IN THE MATTER OF THE SPANNER TRUST

JOINT OPINION

Instructions

1. We are asked to advise on the possibilities of challenging or developing the criminal law as it currently stands in England and Wales on the grounds that the criminalisation of sado-masochistic activities between consenting adults amounts to a breach of human rights.

2. In particular, we are asked to advise:

   (a) Whether the existing restrictions imposed in English criminal law, as represented by the House of Lords decision in *R v Brown and ors* [1994] 1 A.C. 212, are compatible with the requirements of Articles 8 and 14 of the Convention.

   (b) Whether, if those restrictions are incompatible, or arguably incompatible with Articles 8 and/or 14, it is open to affected individuals to bring proceedings under section 7 of the Human Rights Act 1998 challenging the present state of English law as it applies, or potentially applies, to their private sexual activities.

The compatibility of the present law with Articles 8 and 14

3. The decision of the House of Lords in *Brown* was reached by a narrow majority of 3 to 2. To that extent it may be said that the restrictions imposed by the decision rest on an insecure foundation, and are ripe for reconsideration under the Human Rights Act 1998. *Brown* was, of course, decided without detailed examination of the Convention rights at stake. It was concerned with the narrow question of whether, in the context of consensual sado-masochistic activity, the consent of the "victim" should be recognised as a defence to a charge of assault occasioning actual or grievous bodily harm. The House of Lords held that it should not.

4. However, when the facts of *Brown* were considered by the European Court of Human Rights in *Laskey v United Kingdom* (1997) 24 EHRR 39, that Court held unanimously that the prosecution, conviction and sentence of the defendants involved no breach of Article 8. It follows that any legal challenge would, at its highest, involve not only a reconsideration of a recent House of Lords decision, but also a significant departure from a principle unanimously laid down by the European Court of Human Rights.

5. However, it is important to stress that the Strasbourg decision in *Laskey* was fact specific. The Court unanimously concluded that the state was entitled to regulate, through the operation of the criminal law, activities which involved the infliction of physical harm, whether the injuries occurred in the context of sexual activity or otherwise. In the Court's view the decision of the House of

Lords fell within the margin of appreciation left to member states. In view of the large numbers involved, the organised nature of the activities, and the making and circulation of video tapes, the Court doubted whether the activities alleged fell fully within the ambit of Article 8. However, proceeding on the assumption that Article 8 was applicable, the Court held that the prosecution pursued the legitimate aim (within the meaning of Article 8(2)) of the protection of health and possibly also the protection of morals. In considering whether there was a reasonable relationship of "proportionality" between the prosecution of the applicants and the legitimate aim relied upon, the Court held that it was, in the first instance, for the domestic authorities, including the national courts, to determine the level of physical harm which should be tolerated in situations where the victim consented. The Court noted that the injuries sustained were "not insignificant", and that the factors at stake included public health considerations and the general deterrent effect of the criminal law. Accordingly, the Court rejected the applicants' argument that their behaviour formed part of their private morality which it was not the state's business to regulate. Having regard to the fact that the Court of Appeal had reduced the sentences originally imposed by the trial judge, the prosecution and convictions were not disproportionate to the legitimate aims of the protection of health and/or morals.

6. The emphasis which the Court placed in *Laskey* on the severity of the injuries inflicted drove it to distinguish the English Court of Appeal decision in *R v Wilson* [1996] 2 Cr. App. R. 241 on tenuous grounds. In *Wilson* the Court of Appeal held that a defence of consent was available to the defendant, who had branded his initials onto his wife's buttocks. Consensual activity between a

husband and wife, in the privacy of the matrimonial home, was held not to be a proper subject for criminal prosecution. The applicants in *Laskey* argued that if this were true for heterosexual sadomasochism, it must be equally true for homosexuals. In an unconvincing response, the Court held that there was no evidence of a difference in the treatment of homosexuals, because it was the "extreme nature of the practices involved" in *Laskey* that distinguished it, rather than the sexual orientation of the participants. The facts of *Wilson* were, in the Court's view, "not at all comparable in seriousness" with those of *Laskey* even though they amounted to assault occasioning actual bodily harm.

7. A number of points emerge from this:

(a) The Court's decision in *Laskey* was rooted in the "margin of appreciation" doctrine under which the European Court of Human Rights will defer to national authorities, including the national courts, especially when considering issues of personal morality. There is no uniform conception of morals in the member states and each state is free, subject to the limits inherent in European supervision, to set for itself the appropriate standards of morally acceptable behaviour. This principle has no direct equivalent under the Human Rights Act 1998. It is true that the national courts will accord a "discretionary area of judgment" to Parliament and the Executive in considering whether a legislative or administrative act which interferes with Convention rights is justified. But this rests on the principle of democratic accountability – the notion that Parliament's judgment, and the judgment of the Executive is to be

accorded a certain level of respect when the courts come to examine whether an interference with a Convention right amounts to a breach of that right. It involves a recognition that the courts are not always as well placed to judge such matters as those to whom the primary decision has been entrusted. This principle has a limited application in the present context since the rule in *Brown* is neither the result of a statutory provision, nor the result of an Executive decision. It is a judicial rule established by the House of Lords itself. Accordingly, there is a good argument for saying that the English courts should reconsider the question directly under the Human Rights Act and make a primary evaluation (as distinct from the secondary review conducted by the European Court of Human Rights).

(b) For much the same reason, the English courts are required under section 2 of the Human Rights Act to take account of the Strasbourg jurisprudence, but they are not required to follow it. If, having considered *Laskey*, an English court were to be persuaded that the prosecution of a particular individual, for engaging in a particular act, was incompatible with Article 8 then it would have the duty, under sections 6 and 8 of the Human Rights Act to afford an appropriate remedy. This may involve the stay of a criminal prosecution or (subject to the comments below) the grant of an appropriate declaration.

(c) In deciding that issue, however, it will be essential to consider the facts of a particular case. Plainly, a prosecution of the kind which occurred in

Wilson would be more likely to be found incompatible with Article 8 than a prosecution of the kind at issue in *Laskey*. Following the European Court's reasoning, this is not because of the sexual orientation of the participants, but because of the severity of the injuries inflicted. Even allowing for the principle that consent should, in general, be sufficient to remove sadomasochism from the realms of the criminal law, there must, on any view, be limits to what an individual can consent to. Article 8 could never enshrine a right to inflict physical injuries which are fatal, or potentially fatal, in the course of sexual activity. By the same token, a criminal law which prohibits the infliction of grave physical injuries requires less by way of justification under Article 8(2) than a law which prohibits the infliction of minor or transient injuries. The standard to be adopted is a relative one.

(d) It is plain from the decision in *Laskey* that the penalty imposed will be an important factor in an assessment of proportionality. There must be a reasonable relationship between the degree of harm inflicted and the sentence which a criminal prosecution would attract. It is implicit in the reasoning in *Laskey* that even the activities involved in that case could have resulted in a breach of Article 8 if the sentence was out of all proportion to the harm which the offence was seeking to avoid.

8. It follows that there is no simple answer to the question whether the present state of English law complies with Article 8. A proper evaluation of this question depends upon the nature and extent of the injuries inflicted, as well as the

potential sentence which this may attract. In order to demonstrate a breach of Article 8, in the absence of a specific criminal prosecution and sentence, it would be necessary to show that the fact of a prosecution and conviction was itself sufficient to cross the threshold of incompatibility.

9. Thus far, we have been considering the guarantees of Article 8 alone. It must also be borne in mind that Article 14 prohibits discrimination in the delivery of Convention rights on grounds which include gender, sexuality and any "other status". Accordingly, a law which is, in itself, compatible with Article 8 can be incompatible with Article 8, read in conjunction with Article 14, if it applies in a discriminatory fashion. Discrimination, for this purpose, means that there must be a difference in treatment between two persons in a comparable position, on grounds of their status, where either (a) there is no legitimate ground for the difference in treatment or (b) there is no reasonable relationship of proportionality between the ground for the difference in treatment and the extent of that difference. The law on Article 14 has recently and conveniently been summarised by the Court of Appeal in a case which itself concerned discrimination in landlord and tenant legislation as between unmarried heterosexual partners and homosexual partners: see *Ghaidan v. Mendoza* [2002] EWCA Civ 1533 [2002] 4 All ER 1162, esp. paras. 6-7 and 32-33 (Buxton LJ); 40 and 42-44 (Keene LJ).

10. For present purposes Article 14 could, in principle, be relevant in three ways:

(a) *Gender or sexuality.* If the criminal law governing sadomasochism is applied differently to homosexuals and heterosexuals (or to men and women) this would almost certainly involve a violation of Article 8 and 14 taken together. Article 14 was not invoked by the applicants in *Laskey*. However, it is implicit in the decision that if the difference in treatment between the applicants in that case and the defendant in *Wilson* had been based on sexuality then this would have been incompatible with Article 14.

(b) *Gravity of injury*. A distinction based on the gravity of the injuries inflicted would not, in our view, fall foul of Article 14. It is inherent in an assessment of proportionality that if injuries are placed on a scale of escalating seriousness there will come a point at which criminalisation is plainly justified.

(c) *Comparison with other activities involving the infliction of injury.* There is no doubt that the principle in *Brown* permits the infliction of serious injury in sporting activities like boxing, as well as body piercing, whilst prohibiting less serious injury in the context of sadomasochism. This point is of general relevance to the proportionality of the rule for the purposes of Article 8. But it would not, in our view, found an independent challenge under Article 14 since the comparators would not be accepted as being in a sufficiently similar position. In this context, Article 14 adds nothing to Article 8.

11. Thus, the only area in which Article 14 has any true relevance to the issues on which our advice is sought is in the potential for discriminatory application of the law on grounds of gender or sexuality. It is, in our view, most unlikely that an English court would openly apply any such distinction, a view which is reinforced by the approach which the Strasbourg court took to the *Wilson* case in *Laskey*. Certainly, there is an insufficient basis at present for alleging an institutionalised difference of treatment.

12. In summary, therefore, it is our view that in an appropriate case, Article 8 (and possibly Article 14) could be relied upon as a means of challenging a criminal prosecution against an individual who has inflicted minor or moderate injuries in the context of consensual sadomasochistic activity. On the other hand, it is clear that there must be a limit to this principle, and that Article 8 would not protect the infliction of very grave injuries in this context. The nub of the problem lies in defining the boundary between what is and what is not protected under Article 8.

13. At present, the House of Lords has drawn the boundary under English law by holding that consent is no defence to the infliction of actual bodily harm or wounding. However, it appears clear that there may some forms of injury which, though they technically constitute actual bodily harm or wounding, are insufficiently serious to justify the application of the criminal law. That much is implicit in the *Wilson* decision and in the emphasis placed in *Laskey* on the severity of the injuries inflicted.

14. The difficulty for those who wish to engage in sadomasochism lies in knowing exactly where the boundary is to be drawn. One can illustrate the problem by considering a range of factual scenarios:

(a) a heterosexual couple wishing to inflict minor injuries which technically constitute actual bodily harm or wounding;

(b) a homosexual couple in a stable relationship wishing to inflict minor injuries which technically constitute actual bodily harm or wounding;

(c) a heterosexual couple wishing to inflict serious injuries which constitute grievous bodily harm;

(d) a homosexual couple wishing to inflict serious injuries which constitute grievous bodily harm.

15. If a legal challenge is to be mounted then it should, in our view, be mounted by or in relation to couples falling within (a) and (b), that is heterosexual and homosexual couples who inflict - and wish to continue inflicting - minor injuries on each other which technically constitute actual bodily harm or wounding. We are aware that those instructing us do not wish to assert the right to inflict more serious injuries which would constitute grievous bodily harm by consent. We consider that there would now be a reasonable prospect of a challenge in relation to activities carried on by couples falling into categories (a) and (b) above succeeding.

We turn now to consider the means by which such a challenge may be mounted.

A declaration on judicial review

16. Section 7(1) of the Human Rights Act 1998 provides the means by which an individual who complains that his Convention rights have been, or will be, infringed by a public authority may rely on those rights in legal proceedings. By section 7(1)(a) an individual who qualifies as a "victim" of a such an infringement may bring proceedings against the public authority concerned in the appropriate court or tribunal. By section 7(1)(b) such an individual may rely on his Convention rights in any legal proceedings, including criminal proceedings.

17. The first question to be determined is whether it is open to a couple falling within paragraph 14(a) and (b) above to bring proceedings in the Administrative Court to clarify the present state of the law on the ground that the continued existence of the rule in *Brown* constitutes a restriction on their private sexual activity in breach of Article 8.

18. In order to invoke Convention rights through either of the routes laid down in section 7(1) the complainant must be a "victim" or potential "victim" of the act or omission complained of. Section 7(7) provides that for this purpose a person is a victim of an unlawful act or omission only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the

European Court of Human Rights. Under Article 34 the Strasbourg Court has held that a person can claim to be a victim where the mere continued existence of a law is alleged to interfere with the exercise of his Convention rights. This principle has been applied to criminal law prohibiting consensual homosexual activity in private: *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Norris v Ireland* (1991) 13 EHRR 186. In each case the applicants, who complained that the existence of a criminal offence which prohibited consensual homosexual activity in private was in breach of Article 8, were held to qualify as "victims" without having to wait to be prosecuted. The very existence of the offence amounted to an interference with their right to engage in the sexual activity concerned.

19. We therefore consider that the "victim" requirement under section 7 would be satisfied in such a case. The next question is how such a challenge might be mounted. Section 7(1) enables Convention rights to be relied upon only where a public authority acts or proposes to act in a manner incompatible with those rights. In the absence of a prosecution, it is necessary to identify the act or proposed act in question.

20. One technique which has been attempted without success is to write to the Attorney General and seek a decision from him as to whether or not particular conduct is to be regarded as lawful under the Human Rights Act. In *Rusbridger and Toynbee v Attorney General* (20th March 2001), the editor and a journalist working on the Guardian newspaper wrote to the Attorney General giving notice of their intention to publish articles advocating an end to the monarchy, and

asking him to announce his intention to disapply the provisions of the Treason Felony Act 1848, which prohibits the publication of such material, on the ground that it was incompatible with the right to freedom of expression in Article 10. The Attorney General declined to give the undertaking sought and the claimants applied for permission to move for judicial review of that decision. They were refused permission, primarily on the basis that there was no decision to review and thus no "act or proposed act" to challenge under section 7.

21. Before the Court of Appeal, the claimants abandoned their application for permission in relation to the "decision" of the Attorney General not to give an undertaking. Instead, however, they applied for a declaration that the law they complained of was incompatible with Convention rights. More specificially, they sought (a) a declaration that the relevant statutory provision should be read, in accordance with section 3 of the Human Rights Act, as permitting journalists to advocate the establishment of a republic by peaceful means and (b), in the alternative, a declaration of incompatibility under section 4 of the Act.

22. The Court of Appeal held that they were, in principle, entitled to seek a declaration as to the present state of the law following enactment of the Human Rights Act 1998, and granted them permission to do so. Schiemann L.J. said:

> "Mr. Robertson submits that the court has jurisdiction to make a declaration as to the meaning of an Act of Parliament and that the court ought to exercise this jurisdiction so as to clarify the meaning of [the relevant provision] in the light of section 3 of the HRA and the

provisions of the Convention, in particular Article 10. His primary submission in broad terms is that the existence of [the relevant provision] read on its own inhibits publication of matter which advocates the establishment of a republic but that it can be read in the light of the HRA in such a way as not to inhibit such publication. His fall back position is that, if his primary submission is wrong, then the court ought to make a declaration of incompatibility under section 4 of the HRA thus making it possible for remedial action to be taken under section 10…

It is common ground that an application for Judicial review is, at least, an appropriate method of seeking the relief currently sought…

There are powerful arguments against letting litigants occupy the time of the court with problems which do not affect them personally. There are people with pressing problems whose cases await solution. They are waiting longer because this case is being heard. We do not understand the claimants to suggest that the uncertainty of our law as to treason has affected their decision to publish in the past or is likely to in the future…

On the other side, there are powerful arguments in favour of free speech and also of having our criminal law formulated in such a way that the citizen can see what is prohibited and what is not…

In 1998…the HRA was passed. Parliament chose, for reasons which are readily understandable, not to amend all Acts which might require amendment in the light of our obligations under the Convention but instead to leave the Courts to do what they can with the help of section 3 of the HRA. This technique is valuable when deciding whether or not a publication which has taken place constitutes a criminal offence. It is of no help to a person who wishes to publish in the future unless he has access to the courts to tell him in advance whether what he proposes to do is lawful…

The claimants…now seek relief from the Court in the form of a declaration as to the meaning of an Act of Parliament and a declaration of incompatibility in the event that the Court finds the [relevant provision] is incompatible. Had the relief been sought in that form initially the Attorney General would have been the proper respondent to the proceedings but in a purely formal rather than in a personal capacity. It is common ground that the Court has jurisdiction to make such a declaration but that this jurisdiction will only be exercised sparingly…

We of course express no view as to whether a declaration in the form now sought should be granted or as to the construction of the [relevant provision] but we consider that it would not be in the interests of justice to prevent the matters raised in this application from being fully argued."

23. In the light of this decision, it appears to us that there is now available an avenue for seeking a judicial declaration as to the present state of English law on sadomasochist "assault", and the extent of the protection afforded by Article 8. The appropriate form of the challenge is an application for judicial review, and the appropriate respondent is the Attorney General. Such a challenge would need to be very carefully formulated so as to isolate the issues of genuine uncertainty in English law. For the reasons we have already explained it would, in our view, be sensible to select challengers who have a realistic prospect of establishing either that the sexual activity they wish to engage in is (a) arguably prohibited by the decision in *Brown* but (b) arguably protected by Article 8.

24. In considering whether the Court should exercise the "exceptional" jurisdiction it has to grant a declaration as to the present state of the criminal law, and as to the meaning of the relevant provisions of the Offences Against the Persons Act 1861, interpreted with the benefit of section 3 of the HRA, the potential claimants in the present case are in an arguably stronger position than those in *Rusbridger*. Whereas the Guardian was able to publish secure in the knowledge that no criminal prosecution would ever be brought in practice, that is not the position here. There is genuine uncertainty at the borderline as to what sadomasochists can and cannot lawfully do in the course of their sexual activity. It can plausibly be argued that this uncertainty is, in itself, an inhibition on their freedom of sexual expression in the exercise of their Article 8 rights.

25. We therefore advise that the appropriate avenue for such a challenge is by way of an application for permission to move for judicial review, directed to the Attorney General, in order to seek a declaration from the courts clarifying the scope of the offences of assault occasioning actual bodily harm and unlawful wounding, as they apply to consensual sadomasochist "assaults".

26. As to the merits of the challenge it must, realistically, be recognised that there are significant obstacles to overcome. However, properly understood, this challenge would not involve overturning the decision of the House of Lords in *Brown* since that decision was reached prior to the enactment of the HRA and without detailed consideration of the Convention principles at stake. Under the HRA all courts, including the House of Lords, are now bound to act compatibly with the Convention rights unless they are prevented from doing so by the terms of legislation so clearly worded that it is impossible to give effect to the right(s) concerned. *Ghaidan* (above) illustrates the powerful effect of the HRA in this context: in that case the Court of Appeal felt not only free to depart from a decision of the House of Lords on the very same point of statutory interpretation, which had been given just three years earlier, but bound to do so in order to give effect to the HRA. Neither would the challenge involve a significant departure from the European Court decision in *Laskey*. That case decided (a) that the *Brown* principle was within the national margin of appreciation and (b) that, on the facts, the prosecution, conviction and sentence of the applicants was not incompatible with Article 8. *Laskey* does not answer the question of whether an English court, applying a primary judgment, should come to the same conclusion in relation to the infliction of injuries which are

less serious than those at issue in *Laskey* but which would nonetheless amount to offences under the decision in *Brown*.

27. It is right to point out that the costs implications could be substantial. The argument would almost certainly require resolution at an appellate level and, if unsuccessful, the claimants should expect to be held liable to pay the costs of the Attorney General. However, we think that there are reasonable prospects of an appropriately framed application succeeding.

28. If we can assist further, our Instructing Solicitor should not hesitate to contact us again.

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