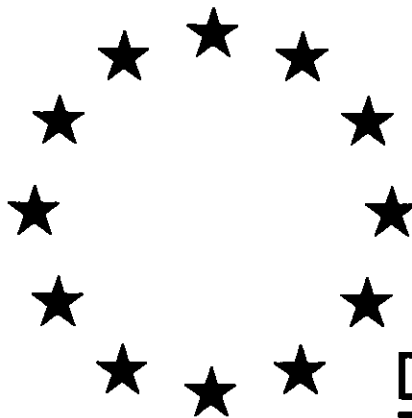


COUNCIL
OF EUROPE



CONSEIL
DE L'EUROPE

Or. English

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 7525/76

Jeffrey DUDGEON

against

the United Kingdom

Report of the Commission

(Adopted on 13 March 1980)

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I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

A. The substance of the application

2. The applicant, Mr Jeffrey Dudgeon, who was 30 years of age at the date of introduction of his application, is a shipping clerk, resident in Belfast, Northern Ireland.

3. In his application to the Commission the applicant complained of the existence, in the law in force in Northern Ireland, of certain offences relative to male homosexual conduct. The offences in question were:

- under SS 61 and 62 of the Offences against the Person Act 1861 - the offence of buggery and attempted buggery;
- under S 11 of the Criminal Law Amendment Act 1885 - the offence of gross indecency between males;
- at common law - attempts to commit the above offences and the offences of conspiracy to corrupt public morals and conspiracy to outrage public decency.

4. The applicant complained that, he being a homosexual, the existence of the above-mentioned offences amounted to unjustified interference with his right to respect for his private life, as guaranteed by Art. 8 of the Convention. He alleged that he had personally suffered prejudice, in the form of fear and distress, as a result of the existence of these offences. He had also been questioned by the police, in January 1976, about homosexual relationships.

5. The applicant further complained that, as a homosexual, he suffered unjustifiable discrimination on sexual grounds and also on grounds of his residence because the offences in question were not part of the law in other regions of the United Kingdom. In this respect he alleged the violation of Art. 14 of the Convention in conjunction with Art. 8.

B. Proceedings before the Commission

6. The application was introduced on 22 May 1976 and registered on 25 May 1976.

7. On 10 December 1976 the Commission decided, in accordance with Rule 42 (2)(b) of its Rules of Procedure, to give notice of the application to the respondent Government and invite them to submit written observations on its admissibility. The Government's observations were submitted on 22 February 1977 and the observations of the applicant in reply were submitted on 7 April 1977.

8. On 18 May 1977 the Commission decided to request the Government to submit further written observations on admissibility. The Government's supplementary observations were submitted on 23 August 1977 and the applicant's observations in reply on 22 September 1977. Both parties also commented on the question of future procedure in the case in the light of the Government's intention to put forward proposals for reform of relevant legislation. By letter of 23 August 1977 the Government suggested that there was little point in proceeding with the application until the proposals had been published. By letter of 28 November 1977 the applicant's representatives indicated that the applicant wished the case to proceed.

9. On 3 March 1978 the Commission decided to proceed with its examination of the case. It declared admissible the applicant's complaints concerning the laws prohibiting homosexual activities between males (or attempts at such activities) and declared inadmissible his complaints concerning the offences of conspiracy to corrupt public morals and conspiracy to outrage public decency (1).

10. The Commission further decided to invite the applicant, and thereafter the respondent Government, to submit written observations on the merits of the case. The applicant's representatives were requested to submit their observations before 28 June 1978. The applicant's observations were submitted, after extension of the time-limit to 15 September 1978, on 1 September 1978. The Government were then invited to submit their observations before 21 October 1978. A number of extensions of the time-limit were requested by them, in view of the fact that they were still considering responses to proposals to change the relevant law. On 2 March 1979 the Commission granted the Government a final extension to 30 March 1979 and at the same time decided in principle to hold a hearing on the merits of the case. The Government's written observations were submitted on 21 March 1979.

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(1) See Decision on Admissibility, Appendix II.

11. On 8 May 1979 the Commission confirmed its decision to hear the parties' submissions on the merits. The hearing was held in Strasbourg on 6 July 1979. The applicant was represented by Mr Kevin Boyle, barrister-at-law and Mr Francis Keenan, solicitor. He was also present himself. The respondent Government were represented by Mrs Audrey Glover, Acting Agent, Foreign and Commonwealth Office, Mr N. Bratza, barrister-at-law, Mr A. Wilson of the Northern Ireland Office and Mr R. Tomlinson of the Home Office.

C. The present Report

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

MM. C.A. NØRGAARD, Acting President (Rule 7 of
the Rules of Procedure)
G. SPERDUTI
E. BUSUTTIL
C.H.F. POLAK
J.A. FROWEIN
G. JØRUNDSSON
G. TENEKIDES
B. KIERNAN
N. KLECKER
M. MELCHIOR

13. The text of the Report was adopted by the Commission on 13 March 1980 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2).

14. A friendly settlement of the case has not been reached and the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly:

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- (1) to establish the facts; and
- (2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

15. A Schedule setting out the history of proceedings before the Commission and the Commission's Decision on Admissibility in the case are attached hereto as Appendices I and II. An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document (Appendix III).

16. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

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II. ESTABLISHMENT OF THE FACTS

17. The facts of the case which are not generally in dispute between the parties, are as follows:

A. The relevant law in Northern Ireland

18. Under S. 61 of the Offences against the Person Act 1861 (1), it is a crime, punishable with a maximum sentence of life imprisonment, to commit buggery. By virtue of S. 62, an attempt to commit buggery is punishable with a maximum sentence of ten years' imprisonment. Under S. 11 of the Criminal Law Amendment Act 1885 (2), it is an offence punishable with a maximum of two years' imprisonment for any male person, in public or in private, to commit an act of "gross indecency" with another male. "Gross indecency" is not defined in the statute but can take various forms such as mutual masturbation, inter-crural contact or oral-genital contact.

19. At common law an attempt to commit an offence is itself an offence, punishable with any sentence not exceeding the maximum for the completed offence. It is thus an offence to attempt to commit an act contravening S. 11 of the 1885 Act.

20. Homosexual acts between females are not in themselves punishable offences. The age of consent for heterosexual intercourse is 17. Subject to certain exceptions it is an offence to have intercourse with a girl under that age.

B. The law in other parts of the United Kingdom

21. The law of England and Wales on male homosexual acts is contained in the Sexual Offences Act 1956 (3), as amended by the Sexual Offences Act 1967 (4).

22. The 1967 Act gave effect to recommendations made in 1957 in a Report by the Committee on Homosexual Offences and Prostitution established under the chairmanship of Sir John Wolfenden (5). Broadly speaking the position since its enactment has been that homosexual acts (acts of buggery or gross indecency), committed in private between two consenting males who have attained the age of twenty-one years, are not criminal offences.

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- (1) 24 and 25 Vict., C. 100.
(2) 48 and 49 Vict., C. 69.
(3) 4 and 5 Eliz. 2, C. 69.
(4) 1967 C. 60.
(5) Cmnd. 247.

23. The relevant law in Scotland is contained partly in the Sexual Offences (Scotland) Act 1976 and partly in common law. The 1976 Act was a consolidating measure. S. 7 is a re-enactment of S. 11 of the Criminal Law Amendment Act of 1885 (see para. 18 above) and contains the offence of gross indecency. The offence of sodomy exists at common law. The law is thus similar to that in force in Northern Ireland. However successive Lord Advocates have stated in Parliament that it is their policy not to prosecute in respect of acts which would not be punishable if the Sexual Offences Act 1967 applied in Scotland.

C. The constitutional position of Northern Ireland

24. When the Acts of 1861 and 1885 were passed, all Ireland was an integral part of the United Kingdom. There was no Parliament in Ireland. The Acts were passed by the United Kingdom Parliament at Westminster. After the partition of Ireland, matters of criminal law fell generally within the legislative competence of the Northern Ireland Parliament established under the Government of Ireland Act 1920 (1). Reform of the laws in question in the present case would have been within the competence of that Parliament. By convention the Westminster Parliament rarely, if ever, legislated in respect of Northern Ireland on devolved matters. In particular between 1921 and 1972 it did not legislate for Northern Ireland on any social matters.

25. From March 1972 onwards, Northern Ireland has been subject to direct rule from Westminster. With the exception of a five month period in 1974, when there was a Northern Ireland Assembly and Executive, legislation in all fields has been the responsibility of the Westminster Parliament and Government. Under the temporary provisions currently in force, power is conferred to legislate by Order in Council for Northern Ireland (2). Much Northern Ireland legislation takes this form rather than being passed in the form of an Act of Parliament.

D. Proposals for reform of relevant legislation

26. Whilst the present application has been pending before the Commission, reform of the legislation in force in Northern Ireland relating to male homosexuality has been under active consideration and discussion.

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(1) 10 and 11 Geo. 5, Ch. 67.

(2) Northern Ireland Act 1974, Schedule 1.

27. The present applicant and others have for some time been conducting a campaign aimed at bringing the law into line with that in force in England and Wales at least, and if possible achieving a lower minimum age than twenty-one years.

28. In July 1976, following the failure of the Northern Ireland Constitutional Convention to work out a satisfactory form of devolved Government for the province, the then Secretary of State for Northern Ireland announced to Parliament that the Government would henceforth be looking closely at the need for legislation in fields which they had previously thought should be left to a future devolved Government. One such case was homosexuality and divorce. The Northern Ireland Standing Advisory Commission on Human Rights were invited to give their views on these matters.

29. The Advisory Commission reported in April 1977 (1). On the question of homosexual offences, they received evidence from a number of persons and organisations. These included various organisations campaigning for reform of the law, the Church of Ireland, the Methodist, Presbyterian and Free Presbyterian Churches, the police, the Department of Health and Social Services and other bodies. The Commission concluded from this evidence that "most people do not regard it as satisfactory to retain the existing differences in the law and few only would be strongly opposed to changes which would bring the Northern Ireland law into conformity with that in England and Wales."

30. The Report of the Advisory Commission includes the following passages as to evidence before them:

"We were informed by Mr W. Meharg, the Assistant Chief Constable (Crime) of the Royal Ulster Constabulary that since the beginning of 1972 there had been 11 convictions in Northern Ireland in respect of homosexual acts: all but one of these cases would have constituted offences under the existing law in England and Wales. Complaints about homosexual acts between consenting adults in private were very rarely made. There was no evidence of any increase in the number of complaints in recent years. The police in England had advised him that no particular problem had been encountered as a result of the passing of the 1967 Act.

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The Free Presbyterian Church of Ulster was the only Church to express firm opposition to legalisation of homosexual acts: the other Churches which submitted

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(1) Report on the law in Northern Ireland relating to divorce and homosexuality.

evidence had in recent years given the matter specific consideration by way of working groups or otherwise. For example, in the case of the Church of Ireland, the Church Committee's Report for 1976 stated as follows:-

'The fact that an individual is homosexual does not exclude him or her from the Church's care. Unfortunately some people of homosexual disposition express themselves by forcing their attentions on other parties - even minors - and this the Church condemns. Increased knowledge and understanding of homosexuality has changed attitudes to it. A consequence of this is the fact that the law relating to homosexual acts between consenting adults has been reformed in Britain by the provision of the Sexual Offences Act 1967. No such change has been made in either part of Ireland. It is the opinion of the majority of the Role of the Church Committee that the relevant laws in both parts of Ireland should be examined with a view to reform.'

The evidence from the Methodist Church in Ireland and the Presbyterian Church in Ireland showed a similar approach. But it would be incorrect to suggest that there is unanimity on this subject amongst members of the Churches.

The Samaritans, the Triangle (Portstewart and Coleraine) Group of Women's Aid, and the Northern Ireland Council on Religion and Homosexuality indicated support for legislation in Northern Ireland on the lines of the 1967 Act.

There was evidence from groups such as Cara Friend, Northern Ireland Gay Rights Association, the Open University Gay Society, Union for Sexual Freedom in Northern Ireland and 1974 Committee for Homosexual Law Reform in Northern Ireland which went further and advocated, amongst other changes, a reduction in the age of consent for homosexual offences in private."

The Advisory Commission concluded that a majority of people would consider it appropriate to introduce legislation corresponding with the 1967 Act but that there would not be support for legislation which went further, in particular by lowering the age of consent. It recommended that Northern Ireland law be brought into line with the 1967 Act.

31. In July 1978 the Government published a proposal for a draft Homosexual Offences (Northern Ireland) Order 1978. This would have brought Northern Ireland law on the matter broadly into line with that of England and Wales. In particular homosexual acts in private between consenting males over 21 years of age would no longer have been punishable. In a foreword to the proposal, the responsible Minister (1) stated that the Government had always recognised that homosexuality was an issue about which some people in Northern Ireland held strong convictions or religious opinions. Since publication of the Advisory Commission Report the Minister had, he said, consulted widely with interested bodies and Church bodies "and I believe that I have heard the main arguments both for and against reform." The foreword continued as follows:

"3. In brief, there are two differing viewpoints. One, based on an interpretation of religious principles, holds that homosexual acts under any circumstances are immoral and that the criminal law should be used, by treating them as crimes, to enforce moral behaviour. The other view distinguishes between, on the one hand that area of private morality within which a homosexual individual can (as a matter of civil liberty) exercise his private right of conscience and, on the other hand, the area of public concern where the State ought and must use the law for the protection of society and in particular for the protection of children, those who are mentally retarded and others who are incapable of valid personal consent.

4. I have during my discussions with religious and other groups heard both these viewpoints expressed with sincerity and I understand the convictions that underlie both points of view. There are in addition other considerations which must be taken into account. For example, it has been pointed out that the present law is difficult to enforce, that fear of exposure can make a homosexual particularly vulnerable to blackmail and that this fear of exposure can cause unhappiness not only for the homosexual himself but also for his family and friends.

5. While recognising these differing viewpoints I believe we should not overlook the common ground. Most people will agree that the young must be given special protection; and most people will also agree that the law should be capable of being equitably enforced. Moreover those who are

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(1) The Parliamentary Under-Secretary of State,
Northern Ireland Office.

against reform have compassion and respect for individual rights just as much as those in favour of reform have concern for the welfare of society. For the individuals in society, as for Government, there is thus a difficult balance of judgment to be arrived at."

The Government invited comments on the proposal before 31 October 1978.

32. Comments received before, during and after the formal period of consultation revealed a substantial division of opinion on the matter. On a simple count of heads, a majority of the individuals and institutions expressing views were against reform. All were either strongly in favour of or strongly against the proposal. Nothing was heard from those who might not feel strongly either way. The comments of many individuals demonstrated that they had not understood the limited nature of the change being proposed (1).

33. A letter of 13 December 1978 from the Northern Ireland Office to the applicant indicates that letters were received from 848 individuals in favour of the proposal. Subsequently ten of these were found to be spurious. Six individual politicians commented in favour. Press reports had indicated that the Social Democratic and Labour Party, the Alliance Party, the Unionist Party of Northern Ireland and the Liberal Party Assembly had all expressed views in favour of the proposal. The General Synod of the Church of Ireland had sent a letter in favour. Representatives of the General Assembly of the Presbyterian Church had expressed favourable views to the Advisory Commission, whilst adding that liberalisation would not be supported by all Presbyterians. The General Secretary of the Council of Social Work of the Methodist Church had also expressed favourable views to the Advisory Commission. The letter also referred to a number of other organisations which had favoured reform. Some of these were organisations for homosexuals (e.g. the Northern Ireland Gay Rights Association). Others were organisations concerned with social matters (e.g. the National Association of Probation Officers).

34. The letter also gave details of those who had expressed views against reform. Letters from 304 individuals had been received and 15 had enclosed petitions with a total of 681 signatures. The Democratic Unionist Party (DUP) had organised and presented a "Save Ulster from Sodomy" petition, with 70,000 signatures. Letters against had been received from the Queen's Democratic Unionist Association, from the DUP and one of its branches. Nine district councils and

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(1) Government's written observations on the merits.

and a number of Orange Lodges and other organisations had expressed opposition. A committee and ten local churches and presbyteries of the Presbyterian Church had also done so, thus dissociating themselves from the General Assembly. A number of other religious bodies had also expressed opposition including the Committee for Moral Questions of the Evangelical Presbyterian Church, the Reformed Presbyterian Church, the Baptist Union of Ireland, the Congregational Union of Ireland, the Free Methodist Church and others. Letters had also been received from several other organisations, generally of a religious character and in some cases engaged in youth activities (e.g. the YMCA Committee, Belfast; Northern Ireland Boys' Brigade). A total of 4,350 signatures was attached to communications received from the churches and other organisations.

35. After the letter had been written to the applicant, the Roman Catholic Bishops submitted a statement to the Government opposing the proposed reform. They considered that the proposed change "would be likely to be the occasion of further decline in moral standards, in a field where there is already much decline and much confusion". They suggested that what the reformers were seeking was acceptance by society in general of homosexuality as an "alternative sexual life style". The change in official attitudes which a change in the law would be taken to imply was likely to create problems, particularly for adolescents, who were vulnerable to harm in a climate of moral laxity. The present law was not harshly interpreted or operated and the proposed change could bring about more serious problems than anything attributable to it.

36. None of the twelve Members of Parliament representing Northern Ireland constituencies has publicly supported reform of the law and some have openly opposed it. However the applicant has lobbied Members of Parliament and states that a number have indicated that they are not opposed to reform, at least in principle.

37. In January 1978 an opinion poll was conducted in Northern Ireland by the Opinion Research Centre on the global question of the desirability of reforms in the law relating to divorce and homosexuality. The result indicates that overall the 1009 people interviewed were evenly divided on the desirability of bringing the law into line with that of England and Wales. Those interviewed were not asked separately about the homosexuality and divorce laws.

38. On 2 July 1979 the Secretary of State for Northern Ireland announced that the Government did not intend to pursue the proposed reform. He made the following statement in Parliament:

"A proposal for a draft Order was published by the previous Government last July at the beginning of a consultation period which lasted three months. Consultation showed that strong views are held in Northern Ireland, both for and against change in the existing law. Although it is not possible to say with certainty what is the feeling of the majority of people in the province it is clear that a substantial body of opinion there (embracing a wide range of religious as well as political opinion) is opposed to the proposed change. In considering its own position the Government has taken into account not only the results of the consultation exercise but also the fact that legislation on an issue such as the one dealt with in the draft Order has traditionally been a matter for the initiative of a Private Member rather than for Government. At present, therefore, the Government proposes to take no further action in relation to the draft Homosexual Offences Order, but we would be prepared to reconsider the matter if there were any developments in the future which were relevant."

39. The law relating to sexual offences in England and Wales has also been under review since July 1975. In June 1979 the Policy Advisory Committee on Sexual Offences provisionally recommended that the minimum age for homosexual relations between men should be reduced to eighteen (1).

E. The application of the law in Northern Ireland - in general

40. Between January 1972 and April 1978 there were 42 prosecutions for homosexual offences in Northern Ireland. The majority of these cases involved minors. Others involved persons aged eighteen to twenty, prisoners or mental patients. The Government have stated that it cannot be established with certainty from records held by them that anyone was prosecuted during this period for an offence which would certainly have been lawful if done in England. The police evidence to the Advisory Commission (see para. 30 above) indicates that there was one such case.

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(1) Working Paper on the Age of Consent in relation to Sexual Offences, HMSO, June 1979 - circulated for comment and criticism only.

41. In about the first six months of 1976, some 23 men, mostly in their twenties, were questioned by the police about alleged homosexual activities. One of these persons was the present applicant (see below, para. 43). Papers were submitted to the Director of Public Prosecutions who decided in February 1977 "that there should be no prosecutions in respect of the cases which were then before him but that his decision was not to be interpreted as representing a policy never again to prosecute in this sphere of the law"(1).

F. The position of the applicant

42. The applicant submitted to the Commission two affidavits describing effects which he alleged he had himself suffered as a result of the legislation. He stated that he had been consciously homosexual from the age of fourteen years; he had been aware of disapproving social attitudes towards homosexual behaviour and had experienced fear, suffering and distress directly caused by the existence of the offences in question. He alleged that the prejudice he had personally suffered included psychological distress, fear of legal repercussions through meeting with other homosexuals, fear of harassment, blackmail, persecution and resultant disclosure and exposure. Relations with his family had been affected by parental fears that his homosexual status might become known. This had caused psychological upset and retardation of his motivation to advance himself. He had thus suffered direct economic loss.

43. On 21 January 1976 the applicant himself was questioned by the police, after they had gone to his home to execute a warrant under the Misuse of Drugs Act 1971. Proceedings were brought against another resident of the house under that Act. As a result of papers found in a search of the house the applicant was asked to go to the police station. He was there questioned about alleged homosexual offences and made a statement to the police under the customary caution that he was not obliged to say anything but that anything he did say could be recorded and given in evidence. His papers were retained by the police. The question whether he should be prosecuted was referred to the Director of Public Prosecutions. In February 1977 he was informed that he was not to be prosecuted and his papers were returned to him.

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(1) Report of the Standing Advisory Commission on Human Rights, p.9

44. The applicant has alleged in his affidavits that the investigating police officers made various insulting remarks when he was questioned. A complaint was made in May 1976 about police action against the applicant and others. However no action was taken against any police officer, on the ground that investigation of the complaint did not reveal any improper conduct. The matter was referred to the Director of Public Prosecutions who decided that no criminal charges should be brought against the officers concerned. The applicant was informed of this decision in March 1977.

45. No criminal proceedings have been instituted against the applicant under the relevant legislation. Nor, other than as mentioned above, has he apparently been the subject of any criminal investigation with a view to such proceedings.

III. SUBMISSIONS OF THE PARTIES

A. The applicant

1. Submissions concerning Art. 8 (1) of the Convention

45. The existence of a penal law without specific measures of enforcement was capable of interfering with private life (1). A homosexual was ipso facto affected by the laws in question here. By definition the law interfered with his private life as it criminalised behaviour he might indulge in within the sphere of his private life. It prohibited and sought to prevent such behaviour. It was unnecessary for the applicant to admit to committing the prohibited act. If he had done so, the law made him a criminal offender. If he had been deterred from doing so, the law had interfered with his freedom. In either case there was interference with his private life. In any event he had suffered the effects set out in his affidavits (fear of blackmail etc.) These arose from the existence of the law. The law itself was thus an interference with his private life, regardless of whether it had been applied to him.

46. Furthermore the law had in fact been applied to him. The steps taken against him, such as police questioning under caution and consideration of prosecution, were aspects of enforcement. There was thus an interference with his private life in this respect.

47. The Government's argument that there was a policy not to prosecute except in cases which would involve offences under the English law, was not an answer. There was no public undertaking not to prosecute, as there was in Scotland. The decision not to prosecute in the applicant's case had been taken in the light of public discussion of possible change in the law. The Government had now decided against such change and prosecutions could arise in the future.

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(1) Application No. 6959/75, Bruggemann & Scheuten v. the Federal Republic of Germany, Report of the Commission, Decisions & Reports 10, p. 100 at p. 115, para. 55; European Court of Human Rights, Case of Klass and others, Judgment of 6 September 1978, Series A, No. 28, pp. 17-18, para. 33.

48. In any event a policy of non-prosecution was unsatisfactory. It offended against the requirements of certainty in the securing of Convention rights. It did not grant a freedom. It appeared almost to invite the applicant to break the law. It was of doubtful legality in United Kingdom law. There could be a prosecution by an individual or an application to the courts challenging the policy of non-prosecution. Such a policy did not "secure", within the meaning of Art. 1 of the Convention, the applicant's rights under Art. 8. It left the individual liable to be stigmatised as a criminal, liable to blackmail and without private rights.

2. Submissions concerning Art. 8 (2)

49. The law of Northern Ireland imposed a total prohibition of homosexual behaviour regardless of the age of the participants or their consent or whether the act took place in public or private. Buggery was punishable with the most severe sanction known to the criminal law, namely life imprisonment.

50. This law reflected a historical attitude of fear and prejudice. Any argument seeking to justify such a total prohibition was a rationalisation of this attitude and unjustified on objective grounds. Even if the law were changed, any more extensive restriction of the sexual freedom of homosexuals as opposed to that of heterosexuals was a compromise with the underlying irrational hostility. The doctrine of margin of appreciation was inapplicable since the restriction thus reflected no legitimate end.

51. Research and enquiry in many countries had exploded the myths used to justify special restrictions on homosexuals, including the ideas that homosexuality was a disease or that homosexuals were unnatural or more prone to proselytising adolescents than were heterosexuals. It had shown that sexual orientation was firmly established early in life. The direction of reform in most countries was towards parity of treatment with heterosexuals (1). The research relied on by the German Constitutional Court, to which the Commission had referred in Application No. 5935/72 (2), was challenged in its conclusions as to the social danger of male homosexuals by more recent research. This suggested that homosexuals were likely to change partners within the homosexual community rather than engage in proselytising. The respondent Government's own latest Green Paper (3) also cast considerable doubt on the German research. There was no justification on any ground in Art. 8 (2) for treating male homosexuals differently to either heterosexuals or female homosexuals.

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- (1) The applicant produced a Conspectus of the Law on Homosexual Offences in selected European countries in 1957 and 1976, as also certain material concerning the position of homosexuals in the United States of America.
- (2) X. v. the Federal Republic of Germany, Decisions and Reports 3, p. 46.
- (3) Working Paper of the Policy Advisory Committee on Sexual Offences - see para. 39 above.

52. The total prohibition now in force was not in any event justified on moral or any other grounds. It was doubtful if such a total removal of a right could ever be justifiable under Art. 8 (2). The Commission's decision in Application No. 5935/72 (sup. cit.) suggested that it would not be permissible to prohibit all homosexual behaviour on the basis that it was necessary for the protection of others. Similarly it could not be argued that it was necessary for the protection of morals.

53. In any event, to justify such a total prohibition, at least two requirements would have to be met. First, it would have to be shown that the overwhelming majority of the community would be opposed to removal of the laws in question on bona fide and moral grounds. The Government's submissions suggested that the views of the majority of people were not in fact known. The views of those who were known included many having a special relationship to the moral sense of the community, such as the major Protestant churches, social workers, police and others, who were not opposed to reform. Taking all the available indices of public opinion together, it could not be said that the overwhelming majority were opposed to reform or opposed on moral grounds.

54. In the second place there would have to be cogent evidence that a change of the law would seriously injure the moral standards of the community. Had the Government thought this would be the result, it would presumably not have issued the draft Order. The report of the Standing Advisory Commission (1) suggested that reform in England had not had any deleterious effect on the moral fibre of society. Further, the Government had persisted with reform of the divorce laws although a substantial section of the community was opposed on moral grounds.

55. As to the manner in which the law was applied, if the Government considered that the total prohibition was necessary to protect morality, it was contradictory and damaging to morality not to impose it. The law could have no deterrent effect without enforcement and could not protect morality unless it had such an effect.

56. Finally, the question of what rights should be permitted in a democratic society could not be tailored only to majority views. In this context the applicant referred to para. 46 of the Report of the

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(1) See above, para. 30, for relevant passage in Advisory Commission Report

Policy Advisory Committee on Sexual Offences. The Committee there observed that the Wolfenden Committee had reported at a time of great prejudice against homosexuals. That Committee had stressed the importance of individual freedom of choice and action in matters of private morality and suggested that there was an area of private morality and immorality which was "not the law's business" (1). There was a clear challenge in the present position in Northern Ireland on the question of minimum rights for a minority. There was no evidence that attitudes of those against reform would change, since they were based largely on a religious position. If the proposed legislation was not passed, the result would be to condemn a minority of 70,000 to 100,000 people to a situation in which they had no rights in the matter. The Commission should hold that that was unacceptable under the Convention.

3. Submissions as to Art. 14 in conjunction with Art. 8

57. The applicant first argued that since the restrictions imposed on male homosexual activity by the law of Northern Ireland were greater than those imposed by the law in other parts of the United Kingdom, he was the victim of a violation of Art. 14 in conjunction with Art. 8. In support of this argument he referred to and relied on his submissions at the stage of admissibility (2). These were to the effect that, whether a State comprised a single or different legal systems, it was obliged to secure minimum standards to all its citizens. There was no objective and reasonable justification for the difference in treatment between homosexuals in Northern Ireland and in other parts of the United Kingdom. Alternatively the legislative means employed lacked proportionality.

58. It was accepted that part of the explanation for the differences between the law of Northern Ireland and that of England and Wales lay in the religious nature of Northern Irish society. There was a higher attendance at church and a stronger commitment to religious denominations than on the mainland. However, it was still a modern European society. The Court had said of the Isle of Man that:

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(1) Wolfenden Report, para. 61

(2) See Decision on Admissibility, Annex II

"It not only enjoys long established and highly developed political, social and cultural traditions, but is an up-to-date society. Historically, geographically and culturally, the island has always been included in the European family of nations and must be regarded as fully sharing the common heritage of political traditions, ideals, freedoms and the rule of law, to which the Preamble to the Convention refers."(1)

These remarks applied mutatis mutandis to Northern Ireland. It was not a society that could be regarded as wholly exceptional and in need of protection. Whilst there were differences these did not absolve the Government from applying the minimum standards of rights for minorities in Northern Ireland.

59. The applicant further argued that he was the victim of discrimination on sexual grounds, in that, as a male homosexual his private life was subject to greater restrictions than that of either heterosexuals or female homosexuals. The special restrictions imposed on male homosexuals had no objective and reasonable justification and were also disproportionate. In particular, Application No. 5935/72 (sup. cit) provided no justification for differentiating between adult male and female homosexuals. These differences in treatment were therefore discriminatory and in breach of Art. 14 in conjunction with Art. 8.

B. The respondent Government

1. Submissions as to Art. 8(1) of the Convention

60. The first question under Art. 8(1) was whether the relevant legislation had been applied to the applicant in such a way as to constitute an interference with his right to respect for his private life. The applicant had never been prosecuted or charged with any offence under the legislation. The only direct application of the legislation of which he complained was the police action against him. The Commission had not seen details of the police interviews or the nature of the suspected offences. The applicant had not been obliged to answer questions, his property had been returned to him, his allegations of police misconduct had been investigated and found to be unsubstantiated. There was no basis on the material before the Commission for a finding that the legislation had been applied in such a way as to constitute an interference.

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(1) Eur. Court H.R., Tyrer Case, Series A, para, 38

61. As to whether the existence of the legislation gave rise to an interference, the Government, whilst not conceding the point, did not dispute that as a homosexual the applicant was directly affected by it and entitled to claim to be a victim of an alleged violation of his rights arising therefrom.

62. Not all legislation which purported to regulate sexual conduct was necessarily an interference with private life. Regard should be had not only to the abstract terms of the legislation, but to the manner in which it was applied in practice and the extent to which its application affected, or was likely to affect or interfere with, the applicant's private sexual activity.

63. Referring to the manner in which the legislation had been applied (1) the Government accepted that in so far as it prohibited, and had been enforced so as to punish, private homosexual acts with persons under 21, it might give rise to an interference with the right to respect for private life. However, in so far as it purported to prohibit private homosexual acts between consenting adults over 21, no such interference had been shown to exist since the legislation had not been invoked by the State authorities to charge or prosecute. Any other conclusion would require the Commission to examine other legislation in abstracto. Whilst the applicant maintained that the legislation had a chilling or restraining effect on his sexual life, in evaluating the reality of that effect it was of the highest relevance to examine how the legislation had been applied in practice.

2. Submissions concerning Art. 8(2) of the Convention

64. In considering an issue giving rise to difficult social and moral questions, it was necessary to pay close regard to the particular society whose legislation was in issue. There were marked differences between the social and moral attitudes in Northern Ireland and those in England and Wales. Furthermore, in the circumstances of direct rule, the United Kingdom Government had a heavy responsibility in legislating for Northern Ireland, particularly since only some 12 out of 635 members of the House of Commons represented Northern Ireland constituencies. Before introducing legislation in such a sensitive area, the closest regard must be paid to public opinion. This could only be tested by inviting the views of the community as a whole, as had been done.

(1) See para. 40 above

65. The applicant did not appear to dispute that the general aim of the legislation was consistent with Art. 8(2), being the protection of morals and the protection of the rights of others. The central issue was whether the measures were necessary in a democratic society for these purposes. The approach to this question had been laid down by the Court in the Handyside (1) and Sunday Times (2) cases. The Convention machinery was subsidiary to national systems of protection. Recognition of the primary role of the national authorities was of particular importance where the protection of morals was in issue (3). States had a margin of appreciation in determining both the necessity for a restriction or interference and its extent and the means by which it was effected. The scope of this margin was wider when the protection of morals was at issue than in other cases (4).

66. In both judgments the Court had explained that the power of appreciation was subject to the supervision of the Convention organs. Their function was not to take the place of the national authorities but to review under Art. 8 the measures they had taken. In conducting this review they had to determine whether the measures taken were proportionate to the legitimate aim pursued, and whether the reasons given to justify the measures in question were relevant or sufficient under Art. 8(2).

67. The applicant's suggestion that the doctrine of margin of appreciation did not apply was misconceived. Nothing in the Court's judgments suggested that the existence or scope of the margin of appreciation was dependent on whether the reasons for the restriction imposed were rational or reasonable. In any event the suggestion that restrictions on male homosexual conduct were founded on irrational prejudice was fanciful in view of the overwhelming measure of agreement in Europe as to the necessity for some such restrictions.

68. The applicant's argument based on the position in other countries sought to impose a uniform moral standard and deny States their margin of appreciation. The Sunday Times Case Judgment (para. 61) in particular

(1) Handyside Case, Judgment of 7 December 1976, Series A., Vol. 24

(2) Sunday Times Case, Judgment of 26 April 1979, Series A., Vol. 30

(3) Handyside Judgment, para. 48

(4) Sunday Times Judgment, para. 59

observed that whilst the main purpose of the Convention was to lay down certain international standards, this did not mean that absolute uniformity was required. Even if the applicant had been able to demonstrate a total uniformity of view as to an age of consent for homosexual acts, it would not necessarily follow that Northern Irish law was in breach of Art. 8. In assessing the question of necessity, what was important was not the balance struck in other countries, but the merits of the particular law in the context of the society in question.

69. The laws as applied in the past seven years, namely in cases involving persons under 21 years old or other special circumstances, were justified under Art. 8 (2) as necessary for the protection of the rights of others. The Wolfenden Committee had recommended adoption of 21 as the age of consent on the ground that young men in the age-bracket of 18 to 21 years would otherwise be subjected to substantial social pressures which could be harmful to their psychological development. This remained a valid basis for enforcing legislation where persons under 21 were involved. The Government referred to the Commission's decision in Application No. 5935/72 (sup. cit.) in support of this submission.

70. If, contrary to their primary submission, the general prohibition of homosexual acts had amounted to an interference with private life, it was justified under Art. 8 (2) as being necessary in a democratic society for the protection of morals. The consultation of public opinion had revealed that a substantial proportion of those who expressed views considered that removal or modification of the provisions in question would be seriously damaging to the moral fabric of society. These views might be wrong or misguided but it could not be said that they were irrelevant or insufficient reasons within the meaning ascribed to these terms in the Handyside and Sunday Times cases.

71. The proposed changes might be thought modest, but in practice would be profound, with marked social consequences. Since the 1967 Act came into force in England, there had been a dramatic social change in relation to the whole issue of homosexuality. Whilst this might be thought a change for the better, there was room for the view that the change in the law had led to a decline in moral and social standards. The body of opinion taking this view in Northern Ireland might be out of line with opinion in other communities. However the issue under Art. 8 (2) was the necessity for the provisions in the context of the particular society.

72. The Government had not themselves taken up a position either for or against reform. However after careful consideration, in face of the strong body of opposition, they had decided that it would not be appropriate to introduce the amendment to the law against the wishes of the elected representatives of Northern Ireland and a substantial proportion of the community. To have legislated in defiance of the wishes of a large part of the community could have done more harm than good by creating a climate of opinion hostile to homosexuals. Their reasons for declining at this stage to introduce legislation to alter the law were relevant and sufficient for the purposes of Art. 8 (2).

73. As to whether the measures were proportionate to the legitimate aim pursued, it was essential to have regard to the way in which the laws were applied in practice.

74. The Commission should find that in maintaining the legislation in force, and in applying it, the Government had not exceeded the margin of appreciation allowed them under Art. 8 (2) of the Convention and were not in breach of Art. 8.

3. Submissions concerning Art. 14 of the Convention

75. The Government first referred to the applicant's allegation of discrimination on grounds of residence. In this context also it was necessary to have regard to the particular society whose laws were in issue and to avoid drawing conclusions merely on a comparison with the practice of other communities. Particularly in the field of morality or social law, it would be wrong to conclude from the fact that two different communities in the same State were subject to different laws or measures, that there had necessarily been discriminatory treatment. Provided its requirements were met, the Convention did not oblige a State to have the same laws in force in different parts of its territory.

76. In support of their submissions the Government referred to passages in the Judgment in the Handyside Case (sup. cit.) to the effect that the fact that the publication in question had not been the subject of measures in other parts of the United Kingdom (para. 54), or other Council of Europe member States (para. 57), did not mean that measures taken against it in England were not "necessary" for the purposes of Art. 10 (2). These observations were equally apposite when the question was whether there was objective and reasonable justification for a difference of treatment in two distinct regions, for the purposes of Art. 14.

77. It was beyond dispute that there were profound differences of attitude and public opinion on questions of morality between the English and Irish communities. These differences in moral attitudes provided objective and reasonable justification for the difference in the legislative provisions. The difference in actual treatment was far less marked in view of the way the Northern Irish laws were applied. This was important in judging the proportionality of the difference in treatment. There was thus no breach of Art. 14 in this respect.

78. The issue as to the difference of treatment between homosexuals and heterosexuals was essentially the same as that arising under Art. 8. It was not a difference capable of raising an issue under Art. 14. The mere fact that provisions were framed by reference to particular conduct could not of itself give rise to an issue under Art. 14 of discrimination against those with a particular disposition towards the conduct in question.

79. In any event the difference was justified. In the majority of States separate provisions applied to heterosexual and homosexual acts. This reflected the recognition of society that the social and moral problems posed by the two forms of conduct were not the same and that the need for social protection was greater in the one case than the other. This was borne out by the Wolfenden Report and the Report of the Policy Advisory Committee on Sexual Offences, which took the view that a different age of consent should continue to apply.

80. The criterion of social protection justified the difference of treatment in fact as between homosexuals and heterosexuals in Northern Ireland. The differences in law were justified as necessary for the protection of morals. Homosexual activity raised moral and social problems which did not exist in the case of heterosexual activity. The difference of treatment of the two forms of conduct between persons over 21, was therefore objectively and reasonably justified.

81. As to the difference between male and female homosexuals, the position in the United Kingdom whereby acts of female homosexuality had never been proscribed as such, was similar to that in other European countries, in particular Germany (1). In other countries there was no express distinction but the legislation was in practice applied

(1) Application No. 5935/72 sup. cit.

exclusively against male homosexual conduct. This difference in treatment reflected a genuine difference in the nature and scale of the social and moral problems presented by the two forms of homosexuality. This had been recognised by the Commission in its earlier decisions where it held that Art. 14 did not preclude a difference of treatment between men and women in this field (1). In Application No. 5935/72 (sup. cit.) the Commission had identified reasons, consisting of a specific social danger in the case of male homosexuality, justifying such a difference of treatment. Whilst the case had concerned a law prohibiting only acts involving a person under 21, and not a total prohibition, the reasons in question were of general application. The question whether or not a minimum age was prescribed was relevant not to the question of objective and reasonable justification, but to the question of proportionality. On that issue the Government emphasised the manner in which the law had been applied. As applied, the law had not been disproportionate to the object pursued.

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(1) Application No. 104/55. Yearbook I p.228
Application No. 167/56. Yearbook I p. 235
Application No. 261/57. Yearbook I p. 255.

IV. OPINION OF THE COMMISSION

A. Points at Issue

82. The following points are at issue in the case:

- i. whether the applicant has been the victim of an interference with his right to respect for his private life as guaranteed by Art. 8 (1) of the Convention arising either from the existence of the laws in Northern Ireland prohibiting male homosexual activity or from the police action taken against him;
- ii. if so, whether the interference was justified under Art. 8 (2) of the Convention, in particular whether the maintenance in force and application of the laws is justified as necessary in a democratic society for the protection of morals or for the protection of the rights of others;
- iii. whether the applicant has been the victim of discrimination in securing the enjoyment of his right to respect for his private life, in breach of Art. 14 in conjunction with Art. 8, as a result of any of the following matters:
 - a. the difference between laws in force in Northern Ireland in respect of male homosexual behaviour and those in force in England and Wales;
 - b. the difference between the law relating to heterosexual behaviour and that relating to male homosexual behaviour;
 - c. the difference between the law relating to female homosexual behaviour and that relating to male homosexual behaviour.

B. Art. 8 of the Convention

83. Art. 8 of the Convention is in the following terms:

"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."

84. The first question which arises under Art. 8 is whether the applicant has been the victim of an interference with his right to respect for his private life, as guaranteed by Art. 8 (1). The applicant maintains that the very existence of the laws complained of amounted to such an interference and that in any event the police action taken against him amounted to an application of the laws against him and an interference. The respondent Government, without conceding the point, do not dispute that the applicant is directly affected by the laws and entitled to claim to be a "victim" thereof under Art. 25 of the Convention. They maintain, however, that the effects of the laws on him have not been such as to amount to an interference with his private life.

85. Under Art. 25 (1) of the Convention the Commission may only receive applications from individuals "claiming to be the victim" of a violation of the rights guaranteed by the Convention. The Commission recalls that in the case of Klass and others the Court held that this provision required that an individual should claim to have been actually affected by the violation he alleged. Art. 25 did not permit individuals to complain against a law in abstracto simply because they felt that it contravened the Convention. In principle it did not suffice for an individual to claim that the mere existence of a law violated his rights, it was necessary that it should have been applied to his detriment. Nevertheless the Court recognised that "a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of any specific measure of implementation" (1).

86. The Commission considers that, quite apart from any specific measure of implementation, the applicant is directly affected by the laws of which he complains since he is a male homosexual and the laws prohibit homosexual acts between males. He is one of a particular

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(1) European Court of Human Rights, Case of Klass and others, Judgment of 6 September 1978, Series A, Vol. 28, pp. 17-18, para. 33.

class of persons whose conduct is thus legally restricted. He can therefore properly "claim to be the victim" of a violation of the Convention consisting in the existence of the laws in question.

87. As to the question whether the effects of the laws on the applicant have in fact been such as to amount to an interference with his right to respect for his private life, the Commission first recalls that in a number of previous cases (1), it has held that a person's sexual life forms part of his "private life" for the purposes of Art. 8 (1). Furthermore, in its Report on the case of Brüggemann and Scheuten v. the Federal Republic of Germany (2) it said as follows:

"The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons. In principle, therefore, whenever the State sets up rules for the behaviour of the individual within this sphere, it interferes with the respect for private life and such interference must be justified in the light of para. (2) of Art. 8."
(para. 55)

It also observed that there were limits to the personal sphere and that the claim to respect for private life was automatically reduced to the extent that the individual brought his private life into contact with private life or into close connection with other protected interests (3).

88. The laws in question in the present case impose an absolute prohibition on certain forms of sexual act, regardless of whether they are committed in public or private, or whether or not the parties thereto are consenting parties. However it seems clear that the applicant's complaint relates only to the prohibition of private, consensual acts, which in the Commission's opinion clearly fall within the sphere of private life.

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- (1) See e.g. Application No. 5935/72, X. v. the Federal Republic of Germany, Decisions and Reports 3, p. 46.
(2) Application No. 6959/75, Decisions and Reports 10, p. 100 at p. 115.
(3) Ibid., para. 56.

89. The respondent Government have argued that in considering whether the existence of the laws has interfered with the applicant's right to respect for his private life, the Commission must have regard to the way in which they have been applied in practice in recent years. To do otherwise would, in their submission, involve an in abstracto examination of the laws. Since the laws have not been applied so as to prosecute in respect of private consensual acts involving persons over 21 years of age, they argue that they have not interfered with the applicant's private life insofar as they purport to prohibit him from engaging in such acts.

90. The Commission accepts that, as a general rule, it is necessary to take into account the way a law is applied in practice when deciding whether it gives rise to an interference with the private life of an individual applicant. In accordance with the Court's case-law in the Klass Case (para. 85 above), such an applicant may only complain of the actual effects of the law on him. If in reality it does not affect him at all, he cannot complain. Or its effects may be slight and not such as to interfere with his right to private life. When he complains of the existence of penal legislation, the question whether he runs any risk of prosecution will be relevant in assessing the existence, extent and nature of any actual effects on him. On the other hand the mere fact that a penal law has not been enforced by means of criminal proceedings, or is unlikely to be so enforced, does not of itself negate the possibility that it has effects amounting to interference with private life. A primary purpose of any such law is to prevent the conduct it proscribes, by persuasion or deterrence. It also stigmatises the conduct as unlawful and undesirable. These aspects must also be taken into consideration.

91. The essential question is whether the actual effects of the law, in all the circumstances of the case, are such as to amount to an interference with the right to respect for private life of the individual concerned. The relative weight to be attached to any one factor, such as the terms of the legislation or the rigour with which it is actually enforced, must vary according to the circumstances.

92. As to the present case, the Commission first notes that it is not in dispute that the laws complained of are on occasions applied so as to prosecute private consensual homosexual acts involving persons under 21 years of age. To the extent that the law makes it a criminal offence for the applicant to commit such acts with a person under that age, the Commission considers that it amounts to an interference with his right to respect for his private life, which falls to be justified under Art. 8 (2). It imposes a prohibition on the conduct in question which is actually enforced in practice by means of penal sanctions.

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93. The law also prohibits private consensual homosexual acts involving persons over 21 years of age but, subject to one possible exception (1), it does not appear to have been enforced by means of criminal proceedings in respect of any such acts since at least 1972. However, it has not fallen into desuetude or lost its legal effectiveness to prohibit such acts. The legal prohibition remains and the possibility of prosecutions by either the public prosecuting authorities or private individuals is open in law. Furthermore it does not appear that there is any clear policy not to prosecute in respect of such acts. Whilst there have been no recent prosecutions, this may well be explained by the evident difficulties in obtaining evidence and the fact that relevant complaints are apparently very rarely made to the police (2). The Director of Public Prosecutions announced in February 1977 that his decision not to prosecute in cases then before him "was not to be interpreted as representing a policy never again to prosecute in this sphere of the law" (3). The Commission also notes that that decision was taken at a time when law reform was under discussion, whereas the relevant Government proposals have for the time being at least, now been dropped. It further notes that according to the applicant a policy not to enforce the law would be of doubtful legality and open to challenge in the courts.

94. The risk of prosecution if the law is disregarded is thus not altogether absent. Furthermore, the penalties which could be imposed on conviction are heavy. In such circumstances it is inevitable, in the Commission's opinion, that the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals. The Policy Advisory Committee on Sexual Offences recognised that the existence of the law prohibiting consensual and private homosexual acts involving persons aged between 18 and 21 years of age "provides opportunities for blackmail in some cases and may put a strain upon young men over 18 who fear prosecution for their homosexual activities". They reached this conclusion despite their finding that the number of prosecutions in such cases (in England and Wales) was so small "that the law has in effect ceased to operate" (4). It appears inevitable to the Commission that the existence of the laws in question here will have similar effects. The applicant alleges in his affidavits that they have such effects on him (see para. 42 above). In the circumstances the Commission sees no reason to doubt the general truth of his allegations concerning the fear and distress he has suffered.

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- (1) See Report of the Standing Advisory Commission on Human Rights, para. 30 above.
 - (2) Evidence of the Assistant Chief Constable (Crime) to the Advisory Commission on Human Rights - see para. 30 above.
 - (3) See para. 41 above.
 - (4) Working Paper on the Age of Consent in relation to Sexual Offences, paras. 67-68.

95. The absolute legal prohibition on private consensual homosexual acts involving persons over 21 years of age cannot therefore be regarded as now being illusory or theoretical, or as having no real or practical effect. It still has concrete effects on the private life of male homosexuals including the present applicant, even if the risk that it will be enforced in criminal proceedings may not be great. In all the circumstances the Commission is therefore of the opinion that the existence of this prohibition in Northern Ireland law also interferes with the applicant's right to respect for private life.

96. The fact that the police took the first steps towards prosecuting the applicant under the relevant legislation, adds weight to the Commission's view that its existence interfered with his private life even though no charges were in fact brought.

97. Conclusion under Art. 8 (1)

The Commission concludes by a unanimous vote that the legislation complained of interferes with the applicant's right to respect for his private life guaranteed by Art. 8 (1), in so far as it prohibits homosexual acts committed in private between consenting males.

98. The next question which arises is whether the interference is justified on one or more of the grounds set out in Art. 8 (2) of the Convention. Following the approach taken by the Court in relation to similar issues under Art. 10, the Commission will examine whether the interference was "in accordance with law", whether it pursued any legitimate aim under Art. 8 (2) and, if so, whether it was "necessary in a democratic society" for that purpose (cf. The Sunday Times Case, Series A, Vol . 30, p. 29, para. 45).

99. As to the first point, the interference is plainly "in accordance with law" since it arises from the very existence of the legislation.

100. As to the aim of the legislation, the respondent Government argue that in so far as it concerns acts involving persons aged under 21 years of age, it pursues the legitimate aim of protecting young persons from undesirable and harmful pressures and attentions. They further argue that the legislation aims to secure the protection of morals. The applicant, on the other hand, suggests that the laws reflect an irrational attitude of prejudice against homosexuals and do not pursue any legitimate aim in so far as they restrict the private sexual conduct of such homosexuals to a greater extent than that of heterosexuals or female homosexuals.

101. The Commission accepts the Government's argument that the laws in question are aimed both at the protection of young persons and at the protection of morals. These are legitimate aims under Art. 8 (2), which allows measures for the protection of the rights of others and the protection of morals. The essential question is to what extent, if at all, the maintenance in force of these laws is "necessary in a democratic society" for these purposes.

102. In considering this matter the Commission has had regard to the Court's general observations on the question of "necessity" in the Handyside Case. In particular, the Court observed that the word "necessary" in Art. 10 (2) implied a "pressing social need", although it was not to be equated with terms used elsewhere in the Convention such as "absolutely necessary" on the one hand or "reasonable" on the other (Series A, Vol. 24, p. 23, para. 49). The Court also held that the interference must be proportionate to the legitimate aim pursued.

103. The Commission has first considered to what extent the prohibition of private consensual male homosexual activity can be considered as necessary for the protection of the rights of others, that is to say young persons. In this context it recalls that in two previous cases it has held that legislation which fixed an "age of consent" for male homosexual acts at 21 years was justified for this purpose (1), and did not infringe Art. 8 of the Convention. In its Resolution DH (79) 5, the Committee of Ministers of the Council of Europe expressed its agreement with the Commission's Opinion in Application No 7215/75. That application concerned the English Sexual Offences Act 1967 (2). In reaching its opinion under Art. 8 of the Convention the Commission stated inter alia that, in its view:

"..... there is a realistic basis for the respondent Government's opinion that, given the controversial and sensitive nature of the question involved, young men in the eighteen to twenty-one age bracket who are involved in homosexual relationships would be subject to substantial social pressures which could be harmful to their psychological development."

It considered that the Government had not gone beyond its obligation under the Convention in finding the right balance to be struck.

104. Since the Commission adopted its Report in that case the Policy Advisory Committee on Sexual Offences has recommended reduction of the age of consent in England and Wales to 18 years. A minority of the Committee recommended 16 years as the appropriate age. However, as the Commission observed in both the cases it has referred to, this is a matter of controversy on which views are varied and developing. It is also to be noted that the views expressed in the Committee's Working Paper are described as "provisional" only and the Paper is circulated for comment and criticism only (3).

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- (1) Application No 5935/72, X v. Federal Republic of Germany, 3 Decisions and Reports, p. 46; Application No 7215/75, X v. the United Kingdom, Report of the Commission adopted on 12 October 1978.
- (2) See paras. 21 and 22 above.
- (3) Working Paper, para. 1.

105. In the context of the present case the Commission considers, for similar reasons to those which it gave in Application No 7215/75, that the interference in the applicant's private life involved in prohibiting male homosexual acts can, in so far as it prevents his having relations with persons under 21 years of age, be justified as necessary in a democratic society for the protection of the rights of others. To the extent that the applicant's conduct is thus restricted, this is compatible with Art. 8.

106. It has not been suggested that the restriction on the applicant's conduct, in so far as it prevents him having private consensual homosexual relations with persons over 21 years of age, can be justified under Art. 8 (2) on any ground other than for the "protection of morals". In considering whether this prohibition can be considered necessary for that purpose, the Commission has again had regard to the general principles laid down by the Court, in the context of Art. 10 in the Handyside and Sunday Times Cases (sup. cit.).

107. In particular in the Handyside Case the Court, having emphasised the subsidiary nature of the Convention machinery and observed that the Convention left to the Contracting States in the first place the task of securing the guaranteed rights and freedoms, stated as follows:

"These observations apply, notably, to Article 10 para. 2. In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them", (para. 48).

In the Sunday Times Case it suggested that, in view of the above considerations the domestic authorities had a more extensive power of appreciation as to what measures were necessary for the protection of morals than they had in considering the necessity of measures taken to meet other more objective aims, in particular the maintenance of the authority of the judiciary. (Series A. Vol. 30, p. 36, para. 59).

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108. At the same time, in reviewing the necessity for the restriction in question in the present case, the Commission considers it of considerable importance that it is an interference in private life. In its opinion the term "protection of morals" used in paras. 2 of Arts. 8-11 of the Convention refers primarily to the protection of the moral ethos of society, and the Convention (Arts. 8 and 9 in particular) preserves to the individual an area of strictly private morality in which the State may not interfere. That is not to say that interferences in "private life" may not be "necessary" for the purpose of protecting the morals of society. However, in this area it is especially necessary to bear in mind that the interference must be justified by "a pressing social need" in a "democratic society" and also the Court's reference in the Handyside Case to "the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society", (Series A., Vol. 24, p. 23, para. 49).

109. It is also relevant that the special "duties and responsibilities" referred to in Art. 10(2) and to which the Court also had regard in the Handyside Case (para. 49), are not referred to in Art. 8(2). Indeed Art. 8(2) is generally drafted in more restrictive terms than Art. 10(2). This appears to reflect the fact that the exercise of the freedoms guaranteed by Art. 10, with their public aspect, may call for greater regulation by the State, than does the carrying on of activities within the essentially private sphere covered by Art. 8. These differences must be taken into consideration in applying the principles laid down under Art. 10 in the Handyside and Sunday Times Cases to the facts of the present case under Art. 8.

110. As to the particular facts of the case, the Commission again recalls that it is concerned only with the actual effects of the law on the applicant. It must assess whether the interference with the applicant's right to respect for his private life which it has found to exist, notwithstanding the manner in which the laws are applied, is justified as necessary in a democratic society for the protection of morals.

111. In assessing the requirements of the "protection of morals" in Northern Ireland, the Commission considers that it must examine the measures in question in the context of Northern Irish society, taking into account the information before it as to the climate of moral opinion in that particular society. The fact that similar measures are not considered necessary in other parts of the United Kingdom, or in other European countries does not mean that they cannot be necessary

in Northern Ireland. In this respect the Commission again follows the Court's approach in the Handyside Case (sup. cit., paras. 54 & 57) and its own approach in its Report in Application No. 7215/75 (paras. 147-8).

112. It is plain from the information supplied by the parties that a substantial section of Northern Irish society favours the maintenance in force of the current legislation and is opposed to the proposed reform. The Commission accepts that this opposition is based largely on religious and moral considerations. It also appears that none of the Members of Parliament from Northern Ireland actively favour reform, although some apparently are not opposed to it in principle and the possibility of a Private Member's Bill being introduced exists. On the other hand, however substantial and vociferous the opposition to reform, it is also clear that there is a considerable body of opinion which is in favour of it, or at least would not object to it. This includes not only organisations representing the interests of homosexuals, but also church representatives and other responsible leaders of moral opinion, (see paras. 26-39 above). The majority opinion of the population as a whole is not in fact known (para. 38 above).

113. However, these indicia of public opinion form only one element to be taken into account under Art. 8(2). Even if the majority of people in Northern Ireland disapproves of homosexual conduct on moral grounds, this does not mean that it is "necessary" to prohibit it in order to "protect morals" in a democratic society. As the Court has said, the exceptions in Art. 8(2) to the fundamental right to respect for private life must be narrowly interpreted. (See Klass Case, Series A. Vol. 28, p. 21, para. 42; Sunday Times Case, Series A. Vol. 30, p. 41 para. 65). It would be quite contrary to this principle to interpret Art. 8(2) as allowing a majority an unqualified right to impose its standards of private sexual morality on the whole of society. Account must be taken of the effect which allowing the conduct in question is likely to have on the moral standards of society as a whole. However, the available evidence does not suggest that to allow private acts between consenting adults would have any very significant impact on public morality. The rarity of complaints to the police suggests that such conduct in fact gives rise to little or no public offence. The police and public prosecuting authorities evidently do not consider it necessary to enforce the relevant prohibition by taking steps to detect and prosecute offences. Furthermore, whilst it may be true that attitudes towards homosexuality have changed in England since enactment of the 1967 Act, this appears to be part of a general phenomenon, possibly reflecting increased knowledge on the matter, rather than a direct result of the Act. There is little evidence to suggest that any increase in homosexual conduct has resulted.

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114. The Commission is aware that in the religious and political situation prevailing in Northern Ireland the respondent Government may have had strong reasons for their decision not now to change the law. Nevertheless it must consider whether the reasons given for maintaining the law are relevant and sufficient in the context of Art. 8 of the Convention. Whilst the views of local politicians, church leaders and other members of the community may provide a valuable indication of the requirements of "protection of morals" in the particular community and be entitled to considerable respect, they cannot of themselves be decisive. The Commission must address itself to the question whether it is necessary in order to protect the moral standards of the community to interfere with the fundamental right to respect for private life of persons who, almost by definition, form part of a minority. The criterion to be applied is not whether the prevailing attitude in the community is one of moral disapproval of homosexuality, of tolerance or intolerance, but whether in order to preserve moral standards it is necessary to maintain criminal legislation.

115. In all the circumstances of the present case the Commission does not consider it established that there exists any "pressing social need" related to the protection of morality in Northern Ireland which requires the maintenance in force of the legal prohibition on private consensual male homosexual acts involving persons over 21 years of age. It has not been shown to make any contribution to the moral climate of society which could, within a reasonable relationship of proportionality, justify or counter-balance the inevitable negative effects which it has on the private lives of homosexuals, and the present applicant in particular. It cannot therefore be justified as "necessary" under Art. 8(2).

116. Overall conclusion under Art. 8

(a) The Commission therefore finds by eight votes against two

that the legal prohibition of private consensual homosexual acts involving persons aged under 21 years is not in breach of the applicant's rights under Art. 8 of the Convention.

(b) It finds by nine votes against one

that the legal prohibition of private homosexual acts between consenting males over 21 years of age breaches the applicant's right to respect for private life under Art. 8 of the Convention.

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difference of treatment between male homosexuals on the one hand and heterosexuals and female homosexuals on the other, (Report adopted on 12 October 1978, paras. 159-170). Similarly, it considers that the criterion of social protection provides objective and reasonable justification for the restriction on male homosexual conduct in question here, in so far as it relates to acts involving persons under 21 years of age. To that extent the difference of treatment between male homosexuals and heterosexuals and female homosexuals is not therefore discriminatory. No question of regional discrimination arises in this respect since the law in all parts of the United Kingdom prohibits homosexual acts involving persons under 21 years old.

121. Conclusion

The Commission therefore finds by eight votes against one, with one abstention that the legal prohibition of private consensual homosexual acts involving male persons aged under 21 years is not in breach of the applicant's rights under Art. 14 of the Convention in conjunction with Art. 8.

122. The only remaining issues concern the question whether the prohibition of acts involving persons over 21 years old, which the Commission has already held to be in breach of the applicant's rights under Art. 8 of the Convention alone, is also in breach of his rights under Art. 14 in conjunction with Art. 8.

123. The Commission recalls that in the Airey Case the Court observed that it was not generally necessary to examine a case under Art. 14 of the Convention where a separate breach of an Article invoked both on its own and in conjunction with Art. 14 had been found. The position was otherwise "if a clear inequality of treatment in the enjoyment of the rights in question is a fundamental aspect of the case ..." (Judgment of 9 October 1979, para. 30).

124. In the Commission's view the essential question in the present case is whether the restrictions in question infringed the minimum standard set by Art. 8 of the Convention. Was it in fact necessary generally to prohibit certain specific forms of conduct in order to protect morality in the particular society of Northern Ireland? Having held that it was not, and that the applicant's rights under Art. 8 were thus violated, the Commission considers that it is unnecessary to examine whether the restriction in question also had a discriminatory character because similar restrictions did not apply to heterosexual or female homosexual conduct or to male homosexual conduct in other parts of the United Kingdom.

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C. Art. 14 of the Convention in conjunction with Art. 8

117. The applicant alleges that the legal restrictions on his conduct not only breach Art. 8 alone but also involve discrimination against him on sexual grounds and on grounds of residence, in breach of Art. 14 in conjunction with Art. 8. He alleges that he is the victim of discrimination on sexual grounds in so far as Northern Ireland law imposes greater restrictions on male homosexuals than it does on (a) heterosexuals and (b) female homosexuals and of discrimination on grounds of residence in so far as greater restrictions are imposed on male homosexuals in Northern Ireland than are imposed on them in other parts of the United Kingdom.

118. Art. 14 is in the following terms:

"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."

119. The Commission first recalls that the Court has held that Art. 14 "safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in the other normative provisions of the Convention ..." (Sunday Times Case p. 43, para. 70). It has also held that not every difference of treatment contravenes Art. 14, but that the principle of equality of treatment is violated if a distinction has no objective and reasonable justification. A difference of treatment must pursue a legitimate aim and Art. 14 is also violated "when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised". (Belgian Linguistic Case, Series A No. 5 p. 34 para. 10).

120. The Commission has already found that to the extent that Northern Irish law prevents the applicant from having homosexual relations with persons under 21 years of age, the interference with his right to respect for private life is justified under Art. 8(2) as necessary in a democratic society "for the protection of the rights of others" (see paras. 103-105 above). It recalls furthermore that in its Report on Application No. 7215/75 it expressed the opinion that the same criterion of social protection which provided justification under Art. 8(2) for the prohibition imposed by the 1967 Act on homosexual acts involving persons under 21 years old, also provided objective and reasonable justification for the resulting

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125. Conclusion

The Commission therefore finds by nine votes against one that it is unnecessary to examine the question whether the legal prohibition of private homosexual acts between consenting males over 21 years of age breaches the applicant's rights under Art. 14 of the Convention in conjunction with Art. 8.

Secretary to the Commission

Acting President of the Commission

(H.C. KRUGER)

(C.A. NØRGAARD)

SEPARATE OPINION OF Mr POLAK

I cannot agree with the conclusion of the Commission that it is unnecessary to examine whether the prohibition of acts involving male persons over 21 years old had a discriminatory character because similar restrictions did not apply to heterosexual or female homosexual conduct or to male homosexual conduct in other parts of the United Kingdom (paras. 122-125 of the Report).

Although the Commission found that the said prohibition was in breach of Art. 8, it should, in my opinion, have come to the same conclusion as regards the complaint about the violation of Art. 14 in conjunction with Art. 8. The enumeration of the forbidden grounds of discrimination in Art. 14 is clearly not an exhaustive one. Since the prohibition of homosexual acts in private is contrary to Art. 8, there cannot be an objective and reasonable justification for the difference in treatment between homosexual and heterosexual persons.

The prohibition, with its possibility of very heavy sanctions in case of contravention, stigmatizes homosexuality between consenting adults in private as a very severe crime. By doing so the State, which has the duty to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention, supports and intensifies old and deep-seated sentiments of aversion and fear which have been proved to be unjustifiable and without factual ground. It strengthens the prejudices against homosexuals, it perpetuates their fear of prosecution and punishment, it compels them to keep secret or suppress their sexual inclinations and wishes, and it increases the danger of blackmail. By maintaining these provisions the State discriminates strongly against this group of the population in comparison with heterosexual adults who are free to have any kind of sexual contact in private. This difference amounts to a clear inequality of treatment in the enjoyment of the right in question, which is a fundamental aspect of this case. In the light of the judgment of the Court in the Airey Case, quoted in para. 123 of the opinion of the Commission, this inequality of treatment, which constituted an integral part of the present application, has to be considered as a separate violation of the Convention, namely as a breach of Art. 14 in conjunction with Art. 8.

Appendix I

HISTORY OF PROCEEDINGS

<u>Item</u>	<u>Date</u>	<u>Note</u>
1. <u>Examination of admissibility</u>		
Date of introduction of application	22 May 1976	
Date of registration	25 May 1976	
Commission's deliberations on admissibility and decision to communicate the case to the United Kingdom Government and invite them to submit observations on its admissibility	10 December 1976	MM. G. Sperduti J.E.S. Fawcett C.A. Nørgaard E. Busuttil L. Kellberg B. Daver T. Opsahl J. Custers J.A. Frowein G. Jörundsson G. Tenekides S. Trechsel B.J. Kiernan N. Klecker
Date of Government's observations on admissibility	22 February 1977	
Date of applicant's observations in reply	7 April 1977	
Commission's deliberations on admissibility and decision to invite the parties to submit supplementary observations on admissibility	18 May 1978	MM. G. Sperduti J.E.S. Fawcett F. Ermacora L. Kellberg B. Daver T. Opsahl R.J. Dupuy G. Tenekides S. Trechsel B.J. Kiernan
Date of Government's supplementary observations on admissibility and letter on procedure	23 August 1977	
Date of applicant's supplementary observations on admissibility	22 September 1977	

Item	Date	Note
Date of letter on procedure from applicant's representatives	28 November 1977	
Commission's deliberations and decision on admissibility	3 March 1978	MM G. Sperduti J.E.S. Fawcett C.A. Nørgaard E. Busuttil L. Kellberg B. Daver J. Custers C.H.F. Polak J.A. Frowein G. Jörundsson G. Tenekides S. Trechsel B.J. Kiernan N. Klecker
Applicant's written observations on the merits	1 September 1978	
Commission's decision to extend the time limit for submission of the Government's observations, and in principle to hold a hearing on the merits	2 March 1979	MM C.A. Nørgaard J.E.S. Fawcett G. Sperduti E. Busuttil L. Kellberg B. Daver C.H.F. Polak G. Jörundsson G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior
Government's written observations on the merits	21 March 1979	
Commission's confirmation of its decision to hold a hearing on the merits	8 May 1979	MM C.A. Nørgaard J.E.S. Fawcett F. Ermacora B. Daver C.H.F. Polak J.A. Frowein G. Tenekides B. Kiernan N. Klecker M. Melchior J. Sampaio

Item	Date	Note
Hearing on the merits and deliberations of the Commission	5 and 6 July 1979	MM C.A. Nørgaard J.E.S. Fawcett G. Sperduti F. Ermacora E. Busuttil L. Kellberg B. Daver C.H.F. Polak J.A. Frowein G. Tenekides S. Trechsel B. Kiernan N. Klecker J. Sampaio <u>For the applicant</u> Mr K. Boyle Mr F. Keenan <u>For the respondent Government</u> Mrs A. Glover MM N. Bratza A. Wilson R. Tomlinson
Date of the applicant's letter concerning friendly settlement	29 August 1979	
Date of Government's letter concerning friendly settlement	18 September 1979	
Commission's deliberations, final votes on the merits of the case and adoption of the Report	13 March 1980	MM C.A. Nørgaard G. Sperduti E. Busuttil C.H.F. Polak J.A. Frowein G. Jörundsson G. Tenekides B. Kiernan N. Klecker M. Melchior