

Application No. 10581/83

David NORRIS

against

IRELAND

Report of the Commission

(adopted on 12 March 1987)

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I. INTRODUCTION

A. The application

1. The applicant is a citizen of Ireland, born in 1944 and resident in Dublin.
2. He is represented before the Commission by Mr John Jay, Solicitor, of Messrs Herman Good, Hubert Wine & Co., Solicitors, Dublin. The Irish Government is represented by Mrs Jane Liddy, Agent.
3. The applicant is a homosexual. He complains of legislation which prohibits male homosexual activity (Sections 61 and 62 of the Offences against the Person Act 1861 and Section 11 of the Criminal Law (Amendment) Act 1885). He contested the constitutionality of the legislation, but the Supreme Court upheld its constitutionality on religious, moral, health and social grounds.
4. The applicant alleges that the prohibition on male homosexual activity constitutes a continuing interference with his right to respect for private life (which includes sexual life), ensured by Article 8 of the Convention.

B. The proceedings

5. The application was introduced on 5 October 1983 and registered on 7 October 1983.
6. On 2 July 1984 the Commission decided to give notice of the

application to the Government of Ireland and to invite them to present written observations on admissibility and merits.

7. The Government's observations were received on 15 November 1984, the applicant's observations in reply were received on 10 January 1985.

8. On 16 May 1985 the Commission declared the application admissible in so far as it had been presented by the applicant and concerned his complaint of an unjustified interference with his private life. The original application had also been lodged by the National Gay Federation, and both the applicant and the Federation had made other complaints under Articles 1 and 13 of the Convention. These aspects of the case were declared inadmissible, as were the Federation's entire complaints.

9. On 12 October 1985 the Commission decided to invite the parties to a hearing on the merits of the case. This hearing was held on 17 April 1986, on which date the applicant was also granted legal aid for his representation before the Commission.

10. At the hearing the applicant was represented by Senator M. Robinson, Counsel, and Mr J. Jay, Solicitor. The Government was represented by Mrs J. Liddy, Agent, Messrs E. Comyn, S.C., and J. O'Reilly, Counsel, and Messrs J. Hamilton and P. Smyth, Advisers.

11. After declaring the case admissible the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. Active consultations with the parties took place between May 1985 and August 1986. In the light of the parties' reaction, the Commission now finds that there is no basis upon which a settlement can be effected.

C. The present Report

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

MM. C.A. Nørgaard, President
G. Sperduti
E. Busuttil
G. Jörundsson
B. Kiernan
A.S. Gözübüyük
A. Weitzel
J.-C. Soyer
H. Danelius
H. Vandenberghe
Mrs G.H. Thune

13. The text of this Report was adopted on 12 March 1987 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

14. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

- i. to establish the facts, and
 - ii. to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.
15. A schedule setting out the history of the proceedings before

the Commission is attached hereto as Appendix I, and the Commission's decision on the admissibility of the application as Appendix II.

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

II. ESTABLISHMENT OF THE FACTS

17. The relevant law and practice and the particular facts are not in dispute between the parties.

A. The relevant law and practice

18. Section 61 of the Offences Against the Person Act 1861, as amended in 1862, provides as follows:

"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."

19. Section 62 of the 1861 Act, as similarly amended, reads as follows:

"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 any 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. "

20. Section 11 of the Criminal Law (Amendment) Act 1885 lays down the following offences:

"Any male person who, in public or 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. "

21. Sections 61 and 62 of the 1861 Act are to be read in conjunction with the provisions of the Penal Servitude Act 1891, by virtue of Section 1 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. The provisions are also subject to the powers given to the Court by Section 1 (2) of the Probation of Offenders Act 1907, whereby on conviction or indictment of any offence punishable with imprisonment the Court may, instead of passing sentence, require a person who has been convicted to enter into recognisances, with or without sureties, to be of good behaviour and to appear for sentence when called upon.

22. The Director of Public Prosecutions, who is independent in the performance of his functions, 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. Prosecutions are regularly brought under the Sections in question.

23. According to records going back to 1980, no file relating to homosexual acts by adults in private has been received in the Public Prosecutions' Office.

B. The particular facts of the application

24. The applicant has been an active campaigner for homosexuals' rights in Ireland since 1971 and in 1974 he became a founding member and chairman of the Irish Gay Rights Movement.

25. On 23 November 1977, the applicant issued High Court proceedings against the Attorney General, being the appropriate person to act as defendant in a constitutional action. He claimed, inter alia :

(1) A Declaration that Sections 61 and 62 of the Offences against the Person Act 1861 are inconsistent with the provisions of the Constitution, were not continued in force by Article 50 of the Constitution, and no longer form part of the Law of the State.

(2) A Declaration that Section 11 of the Criminal Law (Amendment) Act 1885 is inconsistent with the provisions of the Constitution, was also not continued by Article 50 thereof, and no longer forms part of the Law of the State.

26. On 10 October 1980 the claim was dismissed and the applicant was ordered to pay the costs of the action.

27. The applicant, subsequently, appealed to the Supreme Court. The Court of five judges dismissed the appeal on 22 April 1983 in a judgment delivered by three of the judges, with two dissenting judgments.

28. In considering the applicant's claim under Article 8 of the Convention, with reference to the Dudgeon case (Eur. Court H.R., judgment of 22 October 1981 Series A No. 45 para. 41), the Supreme Court, in the majority judgment, stated that neither the Convention nor the Dudgeon judgment were in any way relevant to the question which had to be considered, the Convention not being part of domestic law. However the Court was satisfied that the applicant had locus standi to bring his constitutional claim even though he had not been prosecuted for any of the offences in question. It held that "as long as the legislation stands and continues to proclaim as criminal the conduct which <the applicant> asserts he had a right to engage in, such right, if it exists, is threatened, and <the applicant> has standing to seek the protection of the Court."

29. It considered, inter alia, that the laws making homosexual conduct criminal are consistent with the Irish Constitution, and no right of privacy could prevail against them for the following reasons:

"(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."

30. On the question of costs, the Supreme Court, referring to the exceptional circumstances of the case, ordered that the applicant be awarded his costs both of the proceedings before the High Court and of the appeal to the Supreme Court.

III. SUBMISSIONS OF THE PARTIES

A. The applicant

1. The position of the applicant as a victim of a violation of Article 8 of the Convention

31. The applicant claims to be a victim of a violation of Article 8 of the Convention by virtue of the criminal law prohibition on male homosexual activity. He relies on the case-law of the European Court of Human Rights:

"Article 25 of the Convention entitles individuals to contend that a law violates their right by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it." (Eur. Court H.R. Marckx judgment of 13 June 1979 Series A No. 31 para. 27)

32. In the Dudgeon case concerning identical legislation in Northern Ireland the Court held as follows:

"In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life either he respects the law and refrains from engaging - even in private 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." (Eur. Court H.R. Dudgeon judgment of 22 October 1981 Series A No. 45 para. 41)

33. The applicant also refers to the evidence put before and accepted by the Supreme Court of the personal effects of the impugned legislation upon him: he had realised at a young age that he was irreversibly homosexual, and had become traumatised by the fear that any overt expression of his sexuality would expose him to criminal prosecution. The applicant has had a long-term and stable relationship with another man who is not living in Ireland. He has suffered great strain, apprehension and fear of prosecution with the necessarily covert nature of this relationship, to the extent that the applicant had to seek psychotherapy. The psychiatrist advised him after nine months of treatment to consider emigrating to a country where the law takes a more liberal attitude to male homosexuals. The applicant has been subjected to denigrating and hurtful treatment meted out to him because of his homosexuality. Since publicly campaigning for homosexual rights, he has been physically attacked and verbally abused. There have been other alleged interferences with his private life with the opening of his mail on several occasions and the upholding of a complaint against the State broadcasting company, R.T.E., for broadcasting an interview with the applicant concerning his homosexuality.

34. The fact that the Director of Public Prosecutions has no stated or unstated policy not to prosecute adult homosexuals shows the continuing risk of prosecution to which the applicant is exposed. However the absence of recent prosecutions also shows the absence of any pressing social need to make homosexual activities criminal offences.

2. The merits of the Article 8 claim

35. The applicant again relies on the conclusions of the Commission and the Court in the Dudgeon case, from which, it is submitted, the present case cannot be distinguished (cf. in particular Eur. Court H.R. judgment of 22 October 1981, Series A No. 45 paras. 48, 52 and 60).

36. The applicant contends that the Government has submitted no significant evidence or argument as to the necessity of maintaining the criminalisation of adult homosexual activities in Ireland. No evidence has been put forward of any pressing social need for the interference with the private life in question. Despite Governments' margin of appreciation in this area, there must exist serious reasons before the State may legitimately interfere with the intimate, sexual aspects of private life. No such reasons have been put forward in the present case.

3. Conclusion

37. The applicant desires to engage privately in sexual activity with another consenting adult. The activity he has been engaged in and seeks to continue is quintessentially private and lies at the heart of an intimate association which must be beyond the reach of the criminal law in the Contracting Parties to the Convention. It is submitted that his case falls within the principles as clarified by the Court in the Dudgeon case and that there is no distinguishing feature in Irish society to justify the continuance in force of legislation criminalising such homosexual activity.

B. The Government

1. Statistics

38. The Government refers to the prosecution statistics for offences involving indecency between males, including buggery and homosexual acts and attempts at such acts over the period 1979 to 1985. These statistics show that there is not a determined policy to prosecute or persecute the adult homosexual community, few prosecutions having been brought during the relevant period except where minors have been involved or the acts committed in public or without consent.

2. The Dudgeon case

39. The Government relies on its submissions prior to the admissibility of the application, in particular the partially dissenting opinion of Judge Walsh in the Dudgeon judgment (see the Commission's Decision on Admissibility, Appendix II to this Report pp. 24-37).

40. The relevance of the judgment of the European Court of Human Rights in the Dudgeon case is acknowledged: the legislation involved is identical, the sexual nature of the applicants is apparently the same, and the absence of any Government undertaking not to prosecute is also a common factor. However the Government submits that the present case can be distinguished from that of Mr Dudgeon.

41. There has been no public authority interference with the applicant's private life, despite his campaigning for homosexuals' rights and his Supreme Court case i.e. his activities being public knowledge. He runs no real risk of being directly affected by the laws in question. On the contrary there has been a degree of

recognition of the applicant's position and a sympathy with his aims by at least one State organ, namely the Supreme Court. In the Dudgeon case, on the other hand, there was substantial evidence of direct interference by public authorities in that applicant's private life. On a drugs raid of Mr Dudgeon's home the police seized a great quantity of his personal papers including letters and diaries. Mr Dudgeon then accompanied the police to the police station where he was questioned at length about his private sexual life. Those papers were retained for a year, during which time Mr Dudgeon experienced intense anxiety and the very real expectation of a serious criminal prosecution.

42. Nothing of the sort happened to the present applicant, who is complaining, in the abstract, of the mere existence of certain penal laws, which have fallen into desuetude regarding private, adult homosexual acts. The fact that such laws have fallen into disuse reflects the evolution of public opinion to one of indifference or the liberalisation of society's norms of behaviour. Although a Catholic society, Ireland should not be seen as intolerant. Nor should it be assumed that, in the sphere of judicial review, orthodox Catholic teaching is a touchstone when considering the curtailment of liberty. However if the legislature is slow to repeal the laws in question this is because caution must be shown in choosing the right time for reform which will meet with wide acceptance rather than a hostile backlash of prejudice. Respect must therefore be afforded to that transitional period during which certain laws fall into disuse. These are matters which fall within a State's margin of appreciation (cf. e.g. Eur. Court H.R. Abdulaziz, Cabales and Balkandali judgment of 28 May 1985 Series A No. 94 para. 67 and the Handyside judgment of 7 December 1976 Series A No. 24 para. 48).

43. Thus whilst the applicant as a person with a homosexual nature can validly claim to be prohibited by the laws complained of from performing homosexual acts in private, and in that sense his claim is neither abstract nor academic, nevertheless, his application represents as extreme a case in this respect as can be envisaged, in view of the freedom he has enjoyed in his public avowals and his uninhibited campaign for reform. It would therefore be stretching the notion of victim under Article 25 of the Convention to the outermost limit if the principles of the Marckx and Dudgeon judgments of the European Court of Human Rights were applied in this case.

44. The Government refers to other cases before the Commission in which it has held that, despite the modern evolution of attitudes towards homosexuality, not every aspect of homosexual life is protected by Article 8 of the Convention, e.g. as regards the exclusion of a man from the country where his homosexual partner permanently resides (No. 9369/81 Dec. 3.5.83 D.R. 32 p. 220) and the imposition of different rules for the homosexual age of sexual consent (No. 7215/75 Comm. Report 12.10.78 D.R. 19 p. 66).

45. At the time of the Dudgeon case apparently more than one other High Contracting Party, apart from Ireland, prohibited consensual homosexual acts between adults. Liechtenstein even entered an express reservation to the Dudgeon judgment when ratifying the Convention. The United States Supreme Court has refused to review the laws of certain American States retaining criminal prohibitions on homosexual acts. The Government, therefore, submits that this wide diversity of practices in the various jurisdictions and the absence of any direct action by the public authorities against the applicant are matters which the Commission should carefully consider in this case.

IV. OPINION OF THE COMMISSION

46. The point at issue is whether the facts of the present case, by reason of the existence in Ireland of laws prohibiting homosexual acts between consenting, adult men, disclose a violation of the

applicant's right to respect for private life, as guaranteed by Article 8 (Art. 8) of the Convention.

A. On the question of an interference under Article 8 para. 1 (Art. 8-1) of the Convention

47. Article 8 (Art. 8) of the Convention provides as follows:

"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."

48. The Commission has held in its decision on admissibility that the applicant may claim to be a victim of a violation of Article 8 (Art. 8) of the Convention (see Appendix II p. 43). The Commission therefore reads the parties' further submissions on the merits of this case as regards the issue of "victim" as being pertinent to the related question of whether the applicant has suffered an actual interference with his right to respect for private life, ensured by Article 8 para. 1 (Art. 8-1) of the Convention.

49. The applicant has contended that, as a homosexual, he has suffered great strain, apprehension and fear of prosecution, by reason of the existence of the penal laws in question. This stress has caused him to seek psychiatric treatment. The fear of prosecution is constant, given the absolute nature of the prohibition on homosexual activity and the absence of any clear policy on the part of the Director of Public Prosecutions not to prosecute.

50. The Government has submitted that the mere existence of penal legislation prohibiting homosexual activity is not in itself sufficient to constitute an interference with the applicant's right to respect for private life, for, otherwise, the applicant has never been questioned by the police about his homosexual activities or publicly held views on the subject, and he has never been prosecuted for such activities.

51. The Commission refers to the case of *Dudgeon v. the United Kingdom* (Comm. Report 13.3.80, Eur. Court H.R. Series B No. 40, and Eur. Court H.R. judgment of 22 October 1981 Series A No. 45). In that case the applicant, a homosexual, complained of identical legislation in Northern Ireland prohibiting homosexual acts between consenting adult men.

52. In that case the Commission expressed the following opinion at paras. 88 - 95 of its Report:

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

....

90. The Commission accepts that, as a general rule, it is

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

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

....

93. The law ... prohibits private consensual homosexual acts involving persons over 21 years of age but, subject to one possible exception, it does not appear to have been enforced by means of criminal proceedings in respect of any such acts since at least 1972. However, it has not fallen into desuetude or lost its legal effectiveness to prohibit such acts. The legal prohibition remains and the possibility of prosecutions by either the public prosecuting authorities or private individuals is open in law. Furthermore it does not appear that there is any clear policy not to prosecute in respect of such acts. Whilst there have been no recent prosecutions, this may well be explained by the evident difficulties in obtaining evidence and the fact that relevant complaints are apparently very rarely made to the police.

....

94. The risk of prosecution if the law is disregarded is thus not altogether absent. Furthermore, the penalties which could be imposed on conviction are heavy. In such circumstances it is inevitable, in the Commission's opinion, that the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals.

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

53. This opinion was endorsed by the European Court of Human Rights (judgment para. 41).

54. The Commission and the Court also took into account the fact

that steps towards prosecuting Mr Dudgeon had been taken by the police, even though no criminal charges were in fact brought.

55. The Commission finds the present case indistinguishable from that of Mr. Dudgeon on the question of an interference with the right to respect for private life ensured by Article 8 para. 1 (Art. 8-1) of the Convention. In the present case there is a clear prohibition (Section 11 of the Criminal Law (Amendment) Act 1885) on the applicant's homosexual activities with consenting, adult men. Although, during the relevant period, there has been no prosecution of adult, homosexual activities, there has also been no explicit policy declaration by the Director of Public Prosecutions not to prosecute. This aspect of the law has therefore clearly not fallen into desuetude and can still be considered to have residual effects. 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 applicant is a declared homosexual who claims to have a stable relationship with an adult man. The applicant also claims to have suffered great stress as a result of his sexual proclivities and the fear of prosecution because of them. In the circumstances the Commission considers that there is no reason to doubt the general truth of these claims concerning the fear and distress that he has suffered.

56. The Commission, therefore, finds that the legislation complained of interferes with the applicant's right to respect for his private life, ensured by Article 8 para. 1 (Art. 8-1) of the Convention, in so far as it prohibits homosexual acts committed in private between consenting adult men.

B. On the question of justification under Article 8 para. 2 (Art. 8-2) of the Convention

57. The next question which arises is whether the interference with the applicant's private life is prescribed by law and necessary in a democratic society on one or more of the grounds set out in Article 8 para. 2 (Art. 8-2) of the Convention.

58. As to the first point, the interference is plainly "in accordance with the law", within the meaning of Article 8 para. 2 (Art. 8-2), since it arises from the very existence of the legislation.

59. As regards the question of necessity, the applicant has submitted that the considerations and conclusions of the Commission and Court in the Dudgeon case are again relevant to his application. He contended that the Government has provided no significant evidence or argument as to the necessity of maintaining the criminalisation of adult homosexual activities in Ireland. Moreover, there is no evidence of any pressing social need for such an interference with private life, as is shown by the absence of any recent criminal prosecutions in this sphere.

60. The Government has relied on the dissenting opinion of Mr Justice Walsh in the Dudgeon case, who considered, inter alia, that the State has a valid interest in the prevention of corruption and in the preservation of the moral ethos of its society. It may, therefore, enact such laws as it thinks necessary to achieve these objects. There cannot be said to be a common, moral, European standard in the legislation concerning homosexual practices. Thus in an area of law where adults, albeit consenting, may be exploited by reason of their own weaknesses, the legislature has a wide margin of appreciation in enacting protective legislation.

61. The Government submitted that there is a wide diversity of legislative practices and attitudes in the various jurisdictions of the Council of Europe, as well as in the comparable jurisdictions of the United States of America. Thus, even if the penal prohibition on adult homosexual activities has in effect fallen into disuse in Ireland, it is within the State's margin of appreciation to choose the appropriate moment for reform so that it meets with wide acceptance rather than a hostile backlash of prejudice.

62. The Commission refers to the Dudgeon case, and, in particular, the considerations of the European Court of Human Rights in its judgment of 22 October 1981 (paras. 48 - 63), on the question of necessity:

"48. As the Commission rightly observed in its report (at paragraph 101), the cardinal issue arising under Article 8 (Art. 8) in this case is to what extent, if at all, the maintenance in force of the legislation is 'necessary in a democratic society' for these aims.

49. There can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as 'necessary in a democratic society'. The overall function served by the criminal law in this field is, in the words of the Wolfenden report, 'to preserve public order and decency <and> to protect the citizen from what is offensive or injurious'. Furthermore, this necessity for some degree of control may even extend to consensual acts committed in private, notably where there is call - to quote the Wolfenden report once more - 'to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence'. In practice there is legislation on the matter in all the member States of the Council of Europe, but what distinguishes the law in Northern Ireland from that existing in the great majority of the members States is that it prohibits generally gross indecency between males and buggery whatever the circumstances. It being accepted that 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 of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.

50. A number of principles relevant to the assessment of the 'necessity', 'in a democratic society', of a measure taken in furtherance of an aim that is legitimate under the Convention have been stated by the Court in previous judgments.

51. Firstly, 'necessary' in this context does not have the flexibility of such expressions as 'useful', 'reasonable', or 'desirable', but implies the existence of a 'pressing social need' for the interference in question (see the above-mentioned Handyside judgment, p. 22, para. 48).

52. In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them (ibid). However, their decision remains subject to review by the Court (ibid., p. 23, para. 49).

As was illustrated by the Sunday Times judgment, the scope of the margin of appreciation is not identical in respect

of each of the aims justifying restrictions on a right (p. 36, para. 59). The Government inferred from the Handyside judgment that the margin of appreciation will be more extensive where the protection of morals is in issue. It is an indisputable fact, as the Court stated in the Handyside judgment, that 'the view taken ... of the requirements of morals varies from time to time and from place to place, especially in our era,' and that 'by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements' (p. 22, para. 48).

However, 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 the public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (Art. 8-2).

53. Finally, in Article 8 (Art. 8) as in several other Articles of the Convention, the notion of 'necessity' is linked to that of a 'democratic society'. According to the Court's case-law, a restriction on a Convention right cannot be regarded as 'necessary in a democratic society' - two hallmarks of which are tolerance and broadmindedness - unless, amongst other things, it is proportionate to the legitimate aim pursued (see the above-mentioned Handyside judgment, p. 23, para. 49, and the above-mentioned Young, James and Webster judgment, p. 25, para. 63).

54. The Court's task is to determine on the basis of the aforesaid principles whether the reasons purporting to justify the 'interference' in question are relevant and sufficient under Article 8 para. 2 (see the above-mentioned Handyside judgment, pp. 23 - 24, para. 50). The Court is not concerned with making any value-judgment as to the morality of homosexual relations between adult males.

....

57. the moral climate in Northern Ireland in sexual matters, in particular as evidenced by the opposition to the proposed legislative change, is one of the matters which the national authorities may legitimately take into account in exercising their discretion. There is, the Court accepts, a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society This opinion reflects a view both of the requirements of morals in Northern Ireland and of the measures thought within the community to be necessary to preserve prevailing moral standards.

Whether this point of view be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Irish society is certainly relevant for the purposes of Article 8 para. 2 (Art. 8-2).

....

59. Without any doubt the United Kingdom Government acted carefully and in good faith; what is more, they made every effort to arrive at a balanced judgment between the differing viewpoints before reaching the conclusion that such a substantial body of opinion in Northern Ireland was opposed to a change in the law that no further action should be taken (see, for example, paragraphs 24 and 26 above). Nevertheless, this cannot of itself

be decisive as to the necessity for the interference with the applicant's private life resulting from the measures being challenged (see the above-mentioned Sunday Times judgment, p. 36, para. 59). Notwithstanding the margin of appreciation left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it (see paragraph 53 above).

60. The Convention right affected by the impugned legislation protects an essentially private manifestation of the human personality (see paragraph 52, third sub-paragraph, above).

As compared with the era when that 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 sanction 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 (see, *mutatis mutandis*, the above-mentioned Marckx judgment, p. 19, para. 41, and the Tyrer judgment of 25 April 1978, Series A No. 26, pp. 15 - 16, para. 31). In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a 'pressing social need' to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers 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.

61. Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. 'Decriminalisation' does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.

To sum up, the restriction imposed on Mr Dudgeon under Northern Ireland law, by reason of its breadth and absolute

character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.

....

63. Mr Dudgeon has suffered and continues to suffer an unjustified interference with his right to respect for his private life. There is accordingly a breach of Article 8 (Art. 8)."

63. As regards the present case, the Commission is of the opinion that it is indistinguishable from that of Mr Dudgeon on the question of necessity. The Commission finds that the respondent Government has not shown how the present case significantly differs from that of Mr Dudgeon. Although there may indeed be no common, moral, European standard on the criminalisation of homosexuality, nevertheless it has not been shown that the societies of Southern and Northern Ireland are widely different in their attitudes to adult homosexual activities. In particular the respondent Government has not contended, as did the United Kingdom Government in respect of Northern Ireland in the Dudgeon case, that there is a large body of opinion in Ireland which is hostile or intolerant towards adult homosexual activity. On the contrary, the Government stated that Ireland should not be seen as an intolerant society. Moreover it has not been contended that Irish society has a special need to be protected from such activity. In these circumstances the Commission is of the opinion that the restriction imposed on the present applicant under Irish law, by reason of its breadth and absolute character, is disproportionate to the aims sought to be achieved. The penal prohibition of adult homosexual activities, therefore, constitutes an interference with the applicant's private life which is not necessary for one or more of the reasons laid down in Article 8 para. 2 (Art. 8-2) of the Convention.

Conclusion

64. The Commission concludes, by 6 votes to 5, that there has been a violation of Article 8 (Art. 8) of the Convention in that the interference with the applicant's right to respect for private life was not necessary, within the meaning of the second paragraph of that provision.

Secretary to the Commission

President of the Commission

(H. C. KRÜGER)

(C. A. NØRGAARD)

Dissenting opinion of Mr. B. Kiernan, joined by MM. Sperduti, Gözübüyük, Weitzel and Soyer

I disagree with the opinion of the majority of the Commission. Although Section 11 of the Criminal Law (Amendment) Act 1885 is still on the statute book, it has been allowed to fall into disuse in so far as it relates to the homosexual activities of consenting adult males. There has been no prosecution either by a private person or by the Director of Public Prosecutions in respect of such activities for many years.

I attach no significance to the fact that the Director of Public Prosecutions has not issued any declaration of an explicit policy not to prosecute. To do so would run counter to the duties of his office and would, in effect, be a usurpation of the functions of the Legislature.

The proceedings taken by Mr. Norris before the Commission are, in my opinion, in the nature of an actio popularis designed to focus attention and attract support for his campaign for the revision of the statute law of which he complains.

I, therefore, conclude that there has been no violation of Article 8 of the Convention in the present case.

APPENDIX I

History of proceedings before the Commission

Date	Item
a) Examination of admissibility	
5 October 1983	Introduction of application
7 October 1983	Registration of application
2 July 1984	Commission's deliberations and decision to communicate application to respondent Government
15 November 1984	Receipt of Government's observations
10 January 1985	Receipt of applicant's observations in reply
16 May 1985	Commission's deliberations and decision to declare application partially admissible
b) Examination of the merits	
12 October 1985	Commission's deliberations and decision to hold a hearing on the merits of the application
17 April 1986	Hearing on the merits and deliberations
	For the Government:
	Mrs Liddy MM Comyn O'Reilly Hamilton Smyth
	For the applicant:
	Mrs Robinson Mr Jay
11 October 1986	Commission's deliberations on the merits
5 March 1987	Deliberations and final votes.
12 March 1987	Adoption of the Report

