

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 25186/94

Euan Sutherland

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 1 July 1997)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a British citizen, born in 1977 and resident in London. He is represented before the Commission by Mr. S. Grosz, solicitor with Messrs. Bindmans, London, together with Ms. Angela Mason, of STONEWALL, a non-governmental organisation which works for lesbian and gay equality, and Mr. Peter Duffy, a barrister in London.

3. The application is directed against the United Kingdom. The respondent Government were represented by their Agent, Ms. Susan Dickson, of the Foreign and Commonwealth Office, London.

4. The case concerns the age of consent for homosexual relations in the United Kingdom. The applicant invokes Articles 8 and 14 of the Convention.

B. The proceedings

5. The application was introduced on 8 June 1994 and registered on 19 September 1994.

6. On 10 January 1995 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 5 May 1995, after an extension of the time-limit fixed for this purpose. The applicant replied on 24 August 1995, also after an extension of the time-limit. On 19 April 1996 the Commission granted the applicant legal aid for the representation of his case.

8. On 27 November 1995 the Commission decided to hold a hearing of the parties. The hearing was held on 21 May 1996. The Government were represented by Ms. Susan J. Dickson, Agent of the Government, Mr. David Pannick QC, Counsel and MM. Steven Bramley and Chris Hudson, Advisors of Home Office. The applicant was represented by Mr. Peter Duffy, Counsel, Ms. Clare Montgomery QC, Counsel, Mr. Stephen Grosz, Solicitor, Ms. Angela Mason, Executive Director of Stonewall and Mr. Matthew Heim, Pupil barrister. The applicant and his father, Mr. Norman Sutherland, were also present.

9. After the hearing, the Commission declared the application admissible.

10. The text of the Commission's decision on admissibility was sent to the parties on 4 June 1996 and they were invited to submit such further information or observations on the merits as they wished. The Government submitted certain information on 9 July 1996.

11. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

12. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. S. TRECHSEL, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
F. MARTINEZ
C.L. ROZAKIS
J.-C. GEUS
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
A. PERENIC
K. HERNDL
E. BIELIUNAS

13. The text of this Report was adopted on 1 July 1997 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

14. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- (i) to establish the facts, and
- (ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

15. The Commission's decision on the admissibility of the application is annexed hereto.

16. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

17. The applicant became aware of attraction to other boys at about the age of 12. As his contemporaries became more interested in girls, he became more aware that he was sexually attracted to boys. From around that time, he felt sure that his sexual orientation was homosexual. He tried going out with a girl when he was 14. They are still friends, but there was no sexual attraction with her, and the experience confirmed for the applicant that he could only find a fulfilling relationship with another man.

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

B. Relevant domestic law and background

19. Section 12(1) of the Sexual Offences Act 1956 ("the 1956 Act") makes it an offence for a person to commit buggery with another person.

By Section 13 of the 1956 Act it is an offence for a man to commit an act of "gross indecency" with another man, whether in public or private.

20. By Section 14(1) of the 1956 Act, it is an offence for a person to commit an indecent assault on a woman. By Section 14(2) of the 1956 Act, a girl under the age of 16 cannot give any consent which would prevent an act being an assault for the purposes of the section.

21. By Section 1 of the Sexual Offences Act 1967 it was provided, inter alia:

"(1) Notwithstanding any statutory or common law provision ... a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years.

...

(7) For the purposes of this section a man shall be treated as doing a homosexual act if, and only if, he commits buggery with another man or commits an act of gross indecency with another man or is a party to the commission by a man of such an act ..."

22. The consent of the Director of Public Prosecutions was required for criminal proceedings in relation to homosexual acts "where either of those men was at the time of its commission under the age of 21" (Section 8 of the 1967 Act). In 1990 455 prosecutions gave rise to 342 convictions. In 1991 213 prosecutions gave rise to 169 convictions. The consent of the DPP is now required for prosecutions of males aged 16 and 17.

23. The Policy Advisory Committee on Sexual Offences, reporting to the Home Secretary in 1981, recommended that the minimum age for homosexual relations between men should be reduced to 18. The Committee accepted that the sexual pattern of the overwhelming majority of young men is fixed by the age of 18, and that whilst young men of between 16 and 18 could still benefit from the protection of the criminal law, by the age of 18 the overwhelming majority of young men are mature enough to assume the responsibility of deciding their reaction to homosexual advances. A minority of the Committee considered that the minimum age should be reduced to 16. The Committee noted:

"38. Most people feel that the natural and proper expression of human sexuality is to be found in heterosexual relationships ... and that to introduce a boy to homosexual practices could, in some cases, deprive him of this. The majority of parents would surely wish their children to grow up with the desire and possibility of marriage and children and anything which puts this expectation at risk would be deplored.

39. ... with more general understanding of the very delicate balance of sexuality in all of us, with a greater willingness to discuss the subject in public and private, we believe that society's attitude to homosexuality has become less hostile and that a recommendation for reduction in the minimum age from 21 to 18 would now be likely to be acceptable to public opinion. ... Although it will, of course, be for Ministers and Parliament to consider our recommendations in this Report, most of us believe that a recommendation that the minimum age should be reduced to 16 would prove to be wholly unacceptable to public opinion. Those members consider that public opinion would support the proposition that the minimum age for homosexual relations should be higher than the age of consent for sexual intercourse: the law would then be regarded as a factor in encouraging those young men who need protection and assistance to avoid homosexual relations while they are immature.

...

41. In our working paper we concentrated much attention on the age by which a young man's sexual pattern becomes fixed so that the performance by him of homosexual acts above that age would be unlikely to divert him from a heterosexual to a homosexual pattern of sexual behaviour. We learned that most medical commentators consider that with few exceptions a settled orientation is established before the age of 16. A minority of commentators, however, are of opinion that there is a significant number of young men, including bisexuals ... whose sexual pattern is not fixed by that age. Those of us who favour a minimum age of 16 think that the proportion is too small to merit a minimum age of 18. Most of us, however, take the view that a reduction in the minimum age to 16 could only be justified if there were stronger evidence than at present exists to the effect that such a reduction would not have harmful consequences for 16- and 17-year-olds and are strongly influenced by the lack of unanimity in the medical evidence on the subject. We all accept, however, that the sexual pattern of the overwhelming majority of young men is fixed by the age of 18.

42. Another reason for discouraging young men from participating in homosexual relations is the possibility that they will not be sufficiently mature to cope with the consequences of their actions. The British Medical Association, who favour a reduction in the minimum age to 18, have told us that the physical development of males is in general about two years behind that of females. A number of organisations who commented on our working paper said that in recommending a minimum age of 18 as opposed to 16 the majority of us had disregarded the principle of sexual equality (by which we understand equal treatment of heterosexual and homosexual acts) which appeared to demand a reduction in the age to 16, the age which we recommend should remain the age of consent for sexual intercourse. To this the majority replies that it seems reasonable, taking into account the evidence of the British Medical Association, to assume that emotional and psychological development do not significantly outstrip physical growth. They consider it incumbent on those who assert that boys and girls of the same age possess much the same degree of emotional and psychological maturity to adduce evidence in support of their claim. In their opinion satisfactory evidence has not been forthcoming ..."

24. In January 1994 the British Medical Association (BMA) adopted a report of its Board of Science and Education. The report discussed the BMA's previous position and the present evidence, and noted concern that young homosexual men were especially at risk of sexually transmitted infections including gonorrhoea and HIV. It considered that this "may be because they are less able to access sources of information and advice about safer sexual practice", and gave as possible reasons for that lack of access that they feared seeking professional advice because to do so would be to admit to having committed a crime, and because official homosexual organisations operated over-21 policies, to comply with the law as it then stood. The report concluded:

"Of prime concern to the Board ... and to the medical profession as a whole, are the concerns that the present law may inhibit efforts to improve the sexual health of young homosexual and bisexual men. The average age of first homosexual encounter has been found to be 15.7, and it is vital that these young homosexual men receive effective health education and health care.

Previously the BMA proposed that the age of consent for

homosexual men should be set at 18 to reflect their slower rate of biological development. However, most researchers now believe that sexual orientation is usually established before the age of puberty in both boys and girls.

The purpose of age of consent legislation is to protect vulnerable young people from sexual exploitation and abuse, but there is no clear justification for a differential age for homosexual male activity and other sexual activity. Although homosexual experimentation may be quite common among adolescent boys (despite the present law), extensive recent research does not indicate that men aged 16-21 are in need of special protection because they may be "recruited" into homosexuality. Unwelcome sexual attractions of a seriousness warranting criminal prosecution are equally offensive whether the victim is a man or a woman: the same law should therefore apply to all.

Evidence would suggest that reducing the age of consent to 16 would be unlikely to affect the number of men engaging in homosexual activity, either in general or within specific age groups. Commencement of sexual activity well below the age of 21 has been established ...

There is no convincing reason against reducing the age of consent for male homosexuals to 16 years, and to do so may yield some positive health benefits.

[The Board recommended:]

That the age of consent for homosexual men should be set at 16 because the present law may inhibit efforts to improve the sexual health of young homosexual and bisexual men."

25. The question of an appropriate minimum age of consent to male homosexual relations was debated in Parliament during consideration of amendments to the Criminal Justice and Public Order Bill.

26. On 21 February 1994, on a free vote, the House of Commons by 307 votes to 280 rejected an amendment to reduce the minimum age of consent to 16 but, by 427 votes to 162, accepted an amendment to reduce the minimum age to 18.

27. In the course of the debates, the then Home Secretary, Mr. Michael Howard, supporting the reduction of the age of consent to 18, but opposing a reduction of the age to 16, said, *inter alia*:

"... The [Policy Advisory] Committee could not reach a unanimous view. But the majority of its members concluded, like [the] Wolfenden [Committee], that the key question was to determine an age at which most young men could be said to be mature enough to take a decision on these matters for themselves. The Committee's conclusion, which was informed by the public consultation which preceded its report, was that the age of consent should be reduced to 18. Although current medical opinion seems more rather than less certain that sexual orientation is fixed in both sexes by 16 in most cases, there will still be some young men for whom homosexual experience after that age will have profoundly influential and potentially disturbing effects.

It is also still unquestionably the case that most parents hope and expect their sons to follow a heterosexual lifestyle and hope that in due course they will build a family life of their own. The Committee put it in the following way at paragraph 38:

'The majority of parents would surely wish their children to grow up with the desire and possibility of marriage and children, and anything which puts this expectation at risk would be deplored.'

I believe that those arguments still hold good. It is still true that in following a homosexual way of life a young man sets himself apart from the majority. From a certain age, he should be free to take that decision and no persecution or discrimination should flow from his decision, but he should not be misled into thinking that his decision will have no effect on his dealings with society at large. At the very least, he deserves time in which to make up his mind.

... (H.C. Deb. 21 February 1994, Col. 93)

Two further arguments have been put with especial frequency in the discussions leading up to the debate and I want to deal with them. They both concern equality, although to my mind the analysis offered by Wolfenden and by the Policy Advisory Committee, which I have just discussed, offers a more robust basis for what the criminal law can and should do in the area than an over-simple reliance on parity, either as between the sexes or as between countries.

Equality of treatment under the law between homosexuals and heterosexuals does not in my view represent an end in itself. Whatever the scientific evidence about the age at which sexual orientation is fixed, it would be wrong to ignore the instinctive and deeply-held concern of many people that a decision to have homosexual sex is quite different from a decision to have heterosexual sex. Both Wolfenden and the Policy Advisory Committee recognised the general desirability of avoiding unnecessary discrepancies in the law's treatment of men and women, but both eventually supported recommendations which acknowledged that such discrepancies were still justified. In my view, therefore, we shall not offend against any fundamental political or civil right if we continue to reflect in the criminal law a public understanding of the difference between homosexual activity and heterosexual activity.

... (ibid, Cols. 95-96)

There is a second element of equality on which some reliance has been made. It has been suggested that we in this country should change our age of consent because it has been changed in other countries. That is a rather extraordinary argument, particularly as there is no consensus in other countries about what that age should be. If we are unusual in Europe in respect of our age of consent for homosexuals and we are satisfied that there is good reason for us to do so, we are entitled to maintain that position. That is an issue which we can and should decide for ourselves.

...

For my part, I believe that reducing the age of consent from 21 to 18 strikes the right balance. On the one hand, we should not criminalise private actions freely entered into by consenting mature adults. On the other hand, we need to protect vulnerable young man from activities which their lack of maturity might cause them to regret ..."

(ibid, Col. 97)

28. In supporting a reduction of the age of consent to 16, Mr. Tony Blair, the then Leader of the Opposition said, inter alia:

"Let us be clear about the issue before us tonight. It is not at what age we wish young people to have sex. It is whether the criminal law should discriminate between heterosexual and homosexual sex. It is therefore an issue not of age, but of equality. By supporting equality, no one is advocating or urging gay sex at 16 any more than those who would maintain the age of consent for heterosexual sex advocate that girls or boys of 16 should have sex. It is simply a question of whether there are

grounds for discrimination.

At present, the law discriminates. There is no doubt about the personal misery that such discrimination brings: to young people frightened to admit their own sexuality and of the fear of imprisonment, and to any man who is homosexual and who knows that the criminal law treats that in a different and more incriminating way.

The argument - and the only argument - advanced to justify that discrimination and its attendant tragedy is that it is necessary for the protection of young people. Without it, it is said, young men unsure of their sexuality may be preyed upon by older homosexuals and induced to become homosexual when they otherwise would not. I will attempt to deal with that argument tonight.

...

The overwhelming evidence - scientific or indeed merely experience of life - suggests that being homosexual is not something that people catch, are taught or persuaded into, but something that they are.

It is not against the nature of gay people to be gay; it is in fact their nature. It is what they are, it is different, but that is not a ground for discrimination. The vast bulk of evidence suggests that, at 16, boys and girls, particularly nowadays, are aware of their sexuality and that, what is more, that sexuality is normally developed with those of their own age, not with predatory elders ...

...

(ibid, Cols. 97-98)

We talk about predatory older men. That happens - if it does happen - not just with young men but with young girls, yet no one would advance that as a reason for raising the age of consent.

...

The point that has been made about other countries is not that we should follow what happens in other countries, or the fact that the majority of other countries in Europe do not discriminate should mean that we necessarily blindly follow their path; it is, first, that many of those countries are among the most conservative, usually, in such matters, which makes their decision on equality all the more telling, and, secondly, and most important, that there is no evidence to suggest that any of the adverse consequences forecast as attending a move to equality here have happened in those countries - none, not a shred of evidence, not anywhere.

...

In the end, all the concern, however ostensibly objective - let us assume that some of it is genuinely motivated - is traceable to that very subjective prejudice. Let us be clear that people are entitled to think that homosexuality is wrong, but they are not entitled to use the criminal law to force that view upon others. That is where the real practitioners of political correctness lie - not in those who merely seek equality of treatment but in those who insist that the law must discriminate in favour of their view of the conduct of others. That is why, also, the so-called compromise of 18 is misguided. What is the rationale behind maintaining the stigma but at a different age? It is an issue not of age but of equality ..."

(ibid, Col. 99)

29. The amendments to the Bill were further debated in the House of Lords on 20 June 1994. The House voted, again on a free vote, by 245 votes to 71, not to reduce the minimum age of consent to 16 but, by 176 votes to 113, to reduce it to 18.

30. The Criminal Justice and Public Order Act 1994 replaced the word "twenty-one" in Section 1 of the Sexual Offences Act 1967 with the word "eighteen". The Act entered into force on 3 November 1994.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

31. The Commission has declared admissible the applicant's complaints that the fixing of the minimum age for lawful homosexual activities at 18, rather than 16, is in violation of his right to respect for his private life, and is discriminatory.

B. Points at issue

32. Accordingly, the issue to be determined is whether there has been a violation of Article 8 (Art. 8) alone or taken in conjunction with Article 14 (Art. 8+14) of the Convention by reason of the prohibition of consensual homosexual acts between males over the age of 16 but under the age of 18 years.

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

33. Article 8 (Art. 8) of the Convention provides, so far as is material, as follows:

"1. Everyone has the right to respect for his private ... life
...

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 ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

34. The applicant asserts, and his assertion is undisputed by the Government, that he is a homosexual who has had sexual relations with other males since he attained the age of 16. The Government emphasise that despite the content of the law, the applicant has not been prosecuted or threatened with prosecution and that there is no suggestion that the police or any other domestic authority showed any interest in his sexual activities prior to his eighteenth birthday. Consequently, it is argued that any interference with the applicant's private life has, in practice, been extremely limited.

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

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

choose between engaging in a sexual relationship with a like-orientated person of around the same age and breaking the law.

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

38. The Commission recalls that the compatibility with Article 8 (Art. 8) of the Convention of the setting of a minimum age below which male homosexual acts are prohibited has been considered in the case-law of the Court and of the Commission. It is well established by that case-law that there is a legitimate necessity in a democratic society for some restrictions over homosexual conduct, notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason of their youth. As the Court has observed, such restrictions serve the interests both of the "protection of the rights and freedoms of others" and the "protection of morals":

"Thus, 'protection of the rights and freedoms of others', when meaning the safeguarding of the moral interests and welfare of certain individuals or classes of individuals who are in need of special protection for reasons such as lack of maturity, mental disability or state of dependence, amounts to one aspect of 'protection of morals'..."

(the above-mentioned Dudgeon judgment, p. 20, para. 47)

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

40. In its Report in Application No. 7215/75, X. v. the United Kingdom (D.R. 19, p. 66) the Commission found that the interference in the applicant's private life involved in fixing the age of consent at 21 was justified as being necessary in a democratic society for the protection of the rights of others. The Commission observed that the age limit of 21 might be regarded as high in the present era, especially when contrasted with the current position in other Member States of the Council of Europe, and that it might be seen as inconsistent to have an age of majority applicable to voting and other legal transactions which was lower than the age of consent for homosexual behaviour. However, the Commission held that it could not disregard the fact that the question had been examined by the Wolfenden Committee, whose recommendations had been adopted by Parliament and incorporated in the 1967 legislation; nor could it ignore the fact that the issue had been before Parliament again and was being then currently re-examined by the Criminal Law Revision Committee and the Policy Advisory Committee on Sexual Offence. In addition, the Commission took the view that there was a realistic basis for the respondent Government's opinion that, given the controversial and sensitive nature of the question involved, young men in the 18-21 age bracket who were involved in homosexual relationships would be subject to substantial social pressures which could be harmful to their psychological development.

41. More recently, the Commission found an Austrian measure, which prohibited a male person over the age of 19 from engaging in homosexual acts with a person of the same sex who was under that age, to be compatible with Article 8 (Art. 8) of the Convention, the Commission deciding that the age of "consent" was lower than in the previous case concerning the United Kingdom and that there was nothing to distinguish it from that case, save that the Austrian legislation was less restrictive (No. 17279/90, W. Z. v. Austria, Dec. 13.5.92, unpublished; see also No. 22646/93, H.F. v Austria, Dec 26.6.95, unpublished).

42. The Government contend that the Commission should not depart from this jurisprudence and that the decision of Parliament to fix and maintain a minimum age of 18 for homosexual acts by men is well within the margin of appreciation open to a Contracting State in serving the interests of the protection of the rights of others and of morals.

43. The applicant, while contesting these submissions of the Government, has focused his principal argument on the alleged discriminatory treatment of homosexual men, resulting from the difference in the minimum age for lawful private homosexual and heterosexual relationships, and the difference of treatment between homosexual men and women.

44. In the light of the arguments which have been developed by the parties in their written and oral submissions, the Commission finds it appropriate to examine the issues raised under Article 8 in conjunction with Article 14 (Art. 8+14) of the Convention.

45. Article 14 (Art. 14) of the Convention provides as follows:

"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."

46. The applicant contends that the margin of appreciation is particularly narrow in cases involving an obligation to refrain from interference rather than the imposition of positive obligations on the state, and contends that no justification at all has been advanced for the different treatment of male and female homosexuals, and that the justifications tendered for the difference between homosexuals and heterosexuals are inadequate and fall outside the margin of appreciation. In particular, he considers that most of them amount to a bald assertion based on the fact that the current age limit results from a vote of both Houses of Parliament. He also points out that the evidence on which the Wolfenden Committee (1957), the Policy Advisory Committee on Sexual Offences (1981) and the Criminal Law Revision Committee (1984) based themselves is no longer reliable and have been superseded by modern professional opinion and the particular issues raised by the need to prevent HIV infection. As an example, the British Medical Association, to whose views the Policy Advisory Committee paid particular attention, now advocates an equal age of consent of 16.

47. The Government recall the well-established case-law to the effect that Contracting States are entitled to prohibit consensual homosexual acts involving young persons in order to protect the rights of others and to protect morals, in particular to protect young men from conduct by which they will set themselves apart from the rest of society and which they may well regret when they reach greater maturity. Given the entitlement to prohibit consensual homosexual acts involving young persons, the Government consider that they are also entitled to take the view that such aims justify special measures in relation to young male homosexuals by comparison with young heterosexuals, and that such aims justify the possible application of criminal law against the young person, and not merely against an older partner.

48. The Commission recalls that Article 14 (Art. 14) of the Convention affords protection against discrimination, that is, treating differently persons in relevantly similar situations without due justification (Eur. Court HR, *Fredin v. Sweden* judgment of 18 February 1991, Series A no. 192, p. 19, para. 60). In particular, "a difference of treatment is discriminatory, for the purposes of Article 14 (Art. 14), if it 'has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if

there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment" (Eur. Court HR, *Gaygusuz v. Austria* judgment of 16 September 1996, Reports 1996, para. 42).

49. In the United Kingdom, prior to 3 November 1994, the minimum age for consensual male homosexual relations was 21 and, since that date, the minimum age has been 18. The age of consent for consensual heterosexual and lesbian relations has at all material times been 16. There were and are therefore at least two differences which are at issue: the difference in treatment of homosexual and heterosexual relationships, and the difference in treatment between male homosexual and lesbian relationships. The parties' submissions as to discrimination have concentrated principally on the difference of treatment between homosexuals and heterosexuals, and in the following discussion, the Commission will do likewise.

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

51. The Commission for its part considers that it is not required to determine whether a difference based on sexual orientation is a matter which is properly to be considered as a difference on grounds of "sex" or of "other status". In either event, it is a difference in respect of which the Commission is entitled to seek justification.

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

53. The Commission must accordingly next determine whether the difference in treatment of these categories pursued a legitimate aim.

54. The Commission accepts, as does the applicant, that the aim of protecting morals and the rights of others is legitimate. The Commission also accepts that legal measures which prescribe age limits for particular types of sexual behaviour are, in principle, a legitimate way of pursuing that aim. Whether, in the specific case, the aim of protection of morals can be sufficient to justify differing ages is a matter which the Commission will consider in connection with the proportionality of the means and the aim.

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

56. The Government argue that it is well-established that Contracting States enjoy a very broad margin of appreciation concerning the assessment of the measures appropriate in relation to matters associated with questions of morality. It is true that, in the context

of measures designed to protect the moral interests and welfare of the society, the Court has held that State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements. It is true too that, as noted above, the Court, in the context of Article 8 (Art. 8) of the Convention, has acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct "notably in order to provide safeguards against the exploitation of those who are specially vulnerable by reason, for example, of their youth" (above-mentioned Dudgeon judgment, p. 25, para. 62). On the other hand, the Court has underlined that in areas involving intimate aspects of private life, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes of Article 8 para. 2 (Art. 8-2) (above-mentioned Dudgeon judgment, p. 21, para. 52, confirmed as recently as 1993 in the above-mentioned Modinos judgment, p. 12, para. 25). Moreover, in matters concerning alleged discrimination on grounds of sex, very weighty reasons would have to be put forward before the Convention organs could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention (see Eur. Court HR, Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291-B, p. 32, para. 24).

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

58. The Government draw attention to the consistent series of decisions by the Commission recognising that the criterion of social protection justifies not only the imposition of restrictions on male homosexual activity but the setting of a higher minimum age than in the case of heterosexuals. In particular, in *X v the United Kingdom* (No. 7212/75 referred to above) the Commission found that an objective and reasonable justification existed for the different ages of consent, there being a realistic basis for the Government's opinion that, given the controversial and sensitive nature of the question involved, young men in the 18-21 bracket who were involved in homosexual relationships would be subject to substantial social pressures which could be harmful to their psychological development. Reliance is further placed on the conclusion of the majority of the Policy Advisory Committee which, while recommending the reduction of the age of consent to 18, was not prepared to accept the reduction of the age to 16: the majority of the Committee expressed the view that such reduction could only be justified if there was stronger evidence than then existed to the effect that the reduction would not have harmful consequences for 16 and 17 year olds and stated that they were strongly influenced by the lack of unanimity in the medical evidence on the subject.

59. The Commission, however, observes that its Report in *X. v. the United Kingdom* is now nearly 20 years old. While it is true that the views expressed in that Report have been subsequently repeated, it is also true that major changes have in the meantime occurred in professional opinions - particularly those of the medical profession - on the subject of the need for the protection of young male homosexuals and on the desirability of introducing an equal age of consent. In the first place, it is noted that even by 1981 the Policy Advisory Committee was unanimous in its view that the sexual pattern of the overwhelming majority of young men was fixed by the age of 18 and that a minimum age in excess of 18 could no longer be supported. Since 1981 there have been further important developments in professional opinion. In particular, as noted above, the Council of the British Medical Association (BMA), which in 1981 gave evidence to the Policy Advisory Committee that boys and girls of the same age did not possess the same degree of emotional and psychological maturity, observed in 1994 that most researchers now believed that sexual

orientation was usually established before the age of puberty in both boys and girls and referred to evidence that reducing the age of consent would be unlikely to affect the majority of men engaging in homosexual activity, either in general or within specific age groups. The BMA Council concluded in its Report that the age of consent for homosexual men should be set at 16 since the then existing law might inhibit efforts to improve the sexual health of young homosexual and bisexual men. An equal age of consent was also supported by the Royal College of Psychiatrists, the Health Education Authority and the National Association of Probation Officers as well as by other bodies and organisations concerned with health and social welfare. It is further noted that equality of treatment in respect of the age of consent is now recognised by the great majority of Member States of the Council of Europe.

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

61. In contending that there remains a reasonable and objective justification for maintaining different ages of consent for homosexual males and for heterosexuals, the Government place considerable reliance on the fact that the issue was recently and fully debated by a democratically elected Parliament which, on a free vote, decided to reduce the minimum age of consent to homosexual acts to 18 but rejected a proposal to assimilate the age of consent to that for heterosexuals.

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

63. Two such principal arguments emerge from the speeches in Parliament and are adopted and repeated in the Government's submissions. In the first place it is argued that certain young men between the ages of 16 and 18 do not have a settled sexual orientation and that the aim of the law is to protect such vulnerable young men from activities which will result in considerable social pressures and isolation which their lack of maturity might cause them later to repent: it is claimed that the possibility of criminal sanctions against persons aged 16 or 17 is likely to have a deterrent effect and give the individual time to make up his mind. Secondly, it is argued that society is entitled to indicate its disapproval of homosexual conduct and its preference that children follow a heterosexual way of life.

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

to expose to criminal sanctions not only the older man who engages in homosexual acts with a person under the age of 18 but the young man himself who is claimed to be in need of such protection.

65. As to the second ground relied on - society's claimed entitlement to indicate disapproval of homosexual conduct and its preference for a heterosexual lifestyle - the Commission cannot accept that this could in any event constitute an objective or reasonable justification for inequality of treatment under the criminal law. As the Court observed in its Dudgeon judgment in the context of Article 8 (Art. 8) of the Convention:

"Decriminalisation' does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features."

(above-mentioned Dudgeon judgment, p. 24, para. 61)

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

CONCLUSION

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

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. French)

CONCURRING OPINION OF Mr. I. CABRAL BARRETO JOINED BY Mr. I. CONFORTI

J'ai voté, avec la majorité, pour la violation de l'article 8 combiné avec l'article 14 de la Convention.

Toutefois, au raisonnement de la majorité, j'ajouterai qu'il existe également une discrimination par rapport aux relations homosexuelles des filles âgées de seize ans (par. 49).

Comme cela est indiqué à juste titre au paragraphe 64, l'orientation sexuelle des garçons et des filles est aujourd'hui fixée à seize ans, et je n'arrive pas à comprendre le traitement différent qui est accordé au Royaume-Uni aux relations homosexuelles masculines ou féminines (entre garçons ou entre filles).

(Or. English)

DISSENTING OPINION OF MM. K. HERNDL AND I. BÉKÉS

We regret that we cannot concur with the majority's view that by maintaining a different minimum age for lawful private homosexual and heterosexual relationships - 18 years for the former vs. 16 years for the latter - the United Kingdom should be regarded as being in violation of Article 8 of the Convention, taken in conjunction with its Article 14.

The issue at stake in the present case is exclusively whether a

different treatment of homosexual and heterosexual relations, insofar as the minimum age of consent is concerned, is permissible under the Convention or not.

While the majority seem to recognise that some need for the protection of young male homosexuals (below the statutory age of 18 under present law in the United Kingdom) may still exist, as there may be certain young men for whom homosexual experience after the age of 16 (but under the age of 18) will have influential and potentially disturbing effects, they find that maintaining the different minimum age "is not proportionate to any legitimate aim served thereby" (para. 64 of the Report).

So far the Commission has consistently held (cf. *X. v. Federal Republic of Germany*, No. 5935/72, Dec. 30.9.1975, D.R. 3 p. 46; *X. v. the United Kingdom*, No. 7215/75, Dec. 12.10.1978, D.R. 19 p. 66, *Johnson v. the United Kingdom*, No. 10389/83, Dec. 17.7.1986, D.R. 47 p. 72; *Zukrigl v. Austria*, No. 17279/90, Dec. 13.5.1992, unpublished; *H. F. v. Austria*, No. 22646/93, Dec. 26.6.1995, unpublished) that setting a higher minimum age for lawful homosexual relationships than for heterosexual relationships is not in violation of the Convention. Such type of different treatment was regarded by the Commission as having "an objective and reasonable justification in the criterion of social protection". With its present finding the Commission departs from this established jurisprudence on the sole ground that "now" "most researchers believe that sexual orientation is usually established before the age of puberty in both boys and girls". This is a quotation from a Report of the British Medical Association which voted in 1994 "to support lowering the age of consent for gay men to 16" (although as stated in the same Report the Association had previously proposed "that the age of consent for homosexual men should be set at 18 to reflect their lower rate of biological development").

While, as we believe, all States parties to the Convention share the view expressed by the Court that the Convention is a living instrument which must be interpreted in the light of present-day conditions (cf. *Eur. Court HR, Tyrer v. United Kingdom* judgment of 25.4.1978, Series A no. 26, p. 26, para. 31, *Marckx v. Belgium* judgment of 13.6.1979, Series A no. 31, p. 31 para. 41, *Airey v. Ireland* judgment of 9.10.1979, Series A no. 32, p. 32, para. 26), it is also true that when interpreting its provisions, the developments and commonly accepted standards in the policy of the Member States of the Council of Europe in the relevant field will have to be taken into account (*Tyrer* case, para. 31, verbatim, but also the argument made by the Court in the *Marckx* case, para. 41, when it stated that it was "struck" by specific evolutions in the domestic law of Member States). In the field of the minimum age of consent for sexual relationships there does, however, not seem to exist a common standard. A number of States parties to the Convention still maintain different minimum ages for homosexual and heterosexual relations, sometimes as far as four years apart. According to the majority of the Commission "equality of treatment in respect of age for consent is now recognised by the great majority of Member States of the Council of Europe" (para 59 of the Report). Does that statement really reflect the present situation?

The issue of the uniform age in this field was extensively debated in the British Parliament in 1994, quite some time before the present application was introduced. A free vote was taken on how far to lower the age for homosexual relations (at that time still fixed at 21 years). On the basis of the available medical studies and recommendations, including those of the British Medical Association, the Royal College of Psychiatrists and the Health Education Authority, Parliament reduced the age of consent to 18 years. While the argument mainly ranged between the ages of 16 and 18, the majority in the House of Commons felt that young men may still be sexually uncertain and often disturbed between the ages of 16 and 18; they therefore opted for the higher age. We cannot see how the Commission at the present stage

can determine that such a decision of the British Parliament based as it were on a careful consideration of all arguments advanced in favour of the 18 as well as of the 16 year limit, would constitute a discrimination forbidden by the Convention and not justifiable under para. 2 of Article 8.

(Or. French)

DISSENTING OPINION OF Mr. J.-C. SOYER

Je n'ai pu me rallier à l'avis de la majorité, cela pour des raisons qui se trouvent excellemment exprimées par M. Martínez, d'une part, et MM. Herndl et Békés, dans leurs opinions dissidentes respectives.

Comme M. Martínez, à la démonstration duquel je me rallie totalement, je considère que l'on doit tenir compte, dans cette affaire où les données nationales sont prédominantes, de la marge d'appréciation de l'Etat concerné.

Comme MM. Herndl et Békés, dont j'adopte sans restriction le raisonnement, je pense que des données objectives et raisonnables justifient la distinction que le Parlement britannique a choisi de retenir pour fixer l'âge à partir duquel les relations homosexuelles ou hétérosexuelles échappent à la répression pénale.

(Or. French)

DISSENTING OPINION OF Mr. F. MARTINEZ

Je ne partage pas l'avis de la majorité de la Commission. Pour ma part, j'estime que la présente affaire relève de la marge d'appréciation qui est l'apanage de l'Etat concerné.

En effet, le Parlement britannique s'est engagé dans la voie d'une réduction de l'âge légal des relations homosexuelles entre hommes. Il n'a pas agi à la légère. Loin de là, il a tenu compte des études faites et d'opinions savantes exprimées sur le point de savoir quel était le meilleur âge. Après avoir pris en considération les différentes opinions sur le sujet, le Parlement a voté et décidé à la majorité de ramener l'âge légal à 18 ans, et non à 16 ans, comme la minorité parlementaire préconisait.

Je signale que le Parlement britannique a pesé les arguments pour l'un et l'autre âge et que, par la voie démocratique de la majorité des voix, il s'est décidé pour l'âge de 18 ans. Pourtant, on dirait, d'après les paragraphes 59 et 60 du rapport, que les 15 membres représentant la majorité de la Commission européenne des Droits de l'Homme, dans cette affaire prennent fait et cause pour la minorité parlementaire.

Ceci, selon mon avis très personnel, s'apparente à une sorte d'excès de pouvoir.

C'est vrai que le rapport de la Commission ne s'arrête pas là et qu'il présente définitivement son opinion sous couvert d'une discrimination interdite par l'article 14 de la Convention. Mais cela ne change rien.

Il y a des opinions fondées, selon lesquelles les rapports homosexuels des adolescents ont un impact plus négatif pour leur développement émotionnel et psychologique que les rapports hétérosexuels (voir, par exemple, le paragraphe 23 du rapport de la Commission). Dans ces circonstances, je pense qu'il y a une justification objective et suffisante de la part du Parlement britannique pour fixer un âge différent en fonction de chaque type de rapport, sans que la Commission européenne des Droits de l'Homme puisse

imposer ses vues à la souveraineté parlementaire, sous couvert de l'article 14 de la Convention.

Il en va de même pour la différence entre hommes et femmes. Dès lors que les filles sont plus précoces que les garçons (voir page 5 du rapport), il n'y a pas lieu de trouver une violation de la Convention dans le fait que le Parlement britannique a pris en compte cette différence-là.

Enfin, je tiens à souligner que le Parlement britannique est mieux placé que les membres composant la majorité de la Commission pour déterminer ce qui convient le mieux au peuple ou à la société qu'il représente démocratiquement.