EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No 7114/75

Alan Stanley HAMER

against

the UNITED KINGDOM

Report of the Commission
(adopted on 13 December 1979)

62.486
06.2

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I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The substance of the application

2. The applicant, Mr Alan Stanley Hamer, is a United Kingdom citizen, born in 1947. At the date of introduction of his application he was detained in Gartree Prison. He has since been released. He is represented by Mr Cedric Thornberry, barrister-at-law.

3. On 7 March 1975, whilst detained at Gartree, the applicant petitioned the Home Secretary for permission to marry. This request was refused on 21 March 1975, when the applicant was informed that "in accordance with the regulations it is not possible to allow you temporary release for the purpose of marriage as consent is only given if there is a child to legitimise". Subsequent requests for such permission met with a similar reply. No facilities are available for the celebration of marriage within prisons in the United Kingdom. The applicant submits that, by the refusal of these requests, he was denied the right to marry, as guaranteed by Art. 12 of the Convention.

Proceedings before the Commission

4. The application was introduced with the Commission on 25 May 1975 and was registered on 8 July 1975. On 16 July 1976 the Commission decided, in accordance with Rule 42 (2)(b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite them to submit written observations on its admissibility. The Government's observations were submitted on 21 September 1976 and the applicant's observations in reply were submitted on 12 October 1976 and received on 18 October 1976. On 11 March 1977, after having considered the parties' written observations, the Commission decided to invite the parties to appear before it at a hearing on the admissibility and merits of the case.

5. The hearing took place on 13 October 1977. The applicant was represented by Mr Thornberry and the respondent Government by Mr D.H. Anderson, Legal Counsellor at the Foreign and Commonwealth Office as their Agent, Mr A. de Piro Q.C., who presented their case, and Mrs S.A. Evans, Mr W.D. Fortune and Mr Cole, of the Home Office. Having considered the parties' submissions the Commission decided, on the same date, to declare the application admissible since it considered that the case raised substantial issues under Art. 12 of the Convention (1).

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(1) See Decision on Admissibility, Appendix II.

6. After observations on friendly settlement had been obtained, written observations on the merits of the case were submitted on behalf of the applicant on 14 June 1978 and on behalf of the respondent Government on 28 September 1978. On 25 October 1978 the Acting President requested the parties to submit certain further information. On 2 November 1978 a document supplementing the applicant's observations was received and communicated to the respondent Government. On 8 November 1978 the information requested by the Acting President was submitted by the respondent Government.

Subsequently, between December 1978 and September 1979, the Commission pursued its efforts to reach a friendly settlement of the case between the parties.

The present Report

7. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. C.A. NØRGAARD, Acting President (Rules 7 and 9 of the Rules of Procedure)
J.E.S. FAWCETT
G. SPERDUTI
E. BUSUTTIL
C.H.F. POLAK
J.A. FROWEIN
G. JÖRUNDSSON
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
N. KLECKER

8. The text of the Report was adopted by the Commission on 13 December 1979 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2).

9. A friendly settlement of the case has not been reached and the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly:

(1) to establish the facts; and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

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10. A Schedule setting out the history of proceedings before the Commission and the Commission's Decision on Admissibility in the case are attached hereto as Appendices I and II. An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document (Appendix III).

11. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

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II. ESTABLISHMENT OF THE FACTS

12. The facts of the case are not generally in dispute between the parties.

The factual basis of the applicant's complaint

13. On 18 April 1974 the applicant was arrested and charged with certain offences. He was detained until 15 May 1974, when he was released on bail. On 18 July 1974, the applicant having failed to appear for trial, a warrant was issued for his arrest. He was re-arrested on 14 October 1974 and detained on remand at Lincoln Prison until 19 December 1974 when he appeared for trial at Nottingham Crown Court. He pleaded guilty to a number of offences, including obtaining property by deception and theft, and was sentenced to a total of five years' imprisonment.

14. Prior to the applicant's arrest he had formed a relationship with a Miss J. There was no legal impediment to their marrying. They had lived together for some time, about ten weeks according to the applicant, before his arrest in October 1974. On 21 October 1974 the applicant applied to the Governor of Lincoln Prison for permission to marry. This request was not successful.

15. On 7 March 1975, whilst detained at Gartree Prison, the applicant petitioned the Home Secretary for permission to marry Miss J. In this petition the applicant stated inter alia as follows:

> "We were living together at the time of my arrest on 14 October 1974 and considered ourselves engaged to be married sometime in the near future, certainly within six months. My fiancée is still receiving treatment

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from her doctor for her nerves brought about by my arrest, remand and trial. She feels as I do that our marriage would bring her some measure of comfort if only mentally, during my imprisonment, and we would be able to plan for the future. Why is it when I am trying to create for us some measure of security and happiness I am quoted from the rule book that it is not possible. Yet if I were seeking a divorce the facilities of the prison would be immediately available to make this breakdown of a marriage absolute. I am during my time here taking full advantage of the educational facilities and I hope to leave with the ability and responsibility to obtain good employment and support a family. This could be the first time I have been discharged from an institution with a home and a future to go to giving me a real opportunity to settle down. I hope it will be possible to consider this request favourably."

16. On 21 March 1975 the reply to the applicant's petition was transmitted to him. This was in the following terms:

"The Secretary of State has fully considered your petition but points out that in accordance with the regulations it is not possible to allow you temporary release for the purpose of marriage as consent is only given if there is a child to legitimise."

17. The applicant made a further petition on 7 April 1975 reiterating his request and on 25 April 1975 received a reply in terms similar to that of 21 March 1975. He also took the matter up with a Member of Parliament, Mr. J. D. Concannon. On 12 May 1975 the Under Secretary of State at the Home Office, Dr. Shirley Summerskill, wrote to Mr. Concannon explaining the reasons for the refusal of the applicant's request in the following terms:

"Prisoners or their fiancées quite often ask to be allowed to marry during their sentence; but I am afraid that it would be impossible administratively, even if it were thought desirable as a matter of policy, to grant all such requests. There has to be, therefore, some criterion for distinguishing between prisoners who can be allowed out for this purpose and those who cannot. The present rule is that prisoners may be allowed

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temporary absence under escort in order to be married only when the marriage will legitimate the prisoner's own child. This gives us an objective criterion which avoids our having to assess whether the marriage would otherwise be desirable. Any such assessment would be an impossible and intolerable burden for us and would also lead to complaints about favouritism from prisoners who were turned down. Our present practice was adopted on the recommendation of the Advisory Council of the Treatment of Offenders who considered the matter with particular care, and no Home Secretary has felt able to go beyond it, except to the extent of allowing marriage to legitimate children already born, as well as the unborn children to which the original recommendation of the Advisory Council referred.

I have carefully considered this case but, whilst I sympathise with Mr. Hamer, I am afraid I can find no reason to treat him exceptionally by granting him permission to marry during his sentence."

18. The applicant continued his efforts to obtain permission to marry. In about August 1975 he was interviewed by a welfare officer in connection with the matter. In a report dated 18 August 1975 on the interview, the welfare officer recorded that he had explained the regulations to the applicant and that the applicant "blandly told me that he was well aware of what he was doing, and he intended to persist with the applications and petitions throughout his sentence to keep us all busy. His contribution to irritate authority."

19. Miss J. visited the applicant in prison from time to time up until October 1975. The applicant subsequently received one or two letters from her and about six months after her last visit he learned that she had married someone else.

19. The applicant became eligible to be considered for release on parole after one-third of his sentence, namely in about June 1976. He asked to be considered for such release in December 1976 but was not successful. From about May 1977 onwards he had the possibility of obtaining temporary release on home leave. On 18 July 1977 he entered a pre-release employment scheme. From then onwards he lived in lodgings outside the immediate confines of Exeter Prison and worked in a factory in the town. He received home-leaves between 5 and 14 August, 26 and 29 August and 7 and 9 October 1977. He was released in about January 1978.

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Had the applicant and Miss J. still been in a position to marry and wished to do so, they would have had opportunities to do so at any time after the applicant started work on the pre-release employment scheme in July 1977.

Domestic law of marriage

21. No provision of English law expressly removes or regulates the right of a prisoner to marry. Prisoners are subject to the general laws in force concerning such matters as legal capacity, consanguinity and the time, place and manner of celebration of a marriage. The fact that a person is serving a sentence of imprisonment does not affect his legal capacity to marry. Marriage by proxy is not permitted. The Marriage Act 1949 (1), referred to hereinafter as "the 1949 Act" contains detailed provisions as to the places in which marriages may be celebrated. In summary these are, save in the exceptional cases mentioned below, a parish church or "authorised chapel" of the Church of England (SS. 12, 15, 17, 20, 21 and 78 of the 1949 Act), a "registered building", namely one certified by law as a place of religious worship and registered for the solemnisation of marriages by the superintendent registrar of the local registration district (S.41), or a register office (S.45).

22. Subject to two exceptions, any marriage must be celebrated at one of the places prescribed in the 1949 Act. The exceptions arise (a) where a special licence has been granted by the Archbishop of Canterbury or one of his officers and (b) where a Registrar General's licence has been granted under the Marriage (Registrar General's Licence) Act 1970 (2) "the 1970 Act". As to the first exception, SS. 5(b) and 79(6) of the 1949 Act expressly preserved a power of the Archbishop of Canterbury and other persons under the Ecclesiastical Licences Act 1533 "to grant special licences to marry at any convenient time or place". This power applies only in the case of marriages celebrated under the rites of the Church of England. The 1970 Act provides that a Registrar General's Licence authorising the solemnisation of marriages other than those solemnised according to the rites of the Church of England (or the Church in Wales), may be issued in certain cases of serious illness. The marriage may then be solemnised elsewhere than in a prescribed place.

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(1) 12, 13 & 14 Geo. 6 c. 76

(2) 1970 c. 34

23. No places of marriage prescribed by the 1949 Act exist within prisons. The Government have explained that the prescribed places are public, and that English law does not generally enable a marriage to be celebrated in a place from which the public are excluded. They have further explained that the issue of a special licence by the Archbishop of Canterbury or his officers is a very rare event. It was submitted on behalf of the applicant, with reference to the power to issue a special licence, that it is not in fact the case that a marriage must take place in public. It was further suggested that a building within a prison might be registered by a superintendent register under S.41 of the 1949 Act or that a register office might be located within a prison so that a marriage could be solemnised there under S. 45 of the Act. However, S.41(2) of the 1949 Act provides that any application for registration of a building under S.41 must be accompanied by a certificate signed by at least twenty householders stating that the building is used by them as their usual place of "public religious worship". Furthermore S.44 provides that a marriage within a registered building shall be solemnised "with open doors" and S.45 contains a similar provision concerning marriages in register offices. These provisions appear to exclude the possibility of a marriage being lawfully celebrated in a "registered building" or register office within a prison. The applicant would not have qualified for a Registrar General's licence under the 1970 Act and it does not appear in the light of the parties' submissions that it would be open in practice to a prisoner to obtain a special licence from the Archbishop of Canterbury, assuming that he wanted to marry in a Church of England ceremony.

24. Despite the theoretical possibility for a prisoner to obtain a special licence, which is open in the case of a Church of England marriage only, the effect of the provisions outlined above is thus that it is only possible in practice for a prisoner to marry if he is able to leave prison and have the marriage solemnised in a prescribed place outside.

Domestic law and practice concerning temporary release of prisoners for the purpose of marriage

25. Under relevant United Kingdom law the prison authorities have certain discretionary powers to allow a prisoner to leave prison under escort or otherwise. S. 13(2) of the Prison Act 1952 (1), to which the respondent Government have referred in their written observations on the merits, contemplates that a prisoner may be taken out of prison under escort and is in the following terms:

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(1) 15 & 16 Geo. 6 & 1 Eliz. C.52

"A prisoner shall be deemed to be in legal custody while he is confined in, or is being taken to or from, any prison and while he is working, or is for any other reason, outside the prison in the custody or under the control of an officer of the prison and while he is being taken to any place to which he is required or authorised by or under this Act to be taken, or is kept in custody in pursuance of any such requirement or authorisation".

26. The Prison Rules 1964 (as amended), which are subordinate legislation made under powers conferred by inter alia S.47 of the Prison Act 1952 provide, in Rule 6, for the temporary release of prisoners serving sentences. Rule 6 is in the following terms:

"Temporary release

1. A prisoner to whom this Rule applies may be temporarily released for any period or periods and subject to any conditions.

2. A prisoner may be temporarily released under this Rule for any special purpose to enable him to engage in employment, to receive instruction or training or to assist him in his transition from prison life to freedom.

3. A prisoner released under this Rule may be recalled to prison at any time whether the conditions of this release have been broken or not.

4. This Rule applies to prisoners other than persons committed in custody for trial or to be sentenced or otherwise dealt with by or before the Crown Court, or remanded in custody by a Court".

27. A prisoner has no right to temporary release under the above-mentioned provisions, which merely give the prison authorities a discretion to allow such release. At the relevant time, where a prisoner wished to get married, the practice of the prison authorities was, as indicated above, to allow temporary release for this purpose only if the effect of the marriage would be to legitimise a child,

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born or unborn, of the prisoner concerned. Temporary release for the purpose of marriage would not be allowed otherwise, save possibly in very exceptional compassionate circumstances. The practice was changed in August 1977 so that, in general, prisoners serving determinate sentences and having over twelve months of their sentence left to serve, were thereafter allowed temporary release in order to marry. This twelve months period has since been reduced to six months.

28. At all relevant times prisoners have been free to make arrangements to marry when living outside prison on pre-release employment schemes or on home-leave towards the end of their sentences.

III. SUBMISSIONS OF THE PARTIES

A. *Submissions as to the facts*

29. The parties' submissions as to the facts of the case are, for the most part, incorporated in Section II above. The following further submissions may also be noted.

The applicant

30. At the hearing the applicant's representative stated that at the time of his arrest the applicant and his fiancée had, as stated in his petition, considered themselves engaged to be married "in the near future, certainly within 6 months". He had had a real intention of marrying. Having had a bad record and unsatisfactory early home life, he had been trying to make sensible and concrete plans for the future. He reiterated these submissions in his written observations on the merits and refuted the innuendo seemingly advanced by the Government at the hearing that he had had other motives in making his requests. He further stated that, at the time of his arrest, he and his fiancée had been living together for only about 10 weeks. They had taken their decision to marry, if possible, within hours of his "re-arrest".

31. The applicant's representative also stated at the hearing that the refusal of the applicant's second petition in April 1975 had led to a crisis in the relationship. Visits between the applicant and his fiancée had been supervised and listened in to by prison staff. The applicant's fiancée had apparently suggested to friends that the form of the Home Office refusals showed that the applicant had not really been trying.

32. It was further submitted at the hearing that there was a paucity of evidence in favour of the propositions in the Under Secretary of State's Letter of 12 May 1975, explaining the reasons for the Home Office practice. It was not clear what was meant when it was said to be "impossible administratively" to grant requests to marry. Whatever had been thought to be insuperable administrative difficulties had apparently now faded.

33. With reference to domestic law, the applicant submitted that, whilst it was not necessary to release a prisoner to enable him to marry (See para. 2.14 above), in any event there was nothing to prevent the Government from introducing legislation making it possible for marriages to take place in prisons.

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The respondent Government

34. The respondent Government stated at the hearing that they were not able to accept the truth of all the factual allegations then made on behalf of the applicant. They observed that the applicant had been free to marry both before and after his arrest and drew attention to the terms of the welfare officer's report of 18 August 1975.

35. As to the domestic law and practice they observed that English law provided that, save in the very special circumstances where a special licence or Registrar General's licence was granted, marriage must take place in public. The public had no access to a prison. The object of the provision was to ensure full publicity for the marriage. Marriage was regarded as a question of status, not merely of private right. Accordingly if a prisoner was permitted to marry, special arrangements had to be made to escort him to a public place. This could involve considerable security precautions and cost. Prison staff would have to spend time which they would otherwise be spending looking after other prisoners. In view of the high number of prisoners and relative shortage of staff other prisoners might be denied opportunities for exercise, recreation etc. It would be wrong to put prisoners in a privileged position by allowing them to marry in private.

36. In their written observations on the merits the Government maintained the submissions made at the hearing and stated that no admission was made save as expressly noted in their Counter-Memorial. In particular they submitted that the changes in practice which had taken place had followed a review of the whole question, but should not be taken as implying any admission in relation to this case. They had no further comments on the facts of the case.

B. Submissions as to the law

37. The submissions as to the law made by the parties at the hearing, and further developed in their written observations, are summarised in the following paragraphs.

The applicant

38. The applicant's representative first submitted that the issue was not whether the applicant's rights were now being interfered with, but whether they had been interfered with in the past. He made six submissions in law.

39. Firstly the case did not concern the domestic law of marriage but an issue of executive discretion involving the exercise of physical constraints over and above the deprivation of liberty. To be lawful under the Convention the authorities' action must comply with the domestic law of marriage. That law did not contain the limitation contended for by the Government but permitted the applicant's

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marriage. The "law" referred to in Art. 12 was that dealing with consent, marriageable age and other such matters. The system of discretionary controls in question was not "national law governing the exercise" of the right to marry within the meaning of Art. 12. Furthermore it was questionable whether such discretionary decisions, unregulable by the courts applying the law, belonged to the category of "law" at all, even if, contrary to his submission, they did fall within the concept of "governing the exercise of the right" to marry. The essence of law was certainty. It should contain clear rules laying categories, classes and consequences or implications in regard to such categorisations. Such rules must be public and capable of ascertainment, application and enforcement by courts. The "rules" by which the relevant decisions were taken, bearing upon a fundamental human right, were not applicable by courts. Law and absolute executive discretion were often incompatible in their juridical essence.

40. Secondly, the domestic law and its application must comply with Convention requirements and was subject to the supervision of the Commission and Court. It was not sufficient for a Government to show that its practice complied with domestic law.

41. Thirdly, there was no implied limitation to the rights guaranteed in Art. 12. The Convention left no place for inherent limitations and in this respect the applicant adopted the argument in Jacobs: The European Convention on Human Rights pp. 198-201. The Government's suggestion that limitations must be implied was contrary to a number of fundamental rules of construction. In particular words must be given their literal meaning, as was upheld in the Vienna Convention and elsewhere. Furthermore limitations were set out elsewhere in substantive Articles of the Convention and should not be implied where they were not set out. They should not be implied any more in Art. 12 than in Art. 3. In the Golder case the Court had suggested that in the case of rights which the Convention "set forth without in the narrow sense of the term defining" there was room for limitations permitted by implication (Judgment of 21 February 1975, Series A, Vol. 18, para. 38). However, the Court had clarified what they meant by referring to the Belgian Linguistics Case, where the idea of "regulation", rather than "limitation", of a right had been used. Finally, the idea of implied limitation did not appear to have been used previously in relation to Art. 12 and it was questionable whether it was right as a matter of law to insert the idea now.

42. Fourthly, no limitation such as that contended for by the Government would in any event be valid. A limitation which prohibited the exercise of the right in toto for any prolonged period, could not properly be called a limitation. A limitation was an action which regulated and set bounds to a right, not one which totally prevented its exercise. In the Golder case (sup. cit. paras. 39 and 40), the Court had been very cautious about formulating any general theory about implied limitations. What had been involved there was a limitation on the right of a

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prisoner to seek legal advice during a period of some 2 years and 3 months. At the end of that time he had been free to obtain advice. There had been a delay, but his right had not been destroyed. In the present case, the applicant had been stopped from marrying for a considerable period after his petition in March 1975 and at the end of the period his fiancée had no longer been there. His right had not only been interfered with, but by the nature of the situation it had been extinguished. By his imprisonment he had been effectively prevented altogether from exercising his right. This was clearly a case where the substance of the right had been injured.

43. Fifthly, in any event any implied limitation must be compatible with the objectives of public policy expressed in the Convention and analogous standards pertaining to the purpose and nature of imprisonment and the importance of the family unit. Whilst Art. 12 might lack exactitude, the drafters clearly had in mind the exercise of an individual choice. It was not the business of the state to dictate whom a person should marry or when he should marry or when it was good or bad for him to marry. Rule 1 of the United Kingdom Prison Rules stated that the purpose of prison training and treatment should be to encourage and equip the inmates to lead a good and useful life. Rule 31 also provided for prisoners to be encouraged to maintain outside relationships which would promote the interests of his family and his own social rehabilitation. Reference was also made to Rules 58-62 of the Standard Minimum Rules for the Treatment of Prisoners (Resolution 73(5) of the Committee of Ministers of the Council of Europe) to a published statement by Lord Kilbrandon to the effect that imprisonment should involve no more than the deprivation of liberty, and to Art. 10(3) of the UN Covenant on Civil and Political Rights.

44. Sixthly, each proposed limitation which a Government might advance must be strictly proved to be necessary within the framework of a legitimate policy regarding prisoners. The evidence advanced by the respondent Government as to what was necessary in the context of prisons and marriage was not sufficiently convincing.

The respondent Government

45. The respondent Government submitted that Art. 12 was formulated in very general terms and was not to be regarded as giving every man and woman an unrestricted right to marry. Account must be taken of the particular circumstances in which individuals found themselves as well as the national laws governing marriage.

46. The interpretation of Art. 12 showed that there must be limitations on the right to marry. If literally interpreted Art. 12 added nothing to the rights prescribed by national law, although it was accepted that the intention was to guarantee certain minimum rights. It was not a unilateral right. There must be two persons able and willing to exercise it. A person might choose to live and work in such a way as

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to put it out of his power to exercise the right, as for instance did a sailor by his decision to live on the seas, a priest through the way he chose to live, or a man who chose to live on an unhabited island. National laws in all countries restricted the exercise of the right. For instance the marriage of insane or medically unfit persons or persons within prohibited degrees of consanguinity might be, and in the latter case was in all countries, forbidden. Such matters all depended on national laws. No national law permitted the exercise of the right at any time and in all circumstances and Art. 12 obviously could not mean that the right could be so exercised.

47. Unlike Art. 8 and other Articles of the Convention, Art. 12 contained no specific limitations. It fell within the category of provisions which, not being narrowly defined, were subject to limitations by implication (Eur. Court. H.R. Golder Case, Series A, Vol. 18 pp. 18-19). Art. 5(1)(a) must also be taken into account in the case of a prisoner.

48. The primary purpose of Art. 12 had been to prevent a recurrence of laws enacted by totalitarian régimes in the 1930's which prohibited marriages in certain circumstances, for instance the Nuremberg laws of 1935. Art. 16 of the Universal Declaration on Human Rights contained a statement on the right to marry in terms similar to Art. 12. This and other provisions of the Universal Declaration concerning "family rights" had been included in the proposals for the Convention made by the European Movement. It appeared that difficulties had arisen concerning one element of family rights, namely the right to education. Arts. 8 and 12 had been included with only technical comments and changes.

49. The Commission had had to consider the application of Art. 12 to prisoners in Application No. 892/60, X. v. the Federal Republic of Germany (Yearbook IV, p. 240 at pp. 254/6). In declaring the complaint manifestly ill-founded it had had regard to the factors that the applicant had committed a number of serious offences and that he was detained and could not expect to live with his future wife because he was facing a long sentence and also to the effect on the maintenance of order in prisons that the marriage of prisoners would inevitably have. A German court had had regard to the same factors. A Netherlands court had decided in 1964 that the state was not bound to remove the material obstacles to marriage resulting from imprisonment. An English court had decided that a person detained pending deportation did not have a right to marry under Art. 12, taking into account that the detention

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was lawful under domestic law and Art. 5(1)(f) of the Convention, (R. v. Secretary of State for Home Affairs and Another, ex parte Bhajan Singh, 1975 § All ER 1081). The Commission's observations in Application No. 6564/74 (Decisions and Reports 2, p. 105) on the right to found a family also applied equally to the right to marry. Thus Art. 12 did not mean that at all times a person must be given the actual possibility to marry.

A lawfully convicted prisoner put his right to marry beyond his reach for a temporary period, but it was not otherwise infringed.

50. The leading commentators on Art. 12 all stressed the crucial role of national law (1). It was necessary in view of the terms of English law on marriage for a prisoner who was to marry to leave prison in order to attend a place where a ceremony might lawfully take place. Apart from the exercise of special powers, a prisoner was required by the national laws in England to be kept within the confines of the prison or other place of detention. Thus a prisoner (like anyone else) must wait to exercise his right until such time as he was in a position to comply with the requirements of national law. There was no obligation under English law to put a person in a position to comply with those requirements when he was unable to do so for personal reasons. The temporary release of a prisoner under the Prison Act 1952 or the Prison Rules involved the exercise of a discretion. There could be no right for a prisoner to leaveprison to attend to his private affairs. Whether he should be permitted to do so must be a matter to be determined by the prison authorities in the circumstances of the particular case.

51. There must be rules and regulations in prison, controlling the activities of prisoners. Prisons faced staff problems and escorting a prisoner to his marriage might deprive other prisoners of their opportunities for exercise, recreation etc. A prisoner could not cohabit with his wife or consummate his marriage. It was difficult to see the particular merit, apart from legitimisation of a child, of marrying in these circumstances. In the application of Art. 12 to prisoners, a case-by-case approach had been adopted by the German authorities, (Application No. 892/60 sup.cit.) The factors they had taken into account had apparently been accepted by the Commission as relevant. However they could not be regarded as an exhaustive list. National security, public safety or the secure custody of a prisoner might inhibit the grant of permission to leave prison to marry. Qualifications on the right must undoubtedly exist in such circumstances. They would be founded to some extent on the notion of implied limitations (or the ordinary and reasonable requirements of imprisonment) and for the rest could be justified by reference to national law. Under English law

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(1) "Privacy and Human Rights", ed. Robertson, p. 190; Vasak, "La Convention Européenne des Droits de l'Homme", p. 50; Scheuner,"Human Rights in National and International law", pp. 250/251

the prison authorities were under a duty to maintain the safe custody of prisoners.

52. In Art. 12 the power of regulation through national laws gave the state a "margin of appreciation" (1). Questions of time, place and circumstances in which a person could marry were left to the national Government within their margin of appreciation. The former practice of the prison authorities had been within that margin. The reasons for the refusal in this case had nothing to do with the existence of some total ban on marriage, nor with a wish to punish prisoners. They had to do with the maintenance of order and conditions of secure custody and with the wish to limit the diversion of limited man-power resources.

53. Dealing with the six points of law raised by the applicant at the hearing the Government accepted firstly that it had to comply with national law (as it had done) and secondly that national law had to comply with the Convention. The applicant's third point, namely that there could be no implied limitations to Art. 12 which must be interpreted literally, was fatal to his argument since if Art. 12 was interpreted literally it added nothing to national law. It was implicit in the language that there had to be limitations. As to the fourth point, the Government did not dispute that there could be no limitations which destroyed the protected right. However the delay in this case in exercising the right to marry with a particular person did not injure the substance of the right. Fifthly, the applicant had said that any limitations must be compatible with the policy of the Convention and purpose of prison. However there was an immediate conflict between imprisonment and the preservation of the family unit. Rule 58 of the Standard Minimum Rules for the Treatment of Prisoners and the observations by Lord Kilbrandon which the applicant had quoted, emphasised that the vital feature of imprisonment was the deprivation of liberty. It was the deprivation of liberty which prevented exercise of the right to marry. The applicant's sixth point, that any limitations must be construed strictly, overlooked the margin of appreciation which the Court had held was left to states.

54. The applicant had not been denied the right to marry. The most that could be alleged was that he had been refused permission to leave prison under escort for a private or social purpose. The practice followed had been consistent with Art. 12 and the decisions complained of had not amounted to a violation thereof.

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(1) "Privacy and Human Rights", sup. cit., p. 190

IV. OPINION OF THE COMMISSION

55. The point at issue in the present case is whether the decision of the Home Secretary, communicated to the applicant on 21 March 1975 and maintained subsequently, involved a violation of his right to marry, as guaranteed by Art. 12 of the Convention.

Art. 12 is in the following terms:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

56. The Commission first recalls that in a previous decision on admissibility, it found that a refusal to allow a prisoner to marry was not in breach of Art. 12 (Application No. 892/60, X. v. the Federal Republic of Germany, Yearbook IV, p. 240; Collection of Decisions 6, p. 17). The respondent Government have referred to that decision and invited the Commission to reach the same conclusion. However the circumstances of the present case are not altogether comparable. In particular in the earlier decision the Commission laid emphasis on the existence of particular rules of German law concerning the right to marry and the extent to which prisoners' rights could be restricted.

57. In any event in interpreting Art. 12 of the Convention the Commission must now have regard to subsequent case-law of the European Court of Human Rights on the scope of permissible limitations to Convention rights, of prisoners in particular. It must also consider the facts now before it in the light of present-day conditions. In this respect it is relevant to note the general tendency in European penal systems in recent years towards reduction of the differences between prison life and life at liberty and the increasing emphasis laid on rehabilitation.

58. The Commission has also previously held that the right to "found a family", guaranteed by Art. 12, was not infringed by a refusal to allow conjugal relations in prison (Application No. 6564/74, X. v. the United Kingdom, 2 Decisions and Reports, p. 105; Application No. 8166/78, X. v. Switzerland, 12 Decisions and Reports, p. 241). In particular in Application No. 6564/74 the Commission stated as follows:

> "Although the right to found a family is an absolute right in the sense that no restrictions similar to those in para. (2) of Art. 8 of the Convention are expressly provided for, it does not mean that a person must at all times be given the actual possibility to procreate his descendants. It would seem that the situation of a lawfully convicted person detained in prison falls under his own responsibility, and that his right to found a family has not otherwise been infringed."

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The respondent Government have invited it to follow the same approach in this case. However in the Commission's opinion different considerations apply in the case of the right to marry. This is, essentially, a right to form a legal relationship, to acquire a status. Its exercise by prisoners involves no general threat to prison security or good order comparable to those referred to by the Commission in the above-mentioned decisions (see especially Application No. 8166/78, sup. cit.). In particular a marriage ceremony can take place under the supervision of the prison authorities.

59. The Commission therefore finds the case-law to which it has referred of little assistance in the present case.

60. As to the general question of interpretation it is clear, as both parties are agreed, that Art. 12 guarantees a fundamental "right to marry". Whilst this is expressed as a "right to marry ... according to the national laws governing the exercise of this right", this does not mean that the scope afforded to national law is unlimited. If it were, Art. 12 would be redundant. The role of national law, as the wording of the Article indicates, is to govern the exercise of the right.

61. The Court has held that measures for the "regulation" of the rights to education (Art. 2 of Protocol No. 1) or access to court (Art. 6) "must never injure the substance of the right". (Belgian Linguistic Case, Judgment of 23 July 1968, Series A, No. 6, p. 32, para. 5; Golder Case, Judgment of 21 February 1975, Series A, No. 18, pp. 18-19, para. 38). In the Commission's opinion this applies also to the national laws which govern the exercise of the right to marry.

62. Such laws may thus lay down formal rules concerning matters such as notice, publicity and the formalities whereby marriage is solemnised (cf. Application No. 6167/73, X. v. the Federal Republic of Germany, Decisions and Reports 1, p. 64). They may also lay down rules of substance based on generally recognised considerations of public interest. Examples are rules concerning capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy (cf. Application No. 3898/68, X. v. the United Kingdom, Collection of Decisions Vol. 35, pp. 97 and 102). However, in the Commission's opinion national law may not otherwise deprive a person or category of persons of full legal capacity of the right to marry. Nor may it substantially interfere with their exercise of the right.

63. Both parties have also made submissions on the question whether there may be implied limitations to the right to marry of a prisoner, other than those arising from the national laws referred to in Art. 12. The Commission finds it sufficient to say that a person deprived of his liberty under Art. 5 remains in principle entitled to the right to marry and that any restriction or regulation of the exercise of that right must not be such as to injure its substance (Belgian Linguistic and Golder Cases, sup. cit.).

64. Turning to the facts of the present case, the first question which arises is whether the applicant's right to marry was denied him or interfered with at all by the United Kingdom authorities. The Government maintain that it was not. They have submitted that the applicant was merely in a position where, as a result of his own actions, he was unable to exercise it for a time, being unable to go to a place authorised under the domestic law of marriage.

65. The Commission first recalls that the Court has held that, even though a right is not formally denied, "hindrance in fact can contravene the Convention just like a legal impediment" and "hindering the effective exercise of a right may amount to a breach of that right, even if the hindrance is of a temporary character" (Golder Case, sup. cit., p. 13, para. 26).

66. Here the applicant was prevented from marrying by a combination of factors. He was in prison. National law did not allow of his marrying there. The Home Secretary would not allow him temporary release so that he could marry elsewhere.

67. This situation was not one of the applicant's own choice. His position was in no way comparable to that of a priest or other person who of his own free will renounces the right to marry or puts himself in a position where he cannot exercise it. Nor can it be said that his inability to marry was simply an inevitable result of his imprisonment, or of his actions which led to it, for which the Government were not responsible. Personal liberty is not a necessary pre-condition to the exercise of the right to marry. The practice of States in allowing prisoners to marry, either within prison or on temporary release under escort, shows that no specially onerous or complex arrangements are necessary. The exercise of the right, particularly within a prison, does not, as the Commission has already pointed out, involve the prisoner escaping from the supervision and control of the prison authorities.

68. Some administrative arrangements must of course be made by the prison authorities before a prisoner can marry. However this also applies to other Convention rights, such as the right of access to court (Art. 6) and the right to respect for correspondence and family life (Art. 8). Some positive action is required on the part of the prison authorities to make these rights effective. A prisoner cannot correspond with his legal adviser or anyone else, unless the authorities transmit his letters. He cannot receive visits from members of his family unless arrangements are made for them to come in. He cannot attend a family funeral unless he is allowed temporary release. Yet the case-law of both the Commission and Court shows

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that where a prisoner is refused the necessary permission or facilities in such cases, his inability to exercise the right in question is not to be seen as resulting from the mere fact that he is in prison, or from his own conduct. The refusal of the necessary permission or facilities is, rather, to be seen as an interference with the relevant Convention right by the competent authorities, which may or may not be justifiable under the Convention. This was the approach of the Commission and Court in the Golder case (sup. cit. Series B, Vol. 16 - Report of the Commission) and that of the Commission in cases involving, for instance, the refusal of permission to attend a family funeral (Application No 4623/70, X v. the United Kingdom, Collection of Decisions 39, p. 63; Application No 5229/71, X v. the United Kingdom, Collection of Decisions 42, p. 140).

69. Following the same approach in the present case, the Commission considers that the respondent Government were responsible for an interference with the exercise of the applicant's right to marry.

70. It remains to be considered whether this interference amounted to a breach of that right, or whether it was justified as resulting from national law governing the exercise of the right to marry or by virtue of any implied limitation on the right. In this connection the Commission notes that the effect of the Home Secretary's decision was to impose a delay on the applicant's proposed marriage. It could not take place until he found himself outside prison. The earliest he could have been released on parole was in June 1976, some 15 months later. If, as in fact occurred, he was not granted parole, the possibility of release on home leave did not arise until May 1977, over two years after the decision. In the event the applicant's relationship with his fiancée ended before either period had expired.

71. In considering whether the imposition of such a delay breached the applicant's right to marry, the Commission does not regard it as relevant that he could not have cohabited with his wife or consummated his marriage whilst serving his sentence. The essence of the right to marry, in the Commission's opinion, is the formation of a legally binding association between a man and a woman. It is for them to decide whether or not they wish to enter such an association in circumstances where they cannot cohabit.

72. In the Commission's opinion the imposition by the State of any substantial period of delay on the exercise of this right must in general be seen as an injury to its substance. This is so whether the delay results from national law purporting merely to "govern the

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exercise" of the right, from administrative action, or a combination of both. Further, no general consideration of public interest arising from the fact of imprisonment itself can justify such interference in the case of a prisoner. As the Commission has already pointed out, no particular difficulties are involved in allowing the marriage of prisoners. In addition there is no evidence before the Commission to suggest that, as a general proposition, it is in any way harmful to the public interest to allow the marriage of prisoners. Marriage may, on the contrary, be a stabilising and rehabilitative influence.

73. In the present case the applicant's ability to exercise his right to marry was substantially delayed by the combined effects of national law and administrative action. This amounted, in the Commission's opinion, to an injury to the substance of his right to marry.

74. Conclusion

The Commission therefore finds unanimously that the applicant's right to marry guaranteed by Art. 12 of the Convention, was violated.

Secretary to the Commission — Acting President of the Commission

(H. C. KRÜGER) — (C.A. NØRGAARD)