



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

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 35765/97
by A.D.T.
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 16 March 1999 as a Chamber composed of

Mr J-P. Costa, *President*,
Sir Nicolas Bratza
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mrs H.S. Greve,
Mr K. Traja, *Judges*,
Mr K. Jungwiert,
Mrs F. Tulkens, *Substitute Judges*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 25 March 1997 by A.D.T. against the United Kingdom and registered on 24 April 1997 under file no. 35765/97;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 20 February 1998 and the observations in reply submitted by the applicant on 29 May 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of the United Kingdom, born in 1948. He is represented before the Court by Mr G. Woodward, a solicitor practising in Manchester and Mr B.

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

A. The particular circumstances of the case

The applicant is a practising homosexual. On 1 April 1996 at approximately 7.50 p.m., police officers conducted a search under warrant of the applicant's home. As a result of the search, various items were seized including photographs and a list of video tapes. The applicant was arrested at about 8.23 p.m. and taken to the local police station. A further search of the applicant's house was conducted the following day and further items, including video tapes, were seized.

The applicant was interviewed by the police on 2 April 1996. During the interview the applicant admitted that some of the video tapes found would contain footage of the applicant and up to four other adult men, engaging in acts, mainly of oral sex, in the applicant's home. On 2 April 1996 the applicant was charged with gross indecency between men contrary to Section 13 of the Sexual Offences Act 1956 ("gross indecency"). The charge related to the commission of the sexual acts depicted in one of the video tapes, which consisted of oral sex and mutual masturbation. It did not relate to the making or distribution of the tapes themselves.

On 30 October 1996, the applicant appeared before a Magistrates' Court. The principal evidence adduced by the Crown consisted of a single specimen video containing footage of the applicant and up to four other men engaging in acts of oral sex and mutual masturbation. The acts which formed the basis of the charge involved consenting adult men, took place in the applicant's home and were not visible to anyone other than the participants. There was no element of sado-masochism or physical harm involved in the activities depicted on the video tape. The applicant was convicted of the offence of gross indecency. On 20 November 1996 the applicant was sentenced and conditionally discharged for two years.

The applicant was subsequently advised by Counsel that an appeal against conviction would enjoy no prospect of success since the provisions of the relevant legislation were clear and mandatory. The applicant, therefore, did not appeal his conviction.

B. The relevant domestic law and practice

Section 13 of the Sexual Offences Act 1956 provides:

"It is an offence for a man to commit an act of gross indecency with another man, whether in public or private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man."

By Section 37 of, and paragraph 16 of the Second Schedule to, the Sexual Offences Act 1956 the offence of gross indecency between men is punishable on indictment by up to

five years' imprisonment if committed by a man of, or over the age of, twenty-one with a man under the age of eighteen, and otherwise by a maximum of two years' imprisonment.

If, as in the present case, the offence is tried summarily by magistrates, the maximum penalty is six months' imprisonment and/or a fine of £5,000 (Magistrates' Courts Act 1980, sections 17 and 32 and Schedule 1, paragraph 23(b)).

There is no statutory definition of "gross indecency". However in its Report, the Committee on Homosexual Offences and Prostitution (Wolfenden Committee) 1957 noted:

"104. "Gross indecency" is not defined by statute. It appears, however, to cover any act involving sexual indecency between two male persons. If two male persons acting in concert behave in an indecent manner the offence is committed even though there has been no actual physical contact [R. v Hunt 34 Cr App R 135].

105. From the police reports we have seen and the other evidence we have received it appears that the offence usually takes one of three forms; either there is mutual masturbation; or there is some form of intercrural contact; or oral-genital contact (with or without emission) takes place. Occasionally the offence may take a more recondite form; techniques in heterosexual relations vary considerably, and the same is true of homosexual relations."

The Sexual Offences Act 1967 introduced a qualification to the legislation regulating male homosexual conduct. It provided that homosexual acts in private between consenting adult men were no longer an offence. Homosexual acts are defined as buggery with another man or gross indecency between men (Section 1 (7)). However Section 1(2) provides that an act is not done in private if, inter alia, more than two persons take part or are present.

Section 1 of the Sexual Offences Act 1967, in so far as relevant, provides:

"(1) Notwithstanding any statutory or common law provision, but subject to the provisos of the next following section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of eighteen years.

(2) An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done-

(a) when more than two persons take part or are present; or

(b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise. ...

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

There are no provisions under domestic law for the regulation of private homosexual acts between consenting adult women.

Likewise there are no provisions under domestic legislation affecting heterosexual behaviour which correspond to Section 13 of the Sexual Offences Act 1956. Thus acts of oral sex and mutual masturbation between more than two consenting adult heterosexuals (as long as there are no homosexual acts between any two males) do not constitute an offence.

COMPLAINTS

The applicant submits that being charged and convicted for his participation in acts of oral sex and mutual masturbation with more than one other consenting adult male in the privacy of his own home constituted an interference with his private life as guaranteed by Article 8 of the Convention. The applicant further complains that had a group of heterosexual individuals or homosexual females been involved in similar sexual activities they would not have been prosecuted, there being no legislation against such acts. The applicant considers this differential treatment amounts to discrimination on the basis of sexual orientation under Article 14 of the Convention, read in conjunction with Article 8.

PROCEDURE

The application was introduced on 25 March 1997 and registered on 24 April 1997.

On 23 October 1997, the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 20 February 1998, after an extension of the time-limit fixed for that purpose. The applicant replied on 29 May 1998, also after an extension of the time-limit.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

The applicant alleges violation of Articles 8 and 14 of the Convention, which read in their relevant parts as follows.

Article 8

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex ... or other status."

The Government contend that the present application falls outside the scope of Article 8 of the Convention as the sexual activity involved did not form part of the applicant's "private life". They point to a number of factors, such as the number of individuals present, the fact that the sexual activities were recorded on video tape, and the possibility that others could have access to the video cassettes. In any event, the Government consider that any interference with the applicant's right to respect for his private life was in accordance with the law and necessary for the protection of morals or the rights and freedoms of others. They underline that a margin of appreciation is left to national authorities in assessing whether a pressing social need exists, and claim that the margin must be particularly broad where the protection of morals is at issue: the mere fact that intimate aspects of private life generally call for a narrower margin of appreciation cannot prevent the margin in the present case from being a significant one. They draw a distinction between intimate, private and, therefore, acceptable homosexual activity between two men, and potentially public and therefore unacceptable homosexual activity between more than two men.

In connection with Article 14, the Government's primary submission is that the applicant's activities did not fall within the ambit of Article 8, such that Article 14 does not apply. In the alternative, they submit that the protection of morals and the rights of others is a legitimate aim, that there was a real risk of the applicant's activities being witnessed more widely because of the existence of the video tapes, and that this brought with it a risk of corruption of others.

The applicant underlines that he was not prosecuted for recording his sexual activities on video tape or for distributing the tapes, but was prosecuted under a law which prohibits the sexual acts themselves, even though they were carried out in the privacy of the bedroom of his own home. The offence was committed not because it was video taped, but because more than two people were participating in the sexual activities. The applicant repeats that there was no evidence to suggest that there was any risk of the tapes finding their way into the public domain, and adds that in any event the video taping cannot affect the position as regards the alleged discrimination.

The Court considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that the application is not manifestly ill-founded, within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

S. Dollé
Registrar

J-P. Costa
President