

## EUROPEAN COMMISSION OF HUMAN RIGHTS

Application Nos. 21627/93, 21826/93 and 21974/93

Colin LASKEY, Roland JAGGARD and Anthony BROWN

against

the United Kingdom

## REPORT OF THE COMMISSION

(adopted on 26 October 1995)

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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 first applicant, a British citizen born in 1943, was resident in Pontypridd until his death in 1995. The second and third applicants are British citizens, born in 1947 and 1935 respectively, and resident in Welwyn Garden City and Yardley. The first applicant's family are represented before the Commission by Miss Anna Worrall, Q.C. and Miss Eleanor Sharpston, counsel, and Messrs. Hughmans, solicitors; the second applicant by Mr. Angus Hamilton, a solicitor practising in London and Mr. Adrian Fulford, counsel and the third applicant by Miss Anna Worrall, Q.C. and Ivan Geffens, solicitors.

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

4. The case concerns the complaints of the applicants that their prosecution and conviction in respect of sado-masochistic acts carried out in private discloses a violation of their right to respect for their private life.

B. The proceedings

5. The applications were introduced on 14 December 1992. The first applicant's complaints were registered under No. 21627/93 on 8 April 1993, those of the second applicant on 12 May 1993 under No. 21826/93 and those of the third applicant on 4 June 1993 under No. 21974/93.

6. On 30 August 1993, the Commission decided to join the first and third applications. It also decided to communicate all three applications to the respondent Government and to ask for written observations on their admissibility and merits.

7. The Government's observations were submitted on 3 December 1993 after an extension of the time-limit fixed for this purpose, and the applicants' observations in reply were submitted on 26 March 1994, also after an extension of the time-limit.

8. On 27 June 1994, the Commission decided to join the second application to the other two. It also decided to hold an oral hearing on the admissibility and merits of the three applications.

9. At the hearing which was held on 18 January 1995, the parties were represented as follows. The Government were represented by Mr. Ian Christie as Agent, Mr. D. Pannick Q.C., Counsel and Mr. R. Heaton and Mr. J. Toon as Advisers. The applicants were represented by Ms. A. Worrall Q.C., Ms. E. Sharpston, Mr. P. Duffy and Mr. T. Eicke as Counsel, by Mr. A. Hamilton, Mr. I. Geffen and Mr. J. Wadham as Solicitors and by Ms. N. Pollard, legal assistant. Mr. Laskey and Mr. Jaggard, applicants, were also present.

10. On 18 January 1995, the Commission declared admissible the applicants' complaints concerning alleged violation of their right to respect for their private life. The remainder of the complaints were declared inadmissible.

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

12. On 11 May 1995, the applicants submitted supplementary material.

13. On 14 May 1995, the first applicant died. On 23 August 1995, the first applicant's legal representatives submitted a statement by his father, Mr. Ernest Laskey, his next-of-kin, concerning his wish to continue the application. By letter dated 4 October 1995, the Government submitted that the application should be struck out. Having regard, however, to the criminal conviction of the first applicant and its impact on the reputation of himself and his family, the Commission decided that, in the circumstances of this case, the first applicant's father may claim to have sufficient legitimate interest to justify the continuing of the case.

14. 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

15. 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. S. TRECHSEL, President  
 H. DANELIUS  
 C.L. ROZAKIS  
 C.A. NØRGAARD  
 G. JÖRUNDSSON  
 A.S. GÖZÜBÜYÜK  
 J.-C. SOYER  
 H.G. SCHERMERS  
 F. MARTINEZ  
 Mrs. J. LIDDY  
 MM. L. LOUCAIDES  
 J.-C. GEUS  
 M.A. NOWICKI  
 N. BRATZA  
 I. BÉKÉS  
 J. MUCHA  
 E. KONSTANTINOV  
 G. RESS

16. The text of the Report was adopted by the Commission on 26 October 1995 and is now transmitted to the Committee of Ministers in accordance with Article 31 para. 2 of the Convention.

17. 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.

18. The Commission's decision on the admissibility of the application is attached as Appendix.

19. 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

20. The applicants, with 10 others, were charged with a series of offences, including assault and wounding, relating to acts which took place in the course of sado-masochistic encounters between the applicants and other homosexual men. The encounters took place with one exception between men of full age. (One charge involved a defendant who was not yet 21 and who was alleged to have procured or counselled the first applicant to assault another person.) The acts consisted in the main of maltreatment of the genitalia (with, for example, hot wax, sandpaper, fish hooks and needles) and ritualistic beatings either with the assailant's bare hands or a bizarre variety of implements, including stinging nettles, spiked belts and a cat-o'-nine tails. There were instances of branding and infliction of injuries which resulted in the flow of blood and which left scarring. These activities were consensual (save for one single indication that there may not have been consent to the second branding of a person in bondage) and were conducted in private for no apparent purpose other than the achievement of sexual gratification. The infliction of pain was subject to certain rules including the provision of a code word to be used by any "victim" to stop an "assault", and did not lead to any instances of infection, permanent injury or the need for medical attention.

21. The applicants belonged to a group of men who had been involved in these activities over a ten-year period from 1978. The activities took place at a number of locations, including rooms equipped as torture chambers. Video cameras were used to record events and the tapes copied and distributed amongst members of the group. The prosecution was largely based on the contents of the video tapes which came into the possession of the police. There was no suggestion that the tapes had been sold or used other than by the members of the group.

22. The applicants pleaded guilty to the assault charges after the trial judge ruled on 19 November 1990 that they could not rely on the consent of the alleged "victims" as an answer to the prosecution case.

23. On 19 December 1990, the defendants were convicted and sentenced. The first applicant was convicted on eight counts of assault contrary to section 47 of the Offences Against the Person Act 1861 (OAPA), one count of wounding contrary to section 20 of the OAPA and of a number of other offences including aiding and abetting the keeping of a disorderly house. He was sentenced to a total of four years and six months' imprisonment.

24. The second applicant was convicted on one count of aiding and abetting unlawful wounding, one count of unlawful wounding, two counts of assault occasioning actual bodily harm and one count of aiding and abetting an assault occasioning actual bodily harm. He was sentenced to a total of three years' imprisonment.

25. The third applicant was convicted on five counts of assault occasioning actual bodily harm and one count of aiding and abetting an assault occasioning actual bodily harm. He was sentenced to a total of

two years and nine months' imprisonment.

26. The applicants, and three co-defendants, appealed against conviction on the ground that the trial judge's ruling was wrong.

27. On 19 February 1992, the Court of Appeal dismissed the appeals against conviction. It reduced the first applicant's sentence of imprisonment as regards the charge of aiding and abetting the keeping of a disorderly house to 18 months, and as regards the assaults and wounding to 6 months: a total of 2 years together. It reduced the second applicant's sentence of imprisonment to six months and that of the third applicant to three months. The Court commented that it was prepared to accept that the applicants and their co-defendants did not appreciate that their actions in inflicting injuries were criminal and that the sentences should be lenient to reflect this.

28. The applicants and two of their co-defendants appealed on the following certified point of law of public importance to the House of Lords:

"Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 and section 47 of the 1861 Offences against the Person Act?"

29. On 11 March 1993, the appeal, known as the case of R. v. Brown, was dismissed by a majority of the House of Lords, two of the five law lords dissenting.

30. Lord Templeman, in the majority, held after reviewing the case-law:

"...the authorities dealing with the intentional infliction of bodily harm do not establish that consent is a defence to a charge under the Act of 1861. They establish that consent is a defence to the infliction of bodily harm in the course of some lawful activities. The question is whether the defence should be extended to the infliction of bodily harm in the course of sado-masochistic encounters..."

Counsel for the appellants argued that consent should provide a defence...because it was said every person has a right to deal with his own body as he chooses. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be taken. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally. In any event the appellants in this case did not mutilate their own bodies. They inflicted harm on willing victims..."

In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty..."

Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised."

31. Lord Jauncey found that:

"In my view the line falls properly to be drawn between assault at common law and the offence of assault occasioning actual bodily harm created by section 47 of the 1861 Act, with the result that consent of the victim is no answer to anyone charged with the latter offence... unless the circumstances fall within one of the well known exceptions such as organised sporting contests or games, parental chastisement or reasonable surgery ...the infliction of actual or more serious bodily harm is an unlawful activity to which consent is no answer.

... Notwithstanding the views which I have come to, I think it right to say something about the submissions that consent to the activity of the appellants would not be injurious to the public interest.

Considerable emphasis was placed by the appellants on the well-ordered and secret manner in which their activities were conducted and upon the fact that these activities had resulted in no injuries which required medical attention. There was, it was said, no question of proselytising by the appellants. This latter submission sits ill with the following passage in the judgment of the Lord Chief Justice:

'They [Laskey and Cadman] recruited new participants: they jointly organised proceedings at the house where much of this activity took place; where much of the pain inflicting equipment was stored.

Cadman was a voyeur rather than a sado-masochist, but both he and Laskey through their operations at the Horwich premises were responsible in part for the corruption of a youth "K" who is now it seems settled into a normal heterosexual relationship.'

Be that as it may, in considering the public interest it would be wrong to look only at the activities of the appellants alone, there being no suggestion that they and their associates are the only practitioners of homosexual sado-masochism in England and Wales. This House must therefore consider the possibility that these activities are practised by others and by others who are not so controlled or responsible as the appellants are claiming to be. Without going into details of all the rather curious activities in which the appellants engaged it would appear to be good luck rather than good judgment which has prevented serious injury from occurring. Wounds can easily become septic if not properly treated, the free flow of blood from a person who is H.I.V. positive or who has Aids can infect another and an inflicter who is carried away by sexual excitement or by drink or drugs could very easily inflict pain and injury beyond the level to which the receiver had consented. Your Lordships have no information as to whether such situations have occurred in relation to other sado-masochistic practitioners. It was no doubt these dangers which caused Lady Mallalieu to restrict her propositions in relation to the public interest to the actual rather than the potential result of the activity. In my view such a restriction is quite unjustified. When considering the public interest potential for harm is just as relevant as actual harm. As Mathew J. said in *Coney* 8 Q.B.D. 534, 547:

'There is however abundant authority for saying that no consent can render that innocent which is in fact

dangerous'.

Furthermore, the possibility of proselytisation and corruption of young men is a real danger even in the case of these appellants and the taking of video recordings of such activities suggest that secrecy may not be as strict as the appellants claimed to your Lordships."

32. The two dissenting members of the House of Lords differed in their opinion.

33. Lord Mustill considered that the case should not be treated as being about the criminal law of violence but rather as concerning the criminal law of private sexual relations. He gave weight to the arguments of the appellants concerning Article 8 of the Convention, finding that the decisions of the European authorities clearly favoured the right of the appellants to conduct their private life undisturbed by the criminal law. He considered after an examination of previous precedents that it was appropriate for the House of Lords to tackle afresh the question whether public interest required penalising the infliction of this degree of harm in private on a consenting recipient, where the purpose was not profit but gratification of sexual desire. He found no convincing argument on grounds of health (alleged risk of infections or spread of AIDS), the alleged risk of the activities getting out of hand or any possible risk of corruption of youth which might require the offences under the OAPA to be interpreted as applying to this conduct.

34. Lord Slynn found that as the law stood adults were able to consent to acts done in private which did not result in serious bodily harm. He agreed that it was in the end a matter of policy in an area where social and moral factors were extremely important and where attitudes could change. It was however for the legislature to decide whether such conduct should be brought within the criminal law and not for the courts in the interests of "paternalism" to introduce into existing statutory crimes relating to offences against the person concepts which did not properly fit there.

B. Relevant domestic law and practice

Offences against the person

35. Section 20 of the Offences Against the Person Act 1861 (OAPA) provides as amended:

"Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, with or without any weapon or instrument, shall be guilty of <an offence>... and shall be liable...<to a maximum penalty of five years' imprisonment>."

36. To constitute a wound for the purposes of the section, the whole skin must be broken, not merely the outer layer or epidermis.

37. Section 47 of the OAPA provides as amended:

"Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable ... to a maximum penalty of five years' imprisonment ."

Case-law prior to R. v. Brown

38. In the case of Rex v. Donovan (1934 2 KB 498), the accused had beaten with a cane a girl for the purposes of sexual gratification,

with her consent. Swift J. held:

"it is an unlawful act to beat another person with such a degree of violence that the infliction of actual bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."

39. In Attorney-General's Reference (No. 6 of 1980) (1980 QB 715) where two men quarrelled and decided to fight each other, Lord Lane CJ in the Court of Appeal had held:

"it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc? These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases."

### III. OPINION OF THE COMMISSION

#### A. Complaint declared admissible

40. The Commission has declared admissible the applicants' complaints that their prosecution and conviction for offences of assault and wounding in the course of consensual sado-masochistic activities constituted an interference with their right to respect for their private life.

#### B. Points at issue

41. The issue to be determined is whether the prosecution and conviction of the applicants for offences committed in the context of consensual sado-masochistic activities discloses a violation of Article 8 (Art. 8) of the Convention:

#### C. Article 8 (Art. 8) of the Convention

42. Article 8 (Art. 8) of the Convention provides as relevant:

"1. Everyone has the right to respect for his private ... life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

43. The applicants complain that the convictions for assault and wounding disclose interferences with their right to respect for their private life under Article 8 para. 1 (Art. 8-1) of the Convention which are not justifiable under the second paragraph. They submit that they have been penalised in respect of sexual acts, which took place wholly in private between consenting adults. They contend that there is no justification for interference with such an intimate aspect of their

private lives. They submit that their conduct involved relatively minor levels of physical harm that did no permanent lasting damage and that there is no real evidence of any risk to health or danger to morals resulting from such conduct.

44. The applicants submit that the fact that the acts committed may have shocked or offended certain members of the public, when publicised through prosecution, is not sufficient justification for criminalising consensual private adult sexual activities. The penalty of imprisonment which was imposed is especially disproportionate in these circumstances and is also unnecessary having regard to ample provision in English law to protect minors and vulnerable adults, to protect public decency, to protect against solicitation for sexual purposes and to prohibit violence. They also point out that there are other situations in which more serious forms of injury are lawful (eg. boxing).

45. The Government submit that any interference disclosed by the applicants' prosecution and conviction is necessary for the protection of morals and the protection of health and accordingly justified under the second paragraph of Article 8 (Art. 8). They refer to the "very broad margin of appreciation" accorded to Contracting States in areas touching morality (see eg. Eur. Court H.R. Handyside judgment of 7 December 1976, Series A no. 24 and Muller judgment of 24 May 1988, Series A no. 133). In their submission, it is open to a Contracting State to regard some acts of violence as so damaging to morality and health that the law must prohibit their infliction irrespective of the consent of the victim. Where the line has to be drawn between those injuries to which a person can consent to infliction upon himself and those which are so serious that consent is immaterial is a matter of public policy. They argue that the decision of the House of Lords in this case to exclude consent as a defence to actual bodily harm is well within their margin of appreciation, having regard to cogent factors such as society's moral rejection of violent sado-masochism, the risks of serious injury and infection and possible adverse effect on the young.

Article 8 paragraph 1 (Art. 8)

46. The Commission notes that the Government do not contest that the imposition of criminal penalties on the applicants in this case constituted an interference with their right to respect for private life under the first paragraph of Article 8 (Art. 8) of the Convention.

47. The Commission finds that the conduct of the applicants, carried out in private and for the purpose of mutual sexual gratification, must be regarded as falling within the scope of this provision. It must therefore be determined whether this interference complied with the requirements of the second paragraph of Article 8 (Art. 8).

Article 8 paragraph 2 (Art. 8-2)

48. For an interference to be justified under the second paragraph, it must be "in accordance with the law", pursue one or more of the legitimate aims enumerated in this provision and be "necessary in a democratic society" for the realisation of one or more of those aims.

"in accordance with the law"

49. The Commission notes that in their initial submissions the applicants argued that their convictions were not "in accordance with the law" since it could not reasonably have been foreseen that the Offences Against the Person Act 1861 (OAPA) would have been applied to consensual sexual activities carried out in private.

50. The Commission and Court's case-law indicate that "in accordance with the law" firstly, requires that an interference must have some basis in domestic law and secondly, refers to the quality of the law, in particular, that it should be accessible to the person concerned who must be able to foresee its consequences for him (eg. Eur. Court H.R., Kruslin and Huvig judgments of 24 April 1990, Series A nos. 176-A p. 20 para. 27 and 176-B p. 52 para. 26).

51. The Commission recalls that in the present case it has already considered the applicants' complaints under Article 7 (Art. 7) of the Convention that they were convicted of conduct which did not constitute a criminal offence at the time when it was committed. In its decision on admissibility (see Annex) in which this complaint was rejected as manifestly ill-founded, the Commission found that while, as accepted by the Court of Appeal, the applicants may not have realised that their conduct was criminal, nonetheless the application of the offences under the OAPA to their conduct must be regarded as having been reasonably foreseeable to an applicant with appropriate legal advice.

52. The Commission finds that this reasoning must apply, *mutatis mutandis*, to this aspect of the applicants' complaints under Article 8 (Art. 8). Consequently, the interference was "in accordance with law".

Legitimate aim or aims

53. The Government have stated that the convictions of the applicants pursued the aims of the protection of health and morals. The applicants have not submitted argument to the contrary. Having regard in particular to the detailed judgments given by the House of Lords, the Commission accepts the Government's submission.

"Necessary in a democratic society"

54. The case-law of the Convention organs establishes that the notion of necessity implies that an interference corresponds to a pressing social need and that it is proportionate to the aim pursued. Further, in determining whether an interference is necessary, the Commission and Court will take into account that a margin of appreciation is left to the Contracting States, which are in principle in a better position to make an initial assessment of the necessity of a given interference (see eg. Eur. Court H.R. Olsson judgment of 24 March 1988, Series A no. 130 pp. 31-32 para. 67).

55. The Commission notes that the interference in this case concerns conduct which the applicants describe as consensual sexual behaviour and which the majority of the judges in the House of Lords and the Government have emphasised as being characterised by violence. The Commission considers that it cannot be disputed that the applicants pursued mutual sexual gratification through their activities. It adopts the approach taken by the Court in the Dudgeon case, which concerned the prohibition under the criminal law in Northern Ireland of adult male homosexual acts. Matters of sexual orientation and practice are of a highly personal nature and concern a most intimate aspect of private life:

"Accordingly there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes of paragraph 2 of the Article 8 (Art. 8)."

(Eur. Court H.R. Dudgeon judgment of 22 October 1981, Series A no. 45 p. 21 para. 52)

56. In this context, it is also appropriate to recall the reference in assessing necessity to the standards of a "a democratic society" two of the hallmarks of which are tolerance and broadmindedness (Dudgeon

loc. cit. p. 21 para. 53). Thus the fact that there were members of the public who might be shocked, offended or disturbed by the commission by others of private homosexual acts was not found by the Court in Dudgeon to warrant on its own the application of penal sanctions when it was consenting adults alone who were involved (Dudgeon loc. cit. p. 24, para. 60).

57. In light of these considerations, the Commission has examined whether there is any justification for the imposition of criminal penalties on the applicants for activities, which were carried out in private and between consenting adults.

58. The Government have submitted that the interference is justified for the protection of health. They argue that domestic criminal law is entitled to prohibit sado-masochistic assaults which cause actual bodily harm or wounding irrelevant of the consent of the victims. Since a line must be drawn somewhere in respect of the infliction of injury by one person on another, the State must enjoy a broad margin of appreciation as to where the limit is set.

59. The applicants dispute that their conduct caused risks to health. It involved relatively minor physical harm that sometimes involved breaking the skin: they did not intend to cause, and did not in fact cause any really serious harm. They point to lawful activities such as tattooing, cosmetic surgery, circumcision, boxing and other sports where consent is sufficient to preclude offences being charged for what would be similar, if not more severe, physical injury being inflicted.

60. The Commission accepts that respect for the health and rights of others may justify a State in prohibiting activities which cause or risk causing death or serious injury or in imposing certain protective measures (cf. No. 7992/77 dec. 12.7.77, D.R. 14 p. 234 concerning the use of motorcycle helmets and 10083/82 dec. 4.7.83 D.R. 33 p. 270 concerning aiding and abetting suicide). Under the Convention however any prohibition or restriction which constitutes an interference with a guaranteed right under Articles 8, 9, 10 and 11 (Art. 8, 9, 10, 11) must be justified as being necessary in a democratic society. In particular, under Article 8's (Art. 8) guarantee for respect for private life, it is not for the applicant to put forward good reasons or show that he falls within an accepted social category (practice of sport or religion etc) to be exempt from measures which invade his sphere of personal autonomy.

61. The Commission notes that the applicants claim that no serious permanent injury was caused by their activities and that none was established as having been caused before the domestic courts. Having regard however to the types of activities eg. piercing of genitalia, branding, prolonged beating, the Commission finds that the injuries cannot be considered to be of a trifling or transient nature. It is not for the Commission to enter into an analysis of categories of physical injury offences at domestic law ie. assault, wounding, grievous bodily harm. The types of injuries that were or could be caused by the applicants' activities were of a significant nature and degree. The fact that United Kingdom domestic law appears to tolerate the deliberate infliction of more serious harm in the context of boxing is not a persuasive argument: the Commission would merely note that boxing is increasingly becoming subject to protective measures in Contracting States.

62. As regards the applicants' arguments that criminal conviction for the infliction of these injuries is disproportionate, given the length of sentence imposed and the nature of the interference with personal autonomy involved, the Commission is of the opinion that the conduct in question in these cases was, on any view, of an extreme nature.

There was also an aspect of organisation - the Commission recalls for example that a significant number of people were involved, that rooms in various locations were specially equipped and that while the conduct was private in essence, it came to light through videos which were being disseminated. It was not a question of the State trespassing into a private bedroom. The Commission does not consider that the prosecution of the applicants can be considered as heralding an invasion into the private lives of people generally or as being particularly aimed at homosexuals. The parties were unaware when asked by the Commission of a subsequent prosecution having been brought in any similar case.

63. The Commission is satisfied that the conviction of the applicants for assault and wounding in the circumstances of this case was not disproportionate and falls within the margin of appreciation to be accorded to the Government as regards the imposition of measures to protect its citizens from physical injury. Consequently, the Commission finds that the interference with the applicants' right to respect for their private life may be considered as "necessary in a democratic society" for the aim of protecting health.

64. Having regard to the finding above, the Commission finds it unnecessary to consider whether, as the Government have also argued, there exists a "pressing social need" for prohibiting the applicants' conduct on the ground of the protection of morals.

#### CONCLUSION

65. The Commission concludes, by 11 votes to 7, that there has been no violation of Article 8 (Art. 8) of the Convention.

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(S. TRECHSEL)

(Or. English)

#### CONCURRING OPINION OF MR. N. BRATZA JOINED BY MR. M.A. NOWICKI

I share the conclusion and reasoning of the majority of the Commission that there has been no violation of the rights under Article 8 of any of the present applicants. I wish to add only a few points by way of amplification of the Commission's reasoning.

In the domestic proceedings it was accepted by the applicants that a line had to be drawn somewhere between those injuries which a person could consent to have inflicted upon himself and those which were so serious that consent was immaterial. As appears from the report of the proceedings, all the appellants in the House of Lords agreed that assaults occasioning actual bodily harm should be below the line but there was disagreement as to whether all offences against section 20 of the 1861 Act should be above the line or only those resulting in grievous bodily harm.

It seems to me that in terms of Article 8 of the Convention it is similarly a question of where the line is to be drawn or, more accurately, whether the United Kingdom exceeded the margin of appreciation afforded under the Article in drawing the line so as to prohibit not only the infliction of serious bodily harm on another (which the applicants consider would be justified) but also the wounding of another or the infliction on him of actual bodily harm, even in a case where such harm is inflicted in private, with the consent of the "victim" and in a sexual context.

In my view the State did not exceed this margin in prohibiting activities which involved the infliction of injuries on another which were of more than a trifling or transient nature, whether or not they could be characterised as serious or permanent and whether or not the injuries took the form of wounding or of some other form of bodily harm. Not only is it likely to be difficult in many cases to determine whether the injury actually caused is properly to be characterised as serious and as to whether, if falling within section 20 it is properly to be treated as wounding or as grievous bodily harm, but, as was pointed out by the majority of the House of Lords, the evidence in the present case itself discloses that the practices of the applicants were unpredictably dangerous and gave rise to obvious risks of serious personal injury.

It is argued that, if death or serious personal injury were to result, those responsible would be punished according to the ordinary law and that this factor cannot justify penalising the applicants' conduct where such extreme consequences did not ensue. It is further contended that there was and is no evidence of the seriousness of the hazards to which sado-masochistic activities of the kind involved gives rise and that such risks were in any event diminished by the pre-arranged "rules" governing such activities.

I am unable to accept these arguments. As the Commission has pointed out, it is apparent from the description of the activities engaged in (eg piercing of the genitalia, branding, prolonged beating) that the injuries sustained cannot be considered to be of a trifling or transient nature. Moreover, the nature of the activities was such that, even in the absence of evidence as to the seriousness of the injuries which might have been sustained or which may have resulted in other cases or on other occasions, the House of Lords was in my view entitled to conclude that they gave rise to real and obvious risks of serious bodily injury, whatever the nature of the rules applied between the participants. It further seems to me that the House of Lords legitimately had regard to these risks in concluding that the public interest demanded that activities which intentionally inflicted injuries on another should continue to be prohibited, notwithstanding that the "victim" consented to the acts, that the acts were done in private and in a sexual context and that no permanent injuries were in fact sustained by him.

In Convention terms the reasons given by the majority of the House of Lords for considering that there was a pressing social need to prohibit social activities were both relevant and sufficient.

Considerable reliance was placed by the applicants on the fact that other activities which were intended to and did cause physical injury were lawful as a matter of English law, even though the injury sustained or likely to be sustained was of a similar, if not more severe, character. In particular, the example of professional boxing was cited, where injury to an opponent is not only intended but frequently caused but which remains nevertheless a lawful activity in English law.

I do not find this argument compelling. It does not in my view follow from the fact that an exception to the established rule that consent is no defence to assault occasioning actual bodily harm has been developed through the case-law in relation to boxing, that a similar exception should be applied in other cases or that the rule itself is not a response to a pressing social need. I am in any event not convinced that any true comparison can be drawn between the activities in question in the present case and professional boxing, which is subject to official controls including strict compulsory

medical supervision.

I am likewise not persuaded that the fact that different approaches are or may be adopted in the legal systems of other Member States of the Council of Europe should lead the Commission to the conclusion that there has been a violation. Not only do there appear to be significant differences in the substantive law and procedural rules applicable in the various Member States in the area of assaults causing physical harm to another, but the mere fact that activities of the kind in question would not, or might not, have constituted an offence in other States, or that no prosecution would or might have ensued, does not in my view mean that the penalising of the applicant's activities in the United Kingdom was a breach of Article 8 of the Convention (cf. Eur. Court H.R., Handyside case, judgment of 29 April 1976, Series A, no. 24, para. 57).

(Or. English)

DISSENTING OPINION OF MR L. LOUCAIDES  
JOINED BY MM. S. TRECHSEL, H.G. SCHERMERS, C.L. ROZAKIS,  
J.-C.GEUS, J. MUCHA AND E. KONSTANTINOV

I am unable to agree with the view of the majority in this case that the interference in the private life of the applicants was justified. I base my opinion on the following reasons.

The activities for which the applicants were convicted of the offences of assault and wounding were carried out in private between consenting adults.

The majority found that the conviction of the applicants was not disproportionate and falls within the margin of appreciation to be accorded to the Government as regards the imposition of measures to protect its citizens from physical injury and that consequently the interference with the applicants' right to respect for their private life may be considered as "necessary in a democratic society" for the aim of protecting health.

However, in the present case the domestic courts do not refer to any permanent or serious harm or injury being caused in the course of the applicants' activities. Nor was it established that a real risk of such harm or injury existed in the circumstances of this case. The risk of activities getting out of hand could be met effectively by the existing provisions of the criminal law because in such a situation either there will be no consent or serious harm will be caused. While mention has been made of AIDS and the risk of infection from bloodletting activities in both domestic and Commission proceedings this risk has not been substantiated. At any rate the risk of infection with the AIDS virus arises in lawful adult heterosexual and homosexual acts and cannot by itself be used as a ground for prohibiting private sexual activities.

I attach particular importance to the fact that in the legal system of the respondent State activities which cause injury or are inherently dangerous to health are generally considered lawful by the mere fact that they are consented to. A typical example is the case of boxing which may cause more severe physical injury than the activities of the Applicants and where violence is glorified with the result that it may incite others to engage in it.

On 15 October 1995 two professional boxers died as a result of a boxing match. It has not been shown that the sado-masochistic acts of the applicants risk to have comparable consequences.

For the margin of appreciation of the State to be acceptable justification it must not be arbitrary or lead to inconsistencies. It appears that the treatment of activities which may cause physical injury by the legal system of the respondent State is not consistent. Apart from the example of boxing one may refer also to cosmetic surgery and tattooing where consent is sufficient to preclude offences being brought.

The Government have also relied on the protection of morals as justifying prohibition of the sado-masochistic behaviour under consideration. It is important to note in this respect that the English criminal law does not punish sado-masochistic acts as such and that the activities of the applicants in this case were merely covered by the offences of assault and wounding. This is indicative of the fact that the punishment of the activities in question was not associated with moral considerations. Such activities were treated as impermissible or unacceptable basically because of their violent character. I believe that when the protection of morals is invoked in order to justify an interference with private life in the form of criminal sanctions the relevant moral considerations must have been the *raison d'être* of such sanctions and not an *ex post facto* justification. The offences of assault and wounding are intended to protect physical integrity and not morals.

As the Court has stated it is not enough for the acts to shock, disturb or offend. There must be some additional element which necessitates state interference. This element has not been established in this case.

As regards the risk to the young and vulnerable it should be noted that the offences with which the applicants were charged did not involve minors. Furthermore criminal offences already exist under United Kingdom law for the protection of minors. It cannot be assumed and certainly it has not been established that the applicants form of sexual activities poses in its nature any greater risk of involvement of the young and vulnerable than any other form of homosexual or heterosexual relations.

If we accept that the interference in question is legitimate we inevitably open the way to Governments to intrude into persons' bedrooms to investigate allegations, for example, that spouses engage in sado-masochistic activities. Strong good reasons are necessary for such a course which in my opinion are lacking.

In light of the above I find that the Government have not put forward any convincing justification for the prohibition under the criminal law of the applicants' consensual private behaviour which resulted in minor forms of bodily harm. I am therefore of the opinion that the conviction of the applicants for assault and wounding cannot be considered as "necessary in a democratic society" for the aims of protecting health or morals.