

IN THE SUPREME COURT OF GIBRALTAR

2009 C No 272

IN THE MATTER OF a Reference by the Chief Minister under the Constitution (Declaration of Compatibility) Act 2009 and proceedings issued by the Claimants under CPR 40.20

BETWEEN:

- (1) THE CHIEF MINISTER OF GIBRALTAR
(2) HER MAJESTY'S ATTORNEY GENERAL FOR GIBRALTAR
Claimants

-and-

- (1) EQUALITY GROUP GGR
(2) THE SECRETARY OF STATE FOR FOREIGN AND
COMMONWEALTH AFFAIRS
Interested Parties

-and-

- (1) UNITE
(2) THE EVANGELICAL ALLIANCE
Interveners

Mr R Rhoda QC with Ms K Khubchand for the Claimants
Mr J Restano for Equality Group GGR
Ms G Guzman with Mr J Santos for the Secretary of State for Foreign and
Commonwealth Affairs
Mr K Azopardi with Mr K Navas for UNITE
Mr C Gomez with Mr R Sharma for the Evangelical Alliance

JUDGMENT

DUDLEY J:

1. This is an action in which the Claimants seek declarations as to

"...whether and if so how the difference in treatment between homosexual men on the one hand and heterosexuals and lesbian women on the other as regards the differing ages of consent for sexual intercourse, buggery and sexual activity in Part XII of the Criminal Offences Act and therefore the different circumstances in which they can be prosecuted violates sections 1, 7 and/or 14 of the Constitution.

Alternatively whether it violates the Constitution on any other ground."

Procedural Background

2. The action was originally brought by the Chief Minister and the Attorney General pursuant to CPR 40.20 which empowers the court to make "*binding declarations whether or not any other remedy is claimed*" albeit as the commentary to the rule makes clear the jurisdiction to grant declaratory relief is not derived from the rule which merely allows for the grant of a declaration in the absence of other relief.

3. Following the enactment of the Constitution (Declaration of Compatibility) Act the claim was amended to reflect that it was also being pursued pursuant to its provisions. Section 2 of that Act empowers the Chief Minister or any other Minister authorised by him to seek declaratory relief from the Supreme Court as to whether any Act, subsidiary legislation or any Bill for an Act, or any provision thereof is compatible with the Constitution.

4. For reasons set out in my ruling of 22nd July 2010 I allowed Equality Group GGR ("GGR") and the Secretary of State for Foreign and Commonwealth Affairs ("the Secretary of State") to be joined as Interested Parties and UNITE, the union and the Evangelical Alliance to advance submissions as Interveners.

The Statutory Provisions

5. Although undoubtedly the primary issue which falls for determination is the constitutionality of the differences between the ages of consent for heterosexual vaginal sex and homosexual anal sex the statutory provisions in the Criminal Offences Act ("the Act") which fall for consideration extend beyond this and it is therefore useful to set them out together with a brief exposition of their effect.

“107.(1) A man who has unlawful sexual intercourse with a girl under the age of thirteen is guilty of an offence and is liable on conviction to imprisonment for life.

...

108.(1) Subject to the exceptions mentioned in this section a man who has unlawful sexual intercourse with a girl not under the age of thirteen but under the age of sixteen is guilty of an offence and is liable on conviction to imprisonment for two years.

...”

Thereafter under the heading “*Unnatural Offences*”

115.(1) A person who commits buggery with another person or with an animal is guilty of an offence and is liable on conviction to imprisonment for life.

(2) A person who attempts to commit buggery with another person or with an animal is guilty of an offence and is liable on conviction to imprisonment for ten years.

116. A man who commits an act of gross indecency with another man, whether in public or in private, or is a party to the commission by a man of an act of gross indecency with another man, or procures the commission by a man of an act of gross indecency with another man is guilty of an offence and is liable on conviction to imprisonment for two years.

116A. (1) Where the acts constituting the offences referred to in sections 115 and 116, occurred in private between two men who consented thereto and at the time were over the age of 18—

(a) in the case of section 115, neither of such persons shall be guilty of an offence;

(b) in the case of section 116—

(i) neither of such persons committing the acts shall be guilty of an offence; and

(ii) the person who procures the commission of such acts, shall not thereby be guilty of an offence.

(2) An act which would otherwise be treated for the purposes of this section as being done in private, shall not be so treated if done—

(a) when more than two persons take part or are present; or

(b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise.

...”

6. The relevant effect of these provisions for present purposes can be summarised as follows:

(i) Pursuant to sections 107 and 108 (subject to certain defences) it is an offence for a man to have sexual intercourse with a girl under the age of 16. Although strictly it is no offence for a woman to have sexual intercourse with a boy under the age of 16 it would constitute the offence of indecent assault on a man contrary to section 118 of the Act or of indecent conduct towards a child contrary to section 119.

(ii) Under the rather pejorative title of "*unnatural offences*" section 115 creates the offence of buggery whether with another person or with an animal. As drafted the section creates a gender neutral offence. However, section 116 creates the offence of gross indecency between men whether the act is undertaken in private or in public. Section 116A decriminalises the acts constituting the offences under those sections when the offence occurs in private between two men over the age of 18 with both consenting. An act is not in private where two or more men take part or are present or if it takes place in a lavatory to which the public have access.

7. Although the fundamental matter which falls for determination and which has become the shorthand reference to this case is the "age of consent" applicable to heterosexual and homosexual sexual relations the issues raised are slightly wider and both for GGR and the Secretary of State it is submitted that the aforesaid provisions of the Criminal Offences Act violate sections 1, 7 and 14 of the Constitution in that:

- (i) An age of consent is set for vaginal intercourse for women but not for men.
- (ii) Sexual relations between men under 18 constitutes an offence whilst heterosexual and lesbian sexual relations for those over 16 are legal.
- (iii) Group homosexual sexual activity is a criminal act whilst similar heterosexual or lesbian activity is not criminalised.

- (iv) Whilst 2 men over the age of 18 may engage in anal sex it is an offence for heterosexual partners to engage in such an act.

The Constitution

8. Although it is not in issue that sections 1, 7 and 14 in Chapter 1 of the Constitution of Gibraltar 2006 (“the Constitution”) are engaged it is useful to consider in some detail the various provisions and their interplay. The relevant passage of section 1 of the Constitution provides:

“It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of any ground referred to in section 14(3), but subject to the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely-

...
(c) the right of the individual to protection for his personal privacy, ...

subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

9. Also not in issue that section 1 is not merely preambular but vests rights albeit subject to the terms of its proviso. In the present case that section 1 vests rights is of no real consequence in that the substantive rights invoked are to be found in sections 7 and 14.

10. Section 7 establishes the right to respect for “*private and family life*” and relevant for present purposes the following:

“7 (1) Every person has the right to respect for his private and family life,
 ...

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) In the interests of... public morality, public health ...;

*...
except so far as that provision or as the case may be, the thing done under authority thereof is shown not to be reasonably justifiable in a democratic society.”*

Subsection 3 is of course in the nature of the limitation envisaged in the proviso to section 1.

11. Section 14 affords protection from discrimination on the following basis:

“14(1) Subject to subsections (4) (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect”

In section 14(3) discrimination is defined and includes *“such other grounds as the European Court of Human Rights may, from time to time, determine to be discriminatory.”* Not in dispute that sexual orientation is one such ground. [*Salguiero da Silva Mouta v Portugal (2001) 31 EHRR 47*]. Whilst section 14(7) allows for restrictions to this right as authorised by section 7(3). It is not in dispute that unlike Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) section 14(1) is a self-standing provision. Although the point has not been subject to final determination support for that proposition is to be found in the Privy Council decision of *Angelo Cerisola (a child by his litigation friend Maria Cerisola) v Her Majesty’s Attorney General for Gibraltar, Privy Council Appeal No 22 of 2007*.

12. It is self evident and as is apparent from authorities with which I shall deal with in due course that there is well established Convention jurisprudence that sexual orientation and sexual life form a crucial part of “private life”. Therefore be it by virtue of the right to *“personal privacy”* in section 1(c) (whether or not its ambit is different to the section 7 right to private life); the section 7 right to private life and the section 14 right to non discrimination it

cannot and it is not in dispute that sections 1, 7 and 14 of the Constitution are engaged.

13. Given the interplay between sections 1, 7 and 14 of the Constitution what falls for determination is whether the statutory provisions previously identified are discriminatory or breach the right to private life. If so whether it is permissible by virtue of section 7(3), that is to say does it fall within the public morality/public health or the protection of the rights and freedoms of others exceptions and if it falls within any such exception is it "*reasonably justifiable in a democratic society*".

14. It is not surprising that in large measure the submissions advanced are premised upon Convention jurisprudence. In that regard of much significance that by virtue of section 18 (8) of the Constitution this court is enjoined inter alia to take account of decisions of the European Commission of Human Rights and European Court of Human Rights when dealing with any question which has arisen in connection with the rights and freedoms protected by Chapter I of the Constitution.

Absence of age consent for men engaging in heterosexual sex

15. As regards the first issue identified by GGR and the Secretary of State there is in my view a failure to take account of section 118 of the Act which as aforesaid creates the offence of indecent assault on a man and which provides that a boy under 16 cannot give consent which would prevent an act being an assault. The effect of that provision must be that a male person under 16 cannot in law consent to sexual intercourse with a woman. In the circumstances and although there is no specific provision which provides that the age of consent for heterosexual vaginal sex for men is 16 I am of the view that although distinct provisions may apply the statutory provisions have the effect that the treatment afforded to men and women is materially the same.

Age of Consent

Discrimination.

16. Albeit not advanced with great zeal the Claimants basic proposition is to the effect that the prohibition against buggery in section 115 of the Act is gender neutral and that the exceptions under section 116A provides savings for homosexuals but not for heterosexuals. That therefore, by virtue of those provisions homosexuals are treated in a more favourable manner than heterosexuals.

17. The touchstone when considering potentially discriminatory provisions is that like cases are to be treated alike and unlike cases are to be treated differently. The difficulty with that principle is that whilst self evidently a fair and logical proposition, it is not always easy to determine when cases are alike or unlike. To my mind this is not a case in which such a difficulty arises. It is possibly not surprising that the European Commission of Human Rights in *Sutherland v The United Kingdom (1997) (Application No 25186/94)* and the European Court of Human Rights in *Dudgeon v United Kingdom (1981) (Application No 7525/76)*; in *SL v Austria (2003) (Application No 45330/99)* and in *BB v The United Kingdom (2004) (Application No 53760/00)* proceeded upon the basis of equating heterosexual vaginal intercourse with homosexual anal intercourse. Mr Restano's research took him to a Hong Kong Court of Appeal decision *Leung v Secretary for Justice [2006] HKCA 360*, (aside the use of the term "buggery" rather than anal sex), I respectfully adopt the analysis of Hon Ma, Chief Judge when dealing with the issue of whether homosexual anal sex and heterosexual intercourse should be equated:

"Sexual intercourse between men and women is not just for the purposes of procreation. It also constitutes an expression of love, intimacy and constituting perhaps the main form of sexual gratification. For homosexual men, buggery fits within these definitions."

Justification

18. The Commission in *Sutherland* dealing with English statutory provisions akin to our provisions (save that the decriminalisation of homosexual anal sex was fixed at 21 years of age) and more recently the European Court in *BB* dealing with that same English legislation, (albeit by then 21 years had been replaced with 18 years of age), found that there was a breach of Article 14 in conjunction with Article 8. In *Sutherland* there was also a specific determination that there was no objective and reasonable justification for the discrimination.

19. It is of course right to say that in the context of ECHR jurisprudence reliance can be placed by contracting states upon the principle that they enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. For the Claimants the submission is advanced that when taking account of Convention jurisprudence for the purpose of making Constitutional determinations this court must approach those authorities with circumspection, given that whether there is objective and reasonable justification depends on the circumstances of each situation. [*Belgian Linguistics Case (1979-80) 1EHRR 252*]. Whilst I accept the logic of the submission what equally cannot be ignored is that by virtue of section 18(8) of the Constitution this court is enjoined to take account of those decisions.

20. In the Claimants' Statement of Objective and Reasonable Justification two matters are prayed in aid, (1) religious tolerance and respect and (2) the sexual development and health of young people. As regards the latter at an early stage of the action I indicated that if the Claimant was to advance the argument that there was an increased health risk in anal sex when compared to vaginal sex the court would require expert medical evidence with such experts (in the absence of agreement) being made available for cross examination. The Claimants chose not to proceed down that route and abandoned that limb

of their argument. Therefore although some material touching upon issues of public health was placed before me by the Evangelical Alliance it is not in the nature of evidence which can be tested and is therefore not material I can properly take account of or consider. In any event even if on evidence it were established that there is an increased health risk that of itself would not necessarily suffice to establish that criminalisation (rather than for example education) could be viewed as proportionate and therefore justifiable.

21. The religious tolerance and respect argument strides both public morality and the protection of the rights of others. For the Claimants the submission advanced is that Gibraltar is a closely knit community which prides itself on its religious tolerance and diversity. That the population as appears from the most recent census is predominantly Christian with a significant number of Muslims and Jews. That religious tolerance is underpinned by respect and that in the Claimants' view reducing the age of consent for homosexual anal sex would be offensive to those faiths and social cohesion would be undermined. For its part the Evangelical Alliance takes the matter further and in some measure relies upon Scriptures in support of its proposition that the legislative provisions do not offend the Constitution, albeit starting from the premise that anal sex is inherently wrong and unnatural and relies upon Leviticus 20:13:

"If a male lies with a male as he lies with a woman, both of them have committed an abomination."

22. In *L and V v Austria (2003) (Application 39392/98 and 39829/98)* the European Court dealing with a criminal code prohibiting homosexual acts between consenting adolescent males aged between 14 and 18 when a similar prohibition did not apply in respect of heterosexual sexual activities concluded that "*weighty reasons*" justifying the discriminatory provisions had not been offered by the Government of Austria and at paragraph 52 of the judgment had this to say:

“To the extent that...the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour...”

23. I fail to see how the rights and freedoms of individuals generally and particularly those of people of religious faith are affected by applying the same age of consent to homosexuals as to heterosexuals. Those whose religious beliefs lead them to the conclusion that anal sex is morally wrong are wholly entitled to that view and for a measure of respect for that view. There is however no basis for the proposition that their rights are affected simply because others do not share that morality and choose to engage in such an act. I also fail to see how social cohesion would be affected by allowing homosexuals between the ages of 16 and 18 to engage in anal sex as opposed to only those over 18. In *McFarlane v Relate Avon Ltd* [2010]EWCA Civ 880 Laws LJ at paragraph 24 put it on these terms:

“The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.”

I would respectfully say that the logic of such an approach is unassailable. Moreover, if that can be said in the context of a constitutional arrangement which embraces an established church and in which Lords Spiritual sit in Parliament, the same approach must, given the secular nature of our Constitution, also apply in this jurisdiction. For these reasons religious tolerance is an insufficient answer.

24. I have no hesitation in concluding that the provisions which establish a differential between the ages of consent and criminalise homosexual anal sex involving someone aged between 16 and 18 breaches both sections 7 and 14 of the Constitution. It is however not for this court to take a view as to what the age of consent in Gibraltar should be, that is a matter which can only be for the legislature to determine. But at this juncture this court cannot restrict or limit the existing rights of heterosexuals to engage in sexual activity by increasing the age of consent applicable to them and therefore the only option available to me is to rule that for the purposes of the penal provisions found in the Act the age of consent for homosexual anal sex is to be read as being 16.

Gross Indecency

25. I have previously summarised the effect of the section 116 *gross indecency* when read together with the exceptions in section 116 A and therefore unnecessary to repeat it.

26. By parity of reasoning with the conclusions I have reached with regard to the age of consent there cannot be any justification for the criminal law to differentiate between the sexual activity of properly consenting individuals on the basis of sexual orientation. Thus, for example there could be no objection (and indeed there could be very good reason) to criminalise “*gross indecency*” in a public lavatory between any two or more individuals be they heterosexual, lesbian or homosexual, but what offends the Constitution is that the criminalisation be limited to homosexual activity. To the extent that the Act creates offences which create a distinction premised upon sexual orientation these breach the Constitution.

27. As regards homosexual group sexual activity apart from the foregoing reasoning a section 7 private life right also arises. In *ADT v UK (2001) 31EHRR 33* the European Court of Human Rights dealing with provisions

akin to section 16A(2) and touching upon a prosecution arising from homosexual group sex in private concluded that:

“Given the narrow margin of appreciation afforded to the national authorities in the case, the absence of any public health considerations and the purely private nature of the behaviour in the present case, the Court finds that the reason submitted for the maintenance in force of legislation criminalising homosexual acts between men in private, and a fortiori the prosecution and conviction in the present case, are not sufficient to justify the legislation and the prosecution.”

Likewise in the present case in that the submissions advanced for the Claimants fail to establish a sufficient basis to justify the criminalisation of acts of that nature.

Anal sex between heterosexuals

28. The submissions advanced as regards this issue are relatively limited and on behalf of the Secretary of State the submission is simply that as the European Court of Human Rights made clear in *Dudgeon v UK (1981) (Application No 7525/76)* private sexual conduct should not be prohibited merely because it shocks or offends others. Therefore, that maintaining the offence of buggery in respect of heterosexual couples is unsustainable. Noteworthy that *Dudgeon* was decided on the basis that the Article 8 right to private life was breached and the Court did not find it necessary to consider whether the applicant had been the victim of discrimination in breach of Article 14 when read together with Article 8. Indeed in *ADT* the Court adopted the same approach and having found a breach of Article 8 did not find it necessary to consider the issue of discrimination.

29. The Constitution affords rights for everyone not just for minority groups. In the context of heterosexual anal sex the argument could be framed in terms of the majority being deprived, by virtue of a criminal sanction, of doing an act which a minority group is entitled to do. It is however unnecessary to

consider it in such a manner. Rather, section 7 of the Constitution which enshrines the right to a private life is undoubtedly engaged. It is difficult to think of a more intimate part of an individual's private life than how he wishes to express his sexuality. If properly consenting heterosexuals choose to do so through anal sex that is a matter entirely for them. Some quite legitimately may wish to censure or pass judgement in relation to conduct of that nature but in the absence of justification its criminalisation offends section 7 of the Constitution.

Relief

30. Section 3 of the Constitution (Declaration of Compatibility) Act provides that:

- “(1) The Supreme Court shall have original jurisdiction to hear and determine any application made under section 2.*
(2) The Supreme Court may if it is satisfied that any Act or subsidiary legislation or any Bill for an Act or any provision thereof—
(a) is incompatible with the Constitution, make a declaration of incompatibility; or
(b) is compatible with the Constitution, make a declaration of compatibility.
(3) A declaration under this section does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given.”

For the purposes of subsection 2, I am satisfied that:

- (i) section 115 of the Act is incompatible with the Constitution to the extent that it creates an offence of buggery between properly consenting individuals.
- (ii) Section 115 and 116 when read with section 116A is incompatible with the Constitution to the extent that it criminalises anal sex and other sexual activity of homosexuals aged between 16 and 18.
- (iii) Section 116 when read with section 116A is incompatible with the Constitution by virtue of it exclusively criminalising homosexual conduct in public lavatories and group sex.

31. The issue which arises by virtue of subsection (3) is the effect of my declaration. Subsection (3) must of course be contrasted with section 2 of Annex 2 to the Gibraltar Constitution Order which provides that:

“2.-(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.”

By virtue of section 2 of Annex 2, which is a supreme rule of constitutional construction this court is required to construe existing laws in a manner whereby they conform with the Constitution. The effect of that cannot be that this court makes non-binding declarations. I also cannot ignore the fact that the Claimants bring this action not just pursuant to the Constitution (Declaration of Compatibility) Act but also CPR40.20 which identifies the court's power to make binding declarations. In those circumstances whether or not the section 3(2) declaration is binding is of little consequence given that I make the like declaration pursuant to section 2 of Annex 2 and CPR 40.20.

32. Although section 2 of Annex 2 enjoins this court to construe the legislation with *“modifications”* and *“adaptations”* the offending provisions do not readily lend themselves to such a task but until such time as the legislature amend the offending provisions no prosecutions which offend the declarations may be brought.

Anthony Dudley
Chief Justice

8th April 2011