

Public Annex B

***139 Hamer v. United Kingdom**

Application No. 7114/75
Before the European Commission of Human Rights
13 December 1979

(1982) 4 E.H.R.R. 13913 December 1979¹**Analysis**

Right to marry. Convicted prisoner. Refusal of right to marry. (Art. 12.)

National law may regulate the exercise of the right to marry on generally recognised considerations of public interest such as consent, capacity, consanguinity or the prevention of bigamy, but it may not otherwise deprive a person or category of persons of full legal capacity to marry, nor may it substantially interfere with their exercise of that right. To accord prisoners the right to marry involves no general threat to prison security or good order, nor is it in any way harmful to the public interest. Whether resulting from national law governing the exercise of the right or from administrative action by prison authorities, the imposition of any substantial period of delay on the exercise of the right to marry is an injury to its substance.

The following cases are referred to in the opinion:

- 1. Belgian Linguistic Case (No. 2) (1968), Series A, No. 6; 1 E.H.R.R. 252.
- 2. Draper v. United Kingdom, Application No. 8186/78, Report of the Commission (10 July 1980).
- 3. Golder v. United Kingdom (1975), Series A, No. 18; 1 E.H.R.R. 524; Series B, No. 16 (Report of the Commission).
- 4. X v. Federal Republic of Germany (1961) 4 Yearbook 240; 6 Coll. 17.
- 5. X v. Federal Republic of Germany (1975) 1 D. & R. 64.
- 6. X v. Switzerland (1978) 12 D. & R. 241.
- 7. X v. United Kingdom (1975) 2 D. & R. 105.

- 8. X v. United Kingdom (1971) 35 Coll. 97.
- 9. X v. United Kingdom (1972) 39 Coll. 63.
- 10. X v. United Kingdom (1973) 42 Coll. 140.

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55. The point at issue in the present case is whether the decision of the Home Secretary, communicated to the applicant on 21 March *140 1975 and maintained subsequently, involved a violation of his right to marry, as guaranteed by Article 12 of the Convention.

Article 12 is in the following terms:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

56. The Commission first recalls that in a previous decision on admissibility, it found that a refusal to allow a prisoner to marry was not in breach of Article 12.³ The respondent Government have referred to that decision and invited the Commission to reach the same conclusion. However the circumstances of the present case are not altogether comparable. In particular in the earlier decision the Commission laid emphasis on the existence of particular rules of German law concerning the right to marry and the extent to which prisoners' rights could be restricted.

57. In any event in interpreting Article 12 of the Convention the Commission must now have regard to subsequent case-law of the European Court of Human Rights on the scope of permissible limitations to Convention rights, of prisoners in particular. It must also consider the facts now before it in the light of present-day conditions. In this respect it is relevant to note the general tendency in European penal systems in recent

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years towards reduction of the differences between prison life and life at liberty and the increasing emphasis laid on rehabilitation.

58. The Commission has also previously held that the right to 'found a family', guaranteed by Article 12, was not infringed by differences between prison life and life at liberty and the increasing Commission stated as follows:

Although the right to found a family is an absolute right in the sense that no restrictions similar to those in paragraph (2) of Article 8 of the Convention are expressly provided for, it does not mean that a person must at all times be given the actual possibility to procreate his descendants. It would seem that the situation of a lawfully convicted person detained in prison falls under his own responsibility, and that his right to found a family has not otherwise been infringed.⁴

The respondent Government have invited it to follow the same approach in this case. However in the Commission's opinion different considerations apply in the case of the right to marry. This is, essentially, a right to form a legal relationship, to acquire a status. Its exercise by prisoners involves no general threat to prison security or good order comparable to those referred to by the Commission in the above-mentioned decisions.⁵ In particular a marriage ceremony can take place under the supervision of the prison authorities. *141

59. The Commission therefore finds the case-law to which it has referred of little assistance in the present case.

60. As to the general question of interpretation it is clear, as both parties are agreed, that Article 12 guarantees a fundamental 'right to marry'. Whilst this is expressed as a 'right to marry ... according to the national laws governing the exercise of this right', this does not mean that the scope

afforded to national law is unlimited. If it were, Article 12 would be redundant. The role of national law, as the wording of the Article indicates, is to *govern the exercise* of the right.

61. The Court has held that measures for the 'regulation' of the rights to education (Article 2 of Protocol No. 1) or access to court (Article 6) 'must never injure the substance of the right'.⁶ In the Commission's opinion this applies also to the national laws which govern the exercise of the right to marry.

62. Such laws may thus lay down formal rules concerning matters such as notice, publicity and the formalities whereby marriage is solemnised.⁷ They may also lay down rules of substance based on generally recognised considerations of public interest. Examples are rules concerning capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy.⁸ However, in the Commission's opinion national law may not otherwise deprive a person or category of persons of full legal capacity of the right to marry. Nor may it substantially interfere with their exercise of the right.

63. Both parties have also made submissions on the question whether there may be implied limitations to the right to marry of a prisoner, other than those arising from the national laws referred to in Article 12. The Commission finds it sufficient to say that a person deprived of his liberty under Article 5 remains in principle entitled to the right to marry and that any restriction or regulation of the exercise of that right must not be such as to injure its substance.⁹

64. Turning to the facts of the present case, the first question which arises is whether the applicant's right to marry was denied him or interfered with at all by the United Kingdom authorities. The Government maintain that it was not. They have submitted that the applicant was merely in a position where, as a result of his own actions, he was unable to exercise it for a time, being unable to go to a place authorised under the domestic law of marriage.

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65. The Commission first recalls that the Court has held that, even though a right is not formally denied, 'hindrance in fact can contravene the Convention just like a legal impediment' and *142 'hindering the effective exercise of a right may amount to a breach of that right, even if the hindrance is of a temporary character'.¹⁰

66. Here the applicant was prevented from marrying by a combination of factors. He was in prison. National law did not allow of his marrying there. The Home Secretary would not allow him temporary release so that he could marry elsewhere.

67. This situation was not one of the applicant's own choice. His position was in no way comparable to that of a priest or other person who of his own free will renounces the right to marry or puts himself in a position where he cannot exercise it. Nor can it be said that his inability to marry was simply an inevitable result of his imprisonment, or of his actions which led to it, for which the Government were not responsible. Personal liberty is not a necessary precondition to the exercise of the right to marry. The practice of States in allowing prisoners to marry, either within prison or on temporary release under escort, shows that no specially onerous or complex arrangements are necessary. The exercise of the right, particularly within a prison, does not, as the Commission has already pointed out, involve the prisoner escaping from the supervision and control of the prison authorities.

68. Some administrative arrangements must of course be made by the prison authorities before a prisoner can marry. However this also applies to other Convention rights, such as the right of access to court (Article 6) and the right to respect for correspondence and family life (Article 8). Some positive action is required on the part of the prison authorities to make these rights effective. A prisoner cannot correspond with his legal adviser or anyone else, unless the authorities transmit his letters. He cannot receive visits from members of his family unless arrangements are made for them to come in. He cannot attend a family funeral unless he is allowed temporary release. Yet the case-law of both the Commission and Court shows that where a prisoner is refused the necessary

permission or facilities in such cases, his inability to exercise the right in question is not to be seen as resulting from the mere fact that he is in prison, or from his own conduct. The refusal of the necessary permission or facilities is, rather, to be seen as an interference with the relevant Convention right by the competent authorities, which may or may not be justifiable under the Convention. This was the approach of the Commission and Court in the Golder Case,¹¹ and that of the Commission in cases involving, for instance, the refusal of permission to attend a family funeral.¹²

69. Following the same approach in the present case, the Commission considers that the respondent Government were responsible *143 for an interference with the exercise of the applicant's right to marry.

70. It remains to be considered whether this interference amounted to a breach of that right, or whether it was justified as resulting from national law governing the exercise of the right to marry or by virtue of any implied limitation on the right. In this connection the Commission notes that the effect of the Home Secretary's decision was to impose a delay on the applicant's proposed marriage. It could not take place until he found himself outside prison. The earliest he could have been released on parole was in June 1976, some 15 months later. If, as in fact occurred, he was not granted parole, the possibility of release on home leave did not arise until May 1977, over two years after the decision. In the event the applicant's relationship with his fiancée ended before either period had expired.

71. In considering whether the imposition of such a delay breached the applicant's right to marry, the Commission does not regard it as relevant that he could not have cohabited with his wife or consummated his marriage whilst serving his sentence. The essence of the right to marry, in the Commission's opinion, is the formation of a legally binding association between a man and a woman. It is for them to decide whether or not they wish to enter such an association in circumstances where they cannot cohabit.

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72. In the Commission's opinion the imposition by the State of any substantial period of delay on the exercise of this right must in general be seen as an injury to its substance. This is so whether the delay results from national law purporting merely to 'govern the exercise' of the right, from administrative action, or a combination of both. Further, no general consideration of public interest arising from the fact of imprisonment itself can justify such interference in the case of a prisoner. As the Commission has already pointed out, no particular difficulties are involved in allowing the marriage of prisoners. In addition there is no evidence before the Commission to suggest that, as a general proposition, it is in any way harmful to the public interest to allow the marriage of prisoners. Marriage may, on the contrary, be a stabilising and rehabilitative influence.

73. In the present case the applicant's ability to exercise his right to marry was substantially delayed by the combined effects of national law and administrative action. This amounted, in the Commission's opinion, to an injury to the substance of his right to marry.

Conclusion

74. The Commission therefore finds unanimously that the applicant's right to marry guaranteed by Article 12 of the Convention was violated. ***144**

Committee of Ministers

Resolution DH(81)5

2 April 1981 ¹³

In his application introduced on 25 May 1975, the applicant complained that he was denied facilities necessary to enable him to marry whilst he was serving a prison sentence, alleging a violation of Article 12 of the Convention.

The Commission, after having declared the application admissible on 13 October 1977, in its report adopted on 13 December 1979, considered that the fact that national law did not allow the applicant to marry in prison and the fact that the Home Secretary would not allow him temporary release so that he could marry elsewhere, amounted to an interference with the exercise of his right to marry, that the imposition of any substantial period of delay on the exercise of this right must in general be seen as an injury to its substance and that the applicant's ability to exercise his right to marry was substantially delayed by the combined effects of national law and administrative action.

In its report, the Commission expressed the unanimous opinion that the applicant's right to marry guaranteed by Article 12 of the Convention had been violated.

During the examination of this case, the Committee of Ministers was informed by the Government of the United Kingdom that it accepted the Commission's report, that it had changed its practice with regard to the marriage of prisoners, like Mr. Hamer, serving a determinate custodial sentence, that a decision had been taken to prepare legislation to amend the marriage laws so as to allow prisoners to be married in prison, that it hoped that there would be an early opportunity to introduce this legislation after the passage of which it intended to allow prisoners' marriages without the restrictions and delays which at present apply.

THE COMMITTEE OF MINISTERS, agreeing with the opinion expressed by the Commission in accordance with Article 31 (1) of the Convention;

voting in accordance with the provisions of Article 32 (1) of the Convention,

(a) decides that in this case there has been a violation of Article 12 of the Convention;

(b) decides, having regard to the information supplied by the Government of the United Kingdom, that no further action is called for in this case. ¹⁴ ***145**

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Footnotes

- 1 Released for publication in April 1981. See p. 144, *post*.
- 2 The statement of facts and the parties' arguments have been omitted.—Ed.
- 3 X v. Federal Republic of Germany (1961) 4 *Yearbook* 240; 6 Coll. 17.
- 4 X v. Federal Republic of Germany, *supra*, note 1.
- 5 See especially X v. Switzerland, *supra*, note 2.
- 6 Belgian Linguistic Case (No. 2) (1968), 1 E.H.R.R. 252, para. 5; Golder v. United Kingdom (1975), 1 E.H.R.R. 524, para. 38.
- 7 Cf. X v. Federal Republic of Germany.
- 8 Cf. X v. United Kingdom(1971) 35 Coll. 97 and 102.
- 9 Belgian Linguistic Case, Golder v. United Kingdom, *supra*, note 5.
- 10 Golder v. United Kingdom, *supra*, note 5, para. 26.
- 11 Report of the Commission, Series B, No. 16.
- 12 X v. United Kingdom(1972) 39 Coll. 63; X v. United Kingdom(1973) 42 Coll. 140.
- 13 Adopted at the 332nd meeting of the Ministers' Deputies.
- 14 An identical decision was reached in the similar case of Draper v. U.K., Application No. 8186/78, Report of the Commission dated 10 July 1980, Committee of Ministers Res. DH (81) 4 of 2 April 1981.

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