

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 20190/92

C.R.

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 27 June 1994)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is C.R., a British citizen born in 1952 and resident in Leicester. He is represented by Mr. Peter Snow, honorary legal officer of the Campaign for Justice in Divorce.

3. The application is directed against the United Kingdom. The respondent Government are represented by Mr. Huw Llewellyn as Agent, from the Foreign and Commonwealth Office.

4. The case concerns the complaint of the applicant that he was convicted in respect of conduct, namely the attempted rape of his wife, which at the relevant time allegedly did not constitute a criminal offence. It raises issues under Article 7 of the Convention.

B. The proceedings

5. The application was introduced on 31 March 1992 and registered on 19 June 1992.

6. On 12 October 1992, the Commission decided to communicate the application to the respondent Government for their written observations on the admissibility and merits of the complaint raised under Article 7 of the Convention.

7. The Government submitted their written observations on 29 January 1993. The applicant submitted his written observations in reply on 24 March 1993.

8. On 28 June 1993, the Commission decided to invite the parties to an oral hearing on the admissibility and merits.

9. At the hearing which was held on 14 January 1994, the Government were represented by Mr. Huw Llewellyn as Agent, Mr. Alan Moses Q.C., Counsel and Miss Waplinton and Mr. Dawson as Advisers. The applicant was represented by Mr. Peter Snow, legal officer and Mr. R. Guthrie, assistant.

10. On 14 January 1994, the Commission declared admissible the complaint under Article 7 of the Convention. The remainder of the application was declared inadmissible.

11. The parties were then invited to submit any additional observations on the merits of the application.

12. On 21 and 24 March 1994, the applicant submitted further observations.

13. After declaring the case partially admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties' reactions, the Commission now finds that there is no basis on which a friendly settlement can be effected.

C. The present Report

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

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
H.G. SCHERMERS
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
M.P. PELLONPÄÄ
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY

15. The text of the Report was adopted by the Commission on 27 June 1994 and is now transmitted to the Committee of Ministers in accordance with Article 31 para. 2 of the Convention.

16. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

- 1) to establish the facts, and
- 2) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

17. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

18. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. Particular circumstances of the case

19. The facts, as summarised by the Court of Appeal in the applicant's case, are accepted by both parties.

20. The applicant married his wife on 11 August 1984. They had one son, who was born in 1985. On 11 November 1987 the parties separated for a period of about two weeks before becoming reconciled.

21. On 21 October 1989, as a result of further matrimonial difficulties, the wife left the matrimonial home with their son and returned to live with her parents. She had by this time already consulted solicitors regarding her matrimonial affairs and had left a letter for the applicant in which she informed him that she intended to petition for divorce. However no legal proceedings had been taken by her before the incident took place which gave rise to criminal proceedings. The applicant had on 23 October 1989 spoken to his wife by telephone indicating that it was his intention also to "see about a divorce".

22. Shortly before 21.00 on 12 November 1989, 22 days after the wife had returned to live with her parents, and while the parents were out, the applicant forced his way into the parents' house and attempted to

have sexual intercourse with the wife against her will. In the course of that attempt he assaulted her, in particular by squeezing her neck with both hands.

23. The applicant was charged with attempted rape and assault occasioning actual bodily harm. At his trial before the Leicester Crown Court on 30 July 1990 it was submitted that the charge of rape was one which was not known to the law by reason of the fact that the applicant was the husband of the alleged victim. The submission was based on the pronouncement of the common law made by Sir Matthew Hale in his "History of the Pleas of the Crown", p. 629, published in 1736:

"But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

24. The trial judge, Owen J., had ruled that the charge could go to the jury. He commented that he found it hard to believe that it was ever the common law that a husband was in effect entitled to beat his wife into submission to sexual intercourse. He considered however, that there was sufficient evidence to indicate an implied agreement to a separation and a withdrawal of consent which would bring the case outside the alleged marital immunity (see Relevant domestic law and practice paras. 34). He also considered that the common law recognised an exception to the concept of marital immunity where there has been a withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse had been terminated, and that there was again sufficient evidence to indicate that this exception applied in this case.

25. The applicant then pleaded guilty to attempted rape and assault occasioning actual bodily harm, and was sentenced to three years' imprisonment. He appealed.

26. The Court of Appeal held on 14 March 1991 as follows:

"Since the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common law fiction which no longer represented the position of a wife in present-day society, it should no longer be applied. Instead, the principle to be applied was that a rapist remained a rapist subject to the criminal law irrespective of his relationship with his victim. The charge of rape had therefore properly been left to the jury. The appeal would accordingly be dismissed."

27. Even if the principle had not been ineffective, the Court stated that where as in that case a wife had withdrawn from cohabitation in such a way as to make it clear to the husband that the marriage was at end as far as she was concerned the husband's immunity would be lost.

28. The Court of Appeal's decision was unanimously upheld by the House of Lords on 23 October 1991. It considered that Sir Matthew Hale's common law proposition could not preclude the application of section 1 of the Sexual Offences (Amendment) Act 1976 concerning the offence of rape.

29. The House of Lords' judgment was summarised by a Times Law Report dated 24 October 1991 as follows:

"For over 150 years after the publication of Hale's work there appeared to have been no reported case in which judicial consideration was given to this proposition. It may be taken that the proposition was generally regarded as an accurate statement of the common law of England.

The common law was however capable of evolving in the light of

changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in those respects at the time it was enunciated. Since then the status of women and particularly of married women had changed out of all recognition.

Apart from property matters and the availability of matrimonial remedies one of the most important changes was that marriage was in modern times regarded as a partnership of equals and no longer one in which the wife was the subservient chattel of the husband.

Hale's proposition involved that by marriage a wife gave her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happened to be feeling at the time. In modern times any reasonable person had to regard that conception as quite unacceptable.

The position was that part of Hale's proposition had been departed from in a series of decided cases. On the ground of principle there was no good reason why the whole proposition of 'marital exemption' to rape should not be held inapplicable in modern times.

The only question was whether section 1 (1) of the 1976 Act presented an insuperable obstacle to that sensible course. The argument was that 'unlawful' in that subsection meant outside the bond of marriage.

That was not the most natural meaning of the word which normally described something which was contrary to some law or enactment or was done without lawful justification or excuse. Certainly in modern times sexual intercourse outside marriage would not ordinarily be described as unlawful.

If the subsection proceeded on the basis that a woman on marriage gave a general consent to sexual intercourse there could be no question of intercourse with her by her husband being without consent. There would thus be no point in enacting that only intercourse without consent outside marriage was to constitute rape.

There was another important context to section 1 (1), namely the existence of the exceptions to the marital exemption established by cases decided before the Act was passed.

Sexual intercourse in any of the cases covered by the exceptions still took place within the bond of marriage. So if 'unlawful' in the subsection meant 'outside the bond of marriage' it followed that sexual intercourse in a case which fell within the exceptions was not covered by the definition of rape notwithstanding that it was not consented to by the wife.

That involved that the exceptions had been impliedly abolished. If the intention of Parliament was to abolish the exceptions it would have been expected to do so expressly and it was in fact inconceivable Parliament should have had such an intention.

In order that the exceptions might be preserved it would be necessary to construe 'unlawfully' so as to give it a meaning unique to that particular subsection and if the mind of the draughtsman has been directed to the existence of the exceptions he would surely have dealt with them specifically and not in such an oblique fashion.

The fact was it was clearly unlawful to have sexual intercourse with any woman without her consent and that the use of the word in the subsection added nothing. There were no rational grounds for putting the suggested gloss on the word and it should be

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treated as mere surplusage in the enactment.

Section 1 (1) of 1976 Act presented no obstacle to the House declaring that in modern times the supposed marital exemption in rape formed no part of the law of England."

B. Relevant domestic law and practice

Common law

30. Until the applicant's case the English courts, on the few occasions that they were confronted with the issue whether directly or indirectly, had always recognised at least some form of immunity as attaching to a husband from any charge of rape or attempted rape by reason of a notional or fictional consent to intercourse deemed to have been given by the wife on marriage. The eighteenth century proposition of Sir Matthew Hale quoted above (para. 23) has been upheld until recently, for example in the case of R. Kowalski (1987, 86, Cr. App. R 339), which concerned the question of whether or not a wife had impliedly consented to acts which if performed against her consent would amount to an indecent assault. Ian Kennedy J. giving the judgment of the court stated, obiter dicta,

"It is clear, well-settled and ancient law that a man cannot, as actor, be guilty of rape upon his wife"

and he went on to say that that principle was

"dependent upon the implied consent to sexual intercourse which arises from the married state and which continues until that consent is put aside by decree nisi, by a separation order or, in certain circumstances, by a separation agreement".

31. In another example, Lord Justice O'Connor in the R. v. Roberts case (1986 CLR 188) stated:

"The status of marriage involves that the woman has given her consent to her husband having intercourse with her during the subsistence of the marriage ... she cannot unilaterally withdraw it."

32. On 20 November 1990, in R.v. J. (1991 1 AER 759), Mr Justice Rougier upheld the general common law rule, considering :

"...there is an important general principle to be considered here, and that is that the law, especially the criminal law, should be clear so that a man may know where he stands in relation to it. I am not being so fanciful as to suppose that this defendant carefully considered the authorities and took Counsel's advice before behaving as alleges, but the basic principle extends a long way beyond the bounds of this case and should operate to prevent a man being convicted by means of decisions of the law ex post facto".

33. In its Working Paper 116 "Rape within Marriage" completed on 17 September 1990, the Law Commission stated:

"2.8 It is generally accepted that, subject to exceptions (considered at paragraphs 2.12-2.26 below), a husband cannot be convicted of raping his wife...Indeed there seems to be no recorded prosecution before 1949 of a husband for raping his wife..."

"2.11 The immunity has given rise to a substantial body of law about the particular cases in which the exemption does not apply. The limits of this law are difficult to state with certainty. Much of it rests on first instance decisions which have never been comprehensively reviewed at appellate level..."

34. The Law Commission identified the following exceptions to a husband's immunity:

- where a court order has been made, in particular:

a. where an order of the court has been made which provides that a wife should no longer be bound to cohabit with her husband (Clarke 1949 33 Cr App R 216);

b. where there has been a decree of judicial separation or a decree nisi of divorce on the ground that "between the pronouncement of decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality" (O'Brien 1974 3 AER 663);

c. where a court has issued an injunction restraining the husband from molesting the wife or the husband has given an undertaking to the court that he will not molest her (Steele 1976 65 Cr App R 22);

d. in the case of Roberts (1986 Crim LR 188), the Court of Appeal found that where a non-molestation order of 2 months had been made in favour of the wife her deemed consent to intercourse did not revive on expiry of the order.

- where no court order has been made:

e. Lynskey J. observed, obiter, in Miller (1954 2 QB 282), that a wife's consent would be revoked by an agreement to separate, particularly if it contained a non-molestation clause;

f. Geoffrey Lane LJ stated, obiter, in Steele (loc. cit.) that a separation agreement with a non-cohabitation clause would have that effect.

35. The Law Commission noted that it was stated in Miller (loc. cit.) and endorsed by the Court of Appeal in Steele (loc.cit) that lodging a petition for divorce would not be sufficient.

36. The Law Commission referred also to the ruling by the trial judge in the case of R. v. R.. where an implied agreement to separate was considered sufficient to revoke the immunity and that even in the absence of agreement, the withdrawal from cohabitation by either party accompanied by a clear indication that consent to sexual intercourse had been terminated, would operate to exclude the immunity. It found this view difficult to reconcile with previous authorities and that it appeared substantially to extend what had previously been thought to be the law.

37. The Law Commission made, inter alia, the provisional proposal that "the present marital immunity be abolished in all cases" (5.2) which would be effected by legislation.

Sexual Offences (Amendment) Act 1976

38. Section 1 (1) of the Sexual Offences (Amendment) Act 1976 provides, in so far as it is material, as follows:

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if

- (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it..."

The position in Scotland

39. An exemption was also enjoyed by a husband in respect of rape of
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his wife under the applicable law in Scotland based on Hume's "Criminal Law of Scotland" first published in 1797.

40. In two cases (HM Advocate v. Duffy 1983 SLT 7 and H.M. Advocate v. Paxton 1985 SLT 96), the High Court of Justiciary held that the exemption did not apply where the parties to a marriage were no longer cohabiting.

41. Following those cases, the High Court proceeded to hold in S v. H.M. Advocate (1989 SLT 469) that the fiction of implied consent and a husband's immunity from a prosecution upon a charge of rape of his wife no longer applied and that "the only question is whether or not as a matter of fact the wife consented to the acts complained of".

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

42. The Commission has declared admissible the applicant's complaint that he has been convicted in respect of conduct which at the relevant time did not constitute a criminal offence.

B. Point at issue

43. The issue to be determined is whether there has been a violation of Article 7 (Art. 7) of the Convention.

C. Article 7 (Art. 7) of the Convention

44. Article 7 (Art. 7) of the Convention provides as relevant:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed...

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

1. General considerations

45. Article 7 para. 1 (Art. 7-1) reflects the principle, found also in other provisions of the Convention in the context of requirements that interferences with or restrictions in the exercise of fundamental rights must be "in accordance with law" or "prescribed by law", that individuals should be able to regulate their conduct with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible - an individual must have an indication of the legal rules applicable in a given case - and he must be able to foresee the consequences of his actions, in particular, to be able to avoid incurring the sanction of the criminal law.

46. In the context of "prescribed by law" the Court set the standard of foreseeability to that of reasonable certainty:

"...a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in

terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

(Eur. Court H.R., the Sunday Times judgment of 26 April 1979, Series A no. 30 p. 31, para. 49)

47. In a common law system, not only written statutes but also rules of common or other customary law may provide sufficient legal basis for the criminal convictions envisaged in Article 7 (Art. 7) of the Convention.

48. Where law is developed by application and interpretation of courts in a common law system, their law-making function must remain within reasonable limits. Article 7 para. 1 (Art. 7-1) excludes that any acts not previously punishable should be held by the courts to entail criminal liability or that existing offences should be extended to cover facts which previously did not clearly constitute a criminal offence (see eg. No. 8710/79, Dec. 7.5.82, D.R. 28 p. 77).

49. It is however compatible with the requirements of Article 7 para. 1 (Art. 7-1) for the existing elements of an offence to be clarified or adapted to new circumstances or developments in society insofar as this can reasonably be brought under the original concept of the offence. The constituent elements of an offence may not however be essentially changed to the detriment of an accused and any progressive development by way of interpretation must be reasonably foreseeable to him with the assistance of appropriate legal advice if necessary (see eg. Nos. 8710/79, loc. cit., 10505/83, Dec. 4.3.85, D.R. 41 p. 178 and No. 13079/87, Dec. 6.3.87, D.R. 60 p. 256).

50. In a common law system therefore, the courts may exercise their customary role of developing the law through cases but in doing so may not exceed the bounds of reasonably foreseeable change.

2. Application to the present case

51. The applicant submits that his conviction for the attempted rape of his wife concerned conduct which did not at the relevant time constitute a criminal offence under United Kingdom law. He contends that the general rule that a husband could not commit the offence of rape against his wife was universally accepted until 1990. While exceptions to this principle had developed, these were strictly limited to circumstances where, for example, there had been a court order or formal separation agreement. The facts of this case do not disclose any mutual separation agreement between the applicant and his wife. There was no authority for the proposition that a wife could unilaterally withdraw her consent. Furthermore, in the applicant's case, the Court of Appeal and the House of Lords acknowledged that they were changing the law, not merely clarifying it. Accordingly, in the applicant's submission, the courts went beyond reasonable interpretation of the existing law and extended the definition of the offence in such a way as to include facts which hitherto had not constituted a criminal offence.

52. The Government submit that the applicant's conviction for the attempted rape of his wife was in conformity with Article 7 (Art. 7) of the Convention. By the relevant time, Hale's proposition that a wife's consent to sexual intercourse was irrevocable was no longer good law. English law did not therefore recognise any absolute immunity conferred on a husband who had sexual intercourse with his wife without her consent. There was, in their view, case-law indicating that a husband could be guilty of raping his wife where, for example, a court had issued a decree nisi of divorce or a non-molestation order; where there was an agreement express or implied between the parties which made it clear that the implied consent of the wife was revoked; and where there had been a withdrawal of either party from cohabitation accompanied by a clear indication that consent to sexual intercourse had been terminated.

53. The Government contend that in the present case the facts indicated that the applicant's wife had revoked her consent by mutual agreement with the applicant. Even if the decisions of the courts were based rather on the fact that a wife was able unilaterally to withdraw her consent, this was a reasonable interpretation of the existing law in the light of changing social circumstances and clarified the existing elements of the offence.

54. The Commission recalls that the applicant was convicted of attempted rape following an incident on 12 November 1989 in which he had broken into his wife's parents' house, assaulted his wife and attempted to force her to have sexual intercourse with him. His submission that he could not be prosecuted for attempted rape since husbands enjoyed an immunity in respect of their wives was rejected by the trial judge and his appeal against his resulting conviction rejected by the Court of Appeal and House of Lords.

55. The Commission does not find that the basic ingredients of the offence of rape were thereby changed when the Court of Appeal, and subsequently the House of Lords reviewed the application of Hale's principle of marital immunity and declared in effect that the immunity no longer applied. The offence continued to consist of unlawful sexual intercourse with a woman without her consent as provided in the Sexual Offences (Amendment) Act 1976. A purported immunity based on a presumption as to one ingredient of the offence - consent - however was definitively removed.

56. It is apparent from case-law of the courts, legal textbooks and the Law Commission's examination of the state of the law that by 1989 the general immunity afforded to a husband in respect of prosecution for rape of his wife had already been subject to a number of exceptions. It was established that in certain circumstances a wife's deemed consent would be considered as having been revoked: in particular where a court order affecting the relationship of the parties had been made or where the parties to a marriage had entered into a separation agreement.

57. Further by 1989, the High Court of Justiciary in Scotland had already come to the conclusion that a similar marital immunity was no longer valid and that the only question was whether a wife consented to the acts in question.

58. In the present case, the trial judge, when rejecting the applicant's submission that marital immunity applied, doubted the extent to which it could ever have been permissible under the common law for a husband to beat his wife into having sexual intercourse with him. In any event he considered that there was sufficient evidence to indicate an implied agreement to a separation by the parties which would bring the case outside the immunity. He also considered that the common law recognised an exception to the concept of marital immunity where there had been a withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse had been terminated.

59. In light of the above, the Commission considers that by November 1989 there was significant doubt as to the validity of the alleged marital immunity for rape. As stated by the Court of Appeal in the applicant's case, lip service had been paid to the alleged general rule while the courts at the same time increased the number of exceptions. That there was uncertainty as to the width of the exceptions is apparent from the Law Commission working Paper examining the question.

60. The Commission finds that this was an area in which the law had been subject to progressive development as courts increasingly found Hale's notion of implied consent by a wife inapplicable to situations where the ordinary relations created by marriage no longer subsisted. While there was no express authority for the proposition that an

implied agreement of separation between husband or wife or unilateral withdrawal of consent by the wife would bring a case outside the marital immunity, the Commission takes the view that in the present case where the applicant's wife had withdrawn from co-habitation and there was de facto separation with the expressed intention of both to seek a divorce, there was a basis on which it could be anticipated that the courts could hold that the notional consent of the wife was no longer to be implied. In particular, given the recognition by contemporary society of women's equality of status with men in marriage and outside it and of their autonomy over their own bodies, the Commission considers that this adaptation in the application of the offence of rape was reasonably foreseeable to an applicant with appropriate legal advice.

61. The Commission is also of the opinion that it is inconceivable that the applicant when he embarked on the course of conduct in question could have held any genuine belief that it was lawful.

62. Consequently, the Commission finds that the judgments of the domestic courts in the applicant's case did not go beyond legitimate adaptation of the ingredients of a criminal offence to reflect the social conditions of the time and that the applicant was not as a result convicted of conduct which did not constitute a criminal offence at the time at which it was committed.

CONCLUSION

63. The Commission concludes, by 14 votes to 3, that there has been no violation of Article 7 para. 1 (Art. 7-1) of the Convention.

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)

(Or. English)

CONCURRING OPINION OF MRS. J. LIDDY

1. In 1984 the Criminal Law Revision Committee was of the view by a narrow majority that there should be no change in the basic principle whereby a husband was immune from any charge of rape by reason of a fictional consent to intercourse deemed to have been given by the wife on marriage. A minority was of the view that the law should be changed so that in all marriages a husband could be convicted of rape, but the Government did not act on this minority opinion and did not introduce in Parliament a bill to amend the law. The majority and the minority of the Criminal Law Revision Committee were apparently united in recommending that an attempt be made to amend the law to enable a prosecution to be brought for rape where a married couple were not cohabiting, although they foresaw difficulties of definition and a possibility of uncertainty. Again, no bill to amend the law even to this limited extent was introduced in Parliament by the Government.

2. On 12 November 1989 the applicant attempted by force to have sexual intercourse with his recently estranged wife at her parents' home, which he had forced his way into. He was subsequently charged with attempted rape and assault.

3. On 30 July 1990 the trial judge ruled that there were exceptions to the immunity where there was (a) an implied agreement to separate and (b) withdrawal from cohabitation accompanied by a clear indication that consent to sexual intercourse had been terminated. Neither of these exceptions had been indicated, even obiter, in earlier case-law. The applicant was convicted of attempted rape and assault. He appealed.

4. On 17 September 1990 the Law Commission reviewed the state of case-law concerning exceptions to the immunity. It commented that the

trial court's ruling was difficult to reconcile with previous authorities and that it appeared substantially to extend what had previously been thought to be the law.

5. On 14 March 1991 the Court of Appeal in *R. v. R.* said that the immunity should no longer be applied.

6. On 23 October 1991 the House of Lords in *R. v. R.* declared that the immunity no longer formed part of the law. Having reviewed the exceptions to the immunity established by case-law the House of Lords said "Those cases illustrate the contortions to which judges have found it necessary to resort in face of the fiction of implied consent to sexual intercourse."

7. Article 7(1) excludes that any acts not previously punishable should be held by the courts to entail criminal liability. On the other hand, case-law may clarify the existing elements of the offence and adapt them to new circumstances which can reasonably be brought under the original concept of the offence (D.R. 28 p. 77).

8. In the present case the act of forcibly having sexual relations with one's recently estranged wife had not previously been thought to be unlawful, as is evidenced by the Law Commission's Report. The applicant's conviction was ultimately based on the House of Lords judgment sweeping away the immunity.

9. This judgment was not a clarification of the existing elements of the offence of rape, but a fundamental change of the law. The change may have been prompted by judicial impatience with the legislature and professional reluctance to engage in further "contortions" of the law, but its effect is to criminalise acts which may have been performed years or decades before that judgment,

10. This reasoning would lead to a finding of a violation of Article 7 (1), were it not for the fact that the Convention has to be read as a whole. Article 17 states "Nothing in this Convention may be interpreted as implying for any ... person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

11. One of the rights guaranteed by the Convention is the right to private life, including integrity of the person, and including the right of a woman to effective measures by means of criminal law provisions whereby there is deterrence against rape (*X. and Y. v. Netherlands*, Series A, no. 91). This right was identified by the Court as long ago as 1985.

12. In the case of *Lawless v. Ireland* (Series A, No. 3 p.45 para. 7) the Court stated that "the purpose of Article 17, insofar as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights or freedoms set forth in the Convention ... in the present case *G. R. Lawless* has not relied on the Convention in order to justify or perform acts contrary to the rights and freedoms recognised therein ..."

13. The same cannot be said of the present applicant. He is indisputably seeking to rely on Article 7 to justify the act of attempting to force his wife to have sexual intercourse with him in 1989, an act aimed at destroying her right to bodily integrity. However, Article 17 precludes him from deriving from the Convention justification for his conduct or a finding that the United Kingdom authorities infringed his fundamental rights by punishing such conduct after a fair trial.

(Or. English)

DISSENTING OPINION OF MR. L. LOUCAIDES
JOINED BY MR. M.A. NOWICKI

I am unable to agree with the majority that there has been no violation of Article 7 (para. 1) of the Convention in this case.

I base my disagreement on the following reasons.

(a) Article 7 (para. 1) excludes that any act not previously punishable shall be held by the courts to entail criminal liability or that existing offences should be extended to cover facts which previously clearly did not constitute a criminal offence. This implies that constituent elements of an offence may not be essentially changed, at least not to the detriment of the accused, by the case law of the courts. Existing elements of the offence may be simply clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence.

(b) On 12 November 1989 the applicant attempted, by force, to have sexual intercourse with his recently estranged wife at her parents' home, into which he had forced his way. He was subsequently charged with rape and assault.

(c) At the time of the applicant's act, for which he was later on charged and convicted for rape, it was a clear and well-settled law in England that a man cannot be guilty of rape upon his wife, he being the actor, for the wife was considered in general unable to retract the consent to sexual intercourse which was part of the contract of marriage. This principle was set out in the main text books on English criminal law and it has been repeatedly upheld by the English courts. For example in the case of *R. v. Kowalski* (1987, 86, Cr, App. R 339), Ian Kennedy J. giving the judgment of the court stated, obiter dicta, "It is clear, well-settled and ancient law that a man cannot, as actor, be guilty of rape upon his wife" and he went on to say that that principle was

"dependent upon the implied consent to sexual intercourse which arises from the married state and which continues until that consent, is put aside by decree nisi, by a separation order or in certain circumstances, by a separation agreement".

Also, Mr. Justice Rougier in *R. v. J.* in November 1990 found that the accused in the case before him should not be convicted ex post facto of rape of his wife.

The general immunity afforded to husbands in respect of prosecution for rape of his wife has been subject to certain specified exceptions, none of which was applicable to the facts of the present case. That the English law on the subject in question was as set out above is further evidenced by the reviews of the Law Commission referred to in the Report of the Commission in this case.

(d) The legal basis for the conviction of the applicant is found in the judgment of 23 October 1991 of the House of Lords in *R. v. R.* In the judgment, the House of Lords has for the first time declared that the immunity in question no longer formed part of the law because it was an anachronistic and an offensive fiction which should be swept away.

(e) I find that as a result of the above judgment, the law as regards one of the existing elements of the offence of rape, i.e., consent, has been fundamentally changed to the applicant's detriment. It was neither a clarification of the existing elements of the offence in question, nor an adaptation of such elements to new circumstances which could reasonably be brought under the original concept of the offence. In sum, I believe that the House of Lords, by their judgment in question, made criminal a conduct which was previously not sanctioned by the criminal law.

The fact that a change of the law so as to remove the above-mentioned immunity was necessary does not make any difference for the purposes of the principle safeguarded under Article 7 para. 1 of the Convention. Such change could have been effected through legislation. A change through the case-law of the courts could not have been reasonably foreseeable to the applicant even with the assistance of legal advice and consequently, in my view, there has been a breach of that Article in this case.

Before concluding, I would like to answer briefly the question of the applicability of Article 17 raised by Mrs. J. Liddy in her separate opinion. Article 17 states that "Nothing in this Convention may be interpreted as implying for any ... person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." In my opinion, Article 17 is intended to exclude the abuse of any of the specific rights safeguarded by the Convention for any of the purposes set out in the same Article. The applicant at the time of the commission of the act for which he was found guilty of rape was not purporting to exercise his rights under Article 7 (para. 1) of the Convention. These rights only arose at the time of his conviction.

(Or. French)

OPINION DISSIDENTE DE M. I. BÉKÉS

Je ne partage pas l'avis de la majorité lorsqu'elle estime qu'il n'y a pas eu violation de l'article 7 de la Convention.

Le requérant se plaint d'avoir été condamné pour tentative de viol de sa femme alors qu'au moment de la commission des faits, ceux-ci ne constituaient pas une infraction pénale en vertu du droit anglais.

S'agissant de la question de la légalité des infractions et des peines, il importe de présenter les textes juridiques pertinents.

Aux termes de l'article 1 (1) de la loi anglaise de 1976 relative aux infractions sexuelles; "un homme commet un viol si (a) il a des relations sexuelles illégales avec une femme qui au moment de l'acte n'est pas consentante ...". Deux notions je semblent essentielles : l'absence de consentement et l'illégalité.

En vertu du droit coutumier (common law), qui en l'espèce résulte de la proposition de Sir Matthew Hale publiée en 1736, le mari ne peut être coupable de viol envers son épouse. En effet, selon ce droit, les liens du mariage créent une présomption irréfragable de consentement de la femme à son époux. Dès lors, celui-ci ne saurait être considéré pénalement responsable d'aucun acte sexuel illégal envers sa femme.

Ce principe, qualifié d'"exemption matrimoniale de viol", confère au mari une immunité pénale pour ce qui est de l'ensemble des relations sexuelles qu'il entretient avec son épouse indépendamment du consentement de celle-ci.

C'est tout au moins ainsi que j'interprète les règles du droit anglais pertinentes dans cette affaire.

En l'espèce, pour condamner le requérant; la "House of Lords" jugé qu'à l'époque des faits, il ressortait clairement des termes de la loi de 1976 que toute relation sexuelle avec une femme non consentante constituait un viol et donc une infraction pénale, et donc que "l'exemption matrimoniale de viol" ne faisait plus partie intégrante du droit anglais.

Notre Commission a estimé qu'en statuant de la sorte, les juridictions anglaises n'avaient pas excédé leur devoir légitime de

clarification du droit pénal au regard des conditions sociales de l'époque et qu'en conséquence, le requérant n'avait pas été condamné pour une action qui au moment où elle avait été commise ne constituait pas un crime.

Je pense pour ma part que les juridictions anglaises ont excédé leur pouvoir d'interprétation du droit écrit. Certes, le droit coutumier est par nature sujet à modification au regard notamment de l'évolution des mentalités et des comportements, mais il n'en demeure pas moins que l'on ne saurait lui substituer ex abrupto une règle du droit écrit. En effet, pareille interprétation extensive de la loi emporte une incertitude juridique pour le mari, incertitude que l'évolution des mœurs ne saurait aucunement justifier.

A mon sens, la solution eut été de légiférer en excluant expressément l'immunité pénale du mari en cas de relation sexuelle non consenties par l'épouse. A défaut, j'estime que l'immunité pénale du mari consacrée par la common law constituait à l'époque de la commission des faits le règle de droit applicable au sens de l'article 7 de la Convention et qu'en conséquence, les juridictions anglaises ne pouvaient légitimement condamner le requérant pour le viol de son épouse.

Il y a donc eu violation de l'article 7 de la Convention.

J'aimerais enfin ajouter, que s'il est vrai que d'un point de vue moral cette règle coutumière est anachronique, il appartient justement à notre Commission de distinguer la morale de l'exigence de sécurité juridique des ressortissants des Etats parties. La présente affaire lui donnait l'opportunité de se pencher sur cette question et de poser des lignes directrices pour l'avenir. Je regrette que tel n'en ait pas été le cas.

Appendix I

HISTORY OF THE PROCEEDINGS

| Date | Item |
|------------------------------|--|
| 31.03.92 | Introduction of the application |
| 19.06.92 | Registration of the application |
| Examination of admissibility | |
| 12.10.92 | Commission's decision to invite the parties to submit observations on the admissibility and merits |
| 29.01.93 | Government's observations |
| 24.03.93 | Applicant's reply |
| 08.04.93 | Commission's decision to grant the applicant legal aid |
| 28.06.93 | Commission's decision to invite the parties to an oral hearing |
| 14.01.94 | Hearing on admissibility and merits |
| 14.01.94 | Commission's decision to declare the application admissible |
| Examination of the merits | |
| 14.01.94 | Commission's deliberations |

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21.03.94 Applicant's observations on the merits
13.05.94 Consideration of the state of proceedings
27.06.94 Commission's deliberations on the merits, final
votes and adoption of the Report