

# Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Spain

Teresa Freixes Sanjuán  
Francisco Balaguer Callejón  
Cristina Elías Méndez

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# Executive summary

## Implementation of Employment Directive 2000/78/EC

- [1]. The implementation of Directive 2000/78/EC was principally effected by Law 62/2003 of 30 December 2003 on *Medidas fiscales, administrativas y del orden social* [Fiscal, Administrative and Social Measures]<sup>1</sup>. Specific legislation includes Law 7/2007 of 12 April on the *Estatuto Básico del Empleado Público* [Basic Statute of Public Employees]<sup>2</sup>, Law 20/2007 of 11 July on the *Estatuto del trabajo autónomo* [Statute of Self-Employed Workers]<sup>3</sup>, Law 55/2003 of 16 December on the *Estatuto Marco del personal estatutario de los servicios de salud* [Framework Statute of Health Service Staff]<sup>4</sup>, Law 31/2006 of 18 October on *Implicación de los trabajadores en las sociedades anónimas y cooperativas europeas* [Participation of Workers in European Public Limited Companies and Cooperatives]<sup>5</sup>, Organic Law 11/2007 of 22 October on *Derechos y deberes de los miembros de la Guardia Civil* [Rights and Duties of the Civil Guard (military police)]<sup>6</sup> and the Organic Law 12/2007 of 22 October on *Régimen disciplinario de la Guardia Civil* [Disciplinary Regime for the Civil Guard]<sup>7</sup>. Some terminological precisions were also introduced by Organic Law 3/2007 of 22 March on *Igualdad efectiva de mujeres y hombres* [Effective Equality of Women and Men]<sup>8</sup>. In addition to this, the reform of Article 314 of the *Código Penal* [Penal Code] effected by Organic Law 15/2003 of 25 November<sup>9</sup> should be mentioned.
- [2]. Attention should be drawn to Law 13/2005 of 1 July, which modifies the *Código Civil* [Civil Code] as regards **the right to marry**<sup>10</sup>. This Law allows people of the same sex to marry and thereby grants them all the legal effects of the matrimonial institution. It thus constitutes major progress in the application of the principle of non-discrimination on the ground of sexual orientation, since it includes full equality in the access to goods and services. In this way certain inconsistencies in the previous

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<sup>1</sup> Spain/Ley 62/2003 (30.12.2003).

<sup>2</sup> Spain/Ley 7/2007 (12.4.2007).

<sup>3</sup> Spain/Ley 20/2007 (11.7.2007).

<sup>4</sup> Spain/Ley 55/2003 (16.12.2003).

<sup>5</sup> Spain/Law 31/2006 (18.10.2006).

<sup>6</sup> Spain/Ley Orgánica 11/2007 (22.10.2007).

<sup>7</sup> Spain/Ley Orgánica 12/2007 (22.10.2007).

<sup>8</sup> Spain/Ley Orgánica 3/2007 (22.3.2007).

<sup>9</sup> Spain/Ley Orgánica 15/2003 (25.11.2003).

<sup>10</sup> Spain/Ley 13/2005 (1.7.2005).

jurisprudence have been removed. **This legislative progress in Spain has overcome the case-law controversies that have taken place and are still taking place in other Member States.**

- [3]. Taking into account all the legislative antecedents one can say that **the implementation of the Directive is largely satisfactory**, especially if one considers not only the aspects related to employment but also those related to access to goods and services. (In accordance with the instructions given for the preparation of this report, reference must also be made to the latter, despite it not being specifically included in the scope of this Directive). To Law 62/2003 on Fiscal, Administrative and Social Measures there have been added a large number of legislative reforms which include specific references to equal treatment, non-discrimination on grounds of sexual orientation and the right to freedom of sexual orientation. The **intense legislative activity throughout 2007** in this respect has propelled Spain further towards full recognition in the legal system of the right to sexual orientation.

## Freedom of movement

- [4]. Directive 2004/38/EC was implemented by Royal Decree 240/2007 of 16 February on *Entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo* [Entry, Free Movement and Residence in Spain of Citizens of European Union Member States and of Citizens of other States Party to the Agreement on the European Economic Area].<sup>11</sup> The Royal Decree includes in the definition of family members the partner with whom the citizen has a relationship equivalent to a marriage registered in a European Union Member State or in a State Party to the European Economic Area. It also includes direct descendants and the descendants of the spouse or registered partner who are under the age of 21, or who are over 21 but still maintained by their parents, or are dependants, provided the registered partnership has not been dissolved. Finally, it also includes as family members the direct relatives in the ascending line and those of the spouse or partner who are maintained by them, provided the registered partnership has not been dissolved. This Royal Decree represents **important progress in the legal development of the principle of equal treatment**, if the restrictive character of the previous regulation is considered. The Royal Decree 178/2003 of 14 February (Spain/Real Decreto 178/2003 (14.2.2003)) did not include registered partners in the definition of family members. This restriction had been ignored in some judicial decisions, but there were also

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<sup>11</sup> Spain/Real Decreto 240/2007 (16.2.2007).

other judicial decisions which maintained a strict interpretation, so that this legal reform was necessary.

## Asylum and subsidiary protection

- [5]. Law 5/1984 of 26 March on *Derecho de asilo y de la condición de refugiado* [Right to Asylum and Refugee Status]<sup>12</sup> (amended by Law 9/1994 of 19 May) establishes in Article 10.1 that, “Asylum shall also be extended to the direct relatives in the ascending line and direct descendants and to the refugee’s spouse, or to the partner with whom the individual has a similar relationship based on affection and cohabitation, except in cases of legal or de facto separation, divorce, majority of age or family independence, in which the status of each member of the family shall be separately assessed”. Regarding the causes that justify the granting of asylum, Article 3.1 establishes that, “Refugee status will be recognised and, therefore, asylum will be granted to all foreigners who fulfil the requirements foreseen in the international instruments ratified by Spain, and especially in the Convention on Refugees, made in Geneva on 28 July 1951, and in the Protocol on Refugees, made in New York on 31 January 1967”. The jurisprudence of the Supreme Court has established that **discrimination and persecution on grounds of sexual orientation shall constitute one of the reasons for the granting of asylum.**

## Family reunification

- [6]. Spanish legislation has not made use of the possibility foreseen in Directive 2003/86/EC of including registered partnerships or non-married couples with a stable relationship and their children. In the Spanish jurisprudence judicial decisions can be found which, though not directly applicable to these cases, establish a doctrine that covers this lack of regulation by making an extensive interpretation of the provisions of the legislation in force. This judicial interpretation has been carried out on different bases, for example, the humanitarian grounds in Article 31.2 (now Article 31.3) of Organic Law 4/2000. Furthermore, the exceptional circumstances also mentioned in Article 31.3 of Organic Law 4/2000, the analogy to marriage and the principle of equality have all been used to extend the legal provisions to registered partnerships. However, since there are judicial decisions which apply the opposite interpretation, **a legislative clarification is needed** to guarantee the full effectiveness of the principle of equal treatment.

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<sup>12</sup> Spain/Ley 5/1984 (26.3.1984).

## Freedom of assembly

- [7]. No statistical data or case law has been found for this chapter. Consequently, this chapter and Chapter H. Miscellaneous use newspaper articles as the main source of information. On the basis of this information (links are to be found in the report), it appears that **there are no practical obstacles** to the holding of demonstrations promoted by gay and lesbian associations.

## Hate speech and criminal law

- [8]. In the Spanish legal system **both hate speech and hate crimes with homophobic motivation are penalised**. The Criminal Code also penalises the denial of benefits on the basis of sexual orientation as well as illegal associations, including those which promote discrimination, hatred or violence on grounds of sexual orientation. In addition, the Criminal Code also considers **the homophobic motivation of crimes as one of the aggravating circumstances** in the context of criminal liability, as illustrated in the case law examined. This type of aggravating circumstance can also be found in other laws on offences and sanctions relating to equal opportunities, non-discrimination and universal accessibility for disabled people. In addition to these regulations, the numerous provisions on harassment made in Spanish legislation must be considered. Finally, it should be noted that the new Statutes of Autonomy of Andalusia and Catalonia have established instructions for the public authorities which oblige them to combat homophobia.

## Transgender issues

- [9]. The general legislation on equal treatment and non-discrimination on grounds of sexual orientation is fully applicable to transsexual people. In addition, with regard to transsexuals, there have been recent legislative changes which have clarified the legal framework applicable to the exercise of their rights. One example is **Law 3/2007 of 15 March on *Rectificación registral de la mención relativa al sexo de las personas*** [Rectification in the Civil Register of the Recorded Gender].<sup>13</sup> This Law establishes the necessary requirements both for changing the gender entry in the Civil Register for an individual if the entry does not correspond to his/her true gender identity and for the change of the name so that it corresponds to the individual's sex. The Courts are already applying Law 3/2007, thus making

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<sup>13</sup> Spain/Ley 3/2007 (15.3.2007).

it possible to grant applications made on the basis of the more favourable conditions established by that law, which **does not require medical treatment to include sexual reassignment surgery.**

## Miscellaneous

- [10]. This chapter includes references to points which do not fit into the other chapters but which also have an impact, in a negative way in this case, on progress towards respect for sexual orientation and gender identity. Among these aspects, mention should be made of the reluctance shown by conservative sectors, supported by the Catholic Church, towards some of the legislative measures promoting equality. A number of these measures have been appealed before the *Tribunal Constitucional* [Spain's Constitutional Court] which has yet to issue a decision. Reference is made to the significant number of same-sex marriages which have already taken place: 4,313 marriages in 2006 alone. Finally, mention is made of the homophobic attitude of certain members of the ecclesiastical hierarchy and of the judiciary which have been the subject of public debate in Spain.

## Good practices

- [11]. Most of this chapter relates to the **legislative reforms** which took place during the last legislature. At state level, the public authorities not only implemented the European directives by means of general measures (as in the case of Law 62/2003 of 30 December on Fiscal, Administrative and Social Measures in connection with Directive 2000/78/EC) but also permeated the legal system with a large number of provisions incorporated into a significant number of laws to promote equal treatment and respect for sexual orientation as well as on the right to gender identity.
- [12]. In this chapter, in relation to national law, special attention has been paid to **Law 13/2005 of 1 July, which modifies the Civil Code as regards the right to marry and which institutes marriage between individuals of the same sex**, granting them the legal effects of the matrimonial institution. The option to fully integrate same-sex marriage into the traditional matrimonial institution, with fully identical legal effects, is liable to have the greatest impact on effective equal treatment and full respect for people's sexual orientation. This equal treatment **makes fully applicable to same-sex marriage all the laws from different sectors** establishing social benefits, rights of spouses, possibility of adoption, etc. It is, therefore, a highly advisable option that makes possible a full application of the principle of non-discrimination in all sectors.

- [13]. However, in order to have a complete overview of good practices in the Spanish legal system, in addition to national laws account must be taken of the **decentralised structure of the State**. This decentralisation means that considerable competences are exercised by the Autonomous Communities. This is true of social policy, the promotion of social rights, social assistance, etc. The competences of the Autonomous Communities in relation to education, health care and housing, among others, imply that the majority of tasks with an impact on equality and respect for sexual orientation and sexual identity is nowadays exercised at autonomous community and not at national level.
- [14]. Thus, a considerable proportion of the good practices of recent years were adopted at the level of the Autonomous Communities. The most recent **reforms of the Statutes**, which took place in six of Spain's 17 Autonomous Communities (together with the two Autonomous Cities, Ceuta and Melilla), are especially relevant here. These statutory reforms affect Autonomous Communities which jointly represent around half of the Spanish population (Andalusia and Catalonia alone represent a third of the total population) and these reforms are especially important because they incorporate new principles and rights which were not foreseen in the previous versions of these Statutes.
- [15]. Among these principles and rights those related to **sexual orientation and gender equality** must be highlighted. They include, in two of the Statutes (Catalonia and Andalusia), **combating homophobia** and in Andalusia and Aragon the recognition of the **right to gender identity**. It is necessary to keep in mind that the Statute of Autonomy is, from a functional point of view, the 'Constitution' of the Autonomous Community and that it is binding on the authorities of the Autonomous Communities (always with respect to the constitutional framework), compelling them to formulate their policies in conformity with the statutory principles. This explains the importance of these statutory provisions and the progress they imply for the Spanish legal system.
- [16]. In short, both the most recent national legislation and the recent reforms of the Statutes of Autonomy of the Autonomous Communities have made progress in the last few years towards promoting **the rights to sexual orientation and gender identity, as well as towards prohibiting any discrimination contrary to those rights and specifically in combating homophobia**. The fact that these principles have already reached the second constitutional level in Spain (that of the Statutes of Autonomy of the Autonomous Communities), as well as the great number of norms that have been devoted in the last few years to incorporating them into the legal system, prove the interest of the public authorities in promoting their effective realisation.

## A. Implementation of Employment Directive 2000/78/EC

- [17]. The implementation of Directive 2000/78/EC was essentially effected by Law 62/2003 of 30 December 2003 on *Medidas fiscales, administrativas y del orden social* [Fiscal, Administrative and Social Measures]<sup>14</sup>. Other legislation which has been adapted to the requirements of the directive are Law 7/2007 of 12 April on the *Estatuto Básico del Empleado Público* [Basic Statute of Public Employees]<sup>15</sup>, Law 20/2007 of 11 July on the *Estatuto del trabajo autónomo* [Statute of Self-Employed Workers]<sup>16</sup>, Law 55/2003 of 16 December on the *Estatuto Marco del personal estatutario de los servicios de salud* [Framework Statute of Health Service Staff]<sup>17</sup>, Law 31/2006 of 18 October on *Implicación de los trabajadores en las sociedades anónimas y cooperativas europeas* [Participation of Workers in European Public Limited Companies and Cooperatives]<sup>18</sup>, Organic Law 11/2007 of 22 October on *Derechos y deberes de los miembros de la Guardia Civil* [Rights and Duties of the Civil Guard (military police)]<sup>19</sup> and the Organic Law 12/2007 of 22 October on *Régimen disciplinario de la Guardia Civil* [Disciplinary Regime for the Civil Guard]<sup>20</sup>. Some terminological precisions were also introduced by Organic Law 3/2007 of 22 March on *Igualdad efectiva de mujeres y hombres* [Effective Equality of Women and Men]<sup>21</sup>. In addition to this, the reform of Article 314 of the *Código Penal* [Penal Code] effected by Organic Law 15/2003 of 25 November<sup>22</sup> should be mentioned. Finally, Law 13/2005 of 1 July, which modifies the *Código Civil* [Civil Code] as regards the right to marry,<sup>23</sup> opens marriage to same-sex couples.
- [18]. Beyond these reforms which are directly relevant to this chapter, the right to sexual orientation and the principle of equal treatment were incorporated into a great number of provisions in the Spanish legal system during the last legislature. These provisions will be explained in the chapter on good practices, a chapter which focuses on the legislative reforms, considering

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<sup>14</sup> Spain/Ley 62/2003 (30.12.2003).

<sup>15</sup> Spain/Ley 7/2007 (12.4.2007).

<sup>16</sup> Spain/Ley 20/2007 (11.7.2007).

<sup>17</sup> Spain/Ley 55/2003 (16.12.2003).

<sup>18</sup> Spain/Law 31/2006 (18.10.2006).

<sup>19</sup> Spain/Ley Orgánica 11/2007 (22.10.2007).

<sup>20</sup> Spain/Ley Orgánica 12/2007 (22.10.2007).

<sup>21</sup> Spain/Ley Orgánica 3/2007 (22.3.2007).

<sup>22</sup> Spain/Ley Orgánica 15/2003 (25.11.2003).

<sup>23</sup> Spain/Ley 13/2005 (1.7.2003).

the significant changes in this sphere which have taken place in recent years.

- [19]. The Preamble to Law 62/2003 makes specific reference both to Directive 2000/43/EC and to Directive 2000/78/EC in the third paragraph.
- [20]. By means of the measures included in this chapter, Spanish legislation has been adapted in line with both Directives, thus implementing them into the country's legal system. In addition, a general legal framework to combat discrimination on the grounds of racial or ethnic origin in all areas of life has been established; the legal definition of direct or indirect discrimination has been tackled; and the regulation of equal treatment and non-discrimination in the workplace has been modernised, modifying, among others things, certain articles of the *Estatuto de los Trabajadores* [Statute of Workers], *Ley de Integración Social de los Minusválidos* [Law on the Social Integration of Disabled People], *Ley de Procedimiento Laboral* [Law on Labour Procedure], *Ley sobre Infracciones y Sanciones en el Orden Social* [Law on Offences and Sanctions in the Social Order] and the legislation on civil servants.
- [21]. Article 28(1)(a) of Law 62/2003 of 30 December on Fiscal, Administrative and Social Measures defines the principle of equal treatment in conformity with the description contained in Article 2(1) of Directive 2000/78/EC: "The absence of any form of direct or indirect discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation".
- [22]. In Chapter III there are measures on equal treatment and non-discrimination in the workplace. In accordance with Article 34(1), these are "measures to guarantee the principle of equal treatment and non-discrimination in access to employment, membership of, and involvement in, organisations of workers or employers, working conditions, professional promotion, vocational training and continuing professional development, as well as in access to self-employment and to the exercise of a profession and in the membership of, and involvement in, an organisation whose members carry on a particular profession".
- [23]. Positive action measures constitute under Article 35 an exception to the prohibition of discrimination (in conformity with Article 7 of Directive 2000/78/EC): "To ensure in practice full equality on grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation, the principle of equal treatment shall not prevent from maintaining or adopting specific measures in favour of certain groups, measures that are dedicated to prevent or to compensate the disadvantages that affect them and that are related to any of the grounds included in the scope of application of this section". Furthermore, the last paragraph of Article 34(2) allows the exception for the reasons set out in Article 4(1) of Directive 2000/78/EC

establishing that a difference of treatment in employment “shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”.

- [24]. The provision of the Directive on the burden of proof (Article 10 of Directive 2000/78/EC) is regulated in Article 36 of the Law 62/2003 with regard to civil and administrative dispute jurisdiction: “In the civil and administrative jurisdictional processes in which the plaintiff’s allegations establish facts from which it may be presumed that there has been discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation in connection with the subjects included in the scope of application of this chapter, it shall be for the respondent to justify in an objective and reasonable way the adopted measures and their proportionality”.
- [25]. With regard to social jurisdiction, Article 40 contains a specific amendment of Article 96 of the modified Law on Labour Procedure, approved by Royal Legislative Decree 2/1995 of 7 April, which now states: “In the processes in which the plaintiff’s allegations establish facts from which it may be presumed that there has been discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, it shall be for the respondent to justify in an objective and reasonable way the adopted measures and their proportionality”.
- [26]. In conformity with Article 4(2)(c), employees have the right “not to be discriminated against directly or indirectly in access to employment, or once employed, on the grounds of sex, marital status, age within the limits established by this law, racial or ethnic origin, social condition, religion or belief, political ideas, sexual orientation, membership or not of a union, as well as on the grounds of use of any of the official languages of the Spanish State”.
- [27]. In addition to this, Article 4(2)(e) of the Statute of Workers also establishes as a worker’s right the right “to respect for their private life and due consideration of their dignity, which also comprises protection against verbal and physical offences of a sexual nature and against harassment on grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation”. Organic Law 3/2007 has amended this provision, which in its current version establishes the right “to private life and due consideration of their dignity, including protection against harassment on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, and against sexual harassment and harassment on the grounds of sex”. It is necessary to keep in mind that this law distinguishes between sexual harassment and harassment on the grounds of sex in Article

7(1) and 7(2): “1. Without prejudice to the provisions of the Penal Code, for the purposes of this Law sexual harassment consists of any verbal or physical behaviour of a sexual nature that has the purpose or produces the effect of violating the dignity of a person, in particular when an intimidating, degrading or offensive environment is created. 2. Harassment on the grounds of sex consists of any behaviour carried out on the grounds of the sex of a person, with the purpose or the effect of violating their dignity and of creating an intimidating, degrading or offensive environment”. This differentiation is coherent with that currently established by Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (which has repealed, among others, Directive 2002/73/EC). Article 2(1)(d) of the Directive applies the following definition of ‘sexual harassment’: “Where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”. Article 2(1)(c) applies the following definition of ‘harassment’ (‘harassment on the ground of sex’ according to Spanish legislation): “Where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. Both formulations clearly protect lesbian, gay, bisexual and transgender (LGBT) people.

- [28]. With regard to harassment, Law 62/2003 introduces a new subsection to Article 54(2) of the Statute of Workers. By virtue of the regulation in the new subsection g), “Harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation of the employer or of the people working in the company” is regarded as a breach of contract. Also on this point, Organic Law 3/2007 widens the concept of harassment, amending this provision in the following way: “Harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation and sexual harassment or harassment on the grounds of sex of the employer or of the people working in the company”.
- [29]. Furthermore, there is a new version of Article 16(2) of the Statute of Workers, establishing with regard to recruitment agencies that “These agencies shall guarantee, in their scope of action, the principle of equality in access to employment, and shall not discriminate on the grounds of origin, including racial or ethnic origin, sex, age, marital status, religion or belief, political opinion, sexual orientation, union membership, social condition, use of any of the official languages of the Spanish State and disability, provided that the workers have the ability to carry out the work or occupation in question”.

- [30]. Article 17 of the Statute of Workers was amended in order to comply with Articles 11 and 15 of Directive 2000/78/EC. In connection with Article 15, the first paragraph of Article 17(1) of the Statute of Workers establishes that “regulations, clauses of collective agreements, individual pacts and employers’ unilateral decisions which contain direct or indirect adverse discrimination on the grounds of age or disability, or favourable or adverse discrimination in employment, as well as regarding wages, working time and other working conditions on grounds of sex, origin, including racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or not of unions and union agreements, family links with other workers in the company and use of any of the official languages of the Spanish State, shall be null and without effect”.
- [31]. In addition, the second paragraph of Article 17(1) of the Statute of Workers incorporates Article 11 of the Directive, establishing that “Employers’ decisions which impose adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination shall also be null”.
- [32]. The sanctions for violations of the principle of equal treatment (Article 17 of Directive 2000/78/EC), which includes protection against reprisals (Article 11 of Directive 2000/78/EC), is developed by amendments to the Law on Offences and Sanctions in the Social Order, enacted by Royal Legislative Decree 5/2000 of 4 August. Thus, under the new version of Article 8(12) the following are regarded as very serious offences in the employment sector: “Employers’ unilateral decisions that imply direct or indirect unfavourable discrimination on grounds of age or disability, or favourable or adverse discrimination regarding wages, working time, vocational training, promotion and other working conditions, on grounds of sex, origin, including racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or not of unions and union agreements, family links with other workers in the company or use of any of the official languages of the Spanish State, as well as employers’ decisions that imply an adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination”. In the new version in Organic Law 3/2007, reference is made to the unilateral decisions “of the undertaking” instead of the “employer”.
- [33]. Similarly, the new section 13.bis of Article 8 of the adapted text of the Law on Offences and Sanctions in the Social Order regards as a very serious offence in the employment sector, “Harassment on grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation, when it takes place within the scope of influence of the undertaking’s

management, without regard to the person responsible for the act, provided that the employer was aware of it but had not adopted the necessary measures to hinder it". In the new version in Organic Law 3/2007, harassment "on grounds of sex" is added.

- [34]. Account should also be taken of the content of Article 314 of the Penal Code, in the version in Organic Law 15/2003 of 25 November: "Those who perpetrate serious discrimination in public or private employment against any person on grounds of ideology, religion or belief, ethnic, racial or national origin, sex, sexual orientation, family situation, illness or disability, legal or union representation of the workers, relationship with other workers of the company or use of any of the official languages of the Spanish State, and do not restore the situation of equality before the law after requirement or administrative sanction, repairing any economic damages arising, will be punished with a prison term of six months to two years or with a penalty from 12 to 24 months".
- [35]. The new formulation of section 2 of Article 16 of the adapted text of the Law on Offences and Sanctions in the Social Order regards as a very serious offence in the labour field, "To establish conditions, by means of publicity, broadcasting or by any other means, that constitute favourable or adverse discrimination for the access to employment on grounds of sex, origin, including racial or ethnic origin, age, marital status, disability, religion or belief, political opinion, sexual orientation, union affiliation, social condition and use of any of the official languages of the Spanish State".
- [36]. Finally, the Law covers, in Article 42, the promotion of collective negotiation in the sphere of equal treatment (Article 13 of Directive 2000/78/EC): "Collective agreements may include measures directed to combat all forms of discrimination in the workplace, to promote equal opportunities and to prevent harassment on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation".
- [37]. Many other laws have also incorporated the principles of equal treatment and respect for sexual orientation. Among them are Law 7/2007 of 12 April on the Basic Statute of Civil Servants. In this law, there are several provisions relating to this issue. Thus, Article 14(h) on the individual rights of civil servants establishes the right "to respect for private life, sexual orientation, one's own appearance and dignity at work, especially against sexual harassment, harassment on grounds of sex, moral harassment and harassment at the work place". In subsection i) of the same Article the right "to non-discrimination on grounds of birth, racial or ethnic origin, gender, sex or sexual orientation, religion or belief, opinion, disability, age or any other condition or personal or social circumstance" is recognised.

- [38]. Article 53(4), with regard to the ethical principles that should govern the behaviour of the civil servants, stipulates that “Their behaviour shall be based on the respect for fundamental rights and public freedoms, avoiding all conduct leading to discrimination on grounds of birth, racial or ethnic origin, gender, sex, sexual orientation, religion or belief, opinion, disability, age or any other personal or social condition or circumstance”. Finally, Article 95(2)(b) considers very serious misdemeanours (which can lead to the disciplinary sanctions foreseen in Article 96), “Any act that supposes discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, language, opinion, birthplace or place of residence, sex or any other personal or social condition or circumstance, as well as harassment on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, and moral harassment, sexual harassment and harassment on grounds of sex”.
- [39]. Similar principles are to be found in Law 20/2007 of 11 July on the Statute of Self-Employed Workers (Article 4(3)(a) on the individual rights of self-employed workers); Law 55/2003 of 16 December on the Framework Statute of Health Service Staff (Article 17(1)(k) on the individual rights of statutory staff); Law 31/2006 of 18 October on Workers’ Participation in European Public Limited Companies and Cooperatives (First Final Provision amending the Adapted Text of the Law on Offences and Sanctions in the Social Order, enacted by Royal Legislative Decree 5/2000 of 4 August); Organic Law 11/2007 of 22 October on the Rights and Duties of Members of the Civil Guard (Articles 3 and 18(2)); and Organic Law 12/2007 of 22 October on the Disciplinary Regime of the Civil Guard (Article 7(4)).
- [40]. With regard to access to goods and services (health, education and social security), mention has already been made of the fact that fundamental progress has taken place in Spain at the legislative level through Law 13/2005 of 1 July, which modifies the Civil Code as regards the right to marry. Section II, third paragraph, of the Preamble to this Law stipulates that the marriage regulation that is now being established aims to provide a satisfactory response to an evident reality whose evolution has been assumed by Spanish society with the contribution of groups which have been campaigning for the full recognition of rights for everybody regardless of sexual orientation. This reality requires a framework establishing the rights and obligations of people who formalise their relationships.
- [41]. In addition to this, the fourth paragraph of the same section establishes a fundamental principle of equality facilitating reform by extending the effects of marriage between men and women to that between couples of the same sex, including all rights and social benefits. The law stipulates that marriage may be celebrated between people of the same or different sex, with full recognition and equality of rights and obligations whatever its

composition. As a consequence, the marriage's effects, which remain identical from the perspective of respect for the objective configuration of the institution, will be the same in all fields regardless of the sex of the contracting parties; among others, those referring to rights and social benefits, such as the possibility of taking part in adoption procedures.

- [42]. Finally, section II, eighth paragraph, of the Preamble already mentions the principle of equality which is incorporated into the articles of the Law. As a result of the first additional provision of the present law, all references to marriage contained in our legal system shall be applicable both to the marriage of two people of the same sex and to that formed by two people of different sex.
- [43]. Section I of the only article of the Law contains the main legislative reform, which adds a second paragraph to Article 44 of the Civil Code, with the following wording: "The marriage will have the same requirements and effects when both contracting parties are of the same or of different sex". In accordance with this provision, the first additional Provision of the Law establishes that "The legal and statutory provisions that contain any reference to marriage shall apply regardless of the sex of the partners in the marriage".
- [44]. The full equality achieved with marriage's recognition among people of the same sex implies the removal of any form of discrimination. Equality is guaranteed since there are no legal reasons for discrimination on grounds of sexual orientation regarding access to services. (On the contrary, as we will see, protection against discrimination in this field is even guaranteed by the Penal Code). Protection against discrimination on the grounds of sexual orientation is ensured in education, housing, goods and services, health, social security etc. The only discriminatory treatment that remained in the legal system was an indirect discrimination, based on the impossibility of marriage among people of the same sex and the subsequent different legal regime of *de facto* couples and marriages with regard to access to goods and services of the partners. As we have already pointed out, the reform is based on a principle of absolute equality of all marriages, so that any reference to marriage in any norm of the Spanish legal system must be understood as applicable both to the marriage of two people of the same sex as to the marriage composed by two people of different sex. This equal treatment makes fully applicable to the marriage among people of the same sex all the norms of different sectors establishing social benefits, rights of the spouses, the possibility of adoption, etc.
- [45]. Leaving aside the matrimonial institution, consideration must also be given to Law 14/2006 of 26 May on techniques of assisted human reproduction, since Article 6(1) establishes that, "Any woman over 18 years of age and with full legal capacity shall be able to receive or use the techniques regulated by this Law, provided she has given her written consent in a free,

conscious and expressed manner. The woman shall be able to use or receive the techniques regulated in this Law regardless of her marital status and sexual orientation”.

- [46]. Finally, mention should be made of the provisions in the Penal Code on the prohibition of discrimination on grounds of sexual orientation in the field of access to services. Articles 511 and 512 of the Penal Code are applicable. The first Article establishes that “1. Anyone in charge of a public service who denies a person a benefit to which s/he is entitled, on grounds of ideology, religion or belief, ethnic, racial or national origin, gender, sexual orientation, family situation, illness or disability, shall be sentenced to prison for a period of six months to two years and a penalty of 12 to 24 months and special disqualification from public employment or position for a period of one to three years. 2. The same legal sanctions shall be applicable when the facts are committed against an association, foundation, society or corporation or against their members on grounds of their ideology, religion or belief, ethnic, racial or national origin, gender, sexual orientation, family situation, illness or disability. 3. Civil servants who perpetrate any of the conducts described in this article shall be punished with sanctions at their upper level and with regard to the special disqualification from public employment or position for a period of two to four years”.
- [47]. Article 512 of the Penal Code rules that, “Those who, in the exercise of their professional or managerial activities, deny any individual a benefit to which s/he is entitled, on grounds of ideology, religion or belief, ethnic, racial or national origin, sex, sexual orientation, family situation, illness or disability, shall be sanctioned with special disqualification from the exercise of their profession, occupation, industry or trade, for a period of one to four years”.
- [48]. With regard to the provision of Article 9(2) of Directive 2000/78/EC, which establishes that “Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive”, it is necessary to take into account the content of Royal Legislative Decree 2/1995 of 7 April, which enacts the Adapted Text of the Law on Labour Procedure. Article 20(1) of this Law states as follows: “Unions shall be able to engage in a procedure on behalf or in support of their affiliated workers, with their approval, to defend their individual rights. Workers must accept the decision of the Court since they have authorised unions to protect their rights”. In addition, there are specific rules of representation (Article 19) in the event that more than ten complainants decide to start a joint procedure. The Law on Labour

Procedure does not provide any special legitimation for NGO's in such labour lawsuits.

- [49]. Finally, with regard to specific institutions for the protection of equal treatment and combating discrimination, the Spanish legal system has no specific institution for this purpose, since these functions correspond to the Ombudsman at the state level and to the Ombudsmen of each of the Autonomous Communities within the framework of their competences to protect the rights of the citizens. The mission of the *Defensor del Pueblo* [Ombudsman] and of the *Defensores del Pueblo Autonómicos* [Ombudsmen of the Autonomous Communities] is to protect the rights and liberties of Title I of the Constitution (what includes Article 14 of the Constitution that prohibits any form of discrimination). Their function is to supervise the activity of the public administrations. They can carry out the investigations they consider necessary, informing Parliament of the results. However, they do not decide for themselves the possible sanctions for the cases they investigate, although they can make suggestions in this sense. Article 23 of the Organic Law 3/1981, of 6 of April, of the *Defensor del Pueblo* establishes that when the complaint has been presumably caused by the abuse, outrage, discrimination, error, malpractice or omission of a civil servant, the Ombudsman can contact the civil servant informing him of his opinion on the case. In addition to this, the Ombudsman shall communicate these facts to the head of the department where the civil servant works, formulating the suggestions that he considers convenient. The *Defensor del Pueblo* is, also, legitimated to interpose the *recurso de inconstitucionalidad* [constitutional appeal] to the Constitutional Court against the laws that he considers contrary to the Constitution and to interpose the *recurso de amparo* [appeal to protect fundamental rights and liberties] to the Constitutional Court. With regard to the intervention in the judicial procedures in defence of the rights, this function corresponds, with general character, to the *Ministerio Fiscal* [Public Prosecutor].
- [50]. Taking into account all the legislative antecedents it can be said that the implementation of the Directive is mostly satisfactory, especially if both the aspects related to employment and those related to access to goods and services are considered, to which, in accordance with the instructions provided for the production of this report, reference must be made (in spite of it not being the specific scope of this Directive). To the Law 62/2003 on Fiscal, Administrative and Social Measures a great number of legislative reforms have been added which include specific references to equal treatment, non-discrimination on grounds of sexual orientation and the right to freedom of sexual orientation. Of particular note is the considerable qualitative progress implied by Law 13/2005, which institutes marriage between people of the same sex. It is also necessary to point out the intense legislative activity developed throughout 2007 in connection with this matter, which seems to reflect a tendency towards full recognition of the right to sexual orientation in the Spanish legal system.

- [51]. The case law has clarified, in particular, the conditions under which the burden of proof may be shifted. In Constitutional Court Decision 41/2006 of 13 February (Second Chamber)<sup>24</sup> the plaintiff argues that the true reason for his dismissal was his homosexual orientation, establishing facts from which it may clearly be presumed to be discriminatory treatment. (The plaintiff had suffered criticism for his manner of dress, he was overburdened with duties and had a conflictual relationship with his boss). The Court considered that these indications were sufficient to shift the burden of proof and the presumption thus established was not rebutted by the company. On this point mention should also be made of Decision 74/2005 of 21 February by Labour Court 33 of the Community of Madrid.<sup>25</sup> The judicial decision considers the suitability of shifting the burden of proof, since the plaintiff establishes sufficient facts of discriminatory treatment on grounds of sexual orientation and the company did not allege any reasonable argument to justify why similar conduct was treated in a different way. (The conduct included the use of the computer at work for playing computer games, access to websites and the use of electronic mail for personal purposes. This conduct led to the plaintiff being reprimanded, whereas his workmates engaging in the same type of irregular conduct were not reprimanded.)
- [52]. Other judicial decisions affect the right of associations to engage in judicial procedures, beyond the labour sphere. One example is Decision 222/2005 of 17 October issued by the *Audiencia Provincial* [ High Court] (Section 1) of Ciudad Real.<sup>26</sup> In this Decision the right to engage in a legal suit for damages and threats in defence of a homosexual individual is recognised for a gay and lesbian association. The Court regards the bringing of popular legal action as a fundamental right and therefore regards it as necessary to interpret and apply this right in a generous way. For this reason, only in cases where it is clear that the association concerned has no connection to the process, shall it be possible to deny access to the proceedings of the popular legal action. Certainly, a detailed and complete test of the link between the procedural and the social or associative objectives of the entity which seeks to engage in the procedure shall not be required for this right to be recognised. It is sufficient, as is usually the case with regard to the right to bring legal action, to affirm that there is a link and that the judicial organ verifies that it is not possible to deny without any further inquiry the existence of that connection. Thus, it is clear for the Court that in this case the appellants should be admitted to the procedure, since its aims are linked to the protection of the rights and interests of homosexual, transsexual and bisexual groups.

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<sup>24</sup> Spain/Tribunal Constitucional/Sentencia 41/2006 (13.2.2006).

<sup>25</sup> Spain/Juzgado 33 de lo Social de la Comunidad de Madrid, núm. 74/2005, (21.2.2005).

<sup>26</sup> Spain/Auto núm. 222/2005 de la Audiencia Provincial Ciudad Real (Sección 1) (17.10.2005).

- [53]. With regard to the access to benefits, a number of decisions may be mentioned which affect registered partnerships, for example, Judicial Decisions 580/2002 of 19 June and 680/2002 of 16 July of the High Court of Justice of the Community of Madrid (Social Chamber, section 5)<sup>27</sup>. These judicial decisions ruled as unlawful the different treatment of heterosexual and homosexual registered partnerships in relation to the extension of travel fare benefits to the partner of an employee of the rail company RENFE.
- [54]. There are no statistics available in Spain concerning the implementation of Employment Directive 2000/78/EC in relation to sexual orientation. Neither the official website of the Spanish *Consejo General del Poder Judicial* [General Council of the Judiciary] nor its Statistics Department has any statistics on types of crimes.<sup>28</sup> On the official website of the *Fiscalía General del Estado* [Office of the General State Prosecutor] the annual reports for the years 2004, 2005 and 2006 can be consulted.<sup>29</sup> These reports refer to the numbers of different types of crimes. With regard to discrimination in the workplace, there were 13 criminal cases in 2004, 28 in 2005 and 12 in 2006. The statistics do not disaggregate the facts according to the different grounds of discrimination. Thus, these data refer to all types of possible discrimination in the workplace (on grounds of ideology, religion or belief, ethnic, racial or national origin, sexual orientation, family situation, illness, disability, legal or union representative of employees, family relationship with other workmates, or language).<sup>30</sup>
- [55]. The *Defensor del Pueblo* [Ombudsman] does not have any specific reports on discrimination on the ground of sexual orientation.<sup>31</sup> The annual reports of the Spanish Ombudsman for the years 2000 to 2007 do not contain any references to complaints of discrimination on the ground of sexual orientation in the workplace. But there are a few references to the following issues: In the 2004 Annual Report 521 people presented complaints regarding the declarations of the General Coordinator of the United Left Party asking the Government to criticize the authorities of the Catholic Church in the public media for the opposition from the Bishopric to the Government's project of legalizing the homosexual marriage. 77 citizens showed their unconformity with the Government's decision of sending to the *Cortes Generales* [Parliament] the bill of reform of the Civil Code allowing marriage among people of the same sex. In the Annual Report

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<sup>27</sup> Spain/Sentencias del Tribunal Superior de Justicia de la Comunidad de Madrid (Sala de lo Social, sección 5ª), núms. 580/2002 (19.6.2002) y 680/2002 (16.7.2002).

<sup>28</sup> *Consejo General del Poder Judicial* [General Council of the Judiciary], <http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpj/principal.htm>.

<sup>29</sup> *Fiscalía General del Estado* [Office of the General State Prosecutor], <http://www.fiscal.es/fiscal/public>.

<sup>30</sup> All websites referred to in this report were last accessed between 4 and 15 February 2008.

<sup>31</sup> *Defensor del Pueblo* [Ombudsman], <http://www.defensordelpueblo.es/index.asp?destino=informes2.asp>.

2005 we find 5 complaints of citizens expressing their opposition to the reform of the Civil Code, introducing the homosexual marriage. In the Annual Report 2006 there are two complaints on this matter: a restaurant refuses to celebrate the wedding reception of a homosexual couple; a non operated transsexual citizen complains about the problems in his every day life for the divergence between his external appearance and his official data. There are no specific reports of the *Defensor del Pueblo Andaluz* [Ombudsman of Andalusia] and no references to discrimination on grounds of sexual orientation in the annual reports.<sup>32</sup>

- [56]. The 2006 Annual Report of the *Síndic de Greuges de Catalunya* [Ombudsman of Catalonia] refers to obstacles to the registration of homosexual marriage (there is a complaint about the lack of proper documents available at the Registry to formalise the union. The *Síndic* wrote to the Registry requesting its staff to facilitate the complainant the necessary official registration form for the inscription of the homosexual marriage).<sup>33</sup> This report also refers to a complaint about right to inheritance for unequal treatment of homosexual couples in the legal regulation. The report contains a suggestion of the *Síndic* to change the law in this field. The 2005 Annual Report refers to the need to further improve the access of homosexual couples to social benefits. The report points out that the *Síndic* has been working to improve this situation. The 2004 Annual Report mentions a complaint from a homosexual teacher who, despite registering his partnership with the notary, was not given permission to marriage holidays. There is also mention of a complaint about the situation of homosexual couples, since children could not be adopted by both partners. In this report there is also a general recommendation by the Ombudsman about the necessity of extending widow's/widower's pensions and subsidies to rent a house to the partners of homosexuals. On the website of the Catalan Ombudsman there is a report on psychological harassment within the Catalan public administration of November 2007, with important references to discrimination on grounds of sexual orientation.<sup>34</sup> In this report there is a description of the legal framework, but no references to specific cases, individual complaints or statistics.

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<sup>32</sup> *Defensor del Pueblo Andaluz* [Ombudsman of Andalucía], <http://www.defensor-and.es/index2.asp>.

<sup>33</sup> *Síndic de Greuges de Catalunya* [Ombudsman of Catalonia], [http://www.sindic.cat/cas/inform\\_anual.asp](http://www.sindic.cat/cas/inform_anual.asp).

<sup>34</sup> *El tratamiento del acoso psicológico en el marco de las administraciones públicas catalanas*, November 2007, [http://www.sindic.cat/cas/inform\\_estudis.asp](http://www.sindic.cat/cas/inform_estudis.asp).

## B. Freedom of movement

- [57]. In this chapter, Directive 2004/38/EC of 29 April 2004 on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States is applicable. This Directive is based on the need to accord family members of citizens of the European Union, whatever their nationality, the right to move and reside freely within the territory of the Member States, so that citizens of the European Union can exercise this right under objective conditions of freedom and dignity. A ‘family member’, in accordance with Article 2(2), is not only the spouse but also “the partner with whom the European Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State”.
- [58]. The transposition of the Directive was effected by Royal Decree 240/2007 of 16 February on *Entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo* [Entry, Free Movement and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area]. The Preamble to the Royal Decree indicates that, “The approval of Directive 2004/38/EC of 29 April 2004 requires the incorporation of its content into the Spanish legal system, in accordance with Articles 17 and 18 of the Founding Treaty of the European Community on European Union citizenship, as well as with its rights and principles, and with the principle of non-discrimination on grounds of gender, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinions, belonging to a national minority, heritage, birth, disability, age or sexual orientation”. It is important to consider that the previous laws (Royal Decree 178/2003 of 14 February on *Entrada y permanencia en España de nacionales de Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo* [Entry and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area]) did not include registered partnerships in the concept of family members.
- [59]. In accordance with Article 2 of the Royal Decree, it also applies, in its terms and whatever the nationality, to the family members of a citizen of another European Union Member State or citizen of another State Party to the Agreement on the European Economic Area, when they accompany or meet him/her. Article 2 includes in the concept of family:

“The partner with whom the citizen has entered into a partnership equivalent to marriage registered in a European Union Member State or in a State Party to the European Economic Area, such that two simultaneous registrations in this State are not possible, and provided that the partnership has not been dissolved, for which adequate proof must be supplied. A marriage and a registered partnership shall be, in any event, incompatible.

c) The direct descendants and the descendants of the spouse or registered partner, who are under the age of 21 or over 21 but still maintained by their parents, or are dependants, provided there is no agreement or declaration of nullity of the matrimonial union, divorce or legal separation, or the registered partnership has been dissolved.

d) The direct relatives in the ascending line and those of the spouse or partner who are maintained by them, provided there is no agreement or declaration of nullity of the matrimonial union, divorce or legal separation, or the registered partnership has been dissolved.”

[60]. The 20th Additional Provision introduced in the Statutory Regulation implementing Organic Law 4/2000 establishes the rules applicable to family members of a Spanish citizen. In this case family members refers to relatives who are not nationals of a European Union Member State or of a State Party to the European Economic Area Agreement. The same Royal Decree 240/2007 of 16 February on the Entry, Free Movement and Residence in Spain of Citizens of European Union Member State and Citizens of other States Party to the Agreement on the European Economic Area is applicable, regardless of their nationality and in the terms foreseen, to the relatives of a Spanish citizen when they accompany the Spanish citizen or meet him/her, and provided that they are included in one of the categories mentioned in that Provision. This Provision includes (section b): “The partner with whom the citizen has a relationship equivalent to marriage entered in a public register established to this effect in a European Union Member State or in a State Party to the European Economic Area, such that two simultaneous registrations in this State are not possible, and provided that the registered partnership has not been dissolved, for which adequate proof must be supplied. A marriage and a registered partnership shall be, in any event, incompatible”, and also (section c): “The direct descendants and the descendants of the spouse or registered partner, who are under the age of 21 or over 21 but still maintained by their parents, or are dependants, provided there is no agreement or declaration of nullity of the matrimonial union, divorce or legal separation, or the registered partnership has been dissolved”.

[61]. This Royal Decree represents important progress in the legal development of the principle of equal treatment, considering the restrictive character of the previous regulation. Royal Decree 178/2003 of 14 February on the Entry and Residence in Spain of Citizens of European Union Member

States and Citizens of other States Party to the Agreement on the European Economic Area did not include registered partnerships in the definition of family members. This restrictive character was overcome in certain judicial decisions (this will be explained in more detail in the chapter on family reunification), for example by Decision 145/2006 of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2) of 8 February, or by Decision 83/2004 of 14 May of the Administrative Dispute Jurisdiction Court of Barcelona.<sup>35</sup> However, there were also other judicial decisions which maintained a strict interpretation, for example Decision 842/2004 of 6 September by the High Court of Justice of Navarre (Administrative Dispute Jurisdiction, Section 1), which made the legal reform necessary.<sup>36</sup> The recent legal provision is dated 2007 (has been in force slightly less than a year in the moment of the writing of this report, having been entered into force on 16th March, 2007, a month after its official publication in the *Boletín Oficial del Estado*). This legal provision is not only very recent, but supersedes the previous, very restrictive, law, which caused a contradictory jurisprudence. Therefore, we have considered the inclusion of this jurisprudence in our report very important, to demonstrate the necessity of a legal change as the one that came into effect in 2007.

- [62]. After requesting this information from the *Ministerio del Interior* [Ministry of Internal Affairs] and from the *Instituto Nacional de Estadística* [National Institute of Statistics] it can be said that there are no relevant official statistics in Spain. LGBT associations (such as the *Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales* and *COGAM*) do not have data available on these issues either.

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<sup>35</sup> Spain/Sentencia del Tribunal Superior de Justicia de Cataluña núm. 145/2006 (Sala de lo Contencioso-Administrativo, Sección 2ª) (8.2.2006). Spain/Sentencia del Juzgado nº 13 de lo Contencioso-Administrativo de Barcelona núm. 83/2004 (14.5.2006).

<sup>36</sup> Spain/Sentencia del Tribunal Superior de Justicia de Navarra (Sala de lo Contencioso-Administrativo, Sección 1ª), núm. 842/2004 (6.9.2004).

## C. Asylum and subsidiary protection

- [63]. Law 5/1984 of 26 March on *Derecho de asilo y de la condición de refugiado* [Right to Asylum and Refugee Status] (amended by Law 9/1994 of 19 May) establishes in its Article 10.1 that, “Asylum will also be extended to the direct relatives in the ascending line and direct descendants and to the refugee’s spouse, or to the partner with whom the individual has a similar relationship of affection and cohabitation, except in cases of legal or de facto separation, divorce, majority of age or family independence, in which the status of each member of the family shall be separately assessed”. Therefore, the Spanish legislation permits to grant asylum not only to the spouse of the refugee, but also to the person with whom the individual is tied by similar relationship of affectivity and “living together”.
- [64]. Regarding the causes that justify the granting of asylum, Article 3(1) establishes that, “Refugee status will be recognised and, therefore, asylum will be granted to all foreigners who fulfil the requirements foreseen in the international instruments ratified by Spain, and especially in the Convention on Refugees, made in Geneva on 28 July 1951, and in the Protocol on Refugees, made in New York on 31 January 1967”.
- [65]. The jurisprudence of the Supreme Court has established that discrimination and persecution on grounds of sexual orientation shall constitute one of the reasons for the granting of asylum. A number of judicial decisions can be quoted which do not, however, focus on the heart of the matter. For example, the judicial decisions from the Supreme Court (Administrative Dispute Jurisdiction, Section 5) of 14 December 2006, 22 December 2006, 25 July 2007 and 4 October 2007 deal with cases in which the appellants had alleged persecution on grounds of sexual orientation. These judicial decisions only deal with the inadmissibility of the application as decided by the authorities and which was confirmed by a court decision. The Supreme Court accepts the applicant’s appeal arguing that possible doubts that may arise about the alleged causes of discrimination on grounds of sexual orientation invoked for the asylum application cannot be dealt with at the admissibility stage, but must be considered as part of the substantial examination of the asylum claim. Thus, the Supreme Court recognises the right of the appellants to have their asylum application examined in Spain.
- [66]. In the Decision by the Supreme Court of 13 December 2007 (Administrative Dispute Jurisdiction, Section 5),<sup>37</sup> the Court does go to the heart of the matter. The appellant had already stated in his asylum application of 20 August 2001 that he claimed asylum on grounds of his

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<sup>37</sup> Spain/Sentencia del Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 5), (13.12.2007).

homosexual orientation, invoking the discriminatory situation and the persecution of homosexuals in Cuba. The Supreme Court decided in favour of the appellant, understanding that there were sufficient facts to fulfil the requirements for the granting of the right to asylum, according to Article 8 of Law 5/1984 of 26 March on the Right to Asylum and Refugee Status. Once both the documents brought by the applicant and the facts deriving from them had been examined, the Court considered that they were, according to the nature of the case, sufficient to conclude that the applicant fulfilled the requirements of Article 3(1) of Law 5/1984 of 26 March. Thus, the right to asylum and refugee status in Spain was granted to the applicant.

- [67]. The information on asylum and subsidiary protection available from the *Subdirección General de Asilo* [General Subdirectorate on Asylum] of the Ministry of Internal Affairs does not disaggregate data concerning the sexual orientation of the applicants. Thus, the 2006 Annual Report disaggregates data according to age, gender, education, economic activity or country of origin of the applicants, but not according to reasons for the asylum protection sought. There are also data on the number of appeals lodged against negative resolutions, but not on the reasons for the appeals.

## D. Family reunification

- [68]. Spanish legislation on this subject is to be found in Organic Law 4/2000 of 11 January on the Rights and Freedoms of Foreigners in Spain and their Social Integration, amended by Organic Law 8/2000 of 22 December on the Reform of Organic Law 4/2000 of 11 January on the Rights and Freedoms of the Foreigners in Spain and their Social Integration, as well as in Organic Law 11/2003 of 29 September on Concrete Measures regarding Civil Security, Domestic Violence and the Social Integration of Foreigners, and in Organic Law 14/2003 of 20 November on the Reform of Organic Law 4/2000 of 11 January on the Rights and Freedoms of Foreigners in Spain and their Social Integration.<sup>38</sup> Neither these laws nor the corresponding statutory regulations (Royal Decree 2393/2004 of 30 December, which enacts the Regulations developing the Organic Law 4/2000 of 11 January on the Rights and Freedoms of Foreigners in Spain and their Social Integration) implement Article 4(3) of Council Directive 2003/86/EC on the right to family reunification, a provision that, in any case, is not compulsory for the Member States.
- [69]. In terms of case law, there are judicial decisions which attempt to cover this lack of regulation by making an extensive interpretation of the provisions of the legislation in force. This judicial interpretation has been carried out on different bases, for example, the humanitarian reasons of Article 31(2) (now Article 31(3)) of Organic Law 4/2000. Furthermore, the exceptional circumstances also mentioned in Article 31(3) of Organic Law 4/2000, the analogy to marriage and the principle of equality have been used to extend the legal provisions to registered partnerships.
- [70]. On this point mention can also be made of a number of judicial decisions already referred to in the chapter on freedom of movement. Although the facts do not necessarily relate to the subject of this chapter, the doctrine established in these judicial decisions is nevertheless applicable to this subject. For example, Decision 145/2006 of 8 February of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2).<sup>39</sup> In

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<sup>38</sup> *Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, modificada por la Ley Orgánica 8/2000, de 22 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social así como por la Ley Orgánica 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros y por la Ley Orgánica 14/2003, de 20 de noviembre, de Reforma de la Ley orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social.*

<sup>39</sup> Spain/Sentencia núm. 145/2006 del Tribunal Superior de Justicia de Cataluña, Sala de lo Contencioso-Administrativo, Sección 2ª (8.2.2006).

this case of a foreign citizen who was the registered partner of a Spanish national, the Court does not consider him a spouse in the legal sense, but does acknowledge that there was a previous relationship of cohabitation and affection which was legally recognised as a stable relationship. This relationship, if proved, can be included as foreseen in Article 31 of Law 4/2000, as an expression of a concrete humanitarian reason, considering the impossibility of maintaining a stable relationship under circumstances of geographical separation. Thus, the granting of a residence permit is acceptable.

[71]. Similarly, there is Decision 83/2004 of 14 May of the Administrative Dispute Jurisdiction Court number 13 of Barcelona.<sup>40</sup> This case concerns a foreign citizen who was the partner of a Spanish national. The Decision considers that the existence of a permanent and stable union between two people can be evidence of a relationship equivalent to marriage, at least for the purposes of family reunification under the Spanish aliens law (*legislación de extranjería*). The Decision also considers applicable the humanitarian reasons or exceptional circumstances of Article 31 of Organic Law 4/2000 as well as the principle of equality. According to the judgment, “The family circle protected by the provisions of Royal Decree 178/2003 is defined by the reference to certain categories (spouses, relatives in the ascending line and descendants, with some particularities which define a space of relationships in which is necessary to consider included in an implicit way at least the legalised homosexual couples, since the affective intensity of this link will be normally closer to the “core” of the mentioned space than the one between a Spanish citizen and, for example, his foreign spouse’s relatives in the ascending line”. Thus, the Decision recognises the right of the appellant.

[72]. In contrast, as previously mentioned, attention should be drawn to Decision 842/2004 of 6 September of the High Court of Justice of Navarre (Administrative Dispute Jurisdiction, Section 1)<sup>41</sup>. In this case, concerning a foreign citizen who was the partner of a Spanish national, the court considers that the provisions on the rights of foreigners should be subject to a strict interpretation. There are certainly laws which grant registered partnerships treatment similar to marriage (thus as regards tenancy, penal issues and pensions), and this because of the clear declared intention of the legislator in the correspondent legal act. But since the law on aliens does not include it, the court considers that equal treatment of marriage and homosexual partnership is not possible.

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<sup>40</sup> Spain/Sentencia núm. 83/2004 de 14 mayo del Juzgado nº 13 de lo Contencioso-Administrativo de Barcelona (14.5.2004).

<sup>41</sup> Spain/Sentencia núm. 842/2004 de 6 septiembre del tribunal Superior de Justicia de Navarra, Sala de lo Contencioso-Administrativo, Sección 1ª.

- [73]. As can be seen, all these judicial decisions concern relationships formed by a Spanish national and a foreign citizen. Fortunately, a normative regulation on this issue is already to be found in Royal Decree 240/2007 of 16 February on the Entry, Free Movement and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area. However, legislative reform on family reunification for third-country nationals is still pending, which explains the current hesitations in the case law.
- [74]. Certainly, Article 4(3) of Directive 2003/86/EC of 22 September 2003 on the right to family reunification does not contain an obligation for the Member States, since it clearly establishes that the Member States “may” authorise the entry and residence “of the unmarried partner, being a third-country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third-country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons”. Thus, it cannot be said that the Directive has not been implemented appropriately. However, taking into account the fact that there is contradictory jurisprudence, it would be advisable to amend the Spanish legislation to clarify this situation. Obviously, if this reform takes place (it was in fact announced for this legislature but did not in the end happen), it should be made in line with the provisions of the Directive, though they are not compulsory on this point.
- [75]. After requesting this information from the Ministry of Internal Affairs and from the National Institute of Statistics, it can be said that there are no official statistics on these issues in Spain. LGBT associations (such as the *Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales* or *COGAM*) do not have data available either.

## E. Freedom of assembly

- [76]. According to the provisions of Article 5, section a) of the Organic Law 9/1983 of 15 July on Derecho de Reunión [Right of Assembly], the governing authority suspends and, if necessary, dissolves an assembly or a demonstration, considered illegal in accordance to the Penal law. It is to highlight that the Spanish Penal Code provides in its Article 510 that “those conducts likely to incite discrimination, hatred or violence against groups or associations for racist, anti-semitic or other motives, related to their ideology, religion or belief, family situation, the belonging of their members to a particular ethnic, racial, or national group, their sex, sexual orientation, illness or disability, will be fined with a penalty from six up to twelve months or punished with a prison sentence from one up to three years”. Article 513 para. 1 of the Penal Code penalizes assemblies and demonstrations which object is the commitment of an offence. Therefore demonstrations etc. can be prohibited if they have a homophobic object. On the other side, Article 515 para. 4 of the Penal Code penalizes associations which promote or incite the discrimination, hatred or violence against persons, groups or associations for motives related to their ideology, religion or belief, the belonging of their members to a particular ethnic, racial, or national group, their sex, sexual orientation, family situation, illness or disability.
- [77]. The assemblies for the defense of the rights of the homosexuals are protected by the Constitution (Article 21) and by the Law. Article 3 para. 2 of the Organic Law 9/1983 stipulates that “The authority shall protect the assemblies and demonstrations against those who intent to avoid, disturb or affect the legal exercise of this right”. Article 514 para 4 of the Penal Code provides that “Those who impede the legal exercise of the rights of assembly and demonstration, or disturb gravely the development of an assembly or a demonstration will be punished with a prison sentence from two up to three years in the case of use of force, and with a prison sentence from three up to six months or fined with a penalty from six up to twelve months if committed through a factual (not legal or psychological) obstacle.
- [78]. For this chapter neither statistical data nor case law has been found. Consequently, this chapter and Chapter H. Miscellaneous are the only ones in which newspaper articles are the main source of information. Taking into account this information (links are included below), it can be said that there are no practical obstacles to the holding of demonstrations promoted by gay and lesbian associations. On the contrary, the public authorities not only contribute with all the usual facilities for this type of event, but also provide significant subsidies (€100,000 in Madrid in 2007 and similar amounts in

past years), granted for activities related to the celebration of Gay Pride. In fact, Euro Pride 2007 took place in Madrid.

[79]. Participation in these types of activities and demonstration is considerable, reaching tens or hundreds of thousands in Madrid (in some cases, nearly a million people) and it is regarded as normal practice. This does not mean that there are no incidents, since isolated acts of aggression have been recorded at some of these events. Taking into account the number of participants and the extremely isolated character of the incidents, they cannot be regarded as relevant. Nevertheless, despite the small number of homophobic incidents, they demonstrate the need to continue with the efforts by the public authorities to achieve full normalisation.

[80]. Relevant newspaper articles are as follows:

The City Council of Madrid provides financial support for the celebration of Gay Pride. In 2007 (€100,000):

[http://www.elpais.com/articulo/madrid/Ayuntamiento/aporta/100000/euros/fiesta/Orgullo/Gay/elpepiespmad/20070608elpmad\\_13/Tes](http://www.elpais.com/articulo/madrid/Ayuntamiento/aporta/100000/euros/fiesta/Orgullo/Gay/elpepiespmad/20070608elpmad_13/Tes)

In 2004 (€80,000):

[http://www.elpais.com/articulo/madrid/Gallardon/subvenciona/60000/euros/fiesta/fin/celebracion/Dia/Orgullo/Gay/elpepiespmad/20040625elpmad\\_8/Tes](http://www.elpais.com/articulo/madrid/Gallardon/subvenciona/60000/euros/fiesta/fin/celebracion/Dia/Orgullo/Gay/elpepiespmad/20040625elpmad_8/Tes)

An individual attacked in Madrid in 2007:

[http://www.elpais.com/articulo/madrid/cara/Orgullo/elpepiespmad/20070704elpmad\\_11/Tes?print=1](http://www.elpais.com/articulo/madrid/cara/Orgullo/elpepiespmad/20070704elpmad_11/Tes?print=1)

Three people attacked in Madrid in 2006:

[http://www.elpais.com/articulo/madrid/chicos/agreden/mujeres/transexuales/dia/Orgullo/Gay/elpepiespmad/20060629elpmad\\_16/Tes](http://www.elpais.com/articulo/madrid/chicos/agreden/mujeres/transexuales/dia/Orgullo/Gay/elpepiespmad/20060629elpmad_16/Tes)

More than half a million people attend Gay Pride in 2003:

[http://www.elpais.com/articulo/sociedad/marcha/Orgullo/Gay/reune/medio/millon/personas/Madrid/elpepusoc/20030628elpepusoc\\_1/Tes](http://www.elpais.com/articulo/sociedad/marcha/Orgullo/Gay/reune/medio/millon/personas/Madrid/elpepusoc/20030628elpepusoc_1/Tes)

One million people attend Gay Pride 2004:

[http://www.elpais.com/articulo/sociedad/millon/personas/colapsan/Madrid/celebrar/Dia/Orgullo/Gay/elpepusoc/20040703elpepusoc\\_2/Tes](http://www.elpais.com/articulo/sociedad/millon/personas/colapsan/Madrid/celebrar/Dia/Orgullo/Gay/elpepusoc/20040703elpepusoc_2/Tes)

Thousands of people at the 2006 march:

[http://www.elpais.com/articulo/sociedad/Orgullo/Gay/inunda/Madrid/elpepisoc/20060702elpepisoc\\_2/Tes](http://www.elpais.com/articulo/sociedad/Orgullo/Gay/inunda/Madrid/elpepisoc/20060702elpepisoc_2/Tes)

Hundreds of thousands of people attend Euro Pride 2007 in Madrid:

<http://videos.abc.es/informaciondecontenido.php?con=1316>

[81]. No official or unofficial statistical data on this issue could be found. The above-mentioned annual reports of the Office of the General State Prosecutor only contain a general reference to the number of illegal demonstrations, without disaggregating data on illegal demonstrations against tolerance of LGBT people: four illegal demonstrations in 2004; two in 2005; and 35 in 2006.<sup>42</sup>

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<sup>42</sup> *Fiscalía General del Estado* [Office of the General State Prosecutor]  
<http://www.fiscal.es/fiscal/public>.

## F. Criminal law

- [82]. On this point a distinction must be made between hate speech and hate crimes on homophobic grounds. Hate speech is regulated in Article 510 of the Criminal Code, which states: “1. Those who promote discrimination, hatred or violence against groups or associations, for racist or anti-Semitic reasons, or other reasons related to ideology, religion or beliefs, family situation, ethnic or racial origin, national origin, gender, sexual orientation, illness or disability, will be punished with a prison term of one to three years and a penalty of six to twelve months. 2. Those who, knowing it to be false or in reckless disregard of the truth, spread injurious information on groups or associations in relation to their ideology, religion or beliefs, ethnic, racial or national origin, gender, sexual orientation, illness or disability, will be punished with the same penalties.”.
- [83]. With regard to homophobic motivation for crimes, mention has already been made of the provisions of the Penal Code on the prohibition of discrimination on grounds of sexual orientation in connection with access to public services. Article 511 of the Penal Code states: “1. Anyone in charge of a public service who denies an individual a benefit to which s/he is entitled, on grounds of ideology, religion or belief, ethnic, racial or national origin, gender, sexual orientation, family situation, illness or disability, shall be sentenced to prison for a period of six months to two years and a penalty of 12 to 24 months and special disqualification from public employment or position for a period of one to three years. 2. The same legal sanctions shall be applicable when the facts are committed against an association, foundation, society or corporation or against their members on grounds of their ideology, religion or belief, ethnic, racial or national origin, gender, sexual orientation, family situation, illness or disability. 3. Civil servants who perpetrate any of the conducts described in this article shall be punished with sanctions from the upper range of the penalty degree and with regard to the special disqualification from public employment or position for a period from two to four years”.
- [84]. On the other hand, Article 512 of the Penal Code rules that, “Those who, in the exercise of their professional or managerial activities, deny any individual a benefit to which s/he is entitled, on grounds of ideology, religion or belief, ethnic, racial or national origin, sex, sexual orientation, family situation, illness or disability, shall be sanctioned with special disqualification from the exercise of their profession, occupation, industry or trade, for a period of one to four years”.
- [85]. In addition, Article 515, section 5, considers illegal associations to be, “Those that promote or prompt discrimination, hatred or violence against

people, groups or associations on grounds of their ideology, religion or beliefs, ethnic, racial or national origin, gender, sexual orientation, family situation, illness or disability”. Article 517 establishes the punishment for these cases: founders, directors and presidents of associations shall be punished with a prison term of two to four years, a penalty of 12 to 24 months and special disqualification from public employment or position for a period of six to 12 years. The active members will be punished with a prison term of one to three years and a fine of 12 to 24 months. The subsequent articles establish other provisions for such cases, including provision for the judicial dissolution of the illegal associations.

- [86]. With regard to homophobic motivation for crimes account must also be taken of Article 22(4) of the Penal Code which defines as an aggravating circumstance, “to commit a crime for racist or anti-Semitic reasons or other types of discrimination on grounds of the victim’s ideology, religion or beliefs, ethnic, racial or national origin, gender or sexual orientation, or illness or disability”.
- [87]. Consideration should also be made of Law 49/2007 of 26 December, which establishes the offences and sanctions regarding equal opportunities, non-discrimination and universal accessibility for disabled people<sup>43</sup>. Article 16(4)(e) of this law establishes as very serious offences conducts regarded as grave when their perpetrators have also been motivated by hatred, including racial or ethnic hatred, gender, sexual orientation, age, severe disability or incapacity of the victim to act on his/her own.
- [88]. In addition, account should be taken of the numerous provisions which Spanish legislation dedicates to harassment, which have been mentioned in the chapter on the implementation of Employment Directive 2000/78/EC (see Chapter A. above for details). It is also necessary to keep in mind the protection offered by Organic Law 1/1982 of 5 May 1982 on *Protección Civil del Derecho al Honor, a la Intimidación Personal y Familiar y a la Propia Imagen* [Civil Protection of the Right to Honour, Personal and Family Intimacy and the right to control the use of One’s Own Image].
- [89]. Finally, it should be noted that the new Statutes of Autonomy of Andalusia and Catalonia have established instructions for the public authorities which oblige them to combat homophobia. Thus, the Statute of Andalusia (enacted by Organic Law 2/2007 of 19 March on *Reforma del Estatuto de Autonomía para Andalucía* [the Reform of the Statute of Autonomy for Andalusia]) includes in Article 37(1.2°) on the leading principles for public policy, “The fight against sexism, xenophobia, homophobia and militarism, especially by means of teaching about values and providing education

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<sup>43</sup> Spain/Ley 49/2007 de 26 diciembre sobre el régimen de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad.

which promotes equality, tolerance, freedom and solidarity”. Similarly, the Statute of Catalonia (enacted by Organic Law 6/2006 of 19 July on *Reforma del Estatuto de Autonomía de Cataluña* [the Reform of the Statute of Autonomy of Catalonia]) establishes in Article 40(8) that, “The public authorities should promote the equality of all individuals regardless of their origin, nationality, gender, race, religion, social condition or sexual orientation, and promote the eradication of racism, anti-Semitism, xenophobia, homophobia and any other expression that violates people’s equality and dignity”.

- [90]. With regard to Spanish jurisprudence, mention may be made, in the first place, of the Decision of the Provincial Court of Cantabria no. 19/2001 (section 2) of 4 October<sup>44</sup>. The Court considered that the circumstance of increased criminal responsibility of Article 22(4) of the Penal Code, relating to the sexual orientation of the victim, should be applied to the offence of murder which was the subject of the Decision. This was also the case in Decision of 14 March 2000 of the Provincial Court of Barcelona<sup>45</sup>. In this Decision, the Court considered applicable the aggravating circumstance of acting because of the sexual orientation of the victim in a case of threats (accompanied by a misdemeanour of harassment).
- [91]. In other judicial decisions there was a negative evaluation of the facts by the court, although the facts were not considered illegal by the criminal law. This was the case in the Decision of the Provincial Court of Barcelona (Section 3) of 20 June 2000<sup>46</sup>. The facts were the expulsion from a disco of a two homosexuals who were kissing each other. The Court considered that this constituted a discriminatory act, although it was not considered illegal on the basis of criminal law. The Court considered that criminal law is governed by the principle of minimum intervention and that there were other means for the complainants to defend their right not to be discriminated against by reason of their sexual orientation.
- [92]. With regard to these other means, mention should be made of Decision 145/2006 of 8 February of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2)<sup>47</sup>. The facts in this case were the publication by a magazine of pictures of the complainants without their consent. Under the pictures there was an insulting caption in aggressive and pejorative language referring to the sexual conduct and specifically regarding the homosexuality of certain of the individuals concerned. The Court concluded that there had been an infraction of Article 7 of Organic Law 1/1982 of 5 May on the Civil Protection of the Right to

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<sup>44</sup> Spain/Sentencia de la Audiencia Provincial Cantabria (Sección 2) núm. 19/2001 de 4 octubre, ,

<sup>45</sup> Spain/Sentencia de la Audiencia Provincial Barcelona (Sección 6),de 14 marzo 2000,

<sup>46</sup> Spain/Sentencia de la Audiencia Provincial Barcelona (Sección 3), de 20 junio 2000.

<sup>47</sup> Spain/Sentencia núm. 145/2006 del Tribunal Superior de Justicia de Cataluña (Sala de lo Contencioso-Administrativo, Sección 2ª), de 8 febrero.

Honour, Personal and Family Intimacy and to control the use of one's Own Image, and required the magazine to pay monetary compensation and to publish the Decision in the magazine.

- [93]. Mention can also be made of the Decision of the Provincial Court of Madrid 455/2006 (section 17) of 28 December<sup>48</sup>. The facts were the publication by the complainant's former boyfriend of an announcement, giving her telephone number, on an internet portal whose purpose was to facilitate lesbian relationships. According to the Court, "Such conduct reflects a macho conception of sexuality that implies radical homophobia; so, from such a perspective, the public imputation of lesbianism would pursue a double purpose: to produce an effect of social repulsion and to hinder the complainant's possible future relationships with other men, in the conviction that all men would abstain from undertaking even short relationships with a lesbian [...] The perpetrator of this absurdity appears to ignore the fact that homosexual relationships have been accepted without problem by a growing majority of Spanish society as a respectable option, to the point of being accepted as the basis for a marriage or similar relationship, with the same legal effects as traditional heterosexual marriage".
- [94]. The annual reports for 2004, 2005 and 2006 of the Office of the General State Prosecutor contain the figures for discrimination offences, without disaggregating on any other criteria. This type of crime includes incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit. In 2004 there were seven discrimination offences; in 2005 there were 26; and in 2006 the figure was 27.<sup>49</sup> The annual reports also include data on illegal associations which promote discrimination, hatred or violence against individuals, groups or associations, but without disaggregating the figures according to associations promoting discrimination, hatred or violence on the grounds of sexual orientation. In 2004, there were 13 criminal cases involving illegal associations; in 2005 there were 30; and in 2006 the figure was 50. There are no statistical data on homophobic motivation as an aggravating factor in crimes.

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<sup>48</sup> Auto de la Audiencia Provincial de Madrid núm. 455/2006 (Sección 17), de 28 diciembre.

<sup>49</sup> *Fiscalía General del Estado* [Office of the General State Prosecutor] <http://www.fiscal.es/fiscal/public>.

## G. Transgender issues

- [95]. The general legislation on equal treatment and non-discrimination on the grounds of sexual orientation is fully applicable to transsexual people, although the right to freedom of sexual identity cannot be identified with the right to freedom of sexual orientation and the right not to be discriminated against on the grounds of that sexual orientation. Transsexuality does not involve a specific sexual orientation. However, discrimination and the violation of the principle of equal treatment on the grounds of sexual orientation include all possible cases, including discrimination of transsexuals. The level of protection is the same. At the same time, transsexuals are also affected by homophobia. For this reason, the protection of transsexuals by the legal system also refers to the right not to be discriminated against on the grounds of sexual orientation.
- [96]. With regard to transsexuals, there have been recent legislative changes which have enabled the previous jurisprudence to be superseded and a stable legal framework to be established which fully respects the rights of transsexual people, for example, Law 3/2007 of 15 March on *Rectificación registral de la mención relativa al sexo de las personas* [the Rectification of the mentions of the Gender in Registries]. The Preamble to this law defines its two main purposes: “This Law seeks to establish the necessary requirements for changing the recorded gender of a person in the Civil Register where the existing entry does not correspond to his/her true gender identity. This Law also regulates the change of name so that it is coherent with the sex”.
- [97]. Both the rectification of the recorded gender and the change of name in the Register are a consequence of a prior change of gender identity: “In accordance with the regulation by this Law, the rectification of the recorded gender and the change of name in the Register certify as an objective fact the prior change of gender identity, so that legal certainty and the protection of general interests are guaranteed. With this purpose, adequate evidence of the change of identity shall be provided and the rectification of the register shall be made in accordance with the government files of the Civil Registry”.
- [98]. Article 1(1) of the Law establishes that, “Any person of Spanish nationality who is over 18 years of age and has the required legal capacity may request the rectification of the gender entry in the Register. The rectification of the gender will bear the change of the individual’s name, so that it is coherent with the registered gender”.

[99]. Article 4 determines the conditions to which the rectification of recorded gender in the register is subjected:

“1. The rectification of the gender recorded in the register shall be accepted provided the applicant proves:

a) A diagnosis of gender dysphoria.

To prove this requirement a report must be submitted from a doctor or clinical psychologist who is a member of a Spanish professional association and whose qualifications have been recognised or accredited in Spain. The report shall refer to:

1. The existence of a discrepancy between the morphological sex or the initially registered physiological gender and the gender identity or psychosocial sex felt by the applicant, as well as the stability and persistence of this dissonance.

2. The absence of personality dysfunctions that could decisively influence the existence of the dissonance referred to in the previous point.

b) That s/he has been medically treated for at least two years to adapt his/her physical characteristics to those corresponding to the claimed sex. The proof of this requirement shall be made by means of the practicing doctor’s report under whose direction the treatment has been carried out or, in its absence, by means of a report by a forensic surgeon.

2. It shall not be necessary for the rectification of the Register for the medical treatment to include gender reassignment surgery. The medical treatment referred to in 1(b) above shall not be a necessary requirement for the rectification of the register if reasons of health or age, certified by a doctor, hinder that treatment.”

[100]. In addition to this important legislative reform, it is also necessary to point out that some Statutes of Autonomy (which are, functionally, the ‘Constitutions’ of each of the Autonomous Communities) have incorporated the right to freedom of gender identity into their new charters of rights when the recent amendments to the Statutes were made. This is the case for the Statute of Andalusia (Organic Law 2/2007 of 19 March on Reform of the Statute of Autonomy for Andalusia) in which Article 35 states: “Everybody has a right to be respected in his/her sexual orientation and his/her gender identity. The public authorities shall promote policies to guarantee the free exercise of this right”. Similarly, the Statute of Aragon (Organic Law 5/2007 of 20 April on *Reforma del Estatuto de Autonomía de Aragón* [Reform of the Statute of Autonomy of Aragon]) in which Article 24(d) establishes that Aragon’s public authorities shall conduct their policies in accordance with the following objective: “To guarantee the right of everyone not to be discriminated against on grounds of sexual orientation and gender identity”.

- [101]. In terms of case law, mention should be made of two judicial decisions which apply Law 3/2007, thus enabling the granting of applications to change names under the more favourable conditions established by that law and not making the change conditional upon medical treatment including gender reassignment surgery. One of these rulings is Decision 121/2007 of the Provincial Court of Cádiz of 15 May<sup>50</sup>. The decision by a first (lower) court refused the plaintiff's request for a declaration of a change of gender from woman to man and the request to change the female name Sofia to the male name Alfonso. The Provincial Court decision highlights the importance of the change introduced by the entry into force of Law 3/2007 of 15 March on the Rectification of the mentions of the Gender in Registries, which makes possible, in accordance with the standards of the Law on the Civil Registry, the rectification of the gender entry in the register, provided that the requirements established by the Law are fulfilled. Specifically, Article 4(2) removes the requirement that medical treatment must include gender reassignment surgery (as required by the Decision of the first instance court). By considering as proven in this case the requirements demanded by the new Law (the plaintiff had received treatment and been operated on over several years and was waiting for a sex-change operation; there was a clinical report on her female-male transgender condition; she did not present any personality disorders), the Court ruled that the application should be granted. The judgment allowed the applicant to register the change from female to male and ordered that it appear in the margin of the registration of the plaintiff's birth in the Civil Register, in conformity with the Law on *Registro Civil (08.06.1957)* [the Civil Registry] and its *Reglamento (14.11.1958)* [Statutory Regulation], with all the legal effects that the change implies.
- [102]. Similarly, Decision 929/2007 of 17 September of the Supreme Court (Civil Chamber, Plenary)<sup>51</sup> deals with an application for a gender and name change in the register. The application, which was made prior to Law 3/2007 of 15 March, was refused successively by two different Courts (Decision of 3 September 2001 of the Court of First Instance no. 1 of Sant Feliu de Llobregat and Decision of 7 April 2003 of the Provincial Court of Barcelona (First Section)<sup>52</sup>), both of which were also handed down before Law 3/2007 of 15 March on the Rectification of the mentions of the Gender in Registries, entered into force. Both earlier decisions had adopted the view that, since there had been no gender reassignment surgery, the name change could not be allowed, as this was regarded as a necessary requirement, at least for Spanish jurisprudence, until the entry into force of

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<sup>50</sup> Spain/Sentencia 121/2007 de la Audiencia Provincial de Cádiz, de 15 de mayo

<sup>51</sup> Spain/Sentencia del Tribunal Supremo núm. 929/2007 de 17 septiembre, Sala de lo Civil, Sección Pleno.

<sup>52</sup> Spain/Sentencia del Juzgado de Primera Instancia de Sant Feliu de Llobregat núm. 1 de 3 de septiembre de 2001, y Sentencia, de la Audiencia Provincial de Barcelona (Sección Primera), de 7 de abril de 2003.

Law 3/2007. The Spanish jurisprudence was, on the other hand, coherent with the doctrine of the European Court of Human Rights. The Supreme Court considered that, from the entry into force of Law 3/2007 of 15 March, transsexuals can obtain, by fulfilling the requirements established by the Law and by the means foreseen by the same Law, a change of the recorded sex and name, and be considered as a person of the desired sex, without requiring any surgical intervention which, in accordance with the jurisprudence previous to Law 3/2007, was a *condicio sine qua non* for the change. The Supreme Court admitted the appeal and declared that the record of the name and the sex change should be rectified in the Register, so that the plaintiff should be named O.C.F. and her registered gender should be female.

- [103]. Regarding the protection of transsexual people against discrimination, mention can be made of the Decision of 26 March 2007 of the High Court of Justice of Catalonia<sup>53</sup>. In this case, the individual concerned gave a female name for a job application and job interview, but mentioned her transsexual condition in her curriculum vitae. After nine days in post, she was informed of a managerial decision to terminate her contract, justified by a claim that her probationary period had been unsatisfactory. The plaintiff took legal action against the company, alleging that the dismissal should be void because it was based on discrimination on the grounds of a transsexual condition (violating Article 14 of the Spanish Constitution and Article 17(1) of the Statute of Workers). The company claimed that the reasons for the dismissal were the employee's lack of adaptation to the job, inappropriate treatment of patients and a conflictual relationship with colleagues. The Court considered that the plaintiff was able to establish sufficient facts from which a discriminatory motivation for the dismissal could at least be presumed, taking into account, among other aspects, the short period worked (nine days) and the fact that she was not given the opportunity to sign an employment contract during this period, although this usually takes place within three days of employment commencing. Since the presumption of discrimination had been established, the burden of proof fell on the respondent, as is the case for discriminatory dismissals. The Court considered that the company had not sufficiently proved the existence of reasons other than the discriminatory treatment. Thus the Court declared the dismissal null and void. Through the application of Articles 55(5) and (6) of the Statute of Workers, the dismissal was deemed to be directly related to the transsexual condition of the worker, which supposes a violation of the right to equality and non-discrimination on grounds of sex of Article 14 of the Spanish Constitution and Article 17(1) of the Statute of Workers. The nullity declaration requires the immediate readmission to employment of the plaintiff under the same conditions

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<sup>53</sup> Spain/Sentencia del Tribunal Superior de Justicia de Cataluña de 26 marzo de 2007

which applied before her dismissal and the payment of the unpaid salaries from the date of the dismissal until the date of readmission to employment.

[104]. Data was requested on numbers of name changes and numbers of people who changed their sex under the applicable legislation from the *Dirección General de Registros y Notariado* [State Office of Registries and Notaries]. Period 200-2007: 20 inscriptions of change of gender and 14 inscriptions of change of gender after gender reassignment operation. The *Dirección General* points out that these data are not relevant since they only refer to the Registers which have computer data bases.

[105]. Data was obtained concerning the numbers of gender reassignment operations from the *Instituto de Información Sanitaria, Ministerio de Sanidad* [Institute of Health Information of the Ministry of Health] with regard to one of the Autonomous Communities, Andalusia:

2000	2001	2002	2003	2004	2005	2006
9	14	31	32	26	28	24

## H. Miscellaneous

- [106]. This chapter covers aspects which do not fit into the other sections but which also have an impact, in a negative way in this case, on progress towards respect for sexual orientation and gender identity. Attention should first be drawn to the significant resistance from conservative sectors, supported by the Catholic Church, to some of the legislative measures promoting equality. A number of these measures have been appealed before the *Tribunal Constitucional* [Spanish Constitutional Court] and the decisions are pending. It is also possible that legislative changes may take place if there is a change in the parliamentary majority at national level after the elections of 9 March 2008. In any case, it is difficult to envisage that measures such as marriage between people of the same sex could be substantially modified in the future, considering the large number of people who have made use of this new right. According to figures from 2006, 4,313 marriages formed by people of the same sex took place in that year. Of these, 3,000 were between males and 1,313 between women.<sup>54</sup>
- [107]. In addition to the critical attitude of the Catholic Church as an institution, there have also been homophobic statements by some members of the ecclesiastical hierarchy which have sparked public debate in recent months. For example, on 24 December 2007, the Bishop of Tenerife said in an interview for the newspaper *La Opinión de Tenerife* that, “Only six per cent of homosexuals can be justified for biological reasons. One should not confuse homosexuality as a person’s existential need with homosexuality practised as a bad habit. Some people practise homosexuality as they might practise child abuse. They do it because they are attracted by the novelty of a different form of sexuality”. This comparison between homosexuality and child abuse caused a great scandal in Spain.<sup>55</sup>
- [108]. More recently, on 27 January 2008, the Bishop of Orihuela-Alicante, speaking to the newspaper *La Opinión de Málaga* regarding homosexuality, declared that, “Biology says that it is usually an illness, but

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<sup>54</sup> National Institute of Statistics, *Natural population movements*, <http://www.ine.es/ioe/ioeFicha.jsp?cod=30302&codtema=&textema=&codorg=&textorg=&sig=null&L=>.

<sup>55</sup> *La Opinión de Tenerife*, 24/12/2007, [http://www.laopinion.es/secciones/noticia.jsp?pRef=2994\\_9\\_120211\\_SOCIEDAD-homosexualidad-perjudica-personas-sociedad](http://www.laopinion.es/secciones/noticia.jsp?pRef=2994_9_120211_SOCIEDAD-homosexualidad-perjudica-personas-sociedad).

in certain cases there can be a concrete situation that has another explanation, but usually nobody wants to be homosexual”.<sup>56</sup>

- [109]. There have been isolated cases of apparently homophobic attitudes in judicial decisions, to the extent that the General Council of the Judiciary (the highest organ of the Judiciary in Spain) had to intervene. Thus, on 12 February 2008, the newspaper *El País* mentioned that, “The Permanent Commission of the General Council of the Judiciary will today decide whether to suspend Murcian judge, Fernando Ferrín Calamita, from his duties. The reason for this is that the High Court of Justice of Murcia has submitted to the judicial process the complaint of a woman alleging that the judge was intentionally and ‘in a malicious way’ delaying her application for the adoption of her female partner’s biological daughter”. According to the newspaper article, “Last Tuesday, the members of the General Council were informed of the content of a report ordered by the Prosecutor’s office, which favoured imposing a provisional measure of suspension”.<sup>57</sup>

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<sup>56</sup> *La Opinión de Málaga*, 27/01/2008, [http://www.laopiniondemalaga.es/secciones/noticia.jsp?pRef=3143\\_11\\_156628\\_LucesdeMalaga-homosexualidad-enfermedad-nadie-quiere](http://www.laopiniondemalaga.es/secciones/noticia.jsp?pRef=3143_11_156628_LucesdeMalaga-homosexualidad-enfermedad-nadie-quiere).

<sup>57</sup> *El País*, 12/02/2007, [http://www.elpais.com/articulo/sociedad/Poder/Judicial/estudia/suspension/juez/obstruyo/adopcion/parte/lesbiana/elpepusoc/20080212elpepusoc\\_2/Tes](http://www.elpais.com/articulo/sociedad/Poder/Judicial/estudia/suspension/juez/obstruyo/adopcion/parte/lesbiana/elpepusoc/20080212elpepusoc_2/Tes).

## I. Good practices

- [110]. The majority of good practices covered in this chapter refer to the legislative reforms which took place during the last legislative period. At state level the public authorities have implemented the European anti-discrimination directives by means of general measures (such as Law 62/2003 of 30 December on Fiscal, Administrative and Social Measures in connection with Directive 2000/78/EC) and have also incorporated into the legal system a large number of provisions on equal treatment and respect for sexual orientation as well as on the right to freedom of gender identity.
- [111]. Among the many laws which implement these principles, some have already been the subject of specific reference in this report and so are simply listed here: Law 7/2007 of 12 April on the Basic Statute of Public Employees; Law 20/2007 of 11 July on the Statute of Self-Employed Workers; Law 55/2003 of 16 December on the Framework Statute of Health Service Staff; Law 31/2006 of 18 October on the Employees' Involvement in European Public Limited Companies and Cooperatives; Organic Law 11/2007 of 22 October on the Rights and Duties of Members of the Civil Guard and Organic Law 12/2007 of 22 October on the Disciplinary Regime for the Civil Guard. Also, Organic Law 3/2007 of 22 March on the Effective Equality between Women and Men and the reform of Article 314 of the Penal Code effected by Organic Law 15/2003 of 25 November.
- [112]. Law 14/2006 of 26 May on Techniques of Assisted Human Reproduction has also been cited above. Special mention should be made of Law 3/2007 of 15 March on the Rectification of the mentions of the Gender in Registries, also referred to above, which creates a stable legal framework for the full respect of the rights of transsexuals. Reference should also be made to Law 49/2007 of 26 December, which establishes the regime of offences and sanctions as regards equal opportunities, non-discrimination and universal accessibility for disabled people.
- [113]. These changes to the legal system are also reflected in other laws which that have not previously been mentioned, as is the case of Law 10/2007 of 22 June on *Lectura, el libro y las bibliotecas* [Reading, Books and Libraries]. In Article 12(2)(b) of this law, among the principles which should inspire the activity of libraries, is the following: "Equality for all users in access to the materials, facilities and services of the library, without discrimination on grounds of origin, ethnicity, religion, ideology, gender or sexual orientation, age, disability, economic resources or any other personal or social circumstance". Note should also be made of Law 19/2007 of 11 July *contra la violencia, el racismo, la xenofobia y la*

*intolerancia en el deporte* [against Violence, Racism, Xenophobia and Intolerance in Sport]. This law makes a considerable number of direct or indirect references to respect for sexual orientation and the prevention and repression of illegal behaviours: Article 2(2)(a), (b), (c) and (d) on definitions; Article 6(1)(b) and (c); Article 23(1)(c) and (d); Article 34(1)(b), (c) and (d); and Article 35(a) and (b).

- [114]. Among the state legislation is Law 52/2007 of 26 December *por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura* [which acknowledges and extends rights and sets down measures in favour of those who suffered persecution or violence during the civil war and the dictatorship]. Article 2(1) gives the following general recognition: “As an expression of the right of all citizens to moral compensation and to regaining their personal and family memory, the radically unjust character is recognised and declared of all condemnations, sanctions and any forms of personal violence perpetrated for political, ideological or religious reasons during the Civil War, as well as those suffered for the same reasons during the Dictatorship”. Article 2(2) includes a specific reference to sexual orientation: “The reasons referred to in the previous section include membership of, participation in or relationship with political parties, unions, religious or military organisations, ethnic minorities, secret societies, Masonic lodges and resistance groups, as well as conduct connected to culture, language or sexual orientation”.
- [115]. The most outstanding law among the state legislation is, without a doubt, Law 13/2005 of 1 July, which modifies the Civil Code as regards the right to marry and which institutes marriage between people of the same sex, granting them the legal effects of the matrimonial institution. The option of this law for the full integration of same-sex marriage into the traditional matrimonial institution, with identical legal effects, may have the greatest impact on effective equal treatment and full respect for people’s sexual orientation. This equal treatment makes fully applicable to same-sex marriage all the laws from different sectors establishing social benefits, rights of spouses, possibility of adoption, etc. It is, therefore, a highly advisable option that makes possible a full application of the non-discrimination principle in all sectors.
- [116]. However, in order to have a complete overview of good practices in the Spanish legal system, in addition to national laws account must be taken of the decentralised structure of the State. This decentralisation means that considerable competences are exercised by the Autonomous Communities. This is true of social policy, the promotion of social rights, social assistance, etc. The competences of the Autonomous Communities in relation to education, health care and housing, among others, imply that the majority of the public administration activities with an impact on equality

and respect for sexual orientation and sexual identity is today exercised at autonomous community level and not at national level.

- [117]. Thus, a considerable proportion of the good practices of recent years were adopted at the level of the Autonomous Communities. The most recent reforms of the Statutes, which took place in six of Spain's 17 Autonomous Communities (together with the two Autonomous Cities, Ceuta and Melilla), are especially relevant here. These statutory reforms affect Autonomous Communities which jointly represent around half of the Spanish population (Andalusia and Catalonia alone represent a third of the total population) and these reforms are especially important because they incorporate new principles and rights which were not foreseen in the previous versions of these Statutes.
- [118]. Among these principles and rights, those related to sexual orientation and gender equality must be highlighted. They include, in two of the Statutes (Catalonia and Andalusia), combating homophobia. It should be kept in mind that the Statute of Autonomy is, from a functional point of view, the 'Constitution' of the Autonomous Community and that it is binding on the autonomous public authorities (always with respect to the constitutional framework), compelling them to formulate their policies in conformity with the statutory principles. This explains the importance of these statutory provisions and the progress they imply for the Spanish legal system.
- [119]. The Statute that devotes most attention to these questions is that of Andalusia (enacted by Organic Law 2/2007 of 19 March on the Reform of the Statute of Autonomy for Andalusia) in which Article 14 incorporates prohibition of discrimination on grounds of sexual orientation: "All forms of discrimination in the exercise of rights, the accomplishment of duties and access to services listed in this Title, particularly discrimination on grounds of gender, ethnic or social origin, language, culture, religion, ideology, genetic characteristics, birth, wealth, disability, age, sexual orientation or any other condition or personal or social circumstance are forbidden. The prohibition of discrimination shall not hinder positive action in favour of disadvantaged sectors, groups or persons".
- [120]. In addition to this, Article 35 of the Statute of Andalusia recognises both the right to freedom of sexual orientation and the right to freedom of gender identity: "Everybody is entitled to respect for his/her sexual orientation and his/her gender identity. The public authorities shall promote policies to guarantee the exercise of this right". Article 37, which deals with the guiding principles for public policy, includes in section (1)(2): "The fight against sexism, xenophobia, homophobia and militarism, especially by means of teaching about values and providing education which promotes equality, tolerance, freedom and solidarity".

- [121]. The Statute of Catalonia (enacted by Organic Law 6/2006 of 19 July on the Reform of the Statute of Autonomy of Catalonia) also contains most of these principles and rights. Article 40(7) of the Statute establishes that, “The public authorities shall promote the equality of different forms of stable relationships between couples, taking into account their particularities regardless of the sexual orientation of the partners. The law shall regulate these unions and other forms of coexistence and their effects”. In addition to this, Article 40(8) establishes that, “The public authorities shall promote the equality of all individuals regardless of their origin, nationality, gender, race, religion, social condition or sexual orientation, and promote the eradication of racism, anti-Semitism, xenophobia, homophobia and any other expression that violates people’s equality and dignity”.
- [122]. The other Statutes of Autonomy also contain important, though fewer, references to this subject. Thus, Article 24(d) of the Statute of Aragon (enacted by Organic Law 5/2007 of 20 April on Reform of the Statute of Autonomy of Aragon) establishes that Aragon’s public authorities shall formulate their policies in accordance with the following objective: “To guarantee the right of everyone not to be discriminated against on grounds of sexual orientation and gender identity”.
- [123]. In addition to this, the Statute of the Balearic Islands (enacted by Organic Law 1/2007 of 28 February on *Reforma del Estatuto de Autonomía de las Illes Balears* [Reform of the Statute of Autonomy of the Balearic Islands]) proclaims in Article 27(3) that, “Everybody is entitled not to be discriminated against on grounds of sexual orientation”. Similarly, the Statute of Castile and León (enacted by Organic Law 14/2007 of 30 November on *Reforma del Estatuto de Autonomía de Castilla y León* [Reform of the Statute of Autonomy of Castile and León]) declares in Article 14(1) that, “Any discrimination on grounds of gender or sexual orientation, either direct or indirect, is forbidden”. Finally, the Valencian Community’s Statute (enacted by Organic Law 1/2006 of 10 April on *Reforma de la Ley Orgánica 5/1982, de 1 de julio, de Estatuto de Autonomía de la Comunidad Valenciana* [Reform of the Organic Law 5/1982 of 1 July on the Statute of Autonomy of the Valencian Community]) incorporates an Additional Provision (the Fourth) under which “The institutions and administrations of the Generalitat shall avoid the use in their public interventions of offensive or disrespectful expressions about any group or person for reason of gender or any other social condition whose different treatment is vetoed by our constitutional framework”.
- [124]. As can be seen, both the most recent national legislation and the recent reforms of the Statutes of Autonomy of the Autonomous Communities show a growing interest in the promotion of the rights to freedom of sexual orientation and gender identity, as well as in the prohibition of any

discrimination contrary to those rights and specifically in combating homophobia. The fact that these principles have already reached the second constitutional level in Spain (that of the Statutes of Autonomy of the Autonomous Communities), as well as the large number of laws which have been devoted in recent years to incorporating them into the legal system, prove the interest of the public authorities in promoting their effective realisation.

- [125]. Statistics. After several researches, the statistical information on this issues could not be retrieved.

# Annex 1 – Case law

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

Case title	Sentencia Tribunal Constitucional núm. 41/2006 (Sala Segunda ), de 13 de febrero
Decision date	13.02.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Constitucional</i> [Constitutional Court] Constitutional jurisdiction Appeal no. 5038/2003 Rapporteur: Mrs Elisa Pérez Vera
Key facts of the case (max. 500 chars)	Appeal against the Decision of the High Court of Justice of Catalonia (social jurisdiction) of 27/06/2003 concerning a dismissal procedure. The appellant alleged violation of the fundamental right to equality, having been dismissed for several reasons (such as poor discipline, criticism of the management, mistakes at work with electronic mail, etc.) which, in his opinion, concealed a discharge based on discrimination because of his homosexuality. The appellant suffered insults because of his manner of dress and was overburdened with duties as a consequence of how the distribution of tasks was planned. He even required medical treatment as a result of the anxiety he suffered after his dismissal.
Main reasoning/argumentation (max. 500 chars)	Referring to abundant constitutional jurisprudence, the Court determined that the appellant had been the victim of conduct on the part of his employer which was contrary to the fundamental right to non-discrimination (Article 14 of the Spanish Constitution). The Court made the following points: - The applicant established facts from which it could be presumed that there was discriminatory treatment, which was the true reason for the dismissal (conflictual relationship with his bosses, deliberate overburdening of the plaintiff in terms of duties). - These indications were enough to shift the burden of proof. In addition, they were not sufficiently discredited by the company either in the dismissal letter or through the evidence referred to in the procedure (not able to prove

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

	<p>that the dismissal had nothing to do with a case of discrimination).</p> <ul style="list-style-type: none"> <li>- The arguments used to justify the decision appealed ignored the consolidated doctrine of the Court concerning the inversion of the burden of proof in the labour lawsuit.</li> <li>- On the basis of all these reasons, the Court ruled for the appellant, confirming the violation of the right of the complainant, declaring the nullity of the dismissal and overruling the appealed Decision.</li> </ul>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>DISCRIMINATION. Specific discrimination; concerning any personal, family or social circumstance; sexual orientation; unlawful dismissal of homosexual employee, based on several reasons; proof by indications and inversion of the burden of proof; proved indications that the company was not able to refute; unproved contractual breaches; lack of proof to show that the real reasons for the dismissal were not related to a discriminatory motivation: existence of discrimination.</p> <p>Violation of the Fundamental right to equality: yes: claim admitted.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The Court upheld the appeal.</p> <ul style="list-style-type: none"> <li>- The Court acknowledged the violation of the right of the appellant not to be discriminated against because of his homosexuality (Article 14 of the Spanish Constitution).</li> <li>- The right of the appellant was protected, overruling the appealed Decision.</li> </ul> <p>The dismissal is to declare null and void. Therefore, the consequence is the obligation to reinstatement of the employee in his/her original employment position and the payment of the missing salary amounts from the dismissal to the reemployment.</p>

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

Case title	Sentencia Juzgado Núm. 33 de lo Social Comunidad de Madrid, núm. 74/2005, de 21 febrero
Decision date	21/02/2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Juzgado Núm. 33 de lo Social Comunidad de Madrid</i> [Court no. 33 of Madrid (Social jurisdiction)] Social jurisdiction Procedure no. 1142/2004 Rapporteur: Mr José Pablo Aramendi Sánchez
Key facts of the case (max. 500 chars)	Employee dismissed for negligence (inappropriate computer use during working time; the employee was admonished on many occasions for playing computer games, visiting websites or misusing e-mail). The employee demonstrated that these facts were common practice among all the employees of the company, but they were not dismissed. The employee who was homosexual was not open about his sexual orientation. Once discovered, this fact was communicated to the management of the company and it became public at his place of work.
Main reasoning/argumentation (max. 500 chars)	The Court ruled for the plaintiff arguing that: - There was an unequal sanctioning treatment (the employee was fired for the same conduct which only attracted admonishments for serious misconduct for other employees). - There should be an inversion of the burden of proof in this case, since the appellant established sufficient facts from which it might be presumed discriminatory treatment took place and the company did not provide any reasonable argument to justify appropriately why the same conduct was treated in a different way. - Even given possible negligence or inattention to his tasks, the evidence did not demonstrate a failing serious enough to justify a fair dismissal. - The employee also suffered a violation of his fundamental right to private life (protected by Article 18.1 of the Constitution): the evidence demonstrated that the individual did not make his sexual orientation, an aspect which belongs to his personal life, public at his place of work. This fact became public in the environment of the company without his consent. His line manager communicated his sexual orientation to the company manager, who made the decision to dismiss him. The employee was forced to reveal his sexual orientation (as can be seen in the text of the lawsuit), violating his intimacy when trying to protect his right to a job.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	UNFAIR DISMISSAL; discrimination and violation of fundamental rights; violation of the right to personal intimacy; discriminatory discharge; the employee's sexual orientation made public. FUNDAMENTAL RIGHTS; necessary protection; Decision; reparation of the consequences of the illegal act; compensation for moral damage.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<ul style="list-style-type: none"> <li>- Partial consideration of the lawsuit.</li> <li>- Declaration of nullity of the dismissal: discrimination on grounds of sexual orientation and violation of the employee's right to intimacy</li> <li>- It condemned the defendant: <ul style="list-style-type: none"> <li>a) to readmit the appellant to his post immediately;</li> <li>b) to pay the wages unpaid from the date of the dismissal until the individual's readmission;</li> <li>c) to pay moral damages compensation of €9,000 for the discriminatory treatment;</li> <li>d) to pay another compensation of €9,000 for the damage caused to his intimacy</li> </ul> </li> </ul> <p>The dismissal is to declare null and void. Therefore, the consequence is the obligation to reinstatement of the employee in his/her original employment position and the payment of the missing salary amounts from the dismissal to the reemployment.</p>

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

Case title	Auto núm. 222/2005 de la Audiencia Provincial de Ciudad Real (Sección 1), de 17 de octubre.
Decision date	17.10.2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Audiencia Provincial de Ciudad Real</i> [Provincial Court of Ciudad Real] Criminal jurisdiction Appeal no. 208/2005 Rapporteur: Mr José María Torres Fernández de Sevilla
Key facts of the case (max. 500 chars)	The Court did not admitted the Lesbian, Gay, Transsexual and Bisexual Group of Madrid (COGAM) as an actor in a judicial procedure for damages and threats caused to a homosexual citizen. The Court considered that the facts established by the organisation did not prove any links between the homophobic nature of the aggression and the facts investigated. COGAM appealed the decision.
Main reasoning/argumentation (max. 500 chars)	Engagement in popular action is a fundamental right. In the case of legal persons, two kinds of requirement are essential to engage in popular action: the traditional requirement of capacity and also a link between the aims of the organisation and the criminal fact that constitutes the subject of the case. In these cases, the general rule shall be as follows: to affirm that there is a link and that the judicial organ verifies that it is not possible to deny the existence of this connection. The Court established that in this case the appellant entity should be admitted as an actor because its aims have a connection with the protection of the rights and interests of homosexual, transsexual and bisexual groups, which of course implies the protection of individuals belonging to these groups with regard to incidents related to their sexual orientation .
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Requirements for the recognition for gay and lesbian associations of the right of associations to engage in judicial procedures in defence of a homosexual individual concerning damages and threats.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Court upheld the appeal lodged by COGAM. Annulment of the decision appealed: COGAM should have taken part in the process as a popular prosecutor.
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Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 4

Case title	Sentencia del Tribunal Superior de Justicia de la Comunidad de Madrid (Sala de lo Social, sección 5ª), núm. 680/2002, de 16 de julio
Decision date	16.07.2002
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Superior de Justicia de la Comunidad de Madrid</i> [High Court of Justice of Madrid] Social jurisdiction Appeal no. 552/2002 Rapporteur: Mr José Hersilio Ruiz Lanzuela
Key facts of the case (max. 500 chars)	An employee of RENFE (rail company) requested travel fare benefits (granted to spouses) for his homosexual partner since 1996 (providing the documents required under the 9 <sup>th</sup> clause of the Collective Agreement that recognises this benefit to the employees). The application was initially refused on the grounds that the individual did not have a ‘spouse’ and was not part of a ‘stable heterosexual couple’. The decision was challenged stating discrimination on grounds of sexual orientation. The Decision of 26 October 2001 of the Social Court of Justice no. 12 of Madrid granted the benefit which had been refused by the company. RENFE appeals the decision.
Main reasoning/argumentation (max. 500 chars)	The High Court came to the same conclusions as the appealed Decision: homosexual couples (in the same way as heterosexual <i>de facto</i> couples) must be included among the potential beneficiaries of the ‘kilometre card’ which allows price reductions to be enjoyed, in accordance with the Collective Agreement. The Decision is based on the following arguments: - Laws and regulations shall be interpreted according to the sense of the words, taking into account the context, the historical and legislative precedents and the current social reality, according to their spirit and purpose (Article 3 of the Civil Code). - The fundamental character of the principle of equality, which is binding for the courts when resolving litigations. - The open and tolerant character of Spanish democracy, which willingly accepts any type of cohabitation, even without formal bonds (civil or religious), including – although with some reluctance – for people of the same sex, when there is evidence of consistency and stability similar to a heterosexual relationship.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The interpretation according to the constitutional jurisprudence on the subject of non-discrimination on grounds of sexual orientation imposes that <i>de facto</i> couples also include those of the same sex (to the effect that they are entitled to the benefits which are foreseen in the Agreement for <i>de facto</i> couples).
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal was dismissed. The Court confirmed the previous Decision which agreed with the employee's claims. The defendant, the rail company RENFE, was ordered to pay the costs of the process (€300.51).

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

Case title	Sentencia del Tribunal Superior de Justicia de la Comunidad de Madrid (Sala de lo Social, sección 5ª), núm. 580/2002, de 19 de junio
Decision date	19.06.2002
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Superior de Justicia de la Comunidad de Madrid</i> [High Court of Justice of Madrid] Social jurisdiction Appeal no. 1272/2002. Rapporteur: Mr José Malpartida Morano
Key facts of the case (max. 500 chars)	An employee of RENFE (rail company) requested travel fare benefits (granted to spouses) for his homosexual partner (providing the documents required under the 9 <sup>th</sup> clause of the Collective Agreement which recognises this benefit to the employees). The application was refused by the company, which considered that the regulations did not cover such a case (a homosexual couple). After taking legal action alleging discrimination on grounds of sex, the Decision of 15.01.2002 of Social Court no. 15 of Madrid recognised the right which had been refused by the company. RENFE appealed the decision.
Main reasoning/argumentation (max. 500 chars)	The Court came to the same conclusions as the appealed Decision. Taking into account constitutional jurisprudence and the following criteria, homosexual <i>de facto</i> couples must be included in the benefits: - Laws and regulations shall be interpreted according to the sense of the words, taking into account the context, the historical and legislative precedents and the current social reality, according to their spirit and purpose (Article 3 of the Civil Code). - The fundamental character of the principle of equality, which is binding for the courts when resolving litigations. - The open and tolerant character of Spanish democracy, which willingly accepts any type of cohabitation, even without formal bonds (civil or religious), including – although with some reluctance – for people of the same sex when there is evidence of consistency and stability similar to a heterosexual relationship.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The main question in this process consisted of deciding whether the reference by the XIII Collective Agreement of RENFE to registered partnerships includes homosexual couples in that legal concept.</p> <p>The interpretation according to the constitutional jurisprudence on the subject of non-discrimination on grounds of sexual orientation determined that <i>de facto</i> couples also include those of the same sex (to the effect that they are entitled to the benefits foreseen in the Agreement for <i>de facto</i> couples).</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The appeal was dismissed.</p> <p>The Court confirmed the previous Decision which agreed with the employee's claims.</p> <p>The defendant, the rail company RENFE, was ordered to pay the costs of the process (€300.51).</p>

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC, case 1

Case title	Sentencia núm. 145/2006 del Tribunal Superior de Justicia de Cataluña (Sala de lo Contencioso-Administrativo, Sección 2ª), de 8 febrero.
Decision date	08.02.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Superior de Justicia de Cataluña</i> [High Court of Justice of Catalonia] Administrative Dispute Jurisdiction Appeal no. 90/2004 Rapporteur: Ms Fernanda Navarro de Zuloaga
Key facts of the case (max. 500 chars)	The Decision refers to the appeal by the Office of the Government Delegate in Barcelona against the Decision of 14.05.2004 of Administrative Dispute Jurisdiction Court no. 13 of Barcelona, which annulled a resolution of the Office denying a residence permit to a foreign citizen who was in a stable relationship with a Spanish national of the same sex. The Office expressed doubts about the stability of the homosexual relationship (which it deemed hardly comparable to a marriage or a heterosexual <i>de facto</i> relationship), considering that none of the circumstances foreseen in Article 41 of the Royal Decree 864/01 (concerning the granting of a temporary residence permit) concur in the case.
Main reasoning/argumentation (max. 500 chars)	Discrimination concerning the homosexual or heterosexual character of a couple is not admissible when assessing the existence of a union of a stable character according to Law 10/1998 of 15 July 1998. There was no evidence of legal fraud (the couple was questioned by the judge of the court of first instance) in the case of this relationship. Although the individual was not a 'spouse' in a legal sense, the fact of the couple's cohabitation and of their relationship could be legally recognised as a stable union. This situation, if proved, might be considered as one of the situations foreseen in Article 31(4) of Law 4/2000, as an expression of a concrete humanitarian reason, bearing in mind the difficulty of a couple maintaining a stable relationship under circumstances of 'considerable geographical separation'. Considering that Spanish society currently accepts relationships between people of the same sex, the term 'spouse' included in Royal Decree 178/2003 shall not be interpreted in a legal, but in a social sense. According to Article 46 of Royal Decree 864/2001, it should be understood that it is not necessary in the present case to obtain an entry visa to apply for a residence permit.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Permanent residence on national territory; residence visa and residence permit; requirement of visa to obtain the permit: no; special connection to the territory; stable sentimental relationship with Spanish citizen; situation similar to marriage; granting of the residence permit is reasonable.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal by the Government Office was dismissed. The Decision contains a dissenting opinion by Judge Ms Pilar Rovira del Canto. Judge Rovira understands that the term 'spouse' used by the law requires without question the existence of a matrimonial union. Considering the fact that legal marriage is not possible for homosexual couples, they shall not be assimilated to married couples (as happens in the case of other legal impediments which are not specific to homosexual couples).

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC, case 2

Case title	Sentencia del Tribunal Superior de Justicia de Navarra (Sala de lo Contencioso-Administrativo, Sección 1ª) núm. 842/2004, de 6 septiembre.
Decision date	06.09.2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Superior de Justicia de Navarra</i> [High Court of Justice of Navarra] Administrative Dispute Jurisdiction Administrative Dispute Jurisdiction appeal no. 84/2004 Rapporteur: Mr Ignacio Merino Zalba
Key facts of the case (max. 500 chars)	The Decision deals with the appeal presented by a foreign citizen whose application for a residence permit had been rejected (decision confirmed by Decision of 26 April 2004 of the Administrative Dispute Jurisdiction Court No. 3 of Pamplona). The appellant, who was in a stable relationship with a Spanish national of the same sex, insisted that the interpretation norms of Article 3(1) of the Civil Code had not been properly applied by the Court, thus disregarding the fact of the current prevailing social reality concerning the accepted assimilation of <i>de facto</i> couples and married couples.
Main reasoning/argumentation (max. 500 chars)	Statutory Regulation 864/2001 of 20 July 2001 (which develops Organic Law 4/2000, amended by Organic Law 8/2000) grants in Article 49(1)(2)(b) the exemption of visa requirements for “foreign citizens who are spouses of Spanish citizens or of legally residing foreign citizens”. It mentions ‘spouses’ but not other couples or <i>de facto</i> couples (as in the present case). The appellant requested exemption from visa requirements, in accordance with Article 17 of Organic Law 4/2000. Section 1(a) of this provision, making reference to family reunification (requested by the appellant), mentions the recognition of the right of “the resident’s spouse...”. The Court declared that this wording does not allow any distinction or interpretation. The Court did not appear to accept the interpretation of the norm in accordance with the prevailing social reality and it decided not to consider all types of <i>de facto</i> unions in the same way, alleging that the provisions concerning foreign citizens should be strictly interpreted. The Court considered that there was neither a lack of regulation nor a possibility of an analogical interpretation based on Article 4(1) of the Civil Code.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Permanent residence on national territory; visa; residence visa; exemption of the requirement; denial; origin; current norms do not even refer to <i>de facto</i> unions, but only to foreigners married to Spanish citizens or to legally resident foreign citizens.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal was dismissed. The decision confirmed Decision 52/2004 of 26 April 2004 of the Administrative Dispute Jurisdiction Court no. 3 of Pamplona. The appellant was expressly ordered to pay the cost of the proceedings.

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC, case 3

Case title	Sentencia del Juzgado nº 13 de lo Contencioso-Administrativo de Barcelona, núm. 83/2004, de 14 mayo
Decision date	14.05.2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Juzgado nº 13 de lo Contencioso-Administrativo de Barcelona</i> [Contentious-administrative Court no. 13 of Barcelona] Contentious-administrative jurisdiction Contentious-administrative appeal no. 84/2004 Rapporteur: Mr Ignacio Merino Zalba
Key facts of the case (max. 500 chars)	Appeal against the Resolution adopted by the Office of the Government Delegate in Barcelona on 26.11.2003, rejecting the application for temporary residence by a foreign citizen alleging to be in a relationship and living together (formalised by a notary) with a Spanish national residing in Barcelona. Reasons for the denial were the lack of a visa and the failure to fulfil the requirements of the law on aliens (Articles 41(3) and 46 of Royal Decree 864/2001 of 20.07.2001).
Main reasoning/argumentation (max. 500 chars)	The Decision deals with the recognition of the status of ‘spouse’ (or, at least, of ‘direct relative’) to members of homosexual couples, but only in accordance with the legal regime applicable to foreign citizens. The Court argued that, if the exceptional requirement of public order is not an obstacle to the recognition of homosexual marriages celebrated in other countries as true marriages, it cannot either be an obstacle to official stable unions, like that formed by the appellant and his partner, which has the same origin and nature. The references to the ‘spouse’ or spouses contained in the legislation on foreign citizens can be only interpreted as a sign of the will to exclude couples without special “guarantees” as those offered by the matrimonial institution to third persons and the society. This legislative purpose is not applicable <i>a priori</i> regarding stable homosexual unions regulated by law and formally constituted with a clear matrimonial purpose and subjected to a regime able to satisfy the requirements of legal security. All legitimate forms of family life shall enjoy a basic right, without which any reference to family would be senseless. This right is the right to live under the same roof (essential at least for the recognition of the basic family nucleus). This is an interpretation of Article 2 of Royal Decree 178/2003. It allows the inclusion by analogy of “partners of the same sex with a marital and stable union to Spaniards or citizens of other EU Member States with residence in Spain” in the legal concept of ‘spouse’. To this purpose, unions shall be evidenced, properly formalised (as in the

	<p>present case) and subjected to a specific legal regime (as the present case) presenting the following requirements: a) determination to create a stable couple with matrimonial and family appearance; b) subjection of both partners to a regime of rights and reciprocal obligations, sufficient to guarantee the seriousness of the union, the protection of both joint and individual interests and, at the same time, the principle of legal security.</p> <p>Under these conditions, it is necessary to conclude that the appellant shall have the right to be treated as a 'spouse' in accordance with Article 2 of Royal Decree 178/2003 (without additional consequences beyond the aspects that concern the legal treatment of foreign citizens).</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>Permanent residence in national territory; non EU relative of a Spanish citizen; stable union of homosexual couple regulated by the law and formally constituted with a clear marital purpose; exam; residence permit; reasonable: visa exemption.</p> <p>The status of 'spouse' (or, at least, of 'direct relative') is recognised to members of homosexual couples in accordance with the legal regime applicable to foreign citizens.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>Contentious-administrative appeal upheld.</p> <p>Annulment of the appealed administrative Resolution.</p> <p>Granting of the residence permit (with visa exemption).</p> <p>No procedure costs.</p>

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

Case title	Sentencia del Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 5), de 13 de diciembre de 2007
Decision date	13.12.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Supremo</i> [Supreme Court] Appeal no. 4529/2004 Rapporteur: Mr Enrique Cancer Lalanne
Key facts of the case (max. 500 chars)	<p>The appellant applied for asylum on 20.08.2001 alleging his homosexuality and arguing that “in Cuba homosexuals have neither freedom nor rights”. He also argued that he had suffered arrest and 24 hours in detention for visiting private gay parties, house searches and general harassment by Castro’s regime because of his homosexuality and that he had no possibility of obtaining employment.</p> <p>The application was submitted and the applicant attended but, in spite of the favourable report from UNHCR (The UN Refugee Agency)21.08.2001), in the end the application received no resolution from the Administration, which has the legal effect of a rejection.</p> <p>The applicant lodged a Contentious-administrative appeal against the (presumed) application rejection, providing new evidence (certificate of being excluded from military service because of his homosexuality).</p> <p>The National Court rejected the appeal (14.01.2004) with the following arguments: 1. Absence of evidence for the alleged harassment: the alleged facts are considered insufficient due to their low impact; 2. The Cuban authorities did not block his exit from the country; 3. The Court referred to case law in the same way as for other Contentious-administrative appeals lodged by Cuban citizens in similar circumstances.</p> <p>The appellant appealed against the Decision, alleging only violation of Article 3 of the Asylum Law and of Article 1-2 of the Geneva Convention.</p>
Main reasoning/argumentation (max. 500 chars)	<p>The Court upheld the appeal with the following arguments:</p> <ol style="list-style-type: none"> <li>1. The negligence of the Administration which deals with asylum applications, since there is <ul style="list-style-type: none"> <li>- an important lack of solid arguments both in the administrative file and in the court proceedings;</li> <li>- lack of reports examining the appellant’s application, both in the file and in the contentious-administrative procedure (the response to the application was written on a single sheet of paper and merely denies that the alleged facts constitute harassment).</li> </ul> </li> </ol>

	<p>2. The appellant had proved his homosexuality and exclusion from Cuban military service for this reason (facts not challenged by the Administration).</p> <p>3. These facts cannot be disregarded in the social and political context of such a dictatorial and strongly militarised regime as that in Cuba.</p> <p>4. Homosexuality is punished in Cuba as a crime (as stated by ACNUR).</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The Supreme Court considered that there was “sufficient evidence” in the present case, the only requirement for the granting of the right to asylum according to Article 8 of Law 5/1984 of 26 March which regulates the right to asylum and refugee status.</p> <p>Taking into account both the documents provided by the appellant and the facts resulting from them, the Court considered that they were, according to the nature of the case, sufficient to conclude that the appellant fulfils the requirements established in Article 3-1 of Law 5/1984.</p> <p>Despite the fact that the burden of proof falls on the asylum applicant to give evidence of harassment (to establish facts is sufficient), the Administration must provide solid reasons to justify the denial of the right.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>1. The appealed Decision was overruled.</p> <p>2. Contentious-administrative appeal no. 723/2002 was upheld.</p> <p>3. The administrative resolution which rejected the asylum application in Spain by a lack of response was annulled.</p> <p>4. The right to asylum and refugee status in Spain was granted to the appellant.</p>

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

Case title	Sentencia del Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 5), de 25 de julio de 2007
Decision date	25.07.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Supremo</i> [Supreme Court] Appeal no. 1447/2004 Rapporteur: Mr Mariano de Oro-Pulido y López.
Key facts of the case (max. 500 chars)	<p>The appeal deals with an asylum application made by a Cuban citizen who alleged harassment on the grounds of sexual orientation (discriminatory treatment, conflicts at the workplace, loss of his job and his decision not to declare his paternity of a child in an effort to prevent negative treatment of his son).</p> <p>The application was refused by resolution of the Ministry of National Affairs of 13.03.2002, on the basis of Article 5.6 of Law 5/1984: the applicant did not allege in his application any of the causes foreseen in the Geneva Convention on Refugees (1951) or Law 5/1984.</p> <p>The application for a review of the case was also rejected in spite of new evidence provided by the appellant. The Contentious-administrative appeal against the first administrative resolution (appeal no. 602/2002), examined by the <i>Audiencia Nacional</i> [National Court] in its Decision of 11.11.2003 was also rejected. The National Court argued the lack of evidence provided by the applicant and the vagueness of the imputation made on the Cuban authorities. The Court concluded that, “the logical and lawful result is the non-admission of an application founded on an objectively inappropriate reason”.</p>
Main reasoning/argumentation (max. 500 chars)	<p>The Supreme Court considered the appeal, reasoning that the potential questions which might arise from the facts in the case concerning discrimination on the ground of sexual orientation (basis of the asylum request) should not be a reason for the non-acceptance of the lawsuit, which must be accepted and thoroughly examined in a judicial procedure, ending with a decision by the court on the granting or rejection of the asylum claim.</p> <p>The Court regarded this approach as “obvious”, according to Articles 17 and 18 of Royal Decree 203/1995 (Statutory Regulation developing Law 5/1984) which demand very clear reasons for not accepting the examination of a lawsuit.</p> <p>Only at the end of the procedure, after the analysis of all the information, documents, inquiries and pertinent tests about potential harassment on the ground of sexual orientation, shall it be possible to deduce whether or not there is</p>

	<p>enough evidence in the particular case to rule on the fulfilment of the requirements established by Article 3 of the Law on Asylum.</p> <p>If there are no objective and clear reasons established by the law for not accepting the case, the applicant shall be given the chance to prove his statements in the course of the proceedings.</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The Decision clarified the question of how to apply Articles 17 and 18 of Royal Decree 203/1995 (Statutory Regulation developing Law 5/1984) with regard to the acceptance of an asylum application for consideration. The asylum application submission phase is not the appropriate procedural moment to assess whether there is enough evidence of harassment on the ground of sexual orientation alleged in the case. Following the case law doctrine, the Supreme Court established that it was “sufficient that the asylum application alleges harassment susceptible of legal protection [as in this case with regard to sexual orientation] to admit the procedure, so that the applicant has the opportunity to prove his statements”.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<ol style="list-style-type: none"> <li>1. The appeal was upheld.</li> <li>2. This appealed Decision was overruled.</li> <li>3. Both the resolution from the Ministry of National Affairs of 13.03.2002, which did not accept the asylum application and the resolution from the same Ministry of 15.03.2002, which did not accept the application for review, were declared null and void.</li> <li>4. The appellant’s right to the examination of his asylum application in a procedure in Spain was acknowledged.</li> </ol>

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

Case title	Sentencia del Tribunal Supremo (Sala de lo Contencioso-Administrativo, sección 5), de 4 de octubre de 2007
Decision date	04.10.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Supremo</i> [Supreme Court] Appeal no. 1981/2004 Rapporteur: Mr Enrique Cancer Lalanne
Key facts of the case (max. 500 chars)	<p>Refusal to accept for consideration a Russian citizen's asylum application based on harassment on the grounds of his sexual orientation (non-admission confirmed by a decision of the Ministry of National Affairs of 22.03.2002). The decision was appealed at the National Court (Third Section). The Court rejected the appeal in its Decision of 29.12.2003.</p> <p>The applicant argued that he had been at risk due to his homosexuality from the moment he was called to the Russian army (with threats to his physical and psychological integrity and to his freedom of speech). He also argued that he was a proscribed citizen (hiding from the Military Administration and the Police, avoiding the citations sent to him by the army and seeking refuge at the homes of friends).</p> <p>The Administration did not accept the application for consideration, as it argued that there was no evidence of harassment on the grounds of the individual's sexual orientation.</p> <p>The National Court, in charge of the contentious-administrative appeal, considered that the established facts referred to the applicant's fear of being discriminated against in the army because of his sexual orientation, without providing any evidence to demonstrate any existence of harassment. The applicant's obligation to "establish true facts of the harassment suffered, by means of sufficient proof or evidence of the circumstances which would justify the granting of the asylum claim" was considered to be unfulfilled.</p>
Main reasoning/argumentation (max. 500 chars)	<p>The Supreme Court recalled that the acceptance of an application for consideration only requires the allegation of harassment and that the application was not based on clearly false facts, data or allegations.</p> <p>It is "a positive requirement (description of the circumstances of harassment) together with a negative requirement (that there are no clear false facts) which opens the process".</p> <p>"The Administration – and the judges and courts – should not judge, at the admission phase, whether there are sufficient indications of the alleged persecution. If the facts alleged describe a persecution and the facts are not</p>

	<p>clearly false, the application deserves to be accepted for consideration”.</p> <p>A further consideration is that the Administration did not provide data or documents which could justify the unacceptability of the claim of persecution related to his homosexual orientation alleged by the applicant.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Decision clarified the requirements for not accepting an asylum application for consideration. The asylum application submission phase is not the suitable procedural point to assess whether there is sufficient proof of the harassment on the ground of the sexual orientation invoked in the case.</p> <p>The reasons alleged by both the Administration and the National Court to justify the non-acceptance of the application referred to the core substance of the case [the existence of harassment on the grounds of sexual orientation] which could only be assessed once the asylum application had been admitted and processed and after allowing the applicant the chance to provide evidence of the truthfulness of his story.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<ol style="list-style-type: none"> <li>1. The appeal was upheld.</li> <li>2. The Contentious-administrative appeal 605/02 lodged by the applicant must be accepted for consideration.</li> <li>3. The Decision of the Ministry of National Affairs of 22.03.2002 was declared null and void.</li> <li>4. The appellant’s right to the examination of his asylum application in a procedure in Spain was acknowledged.</li> </ol>

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

Case title	Sentencia del Tribunal Supremo (Sala de lo Contencioso-Administrativo, sección 5), de 22 de diciembre de 2006
Decision date	22.12.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Supremo</i> [Supreme Court] Appeal no. 9012/2003 Rapporteur: Mr Enrique Cancer Lalanne
Key facts of the case (max. 500 chars)	A Cuban citizen alleged discriminatory treatment and persecution in her country because of her lesbianism (in her application she alleged discriminatory treatment at school, loss of job and social discrimination). Neither the application nor the review of the application were accepted, with the argument that the applicant did not refer in her asylum application to any causes foreseen in the Geneva Convention on Refugees (1951) or Law 5/1984 as a determining factor in the recognition of the requested protection. The Contentious-administrative appeal was dismissed by the National Court in its Decision of 11.06.2003, where it argued that, “the facts established by the appellant do not allow the existence of persecution to be confirmed [...] even recognising the ‘notorious harshness of the political system of Cuba’ (Supreme Court Decision of 28.02.1989)”. According to the National Court, the fact that the applicant left her country with her passport and without any difficulty was a clear indication that persecution did not exist in the terms required to grant the asylum claim.
Main reasoning/argumentation (max. 500 chars)	The norm contained in Article 5(6)(b) of Law 5/84 allows an asylum application not to be accepted when the application does not mention any of the causes which allow the recognition of refugee status. In this case, the applicant alleged persecution on the grounds of her sexual orientation, which constitutes one of the reasons to grant asylum under Article 1.A.2 of the Geneva Convention (1951), Article 1 of the Protocol of New York (1967) and Article 3.1 of Law 5/1984). Moreover, this circumstance affected the political, educational and union field (at school she could no longer be a class representative; in the union she was persecuted by the local union secretary).

<p>\$Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Decision clarified the requirements for not accepting an asylum application for consideration. The asylum application admission phase is not the suitable procedural moment to assess whether there is sufficient proof of the harassment on the ground of the sexual orientation invoked in the case. “The vagueness of the application and the doubts concerning the existence of a persecution shall not be settled with a decision to refuse to consider the asylum application, but rather, on the contrary, they should be settled during the procedure, deciding finally if the requested asylum is to be granted”.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<ol style="list-style-type: none"> <li>1. The appeal was upheld.</li> <li>2. The previous judicial decisions were declared null and void.</li> <li>3. The previous Contentious-administrative appeal should be accepted for consideration.</li> <li>4. Both administrative resolutions were declared null and void.</li> <li>5. The appellant’s right to the examination of her asylum application in a procedure in Spain was acknowledged.</li> </ol>

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

Case title	Sentencia del Tribunal Supremo (Sala de lo Contencioso-Administrativo, sección 5), de 14 de diciembre de 2006
Decision date	14.12.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Supremo</i> [Supreme Court] Appeal no. 8638/2003 Rapporteur: Mr Pedro José Yagüe Gil
Key facts of the case (max. 500 chars)	A Cuban citizen alleged that homosexuality is treated as a crime in his country, declaring that he had suffered persecution for his sexual orientation (his company was closed down and he was forced to move to another town, suffering constant surveillance) and was also unable to obtain a job in Cuba. His asylum application was not accepted for consideration by the Spanish Administration because it did not allege any of the causes foreseen in the Geneva Convention (1951). His later revised application was not accepted either. In response to the Contentious-administrative appeal presented by the applicant, the National Court dictated a Decision (of 16.09.2003) rejecting the appeal because of the generic nature of his allegations.
Main reasoning/argumentation (max. 500 chars)	In this case, the appellant alleged persecution by reason of his sexual orientation, one of the reasons covered by the Geneva Convention (1951) and the Law of Asylum 5/1984. This is considered sufficient to accept the application for consideration (even if the facts are uncertain, because they must be justified during the procedure). It is “a positive requirement (description of the circumstances of harassment) together with a negative requirement (that there are no clear false facts) which opens the process”. “The Administration – and the judges and courts – should not judge, at the admission phase, whether there is sufficient indication of the alleged persecution. If the facts alleged describe a persecution and the facts are not clearly false, the application deserves to be accepted for consideration”.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Decision clarified the requirements for not accepting an asylum application for consideration. The asylum application admission phase is not the suitable procedural moment to assess whether there is sufficient proof of the harassment on the ground of the sexual orientation invoked in the case. The acceptance of the application for consideration only requires (1) persecution to be alleged (Article 5(6)(b) of Law 5/1984) and (2) that the application is not based on clearly false facts, data or allegations (Article 5(6)(d) of Law 5/1984).

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<ol style="list-style-type: none"><li>1. The appeal was upheld.</li><li>2. The administrative resolutions were declared null and void.</li><li>3. The appealed Decision was overruled.</li><li>4. The appellant's right to the examination of his asylum application in a procedure in Spain was acknowledged.</li></ol>
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**Chapter D, Family reunification, case law relevant to art 4/3 of the Council Directive 2003/86/EC, case 1**

Case title	<ul style="list-style-type: none"> <li>- Sentencia núm. 145/2006 del Tribunal Superior de Justicia de Cataluña (Sala de lo Contencioso-Administrativo, Sección 2ª), de 8 febrero.</li> <li>- Sentencia del Tribunal Superior de Justicia de Navarra (Sala de lo Contencioso-Administrativo, Sección 1ª) núm. 842/2004, de 6 septiembre.</li> <li>- Sentencia del Juzgado nº 13 de lo Contencioso-Administrativo de Barcelona, núm. 83/2004, de 14 mayo</li> </ul>
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	<p>See details in Chapter B          [These Judicial decisions refer to issues which relate to both Chapters B and D.]</p>
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter E, Freedom of assembly, case 1

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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## Chapter F, Hate speech, case 1

Case title	Auto Audiencia Provincial Madrid núm. 455/2006 (Sección 17), de 28 diciembre
Decision date	28.12.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Audiencia Provincial de Madrid</i> [Provincial Court of Madrid] Criminal jurisdiction Question of competence no. 19/2006 Rapporteur: Mr Jesús Fernández Entralgo
Key facts of the case (max. 500 chars)	The case refers to a question of competence between a Court in charge of the preliminary investigation and a Court specialised in gender violence. The case refers to the publication by the complainant's former boyfriend of an announcement, giving her telephone number, on an internet portal, the purpose of which is to facilitate lesbian relationships.
Main reasoning/argumentation (max. 500 chars)	The following considerations and reasoning of the Court must be considered to classify, from a legal perspective, the conduct which is the subject of the case. (Either the Penal Code or the specific measures introduced in Organic Law 1/2004 of 28 December on <i>Medidas de Protección Integral contra la Violencia de Género</i> [Measures of Integral Protection against Gender Violence] may be applied). Among other factors, the macho profile and the vengeful reaction of a man who was not able to accept the end of a relationship with a former girlfriend (trying to discredit her by presenting her openly as lesbian), shall be decisive to classify the case within the regulation framework of gender violence. With regard to the criminal punishment of expressions or actions which promote hatred towards homosexuals, the following extracts of the considerations of the judicial organ should be highlighted in particular: “Such conduct reflects a macho concept of sexuality which implies a radical homophobia; so, from such a perspective, the public imputation of lesbianism would pursue a double purpose: to produce an effect of social repulsion and to hinder the complainant's possible future relationships with other men, in the conviction that all men would abstain from undertaking even short relationships with a lesbian [...] The perpetrator of this absurdity appears to ignore the fact that homosexual relationships have been accepted without problem by a growing majority of Spanish society as a respectable option, to the point of being accepted as the basis for a marriage or

	similar relationship, with the same legal effects as traditional heterosexual marriage.”
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court highlighted the fact that such conduct reflects a macho concept of sexuality which implies a radical homophobia. The public imputation of homosexual orientation aims in such a case to produce an effect of social repulsion and to hinder the possible future relationships of the victim. This is sufficient to regard the case as a criminal case.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The competence of the Court on Gender Violence was acknowledged for the present case. The Provincial Court identified a macho profile crime in the conduct of the defendant.

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Chapter F, Hate crimes, case 1

Case title	Sentencia del Tribunal Supremo (Sala de lo Penal) núm. 1341/2002, de 17 de julio
Decision date	17.07.2002
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Supremo</i> [Supreme Court] Criminal jurisdiction Appeal no. 2494/2000 Rapporteur: Mr Joaquín Martín Canivell
Key facts of the case (max. 500 chars)	A group of teenagers (some of them under 18 years old) entered an area of gay bars. Once there, they demonstrated a provocative and scornful verbal attitude towards homosexuals. An individual asked them the reasons for their attitude. The teenagers pushed him to the floor and beat him, one of them stating his disgust and repulsion towards homosexuals as justification for their acts. The aggressors left the place and were later arrested and charged. The victim had to be hospitalised suffering lesions. Section 10 of the Provincial Court of Barcelona (Decision of 13.03.2000) condemned the aggressors as perpetrators of a crime of assault and battery, with the application of both the aggravating circumstances of abuse of superiority and discrimination on the grounds of the victim's sexual orientation and, on the other hand, the mitigating circumstance of juvenile age. The defendants appealed against the decision, alleging errors in the appreciation of the facts.
Main reasoning/argumentation (max. 500 chars)	With regard to the application of the aggravating circumstance of discrimination on grounds of the victim's sexual orientation, the Court considered that there were no errors in the appreciation of the evidence. The defendants came into an area that they knew was frequented by homosexuals. In addition, the verbal expressions used by the defendants left no doubt about their hatred towards homosexuals. In the opinion of the Court, it was unequivocal that the aggression which followed was against a person who was presumed to be homosexual and for the reason of his presumed sexual orientation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Appeal: FACTUAL ERRORS IN THE EVALUATION OF THE EVIDENCE: No. ABUSE OF SUPERIORITY: YES attack by four teenagers on a single person. RACIST, ANTI-SEMITIC GROUNDS OR ANOTHER TYPE OF DISCRIMINATION: YES the accused went to an area that they knew was frequented by homosexuals and one of them told the victim about his repulsion towards homosexuals.

	<p>INJURY: lesion affecting physical integrity or physical or mental health, requiring medical or surgical treatment:          YES: the defendant only administered the first blow to the victim, before the other defendants continued the attack together, sharing the same intention, which determines their responsibility for the result.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was rejected.          Confirmation of the appealed Decision.          The Decision condemned the appellants to pay the costs of the proceedings.</p>

Chapter F, Hate crimes, case 3

Case title	Sentencia Audiencia Provincial Cantabria núm. 19/2001 (Sección 2), de 4 octubre
Decision date	04.10.2001
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Audiencia Provincial Cantabria</i> [Provincial Court of Cantabria] Criminal jurisdiction Jury Tribunal no. 1/2001 Rapporteur: Mr Esteban Campelo Iglesias
Key facts of the case (max. 500 chars)	Surprise attack without apparent reason on someone walking in the street. The aggressor, convinced of the victim's homosexuality, kicked him, knocking him to the ground and, once he was there, beat him brutally in the head with a large plank.
Main reasoning/argumentation (max. 500 chars)	In the present case of murder the fourth aggravating circumstance of Article 22 of the Penal Code must be applied: to commit a crime because of sexual discrimination or sexual orientation discrimination. The Jury Tribunal considered as proven the fact that the appellant carried out the crime because he thought the victim was "queer and gay" (the defendant admitted that the previous day he had attacked another person in Reinosa because he was homosexual too). At the first judicial hearing he claimed he attacked the victim "because he thought that he was a queer". At the trial, although with hesitations, he admitted – or at least he did not deny – that it was the victim's homosexual orientation which motivated his aggression.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	MURDER: Circumstances: premeditation; YES Example of how to prove the concurrence of the fourth aggravating circumstance of Article 22 of the Penal Code (to commit a crime because of sexual discrimination or sexual orientation discrimination), according to the verbal testimony of the defendants. ANOMALY OR PSYCHOLOGICAL ALTERATION: mitigating circumstance; personality problem, serious family problem and abuse of addictive substances, with xenophobic and homophobic fixations.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The accused was convicted as the perpetrator of a murder, with the concurrence of the aggravating circumstance of Article 22.4 and the mitigating circumstance 6 <sup>a</sup> of Article 21 of the Penal Code (fifteen years of prison, deprivation of the ability to occupy a public position during the period of the sentence, payment of procedural costs, compensation of 15,000,000 pesetas to the deceased's heirs and 3,299,731 pesetas to the Hospital Marqués de Valdecilla.

	The minimum sentence was applied: the aggravating circumstance of discrimination based on sexual orientation was compensated by the presence of the mitigating circumstance of personality dysfunction.
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Chapter F, Hate crimes, case 4

Case title	Sentencia Audiencia Provincial Barcelona (Sección 3), de 20 junio 2000
Decision date	20.06.2000
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Audiencia Provincial Barcelona</i> [Provincial Court of Barcelona] Criminal jurisdiction Appeal no. 238/2000 Rapporteur: Mrs Ana Ingelmo Fernández
Key facts of the case (max. 500 chars)	A homosexual couple was expelled from a disco because they were kissing each other: discriminatory conduct without criminal character (since there was neither violence nor intimidation).
Main reasoning/argumentation (max. 500 chars)	There were no errors in the evaluation of the evidence: the facts were not discussed. The facts had been clear since the first report to the police. The plaintiffs presented the case because they were discriminated against on the grounds of their sexual orientation. This was the real reason which motivated their expulsion from the disco, after a discussion. These facts are socially reprehensible and they constitute discrimination based on sexual orientation which is contrary to Article 14 of the Spanish Constitution, but do not constitute a criminal offence. As stated in the Decision, there was neither violence nor intimidation, nor a violation of dignity. In the present case, the appellants' feelings of discrimination and offence were a logical reaction, since the only reason that motivated their expulsion from the disco was the fact of a kiss between two men (something that heterosexual couples were doing as well); the conduct of the security guards was discriminatory and contrary to Article 14 of the Constitution, but it did not constitute a criminal offence. Criminal law is governed by the principle of minimum intervention and that there are other means for the complainants to defend their right not to be discriminated against on grounds of their sexual orientation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	OFFENCES AGAINST PERSONS: Coercion or humiliation: NO Explanation of the necessary requirements for a criminal offence based on discriminatory treatment which violates Article 14 of the Constitution. Absence of violence or intimidation, no violation of the individual's dignity. The behaviour is discriminatory but does not have a criminal character.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal was rejected. The appealed Decision appealed was confirmed in its entirety.
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Chapter F, Hate crimes, case 5

Case title	Sentencia de la Audiencia Provincial Barcelona (Sección 6), de 14 marzo 2000
Decision date	14.03.2000
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Audiencia Provincial Barcelona</i> [Provincial Court of Barcelona] Criminal jurisdiction Appeal no. 187/2000 Rapporteur: Mr Francisco Javier Béjar García
Key facts of the case (max. 500 chars)	The minor accused, who had been threatening the victim (also a minor) for the last two years because of his sexual orientation, told the victim that he would douse him with gasoline because of his homosexuality. Then he administered several blows to the victim (injuring him) and insulted him with regard to his homosexual orientation (in this action he was accompanied by another minor).
Main reasoning/argumentation (max. 500 chars)	There was no error in the evaluation of the evidence. - The defendant's declaration expressed his distaste about the victim's homosexual orientation and this was the motivation for the aggression and all the threats; - The victim's declaration was sufficient to counteract the presumption of innocence; - Clarity of the facts, corroborated by the Judge - Declarations of the other appellants. Absence of sufficient reasons to overrule the conclusion reached by the Judge <i>a quo</i> . The Decision appealed was soundly founded.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	THREATS: Without conditions YES OFFENCES AGAINST PERSONS: Coercion or unjustified disturbance: existence Aggravating circumstance of acting on the grounds of sexual orientation in an offence of issuing threats: proved. Error in the evaluation of the evidence: NO
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal was rejected. The appealed Decision was confirmed. Perpetrator sent to a remand home and freedom under supervision.

### Chapter G, Applicability of legislation on transgender issues, case 1

Case title	STSJ Cataluña, Barcelona, núm. 142/2007, de 26 de marzo
Decision date	26 March 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Superior de Justicia de Cataluña</i> [High Court of Justice of Catalonia] Social Jurisdiction Procedure no. 104/2007 Rapporteur: Mrs Amparo Illán Teba
Key facts of the case (max. 500 chars)	<p>The plaintiff was a transsexual woman, who appeared on her identity card with a male name and sex. The plaintiff had been hired on 17 January 2007 by the company Euro-residences Management, INC, which managed homes for the elderly, for the post of Auxiliary Carer. The individual gave a female name both for the job application and for the job interview, but mentioned her transsexual condition in her curriculum vitae. After nine days in the workplace, she was informed of a managerial decision to terminate her contract, which was justified by a claim that her probationary period had been unsatisfactory. Later, the company would itself recognise the unfounded character of the dismissal.</p> <p>The plaintiff brought legal action against the company, alleging that the dismissal was void because it was based on discrimination on the grounds of her transsexual condition (violating Articles 14 of the Spanish Constitution and 17(1) of the Statute of Workers), to which the company responded that the reasons for the dismissal were the employee's lack of adaptation to the job, inappropriate treatment of patients and a conflictual relationship with colleagues.</p>
Main reasoning/argumentation (max. 500 chars)	<p>The Court considered that the plaintiff was able to establish enough facts from which a discriminatory motivation for the dismissal could be at least presumed, taking into account, among other aspects:</p> <ul style="list-style-type: none"> <li>• the short period worked (nine days);</li> <li>• the fact that she was not given the opportunity to sign a work contract during this period, when this usually takes place within three days of employment commencing;</li> <li>• the testimony of the workmates had not been sufficiently complete;</li> <li>• non-relevance of the claim of lack of experience (known and accepted by the company at the beginning of the labour relationship).</li> </ul>

	Since the legal requirements were fulfilled, the burden of proof fell to the respondent, as is the case for discriminatory dismissals. The Court considered that the company did not sufficiently prove the existence of reasons other than the discriminatory treatment.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<b>Application of the inversion of the burden of proof in proceedings related to discriminatory dismissals on grounds of gender</b> (applied to the case of a transsexual). <b>Requirement of establishing enough facts from which a discriminatory motivation</b> may be at least presumed to shift the burden of proof (enough facts had been established in this case).
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<ol style="list-style-type: none"> <li>1. Consideration of the legal action taken by Mr Oscar against Euro-residences Management, INC, the Fund of Salary Guarantee and the Public Prosecutor.</li> <li>2. The Court declared the dismissal to be unlawful. By the application of Articles 55(5) and (6) of the Statute of Workers, the dismissal was considered as being directly related to the transsexual condition of the worker, which supposed a violation of the right to equality and non-discrimination on grounds of sex of Article 14 of the Spanish Constitution and Article 17(1) of the Statute of Workers.</li> <li>3. Immediate readmission of the plaintiff to the workplace under the same conditions which governed before the dismissal and payment of the unpaid salaries from the date of the dismissal until the date of readmission to the workplace.</li> </ol>

Chapter G, Name change and/or sex change of transgender people, relevant case law, case 2

Case title	Sentencia 121/2007 de la Audiencia Provincial de Cádiz, de 15 de mayo
Decision date	15 May 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Audiencia Provincial de Cádiz</i> [Provincial Court of Cádiz] Civil jurisdiction Appeal no. 125/2007 Rapporteur: Ms Margarita Alvarez-Ossorio Benítez
Key facts of the case (max. 500 chars)	Decision of 31.07.2006 of the Court of First Instance of Puerto Real (Cádiz) refused the plaintiff's request for a declaration of gender change from woman to man and the request to change the female name Sofia to the male name Alfonso, and to a rectification of both facts in the plaintiff's birth registration in the Civil Register, ordering the cancellation of the registration and creating a new registration in the Register, to reflect the male identity of the plaintiff, so that this identity would prevail in any subsequent requests for the issuing of birth certificates. The Court considered that the surgical treatments undergone by the plaintiff were not sufficient because the requirement was not only for the suppression of secondary sexual characteristics but also of primary ones and the provision of sex organs, at least similar in their aspect, to those of the gender emotionally felt. Since the plaintiff had not undergone a hysterectomy with bilateral adnexectomy (removal of ovaries, Fallopian tubes and uterus) to suppress any reproductive option, and since the social aspect was not enough to prove the male role, the Court rejected the action. The plaintiff appealed the Court's decision, requesting its annulment and for a new Decision which accepted the requests.
Main reasoning/argumentation (max. 500 chars)	1. The Decision regarded as correct the reasoning of the Decision appealed considering its date and its coherency with the case-law criteria used by the Decision and customary at that time. 2. However, the Provincial Court highlighted the importance of the change introduced by the entry into force of Law 3/2007 of 15 March on the Rectification in the Civil Register of the Recorded Gender, which makes possible, in accordance with the standards of the Law on the Civil Registry, the rectification of the gender entry in the Civil Register, provided the requirements established by the Law are fulfilled. Specifically, its Article 4(2) removes to this effect the requirement that the medical treatment must include gender reassignment surgery. The choice of the new name was in accordance with the Law (Article 2(1)).

	<p>In the opinion of the Court, the case must be solved by applying the new Law, which is less rigorous in its requirements than the preceding jurisprudence.</p> <p>Since the requirements demanded by the new Law (the plaintiff had been treated and operated on for several years; she was waiting for a sex change operation; there was a clinical report on her transgender condition from woman to man; she did not present any personality disorders) were considered proven in this case, the application should be granted.</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>To rectify the gender from woman to man and to change the name it is not necessary for medical treatment to include a gender reassignment surgery.</p> <p>Accomplishment of the requirements to rectify the register entry for gender according to Law 3/2007 of 15 March.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>Partial acceptance of the appeal.</p> <p>Annulment of Decision of 31 July 2006 of the <i>Juzgado de Primera Instancia e Instrucción</i> [Court of First Instance] number 1 of Puerto Real, in procedure no. 425/05.</p> <p>Declaration on the rectification of the gender of the appellant from woman to man, consent for the change of name from Sofía to Alfonso, and order that these declarations shall be registered in the margin of the birth registration of the plaintiff in the Civil Register, in conformity with the Law on the Civil Registry and its Statutory Regulation, with all the legal effects that the change implies.</p>

Chapter G, Name change and/or sex change of transgender people, relevant case law, case 3

Case title	Sentencia del Tribunal Supremo n. 929/2007 (Sala de lo Civil, Sección Pleno), de 17 de septiembre.
Decision date	17 September 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Tribunal Supremo</i> [Supreme Court] Civil jurisdiction Appeal no. 1506/2003. Rapporteur: Mr Vicente Luis Montes Penades
Key facts of the case (max. 500 chars)	In the present case, the appellant stated his wish to change his male name for a female one, in accordance with the sex he really felt to be his own (he argued that he had identified himself as a girl from the age of seven or eight; he had suffered rejection from the other children; childhood in solitude; social rejection which increased in adolescence; at 12 years old started to think about a sex-change intervention, decided to assume a feminine identity completely at 28). Once he had made the decision that he wished to be treated as a woman, he chose the name 'O.C.F.', abandoning the name entered in the Register. She took legal action in order to be able to develop her work with respect and dignity and to have her gender identity respected. The case was based on an application for changes to the entries for sex and name, which was made prior to Law 3/2007 of 15 March and which had been refused successively by two different Courts (Decision of 03.09.2001 of the Court of First Instance no. 1 of Sant Feliu de Llobregat and Decision of 07.04.2003 of the Provincial Audience of Barcelona (First Section), both also dictated before the Law 3/2007 of 15 March on the Rectification of the mentions of the Gender in Registries, entered into force. Both Judicial decisions argued that no gender reassignment surgery had taken place, which was regarded as a necessary requirement, according to Spanish jurisprudence and European Court of Human Rights Jurisprudence, until the entry into force of the above-mentioned Law.
Main reasoning/argumentation (max. 500 chars)	After analysing in detail (in its second and third paragraphs) the positions of the preceding jurisprudence, which demanded surgical intervention to justify change of gender and name in the Register (jurisprudence of the Supreme Court and of the European Court of Human Rights; references to national, community and compared Law), the Supreme Court showed how this prevailing conception for the recognition of the sex change – though mainly based on psychological and social elements – was still anchored in a somatic criteria, the surgery of sex reassignment, seems to lose weight in the context of the most recent social and legal changes.

	<p>Accordingly, we can highlight the following arguments of the Supreme Court:</p> <ul style="list-style-type: none"> <li>- Although a violation of the fundamental rights to intimacy and to control the use of one's own image (Articles 18(1) and 10(1) of the Constitution) shall not be automatically deduced from the imposition of the surgical intervention as an obligatory requirement, it is necessary (specially in the light of the recent Law 3/2007) to apply the principle of freedom of personal development to the right to control the use of one's own image, allowing its normal development in a context of privacy, without invasion or interference.</li> <li>- Under Law 3/2007 of 15 March, transsexuals shall be entitled (once the sex change has been accomplished in accordance with the requirements that the Law establishes, and following the established process) to change their entries for sex and name without requiring surgical treatment (<i>condicio sine qua non</i> of the change in accordance with the jurisprudence prior to Law 3/2007).</li> <li>- With regard to cases started in the past but still in process: it is not a question of the validity or effectiveness of a certain act or behaviour. The essence is the exercise of a right whose viability was impeded by an obstacle that the new Law has removed (application of the first Transitory Provision of the Civil Code). The right created <i>ex novo</i> as a consequence of the legislative change (right to modify gender due to sex change, but without reassignment surgery), once requested from the Courts (according to the old jurisprudence), is now obtainable through a governmental decision.</li> </ul>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>Sex; 'dysphoria'; possibility for those who suffer from it to form their sexual identity according to their feelings and convictions; protection of the freedom of personal development without external interference; change of sex and name; upheld; absence of surgical sexual reassignment intervention shall not be a legal obstacle; the psycho-social factors shall prevail over phenotypical or chromosomal ones for the purposes of sex determination; application formulated in ordinary judicial procedure before the entry into force of Law 3/2007; now the law constitutes a possibility to decide thereon in the process without need to commence the governmental procedure established by the Law; application to the case of the common or general transitory provisions of the Civil Code. Fundamental rights; right to intimacy and to control the use of one's own image; consideration of their impact on the sex change for those who suffer gender dysphoria.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<ol style="list-style-type: none"> <li>1. The Supreme Court upheld the appeal.</li> <li>2. Annulment of the appealed Decision.</li> <li>3. The name and sex rectification requested by the party proceeded: the appellant acquired the new name (O.C.F.) and female sex recognition, proceeding to its recording in the Civil Register rectifying the previous entry.</li> </ol>

Chapter I, Case law relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation, case 1

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

## Annex 2 – Statistics

NOTE: It is necessary to consult the explanations in the report to interpret the statistics.

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

	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)					Employment: 1 Joint adoption of children: 1		Registration of homosexual marriage: 1 Inheritance tax 1	
Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)					Discrimination in the workplace: 13	Discrimination in the workplace: 28	Discrimination in the workplace: 12	
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								

**Chapter B, Freedom of movement of LGBT partners**

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

**Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation**

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

**Chapter C, Asylum and subsidiary protection, protection of LGBT partners**

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

**Chapter D, LGBT partners benefiting family reunification**

	2000	2001	2002	2003	2004	2005	2006	2007

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

**Chapter E, LGBT people enjoyment of freedom of assembly**

	2000	2001	2002	2003	2004	2005	2006	2007
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc								
Number of demonstrations against tolerance of LGBT people.					Illegal demonstrations (general): 4	Illegal demonstrations (general): 2	Illegal demonstrations (general): 35	

**Chapter F, Homophobic hate speech**

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions)					Discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: 7	Discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: 26	Discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: 27	

					Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations: 13	Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations: 30	Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations: 50	
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)								
Range of sanctions issued for homophobic hate speech								
Number of non-criminal court cases initiated for homophobic statements								
Number of non-criminal court cases initiated for homophobic statements which were successfully completed (leading to a decision in favour of the plaintiff, even if no sanctions other than symbolic were imposed)								

**Chapter F, Homophobic motivation of crimes as aggravating factor**

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing								

**Chapter G, Transgender issues**

		2000	2001	2002	2003	2004	2005	2006	2007
Number of name changes effected due to change of gender	Period 2000-2007: 20								
Number of persons who changed their gender/sex in your country under the applicable legislation	Period 2000-2007: 14								
Number of persons who changed their gender/sex in your country under the applicable legislation	Gender reassignment operations in the Autonomous Community of Andalusia	9	14	31	32	26	28	24	

**Chapter I, Statistics relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation [presentation according to the templates above]**

Number of persons who changed their gender/sex in your country under the applicable legislation