Sexual Offences : Age of Consent

Summary of Advice to the Scrutiny Panel

FOURTH ADDENDUM

Submission of Deputy Reed

65. The submission states that –

> "Under current Jersey sexual offences Law the absolute age of consent (where there is no legal defence) for girls is 13. The same would apply to young boys if the law is amended as proposed."

66. The Law relating to sexual intercourse with young girls is contained in the *Loi (*1895*) modifiant le Droit Criminel* [Law (1895) modifying the Criminal Law]. This Law enacted for Jersey certain provisions of the Criminal Law Amendment Act 1885 of the United Kingdom.

67. Article 2 deals with sexual intercourse with a girl who has not attained the age of 13 years, and provides that anyone who has or attempts to have sexual intercourse with such a girl is liable to imprisonment up to a maximum of life imprisonment.

68. Article 4 provides, so far as it is relevant, that anyone who has or attempts to have sexual intercourse with a girl who has attained the age of 13 years, but who is below the age of 16, is liable to imprisonment for a term not exceeding 5 years. There is a proviso to the effect that an accused is not to be convicted of the offence if it is shown to the satisfaction of the court that at the time of committing the act he had sufficient reason to believe that the girl had attained the age of 16 years.

69. In summary, sexual intercourse with a girl below the age of 16 years is unlawful. The significance of the age of 13 as a dividing line is –

(a) The maximum sentence which can be imposed: if the girl is below the age of

13, the maximum sentence is life imprisonment, but if she has attained the age of 13, it is 5 years.

(b) There is a defence available if the charge is unlawful sexual intercourse with a girl below the age of 16, inasmuch as the defendant cannot be convicted if he can prove to the court that he had sufficient reason to believe that the girl was over 16. There is no similar defence available in the case of sexual intercourse with a girl below the age of 13.

70. As regards boys, the position is that until the enactment of the Sexual Offences (Jersey) Law 1990, all homosexual intercourse was a criminal offence known as sodomy. The effect of the 1990 Law was to decriminalise homosexual intercourse if both parties to the act consented, both had attained the age of 18 years, and the act took place in private. Homosexual intercourse remained a criminal offence if one partner was below the age of 18 years, but if one partner is below that age there are no further distinctions as there are in the case of girls between a girl under 16 who has attained the age of 13 years and a girl who has not.

71. As sodomy is a crime at customary (common) law, there is no fixed maximum penalty as there is with the statutory offences of unlawful sexual intercourse with girls below the age of 13 or with girls below the age of 16. Such limitations as there are upon the sentences which may be imposed by the Court are those imposed by sentencing principles established by case law, i.e. decisions of the courts. The age of the underage partner would be of relevance, not because of any different maximum penalties have been fixed by statute, but because a sentencing court would be likely as a matter of general principle to take a more serious view of intercourse with a very young boy than it would of intercourse with a relatively older boy.

72. If the proposed amendment becomes Law, the position with regard to sexual intercourse with a girl below the age of consent will remain as I have set out above. As regards sexual intercourse with a boy below the age of consent, there will be no statutory maximum and no statutory distinctions, because the offence will be the customary law offence of sodomy, and customary law offences do not have specified maximums. The sentences imposed by the criminal courts will be imposed in accordance with established sentencing principle. In my opinion, the age of the underage participant will be a relevant factor to be taken into account by the Court when sentencing. If the underage partner were only just below the age of consent, that would be a mitigating factor. If he were a very considerable way below the age of consent, that would be an aggravating factor.

73. The submission argues that to legalise anal intercourse in the full knowledge of

the health issues linked to the practice goes against the principle of Article 8. It is a fact that sexual intercourse can and does result in the spread of sexually transmitted diseases. The implication that anal intercourse carries a greater risk is a medical, rather than a legal, point. Health issues were dealt with at section V of the House of Commons Research Paper 98/68. It is there stated that research suggested that young men were more likely to reduce the risks of HIV infection. I do not consider that legalising anal intercourse is contrary to the principle set out in Article 8.

74. The submission goes on to say that the European Commission found that in the case of Austria a measure that prohibited a male over the age of 19 from engaging in homosexual acts with a person of the same sex who was under that age was compatible with Article 8 of the Convention. I think that this may be based upon paragraph 41 of the report of the European Commission of Human Rights in the case of Sutherland v United Kingdom, where it is said –

> "More recently, the Commission found an Austrian measure, which prohibited a male person over the age of 19 from engaging in homosexual acts with a person of the same sex who was under that age, to be compatible with Article 8 (Art 8) of the Convention, the Commission deciding that the age of "consent" was lower than in the previous case concerning the United Kingdom and that there was nothing to distinguish it from that case, save that the Austrian legislation was less restrictive (No. 17279/90, W.Z. v. Austria Dec. 13.5.92, unpublished; see also No. 22646/93, H V v Austria, Dec. 26.6.95, unpublished)."

75. This paragraph comes in a part of the Commission's report where the Commission is reviewing earlier case law, relied upon by the United Kingdom in the Sutherland case, where a difference in the age of consent had been upheld. The reference in the paragraph to "the previous case concerning the United Kingdom" is a reference to a case summarised in paragraph 40, X. v. the United Kingdom, Application No. 7215/75. In paragraph 42, it is recorded that the Government (i.e., the United Kingdom in arguing the Sutherland case) contended that the Commission should not depart from those decided cases. In paragraph 44, the Commission goes on to say that in the light of the arguments it found it appropriate to examine the issues raised under Article 8 in conjunction with Article 14. An extended consideration of previous cases and of the arguments advanced follows, ending at paragraph 59. That paragraph begins with the words –

> "The Commission, however, observes that its Report in X v. the United Kingdom is now 20 years old."

It then summarises changes which had taken place during the 20 year period.

76. At paragraph 20 the report continues –

> "The Commission, accordingly, considers it opportune to reconsider its earlier case-law in the light of these modern developments and, more especially, in the light of the weight of current medical opinion that to reduce the age of consent to 16 might have positively beneficial effects on the sexual health of young homosexual men without any corresponding consequences."

77. Accordingly, the Commission considered the arguments without regarding itself as bound by the previous decisions, including the Austrian case in which it had held that a measure which prohibited a male over the age of nineteen from engaging in homosexual acts with a person of the same sex who was under that age to be compatible with Article 8 of the Convention. It came to the conclusion that there was no objective and reasonable justification for the maintenance of a higher minimum age of consent to male homosexual, than to heterosexual, acts and that the application disclosed discriminatory treatment in the exercise of the applicant's right to respect for private life under Article 8 of the Convention.

78. In other words, while it is correct to say that the European Commission has in the past found that the discriminatory Austrian legislation was compatible with Article 8 of the Convention, that case preceded Sutherland v United Kingdom, and in the Sutherland case the Commission decided to move away from its previous decisions. Since the report of the Commission in Sutherland v United Kingdom, the decisions of the European Court of Human Rights have all been to the same effect, namely, that a different age of consent for homosexual intercourse and heterosexual intercourse is discrimination, contrary to Article 14 of the Convention, in individuals' enjoyment of the right conferred by Article 8 of the Convention.

79. The submissions refer to the application Small v United Kingdom, comment that an applicant must exhaust all domestic remedies before applying to the European Court of Human Rights, and ask whether the applicant has satisfied that requirement.

80. I should state here that I know very little about Small v United Kingdom. During the course of the Scrutiny Panel hearing which I attended I was given a document by a member of the public which I understand relates to that application, but it was clearly not a copy of the application and I do not think that it could even have been a copy of a draft of the application. I have since been advised that Mr. Small is not prepared to allow the use of his application for the Scrutiny process, the result of which is that I still have not seen it and do not expect to do so.

81. Similarly, I know nothing about the procedures which Mr. Small has followed nor what other steps he has taken. What I can state as a matter of general legal advice is that it appears to me that the requirement that an applicant should exhaust his domestic remedies is of limited relevance in the case of an application such as this, because there are no domestic remedies which can be pursued. If the Human Rights (Jersey) Law 2000 were in force, an aggrieved party would be able to begin by bringing proceedings in the Royal Court, and anyone who had not done so would have failed to exhaust his domestic remedies. The Human Rights Law is however not in force and therefore proceedings for an alleged breach of Articles 8 and 14 based on the difference in the age of consent cannot be commenced in the domestic courts.

82. (I should state here that this does not mean that no proceedings for any breach of the Convention can be brought in the domestic courts. If, for example, a person convicted after a trial in the Royal Court wished to complain that his right under Article 6 to a fair trial had been infringed, he would have to exercise his statutory right of appeal to the Court of Appeal, and then if unsuccessful there petition for special leave to appeal to the Privy Council, before he could petition the European Court. There are however no domestic remedies for this particular allegation.)

83. The submissions give a dictionary definition of sodomy including "any of various unnatural sexual acts, especially between humans and animals", and asks whether, if the States legitimise anal intercourse, they will also legitimise other acts described in the dictionary definition.

84. The legislation which the States are being asked to pass takes the form of an amendment to the Sexual Offences (Jersey) Law 1990. As currently in force, that Law provides that a homosexual act in private shall not be punishable as sodomy if the parties to the act consent and have attained the age of 18 years. The amendment takes the form of substituting the age of 16 for the age of 18 years. The offence of sodomy consists of the act of anal intercourse. All that the 1990 Law did was decriminalise sodomy, that is anal intercourse, for consenting parties over the age of 18 years. The amendment will decriminalise sodomy between consenting parties over the age of 16 years. The amendment will not make lawful any sexual practice such as bestiality, any more than the 1990 law in its original form makes lawful other sexual offences such as bestiality, because those other sexual offences do not constitute the criminal offence of sodomy, which is all the 1990 Law is concerned with.

Application Small v United Kingdom

85. At the Scrutiny Panel hearing I was asked if I could comment upon the fact that

the applicant in Small v United Kingdom apparently complains of breaches of Articles 1, 8 and 14. I said that I did not feel able to comment without sight of the application so as to enable me to see in what way Article 1 has been invoked. At that point I was handed a document by a member of the public. I have since studied the document. It is clearly not the application, and I do not believe that it can even be a draft of the application, as it contains errors of law which I would not expect to be contained in an application made by someone who has a legal adviser, as I understand Mr. Small has.

86. I have subsequently been informed by one of the Scrutiny officers that Mr. Small states that he has "been advised not to allow the use of [his] application within the Scrutiny Process". Although he does not say so in terms, this clearly means that he is not prepared to release a copy of the application for me to see.

87. He goes on to say –

> "… I can however offer this justification for invoking Article 1.
>
> Article 1 of the Convention notes a governments [sic] obligation to respect human rights. As an application [sic], I believe that the government are in breach of this Article by not respecting my human rights."

88. Article 1 of the Convention obliges the contracting states to secure to everyone within their jurisdiction the rights and freedoms prevented by the Convention.

89. While it is difficult for me to comment with complete confidence without having seen a copy of the application, I can say that I think that a specific invocation of Article 1 is misconceived. In Lester & Pannick, Human Rights Law and Practice, it is said at paragraph 4.1.4 –

> "A violation of art 1 follows automatically from, but adds nothing to, a breach of any of the Convention rights and freedoms. <u>Article 1 does not therefore confer enforceable rights upon individuals (as distinct from other contracting states) to complain of a breach of the obligation to secure Convention rights and freedoms.</u>"
> [emphasis added]

90. In my opinion, any reference to Article 1 in the application should be regarded as an irrelevance.

Solicitor General
6th March, 2006