphobic hate crimes are allocated a principal offence category as an indication of the type and seriousness of the charges brought. The statistics demonstrate that the most common transphobic crimes were offences against the person and public order offences with 31.6%.<sup>250</sup>

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<sup>248</sup> [UK] Parliament (2012) *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, s 65, available at: [www.legislation.gov.uk/ukpga/2012/10](http://www.legislation.gov.uk/ukpga/2012/10). The Act amends Section 146 and Schedule 21 of the *Criminal Justice Act 2003*. [last accessed 12.05.2014]

<sup>249</sup> [UK] Government Equalities Office (2011) *Advancing transgender equality: a plan for action*, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85498/transgender-action-plan.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85498/transgender-action-plan.pdf). [last accessed 12.05.2014]

<sup>250</sup> [UK] Crown Prosecution Service (2013) *Hate crime and crimes against older people report 2012-2013*, page 25, available at: [http://www.cps.gov.uk/publications/docs/cps\\_hate\\_crime\\_report\\_2013.pdf](http://www.cps.gov.uk/publications/docs/cps_hate_crime_report_2013.pdf). [last accessed 12.05.2014]



Throughout the UK, transphobia is recognised by the police as a factor in hate crimes and hate incidents, and reporting is encouraged (including by means of ‘assisted’ or third-party reporting). For instance, the Police Service of Northern Ireland (PSNI) defines a transphobic incident to be ‘[a]ny incident which is perceived to be transphobic by the victim or any other person’, and it has been recording transphobic incidents since March 2006.<sup>251</sup> In December 2008, the Crown Prosecution Service (CPS) published its first annual hate crime report. The report includes information on CPS performance in prosecuting transphobic hate crimes in England and Wales.<sup>252</sup> In November 2009, a rally and vigil took place in Trafalgar Square, London in memory of victims of homophobic and transphobic hate crime. Rows of candles spelt out ‘No To Hate’ and speeches took place. There was a two-minute silence in memory of victims of these hate crimes. Messages of support were read out from all the main UK political parties.<sup>253</sup> The No to Hate Vigils have continued since 2009, and take place every year in October to commemorate the London Nail Bomb Attacks on Brixton, Brick Lane and Soho, it is also now recognised as National Hate Crime Awareness week. Each year, letters of support are received from prominent political leaders.<sup>254</sup>

## 7.5 Legislation regarding names and changes of names for transgender people

In the UK, there is no requirement to carry an identity card or other form of identification displaying one’s name. In addition, individuals are free to use a name of their own choosing, although to apply for official documentation such as passports or driving licences it will be necessary to have a ‘deed poll’ which is a legal document that proves change of name.<sup>255</sup> No surgery is needed in order to change one’s name or to change it on statutory documents such as a driving licence or a passport.

There are two principal ways of changing one’s name:<sup>256</sup> first, to have a ‘Change of Name by Deed Poll’ executed by a solicitor;<sup>257</sup> and second, to complete a ‘*Statutory Declaration of*

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<sup>251</sup> [UK] Police Service of Northern Ireland, Transphobic Hate Crime, available at: [www.psni.police.uk/directory/advice-and-legislation/advice\\_hate\\_crime/advice\\_hate\\_crime\\_transphobic.htm](http://www.psni.police.uk/directory/advice-and-legislation/advice_hate_crime/advice_hate_crime_transphobic.htm). [last accessed 12.05.2014]

<sup>252</sup> [UK] Crown Prosecution Service (2008) Hate Crime Report 2007-2008, available at: [www.cps.gov.uk/publications/docs/CPS\\_hate\\_crime\\_report\\_2008.pdf](http://www.cps.gov.uk/publications/docs/CPS_hate_crime_report_2008.pdf). [last accessed 12.05.2014]

<sup>253</sup> [UK] Galop, available at: [www.galop.org.uk/category/news/](http://www.galop.org.uk/category/news/). At the time of writing (January 2014) the web-link is no longer functioning, and no replacement could be found. [last attempted accessed 12.05.2014]

<sup>254</sup> [UK] 17-24-30 (2014) 17-24-30 no to hate crime campaign, available at: <http://172430nohatecrime.wordpress.com/2013/10/13/letters-of-support-from-the-prime-minister-the-deputy-prime-minister-and-leader-of-the-opposition/>. [last accessed 12.05.2014]

<sup>255</sup> [UK] HM Government (2014) Change your name (by deed poll), available at: [www.gov.uk/change-name-deed-poll](http://www.gov.uk/change-name-deed-poll). [last accessed 12.05.2014]

<sup>256</sup> [UK] Gender Trust, Information Sheet: Changing Your Name and Documents, available at: <http://gendertrust.org.uk/wp-content/uploads/2013/02/16-Changing-Your-Name-and-Documents.pdf>. [last accessed 12.05.2014]

<sup>257</sup> [UK] Parliament (1994) Enrolment of Deeds (Change of Name) Regulations 1994, Statutory Instrument No. 604 (L. 3), available at: [www.legislation.gov.uk/ukSI/1994/604/made](http://www.legislation.gov.uk/ukSI/1994/604/made). [last accessed 12.05.2014]

*Change of Name*'.<sup>258</sup> The latter states the name by which an individual wishes to be known, and is witnessed by a solicitor, justice's clerk at a magistrate's court or other authorised officer of the court. It is sent with a copy of the individual's birth certificate and a doctor's or psychiatrist's letter to allow the individual's name to be changed on statutory documents.

The cases of *Goodwin v. The United Kingdom*, *I v. The United Kingdom* and *Bellinger v. Bellinger* demonstrated the need for legislation. Under the *Gender Recognition Act 2004* (GRA),<sup>259</sup> which came into force in April 2005 and applies throughout the UK, an individual who is successful in applying for a full *Gender Recognition Certificate* (GRC) can obtain a new birth certificate.

In 2007, a report commissioned by the Equalities Review, recommended that 'a government resource be made easily accessible to trans people and others, which stipulates the legitimate protocol for name and gender changes and the legal consequences for failing to comply'.<sup>260</sup> It emphasised that:

*'The arrival of the Gender Recognition Act [2004] and certificate has added another layer of complication. For many years a whole range of institutions have routinely changed people's details on production of a doctor's note and a formal change of name. The Gender Recognition Act has confused this process. Many organisations, including universities, the police and health authorities now falsely claim that no change of name, gender or pronouns can be made without a gender recognition certificate. There is a real need for government to provide an easily accessible point of information for employers and others to reinstate a simple process which had been in existence for many years.'*<sup>261</sup>

## 7.6 Legislation regarding change of gender/sex

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

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<sup>258</sup> [UK] Parliament (1835) Statutory Declarations Act 1835 c.62, available at: [www.legislation.gov.uk/ukpga/Will4/5-6/62](http://www.legislation.gov.uk/ukpga/Will4/5-6/62). [last accessed 12.05.2014]

<sup>259</sup> [UK] European Court of Human Rights (1996) *Goodwin v. The United Kingdom*, available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974#{"itemid":"001-57974"}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974#{); European Court of Human Rights (2002) *I v. The United Kingdom*, available at: [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":"I%20v.%20The%20United%20Kingdom"},"documentcollectionid2":"GRANDCHAMBER","CHAMBER":"I","itemid":"001-60595"}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{); [UK] House of Lords (2003) *Bellinger v. Bellinger*, available at: [www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030410/bellin-1.htm](http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030410/bellin-1.htm)

<sup>260</sup> [UK] S. Whittle, L. Turner and M. Al-Alami (2007) *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination* (A Research Project and Report commissioned by the Equalities Review), p. 18, available at: [www.pfc.org.uk/pdf/EngenderedPenalties.pdf](http://www.pfc.org.uk/pdf/EngenderedPenalties.pdf) [last accessed 12.05.2014]

<sup>261</sup> [UK] S. Whittle, L. Turner and M. Al-Alami (2007) *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination* (A Research Project and Report commissioned by the Equalities Review), p. 15, available at: [www.pfc.org.uk/pdf/EngenderedPenalties.pdf](http://www.pfc.org.uk/pdf/EngenderedPenalties.pdf) [last accessed 12.05.2014]

Under the Act, UK citizens who satisfy certain criteria are able to apply to a Gender Recognition Panel (GRP) for a *Gender Recognition Certificate* (GRC) - if the applicant has been recognised under the law of another country or territory as having changed gender, the GRP need only be satisfied that the country or territory in question is on an approved list.. The GRP came into existence on 4 April 2005 and certificates were able to be issued from that date. The GRP consists of a president, a deputy, three legal members and six medical members.

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

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

Following the introduction of the *Gender Recognition Act 2004*, there was an initial influx of applications for name changes reaching 1071 name changes in 2005 and 102 gender changes in the same year. However, since then the data shows that there is on average 20 name changes every year and 60 gender changes every year, from 2007-2013 (see Annex 2 for further details).

Before the *Marriage (Same Sex Couples) Act 2013*, which will enter into force on 13 March 2014, the rules differed as between applicants who are single and those who are married. An unmarried or single transgender person who is successful in applying for gender recognition will be given a full GRC. However, a transgender person who is married cannot receive a full GRC because, in the UK, marriage is not permitted between two members of the same sex - This was held not to be in breach of the ECHR in the case of *Parry v UK*.<sup>262</sup> A transgender person who is married will be issued with an interim GRC (IGRC).

This enables them to obtain a full GRC via a simplified procedure if they annul<sup>263</sup> their marriage or their spouse dies. In Scotland, the grant of an IGRC provides a ground for divorce rather than making the marriage voidable; in the rest of the UK, an IGRC is a ground for marriage being voidable. Once the Act is in force, a married transgender person will be able to receive a full GRC

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<sup>262</sup>. [UK] European Court of Human Rights (2006) *Parry V UK*, available at: [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["Parry%20v%20United%20kingdom"\],"documentcollection\\_id2":\["CASELAW"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{). [last accessed 12.05.2014]

<sup>263</sup>. [UK] Parliament (2004) *Gender Recognition Act 2004*, c. 7, Schedule 2, available at: [www.legislation.gov.uk/ukpga/2004/7/contents](http://www.legislation.gov.uk/ukpga/2004/7/contents). [last accessed 12.05.2014]

without divorcing their spouse, provided that he or she gives consent to the process.<sup>264</sup> The requirement for the consent of the spouse, present in both the *Marriage (Same Sex Couples) Act 2013* and the initial draft of the Scottish Bill, has already received criticism. The so-called “spousal veto” has been characterised as unreasonable, since a person must have been living in the gender they identify with for at least two years before being able to apply for gender recognition. This means their marriage will have already been, in practice, a same-sex marriage for two years. It has additionally been said that if the spouse is unhappy with the change, he or she will have also had two years to decide on divorce, rendering the need for consent irrelevant.<sup>265</sup> The Scottish Bill has since been amended and now provides for the possibility of obtaining gender recognition without the spouse’s consent.<sup>266</sup>

Prior to the introduction of the *Marriage (Same Sex Couples ) Act 2013*, the main case law on transgender issues considered the validity of a marriage once a Gender Recognition Certificate has been issued to an individual. Initially, the courts upheld the Corbett test which stated that “the biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.”<sup>267</sup> But in *Bellinger v Bellinger*,<sup>268</sup> the House of Lords exercised its power to make a declaration of incompatibility under section 4 of the Human Rights Act 1998, finding that the non-recognition of change of gender for the purposes of marriage in section 11(c) of the Matrimonial Causes Act was in breach of Arts 8 and 12 of the ECHR. But the House of Lords did not consider that the issues raised in the case were suitable for determination by courts and left the matter for Parliament, which subsequently enacted the Gender Recognition Act 2004 which enables transsexual people to be legally recognised in their acquired gender, and also to marry in that gender.

## 7.7 Other relevant legislation

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

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<sup>264</sup> [UK] Pink News (2014) Comment: spousal veto amendment is a victory for trans equality in Scotland, available at: [www.pinknews.co.uk/2014/01/16/comment-spousal-veto-amendment-is-a-victory-for-trans-equality-in-scotland/](http://www.pinknews.co.uk/2014/01/16/comment-spousal-veto-amendment-is-a-victory-for-trans-equality-in-scotland/). [last accessed 12.05.2014]

<sup>265</sup> [UK] Pink News (2013) Comment: How Scotland’s same-sex marriage bill can be improved for trans and intersex people, available at: [www.pinknews.co.uk/2013/08/09/comment-how-scotlands-same-sex-marriage-bill-can-be-improved-for-trans-and-intersex-people/](http://www.pinknews.co.uk/2013/08/09/comment-how-scotlands-same-sex-marriage-bill-can-be-improved-for-trans-and-intersex-people/). [last accessed 12.05.2014]

<sup>266</sup> [UK] Scottish Parliament (2013) Marriage and Civil Partnership (Scotland) Bill, available at: [www.scottish.parliament.uk/S4/Bills/Marriage%20and%20Civil%20Partnership%20\(Scotland\)%20Bill/b36bs4-aspassed.pdf](http://www.scottish.parliament.uk/S4/Bills/Marriage%20and%20Civil%20Partnership%20(Scotland)%20Bill/b36bs4-aspassed.pdf). [last accessed 12.05.2014]

<sup>267</sup> [UK] Court of Appeal (1970) *Corbett v Corbett*, available at: [www.pfc.org.uk/caselaw/Corbett%20v%20Corbett.pdf](http://www.pfc.org.uk/caselaw/Corbett%20v%20Corbett.pdf).

<sup>268</sup> [UK] House of Lords (2003) *Bellinger v Bellinger* [2003] UKHL 21, available at: [www.bailii.org/uk/cases/UKHL/2003/21.html](http://www.bailii.org/uk/cases/UKHL/2003/21.html) [last accessed 07.07.14].

## **8 Miscellaneous**

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

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

There are no other issues regarding LGBT protection not covered in other sections.

## 9 Intersex

### 9.1 Legislation, jurisprudence and policies

For the purposes of this study, we will consider *intersex*<sup>269</sup> (in the medical community, the term that is more often used to identify intersexuality is Disorders of Sex Development (DSD)). The concept is widely criticized by intersex rights advocates, like the UK Intersex Association, for pathologising and stigmatising intersex people. As a separate category where it does not overlap with the protections already conferred by law on the grounds of sex, sexual orientation and gender reassignment. Therefore, we are taking into consideration the cases where:

- A person is born with sexual characteristics, externally manifested or not, that do not fit the typical definition of male or female and/or;
- A person does not identify with a particular gender.

There is a clear crossover between intersexuality and concepts such as sex, gender identity and sexual orientation. These concepts are explicitly protected by anti-discrimination legislation in the UK, as they constitute protected characteristics under the *Equality Act 2010*.<sup>270</sup> However, intersexuality is not simply an issue of gender identity, as we generally perceive it: i.e., a person does not identify with the sex he or she was born with. It may be the case that the person does not identify with a particular gender at all, which places the individual in an apparent legal void.

Intersexuality is not explicitly protected under non-discrimination legislation in the UK, as it is not one of the protected characteristics in the *Equality Act 2010* (The Equality Act 2010 prohibits discrimination on the grounds of 9 protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation) Nevertheless, section 2(8) of the *Offences (Aggravation by Prejudice) (Scotland) Act 2009*, affords protection to intersex people through the statutory aggravation of common offences for hostility based on transgender identity, by providing a broad definition of ‘transgender identity’ that includes ‘intersexuality’ and ‘gender identity that is not standard male or female’.<sup>271</sup>

Reference is made to concepts linked to intersexuality, such as ‘intersex’, ‘intersexuality’ or ‘non-gendered’, in a number of key instruments of Government policy.<sup>272</sup> Issues related to intersexuality

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<sup>269</sup> [UK] NHS (2014) Disorders of sex development, available at: [www.nhs.uk/conditions/disorders-sex-development/Pages/Introduction.aspx](http://www.nhs.uk/conditions/disorders-sex-development/Pages/Introduction.aspx); [UK] Intersex Association (2014) Why Not "Disorders of Sex Development"?, available at: [www.ukia.co.uk/ukia/dsd.html](http://www.ukia.co.uk/ukia/dsd.html); [UK] Northern Ireland Public Health Agency, (2014) TransgenderNI, available at: [www.transgenderni.com/Terminology-6911.html](http://www.transgenderni.com/Terminology-6911.html). [last accessed 12.05.2014]

<sup>270</sup> [UK] Parliament (2010) Equality Act 2010, c. 15, available at: [www.legislation.gov.uk/ukpga/2010/15](http://www.legislation.gov.uk/ukpga/2010/15). [last accessed 12.05.2014]

<sup>271</sup> [UK] Scottish Parliament (2009) Offences (Aggravation by Prejudice) (Scotland) Act 2009, asp 8, Sections 2(2) and 2(8), available at: [www.legislation.gov.uk/asp/2009/8](http://www.legislation.gov.uk/asp/2009/8). [last accessed 12.05.2014]

<sup>272</sup> [UK] House of Commons (2014) Early Day Motion 907, available at: [www.parliament.uk/edm/2013-14/907](http://www.parliament.uk/edm/2013-14/907). In February 2014, the Home Office issued the results of an internal review on the issue, analysing the current arrangements and possible future options.: [UK] Home Office (2014) Gender Marking in Passports – Internal Review of Existing

appear to be gaining increasing attention by public organs and civil society in general in the UK. In January 2014, an Early Day Motion was submitted in the House of Commons, urging the Government and HM Passport Office to make non-gender specific passports available for persons who do not identify with a particular gender. The Government Equalities Office Transgender Action Plan makes brief reference to “non-gendered” as a part of the transgender category,<sup>273</sup> and the Home Affairs Committee Seventh Report on Asylum, raises concern about the credibility assessments in the cases of Lesbian, Gay, Bisexual, Transgender and Intersex asylum applicants.<sup>274</sup>

There is no relevant case law in the UK relating to the protection of equality on grounds of intersex.

Currently in the UK every person is assigned a particular gender identification, either male or female, which is recorded upon the registration of the child after birth. As a general rule, the registration of a child should be done in a short period of time and may be delayed for a period no longer than 42 days in England, Wales and Northern Ireland, and 21 days in Scotland.<sup>275</sup> The only exception is the registration of stillbirths, where if it is not possible for a clinician to determine the sex of the child, the option "not known" is recorded.<sup>276</sup>

## 9.2 Surgical and medical interventions

There is no particular legal basis for the performance of surgical or medical interventions on intersex people in the UK. Medical care is offered by the National Health Service (NHS) and private medical practices.<sup>277</sup>

It is common practice that, after birth, doctors will decide on which sex to attribute to the child, based on an examination of their external sexual characteristics. When children are born with ambiguous or mixed sexual characteristics, usually further testing is done by medical professionals, with the intention of placing the child on either end of the binary model of sex: male or female.<sup>278</sup>

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Arrangements and Possible Future Options, available at: [http://data.parliament.uk/DepositedPapers/Files/DEP2014-0152/Gendermarkings\\_290114.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2014-0152/Gendermarkings_290114.pdf). [last accessed 12.05.2014]

<sup>273</sup> [UK] Government Equalities Office (2011) Advancing Transgender Equality: a Plan for Action, p. 5, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85498/transgender-action-plan.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85498/transgender-action-plan.pdf). [last accessed 12.05.2014]

<sup>274</sup> [UK] Home Affairs Committee (2013) Seventh Report – Asylum, Volume I, para. 58-63, available at: [www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/710](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/710). Although express reference is made to intersex, the Committee does not address intersex specific concerns, focusing mainly on the issue of proof of sexual orientation. [last accessed 12.05.2014]

<sup>275</sup>, [UK] Government, Register a Birth, available at: [www.gov.uk/register-birth](http://www.gov.uk/register-birth); for Scotland: [UK] General Register Office for Scotland, Registering a Birth, available at: [www.gro-scotland.gov.uk/regscot/registering-a-birth.html](http://www.gro-scotland.gov.uk/regscot/registering-a-birth.html); for Northern Ireland: [UK] Northern Ireland Government Services, Registering and Naming your Baby, available at: [www.nidirect.gov.uk/index/information-and-services/government-citizens-and-rights/births-and-registration/registering-and-naming-your-baby.htm](http://www.nidirect.gov.uk/index/information-and-services/government-citizens-and-rights/births-and-registration/registering-and-naming-your-baby.htm). [last accessed 12.05.2014]

<sup>276</sup> [UK] Email communication with the General Register Office for Scotland in 29.01.2014.

<sup>277</sup> [UK] National Health Service, Disorders of sex development, available at: [www.nhs.uk/conditions/disorders-sex-development/pages/introduction.aspx](http://www.nhs.uk/conditions/disorders-sex-development/pages/introduction.aspx). [last accessed 12.05.2014]

<sup>278</sup> [UK] Sarah Ehtisha, Sex Assignment, available at: [www.dsdfamilies.org/mednote/sex\\_assignment.php](http://www.dsdfamilies.org/mednote/sex_assignment.php). [last accessed 12.05.2014]

Despite being registered as male or female after birth, some persons remain with external sexual characteristics that do not fit the typical anatomy of their assigned sex. These persons often decide to search for medical treatment, which ranges from hormone therapy to surgical procedures intended to adapt their external sexual characteristics to their assigned gender or to the gender they identify with. There are also cases when the parents decide to subject the intersex child to sex assignment surgery, generally at a young age. The surgical procedures that are performed vary depending on the condition that is diagnosed and on the assigned sex of the person undergoing it. All of those conditions can be grouped under the general category of Disorders of Sex Development (DSD), which are characterised by the NHS as ‘a group of conditions where the reproductive organs and genitals do not develop normally’.<sup>279</sup> The NHS indicates that DSD are commonly caused by conditions such as Congenital Adrenal Hyperplasia (CAH), and Androgen Insensitivity Syndrome (AIS).<sup>280</sup> NHS England have published an Interim Gender Dysphoria Protocol and Service Guideline 2013/14 which seeks to achieve national consistency and safe delivery of gender identity services. It was introduced to allow time to develop and consult on a new commissioning policy and service specification in 2014.<sup>281</sup> The interim protocol is to be read in conjunction with the Royal College of Psychiatrists 2013, Good practice guidelines for the assessment and treatment of adults with gender dysphoria.<sup>282</sup>

There is currently no prohibition in UK law regarding the performance of sex assignment surgical procedures or other medical interventions for the treatment of DSD. As a general rule, informed consent to the procedures must be given by the adult being treated or by the persons who hold parental responsibility over the child subject to treatment, usually his or her parents.<sup>283</sup> The age of consent for medical treatment throughout the UK is set at 16.<sup>284</sup> Children under the age of 16 may be able to give consent to the procedure, if they are considered to have sufficient maturity and judgment to enable them fully to understand what is proposed.<sup>285</sup> If two persons hold parental

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<sup>279</sup> [UK] National Health Service, Disorders of sex development, available at: [www.nhs.uk/conditions/disorders-sex-development/pages/introduction.aspx](http://www.nhs.uk/conditions/disorders-sex-development/pages/introduction.aspx). [last accessed 12.05.2014]

<sup>280</sup> [UK] National Health Service, Disorders of sex development, available at: [www.nhs.uk/conditions/disorders-sex-development/pages/introduction.aspx](http://www.nhs.uk/conditions/disorders-sex-development/pages/introduction.aspx). [last accessed 12.05.2014]

<sup>281</sup> [UK] NHS England (2013) Interim Gender Dysphoria Protocol and Service Guideline 2013/14, available at: [www.england.nhs.uk/wp-content/uploads/2013/10/int-gend-proto.pdf](http://www.england.nhs.uk/wp-content/uploads/2013/10/int-gend-proto.pdf) [last accessed 12.05.2014].

<sup>282</sup> [UK] Royal College of Psychiatrists (2013), Good practice guidelines for the assessment and treatment of adults with gender dysphoria, available at: [www.rcpsych.ac.uk/files/pdfversion/CR181.pdf](http://www.rcpsych.ac.uk/files/pdfversion/CR181.pdf). [last accessed 12.05.2014]

<sup>283</sup> [UK] Parliament (1989) Children Act 1989, c. 41, s. 2 and 3, available at: [www.legislation.gov.uk/ukpga/1989/41](http://www.legislation.gov.uk/ukpga/1989/41). Other holders of parental responsibility can be a legally appointed guardian or a state authority designated for the care of the child.

<sup>284</sup> for England and Wales [UK] Parliament (1969) Family Law Reform Act 1969, c. 46, s. 8, available at: [www.legislation.gov.uk/ukpga/1969/46/section/8](http://www.legislation.gov.uk/ukpga/1969/46/section/8); for Scotland [UK] Scottish Parliament (1991) Age of Legal Capacity (Scotland) Act 1991, c. 50, s. 1(1)(b), available at: [www.legislation.gov.uk/ukpga/1991/50](http://www.legislation.gov.uk/ukpga/1991/50); for Northern Ireland [UK] Northern Ireland Parliament (1969) Age of Majority (Northern Ireland) Act 1969, c. 28, s. 4, available at: [www.legislation.gov.uk/apni/1969/28](http://www.legislation.gov.uk/apni/1969/28). [last accessed 12.05.2014]

<sup>285</sup> [UK] Brook (2014) Young People, Consent to medical treatment, available at: [www.brook.org.uk/information/sex-and-the-law/consent-to-medical-treatment](http://www.brook.org.uk/information/sex-and-the-law/consent-to-medical-treatment). [last accessed 12.05.2014]



responsibility over the child and only one of them consents to the treatment, the health professional may still accept the consent and perform it.<sup>286</sup>

Sex assignment surgical procedures have generated controversy and opinions divide on whether they should be admitted under law. The most problematic issue arises when considering their execution on children, as they will generally be performed without their consent or even actual understanding. Several voices have come forward expressing their disagreement with these procedures, or at least expressing concern towards their irreversibility and the physical and psychological damage often suffered by the children who are subjected to them before they are even capable of understanding them.<sup>287</sup> Medical practitioners also appear to be in increasing agreement that surgical correction of the genitals should be considered with care and as a last resort.<sup>288</sup>

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<sup>286</sup> [UK] National Health Service, Consent to treatment – children and teenagers, available at: [www.nhs.uk/Conditions/Consent-to-treatment/Pages/Children-under-16.aspx](http://www.nhs.uk/Conditions/Consent-to-treatment/Pages/Children-under-16.aspx). [last accessed 12.05.2014]

<sup>287</sup>: [uk] Organisation Intersex International in the United Kingdom, available at: <http://oiiuk.org/671/official-position-of-oii-on-medical-care/>; [UK] DSD Families, available at: [www.dsdfamilies.org/mednote/surgery.php](http://www.dsdfamilies.org/mednote/surgery.php); [UK] The UK Intersex Association, available at: [www.ukia.co.uk/ukia/ukia-recommend.html](http://www.ukia.co.uk/ukia/ukia-recommend.html). [last accessed 12.05.2014]

<sup>288</sup> [UK] Imran Mushtaq, Surgery in Infants and Children with DSD, available at: [www.dsdfamilies.org/mednote/surgery.php](http://www.dsdfamilies.org/mednote/surgery.php); Lawson Wilkins Pediatric Endocrine Society and European Society for Paediatric Endocrinology Consensus Group (2006) Consensus statement on management of intersex disorders, p. 4, available at: [www.aissg.org/PDFs/Chicago-Consensus-Statement-06.pdf](http://www.aissg.org/PDFs/Chicago-Consensus-Statement-06.pdf). [last accessed 12.05.2014]

## 10 Good practices

Eight good practices are nominated. The first three concern the reporting of homophobic and transphobic crimes; one concerns research on transgender issues; two concern transgender people and employment practices; one concerns education on sexual orientation; and the last one concerns Government policies. More generally, note that the *Trans Research Review*, published in 2009 by the Equality and Human Rights Commission, concludes that ‘many best practice guides exist for areas of life where little research had been conducted’ and ‘[w]hile this does not necessarily mean that the guidance they provide is inappropriate, confidence in them could be increased if they had been based on rigorous research evidence into the needs of trans people’.<sup>289</sup>

### 10.1 Criminal law: homophobic and transphobic crimes

#### 10.1.1 Assisted or third party reporting of homophobic and transphobic crimes

True Vision is a facility developed by the Association of Chief Police Officers which provides information about hate crime and is an online reporting tool. This service seeks to address the problem that victims of homophobic and transphobic crimes may be unwilling to approach the police. It allows for reporting to a named third party, typically an LGBT organisation. A number of organisations are able to provide third party reporting facilities for reporting homophobic and transphobic hate crime, including, Albert Kennedy Trust, Broken Rainbow, Families and Friends of Lesbian and Gays (FFLAG), Galop, IMAAN, Lesbian and Gay Foundation, London Lesbian and Gay Switchboard, PACE, REGARD, Safra Project, Schools Out!, Stonewall, The Gender Trust, GIRES, Mermaids and Press for Change.<sup>290</sup> Third party reporting was included in the Gay British Crime Survey 2013 by Stonewall as a mechanism by which victims of LGBT hate crime could report an incident/crime. The survey results showed that of those who had experienced an incident/crime, 67% of those who experienced a homophobic hate crime or incident did not report it to anyone and only 4% used third party reporting, although this figure is higher for London (eight per cent) and the South East (eleven per cent).<sup>291</sup> LGBT/minority liaison officers.

Many police forces in the UK have LGBT or minority liaison officers in every borough or police district. These officers have been specially trained to support victims of homophobic and transphobic incidents. They may also have an additional responsibility to engage with individuals and groups who support victims.<sup>292</sup> The Stonewall survey indicated that just one in nine (11 per

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<sup>289</sup> [UK] M. Mitchell and C. Howarth (2009), *Trans Research Review* (EHRC), pp. 31-2, available at: [www.equalityhumanrights.com/uploaded\\_files/trans\\_research\\_review\\_rep27.pdf](http://www.equalityhumanrights.com/uploaded_files/trans_research_review_rep27.pdf). [last accessed 12.05.2014]

<sup>290</sup> [UK] True Vision (2014) *Third Party Reporting Centres*, available at: [http://report-it.org.uk/organisations\\_that\\_can\\_help#sexual\\_orientation](http://report-it.org.uk/organisations_that_can_help#sexual_orientation). [last accessed 12.05.2014]

<sup>291</sup> [UK] Stonewall (2013) *Homophobic Hate Crime: The Gay British Crime Survey 2013*, page 17, available at: [www.stonewall.org.uk/documents/hate\\_crime.pdf](http://www.stonewall.org.uk/documents/hate_crime.pdf). [last accessed 12.05.2014]

<sup>292</sup> [UK] Metropolitan police (2014) *Lesbian, Gay, Bisexual and Transgender Borough Liaison*, available at: <http://content.met.police.uk/Article/Lesbian-Gay-Bisexual-and-Transgender-Borough-Liaison/1400018932800/ContactUs>.

cent) of those reporting a crime or incident, to the police or to another official body, had contact with a dedicated police LGBT liaison officer about it.<sup>293</sup> The recommendations of Stonewall are also cautionary regarding the use of LGBT liaison officers, particularly with regards to attitudes towards victims of LGBT Hate crime, which can still be a barrier to people reporting. The Stonewall survey recommended that all police officers and control room staff should be trained to identify and record homophobic hate crimes and incidents. It is important to deal with the victim in a sensitive manner and it is important that victims are able to report homophobic crimes and incidents to all police officers, not just dedicated Lesbian and Gay Liaison Officers.<sup>294</sup> Any assessment of the impact of LGBT liaison officers on victim's reporting and engaging with the police will be evaluated at a local level within the police constabulary.

### **10.1.2 Incitement to hatred on grounds of sexual orientation**

On 8 May 2008 the Criminal Justice and Immigration Act 2008<sup>295</sup> was given the royal assent. Section 74 amends Part 3A of the Public Order Act 1986 (hatred against persons on religious grounds) to include hatred on the grounds of sexual orientation. This makes it an offence to use threatening words or behaviour, to display written material which is threatening, to publish or distribute written material, to publicly direct or perform a play, to distribute, show or play a recording of visual images or sounds, to broadcast or to possess inflammatory material all with the intent to stir up hatred on the grounds of sexual orientation. On indictment a person guilty of any the above offences can be imprisoned for a term not exceeding seven years, receive a fine or both. The first prosecution for this offence was handed down in February 2012, in the case of *R v Ihjaz Ali, Razwan Javed and Kabir Ahmed*.<sup>296</sup>

### **10.1.3 Pioneering Public NGO Research into Homophobic and Transphobic Crimes**

*Filling in the Blanks*, published in 2009, reports on pioneering investigation into homophobic and transphobic hate crime in London. The investigation was funded in part by the Metropolitan Police Service (MPS) and the Metropolitan Police Authority and it was undertaken by the LGBT community safety charity, Galop, in partnership with Stonewall Housing and London Lesbian and Gay Switchboard. The research aimed to increase understanding about the nature of homophobic and transphobic hate crime, and about the options for victims to report their experiences and get the support they may need. The research was approached in three phases. In the first phase the aim

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<sup>293</sup> [UK] Stonewall (2013) Homophobic Hate Crime: The Gay British Crime Survey 2013, page 22, available at: [www.stonewall.org.uk/documents/hate\\_crime.pdf](http://www.stonewall.org.uk/documents/hate_crime.pdf). [last accessed 12.05.2014]

<sup>294</sup> [UK] Stonewall (2013) Homophobic Hate Crime: The Gay British Crime Survey 2013, page 26, available at: [www.stonewall.org.uk/documents/hate\\_crime.pdf](http://www.stonewall.org.uk/documents/hate_crime.pdf). [last accessed 12.05.2014]

<sup>295</sup> [UK] Parliament (2008) Criminal Justice and Immigration Act 2008 c. 4, available at: [www.legislation.gov.uk/ukpga/2008/4](http://www.legislation.gov.uk/ukpga/2008/4). [last accessed 12.05.2014]

<sup>296</sup> [UK] Derby Crown Court (2012) Sentencing Remarks of HHJ Burgess: *R v Ihjaz Ali, Razwan Javed and Kabir Ahmed*, available at: [www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf). [last accessed 12.05.2014]

was to map the range of reporting and support services targeted at victims of homophobic and transphobic hate crime in London. The second phase involved a period of partnership between the three organisations, to create a collated dataset of incidents reported to each organisation. In the final phase the data that had been collected was analysed and, where possible, compared with police data. The investigation highlighted that a significant proportion of otherwise unreported homophobic or transphobic hate incidents are either informally ‘told’ or more formally reported to LGBT organisations. Such organisations, however, often do not have a system for recording information received, and even where information is recorded by the individual organisation, there is often no shared recording system and no method for wider dissemination among organisations or with the MPS. Numbers indicate that homophobic and transphobic hate crime is significantly under-reported. The research further identified some important differences in the cases reported to MPS or LGBT organisations. It was found that LGBT organisations play a vital role in providing alternative routes for reporting experiences, and getting appropriate advice and support, and without these services some victims would simply not report at all. For example the MPS appear to be more likely to be contacted by victims who were attacked in public areas but less likely to be contacted about incidents occurring in or near the home, which constitute a significant proportion of all incidents reported. It appears that victims are more likely therefore to approach an LGBT organisation to report domestic abuse or ongoing harassment. Furthermore, victims contacting organisations about an incident appear more likely to know the perpetrators, who are most likely to be young men under 30. Significant proportions of victims, however, make contact with LGBT organisations after already reporting to the police or other statutory service, because they need further help or advice that the police cannot provide, such as emotional support or legal advice.<sup>297</sup>

In 2013, Stonewall published the Gay British Crime Survey 2013 which indicates that lesbian, gay and bisexual people continue to live in fear of homophobic abuse. In spite of significant legal changes in recent years, Stonewall's research shows that many gay people remain subject to violence and intimidation, with far too few reporting what they have experienced to the police.<sup>298</sup>

## 10.2 Transgender People and Employment

### 10.2.1 Job Applications and Criminal Record Information

The Disclosure and Barring Services (DBS), replaced the Criminal Records Bureau (CRB) in 2012. It provides access to criminal record information in order to help employers in the public, private and voluntary sectors to identify job applicants who may be unsuitable for certain work, especially positions that involve contact with children or other vulnerable members of society.<sup>299</sup> To perform

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<sup>297</sup> [UK] P. Kelley (2009) Filling in the Blanks: LGBT Hate Crime in London, available at: [www.galop.org.uk/wp-content/uploads/2009/05/filling-in-the-blanks-low-res.pdf](http://www.galop.org.uk/wp-content/uploads/2009/05/filling-in-the-blanks-low-res.pdf). [last accessed 12.05.2014]

<sup>298</sup> [UK] Stonewall (2013) Homophobic Hate Crime: The Gay British Crime Survey 2013, available at: [www.stonewall.org.uk/documents/hate\\_crime.pdf](http://www.stonewall.org.uk/documents/hate_crime.pdf). [last accessed 12.05.2014]

<sup>299</sup> [UK] Government, Disclosure and Barring Services, available at: [www.gov.uk/government/organisations/disclosure-and-barring-service](http://www.gov.uk/government/organisations/disclosure-and-barring-service); [UK] Scottish Government, Disclosure Scotland, available at: [www.disclosurescotland.co.uk](http://www.disclosurescotland.co.uk); [UK] Northern Ireland Government Services, Access NI: Criminal records check, available at: [www.nidirect.gov.uk/accessni](http://www.nidirect.gov.uk/accessni). [last accessed 12.05.2014]

this role, the DBS has to be aware of any previous names and/or gender of job applicants. However, the DBS has created a separate application procedure (the Confidential Checking Process), which allows transgender applicants to exclude previous names from the disclosure application form. Applicants are still required to send details of their previous identity in a separate letter directly to the Sensitive Casework Manager within the DBS. The DBS then checks the data sources held against both current and previous names. This procedure avoids the need for disclosure of former name or gender history to the employer at the application stage, whilst allowing the DBS to carry out the requisite checks against any previously held identities.

## 10.2.2 'Gender Reassignment: A Guide for Employers'

The Department of Trade and Industry funded this workplace good practice guide for employers, reflecting the changes introduced by the *Gender Recognition Act 2004* and making clear the responsibilities for employers and their staff.<sup>300</sup> Since the introduction of the Equality Act 2010, new guidance has been made available to employers from the Government Equalities Office which outlines the responsibilities of employers under the new streamlined legislation with regards to non-discrimination on the basis of the protected characteristics, including gender reassignment.<sup>301</sup> There is also guidance for voluntary sector organisations and their duty in the equal provision of goods and services.<sup>302</sup> There is no evidence to suggest how broadly the guide has been used. However, it is listed as a resource by the Equality and Diversity Forum,<sup>303</sup> by the Equality and Human Rights Commission<sup>304</sup>, Hackney Council,<sup>305</sup> Birmingham City Council,<sup>306</sup> and West London Equalities Toolkit.<sup>307</sup>

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<sup>300</sup> [UK] Department of Trade and Industry (2005) *Gender Reassignment: a Guide for Employers*, available at: [www.lgbthistorymonth.org.uk/documents/Gender%20Reassignment%20-%20Employers%20Guide%202005.pdf](http://www.lgbthistorymonth.org.uk/documents/Gender%20Reassignment%20-%20Employers%20Guide%202005.pdf). [last accessed 12.05.2014]

<sup>301</sup> [UK] Government Equalities Office (2010)\_ The Equality Act 2010 – guidance for employers, available at: <http://www.acas.org.uk/media/pdf/8/a/Equality-Act-2010-guide-for-employers.pdf>. [last accessed 12.05.2014]

<sup>302</sup> [UK] Government Equalities Office (2010)\_ Voluntary and community sector: quick start guide to gender reassignment for service providers, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85024/vcs-gender-reassignment.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85024/vcs-gender-reassignment.pdf). [last accessed 12.05.2014]

<sup>303</sup> [UK] Equality Diversity Forum (2014) available at: [www.edf.org.uk/blog/?p=11210](http://www.edf.org.uk/blog/?p=11210)

<sup>304</sup> [UK] Equality Human Rights Commission (2014) Transgender Additional Resources, available at: [www.equalityhumanrights.com/your-rights/equal-rights/transgender/transgender-additional-resources](http://www.equalityhumanrights.com/your-rights/equal-rights/transgender/transgender-additional-resources).

<sup>305</sup> [UK] Hackney Council (2014) Gender reassignment, available at: [http://www.hackney.gov.uk/equal-gender-reassignment.htm#U6g\\_4\\_ldWSp](http://www.hackney.gov.uk/equal-gender-reassignment.htm#U6g_4_ldWSp).

<sup>306</sup> [UK] Birmingham City Council, available at: [www.birmingham.gov.uk/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-](http://www.birmingham.gov.uk/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-)

[Disposition&blobkey=id&blobtable=MungoBlobs&blobwhere=1223536344814&ssbinary=true&blobheadername1=attachment%3B+filename%3D549578Gender\\_Reassignment\\_Fact\\_Sheet\\_-\\_160713FINAL.pdf](http://www.birmingham.gov.uk/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobkey=id&blobtable=MungoBlobs&blobwhere=1223536344814&ssbinary=true&blobheadername1=attachment%3B+filename%3D549578Gender_Reassignment_Fact_Sheet_-_160713FINAL.pdf).

<sup>307</sup> [UK] West London Network (2013) Equalities Toolkit, available at: [www.westlondonnetwork.org.uk/wp-content/uploads/West-London-Equalities-Toolkit-May-2013.pdf](http://www.westlondonnetwork.org.uk/wp-content/uploads/West-London-Equalities-Toolkit-May-2013.pdf).

## 10.3 Education on sexual orientation

### Changes to the National Curriculum

In 2008, issues relating to discrimination, homosexuality and civil partnership were included in the government's initiatives to improve the National Curriculum. The changes would make it compulsory for all schools to teach 14 to 16 year olds about same sex relationships. The plans saw opposition, in particular from religious schools<sup>308</sup>, however they reflect the fact that studies show Britain is becoming more tolerant towards homosexuality<sup>309</sup>. The change of government after the 2010 General Election led to these plans not being implemented. However, similar changes were further considered in the consultation phase of the *Children and Families Bill 2013*, where amendments were tabled which would have made same-sex relationships, sexual violence, domestic violence and sexual consent a part of the curriculum on Personal Social and Health Education (PHSE).<sup>310</sup> These amendments were rejected by the House of Lords in January 2014.<sup>311</sup>

## 10.4 Government Policies

Building on their first ever cross-governmental work plan on Lesbian, Gay, Bisexual and Transgender Equality,<sup>312</sup> the Government Equalities Offices published two action plans regarding LGBT rights. Recognising the particular concerns that need to be addressed in the protection of transgender people, the Equalities Office opted to prepare a general plan regarding LGBT<sup>313</sup> and a separate plan fully dedicated to transgender issues.<sup>314</sup> Both plans are built around four main action courses:

- Early years, education and social mobility;

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<sup>308</sup> [UK] The Guardian (2008) Sex education made compulsory in all schools, available at: [www.theguardian.com/education/2008/oct/23/sexeducation-primaryschools1](http://www.theguardian.com/education/2008/oct/23/sexeducation-primaryschools1) [UK] Daily Mail (2009) Lessons about gays will be compulsory from age 11, available at: [www.dailymail.co.uk/news/article-1173919/Lessons-gays-compulsory-age-11.html](http://www.dailymail.co.uk/news/article-1173919/Lessons-gays-compulsory-age-11.html). [last accessed 12.05.2014]

<sup>309</sup> [UK] British Social Attitudes (2013) How and why Britain's attitudes and values are changing, available at: [www.bsa-30.natcen.ac.uk/read-the-report/personal-relationships/homosexuality.aspx](http://www.bsa-30.natcen.ac.uk/read-the-report/personal-relationships/homosexuality.aspx). [last accessed 12.05.2014]

<sup>310</sup> [UK] Parliament (2013) House of Commons Notices of Amendments given on Wednesday 5 June 2013, available at: [www.publications.parliament.uk/pa/bills/cbill/2013-2014/0005/amend/psc0050506a.pdf](http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0005/amend/psc0050506a.pdf). [last accessed 12.05.2014]

<sup>311</sup> [UK] Parliament (2014) Children and Families Bill Report: 4th sitting: House of Lords 28 January, 2014, columns 1116-1140, available at: [www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140128-0002.htm#14012881000655](http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140128-0002.htm#14012881000655). [last accessed 12.05.2014]

<sup>312</sup> [UK] Government Equalities Office (2010) Working for Lesbian, Gay, Bisexual and Transgender Equality, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85483/lgbt-work-plan.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85483/lgbt-work-plan.pdf). [last accessed 12.05.2014]

<sup>313</sup> [UK] Government Equalities Office (2011) Working for Lesbian, Gay, Bisexual and Transgender Equality: Moving Forward, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85482/lgbt-action-plan.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85482/lgbt-action-plan.pdf) [last accessed 12.05.2014]

<sup>314</sup> [UK] Government Equalities Office (2011) Advancing transgender equality: a plan for action, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85498/transgender-action-plan.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85498/transgender-action-plan.pdf) [last accessed 12.05.2014]

- A fair and flexible labour market;
- Opening up public services and empowering individuals and communities;
- Changing culture and attitudes.

The implementation of the two action plans has already started with a number of relevant initiatives. The *Legal Aid, Sentencing and Punishment of Offenders Act 2012*<sup>315</sup> amends Section 146 and Schedule 21 the *Criminal Justice Act 2003*, providing for the aggravation of offences motivated by hostility based on transgender identity and a starting point of 30 years imprisonment for murders with the same motivation. These provisions came into force in 3 December 2012.

In November 2013, during Anti-bullying week,<sup>316</sup> the Women and Equalities Minister announced a new program to help eradicate homophobic bullying from schools throughout the UK.<sup>317</sup> The project will start with a full review of the available evidence and the practices already being carried out in the schools, with a view to developing more effective tools and guidance plans to implement in the future.

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<sup>315</sup> [UK] Parliament (2012) *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, s 65, available at: [www.legislation.gov.uk/ukpga/2012/10](http://www.legislation.gov.uk/ukpga/2012/10).

<sup>316</sup>: [UK] Anti-bullying Alliance, *Anti-bullying Week 2013*, available at: [www.anti-bullyingalliance.org.uk/aba-week.aspx](http://www.anti-bullyingalliance.org.uk/aba-week.aspx). [last accessed 12.05.2014]

<sup>317</sup> [UK] Government Equalities Office (2013) *Tackling Homophobic Bullying in Schools*, available at: [www.gov.uk/government/news/tackling-homophobic-bullying-in-schools](http://www.gov.uk/government/news/tackling-homophobic-bullying-in-schools). [last accessed 12.05.2014]

## 11 Annex 1 – Case law

### 11.1 Chapter 2, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC

#### 11.1.1 Chapter 2, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 1

Case title	<i>English v Thomas Sanderson Blinds Ltd [2008] EWCA Civ 1421</i>
Decision date	19 December 2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal, Civil Division
Key facts of the case (max. 500 chars)	In the course of employment by the defendant, the claimant alleged that he was subjected to sexual innuendos suggesting he was homosexual by colleagues. These innuendos were based on the fact the claimant had attended boarding school and lived in Brighton. However, he was a heterosexual happily married man. The claimant's case was that his colleagues' conduct drove him to leave his job. He brought a claim for harassment under Reg. 5 of the Employment Equality (Sexual Orientation) Regulations 2003. The claim had been dismissed by the Employment Tribunal and the Employment Appeal Tribunal.
Main reasoning/argumentation (max. 500 chars)	The claimant argued that someone who is subjected to "homophobic banter" is harassed within the meaning of Reg. 5 even when a) he is not gay, b) he is not perceived or assumed to be gay by his fellow workers, and c) he accepts that they did not believe him to be gay.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court of Appeal held that for conduct to be "on grounds of sexual orientation" it is irrelevant whether the claimant is actually of a particular sexual orientation. The intention of the legislature cannot have been that such a claimant must declare their true sexual orientation, which is not a matter of 'either/or', in order to establish harassment "on grounds of sexual orientation." There is no precedent requiring courts to enquire whether the maker of offensive homophobic statements actually thought that the victim was homosexual.



Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The insult to the claimant's dignity, caused by the behaviour of his colleagues, consequently made an intolerable working environment and was sufficient to bring his case within Reg. 5. Therefore, the appeal was upheld. This ruling was confirmed by the Employment Appeal Tribunal in February 2011, it is correct to consider the claimant's own perceptions and feelings in order to decide whether the alleged unwanted conduct had the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him within the meaning of the Employment Equality (Sexual Orientation) Regulations 2003 reg.5 [Thomas Sanderson Blinds Ltd v English Employment Appeal Tribunal, 21 February 2011, [2011] Eq. L.R. 688].
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### 11.1.2 Chapter 2, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 2

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

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

### 11.1.3 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 3

Case title	<i>R (on the application of Amicus - MSF section and others) v. Secretary of State for Trade and Industry</i> [2004] EWHC 860 (Admin); [2004] ELR 311; [2004] IRLR 430; [2004] Pens. LR 261; [2007] ICR 1176
Decision date	26 April 2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	Queen's Bench Division (Administrative Court)

Key facts of the case (max. 500 chars)	The claimants, trade unions covering a wide range of occupational sectors, sought the annulment of certain of the exceptions to the prohibition of discrimination on grounds of sexual orientation in the fields of employment and vocational training in the <i>Employment Equality (Sexual Orientation) Regulations 2003</i> . The Regulations were made for the purpose of implementing Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation so far as it related to discrimination on grounds of sexual orientation, which Directive contained a derogation in Art. 4 for the purposes of occupational requirements. The claimants challenged the validity of the exceptions in regulations 7(2) and (3) and 20(3) on the grounds that they were incompatible with Directive 2000/78/EC and with Arts 8 and 14 of the ECHR.
Main reasoning/argumentation (max. 500 chars)	The Administrative Court considered whether the above exceptions in the <i>Employment Equality (Sexual Orientation) Regulations 2003</i> were compatible with the above Directive 2000/78/EC and whether they were compatible with the ECHR.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<ol style="list-style-type: none"> <li>1) The <i>Employment Equality (Sexual Orientation) Regulations 2003</i> should be purposively construed so as to conform so far as possible with Directive 2000/78;</li> <li>2) The exception in regulation 7(2) in respect of discrimination where sexual orientation was a genuine and determining occupational requirement was intended to implement Art 4(1) of Directive 2000/78;</li> <li>3) The further specific exception in regulation 7(3) where the employment was for the purposes of an organised religion also formed part of the implementation of Art 4(1) of Directive 2000/78; it was clear from parliamentary material that the exception was intended to be very narrow, and, as a derogation from the principle of equal treatment, it had to be construed strictly;</li> </ol>
	<ol style="list-style-type: none"> <li>4) The exception in regulation 20(3) with respect to discrimination in training referred to training directed specifically and solely for employment to which an occupational requirement could lawfully be applied under regulation 7; it referred to vocational training rather than to training of a more general nature;</li> <li>5) The Regulations did not interfere with rights under Art 8(1) of the ECHR since they added to existing rights and they also did not produce any difference of treatment in the enjoyment of rights falling within the ambit of the Convention which might give rise to a breach of Art 14.</li> </ol>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Application dismissed.

#### 11.1.4 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 4

Case title	<i>Lacey v University of Ulster and Davidson</i> Case Ref: 970/05
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Decision date	27 October 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Industrial tribunal (Decision on Pre-hearing Review)
Key facts of the case (max. 500 chars)	The appellant, a homosexual, unsuccessfully applied for an academic post with the respondent, the University of Ulster. He lodged proceedings at an industrial tribunal, claiming discrimination on grounds of sexual orientation contrary to the <i>Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003</i> . He sought assistance and advice from the Equality Commission for Northern Ireland and was asked to fill out a claim form. In this form, he suggested that his research interest in the history of homosexuality may have been the reason for discrimination, but did not state that he believed that he had been rejected because of his own sexual orientation. The Respondent denied discrimination, relying on the wording of the appellant's claim form.
main reasoning/argumentation (max. 500 chars)	What is the correct interpretation of the coverage of the <i>Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003</i> ? Does the alleged act of discrimination have to be as a result of one's own sexual orientation?
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The tribunal concluded that the 2003 Regulations do not require the alleged act of discrimination to have been as a result of one's own sexual orientation; they also cover situations where the alleged less favourable treatment is on the grounds of another person's sexual orientation.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The tribunal directed that the matter proceed to a full hearing on the merits, which took place on 16 January 2008. <sup>318</sup>

### 11.1.5 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 5

Case title	<i>Smith v Gardner Merchant Ltd</i> [1998] 3 All ER 852; [1999] ICR 134; [1998] IRLR 510; (1998) 95 (32) LSG 29; (1998) 142 SJLB 244
Decision date	14 July 1998

<sup>318</sup> [UK] Equality Commission for Northern Ireland (2007) *Dr Brian Lacey v University of Ulster & Paul Davidson – Summary*, available at: [www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2007/Dr-Brian\\_Lacey\\_v\\_University\\_of\\_Ulster.pdf?ext=.pdf](http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2007/Dr-Brian_Lacey_v_University_of_Ulster.pdf?ext=.pdf). [last accessed 12.05.2014]

Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)
Key facts of the case (max. 500 chars)	The applicant, a homosexual, was employed as a barman. After complaints about his conduct by a fellow employee, T, he was suspended from work and was subsequently dismissed on the grounds of threatening and aggressive behaviour, which was considered by his employer to constitute gross misconduct. T alleged that the applicant had been abusive and threatening towards her, that he had flirted with male customers, and that he had insisted on talking in detail about his love life. The applicant denied the allegations and claimed that T disliked him because he was homosexual and that she had constantly made offensive remarks about his homosexuality. Following his dismissal, the applicant complained that he had been subjected to unlawful sex discrimination contrary to section 1(1)(a) and section 6(2)(b) of the <i>Sex Discrimination Act 1975</i> (SDA) in that (a) T's allegations would not have been made against a homosexual woman and (b) in conducting the disciplinary process and in making the decision to dismiss the applicant rather than T, the employers had treated the applicant less favourably than they had treated her. Both the industrial tribunal and the Employment Appeal Tribunal concluded that the applicant's claim of discrimination on the ground of homosexuality was discrimination on the ground of sexual orientation rather than on the ground of sex and therefore did not fall within the 1975 Act. Therefore the applicant's claim was dismissed.
Main reasoning/argumentation (max. 500 chars)	The Court of Appeal considered whether discrimination against the appellant on the ground of his homosexuality might not also be discrimination against him on the ground of his sex.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<ol style="list-style-type: none"> <li>1) Although discrimination on grounds of sexual orientation did not itself fall within the SDA, under section 1(1)(a) of the Act discrimination against a male homosexual based on his homosexuality could also be discrimination against him as a man;</li> <li>2) In determining whether that was the case, the industrial tribunal had to decide what was the treatment the man had received, whether he was treated less favourably than the woman with whom he fell to be compared and whether he would have been so treated but for his sex;</li> <li>3) The appropriate comparator was dependent on 'the relevant circumstances': the appropriate comparator with regard to the applicant's first complaint, about the treatment he received from the female complainant, was a homosexual woman; the appropriate comparator with regard to the applicant's complaint about the employer's handling of the disciplinary proceedings was the female complainant herself.</li> </ol>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal was allowed and the case was remitted to the industrial tribunal for determination of the facts.

### 11.1.6 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 6

Case title	<i>Pearce v Governing Body of Mayfield School</i> [2003] UKHL 34; [2004] 1 All ER 339; [2003] ICR 937; [2003] IRLR 512
Decision date	19 June 2003
Reference details (type and title of court/body; in original language and English [official translation, if available])	House of Lords
Key facts of the case (max. 500 chars)	The appellant was subjected to a sustained campaign of verbal abuse and harassment from pupils at the school where she was a teacher because she was a lesbian. She eventually applied for ill health retirement. She claimed before a tribunal that that treatment comprised 'direct' sex discrimination, as defined in section 1(1)(a) of the <i>Sex Discrimination Act 1975</i> (SDA), namely that a person discriminates against a woman if 'on the ground of her sex he treats her less favourably than he treats or would treat a man'. She contended that, on the ground of sex, her employers treated her less favourably than they would have treated a man. She also contended that she had been subjected to harassment of a gender specific character, in having been subjected by pupils at her school to insults of a sexually explicit character.
Main reasoning/argumentation (max. 500 chars)	The House of Lords considered the scope of the wording 'on the ground of her sex' in section (1)(1)(a) of the SDA, and discussed the appropriate comparator for making the 'less favourable treatment' comparison. The applicant contended that the SDA envisaged a simple comparison of how the claimant was treated and how a person of the opposite sex would have been treated. Had the claimant in the appeal been a man, he would not have been dismissed; she was dismissed because she was sexually attracted to women; a man in her position, sexually attracted to women, would not have been dismissed; therefore she was less favourably treated than a man in her position would have been, and she received that treatment because she was a woman. The opposing arguments focused on the need for a 'like with like' comparison, as underlined by section 5(3) of the SDA.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	(1) Section 1(1)(a) of the SDA was not to be interpreted expansively so as to include cases of discrimination solely on the ground of sexual orientation. In the context of s 1 'sex' meant gender and did not include sexual orientation. The way the claimant was treated by some of her pupils at the school was because of her sexual orientation, not her sex. In her case the appropriate comparator was a homosexual man. The school would not have treated a male homosexual teacher who had been subjected to homophobic abuse by his pupils any differently from the way it had treated the claimant.  (2) The fact that harassment was gender specific in form could not be regarded as of itself establishing conclusively that the reason for harassment was gender based on the ground of her sex. The words 'less favourable treatment' in section 1(1)(a) rendered the need for comparison inevitable.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	It was held that the applicant had not been discriminated against on the ground of her sex under the SDA and her appeal was dismissed.
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### 11.1.7 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 7

Case title	Core Issues Trust v. Transport for London [2013] EWHC 651 (Admin)
Decision date	22 March 2013
Reference details (type and title of court/body; in original language and English [official translation, if available])	High Court of Justice, Queen’s Bench Division
Key facts of the case (max. 500 chars)	Core Issues Trust (the Trust) sought judicial review of the decision made by Transport for London (TfL), on 12 <sup>th</sup> April 2012, not to allow an advertisement that Anglican Mainstream placed on behalf of the Trust to appear on the outside of its buses. The advertisement read “NOT GAY! EX-GAY, POST-GAY AND PROUD. GET OVER IT!” and was intended as a response to a previous advertisement by Stonewall (an NGO pro LGB rights on the outside of TfL buses reading “SOME PEOPLE ARE GAY. GET OVER IT!”). The Trust is a Christian Charity that describes its aim as “supporting men and women with homosexual issues who voluntarily seek change in sexual preference and expression”.
Main reasoning/argumentation (max. 500 chars)	The Trust argued that TfL’s decision was (1) an abuse of power, because it was really based on the Mayor’s disagreement with the views expressed in the advertisement, and his fear that it would be a liability in his re-election; (2) a result of an unfair decision-making process, since TfL applied its advertisement policy inconsistently and never gave the Trust an opportunity to review the content of the advertisement; (3) in breach of the Trust’s freedom of expression, as protected by the ECHR and the Human Rights Act 1998.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Under section 149 of the Equality Act 2010, TfL was under a duty to eliminate discrimination and harassment based on sexual orientation and to “foster good relations”. “tackle prejudice” and “promote understanding” between those who have same-sex orientation and those who do not. The High Court concluded that displaying the advertisement would have been in breach of that duty, as it encouraged discrimination, and did not foster good relations or tackle prejudice or promote understanding, between those with same-sex sexual orientation and those who do not. The Court also stated that these factors outweighed the unfairness of the decision-making process.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Claim for judicial review dismissed.
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### 11.1.8 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 8

Case title	Catholic Care v The Charity Commission for England and Wales [2012] UKUT 395 (TCC)
Decision date	26 April 2011
Reference details (type and title of court/body; in original language and English [official translation, if available])	Upper Tribunal
Key facts of the case (max. 500 chars)	Catholic Care, a private adoption agency in the Diocese of Leeds, sought to legitimise its policy of excluding same sex couples from its adoption services by seeking permission from the Charity Commission to amend its objects of association. Upon refusal, the charity appealed to the First Tier Tribunal, who dismissed the appeal, and afterwards to the Upper Tribunal.
Main reasoning/argumentation (max. 500 chars)	Catholic Care argued they were within the statutory exception contained in Section 193 of the Equality Act 2010, which states that a person does not contravene the Act by restricting the provision of benefits to persons who share a protected characteristic (sexual orientation being one) if their actions are in pursuance of a charitable instrument, and their provision of benefits fulfils the requirements of justification and proportionality. The charity argued that its policy pursued a legitimate aim: increasing the number of children placed with adoptive families. In support of the argument, the charity maintained that unless it were permitted to discriminate as proposed, it would no longer be able to raise the voluntary income from its supporters on which it relied to run the adoption service, and it would therefore have to close its adoption service permanently on financial grounds.



Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<ol style="list-style-type: none"> <li>1) The simple fact that some people may feel upset if homosexuals are accorded equal treatment in some area of life cannot, of itself, provide objective justification for discrimination on grounds of sexual orientation – there must exist a real detriment of sufficient weight to the general public interest (applying <i>Smith and Grady v UK</i>);</li> <li>2) To exclude from assessment persons whose qualities and aptitude as parents are beyond question simply based on their sexual orientation is not reasonable or justified. However, the benefits to children and the likelihood that such benefits might be achieved are relevant factors in assessing the proportionality of the discriminatory policy;</li> <li>3) The availability of adoption services to same sex couples from other sources may be relevant to the question of objective justification, since it has impact on the detriment caused to those persons by the discriminatory policy, but it does not remove the emotional harm that would be caused to them or the harm to the general social value of the promotion of equality of treatment for people of different sexual orientation.</li> </ol>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Appeal dismissed. To restrict the access to adoption services on the basis of the prospective parents' sexual orientation is discriminatory, Catholic Care did not fulfill the criteria for the statutory exception contained in Section 193 of the Equality Act 2010.

### 11.1.9 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 9

Case title	Walker v Innospec Ltd [2013] Pens. L.R. 21
Decision date	13 November 2012
Reference details (type and title of court/body; in original language and English [official translation, if available])	Employment Tribunal
Key facts of the case (max. 500 chars)	The claimant complained that his occupational pension provision from his former employer was discriminatory on the ground of sexual orientation. He had worked for his former employer between 1980 and 2003, retiring on an occupational pension of £85,000 per annum. In 2006 he and his partner entered into a civil partnership. The pension scheme administrator confirmed that, for the purposes of eligibility for the spouse's pension, civil partners would only be treated as married couples from December 5, 2005, that being the date on which the Civil Partnership Act 2004 came into force. That decision meant that if the claimant died, his partner would be entitled to 50 per cent of the guaranteed minimum pension of around £500 per annum, whereas if the claimant was married to a woman the same age as his partner, she would be entitled to a pension of around £41,000 per annum.

Main reasoning/argumentation (max. 500 chars)	The issue was the interpretation of Sch.9 Pt 3 para.18(1)(b) of the Equality Act 2010. The effect of that provision was that the general requirement under the Act to provide the same benefits to civil partners as to married couples was disapplied in respect of pension rights prior to December 5, 2005. The tribunal was required to determine whether the provision contravened Directive 2000/78 and, if so, whether it should re-interpret it so as to reach a compatible interpretation, or whether the provision should be disapplied.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Tribunal concluded that the ostensible effect of the Equality Act 2010 Sch.9 Pt 3 para.18(1)(b), namely that the general requirement to provide the same benefits to civil partners as to married couples was not applicable in respect of pension rights acquired before the coming into force of the Civil Partnership Act 2004, was discriminatory. The provision had, instead, to be read in a manner which was compatible with Directive 2000/78.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The rules of the pension scheme constituted direct discrimination.  NB The decision from the Employment Tribunal was overturned in January 2014 by the Employment Appeal Tribunal, which considered that the Employment Tribunal's reasoning was flawed, since the relevant provision in the <i>Equality Act 2010</i> only had prospective effects and the Directive did not cover the protection afforded by it previous to its coming into force. <sup>319</sup>

### 11.1.10 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 10

Case title	Lisboa v Realpubs Ltd [2011] Eq. L.R. 267; (2011) 155(2) S.J.L.B. 30
Decision date	11 January 2011
Reference details (type and title of court/body; in original language and English [official translation, if available])	Employment Appeal Tribunal

<sup>319</sup> [UK] Employment Appeal Tribunal (2014) *Innospec Ltd & Ors v Walker*, available at: [www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKEAT/2014/0232\\_13\\_1802.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKEAT/2014/0232_13_1802.html). [last accessed 12.05.2014]

Key facts of the case (max. 500 chars)	The appellant had been employed at a public house owned by the first respondent and run by the third respondent. The pub had developed a reputation as London's first gay pub. The first respondent intended to turn it into a "gastropub", offering food and drink to wider sections of the community. As part of that strategy, the appellant was directed to display a board outside the pub which stated "this is not a gay pub", and instructed to seat families and mixed-sex groups in prominent positions, so that they could be seen from outside the pub. The second respondent dismissed several male employees and replaced them with women in order to create a more even gender balance amongst staff. He also made homophobic remarks about customers who were gay. The appellant resigned and brought a claim under the Employment Equality (Sexual Orientation) Regulations 2003 which implements Directive 2000/78/EC. The tribunal rejected his claim and found that the first respondent had been pursuing a legitimate business strategy.
Main reasoning/argumentation (max. 500 chars)	The Employment Appeal Tribunal considered that the Employment Tribunal had failed to consider the critical question of whether the respondents had gone too far in embracing a policy of taking negative steps to make their venue less welcoming to gay customers, and whether gay customers might reasonably take the view that as a result of the measures adopted they were disadvantaged compared with other customers.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Based on the factual evidence including the respondents' use of homophobic language, the sign that they had wished to display, the change of staff and the showcasing of families, the Appeal Tribunal considered it was plain that gay customers were treated less favourably on the grounds of their sexual orientation. Consequently, the applicant was treated less favourably on the grounds of sexual orientation.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Tribunal's decision was reversed.

### 11.1.11 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 11

Case title	Grant v HM Land Registry & Anor [2011] EWCA Civ 769
Decision date	01 July 2011
Reference details (type and title of court/body; in original language and English [official translation, if available])	England and Wales Court of Appeal

Key facts of the case (max. 500 chars)	The appellant worked for the respondent in its office at Lytham and revealed to his colleagues there that he was gay. Several years later he was promoted to a position in the respondent's office at Coventry. His line manager, who knew of the appellant's sexual orientation, told another colleague at Coventry that he was gay. The appellant complained to an Employment Tribunal that during his employment with the respondent he had been subjected to direct discrimination on the ground of sexual orientation and to harassment through the actions of his line manager. The tribunal concluded that the incidents resulted in detriment to the appellant. The Employment Appeal Tribunal reversed the Tribunal's decision, considering that it had been made without analysing the line manager's claim to have known that the appellant was gay because he had openly revealed that fact while working in Lytham, and without expressing any clear view whether it thought that the line manager's actions sought to undermine the appellant at work because of his sexuality or whether the comments were made without any such intent. The appellant then contested the EAT's decision.
Main reasoning/argumentation (max. 500 chars)	The appellant contended there had been a disclosure of private information without consent, because he did not want the line manager to reveal his sexual orientation to his work colleagues, and that necessarily involved a breach of art.8 of the ECHR. He considered that this had to be sufficient to constitute a detriment for the purposes of direct discrimination, and was enough to constitute an adverse environment of a kind protected by the harassment provision.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court of Appeal stated that the fact that the law had to be interpreted consistently with Convention rights did not mean that discrimination law could be used as a means to enforce rights of privacy. It was not suggested that the appellant had revealed his sexual orientation in circumstances where those informed were required to keep it a secret and there was no evidence of ill-intent. Therefore, the mere innocent disclosure of that information could not lead to liability for either direct discrimination or harassment.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Appeal dismissed.

### 11.1.12 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 12

Case title	Smith v Ideal Shopping Direct Ltd [2013] Eq. L.R. 943
Decision date	16 May 2013
Reference details (type and title of court/body; in original language and English [official translation, if available])	Employment Appeal Tribunal

Key facts of the case (max. 500 chars)	The appellant appealed against an employment tribunal's decision concerning his harassment claim against the respondent. The appellant is a gay man. He had an altercation with another employee, after which disciplinary proceedings were instigated against him. He sought an adjournment of the disciplinary hearing, stating that he would be raising a grievance about homophobic bullying and harassment by other members of staff. He was dismissed shortly afterwards, four days before the disciplinary hearing was due to take place and his grievance was dismissed. The tribunal found that even though his dismissal amounted to victimisation, he would have still been dismissed at the end of the disciplinary process, and that the comments made by staff about his sexual orientation (e.g., calling him "Big Gay Wayne" and "Val's Bitch") were not homophobic, since the appellant used the some of the same terms when referring to himself.
Main reasoning/argumentation (max. 500 chars)	The Employment Appeal Tribunal considered whether the tribunal had properly applied the definition of harassment in the Employment Equality (Sexual Orientation) Regulations 2003 which implements Directive 2000/78/EC, since it had focused on the purpose of the unwanted conduct and failed to have regard to its effect.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The definition of harassment in reg.5(1) of the Employment Equality (Sexual Orientation) Regulations 2003 refers to unwanted conduct which has the "purpose or effect" of violating a person's dignity. The EAT concluded that the Tribunal had erred in law for not considering the effect of the unwanted conduct. Additionally, the EAT stated that the appellant's openness about his sexual orientation did not mean that it was unlikely or impossible for any remark about his sexual orientation to constitute harassment. The abusive character of the references to sexual orientation or any other protected characteristic had to be taken into account.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Appeal allowed. Case remitted to fresh tribunal for redetermination of harassment and loss flowing from the appellant's dismissal.

### 11.1.13 Chapter 2, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 13

Case title	Bivonas LLP & Ors v Bennett [2011] UKEAT 0254_11_3101
Decision date	31 January 2012
Reference details (type and title of court/body; in original language and English [official translation, if available])	Employment Appeal Tribunal

<p>Key facts of the case (max. 500 chars)</p>	<p>Appeal from the Judgment and Reasons of an Employment Tribunal (ET). The Claimant was a Barrister at the Appellants Law Firm. In the course of his work, he came upon a note written by a colleague (the Third Appellant) that implied that the Claimant, as a gay man, had passed work to someone else (“his batty boy mate”) strictly because they were gay. The Claimant complained and a grievance investigation was conducted by the Second Appellant, who dismissed it, considering that the Third Appellant could not have intended to be offensive towards the Claimant. The ET decided that the Claimant had suffered unlawful discrimination on grounds of sexual orientation contrary to Regulation 6(2)(g) of the Employment Equality (Sexual Orientation) Regulations 2003, both in respect of the note written by the Third Appellant and the conduct of the grievance investigation carried out by the Second Appellant.</p>
<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The wording of the note was, in the ET’s unanimous view, inherently insulting to the Claimant as a gay man in two respects: (i) in the use of the possessive ‘his batty boy mate’, the Claimant’s own sexual orientation being implicit in the use of the possessive, as was his inclusion within the umbrella of the offensive term itself; (ii) reading the entire passage, what was being said was that the Claimant, as a gay man, was passing work to somebody else because they were gay and not for other meritorious reasons. The ET considered this to be offensive and insulting on its face and to plainly constitute a detriment to the Claimant. The note was found, in its terms, to be insulting to gay men, and to the Claimant in particular in this context and there was no evidence before the Tribunal that other members of the staff were insulted in respect of their personal attributes or characteristics in a similar way.</p> <p>The Second Appellant’s investigation of the Claimant’s homophobic grievance was seriously defective, as (i) there was no evidence before the Tribunal of the investigation process; (ii) no notes were kept, even though the Second Respondent told the Tribunal that he had conducted several interviews with various staff members, face to face and by telephone; (iii) the conclusions drawn that the Third Appellant did not hold homophobic views were unjustified given the plain wording of the note; (iv) the 24 hour time frame for the decision was inadequate and there was a lack of any evidence of a properly conducted and evidenced investigatory process.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>Concept of ‘detriment’ under the 2003 Regulations. The Appellants claimed the ET had erred in law in deciding that an insult constitutes a detriment. The EAT concluded that the ET had correctly applied the ruling in <i>Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337</i>, which established that a “detriment” exists if a reasonable worker would or might take the view that the treatment accorded to him or her had, in all the circumstances, been to his or her detriment and that it was not necessary to demonstrate some physical or economic consequence. The EAT further added that the facts on the present case were plain enough to cast any doubt that it would be reasonable for a worker to take this treatment to be in his detriment and, therefore, there was no need to construct a hypothetical reasonable worker and consider how he might have reacted.</p> <p>Reversal of the burden of proof under Regulation 29(2) of the 2003 Regulations. Under Reg 29(2) it is necessary for a Claimant to establish facts from which the Tribunal could conclude that he was treated less favourably on the grounds of sexual orientation. The EAT concluded that the ET had ample factual material to decide to reverse the burden of proof. The onus was, therefore, on the Appellants to show, on a balance of probabilities, that there was no discrimination on the grounds of sexual orientation.</p>

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Employment Tribunal correctly applied the law relating to detriment in a case of sexual orientation discrimination. Appeal dismissed.
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## 11.2 Chapter 3, Freedom of movement, case law relevant to Directive 2004/38/EC<sup>320</sup>

No relevant case law available.

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

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

Case title	<i>Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another, Ex parte Shah</i> [1999] 2 WLR 1015; [1999] 2 AC 629
Decision date	25 March 1999
Reference details (type and title of court/body; in original language and English [official translation, if available])	House of Lords
Key facts of the case (max. 500 chars)	Islam and Shah were Pakistani citizens who had been forced out of their marital homes by their husbands after being falsely accused of adultery. Both women had formerly been subjected to domestic abuse and following the allegations were subjected to the violence and social disapprobation of the community. Both women came to the UK independently on visitors visas and subsequently claimed asylum. The women feared that if returned to Pakistan they would be persecuted through physical and mental abuse, would be ostracised in their communities, would be unprotected by state authorities and might be liable to death by stoning in accordance with Sharia law.

<sup>320</sup> [UK] A comprehensive keyword-based search of the main legal databases, conducted on 05.02.2014 and 08.05.2014, did not yield any case law that would be relevant in this context.

Main reasoning/argumentation (max. 500 chars)	Did the appellants, as women, qualify as members of a 'particular social group' in the sense of the <i>Refugee Convention 1951</i> so that they were entitled to asylum if subject to a well-founded fear of persecution?
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	A 'particular social group' within the meaning of Art 1A(2) of the <i>Refugee Convention</i> had to exist independently of the persecution to which its members were subject, but that cohesiveness as a group was not an essential requirement. In the present case, because women in Pakistan were discriminated against as a group in matters of fundamental human rights, and the state gave them no protection because they were not being perceived as entitled to the same human rights as men, women in Pakistan were a 'particular social group' under the <i>Refugee Convention</i> .
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Lord Steyn, having referred to homosexuals in his judgement, reasoned by extension that homosexuals could constitute members of a particular social group, subject to discrimination because of their sexuality, following the reasoning in <i>AG of Canada v Ward</i> whereby sexuality is perceived as an innate and unchangeable characteristic that ought not to be required to change.

### 11.3.2 Chapter 4, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 2

Case title	<i>Amare v Secretary of State for the Home Department</i> [2005] EWCA Civ 1600
Decision date	20 December 2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)
Key facts of the case (max. 500 chars)	The appellant, an Ethiopian national and a lesbian claimed asylum, inter alia, because of her homosexuality. She had had a homosexual relationship with another woman in the UK in part of the period during which her application for asylum was under consideration. Homosexuality is illegal in Ethiopia with penalties of imprisonment ranging from ten days to three years according to Art 600 of the Ethiopian Penal Code. The appellant had had a partner in Ethiopia, but this relationship ended because of fear of discovery. She feared that if returned she would be persecuted because of her sexuality and be forced into a heterosexual marriage.



Main reasoning/argumentation (max. 500 chars)	The appellant argued that there had been an error of law by the adjudicator because he had acted on the basis that the appellant had no well-founded fear of persecution so as to qualify for asylum under the <i>Refugee Convention</i> because the applicant had earlier managed to have a homosexual relationship in Ethiopia in secret without detection and had given no indication that her homosexual identity required her to adopt an overt style of homosexual behaviour in the future. She argued that her removal from the UK would be a breach of the right to privacy in Art 8 ECHR.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The key issue under the <i>Refugee Convention</i> was whether the adjudicator had applied the law correctly. The issue under the ECHR was whether the removal of the appellant would be a disproportionate restriction on her right to privacy.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	It was held that the adjudicator had not erred in law. As to the <i>Refugee Convention</i> , the test that he applied was the correct one. The existence of a discriminatory legislative provision in an applicants home country will not by itself normally amount to persecution unless it has consequences of sufficient severity for that individual. More recently the case of <i>OO (Sudan) JM (Uganda) v Secretary of State for the Home Department</i> [2009] EWCA Civ 1432 Has affirmed that Amare and RG are still good law. The court maintains that the presence of prosecutor legislation does not necessarily amount to persecution, the level of persecution must be sufficiently severe.

### 11.3.3 Chapter 4, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83EC, case 3

Case title	<i>RG (Colombia) v Secretary of State for the Home Department</i> [2006] EWCA Civ 57; 2006 WL 63658
Decision date	20 January 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)

Key facts of the case (max. 500 chars)	The appellant, RG, a gay, HIV positive Colombian, appealed against the rejection of his asylum claim. Before an adjudicator, RG claimed that he feared persecution in Colombia by death squads on account of his sexual orientation and HIV status. Moreover, RG claimed that since his mannerisms had become more overt since living in the UK he would be more likely to be identified as homosexual and face an increased risk of persecution. The adjudicator found that, in Colombia, RG had never experienced any violence or hatred on account of his homosexuality because he had kept it secret. In these circumstances, the adjudicator held that RG had not left Colombia as a result of any persecution connected to his homosexuality. Instead, he was found to have left Colombia in order to receive free antiretroviral treatment in the UK. The adjudicator found that RG's concerns regarding his mannerisms were excessive and concluded that he faced no real risk of persecution as he would modify his behaviour so as not to draw attention to himself.
Main reasoning/argumentation (max. 500 chars)	The Court of Appeal's first and most significant reason was that the alleged persecution was not sufficiently serious or life threatening, since RG had not suffered actual physical violence throughout the 13 years that he had lived as a closeted gay man in Colombia. Secondly, the court considered the real reason for RG's asylum claim was his desire to access free health care in order to treat his HIV infection. His allegations of persecution on the grounds of sexuality were viewed as a sham. The Court determined (1) whether RG was indeed being required to modify his behaviour and (2) whether that modification would place RG in a situation of persecution. The Court found that RG failed to satisfy the first part of the test as the adjudicator had not found, and RG was not specific in his evidence, that the threat from death squads was the reason why the pattern of behaviour forced on him whilst living in Colombia was different from that which he would otherwise have adopted. With regard to the second question, the adjudicator had been entitled to find that RG would not behave, on return, significantly differently from his behaviour during the time when he lived in Colombia. Moreover, the Court's view that RG had travelled to the UK in order to get free medical treatment strongly militated against a conclusion that he had been in a situation of persecution in Colombia or would be if he was returned
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The case confirmed the high level of distress that must be reached before a denial of freedom can be said to qualify as persecutory. The requirement that RG be returned and continue living discreetly was deemed not to be a persecutory burden. Behaviour regulation is valid so long as it is not excessively burdensome. Changes of behaviour upon residence in the UK would be masked upon return with no detrimental effect. RG's real purpose for claiming asylum was to access free health care to manage his HIV status. As to health care, reference was made to the cases of <i>N v SSHD</i> [2005] UKHL 31 and <i>SN v SSHD</i> [2005] EWCA Civ 168. A high level of distress must be reached before a finding of persecution can be made. The breaching of Convention rights cannot in itself amount to persecution.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal was dismissed.

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

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

**11.3.5 Chapter 4, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 5**

Case title	<i>J v Secretary of State for the Home Department</i> [2006] EWCA Civ 1238
Decision date	26 July 2006

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

### 11.3.6 Chapter 4, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 6

Case title	<i>OO (Sudan) and JM (Uganda) v Secretary of State for the Home Department</i> [2009] EWCA Civ 1493
Decision date	18 November 2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal, Civil Division

Key facts of the case (max. 500 chars)	Both claimants were homosexual and claimed asylum in the UK based on persecution suffered in their home states. In both states of origin homosexuality or homosexual acts were criminal by legislation but the legislation was not properly enforced. In this situation, the claimants had, at times, concealed their true sexuality until coming to the UK.
Main reasoning/argumentation (max. 500 chars)	The question arose as to whether the mere existence of legislation discriminating against homosexuals amounted to persecution under the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006, which seek to implement European Council Directive 2004/83/EC.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Despite such laws being discriminatory, it is difficult to see how unenforced legislation amounts to persecution so severe that an individual is in need of international protection. An exception to this may be when an individual has had to modify their behaviour so much that it becomes persecution despite the legislation being unenforced. The Regulations and the Directive do not widen the scope of the concept of persecution under international law, although it is up to individual states whether to view the scope more generously than this or not.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeals were dismissed as the claimants had not had to modify their behaviour in their home states so severely that it amounted to persecution. The interference caused by the change in behaviour was not severe enough to violate the claimants' right to private life under Art. 8 ECHR.

### 11.3.7 Chapter 4, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 7

Case title	<i>HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31</i>
Decision date	7 July 2010
Reference details (type and title of court/body; in original language and English [official translation, if available])	Supreme Court
Key facts of the case (max. 500 chars)	Both claimants were homosexuals claiming asylum in the UK. They argued that in their countries of origin they could not be openly homosexual and that on return from the UK they would be persecuted. The appeals were heard together as both cases raised the same issue. The claimants asked for clarity on what test should be applied when considering whether a homosexual is entitled to claim refugee status on the basis of persecution suffered due to their sexual orientation.

Main reasoning/argumentation (max. 500 chars)	<p>The claimants asked whether it is an answer to a claim for refugee status that the applicant be required to, or otherwise would conceal, his sexual identity in order to avoid harm which would amount to persecution on return to the country of origin.</p> <p>The Secretary of State accepted that homosexuals are a particular social group under Art. 1A of the 1951 Refugee Convention. In reply to the claimants the Secretary of State submitted that the question is always whether the applicant can reasonably be expected to tolerate the need for discretion on return.</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The Supreme Court rejected the Court of Appeal's test. It held that if a gay person would have to conceal aspects of their sexuality and live discretely if returned because of a real fear of persecution they should be granted asylum. Lord Hope stated: 'The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does...he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those who whom he knows may disapprove of.'</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The Supreme Court, allowed the appeals and remitted both cases for reconsideration under the new test.</p>

11.4 **Chapter 4, Asylum and subsidiary protection, case law relevant to art 2/h of Council Directive 2004/83/EC<sup>321</sup>**

No relevant case law available.

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<sup>321</sup> [UK] A comprehensive keyword-based search of the main legal databases, conducted on 05.02.2014 and 08.05.2014, did not yield any case law that would be relevant in this context.

11.5 **Chapter 5, Family reunification, case law relevant to art 4/3 of the Council Directive 2003/86/EC** <sup>322</sup>

No relevant case law available.

11.6 **Chapter 6, Freedom of assembly**<sup>323</sup>

No relevant case law available

## 11.7 Chapter 7, Criminal Law

### 11.7.1 Chapter 7, Hate crimes, case 1

Case title	<i>R v Pickford and Walker</i> <sup>324</sup>
Decision date	16 June 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Central Criminal Court London

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<sup>322</sup> [UK] A comprehensive keyword-based search of the main legal databases, conducted on 05.02.2014 and 08.05.2014, did not yield any case law that would be relevant in this context.

<sup>323</sup> [UK] None of the consulted government agencies (CEHR, NI Equality Commission, UK Government Equalities Office) and civil society organisations (Stonewall, Equality Network) had knowledge of pertinent case law. Moreover, a comprehensive keyword-based search of the main legal databases, conducted on 05.02.2014 and 08.05.2014, did not yield any case law that would be relevant in this context.

<sup>324</sup> [UK] The Guardian (2006) Two face 30 years in jail for homophobic murder, 13 May 2006, available at: [www.theguardian.com/uk/2006/may/13/ukcrime.gayrights](http://www.theguardian.com/uk/2006/may/13/ukcrime.gayrights), [UK] Crown Prosecution Service (2006) CPS determined to tackle homophobic crime, CPS Press Release, 16 June 2006, available at: [www.cps.gov.uk/news/latest\\_news/134\\_06/](http://www.cps.gov.uk/news/latest_news/134_06/) [last accessed 12.05.2014]

Key facts of the case (max. 500 chars)	Mr Dobrowski, a 24 year old gay bar manager, was brutally attacked by the defendants. Mr Dobrowski's head, neck and body were punched, kicked and stamped on. Witnesses saw and heard the sustained assault, and one who tried to intervene was warned off by the defendants. Mr. Dobrowski was punched and kicked so viciously that he died ten hours later in hospital — his face so battered that it was unrecognisable, even to his family. He had to be identified by fingerprints. The defendants were charged with murder aggravated by sexual orientation.
Main reasoning/argumentation (max. 500 chars)	The Prosecutor said the defendants were involved in a ‘premeditated plan to attack a gay man’ and ‘shared an intent to kill’, from the nature of the assault and the evidence of an eyewitness. The defendants were heard by witnesses screaming anti-gay insults as they beat the barman to death.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The question was whether this was a murder aggravated by sexual orientation, referring to section 146 of the <i>Criminal Justice Act 2003</i> .
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The defendants were sentenced to life imprisonment with a minimum tariff of 28 years for the murder Mr Dobrowski. This was the most prominent case since the Criminal Justice Act 2003 came into effect in 2005, requiring courts to treat ‘hostility based on sexual orientation’ as an aggravating factor. It is believed to be the first instance that a judge has been able to use motivation on the basis of sexual orientation as an aggravating feature when sentencing for murder

### 11.7.2 Chapter 7, Hate Speech, Case 2

Case title	<i>R v Ihjaz Ali, Razwan Javed and Kabir Ahmed</i> <sup>325</sup>
Decision date	January 2012
Reference details (type and title of court/body; in original language and English [official translation, if available])	Derby Crown Court
Key facts of the case (max. 500 chars)	Three Muslim men distributed leaflets outside a mosque and into mailboxes that, under the heading ‘Death penalty?’, portrayed an image of a wooden mannequin hanging from a noose and stated that the death sentence was the only way to end homosexuality in society.

<sup>325</sup> [UK] Derby Crown Court (2012) Sentencing Remarks of HHJ Burgess: Ihjaz Ali, Razwan Javed and Kabir Ahmed, available at: [www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf). [last accessed 12.05.2014]



Main reasoning/argumentation (max. 500 chars)	The defendants argued that they did not intend to threaten anyone, but were simply expressing what their religion taught them about homosexuality.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The offence will not be committed by mere adverse criticism of homosexuality. The defendants can only be convicted on the basis that the leaflet they were distributing was threatening and that by distributing it they intended to stir up hatred against homosexuals.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Conviction of the offence of incitement to hatred. Sentences of imprisonment.

## 11.8 Chapter 8, Applicability of legislation on trans gender issues,

### 11.8.1 Chapter 8, Applicability of legislation on trans gender issues, case 1

Case title	<i>J v C (Void Marriage: Status of Children)</i> [2006] EWCA Civ 551; [2006] 2 FLR 1098
Decision date	15 May 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Court of Appeal (Civil Division)

<p>Key facts of the case (max. 500 chars)</p>	<p>The applicant, Mr. J, had been born female, but lived as a male. In 1977 he purported to marry the respondent, Mrs C, without informing her that he was a transsexual. The couple lived together as husband and wife for many years, with the respondent remaining in ignorance of the fact that the applicant was a woman. Two children were conceived by means of artificial insemination by donor. The applicant did not disclose to anyone involved in the process the true reason for the failure to conceive. Only after the breakdown of the marriage, during the process of obtaining a divorce, did the respondent discover the applicant's birth certificate and realise that the applicant was a woman. Mrs C. was granted a decree of nullity on the ground that the parties were not respectively male and female, and the marriage was declared void.</p> <p>In 2000 the applicant, pursuant to section 8 of the <i>Children Act 1989</i>, sought a prohibited steps order to ensure that the children were not informed of their parentage and the reasons for the breakdown of the relationship with the mother, in particular the gender issue, until such time as a named expert advised it was appropriate to do so, and a specific issue order that the mother seek the advice of the named expert.</p>
<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Court of Appeal held that under section 27 of the <i>Family Law Reform Act 1987</i> (FLRA), which was the applicable law in this case, in order to be a parent of a child born through artificial insemination by a donor, the mother's partner had to be 'the other party' to a marriage with the mother. Since marriage in English law is exclusively the union of a man and a woman 'the other party to the marriage' must be a man in order for there to be a marriage. If that other party is not a man, there is no marriage. At the relevant time, the applicant was a woman, and, as such, could not be a party to a marriage with another woman. Therefore, he could not be the parent of the child.</p> <p>The Court acknowledged that the appellant had duly obtained a <i>Gender Recognition Certificate</i> under the <i>Gender Recognition Act 2004</i> (GRA), which makes him a man for all relevant purposes as from the date stated in his Certificate. However, this does not change the fact that he was not a woman on the day he entered into the ceremony of marriage with the respondent. The recognition of the appellant's male gender under the GRA does not have retrospective effect.</p> <p>As a consequence, the appellant's claim that a lack of recognition of his acquired gender through failure to accord him the status of parent under the FLRA would violate his right to respect for private life under Art. 8 of the ECHR was not accepted. The Court determined that 'to give effect to the undoubted fact that he did not have the male gender at the relevant time cannot possibly involve a lack of respect for his male gender as subsequently acquired.'</p> <p>Moreover, the appellant's submission that to deny the status of parent infringes his right to respect for family life under Art. 8, was dismissed because in the Court's view there was no family life as the appellant had not seen the child for many years and had never been married to the respondent.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Court of Appeal agreed with the ruling in <i>Corbett v Corbett</i> [1971] where it was held that a matrimonial relationship between parties to a marriage who were of the same sex was 'a legal impossibility at all times and in all circumstances', and therefore to be declared void.</p> <p>A <i>Gender Recognition Certificate</i> granted under the GRA enables a fresh birth certificate to be obtained and thus indicates that the person's sex at birth was their more recently acquired gender. However, gender recognition does not operate retrospectively.</p>

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Appeal dismissed.
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## 11.8.2 Chapter 8, Applicability of legislation on trans gender issues, case 2

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

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

### 11.8.3 Chapter 8, Applicability of legislation on transgender issues, case 3

Case title	<i>Corbett v Corbett</i> [1970] 2 WLR 1306; [1971] P 83
Decision date	2 February 1970
Reference details (type and title of court/body; in original language and English [official translation, if available])	Probate, Divorce & Admiralty Division of the High Court
Key facts of the case (max. 500 chars)	In September 1963, C, a male, and A went through a ceremony of marriage. C knew that A had been registered at birth as a male and had, in 1960, undergone a sex-change operation and had since then lived as a woman. In December 1963 C petitioned for a declaration that the marriage was null and void because A, at the time of the ceremony, was a person of the male sex.
Main reasoning/argumentation (max. 500 chars)	The case concerned the gender of a male to female transsexual in the context of the validity of a marriage. It was discussed whether A should be legally seen as male or female.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	It was held that marriage was essentially a relationship between man and woman and that to determine a person's sex for the purpose of marriage the law should adopt the chromosomal, gonadal and genital tests, and if all three were congruent, determine the sex accordingly. Any operative intervention should be ignored. The biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Applying the <i>Corbett</i> test, A was held not to be a woman for the purposes of marriage but was from birth and had remained at all times a biological male. Therefore the marriage was declared void. The <i>Corbett v Corbett</i> decision set a legal precedent regarding the status of transsexuals in the UK. The <i>Corbett</i> test was used to define the sex of transsexual people for many purposes until the introduction of the <i>Gender Recognition Act 2004</i> which ultimately defined the sex of transsexual people as whatever is stated on their birth certificate, until such point as a <i>Gender Recognition Certificate</i> corrects the birth certificate.

#### 11.8.4 Chapter 8, Applicability of legislation on transgender issues, case 4

Case title	Green, R (on the application of) v Secretary of State for Justice [2013] EWHC 3491 (Admin)
Decision date	4 December 2013
Reference details (type and title of court/body; in original language and English [official translation, if available])	High Court of Justice, Queen's Bench Division
Key facts of the case (max. 500 chars)	The claimant was serving a sentence of life imprisonment for the murder of his wife. The claimant had manifested the intention to commence gender reassignment and identified himself as female. His application to a gender recognition certificate was withdrawn, because he hadn't been living in the female gender for at least two years.
Main reasoning/argumentation (max. 500 chars)	The complainant argued that she was being unlawfully discriminated by the denial of access to items and services that were essential to her presentation in the female gender (such as wigs, intimate prosthetic devices, hair removal products, etc). The denial was based on security reasons.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Interpretation of Sections 7 and 13(1) of the Equality Act 2010 (direct discrimination on grounds of gender reassignment). The claimant argued that the comparator in the assessment of whether the claimant received less favourable treatment should be a female prisoner. The Court stated that the comparator had to be a male prisoner who is not undergoing gender reassignment, arguing that he is in a male prison and, until there is a gender recognition certificate, he remains male. The Court further stressed that male to female transsexuals are not entitled to the same treatment as women until they become women. Transsexual prisoners are treated differently (and wish to be so) and as such have a number of advantages in terms of clothing and lifestyle not available to the remainder of the male prison population absent privileges – therefore, not only was the claimant not treated less favourably, she was entitled to advantages not available to male prisoners.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Claim for judicial review dismissed.

### 11.8.5 Chapter 8, Name change and/or sex change of transgender people, relevant case law, case 1

Case title	<i>R (on the application of AB) v Secretary of State for Justice</i> [2009] EWHC 2220
Decision date	4 September 2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	High Court, Queen’s Bench Division
Key facts of the case (max. 500 chars)	The claimant was a pre-operative transgender woman who sought judicial review against the Secretary of State for Justice and the Governor of HMP Manchester to challenge the decision to keep her in a male prison and not transfer her to a female prison. The claimant had been diagnosed with gender dysphoria and had obtained a gender recognition certificate recognising her as female. She wanted to undergo gender reassignment surgery which would not be approved by the Gender Identity Clinic treating her until she spent a period living “in role” as a woman within a female prison.
Main reasoning/argumentation (max. 500 chars)	The decision of the Secretary of State and HMP Manchester not to move the claimant was based on the cost of moving her into segregation at a female prison and the precedent the move would set for others with gender dysphoria. The claimant argued that the decision to keep her in a male prison was contrary to s. 9 of the Gender Recognition Act as she was not being treated as female “for all purposes”, that this violated her Art. 8 ECHR rights and that the decision was unlawful on Wednesbury grounds.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	S.9 does not require the law to presume the claimant has physical characteristics other than she possesses and the Secretary of State is to have regard to them only when they affect its responsibility for prisons. The Secretary of State failed to provide evidence that the decision was in accordance with the law and proportionate under Art 8 ECHR. The Secretary of State did not consider the implications, in terms of risk to the claimant, caused by denying her the opportunity to qualify for surgery and the likelihood of segregation in a male prison. The decision was Wednesbury unreasonable.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The High Court quashed the decision to keep the claimant in a male prison and declared that her continued detention in a male prison was in breach of Art. 8 ECHR as the claimant's autonomy was significantly and personally interfered with.

### 11.8.6 Chapter 8, Name change and/or sex change of trans gender people, relevant case law, case 2

Case title	<i>X v Brighton and Hove City Council</i> <sup>326</sup>
Decision date	June 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Brighton Employment Tribunal

<sup>326</sup> [UK] This case has not been reported. Information can be found on the website of the Equality and Human Rights Commission: [www.equalityhumanrights.com/advice-and-guidance/your-rights/transgender/transgender-case-decisions/](http://www.equalityhumanrights.com/advice-and-guidance/your-rights/transgender/transgender-case-decisions/). [last accessed 12.05.2014]



Key facts of the case (max. 500 chars)	<p>A teacher who had undergone a process of gender reassignment registered with a teacher requirement agency in order to seek work and sought a reference from her previous manager at the Council. The manager initially delayed responding to the request for a reference. When he did respond, he faxed a secret side memo that disclosed her former name, stated her previous gender, although the appellant had requested that this should not be disclosed. He also referred to her as both 'he or she', 'him' and 'her'. In the side memo the manager also revealed that the appellant had previously initiated proceedings alleging discrimination and offered to have further telephone conversations with agency staff. It was only after the teacher had contacted the agency directly some months later, because the agency had refused to provide her with any work, that she discovered the existence of the secret fax. The defendant had failed to reveal its existence when originally asked.</p> <p>In 2005, in the absence of having received any employment, the teacher approached her previous manager for a reference again but was refused.</p> <p>The employment tribunal confirmed the claimant's claim of discrimination on grounds of transsexualism.</p>
	<p>Although the defendant applied for a review of the employment tribunal's findings of discrimination and victimisation, and then lodged an Appeal, both were unsuccessful.</p>
Main reasoning/argumentation (max. 500 chars)	<p>The tribunal found that the manager's treatment of her request amounted to discrimination and victimisation of the teacher, for which the defendant and her previous manager were liable.</p> <p>The tribunal also found that both the defendant and the manager had further discriminated against and victimised the teacher by refusing the second reference request and by refusing to hear her grievance over the refusal. The defendant also failed to adopt existing Criminal Records Bureau procedures for transgender people, and ignored guidance by the Equal Opportunities Commission on the employment of transgender people.</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The key issue was whether the defendant's treatment of the teacher was discrimination on grounds of transsexualism.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The employment tribunal ordered the defendant to pay compensation of £34,765.18 to the claimant. The compensation order followed the decision of the tribunal in November 2006 that the defendant, and one of its senior managers, had discriminated against and victimised the former teacher on grounds of gender reassignment. The tribunal also made a recommendation that the defendant provide any prospective employer or employment agency with a non-discriminatory reference.</p>

### 11.8.7 Chapter 8, Name change and/or sex change of trans gender people, relevant case law, case 3

Case title	<i>A v Chief Constable of West Yorkshire</i> [2004] UKHL 21; [2005] 1 AC 51; [2004] 2 WLR 1209; [2004] 3 All ER 145
Decision date	6 May 2004

Reference details (type and title of court/body; in original language and English [official translation, if available])	House of Lords
Key facts of the case (max. 500 chars)	A was a post operative male to female transsexual. Her application to join the police force as a woman was rejected by the Chief Constable in March 1998 on the ground that she could not perform the full searching duties required
	of a constable pursuant to the <i>Police and Criminal Evidence Act 1984</i> (PCEA) section 54(9) which provides that a search of persons who have been arrested or are in custody has to be carried out by a constable of the same sex as the person searched. The Chief Constable maintained that it was a genuine occupational qualification, within the meaning of section 7 of the <i>Sex Discrimination Act 1975</i> (SDA), for a constable to be capable of searching men and women, and that A could search neither given that under domestic law she was a man, but was otherwise, for all intents and purposes, a woman. A relied on the prohibition on any discrimination on grounds of sex in the Equal Treatment Directive 76/207 Art.2(1) . By the time the case reached the Court of Appeal, the European Court of Human Rights had decided in <i>Goodwin v UK</i> that the refusal of English law to recognise a person's gender reassignment was in breach of that person's rights under Arts 8 and 12 of the ECHR. The Court of Appeal, therefore, allowed A's appeal on the basis that the Convention jurisprudence was read into domestic law and that the Chief Constable was obliged to treat the complainant as a female and that it was not open to him to discriminate against her on the basis that she was a transsexual and that no possibility of invoking section 7 of the SDA 1975 could arise. The Chief Constable appealed.
Main reasoning/argumentation (max. 500 chars)	Was the rejection of A's application unlawful discrimination on the ground of sex? Is being a man, as opposed to a woman, or vice versa, a genuine occupational qualification for the job of police officer in terms of section 7(2)(b) of the SDA ? Does the wording 'same sex' in section 54(9) of the PCEA and the references to 'woman' and 'man' in the SDA refer to a transsexual person in his or her reassigned gender?
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	It was agreed that the appeal had to turn on the rights of a transsexual under the Directive at the date when C refused to offer A employment, rather than on domestic law or the impact of the <i>Goodwin</i> decision. To give effect to the clear thrust of EC law, section 54(9) of the PCEA and section 7 of the SDA had to be interpreted as referring to the acquired gender of a post operative transsexual who was visually and for all practical purposes indistinguishable from non transsexual members of that gender.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	House of Lords, dismissing the Chief Constable's appeal, held that to refuse A's application was contrary to the SDA.

### 11.8.8 Chapter 8, Name change and/or sex change of trans gender people, relevant case law, case 4

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

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

### 11.8.9 Chapter 8, Name change and/or sex change of trans gender people, relevant case law, case 5

<p>Case title</p>	<p><i>Chessington World of Adventures Ltd v Reed</i> [1998] ICR 97; [1997] IRLR 556</p>
<p>Decision date</p>	<p>27 June 1997</p>

Reference details (type and title of court/body; in original language and English [official translation, if available])	Employment Appeal Tribunal
Key facts of the case (max. 500 chars)	In 1987, R, a biological male, was employed by CW as a rides technician. In July 1991, R announced her change of gender identity from male to female, following which she suffered prolonged and serious harassment by a minority of her male colleagues. R went on sick leave in March 1994 and was dismissed on grounds of incapability in July 1994. No real investigation was carried out into R's difficulties and no significant steps were taken to protect her or prevent the continuation of the harassment, in spite of complaints made by R. No disciplinary action was taken against those responsible for the harassment. On her complaint to an industrial tribunal that she had been unlawfully discriminated against on the ground of her sex, contrary to sections 1(1)(a) and 6(2)(b) of the <i>Sex Discrimination Act 1975</i> (SDA), the tribunal found that the employers had known that a concerted course of harassment had taken place but had failed to act on that knowledge and that that constituted a continuous detriment amounting to direct discrimination, for which the employers were directly liable to the applicant.
Main reasoning/argumentation (max. 500 chars)	The principal question considered was whether the SDA applies in a case where the complainant relies upon less favourable treatment following notice of intention to undergo gender reassignment.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Interpreting the SDA consistently with the ruling of the ECJ in <i>P v S and Cornwall County Council</i> [1996] IRLR 347, it was held that the scope of the Act also extended to discrimination arising from gender reassignment and that there was no requirement for a male/female comparison where the reason for the less favourable treatment was the applicant's intention to undergo gender reassignment.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The tribunal applied the decision of the European Court of Justice in <i>P v S and Cornwall County Council</i> that discrimination arising from gender reassignment constituted discrimination on grounds of sex under Art 5(1) of Council Directive (EEC) 76/207 (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working

## 11.9 Chapter 11, Case law relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation

No relevant case law available.

## 12 Annex 2 – Statistics

### 12.1 Chapter 2, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Total complaints of discrimination on the ground of sexual orientation	n.a.	n.a.	n.a.	122	734	812	980	1188	1234	730	662	638	24	n.a.
A) Employment	n.a. <sup>327</sup>	n.a.	n.a.	61	367	406	490	594	617	729	662	638	24	n.a.
• England, Wales and Scotland <sup>328</sup>	n.a.	n.a.	n.a.	61	349	395	470	582.	600	710	640	610	n.a.	n.a.
• Northern Ireland <sup>329</sup>	n.a.	n.a.	n.a.	n.a.	18	11	20	12	17	19	22	28	24	n.a.
B) Goods and Services <sup>330</sup>	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	0	0	1	n.a.	n.a.	n.a.	n.a.
Total finding of Discrimination confirmed	n.a.	n.a.	n.a.	n.a.	0	14	21	29	13	27	22	20	n.a.	n.a.
• Employment Tribunal (for England, Wales and Scotland)	n.a.	n.a.	n.a.	n.a.	0	14	21	29.	13	27	22	20	n.a.	n.a.
• Industrial Tribunal (for Northern Ireland)	n.a.	n.a.	n.a.	n.a.	0	0	0	0	0	0 <sup>331</sup>	0	0	0	n.a.

<sup>327</sup>[UK] N.a. = not available.

<sup>328</sup> [UK] The Employment Equality (Sexual Orientation) Regulations 2003 came into force in December 2003. The statistical information is collected according to the employment tribunal's financial year, which starts in April and finishes in March of the following year. The latest statistics for the period from April 2012 to March 2013 are not yet available. See Employment Tribunals Service, Annual Reports for 2009-10, 2010-11 and 2011-12,, available at: [www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb](http://www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb). [last accessed 12.05.2014]

<sup>329</sup> [UK] The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 came into force in December 2003. The statistical information is collected according to the industrial tribunal's financial year, which starts in April and finishes in March of the following year. See the Northern Irish Office of the Industrial Tribunals and Fair Employment Tribunals Annual Reports for 2007-08, 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13, available at: [www.employmenttribunalsni.co.uk/index/publications\\_statistics/publications.htm](http://www.employmenttribunalsni.co.uk/index/publications_statistics/publications.htm). [last accessed 12.05.2014]

<sup>330</sup> [UK] The Equality Act (Sexual Orientation) Regulations 2007 prohibiting discrimination on grounds of sexual orientation in goods and services came into force in April 2007. After a comprehensive search of online legal databases only one case in 2009 was found which regarded provision of services under the 2007 Regulations. The case was *Islington LBC v Ladele* [2009] EWCA Civ 1357, which involved the refusal of a registrar to perform civil partnership ceremonies on religious grounds.

<sup>331</sup> [UK] In an email dated 04.02.2010 the Northern Irish Office of the Industrial Tribunals and Fair Employment Tribunal confirmed that in the period between 01.04.2009 and 31.01.2010 no complaints of discrimination on the grounds of sexual orientation had been allowed.

National Number of sanctions/compensation payments issued (by Courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.) <sup>332</sup>	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	15	12	10	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.) <sup>333</sup>	n.a.	n.a.	n.a.	n.a.	0.	0	0	0.	0	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

12.2 **Chapter 3, Freedom of movement of LGBT partners<sup>334</sup>**

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC (i.e., LGBT partners having exercised their freedom of movement as granted to family members of EU citizens, whether under Directive 2004/38/EC or under previous instruments)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of LGBT partners who claimed their right to residence but were denied this right	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

<sup>332</sup> [UK] The tribunals do not hold information on the number and range of sanctions in their database. Such information can only be gathered on a case by case basis from the public register. Email communication with the Office of the Employment Tribunals (UK) and the Office of the Industrial Tribunals & the Fair Employment Tribunal in Northern Ireland, 29.01.2008. The Employment Tribunal Service's Annual Reports now contemplate information on the number of compensation payments issued regarding complaints of discrimination in employment (in Great Britain). See the latest reports for the periods 2009-10, 2010-11 and 2011-12, available at: [www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb](http://www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb). [last accessed 12.05.2014]

<sup>333</sup> [UK] As there have been no findings of discrimination by Northern Irish industrial tribunals, as noted above, it follows that no awards of compensation have been made.

<sup>334</sup> [UK] According to communication with the Home Office on 24.01.2008, the statistical information requested by the FRA does not exist, mainly because family members are not required to indicate whether they live in a same-sex or different-sex relationship or whether they are married or have contracted a registered partnership. Follow up by telephone and email communication with the Home Office (last contact on 17.01.2014) unsuccessful.

### 12.3 Chapter 4, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation<sup>335</sup>

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of LGBT individuals benefiting from asylum/subsidiary protection due to persecution on the ground of sexual orientation.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

### 12.4 Chapter 5, Asylum and subsidiary protection, protection of LGBT partners<sup>336</sup>

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of LGBT partners of persons enjoying refugee/subsidiary protection status residing in your country falling under Art 2/h Directive 2004/83/EC	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of LGBT partners of persons enjoying refugee/subsidiary protection status who were denied the possibility to stay with their partner	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

### 12.5 Chapter 5, LGBT partners benefiting family reunification<sup>337</sup>

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013

<sup>335</sup> [UK] The Home Office does not collect data on the sexual orientation of applicants for asylum or human rights protection. (Email-communication with the Home Office, 08.02.2008). Follow up by telephone and email communication with the Home Office (last contact on 17.01.2014) unsuccessful.

<sup>336</sup> [UK] The Home Office does not collect data on the sexual orientation of applicants for asylum or human rights protection. (Email-communication with the Home Office, 08.02.2008). Follow up by telephone and email communication with the Home Office (last contact on 17.01.2014) unsuccessful.

<sup>337</sup> [UK] Information on numbers of LGBT partners benefiting from family reunification is not available. (Communication by phone and email with the Home Office, 24.01.2008 and 08.02.2008). Follow up by telephone and email communication with the Home Office (last contact on 17.01.2014) unsuccessful.



Number of LGBT partners of third country nationals residing in your country benefiting from family reunification.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

## 12.6 Chapter 6, LGBT people enjoyment of freedom of assembly

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc. <sup>338</sup>	13	14	17	19	21	26	26	27	8	27	.18	22	37	63
Number of demonstrations against tolerance of LGBT people.	0	0	0	0	0	1	1	1	1	2	n.a.	n.a.	n.a.	n.a.

Note on table:

1. No information has been found on large demonstrations against tolerance of LGBT people. Each London Pride parade attracts a very small protest by a group called Christian Voice. This protest takes place as the parade passes, and is facilitated as lawful protest so long as the banners do not carry abusive or offensive messages. No incidences of demonstrations against tolerance of LGBT people were found to have been reported in 2008 and only one in 2009,<sup>339</sup>

## 12.7 Chapter 7, Criminal Law - Homophobic hate speech

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	1 <sup>340</sup>	n.a.

<sup>338</sup> [UK] Numbers for years 2000 – 2003 have been gathered through web-research on LGBT news sites. The figures from 2003 onwards are available at: <http://pinkuk.com/events/default.aspx?y=2013> (23.06.2014) (14.02.2008). Figures for the year 2008 and 2009 available at: [http://www.gaytoz.com/gay\\_pride\\_dates.asp](http://www.gaytoz.com/gay_pride_dates.asp) (04.02.2010). [last accessed 12.05.2014] Dates for 2010-2013 available from <http://pinkuk.com/events/default.aspx?y=2013>.]

<sup>339</sup> [UK] Telegraph (2009) Westboro Baptist Church announces first anti-homosexuality picket in Britain, 15 February 2009, available at: [www.telegraph.co.uk/news/religion/4640967/Westboro-Baptist-Church-announces-first-anti-homosexuality-picket-in-Britain.html](http://www.telegraph.co.uk/news/religion/4640967/Westboro-Baptist-Church-announces-first-anti-homosexuality-picket-in-Britain.html). [last accessed 12.05.2014]

<sup>340</sup> . [UK] Derby Crown Court (2012) Sentencing Remarks of HHJ Burgess: Ihjaz Ali, Razwan Javed and Kabir Ahmed, available at: [www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf). [last accessed 12.05.2014]

Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	1	n.a.
Range of sanctions issued for homophobic hate speech	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of non-criminal court cases initiated for homophobic statements	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Number of non-criminal court cases initiated for homophobic statements which were successfully completed (leading to a decision in favour of the plaintiff, even if no sanctions other than symbolic were imposed)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

Notes on above table:

1. On 8 May 2008 the Criminal Justice and Immigration Act 2008 was given the royal assent. Section 74, which makes it an offence to incite hatred on the grounds of sexual orientation, came into force on 23 March 2010.<sup>341</sup>
2. The CPS Hate Crime Reports do not break criminal offences down by specific offences but groups of offences. Inciting hatred on the grounds of sexual orientation will be classed as a public order offence. For the years 2007-08 and 2008-09, respectively 34% and 36% of homophobic crime prosecutions were for public order offences.<sup>342</sup>

## 12.8 Chapter 7, Criminal Law - Homophobic crimes

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of criminal court cases regarding homophobic crimes initiated	n.a.	n.a.	n.a.	n.a.	289	518	791	988	1025	1078	1671	1775	1691	25
• England and Wales <sup>343</sup>	n.a.	n.a.	n.a.	n.a.	289	518	791	988	1025	1078	1281	1208	1096	n.a.
• Scotland <sup>344</sup>	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	357	536	564	n.a.

<sup>341</sup> [UK] Parliament (2008) Criminal Justice and Immigration Act 2008 Section 74, available at: [www.legislation.gov.uk/ukpga/2008/4](http://www.legislation.gov.uk/ukpga/2008/4). [last accessed 12.05.2014]

<sup>342</sup> [UK] Crown Prosecution Service (2013) CPS Hate crime and crimes against older people report, available at: [www.cps.gov.uk/publications/equality/hate\\_crime/index.html](http://www.cps.gov.uk/publications/equality/hate_crime/index.html). [last accessed 12.05.2014]

<sup>343</sup> [UK] Crown Prosecution Service (2013) Hate crime and crimes against older people report 2011-2012, available at: [www.cps.gov.uk/publications/docs/cps\\_hate\\_crime\\_report\\_2013.pdf](http://www.cps.gov.uk/publications/docs/cps_hate_crime_report_2013.pdf). [last accessed 12.05.2014] The latest information for the years 2012-13 and 2013-14 is not yet available.

<sup>344</sup> [UK] Before 2010, Scottish courts did not keep statistical information on homophobic hate crime. For the latest information relating to the periods of 2010-11, 2011-12 and 2012-13, see the Crown Office and Procurator Fiscal Service's reports on hate crime in Scotland available at: [www.copfs.gov.uk/publications/equality-and-diversity](http://www.copfs.gov.uk/publications/equality-and-diversity).

• Northern Ireland <sup>345</sup>	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	33	31	31	25
Number of convictions regarding homophobic crimes	n.a.	n.a.	n.a.	n.a.	204	375	580	759	820	868	1034	951	885	n.a.	
• England and Wales	n.a.	n.a.	n.a.	n.a.	204	375	580	759	820	868	1034	951	885	n.a.	
• Scotland	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	
• Northern Ireland	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	

Notes on table:

1. The Crown Prosecution Service (CPS), which keeps data for England and Wales, collects statistical information on homophobic crime in general and does not disaggregate it according to the type of offence committed, e.g. hate speech. When prosecuting cases with a homophobic element, the CPS adopts the following definition for homophobic crime: ‘Any incident which is perceived to be homophobic or transphobic by the victim’. The same definition is now included in the CPS annual hate crime reports,<sup>346</sup>

## 12.9 Chapter 7, Criminal Law - Homophobic motivation of crimes as aggravating factor

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

Notes on table:

1. In England and Wales, section 146 of the Criminal Justice Act 2003, which extended existing hate-crime statutory aggravating factors to include sexual orientation, came into effect in April 2005. Until April 2007 the Crown Prosecution Service did not collect information on the use of aggravating factors in sentencing, but there is one publicly known murder case where ‘hostility based on

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[last accessed 12.05.2014] The information collected in these reports regards sexual orientation aggravated offences, which are defined as “charges that include an aggravation of prejudice relating to sexual orientation in terms of Section 2 of the Offences (Aggravated by Prejudice) (Scotland) Act 2009”.

<sup>345</sup> [UK] Email communication with the Public Prosecution Service for Northern Ireland on 28.01.2014. The information regards cases considered by a PPS Prosecutor to have been sexual orientation hate crimes which were ‘aggravated by hostility’. The PPS clarified that the category of sexual orientation is not necessarily specific to homophobic incidents, but may also include transphobic incidents.

<sup>346</sup> [UK] Email communication with the CPS, 24.01.2008, and with the Justice Department of the Scottish Government, 07.02.2008. [UK] Crown Prosecution Service (2013) Hate crime and crimes against older people report, available at: [www.cps.gov.uk/publications/equality/hate\\_crime/index.html](http://www.cps.gov.uk/publications/equality/hate_crime/index.html). [last accessed 12.05.2014]

sexual orientation' was used as an aggravating factor when sentencing for murder. This data is now collected but is not yet available to the public<sup>347</sup>

## 12.10 Chapter 8, Transgender issues

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of name changes effected due to change of gender	n.a.	n.a.	n.a.	n.a.	n.a.	1071	591	32	20	18	18	24	13	16
• England and Wales	n.a.	n.a.	n.a.	n.a.	n.a.	1013	527	n.a.	n.a.	n.a. <sup>348</sup>	n.a.	n.a.	n.a.	n.a.
• Scotland	n.a.	n.a.	n.a.	n.a.	n.a.	47	43	30	16	18	18	24	13	16
• Northern Ireland	n.a.	n.a.	n.a.	n.a.	n.a.	11	21	2	4	n.a. <sup>349</sup>	n.a.	n.a.	n.a.	n.a.
Number of persons who changed their gender/sex in your country under the applicable legislation	54	73	81	84	99	102	n.a.	n.a.	143	49	60	72	68	n.a.

### Notes on table:

1. Number of name changes effected due to change of gender -The data indicates the number of new birth certificates issued after gender recognition. The Gender Recognition Act 2004, which enables transsexual people to apply for a Gender Recognition Certificate, came into effect on 4 April 2005. Therefore statistics are only available from 2005 onwards. The data is collected according to the financial year, i.e. for the period from April of the first year to March of the following year. Information provided on enquiry by the General Register Office in England, Scotland and Northern Ireland.
2. Number of persons who changed their gender/sex in your country under the applicable legislation -The data indicates the number of new birth certificates issued after gender recognition. The Gender Recognition Act 2004, which enables transsexual people to apply for a Gender Recognition Certificate, came into effect on 4 April 2005. Therefore statistics are only available from 2005 onwards. The

<sup>347</sup> [UK] email from CPS on 05.02.2010, By email communication on 28.01.2014, the Public Prosecution Service for Northern Ireland informed that this information is not available. Follow up by telephone and email communication with the CPS (last contact on 17.01.2014) unsuccessful.

<sup>348</sup> [UK] By telephone conversation on 05.02.2010 the General Register Office in England stated that this information is now confidential. By telephone conversation on 16.01.2014 the General Register Office in England and the Office for National Statistics confirmed that this information remains confidential and/or is not collected by their services.

<sup>349</sup> [UK] The data for 2009 is not available yet (email from General Register Officer Northern Ireland on 05.02.2010). Follow up by telephone and email communication with the General Register Office for Northern Ireland (last contact on 24.01.2014) unsuccessful in obtaining new data.

data is collected according to the financial year, i.e. for the period from April of the first year to March of the following year. Information provided on enquiry by the General Register Office in England, Scotland and Northern Ireland.

### **12.11 Chapter 11, Statistics relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation**

No relevant statistical information available.

**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 use 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	✓	✓				✓	✓	?		
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	✓	✓	✓			✓		x		Rectification of the recorded sex The Marriage (Same Sex Couples) Act 2013 provides that divorce will no longer be necessary. The change will be in force in March 2014.
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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; x=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 <sup>350</sup>	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			✓	✓	

<sup>350</sup> 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 <sup>350</sup>	All areas of RED*		
DK	✓			✓	New equality body set up
EE	✓			✓	New anti-discrimination legislation adopted
EL	✓			✓	
ES			✓		
FI		✓			
FR	✓			✓	
HU			✓	✓	
IE		✓		✓	
IT	✓				
LT		✓		✓	
LU		✓		✓	
LV		✓		✓	
MT	✓				
NL		✓		✓	
PL	✓				
PT	✓				
RO			✓	✓	
SE			✓	✓	

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED <sup>350</sup>	All areas of RED*		
SI			✓	✓	
SK			✓	✓	
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 main provisions of the Act came into force on 1 October 2010.
<b>TOTAL</b>	<b>9</b>	<b>7</b>	<b>11</b>	<b>20</b>	

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'.
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.

Country Codes	Form of "sex" discrimination	Autonomous ground	Dubious/unclear	Comments
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
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 main provisions of the Act came into force on 1 October 2010.
<b>TOTAL</b>	<b>10</b>	<b>3</b>	<b>15</b>	

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	✓		
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.
LT	✓	✓	Homophobic motivation was included in the list of aggravating circumstances in June 2009.

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
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. The Criminal Justice Act 2003 was amended in 2012 and now extends the statutory aggravation of offences for hostility based on both sexual orientation and transgender identity.
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. Development since 2010.

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

Country Codes	Free movement <sup>351</sup>		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							The new Family Law Act (entry into force 01.07.2010) defines marriage as a different-sex institution only and considers marriage between persons of the same sex invalid. Family reunification possible when the partner can prove that he/she is economically or socially dependent.
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.
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.

<sup>351</sup> 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 <sup>351</sup>		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
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	✓	✓	✓	✓	✓	✓	
<b>TOTAL</b>	<b>8</b>	<b>15</b>	<b>8</b>	<b>13</b>	<b>8</b>	<b>12</b>	

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