

THIRD SECTION

CASE OF A.D.T. v. THE UNITED KINGDOM

(Application no. 35765/97)

JUDGMENT

STRASBOURG

31 July 2000

FINAL

31/10/2000

In the case of A.D.T. v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. Costa, *President*,
Mr W. Fuhrmann,
Mr L. Loucaides,
Mr P. Kūris,
Sir Nicolas Bratza,
Mrs H.S. Greve,
Mr K. Traja, *judges*,

and Mrs S. Dollé, *Section Registrar*,

Having deliberated in private on 30 November 1999 and 11 July 2000,

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

PROCEDURE

1. The case originated in an application (no. 35765/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a United Kingdom national, Mr A.D.T. (“the applicant”), on 25 March 1997. The applicant asked the Court not to reveal his identity.

2. On 23 October 1997 the Commission (First Chamber) decided to give notice of the application to the United Kingdom Government (“the Government”) and invited them to submit observations on its admissibility and merits.

3. The Government submitted their observations on 20 February 1998. The applicant replied on 29 May 1998.

4. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with the provisions of Article 5 § 2 thereof, the case falls to be examined by the Court.

5. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section.

6. On 16 March 1999 the Court declared the application admissible¹ and decided to invite the parties to a hearing on the merits.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on 30 November 1999.

There appeared before the Court:

(a) for the Government

Mrs S. Langrish, Foreign and Commonwealth Office, *Agent*,

Mr N. Garnham, *Counsel*,

Ms S. Chakrabarti,

Ms D. Grice, *Advisers*;

(b) for the applicant

Mr B. Emmerson, *Counsel*,

Mr F. Whitehead, *Solicitor*,

Ms A. Mason,

Ms A. Hudson, *Advisers*.

The Court heard addresses by Mr Emmerson and Mr Garnham.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a practising homosexual. On 1 April 1996, at approximately 7.50 p.m., police officers conducted a search under warrant of the applicant's home. As a result of the search, various items were seized including photographs and a list of videotapes. The

applicant was arrested at about 8.23 p.m. and taken to the local police station. A further search of the applicant's house was conducted the following day and further items, including videotapes, were seized.

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

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

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

II. RELEVANT DOMESTIC LAW and practice

12. Section 13 of the Sexual Offences Act 1956 provides:

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

13. By section 37 of, and paragraph 16 of the Second Schedule to, the Sexual Offences Act 1956, the offence of gross indecency between men is punishable on indictment by up to five years' imprisonment if committed by a man of, or over the age of, 21 with a man under the age of 18, and otherwise by a maximum of two years' imprisonment.

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

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

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

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

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

17. Section 1 of the Sexual Offences Act 1967, in its relevant part, provides:

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

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

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

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

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

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

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

THE LAW

I. alleged violation of Article 8 of the Convention

20. The applicant complained that his conviction for gross indecency constituted a violation of his right to respect for his private life, protected by Article 8 of the Convention. Article 8 reads, in its relevant parts, as follows:

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

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

A. Whether there was an interference

21. By reference to the case of *Laskey, Jaggard and Brown v. the United Kingdom* (judgment of 19 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 131, § 36), the Government contend that there was no interference with the applicant's right to respect for his private life as the sexual activity in the present case fell outside the scope of "private life" within the meaning of Article 8 § 1 of the Convention. They point, firstly, to the number of individuals present and, secondly, to the fact that the sexual activities were recorded on videotape.

22. The applicant sees a dual interference with his right to respect for his private life. Firstly, he refers to the very existence of a criminal law which prohibits homosexual activity in a private place where it involves more than two participants and, secondly, he underlines that that law was applied in the criminal prosecution which was brought against him. On the facts, the applicant notes that there was neither organised activity nor any risk of injury in the present case and adds that, had it not been for the prosecution, the videotape would not have been distributed in any real sense whatever.

23. The Court recalls that the mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life (see, as the most recent Court case-law, the *Modinos v. Cyprus* judgment of 22 April 1993, Series A no. 259, p. 11, § 24).

24. The present applicant was aware that his conduct was in breach of the criminal law, and he was thus continuously and directly affected by the legislation. In addition, he was directly affected in that a criminal prosecution was brought against him which resulted in his conviction for a breach of section 13 of the Sexual Offences Act 1956.

25. As to the Government's comments in connection with the scope of "private life" within the meaning of Article 8 of the Convention, the Court recalls that there was no dispute between the parties in the case of *Laskey, Jaggard and Brown* as to the existence of an interference (*loc. cit.*, p. 131, § 36). In that case, the Court's comments did not go beyond raising a question "whether the sexual activities of the applicants fell entirely within the notion of 'private life' ". The sole element in the present case which could give rise to any doubt about whether the applicants' private lives were involved is the video-recording of the activities. No evidence has been put before the Court to indicate that there was any actual likelihood of the contents of the tapes being rendered public, deliberately or inadvertently. In particular, the applicant's conviction related not to any offence involving the making or distribution of the tapes, but solely to the acts themselves. The Court finds it most unlikely that the applicant, who had gone to some lengths not to reveal his sexual orientation, and who has repeated his desire for anonymity before the Court, would knowingly be involved in any such publication.

26. The Court thus considers that the applicant has been the victim of an interference with his right to respect for his private life both as regards the existence of legislation prohibiting consensual sexual acts between more than two men in private and as regards the conviction for gross indecency.

B. Whether the interference was justified

27. The Government consider that any interference with the applicant's right to respect for his private life was in accordance with the law and necessary for the protection of morals or the rights and freedoms of others. They underline that a margin of appreciation is left to national authorities in assessing whether a pressing social need exists, and claim that the margin must be particularly broad where the protection of morals is at issue: the mere fact that intimate aspects of private life generally call for a narrower margin of appreciation cannot prevent the margin in the present case from being a significant one. They draw a distinction between intimate, private and therefore acceptable homosexual activity (between two men), and group, potentially public and therefore unacceptable homosexual activity (between more than two men). At the hearing before the Court, the Government accepted, in the light of a review of sex offences which is taking place in the United Kingdom, that the precise extent of permissible legislative interference with group activities is difficult to define, although they maintained that in the present case the prosecution was compatible with the Convention.

28. The applicant underlines that he was not prosecuted for recording his sexual activities on videotape or for distributing the tapes, but was prosecuted under a law which prohibits the sexual acts themselves, even though they were carried out in the privacy of the bedroom of his own home. The offence was committed not because it was videotaped, but because more than two people were participating in the sexual activities. The applicant repeats that there was no evidence to suggest that there was any risk of the tapes finding their way into the public domain.

29. An interference with the exercise of an Article 8 right will not be compatible with Article 8 § 2 unless it is “in accordance with the law”, has an aim or aims that is or are legitimate under that paragraph and is “necessary in a democratic society” for the aforesaid aim or aims (see the *Dudgeon v. the United Kingdom* judgment of 22 October 1981, Series A no. 45, p. 19, § 43).

30. The applicant does not claim that the legislation in the present case was not “in accordance with the law”, or that its aims were not legitimate. The Court finds that the interference so far as it relates to the legislation was in accordance with the law, in that Section 13 of the 1956 Act and section 1(2) of the 1967 Act together prescribed the act which was prohibited and the relevant penalty, and that its aims, of protecting morals and protecting the rights and freedoms of others, were legitimate (see, in this context, the *Dudgeon* judgment cited above, p. 20, § 47). The applicant does, however, submit that his prosecution for gross indecency pursued no legitimate aim, as the only aim put forward – the risk that the video-recording might be witnessed by the public at large – had nothing to do with the offence of gross indecency, which was committed regardless of the potential audience for the video. In the light of its conclusions below on the question of the proportionality of the interference with any aims pursued, the Court does not consider it necessary to determine this particular point.

31. The cardinal issue in the case is whether the existence of the legislation in question, and its application in the prosecution and conviction of the applicant, were “necessary in a democratic society” for these aims.

32. The Court recalls that in the *Dudgeon* case, in which it was considering the existence of legislation, it found no “pressing social need” for the criminalisation of homosexual acts between two consenting male adults over the age of 21, and that such justifications as there were for retaining the law were 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”. (loc. cit., pp. 23-24, § 60)

33. Those principles were adopted and repeated in the subsequent cases of *Norris v. Ireland* (judgment of 26 October 1988, Series A no. 142, pp. 20-21, § 46), *Modinos* (judgment cited above, p. 12, § 25) and *Marangos v. Cyprus* (application no. 31106/96, Commission's report of 3 December 1997, unpublished).

34. There are differences between those decided cases and the present application. The principal point of distinction is that in the present case the sexual activities involved more than two men, and that the applicant was convicted for gross indecency as more than two men had been present.

35. The Government contend that where groups of men gather in order to engage in sexual activities, the possibility of such activities being publicised is inevitable, and that this applies all the more where the activities are videotaped. They claim that because of the less intimate nature of group activities, the margin of appreciation afforded to the national authorities is a significant one. The applicant underlines that the offence is committed whenever more than two people are present, and does not depend on the involvement of a large number of people.

36. It is not the Court's role to determine whether legislation complies with the Convention in the abstract. The Court will therefore consider the compatibility of the legislation in the present case with the Convention in the light of the circumstances of the case, that is, that the applicant wished to be able to engage, in private, in non-violent sexual activities with up to four other men.

37. The Court can agree with the Government that, at some point, sexual activities can be carried out in such a manner that State interference may be justified, either as not amounting to an interference with the right to respect for private life, or as being justified for the protection, for example, of health or morals. The facts of the present case, however, do not indicate any such circumstances. The applicant was involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. It is true that the activities were recorded on videotape, but the Court notes that the applicant was prosecuted for the activities themselves, and not for the recording, or for any risk of it entering the public domain. The activities were therefore genuinely “private”, and the approach of the Court must be to adopt the same narrow margin of appreciation as it found applicable in other cases involving intimate aspects of private life (as, for example, in the *Dudgeon* judgment cited above, p. 21, § 52).

38. Given the narrow margin of appreciation afforded to the national authorities in the case, the absence of any public-health considerations and the purely private nature of the behaviour in the present case, the Court finds that the reasons submitted for the maintenance in force of legislation criminalising homosexual acts between men in private, and *a fortiori* the prosecution and conviction in the present case, are not sufficient to justify the legislation and the prosecution.

39. There has therefore been a violation of Article 8 of the Convention.

ii. alleged violation of Article 14 of the Convention taken in conjunction with Article 8

40. The applicant alleged a violation of Article 14 of the Convention, taken together with Article 8, on the ground that no provision of domestic law regulated sexual acts between consenting adult heterosexuals or between lesbians. Article 14 of the Convention provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

41. The Court recalls that in its Dudgeon judgment cited above, having found a violation of Article 8 of the Convention, it did not deem it necessary to examine the case under Article 14 as well (p. 26, § 70). It reaches the same conclusion in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

43. The applicant claimed a total of 10,929.05 pounds sterling (GBP) for pecuniary damage in respect of the costs of defending the criminal proceedings against him (GBP 1,887.05), travel expenses (GBP 21), prosecution costs (GBP 250) and items confiscated and destroyed at the end of the criminal proceedings (GBP 8,771). He also claimed GBP 10,000 in respect of non-pecuniary damage.

44. The Government were “content for just satisfaction to be set in accordance with the applicant's proposals”.

45. The Court considers the sums claimed by the applicant to be reasonable and in accordance with the principles laid down by its own case-law under Article 41 of the Convention. It awards the applicant the sum of GBP 20,929.05.

B. Costs and expenses

46. The applicant also claimed a total of GBP 13,771.28 by way of costs and expenses, including value-added tax. Save for arithmetical comments (taken into account in that figure) the Government made no observations on the total.

47. The Court awards the applicant the sum of GBP 13,771.28.

C. Default interest

According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that it is not necessary to examine the case under Article 14 of the Convention;
3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in respect of damage, GBP 20,929.05 (twenty thousand nine hundred and twenty-nine pounds sterling five pence) and, for costs and expenses, GBP 13,771.28 (thirteen thousand seven hundred and seventy-one pounds sterling twenty-eight pence),

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English, and notified in writing on 31 July 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of the Court.

S. Dollé J.-P. Costa
Registrar President

1 *Note by the Registry*. The Court's decision is obtainable from the Registry.

A.D.T. v. the United Kingdom JUDGMENT

A.D.T. v. the United Kingdom JUDGMENT

A.D.T. v. the United Kingdom JUDGMENT