CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 32792/05
by Laurence PAY
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 16 September 2008 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar*,

Having regard to the above application lodged on 6 September 2005,

Having regard to the decision to examine the admissibility and merits of the case together (Article 29 § 3 of the Convention).

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Laurence Pay, is a British national who was born in 1951 and lives in Kirkham. He was represented before the Court by Liberty, a non-governmental organisation based in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms E. Willmott, Foreign and Commonwealth Office.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant joined the Lancashire Probation Service ("LPS") in 1983. He quickly became involved in the treatment of sex offenders and was well regarded by his employers and the courts in respect of this work.

In October 1999, probation officers were sent a form in which they were asked to declare whether or not they were freemasons. The applicant stated that he was not a freemason but listed a number of other organisations of which he was a member, including "The House of Roissy". This organisation subsequently became "Roissy Workshops Ltd" (hereafter, "Roissy"), of which the applicant was a director.

On 25 July 2000 Lancashire Police received an anonymous fax, in which it was claimed *inter alia* that Roissy advertised its services on the internet as the builder and supplier of products connected with bondage, domination and sadomasochism ("BDSM") and the organiser of BDSM events and performances. The fax included a photograph of the applicant, wearing a mask, with two semi-naked women.

On 27 July 2000 the fax was sent by a police officer to one of the applicant's colleagues, who brought it to the attention of LPS senior management. LPS undertook an investigation, and found that Roissy was registered at the applicant's address and that its website included links to a number of BDSM websites, including "Birmingham Bizarre" ("BB"), which advertised various events and included photographs of the applicant and others, semi-naked, performing acts which the accompanying text indicated had taken place at a local private members' club and involved male domination over submissive women.

The applicant was immediately suspended on full pay, on the ground that LPS had reason to believe that the above activities might be incompatible with his role as a probation officer and bring LPS into disrepute. The applicant admitted that he was involved in the performance aspect of Roissy's activities but claimed that he had never authorised photographs of himself of the type included in the fax to be published on the internet and that the owners of the BB website had now removed the photographs at his request. Although the LPS official carrying out the investigation considered that the photographs were in the nature of soft pornography and depicted acts which were degrading to women, the applicant disagreed. The investigating official concluded that the applicant was unwilling to accept that his involvement in activities of this nature was inappropriate. She made a report to the LPS Assistant Chief Probation Officer.

The Assistant Chief Probation Officer reviewed the report and concluded that while the Roissy website itself did not contain photographs of sexual activity it was linked to other websites which did. She considered that the

activities shown on the BB website were indecent and exploitative. Although she took into account the rights contained in Articles 8 and 10 of the Convention, and the applicant's 17 years of service, she formed the view that the applicant had acted in a way which was incompatible with his job working with sex offenders and vulnerable people. She considered that the information shown on the website could be "badly misinterpreted".

On 19 September 2000 LPS commenced disciplinary proceedings against him. Following a hearing before the Panel of the Personnel Hearings Sub-Committee ("the Panel") on 19 October 2000, the applicant was formally dismissed on 23 October 2000. The Panel, which accepted that the applicant's activities were not contrary to criminal law, considered, however, that, given the nature of the acts shown in the internet photographs and referred to in the Roissy advertisements, the fact that this material was in the public domain was incompatible with his position as a probation officer, particularly an officer working with sex offenders. They held that the Probation Service had a responsibility to the public to maintain confidence in the integrity of its officers and that public knowledge of the applicant's activities would damage the reputation of the Service.

The applicant's appeal to a differently constituted Panel was dismissed on 8 January 2001. The Panel considered whether the applicant should be given alternative employment within the Probation Service, but took the view that such a proposal would be inappropriate given the conclusion that his activities had been found to be incompatible with the role of any probation officer.

On 5 February 2001 the applicant commenced proceedings in the Employment Tribunal ("ET") to challenge his dismissal. In its judgment of 8 August 2002, following a hearing which concluded in July 2002, the ET made the following findings of fact:

> "It was clear having listened to extensive evidence from the respondent's witnesses, and which was probed in great depth on behalf of the applicant, that the investigating officers and the disciplinary and appeal panel had very grave concerns that the activities of the applicant were incompatible with his role as a probation officer. Throughout his interviews the applicant sought to justify his activities and did not accept that these activities could be incompatible with his role as a probation officer. On each interview he sought to justify himself and was not prepared to accept that the view of his employers was a reasonably held view. It was only at a very late stage that he even suggested that he would be willing to take steps to have references to the Birmingham Bizarre website removed."

The ET continued:

> "Great play was made on behalf of the applicant that the approach of the respondents, both with its investigating officers and the disciplinary panels, were prudish and narrow-minded. ... The [ET] heard from various witnesses of their concern as to the consequences if the applicant's activities came more fully into the knowledge of the general public. There was a concern for the general reputation of the Probation Service but there was equally a concern as to the effect of these activities

> upon victims of crime and in particular victims of sex crime as well as on offenders who were receiving the help of the Probation Service".

The ET concluded that the dismissal fell within the range of responses of a reasonable employer. It further concluded that Article 8 of the Convention was not engaged because the activities in question were in the public domain and did not therefore form part of Mr Pay's private life. Article 10 was engaged, but not infringed. The ET recognised that an employee owed duties to his employer and that the conduct of the employee should not bring the work of the employer into disrepute. The work of the Probation Service was sensitive and it was important that employees did not bring into the public domain views or activities which could have an adverse impact. It was not therefore incompatible with Article 10 to place some limitation on a probation officer's freedom of expression and it was reasonable of the LPS to have taken the view that the activities of the applicant, taken in the round, could be damaging to it and needed to be curbed.

The applicant appealed to the Employment Appeal Tribunal ("EAT") which dismissed the appeal in a judgment dated 29 October 2003. The EAT found that Article 8 was not applicable and saw no error in the ET's judgment to that effect. In considering the proportionality of the dismissal under Article 10, the EAT observed that the ET had found as a fact that throughout the disciplinary proceedings the applicant had not been prepared to accept that his employers' view of his activities had been reasonable and had only offered at a very late stage to take steps to have references to the BB website removed. The EAT continued:

> "That finding reflects a dispute which arose at the [ET]. It was contended before us that the Respondent had not demonstrated that it was a proportionate response for it to dismiss the Applicant when it could have considered his severing his connections to Roissy, and opportunities for alternative work. Taking those in turn, the finding of the [ET] is amply borne out by the evidence ...
>
> It is plain that there had been discussion between the Respondent and the Applicant about his willingness to sever his connection with Roissy entirely; but that his case was that only certain *electronic* links between Roissy and the BB websites had been severed. He was at no time willing to alter his connection with Roissy. That is consistent with the finding that he sought to justify his activities.
>
> As to the possibility of alternative deployment, the respondent considered that his activities were inconsistent with any Probation Officer's duties. ... Given the finding that the Applicant was unwilling to give up his connection with Roissy, and the Respondent's attitude to Roissy's activities, the possibility of alternative work would not logically arise."

The EAT concluded that ET had committed no error of law when it decided that the dismissal had been proportionate under Article 10. On the issue of delay the EAT commented:

> "Something must be said about the delays in this case. The applicant's cause of action arose when he was dismissed on 9 January 2001. He presented an Originating Application on 12 January 2001 and so a period of 19 months elapsed before the

> Tribunal gave its decision. The Notice of Appeal in its original form was lodged on 18 September 2002 and we are giving judgment over a year later. Without a convincing explanation, these delays would be unacceptable. However, neither party makes any criticism of the other, nor is there any criticism by them of the Employment Tribunal or of the EAT. In those circumstances it is inappropriate for us to add anything."

On 12 March 2004 the applicant filed notice of an application to seek leave to appeal to the Court of Appeal. This application was filed outside the 14 day time-limit and was rejected on 23 April 2004. He made a renewed application, claiming that the delay had been caused by the fact that legal aid had not been granted until 6 March. On 26 May 2004 the Court of Appeal provisionally granted the applications for leave to appeal and an extension of time, but allowed the respondent LPS 14 days to oppose this order. Lord Justice Sedley observed:

> "It seems to me that there is one issue which is capable of engaging the attention of this court. Accepting, as the EAT did, that, in order to be fair, a dismissal has to be Convention compliant ..., it seems to me arguable that, properly appraised, the factors before the Employment Tribunal did not make it proportionate to dismiss Mr Pay, given that the dismissal was held to have been not for incapacity but for some other substantial reason. The substantive reason was, in effect, the damage that would be done to the good name and standing of the Probation Service were it to become public that Mr Pay, working as he did with sex offenders and their victims, was involved in an activity involving bondage and sadomasochism.
>
> The question is not unproblematical. Under Article 8, it is debateable whether this is a matter of private life since the activities were publicised on the internet, but it does seem to me arguable that, to the extent that Mr Pay's own sexual proclivities were in issue, they related to his private life as much as to matters he had publicised.
>
> What perhaps is more important is the proportionality of dismissal in a situation in which the dismissal was prompted not by considerations of personal unsuitability for the job, but by legitimate considerations of adverse publicity which would rebound on the Probation Service."

Lord Justice Maurice Kay had greater misgivings about the appeal's prospects of success but was prepared to grant leave on the above terms.

The respondent LPS opposed the applications. On 5 November 2004 an identically constituted Court of Appeal issued a supplementary judgment, without the benefit of oral argument, in which it held that in the light of the full Court of Appeal's judgment in *X v. Y* (see below), it now appeared that the applicant's appeal had no prospect of success and there could therefore be no useful purpose in granting the extension of time.

The applicant made a renewed oral application to the Court of Appeal, which was rejected on 7 March 2005. The Court of Appeal again refused to grant an extension, since the question of principle had been decided in *X v. Y.* In parallel with *X v. Y*, there had been a waiver or forfeiture of privacy, on different grounds but with the same legal effect. Article 8 was not, therefore, engaged. Although Article 10 was applicable, the LPS had been entitled to react as it did to the consequences for it of the applicant's exercise of his right to free speech.

B. Relevant domestic law

1. Unfair dismissal

Under section 94(1) of the Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer. By section 98(1), an employer must show a reason for a dismissal falling within a category set out in section 98(2), which includes "conduct" or "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

Section 98(4) deals with fairness:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

2. The case of X v. Y *[2004] EWCA Civ 662*

The applicant in the above case worked as a part time development officer for a charity which aimed to promote, through voluntary work, the personal development of young offenders and those at risk of offending in the 16-25 age group. When the applicant had been working for the respondent charity for about three years, his employers discovered that six months previously he had been arrested and cautioned by the police for having committed a consensual sexual act with another man in a public toilet. The caution came to light as a result of normal police checks made by the local Probation Service before providing further funding to the respondent. Disciplinary proceedings were taken against the applicant. He was dismissed and subsequently complained to the ET.

The ET found that it had been fair and reasonable for the respondent to treat the applicant's conduct as grounds for dismissal. He had committed a criminal offence and shown an inappropriate lack of self control and serious lack of judgment. Given the sector in which he was employed, his failure to tell his employer about the caution was a serious matter which had undermined the respondent's trust and confidence in him.

The applicant appealed to the EAT, contending that his dismissal had breached his rights under Articles 8 and 14 of the Convention. The EAT held that Article 8 did not apply, as the conduct, a "transitory sexual encounter" between two strangers in a public toilet, was not covered by the right to respect for private life. Article 14 did not, therefore, apply, but even if it did, the applicant had not been dismissed on grounds of sexual

orientation but instead because he had committed a criminal offence and failed to disclose it.

The applicant then appealed to the Court of Appeal. The Court of Appeal proposed a framework of questions to assist employment tribunals in dealing with Convention issues in unfair dismissal cases between private litigants, but held, on the facts of the case before it, that Article 8 was not engaged, since X was dismissed for conduct which was a criminal offence and which occurred in a place to which the public had access.

3. The Probation Service

Until its repeal on 1 April 2001, the duties and functions of probation officers were regulated by the Probation Service Act 1993. Section 14 provided that:

> "It is the duty of probation officers –
>
> (a) to supervise the probationers and other persons placed under their supervision and to advise, assist and befriend them;
>
> (b) with a view to assisting the court in determining the most suitable method of dealing with a person's case, to enquire (in accordance with any direction of the Court) into, and make reports on, his circumstances or home surrounding;
>
> (c) to advise, assist and befriend, in such cases and in such manner as may be prescribed, persons who have been released from custody; and
>
> (d) to perform such other duties as may be prescribed."

In its judgment in the present case, the EAT observed:

> "The modern probation service is a law enforcement agency at the heart of the criminal justice system. It aims to see that offenders receive proper punishment for their offending by the way they are supervised in the community. It works for the effective rehabilitation so they are less likely to offend in the future. Its objectives include Home Office priorities which were to challenge offenders in their behaviour, to enforce community sentences rigorously and to reduce the risk of harm from dangerous offenders. Its responsibilities include the delivery of effective programmes for supervising offenders safely in the community and upholding the interests of the victims of crime."

COMPLAINTS

The applicant complained under Articles 8 and 10 of the Convention that his dismissal constituted a disproportionate interference respectively with his right to respect for his private life and his right to freedom of expression. Under Article 6 § 1 he complained about the length of the domestic proceedings and under Article 13 he complained that, since under section 21 of the Employment Tribunals Act 1996, the jurisdiction of the EAT was confined to questions of law, he was denied an effective domestic remedy

because he was unable to dispute the ET's findings of fact before the EAT or Court of Appeal. Finally, under Article 14 combined with Articles 8 and 10 he complained that he was subjected to differential treatment because of his sexual orientation.

THE LAW

A. Article 6 § 1 of the Convention

The applicant complained about the length of the proceedings before the ET, EAT and Court of Appeal. He alleged a breach of his right to trial within a reasonable time, as guaranteed by Article 6 § 1 of the Convention:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

The applicant reasoned that his employment rights were civil rights within the meaning of Article 6 § 1 and the results of the proceedings were decisive for the exercise of his civil rights. The proceedings, which commenced on 5 February 2001 and did not conclude until 7 March 2005, were unreasonably long. The issues in the case were relatively simple; he pursued the case expeditiously; and the delay had a severe effect on his employment and general health.

The Government submitted that there was nothing unreasonable in the case taking a year to reach hearing in the Employment Tribunal. The hearing had to be split, so was not concluded until July 2002. Judgment was given shortly thereafter in August 2002. Although the period of 19 months to that stage was not ideal, it was not unreasonable given that the case (a) was far from straightforward, (b) raised a significant number of issues, both on the substance of the dismissal and on the procedures leading up to it and (c) involved a number of witnesses. The period of a little over five months from the date on which the applicant finally settled on his substituted Grounds of Appeal and the hearing before the EAT was reasonable. Judgment was produced a month later. There was then a delay, attributable in part to the need for funding issues to be dealt with and in part to the applicant, before the case came before the Court of Appeal. However, from the appellant's notice to the first determination on the papers there was no delay: it took little over a month. A renewal hearing was then organised for just over a month later. The supplementary judgment was produced five months later and the final hearing before the Court of Appeal and judgment followed a further five months later. Given the complexity of the case, the fact that it was determined by three levels of tribunal and that the Court of Appeal made a number of different decisions, the overall time was not unreasonable.

The Court notes that parties did not dispute that the proceedings before the ET, EAT and Court of Appeal were for the determination of civil rights and the Court agrees that Article 6 § 1 applies (*Vilho Eskilinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007).

It observes that the proceedings commenced on 5 February 2001, when the applicant lodged his complaint with the ET and concluded on 7 March 2005, when the applicant's renewed application for leave to appeal was rejected by the Court of Appeal; a period of just over four years in total. During this period, hearings took place before the ET, EAT and Court of Appeal, and the Court of Appeal considered the case on four separate occasions. Moreover, a period of nearly five months elapsed between the EAT's judgment and the applicant's application to the Court of Appeal for leave to appeal. While the Court accepts that the outcome of the proceedings was important for the applicant's professional life and that diligence was therefore required (see *Eastaway v. the United Kingdom,* no. 74976/01, § 52, 20 July 2004), it does not consider in all the circumstances that the overall length of the proceedings was excessive.

The complaint under Article 6 § 1 is therefore manifestly ill-founded and should be rejected under Article 35 §§ 3 and 4 of the Convention.

B. Article 8 of the Convention

The applicant claimed that his dismissal violated his right to respect for his private life, as protected by Article 8 of the Convention:

> "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."

He submitted that his activities with Roissy fell within the scope of "private life", since they were an important part of his sexual expression and sexual orientation. The public performance aspect involved in his act was a fundamental part of his sexual expression, rather than an adjunct to it. His performances took place in a private club, to which access was limited, and the environment was one of shared sexual expression. The applicant had not sought to communicate his activities to a wider public: he had worn a mask during his performances, used a stage name and had not authorised the taking or diffusion of photographs. The mere fact that his activities did not take place in an entirely private forum could not be sufficient to constitute a waiver of his Article 8 rights. Nor was the fact that Roissy was a commercial enterprise sufficient to bring his activities outside the scope of

Article 8, since that provision protected the right to establish and develop relationships with other human beings, including entering into relationships of a professional or business nature (*Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B). Although he had not been prevented from continuing with his BDSM activities, he had faced disciplinary action and dismissal from his job as a direct consequence of them. In *Smith and Grady v. the United Kingdom* (nos. 33985/96 and 33986/96, ECHR 1999-VI), the Court had found that both the manner in which the investigation into the applicants' sexual orientation had been carried out and the decision to dismiss them because of it constituted interferences with their Article 8 rights.

The applicant argued that, as a public authority, LPS had a limited right to take action to protect its reputation. It was obliged to take account of the overall purposes of the Convention in exercising its powers. These purposes included broadmindedness and tolerance as hallmarks of a democratic society. It was not open to the LPS to make decisions which had a fundamental impact on the rights, livelihood and reputation of its workers on the basis of views which it considered to be held by the most conservative and unenlightened members of the community. Moreover, it was not sufficient for the Government to assert or assume that there was an adverse impact on the reputation of the LPS from the dissemination of such images, given in particular that the applicant was not identified in the image.

Finally, in the applicant's view, the decision to dismiss him was not proportionate since the LPS did not pursue alternatives, such as asking him to cease his performances or end his involvement with Roissy.

The Government submitted that there had been no interference with the applicant's right to respect for his private life. The Court of Appeal had been correct in *X. v. Y.* (see above) to acknowledge that it does not follow that any action consequent on an individual engaging in sexual activity or activities related to sexual identity will engage Article 8 rights. It was also correct in holding that there may be circumstances in which employees can have no or no reasonable expectation of privacy and that there was no "untrammelled right under Article 8 § 1 to give expression to his or her sexuality in public".

The Government maintained that the domestic courts had been correct to hold that there was no interference with Article 8 rights in the present case. There were alternative bases for that finding. The case could be analysed as involving a waiver of privacy, since the applicant had placed his activities with Roissy into the public domain by participating in the shows to which the public had admittance and by participating in the web sites and their links. In the alternative, it could be argued that there had been no lack of respect for the applicant's private life. He had not been prevented from, or legally restrained in, carrying out any of the activities he undertook, whether as director of Roissy or as a performer. To the extent that such activities

could be considered as part of his private life, that liberty afforded appropriate respect. Moreover, any such interference was justified, given that it was important to the Probation Service's ability effectively to perform its public functions that its integrity and reputation was upheld and that its employees did not act in a way which called them into question.

The Court recalls that in the present case, the applicant was suspended from his job with the LPS when his employer discovered that Roissy, a company of which he was the director and which was registered at his home address, maintained a website on which it advertised its services in the construction and sale of sadomasochistic equipment and included links to a number of other BDSM websites, including one which contained photographs of the applicant taking part in performances involving bondage and domination. It was accepted by the applicant's employer that his activities with Roissy did not contravene the criminal law. The ET, which heard "extensive evidence from the respondent's witnesses, ... which was probed in great depth on behalf of the applicant" found as facts that the applicant was finally dismissed because, during a series of interviews with members of the LPS senior management, he sought to defend his activities with Roissy; refused to accept that these activities might be incompatible with his role as a probation officer; and did not suggest until a very late stage that he would be willing to take steps to have the links removed from the Roissy website to the BB website which contained photographs of him.

The Court has previously observed that private life is a broad term not susceptible to exhaustive definition. Elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. The Article also protects a right to identity and personal development, and the right to establish relationships with other human beings and the outside world. It may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life". There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor (*P.G. and J.H. v. the United Kingdom*, no. 44787/98, §§ 56-57, ECHR 2001-IX). Moreover, the fact that the behaviour in question is prohibited by the criminal law is not sufficient in itself to bring it outside the scope of "private life" (see *Dudgeon v. the United Kingdom,* judgment of 22 October 1981, Series A no. 45; *Norris v. Ireland*, judgment of 26 October 1988, Series A no. 142; *A.D.T. v. the United Kingdom*, no. 35765/97, § 23, ECHR 2000-IX).

In the *A.D.T.* case the sexual activities between the five consenting male adults took place in the applicant's home. The Court observed that the sole element which could give rise to any doubt about whether the participants' private lives were involved was the video-recording of their sexual activities. However, the Court noted that no evidence had been adduced to indicate that there was any actual likelihood of the contents of the tapes being rendered public, deliberately or inadvertently (cited above, §§ 25-26). The applicant's activities were, accordingly, found to have been genuinely "private" (ibid., § 37). In the present case, by contrast, not only was the nature of the applicant's acts shown in the internet photographs and referred to in the Roissy advertisements, but the applicant himself contends that the public performance aspect of his act was a fundamental part of his sexual expression, rather than an adjunct to it. This could give rise to doubts as to whether the applicant's activities may be said to fall with the scope of private life and, if so, whether, as the Court of Appeal found, there has been a waiver or forfeiture of the rights guaranteed by Article 8. The Court notes, however, that the applicant's performances took place in a nightclub which was likely to be frequented only by a self-selecting group of like-minded people and that the photographs of his act which were published on the internet were anonymised. In these circumstances, the Court is prepared to proceed on the assumption, without finally deciding, that Article 8 is applicable. On this assumption, the dismissal of the applicant from his employment for engaging in such activities may be said to amount to an interference with his rights under that Article (see *Smith and Grady*, cited above, §71).

An interference with the rights protected by that Article can be considered justified only if the conditions of its second paragraph are satisfied. Accordingly, the interference must be "in accordance with the law", have an aim which is legitimate under this paragraph and must be "necessary in a democratic society" for the aforesaid aim. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued. It is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court. A margin of appreciation is left to Contracting States in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions (*Smith and Grady*, cited above, §§ 72 and 87-88). The nature of the activities in this context includes the extent to which they impinge on the public domain.

The applicant does not dispute that his dismissal was lawful. In addition, he appears to concede that it pursued a legitimate aim, namely the protection of the reputation of the LPS. However, he claims that the measure was disproportionate to that aim.

The Court notes at the outset that the dismissal of a specialist public servant, such as the applicant, is a very severe measure, because of the effects on his reputation and on his chances of exercising the profession for which he has been trained and acquired skills and experience (see *Vogt*, cited above, § 60).

At the same time, the Court is mindful that an employee owes to his employer a duty of loyalty, reserve and discretion (*Guja v. Moldova* [GC], no. 14277/04, § 70, ECHR 2008). The applicant's job involved, *inter alia,* working closely with convicted sex offenders who had been released from prison, to ensure that they complied with the conditions of release and did not re-offend. As such, it was important that he maintained the respect of the offenders placed under his supervision and also the confidence of the public in general and victims of sex crime in particular.

The applicant may be correct in thinking that consensual BDSM role-play, of the type depicted in the photographs on the BB website, is increasingly accepted and understood in mainstream British society. Indeed, the hallmarks of a "democratic society" include pluralism, tolerance and broadmindedness (*Smith and Grady,* cited above, § 87). Nonetheless, given the sensitive nature of the applicant's work with sex offenders, the Court does not consider that the national authorities exceeded the margin of appreciation available to them in adopting a cautious approach as regards the extent to which public knowledge of the applicant's sexual activities could impair his ability effectively to carry out his duties.

It might have been open to the LPS to take less severe measures, short of dismissal, to limit the risk of adverse publicity caused by the applicant's activities, particularly as there was no evidence that his involvement with Roissy was widely known at that point. However, the Court notes the facts as found by the domestic tribunals, and notably that the applicant did not accept as reasonable his employer's view that his activities with Roissy could be damaging and that, apart from offering to ensure that the electronic links between the Roissy and BB websites were severed, he had not been willing to alter his connection with Roissy. In these circumstances, and given in particular the nature of the applicant's work with sex offenders and the fact that the dismissal resulted from his failure to curb even those aspects of his private life most likely to enter into the public domain, the Court does not consider that the measure was disproportionate.

In conclusion, it finds the complaint under Article 8 to be manifestly ill-founded. It should therefore be rejected under Article 35 §§ 3 and 4 of the Convention.

C. Article 10 of the Convention

The applicant complained that his dismissal interfered with his right to freedom of expression under Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The applicant submitted that it was well-established that artistic expression, including that of an erotic nature, fell within the scope of Article 10. It was clear that the decision to dismiss him on the basis of his expression of his sexuality and the photographic representations of this was an interference with his right to free speech. The justification advanced by the State authorities for the interference with his rights under Article 10 were unsatisfactory, for the reasons advanced in connection with the alleged violation of his rights under Article 8.

The Government emphasised that the applicant was not prevented from carrying out his activities with Roissy. Any alleged interference with his freedom of expression could be based only on the fact that he risked disciplinary action by his employer as a result of his public activities. If Article 10 was engaged, any interference was justified for the reasons set out in connection with Article 8.

The Court considers that Article 10 applies, in that the applicant was dismissed as a consequence of his expression of aspects of his sexual identity. However, it considers that the interference may be considered "necessary in a democratic society" for the reasons set out in connection with Article 8, above.

The complaint under Article 10 is therefore manifestly ill-founded and should be rejected under Article 35 §§ 3 and 4 of the Convention.

D. Article 13 of the Convention

The applicant submitted that he was deprived of an effective national remedy, contrary to Article 13 of the Convention, which states:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

In the applicant's contention, the domestic courts were unable to afford a degree of review sufficient to examine the legality of the actions of the LPS in dismissing him, primarily because he was unable to dispute the factual basis upon which the LPS purported to base his dismissal and unable to

establish that his activities with Roissy were neither incompatible with his role as a probation officer nor likely to bring the LPS into disrepute.

The Court recalls that Article 13 requires a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (*Powell and Rayner v. the United Kingdom,* judgment of 21 February 1990, Series A no. 172, § 33). Given its above findings that the applicant's complaints under Articles 8 and 10 of the Convention are manifestly ill-founded, the Court does not consider that Article 13 is applicable.

The complaint under Article 13 is therefore manifestly ill-founded and should be rejected under Article 35 §§ 3 and 4 of the Convention.

E. Article 14 of the Convention

Finally, the applicant complained that he was the victim of discrimination, because of his sexual identity, in the exercise of his rights under Articles 8 and 10 of the Convention, in breach of Article 14, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] 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."

The Court recalls that for the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Pretty v. the United Kingdom*, no. 2346/02, § 88, ECHR 2002-III).

The applicant in the present case was not dismissed because of his sexual orientation as such, but because of concerns that knowledge of his participation in BDSM nightclub performances would come more fully into the knowledge of the general public and hinder the effectiveness of his work with sex offenders. In these circumstances, the Court considers that the reasons given for finding that the complaints under Articles 8 or 10 are manifestly ill-founded also afford a reasonable and objective justification under Article 14 (see, *mutatis mutandis,* Pretty § 89).

The complaint under Article 14 is therefore manifestly ill-founded and should be rejected under Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President