AS TO THE ADMISSIBILITY OF

Application No. 33987/96
by Margaret Fleming
against the United Kingdom

The European Commission of Human Rights sitting in private on 20 May 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

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 18 September 1996 by Margaret FLEMING against the United Kingdom and registered on 27 November 1996 under file No. 33987/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a British national, was born in 1964 and she is currently resident in Edinburgh. She is represented before the Commission by Jonathan Cooper, barrister working with Liberty, a civil liberties group based in London.

A. Particular facts of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 8 April 1989 the applicant's partner joined the Royal Air Force and she subsequently obtained the rank of Senior Aircraft Woman. Since 1991 the applicant and her partner have had a relationship and from February 1993 the applicant lived with her partner in Swindon.

On 15 June 1994 the applicant's partner reported, as ordered, to the Royal Air Force base at Halton where she was interviewed by the air force authorities as part of an investigation of an allegation that she was homosexual and in pursuance of the armed forces' policy against the participation of homosexuals in the armed forces. The applicant's partner admitted to being a lesbian during her first interview on that day. During the subsequent and second interview on that day the applicant's partner again stated that she was a lesbian but she was further questioned regarding the most intimate details of her private life including questions as to her sexual practices with the applicant and other partners and whether she had ever "interfered sexually" with her sixteen year old foster daughter.

On the same day the applicant, who was not a member of the armed forces but who had accompanied her partner to Halton, was approached and asked if she could be interviewed. She was taken to an interview room where she was to be questioned by the air force authorities. The applicant requested to see her partner who was subsequently brought into the room visibly distressed and gave the applicant her consent to answer the air force authorities' questions. The applicant's partner was then led away.

The applicant was asked whether she and her partner were homosexual and the applicant replied in the affirmative. The applicant was then asked whether her partner slept with other women in the armed forces, what sexual acts she and her partner performed and whether she and her partner had had sex with their foster daughter. The applicant states that she was profoundly distressed, that she felt abused and shamed and that she was given no warning or notice of the nature or content of the questions which were to be raised.

On 16 November 1994 the applicant's partner received a certificate of discharge from the armed forces on the basis of her homosexuality.

On 23 February 1995 the applicant's partner applied for leave to take judicial review proceedings as regards the decision to dismiss her from the armed forces and on 8 March 1995 the High Court granted her leave to apply for judicial review. Before the High Court the applicant's partner argued that the policy against homosexuals in the armed forces was "irrational", that it was in breach of the European Convention on Human Rights and that it was against the EU Directive on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion and Working Conditions (Equal Treatment Directive).

On 7 June 1995 the High Court dismissed the applicant's partner's application (together with similar applications of three other members of the armed forces discharged on grounds of homosexuality) for judicial review.

Lord Justice Brown (who gave the main judgment of the High Court) noted that the cases illustrated the hardships resulting from the absolute policy against homosexuals in the armed forces and also noted that all four of the applicants had exemplary service records, some with reports written in glowing terms. Moreover, he found that in none of the cases before him was it suggested that the applicants' sexual orientation had in any way affected their ability to carry out their

work or had any ill-effect on discipline. The judge also found that the sexual orientation of two or three of the applicants had been known or suspected without it making the least difference to the relevant working relationships and that there was no reason to doubt that, but for their discharge on the sole ground of their sexual orientation, they would have continued to perform their service duties entirely efficiently and with the continued support of their colleagues. Having reviewed the statutory background and the arguments presented by both sides, the judge considered that the balance of argument lay clearly with the applicants and that, whatever the court would find, the existing policy could not survive for much longer.

However, that judge found that the test to be applied in the context of the judicial review proceedings was whether the Secretary of State could show an important competing public interest which he could reasonably judge sufficient to justify the restriction - only if the purported justification "outrageously defies logic or accepted moral standards" could the court properly strike down the policy. The judge found that, although the justifications may have seemed to many to be unconvincing, the decision to discharge based on the armed forces' policy was not unlawful on the basis of the applicable test. The judge also found that the Equal Treatment Directive was not applicable to discrimination on grounds of sexual orientation and that the domestic court could not rule on Convention matters. The judge concluded, while expressing sympathy, hesitation and regret, that he had to refuse the application for judicial review. The second judge of the High Court agreed with Lord Justice Brown's conclusion and his reasoning in law except that he disagreed that the balance of argument lay with the applicants or that the policy of the armed forces was doomed to die an early death.

On 3 November 1995 the Court of Appeal dismissed the applicant's partner's appeal, that court finding that the applicant's partner's discharge based on the policy was not "irrational". The test applied was whether the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision maker and, in judging whether this margin had been exceeded, the human rights context was important in that the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable. That court also accepted that the Equal Treatment Directive did not apply to complaints in relation to sexual orientation and that it could not rule on Convention matters.

On 19 March 1996 the Appeal Committee of the House of Lords refused to grant leave to appeal to the House of Lords.

COMPLAINTS

The applicant complains under Articles 3 and 8 alone and in conjunction with Article 14 of the Convention about the investigation carried out by the air force authorities into her private life. She also complains under Article 13 of the Convention that she had no domestic remedy in those respects.

THE LAW

The applicant invokes Articles 3 and 8 (Art. 3, 8) alone and in conjunction with Article 14 (Art. 3+8+14) of the Convention in respect of the investigation carried out by the air force authorities into her private life and, in particular, in relation to her sexual orientation and activities. She also invokes Article 13 (Art. 13) of the Convention claiming that she had no effective domestic remedy available to her in relation to these matters.

As regards the timeliness of the introduction of her application, the applicant argues that she had no domestic remedy to exhaust. She therefore awaited the outcome of the judicial review proceedings commenced by, inter alia, her partner. She submits that she would have felt personally vindicated by a decision in favour of her partner in those proceedings. Since she introduced her application within six months of the decision of the House of Lords of 19 March 1996, she submits that her application was introduced within the time-limit set down by Article 26 (Art. 26) of the Convention.

The Commission recalls its constant jurisprudence to the effect that, where no domestic remedy is available, the six-month time-limit set down by Article 26 (Art. 26) of the Convention runs from the date of the act which is alleged constitutes a violation of the Convention (see, for example, No. 14807/89, Dec. 12.2.92, D.R. 72 p. 148).

The Commission notes that the investigation into the applicant's partner's sexual orientation commenced in June 1994 and that the applicant's interview with the air force authorities took place on 15 June 1994. By December 1994 the applicant's partner had been discharged from the air force and the Commission considers that any investigation which could have involved an investigation of the applicant and her sexual orientation would have terminated at that date.

The Commission also notes that the applicant was not a party to the judicial review proceedings and that neither she nor her situation was mentioned, referred to or relevant to the domestic decisions. In such circumstances, the Commission does not accept that those proceedings, even if the applicant would have felt personally "vindicated" by a decision in her partner's favour, would constitute an effective remedy in relation to the applicant's own complaints which could interrupt the running of the six-month time-limit.

Accordingly, the Commission considers that, even assuming that the six-month time-limit set down by Article 26 (Art. 26) of the Convention began to run from December 1994, the introduction of the application on 18 September 1996 was outside of that time-limit.

It follows that the application must be declared inadmissible pursuant to Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission