**Sexual Orientation and the European Convention on Human Rights – Voices and Perspectives**

**Heslinton Hall**

**York University**

**16 May 2014**

***Mission Accomplished in Northern Ireland?***

**Jeffrey Dudgeon (Northern Ireland Gay Rights Association)**

My thanks go to Paul Johnson of York University for inviting me to speak to you here.

Powerpoint screen illustrations will punctuate my talk. They are not precisely connected to points in the text but do provide an, at times random, flavour of my life and campaigns, adding colour to what I say.

I will deal with some of the facts about my case which started in 1976. I will then explain what is currently happening in Northern Ireland and how events have unfolded since, essentially saying nothing much has changed, nor can it legislatively, because of the devolutionary arrangements imposed on us for nearly a century. Stormont, or local parliament was long recognised as essentially a factory of grievances.

And, if I have time, I will ask you to query some conventional certainties. Given my status as a UK outsider, for so many decades detached from the mainstream, I and others in Ulster have a unique ability to observe what happens when ethnic and other disputes threaten a country. The English cannot understand nationalism. Yet.

My case - more precisely that of NIGRA was, as you know, taken to the European Court of Human Rights in Strasbourg – that is the 47-member, Council of Europe court. Only Belarus, the Vatican and Kosovo are non-members. Mine was just the fifteenth case where a violation of the Convention was judged, and the fifth of any sort won against the UK.

There have been some fifty successful gay-related judgments since, most against the UK - on the age of consent and gays in the military for example; not to mention David Norris’s follow-on case in Ireland and Alecos Modinos in (Greek) Cyprus.

When Northern Cyprus voted to abolish the criminal provision outlawing sexual acts between men earlier this year, Europe completed the cycle of reform. ILGA declared “We welcome today’s vote and can finally call Europe a continent completely free from laws criminalising homosexuality. In 1981, the ECHR ruled in its historic judgment in Dudgeon v UK that such laws are in breach of the European Human Rights Convention and must be abolished. It took Europe 33 years to completely free the continent from these unjust and discriminatory laws.”

Judgement in my case was given in 1981, six years after it commenced. Homosexuality had to be decriminalised in Northern Ireland, and one year later it was.

It was a crime in Northern Ireland in 1976 to be gay; that is to do anything sexual with another male, as it is in so many former British colonies today. A man was subject to life imprisonment for sodomy and two years for gross indecency - which covered any and every other sexual act. Gross indecency was the crime of Oscar Wilde. Even before him, in 1893, Edward de Cobain, MP for East Belfast, was convicted on that charge. Until 1861, you could be hanged for sodomy, and some were; the last such execution was in 1836.

The Government’s Wolfenden Report of 1957 was prompted by the unpopular imprisonment of Lord Montagu of Beaulieu in 1955 while the Second World War with its unsettling social changes, and the consequent post-war Puritanism of the 1950s, was its backdrop.

But those who commissioned the report never expected its radical recommendations so it remained unimplemented for a decade. Wolfenden, I discovered recently, had a gay son which may well have coloured his findings.

The Home Secretary, David Maxwell Fyfe, later Lord Kilmuir, was a champion of European integration and the chairman of the Council of Europe Assembly Committee that drafted the European Convention on Human Rights. He also led the opposition in the House of Lords to the implementation of the Wolfenden Committee report, which had recommended the decriminalisation of homosexual acts between consenting adults.

Kilmuir bitterly opposed liberalisation when a bill was introduced by Lord Arran in 1965. Maxwell Fyfe had earlier told the Conservative backbencher, Sir Robert Boothby: “I am not going down in history as the man who made sodomy legal.”

He stated in debate, “It is even more important to pause and consider when one is proposing to remove the sanction from something which has been a criminal offence for many centuries. I believe that the result would be, and must be, after 432 years, that if people find that the view is changed, then, in the eyes of many of them, this behaviour will have a respectability that it never had before. I also believe that many of those who now keep silent and discreet about their desires will feel free to proselytise, and this is a matter which is well known. It is no help on this point for the noble Earl to say that importuning would still be an offence. That is not the proselytisation I have in mind. I have in mind the proselytisation which goes out from sodomitic societies and buggery clubs, which everybody knows exist.”

On another occasion he said, “I know, my Lords, that there is a point of view to-day which has some popularity and which would say that because it is 432 years since the passage of the Act of Henry VIII on buggery, it is therefore a good thing to change it. I respectfully ask your Lordships to consider the more modest and humbler but more democratic point of view put forward by a great friend of mine. It is worth remembering that the dead are the great majority, and many of the dead were not fools. I ask your Lordships to reject this Bill.” (Sexual Offences Bill, Lords debate, 24 May 1965)

My point for quoting Kilmuir at length is to say that even an architect of the European Convention would have recoiled at where it has travelled. Things change dramatically in a couple of generations. And of course they can go backwards.

Decriminalisation for England and Wales occurred in 1967 after several years of parliamentary battles when the Sexual Offences Act was finally passed. I actually attended one of the debates, when I was 20.

Nothing happened in Northern Ireland for the next decade, as we had our own devolved legislature, Stormont. It basically existed not to legislate. Much as now.

Unbeknownst to me and just off my radar, the most prominent MP arguing for gay law reform in the 1950s was a Unionist MP, Harford Montgomery Hyde.

He paid for his courage in 1959 by being deselected, narrowly, for his North Belfast seat, but he went on to become the author of many books, including *The Other Love*, the best book on the history of homosexuality in Britain and Ireland, and the *Trial of Roger Casement*. One of those working against him in the constituency, as he told me, was Rev Ian Paisley.

I too have written on Roger Casement publishing in 2002 an extensive illustrated biography that included a full transcript of the Black Diaries. The authenticity dispute however lives on, forgery being something of an article of faith for Irish nationalists.

Despite our efforts, we failed to get law reform into the short-lived 1974 Northern Ireland executive or even past the Alliance Party’s Law Reform Minister. Direct rule from London followed for thirty years.

In 1975, Kevin Boyle, a Queen’s law lecturer suggested to me, to try Strasbourg. He said an application only cost the price of a stamp. We were angry enough to try anything. Coming from an angry part of the world helped. By then the Stonewall events in New York had occurred which also influenced us.

Kevin had been involved in the Ireland v. UK case at the Court. It ascribed, not torture, but inhuman and degrading treatment to certain British military actions in Northern Ireland. Luckily, we had exhausted our domestic remedies, as is required by Strasbourg, since the UK has no constitutional court and both Stormont and later Westminster had declined to reform the law.

We thought the law moribund and we would be let alone but out of the blue came the 1976 gay raids.I was taken in for questioning as were the 25 other committee members of our two groups Cara-Friend and NIGRA, women excepted (and it was nothing to do with Queen Victoria that women were excepted from the law). Literally all my papers and letters were seized and annotated for use against me. I still have them with all the red underlings through personal details.

Breaking up a gay organisational conspiracy was the police’s purpose on foot of a reformed Royal Ulster Constabulary doing what it thought English constabularies did. Round up the local queers.

The authorities were intent on convictions to the point where the Director of Public Prosecutions, in early 1977, prepared charge papers against four of us for acts that could not have been prosecuted in England, and sent them to the RUC.

A Freedom of Information request I made to the Northern Ireland Office recently revealed that it was only by a sliver of luck that I was not charged, a note on the file saying: “DPP (NI) decides to prosecute, but the relevant papers are retrieved from the out-tray at the last moment…” The Attorney General in London, unusually, had vetoed a Northern Ireland prosecution. These raids none the less gave our case invaluable traction.

There were inevitably early difficulties in the Strasbourg case. Anything I said was potentially self-incriminating which was why initially the case was filed anonymously, while the earliest papers were actually seized in the police raids.

The Labour Government meantime started a meandering process of law reform which was shelved in 1978, and ditched by Margaret Thatcher’s new government a year later. The NIO Minister, Hugh Rossi, when making that decision in a note on the papers wrote, “Leave it to Strasbourg to find against us.”

Anything that could unite Catholic and Protestant - and there were few enough of these - was sacrosanct to the NIO and the view was (and long maintained) that homosexuality had a uniquely unifying effect. Delay on the Civil Partnership Bill was even dangled as bait in front of the DUP in 2003.

Meantime there had been in 1977, the *Save Ulster from Sodomy* campaign led by Rev Ian Paisley, then a fundamentalist preacher politician, ably assisted by his deputy Peter Robinson. They gathered 70,000 signatures on a petition against law reform.

This gives the impression of a thoroughly illiberal society in Northern Ireland, but I have always said it masks a moderate and more easy-going majority. Although my house came under sustained attack after the law reform, I was not beaten on the street, despite appearing on TV arguing with both Paisley and Robinson at the moment of law change.

Mine was to be the first successful gay case at the Court. Previous German applications in the 1950s had failed, rejected as inadmissible due to the Court’s acceptance of toxic Nazi and Imperial German sociological evidence. I hoped to undo the German precedents.

The European Convention of course was written in the wake of the Second World War, the Jewish extermination, and the less-noted fact that gay men and lesbians were imprisoned without trial in concentration camps, notably Mauthausen in Austria. Many thousands were worked to death. Few returned, and those that did weren’t compensated and they kept quiet.

The value and virtue of the Court is that it has modernised along with European society. I likened its political, geographical and cultural position to somewhere in north middle Europe like Frankfurt. Perhaps now it is further east – Berlin, Vienna?

In a prolonged and often petty defence, the UK made much of the pronounced religiosity of Northern Ireland, even seeking out a private statement of support from the then Cardinal. We argued that life imprisonment for something legal in Liverpool was absurd, disproportionate and way beyond any margin of appreciation that states were permitted.

We knew we were going to win on Article 8. The penalty was just so extreme. I pushed to open up Article 14: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground.”

That obliged, unfortunately, a change of lawyers and the briefing of Lord Gifford as lead barrister, Terry Munyard as junior instructed by Paul Crane as solicitor, the last two being gay, the first a radical lawyer. Peter Ashman of Justice who sadly died this year, too young, was a valuable partner in the enterprise.

The Court hearing which I attended, silently, in April 1981 was unusually held before a full panel of 19 judges. In October, judgement was given. The Court held by 15 votes to 4 that the UK was in breach of Article 8.

They stated the “restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.”

But by 14 votes to 5, they decided that it was not necessary to examine the case under Article 14, stating there was no useful legal purpose in determining whether I had, in addition, suffered discrimination.

The judgements carry several minority opinions on either side of that ‘mittel-Europ’ consensus, one which is secular and progressive but not radical. They remain interesting, although in one case inaccurate and dangerous. The Irish (dissenting) by Judge Brian Walsh opinion reads well as a defence of traditional values. He was later to become a Supreme Court Judge in Dublin.

The majority view stayed the course and became an international standard; one followed by judgments against Ireland in the Norris case and against Cyprus - in the wake of my precedent.

A year later, in 1982 I was listening in the House of Commons. The Ulster MPs who voted were universally opposed to reform, including Enoch Powell who found a technical excuse to oppose the legislation. After his death, he was reported as having had a homosexual love affair while a university student!

James Kilfedder, another gay and closeted Westminster Unionist MP (of whom there seemed a disproportionate number), abstained. He was to die of a heart attack in 1995, the day Outrage was reported in the *Belfast Telegraph* as being about to out a Unionist MP. Ironically, I got a job with his MP successor for three years!

In the Article 50 costs settlement, after literally every pound had been queried by the government, £3,300 was awarded for my legal fees. I was denied £1,200 because of a mistaken view by the Court that my lawyers were acting on a contingency basis – at that time an improper arrangement in Northern Ireland. No damages were given, the verdict and law reform being seen as sufficient reward.

Three of the five judges who had voted against me and the UK judge were amongst the seven in this costs hearing; a disgraceful imbalance - perhaps a punishment for changing lawyers and trying to push beyond consensus.

In 2007, at a QUB lecture on the European Convention, I heard our then Lord Chief Justice, Sir Brian Kerr, describe defending cases at Strasbourg for the NIO. In particular, he recalled that of “Jeffrey Dudgeon” and remarked that he had been endlessly criticised, particularly at dinner parties, for taking the brief. He remarked that what he had said was “bilge,” and that there had been “nothing sensible” in his pleadings.

He did not know I was present. Kerr also told of fixing his gaze, on the Irish judge, Brian Walsh - as he thought - only to discover that the bench was out of alphabetical order. It was the Greek judge he was eye stalking, one of the five willing to hear my Article 14 points!

My case, unusually, was cited in the US Supreme Court by Justice Anthony Kennedy in the 2003 Lawrence decision. ‘Lawrence’ was the overturned Texas sodomy conviction that led to such laws being struck down.

The UK, by virtue, in part, of having an unwritten constitution has had many hundreds of cases filed against it, so I was pleased when the Human Rights Act was passed in 1998. It wrote the European Convention into UK domestic law requiring judges to take account of decisions of the Strasbourg Court and to interpret legislation in a way compatible with the Convention.

I had long argued that Westminster had lost the power, indeed the ability to take difficult or unpopular decisions in human rights matters. We also needed a domestic system to test such cases internally because of the extreme length of time involved in a Strasbourg application. Individuals however retain the right to go on to Europe.

It is astonishing that I have gone in the space of 30 years from total illegality to a high level of legal protection with even employment protection and the option of civil partnership.

In gay terms, we may have reached the limits of equality and protective law and can now consolidate.

Gay men still fall foul of police and of prosecutors in relation to outdoor activity and often historic, under-age crimes. I have advised in many such unfortunate cases which take a high toll in suicides. I have found our public prosecution service particularly inflexible and contradictory in this area.

My case opened up the concept of gay rights as human rights. Until then we were a community at the edge of the law, in many European countries, barely tolerated; outlaws in others. Now we were no longer criminals, but humans with rights, and with more to come.

To update and conclude this aspect, being governed, as we are in Northern Ireland, by an evangelical Protestant sect and a clutch of retired paramilitaries is not my idea of heaven. However due to the existence of a plethora of international agreements - not least the ECHR - and equality legislation, Northern Ireland cannot go backwards.

Peter Robinson’s wife Iris, in 2008, in parliament called homosexuality a sickening abomination and that “just as a murderer can be redeemed by the blood of Christ, so can a homosexual” adding “there can be no viler act than sexually abusing innocent children apart from homosexuality and sodomy.”

Shortly afterwards, she was exposed as having an affair with a teenage boy, forty years her junior. Because of her hypocrisy, and country and western morals, she had to resign as an MP

I argued, not without some complaints in the gay community, that I could live with her offensive remarks. In the 1970s, her husband wanted me jailed. His wife, thirty years later wanted to send me to her, also now-disgraced, psychiatrist. Matters had vastly improved.

Finally, how did we all prosper?

The leaders of the ‘Save Ulster from Sodomy’ campaign, Dr Paisley and Peter Robinson, became successively First Ministers of Northern Ireland.

But Ulster was not saved from sodomy. They lost, as I like to remind the DUP.

That is not to say that London behaved well after 1982. Indeed they behaved as badly as before. Each law reform disregarding the precedent of the judgment in my case - the lowering of the age of consent in one instance, the Sexual Offences Act 2003 and civil partnership required a short sharp campaign before the NIO changed its mind and included Northern Ireland. Nothing came easy and no local political party assisted us when it was politically difficult or when it was needed. Now most fall over themselves to be of assistance.

What became of the two UK lawyers who argued at the European Court of Human Rights for the criminalisation of gay men in Northern Ireland? Nicolas Bratza, who resisted my case on behalf of the British is now Sir Nicolas and became President of the European Court of Human Rights, while Brian Kerr who acted for the Northern Ireland Office, became our Lord Chief Justice and, as Lord Kerr, sits now on the UK Supreme Court. Backing bigotry did them no damage.

Recently I learnt that Tony Gifford, 30 years on, is the lawyer taking a similar case as mine to the Inter-American Human Rights Commission on behalf of Jamaican gays.

In 2012, I was awarded an MBE for services to the LGBT community in Northern Ireland.

Back home, Peter Robinson lost his Westminster seat in 2010, partly because of Iris and their ‘Swish Family Robinson’ image. However he and the DUP remain in power. They can and will ensure not a single further gay law change in Northern Ireland, for example equal marriage, because they have veto power in a joint government.

We have not gone into reverse but it is only the local courts and Strasbourg which can make changes and modernise our law despite the efforts of our Attorney General John Larkin who has been something of a Catholic activist in these matters. This process has already happened in the case of adoption (judged ‘irrational’ as the related hand-outs will explain) and the ban on blood donation by gay men although the latter decision is still subject to appeal, being opposed by both the English and Northern Ireland Ministers of Health - for different reasons. Marriage is a more complex issue locally and indeed in Strasbourg.

Article 12 of the ECHR reads, “Men and women of marriageable age have the right marry and to found a family, according to the national laws governing the exercise of this right.” I think, although I am no lawyer, that that could be read as unspecific as to who can marry who. However being drafted in the plural it might also be interpreted as accepting polygamy! None the less the overall European balance will probably need to shift before any consensus for judging change is found. On marriage, I argued at the time simply for civil partnerships (but also for intra-UK equal treatment) and, like Stonewall the Labour Party and Tony Blair, am in a somewhat invidious position on the matter.

Perhaps I am long enough in the tooth, perhaps I am now past caring, or perhaps as I am seen by many to be ex-gay being an active Unionist politician (no newspaper has commented on my current and leading role in the Ulster Unionist Party) I will now say something that only a few will or can.

The terms of trade have certainly shifted since 1950 and especially this century. Indeed liberals, nationalists and socialists have been using religious homophobia as a stick to beat the status quo. My fear is that as the issues narrow and equality is increasingly upon us, matters such as marriage are no longer gay issues but test issues, used generationally. That’s fine in that young people have to have something to rebel against but it can be misleading or diverting and there is a danger of a backlash if it becomes zealotry.

END

[Jeffrey Dudgeon MBE was the successful plaintiff at the European Court of Human Rights whose 1981 judgment relating to the right to a private life led to the passing of the 1982 law decriminalising male homosexual behaviour in Northern Ireland. This was a European first. He is the author of *Roger Casement: The Black Diaries - With a Study of his Background, Sexuality, and Irish Political Life* (692 pp., 2002). During his career he worked latterly in the NI Department of Health dealing with public health issues including antibiotic resistance and healthcare associated infection. He stood for a Trinity College seat in the Dublin Seanad in 2011 to offer an alternative voice from Northern Ireland. Jeff was awarded an MBE in the 2012 Honours List for services to the

LGBT community in Northern Ireland. He was one of the Ulster Unionist Party’s two negotiators at the recent Haass talks in Belfast on the issues of Flags, Parades and the Past and is a candidate in the local government elections in Belfast in May 2014. His website http://jeffdudgeon.com/ carries

extensive material on the continuing Casement controversies and current LGBT and Irish political issues. He is still active in the Northern Ireland Gay Rights Association which has a website at <http://nigra.org.uk/>. He can be contacted at jeffreydudgeon@hotmail.com or 079 2125 1874.]