

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 20166/92

S.W.

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 S.W., a British citizen born in 1963 and detained in HM Prison Erlstoke. He is represented by Messrs. S.P. Groves, solicitors practising in Farnham.

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 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 29 March 1992 and registered on 18 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 application.

7. The Government submitted their written observations on 29 January 1993. The applicant submitted his written observations in reply on 31 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. Alan Tyrell Caplan Q.C., Counsel, Mr. Robert Hill, Counsel, Mr. Purvaise Punwar, Counsel and Mr. Simon Groves, Solicitor.

10. On 14 January 1994, the Commission declared the application admissible.

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

12. On 2 March 1994, the applicant submitted further observations.

13. After declaring the case 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 applicant married his wife in August 1987. Their relationship was turbulent and the marriage came under great strain in 1990 with the applicant becoming unemployed. Prior to the evening of 18 September 1990 the wife and the applicant had been sleeping separately - for one night (according to the applicant), five nights (according to the wife). The wife had been thinking of leaving the applicant for some weeks and told him in the early evening of 18 September 1990. The applicant did not accept that she meant what she said and there was a row, during which the applicant ejected his wife from the house, bruising her arm. The police were called and following their visit, the applicant's wife re-entered the house. Later that same evening the applicant forcibly and violently had sexual intercourse with his wife to the extent that he assaulted her, placed her in fear of further violence and threatened to kill her.

20. On 19 September 1990 the applicant was charged with rape, contrary to section 1 (1) of the Sexual Offences Act 1956, threatening to kill, contrary to section 16 of the Offences against the Person Act 1861, and assault occasioning actual bodily harm, contrary to section 47 of the latter Act.

21. On 30 July 1990, the defendant in the case of R. v. R. had been convicted in the Crown Court for an offence of attempted rape against

his wife. The trial judge, Owen J., had rejected a submission that the defendant husband could not be convicted in light of the common law principle that a husband cannot commit the offence of rape on his wife. The principle was derived from the statement of common law of England as given by Sir Matthew Hale in his "History of Pleas for the Crown" published in 1736:-

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

22. 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 para. 32). 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. The defendant R. then pleaded guilty to attempted rape and assault occasioning actual bodily harm, and was sentenced to three years' imprisonment.

23. On 14 March 1991, the Court of Appeal rejecting that applicant's appeal in R. v R. had declared that the general principle of marital immunity was anachronistic and an offensive common law fiction which should no longer be applied. 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 an end as far as she was concerned the husband's immunity would be lost.

24. At the commencement of his trial on 16 April 1991, the present applicant contended that -

(a) the judgment of the Court of Appeal of 14 March 1991 in the case of R. v. R. was not binding on the trial judge in his case insofar as it purported to change the principle that a husband cannot rape his wife, since the Court of Appeal was bound by its own previous decision in R. v. Steele;

(b) the decision in R. v. R., insofar as it is purported to change the principle, infringed Article 7 para. 1 of the Convention;

(c) although the Convention was not part of the law of England, Article 7 para. 1 had to be incorporated into the law of the European Community by the decision of the European Court of Justice in R. v. Kirk (1984) ECR 2689 (at page 2718), and was thus part of the law of England.

25. The trial judge, Rose J., assumed for the purposes of his judgment that submissions (b) and (c) were possibly correct in principle, but held that this case fell within the exception contained in Article 7 para. 2 of the Convention, and he therefore rejected the submissions.

26. On 19 April 1991 the applicant was found guilty by the jury of all three offences. He was sentenced to five years' imprisonment for rape, two years' imprisonment for making threats to kill and three months' imprisonment for assault occasioning actual bodily harm.

27. The applicant lodged an appeal against conviction and sentence

in which he repeated the submissions set out in paragraphs (a) to (c) above.

28. On 23 October 1991 the House of Lords dismissed the further appeal by the defendant in R. v. R. and declared, inter alia, that the common law was capable of evolving in the light of changing social, economic and cultural developments, and that the general principle that a husband cannot rape his wife no longer formed part of the law of England and Wales. In these circumstances the applicant was advised by his lawyers on 3 January 1992 that the prospects of success of his appeal against conviction were hopeless. He, therefore, withdrew it on 15 January 1992. His appeal against sentence was dismissed by the Court of Appeal on 30 July 1992.

## B. Relevant domestic law and practice

### Common law

29. Until the case of R. v. R. the English courts, on the few occasions when 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 (see para. 21) 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".

30. 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."

31. 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 alleged, 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".

32. 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

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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..."

33. 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.

34. 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.

35. 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.

36. 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

37. 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

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(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

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

39. 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.

40. 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

41. 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

42. 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

43. 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

44. 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.

45. 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)

46. 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.

47. 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 offences (see eg. No. 8710/79, Dec. 7.5.82, D.R. 28 p. 77).

48. 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).

49. 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

50. The applicant submits that his conviction for 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 did 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 case of R. v. R. 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.

51. The Government submit that the applicant's conviction for the rape of his wife was in conformity with Article 7 (Art. 7) of the Convention. They submit that, 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.

52. 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.

53. The Commission recalls that the applicant was convicted of rape following an incident on 18 September 1990 in which he had threatened and assaulted his wife and forced her to have sexual intercourse with him. His submission that he could not be prosecuted for rape since husbands enjoyed an immunity in respect of their wives was rejected in light of the judgment of the Court of Appeal in R.v. R.

54. 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 in R. v. R. 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.

55. 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 1990 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.

56. 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.

57. In the case of R. v R., the defendant was convicted on 30 July 1990 of attempted rape of his wife in circumstances where she had left the matrimonial home and he had forced his way into her parents' house where he had assaulted and tried to rape her. The trial judge in rejecting a 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 has been a withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse had been terminated. An appeal challenging the correctness of the trial judge's ruling was pending at the time of the incident in this case.

58. In light of the above, the Commission considers that by September 1990 there was significant doubt as to the validity of the alleged marital immunity for rape. As stated by the Court of Appeal in

the case of R. v. R., 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.

59. 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. There were strong indications that still wider interpretation by the courts was probable. In particular, given the recognition by contemporary society of women's equality of status with men in marriage and outside it and their autonomy over their own bodies, the Commission is of the opinion that the adaptation in the application of the offence of rape was reasonably foreseeable to an applicant with appropriate legal advice.

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

61. Consequently, the Commission finds that the judgments of the domestic courts in the case of R. v. R. 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 which it was committed.

#### CONCLUSION

62. The Commission concludes, by 11 votes to 6, that there has been no violation of Article 7 para. 1 (Art. 7-1) of the Convention.

U

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 17 September 1990 the Law Commission reviewed the state of case-law concerning exceptions to the immunity. With regard to the statements of the trial judge in R.v. R. (30 July 1990) concerning the exceptions of (a) implied agreement to separate and (b) withdrawal from cohabitation accompanied by a clear indication that consent to sexual intercourse had been terminated, the Law Commission considered that these represented a substantial extension of what had previously been thought to be the law. It recommended that the immunity be abolished by legislation.

3. The following day, 18 September 1990, the applicant forcibly had

sexual intercourse with his wife in their home, and was subsequently charged with rape, threatening to kill and assault.

4. On 20 November 1990 in R. v. J. the courts confirmed that the immunity continued to be part of 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 19 April 1991 the applicant was convicted of rape (and also of threatening to kill and assault) on the basis of the Court of Appeal's decision in R. v. R.

7. 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."

8. 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).

9. In the present case the act of forcibly having sexual relations with one's wife in the home had not previously been punishable as rape, although a charge of assault could lie and attract a different penalty. The applicant's conviction was based on the Court of Appeal's decision in R. v. R. sweeping away the immunity. This was not a clarification of the existing elements of the offence but a fundamental change of the law. The change upheld by the House of Lords 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 the case of R. v. R.

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 forcing his wife to have sexual intercourse with him in 1990, 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.

14 For these reasons I consider that there has been no violation of Article 7.

Or. English

DISSENTING OPINION OF MR. L. LOUCAIDES JOINED BY  
MM. S. TRECHSEL, M. A. NOWICKI AND I. CABRAL BARRETO

I regret that I am unable to agree with the opinion of the majority of the Commission that there has been no violation of Article 7 para. 1 of the Convention.

I agree with the majority that by 1990 the general immunity afforded to a husband in respect of prosecution for rape of his wife had been subject to certain exceptions ie. 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. However, the general principle continued to exist: as is apparent from the judgment of Mr. Justice Rougier in R. v J. as recently as November 1990 who found that the accused in the case before him should not be convicted ex post facto of rape of his wife .

The conviction of the applicant in this case is due to the judicial determination of the case of R. v. R. up to the Court of Appeal. The trial judge in R. v. R. had held, in rejecting the defendant husband's submission that he fell within the marital immunity, that in any event even if the immunity did continue to exist, 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. However before the case of R. v. R. there had been no other authority suggesting that an implied agreement between the parties would be sufficient or that a wife could by unilateral action withdraw her consent. Indeed there were judicial dicta to the contrary (see paras. 33-34).

In the case of this applicant, his submission as to the applicability of the immunity was not rejected on the basis that he fell within one of the exceptions. Even assuming that, in light of the ruling at first instance in R. v. R., the exceptions could be construed as including circumstances where there was an implied agreement or where the wife had unilaterally withdrawn from cohabitation, at the same time clearly indicating the withdrawal of consent to intercourse, it is apparent that the circumstances of the applicant's case fell outside such exceptions. At the time of the incident, the applicant and his wife were co-habiting and it would have been difficult to argue that any unequivocal agreement or incontrovertible step towards separation had taken place.

As pointed out by the applicant, this was the first case where a husband still co-habiting with his wife was convicted of rape. The immunity was held not to apply to him because of the decision of the Court of Appeal, subsequently upheld by the House of Lords, that the immunity was an anachronistic and an offensive fiction which should be swept away. In so holding, I find that an immunity based on a historic legal presumption as to one ingredient of the offence of rape - lack of consent - was definitively removed to the applicant's detriment.

I do not consider that the abolition of this immunity in its entirety can be construed as mere clarification of the existing elements of an offence or as any adaptation of such elements to new circumstances which can reasonably be brought under the original concept of the offence. In the case of the applicant, the removal of

the immunity resulted in the application of the criminal law to conduct which had never previously constituted an offence. This step would have not been reasonably foreseeable to the applicant even with the assistance of legal advice.

I have considered whether nevertheless the facts of this case fall within the scope of Article 7 para. 2 as involving the punishment of a person for an act which at the time at which it was committed was criminal according to the general principles of law recognised by civilised nations. The travaux préparatoires indicate that this provision in the Convention was intended to cover prosecution of crimes against humanity in the context of the post-Second World War Nuremberg trials. While it cannot be excluded that other conduct might fall within the ambit of the paragraph, I am of the opinion that there is insufficient general consensus as regards marital rape, similar immunities existing, or existing until recently in a number of common law jurisdictions.

Consequently, I find that the applicant was convicted of conduct which did not constitute a criminal offence at the time at which it was committed. I would emphasise that this finding does not in any way condone the conduct in question or validate the marital immunity which husbands were afforded by Hale's principle (see para. 29 above). I would subscribe unconditionally to the sentiments expressed by the Court of Appeal and House of Lords in the case of *R. v. R.* as regards the offensive nature of the principle. Prior to its removal, an issue might indeed have arisen as regards a failure on the behalf of the United Kingdom to fulfill a positive obligation to ensure respect for a wife's rights. The 1990 Law Commission Working Paper provisionally proposed abolition of the principle by way of legislation. The principle was instead abolished by the courts with a retrospective effect which is not compatible with the requirements of Article 7 para. 1 of the Convention.

I conclude that there has been on the facts of this case a violation of Article 7 para. 1 of the Convention.

#### Appendix I

##### HISTORY OF THE PROCEEDINGS

Date	Item
29.03.92	Introduction of the application
18.06.92	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
31.03.93	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
02.03.94	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