

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

**IN THE MATTER OF AN APPLICATION BY McR FOR JUDICIAL
REVIEW**

KERR J

Introduction

The applicant is charged with a number of sexual offences against a mentally retarded woman. He has applied to proceed with this application using the initials of his surname only. The respondent did not object to this course and since disclosure of his full name might lead to the identification of the woman involved, I ordered that he should be referred to only as "McR".

The offences with which the applicant is charged are all charges of attempted buggery contrary to section 62 of the Offences against the Person Act 1861. By this application he claims that this provision is incompatible with Article 8 of the European Convention on Human Rights and Fundamental Freedoms. He seeks a declaration of incompatibility under

section 4 of the Human Rights Act 1998 and an order of certiorari quashing the decision of a Resident Magistrate taken at Belfast Magistrates' Court on 16 October 2000, remanding the applicant on the charges of attempted buggery.

Notice of the application to have the section declared incompatible was duly given to the Secretary of State for Northern Ireland, the Secretary of State for the Home Department and the Attorney General for Northern Ireland pursuant to section 5 of the Human Rights Act 1998. The Crown was represented on the hearing of the case and did not oppose the application for judicial review.

Section 62 of the Offences against the Person Act 1861

Under section 62 of the Offences against the Person Act 1861 attempting to commit buggery is made an offence punishable with a maximum sentence of ten years' imprisonment. Buggery consists of sexual intercourse per anum by a man with a man or a woman.

Article 8 of the Convention

Article 8 of the Convention provides: -

"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."

The relevant Strasbourg jurisprudence

In *Dudgeon v United Kingdom* [1981] ECHR 7525/76 the applicant, a homosexual, complained *inter alia* that the criminal law of Northern Ireland (which then forbade acts of a homosexual nature including buggery between consenting male adults) constituted an interference with his right to respect for his private life, in breach of Article 8 of the European Convention of Human Rights. It was held that the maintenance in force of the impugned legislation constituted a continuing interference with the applicant's right to respect for his private life (which included his sexual life) within the meaning of Article 8(1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affected his private life.

In *A. D. T. v. United Kingdom* [2000] ECHR 35765 the applicant was a practising homosexual. Following a police search of his home, videotapes were seized. These tapes contained footage of the applicant and up to four other adult men engaging in sexual acts. The applicant was charged with gross indecency between men as a result of the commission of the acts depicted in the videotapes. It was held that the mere existence of legislation prohibiting homosexual conduct in private continuously and directly affected a person's private life. The applicant in that case had been affected by the legislation as he was aware that his conduct had been in breach of the criminal law. Therefore, the applicant had been a victim of an interference with his right to respect for his private life because of the existence of

legislation prohibiting consensual acts between more than two men in private.

Both cases make clear that consensual sexual behaviour between individuals is protected by Article 8. In neither case was it considered that there was a pressing social need for the criminalisation of homosexual acts between consenting adult males performed in private. No such need was canvassed in the present case. I am satisfied, therefore, that the continued existence in the law of Northern Ireland of section 62 of the Offences against the Person Act 1861 is incompatible with Article 8 of the Convention.

Declaration of Incompatibility

Section 4 of the Human Rights Act 1998 provides: -

“4. - (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied-

- (a) that the provision is incompatible with a Convention right, and
- (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section "court" means-

- (a) the House of Lords;
- (b) the Judicial Committee of the Privy Council;
- (c) the Courts-Martial Appeal Court;
- (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;
- (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal."

I am therefore empowered by subsection (5) (e) to make a declaration of incompatibility where I am satisfied under subsection (4) that that the provision is incompatible with a Convention right, and that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility. Both conditions are satisfied in the present case and I will therefore make the declaration of incompatibility sought.

Certiorari

Since I am satisfied that the prosecution of the applicant under section 62 of the 1861 Act would constitute a violation of his Article 8 rights, it follows that he should not have been remanded on charges under that provision. I will therefore make an order of certiorari quashing the remand.

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