[2010–12 Gib LR 178]

IN THE MATTER OF THE REFERENCE OF THE CHIEF MINISTER and HER MAJESTY'S ATTORNEY-GENERAL (COMPATIBILITY OF CRIMINAL OFFENCES ACT 1960, PART XII WITH CONSTITUTION)

SUPREME COURT (Dudley, C.J.): April 8th, 2011

Criminal Law—age of consent—sexual offences—non-discrimination—sexual orientation—different ages of consent for heterosexuals and homosexuals in sexual offences legislation unconstitutional discrimination on ground of sexual orientation and interference with private life—religious toleration and respect insufficient justification

Constitutional Law—declaration of compatibility—binding declarations—court empowered, by CPR, r.40.20 and Constitution Order, Annex 2, s.2(1), to make binding declarations that qualify, or make exemption to, unconstitutional statutory provisions—court may declare that no prosecutions to be brought under discriminatory criminal legislation—validity of legislation not affected by binding declarations

The Chief Minister and the Attorney-General brought a reference to the Supreme Court, seeking a declaration, originally under the Civil Procedure Rules, r.40.20, and subsequently also under the Constitution (Declaration of Compatibility) Act 2009, s.2.

The reference requested a declaration on the compatibility of the differing ages of consent for homosexual men, heterosexuals, and lesbians (prescribed by the Criminal Offences Act 1960, Part XII for various sexual activities) with ss. 1, 7, and/or 14 of the Constitution.

The Supreme Court allowed the joinder of the Equality Rights Group GGR as an interested party and directed the claimants to place notices in the *Gibraltar Chronicle* inviting all interested parties to file application notices. The court (Dudley, C.J.) allowed the Foreign Secretary to be joined as an interested party, and Unite the Union, and the Evangelical Alliance to intervene (in proceedings reported at 2010–12 Gib LR 32).

The claimants, the Foreign Secretary and the Evangelical Alliance sought a declaration that the provisions of the Act did not violate the Constitution, submitting that (a) the different ages of consent for heterosexual and homosexual intercourse between two persons were justified by the need to preserve religious toleration, social cohesion and respect in a closely-knit community; (b) for the same reasons, the differing ages of consent for heterosexual and homosexual group intercourse were justified;

(c) for the same reasons, the prohibition on heterosexual anal sex was justified; (d) the Act did not stipulate a different age of consent for men and women for heterosexual intercourse, as it followed from the provisions of s.118 that the age of consent was 16 for both men and women; and (e) in the event of incompatibility, the court could not make binding declarations that no prosecutions be brought under the offending provisions until legislative amendment, as the Constitution (Declaration of Compatibility) Act 2009, s.3 clearly stated that a declaration of incompatibility could not affect the validity of existing statutory provisions.

The Equality Rights Group GGR and Unite submitted in reply that (a) having regard to the Strasbourg jurisprudence, the different ages of consent for heterosexual and homosexual intercourse between two persons was an unjustifiable interference with the constitutional right to private life and discriminated on the basis of sexual orientation; (b) for the same reasons, the differing ages of consent for heterosexual and homosexual group intercourse violated the Constitution; (c) for the same reasons, the prohibition of heterosexual anal sex violated the constitutional right to private life; (d) the Act discriminated between men and women in so far as it stipulated different ages of consent for heterosexual intercourse; and (e) the court should make binding declarations, as empowered to do by the CPR, r.40.20 and the Constitution, Annex 2, s.2(1), that no prosecutions be brought under the offending provisions until legislative amendment.

Held, making binding declarations that ss. 115 and 116 of the Criminal Offences Act 1960 were incompatible with the Constitution:

(1) The differing ages of consent for heterosexual and homosexual intercourse between two persons in ss. 115 and 116 of the Act violated the Constitution, ss. 1, 7 and 14. Strasbourg jurisprudence, to which the court was required to have regard by the 2006 Constitution, s.18(8), affirmed the legal equality of heterosexual and homosexual intercourse. It was accepted by the parties that, unlike art. 14 of the Convention on Human Rights, s.14 was a free-standing provision giving a right to be free from discrimination on the grounds set out at sub-s. (3), including the ground of sexual orientation, so that differing ages of consent on that basis were, *prima facie*, contrary to the Constitution. It was not disputed that ss. 1 and 7 of the Constitution also protected sexual orientation as an aspect of private life with which discriminatory ages of consent would interfere. This interference could not be justified as reasonable in a democratic society for the protection of public health, morality, or the rights of others. No evidence had been adduced to support the proposition that differing ages of consent were needed to protect the sexual health of young people. In any event, establishing such a health risk would not itself support criminalization, as a more proportionate solution would be education. Nor was religious toleration and respect for moral beliefs a sufficient justification for the infringement. The Constitution was secular in nature and prohibiting private conduct could not be justified on the ground of

protecting public morals merely because it offended the beliefs of religious groups, nor were religious rights engaged by refusing to criminalize sexual intercourse that they believed to be immoral. There was also no evidence that an equal age of consent would lead to a breakdown in social cohesion (paras. 8–15; paras. 17–25).

(2) Further, the differing ages of consent for heterosexual and homosexual intercourse involving more than two persons, that resulted from s.116, when read with s.116A, violated the Constitution for the same reasons (paras. 26–28).

(3) Moreover, the prohibition on heterosexual anal sex also violated the right to private life under the Constitution, s.7 (paras. 29–30).

(4) However, the age of consent for heterosexual intercourse did not discriminate between men and women. Although s.108 prohibited sexual intercourse with females younger than 16, but did not give an age of consent for sexual intercourse with males, it was apparent from s.118 that the consent of a male younger than 16 was no defence to indecent assault. It followed that, notwithstanding the absence of an explicit provision in the Act, a male under 16 could not lawfully consent to sexual intercourse and the Act therefore treated men and women alike (para. 16).

(5) The court was empowered, by the CPR, r.40.20 and the Constitution Order, Annex 2, s.2(1), to make binding declarations, by qualifying, or making exemptions to, the offending provisions. The court would declare that no-one should be prosecuted under the parts of the Act contrary to the Constitution until the legislature amended the provisions, notwithstanding that the Constitution (Declaration of Compatibility) Act 2009, s.3 prevented declarations of incompatibility from affecting the validity of a statutory provision and the fact that the provisions could not, given the words used, be modified or adapted by construction within the meaning of s.2(1) (para. 25; paras. 31–34).

Cases cited:

(1) *ADT* v. *United Kingdom* (2001), 31 E.H.R.R. 33, followed.
(2) *BB* v. *United Kingdom* (2004), 39 E.H.R.R. 30, followed.
(3) *Belgian Linguistic Case (No. 2)* (1979–80), 1 E.H.R.R. 252, considered.
(4) *Cerisola* v. *Att.-Gen.*, 2007–09 Gib LR 204, considered.
(5) *Dudgeon* v. *United Kingdom* (1981), 3 E.H.R.R. 40, followed.
(6) *L* v. *Austria* (2003), 36 E.H.R.R. 55, followed.
(7) *Leung* v. *Justice Secy.*, [2006] HKCA 360; [2006] 4 HKLRD 211, followed.
(8) *McFarlane* v. *Relate Avon Ltd.*, [2010] I.R.L.R. 872; [2010] EWCA Civ 880, *dicta* of Laws, L.J. considered.
(9) *SL* v. *Austria* (2003), 37 E.H.R.R. 39, followed.
(10) *Salgueiro da Silva Mouta* v. *Portugal* (2001), 31 E.H.R.R. 47; [2001] 1 F.C.R. 653, followed.

(11) *Sutherland* v. *United Kingdom* (1997), 24 E.H.R.R. CD22, followed.

Legislation construed:

Constitution (Declarations of Compatibility) Act 2009, s.3: The relevant terms of this section are set out at para. 31.

Criminal Offences Act 1960, s.107(1): The relevant terms of this section are set out at para. 5.
s.108(1): The relevant terms of this sub-section are set out at para. 5.
s.115: The relevant terms of this section are set out at para. 5.
s.116: The relevant terms of this section are set out at para. 5.
s.116A: The relevant terms of this section are set out at para. 5.
s.118: "(1) A person who makes an indecent assault on a man shall be guilty of an offence and liable on conviction to imprisonment for two years.

(2) A boy under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section."

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.1: The relevant terms of this section are set out at para. 8.
s.7: The relevant terms of this section are set out at para. 10.
s.14: The relevant terms of this section are set out at paras. 11 and 12.
s.18(8): The relevant terms of this section are set out at para. 15.
Annex 2, s.2(1): The relevant terms of this section are set out at para. 32.

Civil Procedure Rules (S.I. 1998/3132), r.40.20: The relevant terms of this rule are set out at para. 33.

R.R. Rhoda, *Q.C.*, *Attorney-General*, and *Ms. K. Khubchand*, *Senior Crown Counsel*, for the claimants;
J. Restano for Equality Rights Group GGR;
Ms. G. Guzman and *J. Santos* for the Foreign Secretary;
K. Azopardi and *K. Navas* for Unite the Union;
C. Gomez and *R. Sharma* for the Evangelical Alliance.

1 **DUDLEY, C.J.:** 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 1960, 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 the Civil Procedure Rules, r.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 2009, 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 authorized 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 the reasons set out in my ruling of July 22nd, 2010, I allowed the Equality Rights 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 1960 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 summarized as follows:

(a) Pursuant to ss. 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 s.118 of the Act or of indecent conduct towards a child contrary to s.119.

(b) Under the rather pejorative title of "unnatural offences," s.115 creates the offence of buggery whether with another person or with an animal. As drafted, the section creates a gender neutral offence. However, s.116 creates the offence of gross indecency between men whether the act is undertaken in private or in public. Section 116A decriminalizes 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 Act violate ss. 1, 7 and 14 of the Constitution in that—

(a) an age of consent is set for vaginal intercourse for women but not for men;

(b) sexual relations between men under 18 constitutes an offence whilst heterosexual and lesbian sexual relations for those over 16 are legal;

(c) group homosexual sexual activity is a criminal act whilst similar heterosexual or lesbian activity is not criminalized; and

(d) whilst two 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 ss. 1, 7 and 14 of the Gibraltar Constitution Order 2006, Annex 1 are engaged, it is useful to consider in some detail the various provisions and their interplay. The relevant passage of s.1 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 respect for 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 s.1 is not merely preambular but vests rights, albeit subject to the terms of its proviso. In the present case, that s.1 vests rights is of no real consequence in that the substantive rights invoked are to be found in ss. 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."

Sub-section (3) is of course in the nature of the limitation envisaged in the proviso to s.1.

11 Section 14(1) affords protection from discrimination on the following basis: "Subject to sub-sections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect."

12 In s.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." Sexual orientation is one such ground (*Salgueiro da Silva Mouta* v. *Portugal* (10)). Section 14(7) allows for restrictions to this right as authorized by s.7(3). It is not in dispute that, unlike art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), s.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 *Cerisola* v. *Att.-Gen.* (4).

13 It is self-evident, and apparent from those authorities with which I shall deal in due course, that there is well-established Convention jurisprudence that sexual orientation and sexual life form a crucial part of "private life." Therefore, by virtue of the right to "personal privacy" in s.1(c) (whether or not its ambit is different to the s.7 right to private life), the s.7 right to private life and the s.14 right to non-discrimination, it is not in dispute that ss. 1, 7 and 14 of the Constitution are engaged.

14 Given the interplay between ss. 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 and, if so, whether it is permissible by virtue of s.7(3), that is to say, does it fall within the exceptions for public morality/public health or the protection of the rights and freedoms of others and, if it falls within any such exception, is it "reasonably justifiable in a democratic society."

15 It is not surprising that in large measure the submissions advanced are premised upon Convention jurisprudence. In that regard, of much significance is that by virtue of s.18(8) of the Constitution this court is enjoined, *inter alia*, to "take into account" the 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 the Constitution.

Absence of age consent for men engaging in heterosexual sex

16 As regards the first issue identified by GGR and the Secretary of State, there is in my view a failure to take account of s.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

17 Although not advanced with great zeal, the claimants' basic proposition is to the effect that the prohibition against buggery in s.115 of the Act is gender neutral and that the exceptions under s.116A provide savings for homosexuals but not for heterosexuals. Therefore, by virtue of those provisions, homosexuals are treated in a more favourable manner than heterosexuals.

18 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. *United Kingdom* (11) and the European Court of Human Rights in *Dudgeon* v. *United Kingdom* (5), in *SL* v. *Austria* (9) and in *BB* v. *United Kingdom* (2) 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. *Justice Secy.* (7) and (aside from the use of the term "buggery" rather than "anal sex"), I respectfully adopt the analysis of Chief Judge Ma when dealing with the issue of whether homosexual anal

sex and heterosexual intercourse should be equated ([2006] HKCA 360, at para. 47):

> "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

19 The Commission in *Sutherland* (11), dealing with English statutory provisions akin to our provisions (save that the decriminalization of homosexual anal sex was fixed at 21 years of age), and more recently the European Court in *BB* (2), 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 art. 14 in conjunction with art. 8. In *Sutherland* there was also a specific determination that there was no objective and reasonable justification for the discrimination.

20 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 Linguistic Case* (3)). Whilst I accept the logic of the submission, what equally cannot be ignored is that by virtue of s.18(8) of the Constitution this court is enjoined to take account of those decisions.

21 In the claimants' statement of objective and reasonable justification, two matters are prayed in aid: (a) religious tolerance and respect; and (b) 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 were to advance the argument that there was an increased health risk in anal sex when compared with 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 of which I can properly take account 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 criminalization (rather than, for example, education) could be viewed as proportionate and therefore justifiable.

22 The religious tolerance and respect argument bestrides 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 Scripture 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."

23 In *L* v. *Austria* (6), 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 said (36 E.H.R.R. 55, at para. 52):

> "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."

24 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 to 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.* (8), Laws, L.J. put it on these terms ([2010] EWCA Civ 880, at para. 24):

> "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.

25 I have no hesitation in concluding that the provisions which establish a differential between the ages of consent and criminalize homosexual anal sex involving someone aged between 16 and 18 breaches both ss. 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 prosecution under the penal provisions found in the Act the age of consent for homosexual anal sex is to be read as being 16.

Gross indecency

26 I have previously summarized the effect of the s.116 gross indecency provisions when read together with the exceptions in s.116A and it is unnecessary to repeat it.

27 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 to (and indeed there could be very good reason for) criminalizing "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 criminalization is limited to homosexual activity. To the extent that the Act creates

offences which create a distinction premised upon sexual orientation, these breach the Constitution.

28 As regards homosexual group sexual activity, apart from the foregoing reasoning, a s.7 private life right also arises. In *ADT* v. *United Kingdom* (1), the European Court of Human Rights, dealing with provisions akin to s.16A(2) and touching upon a prosecution arising from homosexual group sex in private, concluded that (31 E.H.R.R. 33, para. 1, at H14(j)):

> "Given the narrow margin of appreciation afforded to the national authorities, the absence of any public health considerations and the purely [private] nature of the behaviour in the present case, the reasons 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, the submissions advanced for the claimants fail to establish a sufficient basis to justify the criminalization of acts of that nature.

Anal sex between heterosexuals

29 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. *United Kingdom* (5), private sexual conduct should not be prohibited merely because it shocks or offends others and, therefore, that maintaining the offence of buggery in respect of heterosexual couples is unsustainable. It is noteworthy that *Dudgeon* was decided on the basis that the art. 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 art. 14 when read together with art. 8. Indeed in *ADT* (1) the court adopted the same approach and, having found a breach of art. 8, did not find it necessary to consider the issue of discrimination.

30 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, s.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

judgment in relation to conduct of that nature, but in the absence of justification its criminalization offends s.7 of the Constitution.

Relief

31 Section 3 of the Constitution (Declaration of Compatibility) Act 2009 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 sub-s. (2), I am satisfied that—

(a) s.115 of the Act is incompatible with the Constitution to the extent that it creates an offence of buggery between properly consenting individuals;

(b) ss. 115 and 116 when read with s.116A are incompatible with the Constitution to the extent that they criminalize anal sex and other sexual activity of homosexuals aged between 16 and 18; and

(c) s. 116 when read with s.116A is incompatible with the Constitution by virtue of it exclusively criminalizing homosexual conduct in public lavatories and group sex.

32 The issue which arises by virtue of sub-s. (3) is the effect of my declaration. Sub-section (3) must of course be contrasted with s.2(1) of Annex 2 to the Gibraltar Constitution Order which provides that—

> "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."

33 By virtue of s.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 the CPR, r.40.20, which identifies the court's power to make "binding declarations." In those circumstances, whether or not the s.3(2) declaration is binding is of little consequence given that I make the like declaration pursuant to s.2 of Annex 2 and the CPR, r.40.20.

34 Although s.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.

Orders accordingly.