International Commission of Jurists

SEXUAL ORIENTATION AND GENDER IDENTITY IN HUMAN RIGHTS LAW

Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union

October 2007

International Commission of Jurists

Founded in Berlin in 1952, the ICJ is a global network of judges, lawyers and human rights defenders united by international law and rule of law principles that advance human rights. Using our expertise in law, justice systems and advocacy, we work for victims to obtain remedies, for those responsible for abuses to be held accountable and for justice systems to be independent and active protectors of human rights. We work to change law and policy at the national and international levels when they do not adequately protect people from human rights violations.

International Commission of Jurists, P.O. Box 91, 33 rue des Bains, 1211 Geneva 8, Switzerland

Sexual Orientation and Gender Identity in Human Rights Law, Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union

ISBN: 978-92-9037-116-1

Geneva, October 2007

Switzerland

SEXUAL ORIENTATION AND GENDER IDENTITY IN HUMAN RIGHTS LAW

Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union

October 2007

TABLE OF CONTENT

Introductory Note

This document is a compilation of European jurisprudence, legislation and doctrine referring to sexual orientation and gender identity. It addresses references from both the Council of Europe and the European Union systems.

The objective of this document is to compile relevant and authoritative references in order to frame informed debate on the human rights concerns of sexual orientation and gender identity in Europe. The document is also meant to be a resource for human rights defenders working on these issues.

In order to facilitate the use of this compilation, an index of relevant terms is available at the end of the document. Keywords are also provided before each decision from the European Court of Human Rights and the Court of Justice of the European Communities.

The following paragraphs propose a brief explanation of the legal value of the documents presented in this compilation depending on the body that adopted them.

Council of Europe[1]

The Council of Europe is an international organization which comprises 47 democratic countries of Europe. It was set up to promote democracy and protect human rights and the rule of law in Europe.

The Council of Europe is composed of:

- the Committee of Ministers, the Organisation's decision-making body, composed of the 47 Foreign Ministers or their Strasbourg-based deputies;
- the Parliamentary Assembly grouping 636 members (318 representatives and 318 substitutes) from the 47 national parliaments;
- the Congress of Local and Regional Authorities, representing Europe's regions and municipalities;
- the secretariat headed by a Secretary General, elected by the Parliamentary Assembly.

Treaties

European Conventions and Agreements are prepared and negotiated within the institutional framework of the Council of Europe. A decision of the Committee of Ministers establishes the text of the proposed treaty. It is then agreed to open the treaty for signature by member States of the Council. European Conventions and Agreements, however, are not statutory acts of the Organisation; they owe their legal existence simply to the expression of the will of those States that may become Parties thereto, as manifested inter alia by the signature and ratification of the treaty.

[1] Information about the Council of Europe is available on the website of the organisation: http://www.coe.int/

European Court of Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up within the Council of Europe, was opened for signature in Rome on 4 November 1950 and entered into force in September 1953.

The Convention lays down a catalogue of civil and political rights and freedoms and set up a mechanism for the enforcement of the obligations entered into by Contracting States. Three institutions were entrusted with this responsibility: the European Commission of Human Rights (set up in 1954), the European Court of Human Rights (set up in 1959) and the Committee of Ministers of the Council of Europe. The Court, as presently constituted, was brought into being by Protocol No. 11 on 1 November 1998.

Any Contracting State or individual claiming to be a victim of a violation of the Convention may lodge directly with the Court in Strasbourg an application alleging a breach by a Contracting State of one of the Convention rights.

All final judgments of the Court are binding on the respondent States concerned. Responsibility for supervising the execution of judgments lies with the Committee of Ministers of the Council of Europe. The Committee of Ministers verifies whether the State in respect of which a violation of the Convention is found has taken adequate remedial measures, which may be specific and/or general, to comply with the Court’s judgment.

Parliamentary Assembly

The Assembly can adopt three different types of texts:

- Recommendations contain proposals addressed to the Committee of Ministers, the implementation of which is within the competence of governments.
- Resolutions embody decisions by the Assembly on questions, which it is empowered to put into effect or expressions of view, for which it alone is responsible.
- Opinions are mostly expressed by the Assembly on questions put to it by the Committee of Ministers, such as the admission of new member states to the Council of Europe, but also on draft conventions, the budget, the implementation of the Social Charter.

The texts adopted serve as guidelines for the Committee of Ministers, national governments, parliaments and political parties.

Committee of Ministers

The Committee of Ministers is the Council of Europe's decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg. It is a governmental body, where national approaches to problems facing European society can be discussed, and a collective forum, where Europe-wide responses to such challenges are formulated. In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values, and monitors member states' compliance with their undertakings.

Congress of local and regional authorities

The Congress is a political assembly composed of representatives holding an electoral mandate as members of a local or regional authority appointed each by a specific procedure. Its 318 full members and 318 substitute members, representing over 200 000 European municipalities and regions, are grouped by national delegation and by political group. The Congress offers a forum for dialogue where representatives of local and regional authorities discuss common problems, compare notes about their experiences and then put their points of view to the national governments.

Recommendations are proposals to the Committee of Ministers, and implementing them is a matter for governments. They are sometimes addressed to other international institutions. Resolutions embody advice to local and regional authorities and their associations, and cover all issues dealt with by the Congress.

Commissioner for Human Rights

The Commissioner for Human Rights is an independent institution within the Council of Europe, mandated to promote the awareness of and respect for human rights in 47 Council of Europe member states.

The Commissioner's reports on specific countries contain both an analysis of human rights practices and detailed recommendations about possible ways of improvement. The reports are presented to the Council of Europe's Committee of Ministers and the Parliamentary Assembly. Subsequently they are published and widely circulated in the policy-making and NGO community as well as the media.

The Commissioner for Human Rights is also mandated to provide advice and information on the protection of human rights and the prevention of human rights violations. The Commissioner's Office can issue recommendations regarding a specific human rights issue in a single member state. Either on the request of national bodies or on his own initiative, the Commissioner may also give opinions on draft laws and specific practices.

European Union[2]

The European Union is a type of structure that does not fall into any traditional legal category. It is not a confederation of countries nor a federal State. The Member States remain sovereign but delegate their decision-making powers to shared institutions on specific matters.

Treaties

The Treaties, or 'primary' legislation, are the basis for a large body of 'secondary' legislation which has a direct impact on the daily lives of EU citizens. The secondary

[2] Information about the European Union is available on the website of the organisation: http://europa.eu/

legislation consists mainly of regulations, directives and recommendations adopted by the EU institutions.

The European Coal and Steel Community (ECSC) Treaty created the first Community in 1951. Until 2001 (Treaty of Nice), 16 treaties were signed. This series of treaties amended the original text and new treaties were born.

The principal treaties are as follows:

- Treaty establishing the European Coal and Steel Community (ECSC), signed in Paris in 1951. This treaty expired on 23 July 2002.
- Treaty establishing the European Economic Community (EEC), signed in Rome in 1957.
- Treaty establishing the European Atomic Energy Community (Euratom), signed in Rome in 1957.
- Single European Act (SEA), signed in Luxembourg in 1986.
- Treaty on European Union (TEU), signed in Maastricht in 1992.
- Treaty of Amsterdam, signed on 2 October 1997.
- Treaty of Nice, signed on 26 February 2001.

All these treaties have been amended on a number of occasions, in particular at the time of accession of new Member States in 1973 (Denmark, Ireland and the United Kingdom), in 1981 (Greece), in 1986 (Spain and Portugal), in 1995 (Austria, Finland and Sweden), in 2004 (Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) and in 2007 (Bulgaria and Romania).

Court of Justice of the European Communities

The Court of Justice ensures compliance with the law in the interpretation and application of the founding Treaties. It is composed of the same number of judges as there are Member States and therefore at present has 27 judges. The ECJ was created by the Treaty establishing the European Coal and Steel Community in 1952. It has two principal functions:

- to check whether instruments of the European institutions and of governments are compatible with the Treaties (infringement proceedings, proceedings for failure to act, actions for annulment;
- to give rulings, at the request of a national court, on the interpretation or the validity of provisions contained in Community law (references for a preliminary ruling).

Codecision Procedure

The codecision procedure (Article 251 of the EC Treaty) was introduced by the Treaty of Maastricht. It gives the European Parliament the power to adopt instruments jointly with the Council of the European Union. In practice, it has strengthened Parliament's legislative powers in the following fields: the free movement of workers,

right of establishment, services, the internal market, education (incentive measures), health (incentive measures), consumer policy, trans-European networks (guidelines), environment (general action programme), culture (incentive measures) and research (framework programme).

The Treaty of Amsterdam has simplified the codecision procedure, making it quicker and more effective and strengthening the role of Parliament. In addition it has been extended to new areas such as social exclusion, public health and the fight against fraud affecting the European Community's financial interests.

European Parliament

The European Parliament is the assembly of the representatives of the 492 million European Union citizens. The 785 representatives are elected by direct universal suffrage.

The European Parliament's main functions are:

- legislative power: in most cases Parliament shares the legislative power with the Council, in particular through the codecision procedure;
- budgetary power: Parliament shares budgetary powers with the Council in voting on the annual budget, rendering it enforceable through the President of Parliament's signature, and overseeing its implementation;
- power of control over the Union's institutions, in particular the Commission.

Council of the European Union

The Council of the European Union (“Council of Ministers” or “Council”) is the Union's main decision-making body. Its meetings are attended by Member State ministers, depending on the matter to be discussed, and it is thus the institution which represents the Member States.

The Council, together with the European Parliament, acts in a legislative and budgetary capacity. It is also the lead institution for decision-making on the common foreign and security policy (CFSP), and on the coordination of economic policies (intergovernmental approach), as well as being the holder of executive power, which it generally delegates to the Commission.

European Commission

The European Commission is a politically independent collegial institution which embodies and defends the general interests of the European Union. Its has an exclusive right of initiative in the field of legislation. It prepares and then implements the legislative instruments adopted by the Council and the European Parliament in connection with Community policies.

The Commission also has powers of implementation, management and control. It is responsible for planning and implementing common policies, executing the budget and managing Community programmes. As "guardian of the Treaties", it also ensures that European law is applied.

European Economic and Social Committee

The European Economic and Social Committee was set up, as an advisory body, by the Treaty establishing the European Economic Community in 1957 to represent the interests of the various economic and social groups. It consists of 344 members falling into three categories: employers, workers and representatives of particular types of activity (such as farmers, craftsmen, small businesses and industry, the professions, consumer representatives, scientists and teachers, cooperatives, families, environmental movements).
The EESC is consulted before many instruments concerning the internal market, education, consumer protection, environment, regional development and social affairs are adopted. It may also issue opinions on its own initiative. Since the Treaty of Amsterdam, the EESC has to be consulted on an even wider range of issues (the new employment policy, the new social affairs legislation, public health and equal opportunities) and it may also be consulted by the European Parliament.

European Ombudsman

The position of Ombudsman was established by the Treaty on European Union (Maastricht, 1992). The Ombudsman is appointed by the European Parliament after each election for the duration of Parliament's term of office (five years).

He is empowered to receive complaints from any citizen of the Union or any natural or legal person residing in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies (with the exception of the Court of Justice and the Court of First Instance). The Ombudsman can open an investigation on his own initiative or following a complaint. Complaints can be submitted to the Ombudsman directly or through a Member of the European Parliament.

Where the Ombudsman establishes an instance of maladministration he refers the matter to the institution concerned, conducts an investigation, seeks a solution to redress the problem and, if necessary, submits draft recommendations to which the institution is required to reply in the form of a detailed opinion within three months. If the institution concerned does not agree to the proposed recommendations, the Ombudsman may in no case mandate a solution. However, he will be able to submit a special report on the question to the European Parliament so that it can take the appropriate measures. Every year, the Ombudsman gives the European Parliament a report on all his investigations.

I. Council of Europe

A. Treaties and other instruments of the Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms
CETS No. 005, 4 November 1950[3]

Article 1 – Obligation to respect human rights[4]

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 8 – Right to respect for private and family life[5]

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14 – Prohibition of discrimination[6]

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

---

[3] The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol No. 10 (ETS No. 146) has lost its purpose.

[4] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

[5] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

[6] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms
CETS No. 177, 4 November 2000

The member States of the Council of Europe signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

Article 1 – General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Statute of the Council of Europe
CETS No. 001, 5 May 1949

Preamble

(…)
Convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation;

Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy;

Believing that, for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there is a need of a closer unity between all like-minded countries of Europe;

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data
CETS No. 108, 28 January 1981

Article 6 – Special categories of data

Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.

European Convention on the Adoption of Children
CETS No. 058, 24 April 1967

Article 6

1. The law shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person.

European Social Charter (revised)
CETS No. 163, 3 May 1996

Part V

Article E – Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

B. European Court of Human Rights

Case of L. v. Lithuania, Application no. 27527/03, Judgment of 11 September 2007

Keywords: pre-operative transsexual – name – identity – registration – civil status – gender reassignment surgery – private life – legislative gap

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. At birth the applicant was registered as a girl with a clearly female name under the rules of the Lithuanian language.

7. The applicant submits that from an early age he became aware of his male mental sex, thus acknowledging the conflict between his mental and genital gender.

17. On an unspecified date in 1999, the applicant requested that his name on all official documents be changed to reflect his male identity; that request was refused.

19. From 3 to 9 May 2000 the applicant underwent “partial gender-reassignment surgery” (breast removal). The applicant agreed with the doctors that a further surgical step would be carried out upon the adoption of the subsidiary laws governing the conditions and procedure thereof.

20. On an unspecified date in 2000, with the assistance of a Lithuanian Member of Parliament (the “MP”), the applicant's birth certificate and passport were changed to indicate the applicant's identity as P.L. The name and surname chosen by the applicant for this new identity were of Slavic origin, and thus did not disclose the applicant's gender. The applicant could not choose a Lithuanian name or surname as they are all gender-sensitive. However, the applicant's “personal code” in his new birth certificate and passport, i.e. a numerical code comprising the basic information about a person in accordance with the Lithuanian civil registration rules, remained the same, starting with number “4”, thus disclosing his gender as female (see paragraphs 28-29 below).

21. The applicant underlined that he therefore remains of female gender under domestic law. (…)

THE LAW

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

B. The Court's assessment

46. The Court observes that the prohibition under Article 3 of the Convention is of an absolute nature, but that the kind of treatment qualified as inhuman and degrading will depend upon an examination of the facts of the specific case in order to establish whether the suffering caused was so severe as to fall within the ambit of this

provision. Moreover, according to its established case-law, Article 3 entails a positive obligation on the part of the State to protect the individual from acute ill-treatment, whether physical or mental, whatever its source. Thus if the source is a naturally occurring illness, the treatment for which could involve the responsibility of the State, but is not forthcoming or patently inadequate, an issue may arise under this provision (see, for example, *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports of Judgments and Decisions* §§ 51-54; *mutatis mutandis Pretty v. the United Kingdom*, no. 2346/02, §§ 49-52, ECHR 2002-III).

47. However, an examination of the facts of the present case, whilst revealing the applicant's understandable distress and frustration, does not indicate circumstances of such an intense degree, involving the exceptional, life-threatening conditions found in the cases of Mr D. and Mrs Pretty, cited above, and thereby falling within the scope of Article 3 of the Convention. The Court considers it more appropriate to analyse this aspect of the applicant's complaint under Article 8 (respect for private life) below.

48. Consequently, the Court finds no violation of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

B. The Court's assessment

56. The Court recalls the positive obligation upon States to ensure respect for private life, including respect for human dignity and the quality of life in certain respects (cf. *mutatis mutandis* the aforementioned *Pretty* judgment, § 65). It has examined several cases involving the problems faced by transsexuals in the light of present-day conditions, and has noted and endorsed the evolving improvement of State measures to ensure their recognition and protection under Article 8 of the Convention (e.g. *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI; *Van Kück v. Germany*, no. 35968/97, ECHR 2003-VII; *Grant v. the United Kingdom*, no. 32570/03, ECHR 2006). Whilst affording a certain margin of appreciation to States in this field, the Court has nevertheless held that States are required, by their positive obligation under Article 8, to implement the recognition of the gender change in post-operative transsexuals through, *inter alia*, amendments to their civil status data, with its ensuing consequences (e.g. the abovementioned judgments - *Christine Goodwin*, §§ 71- 93, and *Grant* §§ 39-44).

57. The present case presents another aspect of the problems faced by transsexuals: Lithuanian law recognises their right to change not only their gender but also their civil status (paragraphs 25, 27, and 29 above). However, there is a gap in the pertinent legislation; there is no law regulating full gender-reassignment surgery. Until that law is adopted there do not appear to be suitable medical facilities reasonably accessible or available in Lithuania itself (paragraphs 13, 16, 19, 22, 25, 30 and 55 above). Consequently, the applicant finds himself in the intermediate position of a pre-operative transsexual, having undergone partial surgery, with certain important civil status documents having been changed. However, until he undergoes the full surgery, his personal code will not be amended and, therefore, in some significant situations for his private life, such as his employment opportunities or travel abroad, he remains a woman (paragraphs 19-21 above).

58. The Court notes that the applicant has obtained partial gender-reassignment surgery. It is not entirely clear to what extent he could complete the procedure privately in Lithuania (cf. the newspaper reference at paragraph 22 above). However, that consideration has not been put forward by either party to the present case so, presumably, it is to be excluded. As a short term solution, it may be possible for the applicant to have the remaining operation abroad, financed in whole or in part by the State (paragraphs 31, 42 and 55 above).

59. The Court finds that the circumstances of the case reveal a limited legislative gap in gender-reassignment surgery which leaves the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity. Whilst budgetary restraints in the public health service might have justified some initial delays in implementing the rights of transsexuals under the Civil Code, over four years have elapsed since the pertinent provisions came into force and the necessary legislation, although drafted, has yet to be adopted (paragraph 30 above). Given the few individuals involved (some 50 people, according to unofficial estimates; paragraph 22 above), the budgetary burden on the State would not be expected to be unduly heavy. Consequently, the Court considers that a fair balance has not been struck between the public interest and the rights of the applicant.

60. In the light of the above considerations, the Court concludes that there has been a violation of Article 8 of the Convention.

Case of Baczkowski and Others v. Poland, Application no. 1543/06, Judgment of 3 may 2007

Keywords: homosexual – assembly – ban – minority – discrimination – victim – remedy – administrative proceedings – expression

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants, a group of individuals and the Foundation for Equality (of whose executive committee the first applicant is also a member empowered to act on its behalf in the present case), wished to hold, within the framework of Equality Days organised by the Foundation and planned for 10-12 June 2005, an assembly (a march) in Warsaw with a view to alerting public opinion to the issue of discrimination against minorities - sexual, national, ethnic and religious - and also against women and disabled persons.

11. On 3 June 2005 the Traffic Officer, acting on behalf of the Mayor of Warsaw, refused permission for the march, (…).

12. On the same day the applicants informed the Mayor of Warsaw about stationary assemblies they intended to hold on 12 June 2005 in seven different squares of Warsaw. Four of these assemblies were intended to protest about discrimination against various minorities and to support actions of groups and organisations

combating discrimination. The other three planned assemblies were to protest about discrimination against women.

13. On 9 June 2005 the Mayor gave decisions banning the stationary assemblies to be organised by Mr Baczkowski, Mr Biedron, Mr Kliszczynski, Ms Kostrzewa, Mr Szypula, and another person, Mr N. (who is not an applicant), who are active in various non-governmental organisations acting for the benefit of persons of homosexual orientation. (…)

17. On 11 June 2005, despite the decision given on 3 June 2005, the march took place. It followed the itinerary as planned in the original request of 12 May 2006. The march, attended by approximately 3,000 people, was protected by the police.

18. Apart from the march, nine stationary assemblies were held on the same day under permissions given by the Mayor on 9 June 2005 (see paragraphs 15-16 above).

THE LAW

II. THE MERITS OF THE CASE

A. Alleged violation of Article 11 of the Convention

2. The Court's assessment

61. As has been stated many times in the Court's judgments, not only is democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from "democratic society" (see *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 86-89, ECHR 2003-II; *Christian Democratic Peoples Party v. Moldova*, 28793/02, 14 May 2006).

62. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 92, 17 February 2004).

63. Referring to the hallmarks of a “democratic society”, the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44, p. 25, § 63, and *Chassagnou and Others v. France* [GC], nos. 25088/95 and 28443/95, ECHR 1999-III, p. 65, § 112).

64. In *Informationsverein Lentia and Others v. Austria* (judgment of 24 November 1993, Series A no. 276) the Court described the State as the ultimate guarantor of the principle of pluralism (see the judgment of 24 November 1993, Series A no. 276, p. 16, § 38). A genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms (see *Wilson & the National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V; *Ouranio Toxo v. Greece*, no. 74989/01, 20 October 2005, § 37). This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.

65. In this connection, the Court reiterates that according to the Convention organs' constant approach, the word “victim” of a breach of rights or freedoms denotes the person directly affected by the act or omission which is in issue (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, § 27, and *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, § 41).

68. Hence, the Court is of the view that, when the assemblies were held, the applicants were negatively affected by the refusals to authorise them. The Court observes that legal remedies available to them could not ameliorate their situation as the relevant decisions were given in the appellate proceedings after the date on which the assemblies were held. (…) There has therefore been an interference with the applicants' rights guaranteed by Article 11 of the Convention.

69. An interference will constitute a breach of Article 11 unless it is “prescribed by law”, pursues one or more legitimate aims under paragraph 2 and is “necessary in a democratic society” for the achievement of those aims.

70. (…) on 22 August 2005 the Local Government Appellate Board found the decision of 3 June 2005 unlawful (see paragraph 20 above). Likewise, on 17 June 2005 the Mazowsze Governor quashed the refusals of 9 June 2005, finding that they breached the applicants' freedom of assembly (see paragraphs 22 – 26). The Court concludes that the interference with the applicants' right to freedom of peaceful assembly was therefore not prescribed by law.

71. (…)
The Court is well aware that under the applicable provisions of the Constitution these provisions lost their binding force after the events concerned in the present case (see

paragraph 30 above). However, it is of the view that the Constitutional Court's ruling that the impugned provisions were incompatible with the freedom of assembly guaranteed by the Constitution cannot but add force to its own above conclusion concerning the lawfulness of the interference complained of in the present case.

72. Having regard to this conclusion, the Court does not need to verify whether the other two requirements (legitimate aim and necessity of the interference) set forth in Article 11 § 2 have been complied with.

73. The Court therefore dismisses the Government's preliminary objection regarding the alleged lack of victim status on the part of the applicants and concludes that there has been a violation of Article 11 of the Convention.

B. Alleged violation of Article 13 of the Convention

2. The Court's assessment

79. The Court reiterates that the effect of Article 13 is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision (see, among many other authorities, *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, pp. 1869-70, § 145).
In the present case the Court found that the applicants' rights under Article 11 were infringed (see paragraph 73 above). Therefore, they had an arguable claim within the meaning of the Court's case-law and were thus entitled to a remedy satisfying the requirements of Article 13.

80. (…) In the present case, the applicants, having obtained decisions of the second-instance administrative bodies essentially in their favour, in that the refusal of permissions had been quashed, had no legal interest in bringing an appeal against these decisions to the administrative courts. Hence, the way to the Constitutional Court was not open to them.

81. (…) The Court notes that the present case is similar to that of *Stankov and the United Macedonian Organisation Ilinden* (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (nos. 29221/95 and 29225/95, Commission decision of 29 June 1998, unreported) (…). (…) in the circumstances, the notion of an effective remedy implied the possibility to obtain a ruling before the time of the planned events.

82. In this connection, the Court is of the view that such is the nature of democratic debate that the timing of public meetings held in order to voice certain opinions may be crucial for the political and social weight of such a meeting. Hence, the State authorities may, in certain circumstances, refuse permission to hold a demonstration, if such a refusal is compatible with the requirements of Article 11 of the Convention, but cannot change the date on which the organisers plan to hold it. If a public assembly is organised after a given social issue loses its relevance or importance in a current social or political debate, the impact of the meeting may be seriously

diminished. The freedom of assembly – if prevented from being exercised at a propitious time – can well be rendered meaningless.

83. The Court is therefore of the view that it is important for the effective enjoyment of the freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities, when giving relevant decisions, should act. (…) The Court is therefore not persuaded that the remedies available to the applicants in the present case, all of them being of a *post-hoc* character, could provide adequate redress in respect of the alleged violations of the Convention.
Therefore, the Court finds that the applicants have been denied an effective domestic remedy in respect of their complaint concerning a breach of their freedom of assembly. Consequently, the Court dismisses the Government's preliminary objection regarding the alleged non-exhaustion of domestic remedies and concludes that there has been a violation of Article 13 in conjunction with Article 11 of the Convention.

C. Alleged violation of Article 14 in conjunction with Article 11 of the Convention

2. The Court's assessment

93. The Court has repeatedly held that Article 14 is not autonomous but has effect only in relation to Convention rights. This provision complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, p. 184, § 33; *Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports* 1996-IV, § 36).

94. It is common ground between the parties that the facts of the case fall within the scope of Article 11 of the Convention. Hence, Article 14 is applicable to the circumstances of the case.

95. (…) It has been established that in the proceedings before the Traffic Officer the applicants had been requested to submit a "traffic organisation plan" and that their request had been refused because of a failure to submit such a plan. At the same time, the Court notes that it has not been shown or argued that other organisers had likewise been required to do this.

97. The Court cannot speculate on the existence of motives, other than those expressly articulated in the administrative decisions complained of, for the refusals to hold the assemblies concerned in the present case. However, it cannot overlook the fact that on 20 May 2005 an interview with the Mayor was published in which he stated that he would refuse permission to hold the assemblies (see paragraph 27 above).

98. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest, in particular as regards politicians themselves (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *Castells v. Spain*, judgment of 23 April

1992, Series A no. 236). However, the exercise of the freedom of expression by elected politicians, who at the same time are holders of public offices in the executive branch of the government, entails particular responsibility. In certain situations it is a normal part of the duties of such public officials to take personally administrative decisions which are likely to affect the exercise of individual rights, or that such decisions are given by public servants acting in their name. Hence, the exercise of the freedom of expression by such officials may unduly impinge on the enjoyment of other rights guaranteed by the Convention (as regards statements by public officials, amounting to declarations of a person's guilt, pending criminal proceedings, see *Butkevicius v Lithuania*, no. 48297/99, § 53, ECHR 2002-II (extracts); see also *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36; *Daktaras v. Lithuania*, no. 42095/98, §§ 41-44, ECHR 2000-X). When exercising their freedom of expression they may be required to show restraint, bearing in mind that their views can be regarded as instructions by civil servants, whose employment and careers depend on their approval.

99. The Court is further of the view, having regard to the prominent place which freedom of assembly and association hold in a democratic society, that even appearances may be of a certain importance in the administrative proceedings where the executive powers exercise their functions relevant for the enjoyment of these freedoms (see, *mutatis mutandis*, *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 14, § 26). The Court is fully aware of the differences between administrative and judicial proceedings. It is true that it is only in respect of the latter that the Convention stipulates, in its Article 6, the requirement that a tribunal deciding on a case should be impartial from both a subjective and objective point of view (*Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, § 73; *Warsicka v. Poland*, §§ 34-37, no. 2065/03, 16 January 2007*).*

100. (…) the decisions concerned were given by the municipal authorities acting on the Mayor's behalf after he had made known to the public his opinions regarding the exercise of the freedom of assembly and “propaganda of homosexuality” (see paragraph 27 above). It is further noted that the Mayor expressed these views when a request for permission to hold the assemblies was already pending before the municipal authorities. The Court is of the view that it may be reasonably surmised that his opinions could have affected the decision-making process in the present case and, as a result, impinged on the applicants' right to freedom of assembly in a discriminatory manner.”

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections;

2. *Holds* that there has been a violation of Article 11 of the Convention;

3. *Holds* that there has been a violation of Article 13 in conjunction with Article 11 of the Convention;

4. *Holds* that there has been a violation of Article 14 in conjunction with Article 11 of the Convention.

Case of Grant v. the United Kingdom, Application no. 32570/03, Judgment of 23 May 2006

Keywords: transsexual – pension – age – private life – legal recognition – non-pecuniary damage

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant's birth certificate shows her as male. She served in the army for three years from age 17 and then worked as a police officer. Aged 24, she gave up attempting to live as a man, and had gender reassignment surgery two years later. She has presented as a woman since 1963, was identified as a woman on her National Insurance card and paid contributions to the National Insurance scheme at a female rate (until 1975, when the difference in rates was abolished). In 1972, she became self-employed and started paying into a private pension fund.

8. By letter dated 22 August 1997, the applicant applied to the local government benefits office for state pension payments. She wished these to commence on 22 December 1997, her 60th birthday. Her application was refused, by a decision of the Adjudication Officer issued on 31 October 1997. He stated that she had applied "too early", and was only entitled to a State pension from the retirement age of 65 applied to men.

12. On 5 September 2002, the Department for Work and Pensions refused to award the applicant a state pension in light of the *Christine Goodwin* judgment.

15. On 26 April 2005 the applicant was issued with a gender recognition certificate following her application under the Gender Recognition Act 2004 which had come into force on 1 July 2004 (…).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

B. The Court's assessment

39. The Court recalls that it has dealt with a series of cases concerning the position of transsexuals in the United Kingdom (*Rees v. the United Kingdom* judgment of 17 October 1986, Series A no. 106, *Cossey v. the United Kingdom*, judgment of 27 September 1990, Series A no. 184, *X., Y. and Z. v. the United Kingdom* judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, *Sheffield and Horsham v. the United Kingdom*, judgment of 30 July 1998, *Reports* 1998-V, p. 2011 and most recently, *Christine Goodwin v. the United Kingdom*, cited above and *I. v. the United Kingdom* [GC], no. 25680/94, 11 July 2002). In the earlier cases, it held that the refusal of the United Kingdom Government to alter the register of births or to issue birth certificates whose contents and nature differed from those of the original entries concerning the recorded gender of the individual could not be considered as an

interference with the right to respect for private life (the above-mentioned *Rees* judgment, p. 14, § 35, and *Cossey* judgment, § 36; *Sheffield and Horsham* judgment cited above, § 59). However, at the same time, the Court was conscious of the serious problems facing transsexuals and on each occasion stressed the importance of keeping the need for appropriate legal measures in this area under review (see the *Rees* judgment, § 47; the *Cossey* judgment, § 42; the *Sheffield and Horsham* judgment, § 60). In the latest cases, it expressly had regard to the situation within and outside the Contracting State to assess "in the light of present-day conditions" what was at that time the appropriate interpretation and application of the Convention (*Christine Goodwin*, § 75). Following its examination of the applicants' personal circumstances as a transsexual, current medical and scientific considerations, the state of European and international consensus, impact on the birth register and social and domestic law developments, the Court found that the respondent Government could no longer claim that the matter fell within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. As there were no significant factors of public interest to weigh against the interest of these individual applicants in obtaining legal recognition of their gender re-assignment, it reached the conclusion that the fair balance that was inherent in the Convention now tilted decisively in favour of the applicants and that there had, accordingly, been a failure to respect their right to private life in breach of Article 8 of the Convention.

40. In the present case, where the applicant is a post-operative male-to-female transsexual in an identical situation to the applicant in the *Christine Goodwin* case, the Court finds that the applicant may also claim to be a victim of a breach of her right to respect for her private life contrary to Article 8 of the Convention due to the lack of legal recognition of her change of gender.

41. The Court has noted the arguments of the parties concerning the date from which the applicant can claim, if at all, to be a victim of such a breach. While it is true that the Government had to take steps to comply with the *Christine Goodwin* judgment, which involved drafting, and passing in Parliament, new legislation, which they achieved with laudable expedition, it is not the case that this process can be regarded as in any way suspending the applicant's victim status. The Court's judgment in *Christine Goodwin* found that from that moment there was no longer any justification for failing to recognise the change of gender of post-operative transsexuals. The applicant as such a transsexual did not have at that time any possibility of obtaining such recognition and could claim to be prejudiced from that moment. This situation may be distinguished from the *Walden* case (cited above), relied on by the Government, where the domestic courts did not act unreasonably or disproportionately, when considering the applicants' claims for redress under domestic law, in taking into account the time necessary for passing remedial legislation. The present applicant's victim status came to an end when the Gender Recognition Act 2004 came into force, thereby providing the applicant with the means on a domestic level to obtain the legal recognition previously denied.

42. The Court must also therefore reject the applicant's claims that her victim status should be regarded as existing before the *Christine Goodwin* case and in particular encompassing the decision taken in October 1997 which first denied her the pension payable to women. Contrary to the applicant's argument, the Court did not make any finding in the *Christine Goodwin* case that the refusal of a pension at an earlier time

violated that applicant's rights. The differences applicable to men and women concerning pension ages and national insurance contributions was adverted to in the context of examining the consequence of the lack of legal recognition of transsexuals. The finding of a violation was, in light of previous findings by the Court that the Government had been acting within their margin of appreciation, made with express reference to the conditions pertaining at the time the Court carried out its examination of the merits of the case (see, *mutatis mutandis*, in expulsion cases, *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 97).

43. Consequently, in so far as the applicant makes specific complaint about the refusal to accord her the pension rights applicable to women of biological origin she may claim to be a victim of this aspect of the lack of legal recognition from the moment, after the *Christine Goodwin* judgment, when the authorities refused to give effect to her claim, namely, from 5 September 2002.

44. Subject to the above considerations, the Court finds that there has been a breach of the applicant's right to respect for private life contrary to Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1, ALONE AND IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

B. The Court's assessment

50. The Court would note that under domestic law as it stood at the relevant time the applicant had no right to be paid a state pension at age 60 and, on the same basis, it may well be that no proprietary right arose capable of engaging Article 1 of Protocol No. 1 taken alone. The Court does not consider it necessary however to decide this point.

51. As regards Article 14 of the Convention, this provision complements the other substantive provisions of the Convention and the Protocols and there can be no room for its application unless the facts at issue fall within the ambit of one or more of them (see, among other authorities, *Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1141, § 36). Assuming that issues relating to the eligibility for a state pension are sufficiently pecuniary to fall within the scope of Article 1 of Protocol No. 1 for the purposes of Article 14, the Court observes that any failure by the domestic authorities to accord the applicant her pension at the age applicable to women must be regarded, at the time of the first refusal in 1997, as within the Government's margin of appreciation (see paragraph 39). In so far as her pension was again refused after the *Christine Goodwin* judgment, which had found a violation of Article 8, the Court recalls that the applicant has already complained of this aspect also in the context of Article 8. Since this refusal indeed flowed as a consequence from the failure to accord due respect to the applicant's private life, the Court considers that it is essentially an Article 8 matter and that no separate issue arises for the purposes of Article 1 of Protocol No. 1 either taken alone or in conjunction with Article 14.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

57. As regards non-pecuniary damage, the Court recalls that it considered in the *Christine Goodwin* case that such an award was not appropriate and that the essence of redress lay in the implementation, in due course, by the Government of the necessary measures to secure compliance with the Article 8 rights.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that no separate issue arises under Article 1 of Protocol No. 1, alone or in conjunction with Article 14 of the Convention;
(…)

Case of R. H. v. Austria, Application no. 7336/03, Judgment of 19 January 2006

Keywords: homosexual – criminal proceedings – conviction – private life – discrimination

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. On 9 December 1998 the Vienna Regional Court (*Landesgericht*) ordered the applicant's detention on remand on suspicion of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code.

13. On 8 April 2002 the Vienna Court of Appeal, after a public hearing, dismissed the applicant's appeal but granted the Public Prosecutor's appeal and increased the sentence to nine months' imprisonment, out of which six months were suspended on probation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

B. Merits

21. The Court observes that the present case raises the same issue as *L. and V. v. Austria* (…). It notes in particular that, like the applicants in the *L. and V.* case the applicant in the present case was convicted under Article 209 of the Criminal Code.

22. In the *L. and V.* case the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision (ibid., § 53). Further it found that it was not necessary to rule on the question whether there had been a violation of Article 8 taken alone (§ 55).

23. The Court sees nothing to distinguish the present case from the above precedent. Accordingly, it finds that there has been a violation of Article 14 taken in conjunction with Article 8.

24. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

B. Merits

29. Having regard to its above conclusion on the complaint under Article 14 read in conjunction with Article 8 of the Convention, the Court finds that there is no need to examine this part of the application. It observes that in the case of *Wolfmeyer v. Austria* (no. 5263/03, 26.5.2005, § 32) - which also concerned criminal proceedings under Article 209 of the Criminal Code – it found that even if Mr Wolfmeyer had eventually been acquitted of the charges under Article 209 of the Criminal Code, he could still claim to be the victim of an alleged breach of Article 14 read in conjunction with Article 8 of the Convention. What mattered was not a conviction under Article 209 of the Criminal Code but the mere fact that criminal proceedings under this provision had been instituted at all. Thus, for the purpose of the present application it is irrelevant whether or not the criminal proceedings against the applicant respected the guarantees of Article 6 of the Convention because, in any event, the Court has found above that such proceedings should not have been instituted in the first place. In those circumstances the Court considers that no separate issue needs to be examined under Article 6 of the Convention.

FOR THESE REASONS, THE COURT

2. *Holds* unanimously that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

3. *Holds* unanimously that there is no need to examine the complaint either under Article 8 of the Convention alone or under Article 6 of the Convention;
(…)

Case of H.G. and G.B. v, Austria, Applications no. 11084/02 and 15306/02, Judgment of 2 June 2005

Keywords: homosexual – criminal proceedings – conviction – discrimination – private life

THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The first applicant

4. On 1 September 2001 the Innsbruck Regional Court (*Landesgericht*) ordered the first applicant's detention on remand on suspicion of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code.

5. On 3 December 2001 the Innsbruck Regional Court convicted the first applicant under Article 209 of the Criminal Code and sentenced him to eighteen months' imprisonment. It found that, from July 2001 until his arrest, the first applicant had had sexual relations with three different male minors born in 1986 and 1987 respectively. In determining the sentence the court had regard to the first applicant's confession as a mitigating circumstance and to his previous convictions as aggravating circumstance.

6. On 6 December 2001 the first applicant started to serve his sentence of imprisonment at Garsten prison. On 1 September 2002 the first applicant was granted early release from detention.

B. The second applicant

7. On 25 September 2000 the Wels Regional Court convicted the second applicant under Article 209 of the Criminal Code and sentenced him to three months' imprisonment, suspended for a probation period of three years. It found that on 3 June 1998 the second applicant had had a sexual encounter with a male minor born in 1981. Referring to Article 41 § 1 of the Criminal Code the court found that the conditions for an extraordinary mitigation of sentence (*ausserordentliche Strafmilderung*) were met, (…).

9. On 20 February 2001 the Linz Court of Appeal dismissed the second applicant's appeal. The Court stated that it had no doubts about the constitutionality of Article 209 of the Criminal Code and referred in this respect to the Constitutional Court's case-law.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

B. Merits

28. The Court observes that the present case raises the same issue as *L. and V. v. Austria* (…). It notes in particular that, like the applicants in the *L. and V.* case the applicants in the present case were convicted under Article 209 of the Criminal Code.
29. The Court reiterates its finding in *L. and V.* that the fact that Article 209 of the Criminal Code has been repealed does not affect the applicants' victim status (ibid., § 43). It sees no reason to deviate from this position in the present case.

30. In the *L. and V.* case the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this

provision (ibid., § 53). Further it found that it was not necessary to rule on the question whether there had been a violation of Article 8 taken alone (§ 55).

31. The Court sees nothing to distinguish the present case from the above precedent. It notes that the parties have not submitted any new argument which would require it to deviate from its previous finding.

32. Accordingly, the Court finds that there has been a violation of Article 14 taken in conjunction with Article 8.

33. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously to join the applications;

2. *Declares* unanimously the applications admissible;

3. *Holds* unanimously that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

4. *Holds* unanimously that there is no need to examine the complaint under Article 8 of the Convention alone:
(…)

Case of Wolfmeyer v. Austria, Application no. 5263/03, Judgment of 26 May 2005

Keywords: homosexual – criminal proceedings – acquittal – discrimination – private life –victim – compensation – redress

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. In May 2000 the Feldkirch Regional Court (*Landesgericht*) opened criminal proceedings against the applicant on suspicion of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code.

6. On 23 November 2000 the Regional Court, after having held a trial, convicted the applicant under Article 209 of the Criminal Code and sentenced him to six months' imprisonment suspended on probation. It found that, in 1997, he had performed homosexual acts with two adolescents.

10. On 21 June 2002 the Constitutional Court gave a judgment holding that Article 209 of the Criminal Code was unconstitutional (…).

11. The amendment repealing Article 209 entered into force on 14 August 2002. While, according to the transitional provisions, Article 209 remained applicable in all cases in which the judgment at first instance had already been given before the entry into force of the amendment, it could no longer be applied in the applicant's case since it had been the case in point (*Anlaßfall*) before the Constitutional Court.

12. On 17 July 2002 the Innsbruck Court of Appeal, noting that the Constitutional Court had repealed Article 209 as unconstitutional, acquitted the applicant. This decision was served on him on 12 August 2002.

14. On 12 November 2002 the Innsbruck Court of Appeal partly granted the applicant's appeal, awarding him reimbursement of a total amount of 1,839.38 euros (EUR) for costs and expenses. It found that the Regional Court had wrongly applied Article 393a (3) of the Code of Criminal Procedure. The applicant's case had been the case in point before the Constitutional Court leading to the repeal of Article 209 of the Criminal Code. His case had to be treated as if Article 209 had never existed. Consequently, it could not be said that he was acquitted on grounds which occurred after the indictment.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

A. Admissibility

28. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 43, ECHR 1999-VI).

31. The Court (…) observes that neither the applicant's acquittal nor the subsequent costs order contains any statement acknowledging at least in substance the violation of the applicant's right not to being discriminated against in the sphere of his private life on account of his sexual orientation. Even if they did, the Court finds that neither of them provided adequate redress as required by its case law.

32. In this connection it is crucial for the Court's consideration that in the present case the maintenance in force of Article 209 of the Criminal Code in itself violated the Convention (*S.L. v. Austria*, cited above, § 45) and, consequently, the conduct of criminal proceedings under this provision.

33. The applicant had to stand trial and was convicted by the first instance court. In such circumstances, it is inconceivable how an acquittal without any compensation for damages and accompanied by the reimbursement of a minor part of the necessary defence costs could have provided adequate redress (see, *mutatis mutandis, Dalban*, cited above, § 44). This is all the more so as the Court itself has awarded substantial amounts of compensation for non-pecuniary damage in comparable cases, having particular regard to the fact that the trial during which details of the applicants' most

intimate private life were laid open to the public, had to be considered as a profoundly destabilising event in the applicants' lives (*L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 60, ECHR 2003-I).

34. In conclusion, the Court finds that the applicant's acquittal which did not acknowledge the alleged breach of the Convention and was not accompanied by adequate redress did not remove the applicant's status as a victim within the meaning of Article 34 of the Convention.

35. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

38. The present case differs from *L. and V. v. Austria* in that the applicant was acquitted following the repeal of Article 209, while the convictions of applicants L. and V. continue to stand despite the said repeal. In this context, the Court refers to its above finding that the applicant's position as a victim has not been removed by his acquittal. There are no other elements which would distinguish the present case from the above precedent. As was already noted above, in the case of *S.L. v. Austria*, the finding of a violation was based on the mere maintenance in force of Article 209 of the Criminal Code. The repeal of that provision was not considered to affect the applicant's victim status.

39. Accordingly, the Court considers that the maintenance in force of Article 209 of the Criminal Code and the conduct of the criminal proceedings against the applicant on the basis of that provision amounted to a violation of Article 14 taken in conjunction with Article 8.

40. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

45. The present applicant had to stand trial and was convicted at first instance. The Court considers that the acquittal, although it has to be taken into account in the assessment of non-pecuniary damage, cannot make undone the suffering associated with the public exposure of most intimate aspects of the applicant's private life or the loss of his employment. As was already noted, no redress for non-pecuniary damage was provided at the domestic level.

46. Having regard to the amounts granted in the above comparable cases, the Court, making an assessment on an equitable basis, awards the applicant EUR 10,000 for non-pecuniary damage.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;
3. *Holds* that there is no need to examine the complaint under Article 8 of the Convention alone;

4. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 10,000 (ten-thousand euros) in respect of non-pecuniary damage and EUR 18,000 (eighteen-thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
(…)

Case of Ladner v. Austria, Application no. 18297/03, Judgment of 3 February 2005

Keywords: homosexual – criminal proceedings – conviction – discrimination – private life

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. On 14 February 2001 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) ordered the applicant's detention on remand on suspicion of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code. The applicant was released on 27 February 2001.

9. On 15 January 2002 the Regional Court convicted the applicant under Article 209 of the Criminal Code and sentenced him to three months' imprisonment suspended on probation. It found that, between 1994 and 2001, the applicant had performed homosexual acts with four different adolescents.

10. On 3 December 2002 the Vienna Court of Appeal dismissed the applicant's appeal on points of law. It referred to the Constitutional Court's judgment of 21 June 2002 which had found that Article 209 of the Criminal Code was unconstitutional. However, the amendment of the law, which had repealed Article 209 did not apply to proceedings, in which the first instance court's judgment had already been given before its entry into force on 14 August 2002. The decision was served on the applicant on 4 July 2003.

12. On 3 April 2003 the Federal Minister of Justice replied to questions put by members of Parliament concerning the granting of a pardon in cases of convictions under Article 209. In these questions the applicant's case was referred to by the file number and the date of the final decision. The Minister stated, without mentioning the applicant's name, that he had denied a pardon in this case, as the conduct of the person concerned would also qualify as an offence under the newly introduced Article

207b, as in one case that person had taken advantage of the adolescent's predicament, i.e. the fact that the latter had, following a conflict with his parents, temporarily lived in that person's apartment.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

B. Merits

21. The Court observes that the present case raises the same issue as *L. and V.* It notes in particular that, like in *L. and V.*, the applicant was convicted under Article 209 of the Criminal Code.

22. The Court reiterates its finding in *L. and V.* that the fact that Article 209 of the Criminal Code has been repealed does not affect the applicant's victim status (ibid., § 43). Noting, in particular, that the applicant's conviction still stands despite the repeal of Article 209, it sees no reason to deviate from this position in the present case.

23. In the *L. and V.* case the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision (ibid., § 53). Further it found that it was not necessary to rule on the question whether there had been a violation of Article 8 taken alone (§ 55).

24. The Court sees nothing to distinguish the present case from the above precedent. It notes that the parties have not submitted any new argument which would require it to deviate from its previous finding.

25. Accordingly, the Court finds that there has been a violation of Article 14 taken in conjunction with Article 8.

26. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

27. The applicant complained that his rights under Article 3 of the Convention had been violated, alleging that the Minister of Justice, in his reply to questions put by members of Parliament (see paragraph 12 above) described him as a sexual abuser who exploited his partners.

28. Having regard to the context of the Minister's statement and, in particular, the fact that he did not mention the applicant's name, the Court considers that the treatment complained of does not reach the minimum level of severity required for any ill-treatment to fall within the scope of Article 3.

29. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declared* the complaint under Article 8 taken alone and in conjunction with Article 14 admissible and the remainder of the application inadmissible;

2. *Held* that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

3. *Held* that there is no need to examine the complaint under Article 8 of the Convention alone;
(…)

Case of Woditschka and Wilfling v. Austria, Applications no, 69756/01 and 6306/02, Judgment of 21 October 2004

Keywords: homosexual – criminal proceedings – conviction – discrimination – private life

THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The first applicant

5. On 19 July 2000 the Vienna Regional Court (*Landesgericht für Strafsachen*) convicted the first applicant under section 209 of the Criminal Code of having committed homosexual acts with an adolescent and sentenced him to a fine of ATS 4,500 (approximately EUR 330) with 75 days' imprisonment in default. The sentence was suspended on probation. The Regional Court found that, in September 1999, the first applicant, who was then twenty years old, had had about ten homosexual contacts with a sixteen-year-old. In determining the sentence the court had regard to the applicant's confession and his young age as a mitigating circumstance, as well as to the repetition of the offence as an aggravating circumstance.

6. On 13 November 2000 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the first applicant's appeal on points of law, in which he had complained that section 209 of the Criminal Code was discriminatory and violated his right to respect for his private life, and in which he had also suggested that the Court of Appeal request the Constitutional Court to review the constitutionality of that provision.

B. The second applicant

8. On 7 August 2001 the Wiener Neustadt Regional Court ordered the second applicant's detention on remand on suspicion of having committed homosexual acts with an adolescent contrary to section 209 of the Criminal Code.

9. On 24 August 2001 the Wiener Neustadt Regional Court convicted the second applicant under section 209 of the Criminal Code and sentenced him to fifteen months' imprisonment, fourteen of which were suspended on probation. It found that, from March 2001 until his arrest, the second applicant had a homosexual relationship with a seventeen-year-old. In determining the sentence the court had regard to the applicant's confession as a mitigating circumstance, as well as to the repetition of the offence and a previous conviction as aggravating circumstances.

11. On 23 October 2001 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the second applicant's appeal on points of law, in which he had complained that section 209 of the Criminal Code was discriminatory and violated his right to respect for his private life, and in which he had also suggested that the Court of Appeal request the Constitutional Court to review the constitutionality of that provision. Upon the Public Prosecutor's appeal it changed the sentence to the effect that only ten out of fifteen months of imprisonment were suspended on probation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

B. Merits

26. The Court observes that the present case raises the same issue as *L. and V. v. Austria* (…). It notes in particular that, like the applicants in the *L. and V.* case the applicants in the present case were convicted under Article 209 of the Criminal Code.

27. The Court reiterates its finding in *L. and V.* that the fact that Article 209 of the Criminal Code has been repealed does not affect the applicants' victim status (ibid., § 43). It sees no reason to deviate from this position in the present case.

28. In the *L. and V.* case the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision (ibid., § 53). Further it found that it was not necessary to rule on the question whether there has been a violation of Article 8 taken alone (§ 55).

29. The Court sees nothing to distinguish the present case from the above precedent. It notes that the parties have not submitted any new argument which would require it to deviate from its previous finding.

30. Accordingly, the Court finds that there has been a violation of Article 14 taken in conjunction with Article 8.

31. Moreover, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 alone.

FOR THESE REASONS, THE COURT UNANIMOUSLY

(…)

3. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

4. *Holds* that there is no need to examine the complaint under Article 8 of the Convention alone:
(…)

Case of B.B. v. the United Kingdom, Application no. 53760/00, Judgment of 10 February 2004

Keywords: homosexual – age – criminal proceedings – acquittal – discrimination – private life – satisfaction

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

The events described below took place between January 1998 and February 1999.

11. The applicant contacted the police after he was attacked by a young man with whom he had had homosexual relations. He was arrested for allegedly engaging in buggery with a young man aged 16 years of age contrary to section 12(1) and schedule 2 of the Sexual Offences Act 1956. The applicant underwent a medical examination with his consent during which samples were taken and his residence was searched by police. He was released on police bail the following day and was subsequently formally charged.

14. The CPS later advised the applicant by letter that it had decided not to proceed with the case against him and that he should accordingly attend the Central Criminal Court on a particular date. On that date he was formally acquitted by that court. The trial judge asked the applicant if he would like to make a claim for costs but, following a brief discussion, the applicant decided not to make any claim on the grounds that, in his view, the CPS were “quibbling” over the amount to be awarded.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

B. The Court's assessment

1. Complaint of discrimination on the grounds of sexual orientation

23. The Court recalls that, in the case of *Sutherland v. the United Kingdom*, the Commission was of the opinion that the existence of legislation making it a criminal offence to engage in male homosexual activities unless both parties had consented and attained the age of 18 while the age of consent for heterosexual activities was set

at 16 years of age violated Article 14 of the Convention taken in conjunction with Article 8 (*Sutherland v. the United Kingdom*, (striking out) [GC], no. 25186/94, 27 March 2001 and Commission's report of 1 July 1997, unpublished). The Court further recalls its finding of a violation of Article 14 taken in conjunction with Article 8 due to the existence of, and in one case the conviction of individuals under, legislation which criminalised homosexual activity with men of 14 to 18 years of age when no such criminal offence existed for heterosexual or lesbian relations (*S.L. v. Austria*, no. 45330/99, 9 January 2003 and *L. and V. v. Austria*, nos. 39392/98 and 39829/98, 9 January 2003).

24. The Court notes that, while domestic law has since been amended, the present applicant was prosecuted under legislation which made it a criminal offence to engage in homosexual activities with men under 18 years of age while the age of consent for heterosexual relations was fixed at 16 years of age. (…)

25. The Court sees no reason to reach a conclusion different to those reached in the cases of *S.L. v. Austria* and *L. and V. v. Austria* (cited above). It therefore finds that the existence of, and the applicant's prosecution under, the legislation applicable at the relevant time constituted a violation of Article 14 taken in conjunction with Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. (…) the applicant (…) submitted, *inter alia*, that the Court should order the Government to apologise to him, to offer reparation to all homosexuals and to strengthen the domestic legislation incorporating the Convention.

34. Turning to the applicant's claim for non-pecuniary damage, the Court initially observes that, in a number of cases concerning the maintenance in force of legislation penalising homosexual acts between consenting adults, it considered that the finding of a violation in itself constituted sufficient just satisfaction for any non-pecuniary damage suffered (see the *Dudgeon v. the United Kingdom* judgment (just satisfaction) of 24 February 1983, Series A no. 59, pp. 7-8, § 14; the *Norris v. Ireland* judgment of 26 October 1988, Series A no. 142, pp. 21-22, § 50; and the *Modinos v. Cyprus* judgment of 22 April 1993, Series A no. 259, p. 12, § 30). However, the Court notes that in the more recent case of *S.L. v. Austria*, the Court awarded EUR 5000 where the existence of the discriminatory legislation meant that the applicant was prevented from entering into sexual relations with men until the age of eighteen. Awards for non-pecuniary damage were also made in cases where discriminatory legislation resulted in the prosecution of the applicants. However, the Court notes that the two cases cited by the applicant in which the Court made awards of EUR 15,000 and GBP 10,000 involved not only the prosecution, but also the conviction of the applicants and the imposition of a sentence, in the former case a suspended sentence of imprisonment and in the latter a conditional discharge, following a trial in which details of the applicants' most intimate private life were laid open in public (respectively *L. and V. v. Austria* and *A.D.T. v. the United Kingdom*, both cited above). The Court further notes that in the cases involving the discharge of military personal on account of their homosexuality, the investigations carried out were of an exceptionally intrusive character, the discharge had a profound effect on the careers and prospects of the applicants and the policy was of an absolute and general nature

so that the applicants were discharged due to an innate personal characteristic irrespective of their conduct or service records (*Smith and Grady v. the United Kingdom* (just satisfaction), *Lustig-Prean and Beckett* (just satisfaction), *Perkins and R. v. the United Kingdom* and *Beck, Copp and Bazely v. the United Kingdom*, all cited above). Finally the Court considers that the facts and violations in the cases of *Ayd_n v. Turkey* and *B v. France* are sufficiently different as not to be of any real relevance.

35. The Court notes that, in the present case, the applicant was prosecuted under the relevant legislation found to be in violation of the Convention. He was also committed for trial. While the CPS later discontinued the case before trial and the applicant was formally acquitted of all charges, the Court recognises the anxiety and distress that the prosecution must have caused the applicant. Making an assessment on an equitable basis, the Court awards the applicant EUR 7000 to be converted to pounds sterling at the date of settlement.

37. The Court further recalls that it cannot make orders of the type requested by the applicant in paragraph 31 (for example, *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, § 34, *Akdivar and Others v. Turkey* (Article 50), judgment of 1 April 1998, *Reports* 1998-II, § 125 and *Finucane v. the United Kingdom*, no. 29178/95, §§ 88-90, 1 July 2003).

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 14 in conjunction with Article 8 of the Convention;

2. *Holds* unanimously

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the sums of EUR 7000 (seven-thousand euros) in respect of non-pecuniary damage and EUR 600 (six-hundred euros) in respect of costs and expenses, these sums to be converted into pounds sterling at the date of settlement;
(…)

3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Case of Karner v. Austria, Application no. 40016/98, Judgment of 24 July 2003

Keywords: homosexual – tenancy – succession – protection of the family – discrimination – private life

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. From 1989 the applicant lived with Mr W., with whom he had a homosexual relationship, in a flat in Vienna, which the latter had rented a year earlier. They shared the expenses on the flat.

12. In 1991 Mr W. discovered that he was infected with the Aids virus. His relationship with the applicant continued. In 1993, when Mr W. developed Aids, the applicant nursed him. In 1994 Mr W. died after designating the applicant as his heir.

13. In 1995 the landlord of the flat brought proceedings against the applicant for termination of the tenancy. On 6 January 1996 the Favoriten District Court (*Bezirksgericht*) dismissed the action. It considered that section 14(3) of the Rent Act (*Mietrechtsgesetz*), which provided that family members had a right to succeed to a tenancy, was also applicable to a homosexual relationship.

15. On 5 December 1996 the Supreme Court (*Oberster Gerichtshof*) granted the landlord's appeal, quashed the lower court's decision and terminated the lease. It found that the notion of "life companion" (*Lebensgefährte*) in section 14(3) of the Rent Act was to be interpreted as at the time it was enacted, and the legislature's intention in 1974 was not to include persons of the same sex.

I. JURISDICTION OF THE COURT

26. (…) Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.

27. The Court considers that the subject matter of the present application – the difference in treatment of homosexuals as regards succession to tenancies under Austrian law – involves an important question of general interest not only for Austria but also for other States Parties to the Convention. In this connection the Court refers to the submissions made by ILGA-Europe, Liberty and Stonewall, whose intervention in the proceedings as third parties was authorised as it highlights the general importance of the issue. Thus, the continued examination of the present application would contribute to elucidate, safeguard and develop the standards of protection under the Convention.

28. In these particular circumstances, the Court finds that respect for human rights as defined in the Convention and the Protocols thereto requires a continuation of the examination of the case (Article 37 § 1 *in fine* of the Convention) and accordingly rejects the Government's request for the application to be struck out of its list.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

A. Applicability of Article 14

32. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the

latter (see *Petrovic v. Austria*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 585, § 22).

33. The Court has to consider whether the subject matter of the present case falls within the ambit of Article 8. The Court does not find it necessary to determine the notions of "private life" or "family life" because, in any event, the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affected the enjoyment of his right to respect for his home guaranteed under Article 8 of the Convention (see *Larkos v. Cyprus* [GC], no. 29515/95, § 28, ECHR 1999-I). The applicant had been living in the flat that had been let to Mr W. and if it had not been for his sex, or rather, sexual orientation, he could have been accepted as a life companion entitled to succeed to the lease, in accordance with section 14 of the Rent Act.
Therefore, Article 14 of the Convention applies.

B. Compliance with Article 14 taken in conjunction with Article 8

37. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Petrovic*, cited above, p. 586, § 30). Furthermore, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention (see *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29, ECHR 1999-IX; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 94, ECHR 1999-VI; *Fretté v. France*, no. 36515/97, §§ 34 and 40, ECHR 2002-I; and *S.L. v. Austria*, no. 45330/99, § 36, ECHR 2003-I). Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see *Smith and Grady*, cited above, § 90, and *S.L. v. Austria*, cited above, § 37).

40. The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI, with further references). It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected.

41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion.

42. Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.

43. Thus, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

FOR THESE REASONS, THE COURT
1. *Rejects* by six votes to one the Government's request that the application be struck out of the list of cases;

2. *Holds* by six votes to one that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;
(…)

Case of van Kück v. Germany, Application no. 35968/97, Judgment of 12 June 2003

Keywords: transsexual – legal status – name – gender-reassignment surgery – medical necessity – reimbursement – private life – self-determination

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1948 and lives in Berlin. At birth, she was registered as male, with the forenames Bernhard Friedrich.

A. The proceedings for the change of the applicant's forenames

9. In 1990 the applicant instituted proceedings before the Schöneberg District Court, asking it to change her forenames to Carola Brenda.

10. On 20 December 1991 the District Court granted the applicant's request. The court found that the conditions under section 1 of the Transsexuals Act (*Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen*) were met in the applicant's case.

B. The civil proceedings against the health insurance company

12. In 1992 the applicant, represented by counsel, brought an action with the Berlin Regional Court against a German health insurance company. Having been affiliated to this company since 1975, she claimed reimbursement of pharmaceutical expenses for hormone treatment. She further requested a declaratory judgment to the effect that the defendant company was liable to reimburse 50% of the expenses for gender reassignment operations and further hormone treatment. As an employee of the Berlin

Land, she was entitled to allowances covering half of her medical expenses; the private health insurance was to cover the other half.

15. On 3 August 1993 the Regional Court, following an oral hearing, dismissed the applicant's claims. The court considered that under the relevant provisions of the General Insurance Conditions (*Allgemeine Versicherungsbedingungen*) governing the contractual relations between the applicant and her private health insurance company, the applicant was not entitled to reimbursement of medical treatment regarding her transsexuality.

19. In November 1994 the applicant underwent gender reassignment surgery. According to her, having been unfit for work since February 1994, she had agreed with the physician treating her that her suffering would not permit her to await the outcome of the appeal proceedings.

20. On 27 January 1995 the Court of Appeal, following an oral hearing, dismissed the applicant's appeal. (…)

28. On 25 October 1996 the Federal Constitutional Court refused to admit the applicant's constitutional complaint.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

B. The Court's assessment

1. The Court's general approach

49. As to the issue of transsexualism, the Court observes that, in the context of its case-law on the legal status of transsexuals, it has had regard, *inter alia*, to developments in medical and scientific thought.

50. In *Rees v. the United Kingdom* (judgment of 17 October 1986, Series A no. 106, pp. 15-16, § 38), (…)[7].

51. In *Cossey v. the United Kingdom* (judgment of 27 September 1990, Series A no. 184, p. 16, § 40), (…)[8].

52. However, in recent judgments (see *I. v. the United Kingdom* [GC], no. 25680/94, §§ 61-62, 11 July 2002, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§ 81-82, ECHR 2002-VI), the Court came to different conclusions. (…)

"81. It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. The expert evidence in the domestic case of *Bellinger v. Bellinger* was found to indicate a growing acceptance of findings of

[7] Please see the Rees Judgement p. XX of this compilation.
[8] Please see the Cossey Judgment p. XX of this compilation.

sexual differences in the brain that are determined pre-natally, although scientific proof for the theory was far from complete. The Court considers it more significant however that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief (for example, the *Diagnostic and Statistical Manual*, 4th edition (DSM-IV) replaced the diagnosis of transsexualism with 'gender identity disorder'; see also *The International Classification of Diseases*, 10th edition (ICD-10)). The United Kingdom National Health Service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. The medical and surgical acts which in this case rendered the gender reassignment possible were indeed carried out under the supervision of the national health authorities. Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment. In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance.

82. While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex (see *Sheffield and Horsham*, cited above, p. 2028, § 56), the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals ..."

2. Assessment of the "medical necessity" of gender reassignment measures

54. The Court, bearing in mind the complexity of assessing the applicant's transsexuality and the need for medical treatment, finds that the Regional Court rightly decided to obtain an expert medical opinion on these questions. However, notwithstanding the expert's unequivocal recommendation of gender reassignment measures in the applicant's situation, the German courts concluded that she had failed to prove the medical necessity of these measures. In their understanding, the expert's finding that gender reassignment measures would improve the applicant's social situation did not clearly assert the necessity of such measures from a medical point of view. The Court considers that determining the medical necessity of gender reassignment measures by their curative effects on a transsexual is not a matter of legal definition. In *Christine Goodwin* (…), the Court referred to the expert evidence in the British case of *Bellinger v. Bellinger*, which indicated "a growing acceptance of findings of sexual differences in the brain that are determined pre-natally, although scientific proof for the theory was far from complete". The Court considered it more significant "that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief".

55. In the present case, the German courts' evaluation of the expert opinion and their assessment that improving the applicant's social situation as part of psychological treatment did not meet the requisite condition of medical necessity does not seem to coincide with the above findings of the Court (see *Christine Goodwin*, cited above). In any case, it would have required special medical knowledge and expertise in the field of transsexualism. In this situation, the German courts should have sought further, written or oral, clarification from the expert Dr H. or from any other medical specialist.

56. Furthermore, considering recent developments (see *I. v. the United Kingdom* and *Christine Goodwin*, both cited above, § 62 and § 82, respectively), gender identity is one of the most intimate areas of a person's private life. The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate.

57. In these circumstances, the Court finds that the interpretation of the term "medical necessity" and the evaluation of the evidence in this respect were not reasonable.

3. Assessment of the cause of the applicant's transsexuality

59. The Court reaffirms its statement in *I. v. the United Kingdom* and *Christine Goodwin* (…) that, given the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment.

61. The Court notes that the issue of the cause of the applicant's transsexuality did not appear in the Regional Court's order for the taking of expert evidence and was not, therefore, covered by the opinion prepared by Dr H. The Court of Appeal did not itself take evidence from Dr H. on this question, nor did it examine the experts involved in the earlier proceedings in 1990 and 1991, respectively, as the applicant had requested. Rather, the Court of Appeal analysed personal data recorded in a case history which was contained in the opinion prepared by Dr O. in 1991 in the context of the proceedings under the Transsexuals Act. This opinion had been limited to the questions whether the applicant was a male-to-female transsexual and had been for at least the last three years under the constraint of living according to these tendencies, which were answered in the affirmative.

62. In the Court's opinion, the Court of Appeal was not entitled to take the view that it had sufficient information and medical expertise for it to be able to assess the complex question of whether the applicant had deliberately caused her transsexuality (see, *mutatis mutandis*, *H. v. France*, judgment of 24 October 1989, Series A no. 162-A, pp. 25-26, § 70).

63. Moreover, in the absence of any conclusive scientific findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain (see again *I. v. the United Kingdom* and *Christine Goodwin*, loc. cit.), the approach taken by the Court of Appeal in examining the question whether the applicant had deliberately caused her condition appears inappropriate.

4. Conclusion

64. Having regard to the determination of the medical necessity of gender reassignment measures in the applicant's case and also of the cause of the applicant's transsexuality, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair hearing.

65. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

B. The Court's assessment

1. General principles

69. As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22). It can sometimes embrace aspects of an individual's physical and social identity (see *Mikulic v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, for example, *B. v. France*, cited above, pp. 53-54, § 63; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports* 1997-I, p. 131, § 36; and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45). Likewise, the Court has held that although no previous case has established as such any right to self-determination as being contained in Article 8, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). Moreover, the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security (see *I. v. the United Kingdom*, § 70, and *Christine Goodwin*, § 90, both cited above).

70. The Court further reiterates that, while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, cited above, p. 11,

§ 23; *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, p. 422, § 33; and *Mikulic*, cited above, § 57).

71. However, the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation (see, for instance, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49; *B. v. France*, cited above, p. 47, § 44; and, as recent authorities, *Sheffield and Horsham*, cited above, p. 2026, § 52, and *Mikulic*, cited above, § 57).

72. For the balancing of the competing interests, the Court has emphasised the particular importance of matters relating to a most intimate part of an individual's life (see *Dudgeon*, cited above, p. 21, § 52, and *Smith and Grady*, cited above, § 89).

2. Application of these principles to the present case

73. In the present case, the civil court proceedings touched upon the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination. (…)

74. (…) the Court points to the difference in the nature of the interests protected by Article 6, namely procedural safeguards, and by Article 8 § 1, ensuring proper respect for, *inter alia*, private life, a difference which justifies the examination of the same set of facts under both Articles (see *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 57, § 91; *Buchberger v. Austria*, no. 32899/96, § 49, 20 December 2001; and *P., C. and S. v. the United Kingdom*, no. 56547/00, § 120, ECHR 2002-VI).

76. The Court notes at the outset that the proceedings in question took place between 1992 and 1995 at a time when the condition of transsexualism was generally known (…). In this connection, the Court likewise notes the remaining uncertainty as to the essential nature and cause of transsexualism and the fact that the legitimacy of surgical intervention in such cases is sometimes questioned (see the Court's observations of 1992, 1998 and 2002 in *B. v. France*, in *Sheffield and Horsham*, in *I v. the United Kingdom*, and in *Christine Goodwin*, …).

77. The Court has also previously held that the fact that the public health services did not delay the giving of medical and surgical treatment until all legal aspects of transsexuals had been fully investigated and resolved, benefited the persons concerned and contributed to their freedom of choice (see *Rees*, …, p. 18 § 45). Moreover, manifest determination has been regarded as a factor which is sufficiently significant to be taken into account, together with other factors, with reference to Article 8 (see *B. v. France*, …, p. 51, § 55).

78. In the present case, the central issue is the German courts' application of the existing criteria on reimbursement of medical treatment to the applicant's claim for reimbursement of the cost of gender reassignment surgery, not the legitimacy of such

measures in general. Furthermore, what matters is not the entitlement to reimbursement as such, but the impact of the court decisions on the applicant's right to respect for her sexual self-determination as one of the aspects of her right to respect for her private life.

82. In the light of recent developments (see *I. v. the United Kingdom* and *Christine Goodwin*, cited above, § 62 and § 82, respectively), the burden placed on a person to prove the medical necessity of treatment, including irreversible surgery, in one of the most intimate areas of private life, appears disproportionate.

84. In the light of these various factors, the Court reaches the conclusion that no fair balance was struck between the interests of the private health insurance company on the one side and the interests of the individual on the other.

85. In these circumstances, the Court considers that the German authorities overstepped the margin of appreciation afforded to them under paragraph 2 of Article 8.

86. Consequently, there has been a violation of Article 8 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLES 6 § 1 AND 8

90. The Court reiterates that where domestic courts base their decisions on general assumptions which introduce a difference of treatment on the ground of sex, a problem may arise under Article 14 of the Convention (see *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, pp. 21-22, § 67). Similar considerations apply with regard to discrimination on any other ground or status, that is, also on the ground of an individual's sexual orientation.

91. The Court considers, however, that, in the circumstances of the present case, the applicant's complaint that she was discriminated against on account of her transsexuality amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 6 § 1 and, more particularly, Article 8 of the Convention (see *Smith and Grady*, cited above, § 115).

92. Accordingly, the Court considers that the applicant's complaints do not give rise to any separate issue under Article 14 of the Convention taken in conjunction with Articles 6 § 1 and 8.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

96. The Court cannot speculate as to what the outcome of the impugned proceedings would have been if the Convention had not been violated. However, it considers that the applicant undeniably sustained non-pecuniary damage as a result of the unfairness of the court proceedings and the lack of respect for her private life. Having regard to the circumstances of the case and ruling on an equitable basis as required by Article 41, the Court awards her compensation in the sum of EUR 15,000.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* by four votes to three that there has been a violation of Article 8 of the Convention;

3. *Holds* unanimously that no separate issue arises under Article 14 of the Convention taken in conjunction with Articles 6 § 1 and 8;

4. *Holds* by four votes to three
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
(i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
(…)

Case of S.L. v. Austria, Application no. 45330/99, Judgment of 9 January 2003

Keywords: homosexual – private life – discrimination – age – satisfaction

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. At about the age of eleven or twelve the applicant began to be aware of his sexual orientation. While other boys were attracted by women, he realised that he was emotionally and sexually attracted by men, in particular by men who are older than himself. At the age of fifteen he was sure of his homosexuality.

10. The applicant submits that he lives in a rural area where homosexuality is still taboo. He suffers from the fact that he cannot live his homosexuality openly and - until he reached the age of eighteen - could not enter into any fulfilling sexual relationship with an adult partner for fear of exposing that person to criminal prosecution under Article 209 of the Criminal Code (*Strafgesetzbuch*), of being obliged to testify as a witness on the most intimate aspects of his private life and of being stigmatised by society should his sexual orientation become known.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

28. Given the nature of the complaints, the Court deems it appropriate to examine the case directly under Article 14, taken together with Article 8.

29. It is not in dispute that the present case falls within the ambit of Article 8, concerning as it does a most intimate aspect of the applicant's private life (see, for instance, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, EHCR 1999-VI). Article 14 therefore applies.

35. The Court notes at the outset that, following the Constitutional Court's judgment of 21 June 2002, Article 209 of the Criminal Code has been repealed. The amendment in question entered into force on 14 August 2002. However, this development does not affect the applicant's status as a victim within the meaning of Article 34 of the Convention. In this connection, the Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). In the admissibility decision of 22 November 2001 in the present case, the Court accepted that the applicant, who has always asserted that he felt attracted by men older than himself, was prevented by Article 209 of the Criminal Code from entering into any sexual relationship corresponding to his disposition. Accordingly, it found that he was directly affected by the maintenance in force of Article 209 until he attained the age of eighteen. Having regard to the present situation, the Court considers that the Constitutional Court's judgment, which is based on other grounds than those relied on in the present application, has not acknowledged let alone afforded redress for the alleged breach of the Convention. Nor can it be said that the "matter has been resolved" within the meaning of Article 37 § 1 (b) of the Convention. The present case differs from the Sutherland case which has been struck off the Court's list upon the request of the parties, who had reached a settlement following a change in domestic law (*Sutherland v. the United Kingdom* [GC], no. 25186/94, 27 March 2001, unreported).

36. According to the Court's established case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see the *Karlheinz Schmidt v. Germany* judgment of 18 July 1994, Series A no. 291-B, pp. 32–33, § 24; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29, ECHR 1999-IX and *Fretté v. France*, no. 36515/97, §§ 34 and 40, ECHR 2002-I).

37. (…) the Court reiterates that sexual orientation is a concept covered by Article 14 (see the above-cited *Salgueiro da Silva Mouta v. Portugal* case, § 28). Just like differences based on sex, (see the *Karlheinz Schmidt v. Germany* judgment, ibid. and the *Petrovic v. Austria* judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 587, § 37), differences based on sexual orientation require particularly serious reasons by way of justification (see the above-cited *Smith and Grady v. the United Kingdom* case, § 90).

38. The Government asserted that the contested provision served to protect the sexual development of male adolescents. The Court accepts that the aim of protecting the rights of others is a legitimate one. It remains to be ascertained whether there existed a justification for the difference of treatment.

39. (…) the Court has frequently held that the Convention is a living instrument, which has to be interpreted in the light of present-day conditions (see, for instance, the above-cited *Fretté v. France* case, ibid.) In the Sutherland case, the Commission, having regard to recent research according to which sexual orientation is usually established before puberty in both boys and girls and to the fact that the majority of member States of the Council of Europe have recognised equal ages of consent, explicitly stated that it was "opportune to reconsider its earlier case-law in the light of these modern developments" (*Sutherland v. the United Kingdom*, Commission's report, cited above, §§ 59-60). It reached the conclusion that in the absence of any objective and reasonable justification the maintenance of a higher age of consent for homosexual than for heterosexual acts violated Article 14 taken together with Article 8 of the Convention (ibid., § 66).

40. Furthermore, the Court considers that the difference between the Sutherland case and the present case, namely that the adolescent partner participating in the proscribed homosexual acts was not punishable, is not decisive. This element was only a secondary consideration in the Commission's report (*ibid*., § 64).

41. What is decisive is whether there was an objective and reasonable justification why young men in the fourteen-to eighteen-year age bracket needed protection against any sexual relationship with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. In this connection the Court reiterates that the scope of the margin of appreciation left to the Contracting State will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for instance, *Petrovic v. Austria*, cited above, § 38, and *Fretté v. France*, cited above, § 40).

43. (…) the vast majority of experts heard in Parliament clearly expressed themselves in favour of an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty and that the theory that male adolescents were "recruited" into homosexuality had thus been disproved. Notwithstanding its knowledge of these changes in the scientific approach to the issue, Parliament decided in November 1996 to keep Article 209 on the statute book.

44. To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour (see *Smith and Grady v. the United Kingdom*, cited above, § 97).

45. In conclusion, the Court finds that the Government have not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code.

46. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

47. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

51. The Court observes that, in a number of cases concerning the maintenance in force of legislation penalising homosexual acts between consenting adults, it considered that the finding of a violation in itself constituted sufficient just satisfaction for any non-pecuniary damage suffered (see the *Dudgeon v. the United Kingdom* judgment (just satisfaction) of 24 February 1983, Series A no. 59, pp. 7-8, § 14; the *Norris v. Ireland* judgment of 26 October 1988, Series A no. 142, pp. 21-22, § 50; and the *Modinos v. Cyprus* judgment of 22 April 1993, Series A no. 259, p. 12, § 30).

52. Nevertheless the Court notes that the judgments in the above-cited cases were given between twenty and ten years ago. The Court considers it appropriate to award just satisfaction for non-pecuniary damage in a case like the present one, even though Article 209 of the Criminal Code has recently been repealed and the applicant has therefore achieved in part the objective of his application. In fact, the Court attaches weight to the fact that the applicant was prevented from entering into relations corresponding to his disposition until he reached the age of eighteen. Making an assessment on an equitable basis, the Court awards the applicant EUR 5,000.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

2. *Holds* unanimously that there is no need to rule on the complaints lodged under Article 8 of the Convention alone.

3. *Holds*
(a) by 4 votes to 3 that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;
(…)

Case of L. and V. v. Austria, Applications no. 39392/98 and 39829/98, Judgment of 9 January 2003

Keywords: homosexual – conviction – private life – discrimination – age – satisfaction

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

10. On 8 February 1996 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) convicted the first applicant under Article 209 of the Criminal Code (*Strafgesetzbuch*) of homosexual acts with adolescents and sentenced him to one year's imprisonment suspended on probation for a period of three years. Relying mainly on the first applicant's diary, in which he had made entries about his sexual encounters, the court found it established that between 1989 and 1994 the first applicant had had, in Austria and in a number of other countries, homosexual relations either by way of oral sex or masturbation with numerous persons between 14 and 18 years of age, whose identity could not be established.

11. On 5 November 1996 the Supreme Court (*Oberster Gerichtshof*), upon the first applicant's plea of nullity, quashed the judgment regarding the offences committed abroad.

14. On 31 July 1997 the Vienna Court of Appeal (*Oberlandesgericht*), upon the first applicant's appeal, reduced the sentence to eight months' imprisonment suspended on probation for a period of three years.

B. The second applicant

15. On 21 February 1997 the Vienna Regional Criminal Court convicted the second applicant under Article 209 of the Criminal Code of homosexual acts with adolescents, and on one minor count of misappropriation. It sentenced him to six months' imprisonment suspended on probation for a period of three years. The Court found it established that on one occasion the second applicant had had oral sex with a 15-year-old.

16. On 22 May 1997 the Vienna Court of Appeal dismissed the second applicant's appeal on points of law, in which he had complained that Article 209 of the Criminal Code was discriminatory and violated his right to respect for his private life and had suggested that the Court of Appeal request the Constitutional Court to review the constitutionality of that provision. It also dismissed his appeal against sentence. The decision was served on 3 July 1997.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

36. It is not in dispute that the present case falls within the ambit of Article 8, concerning as it does a most intimate aspect of the applicants' private life (see, for instance, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52, and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, ECHR 1999-VI). Article 14 is therefore applicable.

43. The Court notes at the outset that, following the Constitutional Court's judgment of 21 June 2002, Article 209 of the Criminal Code was repealed on 10 July 2002. The amendment in question came into force on 14 August 2002. However, this development does not affect the applicants' status as victim within the meaning of Article 34 of the Convention. In this connection, the Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). In the present case it is sufficient to note that the applicants were convicted under the contested provision and that their respective convictions remain unaffected by the change in the law. Thus, as the applicants rightly pointed out, it cannot be said that the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention.

44. According to the Court's established case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29, ECHR 1999-IX; and *Fretté v. France*, no. 36515/97, §§ 34 and 40, ECHR 2002-I).

45. (…) the Court reiterates that sexual orientation is a concept covered by Article 14 (see *Salgueiro da Silva Mouta*, cited above, § 28). Just like differences based on sex (see *Karlheinz Schmidt*, cited above, ibid., and *Petrovic v. Austria*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 587, § 37), differences based on sexual orientation require particularly serious reasons by way of justification (see *Smith and Grady*, cited above, § 90).

46. The Government asserted that the contested provision served to protect the sexual development of male adolescents. The Court accepts that the aim of protecting the rights of others is a legitimate one. It remains to be ascertained whether there existed a justification for the difference of treatment.

47. (…) the Court has frequently held that the Convention is a living instrument, which has to be interpreted in the light of present-day conditions (see, for instance, *Fretté*, cited above, ibid.) In *Sutherland*, the Commission, having regard to recent research according to which sexual orientation is usually established before puberty in both boys and girls and to the fact that the majority of member States of the Council of Europe have recognised equal ages of consent, explicitly stated that it was

“opportune to reconsider its earlier case-law in the light of these modern developments” (Commission's report cited above, §§ 59-60). It reached the conclusion that in the absence of any objective and reasonable justification the maintenance of a higher age of consent for homosexual acts than for heterosexual ones violated Article 14 taken in conjunction with Article 8 (ibid., § 66).

48. Furthermore, the Court considers that the difference between *Sutherland* and the present case, namely that here the adolescent partner participating in the proscribed homosexual acts was not punishable, is not decisive. This element was only a secondary consideration in the Commission's report (ibid., § 64).

49. What is decisive is whether there was an objective and reasonable justification why young men in the 14 to 18 age bracket needed protection against sexual relationships with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. In this connection the Court reiterates that the scope of the margin of appreciation left to the Contracting State will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for instance, *Petrovic*, cited above, § 38, and *Fretté*, cited above, § 40).

51. (…) the vast majority of experts who gave evidence in Parliament clearly expressed themselves in favour of an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty and that the theory that male adolescents were “recruited” into homosexuality had thus been disproved. Notwithstanding its knowledge of these changes in the scientific approach to the issue, Parliament decided in November 1996, that is, shortly before the applicants' convictions, in January and February 1997 respectively, to keep Article 209 on the statute book.

52. To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour (see *Smith and Grady*, cited above, § 97).

53. In conclusion, the Court finds that the Government have not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision.

54. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

55. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

60. In the present case, the Court notes that Article 209 of the Criminal Code has recently been repealed and that the applicants have therefore in part achieved the objective of their application. However, they were convicted under Article 209. The Court considers that the criminal proceedings and, in particular, the trial during which details of the applicant's most intimate private life were laid open in public, have to be considered as profoundly destabilising events in the applicants' lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them (see *Smith and Grady* (just satisfaction), ibid.). Making an assessment on an equitable basis, the Court awards the applicants EUR 15,000 each.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

2. *Holds* that there is no need to rule on the complaints lodged under Article 8 of the Convention taken alone;

3. *Holds*
(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and 10,633.53 (ten thousand six hundred and thirty-three euros fifty-three cents) in respect of costs and expenses;
(…)

Case of Waite v. the United Kingdom, Application no. 53236/99, Judgment of 10 December 2002

Keywords: homosexual – discrimination – age

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, then aged sixteen years, was convicted of the murder of his grandmother on 12 October 1981. At his trial, he had unsuccessfully raised the defence of diminished responsibility, based on the fact that he had been addicted to glue sniffing for several years. He was sentenced to detention at Her Majesty's Pleasure pursuant to section 53(1) of the Children and Young Persons Act 1933. His tariff (the portion of sentence representing punishment and deterrence) was set at 10 years.

10. On 26 January 1994, the applicant, aged 29 years, was released on life licence.

11. No concerns arose with his supervising probation officer until in April 1997 the applicant told her that he had been having a sexual relationship with MM, a 16-year-

old youth. MM was regarded as a vulnerable youth and had been provided with the support of a social worker following his involvement in a theft offence.

19. On 21 July 1997, the Secretary of State accepted the recommendation, revoked the applicant's licence and recalled him to prison. (…)

33. The applicant was released on 17 November 1998.

36. On 21 December 1999, the applicant was again recalled to prison, following his arrest for possession of a Class A drug (ecstasy) and a Class B drug (cannabis). His recall was recommended by the Parole Board and he continues to be detained in prison on the recommendation of the Parole Board following periodic reviews of his case. He is currently detained in open prison and his next review is scheduled for December 2002.

THE LAW
(…)

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

B. The Court's assessment

79. For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Camp and Bourimi v. the Netherlands*, no. 28369/95, ECHR 2000-X, § 37).

80. The Court recalls that in this case the decision for the applicant's recall included reference to his relationship with a minor who was male. At that time, the age of consent for male consensual adult homosexual relations was set at 18, while the age of consent for heterosexual relations was 16. The age for male homosexuals was not brought down to 16 until a few years later when the Sexual Offences (Amendment) Act 2000 came into force. The Court does not consider that it must necessarily be assumed that it would not have been of concern to the probation service if the applicant, a prisoner on life licence, had become involved in a relationship with a girl of 16 years. In their assessment of any risk of dangerousness to the public of a person convicted of murder, it would have been inevitable that his relationships, as with other aspects of his life affecting his stability, would have come under scrutiny, whether contrary to the criminal law or not. Furthermore, as the Government points out, the relationship with MM was known for some months without any action being taken. It appears that it was his arrest for drugs offences and his failure to keep in contact with his probation officer which gave rise to serious alarm. While therefore the relationship with MM was referred to in the reports, the Court does not find that it can be considered as playing a determinative role in his recall to prison.

81. In the circumstances, it has not been established that the applicant has been treated differently in the enjoyment of his rights under Articles 5 or 8 of the Convention on grounds of his sexual orientation. There has therefore been no violation of Article 14 of the Convention.

Case of Perkins and R. v. the United Kingdom, Applications no. 43208/98 and 44875/98, Judgment of 22 October 2002

Keywords: homosexual – armed forces – investigation – discharge – private life

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

12. On 11 February 1991 the first applicant joined the Royal Navy as a medical assistant and worked in a Royal Navy hospital. He signed on for 22 years of service. Between 1992 and 1995 he passed several professional examinations, described as being "for advancement and sub-specialisation". His naval character was assessed as being "very good" for every year that he served in the Royal Navy and he was granted a good conduct badge on 11 February 1995. (…)

13. On 1 August 1995 the first applicant was interviewed by the Special Investigations Branch ("SIB") of the Royal Navy, as a result of the receipt of information by the naval authorities that he was homosexual.

14. The first applicant confirmed at the outset that the interview took place with his consent and that he was homosexual. Thereafter, the interview continued for about a further 10 minutes. (…)

15. After the interview the first applicant was informed that he would be discharged pursuant to the Ministry of Defence's policy against homosexuals serving in the armed forces. The discharge took effect on 24 October 1995. At the time of his discharge the first applicant held the position of leading medical assistant.

21. On 17 February 1998 the ECJ found that Article 119 of the Treaty of Rome and the Equal Pay Directive (EU Council Directive 75/117/EEC, also prohibiting discrimination "on grounds of sex") did not apply to discrimination on grounds of sexual orientation (*Grant v. South West Trains Ltd* [1998] ICR 449).

22. (…) On 13 July 1998, following a hearing between the parties, the High Court ordered the withdrawal of its reference in the first applicant's case. Leave to appeal that decision was refused by the High Court. On 15 July 1998, two Queen's Counsel advised the first applicant against an appeal to the Court of Appeal on the grounds that such an appeal did not have any prospects of success.

B. The second applicant

23. On 30 July 1990 the second applicant joined the Royal Navy. She signed on for 22 years of service. Following basic training, she trained as a radio operator. In May

1991 she passed a course described as “specialist courses of civilian value” in basic ships fire fighting. In June 1992 she passed a professional qualifying examination for wren radio operator first class, described as a “highest service examination”. Her naval character was assessed as being “very good” for each year in which she served in the Royal Navy and her efficiency was noted to be “satisfactory”.

24. In or around September 1993, the second applicant, who was working on a submarine base in Scotland and was suffering from a great deal of emotional distress relating to her father’s illness, confided in a colleague that she had had a brief lesbian relationship with a civilian whilst on leave. The second applicant discussed this with no one else. That colleague reported the second applicant to the naval authorities.

25. On 10 September 1993 the second applicant was woken up and interrogated by an officer from the SIB for two hours. The interview focussed on matters of an intimate sexual nature. (…)

27. The second applicant’s discharge came into effect on 26 November 1993. Her character on her ‘Certificate of Discharge’ was recorded to be “exemplary”. (…)

29. (…) in view of, *inter alia*, the above-cited judgment of the ECJ on 30 April 1996 in the *Cornwall County Council* case and the reference under former Article 177 to the ECJ by the High Court in the first applicant’s case in March 1997, the second applicant lodged, on 27 January 1998, an application in the Industrial Tribunal alleging unfair dismissal (although this complaint was later withdrawn) and sexual discrimination contrary to the provisions of the Sex Discrimination Act 1975 and the Equal Treatment Directive. She also requested the Industrial Tribunal to stay her case pending the outcome of the afore-mentioned Article 177 reference in the first applicant’s case.

31. (…) On 23 July 1998 the Employment Appeal Tribunal dismissed her appeal on the basis that it had been withdrawn.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION, ALONE AND IN CONJUNCTION WITH ARTICLE 14

B. The Court’s assessment

38. The Court recalls that in its judgments in the above-cited cases of *Lustig-Prean and Beckett* (§§ 63-68 and 80-105) and *Smith and Grady* (§§ 70-75 and 87-112) it found that the investigation of the applicants’ sexual orientation, and their discharge from the armed forces on the grounds of their homosexuality pursuant to the absolute policy of the Ministry of Defence against the presence of homosexuals in the armed forces, constituted direct interferences with the applicants’ right to respect for their private lives which could not be justified under the second paragraph of Article 8 of the Convention as being “necessary in a democratic society”. A violation of Article 8 was therefore found.

39. The Court further recalls that, in those cases, it considered (at §§ 108 and 115, respectively) that the applicants' complaints under Article 14 of the Convention that they had been discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence amounted in effect to the same complaint, albeit seen from a different angle, that the Court had already considered in relation to Article 8 of the Convention.

40. The Court does not consider there to be any material difference between those cases and the present one.

41. Accordingly, the Court finds that in the present case there has been a violation of Article 8 of the Convention in respect of each applicant. In addition, the Court does not consider that the applicants' complaints under Article 14 of the Convention in conjunction with Article 8 give rise to any separate issue.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8;

Case of Beck, Copp and Bazeley v. the United Kingdom, Applications no. 48535/99, 48536/99 and 48537/99, Judgment of 22 October 2002

Keywords: homosexual – armed forces – discharge – private life – ill-treatment (no violation) – freedom of expression (no examination) – effective remedy

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

12. On 4 May 1976 the first applicant joined the Royal Air Force ("RAF"). By 1993 he had reached the rank of sergeant in the Electronic Warfare Operational Support Establishment ("EWOSE") where he was employed as a communications systems analyst and he submitted that he was well placed for promotion. (…)

13. The first applicant's service evaluations covering the period June 1990 to January 1993 all recorded his conduct as exemplary and, for the most part, his trade proficiency, supervisory ability and personal qualities were assessed at 8 out of 10. (…) He was said to be "widely recognised as one of the most experienced [senior non-commissioned officers] in the trade".

15. (…) on 10 May 1993 the first applicant informed the EWOSE security officer that he was homosexual and he made it clear that he had always been a celibate homosexual. Since he considered his discharge inevitable, he requested that it take place as soon as possible. (…)

16. A service police investigation commenced on 20 May 1993 which included their completing a Character Defect Enquiry ("CDE") on the first applicant. (…)

22. The CDE report concluded that no signs of homosexual tendencies were identified by the first applicant's ex-wife, colleagues or friends, that the only evidence was the first applicant's own admission and that the enquiry had not revealed anything to rebut the first applicant's submissions that he had not had a homosexual physical relationship. Various identified matters could imply that the first applicant had mercenary reasons for wishing to be discharged and it was noted that he had threatened to go to the press if he was not treated properly. It was recommended that the first applicant's financial problems should be included in any further personal security report.

26. Further to the intervention of the first applicant's Member of Parliament, the Parliamentary Under-Secretary of State for Defence apologised for the delay in processing the first applicant's case and, on 27 November 1993, the first applicant was discharged from the RAF on grounds of his homosexuality. (…)

B. The second applicant

27. The second applicant joined the Royal Army Medical Corps on June 1978 and was indexed as a pupil nurse on 12 November 1979. He passed his autumn assessment in 1981. At the time of his discharge on 29 January 1982 he was a Private, training as a pupil nurse in a military hospital.

29. In June 1981 the second applicant commenced a homosexual relationship with a civilian. Six months later he received a posting order to Germany and applied for a home posting as he wished to remain in the United Kingdom with his partner. His application was refused. He submitted that he then realised that he could not lead a double life or face separation from his partner. Although he knew that revealing his homosexuality would lead to his discharge, he informed his nurse tutor. The latter informed the personnel officer who conducted four interviews with the second applicant on the subject of his homosexuality.

30. The second applicant was then required to undergo a psychiatric assessment and was advised that this was necessary in order to ascertain whether he was, in fact, homosexual. (…) He was discharged from the army on 29 January 1982 on grounds of his homosexuality.

C. The third applicant

33. The third applicant joined the RAF on 10 November 1985 and commenced officer training at the RAF college. He was commissioned as Acting Petty Officer on 27 March 1986, achieved the rank of Flight Lieutenant in September 1991 and served as a second navigator at a RAF base in Scotland.

35. In August 1994 the third applicant's credit card holder, which he had previously lost, was found by an officer of the service police in the latter's internal mail and its contents aroused suspicion that the third applicant might be homosexual. On 3 August 1994 the third applicant was interviewed by an officer of the service police and he

was shown two membership cards of homosexual clubs which were in his name. The third applicant confirmed that the cards were his and that he was homosexual. During that interview he was pressed to give names of service personnel with whom he had had a sexual relationship. He stated that his homosexual activity was limited to members of the civilian population and that he had never had a sexual relationship with a member of the service.

37. On 24 August 1994 the third applicant was suspended from his normal primary duties with immediate effect. A report was prepared recommending that he be ordered to resign his commission on the grounds of unsuitability.

38. On 31 August 1994 the third applicant lodged a petition challenging this recommendation. On 6 January 1995 the decision of the Air Force Board, rejecting the third applicant's petition, was promulgated. On 19 May 1995 he was informed that the decision of the Air Force Board would not be reviewed. On 4 September 1995 he was discharged from the RAF on grounds of his homosexuality.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3, 8 AND 10 OF THE CONVENTION, ALONE AND IN CONJUNCTION WITH ARTICLE 14, AND OF ARTICLE 13 OF THE CONVENTION

B. The Court's assessment

1. Article 8 of the Convention, alone and in conjunction with Article 14

51. The Court recalls that in its judgments in the above-cited cases of *Lustig-Prean and Beckett* (§§ 63-68 and 80-105) and *Smith and Grady* (§§ 70-75 and 87-112) it found that the investigation of the applicants' sexual orientation, and their discharge from the armed forces on the grounds of their homosexuality pursuant to the absolute policy of the Ministry of Defence against the presence of homosexuals in the armed forces, constituted direct interferences with the applicants' right to respect for their private lives which could not be justified under the second paragraph of Article 8 of the Convention as being "necessary in a democratic society". A violation of Article 8 was therefore found.

52. The Court further recalls that, in those cases, it considered (at §§ 108 and 115, respectively) that the applicants' complaints under Article 14 of the Convention that they had been discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence amounted in effect to the same complaint, albeit seen from a different angle, that the Court had already considered in relation to Article 8 of the Convention.

53. The Court does not consider there to be any material difference between those cases and the present one. Accordingly, the Court finds that in the present case there has been a violation of Article 8 of the Convention in respect of each applicant. In addition, the Court does not consider that the applicants' complaints under Article 14 of the Convention in conjunction with Article 8 give rise to any separate issue.

2. Article 3 of the Convention, alone and in conjunction with Article 14

54. The Court further recalls that in its above-cited judgment in *Smith and Grady* (§§ 122-123) it found no violation in respect of the applicants' complaints under Article 3, taken either alone or in conjunction with Article 14 of the Convention. It considered that, while the policy of the Ministry of Defence together with the investigation and discharge which ensued were undoubtedly distressing and humiliating for the applicants, the treatment did not reach, in the circumstances of the cases, the minimum level of severity which would bring it within the scope of Article 3 of the Convention.

55. The Court does not find that there is any material difference between that case and the present one. Accordingly, the Court concludes that in the present case there has been no violation of Article 3 of the Convention, taken alone or in conjunction with Article 14.

3. Article 10 of the Convention, alone and in conjunction with Article 14

56. The Court further considered in its above-cited *Smith and Grady* judgment (§§ 127-128) that it was not necessary to examine Ms Smith and Mr Grady's complaints under Article 10 of the Convention, either alone or in conjunction with Article 14. It did not rule out that the policy of the Ministry of Defence could constitute an interference with the applicants' freedom of expression. However, it noted that the sole ground for the investigation and discharge of the applicants was their sexual orientation which was an essentially private manifestation of human personality and it considered that the freedom of expression element of the present case was subsidiary to the applicants' right to respect for their private lives which was principally at issue.

57. The Court does not find that there is any material difference between that case and the present one. Accordingly, the Court concludes that in the present case it is not necessary to examine the applicants' complaints under Article 10 of the Convention, either taken alone or in conjunction with Article 14.

4. Article 13 of the Convention

58. In its above-cited *Smith and Grady* judgment (§§ 135-139), having reviewed the domestic remedies available to the applicants including judicial review proceedings, the Court found that the applicants had no effective remedy in relation to the violation of their right to respect for their private lives guaranteed by Article 8 of the Convention and that there had been, accordingly, a violation of Article 13 of the Convention.

59. The Court does not find that there is any material difference between that case and the present one. Consequently, the Court concludes that in the present case there has been a violation of Article 13 in conjunction with Article 8 of the Convention on the basis that the applicants did not have any effective remedy in relation to the violation of their right to respect for their private lives.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8;

3. *Holds* that there has been no violation of Article 3 of the Convention taken either alone or in conjunction with Article 14;

4. *Holds* that it is not necessary to examine the applicants' complaints under Article 10 of the Convention taken either alone or in conjunction with Article 14;

5. *Holds* that there has been a violation of Article 13 of the Convention;

Case of Christine Goodwin v. the United Kingdom, Application no. 28957/95, judgment of 11 July 2002

Keywords: transsexual – legal status – retirement – private life – birth register – right to marry

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant is a United Kingdom citizen born in 1937 and is a post-operative male to female transsexual.

13. (…) In 1990, she underwent gender re-assignment surgery at a National Health Service hospital. Her treatment and surgery was provided for and paid for by the National Health Service.

15. The applicant claims that between 1990 and 1992 she was sexually harassed by colleagues at work. She attempted to pursue a case of sexual harassment in the Industrial Tribunal but claimed that she was unsuccessful because she was considered in law to be a man. She did not challenge this decision by appealing to the Employment Appeal Tribunal. The applicant was subsequently dismissed from her employment for reasons connected with her health, but alleges that the real reason was that she was a transsexual.

16. In 1996, the applicant started work with a new employer and was required to provide her National Insurance ("NI") number. She was concerned that the new employer would be in a position to trace her details as once in the possession of the number it would have been possible to find out about her previous employers and obtain information from them. Although she requested the allocation of a new NI number from the Department of Social Security ("DSS"), this was rejected and she eventually gave the new employer her NI number. The applicant claims that the new employer has now traced back her identity as she began experiencing problems at work. (…)

17. The DSS Contributions Agency informed the applicant that she would be ineligible for a State pension at the age of 60, the age of entitlement for women in the United Kingdom. (…) On
23 April 1997, she therefore entered into an undertaking with the DSS to pay direct the NI contributions which would otherwise be deducted by her employer as for all male employees. In the light of this undertaking, on 2 May 1997, the DSS Contributions Agency issued the applicant with a Form CF 384 Age Exemption Certificate (see Relevant domestic law and practice below).

18. The applicant's files at the DSS were marked “sensitive” to ensure that only an employee of a particular grade had access to her files. This meant in practice that the applicant had to make special appointments for even the most trivial matters and could not deal directly with the local office or deal with queries over the telephone. Her record continues to state her sex as male and despite the “special procedures” she has received letters from the DSS addressed to the male name which she was given at birth.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

B. The Court's assessment

1. Preliminary considerations

71. This case raises the issue whether or not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment.

72. The Court recalls that the notion of “respect” as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (Cossey v. the United Kingdom judgment of 27 September 1990, Series A no. 184, p. 15, § 37).

73. The Court recalls that it has already examined complaints about the position of transsexuals in the United Kingdom (see the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, the Cossey v. the United Kingdom judgment, cited above; the X., Y. and Z. v. the United Kingdom judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, and the Sheffield and Horsham v. the United Kingdom judgment of 30 July 1998, *Reports* 1998-V, p. 2011). (…)

74. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, the Cossey judgment, p. 14, § 35, and *Stafford v. the United Kingdom* [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR 2002-, §§ 67-68). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above-cited *Stafford v. the United Kingdom* judgment, § 68). In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (see the Rees judgment, § 47; the Cossey judgment, § 42; the Sheffield and Horsham judgment, § 60).

75. The Court proposes therefore to look at the situation within and outside the Contracting State to assess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention (see the *Tyrer v. the United Kingdom* judgment of 25 April 1978, Series A no. 26, § 31, and subsequent case-law).

2. The applicant's situation as a transsexual

76. The Court observes that the applicant, registered at birth as male, has undergone gender re-assignment surgery and lives in society as a female. Nonetheless, the applicant remains, for legal purposes, a male. This has had, and continues to have, effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women, as, *inter alia*, in the area of pensions and retirement age. (…) the Court would note that she (…) has to make use of a special procedure that might in itself call attention to her status.

77. It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, *mutatis mutandis*, Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, § 41). The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

78. In this case, as in many others, the applicant's gender re-assignment was carried out by the national health service, (…). The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full

recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone. The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8 of the Convention. Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual (as demonstrated in the case of X., Y. and Z. v. the United Kingdom, cited above), it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads.

79. The Court notes that the unsatisfactory nature of the current position and plight of transsexuals in the United Kingdom has been acknowledged in the domestic courts (…) and by the Interdepartmental Working Group which surveyed the situation in the United Kingdom and concluded that, notwithstanding the accommodations reached in practice, transsexual people were conscious of certain problems which did not have to be faced by the majority of the population (…).

80. Against these considerations, the Court has examined the countervailing arguments of a public interest nature put forward as justifying the continuation of the present situation. (…)

3. Medical and scientific considerations

81. It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. (…) The Court considers it more significant however that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief (…). The United Kingdom national health service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. (…) Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment. In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance.

82. While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex (Sheffield and Horsham, cited above, p. 2028, § 56), the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals (…).

83. The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals.

4. The state of any European and international consensus

84. Already at the time of the Sheffield and Horsham case, there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment (see § 35 of that judgment). The latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition (…). In Australia and New Zealand, it appears that the courts are moving away from the biological birth view of sex (as set out in the United Kingdom case of *Corbett v. Corbett*) and taking the view that sex, in the context of a transsexual wishing to marry, should depend on a multitude of factors to be assessed at the time of the marriage.

85. The Court observes that in the case of Rees in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition (…). In the later case of Sheffield and Horsham, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

5. Impact on the birth register system

86. In the Rees case, the Court allowed that great importance could be placed by the Government on the historical nature of the birth record system. The argument that allowing exceptions to this system would undermine its function weighed heavily in the assessment.

87. It may be noted however that exceptions are already made to the historic basis of the birth register system, namely, in the case of legitimisation or adoptions, where there is a possibility of issuing updated certificates to reflect a change in status after birth. To make a further exception in the case of transsexuals (a category estimated as including some 2,000-5,000 persons in the United Kingdom according to the Interdepartmental Working Group Report, p. 26) would not, in the Court's view, pose the threat of overturning the entire system. Though previous reference has been made

to detriment suffered by third parties who might be unable to obtain access to the original entries and to complications occurring in the field of family and succession law (see the Rees judgment, p. 18, § 43), these assertions are framed in general terms and the Court does not find, on the basis of the material before it at this time, that any real prospect of prejudice has been identified as likely to arise if changes were made to the current system.

88. Furthermore, the Court notes that the Government have recently issued proposals for reform which would allow ongoing amendment to civil status data (…). It is not convinced therefore that the need to uphold rigidly the integrity of the historic basis of the birth registration system takes on the same importance in the current climate as it did in 1986.

6. Striking a balance in the present case

89. The Court has noted above (…) the difficulties and anomalies of the applicant's situation as a post-operative transsexual. It must be acknowledged that the level of daily interference suffered by the applicant in B. v. France (judgment of 25 March 1992, Series A no. 232) has not been attained in this case and that on certain points the risk of difficulties or embarrassment faced by the present applicant may be avoided or minimised by the practices adopted by the authorities.

90. Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, *inter alia*, *Pretty v. the United Kingdom*, no. 2346/02, judgment of 29 April 2002, § 62, and *Mikuli_ v. Croatia*, no. 53176/99, judgment of 7 February 2002, § 53, both to be published in ECHR 2002-...). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. Domestic recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of *Bellinger v. Bellinger* (…).

91. The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, as is made clear by the report of the Interdepartmental Working Group, these problems are far from insuperable, to the extent that the Working Group felt able to propose as one of the options full legal recognition of the new gender, subject to certain criteria and procedures. (…) No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain

inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.

92. In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments (see references at paragraph 73). Most recently in the Sheffield and Horsham case in 1998, it observed that the respondent State had not yet taken any steps to do so despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted (…).(…) It may be observed that the only legislative reform of note, applying certain non-discrimination provisions to transsexuals, flowed from a decision of the European Court of Justice of 30 April 1996 which held that discrimination based on a change of gender was equivalent to discrimination on grounds of sex (…).

93. Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

B. The Court's assessment

97. The Court recalls that in the cases of Rees, Cossey and Sheffield and Horsham the inability of the transsexuals in those cases to marry a person of the sex opposite to their re-assigned gender was not found in breach of Article 12 of the Convention. These findings were based variously on the reasoning that the right to marry referred to traditional marriage between persons of opposite biological sex (the Rees judgment, p. 19, § 49), the view that continued adoption of biological criteria in domestic law for determining a person's sex for the purpose of marriage was encompassed within the power of Contracting States to regulate by national law the exercise of the right to marry and the conclusion that national laws in that respect could not be regarded as restricting or reducing the right of a transsexual to marry in such a way or to such an extent that the very essence of the right was impaired (the Cossey judgment, p. 18, §§ 44-46, the Sheffield and Horsham judgment, p. 2030, §§ 66-67). Reference was also made to the wording of Article 12 as protecting marriage as the basis of the family (Rees, *loc. cit.*).

98. Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.

99. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see the Rees judgment, p. 19, § 50; the F. v. Switzerland judgment of 18 December 1987, Series A no. 128, § 32).

100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of *Corbett v. Corbett,* …). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender. The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women (…).

101. The right under Article 8 to respect for private life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.

102. The Court has not identified any other reason which would prevent it from reaching this conclusion. (…)

103. It may be noted from the materials submitted by Liberty that though there is widespread acceptance of the marriage of transsexuals, fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court is not persuaded however that this supports an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. While it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future

marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.

104. The Court concludes that there has been a breach of Article 12 of the Convention in the present case.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

108. The Court considers that the lack of legal recognition of the change of gender of a post-operative transsexual lies at the heart of the applicant's complaints under Article 14 of the Convention. These issues have been examined under Article 8 and resulted in the finding of a violation of that provision. In the circumstances, the Court considers that no separate issue arises under Article 14 of the Convention and makes no separate finding.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

120. The Court has found that the situation, as it has evolved, no longer falls within the United Kingdom's margin of appreciation. It will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the applicant's, and other transsexuals', right to respect for private life and right to marry in compliance with this judgment. While there is no doubt that the applicant has suffered distress and anxiety in the past, it is the lack of legal recognition of the gender re-assignment of post-operative transsexuals which lies at the heart of the complaints in this application, the latest in a succession of cases by other applicants raising the same issues. The Court does not find it appropriate therefore to make an award to this particular applicant. The finding of violation, with the consequences which will ensue for the future, may in these circumstances be regarded as constituting just satisfaction.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 12 of the Convention;

3. *Holds* unanimously that no separate issue arises under Article 14 the Convention;

4. *Holds* unanimously that there has been no violation of Article 13 of the Convention;

5. *Holds* unanimously that the finding of violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

Case of I. v. the United Kingdom, Application no. 25680/94, Judgment of 11 July 2002 (Grand Chamber)

Keywords: transsexual – gender reassignment surgery – legal recognition – private life – scientific considerations – birth register – identity – right to marry

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant is a United Kingdom citizen born in 1955 and is a post-operative male to female transsexual. She worked for some time as a dental nurse in the army. In 1985, she applied for a course for the Enrolled Nurse (General) qualification, but was not admitted as she refused to present her birth certificate.

13. At the age of 33, the applicant retired with a disability pension on the basis of ill-health.

14. In 1993 and 1994, the applicant wrote letters to various institutions requesting amendments to the relevant legislation to allow the recognition of transsexuals' changed gender.

15. On 31 July 2001, in reply to her application for a student loan, a local authority required her to submit an original birth certificate in support of her application. On 14 August 2001, in reply to her application to be an administrative assistant in a prison, the applicant was requested to bring to an interview her birth certificate.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

B. The Court's assessment

1. Preliminary considerations

51. This case raises the issue whether or not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment.

52. The Court recalls that the notion of “respect” as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the

Convention (Cossey v. the United Kingdom judgment of 27 September 1990, Series A no. 184, p. 15, § 37).

53. The Court recalls that it has already examined complaints about the position of transsexuals in the United Kingdom (see the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106; the Cossey v. the United Kingdom judgment, cited above; the X., Y. and Z. v. the United Kingdom judgment of 22 April 1997, *Reports* 1997-II, and the Sheffield and Horsham v. the United Kingdom judgment of 30 July 1998, *Reports* 1998-V, p. 2011). (…)[9]

54. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, the Cossey judgment, p. 14, § 35, and *Stafford v. the United Kingdom* [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR, §§ 67-68). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above-cited *Stafford v. the United Kingdom* judgment, § 68). In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (see the Rees judgment, § 47; the Cossey judgment, § 42; the Sheffield and Horsham judgment, § 60).

55. The Court proposes therefore to look at the situation within and outside the Contracting State to assess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention (see the *Tyrer v. the United Kingdom* judgment of 25 April 1978, Series A no. 26, § 31, and subsequent case-law).

2. The applicant's situation as a transsexual

56. The Court observes that the applicant, registered at birth as male, has undergone gender re-assignment surgery and lives in society as a female. Nonetheless, the applicant remains, for legal purposes, a male. This has had, and continues to have, effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women, as, *inter alia*, in the area of pensions and retirement age. The applicant has also given examples of situations where she has been required, as a matter of course, to show her birth certificate. Though the Government argued that she would be able to request to show some other form of identification, this would risk in itself drawing attention to the applicant's situation.

[9] Please see the previous cases presented in this compilation.

57. It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, *mutatis mutandis*, Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 5, § 41). The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

58. (…) The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone. The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8 of the Convention. Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual (as demonstrated in the case of X., Y. and Z. v. the United Kingdom, cited above), it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads.

59. The Court notes that the unsatisfactory nature of the current position and plight of transsexuals in the United Kingdom has been acknowledged in the domestic courts (see *Bellinger v. Bellinger*, …) and by the Interdepartmental Working Group which surveyed the situation in the United Kingdom and concluded that, notwithstanding the accommodations reached in practice, transsexual people were conscious of certain problems which did not have to be faced by the majority of the population (…).

60. Against these considerations, the Court has examined the countervailing arguments of a public interest nature put forward as justifying the continuation of the present situation. (…)

3. Medical and scientific considerations

61. It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. (…) The Court considers it more significant however that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief (for example, the Diagnostic and Statistical Manual fourth edition (DSM-IV) replaced the diagnosis of transsexualism with “gender identity disorder”; see also the International Classification of Diseases, tenth edition (ICD-10)). The United Kingdom National Health Service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. (…) Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything

arbitrary or capricious in the decision taken by a person to undergo gender re-assignment. In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance.

62. While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex (Sheffield and Horsham, cited above, p. 2028, § 56), the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals (see the dissenting opinion of Thorpe LJ in *Bellinger v. Bellinger* cited in paragraph 36 above; and the judgment of Chisholm J in the Australian case, *Re Kevin,* cited in paragraph 39 above).

63. The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals.

4. The state of any European and international consensus

64. Already at the time of the Sheffield and Horsham case, there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment (see § 35 of that judgment). The latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition (…). In Australia and New Zealand, it appears that the courts are moving away from the biological birth view of sex (as set out in the United Kingdom case of *Corbett v. Corbett*) and taking the view that sex, in the context of a transsexual wishing to marry, should depend on a multitude of factors to be assessed at the time of the marriage.

65. The Court observes that in the case of Rees in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition (see § 37). In the later case of Sheffield and Horsham, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. (…) In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of

increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

5. Impact on the birth register system

66. In the Rees case, the Court allowed that great importance could be placed by the Government on the historical nature of the birth record system. The argument that allowing exceptions to this system would undermine its function weighed heavily in the assessment.

67. It may be noted however that exceptions are already made to the historic basis of the birth register system, namely, in the case of legitimisation or adoptions, where there is a possibility of issuing updated certificates to reflect a change in status after birth. To make a further exception in the case of transsexuals (a category estimated as including some 2,000-5,000 persons in the United Kingdom according to the Interdepartmental Working Group Report, p. 26) would not, in the Court's view, pose the threat of overturning the entire system. Though previous reference has been made to detriment suffered by third parties who might be unable to obtain access to the original entries and to complications occurring in the field of family and succession law (see the Rees judgment, p. 18, § 43), these assertions are framed in general terms and the Court does not find, on the basis of the material before it at this time, that any real prospect of prejudice has been identified as likely to arise if changes were made to the current system.

68. Furthermore, the Court notes that the Government have recently issued proposals for reform which would allow ongoing amendment to civil status data (…). It is not convinced therefore that the need to uphold rigidly the integrity of the historic basis of the birth registration system takes on the same importance in the current climate as it did in 1986.

6. Striking a balance in the present case

69. (…) It must be acknowledged that the level of daily interference suffered by the applicant in B. v. France (judgment of 25 March 1992, Series A no. 232) has not been attained in this case and that on certain points the risk of difficulties or embarassment faced by the present applicant may be avoided or minimised by the practices adopted by the authorities.

70. Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, *inter alia*, *Pretty v. the United Kingdom*, no. 2346/02, judgment of 29 April 2002, § 62, and *Mikulic v. Croatia*, no. 53176/99, judgment of 7 February 2002, § 53, both to be published in ECHR 2002-...). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one

gender or the other is no longer sustainable. Domestic recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of *Bellinger v. Bellinger* (…).

71. The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, as is made clear by the report of the Interdepartmental Working Group, these problems are far from insuperable, to the extent that the Working Group felt able to propose as one of the options full legal recognition of the new gender, subject to certain criteria and procedures. As Lord Justice Thorpe observed in the *Bellinger* case, any "spectral difficulties", particularly in the field of family law, are both manageable and acceptable if confined to the case of fully achieved and post-operative transsexuals. Nor is the Court convinced by arguments that allowing the applicant to fall under the rules applicable to women, which would also change the date of eligibility for her state pension, would cause any injustice to others in the national insurance and state pension systems as alleged by the Government. No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.

72. (…) a report has been issued in April 2000 by the Interdepartmental Working Group which set out a survey of the current position of transsexuals in *inter alia* criminal law, family and employment matters and identified various options for reform. Nothing has effectively been done to further these proposals and in July 2001 the Court of Appeal noted that there were no plans to do so (…). It may be observed that the only legislative reform of note, applying certain non-discrimination provisions to transsexuals, flowed from a decision of the European Court of Justice of 30 April 1996 which held that discrimination based on a change of gender was equivalent to discrimination on grounds of sex (…).

73. Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

B. The Court's assessment

78. Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.

79. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see the Rees judgment, p. 19, § 50; the F. v. Switzerland judgment of 18 December 1987, Series A no. 128, § 32).

80. It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of *Corbett v. Corbett*, paragraph 17 above). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. (…) The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women (…).

81. The right under Article 8 to respect for private life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.

83. It may be noted from the materials submitted by Liberty that though there is widespread acceptance of the marriage of transsexuals, fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court is not persuaded however that this supports an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. While it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.

84. The Court concludes that there has been a breach of Article 12 of the Convention in the present case.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

88. (…) In the circumstances, the Court considers that no separate issue arises under Article 14 of the Convention and makes no separate finding.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 12 of the Convention;

3. *Holds* unanimously that no separate issue arises under Article 14 the Convention;

4. *Holds* unanimously that the finding of violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
(…)

Case of Fretté v. France, Application no. 36515/97, Judgment of 26 February 2002

Keywords: homosexual – adoption (rejected)- private life – discrimination (absence of)

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. In October 1991 the applicant made an application for prior authorisation to adopt a child. A social inquiry was opened by the Paris Social Services, Child Welfare and Health Department. On 18 December 1991 the applicant had a first interview with a psychologist from the Department, during which he revealed that he was a homosexual. He submits that during the interview he was strongly urged not to continue with the adoption process.

10. In a decision of 3 May 1993 the Paris Social Services Department rejected the applicant's application for authorisation to adopt. The reasons given for the decision were that the applicant had “no stable maternal role model” to offer and had “difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child”. The decision was taken on the basis of various inquiries (…).

11. On 21 May 1993 the applicant asked the authorities to reconsider their decision but his application was dismissed by a decision of 15 October 1993 indicating, among other things, that the applicant's “choice of lifestyle” did not appear to be such as to provide sufficient guarantees that he would offer a child a suitable home from a family, child-rearing and psychological perspective.

13. In a judgment of 25 January 1995 the Paris Administrative Court set aside the decisions refusing the applicant authorization (…).

16. In a judgment of 9 October 1996 the *Conseil d'Etat* set aside the Administrative Court's judgment and, ruling on the merits, rejected the applicant's application for authorisation to adopt. (…)

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 8 AND 14 OF THE CONVENTION

A. Applicability of Article 14 taken in conjunction with Article 8

27. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the provisions of the Convention (see, among many other authorities, *Petrovic v. Austria*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 585, § 22, and *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, p. 184, § 33).

32. The Court notes that the Convention does not guarantee the right to adopt as such (see *Di Lazzaro*, cited above, and *X v. Belgium and the Netherlands*, no. 6482/74, Commission decision of 10 July 1975, DR 7, p. 75). Moreover, the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, pp. 14-15, § 31, and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 32, § 62). In the instant case, the decision to dismiss the applicant's application for authorisation could not be considered to infringe his right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life.
However, French domestic law (Article 343-1 of the Civil Code) authorises all single persons – whether men or women – to apply for adoption provided that they are granted the prior authorisation required to adopt children in State care or foreign children, and the applicant maintained that the French authorities' decision to reject his application had implicitly been based on his sexual orientation alone. If this is true, the inescapable conclusion is that there was a difference in treatment based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention (see *Salgueiro da Silva Mouta*, cited above, § 28). The Court also reiterates, in this connection, that the list set out in this provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 30-31, § 72).
It is for the Court to determine therefore whether, as the applicant maintained, his avowed homosexuality had a decisive influence. The Court concedes that the reason given by the French administrative and judicial authorities for their decision was the applicant's "choice of lifestyle", and that they never made any express reference to his

homosexuality. As the case file shows, however, that criterion implicitly yet undeniably made the applicant's homosexuality the decisive factor. That conclusion is borne out by the views expressed by the Paris Administrative Court in its judgment of 25 January 1995 and the Government Commissioner in her submissions to the *Conseil d'Etat*. The applicant's right under Article 343-1 of the Civil Code, which falls within the ambit of Article 8 of the Convention, was consequently infringed on the decisive ground of his sexual orientation.

33. Accordingly, Article 14 of the Convention, taken in conjunction with Article 8, is applicable.

B. Compliance with Article 14 taken in conjunction with Article 8

34. According to the Court's case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among other authorities, *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24, and *Van Raalte*, cited above, p. 186, § 39). In that connection, the Court observes that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, among other authorities, *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112, pp. 24-25, § 53).

37. The Court observes that it has found that the decision contested by the applicant was based decisively on the latter's avowed homosexuality. Although the relevant authorities also had regard to other circumstances, these appeared to be secondary grounds.

38. In the Court's opinion there is no doubt that the decisions to reject the applicant's application for authorisation pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure, for which the granting of authorisation was, in principle, a prerequisite. It remains to be ascertained whether the second condition, namely the existence of a justification for the difference of treatment, was also satisfied.

39. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (see *Thlimmenos*, cited above, § 44).

40. However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, among other authorities, *Petrovic*, cited above, pp. 587-88, § 38, and *Rasmussen v. Denmark*, judgment of 28 November 1984, Series A no. 87, p. 15, § 40).

41. It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely. The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State (see, *mutatis mutandis*, *Manoussakis and Others v. Greece*, judgment of 26 September 1996, *Reports* 1996-IV, p. 1364, § 44, and *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 84, ECHR 2000-VII). This margin of appreciation should not, however, be interpreted as granting the State arbitrary power, and the authorities' decision remains subject to review by the Court for conformity with the requirements of Article 14 of the Convention.

42. As the Government submitted, at issue here are the competing interests of the applicant and children who are eligible for adoption. The mere fact that no specific child is identified when the application for authorisation is made does not necessarily imply that there is no competing interest. Adoption means “providing a child with a family, not a family with a child”, and the State must see to it that the persons chosen to adopt are those who can offer the child the most suitable home in every respect. The Court points out in that connection that it has already found that where a family tie is established between a parent and a child, “particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent” (see *E.P. v. Italy*, no. 31127/96, § 62, 16 November 1999, and *Johansen v. Norway*, judgment of 7 August 1996, *Reports* 1996-III, p. 1008, § 78). It must be observed that the scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date. In addition, there are wide differences in national and international opinion, not to mention the fact that there are not enough children to adopt to satisfy demand. This being so, the national authorities, and particularly the *Conseil d'Etat*, which based its decision, *inter alia*, on the Government Commissioner's measured and detailed submissions, were legitimately and reasonably entitled to consider that the right to be able to adopt on which the applicant relied under Article 343-1 of the Civil Code was limited by the interests of children eligible for adoption, notwithstanding the applicant's legitimate aspirations and without calling his personal choices into question. If account is taken of the broad margin of appreciation to be left to States in this area and the need to protect children's best interests to achieve the desired balance, the refusal to authorise adoption did not infringe the principle of proportionality.

43. In short, the justification given by the Government appears objective and reasonable and the difference in treatment complained of is not discriminatory within the meaning of Article 14 of the Convention.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8;
(…)

Case of Sutherland v. the United Kingdom, Application no. 25186/94, Report and Judgment

Keywords: homosexual – age – discrimination – private life

Report of the European Commission of Human Rights, 1st July 1997

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

18. The applicant had his first homosexual encounter when he was 16, with another person of his own age who was also homosexual. They had sexual relations, but both worried about the law.

III. OPINION OF THE COMMISSION

C. Articles 8 and 14 (Art. 8+14) of the Convention

35. The Commission notes that, prior to November 1994 and until the applicant's eighteenth birthday, the effect of the legislation was to prohibit the applicant from engaging in any homosexual act with another male.

36. Consistently with the Court's judgments in the Dudgeon, Norris and Modinos cases (Eur. Court HR, Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45; Norris v. Ireland judgment of 26 October 1988, Series A no. 142; Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259), the Commission considers that the maintenance in force of the impugned legislation constituted an interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention. Even though the applicant has not in the event been prosecuted or threatened with prosecution, the very existence of the legislation directly affected his private life: either he respected the law and refrained from engaging in any prohibited sexual acts prior to the age of 18 or he committed such acts and thereby became liable to criminal prosecution. The Commission further finds no reason to doubt the general truth of the applicant's allegations as to the distress he felt in having to choose between engaging in a sexual relationship with a like-orientated person of around the same age and breaking the law.

37. The Commission accordingly finds that the applicant was until he attained the age of 18 directly affected by the legislation in question and can claim to be a "victim" thereof under Article 25 (Art. 25) of the Convention.

38. (…) It is well established by that case-law that there is a legitimate necessity in a democratic society for some restrictions over homosexual conduct, notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason of their youth. As the Court has observed, such restrictions serve the interests both of the "protection of the rights and freedoms of others" and the "protection of morals" (…) (the above-mentioned Dudgeon judgment, p. 20, para. 47).

39. The Court further observed that it fell in the first instance to the national authorities to decide on the appropriate safeguards required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law (ibid, p. 24, para. 62).

48. The Commission recalls that Article 14 (Art. 14) of the Convention affords protection against discrimination, that is, treating differently persons in relevantly similar situations without due justification (Eur. Court HR, Fredin v. Sweden judgment of 18 February 1991, Series A no. 192, p. 19, para. 60). In particular, "a difference of treatment is discriminatory, for the purposes of Article 14 (Art. 14), if it 'has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment" (Eur. Court HR, Gaygusuz v. Austria judgment of 16 September 1996, Reports 1996, para. 42).

49. In the United Kingdom, prior to 3 November 1994, the minimum age for consensual male homosexual relations was 21 and, since that date, the minimum age has been 18. The age of consent for consensual heterosexual and lesbian relations has at all material times been 16. There were and are therefore at least two differences which are at issue: the difference in treatment of homosexual and heterosexual relationships, and the difference in treatment between male homosexual and lesbian relationships. (…)

50. The different minimum ages for lawful sexual relations between homosexuals and heterosexuals are a difference based on sexual orientation. In terms of Article 14 (Art. 14) of the Convention, it is not clear whether this difference is a difference based on "sex" or on "other status". The Commission notes that the Human Rights Committee set up under the International Covenant on Civil and Political Rights has considered that sexual orientation is included in the concept of "sex" within the meaning of Article 26 (Art. 26) of that Covenant, and that it did not therefore need to decide whether sexual orientation was included in the concept of "other status" (Toonen v. Australia, CCPR/C/50/D/488/1992).

51. The Commission for its part considers that it is not required to determine whether a difference based on sexual orientation is a matter which is properly to be considered

as a difference on grounds of "sex" or of "other status". In either event, it is a difference in respect of which the Commission is entitled to seek justification.

52. The Commission notes that it is not contested that the applicant, as a young man of 17 years of age who wished to enter into and maintain sexual relations with a male friend of the same age, was in a "relevantly similar situation" to a young man of the same age who wished to enter into and maintain sexual relations with a female friend of the same age.

54. The Commission accepts, as does the applicant, that the aim of protecting morals and the rights of others is legitimate. The Commission also accepts that legal measures which prescribe age limits for particular types of sexual behaviour are, in principle, a legitimate way of pursuing that aim. (…)

55. The third question for the Commission is whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised, and it is in this connection that the Commission must bear in mind the margin of appreciation which the respondent enjoys in assessing whether and to what extent differences justify a different treatment.

57. The Commission is of the opinion that, regardless of whether the difference in treatment of heterosexuals and homosexuals is based on "sex" or "other status", given that it impinges on a most intimate aspect of affected individuals' private lives, the margin of appreciation must be relatively narrow.

59. The Commission, however, observes that its Report in X. v. the United Kingdom is now nearly 20 years old. While it is true that the views expressed in that Report have been subsequently repeated, it is also true that major changes have in the meantime occurred in professional opinions - particularly those of the medical profession- on the subject of the need for the protection of young male homosexuals and on the desirability of introducing an equal age of consent. In the first place, it is noted that even by 1981 the Policy Advisory Committee was unanimous in its view that the sexual pattern of the overwhelming majority of young men was fixed by the age of 18 and that a minimum age in excess of 18 could no longer be supported. Since 1981 there have been further important developments in professional opinion. In particular, as noted above, the Council of the British Medical Association (BMA), which in 1981 gave evidence to the Policy Advisory Committee that boys and girls of the same age did not possess the same degree of emotional and psychological maturity, observed in 1994 that most researchers now believed that sexual orientation was usually established before the age of puberty in both boys and girls and referred to evidence that reducing the age of consent would be unlikely to affect the majority of men engaging in homosexual activity, either in general or within specific age groups. The BMA Council concluded in its Report that the age of consent for homosexual men should be set at 16 since the then existing law might inhibit efforts to improve the sexual health of young homosexual and bisexual men. An equal age of consent was also supported by the Royal College of Psychiatrists, the Health Education Authority and the National Association of Probation Officers as well as by other bodies and organisations concerned with health and social welfare. It is further noted that equality of treatment in respect of the age of consent is now recognised by the great majority of Member States of the Council of Europe.

60. The Commission, accordingly, considers it opportune to reconsider its earlier case-law in the light of these modern developments and, more especially, in the light of the weight of current medical opinion that to reduce the age of consent to 16 might have positively beneficial effects on the sexual health of young homosexual men without any corresponding harmful consequences.

62. The Commission agrees with the Government that some weight should be attached to the fact that the issue has been recently considered by the legislature and that the reduction of the minimum age to 16 was rejected. Nevertheless, this factor cannot of itself be decisive. Of more importance is the sufficiency of the reasons advanced to justify maintaining a different age of consent.

64. The Commission does not consider that either argument offers a reasonable and objective justification for maintaining a different age of consent for homosexual and heterosexual acts or that maintaining such a differential age is proportionate to any legitimate aim served thereby. As to the former argument, as was conceded in the Parliamentary debates, current medical opinion is to the effect that sexual orientation is fixed in both sexes by the age of 16 and that men aged 16-21 are not in need of special protection because of the risk of their being "recruited" into homosexuality. Moreover, as noted by the BMA, the risk posed by predatory older men would appear to be as serious whether the victim is a man or woman and does not justify a differential age of consent. Even if, as claimed in the Parliamentary debate, there may be certain young men for whom homosexual experience after the age of 16 will have influential and potentially disturbing effects and who may require protection, the Commission is unable to accept that it is a proportionate response to the need for protection to expose to criminal sanctions not only the older man who engages in homosexual acts with a person under the age of 18 but the young man himself who is claimed to be in need of such protection.

65. As to the second ground relied on - society's claimed entitlement to indicate disapproval of homosexual conduct and its preference for a heterosexual lifestyle - the Commission cannot accept that this could in any event constitute an objective or reasonable justification for inequality of treatment under the criminal law. (…)

66. Consequently, the Commission finds that no objective and reasonable justification exists for the maintenance of a higher minimum age of consent to male homosexual, than to heterosexual, acts and that the application discloses discriminatory treatment in the exercise of the applicant's right to respect for private life under Article 8 (Art. 8) of the Convention.

CONCLUSION

67. The Commission concludes, by fourteen votes to four, that in the present case there has been a violation of Article 8 of the Convention, taken in conjunction with Article 14 (Art. 8+14) of the Convention.

Judgment of 27 March 2001 (Grand Chamber)

20. The Court takes note of the request made by each party to strike the case out if its list in the light of the entry into force on 8 January 2001 of the Sexual Offences (Amendment) Act 2000. By equalising the age of consent for homosexual acts between consenting males to 16, the new provisions removed the risk or threat of prosecution that previously existed under the national law of the respondent State and which had prompted the applicant's bringing an application under the Convention. It is further noted that the Government have reimbursed the legal costs incurred by the applicant in pursuing his case.
Against this background, the Court is satisfied that the matter has been resolved for the purposes of Article 37 § 1 b of the Convention. In addition, it discerns no reason of *ordre public* (public order) for continuing the proceedings (Article 37 § 1 *in fine* of the Convention).

21. Accordingly, the case should be struck out of the list.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Decides to strike the case out of the list.

Case of A.D.T. v. the United Kingdom, Application no. 35765/97, Judgment of 31 July 2000

Keywords: homosexual – criminal proceedings – private life

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a practising homosexual. On 1 April 1996, at approximately 7.50 p.m., police officers conducted a search under warrant of the applicant's home. As a result of the search, various items were seized including photographs and a list of videotapes. The applicant was arrested at about 8.23 p.m. and taken to the local police station. A further search of the applicant's house was conducted the following day and further items, including videotapes, were seized.

9. (…) On 2 April 1996 the applicant was charged with gross indecency between men contrary to section 13 of the Sexual Offences Act 1956 ("gross indecency"). The charge related to the commission of the sexual acts depicted in one of the videotapes, which consisted of oral sex and mutual masturbation. It did not relate to the making or distribution of the tapes themselves.

10. On 30 October 1996 the applicant appeared before a magistrates' court. The principal evidence adduced by the Crown consisted of a single specimen video containing footage of the applicant and up to four other men engaging in acts of oral sex and mutual masturbation. The acts which formed the basis of the charge involved consenting adult men, took place in the applicant's home and were not visible to anyone other than the participants. There was no element of sado-masochism or

physical harm involved in the activities depicted on the videotape. The applicant was convicted of the offence of gross indecency. On 20 November 1996 the applicant was sentenced and conditionally discharged for two years. An order was made for the confiscation and destruction of the seized material.

THE LAW

I. Alleged violation of Article 8 of the Convention

A. Whether there was an interference

23. The Court recalls that the mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life (see, as the most recent Court case-law, the Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259, p. 11, § 24).

24. The present applicant was aware that his conduct was in breach of the criminal law, and he was thus continuously and directly affected by the legislation. In addition, he was directly affected in that a criminal prosecution was brought against him which resulted in his conviction for a breach of section 13 of the Sexual Offences Act 1956.

25. (…) The sole element in the present case which could give rise to any doubt about whether the applicants' private lives were involved is the video-recording of the activities. No evidence has been put before the Court to indicate that there was any actual likelihood of the contents of the tapes being rendered public, deliberately or inadvertently. In particular, the applicant's conviction related not to any offence involving the making or distribution of the tapes, but solely to the acts themselves. The Court finds it most unlikely that the applicant, who had gone to some lengths not to reveal his sexual orientation, and who has repeated his desire for anonymity before the Court, would knowingly be involved in any such publication.

26. The Court thus considers that the applicant has been the victim of an interference with his right to respect for his private life both as regards the existence of legislation prohibiting consensual sexual acts between more than two men in private and as regards the conviction for gross indecency.

B. Whether the interference was justified

29. An interference with the exercise of an Article 8 right will not be compatible with Article 8 § 2 unless it is “in accordance with the law”, has an aim or aims that is or are legitimate under that paragraph and is “necessary in a democratic society” for the aforesaid aim or aims (see the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 19, § 43).

30. (…) The Court finds that the interference so far as it relates to the legislation was in accordance with the law, in that Section 13 of the 1956 Act and section 1(2) of the 1967 Act together prescribed the act which was prohibited and the relevant penalty, and that its aims, of protecting morals and protecting the rights and freedoms of others, were legitimate (see, in this context, the Dudgeon judgment cited above, p. 20, § 47). (…)

31. The cardinal issue in the case is whether the existence of the legislation in question, and its application in the prosecution and conviction of the applicant, were "necessary in a democratic society" for these aims.

32. The Court recalls that in the Dudgeon case, in which it was considering the existence of legislation, it found no "pressing social need" for the criminalisation of homosexual acts between two consenting male adults over the age of 21, and that such justifications as there were for retaining the law were outweighed by the

"detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved". (loc. cit., pp. 23-24, § 60)

33. Those principles were adopted and repeated in the subsequent cases of Norris v. Ireland (judgment of 26 October 1988, Series A no. 142, pp. 20-21, § 46), Modinos (judgment cited above, p. 12, § 25) and Marangos v. Cyprus (application no. 31106/96, Commission's report of 3 December 1997, unpublished).

34. There are differences between those decided cases and the present application. The principal point of distinction is that in the present case the sexual activities involved more than two men, and that the applicant was convicted for gross indecency as more than two men had been present.

36. It is not the Court's role to determine whether legislation complies with the Convention in the abstract. The Court will therefore consider the compatibility of the legislation in the present case with the Convention in the light of the circumstances of the case, that is, that the applicant wished to be able to engage, in private, in non-violent sexual activities with up to four other men.

37. The Court can agree with the Government that, at some point, sexual activities can be carried out in such a manner that State interference may be justified, either as not amounting to an interference with the right to respect for private life, or as being justified for the protection, for example, of health or morals. The facts of the present case, however, do not indicate any such circumstances. The applicant was involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. It is true that the activities were recorded on videotape, but the Court notes that the applicant was prosecuted for the activities themselves, and not for the recording, or for any risk of it entering the public domain. The activities were therefore genuinely "private", and the approach of the Court must be to adopt the same narrow margin of appreciation as it found applicable in other cases involving intimate aspects of private life (as, for example, in the Dudgeon judgment cited above, p. 21, § 52).

38. Given the narrow margin of appreciation afforded to the national authorities in the case, the absence of any public-health considerations and the purely private nature of the behaviour in the present case, the Court finds that the reasons submitted for the

maintenance in force of legislation criminalising homosexual acts between men in private, and *a fortiori* the prosecution and conviction in the present case, are not sufficient to justify the legislation and the prosecution.

39. There has therefore been a violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that it is not necessary to examine the case under Article 14 of the Convention;
(…)

Case of Salgueiro Da Silva Mouta v. Portugal, Application no. 33290/96, Judgment of 21 December 1999

Keywords: homosexual – child custody – private life – discrimination

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. In 1983 the applicant married C.D.S. On 2 November 1987 they had a daughter, M. The applicant separated from his wife in April 1990 and has since then been living with a man, L.G.C. Following divorce proceedings instituted by C.D.S., the divorce decree was pronounced on 30 September 1993 by the Lisbon Family Affairs Court (*Tribunal de Família*).

10. On 7 February 1991, during the divorce proceedings, the applicant signed an agreement with C.D.S. concerning the award of parental responsibility (*poder paternal*) for M. Under the terms of that agreement C.D.S. was to have parental responsibility and the applicant a right to contact. However, the applicant was unable to exercise his right to contact because C.D.S. did not comply with the agreement.

11. On 16 March 1992 the applicant sought an order giving him parental responsibility for the child. (…) In her memorial in reply C.D.S. accused L.G.C. of having sexually abused the child.

12. The Lisbon Family Affairs Court delivered its judgment on 14 July 1994 after a period in which the applicant, M., C.D.S., L.G.C. and the child's maternal grandparents had been interviewed by psychologists attached to the court. The court awarded the applicant parental responsibility, dismissing as unfounded – in the light of the court psychologists' reports – C.D.S.'s allegations that L.G.C. had asked M. to masturbate him. (…)

14. C.D.S. appealed against the Family Affairs Court's judgment to the Lisbon Court of Appeal (*Tribunal da Relação*), which gave judgment on 9 January 1996, reversing

the lower court's judgment and awarding parental responsibility to C.D.S., with contact to the applicant.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

22. (…) The Court notes at the outset that the judgment of the Court of Appeal in question, in so far as it set aside the judgment of the Lisbon Family Affairs Court of 14 July 1994 which had awarded parental responsibility to the applicant, constitutes an interference with the applicant's right to respect for his family life and thus attracts the application of Article 8. The Convention institutions have held that this provision applies to decisions awarding custody to one or other parent after divorce or separation (see the Hoffmann v. Austria judgment of 23 June 1993, Series A no. 255-C, p. 58, § 29; see also Irlen v. Germany, application no. 12246/86, Commission decision of 13 July 1987, Decisions and Reports 53, p. 225). (…).

A. Alleged violation of Article 8 taken in conjunction with Article 14

26. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see the Hoffmann judgment cited above, p. 58, § 31).
It must be determined whether the applicant can complain of such a difference in treatment and, if so, whether it was justified.

1. Existence of a difference in treatment

28. The Court does not deny that the Lisbon Court of Appeal had regard above all to the child's interests when it examined a number of points of fact and of law which could have tipped the scales in favour of one parent rather than the other. However, the Court observes that in reversing the decision of the Lisbon Family Affairs Court and, consequently, awarding parental responsibility to the mother rather than the father, the Court of Appeal introduced a new factor, namely that the applicant was a homosexual and was living with another man.
The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and M.'s mother which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, pp. 30-31, § 72).

2. Justification for the difference in treatment

29. In accordance with the case-law of the Convention institutions, a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim

sought to be realised (see the Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24).

30. The decision of the Court of Appeal undeniably pursued a legitimate aim, namely the protection of the health and rights of the child; it must now be examined whether the second requirement was also satisfied.

33. (…) In determining whether the decision which was ultimately made constituted discriminatory treatment lacking any reasonable basis, it needs to be established whether, as the Government submitted, that new factor was merely an *obiter dictum* which had no direct effect on the outcome of the matter in issue or whether, on the contrary, it was decisive.

34. (…) The Court of Appeal, (…) considered, among other things, that "custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this (…). The Court of Appeal further considered that there were insufficient reasons for taking away from the mother the parental responsibility awarded her by agreement between the parties.
However, after that observation the Court of Appeal added "Even if that were not the case ... we think that custody of the child should be awarded to the mother" (...). The Court of Appeal then took account of the fact that the applicant was a homosexual and was living with another man in observing that "The child should live in ... a traditional Portuguese family" and that "It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations" (...).

35. It is the Court's view that the above passages from the judgment in question, far from being merely clumsy or unfortunate as the Government maintained, or mere *obiter dicta*, suggest, quite to the contrary, that the applicant's homosexuality was a factor which was decisive in the final decision. That conclusion is supported by the fact that the Court of Appeal, when ruling on the applicant's right to contact, warned him not to adopt conduct which might make the child realise that her father was living with another man "in conditions resembling those of man and wife" (...).

36. The Court is therefore forced to find, in the light of the foregoing, that the Court of Appeal made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention (see, *mutatis mutandis*, the Hoffmann judgment cited above, p. 60, § 36).
The Court cannot therefore find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention taken in conjunction with Article 14;

2. *Holds* that there is no need to rule on the complaints lodged under Article 8 of the Convention taken alone;

3. *Holds* that the present judgment constitutes in itself sufficient just satisfaction for the damage alleged;

Case of Lustig-Prean and Beckett v. the United Kingdom, Applications no. 31417/96 and 32377/96, Merits and Just Satisfaction

Keywords: homosexual – armed forces – discharge – private life

Judgment of 27 September 1999, Merits

AS TO THE FACTS

I. The Circumstances of the case

A. The first applicant

11. Mr Lustig-Prean (the first applicant) joined the Royal Navy Reserve as a radio operator and in 1982 commenced a career in the Royal Navy. On 27 April 1983 he became a midshipman in the executive branch of the navy. His evaluation of November 1989 noted that he was an officer with "great potential" and the "sort of person that the Royal Navy needs to attract and retain". His evaluation of December 1993 concluded that the applicant "is a balanced, enlightened and knowledgeable man who enjoys my complete trust in all matters. He is an outstanding prospect for early promotion to commander." In 1994 the applicant attained the rank of lieutenant-commander.

12. For about thirty months prior to June 1994 the applicant had been involved in a steady relationship with a civilian partner. In early June 1994 the applicant was informed that the Royal Navy Special Investigations Branch ("the service police") had been given his name anonymously in connection with an allegation of homosexuality and was investigating the matter. The applicant admitted to his commanding officer that he was homosexual.

16. On 16 December 1994 the Admiralty Board informed the applicant that it had decided to terminate his commission and to discharge him, administratively, from the navy with effect from 17 January 1995. The ground for his discharge was his sexual orientation. The applicant's commission was removed and most of the bonus which he had received with that promotion was recouped by the naval authorities (£4,875 out of £6,000). His term of service would otherwise have terminated in 2009, with the possibility of renewal.

B. The second applicant

17. On 20 February 1989 Mr. Beckett (the second applicant) joined the Royal Navy, enlisting for twenty-two years' service. In 1991 he became a substantive weapons engineering mechanic. The applicant's report dated 27 November 1992 noted that he displayed potential in a number of areas essential to good leadership, that he had the

ability to become an above-average leading hand and that if he applied his new skills wisely he could, with experience, be considered as a potential officer candidate.

18. In May 1993 the applicant had been refused time off to deal with a personal matter (he wished to collect his Aids test results) and consequently he spoke with the chaplain, to whom he admitted his sexual orientation. (…)

21. (…) On 28 July 1993 the applicant's administrative discharge was approved on the basis of his homosexuality. The applicant then complained about the decision to discharge him to the Admiralty Board and on 6 December 1994 the Admiralty Board dismissed the applicant's complaint.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

A. Whether there was an interference

64. The Court notes that the Government have not claimed that the applicants waived their rights under Article 8 of the Convention when they initially joined the armed forces. It also notes that the applicants were not dismissed for failure to disclose their homosexuality on recruitment. Further, the Government do not dispute Mr. Beckett's statement made during his interview that he had discovered his homosexual orientation after recruitment.
In these circumstances, the Court is of the view that the investigations by the military police into the applicants' homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with the preparation of a final report for the armed forces' authorities on the investigations, constituted a direct interference with the applicants' right to respect for their private lives. Their consequent administrative discharge on the sole ground of their sexual orientation also constituted an interference with that right (see the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and, *mutatis mutandis*, the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 23, § 44).

B. Whether the interferences were justified

65. Such interferences can only be considered justified if the conditions of the second paragraph of Article 8 are satisfied. Accordingly, the interferences must be "in accordance with the law", have an aim which is legitimate under this paragraph and must be "necessary in a democratic society" for the aforesaid aim (see the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, p. 18, § 39).

1. "In accordance with the law"

66. (…) The Court notes that the Ministry of Defence policy excluding homosexuals from the armed forces was confirmed by the Court of Appeal in the present case to be lawful, in terms of both domestic and applicable European Community law. The policy was given statutory recognition and approval by the Sexual Offences Act 1967

and, more recently, by the Criminal Justice and Public Order Act 1994. The Court, accordingly, finds this requirement to be satisfied.

2. Legitimate aim

67. (…) The Court finds no reason to doubt that the policy was designed with a view to ensuring the operational effectiveness of the armed forces or that investigations were, in principle, intended to establish whether the person concerned was a homosexual to whom the policy was applicable. To this extent, therefore, the Court considers that the resulting interferences can be said to pursue the legitimate aims of "the interests of national security" and "the prevention of disorder".
The Court has more doubt as to whether the investigations continued to serve any such legitimate aim once the applicants had admitted their homosexuality. However, given the Court's conclusion at paragraph 104 below, it does not find that it is necessary to decide whether this element of the investigations pursued a legitimate aim within the meaning of Article 8 § 2 of the Convention.

3. "Necessary in a democratic society"

(c) The Court's assessment

(i) Applicable general principles

80. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued (see the Norris judgment cited above, p. 18, § 41).
Given the matters at issue in the present case, the Court would underline the link between the notion of "necessity" and that of a "democratic society", the hallmarks of the latter including pluralism, tolerance and broadmindedness (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 36, and the Dudgeon judgment cited above, p. 21, § 53).

81. The Court recognises that it is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court. A margin of appreciation is left open to Contracting States in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions (see the Dudgeon judgment cited above, pp. 21 and 23, §§ 52 and 59).

82. Accordingly, when the relevant restrictions concern "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8 § 2 of the Convention (see the Dudgeon judgment cited above, p. 21, § 52).
When the core of the national security aim pursued is the operational effectiveness of the armed forces, it is accepted that each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in this respect (see the Engel and Others judgment cited above, p. 25, § 59). The Court also considers that it is open to the State to impose restrictions on an individual's right to respect for his private life where there is a real threat to the armed forces' operational effectiveness, as the proper functioning of an army is hardly imaginable without legal

rules designed to prevent service personnel from undermining it. However, the national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State. Moreover, assertions as to a risk to operational effectiveness must be "substantiated by specific examples" (see, *mutatis mutandis*, the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, §§ 36 and 38, and the Grigoriades judgment cited above, pp. 2589-90, § 45).

(ii) Application to the facts of the case

83. It is common ground that the sole reason for the investigations conducted and for the applicants' discharge was their sexual orientation. Concerning as it did a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required (see paragraph 82 above). In the case of the present applicants, the Court finds the interferences to have been especially grave for the following reasons.

84. In the first place, the investigation process (see the Guidelines at paragraph 42 above and the Government's submissions at paragraph 73) was of an exceptionally intrusive character.
(…) Certain lines of questioning of both applicants were, in the Court's view, particularly intrusive and offensive and, indeed, the Government accepted that they could not defend the level of detailed questioning about precise sexual activities to which Mr Beckett was, at one point, subjected. Mr Beckett's locker was also searched, personal postcards and photographs were seized and he was later questioned on the content of these items. (…)

85. Secondly, the administrative discharge of the applicants had, as Sir Thomas Bingham MR described, a profound effect on their careers and prospects.
(…) The Government accepted in their observations that neither of the applicants' service records nor the conduct of the applicants gave any grounds for complaint and the High Court described their service records as "exemplary".
The Court notes, in this respect, the unique nature of the armed forces (underlined by the Government in their pleadings before the Court) and, consequently, the difficulty in directly transferring essentially military qualifications and experience to civilian life. In this regard, it recalls that one of the reasons why the Court considered Mrs Vogt's dismissal from her post as a school teacher to be a "very severe measure", was its finding that school teachers in her situation would "almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience" (Vogt judgment cited above, p. 29, § 60).

86. Thirdly, the absolute and general character of the policy which led to the interferences in question is striking (see the Dudgeon judgment cited above, p. 24, § 61, and the Vogt judgment cited above, p. 28, § 59). The policy results in an immediate discharge from the armed forces once an individual's homosexuality is established and irrespective of the individual's conduct or service record. With regard to the Government's reference to the Kalaç judgment, the Court considers that the compulsory retirement of Mr Kalaç is to be distinguished from the discharge of the

present applicants, the former being dismissed on grounds of his conduct while the applicants were discharged on grounds of their innate personal characteristics.

87. Accordingly, the Court must consider whether, taking account of the margin of appreciation open to the State in matters of national security, particularly convincing and weighty reasons exist by way of justification for the interferences with the applicants' right to respect for their private lives.

88. (…) Although the Court acknowledges the complexity of the study undertaken by the HPAT, it entertains certain doubts as to the value of the HPAT report for present purposes. The independence of the assessment contained in the report is open to question given that it was completed by Ministry of Defence civil servants and service personnel (see paragraph 44 above) and given the approach to the policy outlined in the letter circulated by the Ministry of Defence in August 1995 to management levels in the armed forces (see paragraph 26 above). In addition, on any reading of the Report and the methods used (see paragraph 45 above), only a very small proportion of the armed forces' personnel participated in the assessment. Moreover, many of the methods of assessment (including the consultation with policy-makers in the Ministry of Defence, one-to-one interviews and the focus group discussions) were not anonymous. It also appears that many of the questions in the attitude survey suggested answers in support of the policy.

89. (…) the Court finds that the perceived problems which were identified in the HPAT report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. (…)

90. The question for the Court is whether the above-noted negative attitudes constitute sufficient justification for the interferences at issue.
The Court observes from the HPAT report that these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above, any more than similar negative attitudes towards those of a different race, origin or colour.

92. The Court notes the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail. (…) Even if the absence of such evidence can be explained by the consistent application of the policy, as submitted by the Government, this is insufficient to demonstrate to the Court's satisfaction that operational effectiveness problems of the nature and level alleged can be anticipated in the absence of the policy (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 38).

93. However, in the light of the strength of feeling expressed in certain submissions to the HPAT and the special, interdependent and closely knit nature of the armed forces' environment, the Court considers it reasonable to assume that some difficulties could be anticipated as a result of any change in what is now a long-standing policy. Indeed,

it would appear that the presence of women and racial minorities in the armed forces led to relational difficulties of the kind which the Government suggest admission of homosexuals would entail (see paragraphs 56 and 57 above).

95. The Court considers it important to note, in the first place, the approach already adopted by the armed forces to deal with racial discrimination and with racial and sexual harassment and bullying (see paragraphs 56-57 above). The January 1996 Directive, for example, imposed both a strict code of conduct on every soldier together with disciplinary rules to deal with any inappropriate behaviour and conduct.

(…) in so far as negative attitudes to homosexuality are insufficient, of themselves, to justify the policy (see paragraph 90 above), they are equally insufficient to justify the rejection of a proposed alternative. (…)

(…) even if it can be assumed that the integration of homosexuals would give rise to problems not encountered with the integration of women or racial minorities, the Court is not satisfied that the codes and rules which have been found to be effective in the latter case would not equally prove effective in the former. (…)

97. (…) The Court (…) notes the evidence before the domestic courts to the effect that the European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority. It considers that, even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue (see the Dudgeon judgment cited above, pp. 23-24, § 60).

98. Accordingly, the Court concludes that convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces or, therefore, the consequent discharge of the applicants from those forces.

99. While the applicants' administrative discharges were a direct consequence of their homosexuality, the Court considers that the justification for the investigations into the applicants' homosexuality requires separate consideration in so far as those investigations continued after the applicants' early and clear admissions of homosexuality.

100. (…) since it was and is clear, in the Court's opinion, that at the relevant time both Mr. Lustig-Prean and Mr. Beckett wished to remain in the navy, the Court does not find that the risk of false claims of homosexuality could, in the case of the present applicants, provide any justification for their continued questioning.

101. (…) the Court observes that, in the HPAT report, security issues relating to those suspected of being homosexual were found not to stand up to close examination as a ground for maintaining the policy. The Court is, for this reason, not persuaded that the risk of blackmail, being the main security ground canvassed by the Government, justified the continuation of the questioning of either of the present applicants. Similarly, the Court does not find that the clinical risks (which were, in any event, substantially discounted by the HPAT as a ground for maintaining the policy)

justified the extent of the applicants' questioning. Moreover, no disciplinary issue existed in the case of either applicant.

102. (…) The Court considers, however, that the applicants did not have any real choice but to cooperate. It is clear that the interviews formed a standard and important part of the investigation process which was designed to verify to "a high standard of proof" the sexual orientation of the applicants (see the Guidelines at paragraph 42 above and the Government's submissions at paragraph 73). Had the applicants not participated in the interview process and had Mr Beckett not consented to the search, the Court is satisfied that the authorities would have proceeded to verify the suspected homosexuality of the applicants by other means which were likely to be less discreet. (…)

103. In such circumstances, the Court considers that the Government have not offered convincing and weighty reasons justifying the continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality to the naval authorities.

104. In sum, the Court finds that neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8 § 2 of the Convention.

105. Accordingly, there has been a violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8;

Judgment of 25 July 2000, Just Satisfaction

AS TO THE LAW

A. Non-pecuniary loss

12. (…)
The Court considers it clear that the investigation and discharges described in the principle judgment were profoundly destabilising events in the applicants' lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them. The Court therefore awards, on an equitable basis, GBP 19,000 to each applicant in compensation for non-pecuniary damage.

Case of Smith and Grady v. the United Kingdom, Applications no. 33985/96 and 33986/96, Merits and Just Satisfaction

Keywords: homosexual – armed forces – discharge – private life – remedy

Judgment of 27 September 1999, Merits

THE FACTS

I. The Circumstances of the case

A. The first applicant

11. On 8 April 1989 Ms Jeanette Smith (the first applicant) joined the Royal Air Force to serve a nine-year engagement (which could be extended) as an enrolled nurse. She subsequently obtained the rank of senior aircraft woman. From 1991 to 1993 she was recommended for promotion. A promotion was dependent on her becoming a staff nurse and in 1992 she was accepted for the relevant conversion course. Her final exams were to take place in September 1994.

12. On 12 June 1994 the applicant found a message on her answering machine from an unidentified female caller. The caller stated that she had informed the air force authorities of the applicant's homosexuality. (…)

13. On 15 June 1994 the applicant reported for duty. She was called to a pre-disciplinary interview because of her absence without leave. In explaining why she did not report for duty, she referred to the anonymous telephone message and admitted that she was homosexual. She also confirmed that she had a previous and current homosexual relationship. Both relationships were with civilians and the current relationship had begun eighteen months previously. The assistance of the service police was requested, a unit investigation report was opened and an investigator from the service police was appointed.

14. The applicant was interviewed on the same day by that investigator and another officer (female) from the service police. (…) the purpose of the questions was to verify that her admission was not an attempt to obtain an early discharge from the service.(…)

16. (…) On 16 November 1994 the applicant received a certificate of discharge from the armed forces. An internal air force document dated 17 October 1996 described the applicant's overall general assessment for trade proficiency and personal qualities as very good and her overall conduct assessments as exemplary.

B. The second applicant

17. On 12 August 1980 Mr Graeme Grady (the second applicant) joined the Royal Air Force at the rank of aircraftman serving as a trainee administrative clerk. By 1991 he had achieved the rank of sergeant and worked as a personnel administrator, at which stage he was posted to Washington at the British Defence Intelligence Liaison Service (North America) – "BDILS(NA)". He served as chief clerk and led the BDILS(NA)

support staff team. In May 1993 the applicant, who was married with two children, told his wife that he was homosexual.

19. Following disclosures to the wife of the head of the BDILS(NA) by their nanny, the head of the BDILS(NA) reported that it was suspected that the applicant was homosexual. A unit investigation report was opened and a service police officer nominated as investigator.

28. (…) In his certificate of qualifications and reference on discharge dated 12 October 1994, the applicant was described as a loyal serviceman and a conscientious and hard worker who could be relied upon to achieve the highest standards. It was also noted that he had displayed sound personal qualities and integrity throughout his service and had enjoyed the respect of his superiors, peers and subordinates alike. The applicant was administratively discharged with effect from 12 December 1994.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

A. Whether there was an interference

71. The Court notes that the Government have not claimed that the applicants waived their rights under Article 8 of the Convention when they initially joined the armed forces. It also notes that the applicants were not dismissed for failure to disclose their homosexuality on recruitment. Further, it finds from the evidence that Ms Smith only came to realise that she was homosexual after recruitment.
In these circumstances, the Court is of the view that the investigations by the military police into the applicants' homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with the preparation of a final report for the armed forces' authorities on the investigations, constituted a direct interference with the applicants' right to respect for their private lives. Their consequent administrative discharge on the sole ground of their sexual orientation also constituted an interference with that right (see the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and, *mutatis mutandis*, the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 23, § 44).

B. Whether the interferences were justified

72. Such interferences can only be considered justified if the conditions of the second paragraph of Article 8 are satisfied. Accordingly, the interferences must be "in accordance with the law", have an aim which is legitimate under this paragraph and must be "necessary in a democratic society" for the aforesaid aim (see the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, p. 18, § 39).

1. "In accordance with the law"

73. (…) The Court notes that the Ministry of Defence policy excluding homosexuals from the armed forces was confirmed by the Court of Appeal in the present case to be lawful, in terms of both domestic and applicable European Community law. The

policy was given statutory recognition and approval by the Sexual Offences Act 1967 and, more recently, by the Criminal Justice and Public Order Act 1994. The Court, accordingly, finds this requirement to be satisfied.

2. Legitimate aim

74. (…) The Court finds no reason to doubt that the policy was designed with a view to ensuring the operational effectiveness of the armed forces or that investigations were, in principle, intended to establish whether the person concerned was a homosexual to whom the policy was applicable. To this extent, therefore, the Court considers that the resulting interferences can be said to have pursued the legitimate aims of "the interests of national security" and "the prevention of disorder".
The Court has more doubt as to whether the investigations continued to serve any such legitimate aim once the applicants had admitted their homosexuality. However, given the Court's conclusion at paragraph 111 below, it does not find it necessary to decide whether this element of the investigations pursued a legitimate aim within the meaning of Article 8 § 2 of the Convention.

3. "Necessary in a democratic society"

(c) The Court's assessment

(i) Applicable general principles

87. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued (see the Norris judgment cited above, p. 18, § 41).
Given the matters at issue in the present case, the Court would underline the link between the notion of "necessity" and that of a "democratic society", the hallmarks of the latter including pluralism, tolerance and broadmindedness (see the Vereinigung demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 36, and the Dudgeon judgment cited above, p. 21, § 53).

88. The Court recognises that it is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court. A margin of appreciation is left to Contracting States in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions (see the Dudgeon judgment cited above, pp. 21 and 23, §§ 52 and 59).

89. Accordingly, when the relevant restrictions concern "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8 § 2 of the Convention (see the Dudgeon judgment cited above, p. 21, § 52).
When the core of the national security aim pursued is the operational effectiveness of the armed forces, it is accepted that each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in this respect (see the Engel and Others judgment cited above, p. 25, § 59). The Court also considers that it is open to the State to impose restrictions on an individual's right to respect for his private life where there is a real threat to the armed forces' operational

effectiveness, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent service personnel from undermining it. However, the national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State. Moreover, assertions as to a risk to operational effectiveness must be "substantiated by specific examples" (see, *mutatis mutandis*, the Vereinigung demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, §§ 36 and 38, and the Grigoriades judgment cited above, pp. 2589-90, § 45).

ii) Application to the facts of the case

90. It is common ground that the sole reason for the investigations conducted and for the applicants' discharge was their sexual orientation. Concerning as it did a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required (see paragraph 89 above). In the case of the present applicants, the Court finds the interferences to have been especially grave for the following reasons.

91. In the first place, the investigation process (…) was of an exceptionally intrusive character.
(…) Both applicants were interviewed and asked detailed questions of an intimate nature about their particular sexual practices and preferences. Certain lines of questioning of both applicants were, in the Court's view, particularly intrusive and offensive and, indeed, the Government conceded that they could not defend the question put to Ms Smith about whether she had had a sexual relationship with her foster daughter.
(…)

92. Secondly, the administrative discharge of the applicants had, as Sir Thomas Bingham MR described, a profound effect on their careers and prospects.
Prior to the events in question, both applicants enjoyed relatively successful service careers in their particular field. (…) The Government accepted in their observations that neither the service records nor the conduct of the applicants gave any grounds for complaint and the High Court described their service records as "exemplary".
The Court notes, in this respect, the unique nature of the armed forces (underlined by the Government in their pleadings before the Court) and, consequently, the difficulty in directly transferring essentially military qualifications and experience to civilian life. The Court recalls in this respect that one of the several reasons why the Court considered Mrs Vogt's dismissal from her post as a schoolteacher to be a "very severe measure", was its finding that schoolteachers in her situation would "almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience" (Vogt judgment cited above, p. 29, § 60). In this regard, the Court accepts that the applicants' training and experience would be of use in civilian life. However, it is clear that the applicants would encounter difficulty in obtaining civilian posts in their areas of specialisation which would reflect the seniority and status which they had achieved in the air force.

93. Thirdly, the absolute and general character of the policy which led to the interferences in question is striking (see the Dudgeon judgment cited above, p. 24, § 61, and the Vogt judgment cited above, p. 28, § 59). The policy results in an immediate discharge from the armed forces once an individual's homosexuality is established and irrespective of the individual's conduct or service record. With regard to the Government's reference to the Kalaç judgment, the Court considers that the compulsory retirement of Mr Kalaç is to be distinguished from the discharge of the present applicants, the former having been dismissed on grounds of his conduct while the applicants were discharged on grounds of their innate personal characteristics.

94. Accordingly, the Court must consider whether, taking account of the margin of appreciation open to the State in matters of national security, particularly convincing and weighty reasons exist by way of justification for the interferences with the applicants' right to respect for their private lives.

95. (…) Although the Court acknowledges the complexity of the study undertaken by the HPAT, it entertains certain doubts as to the value of the HPAT report for present purposes. The independence of the assessment contained in the report is open to question given that it was completed by Ministry of Defence civil servants and service personnel (see paragraph 51 above) and given the approach to the policy outlined in the letter circulated by the Ministry of Defence in August 1995 to management levels in the armed forces (see paragraph 33 above). In addition, on any reading of the report and the methods used (see paragraph 52 above), only a very small proportion of the armed forces' personnel participated in the assessment. Moreover, many of the methods of assessment (including the consultation with policy-makers in the Ministry of Defence, one-to-one interviews and the focus group discussions) were not anonymous. It also appears that many of the questions in the attitude survey suggested answers in support of the policy.

96. (…) the Court finds that the perceived problems which were identified in the HPAT report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. (…)

97. (…) To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour.

99. The Court notes the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail. (…) Even if the absence of such evidence can be explained by the consistent application of the policy, as submitted by the Government, this is insufficient to demonstrate to the Court's satisfaction that operational-effectiveness problems of the nature and level alleged can be anticipated in the absence of the policy (see the Vereinigung demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 38).

100. However, in the light of the strength of feeling expressed in certain submissions to the HPAT and the special, interdependent and closely knit nature of the armed

forces' environment, the Court considers it reasonable to assume that some difficulties could be anticipated as a result of any change in what is now a long-standing policy. Indeed, it would appear that the presence of women and racial minorities in the armed forces led to relational difficulties of the kind which the Government suggest admission of homosexuals would entail (see paragraphs 63 and 64 above).

102. The Court considers it important to note, in the first place, the approach already adopted by the armed forces to deal with racial discrimination and with racial and sexual harassment and bullying (see paragraphs 63-64 above). The January 1996 Directive, for example, imposed both a strict code of conduct on every soldier together with disciplinary rules to deal with any inappropriate behaviour and conduct. This dual approach was supplemented with information leaflets and training programmes, the army emphasising the need for high standards of personal conduct and for respect for others.
(…) in so far as negative attitudes to homosexuality are insufficient, of themselves, to justify the policy (see paragraph 97 above), they are equally insufficient to justify the rejection of a proposed alternative. (…)
(…) even if it can be assumed that the integration of homosexuals would give rise to problems not encountered with the integration of women or racial minorities, the Court is not satisfied that the codes and rules which have been found to be effective in the latter case would not equally prove effective in the former. (…)

103. (…) the Court remains of the view that it has not been shown that the conduct codes and disciplinary rules referred to above could not adequately deal with any behavioural issues arising on the part either of homosexuals or of heterosexuals.

104. (…) The Court (…) notes the evidence before the domestic courts to the effect that the European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority. It considers that, even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue (see the Dudgeon judgment cited above, pp. 23-24, § 60).

105. Accordingly, the Court concludes that convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces or, therefore, the consequent discharge of the applicants from those forces.

106. While the applicants' administrative discharges were a direct consequence of their homosexuality, the Court considers that the justification for the investigations into the applicants' homosexuality requires separate consideration in so far as those investigations continued after the applicants' admissions of homosexuality. (…)

107. (…) the Court does not find that the risk of false claims of homosexuality could, in the case of the present applicants, provide any justification for their continued questioning.

108. (…) the Court observes that, in the HPAT report, security issues relating to those suspected of being homosexual were found not to stand up to close examination as a

ground for maintaining the policy. The Court is, for this reason, not persuaded that the risk of blackmail, being the main security ground canvassed by the Government, justified the continuation of the questioning of either of the present applicants. Similarly, the Court does not find that the clinical risks (which were, in any event, substantially discounted by the HPAT as a ground for maintaining the policy) justified the extent of the applicants' questioning. Moreover, no disciplinary issue existed in the case of either applicant.

109. (…)the applicants did not have any real choice but to cooperate in this process. It is clear that the interviews formed a standard and important part of the investigation process which was designed to verify to "a high standard of proof" the sexual orientation of the applicants (see the Guidelines at paragraph 49 above and the Government's submissions at paragraph 80). Had the applicants not cooperated with the interview process, including with the additional elements of this process outlined above, the Court is satisfied that the authorities would have proceeded to verify the suspected homosexuality of the applicants by other means which were likely to be less discreet. That this was the alternative open to the applicants in the event of their failing to cooperate was made clear to both applicants, and in particularly forthright terms to Mr Grady.

110. In such circumstances, the Court considers that the Government have not offered convincing and weighty reasons justifying the continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality to the air force authorities.

111. In sum, the Court finds that neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8 § 2 of the Convention.

112. Accordingly, there has been a violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

120. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 162).
It is also recalled that treatment may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see the Ireland v. the United Kingdom judgment cited above, pp. 66-67, § 167). Moreover, it is sufficient if the victim is humiliated in his or her own eyes (see the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, p. 16, § 32).

121. (…) the Court would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3

(see, *mutatis mutandis*, the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 42, §§ 90-91).

122. However, while accepting that the policy, together with the investigation and discharge which ensued, were undoubtedly distressing and humiliating for each of the applicants, the Court does not consider, having regard to all the circumstances of the case, that the treatment reached the minimum level of severity which would bring it within the scope of Article 3 of the Convention.

123. Accordingly, the Court concludes that there has been no violation of Article 3 of the Convention taken alone or in conjunction with Article 14.

IV. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

127. The Court would not rule out that the silence imposed on the applicants as regards their sexual orientation, together with the consequent and constant need for vigilance, discretion and secrecy in that respect with colleagues, friends and acquaintances as a result of the chilling effect of the Ministry of Defence policy, could constitute an interference with their freedom of expression.
However, the Court notes that the subject matter of the policy and, consequently, the sole ground for the investigation and discharge of the applicants, was their sexual orientation which is "an essentially private manifestation of human personality" (see the Dudgeon judgment cited above, p. 23, § 60). It considers that the freedom of expression element of the present case is subsidiary to the applicants' right to respect for their private lives which is principally at issue (see, *mutatis mutandis*, the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 23, § 55, and the Larissis and Others v. Greece judgment of 24 February 1998, *Reports* 1998-I, p. 383, § 64).

128. Consequently, the Court considers that it is not necessary to examine the applicants' complaints under Article 10 of the Convention, either taken alone or in conjunction with Article 14.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

134. Although the applicants invoked Article 13 of the Convention in relation to all of their complaints, the Court recalls that it is the applicants' right to respect for their private lives which is principally at issue in the present case (see paragraph 127 above). In such circumstances, it is of the view that the applicants' complaints under Article 13 of the Convention are more appropriately considered in conjunction with Article 8.

135. The Court recalls that Article 13 guarantees the availability of a remedy at national level to enforce the substance of Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Thus, its effect is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. However, Article 13 does not go so far as to require incorporation of the Convention or a particular form of remedy, Contracting States being afforded a

margin of appreciation in conforming with their obligations under this provision. Nor does the effectiveness of a remedy for the purposes of Article 13 depend on the certainty of a favourable outcome for the applicant (see the Vilvarajah and Others judgment cited above, p. 39, § 122).

136. (…) As was made clear by the High Court and the Court of Appeal in the judicial review proceedings, since the Convention did not form part of English law, questions as to whether the application of the policy violated the applicants' rights under Article 8 and, in particular, as to whether the policy had been shown by the authorities to respond to a pressing social need or to be proportionate to any legitimate aim served, were not questions to which answers could properly be offered. The sole issue before the domestic courts was whether the policy could be said to be "irrational".

137. The test of "irrationality" applied in the present case was that explained in the judgment of Sir Thomas Bingham MR: a court was not entitled to interfere with the exercise of an administrative discretion on substantive grounds save where the court was satisfied that the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker. In judging whether the decision-maker had exceeded this margin of appreciation, the human rights context was important, so that the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable.
(…)

138. In such circumstances, the Court considers it clear that, even assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.
(…)

139. In such circumstances, the Court finds that the applicants had no effective remedy in relation to the violation of their right to respect for their private lives guaranteed by Article 8 of the Convention. Accordingly, there has been a violation of Article 13 of the Convention.

FOR THESE REASONS, THE COURT unanimously

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8;

3. *Holds* that there has been no violation of Article 3 of the Convention taken either alone or in conjunction with Article 14;

4. *Holds* that it is not necessary to examine the applicants' complaints under Article 10 of the Convention taken either alone or in conjunction with Article 14;

5. *Holds* that there has been a violation of Article 13 of the Convention;
(…)

Judgment of 25 July 2000, Just Satisfaction

THE LAW

A. Non-pecuniary damage

13. The Court considers it clear that the investigations and discharges described in the principal judgment were profoundly destabilising events in the applicants' lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them. The Court therefore awards, on an equitable basis, GBP 19,000 to each applicant in compensation for non-pecuniary damage. It does not consider an award of interest on this sum to be appropriate given the nature of the damage to which it relates.

Case of Sheffield and Horsham v. the United Kingdom, Applications no. 22985/93 and 23390/94, Judgment of 30 July 1998 (Grand Chamber)

Keywords: transsexual – birth register – legal recognition – private life – right to marry – discrimination

AS TO THE FACTS

I. The circumstances of the case

A. The first applicant, Miss Sheffield

12. The first applicant, Miss Kristina Sheffield, is a British citizen born in 1946 and currently resident in London. At birth the applicant was registered as being of the male sex. Prior to her gender reassignment treatment (…) she was married. She has one daughter from that marriage, which is now dissolved.

13. In 1986 the first applicant began treatment at a gender identity clinic in London and, on a date unspecified, successfully underwent sex reassignment surgery and treatment. She changed her name by deed poll to her present name. The change of name was recorded on her passport and driving licence.

15. (…) she was informed by her consultant psychiatrist and her surgeon that she was required to obtain a divorce as a precondition to surgery being carried out. Following the divorce, the applicant's former spouse applied to the court to have her contact with her daughter terminated. The applicant states that the judge granted the application on the basis that contact with a transsexual would not be in the child's

interests. The applicant has not seen her daughter since then, a period of some twelve years.

16. Although her new name has been entered on her passport and driving licence, her birth certificate and various records including social-security and police records continue to record her original name and gender. (…)

20. The applicant maintains that her decision to undergo gender reassignment surgery has resulted in her being subjected to discrimination at work or in relation to obtaining work. She is a pilot by profession. She states that she was dismissed by her employers in 1986 as a direct consequence of her gender reassignment and has found it impossible to obtain employment in the respondent State in her chosen profession. She attributes this in large part to the legal position of transsexuals in that State.

B. The second applicant, Miss Horsham

21. (…) The second applicant was registered at birth as being of the male sex. She states that from an early age she began to experience difficulties in relating to herself as male and when she was twenty-one she fully understood that she was a transsexual. She left the United Kingdom in 1971 as she was concerned about the consequences of being identified as a transsexual. Thereafter she led her life abroad as a female.

22. From 1990, Miss Horsham received psychotherapy and hormonal treatment and finally underwent gender reassignment surgery on 21 May 1992 at the Free University Hospital, Amsterdam.

23. (…) On 24 August 1992 Miss Horsham obtained an order from the Amsterdam Regional Court that she be issued a birth certificate by the Registrar of Births in The Hague recording her new name and the fact that she was of the female sex. The birth certificate was issued on 12 November 1992. In the meantime, on 11 September 1992 and on production of the court order, the British consulate issued a new passport to the applicant recording her new name and her sex as female.

24. On 15 November 1992 the second applicant requested that her original birth certificate in the United Kingdom be amended to record her sex as female. By letter dated 20 November 1992, the Office of Population Censuses and Surveys (OPCS) replied that there was no provision under United Kingdom law for any new information to be inscribed on her original birth certificate.

25. Miss Horsham states that she is forced to live in exile because of the legal situation in the United Kingdom. She has a male partner whom she plans to marry. She states that they would like to lead their married life in the United Kingdom but has been informed by the OPCS by letter dated 4 November 1993 that as a matter of English law, if she were to be held to be domiciled in the United Kingdom, she would be precluded from contracting a valid marriage whether that marriage “took place in the Netherlands or elsewhere”.

AS TO THE LAW

I. Alleged violation of Article 8 of the Convention

2. The Court's assessment

51. (…) the issue raised by the applicants before the Court is not that the respondent State should abstain from acting to their detriment but that it has failed to take positive steps to modify a system which they claim operates to their prejudice. The Court will therefore proceed on that basis.

52. The Court reiterates that the notion of "respect" is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (see the above-mentioned Rees judgment, p. 15, § 37; and the above-mentioned Cossey judgment, p. 15, § 37).

53. (…)
Although the applicants in the instant case have formulated their complaints in terms which are wider than those invoked by Mr Rees and Miss Cossey since they contend that their rights under Article 8 of the Convention have been violated on account of the failure of the respondent State to recognise for legal purposes generally their post-operative gender, it is nonetheless the case that the essence of their complaints concerns the continuing insistence by the authorities on the determination of gender according to biological criteria alone and the immutability of the gender information once it is entered on the register of births.

56. In the view of the Court, the applicants have not shown that since the date of adoption of its Cossey judgment in 1990 there have been any findings in the area of medical science which settle conclusively the doubts concerning the causes of the condition of transsexualism. (…) Accordingly, the non-acceptance by the authorities of the respondent State for the time being of the sex of the brain as a crucial determinant of gender cannot be criticised as being unreasonable. The Court would add that, as at the time of adoption of the Cossey judgment, it still remains established that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex despite the increased scientific advances in the handling of gender reassignment procedures.

57. (…) the Court is not fully satisfied that the legislative trends outlined by *amicus* suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender.

58. The Court is accordingly not persuaded that it should depart from its Rees and Cossey decisions and conclude that on the basis of scientific and legal developments

alone the respondent State can no longer rely on a margin of appreciation to defend its continuing refusal to recognise in law a transsexual's post-operative gender. For the Court, it continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States (see the X, Y and Z v. the United Kingdom judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, p. 635, § 52).

59. Nor is the Court persuaded that the applicants' case histories demonstrate that the failure of the authorities to recognise their new gender gives rise to detriment of sufficient seriousness as to override the respondent State's margin of appreciation in this area (cf. the above-mentioned B. v. France judgment). It cannot be denied that the incidents alluded to by Miss Sheffield were a source of embarrassment and distress to her and that Miss Horsham, if she were to return to the United Kingdom, would equally run the risk of having on occasion to identify herself in her pre-operative gender. At the same time, it must be acknowledged that an individual may with justification be required on occasion to provide proof of gender as well as medical history. (…) However, (…) the situations in which the applicants may be required to disclose their pre-operative gender do not occur with a degree of frequency which could be said to impinge to a disproportionate extent on their right to respect for their private lives. The Court observes also that the respondent State has endeavoured to some extent to minimise intrusive enquiries as to their gender status by allowing transsexuals to be issued with driving licences, passports and other types of official documents in their new name and gender, and that the use of birth certificates as a means of identification is officially discouraged (…).

60. Having reached those conclusions, the Court cannot but note that despite its statements in the Rees and Cossey cases on the importance of keeping the need for appropriate legal measures in this area under review having regard in particular to scientific and societal developments (see, respectively, pp. 18–19, § 47, and p. 41, § 42), it would appear that the respondent State has not taken any steps to do so. The fact that a transsexual is able to record his or her new sexual identity on a driving licence or passport or to change a first name are not innovative facilities. They obtained even at the time of the Rees case. Even if there have been no significant scientific developments since the date of the Cossey judgment which make it possible to reach a firm conclusion on the aetiology of transsexualism, it is nevertheless the case that there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by Contracting States.

61. For the above reasons, the Court considers that the applicants have not established that the respondent State has a positive obligation under Article 8 of the Convention to recognise in law their post-operative gender. Accordingly, there is no breach of that provision in the instant case.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

66. The Court recalls that the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly

concerned to protect marriage as the basis of the family. Furthermore, Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind (see the above-mentioned Rees judgment, p. 19, §§ 49 and 50).

67. The Court recalls further that in its Cossey judgment it found that the attachment to the traditional concept of marriage which underpins Article 12 of the Convention provides sufficient reason for the continued adoption by the respondent State of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry (p. 18, § 46).

68. In light of the above considerations, the Court finds that the inability of either applicant to contract a valid marriage under the domestic law of the respondent State having regard to the conditions imposed by the Matrimonial Causes Act 1973 (…) cannot be said to constitute a violation of Article 12 of the Convention.

69. The Court is not persuaded that Miss Horsham's complaint raises an issue under Article 12 which engages the responsibility of the respondent State since it relates to the recognition by that State of a post-operative transsexual's foreign marriage rather than the law governing the right to marry of individuals within its jurisdiction. In any event, this applicant has not provided any evidence that she intends to set up her matrimonial home in the United Kingdom and to enjoy married life there. Furthermore, it cannot be said with certainty what the outcome would be were the validity of her marriage to be tested in the English courts.

70. The Court concludes that there has been no violation of Article 12.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 8

75. The Court reiterates that Article 14 affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention. However, not every difference in treatment will amount to a violation of this Article. Instead, it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction.

Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (see the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, *Reports* 1996-IV, p. 1507, § 72).

76. The Court notes that it has already concluded that the respondent State has not overstepped its margin of appreciation in not according legal recognition to a transsexual's post-operative gender. In reaching that conclusion, it was satisfied that a fair balance continues to be struck between the need to safeguard the interests of

transsexuals such as the applicants and the interests of the community in general and that the situations in which the applicants may be required to disclose their pre-operative gender do not occur with a degree of frequency which could be said to impinge to a disproportionate extent on their right to respect for their private lives.
Those considerations, which are equally encompassed in the notion of "reasonable and objective justification" for the purposes of Article 14 of the Convention (see the above-mentioned Cossey judgment, p. 17, § 41), must also be seen as justifying the difference in treatment which the applicants experience irrespective of the reference group relied on.

77. The Court concludes therefore that no violation has been established under this head of complaint.

For these reasons, the Court

1. *Holds* by eleven votes to nine that there has been no violation of Article 8 of the Convention;

2. *Holds* by eighteen votes to two that there has been no violation of Article 12 of the Convention;

3. *Holds* unanimously that there has been no violation of Article 14 of the Convention in conjunction with Article 8 of the Convention;

4. *Holds* unanimously that it is not necessary to examine the applicants' complaints under Article 13 of the Convention.

Case of X, Y and Z v. the United Kingdom, Application no. 21830/93, Judgment of 22 April 1997 (Grand Chamber)

Keywords: transsexual – family life

AS TO THE FACTS

I. Circumstances of the case
12. (…) The first applicant, "X", was born in 1955 and works as a college lecturer. X is a female-to-male transsexual and will be referred to throughout this judgment using the male personal pronouns "he", "him" and "his".

Since 1979 he has lived in a permanent and stable union with the second applicant, "Y", a woman born in 1959. The third applicant,"Z", was born in 1992 to the second applicant as a result of artificial insemination by donor ("AID"). Y has subsequently given birth to a second child by the same method.

18. (…) X was not permitted to be registered as the child's father and that part of the register was left blank. Z was given X's surname in the register (…).

19. In November 1995, X's existing job contract came to an end and he applied for approximately thirty posts. The only job offer which he received was from a

university in Botswana. The conditions of service included accommodation and free education for the dependants of the employee. However, X decided not to accept the job when he was informed by a Botswanan official that only spouses and biological or adopted children would qualify as "dependants". He subsequently obtained another job in Manchester where he continues to work.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

A. The existence of "family life"

36. The Court recalls that the notion of "family life" in Article 8 (art. 8) is not confined solely to families based on marriage and may encompass other de facto relationships (see the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 14, para. 31; the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 17, para. 44; and the Kroon and Others v. the Netherlands judgment of 27 October 1994, Series A no. 297-C, pp. 55-56, para. 30). When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means (see, for example, the above-mentioned Kroon and Others judgment, loc. cit.).

37. In the present case, the Court notes that X is a transsexual who has undergone gender reassignment surgery. He has lived with Y, to all appearances as her male partner, since 1979. The couple applied jointly for, and were granted, treatment by AID to allow Y to have a child. X was involved throughout that process and has acted as Z's "father" in every respect since the birth (…). In these circumstances, the Court considers that de facto family ties link the three applicants.

It follows that Article 8 is applicable (art. 8).

B. Compliance with Article 8 (art. 8)

2. The Court’s general approach

41. The Court reiterates that, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interferences by the public authorities, there may in addition be positive obligations inherent in an effective respect for private or family life. The boundaries between the State's positive and negative obligations under this provision (art. 8) do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both cases the State enjoys a certain margin of appreciation (see, for example, the above-mentioned Rees judgment, p. 14, para. 35, and the above-mentioned Kroon and Others judgment, p. 56, para. 31).

42. The present case is distinguishable from the previous cases concerning transsexuals which have been brought before the Court (see the above-mentioned Rees judgment, the above-mentioned Cossey judgment and the B. v. France judgment (…)), because here the applicants' complaint is not that the domestic law makes no provision for the recognition of the transsexual's change of identity, but rather that it is not possible for such a person to be registered as the father of a child; indeed, it is for this reason that the Court is examining this case in relation to family, rather than private, life (…).

43. It is true that the Court has held in the past that where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible, from the moment of birth or as soon as practicable thereafter, the child's integration in his family (see for example the above-mentioned Marckx judgment, p. 15, para. 31; the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 29, para. 72; the above-mentioned Keegan judgment, p. 19, para. 50; and the above-mentioned Kroon and Others judgment, p. 56, para. 32). However, hitherto in this context it has been called upon to consider only family ties existing between biological parents and their offspring. The present case raises different issues, since Z was conceived by AID and is not related, in the biological sense, to X, who is a transsexual.

44. The Court observes that there is no common European standard with regard to the granting of parental rights to transsexuals. In addition, it has not been established before the Court that there exists any generally shared approach amongst the High Contracting Parties with regard to the manner in which the social relationship between a child conceived by AID and the person who performs the role of father should be reflected in law. Indeed, according to the information available to the Court, although the technology of medically assisted procreation has been available in Europe for several decades, many of the issues to which it gives rise, particularly with regard to the question of filiation, remain the subject of debate. (…)

Since the issues in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation (see, mutatis mutandis, the above mentioned Rees judgment, p. 15, para. 37, and the above-mentioned Cossey judgment, p. 16, para. 40).

3. Whether a fair balance was struck in the instant case

47. First, the Court observes that the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront. (…)

In these circumstances, the Court considers that the State may justifiably be cautious in changing the law, since it is possible that the amendment sought might have undesirable or unforeseen ramifications for children in Z's position. Furthermore, such an amendment might have implications in other areas of family law. For example, the law might be open to criticism on the ground of inconsistency if a female-to-male transsexual were granted the possibility of becoming a "father" in law

while still being treated for other legal purposes as female and capable of contracting marriage to a man.

48. Against these general interests, the Court must weigh the disadvantages suffered by the applicants as a result of the refusal to recognise X in law as Z's "father".

(…) if X were to die intestate, Z would have no automatic right of inheritance. The Court notes, however, that the problem could be solved in practice if X were to make a will. (…) similarly, since Z is a British citizen by birth and can trace connection through her mother in immigration and nationality matters, she will not be disadvantaged in this respect by the lack of a legal relationship with X.

The Court considers, therefore, that these legal consequences would be unlikely to cause undue hardship given the facts of the present case.

49. (…)
In relation to the absence of X's name on the birth certificate, the Court notes, first, that unless X and Y choose to make such information public, neither the child nor any third party will know that this absence is a consequence of the fact that X was born female. It follows that the applicants are in a similar position to any other family where, for whatever reason, the person who performs the role of the child's "father" is not registered as such. The Court does not find it established that any particular stigma still attaches to children or families in such circumstances.

Secondly, the Court recalls that in the United Kingdom a birth certificate is not in common use for administrative or identification purposes and that there are few occasions when it is necessary to produce a full length certificate (…).

50. (…) X is not prevented in any way from acting as Z's father in the social sense. Thus, for example, he lives with her, providing emotional and financial support to her and Y, and he is free to describe himself to her and others as her "father" and to give her his surname (…). Furthermore, together with Y, he could apply for a joint residence order in respect of Z, which would automatically confer on them full parental responsibility for her in English law (…).

51. (…) at the present time there is uncertainty with regard to how the interests of children in Z's position can best be protected (…) and the Court should not adopt or impose any single viewpoint.

52. In conclusion, given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States, the Court is of the opinion that Article 8 (art. 8) cannot, in this context, be taken to imply an obligation for the respondent State formally to recognise as the father of a child a person who is not the biological father. That being so, the fact that the law of the United Kingdom does not allow special legal recognition of the relationship between X and Z does not amount to a failure to respect family life within the meaning of that provision (art. 8).

It follows that there has been no violation of Article 8 of the Convention (art. 8).

FOR THESE REASONS, THE COURT

1. Holds unanimously that Article 8 of the Convention (art. 8) is applicable in the present case;

2. Holds by fourteen votes to six that there has been no violation of Article 8 (art. 8);

3. Holds by seventeen votes to three that it is not necessary to consider the complaint under Article 14 of the Convention taken in conjunction with Article 8 (art. 14+8).

Case of Laskey, Jaggard and Brown v. the United Kingdom, Applications no. 21627/93, 21826/93 and 21974/93, Judgment of 19 February 1997

Keywords: homosexual – sado-masochism – criminal proceedings – protection of health – conviction – private life

AS TO THE FACTS

I. The circumstances of the case

8. In 1987, in the course of routine investigations into other matters, the police came into possession of a number of video films which were made during sado-masochistic encounters involving the applicants and as many as forty-four other homosexual men. As a result the applicants, with several other men, were charged with a series of offences, including assault and wounding, relating to sado-masochistic activities that had taken place over a ten-year period. One of the charges involved a defendant who was not yet 21 years old - the age of consent to male homosexual practices at the time. Although the instances of assault were very numerous, the prosecution limited the counts to a small number of exemplary charges.

The acts consisted in the main of maltreatment of the genitalia (with, for example, hot wax, sandpaper, fish hooks and needles) and ritualistic beatings either with the assailant's bare hands or a variety of implements, including stinging nettles, spiked belts and a cat-o'-nine tails. There were instances of branding and infliction of injuries which resulted in the flow of blood and which left scarring.

These activities were consensual and were conducted in private for no apparent purpose other than the achievement of sexual gratification. The infliction of pain was subject to certain rules including the provision of a code word to be used by any "victim" to stop an "assault", and did not lead to any instances of infection, permanent injury or the need for medical attention.

11. On 19 December 1990, the defendants were convicted and sentenced to terms of imprisonment. On passing sentence, the trial judge commented: "... the unlawful conduct now before the court would be dealt with equally in the prosecution of heterosexuals or bisexuals if carried out by them. The homosexuality of the defendants is only the background against which the case must be viewed."
(…)

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

35. (…) It was common ground among those appearing before the Court that the criminal proceedings against the applicants which resulted in their conviction constituted an "interference by a public authority" with the applicants' right to respect for their private life. It was similarly undisputed that the interference had been "in accordance with the law". Furthermore, the Commission and the applicants accepted the Government's assertion that the interference pursued the legitimate aim of the "protection of health or morals", within the meaning of the second paragraph of Article 8 (art. 8-2).

36. The Court observes that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8 (art. 8). In the present case, the applicants were involved in consensual sado-masochistic activities for purposes of sexual gratification. There can be no doubt that sexual orientation and activity concern an intimate aspect of private life (see, mutatis mutandis, the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 21, para. 52). However, a considerable number of people were involved in the activities in question which included, inter alia, the recruitment of new "members", the provision of several specially equipped "chambers", and the shooting of many videotapes which were distributed among the "members" (…). It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of "private life" in the particular circumstances of the case.

However, since this point has not been disputed by those appearing before it, the Court sees no reason to examine it of its own motion in the present case. Assuming, therefore, that the prosecution and conviction of the applicants amounted to an interference with their private life, the question arises whether such an interference was "necessary in a democratic society" within the meaning of the second paragraph of Article 8 (art. 8-2).

42. According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is "necessary in a democratic society", the Court will take into account that a margin of appreciation is left to the national authorities (see, inter alia, the Olsson v. Sweden (no. 1) judgment of 24 March 1988, Series A no. 130, pp. 31-32, para. 67), whose decision remains subject to review by the Court for conformity with the requirements of the Convention.

The scope of this margin of appreciation is not identical in each case but will vary according to the context. Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned (see the Buckley v. the United Kingdom judgment of 25 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1291-92, para. 74).

43. The Court considers that one of the roles which the State is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law,

activities which involve the infliction of physical harm. This is so whether the activities in question occur in the course of sexual conduct or otherwise.

44. The determination of the level of harm that should be tolerated by the law in situations where the victim consents is in the first instance a matter for the State concerned since what is at stake is related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law, and, on the other, to the personal autonomy of the individual.

45. (…) It is evident from the facts established by the national courts that the applicants' sado-masochistic activities involved a significant degree of injury or wounding which could not be characterised as trifling or transient. This, in itself, suffices to distinguish the present case from those applications which have previously been examined by the Court concerning consensual homosexual behaviour in private between adults where no such feature was present (see the Dudgeon judgment cited above, the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, and the Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259).

46. (…) In deciding whether or not to prosecute, the State authorities were entitled to have regard not only to the actual seriousness of the harm caused - which as noted above was considered to be significant - but also, as stated by Lord Jauncey of Tullichettle (…), to the potential for harm inherent in the acts in question. (…)

47. (…) it is clear from the judgment of the House of Lords that the opinions of the majority were based on the extreme nature of the practices involved and not the sexual proclivities of the applicants (…).

48. Accordingly, the Court considers that the reasons given by the national authorities for the measures taken in respect of the applicants were relevant and sufficient for the purposes of Article 8 para. 2 (art. 8-2).

49. (…) The Court notes that the charges of assault were numerous and referred to illegal activities which had taken place over more than ten years. However, only a few charges were selected for inclusion in the prosecution case. It further notes that, in recognition of the fact that the applicants did not appreciate their actions to be criminal, reduced sentences were imposed on appeal (…). In these circumstances, bearing in mind the degree of organisation involved in the offences, the measures taken against the applicants cannot be regarded as disproportionate.

50. In sum, the Court finds that the national authorities were entitled to consider that the prosecution and conviction of the applicants were necessary in a democratic society for the protection of health within the meaning of Article 8 para. 2 of the Convention (art. 8-2).

51. In view of this conclusion the Court, like the Commission, does not find it necessary to determine whether the interference with the applicants' right to respect for private life could also be justified on the ground of the protection of morals. This finding, however, should not be understood as calling into question the prerogative of the State on moral grounds to seek to deter acts of the kind in question.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 8 of the Convention (art. 8).

Case of Modinos v. Cyprus, Application no. 15070/89, Judgment of 22 April 1993

Keywords: homosexual – prohibition – private life

AS TO THE FACTS

7. The applicant is a homosexual who is currently involved in a sexual relationship with another male adult. He is the President of the "Liberation Movement of Homosexuals in Cyprus". He states that he suffers great strain, apprehension and fear of prosecution by reason of the legal provisions which criminalise certain homosexual acts.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

A. The existence of an interference

20. The Court first observes that the prohibition of male homosexual conduct in private between adults still remains on the statute book (see paragraph 8 above). Moreover, the Supreme Court of Cyprus in the case of Costa v. The Republic considered that the relevant provisions of the Criminal Code violated neither the Convention nor the Constitution notwithstanding the European Court's Dudgeon v. the United Kingdom judgment of 22 October 1981 (Series A no. 45) (see paragraph 11 above).

22. In the Court's view, whatever the status in domestic law of these remarks, it cannot fail to take into account such a statement from the highest court of the land on matters so pertinent to the issue before it (see, mutatis mutandis, the Pine Valley Developments Ltd and Others v. Ireland judgment of 29 November 1991, Series A no. 222, pp. 23-24, para. 52).

23. It is true that since the Dudgeon judgment the Attorney-General, who is vested with the power to institute or discontinue prosecutions in the public interest, has followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct on the basis that the relevant law is a dead letter.
Nevertheless, it is apparent that this policy provides no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force (see paragraph 9 above). Moreover, it cannot be excluded, as matters stand, that the applicant's private behaviour may be the subject of investigation by the police or that an attempt may be made to bring a private prosecution against him.

24. Against this background, the Court considers that the existence of the prohibition continuously and directly affects the applicant's private life. There is therefore an interference (see the above-mentioned Dudgeon and Norris judgments, Series A nos. 45 and 142, pp. 18-19, paras. 40-41, and pp. 17-18, paras. 35-38).

B. The existence of a justification under Article 8 para. 2 (art. 8-2)

25. The Government have limited their submissions to maintaining that there is no interference with the applicant's rights and have not sought to argue that there exists a justification under paragraph 2 of Article 8 (art. 8-2) for the impugned legal provisions. In the light of this concession and having regard to the Court's case-law (see the above-mentioned Dudgeon and Norris judgments, pp. 19-25, paras. 42-62, and pp. 18-21, paras. 39-47), a re-examination of this question is not called for.

C. Conclusion

26. Accordingly, there is a breach of Article 8 (art. 8) in the present case.

II. APPLICATION OF ARTICLE 50 (art. 50)

A. Damage

30. The Court considers that, in the circumstances of the case, the finding of a breach of Article 8 (art. 8) constitutes sufficient just satisfaction under this head for the purposes of Article 50 (art. 50).

FOR THESE REASONS, THE COURT

1. Holds by eight votes to one that there is a breach of Article 8 (art. 8) of the Convention;

2. Holds unanimously that Cyprus is to pay the applicant, within three months, the sum of 6,836 (six thousand, eight hundred and thirty-six) Cyprus pounds in respect of costs and expenses;

3. Dismisses unanimously the remainder of the claim for just satisfaction.

Case of B. v. France, Application no. 13343/87, Judgment of 25 March 1992

Keywords: transsexual – birth register – civil status – private life

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. The applicant, who is a French citizen, was born in 1935 at Sidi Bel Abbès, Algeria, and was registered with the civil status registrar as of male sex, with the forenames Norbert Antoine.

A. The background to the case

11. Distressed by her feminine character, she suffered from attacks of nervous depression until 1967, when she was treated in hospital for a month. The doctor who treated her from 1963 observed a hypotrophy of the male genital organs and prescribed feminising hormone therapy, which rapidly brought about development of the breasts and feminisation of her appearance. The applicant adopted female dress from then on. She underwent a surgical operation in Morocco in 1972, consisting of the removal of the external genital organs and the creation of a vaginal cavity (see paragraph 18 below).

12. Miss B. is now living with a man whom she met shortly before her operation and whom she at once informed of her situation. She is no longer working on the stage, and is said to have been unable to find employment because of the hostile reactions she aroused.

PROCEEDINGS BEFORE THE COMMISSION

29. In her application of 28 September 1987 to the Commission (no. 13343/87), Miss B. complained of the refusal of the French authorities to recognise her true sexual identity, in particular their refusal to allow her the change of civil status sought. She relied on Articles 3, 8 and 12 (art. 3, art. 8, art. 12) of the Convention.

AS TO THE LAW

II. THE MERITS

A. Alleged violation of Article 8 (art. 8)

44. The Court notes first of all that the notion of "respect" enshrined in Article 8 (art. 8) is not clear-cut. This is the case especially where the positive obligations implicit in that concept are concerned, as in the instant case (see the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, p. 14, para. 35, and the Cossey v. the United Kingdom judgment of 27 September 1990, Series A no. 184, p. 15, para. 36), and its requirements will vary considerably from case to case according to the practices followed and the situations obtaining in the Contracting States. In determining whether or not such an obligation exists, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual (see in particular the above-mentioned Cossey judgment, p. 15, para. 37).

1. Scientific, legal and social developments

48. The Court considers that it is undeniable that attitudes have changed, science has progressed and increasing importance is attached to the problem of transsexualism.
It notes, however, in the light of the relevant studies carried out and work done by experts in this field, that there still remains some uncertainty as to the essential nature of transsexualism and that the legitimacy of surgical intervention in such cases is sometimes questioned. The legal situations which result are moreover extremely complex: anatomical, biological, psychological and moral problems in connection with transsexualism and its definition; consent and other requirements to be complied

with before any operation; the conditions under which a change of sexual identity can be authorised (validity, scientific presuppositions and legal effects of recourse to surgery, fitness for life with the new sexual identity); international aspects (place where the operation is performed); the legal consequences, retrospective or otherwise, of such a change (rectification of civil status documents); the opportunity to choose a different forename; the confidentiality of documents and information mentioning the change; effects of a family nature (right to marry, fate of an existing marriage, filiation), and so on. On these various points there is as yet no sufficiently broad consensus between the member States of the Council of Europe to persuade the Court to reach opposite conclusions to those in its Rees and Cossey judgments.

2. The differences between the French and English systems

a) Civil status

(i) Rectification of civil status documents

52. (…) The Court had found, in connection with the English civil status system, that the purpose of the registers was not to define the present identity of an individual but to record a historic fact, and their public character would make the protection of private life illusory if it were possible to make subsequent corrections or additions of this kind (see the above-mentioned Rees judgment, Series A no. 106, pp. 17-18, para. 42). This was not the case in France. Birth certificates were intended to be updated throughout the life of the person concerned (…), so that it would be perfectly possible to insert a reference to a judgment ordering the amendment of the original sex recorded. Moreover, the only persons who had direct access to them were public officials authorised to do so and persons who had obtained permission from the Procureur de la République; their public character was ensured by the issuing of complete copies or extracts. France could therefore uphold the applicant's claim without amending the legislation; a change in the Court of Cassation's case-law would suffice.

55. The Court notes first of all that nothing would have prevented the insertion, once judgment had been given, in Miss B.'s birth certificate, in some form or other, of an annotation whose purpose was not, strictly speaking, to correct an actual initial error but to bring the document up to date so as to reflect the applicant's present position. Furthermore, numerous courts of first instance and courts of appeal have already ordered similar insertions in the case of other transsexuals, and the procureur's office has hardly ever appealed against such decisions, the great majority of which have now become final and binding (…). The Court of Cassation has adopted a contrary position in its case law, but this could change (…).
It is true that the applicant underwent the surgical operation abroad, without the benefit of all the medical and psychological safeguards which are now required in France. The operation nevertheless involved the irreversible abandonment of the external marks of Miss B.'s original sex. The Court considers that in the circumstances of the case the applicant's manifest determination is a factor which is sufficiently significant to be taken into account, together with other factors, with reference to Article 8 (art. 8).

(ii) Change of forenames

58. The judgments supplied to the Court by the Government do indeed show that non-recognition of the change of sex does not necessarily prevent the person in question from obtaining a new forename which will better reflect his or her physical appearance (…).
However, this case-law was not settled at the time when the Libourne and Bordeaux courts gave their rulings. Indeed, it does not appear to be settled even today, as the Court of Cassation has apparently never had an occasion to confirm it. Moreover, the door it opens is a very narrow one, as only the few neutral forenames can be chosen. As to informally adopted forenames, they have no legal status.
To sum up, the Court considers that the refusal to allow the applicant the change of forename requested by her is also a relevant factor from the point of view of Article 8 (art. 8).

(b) Documents

59. (a) The applicant stressed that an increasing number of official documents indicated sex: extracts of birth certificates, computerised identity cards, European Communities passports, etc. Transsexuals could consequently not cross a frontier, undergo an identity check or carry out one of the many transactions of daily life where proof of identity is necessary, without disclosing the discrepancy between their legal sex and their apparent sex.

(b) According to the applicant, sex was also indicated on all documents using the identification number issued to everyone by INSEE (see paragraph 26 above). This number was used as part of the system of dealings between social security institutions, employers and those insured; it therefore appeared on records of contributions paid and on payslips. A transsexual was consequently unable to hide his or her situation from a potential employer and the employer's administrative staff; the same applied to the many occasions in daily life where it was necessary to prove the existence and amount of one's income (taking a lease, opening a bank account, applying for credit, etc). This led to difficulties for the social and professional integration of transsexuals. Miss B. had allegedly been a victim of this herself. The INSEE number was also used by the Banque de France in keeping the register of stolen and worthless cheques.
(c) Finally, the applicant encountered problems every day in her economic life, in that her invoices and cheques indicated her original sex as well as her surname and forenames.

62. The Court (…) considers, in agreement with the Commission, that the inconveniences complained of by the applicant in this field reach a sufficient degree of seriousness to be taken into account for the purposes of Article 8 (art. 8).

(c) Conclusion

63. The Court thus reaches the conclusion, on the basis of the above-mentioned factors which distinguish the present case from the Rees and Cossey cases and without it being necessary to consider the applicant's other arguments, that she finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life. Consequently, even having regard to the State's margin of

appreciation, the fair balance which has to be struck between the general interest and the interests of the individual (…) has not been attained, and there has thus been a violation of Article 8 (art. 8).
The respondent State has several means to choose from for remedying this state of affairs. It is not the Court's function to indicate which is the most appropriate (see inter alia the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 25, para. 58, and the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 15, para. 26).

III. APPLICATION OF ARTICLE 50 (art. 50)

67. The Court considers that Miss B. has suffered non-pecuniary damage as a result of the situation found in the present judgment to be contrary to the Convention. Taking a decision on an equitable basis as required by Article 50 (art. 50), it awards her 100,000 FRF under this head.
(…)

FOR THESE REASONS, THE COURT

1. Holds by sixteen votes to five that it has jurisdiction to examine the Government's preliminary objections;

2. Dismisses them unanimously;

3. Holds by fifteen votes to six that there has been a violation of Article 8 (art. 8);

4. Holds unanimously that it is not necessary also to examine the case from the point of view of Article 3 (art. 3);

5. Holds by fifteen votes to six that the respondent State is to pay the applicant within three months 100,000 (one hundred thousand) French francs in respect of non-pecuniary damage and 35,000 (thirty-five thousand) French francs for costs and expenses;

6. Dismisses unanimously the remainder of the claim for just satisfaction.

Case of Cossey v. the United Kingdom, Application no. 10843/84, Judgment of 27 September 1990 (Plenary Court)

Keywords: transsexual – birth register – private life – right to marry

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. The applicant, who is a British citizen, was born in 1954 and registered in the birth register as a male, under the male Christian names of Barry Kenneth.

10. (…) In July 1972 she abandoned her male Christian names and assumed the female Christian name of Caroline, a change which she confirmed by deed poll (…) in March 1973. Since July 1972 she has been known under that name for all purposes, has dressed as a woman and has adopted a female role.

11. In December 1974 the applicant, who had previously taken female hormones and had had an operation for breast augmentation involving implants, underwent gender reassignment surgery in a London hospital, to render the external anatomy nearer that of the female gender. (…)

12. In 1976 the applicant was issued with a United Kingdom passport as a female (see paragraphs 16-17 below). (…)

13. In 1983 Miss Cossey and Mr L., an Italian national whom she had known for some fourteen months, wished to marry each other.
By letter of 22 August 1983, the Registrar General informed the applicant that such a marriage would be void as a matter of English law, because it would classify her as male notwithstanding her anatomical and psychological status. (…) A reply on behalf of the Registrar General, dated 18 January 1984, to a further enquiry by the applicant stated that she could not be granted a birth certificate showing her sex as female, since such a certificate records details as at the date of birth (…).

AS TO THE LAW

I. IS THE PRESENT CASE DISTINGUISHABLE ON ITS FACTS FROM THE REES CASE?

32. In the view of the applicant and certain members of the Commission, the present case was distinguishable on its facts from the Rees case, in that, at the time of their respective applications to the Commission, Miss Cossey had a male partner wishing to marry her (see paragraph 13 above) whereas Mr Rees did not have a female partner wishing to marry him. (…)
(…) as regards Article 8 (art. 8), the existence or otherwise of a willing marriage partner has no relevance in relation to the contents of birth certificates, copies of which may be sought or required for purposes wholly unconnected with marriage. Again, as regards Article 12 (art. 12), whether a person has the right to marry depends not on the existence in the individual case of such a partner or a wish to marry, but on whether or not he or she meets the general criteria laid down by law.

33. Reliance was also placed by the applicant on the fact that she is socially accepted as a woman (see paragraphs 10-12 above), but this provides no relevant distinction because the same was true, mutatis mutandis, of Mr Rees (see the Rees judgment, p. 9, para. 17). Neither is it material that Miss Cossey is a male-to-female transsexual whereas Mr Rees is a female-to-male transsexual: this - the only other factual difference between the two cases - is again a matter that had no bearing on the reasoning in the Rees judgment.

34. The Court thus concludes that the present case is not materially distinguishable on its facts from the Rees case.

II. SHOULD THE COURT DEPART FROM ITS REES JUDGMENT?

35. (…) It is true that, as she submitted, the Court is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions (see, amongst several authorities, the Inze judgment of 28 October 1987, Series A no. 126, p. 18, para. 41).

A. Alleged violation of Article 8 (art. 8)

36. (…) the Court remains of the opinion which it expressed in the Rees judgment (p. 14, para. 35): refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the original entries cannot be considered as an interference. What the applicant is arguing is not that the State should abstain from acting but rather that it should take steps to modify its existing system. The question is, therefore, whether an effective respect for Miss Cossey's private life imposes a positive obligation on the United Kingdom in this regard.

37. As the Court has pointed out on several occasions, notably in the Rees judgment itself (p. 15, para. 37), the notion of "respect" is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.

38. In reaching its conclusion in the Rees judgment that no positive obligation of the kind now in issue was incumbent on the United Kingdom, the Court noted, inter alia, the following points (…).[10]

39. In the Court's view, these points are equally cogent in the present case, especially as regards Miss Cossey's submission that arrangements could be made to provide her either with a copy birth certificate stating her present sex, the official register continuing to record the sex at birth, or, alternatively, a short-form certificate, excluding any reference either to sex at all or to sex at the date of birth.
Her suggestions in this respect were not precisely formulated, but it appears to the Court that none of them would overcome the basic difficulties. Unless the public character of the register of births were altered, the very details which the applicant does not wish to have disclosed would still be revealed by the original entry therein or, if that entry were annotated, would merely be highlighted. Moreover, the register

[10] Please see the Rees Judgment, p. XX of this compilation

could not be corrected to record a complete change of sex since that is not medically possible.

40. (…) The Court has been informed of no significant scientific developments that have occurred in the meantime; in particular, it remains the case - as was not contested by the applicant - that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex.
There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. However, the reports accompanying the resolution adopted by the European Parliament on 12 September 1989 (OJ No C 256, 9.10.1989, p. 33) and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989 - both of which seek to encourage the harmonisation of laws and practices in this field - reveal, as the Government pointed out, the same diversity of practice as obtained at the time of the Rees judgment. Accordingly this is still, having regard to the existence of little common ground between the Contracting States, an area in which they enjoy a wide margin of appreciation (see the Rees judgment, p. 15, para. 37). In particular, it cannot at present be said that a departure from the Court's earlier decision is warranted in order to ensure that the interpretation of Article 8 (art. 8) on the point at issue remains in line with present-day conditions (see paragraph 35 above).

42. The Court accordingly concludes that there is no violation of Article 8 (art. 8).
The Court would, however, reiterate the observations it made in the Rees judgment (p. 19, para. 47). It is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.

B. Alleged violation of Article 12 (art. 12)

43. In reaching its conclusion in the Rees judgment that there had been no violation of Article 12 (art. 12), the Court noted the following points (…).[11]

45. As to the applicant's inability to marry a woman, this does not stem from any legal impediment and in this respect it cannot be said that the right to marry has been impaired as a consequence of the provisions of domestic law.
As to her inability to marry a man, the criteria adopted by English law are in this respect in conformity with the concept of marriage to which the right guaranteed by Article 12 (art. 12) refers (see paragraph 43 (a) above).

46. Although some Contracting States would now regard as valid a marriage between a person in Miss Cossey's situation and a man, the developments which have occurred to date (…) cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the Court does not consider that it is open to it to take a new approach to the interpretation of Article 12 (art. 12) on the point at issue. It finds, furthermore, that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter

[11] Please see the Rees Judgment, p. XX of this compilation.

encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.

48. The Court thus concludes that there is no violation of Article 12 (art. 12).

FOR THESE REASONS, THE COURT

1. Holds by ten votes to eight that there is no violation of Article 8 (art. 8);

2. Holds by fourteen votes to four that there is no violation of Article 12 (art. 12).

Case of Norris v. Ireland, Application no. 10581/83, Judgment of 26 October 1988

Keywords: homosexual – criminal offence – private life

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. Mr Norris is an active homosexual and has been a campaigner for homosexual rights in Ireland since 1971; in 1974 he became a founder member and chairman of the Irish Gay Rights Movement. His complaints are directed against the existence in Ireland of laws which make certain homosexual practices between consenting adult men criminal offences. (…)

11. It is common ground that at no time before or since the court proceedings brought by the applicant has he been charged with any offence in relation to his admitted homosexual activities. However, he remains legally at risk of being so prosecuted, either by the Director of Public Prosecutions or by way of a private prosecution initiated by a common informer up to the stage of return for trial (…).

AS TO THE LAW

I. WHETHER THE APPLICANT IS ENTITLED TO CLAIM TO BE A VICTIM UNDER ARTICLE 25 PARA. 1 (art. 25-1)

30. The Court recalls that, (…) Article 25 (art. 25) requires that an individual applicant should be able to claim to be actually affected by the measure of which he complains. Article 25 (art. 25) may not be used to found an action in the nature of an actio popularis; nor may it form the basis of a claim made in abstracto that a law contravenes the Convention (see the Klass and Others judgment, previously cited, Series A no. 28, pp. 17-18, para. 33).

31. (…) the conditions governing individual applications under Article 25 (art. 25) of the Convention are not necessarily the same as national criteria relating to locus standi. National rules in this respect may serve purposes different from those contemplated by Article 25 (art. 25) and, whilst those purposes may sometimes be analogous, they need not always be so (ibid., p. 19, para. 36).

Be that as it may, the Court has held that Article 25 (art. 25) of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 21, para. 42, and the Marckx judgment, previously cited, Series A no. 31, p. 13, para. 27).

32. In the Court's view, Mr Norris is in substantially the same position as the applicant in the Dudgeon case, which concerned identical legislation then in force in Northern Ireland. As was held in that case, "either [he] respects the law and refrains from engaging - even in private and with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution" (Series A no. 45, p. 18, para. 41).

33. Admittedly, it appears that there have been no prosecutions under the Irish legislation in question during the relevant period except where minors were involved or the acts were committed in public or without consent. It may be inferred from this that, at the present time, the risk of prosecution in the applicant's case is minimal. However, there is no stated policy on the part of the prosecuting authorities not to enforce the law in this respect (…). A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question. (…)

34. On the basis of the foregoing considerations, the Court finds that the applicant can claim to be the victim of a violation of the Convention within the meaning of Article 25 para. 1 (art. 25-1) thereof.
(…)

II. THE ALLEGED BREACH OF ARTICLE 8 (art. 8)

A. The existence of an interference

38. The Court agrees with the Commission that, with regard to the interference with an Article 8 (art. 8) right, the present case is indistinguishable from the Dudgeon case. The laws in question are applied so as to prosecute persons in respect of homosexual acts committed in the circumstances mentioned in the first sentence of paragraph 33. Above all, and quite apart from those circumstances, enforcement of the legislation is a matter for the Director of Public Prosecutions who may not fetter his discretion with regard to each individual case by making a general statement of his policy in advance (…). A prosecution may, in any event, be initiated by a member of the public acting as a common informer (…).
It is true that, unlike Mr Dudgeon, Mr Norris was not the subject of any police investigation. However, the Court's finding in the Dudgeon case that there was an interference with the applicant's right to respect for his private life was not dependent upon this additional factor. As was held in that case, "the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life ... within the meaning of Article 8 para. 1 (art. 8-1). In the

personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life..." (Series A no. 45, p. 18, para. 41).
The Court therefore finds that the impugned legislation interferes with Mr Norris's right to respect for his private life under Article 8 para. 1.

B. The existence of a justification for the interference

39. The interference found by the Court does not satisfy the conditions of paragraph 2 of Article 8 (art. 8-2) unless it is "in accordance with the law", has an aim which is legitimate under this paragraph and is "necessary in a democratic society" for the aforesaid aim (see, as the most recent authority, the Olsson judgment of 24 March 1988, Series A no. 130, p. 29, para. 59).

40. It is common ground that the first two conditions are satisfied. (…)

41. It remains to be determined whether the maintenance in force of the impugned legislation is "necessary in a democratic society" for the aforesaid aim. According to the Court's case-law, this will not be so unless, inter alia, the interference in question answers a pressing social need and in particular is proportionate to the legitimate aim pursued (see, amongst many other authorities, the above-mentioned Olsson judgment, Series A no. 130, p. 31, para. 67).

44. (…) As early as 1976, the Court declared in its Handyside judgment of 7 December 1976 that, in investigating whether the protection of morals necessitated the various measures taken, it had to make an "assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context" and stated that "every 'restriction' imposed in this sphere must be proportionate to the legitimate aim pursued" (Series A no. 24, pp. 21-23, paras. 46, 48 and 49). It confirmed this approach in its Dudgeon judgment (Series A no. 45, pp. 20-22, paras. 48 et seq.).
The more recent case of Müller and Others demonstrates that, in the context of the protection of morals, the Court continues to apply the same tests for determining what is "necessary in a democratic society". (…)
The Court sees no reason to depart from the approach which emerges from its settled case-law and, although of the three aforementioned judgments two related to Article 10 (art. 10) of the Convention, it sees no cause to apply different criteria in the context of Article 8 (art. 8).

45. (…) Whilst national authorities - as the Court acknowledges - do enjoy a wide margin of appreciation in matters of morals, this is not unlimited. It is for the Court, in this field also, to give a ruling on whether an interference is compatible with the Convention (see the previously cited Handyside judgment, Series A no. 24, p. 23, para. 49). (…)

46. As in the Dudgeon case, "... not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art. 8-2)" (Series A no. 45, p. 21, para. 52). (…)

Applying the same tests[12] to the present case, the Court considers that, as regards Ireland, it cannot be maintained that there is a "pressing social need" to make such acts criminal offences. On the specific issue of proportionality, the Court is of the opinion that "such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved" (…).

47. The Court therefore finds that the reasons put forward as justifying the interference found are not sufficient to satisfy the requirements of paragraph 2 of Article 8 (art. 8-2). There is accordingly a breach of that Article (art. 8).

III. THE APPLICATION OF ARTICLE 50 (art. 50)

A. Damage

50. (…) As in the Marckx case, it is inevitable that the Court's decision will have effects extending beyond the confines of this particular case, especially since the violation found stems directly from the contested provisions and not from individual measures of implementation. It will be for Ireland to take the necessary measures in its domestic legal system to ensure the performance of its obligation under Article 53 (art. 53) (Series A no. 31, p. 25, para. 58).
For this reason and notwithstanding the different situation in the present case as compared with the Dudgeon case, the Court is of the opinion that its finding of a breach of Article 8 (art. 8) constitutes adequate just satisfaction for the purposes of Article 50 (art. 50) of the Convention and therefore rejects this head of claim.

FOR THESE REASONS, THE COURT

1. Holds by eight votes to six that the applicant can claim to be a victim within the meaning of Article 25 (art. 25) of the Convention;

2. Holds by eight votes to six that there is a breach of Article 8 (art. 8) of the Convention;
(…)

4. Dismisses unanimously the remainder of the claim for just satisfaction.

[12] Please see the Dudgeon Judgment, p. XX of this compilation.

Case of Rees v. the United Kingdom, Application no. 9532/81, Judgment of 17 October 1986 (Plenary Court)

Keywords: transsexual – birth register – civil status – private life – right to marry

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

12. At birth the applicant possessed all the physical and biological characteristics of a child of the female sex, and was consequently recorded in the register of births as a female, under the name Brenda Margaret Rees. However, already from a tender age the child started to exhibit masculine behaviour and was ambiguous in appearance. (…)

13. In September 1971, the applicant - who will henceforth be referred to in the masculine - changed his name to Brendan Mark Rees and subsequently, in September 1977, to Mark Nicholas Alban Rees. He has been living as a male ever since. After the change of name, the applicant requested and received a new passport containing his new names. The prefix "Mr." was, however, at that time denied to him.

14. Surgical treatment for physical sexual conversion began in May 1974 with a bilateral masectomy and led to the removal of feminine external characteristics. The costs of the medical treatment, including the surgical procedures, were borne by the National Health Service.

15. The applicant made several unsuccessful efforts from 1973 onwards to persuade Members of Parliament to introduce a Private Member's Bill to resolve the problems of transsexuals. Representations were also made by him, and by a number of Members of Parliament on his behalf, to the Registrar General to secure the alteration of his birth certificate to show his sex as male, but to no avail.

16. On 10 November 1980 his solicitor wrote to the Registrar General making a formal request under Section 29(3) of the Births and Deaths Registration Act 1953, on the ground that there had been "a mistake in completing the Register". (…)
On 25 November the Registrar General refused the application to alter the Register. He stated that the report on the applicant's psychological sex was not decisive and that, "in the absence of any medical report on the other agreed criteria (chromosomal sex, gonadal sex and apparent sex)", he was "unable to consider whether an error (had been) made at birth registration in that the child was not of the sex recorded". No further evidence in support of the applicant's request was subsequently submitted.

17. The applicant considers himself a man and is socially accepted as such. Except for the birth certificate, all official documents today refer to him by his new name and the prefix "Mr.", where such prefix is used. The prefix was added to his name in his passport in 1984.

PROCEEDINGS BEFORE THE COMMISSION

30. In his application (no. 9532/81) lodged with the Commission on 18 April 1979, Mr. Rees complained that United Kingdom law did not confer on him a legal status corresponding to his actual condition. He invoked Articles 3, 8 and 12 (art. 3, art. 8, art. 12) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

A. Interpretation of Article 8 (art. 8) in the context of the present case

35. The Court has already held on a number of occasions that, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective respect for private life, albeit subject to the State's margin of appreciation (see, as the most recent authority, the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, pp. 33-34, para. 67).
In the present case it is the existence and scope of such "positive" obligations which have to be determined. The mere refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register cannot be considered as interferences.

37. As the Court pointed out in its above-mentioned Abdulaziz, Cabales and Balkandali judgment the notion of "respect" is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case.
These observations are particularly relevant here. Several States have, through legislation or by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations (for example, as to previously incurred obligations). In other States, such an option does not - or does not yet - exist. It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation.
In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (see, mutatis mutandis, amongst others, the James and Others judgment of 21 February 1986, Series A no. 98, p. 34, para. 50, and the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 26, para. 69). In striking this balance the aims mentioned in the second paragraph of Article 8 (art. 8-2) may be of a certain relevance, although this provision refers in terms only to "interferences" with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 15, para. 31).

B. Compliance with Article 8 (art. 8)

38. Transsexualism is not a new condition, but its particular features have been identified and examined only fairly recently. The developments that have taken place in consequence of these studies have been largely promoted by experts in the medical and scientific fields who have drawn attention to the considerable problems experienced by the individuals concerned and found it possible to alleviate them by means of medical and surgical treatment. The term "transsexual" is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group.

39. In the United Kingdom no uniform, general decision has been adopted either by the legislature or by the courts as to the civil status of post-operative transsexuals. Moreover, there is no integrated system of civil status registration, but only separate registers for births, marriages, deaths and adoption. These record the relevant events in the manner they occurred without, except in special circumstances (see paragraph 22 above), mentioning changes (of name, address, etc.) which in other States are registered.

40. However, transsexuals, like anyone else in the United Kingdom, are free to change their first names and surnames at will (see paragraph 19 above). Similarly, they can be issued with official documents bearing their chosen first names and surnames and indicating, if their sex is mentioned at all, their preferred sex by the relevant prefix (Mr., Mrs., Ms. or Miss) (see paragraph 20 above). This freedom gives them a considerable advantage in comparison with States where all official documents have to conform with the records held by the registry office.
Conversely, the drawback - emphasised by the applicant - is that, as the country's legal system makes no provision for legally valid civil-status certificates, such persons have on occasion to establish their identity by means of a birth certificate which is either an authenticated copy of or an extract from the birth register. The nature of this register, which furthermore is public, is that the certificates mention the biological sex which the individuals had at the time of their birth (…). The production of such a birth certificate is not a strict legal requirement, but may on occasion be required in practice for some purposes (…).
It is also clear that the United Kingdom does not recognise the applicant as a man for all social purposes. Thus, it would appear that, at the present stage of the development of United Kingdom law, he would be regarded as a woman, inter alia, as far as marriage, pension rights and certain employments are concerned (…). The existence of the unamended birth certificate might also prevent him from entering into certain types of private agreements as a man (see paragraph 25 above).

42. (…) (a) To require the United Kingdom to follow the example of other Contracting States is from one perspective tantamount to asking that it should adopt a system in principle the same as theirs for determining and recording civil status.
Albeit with delay and some misgivings on the part of the authorities, the United Kingdom has endeavoured to meet the applicant's demands to the fullest extent that its system allowed. The alleged lack of respect therefore seems to come down to a refusal to establish a type of documentation showing, and constituting proof of,

current civil status. The introduction of such a system has not hitherto been considered necessary in the United Kingdom. It would have important administrative consequences and would impose new duties on the rest of the population. The governing authorities in the United Kingdom are fully entitled, in the exercise of their margin of appreciation, to take account of the requirements of the situation pertaining there in determining what measures to adopt. While the requirement of striking a fair balance, as developed in paragraph 37 above, may possibly, in the interests of persons in the applicant's situation, call for incidental adjustments to the existing system, it cannot give rise to any direct obligation on the United Kingdom to alter the very basis thereof.

(b) Interpreted somewhat more narrowly, the applicant's complaint might be seen as a request to have such an incidental adjustment in the form of an annotation to the present birth register. (…)
The Court notes that the additions at present permitted as regards adoption and legitimation also concern events occurring after birth and that, in this respect, they are not different from the annotation sought by the applicant. However, they record facts of legal significance and are designed to ensure that the register fulfils its purpose of providing an authoritative record for the establishment of family ties in connection with succession, legitimate descent and the distribution of property. The annotation now being requested would, on the other hand, establish only that the person concerned henceforth belonged to the other sex. Furthermore, the change so recorded could not mean the acquisition of all the biological characteristics of the other sex. In any event, the annotation could not, without more, constitute an effective safeguard for ensuring the integrity of the applicant's private life, as it would reveal his change of sexual identity.

43. The applicant has accordingly also asked that the change, and the corresponding annotation, be kept secret from third parties.
However, such secrecy could not be achieved without first modifying fundamentally the present system for keeping the register of births, so as to prohibit public access to entries made before the annotation. Secrecy could also have considerable unintended results and could prejudice the purpose and function of the birth register by complicating factual issues arising in, inter alia, the fields of family and succession law. Furthermore, no account would be taken of the position of third parties, including public authorities (e.g. the armed services) or private bodies (e.g. life insurance companies) in that they would be deprived of information which they had a legitimate interest to receive.

44. In order to overcome these difficulties there would have to be detailed legislation as to the effects of the change in various contexts and as to the circumstances in which secrecy should yield to the public interest. Having regard to the wide margin of appreciation to be afforded the State in this area and to the relevance of protecting the interests of others in striking the requisite balance, the positive obligations arising from Article 8 (art. 8) cannot be held to extend that far.

45. This conclusion is not affected by the fact, on which both the Commission and the applicant put a certain emphasis, that the United Kingdom cooperated in the applicant's medical treatment.

If such arguments were adopted too widely, the result might be that Government departments would become over-cautious in the exercise of their functions and the helpfulness necessary in their relations with the public could be impaired. In the instant case, the fact that the medical services did not delay the giving of medical and surgical treatment until all legal aspects of persons in the applicant's situation had been fully investigated and resolved, obviously benefited him and contributed to his freedom of choice.

46. Accordingly, there is no breach of Article 8 (art. 8) in the circumstances of the present case.

47. That being so, it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances (see, mutatis mutandis, amongst others, the Dudgeon judgment of 22 October 1981, Series A no. 45, pp. 23-24, paragraph 60). The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.

II. ALLEGED VIOLATION OF ARTICLE 12 (art. 12)

49. In the Court's opinion, the right to marry guaranteed by Article 12 (art. 12) refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 (art. 12) is mainly concerned to protect marriage as the basis of the family.

50. Furthermore, Article 12 (art. 12) lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind.

51. There is accordingly no violation in the instant case of Article 12 (art. 12) of the Convention.

FOR THESE REASONS, THE COURT

1. Holds by twelve votes to three that there is no violation of Article 8 (art. 8);

2. Holds unanimously that there is no violation of Article 12 (art. 12).

Case of Dudgeon v. the United Kingdom, Application no. 7525/76, Merits and Just Satisfaction

Keywords: homosexual – prohibition – private life – satisfaction

Judgment of 22 October 1981 (Plenary Court), Merits

AS TO THE FACTS

F. The personal circumstances of the applicant

32. The applicant has, on his own evidence, been consciously homosexual from the age of 14. For some time he and others have been conducting a campaign aimed at bringing the law in Northern Ireland into line with that in force in England and Wales and, if possible, achieving a minimum age of consent lower than 21 years.

33. On 21 January 1976, the police went to Mr. Dudgeon's address to execute a warrant under the Misuse of Drugs Act 1971. During the search of the house a quantity of cannabis was found which subsequently led to another person being charged with drug offences. Personal papers, including correspondence and diaries, belonging to the applicant in which were described homosexual activities were also found and seized. As a result, he was asked to go to a police station where for about four and a half hours he was questioned, on the basis of these papers, about his sexual life. The police investigation file was sent to the Director of Prosecutions. It was considered with a view to instituting proceedings for the offence of gross indecency between males. The Director, in consultation with the Attorney General, decided that it would not be in the public interest for proceedings to be brought. Mr. Dudgeon was so informed in February 1977 and his papers, with annotations marked over them, were returned to him.

AS TO THE LAW

I. THE ALLEGED BREACH OF ARTICLE 8 (art. 8)

A. Introduction

39. Although it is not homosexuality itself which is prohibited but the particular acts of gross indecency between males and buggery (…), there can be no doubt but that male homosexual practices whose prohibition is the subject of the applicant's complaints come within the scope of the offences punishable under the impugned legislation; it is on that basis that the case has been argued by the Government, the applicant and the Commission. Furthermore, the offences are committed whether the act takes place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants are consenting. It is evident from Mr. Dudgeon's submissions, however, that his complaint was in essence directed against the fact that homosexual acts which he might commit in private with other males capable of valid consent are criminal offences under the law of Northern Ireland.

B. The existence of an interference with an Article 8 (art. 8) right

41. The Court sees no reason to differ from the views of the Commission: the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 13, par. 27): either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.
It cannot be said that the law in question is a dead letter in this sphere. It was, and still is, applied so as to prosecute persons with regard to private consensual homosexual acts involving males under 21 years of age (…). Although no proceedings seem to have been brought in recent years with regard to such acts involving only males over 21 years of age, apart from mental patients, there is no stated policy on the part of the authorities not to enforce the law in this respect (ibid). Furthermore, apart from prosecution by the Director of Public Prosecution, there always remains the possibility of a private prosecution (…).
Moreover, the police investigation in January 1976 was, in relation to the legislation in question, a specific measure of implementation - albeit short of actual prosecution - which directly affected the applicant in the enjoyment of his right to respect for his private life (…). As such, it showed that the threat hanging over him was real.

C. The existence of a justification for the interference found by the Court

43. An interference with the exercise of an Article 8 (art. 8) right will not be compatible with paragraph 2 (art. 8-2) unless it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and is "necessary in a democratic society" for the aforesaid aim or aims (see, mutatis, mutandis, the Young, James and Webster judgment of 13 August 1981, Series A no. 44, p. 24, par. 59).

44. It has not been contested that the first of these three conditions was met. As the Commission pointed out in paragraph 99 of its report, the interference is plainly "in accordance with the law" since it results from the existence of certain provisions in the 1861 and 1885 Acts and the common law (…).

45. It next falls to be determined whether the interference is aimed at "the protection of morals" or "the protection of the rights and freedoms of others", the two purposes relied on by the Government.

46. The 1861 and 1885 Acts were passed in order to enforce the then prevailing conception of sexual morality. (…). In recent years the scope of the legislation has been restricted in England and Wales (with the 1967 Act) and subsequently in Scotland (with the 1980 Act): with certain exceptions it is no longer a criminal offence for two consenting males over 21 years of age to commit homosexual acts in private (…). In Northern Ireland, in contrast, the law has remained unchanged. The decision announced in July 1979 to take no further action in relation to the proposal to amend the existing law was, the Court accepts, prompted by what the United Kingdom Government judged to be the strength of feeling in Northern Ireland against

the proposed change, and in particular the strength of the view that it would be seriously damaging to the moral fabric of Northern Irish society (…). This being so, the general aim pursued by the legislation remains the protection of morals in the sense of moral standards obtaining in Northern Ireland.

47. (…) The Court recognises that one of the purposes of the legislation is to afford safeguards for vulnerable members of society, such as the young, against the consequences of homosexual practices. However, it is somewhat artificial in this context to draw a rigid distinction between "protection of the rights and freedoms of others" and "protection of morals". The latter may imply safeguarding the moral ethos or moral standards of a society as a whole (…), but may also, as the Government pointed out, cover protection of the moral interests and welfare of a particular section of society, for example schoolchildren (see the Handyside judgment of 7 December 1976, Series A no. 24, p. 25, par. 52 in fine - in relation to Article 10 par. 2 (art. 10-2) of the Convention). Thus, "protection of the rights and freedoms of others", when meaning the safeguarding of the moral interests and welfare of certain individuals or classes of individuals who are in need of special protection for reasons such as lack of maturity, mental disability or state of dependence, amounts to one aspect of "protection of morals" (see, mutatis mutandis, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 34, par. 56). The Court will therefore take account of the two aims on this basis.

48. (…) the cardinal issue arising under Article 8 (art. 8) in this case is to what extent, if at all, the maintenance in force of the legislation is "necessary in a democratic society" for these aims.

49. There can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as "necessary in a democratic society". The overall function served by the criminal law in this field is, in the words of the Wolfenden report[13] (…), "to preserve public order and decency [and] to protect the citizen from what is offensive or injurious". Furthermore, this necessity for some degree of control may even extend to consensual acts committed in private, notably where there is call - to quote the Wolfenden report once more - "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence". In practice there is legislation on the matter in all the member States of the Council of Europe, but what distinguishes the law in Northern Ireland from that existing in the great majority of the member States is that it prohibits generally gross indecency between males and buggery whatever the circumstances. It being accepted that some form of legislation is "necessary" to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the contested provisions of the law of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.

[13] Report of the Departmental Committee on Homosexual Offences and Prostitution established under the chairmanship of Sir John Wolfenden, 1967. See para. 17 of the judgment.

51. Firstly, "necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question (see the above-mentioned Handyside judgment, p. 22, par. 48).

52. In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them (ibid). However, their decision remains subject to review by the Court (ibid., p. 23, par. 49).
As was illustrated by the Sunday Times judgment, the scope of the margin of appreciation is not identical in respect of each of the aims justifying restrictions on a right (p. 36, par. 59). (…) It is an indisputable fact, as the Court stated in the Handyside judgment, that "the view taken ... of the requirements of morals varies from time to time and from place to place, especially in our era," and that "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements" (p. 22, par. 48).
However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art. 8-2).

53. Finally, in Article 8 (art. 8) as in several other Articles of the Convention, the notion of "necessity" is linked to that of a "democratic society". According to the Court's case-law, a restriction on a Convention right cannot be regarded as "necessary in a democratic society" - two hallmarks of which are tolerance and broadmindedness - unless, amongst other things, it is proportionate to the legitimate aim pursued (see the above-mentioned Handyside judgment, p. 23, par. 49, and the above-mentioned Young, James and Webster judgment, p. 25, par. 63).

54. (…) The Court is not concerned with making any value-judgment as to the morality of homosexual relations between adult males.

56. In the first place, the Government drew attention to what they described as profound differences of attitude and public opinion between Northern Ireland and Great Britain in relation to questions of morality. (…) the Court acknowledges that such differences do exist to a certain extent and are a relevant factor. (…) the contested measures must be seen in the context of Northern Irish society.
The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland (see, mutatis mutandis, the above-mentioned Sunday Times judgment, pp. 37-38, par. 61; cf. also the above-mentioned Handyside judgment, pp. 26-28, par. 54 and 57). Where there are disparate cultural communities residing within the same State, it may well be that different requirement, both moral and social, will face the governing authorities.

57. As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters, in particular as evidenced by the opposition to the proposed legislative change, is one of the matters which the national authorities may

legitimately take into account in exercising their discretion. There is, the Court accepts, a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society (…). This opposition reflects (…) a view both of the requirements of morals in Northern Ireland and of the measures thought within the community to be necessary to preserve prevailing moral standards.
Whether this point of view be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Irish society is certainly relevant for the purposes of Article 8 par. 2.

58. (…) In the present circumstances of direct rule, the need for caution and for sensitivity to public opinion in Northern Ireland is evident. However, the Court does not consider it conclusive in assessing the "necessity", for the purposes of the Convention, of maintaining the impugned legislation that the decision was taken, not by the former Northern Ireland Government and Parliament, but by the United Kingdom authorities during what they hope to be an interim period of direct rule.

59. (…) this cannot of itself be decisive as to the necessity for the interference with the applicant's private life resulting from the measures being challenged (see the above-mentioned Sunday Times judgment, p. 36, par. 59). Notwithstanding the margin of appreciation left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it (…).

60. The Government right affected by the impugned legislation protects an essentially private manifestation of the human personality (…).
As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States (see, mutatis mutandis, the above-mentioned Marckx judgment, p. 19, par. 41, and the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 15-16, par. 31). In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent (see paragraph 30 above). No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.
It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be

shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.

61. Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.
To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.

62. (…) the applicant (…) submitted that the age of consent for male homosexual relations should be the same as that for heterosexual and female homosexual relations that is, 17 years under current Northern Ireland law (…).
The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth (…). However, it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law (…).

D. Conclusion

63. Mr. Dudgeon has suffered and continues to suffer an unjustified interference with his right to respect for his private life. There is accordingly a breach of Article 8 (art. 8).

II. THE ALLEGED BREACH OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8 (art. 14+8)

65. The applicant claimed to be a victim of discrimination in breach of Article 14 taken in conjunction with Article 8 (art. 14+8), in that he is subject under the criminal law complained of to greater interference with his private life than are male homosexuals in other parts of the United Kingdom and heterosexuals and female homosexuals in Northern Ireland itself. In particular, in his submission Article 14 (art. 14) requires that the age of consent should be the same for all forms of sexual relations.

66. (…) The Court has already held in relation to Article 8 (art. 8) that it falls in the first instance to the national authorities to fix the age under which young people should have the protection of the criminal law (…). The current law in Northern Ireland is silent in this respect as regards the male homosexual acts which it prohibits.

It is only once this age has been fixed that an issue under Article 14 (art. 14) might arise; it is not for the Court to pronounce upon an issue which does not arise at the present moment.

67. Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 (art. 14) and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14 (art. 14), though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see the Airey judgment of 9 October 1979, Series A no. 32 p. 16, par. 30).

68. This latter condition is not fulfilled as regards the alleged discrimination resulting from the existence of different laws concerning male homosexual acts in various parts of the United Kingdom (…). Moreover, Mr. Dudgeon himself conceded that, if the Court were to find a breach of Article 8 (art. 8), then this particular question would cease to have the same importance.

69. (…) The central issue in the present case does indeed reside in the existence in Northern Ireland of legislation which makes certain homosexual acts punishable under the criminal law in all circumstances. Nevertheless, this aspect of the applicant's complaint under Article 14 (art. 14) amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8 (art. 8); there is no call to rule on the merits of a particular issue which is part of and absorbed by a wider issue (see, mutatis mutandis, the Deweer judgment of 27 February 1980, Series A no. 35, pp. 30-31, par. 56 in fine). Once it has been held that the restriction on the applicant's right to respect for his private sexual life give rise to a breach of Article 8 (art. 8) by reason of its breadth and absolute character (…), there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right. This being so, it cannot be said that a clear inequality of treatment remains a fundamental aspect of the case.

70. The Court accordingly does not deem it necessary to examine the case under Article 14 (art. 14) as well.

FOR THE REASONS, THE COURT

1. Holds by fifteen votes to four that there is a breach of Article 8 (art. 8) of the Convention;

2. Holds by fourteen votes to five that it is not necessary also to examine the case under Article 14 taken in conjunction with Article 8 (art. 14+8);

I. DAMAGE ALLEGEDLY CAUSED BY THE VERY EXISTENCE OF THE IMPUGNED LEGISLATION

11. The existence of the laws in question undoubtedly caused the applicant at least some degree of fear and psychological distress; this is clear from the grounds on which the Court found a breach of Article 8 (art. 8) (…).
However, just satisfaction is to be afforded only "if necessary", and the matter falls to be determined by the Court at its discretion, having regard to what is equitable (see the Sunday Times judgment of 6 November 1980, Series A no. 38, p. 9, § 15 in fine).

14. Subject to the question of the age of consent, Mr. Dudgeon should be regarded as having achieved his objective of securing a change in the law of Northern Ireland. This being so and having regard to the nature of the breach found, the Court considers that in relation to this head of claim the judgment of 22 October 1981 constitutes in itself adequate just satisfaction for the purposes of Article 50 (art. 50), without it being "necessary" to afford financial compensation (see, for example, mutatis mutandis, the Le Compte, Van Leuven and De Meyere judgment of 18 October 1982, Series A no. 54, p. 8, § 16).

15. In addition to financial compensation, the applicant initially sought a formal declaration from the Government that if he were to apply for civil service employment in Northern Ireland he would not be discriminated against either on grounds of homosexuality or for having lodged his petition with the Commission. Subsequent to making this submission, he was appointed to a post in the Northern Ireland civil service. He nevertheless maintained his request, believing it to be "not unreasonable in the light of the currently precarious economic situation in the United Kingdom as a whole and Northern Ireland in particular".
The Court is not empowered under the Convention to direct a Contracting State to make a declaration of the kind requested by the applicant (see, for example, mutatis mutandis, the above-mentioned Le Compte, Van Leuven and De Meyere judgment, Series A no. 54, p. 7, § 13).

II. DAMAGE ALLEGEDLY CAUSED BY THE POLICE INVESTIGATION

7. (…) the questioning of the applicant about the commission by him of illegal homosexual acts in private with other males aged over 21 years, together with the seizure of his private papers, constituted an intrusion into his private life. It follows from the Court’s judgment of 22 October 1981 that this intrusion was unjustified in terms of Article 8 (art. 8) of the Convention. In addition, he was confronted for more than a year with the prospect of a criminal prosecution.
The Court is thus satisfied that at least some degree of distress, suffering, anxiety and inconvenience as alleged was sustained.

18. The police investigation carried out in 1976 was, however, simply a specific measure of implementation under the laws allowing this kind of intrusion into the applicant’s private life; (…) In the particular circumstances, the additional element of prejudice suffered as a consequence of the police investigation is not such as to call for further compensation by way of just satisfaction.

C. Parliamentary Assembly

1. Recommendations[14]

Recommendation 1785 (2007), The spread of HIV/Aids to women and girls in Europe, adopted by the Assembly on 25 January 2007 (8th Sitting)

2. While there is a substantial heterogeneity in the epidemic within and among European nations (the use of injectable drugs is the main mode of transmission in eastern Europe, while sexual transmission is the main mode in the rest of Europe), there is a common trend in Europe as well as globally: more and more newly diagnosed HIV infections are in women, particularly young women.

3. This should come as no surprise, as the epidemic started spreading from "high-risk" groups (homosexuals, injectable-drug users and prostitutes) to the general population a long time ago. However, the discovery of tritherapy, a treatment able to considerably slow down the development of the virus, seems to have led many people, young adults in particular, to let down their guard. This attitude can account for much of the increase in infections in young women.

Recommendation 1686 (2004), Human mobility and the right to family reunion, Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004

12. Consequently, the Assembly recommends that the Committee of Ministers:
(…)

a. to apply, where possible and appropriate, a broad interpretation of the concept of family and include in particular in that definition members of the natural family, non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, dependent adult children and dependent parents;

Recommendation 1635 (2003), Lesbians and gays in sport, Text adopted by the Standing Committee, acting on behalf of the Assembly, on 25 November 2003

3. Discrimination based on sexual orientation goes against the European Convention on Human Rights and its Protocol No. 12, Article 1 on the general prohibition of discrimination, and is not acceptable in Council of Europe member states.

4. Sport is a key factor in social integration and the European Sports Charter states that participation in sport should be open to all.

5. Gays and lesbians complain that they are at a disadvantage when it comes to participation in sports activities both in regular sports organisations and at school.

[14] See the replies of the Committee of Ministers to the Parliamentary Assembly in Section D.

6. The Assembly believes that homophobia in sport, both among participants and in their relations with spectators, should be combated on the same grounds as racism and other forms of discrimination.

7. The Assembly therefore calls on member states to:

i. launch active campaigns against homophobia in sport and widen existing campaigns against xenophobia in sport to include homophobia;

ii. include homophobia and abusive language directed at gays and lesbians as grounds for accusation of discrimination and harassment on the basis of sexual orientation;

iii. make homophobic chanting at or around sports events a criminal offence, as is presently the case with racist chanting;

iv. involve NGOs from the gay and lesbian community in their sports campaigns and in all other necessary confidence-building steps.

8. The Assembly also calls on European sports organisations to:

i. make homophobic chanting and other homophobic abuse an offence against their constitutions, as is already the case for xenophobic and racist chanting and other abuse;

ii. call upon UEFA to adapt its Ten Point Plan for Professional Football Clubs so as to include action against homophobia;

iii. adopt or adapt practical guidelines for professional sports clubs to help them fight against all discrimination, including racism, xenophobia, gender discrimination and homophobia; launch active campaigns against homophobia in sport; and widen existing campaigns against xenophobia in sport to include homophobia.

9. The Assembly encourages the media to depict fairly and accurately the strength and competence of female and male athletes, whatever their sexual orientation, to refrain from using sexist language and gender stereotypes while covering sports events and to elaborate a code of conduct for sports commentators.

10. Finally, the Assembly recommends that the Committee of Ministers:

i. extend the grounds listed in Article 4 of the European Sports Charter to discrimination on the grounds of sexual orientation;

ii. address the issue of homophobia and discrimination in sport and education in the preparation of the 10th Conference of European Sports Ministers in 2004;

iii. call upon the National Ambassadors for Sport, Tolerance and Fair Play to include this element in their mission;

iv. consider including the issue of homophobia in the European Convention on Spectator Violence and Misbehaviour at Sport Events and in particular at Football Matches.

Recommendation 1470 (2000), Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe, adopted by the Assembly on 30 June 2000 (24th Sitting)

1. The Assembly recalls and reaffirms its Recommendation 924 (1981) on discrimination against homosexuals, Recommendation 1236 (1994), on the right of asylum, and Recommendation1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe.

2. The Assembly is concerned by the fact that immigration policies in most Council of Europe member states discriminate against lesbians and gays. In particular, the majority of them do not recognise persecution for sexual orientation as a valid ground for granting asylum, nor do they provide any form of residence rights to the foreign partner in a bi-national same-sex partnership.

3. Furthermore, the rules concerning family reunion and social benefits usually do not apply to same-sex partnerships.

4. The Assembly is aware of a number of documented cases of persecution of homosexuals in their countries of origin, including Council of Europe member states.

5. The Assembly is of the opinion that homosexuals who have a well-founded fear of persecution resulting from their sexual preference are refugees under Article 1.A.2. of the 1951 Convention Relating to the Status of Refugees as members of a particular social group, and consequently should be granted refugee status. The present practice in some Council of Europe member states to grant them leave to stay on humanitarian grounds may be detrimental to their human rights, and cannot of itself be considered as a satisfactory solution.

6. Moreover, the Assembly is aware that the failure of most member states to provide residence rights to the foreign partner in a bi-national partnership is the source of considerable suffering to many lesbian and gay couples who find themselves split up and forced to live in separate countries. It considers that immigration rules applying to couples should not differentiate between homosexual and heterosexual partnerships. Consequently, proof of partnership other than a marriage certificate should be allowed as a condition of eligibility for residence rights in the case of homosexual couples.

7. Therefore the Assembly recommends that the Committee of Ministers:

i. instruct its appropriate committees:

a. to hold exchanges of views and experience on these subjects;

b. to examine the question of recognition of homosexuals as members of a particular social group in the understanding of the 1951 Geneva Convention with a view to ensuring that persecution on grounds of homosexuality is recognised as a ground for asylum;

c. to develop guidelines for the treatment of homosexuals who are refugees or members of a bi-national partnership;
d. to initiate the setting up of a European system for data collection, and for the documentation of abuses against homosexuals;
e. to co-operate with, and support, groups and associations defending the human rights of homosexuals in respect of asylum and immigration policies in Council of Europe member states.

ii. urge the member states:

a. to re-examine refugee status determination procedures and policies with a view to recognising as refugees those homosexuals whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Geneva Convention and the 1967 Protocol relating to the Status of Refugees;
b. to adopt criteria and guidelines dealing with homosexuals seeking asylum;
c. to ensure that the authorities responsible for the refugee status determination procedure are well informed about the overall situation in the countries of origin of applicants, in particular concerning the situation of homosexuals and their possible persecution by state and non-state agents;
d. to review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnership and families are treated on the same basis as heterosexual partnerships and families;
e. to take such measures as are necessary to ensure that bi-national lesbian and gay couples are accorded the same residence rights as bi-national heterosexual couples;
f. to encourage the establishment of non-governmental organisations to help homosexual refugees, migrants and bi-national couples to defend their rights;
g. to co-operate more closely with UNHCR and national non-governmental organisations, promote the networking of their activities, and urge them to systematically monitor the observance of the immigration and asylum rights of gays and lesbians;
h. to ensure that the training of immigration officers who come into contact with asylum seekers and bi-national same-sex couples includes attention to the specific situation of homosexuals and their partners.

Recommendation 1474 (2000), Situation of lesbians and gays in Council of Europe member states, adopted by the Assembly on 26 September 2000 (27th Sitting)

1. Nearly twenty years ago, in its Recommendation 924 (1981) on discrimination against homosexuals, the Assembly condemned the various forms of discrimination suffered by homosexuals in certain Council of Europe member states.

2. Nowadays, homosexuals are still all too often subjected to discrimination or violence, for example, at school or in the street. They are perceived as a threat to the rest of society, as though there were a danger of homosexuality spreading once it became recognised. Indeed, where there is little evidence of homosexuality in a country, this is merely a blatant indication of the oppression of homosexuals.

3. This form of homophobia is sometimes propagated by certain politicians or religious leaders, who use it to justify the continued existence of discriminatory laws and, above all, aggressive or contemptuous attitudes.

4. Under the accession procedure for new member states, the Assembly ensures that, as a prerequisite for membership, homosexual acts between consenting adults are no longer classified as a criminal offence.

5. The Assembly notes that homosexuality is still a criminal offence in some Council of Europe member states and that discrimination between homosexuals and heterosexuals exists in a great many others with regard to the age of consent.

6. The Assembly welcomes the fact that, as early as 1981, the European Court of Human Rights, in its *Dudgeon* v. *United Kingdom* judgment held that the prohibition of sexual acts between consenting male adults infringed Article 8 of the European Convention on Human Rights, and that more recently, in 1999, it expressed its opposition to all discrimination of a sexual nature in its *Lustig-Prean and Beckett* v. *United Kingdom* and *Smith and Grady* v. *United Kingdom* judgments.

7. The Assembly refers to its Opinion No. 216 (2000) on draft Protocol No. 12 to the European Convention on Human Rights, in which it recommended that the Committee of Ministers include sexual orientation among the prohibited grounds for discrimination, considering it to be one of the most odious forms of discrimination.

8. While laws on employment do not explicitly provide for restrictions concerning homosexuals, in practice homosexuals are sometimes excluded from employment and there are unjustified restrictions on their access to the armed forces.

9. The Assembly is pleased to note, however, that some countries have not only abolished all forms of discrimination but have also passed laws recognising homosexual partnerships, or recognising homosexuality as a ground for granting asylum where there is a risk of persecution on the basis of sexual orientation.

10. It is nonetheless aware that recognition of these rights is currently hampered by people's attitudes, which still need to change.

11. The Assembly therefore recommends that the Committee of Ministers:

i. add sexual orientation to the grounds for discrimination prohibited by the European Convention on Human Rights, as requested in the Assembly's Opinion No. 216 (2000);

ii. extend the terms of reference of the European Commission against Racism and Intolerance (ECRI) to cover homophobia founded on sexual orientation, and add to the staff of the European Commissioner for Human Rights an individual with special responsibility for questions of discrimination on grounds of sexual orientation;

iii. call upon member states:

a. to include sexual orientation among the prohibited grounds for discrimination in their national legislation;

b. to revoke all legislative provisions rendering homosexual acts between consenting adults liable to criminal prosecution;
c. to release with immediate effect anyone imprisoned for sexual acts between consenting homosexual adults;
d. to apply the same minimum age of consent for homosexual and heterosexual acts;
e. to take positive measures to combat homophobic attitudes, particularly in schools, the medical profession, the armed forces, the police, the judiciary and the Bar, as well as in sport, by means of basic and further education and training;
f. to co-ordinate efforts with a view to simultaneously launching a vast public information campaign in as many member states as possible;
g. to take disciplinary action against anyone discriminating against homosexuals;
h. to ensure equal treatment for homosexuals with regard to employment;
i. to adopt legislation which makes provision for registered partnerships;
j. to recognise persecution against homosexuals as a ground for granting asylum;
k. to include in existing fundamental rights protection and mediation structures, or establish an expert on, discrimination on grounds of sexual orientation.

Recommendation 1117 (1989), on the condition of transsexuals, adopted by the Assembly on 29 September 1989 (21st Sitting)

The Assembly,

1. Considering that transsexualism is a syndrome characterised by a dual personality, one physical, the other psychological, together with such a profound conviction of belonging to the other sex that the transsexual person is prompted to ask for the corresponding bodily ‘‘correction" to be made;

2. Considering that modern medical progress, and in particular recourse to sexual conversion surgery, enable transsexuals to be given the appearance and, to a great extent, the characteristics of the sex opposite to that which appears on their birth certificate;

3. Observing that this treatment is of a nature to bring the physical sex and the psychological sex into harmony with one another, and so give such persons a sexual identity which, moreover, constitutes a decisive feature of their personality;

4. Believing that account of the changes brought about should be taken in the transsexual's civil status records by adding such details to the original record so as to update the data concerning sex in the birth certificate and identity papers, and by authorising a subsequent change of forename;

5. Considering that a refusal of such amendment of the civil status papers exposes persons in this situation to the risk of being obliged to reveal to numerous people the reasons for the discrepancy between their physical appearance and legal status;

6. Noting that transsexualism raises relatively new and complex questions to which states are called upon to find answers compatible with respect for human rights;

7. Observing that, in the absence of specific rules, transsexuals are often the victims of discrimination and violation of their private life;

8. Considering, furthermore, that the legislation of many member states is seriously deficient in this area and does not permit transsexuals, particularly those who have undergone an operation, to have civil status amendments made to take account of their appearance, external morphology, psychology and social behaviour;

9. Considering the case law of the European Commission and Court of Human Rights;

10. Referring to the resolution which the European Parliament adopted on 12 September 1989, in which, among other things, it called on the Council of Europe to enact a convention for the protection of transsexuals,

11. Recommends that the Committee of Ministers draw up a recommendation inviting member states to introduce legislation whereby, in the case of irreversible transsexualism:

a. the reference to the sex of the person concerned is to be rectified in the register of births and in the identity papers;

b. a change of forename is to be authorized;

c. the person's private life is to be protected;

d. all discrimination in the enjoyment of fundamental rights and freedoms is prohibited in accordance with Article 14 of the European Convention on Human Rights.

Recommendation 1080 (1988), on a co-ordinated European health policy to prevent the spread of AIDS **in prisons, adopted by the Standing Committee, acting on behalf of the Assembly, on 30 June 1988**

The Assembly,

1. Recalling its Resolution 812 (1983) on the acquired immune deficiency syndrome (AIDS);

2. Deeply concerned by the rapid and continuing spread both in Europe and world-wide of the human immunodeficiency virus (HIV) which may cause AIDS and a variety of other diseases;

3. Realising that, whereas initially only particular risk-groups were thought to be affected by HIV, it is now understood that the virus may strike anyone;

11. Considering that the occurrence of homosexual activities and intravenous drug abuse in prisons, both of which entail a considerable risk of spreading HIV infection amongst the prison population and eventually outside prison, must at the moment be accepted as realities;

12. Convinced that under these circumstances avoiding the spread of HIV infection should be the overriding concern of prison authorities;

13. Considering that, as in the general population, compulsory measures are likely to be ineffective, discriminatory and invidious,

14. Recommends that the Committee of Ministers:

A. invite the governments of member states:

ii. to provide written information to prisoners, properly translated when necessary, about the modes and consequences of HIV infection, and in particular about the dangers of homosexual contacts and intravenous drug abuse in prisons;

vii. to make condoms available to prisoners;

Recommendation 924 (1981), on discrimination against homosexuals, adopted by the Assembly on 1 October 1981 (10th Sitting)

The Assembly,

1. Recalling its firm commitment to the protection of human rights and to the abolition of all forms of discrimination;

2. Observing that, despite some efforts and new legislation in recent years directed towards eliminating discrimination against homosexuals, they continue to suffer from discrimination and even, at times, from oppression;

3. Believing that, in the pluralistic societies of today, in which of course traditional family life has its own place and value, practices such as the exclusion of persons on the grounds of their sexual preferences from certain jobs, the existence of acts of aggression against them or the keeping of records on those persons, are survivals of several centuries of prejudice;

4. Considering that in a few member states homosexual acts are still a criminal offence and often carry severe penalties;

5. Believing that all individuals, male or female, having attained the legal age of consent provided by the law of the country they live in, and who are capable of valid personal consent, should enjoy the right to sexual self-determination;

6. Emphasising, however, that the state has a responsibility in areas of public concern such as the protection of children,

7. Recommends that the Committee of Ministers:

i. urge those member states where homosexual acts between consenting adults are liable to criminal prosecution, to abolish those laws and practices;

ii. urge member states to apply the same minimum age of consent for homosexual and heterosexual acts;

iii. call on the governments of the member states:

a. to order the destruction of existing special records on homosexuals and to abolish the practice of keeping records on homosexuals by the police or any other authority;

b. to assure equality of treatment, no more no less, for homosexuals with regard to employment, pay and job security, particularly in the public sector;

c. to ask for the cessation of all compulsory medical action or research designed to alter the sexual orientation of adults;

d. to ensure that custody, visiting rights and accommodation of children by their parents should not be restricted on the sole grounds of the homosexual tendencies of one of them;

e. to ask prison and other public authorities to be vigilant against the risk of rape, violence and sexual offences in prisons.

2. Resolutions

Resolution 1536 (2007), HIV/Aids in Europe, adopted by the Assembly on 25 January 2007 (8thSitting)

3. While reaffirming the Millennium Development Goals (MDGs) contained in the United Nations Millennium Declaration, the Assembly is aware that the achievement of the MDGs, will not be possible unless progress is made in addressing the challenge of sexually transmitted infections including HIV/Aids and sexual and reproductive health and rights.

9. While emphasising that the HIV/Aids pandemic is an emergency at the medical, social and economic level, the Assembly calls upon parliaments and governments of the Council of Europe to:
(…)
9.4. adopt and finance the measures necessary to ensure, on a sustained basis and for all affected persons (irrespective of social or legal status, gender, age or sexual orientation), the availability and accessibility of quality services and information for HIV/Aids prevention, management, treatment, care and support, including the provision of means of HIV/Aids prevention such as male and female condoms, sterile hypodermic needles, and basic preventive care kits, as well as affordable ARV medication and other safe and effective medicines, psychological support, diagnostics

and related technologies for all persons, with particular attention to vulnerable individuals and groups such as women and children;

Resolution 1377 (2004), Honouring of obligations and commitments by Albania, adopted by the Assembly on 29 April 2004 (15th Sitting)

1. The Parliamentary Assembly welcomes the progress towards a functioning pluralist democracy, and a state governed by the rule of law and respect for human rights, which has been made by the Albanian authorities in the past three years. There have been improvements in the functioning of state institutions, notably in the increasing influence of parliament in Albanian political life. Recently, there has also been an unprecedented attempt at inter-party dialogue and co-operation which – in spite of being fragile and short-lived – demonstrated that there was an alternative to the perpetual confrontation and obstructionism which has so far dominated Albanian politics.

16. With regard to human rights and fundamental freedoms, the Assembly asks the Albanian authorities to:

ii. investigate all reports and punish all incidents of abuse of homosexuals;

Resolution 1346 (2003), Honouring of obligations and commitments by Ukraine, adopted by the Assembly on 29 September 2003 (27th Sitting)

8. As regards the conditions of detention in the country, the Assembly shares the concerns of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Ukrainian Commissioner for Human Rights and it deplores the lack of progress in numerous areas, especially concerning the ill-treatment of persons deprived of their liberty by law-enforcement agencies; overcrowding both in militia and penitentiary establishments, police malpractice against all prisoners, poor health care and insufficient financing. Moreover, the Assembly welcomes the consent of the Ukrainian authorities to publish all reports of the CPT with respect to Ukraine, which were drawn up following its visits from 1998 to 2000, and which were published in October 2002. It invites the Ukrainian authorities:

iii. to investigate allegations of police harassment of the lesbian and gay community and to take disciplinary action as appropriate. The police should be made aware of the need to respect the rights of lesbian, gay, bisexual and transsexual persons, *inter alia*, through the inclusion of relevant material in police training courses and manuals.

Resolution 1304 (2002), Honouring of obligations and commitments by Armenia, adopted by the Assembly on 26 September 2002 (31st Sitting)

5. It takes note of the adoption at first reading of the new criminal code. It notes that homosexual relations between consenting adults have been decriminalised. However, it is shocked by the National Assembly's decision to maintain capital punishment for

people who commit certain crimes, in violation of its commitment to abolish the death penalty in the criminal code within the year following its accession. It takes note of the position presented by the Armenian delegation to the Parliamentary Assembly that the criminal code will be finally adopted before the end of 2002.

Resolution 1123 (1997), on the honouring of obligations and commitments by Romania, adopted by the Assembly on 24 April 1997 (14th Sitting)

9. It also notes that certain provisions of the Penal Code now in force are unacceptable and seriously imperil the exercise of fundamental freedoms, especially Article 200 on homosexual acts and Articles 205, 206, 238 and 239 relating to insult and defamation, which interfere with the freedom of the press.

13. Lastly, it wishes Romania to be firmly committed to fighting racism, xenophobia and intolerance, particularly in respect of the Rom population, while committing itself to basing its policy regarding the protection of minorities upon the principles laid down in Recommendation 1201 (1993).

14. The Assembly therefore earnestly requests that the Romanian authorities:

i. amend without delay the provisions of the Penal Code and the Judiciary Act, which are contrary to fundamental freedoms as set forth in the European Convention on Human Rights;

v. promote a campaign against racism, xenophobia and intolerance and take all appropriate measures for the social integration of the Rom population.

Resolution 812 (1983), on the acquired immune deficiency syndrome (AIDS), adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 1983.

The Assembly,

1. Noting with concern the spread in Europe of a new disease, namely AIDS (acquired immune deficiency syndrome);

2. Observing that the origin of AIDS is still unknown, and that, while it affects homosexuals, it also strikes other categories of persons;

3. Recalling its Recommendation 924 (1981) and Resolution 756 (1981), on discrimination against homosexuals;

4. Reaffirming its unshakeable attachment to the principle that each individual is entitled to have his privacy respected and to self-determination in sexual matters;

5. Concerned at the inaccuracy in the information circulated on AIDS by some of the media, whose sole concern is sensational news;

6. Emphasising that campaigns of this kind establish a link between AIDS and homosexuality, so spreading anti-homosexual reactions,

7. Welcomes Recommendation No. R (83) 8 of the Committee of Ministers and the concern manifested in that recommendation that information on the matter shall be objective, but regrets that it was circulated with an appended document from the United States which did not reflect the situation in Europe;

9. Calls on the Health Ministries of the various countries to do their utmost to promote dissemination of complete information on AIDS, and to encourage relevant research;

10. Calls for questionnaires and literature on aids to be worded in such terms as to avoid infringing in any way, directly or indirectly, an individual's independence and privacy;

11. Urges the media to ensure that no information on AIDS is diverted from its course to become information directed against homosexuals;

12. Expresses the hope that the governments of the member states will back co-ordinated programmes of research into AIDS.

Resolution 756 (1981), on discrimination against homosexuals, adopted by the Assembly on 1 October 1981 (10th Sitting)

The Assembly,

1. Reaffirming its vocation to fight against all forms of discrimination and oppression;

2. Believing that all individuals, once they have reached the legal age provided for in the country they live in, should have the right to sexual self-determination;

3. Convinced that the theory whereby homosexuality, whether male or female, is a form of mental disturbance has no sound scientific or medical basis, and has been refuted by recent research;

4. Noting that the label of mental disturbance can constitute a severe handicap to homosexuals as regards their social, professional and, particularly, psychological development, and can be used in some countries as a pretext for repressive psychiatric practices;

5. Acknowledging the World Health Organisation's world-wide competence and influence in medical and psychiatric circles,

6. Calls upon the World Health Organisation to delete homosexuality from its International Classification of Diseases.

D. Committee of Ministers

1. Replies to Parliamentary Assembly recommendations

Lesbians and gays in sport, Parliamentary Assembly Recommendation 1635 (2003), Reply adopted by the Committee of Ministers on 17 November 2004 at the 904th meeting of the Ministers' Deputies[15]

Decision

1. The Committee of Ministers has considered Parliamentary Assembly Recommendation 1635 (2003) on lesbians and gays in sport, and welcomes the Assembly's interest and engagement in the issue of discrimination on the basis of sexual orientation. The Recommendation was forwarded to the governments of its member states. It was also sent to its Steering Committee for the Development of Sport (CDDS).

2. The Committee of Ministers shares the Assembly's view that homophobia in sport should be combated in the same way as racism and other forms of discrimination. It recognises that the issue of homophobia in sport is a matter of concern for sports policy makers and sports organisations as a means of promoting tolerance and of ensuring non-discrimination in sport (see Article 4.1 of the European Sports Charter, R (92) 13 revised). The Charter states that the access to sport facilities or to sport activities should be open to all without discrimination.

3. The Committee of Ministers shares the Assembly's view that sport is a key factor in social cohesion as set out in Recommendation No. R (99) 9 on the role of sport in fostering social cohesion. The Committee of Ministers considers that the main platform for further action in this area is at national level.

4. With regard to the Assembly's view regarding possible amendment of Article 4 of the European Sports Charter (paragraph 10.i.), the Committee of Ministers does not consider it necessary to amend the European Sports Charter, as all points raised in the Recommendation are covered by the revised Charter.

5. With regard to the Assembly's proposal to address the issue of homophobia and discrimination in the preparation of the 10th Conference of European Ministers responsible for Sport (Budapest, 14-15 October 2004), the main subject of this Conference was “Good Governance in Sport”. The conclusions of the Conference on this subject are also applicable to this issue.

6. As regards the proposal to call upon National Ambassadors for Sport, Tolerance and Fair Play (paragraph 10.iii.) to include this element in their mission, the Committee of Ministers points out that this network, set up by the CDDS and currently under the Standing Committee of the Convention on Spectator Violence, has organised a series of Round Tables on Sport, Tolerance and Fair Play to which the European Gay and Lesbian Sport Federation has been invited as an observer. Thus,

[15] CM/AS(2004)Rec1635 final, 23 November 2004

the network of National Ambassadors for Sport Tolerance and Fair Play considers that its activities to promote tolerance include the fight against homophobia. The Committee of Ministers notes that this is the first step taken towards this end within the mission of the National Ambassadors.

7. As regards paragraph 10.iv. of the Recommendation, it was brought to the attention of the Standing Committee of the Convention on Spectator Violence at its 24th meeting at Porto on 10-11 June 2004, which has confirmed that all spectators, irrespective of age, gender, race, religion, disability or sexual orientation should be able to attend sporting events in safety, security and comfort without discrimination. The same principles of non-discrimination, in all its forms, including sexual orientation, apply also to players. As regards the proposals at paragraph 10.iv. of the Recommendation, the Standing Committee has considered that this issue is included in its programme on fighting discrimination, for example in its work on sport, tolerance and fair play.

Situation of lesbians and gays in Council of Europe Member States, Parliamentary Assembly Recommendation 1474 (2000), Reply adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies[16]

Decision

The Deputies adopted the following reply to Parliamentary Assembly Recommendation 1474 (2000):

"1. The Committee of Ministers has carefully examined Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member states. It agrees with the Parliamentary Assembly that, regrettably, discrimination and violence against homosexuals still occur. Differentiated treatment of homosexuals under the law and in practice still exists in member states as do contemptuous or intolerant attitudes towards them.

2. In preparing a reply to the recommendation, the Committee has requested the opinion of the European Commission against racism and intolerance (ECRI). ECRI adopted its opinion – to which the Committee of Ministers generally subscribes – at its 24th meeting in March 2001 (…). With regard to the proposal concerning the Council of Europe Commissioner for Human Rights, the Commissioner, when consulted, considered that the problem of discrimination on grounds of sexual orientation was already fully covered by his mandate and sufficiently important to be an integral part of the work of his office as a whole rather than being reserved for a specific appointment.

3. The Committee of Ministers stresses the importance of covering all forms of discrimination within the framework of the Council of Europe's activities and underlines in this respect the relevance of the new Protocol No. 12 to the European

[16] REC 1474 (2000)

Convention on Human Rights (general prohibition of discrimination). Clearly a broad range of legal instruments and activities have the potential to contribute to progress in combating discrimination against lesbians and gays. In this connection, it welcomes the ECRI's proposal concerning "a wide debate within the Council of Europe as to how the Organisation as a whole might best address the various areas of discrimination".

4. With reference to paragraph 11*i* of Recommendation 1474, the Committee of Ministers does not propose to re-open the debate concerning the need to include sexual orientation amongst the grounds for discrimination explicitly mentioned in Protocol No. 12 (or in Article 14 of the Convention). It recalls that careful consideration has been given to this issue by the drafters of the Protocol; reference can be made to the explanations given in paragraph 20 of the Protocol's Explanatory report. It would, however, like to draw attention to several cases in which the Court has adopted a strict scrutiny *vis-à-vis* distinctions based on grounds not explicitly mentioned in Article 14 (see, for example, the judgment in the case of Gaygusuz v. Austria of 11 January 1995, Reports 1996-IV) including distinctions based on sexual orientation (for example the judgment of 21 December 1999 in the case of Salgueiro da Silva Mouta v. Portugal).

5. The case-law of the organs of the European Convention on Human Rights also provides a strong general incitement to all member states, beyond the specific obligation of Contracting States to execute the judgments of the Court, to reform any discriminatory legislation or regulations and in this connection the Committee of Ministers refers not only to the cases mentioned in the recommendation but also, for example, to the cases of Norris against Ireland or those of Modinos and of Marangos against Cyprus.

6. Progress remains to be made in member states' domestic law and practice, which must be kept under review to ensure best standards and practice. In this regard the Committee of Ministers can mark its agreement with several of the injunctions addressed to member states in paragraph 11.*iii* of the recommendation. In this regard it underlines in particular the need, mentioned in sub-paragraph 11.*iii*.e, for […] measures in the areas of education and professional training to combat homophobic attitudes in certain specific circles. Homosexuality can still give rise to powerful cultural reactions in some societies or sectors thereof, but this is not a valid reason for governments or parliaments to remain passive. On the contrary, this fact only underlines the need to promote greater tolerance in matters of sexual orientation.

7. Finally, the Committee wishes to assure the Assembly that it will continue to follow the issue of discrimination based on sexual orientation with close attention.

Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe, Parliamentary Assembly Recommendation 1470 (2000), Reply adopted by the Committee of Ministers on 7 March 2001 at the 744th meeting of the Ministers' Deputies[17]

Decision

The Deputies adopted the following reply to Parliamentary Assembly Recommendation 1470 (2000) on the situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe:

"1. The Committee of Ministers has given careful consideration to Parliamentary Assembly Recommendation 1470 (2000) on the situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe.

2. This Recommendation has been duly brought to the attention of the member Governments and the competent steering committees answerable to the Committee of Ministers.

3. The *Ad hoc* Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR) and the European Committee on Migration (CDMG) have taken steps to give effect to the Assembly's request concerning the holding of exchanges of views and experience on this subject.

4. The CAHAR has included on its future agenda the question of "recognition of homosexuals as members of a particular social group [within the meaning] of the 1951 Geneva Convention with a view to ensuring that persecution on grounds of homosexuality is recognised as a ground for asylum", as formulated by the Assembly. In the course of its future work it will also consider the possibility of "develop[ing] guidelines for the treatment of homosexuals who are refugees", as proposed by the Assembly.

5. The CDMG has, for its part, asked the Committee of Experts on the Legal Status and other Rights of Immigrants to consider the right of homosexual couples to family reunion.

6. The establishment of a European system for data collection and documentation of abuses against homosexuals and co-operation with groups and associations defending the human rights of homosexuals in respect of immigration policies do not fall within the remit of these committees."

[17] CM(2000)179, CM(2001)31

Condition of Transsexuals, Parliamentary Assembly Recommendation 1117 (1989), Reply adopted by the Committee of Ministers in February 1994 at the 508th meeting of the Ministers' Deputies[18]

Decision

The Deputies adopted the following supplementary reply to Parliamentary Assembly Recommendation 1117 (1989) on the condition of transsexuals:

"The Committee of Ministers, having (twice) consulted the European Committee on Legal Co-operation (CDCJ) and the Steering Committee for Human Rights (CDDH) and having thoroughly considered Recommendation 1117 (1989), gives the following supplementary reply to the Parliamentary Assembly:

1. The Committee of Ministers shares the Assembly's view that transsexualism raises complex questions requiring solutions compatible with respect for fundamental rights. It declares its awareness of the serious problems faced by transsexuals, who are often victims of discrimination.

It notes, however, that uncertainty concerning the underlying nature of transsexualism has unfortunately not entirely disappeared, although attitudes have changed and science has progressed. It observes with satisfaction in this connection that the recent case law of the European Commission and Court of Human Rights has prompted encouraging developments in the judicial practice of certain member States regarding legal recognition of the new sexual identity of transsexuals.

It also stresses that the legal situations resulting from transsexualism, particularly as regards marriage and filiation, are proving very complex and necessitate detailed, comprehensive study (including legal recognition of their new sexual identity).

2. The Committee of Ministers notes the fact that decisions concerning the legal status of transsexuals are often still left to administrative or judicial authorities in the member States, although some States have already enacted specific legislation to enable transsexuals to undergo sex reassignment surgery and to have their new sexual identity recognised.

In this connection, the Committee of Ministers draws from the case law of the European Court the conclusion that the Court considers State practice and national case law allowing, inter alia, for changes in registers of births after sexual conversion surgery to be an essential element for judging whether or not the Convention has been violated. The Committee is also aware of the fact that the Court is conscious of the problems transsexuals face and considers it important to keep the need for appropriate legal measures under review.

The Committee of Ministers, while noting, like the European Court of Human Rights in the case of B. versus France, that there is no broad consensus on this matter among Council of Europe member States, considers that there is a trend towards recognition

[18] Concl(92)482/19, CM(93)116 and CM(94)11

of post-operative transsexuals which manifests itself in, for example, the authorisation of changes on birth certificates.

3. The Committee of Ministers is therefore of the opinion that:

i. for a transsexual the transformation he or she seeks to achieve with the assistance of medical science is only completed when his or her newly acquired sexual identity is recognised by law;

ii. this does no more than give legal effect to a fait accompli based on medical judgment and action which is irreversible;

iii. with a view to providing legal certainty both for the individual and society, and to giving the best possible guidelines to the judiciary and administrative authorities, minimum requirements for sex reassignment surgery and the legal recognition of the new sexual identity would be clearly preferable to approaches of an ad hoc nature.

4. The Committee of Ministers recalls that all member States should take account of the case law of the European Court with regard to the legal recognition of transsexuals, the emphasis the Court lays on the seriousness of the problems affecting transsexuals, and the importance of keeping under review the need for appropriate legal measures in this area.

5. The Committee of Ministers considers, bearing in mind also the results of the 23rd Colloquy on European Law, that the legal situation of transsexuals is unsatisfactory and that information is urgently needed in this area. It therefore notes with satisfaction that the European Committee on Legal Co-operation (CDCJ) has amended the terms of reference of the Committee of

Experts on Family Law (CJ-FA) to allow it to study the whole question of transsexuals in detail. The CJ-FA has thus been given the following terms of reference: "Study of questions concerning transsexuals in order to assist member States in dealing with legal problems concerning transsexuals and the preparation of a report containing criteria and possible means of solving these problems." In the light of this report, the CDCJ will make any appropriate proposals for the possible preparation of an international instrument on this question.".

Discrimination against homosexuals, Parliamentary Assembly Recommendation 924 (1981), Reply adopted by the Committee of Ministers on 11 February 1982 at the 343rd meeting of the Ministers' Deputies[19]

Decisions

The Deputies,

i. without wishing to comment on their content, agreed to transmit Recommendation 924 and Resolution 756 to their governments;

ii. adopted the following reply to Recommendation 924: "The Committee of Ministers has considered Recommendation 924 and Resolution 756 on discrimination against homosexuals and, without wishing to comment on their content, has decided to transmit both these texts to the governments of member States."

[19] CM/AS(82)Rec924finalE, 11 February 1982

E. Congress of Local and regional Authorities

1. Recommendation

Recommendation 211 (2007), on freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons, debated and approved by the Chamber of Local Authorities on 27 March 2007 and adopted by the Standing Committee of the Congress on 28 March 2007

1. True democracy requires the enjoyment of freedom of expression and assembly without interference by public authority, as enshrined in the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 10 and 11);

2. The protection of these rights is essential for ensuring the accountability and responsiveness of governing authorities, and thus also critical to the protection of all other basic human rights;

3. Furthermore, the right to express and share one's identity with others is an integral part of tolerance – the principle of protecting society's diversity through a free exchange of ideas which can lead to an enrichment at the level of the individual and of society;

4. These freedoms naturally carry with them certain duties and responsibilities and as such, the state, regional or local authorities may impose restrictions, strictly only where these are prescribed by law, deemed necessary in a democratic society, and pursue the legitimate aims listed in the relevant regional and international human rights instruments;

5. Regrettably, recent homophobic incidents in a number of member states have highlighted not only the systematic violation of the basic rights of the lesbian, gay, bisexual and transgendered (LGBT) community but have shown that in many cases the very authorities who have the positive obligation to protect their citizens against discrimination are actually endorsing and in some cases actively supporting or perpetrating this injustice;

6. Given that freedom of expression and assembly is at the core of a democratic society, and that the role of local authorities in upholding these rights is fundamental, and in light of these recent events, the Congress of Local and Regional Authorities has drawn up an overview of the implementation of these rights at local level throughout Europe, together with the recommendations set out below;

7. The Congress recommends that the Committee of Ministers of the Council of Europe ask member states to ensure that:

a. they take a public stand against discrimination on the grounds of belonging to a sexual minority as well as appropriate steps to combat hate speech on the basis of the principles laid down in the Committee of Ministers Recommendation No. R(97)20;

b. take note of and apply the forthcoming *Guidelines on Freedom of Peaceful Assembly* being drafted by the OSCE/ODIHR Expert Panel on freedom of assembly;

c. they investigate with all the rigour at their disposal all cases of violence, or hate speech during LGBT or LGBT-related events to determine whether discrimination or homophobia may have played a role in the commission of a crime, and ensure prosecution of those responsible;

d. where necessary they take positive measures as required by the European Court of Human Rights, to guarantee effective freedom of assembly and expression across their national territory at state, local and regional level;

e. any civil, criminal or administrative law measures that interfere with freedom of expression or assembly are prescribed by law, serve a legitimate aim (as stated in the relevant regional and international instruments) and are no more restrictive than is necessary to achieve that aim;

f. LGBT groups are consulted when reforming any of the above measures to ensure the mutual benefit of all concerned and foster a spirit of co-operation rather than confrontation;

g. organisers of events on which restrictions have been placed or which have been banned have the right of access to an independent court or tribunal so that they may challenge these restrictions;

h. local authorities are kept informed of all new legislation and relevant case-law pertaining to freedom of assembly and expression and anti-discrimination measures;

i. while the provision of financial or other support by local authorities to the organisers of LGBT events must be provided equally to all similar groups, there should no statutory bar to local authorities assisting or publicizing LGBT events;

8. The Congress invites the Commissioner for Human Rights to work closely with its Committee on Social Cohesion with regard to questions of discrimination against members of the LGBT community, for example in the context of co-operation with ombudspersons.

2. Resolution

Resolution 230 (2007), on freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons, debated and approved by the Chamber of Local Authorities on 27 March 2007 and adopted by the Standing Committee of the Congress on 28 March 2007

1. The Congress of Local and Regional Authorities is gravely concerned by the violation of the rights to freedom of assembly and expression for lesbian, gay, bisexual and transgendered persons (LGBT) in a number of Council of Europe member states, an infringement epitomised by the banning or attempted banning of

peaceful rallies or demonstrations by LGBT and their supporters, and the overt or tacit support some local politicians have given to violent counter-demonstrations;

2. It is the paramount duty of local authorities not only to positively protect the rights to freedom of assembly and expression in a practical and effective manner, but also to refrain from speech likely to legitimise discrimination or hatred based on intolerance;

3. Furthermore, local authorities have an obligation to enable lawful assemblies to proceed peacefully through the provision of, *inter alia*, adequate measures to prevent attacks by violent opponents. A theoretical risk of disorder, or the mere presence of opposition, is insufficient to justify restrictions on public events;

4. The rights of lesbian, gay, bisexual and transgendered persons to freedom of expression and assembly are essential not only for their own personal development, dignity and fulfilment as citizens, but also for the promotion and protection of equality and democracy and for the progress of society as a cohesive whole;

5. The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) proclaims, in Articles 10 and 11, that every person has the right to enjoy freedom of expression, assembly and association without interference by public authorities, and free from discrimination (Article 14);

6. The Congress, believing these rights to be at the core of a democratic society, and the role of local authorities in upholding them to be fundamental, has drawn up the recommendations set out below to guarantee that LGBT citizens, throughout Council of Europe member states, enjoy their full rights to freedom of assembly and expression. The Congress calls on local authorities to:

a. take appropriate steps to combat hate speech on the basis of the principles laid down in the Committee of Ministers Recommendation No. R(97)20;

b. take note of and apply the forthcoming *Guidelines on Freedom of Peaceful Assembly* being drafted by the OSCE/ODIHR Expert Panel on freedom of assembly;

c. restrict the right to peaceful assembly only as a last resort, having exhausted all other means of reaching agreement about the event, following an open, objective and transparent assessment of all available information, and in such cases to:

> i. ensure that the legitimate aims listed in international instruments for restricting events or meetings are strictly complied with and that the interpretation of these grounds is consistent with established jurisprudence and in no case subordinated to the principles of a particular political creed or religion;
>
> ii. impose the least restrictive time, place or manner possible to achieve the stated legitimate aim;
>
> iii. offer the organizer of the proposed event an opportunity to respond to any particular concerns raised by the regulatory authority, or in evidence to it;

iv. publish the reasons for imposing any restrictions sufficiently far in advance of the notified date of the event so as to enable the organizer to challenge the legality of the restrictions in a court of law before the event is due to take place;

v. implement reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully while avoiding regulations which would fundamentally alter the character of an event, such as unnecessary use of crowd control barriers or routing marches through less central areas of a city;

vi. make available adequate policing resources to see that sufficient measures are in place, where counter-protests against an LGBT event have been notified, to ensure that participants in the latter need not fear being subjected to physical violence, in application of Article 2 of the ECHR which imposes a positive obligation on authorities to protect the right to life, and Article 3 which states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment;

d. make certain that they and their employees set an example of tolerance and :

i. discharge their duties in a manner which is neither arbitrary nor discriminatory and do not impose restrictions on the basis of the content or message of an event;

ii. do not withhold the provision of services to members of the LGBT community on the basis of matters of conscience or religion where the services in question are clearly specified in the terms of their contract of employment;

e. ensure that with regard to the holding of LGBT events:

i. notification procedures are as free from bureaucracy as possible;

ii. the public has adequate access to reliable information relating to forthcoming events, as well as to information on discrimination and intolerance;

iii. the costs of cleaning up after an event are not imposed on the organiser of a non-commercial event;

f. consolidate and enhance local police-community relationships to reduce the escalatory potential of public demonstrations, and in this respect:

i. ensure police officers receive the necessary human rights, neutrality and non-discrimination training and instruction and apply it;

ii. use the dispersal of assemblies as a measure of last resort;

iii. ensure that law enforcement officials avoid the use of force or restrict such force to the minimum extent necessary, adhering strictly to international

standards on policing which provide specific and detailed guidance regarding its use;

iv. ensure that police officials take immediate and effective action (subject to normal public order considerations) to remove from an event any persons intent on disrupting it;

v. never require event organisers to hire their own security personnel or cover the cost of policing assemblies (in itself a form of prior restriction, undermining the positive obligation of authorities to protect the exercise of these rights);

g. seek to build capacity for the mediation of disputes, thereby supporting efforts to reach mutually acceptable accommodations between opposed groups by linking up with local civil society organisations with mediation experience, and by expanding the available pool of trained third party mediators;

h. use trained, independent monitors to provide an objective account of LGBT events, oversee policing arrangements involving counter-protesters or sensitive locations or check compliance with the terms of any mediated agreement, and to consider forging links with the OSCE/ODIHR in developing and piloting a monitoring programme in relation to LGBT events;

7. The Congress further decides to:

a. suggest that discussions on LGBT freedom of assembly and expression be incorporated at future high-level meetings with OSCE/ODIHR representatives with a view to increased co-operation between the two organisations in this respect;

b. mandate its Committee on Social Cohesion to work closely with the Commissioner for Human Rights with regard to questions of discrimination against members of the LGBT community, for example in the context of co-operation with ombudspersons.

F. Commissioner for Human Rights

1. Reports

Report by the Commissioner For Human Rights Mr Thomas Hammarberg on his visit to Ukraine (10 – 17 December 2006), 26 September 2007[20]

X. Discrimination and vulnerable Groups
(…)

4. LGBT

173. The Constitution of Ukraine contains a set of basic anti-discrimination provisions and everyone can appeal to a court on the basis of the Constitution's provisions (Article 8 of Ukraine's Constitution). The notion of "sexual orientation" is not to be found in any Ukrainian legislation. It is essential to bear in mind that in the Soviet Union homosexuality was regarded as a crime and a serious mental disorder. Until 1991, Art.122 of the Criminal Code deemed non-violent homosexual sex between adults to be a crime. Ukraine was one of the first countries to repeal the criminal responsibility attached to homosexual sexual intercourse. A change in mentality did not follow this piece of legislation. Labour legislation, in Art. 22 of the Labour Code, lists anti-discriminatory factors, but sexual orientation is not mentioned.

174. *Nash Svit/Mir*, the Ukrainian gay and lesbian NGO met by the Commissioner, conducted a study and came up with the following results. Out of 1,200 people polled, 37% think that associations and clubs for sexual minorities should be banned, 21% disagreed entirely with that stance and 44% had no definite opinion. *Nash Svit*/*Mir* identifies certain areas that are more problematic than others. Discrimination is present in those spheres that are most important for a normal standard of living, and especially in relation to employment and salary, medical services and social protection. Homosexuals who are employed often experience discrimination in the workplace. At the same time, the most frequent instances of discrimination they experience relate to unequal rights to medical and social services. Among respondents who indicated sexual orientation as grounds for discrimination, the spheres of employment and education were named as particularly problematic.

175. It is also important that the people interrogated most often indicated difficulties in defending rights in dealing with government bodies, including law enforcement bodies. Violations of the rights of gay people are most often carried out by law enforcement agents. In addition, it is not uncommon to encounter hate speech with regard to LGBT in the media, and this is inadmissible.

176. The Commissioner concurs with civil society on suggestions that might stem homophobic tendencies: clarification that the anti-discrimination legislation also covers the LGBT community, improvement of awareness of individual rights and an increase in education of public servants, legal recognition of same sex partnerships, introduction of state-level programs of social support for the gay community, and

[20] CommDH(2007)15

taking into account the needs of the gay community while drafting legislation and implementing normative acts.

Report by Mr Alvaro Gil-Robles, Commissioner For Human Rights, on his visit to Hungary (11-14 June 2002) for the Committee of Ministers and the Parliamentary Assembly, 2 September 2002[21]

II. The situation of certain vulnerable groups
(…)

The homosexual community

28. With regard to the homosexual community, the two main issues raided by NGO representatives are, firstly, the continuing difference in treatment between homosexuals and heterosexuals as regards the age of consent for sexual relations, as set out in Article 199 of the Criminal Code. This article has recently been abolished by the Constitutional Court. The Justice Minister's opinion in this matter is that the question should be resolved by legislative means rather than through the courts.

29. The second problem concerns the exclusion of homosexuals from military service, solely on the basis of their sexual orientation, on the grounds that they are allegedly suffering from mental illness, which is obviously unacceptable.

2. Memorandum

Memorandum to the Polish Government, Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, 20 June 2007[22]

V. Tolerance and Non-discrimination

b. Rights of Lesbian, Gay, Bisexual and Transgender Persons

51. At the time of the 2002 mission, the NGO community drew the Commissioner's attention to specific instances of discrimination and incidents of hate crime against homosexuals. According to NGOs with whom the Commissioner met in December 2006, the situation for lesbians, gays, bisexual and transgender persons (LGBT persons) has worsened since then. Specific areas of concern expressed were homophobic statements made by leading public figures, which created an atmosphere of hate and intolerance and that the right to freedom of expression and freedom of association were not fully guaranteed for those with different sexual orientation in Poland. The Polish government vehemently rejects these assertions, citing the fact that in the last twenty years the Civil Rights Ombudsman has only received three complaints concerning violations of civil rights due to sexual orientation.

[21] CommDH(2002) 6
[22] CommDH(2007)13

52. In June 2005 the Warsaw Equality March was banned, with municipal authorities citing threats posed to public safety (due to possible counter-demonstrations) as one of their reasons for banning the event. This case was brought to the European Court of Human Rights, which found violations of Article 11 (freedom of assembly), and Articles 13 and 14 in conjunction with Article 119. In November 2005, the Poznan Equality March was banned and dispersed by the Police. Following appeals, the Polish Supreme Administrative Court declared that the reasons given for banning the March were insufficient to justify restrictions on freedom of assembly. While both the Equality Marches in Warsaw and Poznan took place in 2006, according to NGOs this is not indicative of a general improvement in the rights of LGBT groups.

53. In early 2006, the Polish version of "Compass – Human Rights Education with Young People", a Council of Europe anti-discrimination handbook and a manual on Human Rights for young people, was withdrawn from circulation by the Ministry of Education. On 8 June 2006, the Minister for Education dismissed the director of the National In-Service Teacher Training Centre (CODN), Miroslaw Sielatycki, for having published the Compass handbook. The reason given for his dismissal was that that the contents of the chapter on homosexuality was in contradiction with the core-curriculum for general education and that the publication contained statements aimed at promoting homosexuality in schools.

54. During the Commissioner's visit, the Secretary of State for Education explained that while the Council of Europe manual had many positive chapters, the chapter on homosexuality was unacceptable, as it did not reflect Polish values. According to the Minister, homosexuality was not an 'issue' within Polish society and should not be discussed in schools. The Commissioner was given an example of the sort of manual which the Government considered suitable for the education of young teenagers; a publication entitled "Wygrajmy Mlodosc" ("Let's win youth"). The chapter on homosexuality from the manual was translated into English for the Commissioner. This chapter states that homosexuality is an unnatural inclination and that the person affected should be shown particular care and assistance in fighting this shameful deviation. The chapter links homosexuality to a fear of responsibility, an incorrect hierarchy of values, a lack of a proper idea of love and a hedonistic attitude, as well as prostitution.

55. The Commissioner finds this approach simply wrong. The portrayal and depiction of homosexuality is offensive, out of tune with principles on equality, diversity and respect for the human rights of all. While the Polish authorities are of course free to decide on which materials they use for human rights education, the human rights principles, including the principle of non-discrimination, contained within such materials are not optional. Moreover, the Commissioner is concerned about proposals that there should be legislation which would penalise alleged promotion of homosexuality in schools.

56. The Commissioner deplores any instances of hate speech towards homosexuals, which should not be tolerated by the Polish authorities. Adequate legal measures should be put in place to combat hate speech and discrimination of those with different sexual orientation or gender identity. All persons have a right to free speech, freedom from discrimination and to seek, receive and impart information. Education

and awareness raising measures should be taken to increase the understanding and respect for diversity in cooperation with civil society.

57. The Commissioner encourages the Polish authorities to participate actively in the EU 2007 Year of Equal Opportunities as well as in the Council of Europe's "All Different, All Equal: Campaign for diversity, human rights and participation" and to ensure a visible national implementation of these campaigns.10

3. Speeches

Speech by Thomas Hammarberg, Commissioner for Human Rights, at the Concluding Session of the 8th Annual European Union NGO Forum on Human Rights, Helsinki, 8 December 2006

The second problem is the xenophobic tendency in Europe. It is difficult to say if it is growing. Across Europe there are problems with racism, xenophobia, anti-ziganism and homophobia.

"Implementation of human rights in Europe", Presentation by Thomas Hammarberg, Commissioner for Human Rights, European Ombudsman Meeting Vienna, 13 June 2006[23]

Organizations defending the rights of sexual minorities have become more active and, for instance, planned Gay Pride marches. However, they have been denied permission to demonstrate by local authorities in some cities. This is unfortunate; homosexuals have of course the same right as everyone else to exercise freedom of assembly and expression.

"Freedom of assembly belongs to all people", Statement by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 23 May 2006[24]

Recently, there have been calls for banning gay prides – events organised to celebrate diversity and equality – in a number of Council of Europe member states. A recent example is from Moscow, where the first ever gay pride scheduled for 27 May, was not given permission by the Mayor of Moscow. The case is pending in local courts and final outcome is not yet known. Regrettably, this is not the only case. There are also reports that the Mayor of Chisinau, Moldova has decided to ban a similar manifestation.

The rights to freedom of expression and peaceful assembly are fundamental rights in a democratic society and belong to all people, not just the majority. A demonstration may annoy or give offence to persons opposed to the ideas or claims expressed, but this cannot be a reason to ban a peaceful gathering.

[23] CommDH/Speech(2006)9
[24] CommDH/Speech(2006)7

If the authorities have grounds to fear for the security of the demonstrators they should provide protection or, at least, suggest alternative venues for such a manifestation. A general ban of a peaceful demonstration can only be justified if there is a real danger of disorder which cannot be prevented by reasonable and appropriate measures.

Solutions should be found which guarantee both security and freedom of assembly. This is particularly important in a context of increasing racism and xenophobia, including homophobia. Violent incidents against those who are different or perceived to be different are taking place with alarming frequency, and all too often with impunity. This is unacceptable and has to be stopped. Authorities at all levels must strongly respond to such individual acts of violence and actively promote tolerance and respect in their communities.

4. Viewpoints

Viewpoint, Thomas Hammarberg, "Homophobic policies are slow to disappear"[25], 16 May 2007

The European Court of Human Rights has recently taken another significant decision against tendencies of homophobia. A non-governmental group in Poland, the Foundation for Equality, had been denied permission to organise a demonstration in Warsaw on their "Equality Days" two years ago. The Court found that the local authorities had violated three provisions of the European Convention – relating to freedom of assembly, the right to an effective remedy and the prohibition of discrimination. This ruling sends a message to authorities all over Europe.

It still happens that Gay Pride Parades are banned by authorities or are disrupted. This was the case last year in Chisinau, Moscow, Tallinn and Riga. More recently, the Chisinau local authorities once again banned a march despite the previous ruling of the Moldovan Supreme Court that a similar ban in 2006 was unlawful.

In Chisinau the demonstrators took the risk to march in spite of the denied permission. This has happened in other cases as well – including in Warsaw in 2005 – and these parades have generally been peaceful. When problems occurred, this was due to mob attacks against the marchers and the lack of police protection.

It is a sad fact that discrimination against individuals because of their sexual orientation is still widespread on our continent. During my visits to Member States of the Council of Europe I have repeatedly seen the signs and consequences of such prejudices. Individuals are victimised in their daily lives. Some live in constant fear of being exposed while others, who have "come out" into the open, are facing discrimination or even harassment. Their organisations have been made targets of hate speech.

[25] Also available on the Commissioner's website at www.commissioner.coe.int

Few politicians have fully stood up to this challenge. Instead, some of them have themselves fuelled the prejudices through stereotyped descriptions of homosexuals as dangerous propagandists who should not be allowed to be teachers or show their "lifestyle" to others. In discussions about demonstrations, some mayors and other politicians have made clearly intolerant and homophobic public statements. This kind of populism is most unfortunate and tends to "legitimise" discrimination.

The dehumanisation of lesbians, gays, bi-sexuals and transgender persons (LGBT) did not disappear with the Nazi rule, during which some 100,000 persons were arrested because of their presumed sexual orientation, and more than 10,000 were sent to concentration camps. Extreme right-wing groups still incite hatred and violence against LGBT persons. Some of the old Nazi "arguments" against homosexuals are again heard in public debates. Therefore, it is particularly important that politicians, religious leaders and other opinion-makers stand up for the principle that all people have human rights, irrespective of their sexual orientation.

The Council of Europe's Congress of Local and Regional Authorities recently adopted recommendations on the need to protect the freedom of assembly and expression of LGBT persons, which ought to be studied carefully by local and regional politicians. The European branch of the International Lesbian and Gay Association is circulating an urgent appeal for the same freedoms - to be sent to the mayors of those cities where marches or other public events were banned, restricted or faced violence.

The legal norms are absolutely clear. The European Convention of Human Rights – which is part of national law in all Council of Europe countries - does not allow discrimination against persons because of their sexual orientation or gender identification. Guarantees against discrimination on any ground are provided in Article 14 of the Convention and in its Protocol No. 12. The Protocol, which is now in force in 14 countries, prohibits discrimination in the enjoyment of any right set forth by law as well as any discrimination by public authorities.

In significant rulings, the Strasbourg Court has decided that consensual sexual relations in private, between adults of the same sex, must not be criminalised; that there should be no discrimination when setting the age of consent for sexual acts; that homosexuals should also have the right to be admitted into the armed forces, and that same sex partners should have the same right of succession of tenancy as other couples. On the issue of parenting rights, the jurisprudence of the Court has evolved and it has ruled against discrimination on the grounds of sexual orientation for granting parental responsibility.

The Court has been more cautious on the question of adoption and largely left it to Member States to strike a reasonable balance. Of course, no one has the right to adopt – the best interest of the child must be the decisive consideration. However, the obvious human rights approach is that homosexuals should have same right as other adults to be considered as candidates when decisions are taken about who would be the best adoptive parent for a child in such need.

This is now the approach in several European countries, including Belgium, Denmark, Germany, Iceland, the Netherlands, Norway, Spain, Sweden and the United

Kingdom. Some of these states also grant access to joint adoption by a homosexual couple. As for individual adoption by unmarried individuals, laws in most European countries do not discriminate on the grounds of sexual orientation.

The number of European countries that legally recognise same-sex partnerships with significant protection is increasing and already includes Andorra, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Luxembourg, Norway, Slovenia, Sweden, Switzerland and the United Kingdom. In other countries, this debate is still in progress. Marriage offering full protection is already possible in Belgium, the Netherlands and Spain. Other countries, like Sweden, are likely to follow shortly.

In other words, homophobic policies are on the retreat. However, there is no room for complacency. Remaining prejudices will not disappear by themselves. Further measures should be taken for the protection of human rights of lesbians, gays, bisexuals and transgender persons:

• The legislation in several European countries needs to be reformed in order to ensure that LGBT people have the same rights as others;

• There should be a stronger reaction against officials who take decisions against the law, for instance by banning peaceful demonstrations, or who use their positions to spread prejudices against people because of their sexual orientation;

• History education should be reviewed with the purpose of ensuring that the Nazi crimes against LGBT persons as well as other aspects of their victimisation be objectively taught;

• Schools should give objective information about homosexuality and encourage respect for diversity and minority rights;

• Authorities should treat organisations advocating for rights of LGBT persons with the same respect as they are expected to pay to other nongovernmental organisations;

• Hate crimes against LGBT persons should also be seen as serious crimes;

• Courts as well as ombudsmen and other independent national human rights institutions need to address discrimination based on sexual orientation as a priority.

Viewpoint, Thomas Hammarberg, "Gay Pride marches should be allowed – and protected"[26], 24 July 2006

This week a major international conference and sports event is being organised in Montreal for lesbian, gay, bisexual and transgender (LGBT) rights. It has the fullest support of the Canadian federal and provincial authorities and is therefore under no threat.

[26] Also available on the Commissioner's website at www.commissioner.coe.int

Unfortunately, the picture doesn't look this rosy in many Council of Europe states. Citing security concerns, the authorities in Riga refused a request from sexual minority NGOs to hold a Gay Pride Day parade this past weekend. When a group of activists gathered in a church to support gay rights, they were covered in eggs and rubbish by anti-gay protesters.

In Moscow, a similar demonstration was denied permission by the authorities in May. When some activists nevertheless went ahead with the peaceful march, they were brutally attacked by homophobic extremists, with little protection being provided by the police.

This is not acceptable. Peaceful demonstrations for sexual minority rights must be allowed. The fact that some people harbour homophobic prejudices is no reason to limit the freedom of expression and freedom of assembly of others.

The police have a duty to protect such manifestations and – while in extreme situations it might be necessary to recommend alternative demonstration venues – banning them is certainly unacceptable as it undermines core human rights principles.

In fact, the European Court of Human Rights ruled in 1988 that governments not only need to refrain from interfering, but may on occasion have to take positive measures to ensure an effective freedom of peaceful assembly.

The lesbian and gay movements are getting more and more organised and they urge their members to "come out". This is a logical response to centuries of systematic discrimination in country after country.

The real problem is not their sexual orientation, but the reaction of others. Whatever the psychological roots, many people still react with aggression against homosexuals. Sadly, some priests have also given direct or indirect support to homophobia, which has delayed the necessary attitude change in a number of countries.

Hate speech and violent acts against sexual minorities are still frequent – often with total impunity. The time has come to change that.

European and international norms are clear, and the non-discrimination provisions in international human rights law cover this group as well. Their right to freedom of expression and assembly cannot be restricted.

The European Court of Human Rights has ruled against the criminalisation of homosexuality. It has also taken a clear position against unequal ages of sexual consent, exclusion from the military, deprivation of child custody as well as social benefits for same-sex partners.

However, it is necessary to ensure that national laws conform with the jurisprudence of the Court – and that they are implemented in reality. This will require judges and prosecutors to be well informed, and for the police to receive the necessary training and instruction.

Another group of professionals who are particularly central in efforts to combat prejudice is teachers. Rooting out homophobia should be a central goal of human rights education.

Politicians themselves are also key in this awareness campaign. Former Canadian Prime Minister Paul Martin set a good example when welcoming the conference in Montreal:

"Today's Canada is proud to espouse and promote the inherent values of tolerance and inclusion. I am certain you also share my hope that the discussions at this important event will help change attitudes in our society. You can take pride in your participation in this gathering, which demonstrates your solidarity and commitment to eliminating all forms of discrimination related to sexual orientation."

Viewpoint, Thomas Hammarberg, "The Council of Europe protocol against discrimination is important"[27], 18 April 06

The struggle for human rights is largely about preventing discrimination. That is why Protocol No 12 to the European Convention on Human Rights is particularly important. It is intended to strengthen the protection against discrimination. Though it has been in force for a year, the majority of the member states of the Council have not yet ratified this instrument. They should consider doing so.

Discrimination is a major problem, even in some European countries. There are cases of children with disabilities who are not given a real chance of ordinary schooling; of immigrants who are not employed because of their foreign names; of women who receive lower salaries because they are female; of homosexuals who are harassed because of their sexual orientation; of Roma who are not given protection against mob violence; and of Muslims who are not granted permission to build a mosque.

Such tendencies are not in the spirit of human rights. The European Convention states that all its provisions shall be secured

"without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (Article 14).

This is important, but the protection against discrimination is limited to those rights covered by the Convention. Therefore Protocol No. 12 has been adopted to secure the equal enjoyment of any right in the law. The text also sets out that no one shall be discriminated against by any public authority.

The Protocol has been in force since April 2005 after 10 member states had filed their ratification. This makes it an important basic standard for the European Court of Human Rights – in relation to those states which have ratified the protocol.

[27] Also available on the Commissioner's website at www.commissioner.coe.int

Those that have ratified are Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, the Netherlands, San Marino, Serbia and Montenegro, "the former Yugoslav Republic of Macedonia" and Ukraine.

However, the majority of the Council of Europe members are still hesitating. This means that the standards on discrimination now differ between European countries.

Some of those who have abstained so far have in fact criticised the wording of the protocol. One point made is that the protocol might be interpreted to prohibit "positive discrimination" – proactive measures with the purpose of supporting a disadvantaged group in order to compensate for previous discrimination.

This dilemma is resolved in the preamble to the protocol where it is reaffirmed that it does not prevent states from

"taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures."

Another argument against ratifying the protocol has been that the scope of its coverage is unclear. It is true that the wording could have been more precise and that the interpretation in some cases may not be fully obvious. However, as the protocol is now in force, the European Court will be able to interpret it in its rulings on individual cases. The precise reach of the protocol will soon be obvious.

I recommend all governments within the Council of Europe who have not ratified to have another look. The protocol is a serious, European attempt to intensify our efforts against systematic discrimination. It deserves support.

II. European Union

A. Treaties and other instruments of the European Union

Consolidated version of the Treaty of the European Union[28]

Article 6

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall respect the national identities of its Member States.

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Article 7[29]

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights

[28] Official Journal C 321E, 29 December 2006
[29] Amended by the Treaty of Nice, Official Journal C8, 10 March 2001.

of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community.

This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 3.

6. For the purposes of paragraphs 1 and 2, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its Members.

Article 11

1. The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,
(…)

- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

Consolidated version of the Treaty establishing the European Community[30]

Article 13

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

[30] Official Journal C 325, 24 December 2002

2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

Article 177
(…)

2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

Charter of fundamental rights of the European Union[31]

Article 21
Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

[31] Official Journal C 364, 18 December 2000
The legal status of the Charter is currently under consideration and as of now it is only a political document.

B. Court of Justice of the European Communities

Case C-423/04, Sarah Margaret Richards v. Secretary of State for Work and Pensions, 27 April 2006

Keywords: transsexual – pension – age – equal treatment of men and women – legal recognition – discrimination

THE COURT (First Chamber),
(…)

after hearing the Opinion of the Advocate General at the sitting on 15 December 2005,

gives the following Judgment

1. The reference for a preliminary ruling concerns the interpretation of Articles 4 and 7 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

2. This reference was made in the course of proceedings between Ms Richards, a transsexual who has undergone a gender reassignment operation, and the Secretary of State for Work and Pensions ('the Secretary of State') regarding the latter's refusal to award her a retirement pension as from her 60th birthday.
(…)

The main proceedings and the questions referred for a preliminary ruling

14. Ms Richards was born on 28 February 1942 and her birth certificate registered her gender as male. Having been diagnosed as suffering from gender dysphoria, she underwent gender reassignment surgery on 3 May 2001.

15. On 14 February 2002 she applied to the Secretary of State for Work and Pensions for a retirement pension to be paid as from 28 February 2002, the date on which she turned 60, the age at which, under national law, a woman born before 6 April 1950 is eligible to receive a retirement pension.

16. By decision of 12 March 2002, that application was refused on the ground that 'the claim was made more than 4 months before the claimant reaches age 65', which is the retirement age for men in the United Kingdom.

17. As the appeal which Ms Richards brought before the Social Security Appeal Tribunal was dismissed, she appealed to the Social Security Commissioner, claiming that, following the ruling in Case C-117/01 K.B. [2004] ECR I-541, the refusal to pay her a retirement pension as from the age of 60 was a breach of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as discrimination contrary to Article 4 of Directive 79/7.

18. In that appeal, the Secretary of State for Work and Pensions submitted that the claim by the appellant in the main proceedings did not fall within the scope of Directive 79/7. According to him, Community law provides only for a measure of coordination for old-age benefits but does not confer a right to receive such benefits. Moreover, Ms Richards had not been discriminated against having regard to those who constitute the correct comparator, namely men who have not undergone gender reassignment surgery.

19. In order to be able to dispose of the case, the Social Security Commissioner decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Directive 79/7 prohibit the refusal of a retirement pension to a male-to-female transsexual until she reaches the age of 65 and who would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law?

(2) If so, from what date should the Court’s ruling on Question 1 have effect?’

The first question

20. By its first question, the national court is essentially asking whether Article 4(1) of Directive 79/7 precludes legislation which denies a person who has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.

21. First of all, it should be noted that it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person (see to that effect K.B., paragraph 35).

22. In order to answer the first question, it is necessary to state at the outset that Directive 79/7 is the embodiment in the field of social security of the principle of equal treatment of men and women which is one of the fundamental principles of Community law.

23. Moreover, in accordance with settled case-law, the right not to be discriminated against on grounds of sex is one of the fundamental human rights the observance of which the Court has a duty to ensure (see Case 149/77 Defrenne [1978] ECR 1365, paragraphs 26 and 27, and Case C-13/94 P. v S. [1996] ECR I-2143, paragraph 19).

24. The scope of Directive 79/7 cannot thus be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of that directive is also such as to apply to discrimination arising from the gender reassignment of the person concerned (see, as regards Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), P. v S., paragraph 20).

25. The United Kingdom Government submits that the facts which gave rise to the dispute in the main proceedings stem from the choice made by the national legislature to prescribe differential pensionable ages for men and women. As such a right was expressly granted to the Member States under Article 7(1)(a) of Directive 79/7, they are permitted to derogate from the principle of equal treatment for men and women in the field of retirement pensions. It is irrelevant that, as in the main proceedings, the distinction made by the pension scheme on the basis of gender affects the rights of transsexuals.

26. That line of argument cannot be accepted.
(…)

28. The unequal treatment at issue in the main proceedings is based on Ms Richards' inability to have the new gender which she acquired following surgery recognised with a view to the application of the Pensions Act 1995.

29. Unlike women whose gender is not the result of gender reassignment surgery and who may receive a retirement pension at the age of 60, Ms Richards is not able to fulfil one of the conditions of eligibility for that pension, in this case that relating to retirement age.

30. As it arises from her gender reassignment, the unequal treatment to which Ms Richards was subject must be regarded as discrimination which is precluded by Article 4(1) of Directive 79/7.

31. The Court has already found that national legislation which precludes a transsexual, in the absence of recognition of his new gender, from fulfilling a requirement which must be met in order to be entitled to a right protected by Community law must be regarded as being, in principle, incompatible with the requirements of Community law (see K.B., paragraphs 30 to 34).

32. The United Kingdom Government submits that no Community right has been breached by the decision of 12 March 2002 refusing to award Ms Richards a pension, as entitlement to a retirement pension derives only from national law.

33. In that regard, it is enough to remember that, according to settled case-law, Community law does not affect the power of the Member States to organise their social security systems, and that in the absence of harmonisation at Community level it is therefore for the legislation of each Member State to determine, first, the conditions governing the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits. Nevertheless, the Member States must comply with Community law when exercising that power (Case C-157/99 Smits and Peerbooms [2001] ECR I-5473, paragraphs 44 to 46, and Case C-92/02 Kristiansen [2003] ECR I-14597, paragraph 31).

34. Furthermore, discrimination contrary to Article 4(1) of Directive 79/7 falls within the scope of the derogation provided for by Article 7(1)(a) of that directive only if it is necessary in order to achieve the objectives which the directive is intended to pursue by allowing Member States to retain a different pensionable age for men and for

women (Case C-9/91 Equal Opportunities Commission [1992] ECR I-4297, paragraph 13).

35. Although the preamble to Directive 79/7 does not state the reasons for the derogations which it lays down, it can be inferred from the nature of the exceptions contained in Article 7(1) of the directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored. Those advantages include the possibility for female workers of qualifying for a pension earlier than male workers, as envisaged by Article 7(1)(a) of the same directive (Equal Opportunities Commission, paragraph 15).

36. According to settled case-law, the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) of Directive 79/7 must be interpreted strictly (see Case 152/84 Marshall [1986] ECR 723, paragraph 36; Case 262/84 Beets-Proper [1986] ECR 773, paragraph 38; and Case C-328/91 Thomas and Others [1993] ECR I-1247, paragraph 8).

37. Consequently, that provision must be interpreted as relating only to the determination of different pensionable ages for men and for women. However, the action in the main proceedings does not concern such a measure.

38. It is clear from the foregoing that Article 4(1) of Directive 79/7 must be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.

The second question

39. By its second question the national court asks whether, if the Court finds that Directive 79/7 precludes the national legislation at issue in the main proceedings, the temporal effects of such a judgment must be limited.

40. It is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision it has interpreted with a view to calling in question legal relations established in good faith (Case 24/86 Blaizot [1988] ECR 379, paragraph 28, and Case C-104/98 Buchner and Others [2000] ECR I-3625, paragraph 39).

41. Moreover, it is settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of the ruling (Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 52, and Case-C 209/03 Bidar [2005] ECR I-2119, paragraph 68).

42. The Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number

of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission of the European Communities may even have contributed (Bidar, paragraph 69).

43. In this case, the entry into force of the 2004 Act on 4 April 2005 is liable to lead to the disappearance of disputes such as that which gave rise to the case in main proceedings. Furthermore, in both the written observations which it submitted to the Court and at the hearing, the United Kingdom Government did not maintain the claim which it had submitted in the action in the main proceedings seeking a limitation as to the temporal effect of the judgment.

44. Consequently, the answer to the second question must be that there is no need to limit the temporal effect of this judgment.
(…)

On those grounds, the Court (First Chamber) hereby rules:

1. Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security is to be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.

2. There is no need to limit the temporal effects of this judgment.

Case C-117/01, K.B. v National Health Service Pensions Agency, Secretary of State for Health, 7 January 2004

Keywords: transsexual – pension – right to marry

THE COURT,

gives the following Judgment
(…)

11. K.B., the claimant in the main proceedings, is a woman who has worked for approximately 20 years for the NHS, *inter alia* as a nurse, and is a member of the NHS Pension Scheme.

12. K.B. has shared an emotional and domestic relationship for a number of years with R., a person born a woman and registered as such in the Register of Births, who, following surgical gender reassignment, has become a man but has not, however, been able to amend his birth certificate to reflect this change officially. As a result,

and contrary to their wishes, K.B. and R. have not been able to marry. K.B. stated in her pleadings and confirmed at the hearing that their union was celebrated in an adapted church ceremony approved by a Bishop of the Church of England and that they exchanged vows of the kind which would be used by any couple entering marriage.

13. The NHS Pensions Agency informed K.B. that, as she and R. were not married, if she were to pre-decease R., R. would not be able to receive a widower's pension, since that pension was payable only to a surviving spouse and that no provision of United Kingdom law recognised a person as a spouse in the absence of a lawful marriage.

14. K.B. brought proceedings in the Employment Tribunal, arguing that the national provisions restricting the pension to widowers and widows of members of the scheme amounted to discrimination based on sex, contrary to the provisions of Article 141 EC and Directive 75/117. For K.B., the Community provisions require that in such a context widower should be interpreted in such a way as to encompass the surviving member of a couple, who would have achieved the status of widower had his sex not resulted from surgical gender reassignment.

15. Both the Employment Tribunal, by decision of 16 March 1998, and the Employment Appeal Tribunal, London (United Kingdom), in its judgment on appeal of 19 August 1999, found that the pension scheme at issue was not discriminatory.

16. K.B. took her case to the Court of Appeal (England and Wales) (Civil Division), which decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

Does the exclusion of the female-to-male transsexual partner of a female member of the National Health Service Pension Scheme, which limits the material dependant's benefit to her widower, constitute sex discrimination in contravention of Article 141 EC and Directive 75/117?
(…)

Findings of the Court

25. Benefits granted under a pension scheme which essentially relates to the employment of the person concerned form part of the pay received by that person and come within the scope of Article 141 EC (see, in particular, Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 28, and Case C-351/00 *Niemi* [2002] ECR I-7007, paragraph 40).

26. The Court has also recognised that a survivor's pension provided for by such a scheme falls within the scope of Article 141 EC. It has stated in that regard that the fact that such a pension, by definition, is not paid to the employee but to the employee's survivor does not affect that interpretation because, such a benefit being an advantage deriving from the survivor's spouse's membership of the scheme, the pension is vested in the survivor by reason of the employment relationship between the employer and the survivor's spouse and is paid to the survivor by reason of the

spouse's employment (Case C-109/91 *Ten Oever* [1993] ECR I-4879, paragraphs 12 and 13, and Case C-379/99 *Menauer* [2001] ECR I-7275, paragraph 18).

27. So a survivor's pension paid under an occupational pension scheme such as the NHS Pension Scheme constitutes pay within the meaning of Article 141 EC and Directive 75/117.

28. The decision to restrict certain benefits to married couples while excluding all persons who live together without being married is either a matter for the legislature to decide or a matter for the national courts as to the interpretation of domestic legal rules, and individuals cannot claim that there is discrimination on grounds of sex, prohibited by Community law (see, as regards the powers of the Community legislature, *D.* v *Council*, paragraphs 37 and 38).

29. In this instance, such a requirement cannot be regarded *per se* as discriminatory on grounds of sex and, accordingly, as contrary to Article 141 EC or Directive 75/117, since for the purposes of awarding the survivor's pension it is irrelevant whether the claimant is a man or a woman.

30. However, in a situation such as that before the national court, there is inequality of treatment which, although it does not directly undermine enjoyment of a right protected by Community law, affects one of the conditions for the grant of that right. As the Advocate General noted in point 74 of his Opinion, the inequality of treatment does not relate to the award of a widower's pension but to a necessary precondition for the grant of such a pension: namely, the capacity to marry.

31. In the United Kingdom, by comparison with a heterosexual couple where neither partner's identity is the result of gender reassignment surgery and the couple are therefore able to marry and, as the case may be, have the benefit of a survivor's pension which forms part of the pay of one of them, a couple such as K.B. and R. are quite unable to satisfy the marriage requirement, as laid down by the NHS Pension Scheme for the purpose of the award of a survivor's pension.

32. The fact that it is impossible for them to marry is due to the fact, first, that the Matrimonial Causes Act 1973 deems a marriage void if the parties are not respectively male and female; second, that a person's sex is deemed to be that appearing on his or her birth certificate; and, third, that the Births and Deaths Registration Act does not allow for any alteration of the register of births, except in the case of clerical error or an error of fact.

33. The European Court of Human Rights has held that the fact that it is impossible for a transsexual to marry a person of the sex to which he or she belonged prior to gender reassignment surgery, which arises because, for the purposes of the registers of civil status, they belong to the same sex (United Kingdom legislation not admitting of legal recognition of transsexuals' new identity), was a breach of their right to marry under Article 12 of the ECHR (see Eur. Court H.R. judgments of 11 July 2002 in *Goodwin* v *United Kingdom* and *I.* v *United Kingdom*, not yet published in the *Reports of Judgments and Decisions*, §§ 97 to 104 and §§ 77 to 84 respectively.

34. Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC.

35. Since it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person in R.'s situation - as the European Court of Human Rights has accepted (*Goodwin* v *United Kingdom*, § 103) - it is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.'s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.
(…)

On those grounds,

THE COURT,

in answer to the question referred to it by the Court of Appeal (England and Wales) (Civil Division) by order of 14 December 2000, hereby rules:

Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other. It is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.'s situation can rely on article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.

Joined cases C-122/99 P and C-125/99 P, D and Kingdom of Sweden v Council of the European Union, 31 May 2001

Keywords: homosexual – registered partnership – household allowance – discrimination

Facts

4. D, an official of the European Communities of Swedish nationality working at the Council, registered a partnership with another Swedish national of the same sex in Sweden on 23 June 1995. By notes of 16 and 24 September 1996 he applied to the Council for his status as a registered partner to be treated as being equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff Regulations.

5. The Council rejected the application, by note of 29 November 1996, on the ground that the provisions of the Staff Regulations could not be construed as allowing a registered partnership to be treated as being equivalent to marriage.

6. The complaint against that decision brought by D on 1 March 1997 was rejected on the same ground, by a note of 30 June 1997 from the Secretary-General of the Council (the contested decision).

7. Following that rejection D, by application lodged at the Registry of the Court of First Instance on 2 October 1997, brought an action seeking that the refusal to recognise the legal status of his partnership be annulled and that he and his partner should be granted the remuneration to which he claimed entitlement under the Staff Regulations and the regulations and other general provisions applicable to officials of the European Communities.
(…)

The plea alleging failure to provide adequate reasoning for the contested judgment

24. D contends that the contested judgment is inadequately reasoned because in paragraph 36 it merely dismisses as unfounded, assuming that it is different from the first [plea in the application], the second plea, alleging infringement of the principle of the integrity of a person's status. To deal with the plea in this way does not make it possible to tell, from a reading of the contested judgment, whether the plea was rejected because the principle relied on did not exist, was inapplicable or had not been infringed.

25. In the second plea, which, it is alleged, was not dealt with satisfactorily, the applicant maintained in essence that the right of a national of a Member State to have his civil status respected throughout the Community had been infringed by the contested decision treating his situation as being equivalent to that of an unmarried official. This plea followed on from the first plea, in which the applicant alleged infringement of equal treatment and discrimination on grounds of sexual orientation in that the Council did not recognise that the legal effects of a partnership registered in Sweden should result in its being treated as equivalent to a marriage, including for the purposes of the Staff Regulations.

26. In those circumstances, it appears, given the reasoning it adopted, that the Court of First Instance considered the second plea from two separate perspectives in turn. If the plea was a restatement of the idea that national law must take precedence as regards interpretation of the term married official in the Staff Regulations, the Court of First Instance considered, quite rightly, that it had already dealt with it in its consideration of the first plea. If it was based on a separate rule that a person's civil status should be the same throughout the Community, the reply was that assessment of entitlement to an allowance provided for in the Staff Regulations does not, on any view, alter the applicant's civil status and therefore that, if there were such a rule, it would not be relevant.

27. The reasoning, though brief, is nonetheless sufficient to convey the grounds of fact and law on which the Court of First Instance rejected the second plea.

28. The plea alleging failure to provide an adequate reasoning must therefore be rejected.

The pleas concerning interpretation of the Staff Regulations

29. D and the Kingdom of Sweden, supported by the Kingdom of Denmark and the Kingdom of the Netherlands, assert that, since civil status is a matter which comes within the exclusive competence of the Member States, terms such as married official or spouse in the Staff Regulations should be interpreted by reference to the law of the Member States and not be given an independent definition. Thus, where a Member State has legislated to give legal status to an arrangement such as registered partnership, which is to be treated in respect of the rights and duties it comprises as being equivalent to marriage, the same treatment should be accorded in the application of the Staff Regulations.

30. That interpretation does not conflict with Community case-law, which has not so far dealt with statutory partnership and has merely distinguished between marriage and stable relationships involving de facto cohabitation, which differ essentially from the statutory arrangement constituted by registered partnership. Moreover, it accords with the aim of the Staff Regulations, which is to bring about the recruitment on a wide geographical basis of high-quality staff for the Community institutions, which entails compensation for actual family costs incurred when staff take up their duties.

31. The Council supports the more restrictive interpretation adopted by the Court of First Instance, mainly on the grounds that there is no ambiguity in the wording of the Staff Regulations, that even in the law of those Member States which recognise the concept of registered partnership that concept is distinct from marriage and is treated as being equivalent only as regards its effects and subject to exceptions and, lastly, that a registered partnership arrangement exists only in some of the Member States and to treat it as being equivalent to marriage for the purposes of applying the Staff Regulations would be to extend the scope of the benefits concerned, which requires a prior assessment of its legal and budgetary consequences and a decision on the part of the Community legislature rather than a judicial interpretation of the existing rules.

32. The Council points out in this connection that at the time Regulation No 781/98 was adopted a request by the Kingdom of Sweden for registered partnership to be treated as being equivalent to marriage was rejected; the Community legislature chose instead to instruct the Commission to study the consequences, especially the financial ones, of such a measure and to submit proposals to it, if appropriate, and decided in the meantime to maintain the existing arrangement as regards provisions requiring a particular civil status.

33. It is true that the question whether the concepts of marriage and registered partnership should be treated as distinct or equivalent for the purposes of interpreting the Staff Regulations has not until now been resolved by the Court of Justice. As the appellants contend, a stable relationship between partners of the same sex which has only a de facto existence, as was the case in Grant, cited above, is not necessarily equivalent to a registered partnership under a statutory arrangement, which, as between the persons concerned and as regards third parties, has effects in law akin to those of marriage since it is intended to be comparable.

34. It is not in question that, according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex.

35. It is equally true that since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain effects which, both between the partners and as regards third parties, are the same as or comparable to those of marriage.

36. It is clear, however, that apart from their great diversity, such arrangements for registering relationships between couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage.

37. In such circumstances the Community judicature cannot interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage. The intention of the Community legislature was to grant entitlement to the household allowance under Article 1(2)(a) of Annex VII to the Staff Regulations only to married couples.

38. Only the legislature can, where appropriate, adopt measures to alter that situation, for example by amending the provisions of the Staff Regulations. However, not only has the Community legislature not shown any intention of adopting such measures, it has even (see paragraph 32 above) ruled out at this stage any idea of other forms of partnership being assimilated to marriage for the purposes of granting the benefits reserved under the Staff Regulations for married officials, choosing instead to maintain the existing arrangement until the various consequences of such assimilation become clearer.

39. It follows that the fact that, in a limited number of Member States, a registered partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose legal status is distinct from that of marriage can be covered by the term married official as used in the Staff Regulations.

40. It follows from the above considerations that the Court of First Instance was right to hold that the Council could not interpret the Staff Regulations so as to treat D's situation as that of a married official for the purposes of granting a household allowance.

41. The pleas concerning the interpretation of the Staff Regulations must therefore be rejected.
(…)

The pleas relating to infringement of the principle of equal treatment, discrimination on grounds of sex and nationality and restriction of the free movement of workers

45. D contends that the contested decision, which deprives him of an allowance to which his married colleagues are entitled solely on the ground that the partner with

whom he is living is of the same sex as himself, constitutes, contrary to what the Court of First Instance held, discrimination based on sex, in breach of Article 119 of the Treaty, and infringement of the principle of equal treatment.

46. It should be observed first of all that it is irrelevant for the purposes of granting the household allowance whether the official is a man or a woman. The relevant provision of the Staff Regulations, which restricts the allowance to married officials, cannot therefore be regarded as being discriminatory on grounds of the sex of the person concerned, or, therefore, as being in breach of Article 119 of the Treaty.

47. Secondly, as regards infringement of the principle of equal treatment of officials irrespective of their sexual orientation, it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner.

48. The principle of equal treatment can apply only to persons in comparable situations, and so it is necessary to consider whether the situation of an official who has registered a partnership between persons of the same sex, such as the partnership entered into by D under Swedish law, is comparable to that of a married official.

49. In making such an assessment the Community judicature cannot disregard the views prevailing within the Community as a whole.

50. The existing situation in the Member States of the Community as regards recognition of partnerships between persons of the same sex or of the opposite sex reflects a great diversity of laws and the absence of any general assimilation of marriage and other forms of statutory union (see paragraphs 35 and 36 above).

51. In those circumstances, the situation of an official who has registered a partnership in Sweden cannot be held to be comparable, for the purposes of applying the Staff Regulations, to that of a married official.

52. It follows that the plea relating to infringement of the principle of equal treatment and discrimination on grounds of sex must be rejected.
(…)

The plea based on the right to respect for private and family life
(…)

59. It is sufficient to observe that refusal by the Community administration to grant a household allowance to one of its officials does not affect the situation of the official in question as regards his civil status and, since it only concerns the relationship between the official and his employer, does not of itself give rise to the transmission of any personal information to persons outside the Community administration.

60. The contested decision is not therefore, on any view, capable of constituting interference in private and family life within the meaning of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

61. The plea based on the right to respect for private and family life must therefore be rejected.

62. It follows that the appeals must be dismissed in their entirety.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeals;

2. Orders D and the Kingdom of Sweden jointly and severally to pay the costs;

3. Orders the Kingdom of Denmark and the Kingdom of the Netherlands to bear their own costs.

Case C-249/96, Lisa Jacqueline Grant v South-West Trains Ltd, 17 February 1998

Keywords: homosexual – relationship – travel concession – discrimination

3. Ms Grant is employed by SWT, a company which operates railways in the Southampton region.

4. Clause 18 of her contract of employment, entitled `Travel facilities', states:

`You will be granted such free and reduced rate travel concessions as are applicable to a member of your grade. Your spouse and depend[a]nts will also be granted travel concessions. Travel concessions are granted at the discretion of [the employer] and will be withdrawn in the event of their misuse.'

5. At the material time, the regulations adopted by the employer for the application of those provisions, the Staff Travel Facilities Privilege Ticket Regulations, provided in Clause 8 (`Spouses') that:

`Privilege tickets are granted to a married member of staff ... for one legal spouse but not for a spouse legally separated from the employee ...
...
Privilege tickets are granted for one common law opposite sex spouse of staff ... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more ...'.

6. The regulations also defined the conditions under which travel concessions could be granted to current employees (Clauses 1 to 4), employees having provisionally or definitively ceased working (Clauses 5 to 7), surviving spouses of employees (Clause 9), children of employees (Clauses 10 and 11) and dependent members of employees' families (Clause 12).

7. On the basis of those provisions Ms Grant applied on 9 January 1995 for travel concessions for her female partner, with whom she declared she had had a `meaningful relationship' for over two years.

8. SWT refused to allow the benefit sought, on the ground that for unmarried persons travel concessions could be granted only for a partner of the opposite sex.

9. Ms Grant thereupon made an application against SWT to the Industrial Tribunal, Southampton, arguing that that refusal constituted discrimination based on sex, contrary to the Equal Pay Act 1970, Article 119 of the Treaty and/or Directive 76/207. She submitted in particular that her predecessor in the post, a man who had declared that he had had a meaningful relationship with a woman for over two years, had enjoyed the benefit which had been refused her.

10. The Industrial Tribunal considered that the problem facing it was whether refusal of the benefit at issue on the ground of the employee's sexual orientation was `discrimination based on sex' within the meaning of Article 119 of the Treaty and the directives on equal treatment of men and women. It observed that while some United Kingdom courts had held that that was not the case, the judgment of the Court of Justice in Case C-13/94 P v S and Cornwall County Council [1996] ECR I-2143 was, on the other hand, `persuasive authority for the proposition that discrimination on the ground of sexual orientation [was] unlawful'.

11. For those reasons the Industrial Tribunal referred the following questions to the Court for a preliminary ruling:

`1. Is it (subject to (6) below) contrary to the principle of equal pay for men and women established by Article 119 of the Treaty establishing the European Community and by Article 1 of Council Directive 75/117 for an employee to be refused travel concessions for an unmarried cohabiting same-sex partner where such concessions are available for spouses or unmarried opposite-sex cohabiting partners of such an employee?

2. For the purposes of Article 119 does "discrimination based on sex" include discrimination based on the employee's sexual orientation?

3. For the purposes of Article 119, does "discrimination based on sex" include discrimination based on the sex of that employee's partner?

4. If the answer to Question (1) is yes, does an employee, to whom such concessions are refused, enjoy a directly enforceable Community right against his employer?

5. Is such a refusal contrary to the provisions of Council Directive 76/207?

6. Is it open to an employer to justify such refusal if he can show (a) that the purpose of the concessions in question is to confer benefits on married partners or partners in an equivalent position to married partners and (b) that relationships between same-sex cohabiting partners have not traditionally been, and are not generally, regarded by

society as equivalent to marriage; rather than on the basis of an economic or organisational reason relating to the employment in question?'

12. In view of the close links between the questions, they should be considered together.

13. As a preliminary point, it should be observed that the Court has already held that travel concessions granted by an employer to former employees, their spouses or dependants, in respect of their employment are pay within the meaning of Article 119 of the Treaty (see to that effect Case 12/81 Garland v British Rail Engineering [1982] ECR 359, paragraph 9).

14. In the present case it is common ground that a travel concession granted by an employer, on the basis of the contract of employment, to the employee's spouse or the person of the opposite sex with whom the employee has a stable relationship outside marriage falls within Article 119 of the Treaty. Such a benefit is therefore not covered by Directive 76/207, referred to in the national tribunal's Question 5 (see Case C-342/93 Gillespie and Others v Northern Health and Social Services Board and Others [1996] ECR I-475, paragraph 24).

15. In view of the wording of the other questions and the grounds of the decision making the reference, the essential point raised by the national tribunal is whether an employer's refusal to grant travel concessions to the person of the same sex with whom an employee has a stable relationship constitutes discrimination prohibited by Article 119 of the Treaty and Directive 75/117, where such concessions are granted to an employee's spouse or the person of the opposite sex with whom an employee has a stable relationship outside marriage.
(…)

24. In the light of all the material in the case, the first question to answer is whether a condition in the regulations of an undertaking such as that in issue in the main proceedings constitutes discrimination based directly on the sex of the worker. If it does not, the next point to examine will be whether Community law requires that stable relationships between two persons of the same sex should be regarded by all employers as equivalent to marriages or stable relationships outside marriage between two persons of opposite sex. Finally, it will have to be considered whether discrimination based on sexual orientation constitutes discrimination based on the sex of the worker.

25. First, it should be observed that the regulations of the undertaking in which Ms Grant works provide for travel concessions for the worker, for the worker's `spouse', that is, the person to whom he or she is married and from whom he or she is not legally separated, or the person of the opposite sex with whom he or she has had a `meaningful' relationship for at least two years, and for the children, dependent members of the family, and surviving spouse of the worker.

26. The refusal to allow Ms Grant the concessions is based on the fact that she does not satisfy the conditions prescribed in those regulations, more particularly on the fact that she does not live with a `spouse' or a person of the opposite sex with whom she has had a `meaningful' relationship for at least two years.

27. That condition, the effect of which is that the worker must live in a stable relationship with a person of the opposite sex in order to benefit from the travel concessions, is, like the other alternative conditions prescribed in the undertaking's regulations, applied regardless of the sex of the worker concerned. Thus travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex.

28. Since the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex.

29. Second, the Court must consider whether, with respect to the application of a condition such as that in issue in the main proceedings, persons who have a stable relationship with a partner of the same sex are in the same situation as those who are married or have a stable relationship outside marriage with a partner of the opposite sex.
(…)

31. While the European Parliament, as Ms Grant observes, has indeed declared that it deplores all forms of discrimination based on an individual's sexual orientation, it is nevertheless the case that the Community has not as yet adopted rules providing for such equivalence.

32. As for the laws of the Member States, while in some of them cohabitation by two persons of the same sex is treated as equivalent to marriage, although not completely, in most of them it is treated as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights, or else is not recognised in any particular way.

33. The European Commission of Human Rights for its part considers that despite the modern evolution of attitudes towards homosexuality, stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the Convention (see in particular the decisions in application No 9369/81, X. and Y. v the United Kingdom, 3 May 1983, Decisions and Reports 32, p. 220; application No 11716/85, S. v the United Kingdom, 14 May 1986, D.R. 47, p. 274, paragraph 2; and application No 15666/89, Kerkhoven and Hinke v the Netherlands, 19 May 1992, unpublished, paragraph 1), and that national provisions which, for the purpose of protecting the family, accord more favourable treatment to married persons and persons of opposite sex living together as man and wife than to persons of the same sex in a stable relationship are not contrary to Article 14 of the Convention, which prohibits inter alia discrimination on the ground of sex (see the decisions in S. v the United Kingdom, paragraph 7; application No 14753/89, C. and L.M. v the United Kingdom, 9 October 1989, unpublished, paragraph 2; and application No 16106/90, B. v the United Kingdom, 10 February 1990, D.R. 64, p. 278, paragraph 2).

34. In another context, the European Court of Human Rights has interpreted Article 12 of the Convention as applying only to the traditional marriage between two persons of opposite biological sex (see the Rees judgment of 17 October 1986, Series

A no. 106, p. 19, § 49, and the Cossey judgment of 27 September 1990, Series A no. 184, p. 17, § 43).

35. It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.

36. In those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position.
(…)

38. In P v S the Court was asked whether a dismissal based on the change of sex of the worker concerned was to be regarded as `discrimination on grounds of sex' within the meaning of Directive 76/207.

39. The national court was uncertain whether the scope of that directive was wider than that of the Sex Discrimination Act 1975, which it had to apply and which in its view applied only to discrimination based on the worker's belonging to one or other of the sexes.
(…)

41. (…) the Court stated that the provisions of the directive prohibiting discrimination between men and women were simply the expression, in their limited field of application, of the principle of equality, which is one of the fundamental principles of Community law. It considered that that circumstance argued against a restrictive interpretation of the scope of those provisions and in favour of applying them to discrimination based on the worker's gender reassignment.

42. The Court considered that such discrimination was in fact based, essentially if not exclusively, on the sex of the person concerned. That reasoning, which leads to the conclusion that such discrimination is to be prohibited just as is discrimination based on the fact that a person belongs to a particular sex, is limited to the case of a worker's gender reassignment and does not therefore apply to differences of treatment based on a person's sexual orientation.

43. Ms Grant submits, however, that, like certain provisions of national law or of international conventions, the Community provisions on equal treatment of men and women should be interpreted as covering discrimination based on sexual orientation. She refers in particular to the International Covenant on Civil and Political Rights of 19 December 1966 (United Nations Treaty Series, Vol. 999, p. 171), in which, in the view of the Human Rights Committee established under Article 28 of the Covenant, the term `sex' is to be taken as including sexual orientation (communication No 488/1992, Toonen v Australia, views adopted on 31 March 1994, 50th session, point 8.7).

44. The Covenant is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law (see, for example, Case 374/87 Orkem v Commission [1989] ECR 3283, paragraph 31, and Joined Cases C-297/88 and C-197/89 Dzodzi v Belgian State [1990] ECR I-3763, paragraph 68).

45. However, although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community (see, inter alia, on the scope of Article 235 of the EC Treaty as regards respect for human rights, Opinion 2/94 [1996] ECR I-1759, paragraphs 34 and 35).

46. Furthermore, in the communication referred to by Ms Grant, the Human Rights Committee, which is not a judicial institution and whose findings have no binding force in law, confined itself, as it stated itself without giving specific reasons, to `noting ... that in its view the reference to "sex" in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation'.

47. Such an observation, which does not in any event appear to reflect the interpretation so far generally accepted of the concept of discrimination based on sex which appears in various international instruments concerning the protection of fundamental rights, cannot in any case constitute a basis for the Court to extend the scope of Article 119 of the Treaty. That being so, the scope of that article, as of any provision of Community law, is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context. It follows from the considerations set out above that Community law as it stands at present does not cover discrimination based on sexual orientation, such as that in issue in the main proceedings.

48. It should be observed, however, that the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions (a unanimous vote on a proposal from the Commission after consulting the European Parliament) to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.

49. Finally, in the light of the foregoing, there is no need to consider Ms Grant's argument that a refusal such as that which she encountered is not objectively justified.

50. Accordingly, the answer to the national tribunal must be that the refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the Treaty or Directive 75/117.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Industrial Tribunal, Southampton, by decision of 19 July 1996, hereby rules:

The refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the EC Treaty or Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

Case C-13/94, P. v S. and Cornwall County Council, 30 April 1996

Keywords: transsexual – dismissal – discrimination

3. P., the applicant in the main proceedings, used to work as a manager in an educational establishment operated at the material time by Cornwall County Council (hereinafter "the County Council"), the competent administrative authority for the area. In early April 1992, a year after being taken on, P. informed S., the Director of Studies, Chief Executive and Financial Director of the establishment, of the intention to undergo gender reassignment. This began with a "life test", a period during which P. dressed and behaved as a woman, followed by surgery to give P. the physical attributes of a woman.

4. At the beginning of September 1992, after undergoing minor surgical operations, P. was given three months' notice expiring on 31 December 1992. The final surgical operation was performed before the dismissal took effect, but after P. had been given notice.

5. P. brought an action against S. and the County Council before the Industrial Tribunal on the ground that she had been the victim of sex discrimination. S. and the County Council maintained that the reason for her dismissal was redundancy.

6. It appears from the order for reference that the true reason for the dismissal was P.' s proposal to undergo gender reassignment, although there actually was redundancy within the establishment.

7. The Industrial Tribunal found that such a situation was not covered by the Sex Discrimination Act 1975, inasmuch as it applies only to cases in which a man or woman is treated differently because he or she belongs to one or the other of the sexes. Under English law, P. is still deemed to be male. If P. had been female before her gender reassignment, the employer would still have dismissed her on account of that operation. However, the Industrial Tribunal was uncertain whether that situation fell within the scope of the directive.

8. According to Article 1(1), the purpose of the directive is to put into effect in the Member States the principle of equal treatment for men and women, in particular as regards access to employment, including promotion, and to vocational training, and as regards working conditions. Article 2(1) of the directive provides that the principle of equal treatment means that there is to be "no discrimination whatsoever on grounds of sex, either directly or indirectly".

9. Furthermore, the third recital in the preamble to the directive states that equal treatment for men and women constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement is to be furthered.

10. Considering that there was doubt as to whether the scope of the directive is wider than that of the national legislation, the Industrial Tribunal decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

"(1) Having regard to the purpose of Directive No 76/207/EEC which is stated in Article 1 to put into effect the principle of equal treatment for men and women as regards access to employment etc ... does the dismissal of a transsexual for a reason related to a gender reassignment constitute a breach of the Directive?

(2) Whether Article 3 of the Directive which refers to discrimination on grounds of sex prohibits treatment of an employee on the grounds of the employee' s transsexual state."

11. Article 3 of the directive, to which the Industrial Tribunal refers, is concerned with application of the principle of equal treatment for men and women to access to employment.

12. A dismissal, such as is in issue in the main proceedings, must be considered in the light of Article 5(1) of the directive, which provides that:

"Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex."

13. The Industrial Tribunal' s two questions, which may appropriately be considered together, must therefore be construed as asking whether, having regard to the purpose of the directive, Article 5(1) precludes dismissal of a transsexual for a reason related to his or her gender reassignment.

14. The United Kingdom and the Commission submit that to dismiss a person because he or she is a transsexual or because he or she has undergone a gender-reassignment operation does not constitute sex discrimination for the purposes of the directive.

15. In support of that argument, the United Kingdom points out in particular that it appears from the order for reference that the employer would also have dismissed P. if P. had previously been a woman and had undergone an operation to become a man.

16. The European Court of Human Rights has held that "the term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group" (judgment of 17 October 1986, in Rees v United Kingdom, paragraph 38, Series A, No 106).

17. The principle of equal treatment "for men and women" to which the directive refers in its title, preamble and provisions means, as Articles 2(1) and 3(1) in particular indicate, that there should be "no discrimination whatsoever on grounds of sex".

18. Thus, the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law.

19. Moreover, as the Court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure (see, to that effect, Case 149/77 Defrenne v Sabena [1978] ECR 1365, paragraphs 26 and 27, and Joined Cases 75/82 and 117/82 Razzouk and Beydoun v Commission [1984] ECR 1509, paragraph 16).

20. Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.

23. Dismissal of such a person must therefore be regarded as contrary to Article 5(1) of the directive, unless the dismissal could be justified under Article 2(2). There is, however, no material before the Court to suggest that this was so here.

24. It follows from the foregoing that the reply to the questions referred by the Industrial Tribunal must be that, in view of the objective pursued by the directive, Article 5(1) of the directive precludes dismissal of a transsexual for a reason related to a gender reassignment.
(…)

On those grounds,

THE COURT,

in answer to the questions referred to it by the Industrial Tribunal, Truro, by order of 11 January 1994, hereby rules:

In view of the objective pursued by Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5(1) of the directive precludes dismissal of a transsexual for a reason related to a gender reassignment.

C. Co-decision Procedure

1. Regulations of the European Parliament and the Council

Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers[32]

(16) This Regulation contributes to the correct application of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code). To this end, members of the teams and guest officers, while carrying out border checks and surveillance, should not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Any measures taken in the performance of their tasks and in the exercise of their powers should be proportionate to the objectives pursued by such measures.
Article 5

Instructions to the Rapid Border Intervention Teams

2. Members of the teams shall, in the performance of their tasks and in the exercise of their powers, fully respect human dignity. Any measures taken in the performance of their tasks and in the exercise of their powers shall be proportionate to the objectives pursued by such measures. While performing their tasks and exercising their powers, members of the teams shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Regulation (EC) No 1927/2006 of the European Parliament and of the Council of 20 December 2006 on establishing the European Globalisation Adjustment Fund[33]

Article 7

Equality between women and men and non-discrimination

The Commission and the Member States shall ensure that equality between men and women and the integration of the gender perspective is promoted during the various stages of implementation of the EGF. The Commission and the Member States shall take appropriate steps to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of the implementation of and, in particular, in access to, the EGF.

[32] Official Journal L 199, 31 July 2007, p. 30 - 39

[33] Official Journal L 406, 30 December 2006, p. 1 - 6

Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide[34]

Article 2
Scope

1. Having regard to Articles 1 and 3, Community assistance shall relate to the following fields:
(…)
(b) the promotion and protection of human rights and fundamental freedoms, as proclaimed in the Universal Declaration of Human rights and other international and regional instruments concerning civil, political, economic, social and cultural rights, mainly through civil society organisations, relating to inter alia:

(…)

iii) the fight against racism and xenophobia, and discrimination based on any ground including sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation;

Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999
[35]

(8) The Member States and the Commission should ensure that there is no discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of implementation of the operational programmes co-financed by the ERDF.

Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)
[36]

CHAPTER II
Control of external borders and refusal of entry

Article 6
Conduct of border checks

1. Border guards shall, in the performance of their duties, fully respect human dignity.

[34] Official Journal L 386, 29 December 2006, p. 1 - 11

[35] Official Journal L 210, 31 July 2006, p. 1 - 11

[36] Official Journal L 105, 13 April 2006, p. 1 - 32

Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.

2. While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. Decision of the European Parliament and of the Council

Decision No 771/2006/EC of the European Parliament and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007) — towards a just society
[37]

(2) On the basis of Article 13 of the Treaty, the Council has adopted Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin in, inter alia, employment, vocational training, education, goods and services, and social protection, Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, which prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation and Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services.

(10) It is essential that actions in relation to racial or ethnic origin, religion or belief, disability, age or sexual orientation take full account of gender differences.

(11) The consultation process organised by the Commission through the Green Paper entitled "Equality and non-discrimination in an enlarged European Union", which was presented on 28 May 2004, shows that, in the opinion of most of the persons questioned, the Union should step up its efforts to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
(…)

Article 2
Objectives

The objectives of the European Year shall be as follows:

(a) Rights — Raising awareness of the right to equality and non-discrimination and of the problem of multiple discrimination.
The European Year will highlight the message that all people are entitled to equal treatment, irrespective of their sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The European Year will make groups that are at risk of discrimination more aware of their rights and of existing European legislation in the field of non-discrimination.
(…)

[37] Official Journal L 146, 31.5.2006, p. 1–7

(c) Recognition — Facilitating and celebrating diversity and equality.
The European Year will highlight the positive contribution that people, irrespective of their sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, can make to society as a whole, in particular by accentuating the benefits of diversity.

Article 4
Gender mainstreaming

The European Year shall take into account the different ways in which women and men experience discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

3. Common Positions

Common Position (EC) No 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC[38]

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation,

B. European Parliament Amendments which have been rejected by the Council

Amendments 4, 14, 15 and 16: the text of these amendments recognises as family members the spouse and registered partner, irrespective of sex, on the basis of the relevant national legislation, and the unmarried partner, irrespective of sex, with whom the Union citizen has a durable relationship, if the legislation or practice of the host and/home Member States treats unmarried couples and married couples in a corresponding manner and in accordance with the conditions laid down in any such legislation. These amendments have not be accepted for the following reasons:

With regard to marriage, the Council has been reluctant to opt for a definition of the term "spouse" which makes a specific reference to spouses of the same sex. For the moment only two Member States have legal provisions for marriages between partners of the same sex. Moreover, in its case-law the Court of Justice has made it

[38] Official Journal C 54E, 2 March 2004, p. 12 - 32

clear that, according to the definition generally accepted by the Member States, the term "marriage" means a union between two persons of the opposite sex.

D. European Parliament

1. Resolutions

European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe[39]

The European Parliament,
(…)
24. Feels that there is a need for action against growing homophobia; notes with concern increasing violence against homosexuals, for example bullying in schools and at the work place, the making of hate-filled comments by religious and political leaders, reduced access to health care (for example exclusion from insurance, reduced availability of organs for transplantation) and reduced access to the labour market; calls on the Commission to come forward with a communication on obstacles to free movement in the EU for married or legally recognised gay couples;

European Parliament resolution on the Annual Report on Human Rights in the World 2004 and the EU's policy on the matter[40]

The European Parliament,
(…)
Issues in different countries

The Americas

82. Calls on the government of Jamaica to take effective action to stop the extra-judicial killing of people by security forces; also calls on the Government of Jamaica to repeal sections 76, 77 and 79 of the Offences Against the Person Act, which criminalise sex between consenting adult men and are used as justification for unacceptable harassment, notably against HIV/AIDS educators; asks the Government of Jamaica to actively fight widespread homophobia;
(…)

Thematic Issues

IV. Abolishing the Death Penalty

168. Urges states which impose the death penalty on persons accused of same-sex consensual sexual relationships to abolish such laws and judicial practices;

[39] Official Journal C 124E, 25 May 2006, p. 405 - 415

[40] Official Journal C 45E, 23 February 2006, p. 107 - 127

VII. Impunity and the role of the ICC

215. Calls upon the Council and the Commission to address and take concrete measures in respect of those countries which have laws that discriminate on the grounds of sexual orientation; calls on those countries which have laws that make same-sex consensual sexual relationships between adults a criminal offence to abolish them;

European Parliament legislative resolution on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union[41]

The European Parliament,
(…)

1. Approves the Commission proposal as amended;

2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;

3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;

4. Instructs its President to forward its position to the Council and Commission.

Amendment 13

Article 1a (new)
Definitions

For the purposes of this Framework Decision, the following definitions shall apply:
(…)

(c) 'persons assimilated to family members' means:
- persons who, under the law of a Member State, live in a registered or otherwise legalised same-sex partnership with the suspected person,
- persons who cohabit permanently with the suspected person in a non-marital relationship.

[41] Official Journal C 33E, 9 February 2006, p. 159 - 169

Resolution on equal rights for gays and lesbians in the European Community[42]

The European Parliament,

- having regard to its resolution of 8 February 1994 on equal rights for homosexuals and lesbians in the EC ((OJ C 61, 28.2.1994, p. 40.)), calling on the Member States to apply the same age of consent to homosexual and heterosexual activities alike (para 6),

- having regard to its resolution of 17 September 1996 on respect for human rights in the European Union (1994) ((OJ C 320, 28.10.1996, p. 36.)), demanding the elimination of discrimination and unequal treatment of homosexuals, especially in view of unequal age of consent provisions (paragraph 84),

- having regard to its resolution of 19 September 1996 on sexual orientation, discrimination and the human rights of homosexuals in Romania ((OJ C 320, 28.10.1996, p. 197.)),

- having regard to its resolution of 8 April 1997 on respect for human rights in the European Union (1995) ((OJ C 132, 28.4.1997, p. 31.)), repeating the demand for the repeal of unequal age of consent provisions (para. 136) and explicitly urging Austria to repeal her age of consent law (para. 140),

- having regard to its resolution of 17 February 1998 on respect for human rights in the European Union (1996) ((OJ C 80, 16.3.1998, p. 43.)), reiterating its demand to the Austrian Government to repeal the unequal age of consent provision in the Austrian penal code (para. 69),

- recalling the Copenhagen accession criteria for candidate members, in particular the requirement to respect human rights,

A. having regard to Recommendation 924/1981 on discrimination against homosexuals adopted by the Parliamentary Assembly of the Council of Europe, recommending the Committee of Ministers to urge all Member States to apply the same minimum age of consent for homosexual and heterosexual acts (para. 7 ii),

B. having regard to the decision of the European Commission of Human Rights, adopted on 1 July 1997, in Application No. 25186/94 (Euan Sutherland) against the United Kingdom, finding 'that no objective and reasonable justification exists for the maintenance of a higher minimum age of consent to male homosexual, than to heterosexual, acts and that the application discloses discriminatory treatment in the exercise of the applicant's right to respect for private life under Article 8 of the Convention¨ (para. 66), and concluding that an unequal age of consent provision is 'a violation of Article 8 of the [European Human Rights] Convention, taken in conjunction with Article 14 of the Convention¨ (para. 67),

C. considering that, for reasons of credibility towards the applicant countries when demanding from them the observance of human rights, EU Member States such as

[42] Official Journal C 313, 12 October 1998, p. 186

Austria need to repeal their own legislation discriminating against lesbians and gay men, in particular existing discriminatory age of consent provisions,

D. noting that the following applicant countries, with which the EU has already started the accession negotiation process, still have legal provisions in their penal code that seriously discriminate against homosexuals: Bulgaria, Cyprus, Estonia, Hungary, Lithuania, and Romania,

E. deploring the insufficient law reform voted upon by the Parliament of Cyprus on 21 May 1998, replacing the total ban on male homosexual acts by a series of other discriminatory provisions, including a higher age of consent,

F. deploring the refusal of the Romanian Chamber of Deputies on 30 June 1998 to adopt a reform bill presented by the Government to repeal all anti-homosexual legislation provided by Article 200 of the penal code,

G. regretting the refusal of the Austrian Parliament to vote for the repeal of Article 209 of the penal code, the higher age of consent provision for gay men, on 17 July 1998, thus knowingly ignoring both the decision in the Sutherland case and the urgent demands towards Austria expressed by the European Parliament in its abovementioned resolutions of 8 April 1997 and 17 February 1998,

H. welcoming with great satisfaction the recent law reforms in this field in Finland and Latvia as well as the positive 22 June 1998 vote of the UK House of Commons on repealing the unequal age of consent provision for gay men though, regrettably, this was subsequently overruled by a vote in the House of Lords,

I. considering that Article 13 EC as amended by the Amsterdam Treaty, once ratified, will empower the Council to take appropriate measures to combat discrimination based on sexual orientation,

J. confirming that it will not give its consent to the accession of any country that, through its legislation or policies, violates the human rights of lesbians and gay men,

K. whereas, according to official statistics, there are still every year approximately 50 reports to the police, 30 criminal proceedings and judicial inquiries and 20 convictions under Article 209 of the Austrian penal code which provides a minimum penalty of six months' imprisonment and a maximum sentence of five years' imprisonment,

1. Calls on the Austrian Government and Parliament to immediately repeal Article 209 of the penal code and to immediately provide for an amnesty for, and the release from prison of, all persons jailed under this law;

2. Calls on all applicant countries to repeal all legislation violating the human rights of lesbians and gay men, in particular discriminatory age of consent laws;

3. Calls on the Commission to take into consideration respect and observance of the human rights of gays and lesbians when negotiating the accession of applicant countries;

4. Asks the Commission in particular to examine, in its review of the CEEC due before the end of this year, the human rights situation of gays and lesbians in these countries;

5. Instructs its President to forward this resolution to the Council, the Commission, the parliaments and governments of Austria, Cyprus, and Romania, and the Secretary-General of the Council of Europe.

Resolution on stiffer penalties for homosexuals in Romania[43]

The European Parliament,

- having regard to the Universal Declaration of Human Rights,
- having regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms,
- having regard to its previous resolution on Romania,

A. shocked at the decision of the Romanian Chamber of Deputies to introduce stiffer penalties for any homosexual relations between consenting adults in the context of a revision of the Romanian penal code,

B. whereas homosexuality is now subject in Romania to prison sentences of between six months and three years; whereas the proposal to amend Article 200 of the penal code would make acts of homosexuality punishable by up to five years' imprisonment,

C. whereas the Parliamentary Assembly of the Council of Europe, among others, has called on Romania to decriminalize relationships between adults of the same sex,

D. whereas the law will only come into force if a compromise text is approved by both Chambers and signed by the President of the Republic of Romania,

1. Expresses its profound indignation at these decisions by the Romanian Parliament and condemns any attempt to criminalize sexual relations between adults of the same sex;

2. Calls on the President of Romania to use all his powers to prevent the entry into force of the proposed amendments to the penal code;

3. Recalls the importance it attaches to respect for human rights and calls on the Government of Romania to adhere to its undertakings to the Council of Europe to repeal all laws criminalizing homosexuality;

4. Calls on the Commission, the Council and the Member States, each within their respective spheres of responsibility, to exert pressure to prevent discriminatory provisions from being adopted;

[43] Official Journal C 320, 28 October 1996, p. 197

5. Instructs its President to forward this resolution to the Council, the Commission, the Council of Europe and the President, Government and Parliament of Romania.

Resolution on respect for human rights in the European Union in 1994[44]

The European Parliament,

C. whereas the legal protection of the human rights of any person within the territory of the European Union should be guaranteed by the Member States, under the supervision of the Commission and the Court of Human Rights in Strasbourg, whatever that person's race, sex, nationality, origin, language, religion, culture, beliefs or opinions (…).

A. European Union system for the protection of human rights

Right to respect for private and family life, property and correspondence
(…)

56. Demands that SIS, EIS, CIS and the Europol databank be subject to an independent assessment system, in order to respect private life; demands that personal information such as references to religion, philosophical or religious beliefs, race, health and sexual habits be excluded from these databanks;

Equal treatment

77. Considers it essential to maintain as one of the general principles of Community law the principle of equal treatment and non-discrimination and urges the Member States to continue guaranteeing that principle;

78. Regards as unacceptable any kind of discrimination based on race, skin colour, ethnic origin, sex, sexual orientation, language, religion and political beliefs;

83. Urges the Member States to abolish all laws of whatever nature which criminalize and discriminate against emotional and sexual relations between adults of the same sex;

84. Calls, pursuant to its resolution of 8 February 1994 on equal rights for homosexuals and lesbians in the EC ((OJ C 61, 28.2.1994, p. 40.)), for the abolition of all discrimination against and unfair treatment of homosexuals, particularly as regards the differences which still persist with regard to the age of consent and discrimination with regard to the right to work, criminal law, civil law, law of contract and economic and social legislation;

[44] Official Journal C 320, 28 October 1996, p. 36

Resolution on discrimination against transsexuals[45]

The European Parliament:

Having regard to Petitions Nos. 16/84 and 229/87

Having regard to the joint declaration by the European Parliament, the Council and the Commission on Human Rights of 27 April 1977 (OJ No. C 103, 27. 4. 1977, p.1)

Having regard to the commitment made in the preamble to the Single European Act (OJ No L 169, 29. 6. 1987, p.1) to promote the fundamental rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.

Having regard to the European Parliament's resolution of 29 October 1982 (OJ No C 304, 22. 11. 1982, p.253) on legal measures to improve the protection of fundamental rights in the EC

Having regard to its resolution on sexual discrimination at the workplace (OJ No C 104, 16. 4. 1984, p.46)

Having regard to its resolution on violence against women (OJ No C 176, 14. 7. 1986, p.52)

Having regard to the report of the Committee on Petitions (Doc. A 3-16/89)
• whereas the procedure for transsexuals to change sex is still not available or regulated in all Member States of the Community, and the costs are not reimbursed by the health insurance institutions
• regretting that transsexuals everywhere are still discriminated against, marginalised, and sometimes even criminalised.
• aware that the unemployment rate among transsexuals undergoing a change of sex is between 60% and 80%
• whereas transsexuality is a psychological and medical problem, but also a problem of a society which is incapable of coming to terms with a change in the roles of the sexes laid down by its culture

1. Believes that human dignity and personal rights must include the right to live according to one's sexual identity
2. Calls on the Member States to enact provisions on transsexuals' right to change sex by endocrinological, plastic surgery, and cosmetic treatment, on the procedure, and banning discrimination against them

The procedure should offer the following possibilities as a minimum:
- psychiatric/psychotherapeutic differential diagnosis of transsexualism, by way of help with self-diagnosis
- a consultation period; psychotherapeutic assistance and support; information on the change of sex; medical examinations

[45] Official Journal 256, 09 October 1989, p. 33

- hormone treatment combined with a trial in everyday life, i.e. living the role of the new sex for at least one year
- surgery after approval by a board of experts consisting of a medical specialist, psychotherapist and possibly a representative nominated by the person concerned
- legal recognition; change of forename; change of sex on birth certificate; and identity documents
- psychotherapeutic and medical aftercare

1. Calls on the Council of Europe to enact a convention for the protection of transsexuals
2. Calls on the Member States to ensure that the cost of psychological, endocrinological, plastic, surgical and cosmetic treatment of transsexuals is reimbursed by the health insurance institutions
3. Calls on the Member States to grant public assistance to transsexuals who have through no fault of their own lost their jobs and/or accommodation because of their sexual adaptation
4. Calls on the Member States to set up advice centres for transsexuals and to give financial support to self-help organisations
5. Calls on the Member States to disseminate information on the problems of transsexuals, especially among the staff of their social services, police, frontier authorities, registration offices, military authorities and prison services
6. Calls on the Commission and the Council to make it clear that Community directives governing the equality of men and women at the workplace also outlaw discrimination against transsexuals
7. Calls on the Commission, the Council and the Member States to devise identity documents which would be recognised throughout the Community and in which, where applicable, the holders transsexuality could be indicated during the period of sexual adaptation if so requested
8. Calls on the Council and the Member States, when harmonising the right of asylum, to recognise persecution on the grounds of transsexuality as grounds for asylum
9. Calls on the Commission to make funds available under its aid programmes for further study of transsexuality in the medical field
10. Calls on the Commission to urge the Member States to adopt special measures to find employment for transsexuals
11. Calls for the setting up of an office at the Commission to which cases of discrimination may be reported
12. Instructs its President to forward this resolution to the Commission, the Council, the governments and parliaments of the Member States and the Council of Europe.

2. Rules of Procedure

European Parliament - Rules of Procedure, 15th edition (February 2003)[46]

VIII. Committee on Employment and Social Affairs

This committee is responsible for matters relating to:
9. all forms of discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 13 of the EC Treaty), related to fundamental social rights and to the labour market;

IV. Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

This committee is responsible for matters relating to:
1. citizens' rights, human rights and fundamental freedoms in the European Union;
2. the measures needed to combat all forms of discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 13 of the EC Treaty) other than those mentioned in VIII;

E. Council of the European Union

1. Regulations

Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999[47]

(30) In the context of its effort in favour of economic and social cohesion, the Community, at all stages of implementation of the Funds, has as its goals to eliminate inequalities and to promote equality between men and women as enshrined in Articles 2 and 3 of the Treaty, as well as combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
(…)

Article 16
(…)
The Member States and the Commission shall take appropriate steps to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of implementation of the Funds and, in particular, in the access to them. In particular, accessibility for disabled persons shall be one of the criteria to be observed in defining operations co-financed by the Funds and to be taken into account during the various stages of implementation.

[46] Official Journal L 61, 5 March 2003, p. 1 – 138

[47] Official Journal L 210, 31 July 2006, p. 25 - 78

Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development[48]

CHAPTER III
PRINCIPLES OF ASSISTANCE

Article 8
Equality between men and women and non-discrimination

Member States and the Commission shall promote equality between men and women and shall ensure that any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation is prevented during the various stages of programme implementation.

Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities[49]

(7) Compliance should be observed with the principle of non-discrimination as enshrined in the EC Treaty, which thus necessitates the further development of a staff policy ensuring equal opportunities for all, regardless of sex, physical capacity, age, racial or ethnic identity, sexual orientation and marital status.

ANNEX I
AMENDMENTS TO THE STAFF REGULATIONS OF OFFICIALS OF THE EUROPEAN COMMUNITIES

3) the former Article 1a becomes Article 1d and is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. In the application of these Staff Regulations, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited.

30) Article 26 is amended as follows:
(…)
(b) the fourth paragraph is replaced by the following:"An official's personal file shall contain no reference to his political, trade union, philosophical or religious activities and views, or to his racial or ethnic origin or sexual orientation.

CHAPTER 3
CONDITIONS OF ENGAGEMENT

[48] Official Journal L 277, 21 October 2005, p. 1 - 40

[49] Official Journal L 124, 27 April 2004, p. 1 - 118

Article 82
1. Contract staff shall be selected on the broadest possible geographical basis from among nationals of Member States and without distinction as to racial or ethnic origin, political, philosophical or religious beliefs, age or disability, gender or sexual orientation and without reference to their marital status or family situation.

Council Regulation (EC, ECSC, Euratom) No 781/98 of 7 April 1998 amending the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities in respect of equal treatment[50]

Article 1

The Staff Regulations of officials of the European Communities are hereby amended as follows:

1. The following Article shall be inserted after Article 1:
'Article 1a
1. Officials shall be entitled to equal treatment under these Staff Regulations without reference, direct or indirect, to race, political, philosophical or religious beliefs, sex or sexual orientation, without prejudice to the relevant provisions requiring a specific marital status.

2. The second paragraph of Article 27 shall be replaced by the following:
'Officials shall be selected without distinction as to race, political, philosophical or religious beliefs, sex or sexual orientation and without reference to their marital status or family situation.`

Article 2
The conditions of employment of other servants of the European Communities are hereby amended as follows:

1. the first paragraph of Article 10 shall be replaced by the following:
'Article 1a, Article 5(1), (2) and (4) and Article 7 of the Staff Regulations concerning equal treatment for officials, the classification of posts in categories, services and grades and the assignment of officials to posts shall apply by analogy.`

2. the second subparagraph of Article 12(1) shall be replaced by the following:
'Temporary staff shall be selected without distinction as to race, political, philosophical or religious beliefs, sex or sexual orientation and without reference to their marital status or family situation.

[50] Official Journal L 113, 15 April1998, p. 4 - 5

2. Directives

Council Directive No 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research[51]

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(a) and (4) thereof,
(…)

(24) Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

Council Directive No 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service[52]

(5) The Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.

Council Directive No 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted[53]

Article 10
Reasons for persecution

(d) a group shall be considered to form a particular social group where in particular:
members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be

[51] Official Journal L 289, 3 November 2005, p. 15 – 22

[52] Official Journal L 375, 23 December 2004, p. 12 - 18

[53] Official Journal L 304, 30 September 2004, p. 2 - 2, p. 12 - 23

considered, without by themselves alone creating a presumption for the applicability of this Article;

Council Directive No 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities[54]

(7) Member States should give effect to the provision of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

Council Directive No 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents[55]

(5) Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

Council Directive No 2003/86/EC of 22 September 2003 on the right to family reunification[56]

(5) Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

Council Directive No 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[57]

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

[54] Official Journal L 261, 6 August 2004, p. 3 - 3, p. 19 - 23

[55] Official Journal L 16, 23 January 2004, p. 44 - 53

[56] Official Journal L 251, 3 October 2003, p. 12 - 18

[57] Official Journal L 303, 2 December 2000, p. 16 - 22

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(26) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

CHAPTER I
GENERAL PROVISIONS

Article 1
Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2
Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons (…)

3. Decisions

a. Framework decisions

Council Framework Decision No 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties[58]

(5) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty and reflected by the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to execute a decision when there are reasons to believe, on the basis of objective elements, that the financial penalty has the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

Council Framework Decision No 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence[59]

(6) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty and reflected by the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to freeze property for which a freezing order has been issued when there are reasons to believe, on the basis of objective elements, that the freezing order is issued for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

[58] Official Journal L 076, 22 March 2005, p. 16 - 30

[59] Official Journal L 196, 2 August 2003, p. 45–55

Council Framework Decision No 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision[60]

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

b. Decisions

Council Decision No 2006/35/EC of 23 January 2006 on the principles, priorities and conditions contained in the Accession Partnership with Turkey[61]

ANNEX
TURKEY: 2005 ACCESSION PARTNERSHIP

3. PRIORITIES
The priorities listed in this Accession Partnership have been selected on the basis that it is realistic to expect that the country can complete them or take them substantially forward over the next few years. A distinction is made between short-term priorities, which are expected to be accomplished within one to two years, and medium-term priorities, which are expected to be accomplished within three to four years. The priorities concern both legislation and the implementation thereof.
(…)

3.1. SHORT-TERM PRIORITIES
Enhanced political dialogue and political criteria
Democracy and the rule of law
Human rights and the protection of minorities
Observance of international human rights law
- Guarantee in law and in practice the full enjoyment of human rights and fundamental freedoms by all individuals without discrimination and irrespective of language, political opinion, race, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

[60] Official Journal L 190, 18 July 2002, p. 1 – 20

[61] Official Journal L 22, 26 January 2006, p. 34 - 50

Council Decision No 2004/676/EC of 24 September 2004 concerning the Staff Regulations of the European Defence Agency[62]

TITLE II
TEMPORARY STAFF

CHAPTER 1

Article 5

1. In the application of these Staff Regulations, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited.

Article 32

The personal file of a member of temporary staff shall contain:
(a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;
(b) any comments by the member of temporary staff on such documents.
Documents shall be registered, numbered and filed in serial order; the documents referred to in subparagraph (a) may not be used or cited by the Agency against a member of temporary staff unless they were communicated to him before they were filed.
The communication of any document to a member of temporary staff shall be evidenced by his signing it or, failing that, shall be effected by registered letter to the last address communicated by the member of temporary staff.
A member of temporary staff's personal file shall contain no reference to his political, trade union, philosophical or religious activities and views, or to his racial or ethnic origin or sexual orientation.

CHAPTER 3
Conditions of engagement

Article 36

1. The engagement of temporary staff shall be directed to securing for the Agency the services of persons of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States participating in the Agency.
Temporary staff shall be selected without distinction as to race, political, philosophical or religious beliefs, sex or sexual orientation and without reference to their marital status or family situation.

TITLE III
CONTRACT STAFF

[62] Official Journal L 310, 07 October 2004, p. 9 - 63

CHAPTER 3
Conditions of engagement

Article 104

1. Contract staff shall be selected on the broadest possible geographical basis from among nationals of participating Member States and without distinction as to racial or ethnic origin, political, philosophical or religious beliefs, age or disability, gender or sexual orientation and without reference to their marital status or family situation.

Council Decision No 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community ("Overseas Association Decision")[63]

GENERAL PROVISIONS OF THE ASSOCIATION OF THE OCTs WITH THE COMMUNITY

Chapter 1
General provisions

Article 2
Basic elements

1. The OCT-EC association shall be based on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. These principles, on which the Union is founded in accordance with Article 6 of the Treaty on European Union, shall be common to the Member States and the OCTs linked to them.

2. There shall be no discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in the areas of cooperation referred to in this Decision.

Council Decision No 2001/235/EC of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey[64]

ANNEX
TURKEY: 2000 ACCESSION PARTNERSHIP

4. PRIORITIES AND INTERMEDIATE OBJECTIVES

4.2. Medium-term

[63] Official Journal L 314, 30 November 2001, p. 1 - 77

[64] Official Journal L 85, 24 March 2001, p. 13 - 23

Employment and social affairs
- Remove remaining forms of discrimination against women and all forms of discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Council Decision No 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006)[65]

Article 1
Establishment of the programme

This Decision establishes a Community action programme, hereinafter referred to as "the programme", to promote measures to combat direct or indirect discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation, for the period from 1 January 2001 to 31 December 2006.

4. Resolutions

Council Resolution of 15 July 2003 on promoting the employment and social integration of people with disabilities[66]

(2) NOTING that the Treaty establishing the European Community enables the Community to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;

(3) RECALLING in particular that acting on the basis of Article 13 of the Treaty establishing the European Community, which enables the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, the Council adopted Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;

Council Resolution of 6 May 2003 on accessibility of cultural infrastructure and cultural activities for people with disabilities[67]

1. NOTING that the Treaty establishing the European Community gives the Community the opportunity to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;

[65] Official Journal L 303, 2 December 2000, p. 23 - 28

[66] Official Journal C 175, 24 July 2003, p. 1 - 2

[67] Official Journal C 134, 7 June 2003, p. 7 - 8

Council resolution of 5 May 2003 on equal opportunities for pupils and students with disabilities in education and training[68]

2. NOTING that the Treaty establishing the European Community gives the Community the opportunity to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity;

Council Resolution of 6 February 2003 on Social Inclusion — through social dialogue and partnership[69]

EMPHASISING THAT:
4. there is an increasing need for more widespread social inclusion which will allow as many people as possible to be active participants in the labour market and in society at large, regardless of racial and ethnic background, gender, age, disability, religion and sexual orientation; a need which is underlined by current demographic changes which pose serious challenges to the future supply of labour and the smooth functioning of labour markets;

Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 14 December 2000 on the social inclusion of young people[70]

The Council and the representatives of the governments of the member states, meeting within the Council
Whereas:
ENCOURAGE the Community institutions and Member States, in line with the principle of subsidiarity and further to the Lisbon European Council, to launch Europe-wide cooperation initiatives in conjunction with national and, as appropriate, regional and local youth policies, and INVITE, in this context, the Commission and the Member States, each within its own sphere of competence, to:
(iii) study common objectives directed at:

(…)

- fighting discriminatory behaviour against young people, whether based on sex, race or ethnic origin, religion or beliefs, disability, age or sexual orientation,

[68] Official Journal C 134, 07 June 2003, p. 6 - 7

[69] Official Journal C 039, 18 February 2003, p. 1 - 2

[70] Official Journal C 374, 28 December 2000, p. 5 - 7

F. Commission

1. Regulation

Commission Regulation (EC) No 718/2007 of 12 June 2007 implementing Council Regulation (EC) No 1085/2006 establishing an instrument for pre-accession assistance (IPA)[71]

Article 3
Principles of assistance

The Commission shall ensure that the following principles apply in relation to assistance under the IPA Regulation:
(…)
Any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation shall be prevented during the various stages of the implementation of assistance. in the country concerned;

2. Decision

Commission Decision No 2006/33/EC of 20 January 2006 establishing a high-level advisory group on social integration of ethnic minorities and their full participation in the labour market[72]

1) Article 13 of the Treaty establishing the European Community confers powers on the Community to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

3. Recommendations

Commission Recommendation No 2005/251/EC of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers (Text with EEA relevance)[73]

GENERAL PRINCIPLES AND REQUIREMENTS APPLICABLE TO EMPLOYERS AND FUNDERS

Non-discrimination
Employers and/or funders of researchers will not discriminate against researchers in any way on the basis of gender, age, ethnic, national or social origin, religion or belief, sexual orientation, language, disability, political opinion, social or economic condition.

[71] Official Journal L 170, 29 June 2007, p. 1 - 66

[72] Official Journal L 21, 25 January 2006, p. 20 - 21

[73] Official Journal L 075, 22 March 2005, p. 67 - 77

Commission Recommendation No 92/131/EEC of 27 November 1991 on the protection of the dignity of women and men at work[74]

PROTECTING THE DIGNITY OF WOMEN AND MEN AT WORK
A code of practice on measures to combat sexual harassment

1. INTRODUCTION
Some specific groups are particularly vulnerable to sexual harassment. Research in several Member States, which documents the link between the risk of sexual harassment and the recipient's perceived vulnerability, suggests that divorced and separated women, young women and new entrants to the labour market and those with irregular or precarious employment contracts, women in non-traditional jobs, women with disabilities, lesbians and women from racial minorities are disproportionately at risk. Gay men and young men are also vulnerable to harassment. It is undeniable that harassment on grounds of sexual orientation undermines the dignity at work of those affected and it is impossible to regard such harassment as appropriate workplace behaviour.

4. Proposals for Council Regulations and Directives

Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection[75]

(15) In particular, it is necessary to introduce a common concept of the persecution ground membership of a particular social group, which shall be interpreted to include both groups which may be defined by relation to certain fundamental characteristics, such as gender and sexual orientation, as well as groups, such as trade unions, comprised of persons who share a common background or characteristic that is so fundamental to identity or conscience that those persons should not be forced to renounce their membership.

VII FINAL PROVISIONS

Article 35
Non-discrimination

Member States shall implement the provisions of this Directive without discrimination on the basis of sex, race, nationality, membership of a particular social group, health, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

[74] Official Journal L 049, 24 February 1992, p. 1 - 8

[75] Official Journal C 51E , 26 February 2002, p. 325 - 334

Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States[76]

CHAPTER VIII
FINAL PROVISIONS

Article 32
Non-discrimination

The Member States shall give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof[77]

CHAPTER III
Obligations of the Member States towards persons enjoying temporary protection

Article 15

The Member States shall implement their obligations under Articles 8 to 14 without discriminating between persons enjoying temporary protection, on the grounds of sex, race, ethnic origin, nationality, religion or convictions, handicap, age or sexual orientation.

Amended proposal for a Council Regulation (Euratom, ECSC, EEC) amending the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities in respect of equal treatment of men and women[78]

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing a Single Council and a Single Commission of the European Communities, and in particular Article 24 thereof,
Having regard to the proposal from the Commission, made after consulting the Staff Regulations Committee,
Having regard to the opinion of the European Parliament,

[76] Official Journal C 213E, 31 July 2001, p. 286–295

[77] Official Journal C 311E, 31 October 2000, p. 251 - 258

[78] Official Journal C 144, 16 May1996, p. 14

Having regard to the opinion of the Court of Justice,
Having regard to the opinion of the Court of Auditors,

Whereas the principle of equal treatment of men and women should be included among the basic tenets set out in the Staff Regulations and Conditions of Employment applying to the Community's public service, and not only in the matter of recruitment;
Whereas the institutions should be asked to determine, by agreement, positive actions to promote equal opportunities for female and male officials in the areas covered by the Staff Regulations and the Conditions of Employment of Other Servants,

HAS ADOPTED THIS REGULATION:

Article 1

The Staff Regulations of Officials of the European Communities are amended as follows:
1. The following Article 1a is inserted after Article 1:
‘Article 1a
1. Officials shall be entitled to equal treatment under these Staff Regulations without reference, direct or indirect, to race, political, philosophical or religious beliefs, sex or sexual orientation without prejudice to the relevant provisions requiring a specific marital status.
2. The institutions shall determine, by agreement, after consulting the Staff Regulations Committee, measures and actions to promote equal opportunities for female and male officials in the areas covered by these Staff Regulations, and shall adopt the appropriate provisions, notably to redress such de facto inequalities as hamper opportunities for women in these areas.’

2. The second paragraph of Article 27 is replaced by the following:
'Officials shall be selected without distinction as to race, political, philosophical or religious beliefs, sex or sexual orientation and without reference to their marital status or family situation.’

Article 2

The Conditions of Employment of Other Servants of the European Communities are amended as follows:
1. The first paragraph of Article 10 is replaced by the following:
‘Article 1a, Article 5 (1), (2) and (4) and Article 7 of the Staff Regulations, concerning the classification of posts in categories, services and grades, equal treatment for officials and the assignment of officials to posts, shall apply by analogy.’

2. The second subparagraph of Article 12 (1) is replaced by the following:
‘Temporary staff shall be selected without distinction as to race, political, philosophical or religious beliefs, sex or sexual orientation and without reference to their marital status or family situation.’

3. The following is added to Article 53:

'Article 1a of the Staff Regulations, concerning equality of treatment for officials, shall apply by analogy.'

4. Article 83 is replaced by the following:
'Article 1a, Article 11, the first paragraph of Article 12, Article 14, the first paragraph of Article 16, Articles 17, 19 and 22, the first and second paragraphs of Article 23 and the second paragraph of Article 25 of the Staff Regulations, concerning the rights and obligations of officials, and Articles 90 and 91 of the Staff Regulations, concerning appeals, shall apply by analogy.'

Article 3
This Regulation shall enter into force on the day following its publication in the Official Journal of the European Communities.
This Regulation shall be binding in its entirety and directly applicable in all Member States.

5. Communication

Communication from the Commission to the Member States establishing the guidelines for the Community initiative Equal concerning transnational cooperation to promote new means of combating all forms of discrimination and inequalities in connection with the labour market[79]

II. POLICY CONTEXT

8. At Community level there is an integrated strategy to combat discrimination (in particular that based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation) and social exclusion. Focusing on the labour market, Equal will form part of that strategy. It will be complementary to other policies, instruments and actions developed in this respect and which go beyond the labour market area and, in particular, the specific legislation and action programmes under Articles 13 and 137 of the Treaty. The Commission and the Member States will ensure coherence between Equal and such activities. Equal will, therefore, play a key role in linking together the EU supported actions under Articles 13 and 137, the ESF supported programmes and the political objectives pursued in the framework of the European employment Strategy.

III. GENERAL PRINCIPLES

Thematic approach

14. Member States shall formulate their strategy for Equal on the basis of thematic fields in the four pillars of the European Employment strategy. Within these fields Member States shall ensure that their proposals principally benefit those subject to the main forms of discrimination (based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation) and inequality. Each thematic field shall be fully

[79] Official Journal C 127, 5 May 2000, p. 2 - 10

accessible to all such groups. Within this horizontal approach, the promotion of equality between women and men will be integral to the thematic fields in all four pillars as being targeted through specific actions in the fourth pillar.

6. Rules of Procedure

Rules of Procedure of the Commission[80]

ANNEX
CODE OF GOOD ADMINISTRATIVE BEHAVIOUR FOR STAFF OF THE EUROPEAN COMMISSION IN THEIR RELATIONS WITH THE PUBLIC

1. GENERAL PRINCIPLES
The Commission respects the following general principles in its relations with the public:

Lawfulness
The Commission acts in accordance with the law and applies the Rules and Procedures laid down in Community legislation.

Non-discrimination and equal treatment
The Commission respects the principle of non-discrimination and in particular, guarantees equal treatment for members of the public irrespective of nationality, gender, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation. Thus, differences in treatment of similar cases must be specifically warranted by the relevant features of the particular case in hand.

[80] Official Journal L 308, 8 December 2000, p. 26 - 34

G. European Economic and Social Committee

Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters[81]

On 20 September 2006 the Council decided, in accordance with Article 262 of the Treaty establishing the European Community, to consult the European Economic and Social Committee on the abovementioned proposal. The Section for Employment, Social Affairs and Citizenship, which was asked to prepare the Committee's work on the matter, adopted its opinion on 7 November 2006 (rapporteur working alone: Mr Retureau). At its 431st plenary session of 13 and 14 December 2006 (meeting of 13 December), the European Economic and Social Committee adopted the following opinion by 108 votes to two, with one abstention.

1. Summary of the opinion

1.1 The Committee, consulted on the first initiative, basically approves the extension, through amendments, of the questions of jurisdiction and law applicable to Regulation No 2201/2003, thereby supplementing on these points a regulation which dealt with the recognition of legal decisions on matrimonial and childcare matters. It has already expressed its views — at the time of the Green Paper on Divorce — on legal jurisdiction and applicable law, and would refer to this highly detailed opinion (1).
(…)

3. General comments
(…)

3.3 Certain national laws do not require the spouses to be of different sexes, unlike a majority of national legislations, but the EESC notes that the aim of the amended regulation is not to harmonise national laws but to determine the applicable law in all actual cases comprising an extraneous element and to enable the circulation of judgments without exequatur. So, even fundamental differences between national laws do not, in principle, prevent the application of the amended regulation proposed by the Commission.
(…)

4. Specific comments
(…)

4.3 Perhaps it would have been more logical to deal with all the consequences, including the financial ones, of a dissolution of a marriage and the custody of joint children in an expanded Regulation No 2201/2003 and draw up a new regulation to deal with all the consequences of the separation of couples who are not married, possibly of the same sex, and who live under a legal contractual arrangement (like the PACS in France) or a de facto arrangement (e.g. as a concubine).

[81] COM(2006) 399 final (2006/C 325/17)

4.4 That would undoubtedly have made the applicable law clearer and more understandable and made it easier to recognise the legal decisions which often regulate all the conditions and consequences of divorce or separation in a single judgment, especially as the situation of the children of ‘non-typical’ couples — and not just that of their assets — also has to be resolved.

H. European Ombudsman

The European Ombudsman - Annual Report 1998[82]

1. Age limits and human rights

1.4. In July 1997, the European Union took steps to combat age discrimination. The Treaty of Amsterdam introduced a new Article 13 in the EC Treaty, in which age is mentioned as one form of discrimination. This Article reads as follows: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it on the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[82] Official Journal C 300, 18 October 1999, p. 1 - 166

Index

L

M

N

P

R

S

T

U

V

Members of the International Commission of Jurists

President

Justice Arthur CHASKALSON, South Africa

Vice-Presidents

Prof. Jochen A. FROWEIN, Germany
Prof. Leila ZERROUGUI, Algeria

Executive Committee

Justice Ian BINNIE, Canada
Dr. Rajeev DHAVAN, India
Prof. Vojin DIMITRIJEVIC, Serbia & Montenegro
Prof. Louise DOSWALD-BECK, Switzerland
Justice Unity DOW, Botswana
Justice John DOWD, Australia (Chairperson)
Dr. Gustavo GALLÓN GIRALDO, Colombia
Mr Stellan GÄRDE, Sweden
Mr Raji SOURANI, Palestine

Other Commission Members

Mr Raja Aziz ADDRUSE, Malaysia
Prof. Abdullahi AN-NA'IM, Sudan
Justice Solomy BALUNGI BOSSA, Uganda
Ambassador Julio BARBOZA, Argentina
Prof. Alexander BRÖSTL, Slovakia
Prof. Juan Antonio CARRILLO SALCEDO, Spain
Ms Christine CHANET, France
Ms Vera DUARTE LOBO DE PINA, Cape-Verde
Prof. Paula ESCARAMEIA, Portugal
Justice Elisabeth EVATT, Australia
Prof. Ruth GAVISON, Israel
Prof. Jenny E. GOLDSCHMIDT, Netherlands
Lord William GOODHART, United Kingdom
Ms Asma JAHANGIR, Pakistan
Ms. Imrana JALAL, Fiji
Prof. David KRETZMER, Israel
Prof. Kazimierz Maria LANKOSZ, Poland
Ms Gladys Veronica LI, Hong Kong
Prof. Cecilia MEDINA QUIROGA, Chile
Mr Kathurima M'INOTI, Kenya
Ms Karinna MOSKALENKO, Russia
Professor Vitit MUNTABHORN, Thailand
Dr. Adnan B. NASUTION, Indonesia
Dr. Pedro NIKKEN, Venezuela
Prof. Manfred NOWAK, Austria
Prof. Andrei RICHTER, Russia
Justice Michèle RIVET, Canada
Dr. Mary ROBINSON, Ireland
Sir Nigel RODLEY, United Kingdom
Justice A.K.M. SADEQUE, Bangladesh
Prof. Claes SANDGREN, Sweden
Mr Jerome J. SHESTACK, U.S.A.
Dr. Hipólito SOLARI YRIGOYEN, Argentina
Prof. Daniel THÜRER, Switzerland
Prof. U. Oji UMOZURIKE, Nigeria
Justice Vilenas VADAPALAS, Lithuania
Prof. Theo VAN BOVEN, Netherlands
Prof. Yozo YOKOTA, Japan
Dr. José ZALAQUETT, Chile

Honorary Members

P.N. Bhagwati, India
Boutros Boutros-Ghali, Egypt
William J. Butler, USA
Prof. Antonio Cassese, Italy
Marie-José Crespin, Senegal
Dato' Param Cumaraswamy, Malaysia
Dalmo A. de Abreu Dallari, Brazil
Alfredo Etcheberry, Chile
Desmond Fernando, Sri Lanka
P. Telford Georges, Bahamas
Lennart Groll, Sweden
Hans-Heinrich Jescheck, Germany
P.J.G. Kapteyn, Netherlands
Michael D. Kirby, AC, CMG, Australia
Kofi Kumado, Ghana
Jean Flavien Lalive, Switzerland
Claire L'Heureux-Dubé, Canada
Rudolf Machacek, Austria
Daniel H. Marchand, France
Norman S. Marsch, United Kingdon
J.R.W.S. Mawalla, Tanzania
Keba M'baye, Senegal
François-Xavier Mbouyom, Cameroon
Fali S. Nariman, India
Shridath S. Ramphal, Guyana
Bertrand Ramcharan, Guyana
Joaquin Ruiz-Gimenez, Spain
Christian Tomuschat, Germany
Michael A. Triantafyllides, Cyprus

International Commission of Jurists
P.O. Box 91, 33 rue des Bains
CH-1211Geneva 8, Switzerland
Tel. (41 22) 979 38 00 – Fax (41 22) 979 38 01
E-mail: info@icj.org
Website: www.icj.org