AS TO THE ADMISSIBILITY OF

Application No. 16106/90
by B.
against the United Kingdom

The European Commission of Human Rights sitting in private on 10 February 1990, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 22 January 1990 by Z.B. against the United Kingdom and registered on 1 February 1990 under file No. 16106/90;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Cypriot national, born in 1958 and now living in the United Kingdom. He is represented by Mr. J. P. Gardner, Solicitor, and Stephanie Grant, Solicitor, Bindman and Partners, of London.

The applicant came to the United Kingdom on 8 October 1977 and was granted limited leave to remain as a student. His leave to remain expired in October 1979. On 30 August 1983 the Secretary of State made a deportation order against the applicant. The order was eventually served on the applicant on 14 October 1986 together with directions for removal to Cyprus.

On 21 October 1986 the applicant wrote to the Home Secretary requesting him permission to remain in the United Kingdom on the grounds that he was a homosexual with a permanent and stable homosexual relationship with Mr. R., a United Kingdom national, with whom the applicant had been living since late 1985. On 18 February 1988 the applicant was informed that the deportation order would not be revoked.

The applicant has lived with Mr. R continuously since 1985 and together they have formed a travel business. They have a joint bank account and have jointly purchased a flat.

On 9 May 1988 the applicant's solicitors made a claim for asylum on the basis of a well-founded fear of persecution by virtue of the applicant's homosexuality and in view of the fact that male homosexual behaviour is a criminal offence in Cyprus. On 19 July 1988 the Secretary of State informed the applicant that it was his view that there was no persecution of any person for being homosexual in Cyprus and that arrest for a criminal offence in Cyprus would not amount to persecution. The applicant was further informed that even taking into account the possible effect of the applicant's deportation on Mr. R. and the total period spent by the applicant in the United Kingdom, the Secretary of State had decided not to revoke the deportation order.

On 14 September 1988 the applicant was granted leave to move for judicial review challenging the lawfulness of the Secretary of State's refusal to revoke the deportation order. He submitted, firstly, that he was a refugee and, secondly, that the Secretary of State had failed adequately to appreciate the implications of Article 8 of the European Convention on Human Rights. In his application the applicant referred to the criminal penalties imposed by sections 171 and 173 of Chapter 154 of the Criminal Code of Cyprus. He referred to his former reluctance to acknowledge his homosexual orientation while living in the Turkish community in Cyprus on the grounds that homosexuals were openly reviled and abused in public, subjected to open intolerance by society and the subject of close attention from the police who monitored their activities.

In the judicial review proceedings before the High Court on 18 July 1989 the applicant submitted that no reasonable Home Secretary would so exercise his discretion as to put the United Kingdom in breach of its obligations by removing an individual to a jurisdiction where his rights under Article 8 were not protected. In addition reference was made to the fact that the applicant would be surrendered to the northern part of Cyprus, in respect of which there is reason to doubt the scope of the availability of the right of individual petition in view of the instruments deposited under Article 25 para. 1 of the Convention by the Republic of Cyprus and Turkey.

Judgment was given on 25 July 1989 refusing the application for judicial review. In his judgment Mr. Justice Kennedy stated as follows:

"... I accept that on the facts of the present case the Secretary of State was entitled to conclude that if the Appellant is returned to the Turkish Republic of Northern Cyprus it is not inevitable that he will openly behave in a homosexual manner, nor is it inevitable that if he does so he will inevitably suffer as a result anything which would properly be described as persecution. If he does openly behave in a homosexual manner he may be discriminated against, but the Secretary of State was entitled to take the view that the degree of discrimination would not be such as to have the quality of persecution (see Moezzi v. Secretary of State for the Home Department, Court of Appeal 6 October 1988, unreported). Of course, on the evidence, if the Appellant were to indulge in certain types of homosexual activity he would risk prosecution, but the Secretary of State was, submits Mr. Pannick, entitled to recognise that the risk of prosecution would be avoided by self restraint, that statistically the risk does not seem to be very great, and that even when there is a prosecution the consequences, relatively speaking, are not particularly

dire."

In the course of the proceedings evidence had been adduced that since 1982 in the north of Cyprus four offenders had received sentences of imprisonment, the maximum sentence being one of six months' imprisonment.

Mr. Justice Kennedy concluded that the Secretary of State could not be criticised for failing to act upon the possibility "as yet untested before the organs of the Convention, that northern Cyprus may be in breach of an Article of the Convention by continuing to regard as criminal certain types of conduct in which the applicant might or might not choose to indulge." Accordingly the Secretary of State had not exercised his discretion in a manner which was so unreasonable that the Court should intervene.

The applicant was advised by leading counsel that an appeal against this decision was without prospects of success.

COMPLAINTS

1. The applicant complains that the decision of the Home Secretary that he should be removed from the United Kingdom to Cyprus constitutes an interference with his private life which shows such lack of respect as to fail to be justifiable under Article 8 para. 2 of the Convention. He contends that this violation arises from the forceable separation from Mr. R. and also from the implementation of the decision to remove him to a jurisdiction where he would be subject to prosecution and imprisonment for homosexual activities. In this context he refers to the nature of his relationship with Mr. R. which is closely akin to family life and the existence of a home established by them. He points out that Mr. R. cannot join the applicant in Cyprus, in the event of the applicant's removal, because the establishment of such private relations would be a criminal offence and is likely to lead to prosecution and imprisonment including Mr. R.'s removal from the jurisdiction.

The applicant further maintains that treatment anticipated in the country of destination is not in conformity with the Convention. The decision to remove the individual to that jurisdiction cannot be in accordance with the law for purposes of Article 8 para. 2 of the Convention.

He further submits that there can be no justification for the interference with his rights under this provision having regard to the fact that he would be unable to continue his relationship in a country where homosexual activity is criminalised and the possibility that the right of individual petition does not extend to the acts of the Turkish authorities in the occupied part of northern Cyprus.

2. The applicant further complains that the decision to remove him constitutes discrimination contrary to Article 14 of the Convention. He alleges that homosexual couples with an established relationship are treated differently from heterosexual couples with established relationships. In this context he points out that until July 1985 women who had an established relationship outside marriage with a patrial had a right to claim to settle in the United Kingdom. This right was abolished in July 1985 but replaced with a discretion, acknowledged by the Secretary of State, to consider the case of a woman in such circumstances. No claim to the exercise of such a discretion is afforded to male homosexual partners in equivalent circumstances.

3. The applicant further complains that he is without an effective remedy as required by Article 13 of the Convention in respect of the decision of the Secretary of State. He points out that there is no opportunity in English law to review the exercise of a

purely discretionary decision by the Secretary of State to remove an individual notwithstanding his rights under the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 January 1990 and registered on 1 February 1990.

On 1 February 1990 the President refused a request under Rule 36 of the Rules of Procedure that an indication be made to the respondent Government not to remove the applicant from the United Kingdom.

THE LAW

1. The applicant complains that his deportation constitutes an unjustified interference with his right to respect for private life guaranteed by Article 8 (Art. 8) of the Convention. He refers in this context to his stable homosexual relationship since 1985 with Mr. R. and the home and business they have set up together; the impossibility of Mr. R. joining him in the northern part of Cyprus because of the criminalisation of homosexual behaviour; the fact that he will be removed to a jurisdiction where he risks prosecution and imprisonment for homosexual acts.

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."

Whilst the Convention does not guarantee a right, as such, to enter and remain in a particular country, the Commission has constantly held that the exclusion of a person from a country where members of his close family reside may raise an issue under Article 8 (Art. 8) of the Convention (see, e.g. No. 7816/77, Dec. 19.5.77, D.R. 9 p. 219, No. 9088/80, Dec. 6.3.82, D.R. 28 p. 160 and No. 9285/81, Dec. 6.7.82, D.R. 29 p. 205). The Commission has also considered that an issue could arise under this provision where exclusion from a country impinged on private life (see No. 9369/81, Dec. 3.5.83, D.R. 32 pp. 220, 221).

In the present case the Commission notes that the applicant formed his relationship with Mr. R. at a time when he was aware that he had no right to remain in the United Kingdom (see, mutatis mutandis, Eur. Court H.R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 34 para. 68). Moreover, the Commission recalls its previous case-law concerning the deportation of persons with established lesbian or homosexual relationships. The Commission has held that such relationships involve private life within the meaning of Article 8 (Art. 8) and that, although lawful deportation will inevitably have repercussions on such relationships, it cannot in principle be regarded as an interference with the right to respect for private life given the state's right to impose immigration controls and limits (see No. 9369/81, Dec. 3.5.83, D.R. 32 p. 221 and No. 14753/89, Dec. 9.10.89, to be published in D.R.).

Accordingly insofar as the applicant complains of the effect that the deportation will have on his relationship with Mr. R. the Commission finds that there has been no "lack of respect" for private life within

the meaning of Article 8 para. 1 (Art. 8-1) of the Convention.

In the present case, however, the applicant further contends that he will be exposed to prosecution for homosexual activity if he is returned to the northern part of Cyprus. He submits that his removal in such circumstances constitutes an unjustifiable interference with his rights under this provision. He refers in this context to the judgments of the European Court of Human Rights in the cases of Dudgeon (judgment of 22 October 1981, Series A no. 45) and Norris (judgment of 26 October 1988, Series A no. 142) where the criminalisation of homosexual behaviour was held to constitute a breach of Article 8 (Art. 8) of the Convention. He emphasises that he is thus being returned to a country whose criminal laws in respect of homosexuality are in breach of the Convention.

The Commission, however, in assessing this claim must attach significant weight to the reasons for his deportation, namely, the fact that he stayed for some considerable time in the United Kingdom without leave. Moreover while the evidence indicates that the applicant might at some stage in the future be subject to the risk of prosecution for homosexual acts it does not indicate that the risk is high. Furthermore, the evidence adduced in the course of the proceedings for judicial review does not show that homosexuals in the northern part of Cyprus are persecuted by the authorities.

The Commission considers that even if the applicant's deportation were to constitute an interference with the right to respect for private life against the background of the Dudgeon and Norris judgments such interference was in accordance with the law (the Immigration Act of 1971) and justified as being necessary in a democratic society for the prevention of disorder under the second paragraph of Article 8 (Art. 8) as a legitimate measure of immigration control. The Commission refers in this respect to its case-law which highlights the close connection between the policy of immigration control and considerations pertaining to public order (see No. 9285/81, Dec. 6.7.82, D.R. 29 p. 205). It finds that notwithstanding the possibility that the applicant will be subjected to hostility and social ostracism because of his homosexuality the considerations relating to respect for private life in this case do not outweigh valid considerations relating to the proper enforcement of immigration controls.

It follows that the complaint under this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant next complains that he is the victim of discrimination insofar as United Kingdom immigration law affords preferential protection to heterosexual couples. He points out that in the case of a woman living in an established relationship outside marriage the Secretary of State had a discretion under the immigration rules to admit her in certain circumstances.

Article 14 (Art. 14) of the Convention provides as follows:

"The enjoyment of the rights and freedoms set forth in this 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."

The Commission has previously held that no discrimination exists contrary to this provision where the Immigration Rules give priority and better guarantees to established couples living in a family relationship as opposed to other established relationships such as lesbian or homosexual relationships (see No. 14753/89, loc. cit.).

In a previous case concerning the better protection under housing legislation for established heterosexual couples rather than lesbian couples the Commission stated as follows:

"The Commission accepts that the treatment accorded to the applicant (a recognised lesbian) was different from the treatment she would have received if the partners had been of different sexes. The Commission finds that the aim of the legislation in question was to protect the family, a goal similar to the protection of the right to respect for family life guaranteed by Article 8 (Art. 8) of the Convention. The aim itself is clearly legitimate. The question remains, however, of whether it was justified to protect families but not to give similar protection to other stable relationships. The Commission considers that the family (to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated) merits special protection in society and it sees no reason why a High Contracting Party should not afford particular assistance to families. The Commission therefore accepts that the difference in treatment between the applicant and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified." (No. 11716/85, Dec. 14.5.86, to be published in D.R. 47)

The Commission finds that the difference in treatment pursues the legitimate aim of protecting family based relationships (including relationships existing outside marriage) in a manner proportionate to the achievement of that aim.

Accordingly in the present case the Commission concludes that this complaint is also manifestly ill-founded, within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant furthers complains under Article 13 (Art. 13) of the Convention that he is without an effective remedy in respect of the decision of the Secretary of State to deport him.

The Commission recalls that an issue can only arise under this provision in respect of an "arguable" claim that there has been a breach of one of the provisions of the Convention (see Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 39, para. 71). The Commission notes its above findings as regards the applicant's complaints under Articles 8 and 14 (Art. 8, 14) of the Convention. The complaints under these provisions do not give rise to an "arguable" claim for the purpose of Article 13 (Art. 13). It follows that this complaint must also be rejected as manifestly ill-founded, in the light of the Commission's analysis and rejection of the complaint, under the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Commission President of the Commission

(H. C. KRÜGER) (C. A. NØRGAARD)