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

COURT (PLENARY)

**CASE OF NORRIS v. IRELAND**

*(Application no. 10581/83)*

JUDGMENT

STRASBOURG

26 October 1988

**In the Norris case[*],**

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr J.A. CARRILLO SALCEDO,
Mr N. VALTICOS,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 29 April and 29 September 1988,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 14 May 1987, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 10581/83) against Ireland lodged with the Commission under Article 25 (art. 25) by Mr David Norris, an Irish citizen, on 5 October 1983.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby Ireland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). It sought a

[*] Note by the registry: The case is numbered 6/1987/129/180. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr B. Walsh, the elected judge of Irish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 23 May 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr Thór Vilhjálmsson, Mr G. Lagergren, Mr F. Matscher, Mr J. Q. Pinheiro Farinha and Mr R. Bernhardt (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal, who had assumed the office of President of the Chamber (Rule 21 para. 5), consulted - through the Registrar - the Agent of the Irish Government ("the Government"), the Delegate of the Commission and the lawyer of the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with his orders, the following documents were received by the registry:

- the Government's memorial, on 26 October 1987;
- the applicant's memorial, on 2 November 1987;
- supplementary memorial by the Government, on 25 April 1988.

In a letter received by the Registrar on 11 December 1987, the Secretary to the Commission indicated that the Delegate would submit her observations at the hearing.

5. On 30 November 1987, the Chamber decided to relinquish jurisdiction in favour of the plenary Court (Rule 50).

6. Having consulted - through the Registrar - those who would be appearing before the Court, the President directed on 16 December 1987 that the oral proceedings should commence on 25 April 1988 (Rule 38).

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government
  Mr P.E. SMYTH, *Agent*,
  Mr E. COMYN, Senior Counsel,
  Mr D. GLEESON, Senior Counsel,
  Mr J. O'REILLY, Barrister-at-Law, *Counsel*,
  Mr J. HAMILTON, Office of the Attorney General, *Adviser*;
- for the Commission
  Mrs G.H. THUNE, *Delegate*;
- for the applicant

Senator M. ROBINSON, Senior Counsel, *Counsel*,
Mr J. JAY, Solicitor of the Supreme Court, *Adviser*.

The Court heard addresses by Mrs Thune for the Commission, by Senator Robinson for the applicant and by Mr Comyn and Mr Gleeson for the Government, as well as their replies to its questions.

# AS TO THE FACTS

## I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr David Norris was born in 1944. He is an Irish citizen. He is now, and has been since 1967, a lecturer in English at Trinity College, Dublin. At present he sits in the second chamber (Seanad Eireann) of the Irish Parliament, being one of the three Senators elected by the graduates of Dublin University.

9. Mr Norris is an active homosexual and has been a campaigner for homosexual rights in Ireland since 1971; in 1974 he became a founder member and chairman of the Irish Gay Rights Movement. His complaints are directed against the existence in Ireland of laws which make certain homosexual practices between consenting adult men criminal offences.

10. In November 1977 the applicant instituted proceedings in the High Court (see paragraphs 21-24 below) claiming that the impugned laws were no longer in force by reason of the effect of Article 50 of the Constitution of Ireland, which declared that laws passed before the Constitution but which were inconsistent with it did not continue to be in force. Evidence was given of the extent to which the applicant had been affected by that legislation and had suffered interference with his right to respect for private life. Salient points in this evidence were summarised as follows:

(i) The applicant gave evidence of having suffered deep depression and loneliness on realising that he was irreversibly homosexual and that any overt expression of his sexuality would expose him to criminal prosecution.

(ii) The applicant claimed that his health had been affected when in 1969 he fainted at a Dublin restaurant and was sent to Baggot Street Hospital for tests which resulted in his being referred to a psychiatrist. He was under the psychiatric care of Dr. McCracken for a period in excess of six months. Dr. McCracken’s advice to the applicant was that, if he wished to avoid anxiety attacks of this kind, he should leave Ireland and live in a country where the laws relating to homosexual behaviour had been reformed. Dr. McCracken stated in evidence that the applicant was in a normal condition at the time of the first consultation. He did not recall being made aware of a history of collapse.

(iii) No attempt had been made to institute a prosecution against the applicant or the organisation of which the applicant was then the chairman (see paragraph 9 above). The applicant informed the police authorities of his organisation's activities but met with a sympathetic response and was never subjected to police questioning.

(iv) The applicant had participated in a television programme on RTE, the State broadcasting company, in or about July 1975. The programme consisted of an interview with him in the course of which he admitted to being a homosexual but denied that this was an illness or that it would prevent him from functioning as a normal member of society. A complaint was lodged against that programme. The Broadcasting Complaints Advisory Committee's report referred to the existing law criminalising homosexual activity and upheld the complaint on the ground that the programme was in breach of the Current/Public Affairs Broadcasting Code in that it could be interpreted as advocacy of homosexual practices.

(v) The applicant gave evidence of suffering verbal abuse and threats of violence subsequent to the interview with him on RTE, which he attributed in some degree to the criminalising of homosexual activity. He also alleged in evidence that in the past his mail was opened by the postal authorities.

(vi) The applicant admitted to having a physical relationship with another man and that he feared that he or the person with whom he had the relationship, who normally lived outside Ireland, could face prosecution.

(vii) The applicant also claimed to have suffered what Mr Justice Henchy in a dissenting judgment in the Supreme Court (see paragraph 22 below) alluded to as follows:

> "... fear of prosecution or of social obloquy has restricted him in his social and other relations with male colleagues and friends: and in a number of subtle but insidiously intrusive and wounding ways he has been restricted in or thwarted from engaging in activities which heterosexuals take for granted as aspects of the necessary expression of their human personality and as ordinary incidents of their citizenship."

11. It is common ground that at no time before or since the court proceedings brought by the applicant has he been charged with any offence in relation to his admitted homosexual activities. However, he remains legally at risk of being so prosecuted, either by the Director of Public Prosecutions or by way of a private prosecution initiated by a common informer up to the stage of return for trial (see paragraphs 15-19 below).

## II. THE RELEVANT LAW IN IRELAND

### A. The impugned statutory provisions

12. Irish law does not make homosexuality as such a crime. But certain statutory provisions in force in Ireland penalise certain homosexual

activities. Some of these are penalised by the Offences against the Person Act, 1861 ("the 1861 Act") and the Criminal Law Amendment Act, 1885 ("the 1885 Act").

The provisions relevant to the present case are sections 61 and 62 of the 1861 Act. Section 61 of the 1861 Act, as amended in 1892, provides that:

> "Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be kept in penal servitude for life."

Section 62 of the 1861 Act, as similarly amended, provides that:

> "Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon a male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding ten years."

The offences of buggery or of an attempt to commit the same may be committed by male or female persons.

Section 11 of the 1885 Act deals only with male persons. It provides that:

> "Any male person who, in public or in private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

13. Sections 61 and 62 of the 1861 Act should be read in conjunction with the provisions of the Penal Servitude Act 1891, section 1, by virtue of which the court is empowered to impose a lesser sentence of penal servitude than that mentioned in the 1861 Act or, in lieu thereof, a sentence of imprisonment for a term not exceeding two years or a fine. The provisions of the 1861 Act and of the 1885 Act are also subject to the power given to the court by section 1(2) of the Probation of Offenders Act 1907, to apply, by way of substitution, certain more lenient measures.

The terms "hard labour" and "penal servitude" no longer have any practical significance, since anyone now sentenced to "hard labour" or "penal servitude" will, in practice, serve an ordinary prison sentence.

14. The 1885 Act is the only one of the legislative provisions attacked in the instant case that can be described as dealing solely with homosexual activities. What particular acts in any given case may be held to amount to gross indecency is a matter which is not statutorily defined and is therefore for the courts to decide on the particular facts of each case.

### B. The enforcement of the relevant statutory provisions

15. The right to prosecute persons before a court other than a court of summary jurisdiction is governed by Article 30, section 3 of the Constitution which is as follows:

> "All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose."

Section 9 of the Criminal Justice (Administration) Act, 1924, as adapted by the Constitution (Consequential Provisions) Act, 1937, provides that:

> "All criminal charges prosecuted upon indictment in any court shall be prosecuted at the suit of the Attorney General of Ireland."

16. The provisions of the Prosecution of Offences Act 1974 extended to the Director of Public Prosecutions most of the prosecuting functions exercised by the Attorney General. The Director of Public Prosecutions (an office created by that Act) is independent of the Government and a permanent official in the Civil Service of the State as distinct from the Civil Service of the Government.

17. Any member of the public, whether an Irish citizen or not, has the right as a "common informer" to bring a private prosecution. He need not have any direct interest in the alleged offence or be personally affected by it. A private prosecutor's rights are limited in respect of offences which are not triable summarily. In The State (Ennis) v. Farrell [1966] Irish Reports 107, it was held by the Supreme Court that the effect of section 9 of the Criminal Justice (Administration) Act 1924 was that a private prosecutor may conduct a prosecution up to the point where the judge of the District Court decides that the evidence is sufficient to warrant a committal for trial in cases of indictable offences i.e. triable with a jury. Thereafter the Attorney General, or now also the Director of Public Prosecutions, becomes dominus litis and must then consider whether or not he should present an indictment against the accused who has been returned by the District Court for trial with a jury.

18. The offences which are at issue in the present case, namely those set out in sections 61 and 62 of the 1861 Act and in section 11 of the 1885 Act, are indictable offences. Indictable offences are only triable summarily in the District Court if the judge of the District Court is of the opinion that the facts constitute a minor offence and the accused, on being informed of his right to trial by jury, expressly waives that right. This availability of summary trial is provided for by the Criminal Justice Act 1951 and is limited to those indictable offences set out in the Schedule to that Act. This does not include the offences under sections 61 and 62 of the 1861 Act. The summary trial procedure is available in respect of an offence under section

11 of the 1885 Act where the accused is over the age of sixteen years and the person with whom the act is alleged to have been committed is legally unable to consent for being under the age of sixteen years or an idiot, an imbecile or a feeble-minded person. Thus a summary trial can never be had in cases involving consenting adults and, save where the accused pleads guilty, the case can be heard only with a jury whether the prosecution was commenced by a private prosecutor or by the Director of Public Prosecutions.

Moreover, the Criminal Procedure Act 1967 permits a person charged with any indictable offence (save an offence under the Treason Act, 1939, murder, attempt to murder, conspiracy to murder, piracy or an offence under section 3 (1) (i) of the Geneva Conventions Act, 1962) to plead guilty in the District Court. If the Director of Public Prosecutions, or the Attorney General, as the case may be, consents, the case may be disposed of summarily in that Court. If sentence is imposed by the District Court, it cannot exceed twelve months' imprisonment. If the judge of the District Court is of opinion that the offence warrants a greater penalty, he may send the accused forward to the Circuit Court for sentence. In such a case an accused may change his plea to one of "not guilty" and the case will then be tried with a jury. The Circuit Court has a discretion to impose any sentence up to the limit permitted by the relevant statutory provision.

19. Therefore, while a private prosecution may be initiated by a common informer, a prosecution brought under one of the impugned provisions cannot proceed to trial before a jury unless an indictment is laid by the Director of Public Prosecutions. According to the Office of the Director of Public Prosecutions there have not been any private prosecutions arising out of the homosexual activity in private of consenting male adults since the inception of the Office in 1974.

20. The following statement was made by the Office of the Director of Public Prosecutions in September 1984, in reply to a question asked by the Commission:

> "The Director has no stated prosecution policy on any branch of the criminal law. He has no unstated policy not to enforce any offence. Each case is treated on its merits."

The Government's statistics show that no public prosecutions, in respect of homosexual activities, were brought during the relevant period except where minors were involved or the acts were committed in public or without consent.

## III. THE PROCEEDINGS BEFORE THE NATIONAL COURTS

21. In November 1977 the applicant brought proceedings in the Irish High Court seeking a declaration that sections 61 and 62 of the 1861 Act

and section 11 of the 1885 Act were not continued in force since the enactment of the Constitution of Ireland (see paragraph 10 above) and therefore did not form part of Irish law. Mr Justice McWilliam, in his judgment of 10 October 1980, found, among other facts, that "One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease". However, he dismissed Mr Norris's action on legal grounds.

22. On appeal, the Supreme Court, by a three-to-two majority decision of 22 April 1983, upheld the judgment of the High Court. The Supreme Court was satisfied that the applicant had locus standi to bring an action for a declaration even though he had not been prosecuted for any of the offences in question. The majority held that "as long as the legislation stands and continues to proclaim as criminal the conduct which the plaintiff asserts he has a right to engage in, such right, if it exists, is threatened, and the plaintiff has standing to seek the protection of the court".

23. In the course of these proceedings it was contended on behalf of the applicant that the judgment of 22 October 1981 of the European Court of Human Rights in the Dudgeon case (Series A no. 45) should be followed. In support of this plea, it was argued that, since Ireland had ratified the European Convention on Human Rights, there arose a presumption that the Constitution was compatible with the Convention and that, in considering a question as to inconsistency under Article 50 of the Constitution, regard should be had to whether the laws being considered are consistent with the Convention itself.

In rejecting these submissions, Chief Justice O'Higgins, in the majority judgment, stated that "the Convention is an international agreement" which "does not and cannot form part of [Ireland's] domestic law nor affect in any way questions which arise thereunder". The Chief Justice said: "This is made quite clear by Article 29, section 6, of the Constitution which declares: - 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.'"

In fact, the European Court of Human Rights already noted in its judgment of 1 July 1961 in the Lawless case (Series A no. 3, pp. 40-41, para. 25) that the Oireachtas had not introduced legislation to make the Convention on Human Rights part of the municipal law of Ireland.

24. The Supreme Court considered the laws making homosexual conduct criminal to be consistent with the Constitution and that no right of privacy encompassing consensual homosexual activity could be derived from "the Christian and democratic nature of the Irish State" so as to prevail against the operation of such sanctions. In its majority decision, the Supreme Court based itself, inter alia, on the following considerations:

"(1) Homosexuality has always been condemned in Christian teaching as being morally wrong. It has equally been regarded by society for many centuries as an offence against nature and a very serious crime.

(2) Exclusive homosexuality, whether the condition be congenital or acquired, can result in great distress and unhappiness for the individual and can lead to depression, despair and suicide.

(3) The homosexually oriented can be importuned into a homosexual lifestyle which can become habitual.

(4) Male homosexual conduct has resulted, in other countries, in the spread of all forms of venereal disease and this has now become a significant public health problem in England.

(5) Homosexual conduct can be inimical to marriage and is per se harmful to it as an institution."

The Supreme Court, however, awarded the applicant his costs, both of the proceedings before the High Court and of the appeal to the Supreme Court.

## PROCEEDINGS BEFORE THE COMMISSION

25. Mr Norris applied to the Commission on 5 October 1983 (application no. 10581/83). He complained of the existence in Ireland of legislation which prohibits male homosexual activity (sections 61 and 62 of the 1861 Act and section 11 of the 1885 Act). Mr Norris alleged that the prohibition on male homosexual activity constitutes a continuing interference with his right to respect for private life (including sexual life), contrary to Article 8 (art. 8) of the Convention. The National Gay Federation joined with the applicant in the application to the Commission and both made other claims under Articles 1 and 13 (art. 1, art. 13) of the Convention.

26. By decision of 16 May 1985, the Commission declared the application admissible in respect of the alleged interference with Mr Norris's private life. The claims made under Articles 1 and 13 (art. 1, art. 13) were declared inadmissible, as were the aforesaid Federation's entire complaints.

In its report adopted on 12 March 1987 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion, by six votes to five, that there had been a violation of Article 8 (art. 8) of the Convention.

The full text of the Commission's opinion and the joint dissenting opinion contained in the report is reproduced as an annex to this judgment.

## FINAL SUBMISSIONS MADE TO THE COURT

27. At the hearing the Government maintained the final submissions in their memorial of 23 October 1987, in which they requested the Court:

> "(1) to decide and declare that the applicant is not a 'victim' within the meaning of Article 25 (art. 25) of the European Convention on Human Rights and therefore that there has been no breach of the Convention in this case; or, in the alternative
>
> (2) to decide and declare that the present laws in Ireland relating to homosexual acts do not give rise to a breach of Article 8 (art. 8) of the Convention in that the laws are necessary in a democratic society for the protection of morals and for the protection of the rights of others for the purposes of paragraph 2 of Article 8 (art. 8-2) of the Convention."

## AS TO THE LAW

### I. WHETHER THE APPLICANT IS ENTITLED TO CLAIM TO BE A VICTIM UNDER ARTICLE 25 PARA. 1 (art. 25-1)

28. The Government asked the Court - and had made the same plea before the Commission - to hold that the applicant could not claim to be a "victim" within the meaning of Article 25 para. 1 (art. 25-1) of the Convention which, so far as is relevant, provides that:

> "The Commission may receive petitions ... from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention ..."

The Government submitted that, since the legislation complained of had never been enforced against the applicant (see paragraphs 11-14 above), his claim was more in the nature of an actio popularis by means of which he sought a review in abstracto of the contested legislation in the light of the Convention.

29. The Commission considered that Mr Norris could claim to be a victim. In this connection, it referred to certain earlier decisions of the Court, namely the Klass and Others judgment of 6 September 1978, the Marckx judgment of 13 June 1979 and the Dudgeon judgment of 22 October 1981 (Series A nos. 28, 31 and 45).

In the Commission's view, although the applicant has not been prosecuted or subjected to any criminal investigation, he is directly affected by the laws of which he complains because he is predisposed to commit prohibited sexual acts with consenting adult men by reason of his homosexual orientation.

30. The Court recalls that, whilst Article 24 (art. 24) of the Convention permits a Contracting State to refer to the Commission "any alleged breach" of the Convention by another Contracting State, Article 25 (art. 25) requires that an individual applicant should be able to claim to be actually affected by the measure of which he complains. Article 25 (art. 25) may not be used to found an action in the nature of an actio popularis; nor may it form the basis of a claim made in abstracto that a law contravenes the Convention (see the Klass and Others judgment, previously cited, Series A no. 28, pp. 17-18, para. 33).

31. The Court further agrees with the Government that the conditions governing individual applications under Article 25 (art. 25) of the Convention are not necessarily the same as national criteria relating to locus standi. National rules in this respect may serve purposes different from those contemplated by Article 25 (art. 25) and, whilst those purposes may sometimes be analogous, they need not always be so (ibid., p. 19, para. 36).

Be that as it may, the Court has held that Article 25 (art. 25) of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 21, para. 42, and the Marckx judgment, previously cited, Series A no. 31, p. 13, para. 27).

32. In the Court's view, Mr Norris is in substantially the same position as the applicant in the Dudgeon case, which concerned identical legislation then in force in Northern Ireland. As was held in that case, "either [he] respects the law and refrains from engaging - even in private and with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution" (Series A no. 45, p. 18, para. 41).

33. Admittedly, it appears that there have been no prosecutions under the Irish legislation in question during the relevant period except where minors were involved or the acts were committed in public or without consent. It may be inferred from this that, at the present time, the risk of prosecution in the applicant's case is minimal. However, there is no stated policy on the part of the prosecuting authorities not to enforce the law in this respect (see paragraph 20 above). A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question. This conclusion is further supported by the High Court's judgment of 10 October 1980, in which Mr Justice McWilliam, on the witnesses' evidence, found, inter alia, that "One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public

and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease" (see paragraph 21 above).

34. On the basis of the foregoing considerations, the Court finds that the applicant can claim to be the victim of a violation of the Convention within the meaning of Article 25 para. 1 (art. 25-1) thereof.

That being so, the Court does not consider it necessary to examine further the applicant's allegations with regard to, inter alia, threats of prosecution, claims of interference with his mail, the upholding of a complaint against a television programme on which he appeared and the evidence he gave before the High Court of Ireland of his psychiatric problems (see paragraph 10 above).

## II. THE ALLEGED BREACH OF ARTICLE 8 (art. 8)

### A. The existence of an interference

35. Mr Norris complained that under the law in force in Ireland he is liable to criminal prosecution on account of his homosexual conduct. He alleged that he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life, in breach of Article 8 (art. 8) which provides that:

> "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."

36. The Commission (at paragraph 55 of its report) considered that "One of the main purposes of penal legislation is to deter the proscribed behaviour, and citizens are deemed to conduct themselves, or modify their behaviour, in such a way as not to contravene the criminal law. It cannot be said, therefore, that the applicant runs no risk of prosecution or that he can wholly ignore the legislation in question."

The Commission, therefore, found that the legislation complained of interferes with the applicant's right to respect for his private life, guaranteed by Article 8 para. 1 (art. 8-1) of the Convention, in so far as it prohibits the homosexual activities in question even when committed in private between consenting adult men.

37. The Government, on the other hand, contended that it was not possible to conclude that there had been any lack of respect for the

applicant's rights under the Convention. In support of their contention, the Government relied on the fact that the applicant had been able to maintain an active public life side by side with a private life free from any interference on the part of the State or its agents. They further submitted that no derogation from the applicant's fundamental rights occurs by virtue of the mere existence of laws restricting homosexual behaviour under pain of legal sanction.

38. The Court agrees with the Commission that, with regard to the interference with an Article 8 (art. 8) right, the present case is indistinguishable from the Dudgeon case. The laws in question are applied so as to prosecute persons in respect of homosexual acts committed in the circumstances mentioned in the first sentence of paragraph 33. Above all, and quite apart from those circumstances, enforcement of the legislation is a matter for the Director of Public Prosecutions who may not fetter his discretion with regard to each individual case by making a general statement of his policy in advance (see paragraph 20). A prosecution may, in any event, be initiated by a member of the public acting as a common informer (see paragraphs 15-19 above).

It is true that, unlike Mr Dudgeon, Mr Norris was not the subject of any police investigation. However, the Court's finding in the Dudgeon case that there was an interference with the applicant's right to respect for his private life was not dependent upon this additional factor. As was held in that case, "the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life ... within the meaning of Article 8 para. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life ..." (Series A no. 45, p. 18, para. 41).

The Court therefore finds that the impugned legislation interferes with Mr Norris's right to respect for his private life under Article 8 para. 1 (art. 8-1).

### B. The existence of a justification for the interference

39. The interference found by the Court does not satisfy the conditions of paragraph 2 of Article 8 (art. 8-2) unless it is "in accordance with the law", has an aim which is legitimate under this paragraph and is "necessary in a democratic society" for the aforesaid aim (see, as the most recent authority, the Olsson judgment of 24 March 1988, Series A no. 130, p. 29, para. 59).

40. It is common ground that the first two conditions are satisfied. As the Commission pointed out in paragraph 58 of its report, the interference is plainly "in accordance with the law" since it arises from the very existence

of the impugned legislation. Neither was it contested that the interference has a legitimate aim, namely the protection of morals.

41. It remains to be determined whether the maintenance in force of the impugned legislation is "necessary in a democratic society" for the aforesaid aim. According to the Court's case-law, this will not be so unless, inter alia, the interference in question answers a pressing social need and in particular is proportionate to the legitimate aim pursued (see, amongst many other authorities, the above-mentioned Olsson judgment, Series A no. 130, p. 31, para. 67).

42. In this respect, the Commission again was of the opinion that the present case was indistinguishable from that of Mr Dudgeon. At paragraph 62 of its report it quoted extensively from those paragraphs of the Dudgeon judgment (paragraphs 48-63) in which this question was discussed. In that judgment it was accepted that, since "some form of legislation is 'necessary' to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the contested provisions of the law ... and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims" (Series A no. 45, p. 21, para. 49).

It was not contended before the Commission that there is a large body of opinion in Ireland which is hostile or intolerant towards homosexual acts committed in private between consenting adults. Nor was it argued that Irish society had a special need to be protected from such activity. In these circumstances, the Commission concluded that the restriction imposed on the applicant under Irish law, by reason of its breadth and absolute character, is disproportionate to the aims sought to be achieved and therefore is not necessary for one of the reasons laid down in Article 8 para. 2 (art. 8-2) of the Convention.

43. At the oral hearing, the Government argued that, whilst the criteria of pressing social need and proportionality were valid yardsticks for testing restrictions imposed in the interests of national security, public order or the protection of public health, they could not be applied to determine whether an interference is "necessary in a democratic society" for the protection of morals; and that further a wider view of necessity should be taken in an area in which the Contracting States enjoy a wide margin of appreciation.

In the Government's opinion, the application of these criteria emptied the "moral exception" of meaning. In their view, the identification of "necessity" with "pressing social need" in the context of moral values is too restrictive and produces a distorting result, while the test of proportionality involves the evaluation of a moral issue and this is something that the Court should avoid if possible. Within broad parameters the moral fibre of a democratic nation is a matter for its own institutions and the Government should be allowed a degree of tolerance in their compliance with Article 8 (art. 8), that is to say, a margin of appreciation that would allow the

democratic legislature to deal with this problem in the manner which it sees best.

44. The Court is not convinced by this line of argument. As early as 1976, the Court declared in its Handyside judgment of 7 December 1976 that, in investigating whether the protection of morals necessitated the various measures taken, it had to make an "assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context" and stated that "every 'restriction' imposed in this sphere must be proportionate to the legitimate aim pursued" (Series A no. 24, pp. 21-23, paras. 46, 48 and 49). It confirmed this approach in its Dudgeon judgment (Series A no. 45, pp. 20-22, paras. 48 et seq.).

The more recent case of Müller and Others demonstrates that, in the context of the protection of morals, the Court continues to apply the same tests for determining what is "necessary in a democratic society". In that case, the Court, in reaching its decision, examined whether the contested measures, which pursued the legitimate aim of protecting morals, both answered a pressing social need and complied with the principle of proportionality (see the judgment of 24 May 1988, Series A no. 133, pp. 21-23, paras. 31-37 and pp. 24-25, paras. 40-44).

The Court sees no reason to depart from the approach which emerges from its settled case-law and, although of the three aforementioned judgments two related to Article 10 (art. 10) of the Convention, it sees no cause to apply different criteria in the context of Article 8 (art. 8).

45. Moreover, in making their submission that the definition of "necessity" should be given a wider interpretation, the Government in effect put forward no viable tests of their own to replace or complement those mentioned above. The Government's contention would therefore appear to be that the State's discretion in the field of the protection of morals is unfettered.

Whilst national authorities - as the Court acknowledges - do enjoy a wide margin of appreciation in matters of morals, this is not unlimited. It is for the Court, in this field also, to give a ruling on whether an interference is compatible with the Convention (see the previously cited Handyside judgment, Series A no. 24, p. 23, para. 49).

The Government are in effect saying that the Court is precluded from reviewing Ireland's observance of its obligation not to exceed what is necessary in a democratic society when the contested interference with an Article 8 (art. 8) right is in the interests of the "protection of morals". The Court cannot accept such an interpretation. To do so would run counter to the terms of Article 19 (art. 19) of the Convention, under which the Court was set up in order "to ensure the observance of the engagements undertaken by the High Contracting Parties ...".

46. As in the Dudgeon case, "... not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope

of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art. 8-2)" (Series A no. 45, p. 21, para. 52).

Yet the Government have adduced no evidence which would point to the existence of factors justifying the retention of the impugned laws which are additional to or are of greater weight than those present in the aforementioned Dudgeon case. At paragraph 60 of its judgment of 22 October 1981 (ibid., pp. 23-24), the Court noted that "As compared with the era when [the] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States". It was clear that "the authorities [had] refrained in recent years from enforcing the law in respect of private homosexual acts between consenting [adult] males ... capable of valid consent". There was no evidence to show that this "[had] been injurious to moral standards in Northern Ireland or that there [had] been any public demand for stricter enforcement of the law".

Applying the same tests to the present case, the Court considers that, as regards Ireland, it cannot be maintained that there is a "pressing social need" to make such acts criminal offences. On the specific issue of proportionality, the Court is of the opinion that "such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved" (ibid., p. 24, para. 60).

47. The Court therefore finds that the reasons put forward as justifying the interference found are not sufficient to satisfy the requirements of paragraph 2 of Article 8 (art. 8-2). There is accordingly a breach of that Article (art. 8).

## III. THE APPLICATION OF ARTICLE 50 (art. 50)

48. Under Article 50 (art. 50) of the Convention:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant seeks compensation for damage and reimbursement of legal costs and expenses.

### A. Damage

49. The applicant requested the Court to fix such amount by way of damages as would recognise the extent to which he has suffered from the maintenance in force of the legislation.

The Government submitted that the Court should follow its decision of 24 February 1983 in the Dudgeon case on this point (see Series A no. 59) in which it held that a finding of a breach of Article 8 (art. 8) in itself constituted just satisfaction.

50. In reaching the aforementioned decision, the Court took into account the change in the law which had been effected with regard to Northern Ireland in compliance with the Court's judgment of 22 October 1981 (Series A no. 59, pp. 7-8, paras. 11-14). No similar reform has been carried out in Ireland.

As in the Marckx case, it is inevitable that the Court's decision will have effects extending beyond the confines of this particular case, especially since the violation found stems directly from the contested provisions and not from individual measures of implementation. It will be for Ireland to take the necessary measures in its domestic legal system to ensure the performance of its obligation under Article 53 (art. 53) (Series A no. 31, p. 25, para. 58).

For this reason and notwithstanding the different situation in the present case as compared with the Dudgeon case, the Court is of the opinion that its finding of a breach of Article 8 (art. 8) constitutes adequate just satisfaction for the purposes of Article 50 (art. 50) of the Convention and therefore rejects this head of claim.

### B. Costs and expenses

51. In respect of the proceedings before the national courts, the Supreme Court awarded the applicant taxed costs in the amount of IR£75,762.12 (see paragraph 24 above). He submitted that this amount did not in fact fully cover the actual expenditure incurred.

The Court cannot accept this head of claim. The costs having been assessed by a Taxing Master in accordance with the law of Ireland, it is not the Court's role to reassess them.

52. The applicant also sought an amount of IR£14,962.49 for costs and expenses, details of which he furnished, in respect of the proceedings conducted before the Convention institutions.

Whilst not contesting that the applicant had incurred additional liabilities over and above the amounts received by him by way of legal aid, the Government claimed that the legal costs sought by him were not reasonable as to quantum and required reassessment. The Court notes, however, that the Government made no counter-proposal as to what might constitute a reasonable amount.

The Court considers that the amount claimed satisfies the criteria laid down in its case-law (see among other authorities the Belilos judgment of 29 April 1988, Series A no. 132, pp. 27-28, para. 79) and awards to the applicant, in respect of costs and expenses, IR£14,962.49 less 7,390 French francs already paid in legal aid.

## FOR THESE REASONS, THE COURT

1. Holds by eight votes to six that the applicant can claim to be a victim within the meaning of Article 25 (art. 25) of the Convention;

2. Holds by eight votes to six that there is a breach of Article 8 (art. 8) of the Convention;

3. Holds unanimously that Ireland shall pay to the applicant, in respect of legal costs and expenses, the amount of IR£14,962.49 (fourteen thousand nine hundred and sixty-two Irish pounds and forty nine pence) less 7,390 (seven thousand three hundred and ninety) French francs to be converted into Irish pounds at the rate applicable on the date of delivery of this judgment;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 October 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the dissenting opinion of Mr Valticos, joined by Mr Gölcüklü, Mr Matscher, Mr Walsh, Mr Bernhardt and Mr Carrillo Salcedo concurred, is annexed to the present judgment.

R.R.
M-A.E.

# DISSENTING OPINION OF JUDGE VALTICOS APPROVED BY JUDGES GÖLCÜKLÜ, MATSCHER, WALSH, BERNHARDT AND CARRILLO SALCEDO

*(Translation)*

I find myself unable to concur with the majority of the Court which held that the applicant must be considered a "victim", within the meaning of Article 25 (art. 25) of the Convention, of a breach of rights guaranteed by Article 8 (art. 8).

In fact, the applicant was not subjected to any action, penalty or other measure by his country's authorities in respect of any homosexual acts committed by him. The criminal law in this matter in Ireland was not enforced against him and, more generally, no prosecutions for homosexual activities in private between consenting adult men have been instituted for a number of years. The various minor difficulties of which the applicant complains were not caused by the authorities. Nor, moreover, has the applicant encountered any problems on account of the campaign which he has been overtly conducting since 1971 in favour of homosexual rights.

This case does, indeed, bear great similarities to the Dudgeon case in which the Court considered that there had been a breach of the Convention. However, an appreciable and, in my view, decisive difference between the two cases lies in the fact that, in the Dudgeon case, the applicant had been subjected by the police to certain intrusions into his private life whilst, in this case, no action was taken against the applicant by the authorities.

The natural meaning of the word precludes a person from being regarded as a "victim" of a legal provision if that person has not been subjected to any penal or other measure based on the legislation in question. The fear of prosecution which the applicant may have experienced and the psychological problems which may have been thereby occasioned do not in themselves suffice for a finding that the applicant is a victim. Moreover, the likelihood of the applicant's being prosecuted seems minimal regard being had to the aforementioned practice of the authorities and to the fact that the applicant has spoken out publicly on the subject of his proclivities and activities for a number of years without attracting any prosecution.

Certainly, it can never be ruled out that a law regarded as having fallen into desuetude may one day be implemented anew. But that is not the issue here. The case turns rather on whether the applicant was in fact personally a victim. It cannot really be said that that has been, or is likely to be, the case.

The system of the Convention, as a whole, is precise and, on this point, gives rise to no ambiguity or latitude. Unlike the provision in Article 24 (art. 24) relating to complaints lodged by Contracting Parties, an application under Article 25 (art. 25) by a natural person is admissible only if an

applicant can claim to be the victim of a violation by a Contracting Party of the rights secured by the Convention. For the reasons which have been stated, it cannot be said that this condition is satisfied in this case.

To interpret too widely the word "victim" would risk appreciably altering the system laid down by the Convention. The Court might thus be led, even in respect of complaints from individuals, to adjudicate on the compatibility of national laws with the Convention irrespective of whether those laws have in fact been applied to an applicant whose status as a victim would be no more than very potential and contingent. An actio popularis would then not be far off.

I would add that this opinion in no wise seeks to call in question the authority of the Dudgeon judgment as to the merits.