A force to be reckoned with

John Bowers QC reports on the gay servicemen case…20 years on

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It is now 20 years since the ban on gay men and women serving in the military was lifted and I acted (together with David Pannick QC, Laura Cox, the late Peter Duffy and several others) in the ground breaking case which led to this change. I represented one of the applicants, the naval claimant John Beckett. The case which led to the new open policy being adopted was decided by the European Court of Human Rights (ECtHR) on 27 September 1999. We had lost at each stage in the UK but won at Strasbourg and that led to the change in practice which did not require legislation (there was an announcement in the House of Commons by the Secretary of State for Defence).

In retrospect, with the distance of twenty years (and the changes in societal attitudes) it just seems so obvious that we should have won the case in the UK but it was very hard fought and success was not at all assured. Indeed, this is the only case in which I recall that counsel was booed in court, that is Stephen Richards QC (later a Lord Justice) who acted for the Ministry of Defence.

Four test cases

There were four test cases brought in the Administrative Court as judicial review applications to test the legality of the policy which was to ban gay men and women from serving in the military but marching behind them were some forty cases which were brought in the employment tribunals. The cases were backed by Stonewall and Liberty.

The other three claimants were Jeanette Smith, a senior aircraft woman; Graeme Grady, a sergeant who worked as a personnel administrator in the RAF and had been in the forces for 14 years often in highly sensitive positions; and Duncan Lustig Preen, a midshipman in the executive branch of the Navy who was a lieutenant commander. All had exemplary service records.

The policy under review was known as the Armed Forces' Policy and Guidelines on Homosexuality distributed in December 1994 (with changes made by the Criminal Justice and Public Order Act 1994) and included this paragraph:

> 'Homosexuality, whether male or female, is considered incompatible with service in the armed forces. This is not only because of the close physical conditions in which personnel often have to live and work, but also because homosexual behaviour can cause offence, polarise relationships, induce ill-discipline and, as a consequence, damage morale and unit effectiveness. 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…'

There had been a review of the policy a year before the case was launched. The controversial Report of the Homosexuality Policy Assessment Team, February 1996 concluded:

> 'The starting-point of the assessment was an assumption that homosexual men and women were in themselves no less physically capable, brave, dependable and skilled than heterosexuals. It was considered that any problems to be identified would lie in the difficulties which integration of declared homosexuals would pose to the military system which was largely staffed by heterosexuals. The HPAT considered that the best predictors of the "reality and severity" of the problems of the integration of homosexuals would be the service personnel themselves' (para 30 of the report).

The only countries known to still be operating blanket bans at this point in time were Turkey and Luxembourg, yet it was apparently considered vital to the future of the armed forces in the UK that it remain. The problems anticipated by the assessment report 'included controlling homosexual behaviour and heterosexual animosity, assaults on homosexuals, bullying and harassment of homosexuals, ostracism and avoidance, "cliquishness" and pairing, leadership and decision-making problems including allegations of favouritism, discrimination and ineffectiveness (but excluding the question of homosexual officers taking tactical decisions swayed by sexual preference), sub-cultural friction, privacy/decency issues, increased dislike and suspicions (polarised relationships), and resentment over imposed change especially if controls on heterosexual expressions also had to be tightened' (see Section F.II of the report).

Investigations

There were some heart-rending details of distressing investigations by military police into the sex lives of those who had come out which were presented in the court papers (and these are also to be found in an excellent recently published book *Fighting with Pride* by Craig Jones and others, Pen and Sword, 2020). There were extremely prurient enquiries about partners and as an example Ms Smith was asked whether she was 'into girlie games like hockey and netball'. Mr Grady was questioned as to whether his wife knew that he really was gay and was told that they wanted to verify

his admission that he was gay as they thought it might be a fraudulent attempt at early discharge from the services. In this case they took his digital diary and many letters to his partner.

UK courts

The basic case for the Ministry of Defence in their defence to the claims was that to admit gay personnel to the military would interfere with military morale and consequently would have a substantial and negative effect on the fighting power and operational effectiveness of the armed forces. The Ministry of Defence also said that there would be problems about toilet provision.

The Administrative Court at first instance consisted of Lord Justice Simon Brown and Mr Justice Curtis who upheld the policy, but the former (unusually in a judgment) said that the 'tide of history was against the MOD' as indeed in due course it proved to be. They however decided that the policy was not unreasonable on the *Wednesbury* test of perversity. Simon Brown LJ however noted that in none of the cases was it suggested that the applicants' sexual orientation had in any way affected their ability to carry on their work or had any ill effect on discipline. Nevertheless, he said that it was only if the purported justification 'outrageously defies logic or accepted moral standards' that the court could strike down the minister's decision. The court importantly decided they had no power to interpret the European Convention of Human Rights (the Convention).

Lord Justice Bingham in the Court of Appeal gave a strong example of judicial restraint in saying that 'courts owe a duty to remain within their constitutional bounds and not trespass beyond them. Only if it were plain beyond sensible argument that no conceivable damage could be done to the armed services as a fighting unit would it be appropriate for this court now to remove the issue entirely from the hands of both the military and government'. He commented that the applicants' arguments were 'of very considerable cogency'. He also said that 'the fact that a decision maker failed to take account of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning the exercise of that discretion'. The Court of Appeal thus rejected the appeals and demonstrated the need for human rights legislation to be incorporated into UK law.

The Strasbourg Court

The Human Rights Act 1998 was not in place at this time, so that the UK courts could not adjudicate on the Convention itself. It was merely part of the background. The Strasbourg Court however was established precisely to do this. It held in *Smith & Grady v UK* (1999) 29 EHRR 493 that there was a prima facie breach of the right to a private life under Art 8 of the Convention (a point not contested by the UK Government) but the key question was whether it was justified. For this it was necessary that it be in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society. The court held that that it was not shown that interference was necessary in a democratic society or that it would have a substantial negative effect on morale and fighting power and the effectiveness of the armed forces.

The court importantly directed itself that such assertions as to a risk to operational effectiveness must be 'substantiated by specific examples' (para 89) to be recognised. This notion of the UK military relied on by the UK Government in defending the claims was it held founded solely on negative views of gay people, in other words hostile stereotypes. These were said by the court to 'range from stereotypical expressions of hostility to those of homosexual orientation to vague expressions of unease about the presence of homosexual colleagues' (para 97). At para 105, the court 'concluded that convincing and weighty reasons have not been offered by the Government to justify the policy or… the consequent discharge of the applicants from these forces'. The court thus declared that the ban was contrary to the Convention to which the UK had signed up. Although this was not binding as a matter of UK law the government agreed to change the policy (which did not require legislation).

Subsequent events

One of the key aspects of the victory in the ECtHR was that we accepted that there would have to be an Armed Forces Code of Social Conduct so that gay relationships were regulated in the same way as straight people in respect of, for example, public displays of affection. This was adopted in January 2000.

In 2007 the Ministry of Defence issued a formal apology to those affected by its former policy. This was an important milestone in the battle for gay rights which include clashes over the age of consent, adoption and gay marriage.

The case is also important more generally in the protection of the rights of privacy and is still frequently cited in Strasbourg jurisprudence. It also points out a wider point of the importance of the protections in the UK subsequently ushered in by the Human Rights Act 1998 (HRA 1998). It was because of the lack of such incorporation of the Convention that the UK courts were unable to protect the rights of the claimants. The case set the scene for HRA 1998. Given the hostile approach of the present government to that convention it is a reminder of why HRA 1998 is so necessary.

It is appropriate to salute the bravery of those who sacrificed their careers and it is tragic that they were put in a position where they had to do so.

NLJ

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