

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 17419/90

Nigel Wingrove

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 10 January 1995)

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I. INTRODUCTION	
1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.	
A. The application	
2. The applicant is a British citizen, born in 1957 and resident in London. He was represented before the Commission by Messrs. Stephens Innocent, Solicitors, London.	
3. The application is directed against the United Kingdom. The respondent Government were represented by their Agents, Mrs. A. Glover and Mr. H. Llewellyn, both of the Foreign and Commonwealth Office.	
4. The case concerns the refusal of the British Board of Film Classification to grant a classification certificate to the applicant for an 18 minute video film he made, entitled "Visions of Ecstasy", because it was deemed to be blasphemous. The applicant invokes Article 10 of the Convention.	
B. The proceedings	
5. The application was introduced on 18 June 1990 and registered on 13 November 1990.	
6. After a preliminary examination of the case by the Rapporteur, the Commission considered the admissibility of the application on 7 April 1992. It decided, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on admissibility and merits. The Government's observations were submitted on 24 July 1992 after an extension of the time-limit fixed for this purpose. The applicant replied on 18 December 1992 also after an extension of the time-limit. (On 23 October 1992 the Commission had granted the applicant legal aid.)	
7. On 10 March 1993 the Government submitted comments on points raised in the applicant's observations, to which the applicant responded on 10 May 1993.	
8. On 11 May 1993 the Commission decided to invite the parties to make oral submissions at a hearing. The hearing was fixed for 15 October 1993, but then adjourned until 8 March 1994 at the request of the applicant.	
9. On 21 February 1994, prior to the hearing, the applicant submitted a pre-hearing brief and a document containing counsel's	

advice on remedies. On 7 March 1994 the Commission saw the applicant's video film.

10. At the hearing on 8 March 1994 the Government were represented by Mr. H. Llewellyn, Foreign and Commonwealth Office, Agent, Mr. P. Havers, Counsel, Miss S. Dickson, Foreign and Commonwealth Office, Mr. D. Evans, Home Office, Adviser and Mr. R. Heaton, Home Office, Adviser. The applicant was represented by Mr. G. Robertson, QC, Counsel, Mr. M. Stephens, and Mr. P. Chinnery, Solicitors, Messrs. Stephens Innocent.

11. On 8 March 1994 the Commission declared the application admissible.

12. The text of the Commission's decision on admissibility was sent to the parties on 18 March 1994 and they were invited to submit such further information or observations on the merits as they wished. No further observations were submitted.

13. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

14. 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.L. ROKAKIS, Acting President
F. ERMACORA
S. TRECHSEL
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
J. MUCHA
D. SVÁBY
E. KONSTANTINOV

15. The text of this Report was adopted on 10 January 1995 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

16. The purpose of the Report, pursuant to Article 31 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.

17. 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.

18. 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

A. The particular circumstances of the case

19. The applicant wrote the shooting script for, and directed the making of, a video work entitled "Visions of Ecstasy" ("the video"). Its running time is approximately 18 minutes, and it contains no dialogue, only music and moving images. The idea for the video was derived from the life and writings of St. Teresa of Avila, the sixteenth century Carmelite nun and founder of many convents, who experienced powerful ecstatic visions of Jesus Christ.

20. The action of the video centres upon a youthful actress dressed as a nun and intended to represent St. Teresa. It begins with the nun, dressed loosely in a black habit, stabbing her own hand with a large nail and spreading her blood over her naked breasts and clothing. In her writhing, she spills a chalice of communion wine and proceeds to lick it up from the ground. She loses consciousness. This sequence takes up approximately half of the running time of the video. The second part of the video shows St. Teresa dressed in a white habit standing with her arms held above her head by a white cord which is suspended from above and tied around her wrists. The near naked form of a second female, said to represent the psyche of St. Teresa, slowly crawls her way along the ground towards her. Upon reaching her feet, the psyche begins to caress her, first her feet and legs, then her midriff, then her breasts and finally to engage in passionate kisses with her. Throughout this sequence, St. Teresa appears to be writhing in exquisite erotic sensation. This sequence is intercut at frequent intervals with a second sequence in which one sees the body of Christ, fastened to the cross which is lying upon the ground. St. Teresa first kisses the stigmata of his feet before moving up his body and kissing or licking the gaping wound in his right side. Then she sits astride him, seemingly naked under her habit, all the while moving in a motion reflecting intense erotic arousal, and kisses his lips. For a few seconds, it appears that he responds to her kisses. This action is intercut with the passionate kisses of the Psyche already described. Finally, St. Teresa runs her hand down to the fixed hand of Christ and entwines his fingers in hers. As she does so, the fingers of Christ seem to curl upwards to hold with hers, whereupon the video ends.

21. Apart from the cast list which appears on the screen for a few seconds, the viewer has no means of knowing that the person dressed as a nun in the video is intended to be St. Teresa or that the other woman who appears is intended to be her psyche. No attempt is made in the video to explain its historical background.

22. The video was submitted to the British Board of Film Classification ("the Board"), being the authority designated by the Home Secretary under section 4 (1) of the Video Recordings Act 1984 (the 1984 Act; see below para. 33) as

"the authority responsible for making arrangements

- (a) for determining, for the purposes of (the) Act whether or not video works are suitable for classification certificates to be issued in respect of them, having special regard to the likelihood of video works in respect of which such certificates have been issued being viewed in the home
- (b) in the case of works which are determined in accordance with the arrangements to be so suitable -

- (i) for making such other determinations as are required for the issue of classification certificates, and
- (ii) for issuing such certificates ...".

23. The applicant submitted the video to the Board in order that it might lawfully be sold, hired out or otherwise supplied to the general public or a section thereof.

24. The Board rejected the application for a classification certificate on 18 September 1989 in the following terms:

"Further to your application for a classification certificate for the above video work, you are already aware that under the Video Recordings Act 1984 the Board must determine first of all whether or not a video work is suitable for such a certificate to be issued to it, having special regard to the likelihood of video works being viewed in the home. In making this judgment, the Board must have regard to the Home Secretary's Letter of Designation in which we are enjoined to 'continue to seek to avoid classifying works which are obscene within the meaning of the Obscene Publications Acts 1959 and 1964 or which infringe other provisions of the criminal law.'

Amongst these provisions is the criminal law of blasphemy, as tested recently in the House of Lords in R v. Lemon (1979), commonly known as the 'Gay News' case. The definition of blasphemy cited therein is 'any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible ... It is not blasphemous to speak or publish opinions hostile to the Christian religion' if the publication is 'decent and temperate'. The question is not one of the matter expressed, but of its manner, i.e. 'the tone, style and spirit', in which it is presented.

The video work submitted by you depicts the mingling of religious ecstasy and sexual passion, a matter which may be of legitimate concern to the artist. It becomes subject to the law of blasphemy, however, if the manner of its presentation is bound to give rise to outrage at the unacceptable treatment of a sacred subject. Because the wounded body of the crucified Christ is presented solely as the focus of, and at certain moments a participant in, the erotic desire of St. Teresa, with no attempt to explore the meaning of the imagery beyond engaging the viewer in an erotic experience, it is the Board's view, and that of its legal advisers, that a reasonable jury properly directed would find that the work infringes the criminal law of blasphemy.

To summarise, it is not the case that the sexual imagery in VISIONS OF ECSTASY lies beyond the parameters of the '18' category; it is simply that for a major proportion of the work's duration that sexual imagery is focused on the figure of the crucified Christ. If the male figure were not Christ, the problem would not arise. Cuts of a fairly radical nature in the overt expressions of sexuality between St. Teresa and the Christ figure might be practicable, but I understand that you do not wish to attempt this course of action. In consequence, we have concluded that it would not be suitable for a classification certificate to be issued to this video work."

25. The applicant appealed against the Board's determination to the Video Appeals Committee ("the VAC"), established pursuant to section 4(3) of the 1984 Act. His Notice of Appeal, prepared by his legal representatives at the time, contained the following grounds:

- "i) that the Board was wrong to conclude that the video infringes the criminal law of blasphemy, and that a

reasonable jury properly directed would so find.

- ii) in particular, the appellant will contend that upon a proper understanding of the serious nature of the video as an artistic and imaginative interpretation of the 'ecstasy' or 'rapture' of the sixteenth century Carmelite nun, St. Teresa of Avila, it would not be taken by a reasonable person as contemptuous, reviling, scurrilous or ludicrous or otherwise disparaging in relation to God, Jesus Christ or the Bible. The appeal will raise the question of mixed fact and law, namely whether publication of the video, even to a restricted degree, would contravene the existing criminal law of blasphemy."

26. The Board submitted a formal reply to the VAC explaining its decision in relation to its functions under section 4 of the 1984 Act:

"The Act does not expressly set out the principles to be applied by the authority in determining whether or not a video work is suitable for a classification certificate to be issued in respect of it. In these circumstances, the Board has exercised its discretion to formulate principles for classifying video works in a manner which it believes to be both reasonable and suited to carrying out the broad objectives of the Act. Amongst these principles, the Board has concluded that an overriding test of suitability for classification is the determination that the video work in question does not infringe the criminal law. In formulating and applying this principle, the Board has consistently had regard to the Home Secretary's Letter of Designation under the Video Recordings Act ...

The Board has concluded on the advice of leading Counsel that the video work in question infringes the criminal law of blasphemy and that a reasonable jury properly directed on the law would convict accordingly. The Board submits and is advised that in Britain the offence of blasphemy is committed if a video work treats a religious subject (in particular God, Jesus Christ or the Bible) in such a manner as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented.

The video work under appeal purports to depict the erotic fantasies of a character described in the credits as St. Teresa of Avila. The 14 minute second section of the video work portrays 'St. Teresa' having an erotic fantasy involving the crucified figure of Christ, and also a Lesbian erotic fantasy involving the 'Psyche of St. Teresa'. No attempt is made to place what is shown in any historical, religious or dramatic context: the figures of St. Teresa and her psyche are both clearly modern in appearance and the erotic images are accompanied by a rock music backing. The work contains no dialogue or evidence of an interest in exploring the psychology or even the sexuality of the character purporting to be St. Teresa of Avila. Instead, this character and her supposed fantasies about lesbianism and the body and blood of Christ are presented as the occasion for a series of erotic images of a kind familiar from 'soft-core' pornography.

In support of its contentions, the Board refers to an interview given by the appellant and published in 'Midweek' magazine on 14 September 1989. In this interview, the appellant attempts to draw a distinction between pornography and 'erotica', denying that the video work in question is pornographic but stating that 'all my own work is actually erotica.' Further on, the

interviewer comments:

'In many ways, though, Visions calls upon the standard lexicon of lust found in down market porn: nuns, lesbianism, women tied up ("Gay nuns in bondage" could have been an alternative title in fact). <The film's director> flashes a wicked grin. 'That's right, and I'm not denying it. I don't know what it is about nuns, it's the same sort of thing as white stocking tops I suppose.' So why does he not consider Visions to be pornography, or at least soft porn? 'I hope it is gentler, subtler than that. I suppose most people think pornography shows the sex act, and this doesn't.'

It is clear from the Appellant's own admissions that, whether or not the video work can rightly be described as pornographic, it is solely erotic in content, and it focuses this erotic imagery for much of its duration on the body and blood of Christ, who is even shown to respond to the sexual attentions of the principal character. Moreover, the manner in which such imagery is treated places the focus of the work less on the erotic feelings of the character than on those of the audience, which is the primary function of pornography whether or not it shows the sex act explicitly. Because there is no attempt, in the Board's view, to explore the meaning of the imagery beyond engaging the viewer in a voyeuristic erotic experience, the Board considers that the public distribution of such a video work would outrage and insult the feelings of believing Christians. It is impossible therefore to accept the Appellant's contention in his Notice to Appeal ...

The Board ... submits that the appeal should be dismissed and its determination upheld."

27. The applicant then made further representations to the VAC, stating inter alia:

"The definition of the offence of blasphemy set out in ... the reply is too wide, being significantly wider than the test approved in the only modern authority - see *Lemon & Gay News Ltd v. Whitehouse* (1979) AC 617, per Lord Scarman at p. 665. For example, there is no uniform law of blasphemy in Britain; the last recorded prosecution for blasphemy under the law of Scotland was in 1843 - see *Thos Paterson* (1843) I Brown 629. Nor is any religious subject protected - the reviling matter must be in relation to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established.

In the Appellant's contention, these limitations are of the utmost significance in this case since the video is not concerned with anything which God or Jesus Christ did, or thought or might have approved of. It is about the erotic visions and imaginings of a 16th Century Carmelite nun - namely St. Teresa of Avila. It is quite plain that the Christ figure exists in her fantasy as the Board expressly accepts ... The scurrilous and/or erotic treatment of religious subject matter has received the Board's classification without attempted prosecution in recent years, eg Monty Python's 'Life of Brian' and Mr. Scorsese's 'Last Temptation of Christ'.

... The Board argues that the video is purely erotic or 'soft-core' pornographic, without historical, religious, dramatic or other artistic merit. The implication is that, had it possessed such merit the Board's decision might very well have been otherwise. The Appellant will seek to argue and call evidence to the effect that the video work is a serious treatment of the subject of the ecstatic raptures of St. Teresa (well chronicled in her own works and those of commentators) from a twentieth

century point of view.

The so-called 'rock music backing' was in fact specially commissioned from the respected composer, Steven Severin, after discussion of the Director's desired artistic and emotional impact. The Board has based its decision upon the narrowest, most disparaging, critical appreciation of the work. The Appellant will contend that a very much more favourable assessment of his aims and achievement in making 'Visions of Ecstasy' is, at the very least, tenable and that the Board ought not to refuse a certificate on a mere matter of interpretation.

The Appellant takes objection to the Board's quotation ... of comments attributed to him from an article by one Rob Ryan published in 'Midweek' magazine 14 September 1989. The remarks are pure hearsay so far as the Board is concerned. That aside, the piece quoted is in large part the comments of the author of the article. An entirely misleading impression of what the Appellant said to the author is conveyed by the interpolation of the words attributed to him, and by taking this passage out of context.

Above all, the Appellant disputes the key assertion by the Board that the video work is solely erotic in content."

28. The appeal was heard by a five member Panel of the VAC ("the Panel") on 6 and 7 December 1989; oral and affidavit evidence was submitted. By a majority of three to two, a written decision was given on 23 December 1989. The Panel also considered itself bound by the criteria set out in the designation notice (para. 33 below). It had difficulty, however, in ascertaining and applying the present law of blasphemy. It commented as follows:

"The authorities on this Common Law offence were reviewed by the House of Lords in the case of *Lemon and Gay News Ltd v. Whitehouse* which concerned a magazine called 'Gay News', the readership of which consisted mainly of homosexuals although it was on sale to the general public at some bookstalls. One edition contained a poem entitled 'The Love that Dares to Speak its Name' accompanied by a drawing illustrating its subject matter.

In his judgment Lord Scarman said that it was unnecessary to speculate whether an outraged Christian would feel provoked by the words and illustration to commit a breach of the peace, the true test being whether the words are calculated to outrage and insult the Christian's religious feelings, the material in question being contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible or the formularies of the Church of England. It should perhaps be added that the word 'calculated' should be read in the dictionary sense of 'estimated' or 'likely' as it was decided that intent (other than an intent to publish) is not an element in the offence.

In the same case Lord Diplock said that the material must be 'likely to arouse a sense of outrage among those who believe in or respect the Christian faith'.

In the present case the Board's Director ... said in evidence that the Board's view was that the video was 'contemptuous of the divinity of Christ'. He added that although the Board's decision was based upon its view that the video is blasphemous (blasphemy being an offence which relates only to the Christian religion), it would take just the same stance if it were asked to grant a Certificate to a video which, for instance, was contemptuous of Mohammed or Buddha."

29. The Panel reviewed the contents of the video and accepted that the applicant had in mind St. Teresa, a nun, "who is known to have had ecstatic visions of Christ although, incidentally, these did not start until she was 39 years of age - in marked contrast to the obvious youthfulness of the actress who plays the part."

30. The Panel held as follows:

"From the writings of St. Teresa herself, and the subsequent writings of others, there seems no reason to doubt that some of her visions were of seeing the glorified body of Christ and being shown his wounds but, even so, it seems clear that (the appellant) has taken considerable artistic licence with his subject. Apart from the age discrepancy - a comparatively minor matter - we were made aware of nothing which would suggest that Teresa ever did anything to injure her hand or that any element of lesbianism ever entered into her visions. More importantly, there seems nothing to suggest that Teresa, in her visions, ever saw herself as being in any bodily contact with the glorified Christ. As one author, Mr. Stephen Clissold, puts it 'Teresa experienced ecstasy as a form of prayer in which she herself played almost no part'. So, in view of the extent of the artistic licence, we think it would be reasonable to look upon the video as centering upon any nun of any century who, like many others down the ages, had ecstatic visions. There is also another reason for taking this stance: unless the viewer happens to read the cast list which appears on the screen for a few seconds, he or she has no means of knowing that the nun is supposed to be St. Teresa, nor that the figure of the second woman is supposed to be her Psyche. And he or she in any event may well be unaware that Teresa was a real-life nun who had ecstatic visions.

It is true that (the appellant) says that it is intended that the sleeve or jacket for the video will provide 'basic historical information to assist the viewer', but we feel bound to regard this as irrelevant. Firstly because it by no means follows that every viewer will read any such description; and secondly because the Board's and the Appeal Panel's decision must be based solely upon the video itself, quite apart from the fact that at the time of making a decision the sleeve or jacket is usually - as in the present instance - not even in existence.

However, although we have thought it proper to dwell at some length with the 'St. Teresa' aspect, we are of the opinion that in practice, when considering whether or not the video is blasphemous, it makes little or no difference whether one looks upon the central character as being St. Teresa or any other nun. The appellant, in his written statement, lays stress upon the undoubted fact that the whole of the second half consists of Teresa's vision or dream. Hence he says the video says nothing about Christ, his figure being used only as a projection of St. Teresa's mind, nor was it his intention to make that figure an active participant in any overt sexual act. He goes on to say 'Rather the very mild responses are those of St. Teresa's conjecture: the kiss, hand clasp and ultimately the tears of Christ. To show no response to a creation of her own mind would be nonsense; no woman (nor man) whose deep love could cause such visions/ecstasies would imagine the object of that love coldly to ignore their caresses'. Although we quite appreciate the logic of this point of view, we have reservations about the extent to which a vision or dream sequence can affect the question of whether what is pictured or said is blasphemous. It would, for instance, be possible to produce a film or video which was most extremely contemptuous, reviling, scurrilous or ludicrous in relation to Christ, all dressed up in the context of someone's imaginings. In such circumstances we find it hard

to envisage that, by such a simple device, it could reasonably be said that no offence had been committed. If in our opinion the viewer, after making proper allowance for the scene being in the form of a dream, nevertheless reasonably feels that it would cause a sense of outrage and insult to a Christian's feelings, the offence would be established.

We should perhaps also deal, albeit briefly, with a further submission made on behalf of the appellant, namely that the crime of blasphemy may extend only to the written or spoken word and hence that a Court might rule that no film or video, and perhaps nothing shown on television, could become the subject of such a charge. Suffice it to say that in our view this is too unlikely to cause it to be taken into account by the Board or a panel of the Appeals Committee when reaching a decision.

In the opinion of a majority of the Panel the video did not, as the appellant claims, explore St. Teresa's struggles against her visions but exploited a devotion to Christ in purely carnal terms. Furthermore they considered that it lacked the seriousness and depth of 'The Last Temptation of Christ' with which Counsel for the appellant sought to compare it. Indeed the majority took the view that the video's message was that the nun was moved not by religious ecstasy but rather by sexual ecstasy, this ecstasy being of a perverse kind - full of images of blood, sado-masochism, lesbianism (or perhaps auto-erotism) and bondage. Although there was evidence of some element of repressed sexuality in St. Teresa's devotion to Christ, they did not consider that this gave any ground for portraying her as taking the initiative in indulged sexuality. They considered the overall tone and spirit of the video to be indecent and had little doubt that all the above factors, coupled with the motions of the nun whilst astride the body of Christ and the response to her kisses and the intertwining of the fingers would outrage the feelings of Christians, who would reasonably look upon it as being contemptuous of the divinity of Christ. In these circumstances the majority were satisfied that the video is blasphemous, that a reasonable and properly directed jury would be likely to convict and therefore that the Board was right to refuse to grant a Certificate. Hence this appeal is accordingly dismissed.

It should perhaps be added that the minority on the Panel, whilst being in no doubt that many people would find the video to be extremely distasteful, would have allowed the appeal because in their view it is unlikely that a reasonable and properly directed jury would convict."

31. As a result of the Board's determination, as upheld by the Panel, the applicant would commit an offence under section 9 of the 1984 Act if he were to supply the video in any manner, whether or not for reward. The applicant received legal advice that his case was not suitable for judicial review (cf. paras. 38-39 below).

B. Relevant domestic law

1. The regulation of video recordings

32. The Video Recordings Act 1984 (the 1984 Act) regulates the distribution of video recordings. Subject to certain exemptions, it is an offence under section 9(1) of that Act for a person to supply or offer to supply a video recording containing a video work in respect of which no classification certificate has been issued. There are three categories of classification: works deemed suitable for general viewing (and to which a parental guidance reference may be added), works for which the viewing is restricted to people who have attained the age of 18, and works which may only be supplied by licensed sex shops (section

7). The Secretary of State may require that the contents of certain works be labelled (section 8). It is an offence to ignore such conditions, for example by supplying someone under 18 years of age with an "18" classified work (section 11).

33. Under section 4(1) of the 1984 Act the Secretary of State may by notice designate any person or body as the authority for making arrangements for determining whether or not video works are suitable for classification certificates to be issued in respect of them (having special regard to the likelihood of certified video works being viewed in the home). By a notice dated 26 July 1985 the British Board of Film Classification ("the Board") was so designated. In the case of works which are determined in accordance with the arrangements described above to be suitable for classification certificates, the Board is responsible under section 4(1) for making arrangements for the issue of certificates and making other determinations relating to their use (see pp.4-5 above). The Secretary of State's notice enjoined the Board "to continue to seek to avoid classifying works which are obscene within the meaning of the Obscene Publications Acts 1959 and 1964 or which infringe other provisions of the criminal law".

34. Pursuant to section 4(3) of the 1984 Act arrangements were made for the establishment of the Video Appeals Committee to determine appeals against decisions of the Board.

2. The law relating to blasphemy and blasphemous libel

35. Blasphemy and blasphemous libel are common law offences triable on indictment and punishable by fine or imprisonment. Blasphemy consists in speaking and blasphemous libel in otherwise publishing blasphemous matter. Libel involves a publication in a permanent form, but that form may consist of moving pictures.

36. In the case of *Whitehouse v. Gay News Ltd. and Lemon* [1979] A.C. 617 at 665 which concerned the law of blasphemy in England and Wales, Lord Scarman held that the modern law of blasphemy was correctly formulated in article 214 of *Stephen's Digest of the Criminal Law*, 9th ed. (1950). This states as follows:

"Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves."

37. The House of Lords in that case also decided that the mental element in the offence did not depend upon the accused having an intent to blaspheme. It was sufficient for the prosecution to prove that the publication had been intentional and that the matter published was blasphemous.

3. The availability of judicial review as a remedy

38. Decisions of public bodies which have consequences which affect some person or body of persons are susceptible to challenge in the High Court on an application for judicial review. Amongst the grounds on which such a challenge may be brought is that the body in question misdirected itself on a point of law. The Video Appeals Committee is such a public body because it is established pursuant to an Act of Parliament (namely, section 4(3) of the 1984 Act). Furthermore, its decisions affect the rights of persons who make video works because confirmation of a decision that a video work cannot receive a classification certificate would mean that video recordings of that

work could not be lawfully supplied to members of the public.

39. A court would not normally look on an application for judicial review at the merits of any decision made by such a body, except where the decision was so unreasonable that no reasonable body, properly instructed, could have reached it. However, where the decision is based on a point of law and it is alleged that the body has misdirected itself on that point, the decision could be challenged by an application for judicial review. In the case of *C.C.S.U. v. Minister for the Civil Service* [1984] 3 All E.R. at p. 950, a decision of the House of Lords, Lord Diplock classified under three heads the grounds on which administrative action is subject to control by judicial review. He called the first ground "illegality" and described it as follows:

"By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the State is exercisable."

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

40. The Commission has declared admissible the applicant's complaint that the refusal of a classification certificate for his video film, "Visions of Ecstasy" was in breach of his freedom of expression.

B. Point at issue

41. The point at issue in the present case is whether there has been a violation of Article 10 (Art. 10) of the Convention.

C. As regards Article 10 (Art. 10) of the Convention

42. The relevant part of Article 10 (Art. 10) of the Convention provides as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the ... rights of others ...".

(a) Interference with freedom of expression

43. It is undisputed by the parties, and the Commission agrees, that the refusal of a classification certificate for the applicant's film constituted an interference with his freedom of expression, in particular his freedom to impart information and ideas, as envisaged by Article 10 para. 1 (Art. 10-1) of the Convention.

(b) Prescribed by law

44. The applicant contends that this interference with his freedom of expression was not prescribed by law because the offences of blasphemy or blasphemous libel, of which his video was deemed to fall foul, are not sufficiently accessible or precise. The Government submit that the interference with the applicant's freedom of expression was prescribed by law, given the lawful authority conferred on the British

Board of Film Classification by section 4(1) of the Video Recording Act 1984, combined with the Secretary of State's designation notice to the Board which, inter alia, directed it to avoid issuing classification certificates in respect of obscene or other work infringing the criminal law (see para. 33 above).

45. The Commission recalls that any interference with freedom of expression must be prescribed by law. The word "law" in the expression "prescribed by law" covers not only statute but also unwritten law such as the English common law. Accordingly, the Commission does not attach importance here to the fact that the criminal law of blasphemy and blasphemous libel are creatures of the common law and not statute law.

46. Two requirements flow from the expression "prescribed by law": those of the adequate accessibility and foreseeability of law, to enable the individual to regulate his conduct in the light of the foreseeable consequences of a given action (Eur. Court H.R., Sunday Times judgment of 26 April 1979, Series A no. 30, pp. 30-31, paras. 47-49). The central question, therefore, is whether the common law on blasphemy and blasphemous libel is sufficiently accessible and foreseeable.

47. The Commission recalls a previous decision in the case of X and Y Ltd v. the United Kingdom, commonly known as the Gay News case (No. 8710/79, Dec. 7.5.82, D.R. 28 p. 77), that the law of blasphemy, as defined by the House of Lords at that time, was sufficiently accessible and foreseeable so as to satisfy the requirement that any restriction on freedom of expression must be prescribed by law within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. The Commission finds no distinguishable elements in the present case to detract from that conclusion, the common law in this field not having materially changed since then.

48. Moreover, the Commission notes that the British Board of Film Classification has lawful authority to issue or refuse classification certificates under section 4 of the Video Recordings Act 1984. The discretion conferred on the Board by this Act is, as the Government pointed out, partly circumscribed by the Secretary of State's designation notice of 26 July 1985 in which the Board was directed to refuse certificates in respect of video works which in any respect infringe the criminal law. The law of blasphemy falls into this category. Finally, the Commission notes the considerable legal advice that was available to the applicant.

49. In the circumstances of the present case, the Commission is of the view that the applicant could reasonably have foreseen the restrictions to which his video work was liable. Accordingly, the Commission considers that the refusal of a classification video to the applicant was prescribed by law within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

(c) Legitimate aim

50. The applicant submits that the refusal of a classification certificate in his case did not pursue a legitimate aim. He challenges the very basis of the law of blasphemy as being vague and discriminatory. He maintains that protecting a section of the population from offence at the mere thought that a work of art of the present kind might become available to another section of the population could not be deemed legitimate. The Government contend that the refusal of a classification certificate in the present case pursued the legitimate aim of protecting the rights of others, within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention, not to be offended in their religious feelings by the showing of the video.

51. The Commission recalls that interference with freedom of expression may only be justified if it pursues a legitimate aim, such

as the protection of the rights of others, within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. In the Gay News case (already referred to at para. 46 above) the Commission held that

"the offence of blasphemous libel as it is construed under the applicable common law in fact has the main purpose to protect the right of citizens not to be offended in their religious feelings by publications ... The Commission therefore concludes that the restriction was indeed covered by the legitimate purpose recognised in the Convention, namely the protection of the rights of others."

52. The Commission also refers to the case-law of the European Court of Human Rights in this context: The Court has emphasised the primordial place in a democratic society of freedom of thought, conscience and religion, safeguarded by Article 9 (Art. 9) of the Convention (Eur. Court H.R., Kokkinakis judgment of 25 May 1993, Series A no. 260, p. 17, para. 31). Religious believers cannot expect to be exempt from all criticism and must tolerate the denial by others of their beliefs. However, the State has a responsibility to ensure the peaceful enjoyment of believers' rights under Article 9 (Art. 9). In this connection, a State may legitimately take measures against conduct which is incompatible with this provision. Such measures may include sanctioning provocative portrayals of objects of religious veneration, which portrayals may be regarded as a malicious violation of the spirit of tolerance inherent in democratic societies. Moreover, "the Convention is to be read as a whole and therefore the interpretation and application of Article 10 (Art. 10) must be in harmony with the logic of the Convention" (Eur. Court H.R., Otto-Preminger Institut judgment of 20 September 1994, Series A no. 295-A, para. 47).

53. The Commission finds no reason to depart from this case-law, despite the element of prior restraint which is a striking feature of the present case. The English law of blasphemy is intended to suppress behaviour directed against objects of religious veneration that is likely to cause justified indignation amongst believing Christians. It follows that the indirect application of this law in the present case was intended to protect the right of citizens not to be insulted in their religious feelings (cf. the aforementioned Otto-Preminger Institut judgment para. 51). Accordingly, the Commission is of the view that the refusal of a classification certificate for the applicant's video because it was deemed blasphemous, in principle, pursued the legitimate aim of protecting the rights of others within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

(d) Necessary in a democratic society

54. The key issue in the present case is whether it was necessary to refuse the classification certificate.

55. The applicant claims that the refusal was not necessary and asserts that the censorship of his video film on the basis of a mere possibility that it might infringe the law of blasphemy was wholly disproportionate in the circumstances. The Government maintain that the refusal was indeed necessary and fell well within the margin of appreciation afforded to Contracting States in this field.

i. General principles

56. The Commission recalls the following general principles established by the Convention organs under Article 10 (Art. 10) of the Convention:

57. Freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10 (Art. 10-2), it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a

matter of indifference, but also to those that offend, shock or disturb. Freedom of expression is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established. This implies the existence of a pressing social need, although the Contracting States have a certain margin of appreciation in assessing whether such a need exists. This margin is subject to the supervision of the Convention organs, which look at the interference complained of in the light of the case as a whole and determine whether it was proportionate to the legitimate aim pursued (Eur. Court H.R., Observer and Guardian judgment of 26 November 1991, Series A no. 216, p. 30, para. 59).

58. Prior restraints, such as the need for a classification certificate before a video film may be released on sale, are not, in themselves, incompatible with Article 10 (Art.) of the Convention. However, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Convention organs (ibid. para. 60).

59. The Court has emphasised that people "who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society". Nevertheless Article 10 para. 2 (Art. 10-2) of the Convention calls upon them to exercise their freedom of expression in the light of their "duties and responsibilities" (Eur. Court H.R., Müller and Others judgment of 24 May 1988, Series A no. 133, p. 22, paras. 33-34).

60. Such duties and responsibilities, in the context of religious opinions and beliefs, may legitimately include "an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs." Nevertheless, any sanction or prevention of improper attacks on objects of religious veneration must be proportionate to the legitimate aim pursued, account being taken of the States' margin of appreciation in such a controversial area in which no common European standard exists (Otto-Preminger Institut judgment, paras. 49-50).

61. The Commission also recalls its decision in the aforementioned Gay News case (para. 47 above) that the private prosecution, conviction and fine for blasphemous libel after the publication in a magazine of an illustrated poem purporting to describe, inter alia, in explicit details acts of sodomy and fellation with the body of Christ immediately after His death, was a justified interference with the freedom of expression of those applicants:

"12. ... the Commission first observes that the existence of an offence of blasphemy does not as such raise any doubts as to its necessity: If it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offence triable at the request of the offended person. It is in principle left to the legislation of the State concerned how it wishes to define the offence, provided that the principle of proportionality, which is inherent in the exception clause of Article 10 (2) (Art. 10-2), is being respected. The Commission considers that the offence of blasphemous libel as laid down in the common law of England in fact satisfies these criteria. In particular it does not seem disproportionate to the aim pursued that the offence is one of strict liability incurred irrespective of the intention to blaspheme and irrespective of the intended audience and of the possible avoidability of the publication by a certain member of the public. The issue of the applicants' journal containing the incriminated poem was on sale to the

general public, it happened to get known in some way or other to the private prosecutor who was so deeply offended that she decided to take proceedings against the publication of this poem, and the outcome of these proceedings showed that not only the private prosecutor herself, but also the judicial authorities of all degrees were convinced of its blasphemous nature. The Commission therefore considers that the application of the blasphemy law could be considered as necessary in the circumstances of this case. The applicants' complaint that it was not necessary and therefore contrary to Article 10 (2) (Art. 10-2) of the Convention is therefore again manifestly ill-founded within the meaning of Article 27 (2) (Art. 27-2) of the Convention" (No. 8710/79, X Ltd. and Y v. the United Kingdom, Dec. 7.5.82, D.R. 28 p. 77 at p. 83).

62. An important element of the Commission's examination of this type of case is whether the offending material is on open display to the general public. In a case concerning the discreet showing of obscene homosexual films at the back of a specialised shop, the Commission formed the view that the conviction of the shopowner for publishing obscene material was a disproportionate interference with his freedom of expression, in violation of Article 10 (Art. 10) of the Convention, because there was no danger of adults being confronted unwillingly with the film. Nor was there any question of minors having access to it (Eur. Court H.R., Scherer judgment of 25 March 1994, Series A no. 287, Opinion of the Commission, pp. 18-20, paras. 57-67).

ii. Application of the above principles

63. The Commission must now examine whether, in the light of the general principles outlined above, the restriction imposed in the present case was necessary in a democratic society.

64. The Commission notes, on the one hand, that it was a unanimous Board of Film Classification and a majority of the Video Appeals Committee who viewed the applicant's work, heard the evidence, and concluded that the video was likely to outrage the feelings of believing Christians. Moreover, the Board was prepared to issue a certificate if the applicant made cuts in the overt expressions of sexuality between St. Teresa and the Christ figure - something that the applicant was not willing to contemplate.

65. On the other hand, the Commission notes that, given the prior censorship of the applicant's work, particularly compelling reasons are required to justify restrictions based on speculation by the competent authorities that a section of the population might be outraged. In this connection the Commission would emphasise that the assessment by the classification authorities was untested by a jury or court.

66. However, the Commission does not find such compelling reasons in the present case for the following reasons: The applicant's film is a video, not a feature film. Moreover, it is of unusually short length and the fleeting parts of it which were deemed blasphemous were much less prominent than those criticised in the film "Council in Heaven", which was at the heart of the dispute in the Otto-Preminger Institut case (reference para. 52 above). The distribution of the applicant's film would, therefore, necessarily be more limited and less likely to attract publicity.

67. It is unlikely that the contents of the applicant's video would be on display to the general public to the extent of, for example, the offending pictures in the Müller and Gay News cases (references paras. 58 and 60 above) or the film in the Otto-Preminger Institut case. It is also unlikely that members of the public could unintentionally find themselves viewing the video in the same way as they might walk into an art gallery or cinema, or browse through magazines. A person would have to make a conscious decision to view the applicant's video, and

it is at least unlikely, having regard to the title and the fact that it was intended to label the video's contents, that it would have been seen by anyone who was unaware of the probable subject matter of the film.

68. The fact that certain Christians, who had heard of the existence of the video, might be outraged by the thought that such a film was on public sale and available to those who wished to see it, cannot, in the view of the Commission, amount to a sufficiently compelling reason to prohibit its lawful supply. Moreover, the Board of Film Classification could have restricted the circulation of the video even more by giving it an "18" certificate, which would have limited its viewing to people over the age of 18.

69. In these circumstances the Commission is of the opinion that the refusal of a classification certificate for the applicant's video film did not correspond to a pressing social need. It considers that the interference with the applicant's freedom of expression was disproportionate to the aim pursued and could not be considered necessary in a democratic society within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

CONCLUSION

70. The Commission concludes, by 14 votes to 2, that in the present case there has been a violation of Article 10 (Art. 10) of the Convention.

Secretary to the Commission

(H.C. KRÜGER)

Acting President of the Commission

(C.L. ROZAKIS)

(Or. English)

CONCURRING OPINION OF MR. SCHERMERS

I agree with the conclusion of the majority of the Commission that there was a breach of Article 10 of the Convention in the present case, but I do not entirely agree with their reasoning.

The majority have distinguished the case from that of the Otto Preminger Institute (Eur. Court H.R., Otto-Preminger Institut judgment of 20 September 1994, to be published in Series A no. 295-A) on the grounds that, unlike the film "Council in Heaven" which was at issue there, the present case concerns a video, which is very short, and whose offending elements were less prominent (para. 66 of the Commission's Report). In my opinion there is another reason why the prohibition of the film "Council of Heaven" was justified, whilst the prohibition of the present video is not.

In the "Council of Heaven", "God the Father is presented both in image and in text as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression and in which the Eucharist is ridiculed" (Otto-Preminger Institute judgment, para. 16). Someone who does not believe in God, Christ, Mary or the Eucharist has no grounds for conveying an opinion about them to others, except the opinion that they do not exist. The portrayal of the image that they do exist in a senile, impotent or cretinous way can only be inspired by a wish to ridicule the faith of others; there was no expression of the faith or non-faith of the authors themselves. Therefore, by implication, the European Court of Human Rights characterised that film as "gratuitously offensive to others" and not contributing "to any form of public debate capable of furthering progress in human affairs" (ibid, para. 49).

The facts of the present case are different: The applicant tries to picture "ecstasy". In his opinion ecstasy has an element of

sexuality in it. In the video he therefore combines religious ecstasy with sexual elements for the purpose of expressing "ecstasy", not in order to hurt or to ridicule others. The element of gratuitousness which was inherent in the "Council of Heaven" film was not present here. Unlike the author of the "Council of Heaven", the present author tries to contribute to a form of public debate in order to further progress in understanding the notion of "ecstasy".

These latter elements, more than those put forward by the majority of the Commission, persuade me that the present case can clearly be distinguished from that of the Otto Preminger Institute, and to conclude that Article 10 has been violated.

(Or. English)

CONCURRING OPINION OF MR. LOUCAIDES

I agree with the majority of the Commission that there has been a breach of Article 10 of the Convention in the present case, but I would like to add the following:

Together with the factors set out in the above Report of the Commission, I have also given weight to the theme of the film, which referred to the real story of St. Teresa, who had visions of erotic experiences with Christ. Taking into account the theme and its presentation as a whole, I formed the opinion that the film portrayed the human problems of St. Teresa rather than an offensive or degrading image of Christ.

My conclusion is that the film cannot be deemed offensive to others or in need of censorship.

(Or. French)

OPINION DISSIDENTE DE M. SOYER A LAQUELLE DECLARE SE RALLIER M. WEITZEL

1. Dans son arrêt *Otto Preminger* (par. 49), la Cour européenne des Droits de l'Homme affirme : «on peut juger nécessaire, dans certaines sociétés démocratiques, de sanctionner, voire de prévenir, des attaques injurieuses contre des objets de vénération religieuse».

La question qu'il convient de se poser est donc fort nette : la vidéo «visions d'extase» (durée 18 minutes environ) contient-elle, ou ne contient-elle pas, à propos d'objets de vénération religieuse (a), des attaques injurieuses (b) ?

(a) Objets de vénération religieuse ? La vidéo dépeint l'extase sexuelle éprouvée par l'une des principales saintes (Thérèse d'Avila) à la vue du Christ cloué sur sa croix. Sainte-Thérèse, le Christ, la Croix : nous sommes au cœur des adorations catholiques.

(b) Attaques injurieuses ? Dans la première moitié de la vidéo, telle que la décrit le rapport de la Commission (par. 20), Sainte-Thérèse répand sur le sol un calice de vin destiné à la communion, et le lèche. Y a-t-il pire profanation ? Dans la seconde moitié de la vidéo, toujours d'après le rapport de la Commission (eod. loc.) : «St. Theresa s'assoit à côté du Christ, apparemment nue sous son habit, secouée d'un mouvement qui traduit un éveil érotique intense. Elle baise ses lèvres. Durant quelques secondes, il paraît répondre à ses baisers ...».

Le descriptif de la Commission montre qu'il s'agit là d'un concentré de sacrilège. Et dès lors, pour faire respecter le droit des croyants à ne pas subir ce blasphème délibéré, comment s'y prendre, à moins d'interdire la diffusion du document blasphématoire ?

2. Dans son arrêt *Otto Preminger*, la Cour avait tenu pour justifiées

la saisie et la confiscation d'un film gravement attentatoire aux croyances catholiques. Or, quand on peut à bon droit saisir et confisquer, pourquoi le refus de visa serait-il illicite ?

Il fallait donc que la Commission, pour étayer son avis de violation, parvienne à contourner le redoutable précédent de l'arrêt Otto Preminger. A cette fin, les arguments avancés par la Commission témoignent d'une ingéniosité qu'il est juste de saluer, sans toutefois en être dupe.

En premier lieu, la Commission relève (par. 65 de son avis) que l'interdiction de la vidéo résulte d'une décision prise par un organe administratif et non pas judiciaire. Mais il s'agit là d'une exigence procédurale qui n'est aucunement formulée par l'article 10 de la Convention.

En deuxième lieu, la Commission relève (par. 66 de son avis) qu'il ne s'agit pas ici d'un film, mais d'une vidéo de durée bien moindre, dont la distribution, par conséquent, se trouve plus limitée et donc plus discrète. C'est là méconnaître les chiffres de diffusion de vidéos, compte tenu de leur facilité de prêt et de duplication.

En troisième lieu, la Commission relève (par. 67 de son avis) que regarder une vidéo est un acte plus réfléchi que de se rendre au cinéma. Le nombre réduit des salles de cinéma, par rapport au nombre immense des magnétoscopes, fonctionnant de plus à domicile et à tout heure du jour ou de la nuit, pousse à penser le contraire.

En dernier lieu, la Commission relève (par. 68 de son avis) qu'il existait une alternative au refus complet de visa. Cette alternative aurait consisté dans un visa restreignant la vente de la vidéo litigieuse aux plus de 18 ans. Tel est le cas, dans maints pays, pour les vidéos érotiques. Or, de par l'abondance des copies et des appareils de projection, les collégiens s'en procurent autant qu'ils en désirent.

Pour toutes ces raisons, la mesure prise à l'encontre du requérant entraine bien dans la marge d'appréciation sans laquelle l'Etat ne pourrait pas concilier, comme il en a le devoir, la liberté d'expression des uns et la sensibilité religieuse d'une part importante de la population.

J'estime donc, au total, qu'il n'y a pas eu, dans la présente espèce, violation de l'article 10 de la Convention.

APPENDIX I

HISTORY OF THE PROCEEDINGS

Date	Item
18.06.90	Introduction of application
13.11.90	Registration of application
Examination of admissibility	
07.04.92	Commission's decision to communicate the case to the respondent Government and to invite the parties to submit observations on admissibility and merits
24.07.92	Government's observations
23.10.92	Commission's grant of legal aid

18.12.92	Applicant's observations in reply
10.03.93	Further Government observations
10.05.93	Applicant's further reply
11.05.93	Commission's decision to hold a hearing
21.02.94	Applicant's pre-hearing brief
08.03.94	Hearing on admissibility and merits
08.03.94	Commission's decision to declare application admissible
Examination of the merits	
18.03.94	Decision on admissibility transmitted to parties. Invitation to parties to submit further observations on the merits
02.07.94	Commission's consideration of state of proceedings
03.12.94	Commission's further consideration of state of proceedings
10.01.95	Commission's deliberations on the merits, final vote and consideration of text of the Report. Adoption of Report