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European Court of Human Rights Overturns British Ban on Gays in Military

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European Court of Human Rights Overturns British Ban on Gays in the Military

*by Richard Kamm**

In a pair of decisions handed down on September 27, 1999, the European Court of Human Rights (ECHR) held that the United Kingdom's policy of excluding homosexuals from the armed forces based solely on their sexual status violated provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and was illegal. Acting on the ECHR's ruling on January 12, 2000, the United Kingdom eliminated all restrictions on gays in its military forces, saying that henceforth, sexual preference would be a non-issue in recruitment, assignment, promotion, and disciplinary decisions.

The four petitioners in the two cases of *Lustig-Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom* each were discharged from the British armed forces between 1993 and 1995 on the sole ground of their sexual orientation. In *Lustig-Prean and Beckett*, the ECHR unanimously found that the U.K. Ministry of Defense (MoD) policy of prohibiting homosexuals from serving in the armed forces violated the petitioners' rights because it interfered with their private and family lives under Article 8 of the European Convention. In *Smith and Grady*, the ECHR found that in addition to violating Article 8, the MoD policy also contravened Article 13. Article 13 of the European Convention grants individuals the right to an effective remedy before a national authority when their European Convention rights have been violated.

Like Lustig-Prean and Beckett, Smith and Grady each had excellent reports on their periodic evaluations. In each case, the Ministry of Defense and the service police took actions based solely on the petitioners' homosexual status.

The Law Regarding Homosexuals in the Military Prior to the ECHR's Decisions

Before the British Parliament's enactment, in 1967, of the Sexual Offenses Act, homosexual acts constituted a criminal offense in both civil society and the military. With the passage of the Sexual Offenses Act, private homosexual acts between consenting adults aged 21 years and over were decriminalized in civil society. Homosexual conduct in the military, however, remained an offense under the 1955 Army and Air Force Acts and the 1957 Naval Discipline Act because Section 1(5) of the 1967 Sexual Offenses Act limited the scope of that law's application to the civil sector. Although Section 1(5) was later amended by the MoD in 1991, and then repealed by the Criminal Justice and Public Order Act in 1994, Section 146(4) of the Criminal Justice and Public Order Act provided that nothing in its provisions prevented the military from continuing to discharge members of the armed forces based on their sexual status. The MoD's 1991 amendment was important because it provided that armed forces personnel could no longer be criminally prosecuted and court-martialed under military law for their homosexuality; personnel could, however, still be administratively discharged.

In addition to British parliamentary law, there also existed prior to January 12, 2000, specific armed forces' guidelines dealing with homosexuals in the military. Updated to reflect the changes made by the aforementioned Criminal Justice and Public Order Act, the Armed Forces' Policy and Guidelines on Homosexuality (Guidelines) were redistributed to service personnel in 1994. The Guidelines stated that homosexuality was incompatible with service in the armed forces "because of the close physical conditions in which personnel often have to live and work, [and] also because homosexual behavior can cause offence, polarise relationships, induce ill-discipline, and . . . damage morale and unit effectiveness." If an individual was discovered to be or admitted to being a homosexual while in the armed forces, he or she was required to leave. If a potential recruit admitted to being homosexual, he or she was not enlisted.

The Petitioners

Duncan Lustig-Prean and John Beckett, along with Jeanette Smith and Graeme Grady, are British nationals, and all were members of the British armed forces when investigations into their sexual orientations were initiated in 1993 and 1994. Each of the petitioners is an admitted homosexual. Lustig-Prean, the first petitioner, began his career in the Royal Navy in 1982. An outstanding officer with an exemplary record, he was promoted to lieutenant commander in 1994. In June 1994, the Royal Navy Special Investigations Branch (the service police) informed Lustig-Prean that his name had been received anonymously in connection with an allegation of homosexuality. After being told that the service police were investigating the allegation, Lustig-Prean admitted to his commanding officer that he was a homosexual and that prior to 1994, he had been involved in a 30-month steady relationship with a civilian partner.

Following this disclosure, the service police interviewed Lustig-Prean regarding his sexual orientation on June 13, 1994. At the interview, Lustig-Prean confirmed his homosexuality and admitted that he had been a practicing homosexual since his teenage years. After two separate follow-up interviews on June 14, 1994, and an ensuing investigation, the Admiralty Board informed Lustig-Prean on December 16, 1994, that his commission was being terminated and that he was to be administratively discharged from the Navy, effective January 17, 1995. The sole basis for Lustig-Prean's discharge was his sexual status.

Beckett, the second petitioner, enlisted in the Royal Navy for a service term of 22 years in 1989. Like Lustig-Prean, Beckett received favorable reviews, and in 1991, he became a substantive weapons engineering mechanic. In May 1993, after being refused time off for a personal matter, Beckett disclosed his sexual orientation to a service chaplain. On May 10, 1993, his lieutenant commander asked Beckett to repeat what he had told the chaplain, and Beckett again admitted his homosexuality. The service police then searched Beckett's locker and seized incriminating evidence.

Following the search and seizure, the service police questioned Beckett regarding his homosexuality. The service police asked about his previous relationship with women, whether he bought pornographic magazines, and whether he had been "touched up" or "abused" as a child. The service police posed detailed and explicit questions to Beckett regarding his current homosexual relationship, including queries about who played "butch" and who played "bitch" in the relationship, how he and his partner had sex, and whether condoms, lubrication, or other sexual aids were used during sexual intercourse. On July 28, 1993, Beckett's administrative discharge was approved on the basis of his homosexuality. When he sought to appeal the discharge to the Admiralty Board, his complaint was dismissed.

The two petitioners in the case of *Smith and Grady v. the United*

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Kingdom similarly were investigated, questioned, and discharged after admitting their homosexuality to investigating armed forces personnel. Like Lustig-Prean and Beckett, Smith and Grady each had excellent reports on their periodic evaluations. In each case, the MoD and the service police took actions based solely on the petitioners' homosexual status, rather than upon any specific acts or allegations of homosexual conduct on the part of the petitioners.

The Petitioners' Appeals Within the British Court System

Following their dismissals from the armed services, each of the four petitioners appealed their administrative discharges to the British High Court, the court of first relief in the British judicial system. Seeking judicial review of the discharge decisions, the petitioners argued that the MoD policy was "irrational" and was in breach of both the European Convention and the Equal Treatment Directive.

The petitioners' "irrationality" argument relied on the Wednesbury principles as developed through British common law. The Wednesbury principles of reasonableness are used to determine whether an agency has acted outside the scope of its delegated administrative powers. Applied to the human rights context, the Wednesbury principles dictate that where fundamental rights are being restricted, the state agency actor must show an important competing interest to justify the restriction. Relying on a February 1996 report conducted by the Homosexual Policy Assessment Team (HPAT), the MoD argued that allowing homosexuals into the armed forces would have a substantial and negative impact on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. In response, the petitioners claimed that the MoD's argument was "irrational" because there was no evidence to suggest that allowing homosexuals into the military would imperil the MoD's asserted interest.

The London Times

John Beckett, Jeanette Smith, and Duncan Lustig-Prean after the European Court of Human Rights' ruling.

In addition to arguing that the MoD policy also violated the European Convention, the petitioners argued that the policy breached the Equal Treatment Directive. Adopted in 1976 by the Council of Ministers, the principal legislative branch of what is today the European Union, the Equal Treatment Directive lays down the principle that men and women are to be treated equally with regard to access to employment, vocational training and promotion, and working conditions. Article 3(1) of the Equal Treatment Directive prohibits European Union member states from discriminating on the basis of sex for access to jobs, and Article 3(2)(a) provides that all laws, regulations, and administrative provisions denying equal treatment on the basis of sex shall be abolished.

Despite the petitioners' arguments and one trial judge's acknowledgment that "the balance of the argument clearly lay with the [petitioners]," the High Court dismissed the petitioners' applications for judicial review of the MoD's discharge decisions. Although the High Court found that the petitioners' fundamental privacy rights had been restricted, it noted that under the Wednesbury principles, it was required to accept the MoD's proffered justifications for the policy, so long as they did not "outrageously def[y] logic or accepted moral standards." Applying this extremely deferential level of review, the High Court found that the MoD's purported justification of excluding homosexuals to maintain morale and unit effectiveness could not be said to be unlawful, and thus the petitioners' "irrationality" argument had to be rejected.

The High Court also dismissed the petitioners' European Convention claims, stating that "[t]he fact that a decision-maker failed to take account of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning the exercise of that discretion." The Court noted that while the United Kingdom is legally obligated to respect and ensure compliance with European Convention principles as a signatory state under Article 1 of the Convention, the obligation is not one that is enforceable by domestic courts. This is because no article in the European Convention requires member countries to implement the Convention into their domestic law following ratification, and the United Kingdom has not done so. Thus, British domestic courts do not have primary jurisdiction over human rights issues contained in the European Convention. Finally, in addressing the petitioners' claims under the Equal Treatment Directive, the High Court found that because the Directive's language only prohibits discrimination on the basis of sex, it was not applicable to a claim of discrimination on the basis of sexual orientation.

Appealing the High Court's dismissal of their grievances, the four petitioners reasserted their claims before the Court of Appeals, the next highest court in the British hierarchy. Once again, they were rebuffed, largely because the Court of Appeals was unwilling to interfere with the exercise of the MoD's administrative discretion. Following a final appeal attempt to the British House of Lords, in which the Appeals Committee of the House of Lords refused leave to appeal, the petitioners lodged applications with the European Commission of Human Rights.

The Petitioners' Claims Before the ECHR

Drafted by members of the Council of Europe following World War II, the European Convention today serves as a codification of European human rights law. Created by Article 19 of the Convention, the ECHR and the European Commission of Human Rights (Commission) initially functioned as dual enforcement mechanisms of the European Convention. Due to the quick increase in the number of cases brought before the Commission and the ECHR, however, the system was reformed in the 1990s. In 1994, Protocol No. 11, which provided for the re-structuring of the system, was opened for signature. On November 1, 1998, the new ECHR began operations, and on October 31, 1999, the Commission was abolished.

According to Article 26 of the Convention, a petitioner must exhaust all domestic legal remedies before filing at the ECHR. Finding that the prerequisites were satisfied in the *Lustig-Prean and Beckett* and *Smith and Grady*, the ECHR declared the petitioners' complaints admissible on February 23, 1999. Although the petitioners came forth alleging violations under seven of the European Convention articles, their two most important claims fell under Articles 8 and 13 of the Convention. Article 8(1) provides that "Everyone has the right to respect for his private and family life" and Article 8(2) adds that "There shall be no inter-

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ference 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 . . . [or] for the prevention of disorder . . . ."

Addressing the Article 8 claims, the seven-member panel of the ECHR first sought to determine whether there had been an interference with the petitioners' right to respect for their private lives under Article 8(1). After the government conceded that interferences had occurred, the ECHR concluded that both the investigations by the military police into the petitioners' homosexuality, and the petitioners' subsequent administrative discharges based solely on their sexual orientation, constituted direct interferences with the petitioners' right to respect for their private lives. The ECHR also noted the absolute and general character of the policy, as well as the "exceptionally intrusive" nature of the MoD's investigations into the petitioners' homosexuality and the "pro-

The ECHR concluded that both the investigations by the military police into the petitioners' homosexuality, and the petitioners' subsequent administrative discharges based solely on their sexual orientation, constituted direct interferences with the petitioners' right to respect for their private lives.

found effect" the discharges were likely to have on the petitioners' future careers and prospects.

Proceeding to the second issue of whether the interferences could be justified under the exceptions outlined in Article 8(2), the Court first sought to determine if the interferences had been "in accordance with the law." Answering in the affirmative, the ECHR found that the MoD policy had been granted tacit approval under both the Sexual Offenses Act of 1967 and the Criminal Justice and Public Order Act of 1994.

The final issue for the ECHR to decide was whether the MoD's interferences with the petitioners' private lives could be considered "necessary in a democratic society" to ensure the protection of national security and the prevention of disorder. Applying a two-prong test to assess the policy's legitimacy, the ECHR first questioned whether the government had shown that its policy of interfering with the petitioners' private lives answered a pressing social need. The Court then asked whether the government had shown that its policy was necessary to fulfill that need. Applying a stricter level of review than either the British High Court or the Court of Appeals, the ECHR noted that: "[W]hen the relevant restrictions concern a 'most intimate part of an individual's private life', there must exist 'particularly serious reasons' before such interferences can satisfy the requirements of Article 8 § 2 of the Convention."

Proceeding to the first issue of whether the MoD's exclusionary policy satisfied a "particularly convincing and weighty" social need, the Court found the government's proffered justifications for its policy to be unpersuasive. Noting that the sole basis for the MoD's policy was the negative attitudes of heterosexual personnel towards those of homosexual orientation, the ECHR stated, "To the extent that [these negative attitudes] represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, [they cannot] be considered by the Court to amount to sufficient justification for the interferences . . . any more than similar negative attitudes towards those of a different race, origin or colour."

Because the government could not satisfy the first prong of the two-prong test, the ECHR did not proceed to address the second issue of whether the MoD's policy had the practical effect of bolstering morale or unit effectiveness. Although the Court assumed and accepted that there would be some difficulties in implementing a new policy, it found that a strict code of conduct, applicable to all personnel, would be sufficient to address any problems that might arise. Addressing separately the MoD's subsequent investigations into the petitioners' sexual orientation, the Court again found the government's actions to be in violation of Article 8(1). The ECHR noted that the MoD's concern regarding false claims of homosexuality by those seeking early administrative discharges could not justify the continuing investigations in the instant case because it was clear that each of the petitioners wished to remain in the armed forces.

Although the ECHR's decision in *Lustig-Prean and Beckett* addressed solely Article 8, the Court's decision in *Smith and Grady* also addressed Article 13. Article 13 provides that, "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." The petitioners in *Smith and Grady* argued that they had not been afforded an effective domestic remedy within the meaning of Article 13 because the threshold for "irrationality" as applied by the High Court and Court of Appeals had been set so high that it effectively excluded any consideration by the British domestic courts of the MoD policy.

Siding with Smith and Grady, the ECHR found that the High Court and Court of Appeals had not adequately considered whether the government's interference with the petitioners' private lives answered a pressing social need or sufficiently related to the national security and public order goals underlying the MoD policy. The ECHR noted that Article 8 of the European Convention requires domestic courts to go through this analysis.

Implications Stemming from the ECHR's Decisions

The ECHR's decisions in *Lustig-Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom* can be viewed best as both reflecting and forming a part of a newly emerging Europe-wide consensus regarding homosexual equality. Under the "European consensus" approach, the ECHR utilizes progressive law reform trends occurring across Europe as a means of continually expanding the European Convention's application to individual rights. This method of resolving disputes can be seen in both the *Lustig-Prean and Beckett* and *Smith and Grady* decisions. In determining whether the MoD policy violated the petitioners' Article 8 privacy rights in *Lustig-Prean and Beckett*, for example, the Court noted that "the European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority." The Court then went on to state that it could not overlook "the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue."

The newly emerging European consensus on homosexual equality also is evidenced by the fact that Denmark, Greenland, Norway, Sweden, Iceland, the Netherlands, and France all have passed registered partnership laws in recent years. Seven other European countries also are currently considering such laws. In Denmark, the law has been extended so far as to allow a partner in a registered partnership to adopt the children of his or her partner.

Although the recent ECHR decisions clearly reflect this emerging consensus on homosexual equality, the decisions hopefully also will further and contribute to this progress. On a significant level, this has already begun because the decisions themselves constitute a shift in the ECHR's views of homosexuals in the military.

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over 20,000 villagers to flee their homes. The Mexican army ransacked some of these empty villages and purposefully poisoned water sources and wasted food supplies so that upon villagers' return, they would have little with which to sustain themselves. Rather than selectively targeting EZLN leaders, the military destroyed entire communities, terrorizing civilian villagers, in direct violation of this second principle.

The third principle was designed to enjoin a party that controls a civilian population to distinguish its military forces from members of that civilian population. Under this provision, the EZLN should demarcate its rebel forces from the rest of the population. Rather than try to distinguish themselves from civilians, however, EZLN combatants have often shielded themselves from direct military reprisal by blending into the civilian population, violating this provision and putting civilians at risk.

UN General Assembly Resolution 2675 of 1970. On December 9, 1970, the UN General Assembly adopted Resolution 2675, extending some of the protections provided under Resolution 2444. Among other provisions, Resolution 2675 states that combatants must take all precautions to prevent harming civilians; that housing and other installations used only by civilians should not be the object of military operations; and that civilian populations, or individual members thereof, should not be the object of assaults.

During the 1995 and 1998 military invasions, the Mexican army did not take precautions to prevent harming citizens, and thus failed to comply with its obligations under humanitarian law. In 1995, after civilian villagers returned from hiding in the mountains, many found their homes destroyed, their churches desecrated, and their food and water supplies purposefully contaminated. In 1998, soldiers and police attacked buildings used by authorities within the autonomous governments for the purpose of storing documents and conducting official business. Such violence against property owned or used for civilian purposes is prohibited by this resolution.

Paramilitaries, according to the Third Report on Colombia, do not fall within the rubric of international humanitarian law unless they become such prominent players as to constitute a party to a conflict. As the growth of paramilitaries in Chiapas is a relatively new phenomenon and their activity still somewhat limited, it is unlikely that international human rights bodies such as the IACHR would consider paramilitaries parties to the conflict at this time. Nevertheless, in the future, regional and international human rights bodies should consider holding the Mexican government accountable for paramilitary activity, since it appears the government utilizes the paramilitaries to carry out government goals.

Conclusion

Contrary to the international image it would like to portray, the Mexican government is fully engaged in a low intensity conflict that wreaks havoc on local communities. Violations of international human rights and humanitarian law are rampant. The ubiquitous presence of soldiers throughout the state affects thousands of individual and communal lives in profound ways that lead ultimately to death and destruction, albeit in a more palatable, less noticeable form. Constant violation of the less prominent rights, such as freedom of association, freedom of movement, and enjoyment of property, dramatically harms the health and well-being of communities and directly contributes to the success of the Mexican government's war of attrition.

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As recently as 1983, in the decision of *B. v. the United Kingdom*, the European Commission deemed a dismissed soldier's complaint inadmissible based on a MoD argument that dismissal was necessary to exclude the "potentially disruptive influence of homosexual practices."

The ECHR's decisions in *Lustig-Prean and Beckett* and *Smith and Grady* also leave no doubt that similar restrictions in certain member states of the Council of Europe are in clear violation of the European Convention. In Germany, for example, lesbians and gay men are disqualified from becoming officers or military instructors, while in Greece and Poland, lesbian and gay service personnel can be discharged on the basis that they suffer from a personality disorder. Both Turkey and the United States also continue to ban acknowledged homosexuals from military service.

The ECHR stated, "To the extent that [these negative attitudes] represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, [they cannot] be considered by the Court to amount to sufficient justification for the interferences ."

Conclusion

In the wake of the United Kingdom's January 12, 2000, decision to eliminate all restrictions on gays serving in its military forces, and the ECHR's findings that neither the investigations conducted into the petitioners' sexual orientation, nor their discharge on the grounds of their homosexuality were justified under Article 8(2) of the European Convention, it is important to realize what was not addressed by the Court. Most significantly, the Court refused to address the issue of whether the former MoD policy constituted discrimination on the basis of sexual orientation. This refusal is attributable to the fact that the Convention itself does not cover discrimination on this ground. Article 14 of the Convention provides only that "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, . . . [etc.]."

Thus, the true issue underlying both the *Lustig-Prean and Beckett* and *Smith and Grady* cases has yet to be adjudicated by the ECHR. Fortunately, however, efforts are currently underway to address this omission from the statutory language of Article 14. On January 26 of this year, for example, members of the Parliamentary Assembly of the Council of Europe voted to recommend that sexual orientation be added to the list of prohibited grounds of discrimination under the European Convention. A new draft protocol has also been put forward by the Council of Europe's governing body, the Committee of Ministers, on this issue. Although these recommendations still are under consideration, favorable ECHR case law such as *Lustig-Prean and Beckett* and *Smith and Grady* hopefully will encourage the Council of Europe to adopt these recommendations.

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