AS TO THE ADMISSIBILITY OF

Application No. 31211/96
by Robert HOARE
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 24 January 1996 by Robert HOARE against the United Kingdom and registered on 29 April 1996 under file No. 31211/96;

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 is a British citizen born in 1951 and currently detained in HM Prison North Sea Camp Freiston Boston. Before the Commission, he is represented by Mr. Richard J. Marshall, a solicitor practising in Lincoln.

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

A. The particular circumstances of the case

The applicant was formerly a businessman engaged in the publication and distribution by mail order of video tapes of a pornographic nature. Videos were advertised in the national newspaper Sunday Sport. If the applicant received a response to the advert he would first send a brochure to the inquirer with a description of the contents of the videos. The tapes would be distributed only upon a request from a potential customer.

On 20 November 1993 the applicant's neighbour saw the applicant's elder daughter putting six packages into a post box in suspicious circumstances. The neighbour thought them to be bombs and called the

police. The bomb squad arrived, opened the post box and retrieved the packages. They contained video cassettes: three of the packages were addressed to Mr. W., two to Mr. Wh. and one to Mr. M.

The videos were looked at by the police to establish their contents.

On 26 November 1993 the police arrived without warning at the applicant's home. Only his wife and younger daughter were present. The police recovered pre-recorded tapes with numbers, recorded video tapes, a carrier bag with electronic wires, leads and three surgical rubber gloves, postage stamps with a variety of different values, address labels, sticky tape, and a box of sticky labels. They also found a cardboard box with some documents, vouchers, order forms, Free Trade Publication documents, recorded delivery slips referring to various customers, labels, and several letters.

On 4 March 1994 the applicant was interviewed at the police station. He made no comment on certain questions about a number of individual items which the police was interested in. During the course of the interview he submitted that the tapes were not harmful in any way.

The applicant and his wife were charged with six counts of publishing obscene articles and having obscene articles for publication for gain, contrary to Section 2(1) of the Obscene Publications Act 1959 as amended ("the 1959 Act").

The Crown case was that Free Trade Publications and JB Marketing and the address in London were directly connected with 15 St Clement's Close in Rawston where the applicant lived. It was submitted that at this address this business of advertising, selling and sending off pornographic tapes was being carried on, and that the applicant used a postal address in London to receive orders but the business was, in fact, carried on from his home where the films were actually recorded and then sent off to customers.

The prosecution called six witnesses, men who had answered advertisements in Sunday Sport and received catalogues or/and video tapes.

Mr. W., the first witness whose statement was read at the trial, submitted that in August 1993 he had answered an advertisement in Sunday Sport for X-rated videos. He received a catalogue of films and ordered four of them from an address in London.

Mr. M., the second witness whose statement was also read at the trial, said that in the summer of 1993 he had answered an advertisement in a men's magazine. He received a letter and a photocopy information sheet from Free Trade Publications from an address in London. In November 1993 he had made an order and received two videos, one of which was damaged and sent back for a replacement. It was the replacement video that was intercepted on 20 November 1993.

Mr. W. answered an advertisement in Sunday Sport and ordered six video cassettes from JB Marketing. He received two brochures and a leaflet.

Mr. H.'s statement was read at the trial. In the summer of 1993 he had answered an advertisement in Sunday Sport and received a catalogue from Free Trade Publications. He ordered sixteen films on eight tapes and received a letter from someone going under the name of Baker.

The prosecution showed to the jury a letter headed Free Trade Publications and JB Marketing, addressed to Mr. H. and which contained the following information:

"Dear Mr. [H.], further to your letter concerning non-delivery of your videos, I have checked with the people that copy and dispatch orders on my behalf and have been informed your order is about to be sent. I apologise for the delay, but since these videos may be considered illegal, it is sometimes necessary to be extra careful and security measures are strictly enforced so as to minimise detection. This does sometimes result in orders going out a few days later than anticipated."

Mr. H. confirmed that he had received the letter in reply to his letter addressed to the firm in London.

Mr. G. said that in 1992 he had answered an advertisement in Sunday Sport, sent off for a free sample from Free Trade Publications, but received a leaflet instead. He then sent off a cheque for two tapes and received two cassettes of what he called hardcore pornography. In August 1993, he sent off £60 to Free Trade Publications for further tapes, but did not receive them and so he wrote to the company.

Mr. McK. had received a catalogue of Free Trade Publications from friends and ordered six videos. He received them together with two catalogues on 9 November 1992 and in December 1993 he handed them over to the police.

Neither the applicant nor his wife gave evidence at the trial. As the judge said in his summing-up, "there is no evidence from either defendant to give any explanation [to the jury] as to what all this stuff was doing in [their] house. No explanation."

The judge described the domestic law to the jury, explaining that the test of whether matter had a tendency to "deprave and corrupt" was an objective test.

A statement of a Dr. C., the only evidence on behalf of the applicant, was read at the trial. In his statement, Dr. C. confirmed that the applicant had visited his offices in late February 1994 to discuss various issues in connection with a Home Office report on pornography co-written by Dr. C. and entitled "Pornography, its impact and influences". The judge described the importance of that evidence as follows:

"Now, members of the jury, the only importance of that evidence is this: that you will recall I read to you the answer given by [the applicant] that he did not believe these tapes were harmful in any way, and challenged the police to produce evidence that they were harmful. Now, members of the jury, the importance of that is that by March of 1994 [the applicant] would have been aware that the police were claiming that these video tapes were harmful in the sense that I have defined it to you and that in February, the previous month, he had consulted somebody about these matters, and that sets in context that answer which he was giving to the police. That is the importance of that."

The video tapes seized by the police were seen by the jury. Its contents were summarised by the judge in his summing-up as follows:

"'First Time' was the first exhibit in relation to count one. ... you saw as feminine masturbation, oral sex on both sides. ... this was a tape where there was a tremendous background noise; sort of animal noises coming from the tape, but hardly any dialogue, if at all any dialogue, just sort of groaning and noises like that. But the high point of the video, or low point, ... was surely this: ... On a

number of occasions during the course of fairly vigorous activity, you saw men and women inserting not only fingers into the vagina of various women, but also the whole hand and, indeed, on one or two occasions, the whole fist up to the wrist. ... you also saw images of a woman urinating on a man's penis at the same time when there was other activity going on. You saw what may have been something like a banana being used and this ... was the film where, towards the end, the three pairs of male and female ended up, six of them, sitting around a table talking to each other, ... and then there was further sexual activity with them all and urinating as well. ...

Count two, 'Anal, Anal, Anal' ... there are fourteen shortish scenes of some fairly graphic activity between women and women and women and men. It involves both normal intercourse and also what is these days called anal intercourse. It involved a great deal of what appeared to be ejaculation on to women's breasts or face. One of the scenes seemed to take place in a hairdressing salon, there is some kind of leather chair or something there. ... Again, there was tremendous noises in the background going on and the main thrust of this film was anal intercourse - buggery, in other words. In every case it seemed to be male on female and there were a number of, also, other images involving vibrators and the insertion of fingers into various orifices. ... there were a number of different women who could be identified by the colour of their lace stockings. As counsel for the Crown said, you very rarely, if at all, saw the faces of the people, and one of the matters relied upon quite properly by the Crown here in saying to you that you should find these to be obscene in the sense that they have a tendency to deprave and corrupt, is what is, perhaps you think, the utter dehumanisation of the people concerned, particularly the women, who are almost invariably on the receiving end of what was going on. In this film, more than in any of the others, you just saw the rear ends of the actors performing vigorously. ...

Count three, called 'Down Town' is a different sort of film altogether. It began with ... a rather blurred image of a girl telling you the various things which she liked. ... this involved a great deal of images of sperm being dribbled in to the mouth of a woman with oral sex, woman on woman and man on woman. There was also anal intercourse, or buggery, as well, and again perhaps one of the high points of the film, ..., was several images of a woman licking the anus of a man as he bent over. There was also an image of a man urinating into the open mouth of a woman. ... You saw the image of one girl with her finger in the anus of another girl and also indulging in oral sex, and then licking that finger. That was an image you saw on several occasions and, again, it is matter like that which the Crown rely upon as making that film obscene. ...

... That film was stopped because of a matter raised by counsel, but it was resumed for a further twenty minutes and in that twenty minutes you saw an example of a man again urinating into a woman's vagina from the rear of it, and other images of women licking the anus of man. Members of the jury, it is on such images as that the Crown say on count three that this is an obscene article. As I say, these are matters for you and you will bear in mind the warning I have given you which particularly applies to one of the other films we have yet to deal with about whether or not this is so over the top that it might actually have the opposite effect of tending to deprave and corrupt, but

that is a matter for you to consider.

> The next film, which relates to count five, ... is one which, at your request, was stopped within the first ten or twelve minutes. ... This bondage film started off with a scene of a girl tied to a table, two masked men, and I need only say that you saw that girl being whipped vigorously, both on her back and on her front, in every area and you saw the use of clothes pegs both on the breasts and on the vagina. ... you had an image for some time of a male urinating over the face and into the mouth of this girl who was tied up. It is on that basis that the Crown say, 'Well, there is material there on which you could find that film to be obscene'.
>
> The fifth film, for count six, ... is 'Caviar dinner'. Now, members of the jury, that was very graphic. I need only say that this is the film where you apparently saw one woman consuming faeces. ...
>
> Count seven, exhibit 6, is called 'Eels for Pleasure'. ... it began with one woman inserting eels into another woman, both into the vagina and into the anus, and that was a scene that was repeated twice, and then the scene changed to what appeared to be some sort of mediterranean country, a naked girl who was making approaches to a young pony. The Crown say there is ample material there for you to come to the conclusion that that film contained obscene matter."

On 16 October 1995 the Nottingham Crown Court convicted the applicant of six counts relating to the publication of obscene articles under Section 2(1) of the 1959 Act. On 16 November 1995 it sentenced him to 30 months' imprisonment concurrently in respect of each offence.

On 29 November 1995 counsel advised that there were no grounds of appeal.

B. Relevant domestic law and case-law

Section 1 of the Obscene Publications Act 1959 as amended ("the 1959 Act"), provides for the test of obscenity. According to Section 1(1), an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. Under sub-section 2, "article" means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures. According to sub-section 3, a person publishes an article who (a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or (b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projets it.

Section 2 of the 1959 Act provides for the prohibition of publication of obscene matter.

Section 4 of the 1959 Act, provides for the defence of public good. According to sub-section 1, a person shall not be convicted of an offence against Section 2 of the Act if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern. According to Section 4(2), the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under the Act either to establish or to negative the

said ground.

In the case of Director of Public Prosecutions v. Jordan ([1976] 3 All ER 775-787), Lord Wilberforce laid down an objective test of obscenity, describing:

> "An article (a technical word which includes books and films) is obscene if its effect is such as to tend to deprave and corrupt persons likely to read, see, or hear the matter contained or embodied in it. The main point to be noticed about [Section 1(1) of the 1959 Act] is, as I pointed out in Director of Public Prosecutions v. Whyte ([1972] 3 All ER 12 at 17), that it is directed at relative obscenity - relative, that is, to likely readers. (I use 'readers' to include other types of recipients.) In each case it has to be decided who these readers are and so evidence is usually given as to the type of shop or place where the material is, and as to the type of customer who goes there (cf. again, Director of Public Prosecutions v. Whyte [1972] 3 All ER 12). When the class of likely reader has been ascertained, it is for the jury to say whether the tendency of the material is such as to deprave or corrupt them, and for this purpose, in general, no evidence, psychological, sociological or medical may be admitted (cf. R. v. Andersson [1971] 3 All ER 1152; Director of Public Prosecutions v. Whyte [1972] 3 All ER 12). The jury consider the material for themselves and reach their conclusion as to its effect. They cannot be told by psychologists or anyone else what the effect of the material on normal minds may be."

COMPLAINTS

1. The applicant complains that there has been an unjustified interference with his freedom of expression contrary to Article 10 of the Convention. He feels that it was his right to produce the material concerned to members of the public who share the same opinion. He contends that the videos he had published were for legitimate entertainment purposes and did not deprave or corrupt citizens in any way as only customers sharing his opinions would have responded to his adverts and after reading his brochures would have purchased videos of this kind.

He claims that to citizens living in other member states as the Netherlands or Germany, videos of a similar nature are freely and legally available. He further submits that similar material was legally broadcast in the United Kingdom by satellite television channels and therefore must be regarded as incapable of depraving or corrupting.

2. The applicant also claims that he was denied a fair trial under Article 6 of the Convention because he was refused the right to have called and examined an expert witness, Dr. C. He submits that the expert's opinion related to an essential element of the offence for which he was convicted, i.e. whether the material contained in the videos was capable of depraving or corrupting. He contends that the jury had to apply a subjective test as to whether the videos were capable of depraving and corrupting because they were simply presented with the videos by the prosecution and invited to reach a conclusion without any expert guidance.

The applicant also submits that he was advised by his counsel during the course of the proceedings that such evidence would be inadmissible under English law because of the decision in the case of Director of Public Prosecutions v. Jordan.

THE LAW

1. The applicant complains that his conviction and sentence constituted an unjustified interference with his freedom of expression ensured by Article 10 (Art. 10) of the Convention, the relevant part of which reads 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 ... restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the prevention of disorder or crime, for the protection of health or morals ..."

The Commission finds that the applicant suffered an interference with the exercise of his freedom of expression by virtue of his conviction and sentence for publication of obscene articles following the police seizure of the video tapes in his home. The Commission also finds that the applicant's conviction was prescribed by law, namely by Section 2(1) of the 1959 Act. The Commission considers that the facts of the present case confirm that the applicant was prosecuted for the purpose of protecting morals, a legitimate aim under Article 10 para. 2 (Art. 10-2) of the Convention.

The applicant does not claim that the video cassettes which he published were not pornographic or obscene in the technical sense of the law, but does contend that the restriction of his freedom of expression was disproportionate as only those who shared his opinions would respond to the advertisements published in the newspaper, and subsequently purchase videos.

No restriction on freedom of expression can be compatible with Article 10 (Art. 10) of the Convention unless it satisfies, inter alia, the test of necessity as required by the second paragraph of that Article. In examining whether restrictions can be considered "necessary in a democratic society", the Contracting States enjoy a certain, but not unlimited, margin of appreciation. It is, however, ultimately for the Convention organs to determine whether an interference corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued" (Eur. Court HR, Wingrove v. the United Kingdom judgment of 25 November 1996, Reports - 1996, para. 53). By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than international organs to give an opinion on the requirements of "morals" as well as on the "necessity" of a "restriction" or "penalty" intended to meet them (Eur. Court HR, Müller and others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 22, para. 35).

In the present case, the sole question which arises in the context of the relationship of proportionality between the interference with the applicant's right to freedom of expression and the aim pursued is the question of whether, given that the applicant only distributed his video cassettes to people who expressed a clear interest, it can be said that the penalty imposed was capable of protecting the "rights of others" (see, in this context, Scherer v. Switzerland, Comm. Report 14.1.93, Eur. Court HR, Series A no. 287, p. 20, para. 65). Where no adult is confronted unintentionally or against his will with filmed matter, there must be particularly compelling reasons to justify an interference (above-mentioned Scherer Report, p. 20, para. 65).

The Commission notes that the applicant went to considerable lengths to prevent cassettes from falling into the "wrong hands": in the first place, he arranged for advertisements to be placed in a newspaper, thereafter a leaflet was sent to interested parties and only

then would a cassette be distributed. It was thus very unlikely that the cassettes would be purchased accidentally. On the other hand, it is in the nature of video works that once they have been distributed, they can, in practice, be copied, lent, rented, sold and viewed in different homes, thereby escaping any form of control by the authorities (see the above-mentioned Wingrove judgment, para. 63).

The Commission considers that it cannot therefore be said with any degree of certainty that only the intended purchasers of the film would have access to it and not minors. To that extent the present case is different from the case of Scherer, where the only adults who saw the applicant's videos were those who had access to his shop (above-mentioned Scherer Report, p. 19, para. 62).

Moreover, the Commission recalls that in its above-mentioned Wingrove judgment, the Court referred to the danger of video works escaping any form of control by the authorities (above-mentioned Wingrove judgment, para. 63). The possibility of such control must therefore be considered as compatible with Article 10 (Art. 10) of the Convention as such. All the applicant's activities were designed to escape any control by the authorities.

Further, the Commission notes that no claim is made for any artistic merit in the applicant's video cassettes: to that extent, the present case is different from cases where an applicant has claimed that artistic considerations should prevail over protection grounds (see, for example, the above-mentioned Müller and others and Wingrove judgments, Otto-Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A, or No. 17634/91, Dec. 2.9.91, unpublished, where the applicant claimed that the absence of a defence of artistic merit violated Article 10 (Art. 10) of the Convention).

Accordingly, the Commission considers that in the circumstances of the present case, where obscene video cassettes were distributed to a limited circle of viewers but where there was no further control over them, where the official channels for certification of videos were not used, and where no artistic merit is claimed for the works, the applicant's conviction for publishing obscene works was proportionate to the legitimate aim pursued.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also claims that he was denied a fair trial because he was refused the right to call and have examined an expert witness Dr. C. He maintains that the jury had to apply a subjective test as to whether the videos were capable of depraving and corrupting. He invokes Article 6 (Art. 6) of the Convention which, insofar as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ...
> ...
> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. ..."

The Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In

particular, it is not competent to deal with applications alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (cf., e.g., No. 21283/93, Dec. 5.4.94, D.R. 77, p. 81).

Under English law, the test of whether matter is obscene, i.e. whether an article has a tendency to "deprave and corrupt", is an objective test. It is for the jury to determine whether the tendency of the material is such as to deprave or corrupt, and for this purpose, no expert evidence will be admitted. The question of whether an article has artistic merit, on the other hand, can be the subject of expert evidence. Thus in the present case, the applicant was indeed prevented from bringing expert evidence on the question of whether his videos were obscene, and any request for such evidence to be led would, as he says, have been refused.

However, under Article 6 (Art. 6) of the Convention the Commission is not required to determine whether the criminal law in a particular area is appropriate. Rather, it must look at the proceedings as a whole with a view to determining whether the guarantees of Article 6(Art. 6) were provided.

Given that the question of whether an article is obscene is a matter for the jury, the fact that the applicant could not bring expert evidence cannot affect the fairness of the proceedings. The Commission notes that had the applicant alleged that his videos had any artistic merit, it would have been open to him to adduce evidence on that point.

Finally, the Commission notes that the statement of the expert whom the applicant now says he would have wished to have called was in fact read out at the trial. It was not therefore formally excluded at all.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber