

## THE LEGAL TREATMENT OF HOMOSEXUALS IN THE ARMED FORCES OF EUROPE

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1. Prior to the year 2000, European countries implemented a discriminatory policy towards the inclusion of homosexual men and women in the armed forces.
2. The discrimination manifested itself in different forms. Thus, while the United Kingdom banned homosexual men and women from serving in the military, the German policy was not dissimilar to the American 'don't ask – don't tell' policy: homosexual service men (women were not admitted to the armed forces at the time) were not banned from the military, but disclosure of their sexual orientation would result in categorizing them as unsuitable for certain tasks.
3. The policy banning homosexuals from the military in European countries was, in some cases, backed up by explicit legislation or regulation but in some countries was a matter of military code or practice. In all instances, the policy was accepted by domestic courts on the few judicial challenges that were launched, prior to the decision of European Court of Human Rights in *Lustig-Prean v. the United Kingdom* and *Smith and Grady v. the United Kingdom* [hereafter: *Smith*].
4. The Court in *Smith* ruled against the British policy of banning homosexual men and women from service, declaring it a violation of the right to private life and, by implication - the right to equality, both fundamental rights protected under the European Convention of Human Rights.
5. The Court stated that a military policy that permits homosexuals to serve as long as they remain silent about their sexual orientation violates the right of individual to a private life. It added that the evidence offered by the U.K. government did not justify an assessment that the inclusion of homosexuals in the forces would damage morale and fighting power.
6. The Court noted that some difficulties could be anticipated as a result of any change to the long-standing policy of excluding homosexuals from the military, but negative attitudes and stereotypes are not a sufficient reason to justify discrimination.
7. In response to *Smith*, all European countries were quick to formulate a new policy that lifted the ban from homosexuals serving in the military. Most countries, such as the United Kingdom and Germany, drafted new regulations that included protection from discrimination on the basis of sexual orientation.
8. Consequently, the United States is now the only country in the Western world that enforces a policy of discharging military service personnel because of their sexual orientation.

## COMPARATIVE JURISPRUDENCE FROM THE EUROPEAN COURT OF HUMAN RIGHTS

### 1. Introduction

The European Court of Human Rights (ECHR) is, like the United States Supreme Court, a court of last resort, with jurisdiction over 45 countries representing about 800 million people. It is authorised to hear human rights complaints from individuals based on the European Convention of Human Rights, and to issue judgments that are legally binding on European governments.

Over the past 30 years, the ECHR has built up a significant body of jurisprudence dealing with claims by homosexual and lesbian individuals, and has also directly addressed the issue of a military policy of discharging homosexual and lesbian service members.

### 2. Differences and Similarities Between the ECHR and the US Supreme Court

Article 8 of the European Convention on Human Rights establishes a general right of privacy, and lays down specific factors which may justify a limitation of that right:

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

In contrast, there is no explicit general right of privacy in the US Constitution, although such a right has been discerned ‘in the penumbras of constitutional provisions’.<sup>1</sup> The right to liberty under the Due Process Clause of the Fourteenth Amendment has also been held to protect interests that amount to a right to privacy.<sup>2</sup>

The ECHR endorses a theory of dynamic interpretation of the European Convention on Human Rights, which views the Convention as ‘a living instrument which ... must be interpreted in light of present-day conditions’.<sup>3</sup> The Court does not, therefore, refer to the original intent of the framers of the Convention. Thus, basing its judgement in part on its view that there was now a general consensus in Europe against criminal prohibitions on sodomy, the Court held that criminal prohibitions on sodomy breached Article 8.<sup>4</sup>

Both the ECHR and the Supreme Court balance the individual’s interest against the interest of the state, but this balancing is done in different ways and at different stages of the analysis. Balancing by the ECHR is explicit, and infuses the entire consideration of a claim under Article 8 after the initial test of whether the infringement is ‘according to a law’. This balancing includes a consideration of whether the challenged interference with an

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<sup>1</sup> *Eisenstadt v Baird* 405 US 438 (1972).

<sup>2</sup> *Lawrence v Texas* (26 June 2003); *Griswold v Connecticut* 381 US 438 (1965).

<sup>3</sup> *Tyrer v United Kingdom* (1978) 2 EHRR 1; see also *Marckx v Belgium* (1979) 2 EHRR 330.

<sup>4</sup> *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

individual's right is 'proportionate to the social need claimed for it'.<sup>5</sup> The ECHR has recognized, as has the US Supreme Court, that different rights and contexts demand judicial scrutiny of differing intensity.<sup>6</sup> In *Dudgeon* it was stressed that because the law inhibited the applicant from enjoying 'a most intimate aspect of private life', the Court required particularly serious reasons to be shown before it would accept that this interference was necessary. Similarly, the UK courts, in interpreting Articles 8 and 14, have insisted on a high standard of justification.

Much like the Supreme Court, the ECHR endorses a theory of judicial restraint. The ECHR respects a 'margin of appreciation' in which the international supervision of the ECHR gives way to governments' discretion in enacting or enforcing their laws.<sup>7</sup> This margin of appreciation is both an interpretive obligation to respect domestic cultural traditions and values when considering the scope and meaning of human rights, and a standard of judicial review used when enforcing human rights protections.<sup>8</sup> It has been applied to cases concerning the right to privacy.<sup>9</sup> However, even when it applies the margin of appreciation, it requires the restriction to be proportionate to the legitimate aim pursued, and in *Dudgeon*, for example, despite applying the margin of appreciation, it did not find that there was relationship of proportionality between the restriction and the State interest.

As shown by Article 8(2), the ECHR also shares with the Supreme Court the view that a government may interfere with the privacy interests of an individual to protect the morals of its constituents.

The US Supreme Court has recently held that ECHR jurisprudence can elucidate 'values we share with a wider civilization'.<sup>10</sup> Where the ECHR addresses a question very similar to that being put before the US Supreme Court, the reasoning of the ECHR may also be of interest. Having recognized this right to choose to enter upon relationships and retain their dignity, the US Supreme Court is ready to follow the European Court of Human Rights in recognizing the right of homosexuals to the same dignity in their working lives and relationships with others, including their rights to belong to the military without having to conceal their identity.

### 3. Privacy Challenge to 'Don't Ask, Don't Tell'

In a series of cases, the ECHR declared that discharging homosexuals and lesbians from the military forces because of their sexuality violated the right to a private life in Article 8 of the Convention. The cases were *Lustig-Prean and Becket v UK*,<sup>11</sup> *Smith and Grady v UK*,<sup>12</sup> *Perkins and R v UK*<sup>13</sup> and *Beck, Copp and Bazeley v UK*.<sup>14</sup> In all cases the applicants had good service

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<sup>5</sup> *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

<sup>6</sup> *ibid*, para 52.

<sup>7</sup> *Handyside v United Kingdom* (1976) 1 EHRR 737.

<sup>8</sup> R Clayton, H Tomlinson *The Law of Human Rights* (OUP, Oxford, vol 1, 2000).

<sup>9</sup> *Rees v United Kingdom* (1986) 9 EHRR 56; *Leander v Switzerland* (1987) 9 EHRR 433.

<sup>10</sup> *Lawrence v Texas* (n 2) (Kennedy J).

<sup>11</sup> (1999) 29 EHRR 548 [hereinafter *Lustig-Prean*].

<sup>12</sup> (1999) 29 EHRR 493 [hereinafter *Smith*].

<sup>13</sup> Applications 43208/98 and 44875/98 (22 October 2002).

<sup>14</sup> Applications 48355/99, 48356/99 and 44357/99 (22 October 2002).

records in the military forces but were discharged after the military authorities conducted investigations confirming that the applicants were homosexuals.

The main reasoning of the ECHR took place in *Lustig-Prean* and *Smith*, which were heard together. Although the judgments are separate, and the facts set out in each refer to the specific applications, the discussion of the arguments and the substantive decisions are exactly the same, with only paragraph numbering differing.

The applicants complained that the investigations into their homosexuality and their subsequent discharge from the services on the sole ground that they were homosexual, in pursuance of the Ministry of Defense's policy banning homosexuals in the British armed forces, constituted a violation of their right to respect for their private lives protected by Article 8 of the Convention. The Government accepted that there had been interferences with the applicants' right to respect for their private lives (*Lustig-Prean* para 63; *Smith* para 70), but sought to justify that interference under Article 8(2). It did not attempt to claim that the applicants waived their rights under Article 8 when they joined the armed forces.

*Lustig-Prean* and *Smith* stand for the following propositions:

- (a) Both the investigations into the applicants' homosexuality and their consequent administrative discharge on the sole ground of their sexual orientation constituted an interference with their right to respect for their private lives (*Lustig-Prean* para 64; *Smith* para 71). Even a military policy that permits homosexuals to serve as long as they remain silent about their sexual orientation would therefore violate that right.
- (b) It is a legitimate aim for the Government to pursue 'the interests of national security' and 'the prevention of disorder' through a policy designed to maintain the morale of service personnel (*Lustig-Prean* para 67; *Smith* para 74). A margin of appreciation must be allowed to the State to organise its own system of military discipline, and it is open to the State to impose restrictions on an individual's right to respect for his private life where there is a real threat to the armed forces' operational effectiveness (*Lustig-Prean* para 82; *Smith* para 89).
- (c) The measures taken to achieve this aim will be considered 'necessary in a democratic society' if they answer a pressing social need and, in particular, are proportionate to the legitimate aim pursued. The hallmarks of a 'democratic society' include pluralism, tolerance and broadmindedness. (*Lustig-Prean* para 80; *Smith* para 87).
- (d) When the relevant restrictions concern 'a most intimate part of an individual's private life', there must exist 'particularly serious reasons' before such interferences can satisfy the requirements of Article 8 (*Lustig-Prean* para 82; *Smith* para 89).
- (e) The argument that the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces is not persuasive if it is founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation (*Lustig-Prean* para 89; *Smith* para 96) and assertions as to a risk to operational effectiveness are not 'substantiated by specific examples' (*Lustig-Prean* para 82; *Smith* para 89).

- (f) Some difficulties could be anticipated as a result of any change to the long-standing policy of excluding homosexuals from the military. Nevertheless, a strict code of conduct applicable to all personnel would address any potential difficulties caused by negative attitudes of heterosexuals (*Lustig-Prean* para 94; *Smith* para 101). This is in line with the approach already adopted by the armed forces to deal with racial discrimination and with racial and sexual harassment and bullying. Even if it can be assumed that the integration of homosexuals would give rise to problems not encountered with the integration of women or racial minorities, the codes and rules that have been found to be effective in the latter case could plausibly prove equally effective in the former. (*Lustig-Prean* para 95; *Smith* para 102).

It should be noted that the ECHR dealt with and dismissed a series of arguments by the UK Government very similar to those tendered by the US government justifying the exclusion of practicing homosexuals from the military in *Able v US*.<sup>15</sup> These are:

1. National security depends on fighting capability, which in turn depends in large part on morale and unit cohesion. Homosexual conduct threatens that morale and cohesion (argued *Lustig-Prean* paras 43-47, 88, *Smith* paras 50-54, 95; rejected *Lustig-Prean* paras 89-92, *Smith* paras 96-99).
2. A code of conduct that applied to homosexuals and heterosexuals equally would not be sufficient to eliminate the threat to fighting power, because the presence of homosexuals is disruptive to non-homosexuals (argued *Lustig-Prean* para 71, *Smith* para 77; rejected *Lustig-Prean* paras 94-95, *Smith* para 77).
3. Due to the unique mission of the military and the lack of expertise on these matters outside the military, a significant level of judicial deference to the military is justified (argued *Lustig-Prean* para 79, *Smith* para 77; rejected *Lustig-Prean* para 79, *Smith* para 77).

The Court highlighted three aspects of the policy relevant to its determination:

1. The investigation process was of an exceptionally intrusive character.
2. The administrative discharge of the applicants had a profound effect on their careers and prospects.
3. The absolute and general character of the policy that led to the interferences in question is striking. The policy results in an immediate discharge from the armed forces once an individual's homosexuality is established and irrespective of the individual's conduct or service record.

The 'essential justification offered by the Government for the policy and for the consequent investigations and discharges' was that the maintenance of the morale of service personnel and, consequently, the fighting power and the operational effectiveness of the armed forces depended on excluding open or suspected homosexuals (*Lustig-Prean* para 67; *Smith* para 74). This argument was supported by a report produced by the Homosexuality Policy Assessment Team (HPAT), which was established by the Ministry of Defence in order to undertake an internal assessment of the armed forces' policy on homosexuality. The HPAT

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<sup>15</sup> 880 F. Supp 968 (EDNY 1995), rev'd, 88 F.3d 1280 (2d Cir 1996), remanded, 968 F. Supp 850 (EDNY 1997), rev'd, 155 F.3d 628 (2d Cir 1998).

was composed of Ministry of Defence civil servants and representatives of the three services. The ECHR held that the ‘independence of the assessment contained in the report is open to question given that it was completed by Ministry of Defence civil servants and service personnel’ (*Lustig-Prean* para 88; *Smith* para 95). Furthermore, it considered that the HPAT assessment did not, whatever its value, provide evidence of damage to morale and fighting power that any change in the policy against homosexuals would entail (*Lustig-Prean* para 92; *Smith* para 99).

This is a significant difference between the reasoning of the ECHR and the US Supreme Court. The British Government’s argument and the HPAT assessment are virtually identical to the argument that the United States Government made in defending ‘Don’t Ask, Don’t Tell’.<sup>16</sup> But the ECHR looked to the lack of facts substantiating the Government’s claim, exposing that the justification for the argument was the prejudice expressed by heterosexual service personnel. The ECHR realised that the central question to be addressed amounted to an assessment of whether the negative attitudes towards homosexual servicemen ‘constitute sufficient justification for the interferences at issue’ (*Lustig-Prean* para 90; *Smith* para 97). On this issue the Court held:

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

It should be noted that the Supreme Court has itself held that restrictions based on societal prejudice cannot withstand a rational basis review.<sup>17</sup>

*Perkins and R v United Kingdom* (supra), *Beck, Copp and Bazeley v United Kingdom* (supra) and *Brown v United Kingdom*<sup>18</sup> all confirm *Lustig-Prean* and *Smith*.

#### 4. Equality Challenge to ‘Don’t Ask, Don’t Tell’

Article 14 of the European Convention of Human Rights states:

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

In *Lustig-Prean* and *Smith*, the applicants also invoked Article 14 in conjunction with Article 8 (*Lustig-Prean* para 106ff; *Smith* para 113ff). Both cases held that the complaints of discrimination on grounds of sexual orientation amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article

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<sup>16</sup> *Able v US* – *ibid*; *Thomasson v Perry* 80 F.3d 915, 929 (4th Cir. 1996).

<sup>17</sup> *Palmore v Sidoti* 466 US 429 (1984) and *City of Cleburne v Cleburne Living Center* 473 US 432 (1985).

<sup>18</sup> Application 52770/99 (29 July 2003).

8, and therefore that the Article 14 complaint did not give rise to a new issue and was disposed of by the judgment relating to Article 8.

Nevertheless, other cases addressing homosexuality have considered Article 14. In *Sutherland v UK*, the applicant successfully argued before the Commission that UK legislation which fixed the minimum age of consent for homosexual conduct by men at the age of 18 rather than at the age of 16 which was the age of consent applicable to a woman constituted a violation of Article 8 when read with Article 14.<sup>19</sup> In *Salgueiro Da Silva Mouta v Portugal*,<sup>20</sup> the ECHR established that discrimination based on sexual orientation is a type of discrimination based on status, and therefore falls under Article 14.

In *Da Silva Mouta* the ECHR found that the authorities denied a father custody of his child solely because of his homosexuality, despite evidence that he was in a better position than his former wife to support the child financially and emotionally. The ECHR held that the different treatment afforded the father and the mother 'was based on [the father's] sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention' (para 28).

*Karner v Austria*<sup>21</sup> reiterated that discrimination based on sexual orientation is a type of discrimination based on status, and therefore falls under Article 14 (paras 36-41). The ECHR held that Karner's right to respect for his home had been adversely affected by the exclusion of same-sex partners from the ambit of the Rent Act, and therefore considered a claim under Article 14 that 'he had been the victim of discrimination on the ground of his sexual orientation'. The Court commented: 'Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification' (para 37). The Court added that, in a case dealing with 'a difference in treatment based on sex or sexual orientation', 'the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of application of Section 14 of the Rent Act in order to achieve that aim' (para 41). The Court found that the Government had not 'advanced any arguments that would allow of such a conclusion'. Article 14, in conjunction with Article 8, was therefore judged to have been violated because of discrimination based on sexual orientation.

## Conclusion

Following the judgments in *Lustig-Prean* and *Smith*, the former policy of the British Ministry of Defence was abandoned and homosexuals have been allowed to serve in the United Kingdom armed forces as from 12 January 2000.<sup>22</sup> The United States is now the only country in the Western world that enforces a policy of discharging military service personnel because of their sexual orientation.

Although the European Convention on Human Rights differs substantially from the US Constitution, and the ECHR applies a different methodology from the US Supreme Court, the decisions in *Lustig-Prean* and *Smith* demonstrate that even when a wide margin of

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<sup>19</sup> App. 25186/94 (27 March 2001)

<sup>20</sup> Application 333290/96 (21 December 1999) [2001] Fam LR 2.

<sup>21</sup> Application 40016/98 (24 July 2003)

<sup>22</sup> See *Brown v United Kingdom* (n 18).

appreciation is afforded to a state on the basis of national security, a military policy that leads to the investigation and dismissal of servicemen and women merely because they are homosexual cannot be justified on the grounds of military necessity, nor can it be tolerated in a democratic society.



## THE LEGAL TREATMENT OF HOMOSEXUALS IN THE UK ARMED FORCES

### 1. The employment of homosexual persons in the armed forces

#### 1.1 Background Information

Despite the fact that the United Kingdom Sexual Offences Act 1967 decriminalized private homosexual acts between consenting adults, an exemption was included at the time so that male service members could still be convicted for consensual homosexual sex. The next development took place in 1994, when section 146(4) of the Criminal Justice Act provided that armed forces personnel could no longer be criminally prosecuted and court-martialed under military law for their homosexuality. The provision stated, however, that homosexual soldiers could still be administratively discharged as committing ‘disgraceful conduct of an indecent kind’ or ‘conduct prejudicial to good order and discipline’.<sup>23</sup> The Armed Forces’s Guidelines on Homosexuality, distributed at the time to service personnel, stated:

Homosexuality, whether male or female, is considered incompatible with service in the armed forces... If individuals admit to being homosexual whilst serving and their Commanding Officer judges that this admission is well-founded they will be required to leave the services... Even if a potential recruit admits to being homosexual, but states that he/she does not at present nor in the future intend to engage in homosexual activity, he/she will not be enlisted.<sup>24</sup>

In September 1995, a Homosexual Policy Assessment Team (‘HPAT’) was commissioned to conduct a report into attitudes towards homosexuals within the armed forces. The HPAT report concluded that lifting the ban on homosexual soldiers would be ‘an affront to Service people’ and would harm efficiency. After debating the report, the House of Commons voted to maintain a ban against homosexuals in the armed forces on 9 May 1996.

In May 1997, the new Labour government in the UK announced that it would review the policy.<sup>25</sup> Before any such review was finalised, the issue was brought to the fore by two judgments of the ECHR. On 27 September 1999, the ECHR issued two rulings against the Ministry of Defence in relation to four ex-Service personnel each of whom had been dismissed from the Armed Forces because of his or her homosexuality.<sup>26</sup> The Court unanimously found that the investigations into the private lives of the individuals and the subsequent dismissal of each person contravened Article 8 of the Convention, which concerns the right to respect for family and private life.<sup>27</sup>

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<sup>23</sup> A Belkin, RL Evans ‘The Effects of Including Gay and Lesbian Soldiers in the British Armed Forces: Appraising the Evidence’ (Center for the Study of Sexual Minorities in the Military, University of California, Nov 2000) 11.

<sup>24</sup> Ministry of Defense ‘Armed Forces Policy and Guidelines on Homosexuality’ pg 1-2.

<sup>25</sup> Right Hon Geoff Hoon MP, Secretary of State for Defence. *Hansard, HC Debates*, 12 January 2000, columns 287-88.

<sup>26</sup> *Lustig-Prean and Becket v United Kingdom* (1999) 29 EHRR 548; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

<sup>27</sup> Article 8: ‘Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others’.

The government accepted the findings of the ECHR. On 30 September 1999, the Ministry of Defence announced a review of existing policy, announcing that it was vital that in undertaking the review, ‘the revised policy complies with the legal aspects of the ECHR ruling, is non-discriminatory (i.e. takes no account of sexual orientation), so far as is possible preserves operational effectiveness, meets service needs while, at the same time, protecting the rights of the individual under the HRA’.<sup>28</sup>

It should be noted that, in assessing the adequacy of various existing models in other armed forces, the American ‘Don’t Ask, Don’t Tell’ policy was considered ‘as something which hadn’t worked, which was unworkable and hypocritical’.<sup>29</sup>

## 1.2 Current position

On 12 January 2000, the government announced that the ban on homosexuals in the Armed Forces was ‘not legally sustainable’. The ban was lifted and replaced with a policy that recognises ‘sexual orientation as essentially a private matter for the individual’.<sup>30</sup>

At the same time, the government introduced the Armed Forces Code of Social Conduct to regulate personal behaviour of Services personnel. According to the Minister of Defence, ‘[a]s all personal behaviour will be regulated by the Code of Conduct with the object of maintaining the operational effectiveness of the three Services, there is no longer a reason to deny homosexuals the opportunity of a career in the Armed Forces’.<sup>31</sup>

## 1.3 The Armed Forces Code of Social Conduct

The Code of Social Conduct (‘the Code’) covers ‘personal relationships involving Service personnel’. It applies to ‘all members of the Armed Forces, regardless of their gender, sexual orientation, rank or status’ and applies to members of the Regular and Reserve forces’.<sup>32</sup> The Code provides for action in the case of ‘social misbehaviour’. It states that the ‘overriding operational imperative to sustain team cohesion and to maintain trust and loyalty between commanders and those they command imposes a need for standards of social behaviour which are more demanding than those required by society at large’.<sup>33</sup>

Each case of ‘social misbehaviour’ is dealt with on an individual basis depending upon its seriousness and the ‘potential for adversely affecting operational effectiveness’.<sup>34</sup> In considering whether a case of social misconduct has occurred and in considering whether the Service has a duty to intervene, a Commanding Officer must apply the ‘Service Test’: ‘Have the actions or behaviour of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service?’<sup>35</sup>

Though Code does not provide an exhaustive list of acts of social misbehaviour, it does list examples of behaviour which may undermine ‘trust and cohesion, and therefore damage the

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<sup>28</sup> Right Hon Geoff Hoon MP. *Hansard, HC Debates*, columns 287-88.

<sup>29</sup> M. Codner of the Royal United Institute, cited in Belkin, Evans (n 23) 25.

<sup>30</sup> Right Hon Geoff Hoon MP. *Hansard, HC Debates*, columns 287-88.

<sup>31</sup> *ibid.*

<sup>32</sup> Ministry of Defense ‘Armed Forces Code of Social Conduct: Policy Statement’ para 1. [<http://www.mod.uk/issues/homosexuality/code.htm>]. Accessed on 12/09/03.

<sup>33</sup> *ibid.*, para 2.

<sup>34</sup> *ibid.*, para 3.

<sup>35</sup> *ibid.*, para 5.

morale or discipline of a unit (and hence its operational effectiveness). In particular, emphasis is placed on various forms of ‘unwelcome sexual attention in the form of physical or verbal conduct’ and ‘displays of affection which might cause offence to others’,<sup>36</sup> thus complementing other policies such as zero tolerance towards harassment, discrimination and bullying.<sup>37</sup>

While the Code does not explicitly state that homosexuals will not be discriminated against in the workforce, the grounds of non-discrimination listed in the policy on Equal Opportunities in the Armed Forces now includes reference to sexual orientation.<sup>38</sup>

## **2. Discrimination on the basis of sexual orientation while employed in the armed forces: statutory and case law**

There continues to be a lack of formal legal protection against discrimination on the basis of sexual orientation in the workplace in the United Kingdom. This lack of protection extends to the situation of homosexual employees in the armed forces. However, this situation should be rectified to a significant extent when the *Employment Equality (Sexual Orientation) Regulations 2003*<sup>39</sup> come into force on 1 December 2003.

### **2.1 The Human Rights Act 1998**

The HRA allows for the application of the rights contained in the European Convention of Human Rights, and the First and Sixth Protocols, to the domestic legal setting.<sup>40</sup>

Section 6 of the HRA provides that it is unlawful for a public authority to act in any way that is incompatible with a Convention right. Section 7 states that the victim of such a breach to bring a claim against the public authority in question. However, the Convention rights, attached to the HRA at Schedule 1, do not explicitly prohibit discrimination in the workplace on the basis of sexual orientation.

Despite this, the ECHR’s findings in *Lustig-Prean*<sup>41</sup> and *Smith and Grady*<sup>42</sup> indicate that any ban on the employment of homosexual persons in the UK armed forces would amount to a breach of the right to private life as protected by Article 8 of the Convention.

Section 2 of the HRA requires that a domestic court or tribunal determining a question that has arisen in connection with a Convention right must take into account, *inter alia*, any judgment of the ECHR. In addition, Section 3 requires that primary legislation be read and given effect in a way that is compatible with the Convention rights.

This development is already manifested in UK case law interpreting Articles 8 and 14. In *Fitzpatrick v Sterling Housing Association Ltd*<sup>43</sup> the House of Lords held that a person who had been in a same-sex relationship with a deceased tenant could qualify as a member of the

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<sup>36</sup> *Armed Forces Code of Social Conduct: Policy Statement*, paragraph 2.

<sup>37</sup> Right Hon Geoff Hoon MP. *Hansard, HC Debates*, columns 287-88.

<sup>38</sup> *Equal Opportunities In the Armed Forces: Corporate Principles*.

[[http://www.mod.uk/issues/equal\\_opportunities/principles.htm](http://www.mod.uk/issues/equal_opportunities/principles.htm)]. (12/09/03).

<sup>39</sup> SI 2003/1661.

<sup>40</sup> Articles 2 to 12 of the Convention, Articles 1 to 3 of the First Protocol and Articles 1 and 2 of the Sixth Protocol.

<sup>41</sup> *Lustig-Prean and Becket v United Kingdom* (1999) 29 EHRR 548 [hereafter: *Lustig-Prean*]

<sup>42</sup> *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 [hereafter: *Smith and Grady*]

<sup>43</sup> [2001] 1 AC 27

tenant's "family" for the the purposes of succession to a statutory tenancy. However, it did not go so far as to hold that a same sex partner qualified as a 'spouse.' In the more recent case of *Mendoza v. Ghaidan*<sup>44</sup> the Court of Appeal held that the statute breached Article 14 read with Article 8 because it excluded same sex partners from the definition of those who could qualify to succeed to a statutory tenancy. It thus held that, the words "as his or her wife or husband" in para.2(2) must be read as meaning "as if they were his or her wife or husband".

## 2.2 Sex Discrimination Act 1975

The SDA prohibits less favourable treatment of a person on the basis of that person's sex or marital status. In considering whether discrimination has occurred, section 5(3) of the SDA requires that 'a comparison of the cases of persons of different sex or marital status ... must be such that the relevant circumstances in one case are the same or not materially different, in the other'.

For many years, the British courts interpreted the term 'sex' to cover gender discrimination only. Recently, in cases such as *Gardner Merchant*<sup>45</sup> and *Pearce*,<sup>46</sup> the courts held that where a homosexual person alleges violation of the SDA on the basis of his or her sexual orientation, the relevant point of comparison is not what the treatment of a heterosexual person of the same or opposite sex would be, rather, what the treatment of a homosexual person of the opposite sex would be in the same position.

This position was repeated by the House of Lords handed down in June 2003 in the case of *Macdonald*.<sup>47</sup> The facts were as follows: prior to the coming into force of the HRA 1998 and the lifting of the ban on homosexuals in the armed forces in January 2000, MacDonald was investigated and then forced to resign from the Royal Air Force after admitting to being a homosexual. Their Lordships found that while MacDonald's rights had been breached under Article 8 of the Convention, as read separately and in conjunction with Article 14, the definition of 'sex' under the SDA does not extend to sexual orientation and therefore the appropriate comparator under section 5(3) is that of a homosexual person of the opposite sex. The application of a 'like with like' comparator resulted in the finding that a homosexual woman would have been treated similarly in the same situation.

However, the House of Lords's decision seems to acknowledge that, had Macdonald suffered the adverse treatment he endured today, the result would have been different. Indeed, the Court describes the case as 'caught up in a time warp whose consequences have only now been completely discredited'.<sup>48</sup> There reasoning for this conclusion is as follows. First, the adverse treatment suffered by Macdonald occurred in 1996 and 1997, some time before the HRA was enacted or came into force. This barred the applicant to rely on the HRA or on Convention rights channeled through it.<sup>49</sup> Second, the Court made clear that decision was reached on legalistic grounds, and that expected domestic legislation pursuant to the EC Equal Treatment Directive 2000/78/EC should lead to a different result:

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<sup>44</sup> November 5, 2002. Common Citation???

<sup>45</sup> *Smith v Gardner Merchant* [1998] LRLR 510 (CA).

<sup>46</sup> *Pearce v Governing Body of Mayfield Secondary School* [2000] IRLR 548.

<sup>47</sup> *MacDonald v Ministry of Defence* [2000] IRLR 748.

<sup>48</sup> *ibid*, para 53 (per Lord Hope).

<sup>49</sup> *ibid*, para 23-24 (per Lord Nicholls).

Since the Act was admittedly not aimed at sexual orientation, there can be no justification for interpreting the expression 'on the ground of her sex' in section 1 expansively so as to include cases which, in truth, are cases of discrimination solely on the ground of sexual orientation. Perceived deficiencies in this regard in the legislative scheme are soon to be made good, in the field of employment and to a limited extent elsewhere, when in the near future the government duly fulfils the United Kingdom's obligations under Council Directive 2000/78/EC of 27 November 2000.<sup>50</sup>

And below:

Once in force that legislation will provide remedies in United Kingdom law to persons, such as the appellants, who complain of discrimination on the ground of their sexual orientation in relation to their employment.<sup>51</sup>

We turn now the Directive and the Regulations made under it.

### **2.3 The EC Equal Treatment Framework Directive 2000 and the new Employment Equality (Sexual Orientation) Regulations 2003**

The EC *Equal Treatment Framework Directive* 2000/78/EC ('the directive') was introduced in 2000 by the European Commission in line with Article 13 of the Treaty of Amsterdam. The directive requires states to implement law(s) prohibiting discrimination in employment on the basis of religion or belief, age, disability or sexual orientation.

The directive provides that states may choose not to apply the provisions concerning non-discrimination on the grounds of disability or age to the armed forces so as to 'safeguard the combat effectiveness of their armed forces'.<sup>52</sup> No such exception is provided in relation to sexual orientation, though the directive does state that it does not require the armed forces to 'recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services'.<sup>53</sup> The directive further states that a difference of treatment may be justified in 'very limited circumstances' where 'a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective legitimate and the requirement is proportionate'.<sup>54</sup> The legislation concerning sexual orientation must be in force by December 2003.

Accordingly, the UK *Employment Equality (Sexual Orientation) Regulations* 2003<sup>55</sup> of 26 June 2003 will enter into force on 1 December 2003. Regulation 6 provides that it is unlawful for an employer to discriminate against a person in the offering of employment or in the terms of employment. The regulations cover direct and indirect discrimination, victimisation and

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<sup>50</sup> *ibid*, para 7 (per Lord Nicholls).

<sup>51</sup> *ibid*, para 163 (per Lord Rodger).

<sup>52</sup> *Equal Treatment Framework Directive* 2000/78/EC, Preamble, para 19.

<sup>53</sup> *ibid*, para 18.

<sup>54</sup> *ibid*, para 23.

<sup>55</sup> SI 2003/1661.

harassment.<sup>56</sup> It is also unlawful to discriminate against a person in relation to appointment to an office or post.<sup>57</sup>

Under regulation 28, a person may bring a complaint against his or her employer to the employment tribunal. Regulation 30 provides for a range of remedies to be ordered by the tribunal where a complaint is considered to be well-founded.

Some exceptions are provided for in the Regulations. Regulation 7 provides for exceptions in relation to some forms of specific discrimination (as listed at regulation 6(1)(a) or (c), 6(2)(b), (c) or (d)) where having regard to the nature of employment or the context in which it is carried out, 'being of a particular sexual orientation is a genuine and determining occupation requirement' and the person in question does not meet that requirement or the employer is reasonably satisfied of this. Regulation 10(5) provides for a similar exception in relation to the appointment of office holders.

Additionally, regulation 24 provides that nothing shall render unlawful 'an act done for the purpose of safeguarding national security, if the doing of the act was justified for that purpose'. Finally, regulation 36(8) provides that where the complaint concerns an act done when the complainant was serving in the armed forces and the complaint relates to service in those forces, the complainant may only present the complaint to an employment tribunal under regulation 28 if 'he has made a complaint in respect of the same matter to an officer under the service redress procedures applicable to him; and that complaint has not been withdrawn'.

The level of liability of the employer under the regulations is high, as set out at regulation 22(1) – 'anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval'. In addition, anything done by a person as an agent for another person with authority (whether express or implied) shall be treated as done by that other person also, as per 22(2). However, regulation 22(3) does provide for the defence that the employer took 'such steps as were reasonably practicable to prevent the employee from doing that act'.

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<sup>56</sup> Regulations 3 to 5.

<sup>57</sup> Regulation 10.

## THE LEGAL TREATMENT OF HOMOSEXUALS IN THE GERMAN ARMED FORCES

### Current position

In December 2000 the armed forces of the Federal Republic of Germany (*Bundeswehr*) took the first positive step towards the elimination of discrimination against homosexual soldiers. This was the **Sexuality Guidelines for Military Superiors** (*Führungshilfe für Vorgesetzte: Umgang mit Sexualität*) of 20.12.2000, an interpretive administrative guideline drawn up to assist commanders and officers within the armed forces in applying and interpreting the various legal provisions under the Soldier Act (*Soldatengesetz*) and other military law provisions. The Guidelines were issued by the General Inspector of the *Bundeswehr*, Harald Kujat, but were drafted by the Centre for Military Leadership (*Zentrum für Innere Führung*).

Paragraph 1 of the 'Sexuality Guidelines' declares the right to sexual self-determination. It derives this right from Article 1(1) of the Basic Law (right to protection of human dignity), Article 2 (1) of the Basic Law (freedom to develop the personality) and Article 8 of the European Convention on Human Rights (right to privacy). Paragraph 2 of the 'Sexuality Guidelines' declares the right to freedom from discrimination on the grounds of sexuality. It derives this right from Article 3 of the Basic Law (right to equality) and Article 14 of the European Convention on Human Rights (right to freedom from discrimination). Paragraph 5 restates the duty to comradeship under paragraph 12 of the Soldier Act and the various rules of behaviour under paragraph 17 of the Soldier Act, including the duty of exemplary behaviour under paragraph 10 of Soldier Act. The 'Sexuality Guidelines' declare that various basic principles flow from these constitutional and military statutory provisions that, in essence, are aimed towards greater tolerance and mutual respect within the armed forces.

Thus soldiers must exercise self-restraint, sensitivity and tolerance as regards to sexuality, and military superiors must take a leading role in this respect. For example, in section 2(f), which concerns tolerance, the Guidelines state:

The duty to comradeship demands tolerance towards other, non-criminal sexual orientations, ie, also towards homosexually oriented soldiers. One's own life plans must not be made the measure for others. Irrespective of the attitude of the individual person, one has to expect of him the tolerance to grant comrades a sexual behaviour different from his own, as long as this does not put at danger instruction and deployment.

Section 3 of the Guidelines, dealing with the duties of instructors, states:

In addition, it is of particular importance to demand tolerance towards other sexual orientations. The superior must note that, for example, there are profound prejudices towards homosexuality in society, which go as far as fundamental rejection. It is therefore important to create awareness of the fact that the quality of military service has nothing to do with the sexual orientation of a soldier, and that rights and duties according to the 'Soldier Act' as well as the 'Basic Principles of Military Leadership' apply to heterosexual and homosexual soldiers in the same way.

In sum the 'Sexuality Guidelines' seek to ensure that homosexuality must not only be tolerated, but that superiors and instructors must take active steps to promote tolerance.

The 'Sexuality Guidelines' have subsequently been supplemented by the **'Joint Services Regulation'** (*Zentrale Dienstvorschrift*) 14/3 B 173 which governs 'the sexual behaviour of and between soldiers'. It is an administrative regulation binding all members of the armed forces. The fundamental principles, set out in section I of this regulation, states:

The intimate sphere, as part of the protection of the personality of soldiers, is a sphere of personal liberty which remains protected from any intervention by the military. Therefore the sexuality of a soldier is only of legal relevance in the course of military service when this behaviour undermines professional co-operation or comradeship and therefore leads to a break down of order within the military service. Sexual orientation per se, whether hetero- or homosexual, is irrelevant.

The 'Joint Services Regulation' forbids both heterosexual and homosexual relations between members of the armed forces whilst on duty, in uniform or whilst on military premises. But the regulation is designed to eliminate any discrimination on the grounds of sexuality in the disciplinary regulation of sexual behaviour within the armed forces.

These two administrative regulations formally ended discrimination against homosexual soldiers within the armed forces which had existed prior to December 2000 in Germany.

## **Background**

Prior to 2000 homosexuals were discriminated against in the armed forces. This manifested in two respects:

First, homosexuals were not allowed to undertake certain roles within the military. Although homosexuals were not automatically dismissed, they were denied the possibility of working as commanders or instructors. This, of course, was a serious restriction; it meant that once the homosexuality of a member of the *Bundeswehr* was known, he could only be used for administrative jobs. If it became public, he would usually be moved to another, lower position, or would be denied further promotion if this would have involved using him for leading or instructing positions. Although this practice was not based on any clear statutory authority and only on administrative guidelines, the Federal Administrative Court and lower courts accepted this approach. For example, in 1997 the Federal Administrative Court decided a case involving a soldier who was told that because of his homosexuality, he would no longer be given leading posts in the *Bundeswehr*. The court, in approving this policy, stated:

The senate has decided repeatedly that it is not a legal mistake not to use soldiers of homosexual disposition as instructors in the troops. The court will stick to this view here. Even if public opinion regarding homosexual disposition has continued to change since 1990, and even if there should be an increasing tolerance, we cannot take for granted general tolerance in the case of soldiers who are going to be instructed in the army, in particular soldiers doing their military service, to an extent that would render the arguments of the Federal Ministry of Defence unreasonable. It cannot be excluded that a part of the young soldiers liable for military service or their relatives would not show



understanding for homosexual soldiers as permanent or temporary instructors and therefore also educators. In spite of a higher tolerance towards homosexual disposition, acts of a homosexual soldier which would in the case of heterosexuals be considered as normal and common, could even today achieve an importance which could lead to talk, suspicions, the rejection of the instructor and therefore to difficulties. This is why it is not the decisive point that ... up to now, there was no cause for complaints with regard to his homosexuality. The only decisive fact is that his homosexual disposition has become known within the troops. (BVerwG, 1998 NVwZ-RR, 244)

Second, homosexual acts in the course of military service, or between male soldiers not on military duty, were classified as disciplinary offences which could be punished either with a promotion prohibition (*Beförderungsverbot*) or, if between a commanding and junior officer, with dismissal. The legal justification given was that this behaviour undermined the order and discipline of the armed forces, objectives which received frequent recognition and protection under military law. The Federal Constitutional Court refrained from striking down these disciplinary offences and punishments in 1992 (BVerfGE 93, 143).

### **Reasons for change**

A number of interlinked factors led to the change in the policy of the *Bundeswehr*.

In 1998, a coalition of the Social Democrats and the Green Party replaced the Christian Democrat government. The new government introduced civil partnerships for gays and lesbians and took several other steps to end discrimination of gays and lesbians. The government was slow at first to extend their reform activism to the armed forces. Thus, the Defence Minister's initial reaction to the ECHR decision in *Smith and Grady v United Kingdom* (declaring that the dismissal of soldiers because of their homosexuality was a violation of their right to privacy) was to declare the judgment inapplicable in the German context. Scharping argued that, in Germany, homosexual soldiers would not automatically be dismissed but merely not used for certain tasks. Nevertheless, the *Smith and Grady* decision bolstered the political lobby and the debate regarding homosexuals in the armed forces intensified (see debate on discrimination in the armed forces in the German Federal Parliament 23.03.2000).

Moreover, a homosexual soldier who had been removed from his position to an office job after his homosexuality had become public, sued the government, claiming that his constitutional right to equality (Article 3 of the Basic Law) had been violated. The case was appealed several times and, shortly before the Federal Constitutional Court entered into discussion of the case, the Federal Ministry of Defence and Minister Scharping, obviously fearing defeat, changed their policy diametrically. All soldiers who had been removed on the ground of their homosexuality were reinstated to their old position. And, in December 2000, the General Inspector of the *Bundeswehr*, Harald Kujat, issued the new 'Sexuality Guidelines'.

The next breakthrough came in a decision of the Federal Administrative Court on 9 October 2001 (*Wehrdienstsenat*, Az 2 WD 10/01). In light of the statutory recognition of same-sex partnerships (*Lebenspartnershipsgesetz* of 1 August 2001), and the general shift in social attitudes, the Court departed from its previous case law tolerating the disciplinary punishment of homosexual sex in the course of military service. Whilst it accepted that sexual relations

between serving soldiers or sexual harassment could not be tolerated within the military service, it held that it made no difference whether these relations or behaviour were homosexual or heterosexual. This decision was also influenced by the increasing number of women within the armed forces since 2000. The decision of the Federal Administrative Court is reflected in the drafting of the Joint Service Regulation 14/3.

### CONCLUDING REMARKS

Even prior to the ECHR judgments in *Lustig-Prean* and *Smith*, public opinion in Europe was forming in a manner that made it clear that government policy, even while it was upheld by domestic courts, could not remain intact for long. This may help explain the fact that, within three months of the ECHR decisions, the British Services already had in place a radically new policy. This policy established a nondiscriminatory mandate that focuses on behaviour rather than on personal traits and instructed commanders to intervene in soldiers' personal lives only when operational effectiveness might be compromised. It invited soldiers who were discharged under former policy to reapply and emphasised a policy of zero tolerance for harassment, bullying and victimization.

Similarly, the German military issued 'Sexuality Guidelines' which concentrate on performance of individuals rather than on vague threats to the order within the military service. The Joint Service Regulations further emphasised tolerance towards others, stating that 'sexual orientation per se, whether hetero- or homosexual, is irrelevant'.

Recent amendments to legislation, regulations, service codes and guidelines in EU countries have gone further towards entrenching positive requirements from officers and commanders in a manner that would serve to ensure an environment of tolerance and comradery amongst servicemen and servicewomen, regardless of their sexual orientation.

The judgments of the European Court of Human Rights demonstrate that even a wide margin of appreciation that respects sovereign countries moral codes and national security interests cannot allow for the intrusion into the lives of service men and service women as such intrusion cannot be tolerated in a democratic society. Enlisting in the military does not give the state the right to intrude into 'the most private human conduct, sexual behaviour, and in the most private of places, the home'.<sup>58</sup>

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<sup>58</sup> *Lawrence v Texas* (n 2) (Kennedy J)