

FRA

Flash Report: Update to the Legal Study on
Homophobia and Discrimination on Grounds of
Sexual Orientation
[United Kingdom]

David Harris
Therese Murphy
Jeffrey Kenner
Toni Johnson
Nottingham, United Kingdom
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Executive summary

Implementation of Employment Directive 2000/78/EC

- [1]. The United Kingdom (UK) has implemented Directive 2000/78 in the specific context of sexual orientation discrimination on time and, with certain exceptions, in compliance with its provisions. The Regulations applying to Great Britain and Northern Ireland outline in detail the personal and material scope of the law, the concepts of discrimination and harassment and exceptions to the principle of non-discrimination, as permitted by the Directive. The Regulations also include broadly compliant provisions on enforcement and remedies. The UK has extremely effective and well resourced statutory equalities commissions with responsibilities for monitoring equalities laws and supporting individuals wishing to bring complaints of unlawful discrimination. Although interest groups cannot bring actions as an alternative to individual complaints these groups are able to represent individuals before courts or tribunals and receive support from the equalities commissions.
- [2]. Moreover, in 2006 and 2007, the constituent parts of the UK introduced additional legislation extending protection beyond the scope of the Directive by prohibiting sexual orientation discrimination in, inter alia, goods, facilities and services. On 8 April 2010, the new Equality Act received Royal assent and its main provisions will come into force in October 2010. The Act harmonises discrimination law in England and Wales across all the protected characteristics including sexual orientation and further strengthens the law to support progress on equality.

Freedom of movement

- [3]. This section contains a summary of the present legal situation in the UK with regard to the rights of LGBT partners of EU citizens who wish to exercise their rights of free movement and residence under EU law. Particular attention is paid to the scope of the definition of a 'family member' and an 'extended family member' which closely follow the requirements of Directive 2004/38. The rights of LGBT partners and their children and other family members are also discussed in the context of the *Civil Partnership Act 2004* and the *Gender Recognition Act 2004*. The position of third-country national LGBT partners of EU citizens and their children and family members is outlined. The effect of the *Civil Partnership Act* is to create rights that are equivalent to marriage and, as such, it enables LGBT partners of UK nationals to benefit from the freedom of movement and residence of their partners in another Member State subject to the recognition of the host State as provided in Art. 2(2)(b) of Directive 2004/38.

Asylum and subsidiary protection

- [4]. This section outlines the current legislative framework in the UK and its impact on claims to refugee and subsidiary status on the ground of sexuality. Specific reference is made to the *Immigration Rules HC 395* as given statutory authority by the *Immigration Act 1971*, as well as the relationship between the *1951 Convention on the Status of Refugees*, the *Human Rights Act 1998*, the *European Convention on Human Rights* (ECHR) and European Directive 2004/83 and its transposition into UK law. Five key cases have been identified which highlight the position of LGBT asylum seekers in the current asylum system, drawing

on key themes that have come out of this rapidly expanding area of asylum law. The main issues that have been addressed in these cases are:

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

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

Family reunification

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

Freedom of assembly

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

Hate speech and criminal law

- [7]. In 2004, the law in Northern Ireland was amended so as to criminalise acts intended or likely to stir up hatred or arouse fear on grounds of sexual orientation. As regards England and Wales, the *Criminal Justice and Immigration Act 2008* amends provisions on incitement to religious hatred in the *Public Order Act 1986*, extending them to cover hatred on the grounds of sexual orientation. At the time of writing (February 2010) these new homophobic hatred offences are not yet in force. Scotland does not have legislation covering incitement to hatred on the grounds of sexual orientation.
- [8]. In the period 2003-2005, England, Wales and Northern Ireland extended hate-crime statutory aggravations to include sexual orientation. In June 2009, Scotland passed the

Offences (Aggravation by Prejudice) (Scotland) Act, which came into force on 24 March 2010. It requires the aggravation of an offence by prejudice on the grounds of disability, sexual orientation or transgender identity to be taken into account in sentencing.

Transgender issues

- [9]. In the UK, discrimination in employment or training, or in the provision of goods, facilities or services on grounds of gender reassignment is a form of sex discrimination. In addition, in Great Britain (England, Wales and Scotland) public authorities have a specific gender equality duty which places an obligation on them to promote gender equality and eliminate sex discrimination. This duty extends to gender reassignment, i.e, to those who are intending to undergo, are undergoing, or have undergone gender reassignment.
- [10].
- [11]. 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.
- [12]. The *Gender Recognition Act 2004* (GRA), which came into force in April 2005 and applies throughout the UK, enables transgender individuals who satisfy certain criteria to apply to a Gender Recognition Panel for a *Gender Recognition Certificate*. From the date of the grant of a full Certificate an individual is afforded legal recognition in his or her acquired gender, and can obtain a new birth certificate which does not disclose the fact that he/she changed gender. A transgender person who is married cannot receive a full Certificate because, in the United Kingdom, marriage is not permitted between two members of the same sex. Where applicants are married, they will be issued with an interim Certificate. This enables them to obtain a full Certificate via a simplified procedure if they annul their marriage. The GRA does not require applicants to undergo hormonal treatment or surgery.

Miscellaneous

- [13]. No relevant information.

Good practices

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

