

**ARTICLE 8 ECHR AND ITS IMPACT ON ENGLISH LAW**

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## **Abstract**

The thesis examines the scope of the right to respect for one's private life, family life, home and correspondence as set out in Article 8 of the European Convention on Human Rights (ECHR). It does so with reference to both the admissibility and merits decisions and judgments from the European Court of Human Rights (ECtHR). It thus shows not only the range of interests that Article 8 covers in the light of the main ECHR principles of proportionality, margin of appreciation or that of living instrument, but also the interests and rights that fall outside Article 8's ambit. At the same time, it offers a clear picture of two basic procedural stages that each individual complaint has to go through in Strasbourg.

The thesis then proceeds with an analysis of the impact of the above-mentioned jurisprudence under Article 8 on English law. It does so by examining the major ECtHR judgments under Article 8 in general, and those in which the UK has been found in breach of Article 8 in particular. It aims to determine whether there has been a positive dialogue between the ECtHR and the UK and whether domestic law and legal thinking have somehow changed as a result of the ECtHR's jurisprudence under Article 8. With references to the specific areas of domestic law, it subsequently addresses the most common factors, such as judicial deference, the way domestic judges apply the proportionality principle, minimal/case specific compliance, persistence of traditional common law doctrines, or the tendency to treat the HRA as a panacea, which have resulted in the overall impact of Article 8 on domestic law being only very limited.

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## 1 Introduction

It was on 4 November 1950 when Article 8 and some other articles guaranteeing civil and political rights of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) were formally born. Being a result of complex negotiations within the Council of Europe (CoE),<sup>1</sup> the ECHR represented a final compromise between two major rival proposals: one drafted by the UK (common law approach) and the other one coming from the Continent (civilian approach).<sup>2</sup> Only the latter contained the clause on the right to respect for private life, family life, home and correspondence<sup>3</sup> but since the UK government did not have any major objections to it being included in the final text,<sup>4</sup> it became part of the ECHR.<sup>5</sup> The story of Article 8

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<sup>1</sup> AWB Simpson, *Human Rights and the End of Empire. Britain and the Genesis of the European Convention* (OUP, Oxford 2004); or G Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993) 42 ICLQ 796.

<sup>2</sup> Basically, the rival texts were the UK draft and that of the Consultative Assembly and the European Movement as modified by the experts. Given the traditional common law philosophy which favoured precise definitions of rights and clear specifications of their limitations, the UK draft of defined rights strongly contrasted with the enumerative model proposed by the European Movement and the Consultative Assembly. J Velu, 'The European Convention on Human Rights and the rights to respect for private life, the home and communications' in AH Robertson (ed), *Privacy and Human Rights* (Manchester University Press, Manchester 1973).

<sup>3</sup> Given the non-existence of the French equivalent of the English term *privacy*, the expression *la vie privée* (private life) was finally employed in the final text without the intention to change its meaning when compared to the Article 12 of the Universal Declaration of Human Rights (UDHR) which obviously served as a model for the wording of Article 8. AWB Simpson (n 1) 713. While being to a great extent inspired by Article 12 of the UDHR, it would be quite a misconception to treat the relationship between these two articles as that of 'copy-and-paste' or to think that the right to private and family life 'travelled as a stowaway in the draft towards adoption'. Indeed, given some documentary evidence regarding the drafting process as well as the clearly different way in which Article 8 is formulated as opposed to its model under the UDHR, one can reasonably argue that some thinking had been done before approving the inclusion of Article 8 into the final text of ECHR. AH Robertson (n 2).

<sup>4</sup> The opposing arguments based on the fact that right to respect for private and family life, home and correspondence might interfere with the UK governmental policy committed to economic planning and therefore would be inconsistent with the powers of economic control which were essential to the operation of a planned economy were held to be absolutely unfounded. At the end of the day, the UK government was confident that there was therefore nothing to worry about. Though not having a general concept of the right to privacy which would fall within English tort law, it believed various aspects of the right as formulated in the proposed draft to be sufficiently protected in domestic law. G Marston (n 1) 814, AWB Simpson (n 1) 731.

<sup>5</sup> For philosophical discussions on the essential purposes of privacy in our private lives and homes, its values and importance for the development of one's personality see: JR Pennock and JW Chapman (eds), *Privacy. Nomos XIII* (Atherton Press, New York 1971); FD Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (CUP, Cambridge 1984); B Rössler (ed), *Privacies. Philosophical Evaluations* (Stanford University Press, Stanford 2004); Ch Fried, 'Privacy' (1968) 77 Yale LJ 475; D Feldman, 'Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47 Current Legal Problems 41; D Feldman, 'Human Dignity as a Legal Value: Part I' [1999] PL 687 and its second part 'Human Dignity as a Legal Value: Part II' [2000] PL 61. For the views of those

in relation to English law did not, however, end with the UK's ratification of the ECHR by which the UK government agreed to be bound by its scope. Given dualistic principle of English law, individuals could not use Article 8 (or any other ECHR article) as the basis for bringing a legal action in domestic courts without having it firstly introduced into English law by an Act of Parliament.<sup>6</sup> All they could do was to bring a legal action in respect of ECHR directly in the European Court of Human Rights (ECtHR) in Strasbourg.<sup>7</sup> Considering the UK government's view that the rights and freedoms guaranteed by the ECHR were already, in substance, fully protected by common law, however, not bringing the ECHR rights home was not believed to result in exposing British citizens too much to the delays and costs of taking their cases to Strasbourg. On the contrary, writing the ECHR itself into English law was deemed a superfluous step, which would very likely destroy the famed flexibility of the unwritten constitution and harm the constitutional doctrine of parliamentary sovereignty.<sup>8</sup> Such a 'no need for incorporation' approach of the UK

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more sceptical of privacy: F Davis, 'What Do We Mean by 'Rights to Privacy'?' (1959) 4 South Dakota L Rev 1; R Wacks, 'The Poverty of Privacy' (1980) 96 LQR 73; and also some contributions in FD Schoeman (see above) R Wacks, *Personal Information: Privacy and the Law* (Clarendon Press, Oxford 1989); R Wacks, *Privacy and Press Freedom* (Blackstone, London 1995); R Wacks, 'Privacy in Cyberspace: Personal Information, Free Speech, and the Internet' in P Birks (ed), *Privacy and Loyalty* (Clarendon Press, Oxford 1997).

<sup>6</sup> Eg *MacLaine Watson v DTI* [1990] 2 AC 418 (HL); or *Cheney v Conn* [1968] 1 All ER 779 (Ch). This dualism of English law reflects the principle of Parliamentary sovereignty: the government cannot simply create law by signing a treaty, but must go through the usual Parliamentary law-making process. D Hoffman and J Rowe, *Human Rights in the UK. An introduction to the Human Rights Act 1998* (2<sup>nd</sup> edn Pearson Education Limited, Harlow 2006).

<sup>7</sup> Having said that, even without incorporating legislation, it was possible for the ECHR principles to have indirect impact on domestic law through judgments against the UK in Strasbourg. Thus, for example, findings of violations against the UK have led to several changes being made to primary legislation: the ECtHR's judgment in *Sunday Times v United Kingdom (No 1)* (App no 6538/74) (1980) 2 EHRR 245 was an important factor leading to the reform of the law of contempt by the Contempt of Court Act 1981; or the violation of the right to respect for private life in Article 8 found by the ECtHR in the telephone-tapping cases which led to the enactment of the Interception of Communications Act 1985. Similarly, domestic judges were able to consider the provisions of the ECHR in cases before them in the following circumstances: as an aid to the construction of legislation in cases of ambiguity: *R v Secretary of State for the Home Department ex parte Brind* [1991] 2 WLR 588 (HL); to establish the scope of the common law where it was developing and uncertain, or where it was certain but incomplete: *Debyshire CC v Times Newspapers Ltd* [1992] 3 WLR 28 (CA); to inform the exercise of judicial (as opposed to administrative) discretion: *R v Khan* [1996] 3 WLR 162 (HL); to inform decisions on Community law taken by domestic courts: Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651. For more detailed analysis of how this was done, see M Hunt, *Using Human Rights Law in the English Courts* (Hart Publishing, London 1997); or MJ Beloff and H Mountfield, 'Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales' (1996) 5 Eur Human Rights L Rev 467.

<sup>8</sup> It was argued in particular that the whole notion of endowing an unelected group with a considerable area of power removed from the reach of the legislature would be incompatible with democratic theory. J Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 OJLA 18 (in his opinion 'respect for ... democratic rights is called seriously into question when proposals are made to shift

government, however, did not stand the test of time given the surprisingly great number of post-1966 cases,<sup>9</sup> in which the Convention organs (ECtHR and the former European Commission of Human Rights (EComHR)) found that there had been violations of the ECHR rights in the UK. This gradually started undermining the views of those who claimed that English law provided adequate human rights protection without the need for the ECHR. Finally, after a shift in governmental policy in 1993, the UK government decided to bring the ECHR rights home by enacting the Human Rights Act (hereafter the 'HRA') in 1998.<sup>10</sup> The HRA entered fully into force on 2 October 2000 and hence made Article 8 part of domestic law.<sup>11</sup>

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decisions about the conception and revision of basic rights from the legislature to the courtroom'). Cf R Dworkin, *A Bill of Rights for Britain* (Chatto & Windus, London 1990) 28 (he claims that 'Britain agreed when it accepted the European Convention and the jurisdiction of the European Court of Human Rights, that it would be bound by the principles laid down in the Convention as these principles were interpreted not by Parliament but by a group of judges. If that limitation on the power of Parliament is acceptable, how can it be unacceptable that the principles be interpreted not by mainly foreign judges but by British judges trained in the common law and in the legal and political traditions of their own country?'). See also H Fenwick and G Phillipson, *Text, Cases & Materials on Public Law & Human Rights* (2nd edn Cavendish Publishing, London 2003) or HA Barnett, *Constitutional & Administrative Law* (5th edn Cavendish, London 2004).

<sup>9</sup> In 1966 the UK accepted that an individual person, and not merely another State, could bring a case against it before the ECtHR.

<sup>10</sup> White Paper 'Rights Brought Home' 1997 (Cmnd 3782) (listing the following aims which the domestication of the ECHR was supposed to achieve; (i) to enable people to enforce their ECHR rights against the State in the British courts; (ii) to make the process less costly and quicker than proceeding to Strasbourg; (iii) to allow British judges to make a distinctive contribution to the jurisprudence of human rights in Europe by ruling on cases on the basis of familiarity and sensitivity with English law and customs and of sensitivity to practices in the UK; and (iv) to lead closer scrutiny of the human rights implications of new legislation and policies). Apart from bringing the ECHR rights home, furthermore, government and those closely involved with advising them mentioned two other broad reasons for supporting the HRA. Firstly, the HRA was supposed to improve awareness of human rights issues throughout society (the so-called human rights culture) and, secondly, to enable individuals to use the UK courts to prevent and remedy the misuse of public power. J Straw and P Boateng, 'Bringing Rights Home' [1997] *Eur Human Rights L Rev* 71 and K Starmer and F Klug, 'Standing Back from the Human Rights Act: How Effective is It Five Years On' [2005] *Public Law* 716.

<sup>11</sup> See generally on the HRA 1998 and its mechanism: S Grosz, J Beatson and P Duffy, *Human Rights: the 1998 Act and the European Convention* (Sweet & Maxwell, London 2000); SH Bailey, DJ Harris and DC Ormerod, *Civil Liberties, Cases and Materials* (5<sup>th</sup> edn Butterworths LexisNexis, Reed Elsevier 2001); E Shorts & C de Than, *Human Rights Law in the UK* (Sweet & Maxwell, London 2001); N Whitty, T Murphy and S Livingstone, *Civil Liberties Law* (Butterworths, London 2001); R Clayton and H Tomlinson, *The Law of Human Rights* (Clarendon, Oxford 2001-3); H Fenwick, *Civil Liberties* (Cavendish, London 2002); P Plowden, *Advocacy and Human Rights: Using the Convention in Courts and Tribunals* (Cavendish, London 2002); H Davis, *Human Rights and Civil Liberties* (Willan, Cullompton 2003); J Wadham, H Mountfield and A Edmundson, *Blackstone's Guide to the Human Rights Act 1998* (3<sup>rd</sup> edn OUP, Oxford 2003) and the next edition: J Wadham, H Mountfield, A Edmundson and C Gallacher, *Blackstone's Guide to the Human Rights Act 1998* (4<sup>th</sup> edn OUP, Oxford 2007); J Jowell and J Cooper (eds), *Delivering rights: How the Human Rights Act is Working* (Hart Publishing, Oxford 2003); R Stone, *Textbook on Civil Liberties and Human Rights* (OUP, Oxford 2004); K Starmer, *European Human Rights Law* (2<sup>nd</sup> edn Legal Action Group, London 2005); M Amos, *Human Rights Law* (Hart Publishing, Oxford 2006); S Foster, *Human Rights and Civil Liberties. Questions & Answers* (OUP, Oxford 2006); H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge 2007). As for the journal



My thesis aims, first of all, to contribute to the better understanding of the scope of Article 8 as such. Not only in the sense of the range of interests that Article 8 covers, but also the interests that fall outside its ambit. The great variety of issues that have been covered by this article has generated a huge literature in which scholars have treated Article 8 as one of the most open-ended provisions of the ECHR.<sup>12</sup> This comes as no surprise given the fact that the scholarly work has primarily analysed Article 8 from the position of case law that has already passed an admissibility stage with the ECtHR being focused already on the merits of the complaints (*second stage*) and has hardly mentioned cases, in which claims under Article 8 have been rejected as inadmissible either *ratione materiae* or manifestly ill-founded (*first stage*).<sup>13</sup> Such

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articles, see J Wadham, 'The Human Rights Act: One Year On' (2001) 6 Eur Human Right L Rev 620; F Klug and K Starmer, 'Incorporation through the Front Door: the First Year of the Human Rights Act' [2001] Public Law 654; F Klug and C O'Brien, 'The First Two Years of the Human Rights Act' [2002] Public Law 649; Lord Irvine of Lairg, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] Public Law 308; A Lester, 'The Human Rights Act 1998 – Five Years On' (2004) 3 Eur Human Rights L Rev 258; KD Ewing, 'The Futility of the Human Rights Act' [2004] Public Law 829; A Lester, 'The Utility of the Human Rights Act: a Reply to Keith Ewing' [2005] Public Law 249; Lord Steyn, '2000 – 2005: Laying Foundations of Human Rights Law in the United Kingdom' (2005) 4 Eur Human Rights L Rev 349; R Wintemute, 'The Human Rights Act's First Five Years: Too Strong, Too Weak, or Just Right?' (2006) 17 King's College LJ 209; K Starmer, 'The Human Rights Act: Review of the Year : 2004-2005' (2006) 1 Eur Human Rights L Rev 1; F Klug and K Starmer (n 10) 716; or R Clayton, 'The Human Rights Act Six Years on: Where are We Now' (2007) 1 Eur Human Rights L Rev 11.

<sup>12</sup> D Feldman, *Civil Liberties and Human Rights in England and Wales* (2<sup>nd</sup> edn OUP, Oxford 2002); Lord Lester and D Pannick (eds), *Human Rights Law and Practice* (2<sup>nd</sup> edn LexisNexis, London 2004); C Ovey and R White *Jacobs and White, the European Convention on Human Rights* (OUP, Oxford 2006); A Mowbray, *Cases and Materials on the European Convention on Human Rights* (2<sup>nd</sup> edn OUP, Oxford 2007); D Feldman, 'The Developing Scope of Article 8 of the European Convention on Human Rights' (1997) 3 Eur Human Rights L Rev 265 and C Warbrick, 'The Structure of Article 8' (1998) 1 Eur Human Rights L Rev 32.

<sup>13</sup> As a rule, both admissible and merits aspects are considered in two different parts of a single judgment, although the chamber may take a separate decision on admissibility, where appropriate. As for the inadmissibility grounds, if the interventions complained of fall outside the scope of Article 8, or if they – in spite of falling within the scope – are not serious enough to amount to interference with Article 8 rights (usually when there has been only a slight or remote effect of such interventions on the applicant's privacy, taking into consideration the particular facts of each case), the ECtHR will reject the lodged application from the individual as inadmissible, being either incompatible *ratione materiae* or manifestly ill-founded. The complaint will simply end there without the ECtHR undertaking any investigation whatsoever into its merits. These two grounds for inadmissibility relating to the substance of an application, ie incompatible *ratione materiae* and manifestly ill-founded, at least theoretically, should not be applicable on the same complaint. For example, if the facts of the case cannot be meaningfully subsumed under the 'private life' notion because they fall outside its scope rightly interpreted, the application will be rejected as incompatible *ratione materiae*. On the other hand, if the measures complained of, though rightly interpreted as to be examined under 'private life', were not serious enough to constitute interference, the complaint is to be declared manifestly ill-founded. L Mikaelson, *European Protection of Human Right. The Practice and Procedure of the European Commission of Human Rights on the Admissibility of Applications from Individuals and States* (Sijthoff & Noordhoff, Alphen aan den Rijn 1980). For other grounds of inadmissibility under Articles 34 and

studies might indeed give an unintentional impression that the right to private life, family life, home and correspondence does not really have the outer boundaries.<sup>14</sup> Doubtless it is, however, that such boundaries exist as having denied new claims under Article 8 as inadmissible, the ECtHR has effectively foreclosed the article's scope. The analysis of inadmissible cases is indubitably as essential for a proper understanding of Article 8 as is the analysis of case law from the second stage in which the ECtHR is concerned with the merits of the claims. Only in this way can the UK comprehend the scope of its international obligations under Article 8 and fully grasp substantive tests that are applied by the ECtHR to an individual's complaint under Article 8 and that must therefore be applied by its judiciary when faced with the 'Article 8' complaint under the Human Rights Act (HRA). At the same time, such an approach offers a clear picture of two basic procedural stages that individual complaints<sup>15</sup> need to go through in Strasbourg.<sup>16</sup> Secondly, once the boundaries of

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35 ECHR which do not relate so much to the substance of an application but rather to the introduction of an application as such *ratione temporis*, *ratione personae*, *ratione loci*, non exhaustion of domestic remedies or an abuse of the individual right of petition, see L Mikaelson (ibid) (although the author talks about the EComHR, the inadmissibility principles discussed in the book have been equally applied by the ECtHR after 1998). See also P van Dijk, F van Hoof, A van Rijn and L Zwaak, *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> edn Intersentia, Oxford 2006). Note that Protocol 14 (n 16 below), once it has entered into force, will introduce a new admissibility criterion to the criteria laid down in Article 35 ECHR by empowering the ECtHR to declare inadmissible applications where the applicant has not suffered any significant disadvantage, and which in terms of respect for human rights do not otherwise require an examination on the merits by the ECtHR. See Explanatory Report to Protocol 14 <<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Protocol+No.+14/>> accessed 30 September 2008.

<sup>14</sup> Notable exceptions being U Kilkelly, *The Right to Respect for Private and Family Life* (Human Rights Handbook, Council of Europe 2001) <[http://www.coe.int/T/E/Human\\_rights/handbookse.asp](http://www.coe.int/T/E/Human_rights/handbookse.asp)> accessed 30 September 2008; L Doswald-Beck, 'The Meaning of the 'Right to Respect for Private Life' under the European Convention on Human Rights' (1983) 4 Human Rights LJ 283; J Liddy, 'The Concept of Family Life under the ECHR' (1998) 1 Eur Human Rights L Rev 15; A Buyse, 'Strings Attached; The Concept of "Home" in the Case Law of the European Court of Human Rights' (2006) 10 Eur Human Rights L Rev 294.

<sup>15</sup> There is a difference between individual applications introduced under Article 34 ECHR and those introduced by Contracting States under Article 33 ECHR for complaints introduced in state applications (the so-called inter-state cases) cannot be rejected as incompatible *ratione materiae* (art 35(1) ECHR).

<sup>16</sup> There are some limitations to such an 'inadmissible case study' though. Pursuant to the relevant procedural rules, after a preliminary examination of the application by a rapporteur, all applications which appear to him or her to be manifestly inadmissible are referred for a final admissibility decision to a committee of three judges rather than a chamber of seven judges which is employed only in cases, which appear to have some *prima facie* merit. This system has been established in order to make an admissibility procedure as economic and efficient as possible, reserving as much time as possible for meritorious cases and ensuring at the same time that justice is done in each individual case. However, it is only the chambers' decisions which are publicly available and accessible via the HUDOC database and so the scope of my 'inadmissible' case study extends only to them. Another limitation of this study is the fact that the new Protocol 14, which will to a certain extent change the way the inadmissible case

Article 8 case law are clearly delineated, the thesis looks at its impact on English law. In other words, it aims to assess effects that Article 8 jurisprudence of Convention organs have had on domestic law. It does so by analysing the UK's compliance with its international obligation to 'secure to everyone within its jurisdiction Article 8 rights' in the light of the major ECtHR Article 8 judgments in general, and those in which the UK has been found in breach of Article 8 in particular. The aim of such an analysis is to determine what changes have occurred in the 'Article 8' areas of domestic law as a direct or indirect result of the ECtHR's jurisprudence under Article 8. On this basis, the thesis attempts to answer the question how far and how deep these changes have gone and why these changes have been, in the vast majority of cases, only of a very limited nature.

As for the structure of the thesis, the subject matters of chapters 2, 3, 4 and 5 mirror four basic rights which the ECtHR commonly asserts to Article 8: the right to respect for (i) private life, (ii) family life, (iii) home and (iv) correspondence. Chapter 6 then examines positive obligations that have been developed through dynamic interpretation of ECHR separately under each of these four rights. Chapters 2, 3, 4, and 5 are divided into two sections followed by partial conclusions that summarize the main findings of both sections in each chapter. The first section of each of these chapters is subdivided into two parts. While the first part discusses the first stage case law (*ratione materiae* and manifestly ill-founded cases), the second part analyses the 'merits' stage case law in the given area. The second sections of chapters 2, 3, 4 or 5 explore English law developments in the relevant 'Article 8' areas. Here, the attention is focused on the issues with respect to which the ECtHR found the UK to be in breach of its Article 8 obligations or on the more sensitive areas in which there seems to be tension between ECHR and English law. Given the specificity of the subject-

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law is going to be handled, is not yet in force at the time of writing and its impact (if any) on the current system is yet to be seen. In short, once ratified by all parties to the ECHR, under Protocol 14 it will be possible for a single judge, assisted by registry 'rapporteurs', to declare obvious cases inadmissible. Three-judge committees will be empowered not only to declare cases inadmissible and strike them off, but also to reach judgments on the merits in follow-up cases, where the legal principles have already been clearly established (repetitive cases). With a view to allowing the ECtHR a greater degree of flexibility, a new admissibility condition is foreseen under which the ECtHR could declare inadmissible applications where the applicant has not suffered a significant disadvantage provided that 'respect for human rights' does not require the ECtHR to go fully into the case and examine its merits (however, in order to ensure that applicants even with minor complaints are not left without any

matter and slightly different procedural steps that ECtHR undertakes when considering the issue of positive obligations, chapter 6 is structured differently.<sup>17</sup> It contains four sections, reflecting four basic rights under Article 8 mentioned above. Each of these sections is subdivided into two parts; the first one dealing with the Strasbourg jurisprudence in the given area, the second one looking at the responses of English law to such jurisprudence. In order to assess English law's responses to the

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judicial remedy, the ECtHR will not be able to reject a case on this ground if there is no such remedy in the country concerned).

<sup>17</sup> The 'negative obligation' applications go through the classical two-stage test of Article 8. First of all, the question of applicability of Article 8 itself has to be answered. In the second stage, the Convention organs engaged in analysis of whether such interference with Article 8 rights can be said to be justified with reference to the requirements of Article 8(2). In the case of 'positive obligation' applications, however, the procedural approach under Article 8 is slightly different. To be sure, the Convention organs must firstly find out whether the complaint falls within the scope of one of the rights protected by Article 8(1) ECHR. To that extent, the reference to the analysis made in chapters 2, 3, 4 and 5: what is not private life, family life, home, correspondence (first stage) can be made. Then, since the gist of an applicant's complaint is that the State or public authorities should have but failed to take action which was necessary in order to respect their Article 8 rights, the ECtHR focuses on the question of what, if any, action has been required on the part of the State to secure the applicant's rights set out in Article 8. The ECtHR's task is to assess whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's ECHR rights without being disproportionately burdened. Once the existence of positive obligation is established, the ECtHR has to find out whether the State has done enough to comply with it, ie it needs to determine the extent of positive obligation. The findings will, however, very much depend on the scope of the margin of appreciation, which States are allowed in determining the steps which they have taken to ensure compliance with a positive obligation under the ECHR. The scope of the margin will not be identical in each case and will depend on the circumstances, subject matter (ie nature of the ECHR right at issue), severity of the effect of the State's omission on the individual's rights or existence or non-existence of common ground between the laws of the Contracting States. In this respect, due regard must be paid to the fair balance that has to be struck between the competing interests of the applicant (individual) and the community and the aims mentioned in the second paragraph of Article 8 may have only a certain relevance. The test, therefore, differs from that under Article 8(2) in 'negative obligation' cases where it is necessary to strike a balance between a right already established and the countervailing interests which the State seeks to protect. Such is the theory, in any case. Nevertheless, one should realize that although most complaints will call for the application of either a 'negative obligation' or 'positive obligation' approach, on occasion the same complaint may have both a positive and a negative aspect. Furthermore, frequently, the theoretical distinction between the principles that apply to positive rights and the ones that apply to negative rights has been evident from the ECtHR's reasoning rather than from its conclusions. And even in its reasoning, one could hear the ECtHR saying whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2; the applicable principles are broadly similar. In both contexts regard must be paid to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the ECHR. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of certain relevance. See, among others, *Hatton v United Kingdom* (App no 36022/97) (2003) 37 EHRR 28 [GC] [98]. See A Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford 2004); K Starmer, 'Positive Obligations Under the Convention' in J Jowell and J Cooper (eds), *Understanding Human Rights Principles* (Hart Publishing, Oxford 2001); or B Conforti, 'Reflection on State Responsibility for the Breach of Positive

'positive obligations' case law under Article 8 in a balanced manner while keeping the work within a reasonable length, the following most problematic areas within the domestic law are examined in the second parts of individual sections of chapter 6: (i) protection against media intrusion into one's private life ('Positive Obligations and Private Life' section); (ii) domestic immigration cases in which the right to respect of family life was raised because of an individual being refused entry to a country where his or her immediate family resided ('Positive Obligations and Family Life' section); (iii) the right to respect for home of those affected by noise, pollution, emissions, smells, etc., in the context of the common law of nuisance ('Positive Obligations and Home' section); and, finally, (iv) UK prisoners' right to respect for their correspondence ('Positive Obligations and Correspondence' section). There is a partial conclusion at the end of chapter 6 summarizing the main findings with respect to all four sections. A final discussion on the main findings in the light of my research questions is provided in the chapter 7 'Conclusion' at the very end of the thesis.

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## 2 Private Life

### 2.1 Private Life under the ECHR

#### 2.1.1 *What is not Private Life and what does not constitute an Interference with one's right to it: a First Stage*

A person's physical and moral integrity as well as his right to protect them are important aspects of private life, and their limits were contemplated in the case against Denmark. Limiting the wide scope of Article 8, the ECtHR refused to stretch the reasoning developed in the case of *Mortensen's Estate v Denmark* so far as to hold that DNA testing on a corpse constituted interference with the Article 8 rights of the deceased's body.<sup>18</sup> The applicant in this case was the estate of Mr Mortensen, who died on 10 February 1999, represented by his son. Mr Mortensen was already deceased when the alleged violation - the Supreme Court's decision permitting the taking of biological material from the corpse - took place and hence when his estate, on his behalf, lodged the complaint with the ECtHR alleging an interference with his right, or rather his corpse's right, to respect for private life. In such circumstances, the ECtHR was not prepared to conclude that there had been interference with Mr Mortensen's right to respect for private life within the meaning of Article 8.<sup>19</sup> Furthermore, the applicant submitted that the exhumation of Mr Mortensen's corpse also constituted an intrusion of his son's privacy and inner emotional life.<sup>20</sup> Although the son was not formally the applicant, for the sake of completeness the ECtHR was ready to examine whether the abovementioned Supreme Court's decision constituted a violation of the son's rights as protected under Article 8. Nevertheless, given the fact that the application was not admissible for non-exhaustion of domestic remedies as well as incompatible *ratione temporis* in this respect, the ECtHR did not make an attempt to answer this question.<sup>21</sup>

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<sup>18</sup> (App no 1338/03) (2006) 43 EHRR SE9 (admissibility decision). See, more recently, *Jäggi v Switzerland* (App no 58757/00) ECtHR 13 July 2006 mentioned in n 226 (especially the dissenting opinions of Judges Hedigan and Gyulumyan).

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> For another example from the group of cases which deal with the physical and moral integrity of a person under Article 8, see *X v Belgium* (App no 8249/78) [1981] ECC 214. In this case, being fined

Undoubtedly, sexual orientation and activity concern an intimate aspect of one's private life. Yet, not every consensual sexual activity carried out behind closed doors seems to necessarily fall within the scope of private life under Article 8. Though never directly, the ECtHR has expressed some reservations about allowing the protection of Article 8 to extend to sadomasochistic activities by subsuming them under the notion of private life. In *Laskey, Jaggard and Brown v United Kingdom*,<sup>22</sup> for example, the ECtHR was of the opinion that it was open to question whether the sexual activities of the applicants fell entirely within the notion of private life in the particular circumstances of the case. In his concurring opinion, for example, Judge Pettiti concluded that the concept of private life could not be stretched indefinitely and not every aspect of private life could automatically qualify for protection under the ECtHR. The fact that the behaviour concerned took place on private premises did not suffice to 'ensure complete immunity and impunity'. As he said:

... [n]ot everything that happens behind closed doors is necessarily acceptable. It is already the case in criminal law that the "rape" of a spouse where there is doubt whether consent was given may lead to prosecution. Other types of behaviour may give rise to civil proceedings (internal telephone tapping for example). Sexual acts and abuse, even when not criminal, give rise to liability. The case could have been looked at differently, both in domestic law and subsequently under the Convention. Can one consider that adolescents taking part in sado-masochistic activities have given their free and informed consent where their elders have used various means of enticement, including financial reward?<sup>23</sup>

The majority, however, concluded that since this point had not been disputed by those appearing before it, it saw no reason to examine it of its own motion.<sup>24</sup> More recently,

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for having failed to wear, while driving a motor-vehicle, a safety belt, the applicant in this case claimed that the obligation of Belgian law for the driver and front-seat passenger of vehicles to wear a safety belt constitutes unlawful interference by a public authority with his right to respect for his private life. In considering the case, however, the EComHR pointed out that though it is true that much legislation had immediate or remote effects on the individual's capacity to develop his personality by exercising an activity not subject to control by the authorities, nevertheless, this legislation could not be considered on the whole as infringing the right to private life within the meaning of Article 8. This was simply a case in which some measures had to be taken by the authorities in order to protect the public from various dangers and to protect society against the harm which they involved. In the EComHR's opinion the measures in question in no way affected a person's private life, however broadly this expression was interpreted. The application was therefore outside the scope of Article 8 and was accordingly rejected as incompatible *ratione materiae*.

<sup>22</sup> (App nos 21627/93, 21826/93 and 21974/93) (1997) 24 EHRR 39.

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid* [36]. The ECtHR's final conclusion was that the prosecution of acts such as assault and wounding, notwithstanding the consent of the adult 'victims', was justified and proportionate for the aim of the protection of health, having regard to the extreme nature of the acts concerned.

*KA and AD v Belgium* raised a similar issue, ie the issue of the extent to which acts of sadomasochism ought to be protected by the right to respect for private life.<sup>25</sup> The ECtHR accepted the findings of the domestic courts to the effect that the applicants had failed to respect their undertakings to intervene and stop the treatment – which was extreme in nature – as soon as the ‘victim’ no longer consented. Indeed, the applicants had lost control of the situation and the violence had escalated in such a way that even they had admitted that they did not know how it might end. As both parties to the proceedings were in agreement that the issue fell within the scope of the notion of private life and that the conviction of applicants by domestic courts amounted to an interference,<sup>26</sup> the ECtHR did not have to answer the question of scope of private life protection and focused instead on the issue of justification under the second paragraph of Article 8. It finally concluded that there had been no violation of Article 8, the convictions having been justified for the protection of the rights of others, taking into account the fact that the victim’s consent was open to question.<sup>27</sup> Clearly, the ‘*ratione materiae*’ question with respect to the sadomasochistic cases has yet to be answered.

There is also a social aspect to one’s private life and his or her personal development that is protected under Article 8. It is our need to establish and develop relationships with other human beings and the outside world. In the case of *X v Iceland*,<sup>28</sup> however, the applicant complained that according to the relevant provisions of Icelandic law he was not permitted to keep a dog in the city of Reykjavik, where he lived. The question was therefore whether the freedom of an individual to keep a dog was protected under the ECHR and, in particular, whether the keeping of a dog belonged to ‘private life’ within the meaning of Article 8. Though the EComHR accepted that right to respect private life comprised also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one’s own personality, in so far as they did not involve human relationships, they did not fall within the scope of private life of Article 8.<sup>29</sup>

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<sup>25</sup> (App nos 42758/98 and 45558/99) ECtHR 17 February 2005 (admissibility decision).

<sup>26</sup> *ibid* [78].

<sup>27</sup> *ibid* [85].

<sup>28</sup> (App no 6825/74) (1976) 5 DR 86.

<sup>29</sup> Reaffirmed in *Artinstoll v United Kingdom* (App no 25517/94) EComHR 30 May 1994 (in which the applicant’s complaint about the city council policy which prohibited, *inter alia*, the keeping of small dogs and cats as pets in the sheltered housing scheme in which he resided, was held not to fall within



This time with respect to a personal relationship which exclusively involved human beings, in the *X v United Kingdom* case,<sup>30</sup> the EComHR found no interference with a prisoner's *private and social life* on the basis of the refusal of a particular proposed visit, for such a refusal did not interfere with the development of a relationship which could be said to be covered by a notion of private life. By noting that the applicant commenced writing to Mr A at the beginning of 1980 only a few months before requesting the visit and the sole purpose of the visit was to discuss medical records, apparently in furtherance of the aims of the applicant's and Mr A's organisation which, given their public character, ie a campaign to arouse public opinion about prison medical treatment, were not part of the applicant's private life, the EComHR held that the proposed meeting did not foster the applicant's personal relationship with Mr A, who could only be described as an acquaintance of the applicant. Since it was not disputed that the applicant was allowed to correspond freely with Mr A and he had not shown that he could not have dealt with the subject-matter to be discussed during the proposed visit by letter, there had been no interference with the applicant's right to respect for private life and this aspect of application under Article 8 was therefore rejected.

In the case of *Bernadotte v Sweden* the ECtHR held that although the issue of personal names and forenames as such falls within the scope of private life and very often also family life notions under Article 8, the same could not be said about the hereditary titles of nobilities.<sup>31</sup> In this case, a son of the late Swedish King Gustav VI Adolf complained<sup>32</sup> that as a result of removing from him the title of prince because of his marriage with the daughter of a foreign private person without the then King's approval, and the subsequent refusal to restore his title by King Carl XVI Gustav amounted to interference with his right to respect for his private life. The applicant stressed that the title of prince, given to him at birth, should be considered as part of

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the scope of the right to respect for private life, guaranteed by Article 8); and later in *Bullock v United Kingdom* (App no 29102/95) (1996) 21 EHRR CD85 (in which domestic courts convicted the applicant of allowing her dog, being of the type known as the pit bull terrier, to stray contrary to section 1(2)(e) of the Dangerous Dogs Act 1991 (adopted pursuant to considerable public concern about recent attacks on persons by, inter alia, pit bull terriers ultimately aimed at the eradication of pit bull terriers as a breed from the UK) and ordered, inter alia, that the dog be destroyed). Yet it would be interesting to see whether the EComHR would have come to the same conclusion were it a blind person who was the applicant. L Doswald-Beck (n 14) 288)

<sup>30</sup> (App no 9054/80) (1983) 5 EHRR 260.

<sup>31</sup> (App no 69688/01) ECtHR 3 June 2004 (admissibility decision).

his name or of his identity in the same way as a name. In Sweden, claimed the applicant, a hereditary title of prince conferred on a person at birth was associated with his name and was, unlike titles of nobility generally, uncontroversial. The humiliation caused by the removal of his title of prince was no less than that caused by the deprivation of a name.<sup>33</sup> According to him, it had violated his right to respect for private and family life, ‘of which his personal and spiritual (intellectual) integrity formed an important part’. Having regard to the relevant case-law of ECtHR, the matter should be considered as covered by Article 8 of the Convention.<sup>34</sup> Although having proceeded on the assumption that the subject matter was one that was capable of engaging the responsibility of the respondent State under the ECHR to hold the issue incompatible *ratione temporis*, the ECtHR nevertheless indicated that the dispute in question did not concern an arguable claim under the ECHR.<sup>35</sup>

To give also some examples of *manifestly ill-founded* cases in which the interventions, though falling within the scope of private life as such, were found not to be serious enough to amount to interference as required by Article 8, one can start with a ‘physical integrity’ case of *Costello-Roberts v United Kingdom*,<sup>36</sup> in which the ECtHR was asked to rule on the compatibility with Article 8 of the corporal punishment of a 7-year-old boy, Jeremy, in a private school. To deal with Jeremy’s lack of discipline, about which he had received three warnings from the headmaster, the headmaster decided to give him three whacks on the bottom through his shorts with a rubber-soled gym shoe. Jeremy claimed that the aim of the punishment was to

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<sup>32</sup> In fact, the application was pursued by Sigvard Bernadotte’s wife, Marianne, after his death on 5 February 2002.

<sup>33</sup> As an example of humiliation, the applicant stated that he had to hand over a number of orders and decorations as well as his royal passport. According to him, he was ‘thrown out of his family’ and was deprived of all financial means, as his name was removed from the Civil List and his bank account was immediately frozen. In vain, he tried to earn his own living; for instance, his application to become an assistant film director was rejected ‘due to intervention by the King’. In addition, often when travelling abroad, he had been exposed to embarrassment and humiliation in the face of questions as to how it was possible that a descendant of King Gustav VI Adolf was not invited to gatherings of the European royal houses and other occasions at which Swedish royalty was present, and could not be addressed by his title at birth, prince. These awkward situations had left him and his wife, Marianne, with a degrading and humiliating sensation of being suspected of having committed crimes or other reprehensible conduct as the reason for the loss of title. By rejecting his petitions for restoration of his title, the current King, who was himself married to a commoner, had contributed to increasing that suspicion (*ibid*).

<sup>34</sup> *ibid*.

<sup>35</sup> *ibid*.

<sup>36</sup> (App no 13134/87) (1995) 19 EHRR 112.

exercise coercion through force and fear and this constituted an interference with his moral as well as physical integrity. At school he was entitled to have his own private life respected irrespective of whether he deserved to be punished.<sup>37</sup> The ECtHR stated, first of all, that the notion of private life is a broad one and certainly covers a person's physical and moral integrity. It then noted, however, that not every act or measure which may be said to adversely affect the physical or moral integrity of a person necessarily gives rise to such an interference. It went on to conclude that:

... [h]aving regard ... to the purpose and aim of the Convention taken as a whole, and bearing in mind that the sending of a child to school necessarily involves some degree of interference with his or her private life, the Court considers that the treatment complained of by the applicant did not entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8 (art. 8). While not wishing to be taken to approve in any way the retention of corporal punishment as part of the disciplinary regime of a school, the Court therefore concludes that in the circumstances of this case there has also been no violation of that Article (art. 8).<sup>38</sup>

There is no doubt that the right to self-determination is also a fundamental part of private life under Article 8. As for the example of manifestly ill-founded self-determination case, in *X v Germany* the EComHR noted that:<sup>39</sup>

... although the choice of a person of the place and ... the modalities of his burial is made for a time after life has come to an end, this does not mean that no issue concerning such arrangements may arise under Article 8 ECHR since persons may feel the need to express their personality by the way they arrange how they are buried.<sup>40</sup>

Nevertheless, Article 8 could not be interpreted as meaning that burials of corpses or disposal of crematorial ashes were, as a principle, solely a matter of the persons directly concerned.<sup>41</sup> In view of all the circumstances the EComHR did not find that

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<sup>37</sup> *ibid* [35].

<sup>38</sup> *ibid* [36]. Notwithstanding the ECtHR's unanimity in regard to Article 8 conclusions, it is interesting to note that there were four dissenting opinions of judges who believed that there was a violation of Article 3 ECHR. They stated, *inter alia*, that the protection afforded by Article 8 to the applicant's physical integrity is not wider than that contemplated in Article 3 ECHR. Cf *A v United Kingdom* (App no 25599/94) (1999) 27 EHRR 611 (in which beating of a child, who was then nine years old, by his step-father with a garden cane with considerable force was held to be of sufficient severity to fall within the ambit of Article 3 ECHR).

<sup>39</sup> (App no 8741/79) EComHR 10 March 1981 (admissibility decision).

<sup>40</sup> *ibid*.

<sup>41</sup> In this respect the EComHR observes that there was not one member State of the ECHR which had not, in one way or another, set up legal rules in this matter (*ibid*).

the contested refusal of the German authorities to allow the applicant to have his ashes scattered in his garden on his death constituted an interference with the right to respect for his private life.<sup>42</sup>

The recording of data and the systematic or permanent nature of the record may and very often will constitute an interference with one's private life under Article 8. Yet, certain forms of observation of individuals and systematic information storage or dissemination about them will not even amount to interference with Article 8 rights. In *Herbecq v Belgium*,<sup>43</sup> for example, the applicant claimed that the lack of legislation which would regulate the use of specific photographic equipment for security reasons in public places interfered with his Article 8 rights. Putting aside the question of whether the applicant could be regarded as a victim of any alleged human rights violation, the EComHR held that the monitoring of the actions of an individual in a public place by the use of the photographic equipment in question did not record the visual data and there was therefore no potential danger of creating any permanent data or record, or to monitor individuals to an extent which would exceed any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when knowingly or intentionally involving himself in activities which were or may have been recorded or reported in a public manner. As a result, the fact that there was no piece of legislation in this specific field which would limit such monitoring did not, as such, give rise to an interference with the individual's private life. Accordingly, the application was held to be manifestly ill-founded.<sup>44</sup>

The right to respect for private life under Article 8 also protects the personal identity of an individual. Though there is no provision in the ECHR which as such expressly

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<sup>42</sup> See also *Jones v United Kingdom* (App no 42639/04) ECtHR 13 September 2005 (admissibility decision) (notwithstanding the applicant's personal preference for the addition of a photograph to his daughter's memorial, the headstone, the ECtHR did not find that the refusal of permission in this case could be regarded as impinging on the applicant's personal or relational sphere in such a manner or to such a degree as to disclose an interference with his right to respect for his family or private life.). Compare with *Elli Poluhas Dodsbo v Sweden* (App no 61564/00) ECtHR 7 January 2006 (in which the applicant complained about the refusal to allow her to remove her husband's urn from a burial place in Fagersta, to the family plot in Stockholm, more than 33 years after her husband's burial, and in which the ECtHR, proceeding on the assumption that the issue fell within the Article 8, held (by 4 votes to 3) that the interference was proportionate, the Swedish authorities acted within their margin of appreciation and there was subsequently no violation of the applicant's Article 8 rights; yet see also the opinion of dissenting judges).

<sup>43</sup> (App no 32200/96 and 32201/96) EComHR 14 January 1998 (admissibility decision).

<sup>44</sup> *ibid.*

or implicitly prohibits the system and use of state identity cards, where such identity cards identify people in a way that causes embarrassment or distress through failing to recognise their true identity, this can raise an issue under Article 8. The obligation to carry an identity card, however, which contains no more information than a person's name, date and place of birth, and permanent address, and the obligation to show it to the police whenever requested to do so was held by the EComHR not to constitute an interference in a person's private life within the meaning of Article 8 in *Reyntjens v Belgium*.<sup>45</sup> Thus, Mr Reyntjens' application in which he claimed that his right to respect for private life had been interfered with by the policemen's sudden request, when they stopped him in a public place, to show them his identity card only because it was his duty to always carry the identity card with him in public and they had a right to ask him to prove his identity when on duty pursuant to domestic legislation, was dismissed as being manifestly ill-founded. A number of 'personal identity' cases have concerned the right of an individual to live and exist under the name of their choice. Indeed, whilst the ECHR is silent on the issue of names and surnames, both the ECtHR and EComHR have held that since it constitutes a means of personal identification their regulation, but not the regulation of hereditary titles as shown above,<sup>46</sup> falls within the ambit of private and very often also family life. Very often, however, restrictive measures and regulations do not reach the level of severity to engage the protection of Article 8 and the ECtHR's case law from this area represents a fertile ground for producing examples of manifestly ill-founded cases. In *Hagmann-Hüsler v Switzerland*,<sup>47</sup> for instance, the applicant complained that she had been refused permission to stand for election to the parliament under her maiden name of Lucie Hüsler, or possibly as Lucie Hüsler, the wife of Hagmann. In particular, she alleged that, since she was known to the public by the name of Hüsler, this refusal damaged her prospects of being elected.<sup>48</sup> The EComHR, however, noted that the Swiss authorities gave the applicant the option of adding the name Hüsler after the name Hagmann and the applicant had thus a reasonable possibility of precise identification available to her. As a result, there was no appearance of a violation of

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<sup>45</sup> (App no 16810/90) (1992) 73 DR 136.

<sup>46</sup> *Bernadotte v Sweden* (n 31).

<sup>47</sup> (App no 8042/77) EComHR 15 December 1977 (admissibility decision).

<sup>48</sup> Note that the EComHR did not try to answer the question whether the use of a patronymic name for the purpose of standing in a parliamentary election came within the sphere of private life (*ibid*).

Article 8 and the complaint was manifestly ill-founded. In the case *Halimi v France* the applicant was a public figure known by the name Gisèle Halimi.<sup>49</sup> After their divorce in 1959, Mr Halimi objected to his former wife's continuing to use his surname in the administrative records and the Family-Allowance Department, but not to her continuing to use that name professionally and in her public life. Since the applicant's subsequent request to change her surname from 'Taïeb' to 'Halimi' was refused, she lodged a present application complaining of inconvenience caused to her career by this refusal. The ECtHR observed that although the name (ie Gisèle Halimi) which the applicant sought to use was not identical to her former husband's surname, it could be a source of confusion between them. In addition, the interference was limited in extent since the only consequence of the refusal to allow her to change her legal name was to prevent her using it in her private life. The applicant had not acquired any right to use her former husband's surname by the fact that she had done so during the marriage and subsequently in her public life and, accordingly, she could not validly complain of infringement of her personal rights. Therefore, her application was manifestly ill-founded. Another example is *Stjerna v Finland* in which the Finnish applicant complained that his inability, under Finnish law, to change his surname from Stjerna to Tavaststjerna violated Article 8.<sup>50</sup> He claimed that his Swedish surname caused problems as it was liable to be mispronounced by Finnish speakers, causing delays in mail and giving rise to a nickname. The ECtHR was not satisfied on the evidence adduced before it, however, that the alleged difficulties in the spelling and pronunciation of the name could have been very frequent or 'any more significant than those experienced by a large number of people in Europe today, where movement of people between countries and language areas is becoming more and more commonplace'.<sup>51</sup> In the case of *Guillot v France* the refusal of the Registrar

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<sup>49</sup> (App no 50614/99) ECtHR 20 March 2001 (admissibility decision).

<sup>50</sup> (App no 18131/91) (1997) 24 EHRR 195.

<sup>51</sup> *ibid* [42]. For further implications of the identity protection under Article 8 in the context of grammatical forms of names and surnames in passports/ID cards/etc., see *Mentzen v Latvia* (App no 71074/01) ECtHR 7 December 2004 (admissibility decision) and *Kuharec v Latvia* (App no 71557/01) ECtHR 7 December 2004 (admissibility decision): in both those cases, the ECtHR examined whether the addition of a variable feminine ending to a foreign surname (in the *Kuharec* case) and/or the transliteration of a foreign surname in accordance with Latvian phonetic rules (in the *Mentzen* case) breached Article 8. In both those decisions, the ECtHR affirmed the following principles: (i) although the spelling of surnames and forenames concerns essentially the area of an individual's private and family life, it cannot be dissociated from the linguistic policy conducted by the State. Linguistic freedom as such is not one of the rights and freedoms governed by the ECHR; (ii) a language is not in any sense an abstract value and it cannot be divorced from the way it is actually used by its speakers;

of Births, Deaths and Marriages and subsequently of the courts to allow them to name their daughter Fleur de Marie amounted to a violation of their right to respect for their private and family life.<sup>52</sup> The ECtHR noted that the difference between the child's forename in law and the forename which she actually used - she was called Fleur de Marie by her family and was known by that name socially - entailed certain complications in practice. Yet, it was not disputed that the child could regularly use the forename in issue without any difficulties and that the domestic courts - which had considered the child's interest - had allowed the application made in the alternative by the applicants for registration of the forename Fleur-Marie. In light of the foregoing, the ECtHR did not find that the inconvenience complained of by the applicants was sufficient to raise an issue of interference with either their private or family life.<sup>53</sup>

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(iii) the process whereby surnames and forenames are given, recognised and used is a domain in which national particularities are the strongest and in which there are virtually no points of convergence between the internal rules of the Contracting States; and (iv) the fact that a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the ECHR, particularly in a field which is so closely bound up with the cultural and historical traditions of each society. Thus, on the basis of those principles, the ECtHR concluded that there was no violation of Article 8 in the aforementioned cases of *Mentzen* and *Kuharec*. In particular, it stressed that (a) the original written version of each of the applicants' names was entered in their respective passports; (b) in the second case, the difference between the original spelling and the adapted spelling was minimal; (c) the disputed measure did not prevent the identification of the applicants; and (d) the practical difficulties which they may have experienced on that account were either insignificant (the *Mentzen* case) or non-existent (the *Kuharec* case). These principles have been more recently confirmed in *Bulgakov v Ukraine* (App no 59894/00) ECtHR 11 September 2007.

<sup>52</sup> (App no 22500/93) ECtHR 24 October 1996.

<sup>53</sup> *ibid* [27]. See also *Salonen v Finland* (App no 27868/95) EComHR 2 July 1997 (which concerned the refusal to register the name 'Ainut Vain Marjaana' ('The One and Only Marjaana') and in which the EComHR found that if the reason for preventing the registration of a forename was to protect a person from inconveniences caused by his name, the Contracting States enjoyed a wide margin of appreciation). Compare with *Johansson v Finland* (App no 10163/02) ECtHR 6 September 2007 (in which the applicants submitted that the refusal to accept the name 'Axl', when there were already three 'Axls' registered in the Finnish Population Information System, interfered with their right to respect for their private and family life).

### 2.1.2 The scope of Private Life Protection: a Second Stage

The ECtHR will hardly ever start its second stage analysis of private life issues other than by noting that private life is a broad term not susceptible to exhaustive definition.<sup>54</sup> Not seeing the need for an all embracing definition of the meaning of private life, the ECtHR has never attempted to create one and thus, in order to see how wide a State's obligations under Article 8 are, one has no choice but to adopt a case-by-case analysis paying particular attention to different areas in which such obligations were found to exist and to the ECtHR's approach towards the justificatory criteria listed in paragraph 2 of Article 8.<sup>55</sup> Thus, considering relevant ECtHR's jurisprudence, private life under Article 8 concerns the following.

To begin with, right to respect for one's private life covers the physical and psychological integrity of a person.<sup>56</sup> With regard to the right to physical integrity, mention may be made of a recent decision concerning the forcible administration of emetics to a suspected drug trafficker<sup>57</sup> as well as that of a judgment concerning the administration of a drug to a severely handicapped child by hospital staff against the wishes of his mother.<sup>58</sup> Due to the severity involved, the former was finally decided under Article 3 ECHR.<sup>59</sup> The latter, on the other hand, was based on a general reasoning of the ECtHR that non-consensual or compulsory medical treatment will, regardless how minor, fall within the protective scope of private life under Article 8, though might be justified under the second paragraph of Article 8.<sup>60</sup> There is also no

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<sup>54</sup> Eg *Niemietz v Germany* (App no 13710/88) (1993) 16 EHRR 97 [29]; or *Pretty v United Kingdom* (App no 2346/02) (2002) 35 EHRR 1 [61].

<sup>55</sup> To be sure, there is also a great number of readily available systematizations of private life case law - a product of legal academics' attempts to classify over and over again the wide range of 'private life' interests by putting them into various categories, groups or types, see n 12 and 14.

<sup>56</sup> *X and Y v Netherlands* (App no 8978/80) (1986) 8 EHRR 235.

<sup>57</sup> *Jalloh v Germany* (App no 54810/00) ECtHR [GC] 11 July 2006. Judging from the number of dissenting judges, however, the issue was found to be very controversial.

<sup>58</sup> *Glass v United Kingdom* (App no 61827/00) (2004) 39 EHRR 15.

<sup>59</sup> The situation is very often reversed, though and the right to physical and moral integrity under Article 8 comes into operation where the minimum level of severity required in Article 3 ECHR is not attained, see *Bensaid v United Kingdom* (App no 44599/98) (2001) 33 EHRR 10 [46]; *Costello-Roberts v United Kingdom* (n 36) [36]; or *DG v Ireland* (App no 39474/98) (2002) 35 EHRR 33 [105].

<sup>60</sup> *X and Y v Netherlands* (n 56) [22]. See also and *Worwa v Poland* (App no 26624/95) (2006) 43 EHRR 35 (successive psychiatric examinations at short intervals in connection with similar criminal cases before the same court); *Young v United Kingdom* (App no 60682/00) ECtHR 11 October 2005 (admissibility decision) (obligation of prisoner to provide urine sample); *Wretlund v Sweden* (App no 46210/99) (2004) 39 EHRR SE5 (obligation on employee at nuclear plant to undergo drug test); *YF v Turkey* (App no 24209/94) (2004) 39 EHRR 34 (compulsory gynaecological examination of applicant's



doubt that the requirement to submit to a strip-search will generally constitute an interference under Article 8, as it did in *Wainwright v United Kingdom*.<sup>61</sup> As to the right to psychological integrity, examples can mainly be found in the immigration context. Thus, rights protected by Article 8 were engaged by foreseeable consequences for mental health of the removal of a schizophrenic to Algeria where his condition would go largely untreated. Yet, no violation of Article 8 was found in this case since the risk of damage to the applicant's health by his removal was based largely on hypothetical factors.<sup>62</sup>

Private life also embraces aspects of an individual's personal and social identity. Since both one's name and surname constitute a means of personal identification, the right to a personal identity may come into play in cases in which state regulation interferes with their use by individuals,<sup>63</sup> especially when they discriminate between people without any legitimate objective or rational justification. Accordingly, matters relating to the refusal to allow a person to obtain a change of name in the Civil Register and other official identity documents to reflect gender re-assignment have been found to concern the right to respect for an applicant's private life.<sup>64</sup>

Right to private life, furthermore, covers a right to personal development through securing for the individual a private, internal sphere within which he or she can freely pursue the development and fulfilment of his personality. It thus guarantees respect

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wife in custody); *ST v Turkey* (App no 32431/96) ECtHR 6 May 2003 (admissibility decision) (psychiatric examination imposed on applicant by court order); *Madsen v Denmark* (App no 58341/00) (2003) 36 EHRR CD61 (mandatory drug tests for employees); *Matter v Slovakia* (App no 31534/96) (2001) 31 EHRR 32 (enforced psychiatric examination).

<sup>61</sup> (App no 12350/04) ECtHR 26 September 2006 (disregard for procedures for strip-searching visitors to a prison led to the finding of a violation of Article 8 as well as of Article 13 ECHR as there was no means of obtaining redress for the interference with visitors' Article 8 rights; it did not, however, reach the minimum level of severity prohibited by Article 3 ECHR). Compare with *Valašinas v Lithuania* (App no 44558/98) ECtHR 24 July 2001 (Article 3 ECHR has been engaged where a prisoner was obliged to strip in the presence of a female officer, his sexual organs and food touched with bare hands). See also *Ewald Wieser v Austria* (App no 2293/03) ECtHR 22 February 2007 (in which the strip-search by police of a complainant during his arrest at his home constituted an unjustified treatment of sufficient severity to be characterised as degrading within the meaning of Article 3 ECHR).

<sup>62</sup> *Bensaid v United Kingdom* (n 59). See also *Paramsothy v Netherlands* (App no 14492/03) (2006) 42 EHRR SE9 (expulsion to Sri Lanka of an applicant who had been diagnosed as suffering from a post-traumatic stress disorder and depression resulting from the traumatic experiences he had undergone in Sri Lanka); or *F v United Kingdom* (App no 17341/03) ECtHR 22 June 2004 (admissibility decision) (expulsion to Iran, where an applicant's right to physical and moral integrity would allegedly be breached given the ban against homosexuality).

<sup>63</sup> *Daróczy v Hungary* (App no 44378/05) ECtHR 1 July 2008 (authorities' refusal to allow the applicant to keep her birth name after her husband's death).

<sup>64</sup> *B v France* (App no 13343/87) (1993) 16 EHRR 1 [GC].

for individuals to shape and define who they are through their own, personal choices. This aspect of Article 8, however, can only be taken so far and does not, for example, incorporate an individual's choice to go on living. Thus, while accepting that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 and that it is under that provision that the notion of the equality of life that on significance, in the case of mercy killing *Pretty v United Kingdom*, the ECtHR pointed out that the more serious the harm involved, the more heavily would weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy, ie the wider margin of appreciation afforded to a State.<sup>65</sup> Accordingly, the ECtHR found the blanket nature of the ban on assisted suicide justified as necessary in a democratic society for the protection of the rights of others and that no violation of Article 8 had occurred. Another example of a 'personal autonomy' case is *JT v United Kingdom*, in which it was claimed that the inability of those detained under the Mental Health Act 1983 to object and change family members appointed as their nearest relative, represented unjustified interference with an applicants' private life.<sup>66</sup> The decision of ECtHR was not necessary, however, since friendly settlement was finally reached in this case.

There is also a social aspect to one's private life and his or her personal development that is protected under Article 8. It is our need to establish and develop relationships with other human beings and the outside world. In the case of *Smirnova v Russia*, for example, the ECtHR examined the effect on an applicant's private life of the seizure by the authorities of an official document (internal passport), even though no specific interference had been alleged by that applicant as a result of the seizure. The ECtHR ruled that the absence of the passport itself caused a number of everyday inconveniences taken in their entirety, as the applicant needed the passport when performing such mundane tasks as exchanging currency or buying train tickets. It was also noted in particular that the passport was required by that applicant for more crucial needs such as finding employment or receiving medical care. The ECtHR concluded that the deprivation of the passport had represented a continuing

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<sup>65</sup> *Pretty v United Kingdom* (n 54) [74] - [76].

<sup>66</sup> (App no 26494/95) (2000) 30 EHRR CD 77 (friendly settlement). See also a follow-up case *M v United Kingdom* (App no 30357/03) ECtHR 13 February 2007 (admissibility decision – friendly settlement) (in which the UK Government undertook to rectify the incompatibility of the Mental Health Act 1983 by the prompt enactment of the Act or the use of a Remedial Order under the Human Rights Act 1998 in the event of any delay to this effect.)

interference with that applicant's private (social) life.<sup>67</sup> Similarly, the applicants' dismissal from their jobs as private-sector lawyers and some other employment restrictions on the basis of their KGB past, could be seen as affecting the applicants' social relationships and therefore their private lives,<sup>68</sup> and in the case of *McFeeley v United Kingdom*, association with other prisoners was also held to constitute a part of a prisoner's private life just because it preserved their sociability.<sup>69</sup> In this context, one can mention three recent Italian cases concerning personal disqualifications imposed on bankrupts and attached automatically to the bankruptcy order as provided for by relevant national legislation, the ECtHR confirmed the *Niemietz* reasoning that protection of private life may cover activities of a professional or business nature.<sup>70</sup> The ECtHR held that entering the applicants' name automatically in the bankruptcy register, without any subsequent possibilities of judicial review or assessment, as well as in the view of length of time before rehabilitation could be obtained, had clearly prevented the applicants from carrying out their professional and commercial activities and therefore from developing their social and business relationships with the outside world which resulted in violation of the right to respect for their private life.<sup>71</sup> It is also worth noting that effective enjoyment of one's social life has also been one of the relevant factors to be taken into account in immigration cases. To give an example, prolonged refusal to grant an applicant the right to reside lawfully and permanently in a state in which the person has legally resided for 22 years having therefore formed and developed sufficiently strong personal, social and economic relationships there, as well as passing on her an expulsion order, led the ECtHR to

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<sup>67</sup> *Smirnova v Russia* (App nos 46133/99 and 48183/99) (2004) 39 EHRR 22. See also *Iletmis v Turkey* (App no 29871/96) ECtHR 6 December 2005 (in which the ECtHR considered that the confiscation of the applicant's passport and the refusal for years to return it constituted interference with the exercise of his right to respect for his private (social) life, inasmuch as it had noted the existence of sufficiently strong personal ties which were likely to be seriously affected by the application of that measure).

<sup>68</sup> *Rainys and Gasparavicius v Lithuania* (App nos 70665/01 and 74345/01) ECtHR 7 April 2005. Here, since the ECtHR found a breach of Article 14 ECHR taken in conjunction with Article 8, it was not necessary also to consider whether there had been a violation of Article 8 taken alone.

<sup>69</sup> (App no 8317/78) (1981) 3 EHRR 161.

<sup>70</sup> *Niemietz v Germany* (n 54) (the interpretation of 'private life' and 'home' as including certain professional or business activities or premises was held to be consonant with the object and purpose of Article 8). See also *Peev v Bulgaria* (App no 64209/01) ECtHR 26 July 2007 (the search of the applicant's office, which was located on the premises of a public authority, also amounted to interference with the applicant's private life). The *Niemietz* reasoning has often been referred to in 'search of business premises' and 'tapping of office telephone and business conversation' cases which will be dealt with in chapters: (4) Home; and (5) Correspondence under the ECHR.

<sup>71</sup> *Albanese; Campagnano and Vitiello v Italy* (App no 77924/01, 77955/01 and 77962/01) ECtHR 23 March 2006.

conclude that the national authorities violated the applicant's right to respect for her private life.<sup>72</sup>

A person's sexual life, the choice of affirming and assuming one's sexual identity as well as development of sexual relationships also come within the protection of Article 8.<sup>73</sup> In *Dudgeon v United Kingdom*, the ECtHR held by majority that given the personal circumstances of the applicant, the very existence of legislation in Northern Ireland which criminalised homosexual conduct continuously and directly affected his private life.<sup>74</sup> A violation of Article 8 was also found where English law made it an offence for male homosexual acts to take place when more than two men were present, but no such restriction was imposed on other types of sexual activity.<sup>75</sup> Violations of right to respect for one's private life were also found in a series of applications concerning the dismissal of homosexuals from the British Armed Forces.<sup>76</sup> In the recent case of *EB v France*, which concerned the application of a single homosexual person to adopt a child, furthermore, the Grand Chamber held by a majority of 10 votes to 7 that the applicant's homosexuality had been mentioned so much by the relevant national authorities that it had to be regarded as a decisive factor to their decision to refuse authorisation to adopt, even though the reviewing national courts had not considered it to be so. As a result, the applicant was held to have

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<sup>72</sup> The violation of Article 8 was, of course, found only after having seen that the interference as such was not justified as required by Article 8(2) - see *Kaftailova v Latvia* (App no 59643/00) ECtHR 22 June 2006. See also *Cordoso and Johansen v United Kingdom* (App no 47161/99) ECtHR 5 September 2000 (friendly settlement) (threatened expulsion of a homosexual living in a long-term relationship).

<sup>73</sup> Given their character, the cases on treatment of transsexuals are discussed in section '6.1.1 Positive Obligations and Private Life under the ECHR'.

<sup>74</sup> (App no 7525/76) (1981) 4 EHRR 149. See also *Norris v Ireland* (App no 10581/83) (1991) 13 EHRR 186 (Irish legislation which penalised buggery and acts of gross indecency constituted a continuing interference with Mr Norris's private life within Article 8); and *Modinos v Cyprus* (App no 15070/89) (1993) 16 EHRR 485 (in which the existence of the criminal prohibition of homosexual relations in Cyprus affected and interfered with M's private life contrary to Article 8).

<sup>75</sup> *ADT v United Kingdom* (App no 35765/97) (2001) 31 EHRR 33. Compare with *Laskey, Jaggard and Brown v United Kingdom* (n 22). See also *Sutherland v United Kingdom* (App no 25186/94) ECtHR 27 March 2001; *SL v Austria* (App no 45330/99) (2003) 37 EHRR 39, and *L and V v Austria* (App nos 39392/98 and 39829/98) (2003) 36 EHRR 55, in which on the basis of differential ages of consent a breach of Article 14 taken together with Article 8 was found.

<sup>76</sup> *MacDonald v United Kingdom* (App no 301/04) ECtHR 6 February 2007 (friendly settlement); and *Beck, Copp nad Bazeley v United Kingdom* (App nos 48535/99, 48536/99 and 48537/99) ECtHR 22 October 2002; *Smith and Grady v United Kingdom* (App nos 33985/96 and 33986/96) (2000) 29 EHRR 493; *Lustig-Prean and Beckett v United Kingdom* (App nos 31417/96 and 32377/96) (2000) 29 EHRR 548; *Perkins and R. v United Kingdom* (App nos 43208/98 and 44875/98) ECtHR 22 October 2002. See also *Love v United Kingdom* (App no 4103/04) ECtHR 13 December 2005 (although here applications were introduced outside the time-limit and therefore held inadmissible).

suffered an unjustified difference in treatment, and, accordingly, there had been a breach of Article 14 ECHR taken with Article 8.<sup>77</sup>

There is, furthermore, a zone of interaction of a person with others, even in a public context, which falls within the scope of private life under Article 8. Examples can be given of certain issues arising out of specific forms of surveillance – the use of security cameras to closed-circuit television (CCTV) in public places. *Peck v the United Kingdom* clearly shows that individuals retain their dignity even outside their homes in purely public areas.<sup>78</sup> In this case, the ECtHR emphasized that it was not the monitoring of an individual attempting to commit suicide in a public place which constituted an interference with the right to respect for private life, but rather the subsequent use which was made of some of the recorded data (the footage showing the immediate aftermath of this episode while the applicant still held the knife had been released by Brentwood Borough Council to the local press as an example of the success of CCTV monitoring) without obtaining the applicant's consent or masking his identity. Similar issues arose in *Perry v United Kingdom*,<sup>79</sup> which concerned the covert filming at a police station for the purposes of identification of a suspect who had refused to participate in an identity parade, the ECtHR emphasized that

... the normal use of security cameras per se whether in the public street or on premises, such as shopping centres or police stations where they serve a legitimate and foreseeable purpose, do not raise issues under Article 8 ECHR.<sup>80</sup>

Here, however, the police adjusted the security camera so that it could take clear footage of the applicant in the custody suite and inserted it in a montage of film of

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<sup>77</sup> *EB v France* (App no 43546/02) ECtHR [GC] 22 January 2008. The findings of the Grand Chamber are at odds with the previous judgment in *Fretté v France* (App no 36515/97) (2004) 38 EHRR 21; which it seems to have overturned (as of course the GC can). Seven strongly dissenting judges in this case did not, however, share the opinion of the majority and found the issues to be far less straightforward.

<sup>78</sup> *Peck v United Kingdom* (App no 44647/98) (2003) 36 EHRR 41. Compare with *Lupker and Others v the Netherlands* (App no 18395/91) EComHR 7 December 1992 (the unforeseen use by the authorities of photographs which had been previously voluntarily submitted to them only to identify offenders in criminal proceedings); or *Friedl v Austria* (App no 15225/89) (1996) 21 EHRR 83 (the use of photographs taken by the authorities during a public demonstration for a general administrative file and not in a data processing system).

<sup>79</sup> *Perry v United Kingdom* (App no 63737/00) (2004) 39 EHRR 3. See also *PG and JH v United Kingdom* (App no 44787/98) ECtHR 25 September 2001 (concerned, inter alia, the use of a covert listening device in a police station); or *Allan v United Kingdom* (App no 48539/99) (2003) 36 EHRR 12 (the use at trial of evidence obtained through covert audio and video recordings made whilst the applicant was on remand). See also relevant case law on interception of correspondence and communication in chapter (5) Correspondence under the ECHR, were also applicable.

other persons to show to witnesses for the purposes of seeing whether they could identify the applicant as the perpetrator of the robberies under investigation. This ‘ploy adopted by the police went beyond the normal or expected use of this type of camera’ and the footage constituted a ‘processing or use of personal data’ of a nature to constitute an interference with respect for private life, which was not in accordance with the law.<sup>81</sup>

In this connection, mention should be made of case law which concerns the recording of personal data and systematic or permanent nature of such records.<sup>82</sup> In principle, such data files are maintained either by security services in the protection of national security or by the police who collect and store personal information in the prevention and detection of crime.<sup>83</sup> According to ECtHR’s case law, the compilation of data by public authorities on particular individuals, even without the use of covert surveillance methods, clearly constitutes an interference with one’s private life and the subsequent use of the stored information has no bearing on that finding.<sup>84</sup> The ECtHR will not speculate as to whether the information gathered on the applicant was sensitive or not or the applicant inconvenienced in any way. This embraces even those parts of the information that are public once the information has been systematically collected and stored in files held by the authorities.<sup>85</sup> To comply with Article 8 and in order to prevent the abuse of power by the State, such interferences must be subject to legal safeguards, adequate supervision and therefore justified by reference to the

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<sup>80</sup> *ibid* [40].

<sup>81</sup> *ibid* [41].

<sup>82</sup> For the ECtHR’s definition of personal data as ‘any information relating to an identified or identifiable individual’, see the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Article 2.

<sup>83</sup> But see *Z v Finland* (App no 22009/93) (1998) 25 EHRR 371 (court order imposed on an applicant’s doctors and psychiatrist to give evidence and disclose information about the applicant in the court proceedings) or *MS v Sweden* (App no 20837/92) (1999) 28 EHRR 313 (whether it was legitimate for state medical institutions to pass onto social insurance authorities an applicant’s medical records).

<sup>84</sup> *Amann v Switzerland* (App no 27798/95) (2000) 30 EHRR 843 [GC], [65]-[70] (the creation of a card and the storing thereof in the public authority’s card index); *Rotaru v Romania* (App no 28341/95) ECtHR [GC] 4 May 2000 [43]-[44] (untrue information held about the applicant by the State Intelligence Service); *Adamson v United Kingdom* (App no 42293/99) ECtHR 26 January 1999 (admissibility decision) (notification of personal information, such as the name, date of birth or home address, to the police by persons who have committed sexual offences pursuant to domestic legislation); *Murray v United Kingdom* (App no 14310/88) (1995) 19 EHRR 193 (recording of the applicant’s personal details and photograph on arrest under the Northern Ireland (Emergency Provisions) Act 1978) or *McVeigh, O’Neill and Evans v United Kingdom* (App nos 8022/77, 8025/77 and 8027/77) (1983) 5 EHRR 71 (questioning, searching, fingerprinting and photographing of an applicant under anti-terrorism legislation and the subsequent retention of relevant records).

<sup>85</sup> *Leander v Sweden* (App no 9248/81) (1987) 9 EHRR 433 [48] (security vetting and access to files).

principles of Article 8(2).<sup>86</sup> Frequently, it is an individual's inability to access the information which the State holds about him or her that is the subject of complaint<sup>87</sup> or, as in *Turek v Slovakia*,<sup>88</sup> the applicant's inability to challenge his registration in state security agency files on the basis of which he had been issued with a negative security clearance in court proceedings. An individual's privacy may also be invaded by subsequent disclosure of personal data to public or third parties. In *Sciacca v Italy*,<sup>89</sup> for example, the absence of a legal basis for the handing over to the press by the Revenue Police of a photograph of a person under house arrest resulted in violation of the applicant's private life. In *AB v Poland*,<sup>90</sup> on the other hand, amounting to an interference with the right to privacy, dissemination of a wanted notice containing a photograph of the applicant and his daughter by the District Prosecutor in the press was held to have pursued the legitimate aim of protecting the child's interests and had been justified by the failure of the various methods employed to make the father hand over his daughter who he had abducted. The measure had therefore been necessary in a democratic society.<sup>91</sup>

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<sup>86</sup> *ibid.* See also *Van der Velden v Netherlands* (App no 29514/05) ECtHR 7 December 2006 (admissibility decision) (in which the ECtHR considered the obligation imposed on all persons who have been convicted of offences of a certain seriousness to undergo DNA testing and the power of the police to retain DNA data of those persons to be proportionate and justified by reference to the principles of Article 8(2)).

<sup>87</sup> *Segerstedt-Wiberg and Others v Sweden* (App no 62332/00) ECtHR 6 June 2006 (impossibility to access the full extent of personal information recorded in security police records).

<sup>88</sup> (App no 57986/00) ECtHR 14 February 2006.

<sup>89</sup> (App no 50774/99) (2006) 43 EHRR 20.

<sup>90</sup> (App no 33878/96) ECtHR 18 October 2001.

<sup>91</sup> Another example of a disclosure of personal data by public authorities to the public would be the case of *Sanchez Cardenas v Norway* (App no 12148/03) ECtHR 4 October 2007 (in which a judgment of the national court in proceedings concerning access by the applicant to his two sons contained a passage relating to accusations made by the mother of sexual abuse by the applicant of one of his sons which was unnecessary to the court's decision and so was held by the ECtHR to have unjustifiably interfered with the applicant's right to private and family life).

## 2.2 Private Life in English Law

In order to analyse how well the ‘Strasbourg’ private life is protected in English law, the following issues are examined in this section: bodily privacy; issue of autonomy/self-determination; protection of personal identity of an individual; one’s right to sexual life and sexual activity of one’s choice; CCTV and privacy rights in public spaces; and, finally, collecting, using and systematic recording of personal data and the National DNA Database.

As mentioned above,<sup>92</sup> the physical integrity of a person is one of the private life aspects covered by Article 8. There are two main issues that need to be addressed regarding the position of English law to the protection of bodily (physical) integrity: the first concerns the physical punishment of children; and the second issue reflects upon the law on searching the person in the light of *Wainwright* judgment.<sup>93</sup>

Although the ECtHR did not find the incident of physical punishment of 7-year-old boy Jeremy in the case of *Costello-Roberts* to be sufficiently serious to amount to interference with the boy’s physical integrity so as to bring it within the scope of Article 8 (let alone Article 3),<sup>94</sup> the question whether English law permitting the physical chastisement of children as it now stands, fully complies with the ECtHR’s case law seems to be still open. While corporal punishment in schools and children’s homes is no longer authorised in the UK,<sup>95</sup> and notwithstanding the removal of the reasonable chastisement defence in respect of statutory assault (ie assault occasioning actual bodily harm under s 47 of the Offences against the Person Act 1861) by s 58 of

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<sup>92</sup> See n 56 et seq.

<sup>93</sup> Ch Barton, ‘Hitting Your Children; Common Assault or Common Sense?’ (2008) 65 Family L 38.

<sup>94</sup> *Costello-Roberts v United Kingdom* (n 36).

<sup>95</sup> Judicial corporal punishment is no longer authorised anywhere in the UK and s 47 of the Education (No 2) Act 1986 removed the right of teachers in state schools in England and Wales to physically chastise children. This was later re-enacted by the Education Act 1996. Following the case of *Costello-Roberts v United Kingdom* (n 36), s 131 of the School Standards and Framework Act 1998 amended the Education Act 1996, extending the prohibition to all schools. See also the Education and Inspections Act 2006 which defines the legal power for teachers and other school staff to use ‘reasonable force’ to prevent pupils from committing a crime or causing injury, damage, or disruption; the power which was first enshrined in the Education Act 1996. See also *R (on the application of Williamson and others) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246 (in this fascinating case the House of Lords dismissed the appeal of teachers and parents of children at four Christian independent schools, whose interpretation of the Christian faith led them to believe that ‘loving corporal correction’ (corporal punishment) was essential and decided thus to



the Children Act 2004, which is likely to be sufficient to remedy the incompatibility found in *A v United Kingdom* with respect to Article 3 ECHR,<sup>96</sup> the defence of reasonable chastisement is still available to parents charged with common assault for causing injury to their children while disciplining them at home, ie acting in *loco parentis*, that amounts to (no more than) reddening of the skin, that is transient and trifling. Here lies a risk that in a future case the ECtHR may find that the continued availability of the reasonable chastisement defence to the offence of common assault is in breach of a child's right to dignity and physical integrity under Article 8 and/or their right not to be discriminated against compared to adults in relation to their enjoyment of those rights on grounds of their age.<sup>97</sup>

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challenge the compatibility of the total ban on corporal punishment in schools with their rights under Article 9 ECHR).

<sup>96</sup> *A v United Kingdom* (n 38) - one of the longest outstanding judgments against the UK, which has placed the UK government under the *positive obligation* to protect individuals from treatment of a severity which infringed Article 3 ECHR. In this 'positive obligation' case, the defence of reasonable chastisement had been relied on by a man who had disciplined his step-children with a garden cane applied with considerable force on more than one occasion. The applicant, a young boy, was found to have been thus disciplined resulting in a total of nine bruises. The stepfather was charged with assault, but was acquitted on the basis of the defence. The ECtHR held that the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3 ECHR (since the ECtHR found a violation of Article 3, it considered it unnecessary to examine whether the inadequacy of the legal protection provided to the child against the ill-treatment that he had suffered also breached his right to respect for private life under Article 8). Although the criteria for assessing the reasonableness of the chastisement slightly changed in the light of *A v United Kingdom* after the enactment of the HRA 1998, the defence of reasonable chastisement was still fully available to a parent accused of assaulting his child before the Children Act 2004, potentially permitting acquittals in circumstances falling within Article 3 ECHR, see *R v H (Assault of Child: Reasonable Chastisement)* [2001] EWCA Crim 1024; [2002] 1 Cr App R 7 (in which the jury unanimously acquitted a father who had admitted using a belt, causing bruising, to punish his four-year-old son for refusing to write his name).

<sup>97</sup> Although in complying with *A v United Kingdom* (n 38), judges could potentially erode the scope of the defence over the years, in accordance with the evolving standards emerging from the jurisprudence of the ECtHR, the State cannot absolve itself of its responsibilities under Article 1 ECHR by simply 'passing the buck to the courts'. It can be seen from the judgement in *R v H* (n 96) that although invoking the HRA 1998 in such situations may appear to be in accordance with the letter of the law, it leaves considerable discretion to the courts, judges and juries. The HRA itself could not be considered to be a sufficient legislative measure to execute *A v United Kingdom*, furthermore, since this would imply that once States had incorporated the ECHR into their domestic law, they would never need to legislate to execute ECtHR judgments, a logic that is clearly untenable. RKM Smith, 'Hands-Off Parenting? - Towards a Reform of the Defence of Reasonable Chastisement in the UK' (2004) 261 *Child and Family LQ* 163; and the opinions of the CoE's Committee of Ministers available at <[http://www.coe.int/t/e/human\\_rights/execution/02\\_Documents/PPcasesExecution.asp#TopOfPage](http://www.coe.int/t/e/human_rights/execution/02_Documents/PPcasesExecution.asp#TopOfPage)> (cases pending for supervision of execution) accessed 30 September 2008. See also relevant Reports of the Joint Committee on Human Rights, for example: 'Implementation of Strasbourg Judgments: First Progress Report' HC/HL (2005-06) 954/133 (in which it is noted that the Committee of Ministers of the CoE has not yet been fully satisfied that the implementation of Children Act 2004 in practice would ensure compliance with the ECHR); its Twelfth and Nineteenth Reports HC/HL (2003-04) 603/93 and 537/161 (in which it examined the Children Bill (as it then was) and concluded in light of recent developments in the interpretation of other international instruments by the relevant monitoring bodies, and the increasing tendency of the ECtHR to look to the UN Convention on the Rights of the Child as

The second 'bodily integrity' issue that is addressed here concerns the scope of domestic legal protection of one's physical integrity from a body search in the light of the *Wainwright* judgment discussed elsewhere in this chapter.<sup>98</sup> According to the very clear case law of the ECtHR,<sup>99</sup> intrusive powers of search are clearly capable of interfering with the bodily integrity of the person being searched and therefore must be accompanied by strong procedural safeguards and rigorous precautions to ensure that the dignity of the person being searched is not interfered with to a greater extent than is necessary.<sup>100</sup> As the domestic law stands, a statutory regime governing all searches is established by the Police and Criminal Evidence Act 1984 (hereafter the 'PACE') and its Codes of Conduct.<sup>101</sup> Both the PACE and the Codes of Conduct have

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a source of standards concerning children, it considered that there was a risk that the continued availability of the reasonable chastisement defence to the offence of common assault would be held by the ECtHR in future to be in breach of a child's right under the ECHR); its Sixteenth Report 'Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights' HC/HL (2006-07) 728/128, published on 28 June 2007; or 'The UN Convention on the Rights of the Child' HC/HL (2002-03) 81/117 (in which it concluded that the retention of the defence of reasonable chastisement was not compatible with the United Kingdom's obligations under that Convention). Note that the Committee of Ministers of the CoE keeps monitoring the operation of s 58 of the Children Act 2004 in practice as well as awareness-raising measures that have been taken in this respect (see the list of cases pending for supervision of execution mentioned above). The Crown Prosecution Service undertook a research project to identify cases where 'reasonable chastisement' has been used as a defence against a charge of common assault of a child from January 2005 (when the Children Act 2004 came into force) to November 2006 and its final reasonable chastisement research report is available at <<http://www.cps.gov.uk/Publications/research/chastisement.html>> accessed 30 September 2008. No less than seven research papers have been published on this issue also by the Department for Children, School and Families on this issue so far and they are all available at: <<http://www.dfes.gov.uk/publications/section58review/>> accessed 30 September 2008.

<sup>98</sup> *Wainwright v United Kingdom* (n 61).

<sup>99</sup> *Wainwright v United Kingdom* (n 61).

<sup>100</sup> Of course, this applies to both visitors to a prison as well as to prisoners, see n 61.

<sup>101</sup> The PACE thus superseded the common law under which searches of a person were only permitted under warrant or where reasonable cause existed for a belief that an arrested person had a weapon or stolen property upon them. Although no right to (bodily) privacy was recognized at common law, any interference with the person was potentially actionable. See, for example, *Ward's Case* [1636] Clay 44; *Kinsey* (1836) 7 C & P 447; *Leigh v Cole* (1853) 6 Cox CC 329; *Bessell v Wilson* (1853) 17 JP 52; *R v Naylor* [1979] Crim LR 532 (Leicester Crown Court); *Lindley v Rutter* [1981] 1 QB 128; [1980] 3 WLR 660 (Divisional Court); or *Brazil v Chief Constable of Surrey* [1983] 1 WLR 1155; [1983] 3 All ER 537 (QB). The effect of a statutory authority to carry out a search is to provide a defence to civil action (or indeed a criminal prosecution) for assault against the person carrying it out. It will also have the effect of keeping the police officer concerned within the bounds of the execution of his duty, and thus make a person who resists potentially liable for the offences of aggravated assault or obstruction. Although not expressly, provisions of the PACE Code of Practice A and other sections of the PACE itself indicate that there are at least four different levels or categories of personal search that allow a personal search to be performed to different extents, and that the question of which category may be used in any particular situation will depend primarily on the nature of the offence which is being investigated, and the place where the search is taking place. The four main categories of search are (using the terminology of PACE and its codes): superficial, non-public, strip and intimate. Apart from personal searches, the PACE governs the general power to enter onto and to conduct searches of property. To make complete the picture, it should be added that there are other specific statutory provisions which authorise police and other officials to search in the course of criminal investigations,

provided the model for other searches by state officials, such as in prisons. According to the Prison Rules 1999 any person or vehicle entering or leaving a prison may be stopped, examined and searched.<sup>102</sup> It appears that more detailed guidance on searching techniques does exist but that this is not publicly available: it is contained in the National Security Framework, which is a mandatory Prison Service Order which, although freely available to staff in both public and private prisons, is not made publicly available due to its restricted security status and impact on operational matters.<sup>103</sup> While searching of visitors is considered as a legitimate preventive measure, it must be conducted with rigorous adherence to procedures and all due respect to human dignity of visitors who are clearly not convicted prisoners or under reasonable suspicion of having committed a criminal offence.<sup>104</sup> It was not done so in the case of *Wainwright v Home Office* in which the prison authorities failed to adhere to the Prison Service's internal policy for the proper conduct of strip searches of two visitors.<sup>105</sup> In domestic courts, the HRA was held to be inapplicable as the events took place before its coming into force and accordingly, the claimants had recourse only to legal remedies with respect to their searches under common law, ie to an action for trespass to the person (more commonly referred to as an *assault* or *battery*). However, the restrictions on those remedies, which are not meant originally to deal with specific violations of bodily privacy anyway, including absence of proportionality and the limited scope for recognizing distress other than for proven psychiatric harm resulted in compensation of one of the claimants only for the battery, which was subsequently condemned at the European level. Thus, although the House of Lords stated that even

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including the Terrorism Act 2000 (to this effect, see *R (on the application of Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307 [28] in which the House of Lords held that a superficial search under the Terrorism Act 2000 could not be viewed as a violation of a person's private life under Article 8, any more than the security checks which a passenger uncomplainingly submits to at an airport). See, generally, R Stone, *The Law of Entry, Search and Seizure* (4<sup>th</sup> edn OUP, Oxford 2005) ch 5; and A Murdie, 'Privacy, Searches and Bodily Integrity - How Far Can a Lawful Search Go?' (2005) 169 *Justice of the Peace* 219.

<sup>102</sup> SI 1999/728 adopted on the basis of section 47 of the Prison Act 1952.

<sup>103</sup> Prison Service Order 1000. The government relies on the existence of this secret internal guidance, along with the various inspection and monitoring mechanisms, in support of its view that appropriate safeguards have been provided to ensure that the power to strip-search visitors is compatible with Article 8. These include a contractual requirement to regularly self-audit their procedural compliance with correct searching techniques, monitoring of the contractor's staff by the prison Controller, inspection by HM Inspectorate of Prisons and the Independent Monitoring Board, and consideration of individual complaints by the Prison and Probation Ombudsman. See <<http://www.hmprisonservice.gov.uk/resourcecentre/psispsos/>> accessed 30 September 2008.

<sup>104</sup> *Wainwright v United Kingdom* (n 61).

<sup>105</sup> *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406.

had the HRA been in force at the time, it was doubtful whether the claimants would have succeeded in their Article 8 claim,<sup>106</sup> the ECtHR declared that the searches were not proportionate, due to the manner in which they were carried out and were in breach of Article 8. Furthermore, since, battery excluded, the claimants did not dispose of any real means of obtaining redress for the interference with their rights under Article 8, the ECtHR found the UK to be also in violation of Article 13 ECHR.<sup>107</sup> The Article 13 ECHR violation was interpreted by early commentary as requiring the introduction of a general tort of invasion of privacy into English law whereas others indicated the need for caution.<sup>108</sup> Domestic courts have historically refused to use s 3 and s 6 of the HRA 1998 to create an entirely new tort of breach of privacy and the House of Lords did expressly do so in *Wainwright* itself.<sup>109</sup> The UK government stated that in the light of the ECtHR's findings in *Wainwright*, it did not consider that a new statutory tort of invasion of privacy was appropriate or necessary.<sup>110</sup> Its main argument is that the case arose before the commencement of the HRA and since 2000 victims of unlawful action can bring a case under the HRA and domestic courts must, under s 2 HRA, take into account jurisprudence of the ECtHR, including the decision in *Wainwright*. The fact of the matter is, however, that despite the ability of an individual to bring a claim under s 7 and s 8 HRA (of course subject to a limitation period of 12 months), it is questionable whether the applicants would have a domestic remedy if they brought their case today. Indeed, following the House

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<sup>106</sup> (ibid) [51]. In Lord Hoffmann's opinion this was because although damages could be available under the HRA for mere distress for which the common law would not generally provide a remedy, it did not follow that a negligent act (as in the present case) would give rise to liability for damages simply because it affected the bodily privacy of the individual. Lord Hoffmann's reliance on the 'merely negligent' actions of the Prison Service is in stark contrast to the ECtHR's ruling in the home search case of *Keegan v United Kingdom* (App no 28867/03) ECtHR 18 July 2006, in which it held that the fact that the police did not act maliciously was not decisive, as the ECHR is 'geared to protecting against abuse of power, however motivated or caused'.

<sup>107</sup> *Wainwright v United Kingdom* (n 61).

<sup>108</sup> B Lask, 'Update: Human Rights' 150 *Solicitors J* (2 June 2006); NA Moreham, 'Violating Article 8' (2007) 66 *CLJ* 35; E Reid, 'Wainwright v United Kingdom: Bringing Human Rights Home?' (2007) 11 *Edinburgh L Rev* 83; Case Comment, 'Human Rights: Article 3 and 8: strip Search of Visitor to Prison' [2007] *PL* 151. See also Sixteenth Report of the Joint Committee on Human Rights, 'Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights' (n 97).

<sup>109</sup> See also B Hewson, 'Privacy Claims Hit the Rocks' (2003) 153 *NLJ* 1694; S Chalton, 'House of Lords Sinks Privacy as a Common Law Right' (2003) 14 *Privacy Laws & Business United Kingdom Newsletter* 16; or A Murdie, 'Improper Searches' (2004) (13) *Solicitors J* 148.

<sup>110</sup> See the Sixteenth Report of the Joint Committee on Human Rights, 'Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights' (n 97) Appendix 68 (Letter dated 14 March 2007 from the Department for Constitutional Affairs to Joint Committee on Human Rights concerning the implementation of judgment of the ECtHR in *Wainwright v UK*).

of Lords decision in *Price v Leeds*,<sup>111</sup> domestic courts would be bound to follow the domestic authority even if there is an unquestionable incompatibility between domestic precedent and a later decision of the ECtHR and the House of Lords made it very clear in *Wainwright*: a negligent invasion of privacy would not give rise to a breach of Article 8, and so, could not give rise to a claim under the HRA. In any case, the ECtHR in *Wainwright* did not comment on whether s 7 and s 8 HRA, even if applicable, could afford an effective remedy for the purposes of Article 13 ECHR, without the realistic availability of damages.<sup>112</sup> It should be highlighted though, that in order to ensure that particular and appropriate efforts are made to avoid disproportionate, unnecessary or negligent searches in breach of Article 8 as was the one in *Wainwright*, the Home Office Prison Service Security Policy Unit agreed a Prison Service Instruction (PSI 30/2007) amending aspects of searching policy which has been circulated to all prison governors in the UK. Part of those amendments are said to specifically address issues raised in the *Wainwright* case.<sup>113</sup> Being a part of the secret Prison Service Order 1000, however, it is not possible to assess compliance of the proposed amendments on procedural safeguards of searching policy with the requirements established in the ECtHR's case law and the recently revised and updated European Prison Rules 2006 which requires that in each prison there should be a clearly understood set of procedures which describe in detail the circumstances in which searches of visitors should be carried out and the methods to be used, and that these procedures should be designed to protect the dignity of visitors.<sup>114</sup>

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<sup>111</sup> *Leeds CC v Price* [2006] UKHL 10; [2006] 2 AC 465. See also *Gilboy v Liverpool CC* [2007] EWHC 2335 (Admin); [2007] NPC 105.

<sup>112</sup> See Lord Hoffmann's opinion in *Wainwright* referred to in n 106.

<sup>113</sup> See the Letter from the Department for Constitutional Affairs (n 110) and the Annotated Agenda (section 6.1) of the Ministers' Deputies of the CoE on their 1007DH meeting on 15-17 October 2007 at <[https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH\(2007\)1007&Language=lanEnglish&Ver=section4.2public&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH(2007)1007&Language=lanEnglish&Ver=section4.2public&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)> accessed 30 September 2008.

<sup>114</sup> See Prison Service Order 1000 n 103. As to the European Prison Rules, they are regularly referred to by both the ECtHRs and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. They date back to 1973 when the CoE first adopted a regional version of the United Nations Standard Minimum Rules for the Treatment of Prisoners. The most recent revision of the European Prison Rules was made with the assistance of Andrew Coyle, a former UK Prison Governor. The new Rules are the subject of Recommendation (2006) 2 of the Committee of Ministers to member States, recommending that governments be guided in their legislation, policies and practice by the new European Prison Rules.

As noted when discussing relevant case law of the ECtHR above,<sup>115</sup> libertarian principle of autonomy or self-determination is fundamental to the private life interests protected under Article 8. One crucial aspect of such personal autonomy (self-determination) is the right of an individual to make choices about his or her own body in the context of medical treatment, in particular to decide for him/herself whether or not to undergo a particular treatment.<sup>116</sup> Under common law a mentally competent adult has the absolute right to refuse consent to any medical treatment or procedure, whether the reasons are rational or irrational and even if the result of the refusal is serious harm or death. Emergency cases apart, medical treatment of an adult patient of full capacity undertaken without his consent is capable of amounting to a battery or negligence.<sup>117</sup> The principle that it is the patient and not the doctor who must decide whether treatment must continue or not, applies under common law not only to the competent patient but also to the incompetent who has made an advanced directive. Indeed, common law rules have recognized that a clear and informed advance refusal

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<sup>115</sup> See n 65 and the related main text.

<sup>116</sup> As to the position of English law with respect to other examples of autonomy/self-determination situations which have been examined in part on the ECHR law above, in particular the cases against the UK concerning the nearest relative provision in the MHA (see *JT v United Kingdom* (n 66); or *M v United Kingdom* (n 66)), the new Mental Health Act 2007 was adopted and ss 23 to 26 are relevant to the *JT* case. In particular, s 24 enables patients to apply to a court to discharge or vary an order appointing a person as their nearest relative. The court must be of the opinion that the person appointed is a suitable person. Given the personal choices involved and the related discussion on the ECtHR's case law above, one can also mention the situation in the case of *Re St Dunstan's, Whiston* [2007] All ER (D) 17 (Apr) (Southwark Consistory Court), in which, after the funeral of her son, the mother began to have doubts about the appropriateness of the arrangements which she had made as regards the interment of her son's ashes. Accordingly, she applied for a faculty to exhume the cremated ashes of her son and for them to be scattered at sea. Applying established principles that Christian burials are final and exceptions can be made and justified only in special circumstances to the instant case (in this respect, see *Re Blagdon Cemetery, Somerset* [2002] 4 All ER 482 (Arches Court of Canterbury)), the court held that the matters raised (ie the mother's conviction that her son would have preferred his ashes to be scattered at sea and that in any case, he did not have any personal connection (save through his mother) with St Dunstan's) did not show that there were special circumstances which justified making an exception from the norm that Christian burial was final. Raising an issue under the HRA as to whether there was an interference with the mother's right to respect for private and family life pursuant to Article 8, the domestic court held that even if her Article 8 rights had been interfered with, that interference was justified. One can only say that such a stance seems to be in full accord with the relevant ECtHR jurisprudence (see in particular the situation that has arisen in *Elli Poluhas Dodsbo v Sweden* (n 42)).

<sup>117</sup> Eg *Airedale NHS Trust v Bland* [1993] AC 789; [1993] 2 WLR 316 (HL); *Re MB (Caesarean Section)* [1997] 2 FLR 426; [1997] 8 Med LR 217 (CA); *St George's Healthcare NHS Trust v S* [1998] 3 WLR 936; [1998] 3 All ER 673 (CA); or *Re A (Children) (Conjoined Twins: Medical Treatment) (No.1)* [2001] Fam 147; [2001] 2 WLR 480 (CA). Consent of an apparently sensible adult has occasionally been set aside but normally on the grounds that, in the circumstances, an autonomous choice could not be exercised, see *Re T (Adult: Refusal of Treatment)* [1993] Fam 95; [1992] 3 WLR 782 (CA) (a Jehovah's Witness' refusal to accept a blood transfusion was based on the overbearing influence of her mother).

of medical treatment is, in principle, as valid as a contemporaneous refusal of treatment, notwithstanding that an individual, who made it, has subsequently become incompetent.<sup>118</sup> However, domestic courts have also held that although a patient may refuse treatment they do not have the right to demand a particular treatment, nor will a doctor be required to provide immediate or future treatment that he does not believe to be in the patient's best interests.<sup>119</sup> In the context of an advance directive, the fact that a patient can decide while capable that a treatment should not be performed on him when incapable, but could not insist on the provision of treatment that a doctor was unwilling to perform, has recently been confirmed in a case of *R (on the application of Burke) v General Medical Council*,<sup>120</sup> in which Mr Burke, who suffered from a progressive degenerative condition that would eventually result in a need for artificial nutrition and hydration (ANH), wished to make an advance directive to receive ANH until he died of natural causes as he knew that at some point in the future, he was likely to lose the ability to communicate, although not his ability otherwise to experience the world and not his mental faculties at least until very late in the progress of his condition. In other words, he did not want a decision to be taken by doctors in future that his life was no longer worth living and that ANH could thus be withdrawn as he neared the end of his life. In particular, he was concerned that the current medical guidance for the medical profession in the United Kingdom would permit the withdrawal of ANH in circumstances which would lead to his suffering, and dying of, starvation and dehydration of which he would be aware throughout.<sup>121</sup> In Mr Burke's

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<sup>118</sup> See *Re AK (Adult Patient) (Medical Treatment: Consent)* [2001] 1 FLR 129; [2001] 2 FCR 35 (Fam); or *HE v A Hospital NHS Trust* [2003] EWHC 1017; [2003] 2 FLR 408.

<sup>119</sup> Eg *Re J (A Minor) (Child in Care: Medical Treatment)* [1993] Fam 15; [1992] 3 WLR 507 (CA); or *Re C (A Minor) (Withdrawal of Lifesaving Treatment)* [1998] 1 FLR 384; [1998] 1 FCR 1 (Fam).

<sup>120</sup> *R (on the application of Burke) v General Medical Council* [2005] EWCA Civ 1003; [2006] QB 273, in which the Court of Appeal reversed the trial judge's decision in [2004] EWHC 1879; [2005] QB 424.

<sup>121</sup> The relevant professional guidance 'Withholding and Withdrawing Life-prolonging Treatments: Good Practice in Decision-making' was published pursuant to section 35 of the Medical Act 1983 by the General Medical Council in 'Withholding and Withdrawing Life-prolonging Treatments: Good Practice in Decision-making' (2002) <[http://www.gmc-uk.org/guidance/current/library/withholding\\_lifeprolonging\\_guidance.asp](http://www.gmc-uk.org/guidance/current/library/withholding_lifeprolonging_guidance.asp)> accessed 30 September 2008, following a substantial consultation process in the course of which the General Medical Council received advice from a wide range of medical, legal and ethical experts and from representatives of particular religious and other groups, including patients and disabled people. It sets out the standards of practice expected of doctors when they consider whether to withhold or withdraw life-prolonging treatment and deals not only with artificial nutrition and hydration but life-prolonging treatment generally. The guidance provides succinct statements of general principles. Doctors are not bound by it but are expected to pay due regard to it and it could be referred to in court as evidence to support a treatment decision. It does not provide prescriptive answers as to whether or when particular life-

opinion, furthermore, the relevant guidance left too much power in the hands of the doctors and placed no obligation to seek the advice of a court as to whether and when his life should be ended. The Court of Appeal, however, held that the whole case was premature and that the declarations went far beyond the current concerns of Mr Burke. It stated that as law stood the patient could not demand ANH or any other specific treatment. A duty of doctors to offer appropriate care to promote the health and life of their patients and in their best interests, which also extended to ANH when it would serve that end, was based in common law and not in the patient's demands or wishes.<sup>122</sup> Indeed, it would quite clearly be murder to withdraw life-prolonging ANH from a patient who, competent, desired the treatment to continue. Where the patient was incompetent, or had become incompetent, the Court of Appeal underlined that as a general rule ANH should continue as long as it prolonged life. There were nonetheless circumstances, for example, where a doctor might find that ANH in fact hastened death and it was thus impossible to lay down any absolute rule as to what the best interests of a patient would require. Under the relevant guidelines, furthermore, a doctor, fully subject to the sanctions of criminal and civil law, was only recommended to obtain legal advice of a court as to the best interests of a patient, in addition to proper supporting medical opinion, where a step was controversial in some way. Any more stringent legal duty would be prescriptively burdensome - doctors and emergency ward staff in particular, would be constantly in court - and would not

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prolonging treatment should be provided since patients' needs and circumstances vary, and it is the doctors' responsibility to exercise their clinical judgment in treating their patients. The guidance provides a framework to help doctors assess and respond to patients' individual needs and circumstances. It is not drafted as a set of rules or a legislative code. Specific passages should be read in context as part of a whole. Since in publishing the guidance the Council was acting as a public authority within s 6 HRA, any erroneous advice in the guidance is subject to judicial review.

<sup>122</sup> '[T]he right to choose is no more than a reflection of the fact that it is the doctor's duty to provide treatment that he considers to be in the interests of the patient and that the patient is prepared to accept.' *Burke* (n 120) [51]. See also D Gurnham, 'Losing the Wood for the Trees: Burke and the Court of Appeal' (2006) 14 *Medical L Rev* 253 (in his opinion although there must be some scope for allowing patients at the end of their lives to determine the balance between pain, consciousness and longevity that is appropriate to them, which may indeed require Article 8 to be invoked to allow the demand as well as the refusal of treatment to be determinative, it makes good practical sense to allow doctors some legal leeway when a patient demands resources that cannot justifiably be provided to the detriment of other needs). See also H Biggs, 'Taking Account of the Views of the Patient, but only if the Clinician (and the Court) Agrees - R (Burke) v General Medical Council' (2007) 19 *Child and Family LQ* 225 (in author's opinion, *Burke* represents a dangerous endorsement of medical paternalism); or C Foster 'Burke: a Tale of Unhappy Endings' (2005) 2 *J of Personal Injury L* 293 (who stated that it is evidence of a return to paternalistic 'doctor knows best' attitudes).



necessarily entail any greater protection.<sup>123</sup> When Mr Burke's case got to Strasbourg, the ECtHR held that the presumption of domestic law strongly in favour of prolonging life was fully in tune with the spirit of the ECHR and it did not disclose any lack of due respect for the crucial rights invoked by the applicant. It held that

... [i]t is apparent that, in the situation apprehended by the applicant in the final stages of his illness, a doctor would be obliged to take account of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel and, if there was any conflict or doubt as to the applicant's best interests, then to approach a court.<sup>124</sup>

The ECtHR was, furthermore, in full agreement with the Court of Appeal that doctors could not be compelled to provide immediate or future treatment to patients which they deem is not in the best interests of those patients. Finally, it concluded that Mr Burke could not pre-determine the administration of specific treatment in future unknown circumstances and as such he could not claim to be a victim of any failure by the State to protect his rights under Article 8.<sup>125</sup> In the meantime, in 2005, a possibility of making advance decisions refusing particular medical treatment as recognized by common law was placed on a statutory footing via the provisions of the Mental Capacity Act 2005 (MCA).<sup>126</sup> Pursuant to the MCA advance decisions may be made by any person who is 18 or over and at a time when the person has the capacity to make them, and must specify the treatment being refused. The decision can be withdrawn or changed by the person at any time as long as they still have the capacity.<sup>127</sup> As in common law, the institutes of advance decisions as a means of promoting patient autonomy, act solely as an or the equivalent to a competent refusal of consent to treatment and may not demand treatment not recommended by the doctor. A more general advance statement relating to values or treatment choices may,

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<sup>123</sup> 'The true position is that the court does not 'authorise' treatment that would otherwise be unlawful. The court makes a declaration as to whether or not proposed treatment, or the withdrawal of treatment, will be lawful. Good practice may require medical practitioners to seek such a declaration where the legality of proposed treatment is in doubt. This is not, however, something that they are required to do as a matter of law.' *Burke* (n 120) [80].

<sup>124</sup> *Burke v United Kingdom* (App no 19807/06) ECtHR 11 July 2006 (admissibility decision).

<sup>125</sup> *ibid.* See also S Burns, 'The Battle for Patient Autonomy' (2006) 156 *NLJ* 1632.

<sup>126</sup> The intention of the MCA was to codify and clarify the position that has developed at common law with respect to advance direction. It largely mirrors the common law position, although new statutory conditions for the applicability of advance decisions refusing life-sustaining treatment (probably the most frequent use of such advance decisions) are provided for by Parliament in s 25(5) MCA.

<sup>127</sup> S 24 – s 26 MCA. See also AR Maclean, 'Advance Directives, Future Selves and Decision-Making. Advance Directives, Future Selves' (2006) 14 *Medical L Rev* 291.

however, play a certain role in the best interests checklist used for making decision for a person who lacks capacity under the MCA.<sup>128</sup> For the avoidance of doubt and in order to address some concerns about the legalization of euthanasia by omission, furthermore, s 62 MCA expressly states that its provisions on advance refusals of life sustaining treatments have no effect on the law relating to unlawful killing or assisted suicide.<sup>129</sup> Thus, although a negative act (omission) of withholding or withdrawing treatment that would artificially prolong life may be permissible, even though this would inevitably and intentionally hasten death, the positive act of administering medical treatment, such as the injection of diamorphine, with the object of bringing about the death of an individual, even if it is at that individual's instigation and so with his or her consent, remains a very serious crime.<sup>130</sup>

The right to respect for private life also protects the personal identity of an individual as a human being.<sup>131</sup> There are two domestic law issues that are addressed in this

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<sup>128</sup> S 4 MCA provides a checklist of factors to be used when assessing an incapacitated person's best interests. One of the factors to consider is the 'past and present wishes and feelings' of the person concerned.

<sup>129</sup> In debate in the House of Commons, concerns were raised that misuse of the relevant provisions could enable a person to be deprived of nutrition and hydration – 'euthanasia by the back door' - and the then Mental Capacity Bill was amended to take account of these concerns. In addition to the declaratory provision (s 62), the MCA thus provides specific safeguards concerning the withdrawal or stopping of life sustaining treatments, in particular, s 6(6), s 11(7)(a), s 25(5) or s 35(5). Although there is nothing in the MCA that would change the law on unlawful killing or assisted suicide, this is unlikely to resolve ethical arguments surrounding the issue. Indeed, there is no single accepted meaning for the word euthanasia, although the concept 'deliberately caused death' is common to all definitions in current usage. The meaning adopted often reflects a particular moral view and includes a wide range of beliefs from those who believe that any shortening of life is wrong, to others who believe euthanasia should be legalised. See, among others, H Kuhse, 'Euthanasia' in P Singer, *A Companion to Ethics* (Blackwell, Oxford 1993); J Keown, *Euthanasia, Ethics and Public Policy: An Argument against Legalisation* (CUP; Cambridge 2002); S Ost, *An Analytical Study of the Legal, Moral, and Ethical Aspects of the Living Phenomenon of Euthanasia* (Edwin Mellen Press, Lampeter 2003); Council of Europe, *Euthanasia. Volume 1: Moral and Ethical Aspects; Volume: 2 National and European Perspectives* (Council of Europe Publication (Ethical Eye), Strasbourg 2003 and 2004); J Linda, *Euthanasia* (Heinemann Library; Oxford 2005). For the unsuccessful attempt to propose legislation permitting active euthanasia or assisted suicide for terminally ill patients, see the former House of Lords Select Committee on the Assisted Dying for the Terminally Ill Bill <[http://www.parliament.uk/parliamentary\\_committees/lordsassisted.cfm](http://www.parliament.uk/parliamentary_committees/lordsassisted.cfm)> accessed 30 September 2008.

<sup>130</sup> See Suicide Act 1961, s 2 and the case of *Pretty v United Kingdom* (n 54 and 65). On the other hand, the positive act of administering medical treatment may be given to a terminally ill person to alleviate pain, even in the knowledge that it may hasten death (the principle of 'dual effect'). See *Bland* case (n 117) which is the basis for the distinction in English law between omissions and positive acts causing death. For further discussion, see J Coggon, 'Could the Right to Die with Dignity Represent a New Right to Die in English Law?' (2006) 14 *Medical L Rev* 219; or L Oates, 'Life, Death and the Law' (2007) 1 *Common L World Rev* 36.

<sup>131</sup> See n 63 and the related main text.

respect: firstly, the UK system of National Identity Register and Identity Cards; and, secondly, the State's control over names/surnames changes.

In the UK, due to the creation and possible future use of the National Identity Register (hereafter the 'NIR') under the Identity Cards Act 2006 (hereafter the 'ICA'), the question of the protection of personal identity of every UK resident over the age of 16 is currently one of the hot issues. Although in *Reyntjens v Belgium* a requirement to have or to carry some form of identity card with basic personal information on it, such as one's name, sex, address, date and place of birth, and a name of his or her spouse, has been held by the EComHR not to be a sufficiently serious intrusion of private life to amount to an interference with the Article 8 rights,<sup>132</sup> it should not automatically follow that any identity card scheme would be automatically compatible with the ECHR, in particular when, as in the case of the ICA, the identity system is not just about having and carrying ID cards containing some basic personal information.<sup>133</sup> Indeed, pursuant to the ICA, an ID card is just a small part of the National Identity System whose cornerstone is the NIR representing a central national database, in which a large amount of information capable of establishing the identity of individuals (the so-called registrable facts) will be collected and stored.<sup>134</sup> During the enrolment process, which will be initiated when an individual applies for an ID card,

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<sup>132</sup> *Reyntjens v Belgium* (n 45). Compare with *Smirnova v Russia* (n 67) (in which the ECtHR examined a slightly different situation: the effect on an applicant's private and social life of the seizure by the authorities of an official identity document (internal passport), even though no specific interference had been alleged by that applicant as a result of the seizure and concluded that the deprivation of the internal passport had represented a continuing interference with that applicant's private (social) life).

<sup>133</sup> Many member States of the CoE operate identity card schemes, which are generally considered to comply with the ECHR. Yet, their ID cards systems do not have a shared register and mostly ID cards have been limited in use, with strong legal privacy protections. In Germany centralisation is forbidden for historical reasons, and when cards are replaced, the records are not linked. Belgium has made use of modern encryption methods and local storage to protect privacy and prevent data-sharing, an approach opposite to that of the UK government. The UK scheme is closest to those of some Middle Eastern countries and of the People's Republic of China - though the latter has largely given up on biometrics. See the website of the NO2ID, which is the UK-wide, non-partisan campaign opposing the government's planned ID card and National Identity Register) <<http://www.no2id.net/IDSchemes/whyNot.php>> accessed 30 September 2008; and also J Wadham, C Gallagher and N Chrolavicius, *Blackstone's Guide to the Identity Cards Act 2006* (OUP, Oxford 2006) ch 2.

<sup>134</sup> Despite its name, the real aim of the ICA is to establish a centralized national identity database rather than an ID card system (Hansard HL vol 675 col 75 (31 October 2005)). During the debates about the then Bill in the House of Lords, for example, many of those opposed to the Bill suggested that the title of the Bill was wrong and misleading and that other names would be more appropriate, such as National Identity Register Bill or even the National Control of the Subject Bill, see Hansard HL vol 675 col 968 (15 November 2005) or Hansard HL vol 675 col 1011 (15 November 2005). For more detail discussion, see J Wadham, C Gallagher and N Chrolavicius (n 133). See also the discussion

information will be entered on the NIR and this would include biometric information, details of residence, residential status in the UK, and records of occasions on which information from a person's entry on the NIR has been checked by others.<sup>135</sup> Every person whose details are entered on the NIR would then be issued with an ID card, which will contain a chip that will hold basic personal identity information along with an individual's biometric data as stored on the NIR which will allow their identity to be verified against their ID cards and both of these against the NIR where necessary in the public interest, including in the interests of national security, the prevention and detection of crime, the enforcement of immigration controls, the prohibition of unauthorised working, and the efficient and effective provision of public services.<sup>136</sup> The ICA itself is enabling legislation, referring to the individuals who are entitled to be entered on the NIR and registration will initially be for the most of UK citizens voluntary or linked to the issuing and renewal of passports. Eventually, however, such a voluntary scheme is likely to become compulsory on the basis of a future Act following the next general election.<sup>137</sup> The UK government has presented the National

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below on Article 8 issues with respect to collecting, using and systematic recording of personal data (n 190 et seq).

<sup>135</sup> S 1 ICA.

<sup>136</sup> Each card will also have its own Identity Registration Number, which will be printed on the card and Personal Identification Number, which the cardholder can set and use as one would for a credit or debit card. See s 2(5) ICA and sch 1(8) ICA.

<sup>137</sup> The UK Government's announcement that ID cards will soon be compulsory for foreign nationals, high-risk workers and eventually students has in fact been perceived as an attempt to soften up the public before making ID cards compulsory for all British nationals; see Liberty, 'Is Government's ID card roll out first step toward compulsion?' (Press release, 6 March 2008) <<http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2008/id-card-roll-out.shtml>> accessed 30 September 2008. The scheme will begin in November 2008 with the introduction of ID cards for non-EEA foreign nationals; starting with the categories most at risk of abuse, which include foreign nationals seeking to enter or remain in the UK as a student or on a marriage visa. Fingerprints will be collected from foreign nationals before they are issued with an ID card showing details of the holder's immigration status and entitlements (whether they are allowed to work or access benefits, and how long they can stay in the UK). Within three years all foreign nationals applying for leave to enter or remain in the UK will be required to have an ID card, with around 90 percent of foreign nationals in the UK being covered by the scheme by 2014/15 (further information on the introduction of compulsory ID cards for foreign nationals is available on the Border and Immigration Agency (BIA) website at <<http://www.bia.homeoffice.gov.uk/newsandmedia/news>> accessed 30 September 2008). As of 2009 the scheme will be extended to UK citizens, the first ID cards being issued to people working in specific sensitive roles or locations where verification of identity will enhance the protection of the public. This will start in the second half of 2009, with the issuing of ID cards to those working airside in the country's airports. From 2010 young people will be able to get an ID card on a voluntary basis, assisting them to prove their identity as they open their first bank account, take out a student loan or start employment. Later that year the scheme will be opened to voluntary applicants of any age. Finally, from 2011/12, all passport applicants will also be registered on the scheme as they apply for the new biometric passports containing fingerprints. British citizens enrolled on the National Identity Register will be able to choose whether to have a passport or an ID card or both, enabling an accelerated roll-out of the scheme (the National Identity Scheme Delivery Plan 2008 can be found at

Identity System (NIS) as vital in order to tackle a number of problems, such as terrorism and organised crime, identity theft and fraud, illegal working and immigration, and benefit fraud, which seem to be the main aims behind the enactment of the ICA.<sup>138</sup> Those who oppose the NIS, however, have expressed a series of Article 8 rights concerns, in particular whether the provisions of the ICA are proportionate to achieving such aims.<sup>139</sup> It has been argued, for example, that the extent of the amount of information retained as a core part of the NIR relating to all or large sections of the population,<sup>140</sup> in particular, the retention of records of checks against the NIR under sch 1(9) ICA,<sup>141</sup> which is likely to build up a comprehensive picture of an individual's

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<<http://www.ips.gov.uk/identity/index.asp>> accessed 30 September 2008). It has been argued that the imposition of effective compulsory registration through designation of documents, including documents unrelated to the statutory aims, risks disproportionate interference with Article 8 rights, as well as unjustified discrimination under Article 14 ECHR. The Joint Committee on Human Rights in its Fifth Progress Report HC/HL (2004 - 05) 283/35 and subsequently in its First Progress Report HC/HL (2005-06) 560/48. See also 6 Perri, 'Should We Be Compelled to Have Identity Cards? Justifications for the Legal Enforcement of Obligations' (2005) 53 Political Studies 243.

<sup>138</sup> As for the benefits to individuals as such, in the UK government's view, the NIS is meant to create a convenient method for individuals to prove registrable facts about themselves to others who reasonably require proof. For more detailed information on the UK government's case for introducing the Identity Cards Act, see its own dedicated ID cards site at <<http://www.ips.gov.uk/identity/index.asp>> accessed 30 September 2008. It is interesting to note that the UK government's main 'public interest' justification for the scheme has changed since 2002. Originally, the argument was the need to combat the serious problems of illegal working and identity fraud: the government estimated that the latter amounted to a £1.3bn annual loss to the UK economy (Home Office, 'Secure Borders, Safe Haven: Integration with Diversity in Modern Britain' Cm 5387, 2002); in 2003 in 'Identity Cards: The Next Steps' (Cm 6020, 2003) the UK government emphasised the use of the card in defeating organised crime, whereas in the 2004 paper 'Legislation on Identity Cards: A Consultation' (Cm 6178, 2004) containing the draft legislation the ID card was clearly presented as a device with which to combat terrorism.

<sup>139</sup> Notably, studies that have been carried out independently by bodies such as the London School of Economics ('The Identity Project: an assessment of the UK Identity Cards Bill and its implications' March 2005 <[http://www.lse.ac.uk/collections/pressAndInformationOffice/PDF/IDreport\\_updat,ed.pdf](http://www.lse.ac.uk/collections/pressAndInformationOffice/PDF/IDreport_updat,ed.pdf)> accessed 30 September 2008), Privacy International ('Mistaken Identity: Exploring the Relationship Between National Identity Cards & the Prevention of Terrorism', April 2004 <<http://www.privacyinternational.org/issues/idcard/uk/id-terrorism.pdf>> accessed 30 September 2008), Liberty ('ID Cards: Fiction & Fact' 2004 <<http://www.liberty-humanrights.org.uk/publications/pdfs/id-cards-fiction-fact.pdf>> accessed 30 September 2008) and Justice ('Response to Consultation on Legislation on Identity Cards, Submission to Home Affairs Committee', May 2004 <<http://www.justice.org.uk/ourwork/humanrights/index.html>> accessed 30 September 2008) have provided statistical research and come to the conclusion that the NIS may not even be able to achieve its stated aims.

<sup>140</sup> The Government's position that as many of the details were 'unexceptionable' and publicly available elsewhere, such information would not engage an individual's privacy rights under Article 8 was strongly rejected by the Joint Committee on Human Rights in its Progress Reports (n 137), in which it stated that where publicly available information was collected and stored, Article 8 would be engaged (*Rotaru v Romania* (n 84); or *Amann v Switzerland* (n 84)) even where the information was not subsequently disclosed (*Leander v Sweden* (n 85)), as was the intention under these proposals.

<sup>141</sup> Sch 1(9) ICA allows for a record to be kept of an 'audit trail' or 'data trail', ie data may be kept about every occasion on which information contained in an individual's entry has been provided, particulars of every person to whom such information has been provided, and other particulars of the provision of the information. As the Information Commissioner has argued, other systems of checks are

employment, use of public services and private transactions, including, for example, records of access to healthcare or mental healthcare services or records of checks by employers or prospective employers, together with the requirement on individuals to keep notifying of changes,<sup>142</sup> may be insufficiently targeted to be justified as proportionate to the statutory aims under the second paragraph of Article 8.<sup>143</sup> Similarly, there is an issue about the extent to which persons, organizations, companies or departments will have access to the information about individuals on the NIR.<sup>144</sup> In particular, the information sharing powers of the ICA which allow an individual's personal information as contained on the NIR to be shared without his or her consent in the interest of national security, the prevention or detection of crime or, most notably, 'other purposes specified by Order made by the Secretary of State' may likewise fail the test of proportionality.<sup>145</sup> On the basis of the abovementioned

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perfectly feasible such as a local card reader and biometric reader verifying identity, removing the need for central records to be kept and minimising the risks and costs associated with developing a complex IT infrastructure. The Information Commissioner would prefer to see identifiable records of card use eliminated from the NIR altogether, or certainly kept to an absolute minimum. See 'The Identity Cards Bill IC Concerns' <[http://www.ico.gov.uk/upload/documents/library/corporate/detailed\\_specialist\\_guides/id\\_cards\\_bill\\_-\\_ico\\_concerns\\_may\\_2005.pdf](http://www.ico.gov.uk/upload/documents/library/corporate/detailed_specialist_guides/id_cards_bill_-_ico_concerns_may_2005.pdf)> accessed 30 September 2008.

<sup>142</sup> S 10 ICA sets out how changes in circumstances should be reported in order to maintain the accuracy of the NIR. An individual to whom an ID card has been issued must notify the Secretary of State about every prescribed change of circumstances affecting his or her entry in the NRS, and every error in the entry of which he or she is aware. For example individuals are obliged to tell the government about all the addresses at which they have lived and any new places where they reside. Besides, individuals are likely to be charged for such mandatory notifications (see s 35 ICA).

<sup>143</sup> In other words, even if the system could produce some reduction of illegal immigration and employment, the impact would be so insignificant that it would make the whole procedure of storing a large amount of personal information and of maintaining the NIR a disproportionate response to the aims that it could achieve. See, among others, R Smith 'Rights and Wrongs: Registering Fears' (2004) 24 LS Gaz 17; AC Grayling, *In Freedom's Name: The Case against Identity Cards* (Liberty, London 2005); D Redmond, 'Licence to Live?' (2005) 155 NLJ 962; G Crossman, 'ID cards - Exposing Criminality or Invading Privacy?' (2005) 155 NLJ 1869; S Singleton, 'The Identity Cards Bill and the Consumer' (2006) 29 (2) Consumer Law Today 9.

<sup>144</sup> In general, such information may be accessed and/or disclosed, either with (s 12 ICA) or without the consent of an individual concerned (s 17 – s 21 ICA). S 17 ICA allows the Secretary of State to disclose information about an individual on the NIR to specific authorities for purposes connected with their functions, namely national security and intelligence agencies, the police, Revenue and Customs, government departments and designated documents authorities. S 18 ICA allows such a disclosure for the purposes of preventing and detecting crime, which will also allow disclosure to overseas bodies or persons. Under s 19 ICA disclosures can be made by the Secretary of State in order to correct inaccurate or incomplete information. S 20 ICA allows disclosure to a public authority in cases not covered within the ambit of s 17 - s19 ICA on the basis of the Order of the Secretary of State whenever it is necessary in the public interest.

<sup>145</sup> See s 17(3) ICA, but also s 20 ICA, both mentioned in n 144 above. As the Joint Committee on Human Rights repeatedly stressed in its Progress Reports (n 137), where legislation intrudes on privacy rights protected by Article 8, it is important that safeguards be contained on the face of primary legislation, which is subject to much fuller parliamentary scrutiny than secondary legislation. Reliance on public authorities to implement wide, human rights intrusive statutory powers in accordance with

discussions it is clear that although the issue of ID cards in general and the ICA in particular, are very controversial in the UK, it cannot be objectively concluded that no identity card scheme would be justifiable in this country. Rather, the question, which will have to be answered in the near future, is that of proportionality and minimal intrusions, ie whether the NIS has enough of an effect on its aims to justify any interference with an individual's Article 8 rights in the first place.

Although another aspect of one's right to a personal identity, that of an extent to which States can regulate and limit the freedom of their citizens to freely determine under which names or surnames they want to live and exist, has generated a significant amount of case law before the Convention organs,<sup>146</sup> this question has not given rise to much litigation in domestic courts.<sup>147</sup> This should not come as a surprise given the near absence in English law of formalities governing changes of name.<sup>148</sup> In general, an adult person is entitled to adopt such first names or surname as he or she wishes as well as to add names, remove names, change their spelling or rearrange the existing names and use these new names without any restrictions. So long as an individual is not changing his or her name for fraudulent purposes, it does not matter what the reason is - it's a person's right to be known by whatever name they wish.<sup>149</sup>

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the ECHR rights does not provide sufficient assurance to Parliament that the legislation is human rights compliant. J Wadham, C Gallagher and N Chrolavicius (n 133). But see S Philippsohn, 'Comment: Cards will End Identity Crisis' (2005) 23 LS Gaz 16 (who welcomes the Identity Card Bill, arguing that it is timely legislation in an age of identity fraud and cyber crime).

<sup>146</sup> Although most of them have been inadmissible as manifestly ill-founded, see n 31, n 47-53 and n 64.

<sup>147</sup> This part deals only with changing of names in the case of adults (ie those of sixteen or over). For case law on naming and renaming minor children and the way in which the legal institutions respond to frequent disputes between parents about it, see A Turner, 'The Naming and Renaming of Children' (2007) 171 Justice of the Peace & Local Government L 209.

<sup>148</sup> There is no statute, ancient or modern, which would govern this question and some only very general guidance have been provided by older case law that may be, however, well challenged in the light of cultural changes in today's society. The ICA mentioned above (see n 134) may give rise to further issues; see in particular s 1(7)(b) ICA which includes the 'other names by which he is or has previously been known' within the registrable facts; and s 10 ICA which imposes an obligation on an individual to whom an ID card has been issued to notify the Secretary of State about every prescribed change of circumstances affecting his or her entry in the NRS, in other words every time one decides to change his or her name.

<sup>149</sup> There is no copyright or trade mark protection for people's names. Therefore, if somebody wants to call himself Elton John for everyday use, he can. The same applies to any titles: one can change Mrs to Miss or even become Lord or Lady (compare with *Bernadotte v Sweden* n 31). It should be noted, however, that in connection with the practice of some professions, use of the new names may be subject to certain formalities (the Law Society might not be, for instance, happy with a registered solicitor being called Mickey Mouse, see the current regulations the Solicitors (Keeping of the Roll) Regulations 1989, made by the Master of the Rolls with the concurrence of the Lord Chancellor and the Lord Chief Justice under the Solicitors Act 1974 s 28 (as amended) which deal, inter alia, with change of name, voluntary removal or restoration of name). Similarly, some limitations still formally exist with

The new name is then valid for purposes of legal identification and may be used in public documents such as passports, driving licences, car registration books, national insurance cards, medical cards, or social security papers and is also entered on the electoral roll.<sup>150</sup> For the purposes of record and to obviate the doubt and confusion which a change of name is likely to involve, the person concerned very frequently makes a declaration in the form of a deed poll of change of name which provides the person with the necessary documentary evidence of the name by which he or she wishes to be known.<sup>151</sup> In general, deed polls are legal documents which bind the persons who sign them to a particular course of action as detailed on the deed poll documents. A deed poll of change of name contains three declarations: one's commitment to (i) abandoning the use of the former name, (ii) using the new name only at all times and (iii) requiring all persons to address him or her by their new name only. One can ask a solicitor to prepare a deed poll, or go to one of the many agencies that provide this service.<sup>152</sup> However, it is perfectly possible to prepare a deed poll of change of name on one's own. A deed poll of change of name is executed as soon as one signs and dates it in the presence of a witness.<sup>153</sup> Once executed, it carries sufficient legal authority to be recognized by all government departments,

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respect to a change of one's Christian forename. It has been held that the Christian name given to a person on baptism can be changed only on confirmation or by Act of Parliament, and in a few cases authority to take a new forename has been given by Royal Licence (see in particular *Re Parrott* [1946] Ch 183, [1946] 1 All ER 321 (Ch)). It is probable that the name given at baptism is the correct first, or proper, name, and that an assumed name does not displace it; but, if an individual has become generally known by a name which he has assumed in addition to or in place of his baptismal name, there is no doubt that the name so assumed is valid for purposes of legal identification (*Walden v Holman* (1704) 6 Mod Rep 115 at 116). It should be noted, however, that the limitations relating to Christian names in the strict sense do not apply to other forenames and are commonly disregarded in practice. See Halsbury's Laws of England (LexisNexis, London 2006) vol 35 [1273].

<sup>150</sup> Note that there is one exception to this rule and it concerns a birth certificate. This is because a birth certificate is considered to be an historical record which was correct when the birth was registered. As a result, a birth certificate cannot be changed to show a new or amended name, unless in the case of an individual who changed his or her gender and obtained a Gender Recognition Certificate which will enable them to obtain a new birth certificate showing both the new gender and the new name (see the Gender Recognition Act 2004).

<sup>151</sup> In fact, a deed poll is required by some institutions in the UK, for example if one applies to the UK Identity & Passport Service to have a passport amended to show his or her new name. There will, however, be no need for a deed poll of change of name for a married woman who wishes to take her husband's surname since a marriage certificate will suffice and if she wishes to return to her maiden name after a divorce, she would only need to show her divorce papers.

<sup>152</sup> Eg <<http://www.ukdps.co.uk/Introduction.html>> accessed 30 September 2008.

<sup>153</sup> A draft form of deed poll as well as some practical help can be found at the HMCS website <<http://www.hmcs-service.gov.uk/cms/9805.htm>> (accessed 30 September 2008) from the practical guide 'Enrolling a Name Change in the Royal Courts of Justice' (QBD, November 2003).



companies and organisations throughout the United Kingdom.<sup>154</sup> If, however, an individual wishes his or her deed poll of a change of name to become a public record and become available for public inspection in the same way the public can inspect past birth, marriage and death records, they must enrol it for safe keeping in the Enrolment Books of the Supreme Court of Judicature, which is located within the Royal Courts of Justice in the Strand, London.<sup>155</sup>

As to one's right to sexual life and sexual activity of one's choice, being regarded by the ECtHR as one of the most intimate aspects of a person's private life under Article 8 ECHR,<sup>156</sup> there was a time when although *entirely consensual, homosexual* activities were - for various historically specific reasons - thought to be morally wrong and therefore outlawed in England.<sup>157</sup> Although being to a certain extent decriminalised even before the landmark decision of the ECtHR in *Dudgeon v United*

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<sup>154</sup> To reduce the risk of the deed poll for a change of name becoming ineffective, if any applicant is changing their forename (see what has been noted about the Christian forenames in n 149), the above-mentioned guide (n 153) advises the following to be written on the deed poll: 'notwithstanding the decision of Mr Justice Vaisey in *Re Parrott, Cox v Parrott*, the applicant desires the enrolment to proceed'.

<sup>155</sup> Enrolment of deeds is regulated by the Enrolment of Deeds (Change of Name) Regulations 1994, SI 1994/604. See also the practical guide 'Enrolling a Name Change in the Royal Courts of Justice' referred to in n 153 above. Although enrolment is only of an evidential and formal character, it is treated as an unquestionable proof of the execution of the deed. From a practical point of view though, the enrolling process may significantly add to the cost and the time taken to change a person's name.

<sup>156</sup> The following discussion focuses only on one aspect of sexual life and that is one's right to sexual orientation and his or her right to choose sexual activities. For a discussion on sexual (gender) identity and transsexuality, which is also an aspect of sexual life, see section '6.1.1 Positive Obligations and Private Life under the ECHR'. For another 'sexual life' issue - one's right to establish family relationships in accordance with chosen sexual activity and sexual identity, in particular the issue of registered partnerships and equal treatment with heterosexual relationships, both married and unmarried, see the section '3.2 Family Life in English law' below (especially the discussion on the Civil Partnership Act 2004).

<sup>157</sup> In England the situation passed, within a century, from the point where homosexuality was not mentioned in the *The Laws of Henry the First* (1100-1135) to the compilation known as the *Britton* where homosexual acts, sexual intercourse with a Jew, and bestiality were punishable by being buried alive. The culmination of this homophobic era is best represented by the brutal deaths of Edward II of England and his reputed lover Hugh le Despenser in 1327, the former being impaled through the anus with a flaming iron rod and the latter decapitated after seeing his genitals cut off and burnt in public. See N Davies, *The Isles: A History* (OUP, Oxford 1999). See also J Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (University of Chicago Press, London 1980); R Aldrich (ed), *Gay Life and Culture: a World History* (Thames and Hudson, London 2006); or M Cook, HG Cocks, R Mills and R Trumbach (eds), *A Gay History of Great Britain: Love and Sex Between Men Since the Middle Ages* (Greenwood World, Oxford 2007). Through a comprehensive examination of evidence from a range of disciplines, including psychology, neuroscience, genetics, endocrinology and evolutionary biology, Q Rahman and G Wilson - the authors of *Born Gay: The Psychobiology of Sex Orientation* (Peter Owen, London 2005) - conclude that sexual orientation is determined by a combination of

*Kingdom*,<sup>158</sup> it was not earlier than 2001 when age and other distinctions between same and opposite sex sexual activity were effectively removed from the criminal law.<sup>159</sup> Thereafter, in 2003, most of the remaining discriminatory sexual offences targeting gay men, including buggery, gross indecency and soliciting were repealed by the Sexual Offences Act 2003.<sup>160</sup> Thus, discrimination against gay and lesbian people consensually engaging in their sexual activities was finally removed and

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genetics and hormonal activity in the womb - and that upbringing, childhood experience and personal choice have little or no influence.

<sup>158</sup> See the above-discussed *Dudgeon v United Kingdom* (n 74) (it should be reminded that here the ECtHR ruled that keeping in force legislation that prosecuted sexual acts between consenting homosexuals in Northern Ireland was a violation of the right to privacy contained in Article 8). In principle, English laws pertaining specifically to sex between gay men have been around since 1885. In 1885 the Labouchere Amendment (Criminal Law Amendment Act) was passed creating the offence of gross indecency that made all sexual acts between men illegal. Over the years thousands of men have been prosecuted, imprisoned and disgraced through the enforcement of these laws. The first wave of reforms came in the 1950s (the Wolfenden Committee published its report on Homosexual Offences and Prostitution in 1957) on the basis of which the Sexual Offences Act 1967 was enacted decriminalising consensual sex between men aged 21 and over provided the act was carried out in private (this meant that an act would not be legal if it took place where a third person was, or was likely to be present), this did not apply to the armed forces though where homosexual acts occurring between consenting adults were criminalized until an amendment to s 146 Criminal Justice and Public Order Act 1994 which prohibited prosecution; yet the practice of discharging from the services for those admitting to such acts was not abandoned until much later in 2000 (see n 76),

<sup>159</sup> It was the decision in *Sutherland v United Kingdom* (n 75), in which the differential age of consent between homosexual and heterosexual activity was found to violate Article 14 ECHR, which led to the change of law by way of the Sexual Offences Act (Amendment) 2000 (in force from 8 January 2001)

<sup>160</sup> The present Sexual Offences Act 2003 (came into force in May 2004), which has repealed the provision that sexual acts taking place *in private* between more than two men is an offence, came about as a result of the ECtHR's judgment in a 'group sex' case of *ADT v United Kingdom* (n 75), where the ECtHR held that prosecution of the applicant for taking part in acts of gross indecency was contrary to Articles 8 and 14 ECHR because a prosecution would not have been brought had the participants been heterosexual. Although the Sexual Offences Act 2003 repeals the anti-gay sexual offences of buggery and gross indecency, there is concern regarding a new offence of sexual activity in a public lavatory (s 71 – the gender-neutral provision which makes it an offence for a person to engage in sexual activity in a lavatory to which the public or a section of the public has or is permitted to have access). Some are worried that this offence will allow the police to continue stigmatising and victimising gay men in particular (although decided under the old Sexual Offences Act 1967, see *X v Y (Employment: Sex Offender)* [2004] EWCA Civ 662; [2004] ICR 1634, in which the Court of Appeal applied the simplistic *public/private* dichotomy, which is at odds with Strasbourg jurisprudence, by holding that 'cottaging' between two homosexual men in a public toilet did not even engage Article 8 as the toilet was a publicly accessible place and the behaviour which constituted an offence was necessarily public in nature). See also the Information Bank of Stonewall (a voluntary organisation renowned for its campaigning and lobbying for equality and justice for lesbians, gay men and bisexuals in the UK) where one can find some very useful information concerning the legal treatment of lesbians, gay men and bisexual people in England, <[http://www.stonewall.org.uk/information\\_bank/default.asp](http://www.stonewall.org.uk/information_bank/default.asp)> accessed 30 September 2008. Stonewall itself was founded in 1989 by a small group of women and men who had originally been active in the struggle against s 28 of the Local Government Act, which was finally repealed in 2003 (s 28 that expressly barred the intentional promotion of homosexuality by local authorities and prohibited the publishing of material with the intention of promoting homosexuality and the promotion of teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship).

homosexuality fully recognised in English criminal law.<sup>161</sup> Whether homosexual or heterosexual, there is nevertheless one area of *consensual* sexual activity, in which the policy of the English law is still in favour of criminality: it is sadomasochism (at least as regards its most serious manifestations).<sup>162</sup> Here, however, given the relevant Strasbourg case law, the English approach seems to be fully ECHR compliant.<sup>163</sup>

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<sup>161</sup> Despite recent reform of the criminal law, some offences that have been historically used to target gay men, and in some cases lesbians as well, remain in place. Lesbians, gay men or bisexuals who hold hands or kiss or fondle each other in public in the same way as heterosexuals may be committing an offence of ‘insulting behaviour’ under the Public Order Act 1986. As the term ‘insulting’ is not defined by the law, much will depend on the particular facts of the case and, as it is an offence which can only be tried in the Magistrates’ Court, it will usually depend on the moral and political views of the magistrates as to whether the behaviour is regarded as insulting: compare, for example, *Masterson v Holden* [1986] 1 WLR 1017; [1986] 3 All ER 39 (QB) with *Brutus v Cozens* [1973] AC 854; [1972] 3 WLR 521 (HL). Furthermore, there is a rarely used but powerful criminal offence of conspiracy to corrupt public morals, invented by the judiciary rather than passed by Parliament. It has been used in particular to prohibit gay men advertising in the contact pages of magazines. Essentially, it is an offence to conspire or agree to some act which, in the opinion of a jury, is calculated to corrupt or debauch public morals. In *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435; [1972] 3 WLR 143 (HL), the House of Lords upheld, by a majority, the conviction of a magazine containing explicit gay contact advertisements on the ground that encouraging homosexuality is the sort of thing a jury might properly consider to be a corrupt practice. However, the people placing the advertisements were not prosecuted. Since 1973, there have been no further prosecutions of this kind and explicit advertisements are now commonplace. The law, however, has not been repealed so there is always the possibility of a prosecution in the future. See ‘The Liberty’s Guide to Human Rights’ at <<http://www.yourrights.org.uk/yourrights/right-to-receive-equal-treatment/sexual-orientation-and-transgender-discrimination/index.html>> accessed 30 September 2008.

<sup>162</sup> In 1993, the House of Lords, in the case of *R v Brown (Anthony Joseph)* [1994] 1 AC 212 (HL) ruled that certain sadomasochistic sex involving the infliction of injury that is more than merely ‘transient and trifling’ is a criminal offence. This is so even where there is express consent to the act or acts. Although the defendants in that case were gay men, it applies equally to the activities of heterosexuals and lesbians. In *R v Emmett (Stephen Roy)* Times, October 15, 1999 (CA) conviction was upheld against a man who had taken part in consensual sexual activities involving the partial asphyxiation and burning of his partner. In this case it was held that the degree of actual and potential harm and also the degree of unpredictability as to injury was such as to make it a proper cause for the criminal law to intervene. This was not tattooing, it was not something which avoided pain or dangerousness and the agreed medical evidence was in each case, certainly on the first occasion, that there was a very considerable degree of danger to life, and on the second that there was a degree of injury to the body.’ As already shown above in *Laskey, Jaggard and Brown v United Kingdom* (n 22), the ECHR has held that the UK was not in breach of the ECHR in prosecuting the defendants in the *Brown*. But see *R v Wilson (Alan Thomas)* [1997] QB 47 (CA), in which it was held that the decision in the *Brown* case did not mean that consent could never be a defence in such matters before English courts. Here, the Court of Appeal distinguished the facts from the *Brown* decision, and allowed the consent to be a full defence for a husband who branded his wife’s buttocks with his initials (confirmed more recently in *R v Meachen (David Nigel)* [2006] EWCA Crim 2414; 2006 WL 3006904 (in which the complainant had consented to vigorous sexual activity which involved her desire to have him insert fingers into her anus resulting in very serious injury)). In this context, however, see also the discussion concerning the case of *Mosley v News Group Newspapers Ltd* in n 653. See also, in general, M Grigolo, ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’ (2003) 14 European J of Intl L 1023.

<sup>163</sup> *Laskey, Jaggard and Brown v United Kingdom* (n 22); confirmed in *KA and AD v Belgium* (n 25). In both cases the ECtHR in fact doubted whether sadomasochistic sexual practices as such could fall within the ‘protective’ scope of the private life notion under Article 8. This should, however, be contrasted with the conclusion made by domestic judges in *Mosley v News Group Newspapers Ltd* (n 653).

Touching on the issue of privacy rights in public spaces, in 2003 the ECtHR articulated its approach to the installation and use of CCTV in public spaces by holding that the recording of images from such systems and their retention or distribution potentially fall within the ambit of private life under Article 8.<sup>164</sup> Inadequacy of procedural steps taken to protect the identity of Mr Peck whose failed suicide attempt was captured on CCTV from improper public disclosure and the lack of any legal remedy for him meant that UK was in breach of Article 8 and 13 ECHR.<sup>165</sup> Although the facts of the case show a measure of support for the use of this type of video surveillance undertaken for the purposes of preventing and detecting crime,<sup>166</sup> they also highlight the manifest lack of effective regulation of how CCTV technology is used in the UK. The issue of the legal regulation of CCTV and its impact on individuals' privacy is particularly fascinating topic to talk about in the context of the UK which is regarded as one of the largest users of CCTV in the world<sup>167</sup> with a society often labelled as a 'Big Brother'<sup>168</sup> or a 'surveillance' society.<sup>169</sup> It is noteworthy that in UK public policy domain, CCTV has a solid,

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<sup>164</sup> See above-mentioned *Peck v United Kingdom* (n 78) and, in a slightly different context, *Perry v United Kingdom* (n 79). Compare with a manifestly ill-founded case *Herbecq v Belgium* (n 43), in which it was held that the monitoring of the actions of a individual in a public place by the use of photographic equipment did not, as such, gave rise to an interference with the individual's private life.

<sup>165</sup> The deficiency in the arrangements to provide remedy or relief to Mr Peck was highlighted by the fact that his cause of action did not engage the breach of confidence law that has long stood as proxy for a privacy law. That being so, there was no recourse, as the law then stood, nor to the media regulators who could provide no remedies; either of restraint or of damages, see further *Peck v United Kingdom* (n 78).

<sup>166</sup> *ibid* [79]: 'the Court appreciates the strong interest of the State in detecting and preventing crime. It is not disputed that the CCTV system plays an important role in these respects and that that role is rendered more effective and successful through advertising the CCTV system and its benefits.'

<sup>167</sup> The introduction of a video surveillance system using closed circuit television (CCTV) in 1961 at a London train station heralded the arrival of what is now one of the most ubiquitous and visible privacy affecting technologies. The UK is the world leader in video surveillance. Britain is monitored by more than four million CCTV cameras, making British citizens the most watched nation in the world. There is one CCTV camera for every fourteen people in the UK. If you live in London you are likely to be on camera 300 times a day; see Liberty's website and the relevant data thereon <<http://www.liberty-human-rights.org.uk/issues/3-privacy/32-cctv/index.shtml>> accessed 30 September 2008. See also BJ Gould, *CCTV and Policing, Public Area Surveillance and Police Practices in Britain* (Oxford, OUP 2004) 2; L Edwards, 'Switching Off the Surveillance Society? Legal Regulation of CCTV in the United Kingdom' in S Nouwt, BR de Vries and C Prins (eds), *Reasonable Expectations of Privacy?* (Hague, TMC Asser Press 2005).

<sup>168</sup> George Orwell, *Nineteen-eighty-four: text, sources, criticism* (Harcourt Brace, New York 1963), in which the author paints a terrifying picture of detailed, damning surveillance by the nation-state, personified by the sinister, looming figure of 'Big Brother'. See also S Davies, *Big Brother - Britain's Web of Surveillance and the New Technological Order* (Pan Books, London 1996).

<sup>169</sup> Pursuant to the 'Report on the Surveillance Society' published for the Information Commissioner by the Surveillance Studies Network in September 2006, where we find purposeful, routine, systematic

attractive and powerful image: it has become an icon for security and people in general do not seem to worry that the data which CCTVs gather every day may be misused to intrude on their privacy or infringe their Article 8 rights. Originally installed to deter burglary, assault and car theft, in practice most camera systems have been used to combat all sorts of forms of anti-social behaviour, including many such minor offences as littering or drunkenness moving the UK towards an Orwellian state<sup>170</sup> where cameras are at every street corner.<sup>171</sup> If such crimes or antisocial behaviour occurs, furthermore, CCTV is believed to serve as one of the main ways of gathering evidence to successfully detect and identify the criminals. The logic of such arguments is impressive, but some analysts are not convinced and claim that CCTV merely displaces criminal activity to areas outside the range of the cameras rather than deter them.<sup>172</sup> There is thus an ongoing debate over how effective CCTV is in

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and focused attention paid to personal details, for the sake of control, entitlement, management, influence or protection, we are looking at surveillance. For further information on where the idea of surveillance society came from, see the Report available at <[http://www.ico.gov.uk/upload/documents/library/data\\_protection/practical\\_application/surveillance\\_society\\_full\\_report\\_2006.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/surveillance_society_full_report_2006.pdf)> accessed 30 September 2008.

<sup>170</sup> For the phrase 'Orwellian' state see literature referred to in n 168. See also a very entertaining article 'George Orwell, Big Brother is Watching Your House' published on 13 July 2007 at <<http://www.thisislondon.co.uk/news/article-23391081-details/George+Orwell,+Big+Brother+is+watching+your+house/article.do>> accessed 30 September 2008.

<sup>171</sup> Following the most recent surge of CCTV installation from the early 1990s, prompted by attempts to reverse the decline of city centre shopping districts as well as fear of terrorism, crime, there may now be as many as 4.2 million CCTV cameras in Britain: one for every fourteen people, and a person can be captured on over three hundred cameras each day. New CCTV technology, furthermore, such as CCTV cameras with loudspeakers used by local authorities to publicly shame 'offenders' or sophisticated road pricing cameras that track the daily journeys of motorists, has already become commonplace. See A Travis, 'Cameras to Tell Off Troublemakers' (Guardian, 5 April 2007); or A Travis, 'Big Brother Plan for Police to Use New Road Cameras' (Guardian, 18 July 2007). In 2004, Information Commissioner, Richard Thomas, the officer empowered by Parliament to act as a watchdog on the use of our personal data, warned that Britain was in danger of sleepwalking into a surveillance society. In November 2006 he said in a statement: 'Today I fear that we are in fact waking up to a surveillance society that is already all around us.', see official website <<http://www.ico.gov.uk/>> accessed 30 September 2008; in particular their 'Report on the Surveillance Society' published by the Surveillance Studies Network for the Information Commissioner from September 2006 referred to in n 169.

<sup>172</sup> A Home Office study concluded that 'the CCTV schemes that have been assessed had little overall effect on crime levels', see M Gill and A Spriggs, 'Assessing the impact of CCTV' (Home Office Research Study 292, London 2005) available at <<http://www.homeoffice.gov.uk/rds/pdfs05/hors292.pdf>> accessed 30 September 2008. Norris and Armstrong, highlighting the increasing amount of evidence that CCTV operators engage in racial and socio-economic profiling, argue that the selection of targets by CCTV operators can be discriminatory towards males, particularly black males. The 'gaze of the cameras', they found, 'do not fall equally on all users of the street but on those who are stereotypically predefined as potentially deviant, or through appearance and demeanor are singled out by operators as unrespectable'. C Norris and G Armstrong, *The Maximum Surveillance Society: The Rise of CCTV* (Berg, Oxford 1999) 10. See also critical comments in relation to the effectiveness of CCTV by Simon Davies, the head of the Privacy International (the influential civil liberties NGO in the UK) available at

reducing and preventing crime in the UK, but one thing is certain, despite the increasing use of CCTV and progress in this technology which, if uncontrolled, makes the danger of misuse of the technology by observers very real, there is still no specific legal regime of licensing or control of CCTV operations in the UK, whether for public or private operators.<sup>173</sup> In its formal response to the Committee of Ministers of the CoE concerning the adoption of execution measures in the light of the ECtHR's findings in *Peck*,<sup>174</sup> the UK government stressed that English common law has sufficiently developed since 1995 to provide the applicant with an adequate remedy, referring also to the adoption of the HRA and the Data Protection Act 1998 (DPA 1998).<sup>175</sup> As to the DPA 1998, first of all, it would indeed appear that the disclosure of material by a public authority and its subsequent publication as occurred in *Peck*

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<[http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-61925&als\[theme\]=Video%20Surveillance&headline=CCTV%20Frequently%20Asked%20Questions](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-61925&als[theme]=Video%20Surveillance&headline=CCTV%20Frequently%20Asked%20Questions)> accessed 30 September 2008.

<sup>173</sup> Although in the context of this section, the focus is obviously on the danger of video surveillance activities performed by public authorities, it should be noted that also on the private level British citizens are using video surveillance supplies more and more to keep an eye inside and outside their homes. The use of video surveillance facilities at homes has likewise soared over the years, whether in a form of so-called nanny cams or more classical cameras mounted in a corner of the entrance to a house or a larger private property. Moreover, due to technological advances, declining costs of video surveillance equipment have helped to increase its use by households. See, among others, J Quinn, 'CCTV, the Latest Must-Have for the Home' (BBC News Magazine, 7 April 2005) <<http://news.bbc.co.uk/1/hi/magazine/4416587.stm>> accessed 30 September 2008. See also Venice Commission's Opinion on 'Video Surveillance by Private Operators in the Public and Private Spheres and by Public Authorities in the Private Sphere and Human Rights Protection', 1-2 June 2007 available at <[http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)027-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)027-e.asp)> accessed 30 September 2008

<sup>174</sup> The Annotated Agenda (section 6) of the Ministers' Deputies of the CoE on their 948DH meeting on 29-30 November 2005 at <[https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH\(2005\)948&Language=lanEnglish&Ver=vol1public&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH(2005)948&Language=lanEnglish&Ver=vol1public&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)> accessed 30 September 2008.

<sup>175</sup> The *Peck* case's effect is rather confusing because the introduction of the HRA and DPA 1998 intervened between the original events and the final judgment of the ECHR (and the fact that the UK government attempted to argue an old case on new law does not help). As to the legislative framework for data protection, it has its roots in the CoE's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1981. The Convention, which was concerned only with computerised data, was given effect in the UK through the DPA 1984. In 1990, the European Commission proposed a directive dealing with data protection within the EU. This proposal resulted in Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31 which increased the scope of data protection legislation considerably. In particular, it brought certain manual files within the scope of data protection legislation for the first time. As a result, in the UK DPA 1984 was repealed and replaced by the DPA 1998 which transposed the Data Protection Directive. Overall the definitions in DPA 1998 are broader than those of the DPA 1984 and so more readily cover the processing of images of individuals caught by CCTV cameras than did the previous data protection legislation. The same legally enforceable information handling standards as have previously applied to those processing personal data on computer now cover CCTV. Although not likely in the situations considered in this section, it should be noted there may be occasions when public authorities use overt CCTV systems for the purposes of a specific investigation or operation in which case authorisation for intrusive or directed surveillance under the Regulation of

would now be processing that falls within the ambit of the DPA 1998. Although the DPA 1998 was not intended to provide a comprehensive framework specifically for CCTV regulation, in accordance with a definition of *personal data* in s 1(1) DPA 1998<sup>176</sup> as long as an individual can be identified from images captured by CCTV, the images would be regarded as personal data and their processing, retention and dissemination would be subject to the full DPA 1998 requirements: foremost amongst which is the idea of fair processing.<sup>177</sup> The problem arose, however, after the Court of Appeal's decision in the leading DPA case of *Durant*.<sup>178</sup> In this case the above interpretation of *personal data* has been narrowed down leading to a situation where most CCTV footage of identifiable individuals *will not* in fact fall within the category of personal data protected by the DPA 1998. Having decided that for information to be regarded personal, it had to affect privacy, ie a person had to be the focus of the

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Investigatory Powers Act 2000 may be necessary. For further details, see V Williams, *Surveillance and Intelligence Law Handbook* (OUP, Oxford 2006).

<sup>176</sup> S 1(1) DPA 1998 defines personal data as data that relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

<sup>177</sup> The idea of fair processing is the first out of eight data protection principles established by the DPA 1998. Generally speaking, the DPA 1998 provides a framework to ensure that personal information is handled properly by stating that anyone who processes personal information must comply with eight principles, which make sure that personal information is: (i) fairly and lawfully processed; (ii) processed for limited purposes; (iii) adequate, relevant and not excessive; (iv) accurate and up to date, (v) not kept for longer than is necessary, (vi) processed in line with one's rights, (vii) secure and (viii) not transferred to other countries without adequate protection. The second area covered by the DPA 1998 provides individuals with important rights, including the right to find out what personal information is held on computer and most paper records.

<sup>178</sup> *Durant v Financial Services Authority* [2003] EWCA Civ 1746; [2004] FSR 28; later confirmed in *Johnson v Medical Defence Union Ltd* [2004] EWHC 347; 2004 WL 852356; *Smith v Lloyds TSB Bank plc* [2005] EWHC 246 (Ch); 2005 WL 636069. Although *Durant* was not a CCTV case as such and the Court of Appeal's resolution of the policy issue has its merits in the context of subject access requests (the Financial Services Authority refused the applicant's request to make available any information it held about his dealings with Barclays Bank after the investigation), it has been found to be unsatisfactory in a broader context and at a legal level. The Court of Appeal's narrow view of the meaning of personal data (and the consequential restrictions on information which may be disclosed under an access request) significantly reduces the protection which the legislation gives to privacy in contexts other than subject access. It is possible, however, that we have not yet seen the last of the matter in *Durant*. Although Mr Durant was unsuccessful in his attempt to obtain leave to appeal from the House of Lords, it is understood that he is to continue his litigation in Strasbourg at the ECtHR. See, among others, S Lorber, 'Data Protection and Subject Access Requests' (2004) 33 ILJ 179; L Edwards, 'Taking the "Personal" Out of Personal Data: *Durant v FSA* and its Impact on the Legal Regulation of CCTV' (2004) <[www.law.ed.ac.uk/ahrc/script-ed/issue2/durant.doc](http://www.law.ed.ac.uk/ahrc/script-ed/issue2/durant.doc)> accessed 30 September 2008; S Chalton, 'Reflections on *Durant v FSA*: the Court of Appeals' Interpretation of "Personal Data" in *Durant v FSA* - a Welcome Clarification or a Cat among the Data Protection Pigeons?' (2004) 20 Computer L & Security Rep 175; A Delaney, 'Data Protection Update' (2005) 68 Employment L Bulletin 2; U Jagessar and V Sedgwick, 'When is Personal Data not "Personal Data" - the Impact of *Durant v. FSA*' (2005) 21 Computer L & Security Rep 505; or M Watts, 'Information, Data and Personal Data - Reflections on *Durant v. Financial Services Authority*' (2006) 22 Computer L & Security Rep 320.

information and, furthermore, the information had to be biographical in nature (it must say something significant about a person's private life), the Court of Appeal has introduced a subjective privacy filter over the objective statutory definition. Transferred to the context of CCTV, as a result of *Durant*, CCTV systems will only be subject to the DPA's control mechanism and related CCTV Code of Practice issued by the Information Commissioner on the basis of the s 51(3)(b) DPA 1998, if it can be shown that images taken by CCTV are aimed at learning about a particular (identifiable) person's activities.<sup>179</sup> Secondly, as to the HRA, it would be too simplistic, and indeed untenable, to consider the HRA to be a sufficient legislative measure on its own to make clear the restrictions on use and dissemination of CCTV footage by anyone - not the public authorities alone so that the data they gather is not misused to intrude on people's privacy or infringe their ECHR rights. In fact, relying on the courts and cases to develop the law sufficiently in reasonable time bit by bit at the expense of litigants and with inevitable delays and uncertainty does not seem to be enough to satisfy the requirements of the ECtHR's case law as to the clarity of domestic law and legal certainty.<sup>180</sup> Thirdly, it is true that the law of breach of confidence has been developed by the courts in a series of recent well known 'celebrity privacy' cases to the point where it can be said in some cases, but significantly not all, to protect certain aspects of privacy.<sup>181</sup> Yet, the problem with CCTV and a breach of confidence as the basis for invasion of privacy seems to be that

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<sup>179</sup> For the CCTV Code of Practice, see <[http://www.ico.gov.uk/Home/for\\_organisations/topic\\_specific\\_guides/cctv.aspx](http://www.ico.gov.uk/Home/for_organisations/topic_specific_guides/cctv.aspx)> accessed 30 September 2008. This Code of Practice (updated version of 28 January 2008) sets out the measures which must be adopted to comply with the DPA 1998 and goes on to set out guidance for the following of good data protection practice. It has been accepted since the very beginning that in order for it to remain a 'living' document, it will be regularly updated as practices, and understanding of the law develop. The Information Commissioner has also published a Data Protection Code Monitoring at Work which refers expressly to video surveillance and to the CCTV Code of Practice, see L Edwards (n 167) 105. Additionally, there are also a variety of informal, 'soft law' codes of practice issued mostly by local authorities or private operators of CCTV, which although not sanctioned directly by law enforcement bodies, may have some regulatory force. See BJ Goold (167) 98.

<sup>180</sup> It is actually contrary to what the ECtHR has kept on saying again and again: domestic law must offer adequate and effective legal guarantees against possible abuses in order to meet the 'in accordance with law' requirement of Article 8(2) (see, in particular, the ECtHR's case law on state surveillance and one's right to correspondence discussed further in the text (n 413-416)). Nowadays, it can even be argued that Article 8 requires that the State has a positive obligation to regulate all CCTV systems both public and private because of their potential to interfere with privacy rights.

<sup>181</sup> Eg *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; *Douglas v Hello! Ltd (No.6)* [2005] EWCA Civ 595; [2006] QB 125; or *McKennitt v Ash* [2006] EWCA Civ 1714; [2007] EMLR 4. See also section '6.1.2 Positive Obligation and Private Life in English Law'.



there is not necessarily creation or exposure of confidence, when being filmed in public and this is exactly what happened to Mr Peck.

In the meantime, there has been great progress in technology and the level of sophistication of CCTV is already very high. The irony seems to be, as many argue, that the term CCTV is now for the most part a misleading label. Modern surveillance systems are no longer 'closed-circuit' and increasing numbers of surveillance systems use networked, digital cameras rather than CCTV.<sup>182</sup> Moreover, due to technological advances, declining costs of video surveillance equipment have resulted in an increase in its use among the public (but also on the private) level. Not surprisingly, in 2007 two parliamentary Select Committees decided to launch their discussions on the impact that UK government surveillance and data collection have upon the privacy of citizens. As one would expect, the responses, which they received, widely criticised the lack of the legal regulation of CCTV and its use in the UK.<sup>183</sup> At the European level, the Article 29 Data Protection Working Party, which has been set up under article 29 of the aforementioned Data Protection Directive and is made up of

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<sup>182</sup> See a recently published report from the Royal Academy of Engineering, 'Dilemmas of Privacy and Surveillance Challenges of Technological Change' (March 2007) available at <[http://www.raeng.org.uk/policy/reports/pdf/dilemmas\\_of\\_privacy\\_and\\_surveillance\\_report.pdf](http://www.raeng.org.uk/policy/reports/pdf/dilemmas_of_privacy_and_surveillance_report.pdf)> accessed 30 September 2008.

<sup>183</sup> Considering that there were now close to 4.2 million CCTV cameras in the UK and that with the introduction of the NHS Spine and the ID card database the UK government would hold more information about British citizens than ever before, the House of Lords' Constitution Committee launched its inquiry into the nature and extent of surveillance and data collection have changed dramatically in recent years in April 2007 <[http://www.parliament.uk/parliamentary\\_committees/lords\\_constitution\\_committee.cfm](http://www.parliament.uk/parliamentary_committees/lords_constitution_committee.cfm)> accessed 30 September 2008. Launched in May 2007, the inquiry of the House of Commons Home Affairs Committee focused on Home Office responsibilities such as identity cards, the National DNA Database and CCTV, but where relevant looked also at other departments' responsibilities in this area, for instance, the implications of databases being developed by the Department of Health and the DfES for use in the fight against crime. The House of Commons Committee's aim was not to carry out a comprehensive detailed review of the subject of the kind recently carried out by the Surveillance Studies Network on behalf of the Information Commissioner (and published in his report on the surveillance society in 2006 (n 169); but to build on the Information Commission's work in exploring the large strategic issues of concern to the general public, with a view to proposing ground rules for government and its agencies <[http://www.parliament.uk/parliamentary\\_committees/home\\_affairs\\_committee/surveillance\\_society.cfm](http://www.parliament.uk/parliamentary_committees/home_affairs_committee/surveillance_society.cfm)> accessed 30 September 2008. For some of the responses the committees received, see the evidence submitted by the Information Commissioner to the Home Affairs Committee inquiry into Surveillance Society from April 2007 available at <[http://www.ico.gov.uk/upload/documents/library/data\\_protection/practical\\_application/home\\_affairs\\_committee\\_inquiry\\_into\\_surveillance\\_society.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/home_affairs_committee_inquiry_into_surveillance_society.pdf)> accessed 30 September 2008; Liberty' response to the House of Lords' Select Committee on the Constitutional Inquiry (June 2007) at <<http://www.liberty-human-rights.org.uk/pdfs/policy07/hlconstcom-surveillance-society.pdf>> accessed 30 September 2008; or JUSTICE's submission to the House of Common Home Affairs Committee on a Surveillance Society of April 2007 <<http://www.justice.org.uk/inthenews/index.html>> accessed 30 September 2008.

representatives from all of the EU data protection authorities, has recently issued Opinion 4/2007 (Opinion) on the concept of personal data.<sup>184</sup> Adopting a wide interpretation of personal data, the Opinion contrasts with the narrow meaning of *personal data* adopted by the Court of Appeal in *Durant*.<sup>185</sup> Although not binding, the Opinion provides a source for the interpretation of the Data Protection Directive by both data controllers and national data protection authorities. In this way, its broad interpretation of *personal data* may bring a greater amount of information into the scope of the DPA 1998 than previously thought as well in the context of CCTV.<sup>186</sup> In summer 2007, moreover, the European Commission for Democracy through Law, known as the Venice Commission, which is the CoE's advisory body on constitutional matters published two opinions on video surveillance and the protection

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<sup>184</sup> The 4/2007 Opinion on the concept of 'personal data' of the Article 29 Data Protection Working Party is available at <[http://ec.europa.eu/justice\\_home/fsj/privacy/docs/guide/guide-ukingdom\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/guide/guide-ukingdom_en.pdf)> accessed 30 September 2008.

<sup>185</sup> After the English courts' judgment in *Durant*, the European Commission expressed serious concerns over the implementation of the Data Protection Directive by the UK in its 'letter of formal notice' to the UK government (sending such a letter is a first stage of the two-stage procedure for enforcing member States fulfilment of their Community obligations by the European Commission under Article 226 EC Treaty; the second one is the formal judicial stage where it refers the member State to the ECJ). Unfortunately, the UK government refused to release both the letter and its own reply despite Freedom of Information Act 2000 requests on the grounds of prejudice to international relations. See also: the response of the Information Commissioner to the disclosure request of 8 March 2005 in which the Information Commissioner was formally requested to provide (i) the European Commission's formal notice to the UK government that sets out respects in which the DPA 1998 is alleged not to meet the standards of the underlying EU Data Protection Directive (Summer 2004); (ii) information between the Information Commissioner and the UK government relating to paragraph 1 above; and, finally, (iii) replies to the EU Commission's concerns, available at <[http://www.ico.gov.uk/upload/documents/foi\\_request\\_responses/foi\\_0401.pdf](http://www.ico.gov.uk/upload/documents/foi_request_responses/foi_0401.pdf)> accessed 30 September 2008.

<sup>186</sup> Indeed, shortly after the 4/2007 Opinion was published, the Information Commissioner replaced the old guidance that concerned the narrowing of the definition of personal data in the context of CCTV adopted after the judgment in *Durant*, with the new 'Data Protection Technical Guidance Determining What Is Personal Data' (published on 21 August 2008). Though structured differently, this modified guidance seems to follow the 4/2007 Opinion. It is available at: <[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/personal\\_data\\_flowchart\\_v1\\_with\\_preamble.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preamble.pdf)> accessed 30 September 2008. See also H Hart, 'Personal Concepts' (2007) 157 NLJ 1339. When the new ICO guidance was issued commentators hoped that, despite its length, it would be helpful for data controllers dealing with subject access requests. Yet, in the recently decided case of *Ezsias v Welsh Ministers* [2007] All ER (D) 65 (Dec) (QB), the judge sought to rely on the *Durant* case rather than the above-mentioned newer definition provided by the Information Commissioner in response to the definition provided by the EU's Article 29 Working Party, which attacked the *Durant* definition as being too narrow. This disparity in approach between the UK courts and the regulator to the interpretation of the DPA is unsatisfactory. In order to ensure that the UK does not deviate further from the broad approach taken by other EU Member States, the UK public needs greater certainty and consistency of approach from the ICO and the courts. A court decision overturning *Durant* and endorsing the ICO's approach on 'personal data' would be a good starting point. H Hart, 'Privacy: Confusion over Personal Data' (2008) 152 Solicitors J 12; or G Brooks, 'Implications of *Ezsias* Case for Subject Access: Proportionality May Apply to Searches of Data' (2008) 8 Data Protection 3.

of privacy rights. The first one deals with video surveillance in public places by public authorities and the second one with video surveillance by private operators in the public and private spheres and by public authorities in the private sphere.<sup>187</sup> Considering that the recent growth and high sophistication of video surveillance is common to all contemporary developed societies, whether privately or publicly operated cameras are concerned, the Venice Commission recommends that specific regulations should be enacted at both international and national level in order to cover the specific issues of the use of CCTV that arise in connection with Article 8 rights. All in all, the abovementioned initiatives at both domestic and European levels, have indicated that although advances in CCTV technology have certainly the potential to do great good, they also carry the risk of doing damage if they are introduced without proper regulatory cover. CCTVs can be of great benefit to citizens enhancing their security, but the danger of misuse by observers of more and more sophisticated CCTV technology, which via the internet reaches out beyond national borders, is in the UK ‘technology first, legal regulations later’ society<sup>188</sup> real. It is suggested that in order to be effective and to keep up with the technological developments which impact on the right to private life but also other ECHR rights (eg right to freedom of movement), English law needs to be clarified and brought up to date.<sup>189</sup>

In the light of Strasbourg jurisprudence: collecting, using and systematic recording of personal data falls within the scope of Article 8. In particular, with respect to DNA

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<sup>187</sup> Venice Commission’s Opinion on ‘Video Surveillance In Public Places By Public Authorities And The Protection Of Human Rights’, 16-17 March 2007 available at <[http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)014-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)014-e.asp)> accessed 30 September 2008; and Venice Commission’s Opinion on ‘Video Surveillance by Private Operators in the Public and Private Spheres and by Public Authorities in the Private Sphere and Human Rights Protection’, 1-2 June 2007 (n 173). See also the Parliamentary Assembly of CoE, ‘Video Surveillance in Public Ares’, Resolution 1604 and Recommendation 1830, adopted on 25 January 2008 (Doc. 11478) <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/EREC1830.htm>> accessed 30 September 2008.

<sup>188</sup> C Gallagher, ‘CCTV and Human Rights: the Fish and the Bicycle? An Examination of Peck v. United Kingdom (2003) 36 EHHR 41’ available at <[http://www.surveillance-and-society.org/articles2\(2\)/humanrights.pdf](http://www.surveillance-and-society.org/articles2(2)/humanrights.pdf)> accessed 30 September 2008.

<sup>189</sup> Another CCTV related case *Perry v United Kingdom* (n 79) has, for example, proved that the English laws of admissibility of evidence are also relevant to the control of CCTV. On a domestic level, the UK courts accepted a policy of blanket CCTV surveillance in public places by law enforcement bodies notwithstanding relevant domestic rules on the admissibility of evidence that aimed at promoting good practice in the administration of CCTV schemes in the UK (primarily s 78 of the PACE). When the case got to Strasbourg, however, the ECtHR found that such use of evidence against an accused collected without consent and in breach of the Code of Practice to the PACE by covert

sampling and DNA databases, it has been held that given the use to which DNA material containing subjective appreciations relating to an identified individual - indeed the most intimate genetic information an individual can possess - could conceivably be put in the future, the systematic retention of that material in various databases by police or other law enforcement agencies is sufficiently intrusive to constitute an interference with the right to respect for private life as set out in Article 8 and needs to be justified by reference to the principles of Article 8(2).<sup>190</sup> In the UK, in the context of law enforcement, DNA samples can be obtained for analysis from the collection of DNA at crime scenes and from samples taken from individuals in police custody and, subsequently, from DNA profiles permanently stored in the National DNA Database (NDNAD), which is an intelligence database run by the Home Office, originally set up in 1995, following amendments to the Police and Criminal Evidence Act 1984 (PACE) by the Criminal Justice and Public Order Act 1994 (CJPOA).<sup>191</sup> It should be noted that as well as storing the DNA *profile* obtained from analysis of the sample on the NDNAD, part of the DNA *sample* is also retained indefinitely, linked to an individual's record on the NDNAD via a unique barcode reference number.<sup>192</sup> Before 2001, the police could take DNA samples during investigations but had to destroy the samples and the records on the NDNAD derived from them if the people concerned were acquitted or charges were not pressed. Yet, the law was changed in 2001 to remove this requirement, and changed again in 2004 so that DNA samples could be taken from anyone arrested on suspicion of a

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CCTV, was clearly in breach of Article 8, even though the conviction had been upheld in the English courts.

<sup>190</sup> *Van der Velden v Netherlands* (n 86). Notably, the ECtHR considered that the retention of DNA samples differed from the previous ruling of EComHR in *Kinnunen v Finland* (App no 24950/94) EComHR 15 May 1996 (admissibility decision concerning the retention of fingerprints). In this respect, see also *McVeigh, O'Neill and Evans v United Kingdom* (n 84).

<sup>191</sup> This legislation allowed buccal (mouth) scrapes, criminal justice samples, or rooted hairs, to be obtained for DNA analysis in broadly the same circumstances as fingerprints. The information derived from these can be searched against records held by or on behalf of the police. See the Home Office website for further info <<http://www.homeoffice.gov.uk/science-research/using-science/dna-database/>> accessed 30 September 2008.

<sup>192</sup> One should be aware of the difference between a DNA *sample* and a DNA *profile*. The DNA *profiles* held on the NDNAD can be used to investigate who a person is related to (including non-paternity), but are unlikely to contain personal genetic information about health or other characteristics. This is because they are based on 'non-coding' parts of DNA (not on genes). This part of a person's DNA is not thought to be important in influencing biological differences such as health or appearance. However, the DNA *samples* which remain permanently linked to the NDNAD contain unlimited amounts of genetic information, increasing privacy concerns.

recordable offence<sup>193</sup> and detained in a police station, whether eventually convicted or not.<sup>194</sup> Although there seems to be some discretion for the police to remove a DNA sample from the NDNAD, the policy currently employed favours retaining DNA samples in all cases subject to exceptional circumstances, such as where an undertaking to destroy the DNA samples was given or where they should not have been taken in the first place, as revealed by subsequent malicious prosecution proceedings.<sup>195</sup> All these legislative changes and developments have resulted in the UK having by far the greatest percentage of its population on the NDNAD which itself is the largest of its kind in the world.<sup>196</sup> The UK government's arguments for adopting such a 'pro-NDNAD' policy that have resulted in a relatively recent rapid expansion of the NDNAD run as follows: the NDNAD assists in the solving of crimes, including bringing their perpetrators to justice, since, with the help of the NDNAD, the police may be able to identify perpetrators of offences faster, and to contribute towards a lower rate of re-offending, because a person's knowledge that his or her DNA is included in a national database may dissuade him or her from committing further offences. The UK judiciary also gave a green light for the expanded NDNAD in *R (on the application of S) v Chief Constable of South Yorkshire*.<sup>197</sup> Here, considering the issue of proportionality of the retention and use of

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<sup>193</sup> Recordable offences are those which carry a custodial sentence whereas non-recordable ones do not as they cover only the most minor offences such as minor traffic violations and dropping litter (under s 87 of the Environmental Protection Act 1990).

<sup>194</sup> The PACE, s 63, permits samples to be taken from those arrested for, charged with, or convicted of, a recordable offence and under PACE, s 64, the retention of samples is predicated on an individual's conviction for the offence or, in cases where no conviction is obtained, suspicion that the individual did, in fact, commit it.

<sup>195</sup> The police can legally take and retain a DNA sample without consent from anyone (aged ten or above) detained at a police station having been arrested for a recordable offence and can further retain the sample, even if the person is finally not charged or is acquitted of the offence. Once lawfully obtained it is only in exceptional circumstances that the profile will be removed from the National DNA Database. See the 'Exceptional Case Procedure' that is incorporated within the 'Association of Chief Police Officers Retention Guidelines for Nominal Records on Police National Computer', available at <[www.acpo.police.uk/asp/policies/Data/Retention%20of%20Records06.pdf](http://www.acpo.police.uk/asp/policies/Data/Retention%20of%20Records06.pdf)> accessed 30 September 2008. For the House of Lords' interpretation of the 'exceptional circumstances', see further in the text a discussion on the case of *R (on the application of S) v Chief Constable of South Yorkshire* (n 197 below).

<sup>196</sup> The UK's database is the largest of any country: 5.2% of the UK population is on the database compared with 0.5% in the USA. The database has expanded significantly over the last five years. By the end of 2005 over 3.4 million DNA profiles were held on the database – the profiles of the majority of the known active offender population. See the above-mentioned Home Office website <<http://www.homeoffice.gov.uk/science-research/using-science/dna-database/>> accessed 30 September 2008.

<sup>197</sup> [2004] UKHL 39; [2004] 1 WLR 2196 [36]. The facts of the case were as follows: the appellant, a man of previous good character, had been arrested and charged with harassment of his partner, and his

DNA samples under s 64 PACE from individuals who were arrested and detained by police on suspicion of a recordable offence but eventually not convicted, the House of Lords stated that the expansion of the database by the further retention of DNA conferred enormous advantages in the fight against serious crime and even if Article 8 had been engaged, which it doubted it was, there was plainly an objective justification under the second paragraph of Article 8 as the crime-solving benefits could not be achieved by less intrusive means and so any intrusion on personal privacy was proportionate.<sup>198</sup> However, many have found the current NDNAD developments irreconcilable with the privacy principles under Article 8 in general and the House of Lords' reasoning in the above case unsatisfactory in particular. It has been argued, for example, that while the legitimate interest in the prevention and detection of crime may well justify the retention of DNA samples of those proven guilty and charged, it can hardly justify the extension of an indefinite retention of DNA to individuals who are by law presumed to be innocent. Although few people have problems with the idea of the police comparing the DNA of a suspect with DNA left at the scene of a serious crime, concerns arise when DNA profiles and other information are stored permanently on a database, especially when the database includes large numbers of innocent people. For such strong infringements of privacy rights to be justified, the effect and effectiveness of NDNAD and DNA technologies upon criminal detections is in need of appraisal and open debate.<sup>199</sup> Apart from the question of proportionality

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fingerprints and DNA samples were taken. Before the date set for trial he and his partner were reconciled and it was concluded that it would not be in the public interest to proceed to trial. The appellant subsequently demanded the destruction of his fingerprints and DNA samples but the police refused to do so.

<sup>198</sup> The House of Lords stressed that the DNA samples were only kept for the limited purpose of the detection, investigation and prosecution of crime and were not of any use without a comparator sample from a crime scene. Furthermore, the retained information would not be made public and a person was not identifiable to the untutored eye from the profile on the database and therefore any interference represented by the retention would be minimal. It was stressed that the fear of what may happen in the future in the light of the expanding frontiers of science was held not relevant in respect of contemporary use of retained samples in connection with the detection and prosecution of crime. As to the policy exercised by the Chief Constable, in retaining fingerprints and samples in all cases subject to exceptional circumstances, it was held lawful and compatible with Article 8 rights and any alternative system of examination on a case-by-case basis would dispose of the benefits of a greatly extended DNA database by involving the police in 'interminable and invidious disputes'. The last point, however, seems to unprecedentedly widen the scope of s 64 PACE by limiting its ability to filter out those individuals who ought never to have been suspected, much less charged, from those who ought without doubt to have been convicted but for one reason or another have not been. For further discussion, see A Roberts and N Taylor, 'Privacy and the DNA Database' (2005) 4 Eur Human Rights L Rev 373; or A Suterwalla, 'DNA Discrimination' (2008) 158 NLJ 505.

<sup>199</sup> Arguments in favour of a further NDNAD extension follow a simple logic that if the NDNAD can help solve crime then the further it is extended, the more crime will be solved. These arguments are

of the expanded NDNAD, its potential for misuse by the UK government and administration and the fact that it is very much prone to discrimination against certain groups of people have also been pointed out.<sup>200</sup> There seem to be some additional concerns in relation to the fact that the rapid extension of NDNAD has proceeded without any formal comprehensive consideration of the issues by Parliament, the governance of the NDNAD itself has no statutory basis, the legislation covering the taking of samples is in an unsatisfactory state after various amendments to close perceived grey areas,<sup>201</sup> and, last but not least, all these rapid and far-reaching changes in legislation have been made with very little public debate.<sup>202</sup> Against this

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usually strengthened by periodic high profile and often emotive cases of serious crimes being solved through addition to, or improvement of, the NDNAD. However, statistically the NDNAD does not seem to have a significant impact upon crime detection. Although there has been a massive extension of the NDNAD over the last three to four years, the rate of crime detection using the Database has stayed at about 0.35% of all recorded crime (see also Joan Ryan MP statement: '[a]s far as we are aware, there is no definitive data available on whether persons arrested but not proceeded against are more likely to offend than the population at large.', Hansard HC vol 450 col 491W (9 October 2006)). See Liberty's response to the House of Lords' Select Committee on the Constitutional Inquiry (June 2007) (n 183); or GeneWatch UK (a not-for-profit group that monitors developments in genetic technologies from a public), 'Briefing 31: The Police National DNA Database: Human Rights and Privacy' (2005) at < [http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/Briefing\\_31\\_A4.pdf](http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/Briefing_31_A4.pdf)> accessed 30 September 2008.

<sup>200</sup> As with any new technology, furthermore, new risks are created, including not only error, improper access and disclosure and function creep but the potential creation of a "suspect society" with DNA technology co-opted into mass surveillance and social control mechanisms. C McCartney, 'Forensic DNA Sampling and the England and Wales National DNA Database: A Sceptical Approach' (2004) 12 *Critical Criminology* 157. While there is no evidence to support the assumption 'the more DNA profiles held on the database - more crimes will be solved', furthermore, an investigation led by GeneWatch UK and the Observer newspaper has revealed that DNA samples collected by the UK police are being used for controversial genetic research, and that a commercial company has kept its own copy of part of the database. This makes a mockery of claims that access to and uses of the Database are tightly controlled. See the Observer article: A Barnett, 'Police DNA database 'is Spiralling Out of Control'' (16 July 2006) <[http://observer.guardian.co.uk/uk\\_news/story/0,,1821676,00.html](http://observer.guardian.co.uk/uk_news/story/0,,1821676,00.html)> accessed 30 September 2008. With respect to some discrimination concerns, furthermore, the nature of roll-out seems to have resulted in a vastly disproportionate number of Afro-Caribbean males being on the NDNAD. The NDNAD Board (a body that oversees the work of the NDNAD and is composed of the Home Office, the Association of Chief Police Officers and the Association of Police Authorities) reports the breakdown of male profiles on the Database as: white skinned European (82%), dark skinned European (2%), Asian (5%), Arab (1%), Afro-Caribbean (7%), other (3%). Because black males make up only a small proportion of the UK population, *New Scientist* magazine has calculated that the NDNAD contains DNA profiles from nearly one-third of black adult men, compared to only 8% of white adult men. Editorial, 'Your DNA in their hands' (2005) 186 *New Scientist* 3 (2005). From the age discrimination point of view, moreover, on the basis of Home Office figures, GeneWatch UK and Action on Rights for Children calculated that at least 100,000 innocent 10-17 year-olds are on the DNA Database: 'Briefing: How many innocent children are being added to the National DNA Database?' (2007) <<http://www.genewatch.org/sub-539478>> accessed 30 September 2008.

<sup>201</sup> Eg N Taylor, 'Genes on Record - One Size Fits All?' (2006) 156 *NLJ* 1354.

<sup>202</sup> By way of example, the latest changes to the law in England and Wales, which came into effect in April 2004, were introduced via a late amendment to the Criminal Justice Bill tabled in late March 2003. This happened less than a week before the Bill was debated in the House of Commons and at a time when the change was least likely to attract public attention and debate (during the first week of the

background and while waiting to see whether the ECtHR will uphold the decision of the House of Lords in the abovementioned case of *R (on the application of S) v Chief Constable of South Yorkshire*, which the ECtHR's Committee has already held admissible,<sup>203</sup> the UK government has indicated that very soon the grounds for retention may be increased even further to cover arrest for non-recordable offences.<sup>204</sup>

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war against Iraq). See GeneWatch UK's Briefing referred to in n 200. From a more economic point of view, one should realize that the costs of NDNAD are covered by public money. There is then required a public consensus that the expenditure on DNA continues to be demand priority and that the significant sums spent on DNA technology, testing and retention of samples could not be more effectively spent elsewhere within policing or other public body budgets. See C McCartney, 'The DNA Expansion Programme and Criminal Investigation' (2006) 46 *British J of Criminology* 175, 190.

<sup>203</sup> *S and Marper v United Kingdom* (App nos 30562/04 and 30566/04) ECtHR 16 January 2007 (admissibility decision). It is useful to compare the current issues at stake with the ones considered by the ECtHR in *Van der Velden v Netherlands* (n 86), which concerned taking DNA samples from convicted criminals.

<sup>204</sup> Home Office, 'Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984' Consultation Paper, March 2007 [3.33] and [3.34] <<http://www.homeoffice.gov.uk/documents/PACE-cover/>> accessed 30 September 2008. See some of the responses by interest groups to the consultation, among others the LIBERTY, 'Response to the Home Office Consultation Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984', June 2007 available at <<http://www.liberty-human-rights.org.uk/pdfs/policy07/pace-review.pdf>> accessed 30 September 2008 (arguing, inter alia, that consideration of permanent retention on the NDNAD focuses more on reviewing the process for sample destruction than on seeking yet further grounds for expansion); Privacy International, 'Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984: Privacy International's Response', 31 May 2007 available at <[http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-553866&als\[theme\]=UK%20DNA%20Policy](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-553866&als[theme]=UK%20DNA%20Policy)> accessed 30 September 2008 (arguing that 'the Home Office proposals in this consultation paper substantially expand the purpose for taking, retaining and comparing DNA samples or fingerprints - taking the purpose away from facilitating specific investigations of certain criminal offences to a general administrative role of identification that the police will casually fulfil for each individual they encounter'; it believes that 'the taking of fingerprints and DNA and their retention for the mere purposes of identification [rather than for the strictly limited purposes of the detection, investigation and prosecution of crime] is not a proportionate measure and is indicative of the Home Office's desire to populate the DNA database at the expense of protections and safeguards that have been essential components of a legitimate, fair and proportionate criminal justice system.' Finally, in '[p]aragraph 3.35, in discussing police powers in relation to the biometric information of an individual, refers to the removal of arbitrary and bureaucratic processes' notwithstanding the fact that the UK currently maintains the largest DNA database and exercises the widest powers enabling retention of an individual's biometrics, even if a charge is discontinued; indeed '[t]he expression that the UK police are subject to arbitrary and bureaucratic processes demonstrates a highly biased viewpoint from which the Home Office is approaching the consultation paper and which ignores the standards and practices upheld in other European countries and across the democratic world'.)



### 2.3 Private Life: Conclusion

The variety of interests that fall within the scope of the right to respect for private life under Article 8 can be structured as follows. Firstly, complaints under the right to physical/bodily integrity that concern issues such as forcible/non-consensual administration of drugs or medical treatment (*Glass v UK*); strip-searches (*Wainwright v UK*); removal of immigrants to their country of origin where there is a real risk of damage to their health, provided their claims are based on real (as opposed to hypothetical) factors (*Bensaid v UK*); or corporal punishment as part of the disciplinary regime of a school but only if effects for physical or moral integrity are sufficiently adverse to amount to an interference (*Costello v UK*). Excluded from the Article 8 scope is the exhumation of a deceased's corpse for the purpose of taking DNA samples (*Mortensen v Denmark*). Secondly, issues concerning personal identity, such as controls over name/surname changes (*Johanssen v Finland*; yet often found justified in the public interests: *Stjerna v Finland* or not serious enough to amount to interference: *Guillot v France*), excluding, however, disputes about hereditary titles of nobilities (*Bernadotte v Sweden*). Furthermore, although covered by the scope of private life, the requirement to carry identity cards only containing very basic personal information (for example, name, sex, address, date/ place of birth) does not reach the level of severity necessary to amount to interference (*Reyntjens v Belgium*). Thirdly, personal autonomy claims, such as those in *JT v UK* (ability of a person suffering from mental disorder to object to the appointed person as his/her nearest relative) or those concerning one's choice to die (but here due to the clear risks of abuse, even the blanket nature of the ban on assisted suicide will not be disproportionate (*Pretty v UK*)) as well as the choice of the way in which one's body should be buried (unless justified as in *X v Germany*). Fourthly, issues relating to personal development and social life, which may include long-term deprivation of one's identity papers that can cause a number of everyday inconveniences (*Smirnova v Russia*); or the ability to engage in activities of a professional or business nature (*Albanese v Italy*); but excludes the relationships between human beings and animals (*X v Iceland*). Fifthly, various aspects of one's sexual life are very important parts of one's private life and include issues such as criminalisation of homosexual relationships (*Dudgeon v UK*) or different treatment on the basis of sexual orientation (*EB v France*). Yet, sadomasochistic activities do not automatically qualify for protection under Article 8

ECHR (*Laskey v UK*). Sixthly, specific forms of surveillance (CCTV monitoring in particular) and privacy in public places (*Peck v UK*). Lastly, recording of personal data and the systematic or permanent nature of such record that extends to the compilation of data by public authorities on particular individuals even without the use of covert surveillance methods (*Amann v Switzerland*), unless justified and subject to sufficient legal safeguards against the abuse (*Velden v Netherlands*).

Looking at English law and its development in the main areas identified above, the following can be observed about the overall impact of Article 8 jurisprudence. Admittedly, the ban on homosexuals serving in the armed forces was lifted and discrimination in criminal law against homosexuals consensually engaging in their sexual activities prohibited as a direct result of the ECtHR's influence (*Dudgeon v UK* or *Sutherland v UK*). Yet, in other 'private life' areas that have been discussed with respect to English law, the impact of ECHR law has been much more limited and the way in which it has been able to penetrate the English law system firmly controlled. In the bodily privacy area, for example, the changes in law have been adopted only in so far as is necessary to address the specific failures that have been expressly pointed out by the ECtHR in individual cases (removal of reasonable chastisement defence in respect of statutory assault). Resistance to go further and abolish the ancient common law defence of reasonable chastisement so as to completely exclude any potential risk of human rights violation in future, furthermore, represents the still popular belief of some that the judicial common law already conforms to the ECHR. In addition, the analysis concerning the extensive use of CCTVs, creation of the largest national DNA database in the world or the National Identity System containing a controversial amount of personal information (registrable facts) show that the importance of the proportionality principle which is a basic principle not only in Article 8 case law but in the whole ECtHR jurisprudence, is still largely ignored by the national organs. There seems to be, furthermore, a tendency to give the impression that the HRA is in itself a panacea which, in case of human rights violations, gives victims a brand new domestic remedy fully effective for the purposes of Article 13 ECHR (s 7 and 8 HRA); yet there is still the question of what kind of stand the ECtHR will ultimately take on this subject (*Wainwright v UK*). No impact of Article 8 case law can be measured in the areas where English law seems to fully comply with the minimum

standards set out by the ECtHR (for example, the issue of control over name/surname changing or self-determination in the context of medical treatment).

### 3 Family Life<sup>205</sup>

#### 3.1 Family Life under the ECHR

##### *3.1.1 What is not Family Life and what does not constitute an Interference with one's right to it: a First Stage*

Although the ECtHR's case by case approach means that it is not really possible to provide a definite enumeration of *ratione materiae family life relationships*, ie the relationships which do not constitute family life, or *manifestly ill-founded situations* which fall short of interference, as this changes over time, the evolution of the case law appears to comprise the following features.<sup>206</sup>

As for the adult-adult family relationships, the protection of Article 8 always extends to marriages which can be shown to be lawful and genuine, even if family life has not been fully established, and indeed, even if the couple has not set up home together. As for marriages of convenience for immigration purposes, in the case of *Yavuz v Austria*,<sup>207</sup> in which the primary purpose of the marriage was to receive a work permit and a residence permit, an application was held to fall outside the scope of family life protection under Article 8 as incompatible *ratione materiae*. Pursuant to relevant case law, the notion of family life in Article 8 is not confined solely to marriage-based relationships and may encompass other de facto family ties where the parties are living together outside marriage. Stable homosexual or lesbian relationships have, however, not been found to constitute family life in the sense of Article 8, though, admittedly, were afforded protection under the 'right to respect for private life' limb

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<sup>205</sup> The protection of the family, as the fundamental unit of society, figures in more than one ECHR article. Apart from Article 8, which in principle prohibits interference with an existing family unit, there is Article 12 ECHR which guarantees the right to marry and to found a family, while Article 2 of the Protocol 1 ECHR deals with an important aspect of the rights of parents in relation to their children's education by providing for the right of parents to ensure such education in conformity with their own religious and philosophical convictions. Article 5 of Protocol 7 ECHR, on the other hand, protects the equality of rights and responsibilities of the character of private law between spouses.

<sup>206</sup> While private life under Article 8 is seen as encompassing various forms of space, activity, information and communication, physical and moral integrity, personal integrity and personal relations; the notion of family life requires the State to respect the value of mutual enjoyment of a wide range of de facto relationships of personal intimacy and genetic closeness. D Feldman, *Civil Liberties* (n 12) 527 and 533.

<sup>207</sup> (App no 25050/94) EComHR 16 January 1996 (admissibility decision).

of Article 8.<sup>208</sup> The ECtHR has indeed already many times reiterated that, according to the established case-law of the Convention organs, long-term homosexual/lesbian relationships between two men or women do not fall within the scope of the right to respect for family life protected by Article 8, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals or lesbians. Thus, given the existence of little common ground between the Contracting States, this still seems to be an area in which they still enjoy a wide margin of appreciation.<sup>209</sup> The Convention organs' traditional approach to accept that close relationships short of family life would generally fall within the scope of private life was also adopted in the case of *Wakefield v United Kingdom* with regard to the engaged couple's relationship of a high security risk category A prisoner and his fiancée.<sup>210</sup> Since apart from the meeting and correspondence in this case, no real existence in practice of close personal ties which would have sufficient constancy and substance was found to be present, the EComHR did not consider engagement to be sufficient in itself to bring the alleged relationship within the scope of family life within the meaning of Article 8.

As for another level of close family relationship, that of a child and an adult, most commonly that of a child and its parent, pursuant to the established ECtHR's case law, the notion of family life embraces, even where there is no cohabitation, the tie between a biological parent and his or her child regardless of whether or not the latter is legitimate from the moment of its birth and by the very fact of it.<sup>211</sup> However, the

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<sup>208</sup> *X and Y v United Kingdom* (App no 9369/81) 32 DR 220; later confirmed in *S v United Kingdom* (App no 11716/85) (1986) 47 DR 274; *WJ and DP v United Kingdom* (App no 12513/86) EComHR 13 July 1987 (admissibility decision); *Kerkhoven and Hinke v Netherlands* (App no 15666/89) EComHR 19 May 1992 (admissibility decision); *C and LM v United Kingdom* (App no 14753/89) EComHR 9 October 1989 (admissibility decision); *Rössli v Germany* (App no 28318/95) EComHR 15 May 1996 (admissibility decision); *Mata Estevez v Spain* (App no 56501/00) ECtHR 10 May 2001 (admissibility decision). Compare with *Karner v Austria* (App no 40016/98) (2004) 38 EHRR 24 (though having found that it was a breach of the applicant's rights under Article 14 ECHR taken with Article 8 to deny a surviving homosexual partner the right to succeed to a tenancy as 'Lebensgefährtin' of the deceased tenant, the ECtHR did not consider it necessary to determine the notions of private life or family life because the complaint related to the enjoyment of the applicant's right to respect for his home).

<sup>209</sup> *ibid.* However, in keeping with the interpretation of the ECHR as a living instrument, this restrictive approach to family life appears to be changing. WK Wright, 'The Tide in Favour for Equality: Same-sex Marriage in Canada and England and Wales' (2006) 20 Intl J of L, Policy and Family 249. For case law regarding homosexuality and family life in relation to a child-parent relationship, see below *Salgueiro da Silva Mouta v Portugal* (n 211).

<sup>210</sup> (App no 15817/89) (1990) 66 DR 251.

<sup>211</sup> Such a presumption of family life exists by virtue of the blood ties even in a child-homosexual parent relationship, see *Salgueiro da Silva Mouta v Portugal* (App no 33290/96) (2001) 31 EHRR 47 (the well known case in which discrimination against a homosexual parent in respect of the relationship

situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination will not of itself, according to the EComHR, give the donor a right to respect for family life with the child. Accordingly, since in *JRM v Netherlands* there was insufficient evidence that the applicant and the child enjoyed close personal ties in addition to their blood tie,<sup>212</sup> a mere biological link was held not to suffice to constitute family life between the applicant and the child. In *Nylund v Finland*,<sup>213</sup> the applicant cohabited with the mother and was engaged to her at the time she became pregnant. Shortly after the confirmation of the conception, however, their cohabitation ended, and soon after that she married her current husband. The baby girl was born several months later and the child's mother asserted that the applicant was not the father of her daughter. On the basis of legal presumption of the husband's paternity as well as the interest of the child, the applicant was barred from instituting paternity proceedings in national courts. According to the applicant, this violated his rights under Article 8 since the family unit that consisted of himself and the then pregnant woman had not been protected and such presumption enabled the child's mother to 'legally kidnap' the child of whom he claimed to be the biological father. The ECtHR stated, however, that although family life protection under Article 8 could in some circumstances extend to the potential relationship which may develop between natural fathers and their children born out of wedlock, this was not the case here. The applicant had not, in fact, seen the child or formed any emotional bond with her and his link with the child had therefore an insufficient basis in law and fact to bring the alleged relationship within the scope of family life;<sup>214</sup> though, undoubtedly, the determination of his legal relations with his putative daughter concerned his private life. The fact that the determination of the legal

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with his child was held to breach Article 14 ECHR taken in conjunction with Article 8). As to the situation before the child's birth, the existence of family life between potential father and aborted child and any interpretation of a potential father's rights under Article 8 as such, when finding a possible interference justified under Article 8(2), is still an area of uncertainty. *Boso v Italy* (App no 50490/99) ECtHR 5 September 2002 (admissibility decision) (impossibility for father of unborn child to intervene in his wife's decision to have an abortion) - in which the ECtHR referred to *X v United Kingdom* (App no 8416/79) (1980) 19 DR 244 and *H v Norway* (App no 17004/90) (1992) 73 DR 155).

<sup>212</sup> (App no 16944/90) EComHR 8 February 1993 (admissibility decision).

<sup>213</sup> (App no 27110/95) ECtHR 29 June 1999 (admissibility decision). Compare with *Róžański v Poland* (App no 55339/00) ECtHR 18 May 2006, dissenting opinion of Judge Steiner in particular.

<sup>214</sup> In this respect, the ECtHR noted that the case differed from the cases of *Keegan v Ireland* (App no 16969/90) (1994) 18 EHRR 342; and of *Kroon v Netherlands* (App no 18535/91) (1995) 19 EHRR 263, where the applicants had emotional bonds with the children in question. Moreover, unlike in those cases, the mother of the child in the present has denied the applicant's paternity.

relationship between a child born out of wedlock and its natural father will be considered under the notion of private life rather than that of family, was reconfirmed in *Mikulić v Croatia*,<sup>215</sup> in which the applicant complained that her right to respect for her private and family life had been violated because the domestic courts had been inefficient in deciding her paternity claim against her putative father and had therefore left her uncertain as to her personal identity. It has also been noted many times by the ECtHR that just as a mere biological link between a child and a parent will not ipso facto constitute family life in a blood parent-child relationship, so the absence of any blood ties between them will not automatically preclude a relationship from constituting family life. Nevertheless, the EComHR decided not to pursue such a ‘social rather than biological reality’ approach in a case of a foster mother and a child, in which the applicant complained that the national court’s decision to grant the custody of her foster child whom she had educated for several years, to the parents, who the child maintained regular contact with, was an infringement of her right to respect for private and family life guaranteed by Article 8. It concluded that it was here not necessary to decide whether, in the absence of any legal relationship, the ties between the applicant and the child amounted to family life in accordance with the well-settled case law since:

... [b]earing in mind that the applicant has cared for the child for many years and is deeply attached to him, the separation ordered by the Court undoubtedly affects her “private life”, the respect for which is also guaranteed by Article 8. In this connection the Commission refers to its previous decisions that the concept of private life also includes “to a certain extent the right to establish and develop relationships with other human beings”.<sup>216</sup>

As a general rule, once family life between a child and its parent is established, not even the subsequent divorce of the parents (which certainly affects the parent-parent relationship) or placement of a child in care will bring it to an end. An applicant in

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<sup>215</sup> (App no 53176/99) ECtHR 7 February 2002.

<sup>216</sup> *X v Switzerland* (App no 8257/78) EComHR 10 July 1978 (admissibility decision). As for the alleged violation of the applicant’s right to private life, the EComHR noted that while not overlooking the interests and conflicting desires of the applicant and the parents, national courts’ decisions gave predominant attention to the interests of the child and examined his position and future prospects with great care after taking into account all the evidence, as well as expert opinions. Accordingly, the application was manifestly ill-founded.

*MIR v Switzerland*,<sup>217</sup> however, could not rely on the right to respect for family life within the meaning of Article 8 any more once his children were already independent adults and he himself no longer married to their mother, in order to prevent his expulsion from Switzerland.<sup>218</sup> Similarly, though rather implicitly, the ECtHR in *Šijakova v Former Yugoslav Republic of Macedonia* held that even assuming that Article 8 might be understood to guarantee the right of the applicants to receive support and care from their children as they grew old and in the event of sickness and infirmity, the issue of maintaining contact and communication between parents and children who in order to join the monastic order of the Macedonian Orthodox Church left their parents' home after they had attained the age of majority, was not something to which the right to respect of family life as such could be applicable.<sup>219</sup> Another example of what may cause that a previous family life relationship has slightly changed its character and does not fit the Strasbourg family life definition any more can be found in the area of adoption law. In principle, adoption is meant to separate for good the adopted child from its original or natural family. As the ECtHR noted in *Pipoli v Italy*,<sup>220</sup> the applicant, who had not opposed the adoption of her children, could not claim to have her right to respect for family life under Article 8 interfered with because she was not able to check the whereabouts of her children and vice versa after adoption and was thus erased from her children's life and memory, since resumption of her family life after such separation was impossible. Looking at it from the perspective of the adoptive parents, the claim that the applicant's right to family life was violated due to the fact that as a single adopter, she was not entitled to adopt a child pursuant to relevant domestic law, was also held incompatible *ratione materiae* since the right to respect for private and family life did not include the right of any unmarried person to adopt a child.<sup>221</sup>

In the immigration context, deportation of an individual can violate Article 8 if it separates an existing family. However, in *Slivenko v Latvia*, which was concerned

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<sup>217</sup> (App 51268/99) ECtHR 26 March 2002 (admissibility decision).

<sup>218</sup> Neither had the applicant shown that he had any particular close ties with Switzerland, which could constitute in private life (the more so having regard to the precariousness of his residence in Switzerland) *ibid* [2].

<sup>219</sup> (App no 67914/01) ECtHR 6 March 2003 (admissibility decision).

<sup>220</sup> (App no 27145/95) ECtHR 30 March 1999 (admissibility decision).

<sup>221</sup> *Dalila di Lazzaro v Italy* (App no 31924/96) EComHR [GC] 10 July 1997 (admissibility decision); later approved of and commented upon by the ECtHR in *Fretté v France* (n 77) and *EB v France* (n 77).



with the agreed withdrawal of former Soviet troops and their families from Latvia, the ECtHR held that when removal is not aimed at breaking up the family, the case will be examined under private life rather than family life within the meaning of Article 8. Given the specific facts in *Slivenko*, the ECtHR furthermore pointed out that, in any case, the existence of family life could not be relied on by the applicants in relation to their elderly parents (the second applicant's grandparents), adults who did not belong to the core family and who were not shown to have been dependent members of the applicants' family.<sup>222</sup>

As shown in chapter 2 'Private Life', the ECtHR has on a number of occasions held that disputes relating to individuals' surnames and first names come within Article 8. Although that provision does not contain any explicit provisions on names, as a means of personal identification and of creating a family link, a person's name nonetheless concerns his or her private and *family life*. Article 8, however, did not extend to a dispute which concerned titles of nobility rather than names of the applicants who complained of a violation of their right to family life because on the basis of historic rules of primogeniture that had been applied to their case, they had been deprived of peerage solely because they were females, not males.<sup>223</sup> The ECtHR found that the applicants' main argument that to regard male blood ties as having precedence over female blood ties within the same family for the purposes of determining rights of succession to peerages would amount to a veritable interference by the State in the normal development of family life, fell outside the scope of Article 8 regardless of whether or not such title might have been entered on the civil register as an item of additional information facilitating the identification of the person concerned.<sup>224</sup>

As to the interests of a more material kind in this context, such as matters of intestate succession between near relatives, for example, they are likewise considered to be intimately connected with family life and hence covered by Article 8. In the ECtHR's

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<sup>222</sup> *Slivenko v Latvia* (App no 48321/99) (2004) 39 EHRR 24 [GC]. On the merits of the complaint, the ECtHR observed that the application of such a withdrawal without any possibility of taking into account the individual circumstances of persons not exempted by domestic law from removal violated the applicants' rights to respect for their private life.

<sup>223</sup> *De la Cierva Osorio de Moscoso; Fernandez de Cordoba ; Roca y Fernandez Miranda and O'Neill Castrillo v Spain* (App nos 41127/98; 41503/98; 41717/98 and 45726/99) ECtHR 28 October 1999 (admissibility decision). See also *Bernadotte v Sweden* (n 31).

<sup>224</sup> Since Article 14 ECHR concerns only discrimination affecting the rights and freedoms guaranteed by the ECHR and its Protocols, the applicants' claim in this respect was likewise dismissed. So was the claim under Protocol 1 Article 1 ECHR as a nobiliary title was held not to amount, as such to a possession within the meaning of that provision. *ibid.*

opinion, however, it would have been stretching the notion of family life too far to hold that family life protection had been applicable in the circumstances of the *Haas v Netherlands* case.<sup>225</sup> Here, the applicant claimed that a deceased person was his father, but despite regular contact between the two during the deceased's lifetime and his financial support, he had never formally been recognised as his child. When the applicant's alleged father died intestate and his estate passed to his nephew as his sole heir, Mr Haas unsuccessfully pursued a claim for the estate in national courts, arguing that the relationship he had enjoyed with the deceased was sufficient to amount to family life and that failure to recognise it as such amounted to discrimination. In Strasbourg, though formally declaring his application admissible, the ECtHR in its decision on merit held that in reality, the national courts were faced, not with an issue of family life within the meaning of Article 8 (not even with an issue of private life seen in terms of personal identity),<sup>226</sup> but with a question of evidence going to the issue of whether legal family ties between the applicant and the deceased should be recognised. The fact that the national courts were reluctant to rule on the elements adduced by the applicant could not be considered in the circumstances as raising an issue which fell within the scope of Article 8. In particular, an applicant could not derive from the right to respect for his family life a right to be recognised as the heir of a deceased person for inheritance purposes.

Once it is established that a dispute concerns family life under Article 8, the next step for the ECtHR is to determine whether the measure complained of interfered with that right or whether the application can be dismissed as manifestly ill-founded. Here are, therefore, examples of what *does not* constitute an interference with family life pursuant to Strasbourg case law.

The ECtHR has repeatedly held that individuals' names constitute a means of linking them to a family and thus, issues concerning the regulations of personal names fall

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<sup>225</sup> (App no 36983/97) (2004) 39 EHRR 41.

<sup>226</sup> Cf *Jäggi v Switzerland* (n 18) (the applicant complained that he had been unable to have a DNA test carried out on a deceased person with the aim of establishing whether that person was his biological father in order to discover the truth about an important aspect of his personal identity). See also *Mortensen's Estate v Denmark* (n 18).

within the scope of family life under Article 8.<sup>227</sup> In *Petersen v Germany*,<sup>228</sup> upon his birth, the applicant's son born out of wedlock was given the surname of his mother at that time. With this choice, the parents stuck to the general statutory rule according to which, at the material time, children born out of wedlock are given their mother's surname. After they separated, the child's mother married her current husband to whose surname she decided to change hers and the child's. The applicant complained that the decisions relating to the change of his son's surname failed to respect his family life under Article 8. The ECtHR, however, held that before the applicant did not have resort to the possibility under German law that his child should be given his surname in order to demonstrate the natural link between them and therefore the child's surname did, at no stage, constitute an outer sign of a bond between the applicant and his child. Consequently, the connections between an applicant's involvement in the choice of his child's surname at the time of his birth and the later change of this surname are too remote as to constitute any legitimate interest in the protection of his family life with his son and the application was rejected as manifestly ill-founded.

Undoubtedly, expelling a person from a country, where his or her family lives, or refusing to admit somebody to join other family members in that country, will more often than not constitute an interference with the right to respect for family life. Indeed, notwithstanding the well-established and internationally recognized legal principle that States enjoy a right to control the entry, residence and expulsion of aliens, such immigration controls must be exercised consistently with ECHR obligations. In order to determine whether or not expulsion of a person from a country or refusal of admission of someone amounted to an interference with the right to respect for one's family life the ECtHR will consider whether the family unit could not be preserved by establishing the family's residence in the country from which the member of the family is to be expelled or to which he or she seeks admission. In a case of deportation case law, for example, once the ECtHR found that the family unit could be preserved by establishing the family's residence in the country to which the member(s) of the family were to be expelled, then the State had not interfered with

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<sup>227</sup> In this respect, reference to some other manifestly-ill founded cases discussed in chapter 2 'Private Life' above, can be made. Indeed, in this area 'private' and 'family' aspects of one's life seem to be very often inextricably linked together.

<sup>228</sup> (App no 31178/96) ECtHR 6 December 2001 (admissibility decision).

Article 8 rights.<sup>229</sup> In *Dragan v Germany* the applicants,<sup>230</sup> a mother and her children, were living in Germany without a residence permit. Having renounced their original Romanian nationality with the consent of the Romanian authorities, as stateless persons, they could not at first be sent back to their country of origin. This obstacle was subsequently removed following an agreement between Germany and Romania by which Romania undertook to accept its former nationals who had renounced their citizenship and the German authorities ordered the applicants to leave German territory and announced their deportation. Having examined the relevant facts of the case, the ECtHR did not consider that the deportation order, which applied to the whole family without splitting it up, had constituted a lack of respect for their family life within the meaning of Article 8(1) ECHR, and found the application manifestly ill-founded. Though not falling within immigration case law, mention can perhaps be made of *Riener v Bulgaria* in this context.<sup>231</sup> In her application, the applicant claimed, inter alia, that there had been violation of her right to respect for her private and family life on account of the restrictions on her travelling outside Bulgaria because of unpaid taxes which prevented her from visiting her husband, her adult daughter and her grandchildren who lived in Austria. Noting that there were no legal obstacles against the applicant's family joining her in Bulgaria, however, the EComHR found that there was no interference with her right to respect for family life under Article 8.

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<sup>229</sup> Eg *Amara v Netherland* (App no 6914/02) ECtHR 5 October 2004 (admissibility decision).

<sup>230</sup> (App no 33743/03) ECtHR 7 October 2004 (admissibility decision) (the ECtHR furthermore found that the fact that a person whose deportation had been ordered threatened to commit suicide did not require the State to abstain from enforcing the envisaged measure, providing that they took specific steps to prevent those threats being realised. In this present case, none of the evidence submitted to it indicated that the authorities would not take the necessary precautions which were incumbent on them under the ECHR. Therefore the ECtHR judged the application in this respect inadmissible also under Article 3 ECHR).

<sup>231</sup> (App no 28411/95) EComHR 11 April 1997.

### 3.1.2 The scope of Family Life Protection: a Second Stage

Having discussed the areas to which the notion of family life and interferences with right to family life do not extend, the next step is to take an affirmative approach and look at the issue from a 'what family life is' perspective. The situation with regard to a definition of what family life under Article 8 is, is very similar to the one concerning the definition of private life discussed in the above chapter 2 'Private Life'. In other words, there is no such general, all-embracing definition. Nevertheless, one could clearly notice while researching the relevant case law that the initial traditional concept focused on marriage and the biological family has evolved, and the ECtHR allows the benefit of protection under Article 8 once the existence of a family unit and adequate family ties are established. So what are the areas in which family life protection is afforded by Article 8?<sup>232</sup>

As far as the adult-adult family relationships are concerned, Article 8 undoubtedly protects husband-wife relationships. The notion of family life in Article 8 is clearly not confined solely to families based on marriage and may encompass other de facto relationships, depending on the actual cohabitation of the couple, the length of their relationship and on whether or not the couple has demonstrated their commitment to each other by having children together or by any other means. In *Johnston v Ireland*,<sup>233</sup> for example, notwithstanding the fact that their relationship existed outside marriage, the applicants who had lived together in an informal union for some fifteen years and had a child together, were held to constitute a family for the purposes of Article 8.<sup>234</sup> Similarly, the cohabitation of a couple composed of a post-operative transsexual and a woman who had given birth to a child as a result of artificial insemination by anonymous donor amounted, according to the ECtHR, to family life protected under Article 8.<sup>235</sup> The ECtHR noted in particular that their relationship was comparable to that of the traditional family and de facto family ties evidently linked

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<sup>232</sup> For the relevant secondary literature, see references in n 12 and 14.

<sup>233</sup> *Johnston v Ireland* (App no 9697/82) (1987) 9 EHRR 203.

<sup>234</sup> Note, however, that in *Saucedo Gomez v Spain* (App no 37784/97) ECtHR 26 January 1999 (admissibility decision), the ECtHR held that although there was no doubt that the existence of family life may be assumed in the case of a couple who had lived together in an informal union for eighteen years, the differences of treatment under state legislation between spouses and cohabitants with regard to the granting of the family home pursued a legitimate aim and could be objectively and reasonably justified (protection of the traditional family).

the three applicants, a post-operative transsexual having acted as the child's father in every respect.<sup>236</sup>

As for parent-child relationships, that between married parents and their dependent children will obviously be covered and so will the relationships between unmarried couples and their dependent children who live together. Similarly, the relationship between an unmarried mother and her child<sup>237</sup> as well as a biological father and his child born outside marriage, even where there is no cohabitation, will fall within the scope of Article 8.<sup>238</sup> Having said that, it must be reiterated that mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, will not be sufficient to attract the protection of Article 8. A mere blood link was, for example, insufficient to constitute family life in the aforementioned case of a child and a sperm donor.<sup>239</sup> One should also not forget that, as mentioned above,<sup>240</sup> even when finally established, family ties may later on be broken by subsequent events, although, it is true, this can only happen in exceptional

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<sup>235</sup> *X, Y and Z v United Kingdom* (App no 21830/93) (1997) 24 EHRR 143.

<sup>236</sup> Although the family life of a couple will quite naturally come to an end upon divorce, or when the parties decide no longer to live together, it seems that it will not necessarily do so upon the death of one of the spouses. In this context, see the chain of cases against the United Kingdom in which the applicants - all male British nationals whose wives had died - attempted to claim equivalent benefits to those to which female widows were entitled at the relevant time in the United Kingdom arguing that the provision of a widow's pension to a surviving spouse was clearly intended to promote family life. Having concluded that there had been a breach of Article 14 ECHR taken in conjunction with Article 1 of Protocol No. 1 regarding the applicant's non-entitlement to Widowed Mother's Allowance, however, the ECtHR did not consider it necessary to examine the complaints in that regard under Article 8. Eg *McNamee v United Kingdom* (App no 61949/00) ECtHR 27 March 2008; *Fallon v United Kingdom* (App no 61392/00) ECtHR 21 November 2007; *Willis v United Kingdom* (App no 36042/97) (2002) 35 EHRR 21.

<sup>237</sup> *Marckx v Belgium* (App no 6833/74) (1979-80) 2 EHRR 330 [31] (in which it was complained that certain aspects of the illegitimacy laws in Belgium, including the requirement that maternal affiliation could be established only by a formal act of recognition, and the existence of limitations on the mother's capacity to give or bequeath, and the child's capacity to take or inherit, property, infringed Article 8).

<sup>238</sup> *Eg Angelov v Finland* (App no 26832/02) ECtHR 5 September 2006 (admissibility decision); *Fourchon v France* (App no 60145/00) ECtHR 28 June 2006 (admissibility decision); *Smolník v Czech Republic* (App no 18302/02) ECtHR 1 March 2005 (admissibility decision); *Boughanemi v France* (App no 22070/93) (1996) 22 EHRR 228.

<sup>239</sup> *JRM v Netherlands* (n 212). Cf *Lebbink v Netherlands* (App no 45582/99) (2005) 40 EHRR 18 (biological father's relationship with his child born out of wedlock, from its birth until the breakdown in his relationship with the child's mother, taken together with their biological ties, were sufficient to qualify for protection under Article 8). Although in principle the relation between a child and his/her biological mother is covered by the concept of family life, see the EComHR's holding in *X v United Kingdom* (App no 7626/76) (1977) 11 DR 164 (in which the applicant who fearing disapproval of her family and being without resources decided to hand over her child immediately after its birth for adoption by third parties, and who had not seen it since, was held to have - by virtue of her own decision - no family life relationship with her son who was already two years old when she changed her mind).

<sup>240</sup> See cases referred to from n 217-220.

circumstances.<sup>241</sup> A large number of cases in this area specifically concern the rights of fathers of children born out of wedlock. Where a father's right to access to such a child, for instance, is objected to by the mother, securing family life for the father will undoubtedly involve competing interests with the mother and with the child. The child's best interests, in particular, are of utmost importance and depending on their nature and seriousness, may easily override those of the parents. In order for the national authorities to justify their refusal of the father's request for a right of access under Article 8(2), they must make sure that the decision-making process itself, seen as a whole, provided the father with the requisite protection of his interests. Notwithstanding the State's margin of appreciation, the ECtHR must be satisfied that the national courts' procedural approach was reasonable and met procedural requirements implicit in Article 8 in the given circumstances, thus providing sufficient material to reach a reasoned decision on the question of access in the particular case.<sup>242</sup>

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<sup>241</sup> Any such exceptional circumstances were present in cases, such as *Gül v Switzerland* (App no 23218/94) (1996) 22 EHRR 93 (in which it could not be claimed that the bond of family life between a father and child has been broken after a considerable period of separation); *Hokkanen v Finland* (App no 19823/92) (1995) 19 EHRR 139 (the family life of a father and child of marriage did not cease when the father agreed that after his wife's death his daughter should be cared for by her maternal grandparents who subsequently refused to return her and did not obey court orders granting him access and custody); or, for example, *Kosmopoulou v Greece* (App no 60457/00) ECtHR 5 February 2004 (there existed between a mother and her daughter a bond amounting to family life despite the fact that after having left the matrimonial home leaving her daughter with her husband, she did not have regular contact with the child for the reasons of father's non-cooperation and the national authorities unreasonable approach). It is well-established, furthermore, that the family life of parents with their children does not cease to exist following the separation of the parents or the divorce of a married couple. See, for example, *Canepa v Italy* (App no 43572/98) ECtHR 25 November 1999 (admissibility decision); *Wilhelm v Germany* (App no 34304/96) ECtHR 20 April 1999 (admissibility decision); *Hoffmann v Austria* (App no 12875/87) (1994) 17 EHRR 293; *Berrehab v Netherlands* (App no 10730/84) (1989) 11 EHRR 322. Nor is the natural family relationship terminated by reason of the fact that the child is taken into public care. See, for example, *Rieme v Sweden* (App no 12366/86) (1993) 16 EHRR 155; *Andersson v Sweden* (App no 12963/87) (1992) 14 EHRR 615; *R v United Kingdom* (App no 10496/83) (1988) 10 EHRR 74.

<sup>242</sup> Notwithstanding the fact that the procedural requirements implicit in Article 8 were complied with in *Sahin v Germany* (App no 30943/96) ECtHR 8 July 2003 [GC], the difference in treatment between natural fathers and divorced fathers under German legislation was found to violate Article 14 ECHR taken in conjunction with Article 8 (see also dissenting judgments, though). See also *Sommerfeld v Germany* (App no 31871/96) (2004) 38 EHRR 35 [GC]. Compare with *Elsholz v Germany* (App no 25735/94) ECtHR [GC] 13 July 2000. For other than 'the right of access to the child, see *Balbontin v United Kingdom* (App no 39067/97) ECtHR 14 September 1999 (admissibility decision) (an unmarried father without parental responsibility complained that his inability to obtain a declaration that his child had been unlawfully removed from the UK); or *McMichael v United Kingdom* (App no 16424/90) (1995) 20 EHRR 205 (the father and mother of the child, who were not married at the time of his birth, complained that their rights under Article 6(1) and Article 8 ECHR had been violated when they had been denied access to certain documents, including social reports, during care proceedings in respect of the child, who was taken into care soon after his birth because the mother was suffering from a mental illness).

Family life protection within the meaning of Article 8 may also extend to non-parental blood relationships. Indeed, family life has been held to involve not only links of a cohabiting couple and any young children (marital or born out of wedlock), but also the links between grandparents and grandchildren,<sup>243</sup> aunts or uncles and nieces or nephews,<sup>244</sup> or brothers and sisters.<sup>245</sup> Whether family life extends to these non-parental blood relationships depends, however, on the circumstances of the particular case.<sup>246</sup>

In this connection, one should mention the non-parental non-blood relationships in the field of adoption which create family life within Article 8. By referring to well-established line of Strasbourg case-law to this effect, it can be said that although the right to adopt is not, as such, included among the rights guaranteed by the ECHR, the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8.<sup>247</sup> Quite naturally, since the sole purpose of adoption is to confer on adoptive parents the same rights and obligations in respect of their adopted children as those of a father or mother in respect of a child born in lawful wedlock, while at the same time to end any rights and obligations existing between the adopted children and their biological father or mother or any other person or body.<sup>248</sup> Consequently, an adoption order interferes with family life

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<sup>243</sup> Eg *L v Finland* (App no 25651/94) (2001) 31 EHRR 30 (taking a grandfather's grandchildren into public care because of the suspected sexual abuse and restricting his access to them were measures hindering such enjoyment and as such amounted to an interference with the right protected by Article 8 which, on the other hand, was found to be justified under its second paragraph given the sexual abuse allegations).

<sup>244</sup> Eg *Boyle v United Kingdom* (App no 16580/90) (1995) 19 EHRR 179 (friendly settlement) (uncle was refused access to his nephew, to whom he was a father figure, because his nephew was freed for adoption).

<sup>245</sup> Eg *I and U v Norway* (App no 75531/01) ECtHR 21 October 2004 (admissibility decision) (refusal to allow two elder sisters to have access to their biological sister taken into care).

<sup>246</sup> *DO v Switzerland* (App no 24545/94) EComHR 31 August 1994 (admissibility case) (the expulsion of a person from a country where close members of his family were living).

<sup>247</sup> Having no right to adopt under Article 8, prospective adopters have rights under the private life limb of Article 8 to a proper and non-discriminatory decision-making process as to their suitability to adopt; see *EB v France* (n 77) and see also *Fretté v France* (n 77) in which the issue of discrimination of a single male homosexual who unsuccessfully sought prior authorisation to adopt a child was raised. With regard to the obligations imposed by Article 8 on the Contracting States in the field of adoption in general, and to the effects of adoption on the relationship between adopters and those being adopted in particular, the ECtHR tends to interpret them in the light of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption; the United Nations Convention of 20 November 1989 on the Rights of the Child; and the European Convention on the Adoption of Children, opened for signature in Strasbourg on 24 April 1967.

<sup>248</sup> *Pini v Romania* (App no 78028/01) (2005) 40 EHRR [142]. Compare with *JL and MH v Poland* (App no 16240/02) ECtHR 23 January 2007 (admissibility decision) (in which a couple's complaint that the removal of a child for whom they had been its pre-adoptive family for three years (this was, by



of biological parents and only the circumstances of the case will determine whether that interference can be justified by relevant and sufficient reasons with reference to the rights and the best interest of the child and the proper involvement of the natural parents in the adoption process itself.<sup>249</sup>

Following the separation of parents, by which they most commonly terminate the family life relationship vis-à-vis each other, the right of custody and care of the child is usually awarded to one parent which in turn interferes with the right to respect for family life of the non-custodial parent. Since the family life of parents and their children does not cease with divorce or separation of the parents, the non-custodial parent's right to respect for his or her family life with regard to the child will inevitably be interfered with. Given the wide margin of appreciation which States enjoy in this area, such measures will often be justified under Article 8(2) and one can hardly find a decision awarding custody to one parent which would have violated Article 8 rights of the other parent. An example can nevertheless be found in a case in which the family life argument was used in connection with the discrimination provision of Article 14 ECHR. Indeed, in *Salgueiro da Silva Mouta v Portugal* a refusal to grant custody to a parent living in a homosexual relationship on the basis of his sexual orientation was found to violate Article 8 taken in conjunction with Article

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the way, the main reason why - notwithstanding the fact that no decision regarding the adoption of the child had been given - the ECtHR seemed to be ready to examine the case under the 'family right' aspect of Article 8 as it considered that the applicants must have developed strong bonds with the child) and who they sought to adopt, to the custody of the child's biological mother had violated their rights to respect for family life under Article 8 was held to be manifestly ill-founded since, in the given circumstances (the child's best interests in particular), there was no appearance of a violation of Article 8). See also the case of *Emonet and others v Switzerland* (App no 39051/03) ECtHR 13 December 2007 (where the Swiss adoption law was held not to comply with the mother's right to family life since it severed the parental tie between the child (already an adult) and her biological mother, as a result of the adoption by the mother's cohabiting partner who was not her husband. The loss of the original parental ties in the event of adoption by the cohabiting partner of the child's parent who was not married to this child's parent was found by the ECtHR to have failed to take the realities into account flying in the face of the wishes of the individuals concerned, without actually benefiting anyone).

<sup>249</sup> *Söderbäck v Sweden* (App no 24484/97) (2000) 29 EHRR 95 (adoption of a child by the mother's husband without the consent of the natural father where the child had been in the mother's care since her birth and the person adopting her had shared the care of the child with the child's mother almost since her birth and she regarded him as her father, did not violate Article 8), the reasoning of which was later applied in *Chepelev v Russia* (App no 58077/00) ECtHR 26 July 2007; *Johansen v Norway* (App no 17383/90) (1997) 23 EHRR 33 (the deprivation of a mother's parental rights and access in the context of compulsory and permanent placement of her daughter in a foster home with a view to adoption by the foster parents; this measure, which was found to violate Article 8, had been imposed some six months after the daughter's birth, during which period the mother had had access to her twice a week); or *Keegan v Ireland* (n 214) (here, the procedural impropriety caused by the failure to consult or inform the unmarried father about his child's placement amounted to a failure to respect his family life under Article 8, regardless of the merits of placing the child for adoption).

14 ECHR.<sup>250</sup> Procedural aspects of custody issues were examined in, inter alia, *C v Finland*,<sup>251</sup> in which the ECtHR stressed the importance of the proper involvement of the parents in the decision-making process itself. This custody dispute which the ECtHR was called upon to resolve lay between the biological father of the two children and a man who was the partner of their deceased mother. Placing exclusive weight on the views expressed by the children, who had both reached the age of 12, without considering any other factors, in particular the father's rights under Article 8, and without holding an oral hearing, in which it might invite the parties to address the matter or without taking any steps to clarify, through further evidence or expert opinion, any divergent interpretation of the evidence, the Finnish Supreme Court held that it was not in the children's best interests for the father to be awarded custody against their wishes and accordingly transferred custody to their deceased mother's partner. Upon examining the parties' observations in Strasbourg, however, the ECtHR held that the Finnish Supreme Court's decision was reached in a manner which understandably left the father (applicant) with the impression that the mother's partner had been allowed to manipulate the children and the court system to deprive him unjustifiably of his parental role. It concluded therefore that the decision-making procedure failed to strike a proper balance between the respective interests and that there has been a violation of Article 8 in that respect.<sup>252</sup>

Undoubtedly, a decision to take a child into public care strongly interferes with family life. The situations giving rise to these cases have been extremely varied, but the following is clear: although States enjoy a wide margin of appreciation with respect to the initial decision to take a child into care because such a measure is often necessarily taken under pressure of circumstances suggestive of urgency with less opportunity for careful reflection, 'a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the

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<sup>250</sup> *Salgueiro da Silva Mouta v Portugal* (n 211). A similar issue arose in *Hoffmann v Austria* (n 241), in which a refusal to grant custody to a particular parent was based on religious grounds. See also *EB v France* (n 77) and compare with *Fretté v France* (n 77) in which the issue of discrimination of a single male homosexual who unsuccessfully sought prior authorisation to adopt a child was raised.

<sup>251</sup> (App no 18249/02) ECtHR 9 May 2006.

<sup>252</sup> *ibid* [58] – [59]. See also, more recently, *Hunt v Ukraine* (App no 31111/04) ECtHR 7 December 2006 (an applicant who had been banned from entry to Ukraine for five years at the instigation of his divorced wife who had then successfully brought proceedings to deprive him of his parental rights on the grounds of his unfitness and lack of interest in their child).

rights of parents and children to respect for their family life.<sup>253</sup> It should be, furthermore, noted that Article 8 imports a notion of a fair procedure for determining not only issues of access and custody of children, as already indicated in relevant case law above, but for determining any other measures which aim to restrict, limit or even withdraw parental rights, care measures included. Thus, Article 8 will be breached where parents are not sufficiently involved in the procedure under which their child may be taken into care.<sup>254</sup> This is not to say that a separate issue under Article 6 ECHR, which is the main procedural safeguard in the ECHR, cannot arise. On the contrary, the interests protected by Articles 6 and 8 ECHR, though both concerning procedural rights, differ in their nature. As the ECtHR noted:

... not only does the procedural requirement inherent in Article 8 ... cover administrative procedures as well as judicial proceedings, but it is ancillary to the wider purpose of ensuring proper respect for, inter alia, family ... The difference between the purpose pursued by the respective safeguards afforded by Articles 6 para. 1 and 8 ... may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles.<sup>255</sup>

Relevant case law shows how crucial it is that in those areas where decisions may prove irreversible (where a child may form new bonds with his alternative carers or adoptive family, for example) parents are adequately protected against arbitrary interferences.<sup>256</sup>

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<sup>253</sup> *Haase v Germany* (App no 11057/02) (2005) 40 EHRR 19 [92]. Although the ECtHR has only rarely held that the initial taking of a child into care violates Article 8, it has done so in the case of new born babies, see *K and T v Finland* (App no 25702/94) (2003) 36 EHRR 18 [168]; or *P v United Kingdom* (App no 56547/00) (2002) 35 EHRR 31 [133]. For the positive obligation which arises under Article 8 obliging the State to reunite the family in public care cases, see section '6.2.2 Positive Obligations and Family Life under the ECHR'.

<sup>254</sup> Eg *Moser v Austria* (App no 12643/02) ECtHR 21 September 2006 [67]; *Haase v Germany* (n 253) [94]; *Venema v Netherlands* (App no 35731/97) (2004) 39 EHRR 5 [91]; or *TP and KM v United Kingdom* (App no 28945/95) (2002) 34 EHRR 2 [GC] [72]; *W v United Kingdom* (App no 9749/82) (1988) 10 EHRR 29 [64].

<sup>255</sup> *McMichael v United Kingdom* (n 242) [91].

<sup>256</sup> See case law referred to in n 254 above, for example. For a case in which it was found that the decision-making process, seen as a whole, provided the applicant with the requisite protection of her interests, see *Glesmann v Germany* (App no 25706/03) ECtHR 10 January 2008. For an example of a case in which the requirement of proportionality rather than that of a fair procedure was not met, see, *Wallová and Walla v Czech Republic* (App no 23848/04) ECtHR 26 October 2006 (taking into care of children from a large family on the sole ground that the family's housing was inadequate, where neither the applicants' capacity to bring up their children nor the affection they bore them had ever been called into question, and the courts had acknowledged the efforts they had made to overcome their difficulties, violated Article 8).

As noted when talking about manifestly ill-founded applications above, the right to respect for family life may be violated by deportation decisions and immigration rules, as an existing family cannot be broken by a deportation decision unless such interference fulfils all of the criteria listed in paragraph 2 of Article 8. In the case of *Jakupovic v Austria*,<sup>257</sup> in which the relationship of parent and child was at stake, the ECtHR dealt with the deportation to Bosnia and Herzegovina of a 16-year-old boy on whom a ten-year residence prohibition had been imposed following a conviction for burglary. He and his younger brother had joined their mother, who was working in Austria four years earlier, and his situation was not therefore comparable to that of second-generation or long-term immigrants, since he remained well acquainted with his country of origin and spoke its language. However, he apparently had no close relatives there and the ECtHR considered that in these circumstances there would have to be very weighty reasons to justify the expulsion of a young person, alone, to a country which had recently experienced a period of armed conflict with all its adverse effects on living conditions. Consequently, the ECtHR concluded that the measure imposed on the applicant was disproportionate to the aim pursued. The interest of the State usually prevails over the applicant's rights in cases where serious offences have been committed and there is little evidence of family ties in the country of integration. Where an exclusion order is imposed on aliens convicted of criminal offences, the ECtHR applies the following guiding principles in its examination of the question whether that order was necessary in a democratic society:<sup>258</sup> the nature and

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<sup>257</sup> (App no 36757/97) (2004) 38 EHRR 27. Cf *Maslov v Austria* (App no 1638/03) ECtHR [GC] 23 June 2008 - case of a second-generation immigrant (having regard to the circumstances of the case, in particular to the nature and severity of the offences, which were to be qualified as non-violent juvenile delinquency, the eighteen-year-old applicant's good conduct after his release from prison and his lack of ties with his country of origin, a ten years' residence prohibition appeared nevertheless disproportionate to the legitimate aim pursued and there was therefore a violation of the applicant's right to private and family life). The *Maslov* case can be distinguished from a number of cases concerning applicants in a comparable personal situation (ie second generation immigrants who were at the time of the impugned measures young single adults who had not yet founded a family of their own in the host country) in which the ECtHR found no violation as regards the imposition of a residence ban since these cases concerned violent crime, such as rape or armed robbery, for which unconditional prison terms of five or more years had been imposed (see the 'Boutif principles' in n 258 below); see for instance, *Kaya v Germany* (App no 31753/02) ECtHR 28 June 2007 (in this case, in his concurring opinion Judge Rozakis held that 'the applicant was a second-generation immigrant (a matter which objectively makes expulsion even more difficult and exceptional), still the nature of the offences committed – offences which clearly were of an extremely serious moral and criminal nature – justified, to my mind, the measure taken against him'); *Bouchelkia v France* (App no 23078/93) (1998) 25 EHRR 686; *Boujlifa v France* (App no 24404/94) (2000) 30 EHRR 419.

<sup>258</sup> *Boutif v Switzerland* (App no 54273/00) (2001) 33 EHRR 50 [48]; the 'Boutif principles' were more recently reconfirmed by the Grand Chamber in *Üner v Netherlands* (App no 46410/99) ECtHR

seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period, the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children in the marriage, and if so, their age; and the seriousness of the difficulties which the spouse is likely to encounter in the applicant's country of origin. In addition, the ECtHR will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life. In numerous such cases, especially those involving drug offences, expulsion has been considered justified by weighty public order interest<sup>259</sup> and similar conclusions were reached in other cases, in which the crimes committed were considered equally serious.<sup>260</sup> Interestingly however, in *Amrollahi v Denmark*,<sup>261</sup> the expulsion of the applicant, an Iranian national married to a Danish national with whom he had two children, and who was found guilty of drug trafficking, was found to be a disproportionate violation of the right to respect for family life. Considering the possibility of the applicant, his wife and his children establishing family life elsewhere, the ECtHR found that in the absence of any ties between the applicant's wife and Iran, and given the difficulty for her and their children to live in that country, the applicant's permanent exclusion from Denmark would result in separation of the family, since it would be de facto impossible for them to continue their family life in Iran.

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[GC] 18 October 2006 (this case clearly shows that the ECtHR considers that a long-term immigrant who was born in a state party has the right not to be expelled from that State, a right which is part and parcel of the more general right to private and family life enshrined in Article 8. That right is, of course, not an absolute one, since like all the other constitutive components of Article 8, it is subject to the limitations provided for by its second paragraph. Yet these limitations are the exceptions, not the rule; and in order for the exceptions to prevail, and for a State to be allowed to expel, very serious and exceptional considerations of public interest must exist in the circumstances of a particular case.). See also *Mehemi v France* (App no 53470/99) (2004) 38 EHRR 16 [36], and, a contrario, *Baghli v France* (App no 34374/97) (2001) 33 EHRR 32 [48]. Note, furthermore, Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants.

<sup>259</sup> See, inter alia, *Lagergren v Denmark* (App no 18668/03) ECtHR 16 October 2006 (admissibility decision); *McCalla v United Kingdom* (App no 30673/04) ECtHR 31 May 2005 (admissibility decision); *Hussain Mossi and Others v Sweden* (App no 15017/03) ECtHR 8 March 2005 (admissibility decision).

<sup>260</sup> See, for example, *Cömert v Denmark* (App no 14474/03) ECtHR 10 April 2006 (admissibility decision) (applicant had abused his daughter sexually).

Family life arguments under Article 8 have often been used in order to support applications of persons detained in prison, who frequently complained of interference with their right to respect for family life mostly as a result of restrictions on their family visits.<sup>262</sup> Pursuant to ECtHR's case law lawful detention entails by its nature a limitation on private and family life. Indeed, it is recognised that some measure of control over prisoners' contacts with the outside world is called for and is not in itself incompatible with the ECHR. Thus, for example, taking into account the specific nature of the phenomenon of organised crime, such as the Mafia type, in which family relations often play a crucial role, in *Bastone v Italy*,<sup>263</sup> the ECtHR found a special prison regime imposed on an applicant, which involved additional restrictions on the number of family visits (one per month) and imposed measures for the supervision of such visits (prisoners were normally separated from visitors by a glass partition) compatible with the requirement of respect for the rights guaranteed by Article 8. On a different occasion, however, the ECtHR held that although the ECHR did not grant prisoners the right to choose their place of detention, and the fact that prisoners were separated from their families, and at some distance from them, was an inevitable consequence of their imprisonment, detaining an individual in a prison which was so far away from his or her family that visits were made very difficult or even impossible

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<sup>261</sup> (App no 56811/00) ECtHR 11 July 2002.

<sup>262</sup> But see also other types of case law in this respect, concerning the refusals of prisoners' requests to visit an ailing relative or to attend a relative's funeral. In such circumstances, the ECtHR had regard to the following factors to assess whether the refusals of leave to visit a sick relative or to attend a relative's funeral were necessary in a democratic society: the stage of the criminal proceedings against the applicant, the nature of the criminal offence, the applicant's character, the gravity of the relative's illness, the degree of kinship, the possibility of escorted leave, and so on. See, among others, *Lind v Russia* (App no 25664/05) ECtHR 6 December 2007 (although the ECtHR did not find that, in refusing to release the applicant so that he could visit his dying father in the Hague or attend the farewell ceremony, the domestic authorities exceeded the margin of appreciation afforded to them, the respect for the applicant's family life required that, once his application for release had been rejected, he be provided with an alternative opportunity to bid farewell to his dying father); or *Płoski v Poland* (App no 26761/95) ECtHR 12 November 2002 (refusal to allow remand prisoner who had not been convicted and was charged with a non-violent crime to attend the funerals of his parents, who died within one month of each other, where the authorities did not give compelling reasons for the refusal and did not consider the possibility of escorted leave, was found to be disproportionate and constituted a violation of Article 8). Compare with *Sannino v Italy* (App no 72639/01) ECtHR 3 May 2005 (refusal was justified because the applicant had been convicted of murder and was of dubious character) or *Schemkamper v France* (App no 75833/01) ECtHR 18 October 2005 (in which the ECtHR also found the refusal justified because the applicant's father was not so unwell as to be unable to visit the applicant in prison).

<sup>263</sup> (App no 59638/00) ECtHR 18 January 2005 (admissibility decision). Compare with *Estrikh v Latvia* (App no 73819/01) ECtHR 18 January 2007 (a violation of Article 8 was found in this case in which a suspected offender had been detained in prison on remand for over four years and had not been allowed

may have in some circumstances amounted to interference with family life, as the opportunity for family members to visit a prisoner is vital to maintaining family life.<sup>264</sup>

Though the issue of names is a fertile breeding ground mainly for all kinds of interference with private life, there are a lot of examples in which a person's name also concerned his or her family life. The ECtHR has stated that there are a variety of recognised public interest considerations which well justify state regulation and restrictions on name changes and choice, such as upholding the unity of the family name (which in itself reflects the unity of the family towards the outside world), importance placed on the child being united, by means of its name, with the family name, preserving the stability required in the legal rules governing names, or accurate population registration.<sup>265</sup> Unless such regulating restrictions have not treated men and women differently, ie they have not amounted to discrimination in violation of Article 14 in conjunction with Article 8, they have been found compatible with respect for family life in the majority of cases.<sup>266</sup>

The ECtHR often reiterates that family life for the purposes of Article 8 does not consist only of social, moral or cultural relations. The case of *Pla v Andorra*, for instance, concerned inheritance by an adopted child through his father of property belonging to a grandmother who had died prior to the adoption.<sup>267</sup> The ECtHR was asked to determine whether the domestic High Court of Justice's interpretation of the grandmother's testamentary disposition which deprived the non-biological, adopted child of his right to inherit under his grandmother's estate amounted to the judicial deprivation of an adopted child's inheritance rights contrary to Article 14 taken in

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visits from his family, and had been unlawfully deported after his conviction at trial and whilst his appeal against deportation was pending).

<sup>264</sup> *Ospina Vargas v Italy* (App no 40750/98) ECtHR 6 April 2000 (admissibility decision).

<sup>265</sup> See, for example, *GMB and KM v Switzerland* (App no 36797/97) ECtHR 27 September 2001 (admissibility decision) (refusal of the authorities to give the mother's surname to a child when the family name of spouses is the father's); or *Bijleveld v Netherlands* (App no 42973/98) ECtHR 27 April 2000 (admissibility decision) (refusal of the authorities to grant the mother's request to change the surname of her daughter pursuant to domestic rules which in case of a conflict between the parents the child would automatically take the father's surname).

<sup>266</sup> *Ünal Tekeli v Turkey* (App no 29865/96) (2006) 42 EHRR 53 (legal imposition— even where the couple prefers an alternative arrangement – the husband's name as the couple's surname and thus the automatic loss of the woman's own surname on her marriage); or *Burghartz v Switzerland* (App no 16213/90) (1994) 18 EHRR 101 (sex discrimination in relation to choice of family name).

<sup>267</sup> (App no 69498/01) (2006) 42 EHRR 25. For other interests of a pecuniary nature that have been held to be covered by the scope of family life, see for instance, *Schaefer v Germany* (App no 14379/03) ECtHR 4 September 2007 (admissibility decision).

conjunction with Article 8.<sup>268</sup> The ECtHR noted that while any interpretation of wills should endeavour to ascertain the testator's intention and render the will effective, the testator could not be presumed to have meant what he did not say. It likewise stressed the importance of interpreting the testamentary disposition in the manner that most closely corresponded to both domestic law and to the ECHR (as interpreted in the ECtHR's case law). The ECtHR concluded that since the testamentary disposition, as worded by the grandmother in 1939, made no distinction between biological and adopted children, it was not necessary to interpret it in that way. Such an interpretation therefore amounted to the judicial deprivation of an adopted child's inheritance rights and violated Article 8 when read with Article 14 ECHR.<sup>269</sup>

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<sup>268</sup> Admittedly, the ECtHR is not (in theory) required to settle disputes of a purely private nature but 'in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention.' *ibid* [59]. See also the dissenting opinion of Judge Garlicki.

<sup>269</sup> See, *inter alia*, RS Kay, 'The European Convention on Human Rights and the Control of Private Law' (2005) 5 *Eur Human Rights L Rev* 466, in which the author explores the case law of the ECtHR primarily through *Pla v Andorra* case, looking at the law of interpretation and the regulation of private transactions through the principles of horizontal effect and the ECHR as a living instrument and concludes with observations concerning the legitimacy of the ECtHR's position on this issue.



### 3.2 Family Life in English Law

In order to analyse the extent to which the current English law responds to the breadth of ‘family life’ protection as established by the ECtHR under Article 8, one needs to examine, first of all, the kinds of adult-adult/adult-child relationships that fall in the eyes of domestic law and domestic courts within the scope of family life. Subsequently, the most common interferences with one’s rights to family life are considered. These include placing a child for adoption and taking a child into public care. While dealing with the issue of public care, some consideration is given also to private law family disputes on parental relationship breakdown and contact/residence orders resulting thereof.

As for the range of relationships covered by the notion of ‘family life’, one can start with the relationships on an adult-adult level. Here, just as in the Strasbourg jurisprudence, the formal bond of marriage is now far from being a significant criterion for domestic courts to find a ‘family life’ relationship to exist between the parties.<sup>270</sup> Although it would be inaccurate to say that current English law formally recognises the status of unmarried but cohabiting persons who live together and behave as if they were married,<sup>271</sup> it is generally accepted that their relationship has the quality of family life.<sup>272</sup> There have also been other types of adult-adult ‘outside

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<sup>270</sup> *Singh (Pawandeep) v Entry Clearance Officer (New Delhi)* [2004] EWCA Civ 1075; [2005] QB 608 [21]. See also Mr Justice Munby, ‘Families Old and New — the Family and Article 8’ (2005) 17 Child and Family LQ 487. Note, furthermore, that not every relationship between husband and wife is considered to fall within the notion of family life. Drawing a parallel with *Yavuz v Austria* n 207, in the light of Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] 3 CMLR 26, sham marriages, entered into for immigration purposes will not be considered by domestic authorities under the right to respect for family life.

<sup>271</sup> The myth of common law marriage - that couples who live together have the same legal rights as married couples - springs from a historical time when there was uncertainty about what constituted a marriage as there was no written law on that. The legal recognition of common law marriage ceased definitively with the Marriage Act of 1753. See R Probert, ‘The History of 20th-Century Family Law’ (2005) 25 OJLS 169; or R Probert, ‘Why Couples still Believe in Common-law Marriage’ (2007) 37 Family L 403.

<sup>272</sup> When can a couple be said to be cohabiting? There are many forms of cohabitation and it is practically impossible to offer any definition that will cover all circumstances. There is certainly no such exhaustive and all-embracing definition provided for by English law (only some sector-specific attempts at defining cohabitation can be found in statutory law; eg Adoption and Children Act 2002 or the Family Law Act 1996). Whilst it is impossible to provide a checklist or set of tests, factors or criteria to cover every cohabitation scenario, the main factors decisive for English courts have been singled out in *Kimber v Kimber* [2000] 1 FLR 383 (Fam). See also K Standley, *Family Law* (5th edn Palgrave Macmillan, Hampshire 2006) Part II; or J Herring, *Family Law* (3rd edn Person Education Limited, Essex 2007) 71-92. Recently, in its report, the Law Commission has concluded that unmarried

marriage' relationships where parties - although not cohabiting - have been found to have family life. Here, in deciding whether there was family life, English courts were primarily concerned with the real existence in practice of close personal ties between parties of sufficient constancy and substance and these were held not to be confined to cohabiting couples only.<sup>273</sup> This approach undoubtedly complies with the principles established by the ECtHR.<sup>274</sup> Crucially, however, a more generous interpretation of the notion of family life has been employed by English courts with respect to same-sex partnerships.<sup>275</sup> This is an important extension of 'family life' protection under Article 8 by domestic courts. While the ECtHR's stance is that same-sex couples have family life with their children, but not (yet) with each other,<sup>276</sup> *M v Secretary of State for Work and Pensions* contains hints that English courts may well be ready to accept

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couples sharing households, particularly those with children, would benefit from the implementation of an entirely new statutory scheme which would provide a clear legal framework for dealing with financial claims upon relationship breakdown and for determining appropriate remedies when merited. Law Commission, 'Cohabitation: The Financial Consequences of Relationship Breakdown' (Law Com No 307 Cm 7182, 2007). After the report, plans to reform the law on cohabitation have been put on hold for further research although the human rights lawyer Lord Lester of Herne Hill QC is said to be planning to introduce a Cohabitation Bill this autumn (2008) to give rights to couples who live together. One more observation, this time on the institution of engagement (see manifestly ill-founded case of *Wakefield v United Kingdom* (n 210)). In the past, under common law, engagement agreements in which the parties agree to marry one another, were seen as enforceable contracts. Such contracts later became unenforceable under the Law Reform (Miscellaneous Provisions) Act 1970 on the basis that it was contrary to public policy for people to feel forced into marriages through fear of being sued. Nowadays, engaged couples are treated in the same way as unmarried couples, though engagement and agreement to enter a civil partnership still has legal significance when it comes to property law issues (eg property of an engaged couple or gifts between engaged couples). See further J Herring (above in this footnote) 80.

<sup>273</sup> In the very nature of things cohabitation is likely to play a much less significant role, for example, in assessing whether there is family life as between grandparent and grandchild or between uncle and nephew; see *Singh (Pawandeep) v Entry Clearance Officer (New Delhi)* (n 270) [74] – [79] ('[g]randparents and uncles, after all, however active a role they play in the lives of their grandchildren, nephews and nieces they tend not to live under the same roof with them.'). When compared to the relevant case law of ECtHR (n 243-246), furthermore, English courts seem to have been more willing to assume family life exists with wider relatives; see *Re R (A Child) (Adoption: Disclosure)* [2001] 1 FCR 238 (Fam). See also J Herring (n 272) 332.

<sup>274</sup> See the relevant ECtHR case law cited in n 233-236.

<sup>275</sup> For the theoretical discussion on two main approaches of English courts to the 'take into account Strasbourg jurisprudence' obligation under s 2 HRA (the one providing for the more generous interpretation of ECHR rights, the second one offering no less but certainly no more than what the ECtHR requires), see A Clapham, 'The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights' in P Alston (ed), *Promoting Human Rights Through Bills of Rights* (OUP, Oxford 1999); R Masterman, 'Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?' [2004] PL 725; R Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act' (2005) 54 ICLQ 907; E Wicks, 'Taking Account of Strasbourg?' (2005) 11 EPL 405; or J Lewis, 'The European Ceiling on Human Rights [2007] PL 720.

<sup>276</sup> See the relevant ECtHR case law cited in n 208-209 and 211. It needs to be remembered, however, that the ECHR is a living instrument and given a continuing European and wider international trend of

family life to exist in both scenarios.<sup>277</sup> Coincidentally the day the House of Lords heard this case, the new piece of domestic legislation - Civil Partnership Act 2004 (CPA) - came into force and accorded same-sex relationships all the rights, responsibilities, benefits and advantages of civil marriage save the name, and removed thus the legal, social and economic disadvantages suffered by same-sex couples.<sup>278</sup> This has been a further significant step forward in establishing legal protections for same-sex partnerships in the UK.<sup>279</sup> True, civil partnership is not the same as *marriage* (emphasis added),<sup>280</sup> yet by providing same-sex partnerships with protection against discriminatory treatment, the status of same-sex couples in the UK has been legally formalised.<sup>281</sup>

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social acceptance of same-sex couples, one can well anticipate some further developments in this area in ECtHR case law; see my comments in n 209.

<sup>277</sup> *M v Secretary of State for Work and Pensions* [2006] UKHL 11; [2006] 2 AC 91 (according to dissenting Baroness Hale of Richmond the long-standing relationship between two persons of the same sex as such has the quality of family life). See also *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27; [1999] 3 WLR 1113 (HL); or *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557. Of course, the issue is far from settled: *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam); [2007] 1 FLR 295 [75] in reaction to the House of Lords' decision in *M v Secretary of State for Work and Pensions*. One can understand the importance of such a 'more generous' interpretation by looking at legal consequences stemming thereof: where, (as may well be the case of same-sex couples being covered by the notion of family life), a State, which is not required by the ECHR to do so, proceeds to legislate in a particular field, then, if such legislation falls within the sphere of an ECHR right Article 14 will apply (*Petrovic v Austria* (App no 20458/92) (1998) 4 BHRC 232). Such argument has in fact been already used (though unsuccessfully) in *Wilkinson v Kitzinger* (above and also n 280 below).

<sup>278</sup> SM Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (OUP, Oxford 2006).

<sup>279</sup> It should be remembered that in 2003 most of the remaining discriminatory sexual offences targeting gay men, including buggery, gross indecency and soliciting were repealed by the Sexual Offences Act 2003; see the section on '2.2 Private life in English law' and its part that talks about one's right to sexual life and sexual activity of one's choice.

<sup>280</sup> Some argue, nevertheless, that there is in fact little difference between a civil partnership and marriage other than that a civil partnership cannot be registered by means of a religious ceremony or in a religious building and, unlike marriage, does not require an act of consummation in order for it to be valid (see Sir Mark Potter P in *Wilkinson v Kitzinger* (n 277) [88]: 'marriage in all but name'; or Baroness Hale of Richmond, writing extra-judicially, in 'Homosexual Rights' (2004) 2 Child and Family LQ 16: 'marriage in almost all but name'). The reasons why the UK did not take the simple step of allowing same-sex marriage rather than creating a brand new institution of civil partnership seem to be essentially political; see J Herring (n 272) 62.

<sup>281</sup> The stated objective of the CPA was to put same-sex couples on an equal footing before the law as married couples (see Women and Equality Unit, 'Civil Partnership - a Framework for the Legal Recognition of Same-sex Couples' (June 2003) available at <[http://www.equalities.gov.uk/research/pubn\\_2003.htm#cp\\_responses](http://www.equalities.gov.uk/research/pubn_2003.htm#cp_responses)> accessed 30 September 2008). Whether this purpose was truly achieved has been the subject of some discussion. There are basically two main challenges to the claim that the two institutions are in practice analogous and non-discriminatory. These concern symbolism and conflicts of law. The former is based on the premise that the exclusion of same-sex partners from such a socially significant institution as marriage, and their placing within a distinct and separate category, sends out the social signal that their relationships are somehow inferior. The latter, conflicts of law related challenges raise the question whether same-sex couples are treated fairly in relation to conflicts issues under the CPA. The distinction between marriage and civil partnership has been directly at issue in the recent case of *Wilkinson v Kitzinger*

As for the question of whether or not family life exists between a child and an adult (most commonly parent), the English approach is again broadly similar to Strasbourg.<sup>282</sup> Thus, also in English law there is a strong presumption of family life between children and their natural (biological) parents regardless of whether or not the latter are married.<sup>283</sup> It has been also established that mere time gaps in contact between child and parent will not themselves be sufficient to indicate that the normal family tie has been broken.<sup>284</sup> However, sometimes the relationship between the child's unmarried parents will be so exiguous that there will be no ipso jure family life between the natural father and his child. In other words, without the real existence of close personal ties, the genetic link alone will not suffice, of itself, to create family life between a natural father and a child born out of wedlock.<sup>285</sup> Where it concerns a

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(n 277). The domestic judge held that not recognising a same-sex marriage as marriage but merely as civil partnership did not constitute a breach of Article 8 (and Article 12 ECHR) taken in conjunction with Article 14 ECHR as the legal consequences of marriage and civil partnership were virtually identical and thus the differential treatment only extended to the name of the relationship and the symbolism attached to it. Therefore the differential treatment was considered justified. Whether this position will remain tenable in the light of possible future developments in this field in Strasbourg remains to be seen. For the time being, however, the prospects of a successful future Strasbourg challenge to the marriage/civil partnership distinction are uncertain. The Strasbourg applicant would have to show, first of all, that same-sex partners fell within the scope of family life, and secondly, that the distinction did not serve a legitimate aim in terms of protecting the traditional notion of the family. And even then, it seems probable that the UK would gain the benefit of any doubt concerning the distinction at Strasbourg level under the margin of appreciation. See L Crompton, 'Civil Partnership Bill 2004: the Illusion of Equality' [2004] Family L 888; JM Scherpe, 'Legal Recognition of Foreign Formalised Same-Sex Relationships in the UK' (2007) 4 Intl Family LJ 196; N Bamforth, 'The Benefits of Marriage in All but Name'? Same – sex couples and the Civil Partnership Act 2004' (2007) 19 Child and Family LQ 133; or R Kirby, 'Equal Treatment of Same-Sex Couples in English Family Law?' (2007) 37 Family L 413.

<sup>282</sup> See the relevant ECtHR's reasoning adopted in cases referred to in n 211-214, n 216, n 237-242.

<sup>283</sup> Family life was held not to exist, for example, between a potential mother and her future child whose embryo had not yet been transferred to her as according to the judge 'an embryo is not a person or an individual with rights under the Convention.', see *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727; [2005] Fam 1 [181] (note that when the case later reached Strasbourg, the ECtHR considered it also solely under the private life limb of Article 8 ECHR, see *Evans v United Kingdom* (n 491)). See also M Amos (n 11) 376.

<sup>284</sup> As the child matures, however, the burden of ongoing family life by reference to substantive links or factors grows. Thus, it will only be in exceptional cases - where further elements of dependency involving more than the normal emotional ties can be shown - that family life will be established between an adult child and his/her parents, see *Mthokozisi v Secretary of State for the Home Department* [2004] EWHC 2964; 2004 WL 3022197. Here, an analogy can be drawn with the ECtHR case of *Šijakova v Former Yugoslav Republic of Macedonia* (n 219).

<sup>285</sup> As it was pointed out in *Re H; Re G (Adoption: Consultation of unmarried fathers)* [2001] 1 FCR 726; [2001] 1 FLR 646 [38] with references to the relevant ECtHR case law: 'Not every natural father has a right to respect for his family life with regard to every child of whom he may be the father ... [th]e application of Article 8(1) will depend upon the facts of each case.'. See also *Leeds Teaching Hospital NHS Trust v A* [2003] EWHC 259 (QB); [2003] 1 FCR 599 in which it was held with respect to a sperm donor who thus became the biological father of the twins that '[t]he provision of sperm to enable a woman to become pregnant through artificial insemination did not, of itself, engage Article 8 of the Convention, since the existence of family life depended on close personal ties.'

potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth.<sup>286</sup> In order to establish the demonstrable interest in and commitment to the child, a parent's cohabitation or lack of cohabitation with the child will often be significant yet not decisive.<sup>287</sup> The existence of 'family life' argument has been increasingly used by unmarried fathers in the UK to support their claim that under the current legal regime of the acquisition and loss of parental responsibility, ie their rights directly relating to the child's day-to-day upbringing,<sup>288</sup> they are - in comparison with married fathers - unjustifiably discriminated against.<sup>289</sup> As to the acquisition of parental responsibility, under English law, unlike a married father, an unmarried father has no parental responsibility that would automatically

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<sup>286</sup> *Re J (Adoption: Contacting Father)* [2003] EWHC 199 (Fam); [2003] 1 FLR 933 in which the court openly followed the reasoning of the ECtHR in *Lebbink v Netherlands* (n 239) [36].

<sup>287</sup> *Re H; Re G (Adoption: Consultation of unmarried fathers)* (n 285) (with respect to facts in *Re H* in particular); or *Singh (Pawandeep) v Entry Clearance Officer (New Delhi)* (n 270) [80] – [81]. A similar approach had already been taken by the ECtHR in *Berrehab v Netherlands* (n 241) [21].

<sup>288</sup> Parental responsibility is one of the key concepts in English family law that refers to the rights, duties, powers and responsibilities and authority which by law a parent of a child has in relation to the child and his property (s 3 Children Act 1989). There is, however, no precise legislative definition of the notion of parental responsibility as it is not possible to list all the responsibilities, rights, powers, and so forth, that accompany parental responsibility (for an attempt to compile such a list (though not exhaustive), see N Lowe and G Douglas, *Bromley's Family Law* (10<sup>th</sup> edn Butterworths, London 2007)). Judicial understanding of parental responsibility is not clear either. There seem to be tensions in the case law as to whether parental responsibility is about real decision-making power, or whether it is of more symbolic value, recognising a father's commitment to a child (*Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)* [2006] EWHC 2; [2006] 1 FCR 556). What needs to be noted is that even parents without parental responsibility can feed, clothe, educate or play with a child and they have been held to have certain parental rights and responsibilities. Of particular importance is the parental duty to provide financial support. Parents without parental responsibilities have, furthermore, succession rights and they can apply for orders under Part II of the Children Act 1989 (eg for residence, contact and parental responsibility). Parents, with or without responsibility, have a right to reasonable contact with a child who is in local authority care and have a right to be consulted by a local authority when it reviews the child's case. Fathers without parental responsibility have, however, no say in a child's education, religion, medical care, adoption (note, however, discussion in n 304) or naming of the child neither can they represent the child in legal proceedings or invoke the international child abduction rules (for a more comprehensive list of rights and responsibilities that a father without parental responsibility lacks, which a father with parental responsibility has, see J Herring (n 272) 385-386). Since parental responsibility does not, on its own, denote or confer legal parenthood, it can be held by more than one person in respect of a particular child (s 2(5) Children Act; sometimes parental responsibility is awarded in recognition of actual parenting (as in *Re G (Children) (Residence: Same Sex Partner)* [2006] UKHL 43; [2006] 4 All ER 241) and sometimes it is only about conferment of status (as in *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)* (see above)).

<sup>289</sup> As shown above, a large number of ECtHR cases under the 'family life' limb of Article 8 ECHR specifically concern the rights of fathers of children born out of wedlock that have a considerable impact on their relationship with such children, see n 242.

arise as a result of his being the child's natural parent.<sup>290</sup> This was claimed to represent an unlawful discrimination on the grounds of marital status in a breach of Article 14 in conjunction with Article 8 in the case *Balbontin v United Kingdom* in which, however, the ECtHR held that since

... the relationship between unmarried fathers and their children varies from ignorance and indifference to a close stable relationship indistinguishable from the conventional family based unit that there exists an objective and reasonable justification for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights.<sup>291</sup>

Furthermore, English family law provides alternative ways in which an unmarried father who has established family life with his children can acquire parental responsibility, by, for example, entering into an agreement with the mother or by obtaining an order of the court.<sup>292</sup> Notwithstanding the ECtHR's acceptance of the lack of automatic acquisition of parental responsibility for unmarried fathers in English law as being objectively and reasonably justified, by conferring on English courts the power to revoke acquired parental responsibility only with respect to unmarried fathers, English law may well be said to discriminate against unmarried fathers. The fact of the matter is that under the current provision of the Children Act 1989 (CA) except for adoption, a freeing order, a child reaching the age of majority or the death of a child, a married father can never lose parental responsibility under the current domestic rules. Unmarried fathers in the same position, however, can also lose

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<sup>290</sup> The father may acquire parental responsibility by marrying the mother, registering as the father of the child on the birth certificate, entering into a parental responsibility agreement with the mother, applying to the court for a parental responsibility order and obtaining it, being appointed guardian, obtaining a residence order from the court, or by adopting the child. See s 2, 4, 5(6) and 12(2) Children Act 1989. The reasoning behind the rule that unmarried fathers are not given automatic parental responsibility was explained in *Re H (Minors) (Local Authority: Parental Rights) (No.3)* [1991] Fam 151 (CA) [218]. It should be furthermore noted that a father (unlike the mother) has a choice to father a child with or without parental responsibility and a mother cannot force the unmarried father of her child to have parental responsibility against his wishes. The mother does not have the option of giving birth to a child but not taking parental responsibility. This may well be part of the cultural and social assumptions that it is natural for mothers to care for children, but this is not expected of fathers. See *J Herring (272)* 336.

<sup>291</sup> *Balbontin v United Kingdom* (n 242). The same reasoning but with respect to Scots law was employed in *McMichael v United Kingdom* (n 242).

<sup>292</sup> See n 290 for the ways in which parental responsibility can be acquired by fathers in the UK. As seen above in n 242, the approach taken by the ECtHR in this field seems to be that as long as the national law provides for a procedural route by which a father can establish his right to parental responsibility and as long as the decision-making process itself provides the father with the requisite

it as a result of a court order to that effect, made on the basis of the application of any person with parental responsibility for the child or on the application of the child (with leave of the court).<sup>293</sup> The reasoning behind this is that if the court has the power to grant an unmarried father parental responsibility, the court may also end it, if it considers the revocation to be for the child's welfare. Yet, it is quite difficult to imagine that the abovementioned justifications for discrimination with respect to the acquisition of parental responsibility based on the wide varieties of relationships between unmarried fathers and their children<sup>294</sup> or the need to identify the meritorious fathers who might be accorded parental rights<sup>295</sup> would enable the UK government to justify in front of the ECtHR the discrimination that concerns revocation of the father's parental responsibilities.<sup>296</sup>

English courts recognise that the relationships between the child and his or her adopter are in principle of the same kind as the family relationships protected by Article 8.<sup>297</sup> By removing a child from his or her natural family and making him or her a full legal member of the new family, adoption severs the legal link the child had with its natural parents. Self-evidently, if a natural parent has a right to respect for

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protection of his interests while taking into account the competing interests of the mother and child, there is no breach of Article 8 ECHR.

<sup>293</sup> See s 4 CA. What it means in practice can be seen from the following paradoxical situation: while in *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048 (Fam) the unmarried father lost his parental responsibility after he caused severe non-accidental injuries to his very young baby, there was no question of the married father losing his parental responsibility in *Re M (A Minor) (Care Order: Threshold Conditions)* [1994] 2 AC 424 (HL) after he had murdered the mother in the presence of the children. See K Standley (n 272) 288.

<sup>294</sup> *Balbontin v United Kingdom* (n 242).

<sup>295</sup> *McMichael v United Kingdom* (n 242).

<sup>296</sup> Especially when seen in the light of the more recent ECtHR case law, such as *Sahin v Germany* or *Sommerfeld v Germany* referred to in n 242 ; or, in the context of Article 1 of Protocol I ECHR, *PM v United Kingdom* (App no 6638/03) (2006) 42 EHRR 45 (held that that it was contrary to Article 14 in conjunction with Article 1 of Protocol I ECHR not to allow an unmarried father who was paying financial support for his child to claim the tax advantages that a divorced father could). See also K Standley (n 272) 288; I Karsten, 'Atypical Families and the Human Rights Act: the Right of Unmarried Fathers, Same Sex Couples and Transsexuals' (1999) 2 Eur Human Rights L Rev 195; S Gilmore, 'Parental Responsibility and the Unmarried Father - a New Dimension to the Debate' (2003) 15 Child and Family LQ 21. Differences between the legal position of married and unmarried fathers with respect to the acquisition and the loss of parental responsibility, argue others, are in practice of less importance than it might at first appear. J Herring (n 272) 343-344 and the discussion on parental responsibility in n 288 above.

<sup>297</sup> *Eg Singh (Pawandeep) v Entry Clearance Officer (New Delhi)* (n 270) in which family life was held to exist within the meaning of Article 8 ECHR in relation to children who had already been the subject of a completed (albeit in the latter case unrecognised) inter-country adoption, notwithstanding that they were still living in their country of origin, had not been able to enter their adoptive parents' country and accordingly had never cohabited with their adoptive parents (compare with *Pini v Romania* (n 248)).

their family life - where it is proposed that a child be adopted - the adoption of that child will constitute an interference with the right.<sup>298</sup> It has been already shown above that given such a serious and irreversible legal effect of adoption, the ECtHR underlines the State's legal obligation to ensure that the rights and interests of children and their natural parents are properly considered before any adoption can be justified under Article 8(2). In particular, the procedural aspects of Article 8 have been interpreted by the ECtHR to require that the natural parents are fully involved throughout the decision making and at every stage of the adoption process.<sup>299</sup> The English law on adoption is laid down in the Adoption and Children Act 2002 (ACA).<sup>300</sup> Pursuant to the ACA, the adoption can only be effected by court order known as an adoption order that extinguishes the parental responsibility of the child's natural parents and transfers it to the adopters making the adopted child the child of the adopters for all purposes.<sup>301</sup> Before any adoption order is made, however, the

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<sup>298</sup> *C (a Child) v XYZ County Council* [2007] EWCA Civ 1206; [2008] HRLR 9 [30].

<sup>299</sup> Eg *W v United Kingdom* (n 254) or ECtHR case law cited in n 249. That is not to say, however, that prospective adopters do not also enjoy important protection under the ECHR as well. Although neither under the ECHR nor in English law have potential parents the right to adopt a child, they have rights to a proper, lawful and non-discriminatory decision-making process on the part of the public authority, eg *R (on the application of Thomson) v the Minister of State for Children* [2005] EWHC 1378; [2006] 1 FLR 175 and see ECtHR's decisions in *Fretté v France* (n 77) and *EB v France* (n 77) and n 247 above. Furthermore, where the child has been placed with the prospective parents (adopters) preceding the adoption, it is possible that the adopters will be able to demonstrate in practice real existence of close personal ties of sufficient constancy to give rise to de facto family life with the child, see by analogy *Singh (Pawandeep) v Entry Clearance Officer (New Delhi)* (n 270) and *R (on the application of Thomson) v the Minister of State for Children* (above in this footnote) and compare to the ECtHR's judgments in *Pini v Romania* (n 248) and *Lebbink v Netherlands* (n 239). With respect to above-mentioned judgments of ECtHR in *Fretté v France* and *EB v France* it is likewise interesting to note that English courts tended until comparatively recently to be troubled by the prospect of lesbians or gay men as would be adopters (or as biological parents in child custody cases). See, generally, *Re D (An Infant) (Adoption: Parent's Consent)* [1977] AC 603 (HL); *Re P (A Minor) (Custody)* (1983) 4 FLR 401 (CA); or *B v B (Minors) (Custody, Care and Control)* [1991] 1 FLR 402 (Fam). Even if a parent's sexuality was not automatically determinative of the outcome, courts repeatedly expressed their concern about the possibility of 'corruption' or stigmatization). However, the ACA now formally allows for adoption orders to be applied for on the same basis by same and opposite sex couples living together in 'enduring family relationships' (it followed more sympathetic judicial treatment of same sex partnerships: *Re W (Adoption: Homosexual Adopter)* [1998] Fam 58 (Fam); *G v F (Contact and Shared Residence: Applications for Leave)* [1998] 2 FLR 799 (Fam)) and the CPA 2004 includes civil partners within the ACA. See further J Herring (n 272) 640; or N Bamforth (n 281).

<sup>300</sup> The CA is also relevant in this context as it provides alternatives to adoption which may better suit some children. As for the ACA (came fully into force on 30 December 2005), it has radically reformed the English adoption law which was contained in the Adoption Act 1976. A major aim of the reformed adoption law is to promote the greater use of adoption, improve the performance of adoption services and put children at the centre of the adoption process by aligning adoption law with the relevant provisions of the CA so as to ensure that the child's welfare is the paramount consideration in all decisions relating to adoption (see Department of Health, 'Adoption - A New Approach. A White Paper' (Cmnd 5017, 2000)).

<sup>301</sup> S 46 and s 67 ACA.



adoption agency (a local authority or an approved adoption agency) must place a child for adoption with the would-be adopters for what is, in effect, a trial period,<sup>302</sup> during which it determines the extent to which the parental responsibility of the natural parents (which continues until the adoption order is made), or prospective adopters, is to be restricted.<sup>303</sup> At both stages, ie the stage of a child's placement for adoption and the final adoption stage aiming at the issuance of an adoption order, the family life of the natural family is clearly at stake. Thus, to ensure that natural parents' interests and wishes are taken into account and that they are properly involved in the adoption proceedings as such, the ACA establishes that natural parents will have to give their consent before any such placement or adoption order.<sup>304</sup> Yet, not all their decisions as to whether or not to consent to adoption will be respected. Since under the ACA the child's welfare has become the paramount consideration throughout the whole adoption process,<sup>305</sup> the courts are empowered under the ACA to dispense with the

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<sup>302</sup> At this point, it is important to make a distinction between agency and non-agency adoptions. While the former are adoptions where the child is placed for adoption by an adoption agency, the latter include adoptions by relatives, step-parents and private foster parents. In case of non-agency adoption, the prospective adopters cannot apply for adoption unless the child's home has been with them for a certain period as specified in the ACA (see s 42).

<sup>303</sup> S 25(4) ACA. Once the child has been placed for adoption, contact issues are governed by s 26 of ACA.

<sup>304</sup> S 47 ACA. It should be noted that only the consent of a parent with parental responsibility is required (s 52(6) ACA). Accordingly, consent of unmarried fathers without parental responsibility (n 288 above) is not required. That does not mean, however, that unmarried fathers without parental responsibility are ignored (see ECtHR case law in this context cited in n 249). The domestic courts have made it clear that, while there is no requirement to obtain consent of an unmarried father without parental responsibility, where such a father has family life for the purposes of Article 8 ECHR and unless there are very good reasons for not doing so, he should normally be notified of the adoption proceedings and involved sufficiently to protect his interests: see *Re R (Adoption: Father's Involvement)* [2001] 1 FLR 302 (CA); *Z County Council v R* [2001] 1 FLR 365 (Fam); *Re H*; *Re G (Adoption: Consultation of unmarried fathers)* (n 285); *Re M (Adoption: Rights of Natural Father)* [2001] 1 FLR 745 (Fam); *Re J (Adoption: Contacting Father)* (n 286); *Re C (Adoption: Disclosure to Father)* [2005] EWHC 3385 (Fam); [2006] 2 FLR 589, or *Birmingham CC v S, R and A* [2006] EWHC 3065 (Fam); [2007] 1 FLR 1223. Apart from a judge having discretion to join a father in adoption proceedings even where there is no marriage and no parental responsibility, furthermore, Rule 108 of the Family Proceedings (Adoption) Rules 2005 now expressly enables a local authority in circumstances such as this to 'ask the High Court for directions on the need to give a father without parental responsibility notice of the intention to place a child for adoption.', see *Re L (Adoption: Contacting Natural Father)* [2007] EWHC 1771 (Fam); [2008] Fam Law 9. See also C Bridge and H Swindells, *Adoption: the Modern Law* (Family Law, Bristol 2003); H Swindells and C Heaton, *Adoption: the Modern Procedure* (Family Law, Bristol 2006).

<sup>305</sup> Section 1(2) of the ACA provides that whenever a court or adoption agency is coming to a decision regarding the adoption, the child's welfare, throughout his or her life, is the paramount consideration. This was introduced to align adoption law with the CA (see n 321 below and the related main text). There is no definition of welfare but there is a list of factors which should be considered regarding the child's welfare, the so-called welfare checklist (s 1(4) ACA). That list encompasses the child's ascertainable wishes and feelings, his or her particular needs, the life-long effect of becoming an adopted person, characteristics such as age, sex and background including harm (in the meaning of the

parental consent requirement if they come to the conclusion that it is in the child's best interests to proceed with adoption.<sup>306</sup> Although, on the surface, the ACA's wording appears to sit comfortably with the Strasbourg jurisprudence and the ECtHR's stance that in cases of this kind particular weight should be attached to the best interests of the child,<sup>307</sup> the way in which English courts tend to apply the paramountcy principle with respect to the child's welfare rule when considering the issue of dispensing with parental consent, as an elevation of the child's interest above those of the parents so that it becomes the sole determining factor, nevertheless questions its overall ECHR-compliance.<sup>308</sup> Indeed, in the eyes of ECtHR no one rule

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CA) and his or her relationships with relatives and other significant individuals. Consideration must be given to the ability and willingness of relatives (including the child's mother and father) or others, as carers, their wishes and feelings regarding the child and the likelihood and value of any ongoing relationship they may have with him or her. See C Bridge and H Swindells (n 304) ch 7; or H Swindells and C Heaton (n 304) ch 1.

<sup>306</sup> See s 52 ACA (to be more precise s 52 ACA lays down two grounds for dispensing with consent to adoption and to placement for adoption and the welfare of the child is one of them. The second one is the impossibility of finding a parent (or a guardian) or their incapability of giving consent). It is interesting to compare the current situation with that under the former adoption law. While under the Adoption Act 1976 the welfare of the child was to be taken into account, it was not necessarily the paramount criterion and parents' objections to adoption could only be overridden if they were unreasonably withholding their consent to the adoption. C Bridge and H Swindells (n 304) 111.

<sup>307</sup> Eg *Chepelev v Russia* (n 249).

<sup>308</sup> *Re S (A Child) (Adoption Order or Special Guardianship Order)* [2007] EWCA Civ 54; [2007] 1 FLR 819 [71]. See also *Re KD (a Minor) (Ward: Termination of Access)* [1988] AC 806 (HL) (their Lordships' clear rejection of any argument that the rights of parents could overrule the interests of children) as well as the well-established definition of the term paramount in *J v C* [1970] AC 668 (HL). Academic commentators have for some time now observed that there has been a marked failure on the part of the judiciary to engage with the requirements of the HRA and the jurisprudence of the ECtHR in interpreting the paramountcy principle with respect to the child's welfare rule. Attention has been drawn on several occasions, and in several contexts, to the difference between the requirements of Article 8 ECHR and the paramountcy principle as interpreted by English judges. The ECHR requires the court to take into account the interests of parents which do not have a direct bearing upon a child's welfare. There is also, as Herring points out, a qualitative difference between applying the welfare principle and Article 8: the former is a determination of fact, the latter a matter of judgment. Under the ECHR, an outcome (ie respect for family life) is prescribed unless overridden by considerations specified in Article 8(2), and interference with a participant's right must be proportionate. As Bonner observes, this clarifies that, while the rights and interests of the child may justify interference with a parent's right, they cannot do so automatically, and there 'will be some circumstances in which interference with the Article 8(1) rights of the parent(s) will be so far-reaching that only particularly strong and weighty welfare considerations will be sufficient to satisfy the 'fair balance' or 'reasonable relationship' requirement of Article 8(2). Indeed, Choudhry and Fenwick have argued convincingly that a dispute in which Article 8 is engaged may require what they have termed a 'parallel analysis', in which the participants start presumptively equal and the Article 8 rights of each must be considered in accordance with the requirements of that article, then weighed against each other. In this process, the child's interests may be privileged but they cannot be automatically decisive. Developing these ideas, Fortin has suggested that the child's interests should be privileged in the sense that they should hold sway when the parties' interests are evenly balanced. She argues that the courts should offset the dilution of the paramountcy principle by articulating children's interests as rights, and using them to counter those of their parents. This would, as a result, avoid the rather loose discretion-based decision-making produced by the welfare principle. In other words, the family judiciary will be required to concentrate far more on a legal analysis of the child's own position than on the extensive summaries of

(that of the best interests of the child included) prevails automatically and that if the best interests of the child do prevail it is only after a detailed consideration of all the parties' rights and interests on a presumptively equal footing has taken place.<sup>309</sup> Notwithstanding the House of Lords' full confidence that the balancing exercise under Article 8 does not differ in substance from the balancing exercise under the conventional welfare approach,<sup>310</sup> therefore, the answer to the question whether the paramountcy principle, combined with a welfare test to dispense with consent, meets the requirements of a fair balance or a sufficient involvement for the parents in the decision-making process on adoption to protect their rights and interests, is not so straightforward.<sup>311</sup>

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expert evidence that have become a feature of their current decision-making. See J Herring, 'The Human Rights Act and the Welfare Principle in Family Law: Conflicting or Complementary?' [1999] Child and Family LQ 223; S Harris-Short, 'Re B (Adoption: Natural Parent) – Putting the Child at the Heart of Adoption?' [2002] Child and Family LQ 325; D Bonner, H Fenwick and S Harris-Short, 'Judicial Approaches to the Human Rights Act' (2003) 52(3) ICLQ 549; S Choudhry, 'The Adoption and Children Act 2002, the Welfare Principle and the Human Rights Act 1998 - a Missed Opportunity?' (2003) 15 Child and Family LQ 119; S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 OJLS 453; J Fortin, 'Accommodating Children's Rights in a post Human Rights Act Era' (2006) 69 MLR 299; S Gilmore, 'Re B (Contact: Child Support) - Horses and Carts: Contact and Child Support' (2007) 19 Child and Family LQ 357; or S Harris-Short, 'Making and Braking Family Life: Adoption, the State and Human Rights' (2008) 33 J of L and Society 28.

<sup>309</sup> 'Article 8 ECHR requires that the domestic authorities strike a fair balance between the interests involved and that, in the balancing process, particular importance should be attached to the best interests of the child, which, *depending on their nature and seriousness*, may override those of the parents' (emphasis added), *Chepelev v Russia* (n 249) (and case law cited therein). See also, *A and Byrne and Twenty-Two Television v United Kingdom* (App nos 32712/96 and 32919/96) EComHR 23 October 1997 (admissibility decision), in which the EComHR gave consideration to a challenge to the UK paramountcy principle itself where it came into conflict with the mother's right to respect for her family life and although the clash of rights which arose was resolved in favour of the Article 8 rights of the child (although the case was not argued in those terms), it was also, most significantly, made clear that even where, in domestic terms, the paramountcy principle had applied, the child's welfare does not take automatic priority over a parent's independent Article 8 rights. Cf case of *Yousef v Netherlands* (n 541 below) [73] (in the context of paternity proceedings) to which many refer to claiming that in this case it was confirmed by the ECtHR that, under the ECHR, where there the rights of children and parents conflict, the rights of children will be the 'paramount consideration'. True, this was very close to the interpretation of the welfare principle by the English courts, yet fell short of holding that the welfare of the child is the sole consideration. Most subsequent cases, furthermore, have not used the term 'paramount' but preferred to say that particular weight should be attached to the best interests of the child, see afore-mentioned case of *Chepelev v Russia* and case law referred to therein.

<sup>310</sup> The House of Lords has directly faced the question whether the paramountcy of welfare principle and the rights protected by the ECHR are consistent in *Re KD (a Minor) (Ward: Termination of Access)* (n 308); *Dawson v Wearmouth* [1999] 2 AC 308 (HL); or *Re B (Adoption: Natural Parent)* [2001] UKHL 70; [2002] 1 WLR 258 [31].

<sup>311</sup> J Herring summarizes the number of indirect ways in which the interests of parents are (but only to some extent) taken into account in adoption proceedings: this is by, for example, the very fact that the court has to decide that the child's welfare 'requires' the consent to be dispensed with (by judging the child's welfare, which includes his mental, physical and emotional needs, and not just his wishes and feelings) demonstrating that this is not just a simple welfare test but one which would not be met in marginal cases; or parental interests are to some extent taken into consideration by virtue of specific

The CA is central to the law concerning the care of children in the UK and covers both ‘private’ family law (ie governing arrangements and disputes between individuals within families)<sup>312</sup> and ‘public’ family law (ie when local authorities intervene in family life).<sup>313</sup> It is believed to be inherent to the philosophy underlying the CA that the State, whether in the guise of a local authority or the court, shall not intervene with the family life of children and their families unless it is necessary to do so.<sup>314</sup> Naturally, despite the recognised need to respect the right to family life, if, having investigated situations, a local authority considers that the child is, or is likely to suffer, significant harm, it can apply for a care order.<sup>315</sup> A care order allows the local authority to remove the child from its home and gives it parental responsibility for the child.<sup>316</sup> When deciding whether or not to make a care order the court must be satisfied that one of the ‘threshold criteria’ in s 31(2) CA is proved. This includes the

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reference to those interests in the checklist, such as s 1(4)(f)(ii) ACA (see J Herring (n 272) 650 – 651)). Do these ways however sufficiently meet the requirements of a fair balance under Article 8 ECHR?

<sup>312</sup> For the relevant ECtHR case law on private law family proceedings concerning residence and contact disputes when parental relationships break down, see n 250-252.

<sup>313</sup> For the relevant ECtHR case law on public law family proceedings, see n 253-256

<sup>314</sup> See *B v B (a Minor) (Residence Order)* [1992] 2 FLR 327 (Fam) [328].

<sup>315</sup> S 31 CA. In fact, a local authority has the choice in a situation when a child is being, or is at risk of being, harmed. Instead of applying for a care order, it can decide to apply for a supervision order. As with the care order, under the supervision order the child will be under the watch of a designated officer of the local authority, yet the child will stay at home. Unlike the care order, furthermore, the supervision order does not give parental responsibility to the local authority. Since the supervision order is clearly a less serious intervention in family life than a care order, making a care order where a supervision order would be adequate to protect the child would offend the principle of proportionality and be a breach of the right to family life under Article 8 ECHR (*Re B (Children) (Care: Interference with Family Life)* [2003] EWCA Civ 786; [2003] 2 FLR 813 [34]; or *X Council v B and Others* [2004] EWHC 2015 (Fam); 2004 WL 3205118 [42]). The parents’ failure to co-operate is supposed to be very cogent evidence that a care order rather than a supervision order may be needed, or, at the very least, that there is a continuing risk of harm to the child (see *Re O (A Child) (Supervision Order: Future Harm)* [2001] EWCA Civ 16; [2001] 1 FLR 923 [24] – [28]). Another principle to note is that the court has the power to make a different order from the one applied for (see *Re C (Care or Supervision Order)* [1999] 2 FLR 621 (Fam)). In the more general context of English care law, one should bear in mind that local authorities have a statutory duty to investigate the family situation when allegations or suspicions of abuse are raised by other agencies or members of the public and so the expectations are that local authorities would take reasonable steps to prevent children within their areas suffering ill-treatment or neglect, take reasonable steps to reduce the need to bring proceedings for care or supervision orders and also to reduce the need to bring any family or other proceedings which might lead to children being placed in their care. So one starts from the point of view of these preventive duties to help children in need (see Part III of CA) and care or supervision orders should only be applied for as a last resort, if preventive arrangements cannot adequately protect a child (see *Oxfordshire CC v B* [1998] 3 FCR 521 (Fam) [74]).

<sup>316</sup> True, parents will retain their parental responsibility, yet they will not be able to exercise it in a way which would be incompatible with the local authority’s plans (s 33(3) CA). For a discussion on the issue of parental responsibility in general, see n 288 above.

proof that the child is suffering, or likely to suffer, significant harm; and that the harm is attributable to the care given, or likely to be given, not being what it would be reasonable to expect a parent to give.<sup>317</sup> When the threshold criteria are met the court proceeds to the welfare (or disposal) stage.<sup>318</sup> Here, the court must decide whether it is in the best interests of the child to make a care order as requested by the local authority.<sup>319</sup> As with ‘private law’ orders made under s 8 CA,<sup>320</sup> so with care orders made under s 31(1) CA, the paramount consideration in making this decision is the child’s welfare.<sup>321</sup> As indicated above, the interpretation of section 1(1) of the CA 1989, that the child’s welfare shall be the court’s paramount consideration (ie the ‘paramountcy principle’), is a matter of considerable contention between the judiciary and academic commentators,<sup>322</sup> although in the context of public care proceedings this seems to be partially counterbalanced by another well-established principle derived from s 1(5) CA, read in conjunction with s 1(3)(g) CA that the court should adopt a ‘non-interventionist’ or ‘least interventionist’ approach and this should be considered to be in the better interests of the child.<sup>323</sup> While considering whether to make the care order, furthermore, the court has to consider and scrutinise the care plan which

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<sup>317</sup> As proceedings for care orders are civil proceedings, the local authority must prove the facts alleged (threshold criteria) on the basis of civil law standards of proof, ie the balance of probabilities. The more unlikely or improbable the alleged event, the more cogent the proof needed to establish the event. See *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 (HL); or *U (A Child) (Serious Injury: Standard of Proof)* [2004] EWCA Civ 567; [2005] Fam 134.

<sup>318</sup> It should be noted though that crossing the threshold is not a reason for making a care order, see *A Council v B and Others* [2007] EWHC 2395 (Fam); 2007 WL 4736037 [404].

<sup>319</sup> In conducting this exercise, the court must apply the welfare principle s 1(1) CA, the welfare checklist s 1(3) CA, the no-order presumption s 1(5) CA and the no-delay principle s 1(2) CA.

<sup>320</sup> On family breakdown, parents often disagree about the child’s residence and subsequent right to contact. If parents cannot settle a dispute by themselves, they may ask the court to make residence and contact orders under s 8 CA.

<sup>321</sup> There is no definition of welfare but there is a list of factors which should be considered when making decisions about the child’s welfare, the so-called welfare checklist (s 1(3) CA) (compare with the situation in adoption proceedings under the ACA (n 305)). When considering the child’s welfare in the context of ‘private law’ applications under s 8 CA, it has been shown that English courts would not deny a parent a residence (or contact) order simply on the basis of their religious beliefs (*Re R (a Minor) (Residence: Religion)* [1993] 2 FLR 163 (CA) (although the court also made a supervision order in favour of the local authority to ensure the child’s safety)) or sexual orientation (*G v F (Contact and Shared Residence: Applications for Leave)* (n 299)). This approach seems perfectly in line with that of ECtHR (n 250).

<sup>322</sup> There is no need to repeat detailed consideration given to this issue in n 308-311 (and the related main text). It will suffice simply to note that several academics have highlighted the difference between the House of Lords’ interpretation of the paramountcy principle to mean the ‘sole consideration’, and the requirements of Article 8 ECHR; and that case-law evidences some failure or reluctance on the part of the judiciary to engage with this alleged conflict (but see, for instance, *Re B (Care: Interference with Family Life)* (n 315) [34]).

contains the local authority's suggestions as to what should happen to the child while he or she is in care.<sup>324</sup> This is in order to ensure that giving parental responsibility to the local authority will not do more harm than good for the child and, at the same time that the local authority's aim is to reunite a family when the circumstances enable that to be done.<sup>325</sup> As shown above, although the ECtHR has only rarely held that the initial taking of a child into care violates Article 8 (although it has done so in the case of new born babies),<sup>326</sup> it has consistently held that the object of the authorities must be to seek to restore the child to its family as soon as practicable.<sup>327</sup> In addition, it has

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<sup>323</sup> The CA directs the court, when making a decision regarding a child's welfare, to have particular regard to s 1(5) CA, see n 319; already mentioned *B v B (A Minor) (Residence Order)* (n 314) [328] or *Re O (Care or Supervision Order)* [1996] 2 FLR 755 (Fam) [760].

<sup>324</sup> A court can only accept or reject the suggested care plan. It can suggest alternatives to it but it cannot make a care order with certain conditions. So if the local authority refuses to change the care plan, then the court must either refuse to make the order or make the order on the basis of the local authority's plan. Even if the care order is made on the basis of the care plan, however, the local authority is not bound by the plan and can subsequently depart from it. This represents the overall philosophy of the CA to balance powers between courts and local authorities (eg *Birmingham CC v R and others* [2006] EWCA Civ 1748; [2007] Fam 41 [83]). If the court is not satisfied with the appropriateness of the care plan or there are some uncertainties whose nature is such that they should be resolved if possible before the court proceeds to make the final care order, the court has the power to make an interim care order under s 38 CA. The power exists when an application for a care order is adjourned (s 38(1)(a) CA) or the court has given a direction to a local authority under s 37 CA to undertake an investigation of a child's circumstances (s 38(1)(b) CA). Thus, the purpose of interim orders is to enable the court to maintain the status quo pending the final hearing, and for it to obtain any information it needs before making a final decision. At the same time, on the basis of an interim care order the local authority gains all the benefits and obligations of a care order: parental responsibility and the child's placement in its care. S 38 CA contains tight limits on the period for which an interim care order has effect: eight weeks initially, thereafter four weeks. The circumstances in which an interim care order ceases to have effect also include the disposal of the application for a care order or a supervision order, in both s 38(1)(a) and s 38(1)(b) cases (eg *S (Children) (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291 [89]; or *Re G (A Child) (Interim Care Orders: Inpatient Assessment)* [2005] UKHL 68; [2006] 1 AC 576). See also J Herring (n 272) 591 – 592 and ch 11.

<sup>325</sup> Eg *Re C & B (Care Order: Future Harm)* [2001] 1 FLR 611 (CA) [33] – [34].

<sup>326</sup> See *K and T v Finland* or *P v United Kingdom* in n 253. In the domestic context, see eg *Re M (Care Proceedings: Judicial Review)* [2003] EWHC 850 (Admin); [2003] Fam Law 479 (a duty of local authority when planning to remove a child at birth to make sufficient arrangements for the mother to breastfeed the baby if she wishes because to prevent her doing so would infringe the mother's and baby's Article 8 rights).

<sup>327</sup> The principle that national care authorities work to support and eventually to reunite the family is an important aspect of positive obligations the ECtHR imposes on States in the context of Article 8 right to family life (see case law cited in n 552-553). As for the positive obligations that the ECtHR imposes on the member States in the context of private law family proceedings (see n 550-551), in the domestic context a mention can be made of the new Children and Adoption Act 2006 which was adopted in order to provide the English courts with new powers to promote contact and enforce contact orders made under s 8 CA. As for the issue of child abduction, it is a criminal offence under the Child Abduction Act 1984. If the child is removed from one part of the UK to another then the situation is dealt with by the Family Act 1986 which enables a court order made under s 8 CA in one part of the UK to be enforced in another part. In cases of an international removal of a child, the international treaties such as the Hague Convention on the Civil Aspects of International Child Abduction 1980 or

stressed that measures which will hinder this, such as prohibiting contact or placing the child a long way away, may well violate Article 8.<sup>328</sup> It is in that context that the English courts are given, under the CA, wide powers to control contact between children and their families not only during the care proceedings when reviewing the care plan<sup>329</sup> but also after, when the care order is granted.<sup>330</sup> Leaving aside the contact issues, however, the English courts are not empowered under the CA to intervene in the way local authorities discharge their parental responsibilities under final care orders.<sup>331</sup> Under the CA, it is for the courts to decide whether to make an order but once the order is made, it is for the local authorities to decide how to implement it.<sup>332</sup> As might be expected, the absence of continuing full supervision by the court of the implementation of care orders by local authorities has raised some human rights concerns especially in cases where local authorities were blamed of infringement of the child's or parents' rights under Article 8 by unilaterally departing from the original care plan.<sup>333</sup> English courts, however, justify the present law (whereby the local authority has power to decide how to bring up a child in its care free from court supervision) by arguing that the local authority is the public body with immediate knowledge of the circumstances of the case, in particular the child concerned, with considerable experience in this field and is thus best placed to take prompt action to safeguard the interests of the child as the situation fluctuates and evolves.<sup>334</sup> From the

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the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and Restoration of Custody of Children 1980, to which the UK is party, would apply.

<sup>328</sup> Eg *KA v Finland* (n 552).

<sup>329</sup> *Re K (a Child) (Contact)* [2008] EWHC 540 (Fam); [2008] All ER (D) 159 (Apr).

<sup>330</sup> *Down Lisburn Health & Social Services Trust v H* [2006] UKHL 36; [2007] 1 FLR 121 [33].

<sup>331</sup> '[T]here are limited exceptions to this principle of non-intervention by the court in the authority's discharge of its parental responsibility for a child in its care under a care order. The court retains jurisdiction to decide disputes about contact with children in care: section 34. The court may discharge a care order, either on an application made for the purpose ... or as a consequence of making a residence order ... The High Court's judicial review jurisdiction also remains available.', see *S (Children) (Care Order: Implementation of Care Plan)* (n 324) [24].

<sup>332</sup> If a care order is made, statutory responsibility for the child passes to the local authority, and the court has no further power (unless expressly provided by statute) to interfere with the local authority's powers; see *A v Liverpool City Council* [1982] AC 363 (HL). The issue of contact between the child in care and his or her family is therefore one of the few issues concerning children in care where the court has a major say (n 329-331).

<sup>333</sup> Eg *S (Children) (Care Order: Implementation of Care Plan)* (n 324).

<sup>334</sup> Apart from this practical argument, there is also the argument that an increase of judicial supervision would also have the effect of promoting a defensive attitude and risk inappropriate focus on short term goals in a care plan and excessive rigidity in care plans. All too often, more importantly, the local authorities lack the resources to implement care plans and will have to balance the needs of all children (and other vulnerable people) in their area with the financial resources they have available (see J Herring (n 272) 633). In fact, this is an area in which member States enjoy a wide margin of appreciation before the ECtHR; eg *K and T v Finland* (n 253) [154].

ECtHR's point of view, a particularly strong point is the fact that public care legislation establishes legal safeguards to protect the rights of all involved in general, and to prevent possible misuse of local authority's power in particular. It, for example, provides for regular reviews of each of its looked after child.<sup>335</sup> Aiming to promote partnership and cooperation between local authorities and children's families (and others interested in child welfare), furthermore, it prohibits a local authority from making significant changes in the care plan without properly involving the parents in the decision-making process and without giving the parents a proper opportunity to make their case before a decision is made.<sup>336</sup> Finally, it should be reminded that a local authority is a public authority for the purpose of HRA and as such it can only lawfully exercise parental responsibility for a child in a manner that is consistent with the substantive and procedural requirements of Article 8. If a local authority fails to discharge its parental responsibilities properly, and in consequence the rights of the parents or children under Article 8 are violated, the parents (or indeed children through a Children's guardian to whom their cases have been referred by an Independent Reviewing Officer (IRO))<sup>337</sup> may bring proceedings against the authority

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<sup>335</sup> Under s 26 CA, a local authority has a duty to review the case of each child in its care at regular intervals. One of the required reviews is that every six months the local authority must actively consider whether it should apply to the court for a discharge of the care order. The detailed requirements are set out in the Review of Children's Cases Regulations 1991 (SI 1991/895), 2004 (England (SI 2004/1419) and Wales (SI 2004/1449)) and 2007 (Wales (SI 2007/307)). See also D Cullen and M Lane, *Child Care Law: A Summary of the Law in England and Wales* (5<sup>th</sup> edn BAAF, London 2006).

<sup>336</sup> *ibid.* As for the procedural requirement inherent in Article 8 ECHR in the context of care proceedings more general (n 254-256), English courts have firmly stated that Article 8 requires that parents are properly involved in the decision making process before care proceedings are launched, during the period when the care proceedings are on foot (*Re L (Care: Assessment: Fair Trial)* [2002] EWHC 1379 (Fam); [2002] 2 FLR 730; or *B (a Child) (Care Proceedings: Expert Witness)* [2007] EWCA Civ 556; [2007] 2 FLR 979), and also after the care proceedings have come to an end and whilst the local authority is implementing the care order (*Re M (Care: Challenging Decisions by Local Authority)* [2001] 2 FLR 1300 (Fam); *C v Bury Metropolitan Borough Council* [2002] EWHC 1438 (Fam); [2002] 2 FLR 868); (*Re G (Care: Challenge to Local Authority's Decision)* [2003] EWHC 551 (Fam); [2003] 2 FLR 42; *Re C (A Child)* [2007] EWCA Civ 2; [2007] 1 FLR 1957)

<sup>337</sup> S 26 CA provides for the appointment of an IRO by the local authority. The IRO is independent of the line management involved in the child's case and his/her role is to participate in statutory reviews, monitor the authority's functions and refer the case to the Children and Family Court Advisory Support Service (CAFCASS) if appropriate. Referral allows a Children's guardian to take any necessary action through the courts by acting for the child either in proceedings for judicial review or free-standing claims under the HRA. The IRO may also refer a child to a solicitor directly if legal assistance is considered more appropriate. See also n 335. These were the amendments of CA adopted to fill previously existing legislative gaps identified by the House of Lords in *Re S (Children) (Care Order: Implementation of Care Plan)* (n 324).



under s 7 HRA.<sup>338</sup> One must admit, after all, on the basis of all these justifications and arguments, up to now the UK government has not had any major difficulties in persuading the ECtHR that there are no failings in the current English care system that would make it incompatible with Article 8.<sup>339</sup>

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<sup>338</sup> Eg *Re M (Care: Challenging Decisions by Local Authority)* (n 336). There are a number of other routes of appeal for those seeking to challenge local authority decisions on grounds other than human rights. These include internal complaints procedures, judicial review on the grounds of unreasonableness or illegality or procedural impropriety, Secretary of State's default powers to intervene in an extreme case, the Local Government Ombudsman in case of maladministration, civil actions under the law of tort, private orders under s 8 CA, or inherent jurisdiction which the court can use in exceptional cases to protect the child's welfare. For more details, see J Herring (n 272) 621-626.

<sup>339</sup> See admissibility decisions in *C v United Kingdom* (App no 14858/03) ECtHR 14 December 2004; or *C and D v United Kingdom* (App no 34407/02) ECtHR 31 August 2004.

### 3.3 Family Life: Conclusion

To conclude, the right to respect for family life protects only such relationships that have a necessary quality of family life. At the adult-adult level, family life exists between married partners (but not in marriages of convenience: *Yavuz v Austria*); partners in the de facto relationships (*Johnston v Ireland*) and post-operative transsexuals partners (*X, Y and Z v UK*). There is currently no family life recognised in homosexual/lesbian relationships (*X and Y v UK*). At the child-adult level, family life exists between a child and his biological parents (even if not married) though a mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship is insufficient (*JRM v Netherlands*). The determination of the legal relationship between a child born out of wedlock and its natural father, furthermore, will be considered under the private rather than family life limb of Article 8 (*Mikulić v Croatia*). Relationships between an adoptive parent and an adopted child have undoubtedly the quality of family life (having no right to adopt under Article 8, prospective adopters have rights – but only under the private limb of Article 8 – to a proper and non-discriminatory decision making process: *EB v France*). Whether family life exists in non-parental blood relationships depends on the circumstance of the particular case (*Boyle v UK*). In the light of the ‘social rather than biological reality’ approach adopted in Strasbourg, family life can also exist in non-blood adult-child relationships (*X, Y and Z v UK*). In certain circumstances, an existing family life may be brought to an end once children become independent adults (*MIR v Switzerland*). Once family life is shown to exist, any interference with it will have to be justified (Article 8(2)). In this respect, in the context of custody/access, care or adoption proceedings, first of all, the ECtHR has particularly stressed the importance of the proper involvement of the natural parents in the decision-making process itself. Pursuant to the settled immigration case law, furthermore, family life must not be broken by a deportation decision unless such interference fulfils criteria listed in Article 8(2) (*TP and KM v UK*; when removal is not aimed at breaking up the family (covers the whole family without splitting it up), the case will be examined under the private rather than family life limb of Article 8: *Slivenko v Latvia*). Deportation will be justified if the ECtHR finds that the family unit can be preserved by establishing the family’s residence in the country to which the member(s) of the family have been expelled (*Amara v Netherlands*). Where an exclusion order is

imposed on aliens convicted of criminal offences, the ECtHR applies the so-called 'Boultif principles' to determine the necessity of their deportation (*Boultif v Switzerland*). Finally, regulating restrictions on surnames may also violate Article 8 in conjunction with Article 14 if they are based on sex discrimination (*Burghartz v Switzerland*) as can the domestic court's interpretation of wills when unreasonable and blatantly inconsistent with the prohibition of discrimination under Article 14 in conjunction with Article 8 (*Pla v Andorra*).

From the above analysis of English law in the context of family life as understood by the ECtHR, the following brief conclusion can be made. As far as the types of relationships which are regarded as 'family life' relationships, English law seems to be in accord with the ECtHR's approach. One cannot, however, say that this accord is more a result of a direct impact of ECHR law developments than the natural result of the way English law happened to develop. More interestingly, there have been some signs that English judges may well be ready to develop a more generous interpretation of the scope of family life (for example, a discussion about family life between same-sex partners in *M v Secretary of State for Work and Pensions*). Such an approach would in fact be very much in line with the Strasbourg system which provides only a floor not a ceiling of rights and could provide domestic human rights law with an opportunity to influence the future development of ECHR law. In the context of adoption, however, English courts have stuck to a traditional domestic legal doctrine of the 'welfare principle' when dispensing with parental consent. Although the ECtHR requires that the needs and interests of all family members be considered and weighed against each other in the decision-making process and that no one interest should automatically prevail, domestic courts thus continue to give primacy to the perceived interests of the child, thus producing rather loose discretion-based decisions. Notwithstanding the ECtHR's findings in *Balbontin v UK*, further complications may arise in future with respect to the polemic issue of discrimination of unmarried as against married fathers when it comes to the possible revocation of acquired parental responsibility especially in the light of *Sahin v Germany*. A certain impact of ECtHR law on English family and care law can nevertheless be noticed in connection with the enhancement of procedural safeguards in care proceedings (*Re S (Children) (Care Order: Implementation of Care Plan)*) and later amendments made to s 26 CA).

## 4 Home

### 4.1 Home under the ECHR

#### *4.1.1 What is not Home and what does not constitute an Interference with one's right to it: a First Stage*

The Convention organs have developed an autonomous notion of home under Article 8 in the same 'case-by-case' way as they did with the notions of private and family life. Similarly, as in the case of private and family life, there is no such thing as one 'all-inclusive' definition of the notion of home under Article 8. Notwithstanding a prima facie broad scope of the term 'home', from relevant case law, one can deduce that the following meanings of home fall outside Article 8's scope as interpreted by the ECtHR.

Pursuant to ECtHR's case law, in order for premises to be a home, it is not necessary for a person to have a proprietary interest in them.<sup>340</sup> Nor are such interests, however, sufficient of themselves to constitute a home. For a place to be considered someone's home, the existence of sufficient continuing links between the person and the place must be clearly present. In *O'Rourke v United Kingdom*,<sup>341</sup> the ECtHR expressed significant doubts over whether or not the applicant's links with the hotel room, which he occupied for less than a month, were sufficient and continuous enough to make it his home at the time of his eviction. Trying to avoid answering the difficult question of what the precise scope of the notion of home was under Article 8, however, on the assumption that they did, the ECtHR went on to conclude that the applicant's eviction from the hotel following complaints about his behaviour there, including allegations of nuisance and assault on female residents, was justified under Article 8(2) anyway. Another situation which was excluded from the scope of home under Article 8 was that of *Loizidou v Turkey*.<sup>342</sup> After her marriage in 1972, the applicant had moved to

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<sup>340</sup> Note, however, that where a person enjoys a property right in relation to a house, any possible interference with that right will (also) be considered under Article 1 of the first Protocol ECHR, which guarantees the right to peaceful enjoyment of possessions.

<sup>341</sup> (App 39022/97) (2001) ECtHR 16 June 2001 (admissibility decision).

<sup>342</sup> (App no 15318/89) (1997) 23 EHRR 513 [GC]. The case is one of the multitude of cases that have arisen as a consequence of the Turkish occupation of northern Cyprus in 1974 during which the northern Cyprian authorities refused to allow displaced Greek Cypriots to return to their homes thus

Nicosia in Cyprus and had made her home there ever since. However, she had planned to live in one of the flats in Kyrenia in northern Cyprus whose construction had begun at the time of the Turkish occupation of northern Cyprus in 1974. As a result of the occupation, it had been impossible to complete the work and subsequent events had prevented her from returning to live in what she considered as her home town. For its part, the ECtHR held that:

... the applicant did not have her home on the land in question. In its opinion it would strain the meaning of the notion “home” in [a]rticle 8 ... to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives.<sup>343</sup>

Accordingly, there had been no interference with the applicant's rights under Article 8.<sup>344</sup> In the same context, in the case of *Iordanou v Turkey*,<sup>345</sup> the ECtHR held that the applicant could not claim that as a result of Turkish occupation of northern Cyprus, her Article 8's right to respect for her home under ECHR was violated in respect of land or a house in which she had grown up and where the family had its roots but where she had not lived since 1963, ie ten years before the occupation occurred. In other words, the ownership was not sufficient to constitute a home under Article 8 when, at the same time, there were no sufficient continuing links with the property in question. More recently, in *Akimova v Azerbaijan*,<sup>346</sup> the ECtHR reconfirmed its previous case law by holding that the apartment which the applicant never occupied, never lived in for any period of time and did not move her belongings to, could not be considered as her home within the meaning of Article 8. The mere fact that the disputed apartment had been allocated to her under the state housing policy and her mere intention to move into the apartment in the future, without any other significant links to the apartment in question, was not a sufficient basis to hold that the apartment constituted a home for the purposes of Article 8.

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making the continuation of their family, social and community life impossible. See *Cyprus v Turkey* (App no 25781/94) (2002) 35 EHRR 30 [GC].

<sup>343</sup> *ibid* [66].

<sup>344</sup> Compare with *Xenides-Arestis v Turkey* (App no 46347/99) ECtHR 22 December 2005 (in which the ECtHR observed that the applicant's situation differed from that of the applicant in *Loizidou v Turkey* since unlike Mrs Loizidou, the applicant had actually lived in her home in Farmagusta, to which her access had been prevented by Turkish military forces).

<sup>345</sup> (App no 46755/99) ECtHR 25 June 2002 (admissibility decision).

<sup>346</sup> (App no 19853/03) ECtHR 12 January 2006 (admissibility decision).

Searches of residential or business premises will normally fall within the scope of Article 8. In *X v Belgium*,<sup>347</sup> however, the EComHR faced the question of whether a police search of the applicant's car for evidence of crime was covered by Article 8. Holding that home connoted what its literal meaning in English implied and that it was not to be arbitrarily interpreted,<sup>348</sup> a search of a car parked in a public street could not be, according to the EComHR, equated to a search of a house for the purposes of Article 8 and the issue was incompatible *ratione materiae*.<sup>349</sup> In a slightly different context, in *RL and M-JD v France*,<sup>350</sup> the applicants, who were restaurateurs in Paris, claimed that police officers had entered the dining room of their restaurant (business premises) after one of the police officers had indicated that the applicant should join them and the latter had refused to do so. Although the main disagreement between the parties was whether or not it was at the invitation of the applicant, who did not wish to join police officers in the corridor, that the police officers entered the restaurant dining room to interview him, the ECtHR concluded that it did not really matter for, in those circumstances in any event, the applicants could not maintain that the police officers' entry to the premises of their restaurant constituted a violation of their right to respect for their home. Similarly, in *Leveau v France*,<sup>351</sup> the ECtHR reiterated that the notion of home could be interpreted to apply to business premises. It did not mean, however, that an unannounced veterinary inspection of the buildings used to house the applicants' pigs could be viewed to constitute a search of business premises or a house search. The ECtHR clearly stated that:<sup>352</sup>

... some limits must be set to this broad interpretation of the "home" and dynamic interpretation of Article 8, to avoid flying in the face of common sense and completely subverting the intentions of the authors of the Convention. Hence, it is

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<sup>347</sup> (App no 5488/72) (1974) 45 CD 20.

<sup>348</sup> The ECHR is equally authentic in English and French texts. Where these texts differ, the meaning which best reconciles the texts, however, having regard to the object and purpose of the treaty must be adopted (Article 33(4) of the Vienna Convention). The French version of the ECHR uses the word domicile, which denotes both a person's home and, for the specific purposes of civil law, the place where he has his principal establishment. For the further impact of such an interpretation on broadening the scope of Article 8 ECHR to also cover business premises and professional person's offices, see n 368-369.

<sup>349</sup> The EComHR went on to consider the matter also under the private life notion of Article 8 ECHR but held that the search was legitimate and justified under Article 8(2).

<sup>350</sup> (App no 44568/98) ECtHR 18 September 2003 (admissibility decision).

<sup>351</sup> (App nos 63512/00 and 63512/00) ECtHR 6 September 2005 (admissibility decision).

<sup>352</sup> *ibid.*

clear that a farm specialising in pig production and housing several hundred pigs can scarcely be described as a “home”, or even as business premises ...

Accordingly, the applications were held to be incompatible *ratione materiae* with the provisions of the ECHR.<sup>353</sup>

To answer also the question of what does not constitute an interference with the right to respect for home under ECHR, in *Sparrenlöv v Sweden*,<sup>354</sup> in which the applicant alleged, inter alia, that the decision to award half her estate to her former husband after they had divorced, violated her right to respect for her home in Article 8. The EComHR held, however, that the impugned judgment did not give any indications as to who should eventually be allowed to stay in the house. In such circumstances, it found no indication of any interference with the applicant's right to respect for her home and this part of her application was held to be manifestly ill-founded.

In the specific context of business premises and Article 8, in *Schuschou v Austria*,<sup>355</sup> the applicant complained about the entry of her inn, whose rooms were intended to be rented to guests, by two police officers who had been instructed to verify the abode of a person of Turkish citizenship against whom a residence prohibition had been issued. Although the notion of home was held to extend to certain business premises and the applicant's particular situation was found to fall within the ambit of Article 8, having regard to the purpose of the police visit to the applicant's inn and particularly the absence of any coercive measures with a view to enforce a search for the Turkish citizen or to arrest him, the EComHR found that the events complained of did not amount to an interference with her right to respect for her home within the meaning of Article 8.

Another example of manifestly ill-founded complaint is *Hellström v Sweden*,<sup>356</sup> the applicant was employed by the municipality to carry out a project with the aim of

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<sup>353</sup> The notion of home, furthermore, does not to apply to issues concerning rents or rights and obligations deriving from the lease. In *Langborger v Sweden* (App no 11179/84) (1990) 12 EHRR 416, Mr Langborger rented an apartment and signed the lease according to which the Tenants' Union had the power to negotiate, on his behalf, the amount of the rent for the flat in which he lived. Being dissatisfied with the rent, he later claimed that the Tenants' Union's power was incompatible with the requirements of his right to respect for his home because the rights and obligations deriving from the lease were, in his view, rooted in the notion of home. The ECtHR unanimously held, however, that this issue did not come within the scope of home under Article 8 ECHR.

<sup>354</sup> (App no 19026/91) EComHR 30 June 1993 (admissibility decision).

<sup>355</sup> (App no 22446/93) EComHR 16 January 1996 (admissibility decision).

theoretically and practically examining the possibilities of using a certain pedagogical method in a comprehensive school. However, after a couple of months, on the basis of the School Board's decision, his project was abandoned. The applicant complained, inter alia, that the effect of that decision interfered with his right to respect for his home since in order to find a new job he had to leave the town and, as the events there affected his possibilities of finding work elsewhere, he and his family had to move twice. The EComHR, however, responded inter alia that although the decision of the School Board might have had repercussions on the applicant's home it could not be considered to have had such effects as to amount to an interference with the applicant's rights under Article 8.

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<sup>356</sup> (App no 13348/87) EComHR 12 July 1989 (admissibility decision).



#### 4.1.2 The scope of Home Protection: a Second Stage

The ECHR's home is an autonomous concept which does not depend on classification under domestic law.<sup>357</sup> As indicated above, whether or not a particular factual habitation (rather than an intended one) constitutes a home which attracts the protection of Article 8 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place,<sup>358</sup> without being limited only to those places which one owns,<sup>359</sup> which are lawfully occupied or which have been lawfully established.<sup>360</sup> It has also been established that home may extend to a professional person's office or other business premises<sup>361</sup> as well as to secondary homes.<sup>362</sup>

As to the most common interferences with the right to respect for home, one can start with case law on the legitimacy of searches of premises constituting home (either the home or business/professional premises) and subsequent seizure of property and/or documents.<sup>363</sup> In general, the issues concern two of the justification criteria laid down in the second paragraph of Article 8, mainly the requirements that such searches be lawful and attended by adequate procedural safeguards against arbitrariness and abuse, and that they be proportionate. As to adequacy of procedural safeguards, the ECtHR has been particularly keen on stressing the importance (although not the

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<sup>357</sup> For the wider discussion on the scope of home protection under Article 8 ECHR, see relevant secondary literature referred to in n 12.

<sup>358</sup> *Gillow v United Kingdom* (App no 9063/80) (1989) 11 EHRR 335 (in which it was held that although the applicants had rented out their house, which they originally built as a home for themselves, while being absent from it for almost nineteen years, they had nevertheless in the circumstances retained sufficient continuing links with the house for it to be considered their home for the purposes of Article 8 ECHR and had a right to live there when they decided to return).

<sup>359</sup> Just as the ownership is not sufficient of itself to constitute a home, its existence is not in any way necessary for Article 8 ECHR to apply. *Mentes v Turkey* (App no 23186/94) (1998) 26 EHRR 595 [73].

<sup>360</sup> Although not being decisive for the issue of the scope of the 'home' notion, ie its applicability of specific facts of the case, the question of lawfulness will undoubtedly be relevant in assessing the justification of any interference under Article 8(2). See *Connors v United Kingdom* (App no 66746/01) (2005) 40 EHRR 9 [86], discussed later in the text (n 394 and 397).

<sup>361</sup> *Buck v Germany* (App no 41604/98) (2006) 42 EHRR 21 (in which the word home was held to include the registered office of a company run by a private individual); *Niemietz v Germany* (n 54 and n 70) (which dealt with the legitimacy under the ECHR of police searches and seizures of a lawyer's home office for the purpose of obtaining evidence in the criminal case against the lawyer's client); or *Chappell v United Kingdom* (App no 10461/83) (1990) 12 EHRR 1 (in which the ECtHR found that the right to respect for one's home applies to premises that were used simultaneously as an individual's residence and as an office for that same individual's limited liability company).

<sup>362</sup> Although having an alternative place to live may weaken one's claim to a home, it is not at all a complete bar to recognition of a house as a home under Article 8 ECHR. A Buyse (n 14) (citing *Demades v Turkey* (App no 16219/90) 31 July 2003).

necessity) of the existence of judicial authorisation for the actions of search and seizure.<sup>364</sup> Yet, the fact that judicial warrant has been obtained has not always been sufficient to comply with the requirement of procedural safeguards under Article 8, especially when such a warrant was drawn in terms which were too broad.<sup>365</sup> As to the proportionality in search cases, the circumstances of each case must be considered in order to determine whether, in the concrete case, the interference was proportionate to the legitimate aim pursued. In *Keegan v United Kingdom*,<sup>366</sup> for example, police officers investigating armed robberies had obtained a warrant to search a house at which the mother of a suspect had lived, and which the suspect had been known to give as his address. However, in the course of time, the residents of the house changed and when the police entry occurred, the applicants, a family with four young children, had been living at the address for about six months having no connection whatsoever with any suspect or offence. The ECtHR, first of all, noted that the exercise of powers to interfere with home (and private life) must be confined within reasonable bounds to minimise the impact of such measures on the personal sphere of the individual guaranteed under Article 8. It then applied this principle to this present case and observed that although the police did not act with malice but indeed with the best of intentions (which was not decisive under the ECHR anyway given its purpose to protect an individual against abuse of power, however motivated or caused), there was no reasonable basis for their action in breaking down the applicants' door early one morning while they were in bed. The ECtHR admitted that there might have been relevant reasons, but, as in the circumstances they were based on a misconception which could, and should, have been avoided with proper precautions, they could not be regarded as sufficient. Accordingly, resulting police action, which had caused the

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<sup>363</sup> In search and seizure case law, an interference with the right to respect for one's correspondence has often been invoked. See chapter (5) Correspondence.

<sup>364</sup> *Funke v France* (App no 10828/84) (1993) 16 EHRR 297 (which involved consideration of the legitimacy of search of the applicants' homes by customs officers who had very wide powers, while, at the same time, there was no requirement for a judicial warrant in domestic law). See also *Gutu v Moldova* (App no 20289/02) ECtHR 7 June 2007 (in which the quality of domestic law was in question as it did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion and powers conferred on public authorities when conducting home searches so as to ensure to individuals the minimum degree of protection to which citizens were entitled under the rule of law in a democratic society).

<sup>365</sup> *Ernst v Belgium* (App no 33400/96) (2004) 39 EHRR 35 (in which the various search warrants were held to be drafted in broad terms as they gave no information about the investigation in question, about the precise places to be visited or about the items to be seized and thus conferred wide powers on the investigators).

<sup>366</sup> n 106.

applicants considerable fear and alarm, could not be regarded as proportionate and therefore justified under Article 8(2).<sup>367</sup> Talking about search and seizure case law under Article 8, one should mention the ECtHR's decision in *Société Colas Est v France* accommodating the view of including legal persons among those able to seek protection under the ECHR.<sup>368</sup> Building on that dynamic interpretation of the ECHR, in this French case, which concerned the seizure of documents on the premises of a limited company, the ECtHR for the first time expressed the view that Article 8 could be construed, in certain circumstances, as including a right to respect for a company's registered office, branches or other business premises.<sup>369</sup>

Frequently, an interference with the right to respect for one's home has involved physical destruction of one's house. In *Bilgin v Turkey*, for instance, it was the deliberate burning of the applicant's home and possessions by the security forces, thus depriving the applicant of his livelihood and forcing him and his family to leave the place, which was held to constitute grave and unjustified interference with the applicant's right to respect for his private and family life and home (and also to the peaceful enjoyment of his possessions).<sup>370</sup> The denial of a right to access to the home

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<sup>367</sup> See also *Kučera v Slovakia* (App no 48666/99) ECtHR 17 July 2007 (where the applicant was confronted by a number of specially trained masked policemen at the front door of his apartment very early in the morning who, having aimed submachine guns at him, had entered his flat without his consent and where, at the same time, there were no safeguards incorporated in domestic law in order to avoid any possible abuse in such circumstances and to ensure the effective protection of a person's rights under Article 8 ECHR); or *McLeod v United Kingdom* (App no 24755/94) (1999) 27 EHRR 493 (where the police did not take steps to verify whether the applicant's ex-husband had the right to enter her house, notwithstanding his genuine belief, and did not wait until her return, though in the light of her absence from the house, there was a corresponding reduction of the risk of disorder or crime).

<sup>368</sup> (App no 37971/97) (2004) 39 EHRR 17. See also commentary on the case itself JT Lang and C Rizza, 'The Ste Colas Est and Others v. France Case: European Court of Human Rights Judgment of April 16, 2002' (2002) 23 ECLR 413.

<sup>369</sup> In its reasoning, the ECtHR relied on *Niemietz v Germany* (n 54 and 70) and *Chappell v United Kingdom* (n 361). In the same manner, the right to respect one's correspondence has been extended to cover legal persons in *Wieser and Bicos Beteiligungen GmbH v Austria* (App no 74336/01) ECtHR 16 October 2007; or *Association for European Integration and Human Rights and Ekimdzhiiev v Bulgaria* (App no 62540/00) ECtHR 28 June 2007. For a discussion on the human rights of companies under the ECHR, see M Emberland, *The Human Rights of Companies* (OUP, Oxford 2006); JT Lang and C Rizza (n 368); or M Emberland, 'Protection Against Unwarranted Searches and Seizures of Corporate Premises under Article 8 of the European Convention on Human Rights: the *Colas Est SA v. France* Approach' (2003-2004) 25 Michigan J Intl L 77. For the wider implications for the EU competition law in this context, see ECJ's decision in Case C-94/00 *Roquette Frères SA v Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes* [2002] ECR I-9011; and relevant secondary literature, such as A Riley, 'The ECHR Implication of the Investigation Provisions of the Draft Competition Regulation' (2002) 51 ICLQ 55; or EM Ameye, 'The Interplay Between Human Rights and Competition Law in the EU' (2004) 25 ECLR 332.

<sup>370</sup> (App no 23819/94) (2003) 36 EHRR 50. See also *Moldovan v Romania* (App nos 41138/98 and 64320/01) (2007) 44 EHRR 16; or *Akdivar v Turkey* (21893/93) (1997) 23 EHRR 143.

constituted a continuing violation by Turkey of Article 8 in *Cyprus v Turkey*<sup>371</sup> whereas in *Prokopovich v Russia* the interference took the form of eviction of the applicant from a flat after the death of her late partner who held tenancy rights to the flat.<sup>372</sup>

It is also clear that decisions within the planning field have a great potential to interfere with the right to respect for home. In *Connors v United Kingdom*,<sup>373</sup> in which the applicant and his family were evicted from the local authority Gypsy caravan site - where they had lived, with a short absence, for some fourteen to fifteen years - due to their unruly conduct on the pitch, with consequent difficulties in finding a lawful alternative location for their caravans, in coping with health problems and young children and in ensuring continuation of the children's education. The applicant was lawfully on the site and complained, inter alia, that the procedural guarantees available to other mobile home sites, including privately run Gypsy sites, and to local authority housing, did not equally apply to the occupation of that site by himself and his family. The ECtHR observed that the case was not concerned with matters of general planning or economic policy but with the much narrower issue of the policy of procedural protection for a particular category of person. On the basis of relevant facts, it found the eviction not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with rights and consequently could not be regarded as justified by a pressing social need or proportionate to the legitimate aim being pursued. There was, accordingly, a violation of Article 8.<sup>374</sup>

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<sup>371</sup> *Cyprus v Turkey* (n 342).

<sup>372</sup> (App no 58255/00) (2006) 43 EHRR 10. See also *Blecic v Croatia* (App no 59352/00) (2006) 43 EHRR 48 [GC] (termination of special protected tenancy of a flat on account of absence during armed conflict; though at the end of the day, the application was by majority of Grand Chamber held inadmissible *ratione temporis*). In this context, see also the case which concerned the right of the homosexual partner of a deceased tenant to take over the lease: *Karner v Austria* (n 208) (in which the applicant had been living in the flat that had been let to his late partner and if it had not been for his gender, or rather, sexual orientation, he could have been accepted as a life companion entitled to succeed to the lease, in accordance with section 14 of the Rent Act).

<sup>373</sup> *Connors v United Kingdom* (n 360).

<sup>374</sup> In short, *Connors* was an exceptional case, depending on a combination of three factors: unjustified discrimination between occupiers of local authority sites and those of private caravan sites; the 'special consideration' required by ECHR law for Gypsies; and lack of suitable procedural means to resolve the factual issues which lay behind the authority's action; the latter was the central issue. The case may be distinguished from *Chapman v United Kingdom* (App no 27238/95) (2001) 3 EHRR 18 (in which there was a wide margin of appreciation, as in that case, it was undisputed that the applicant had breached planning law in taking up occupation of land within the Green Belt in her caravan and claimed, in effect, special exemption from the rules applying to everyone else). Compare also with *Wells v United*

## 4.2 Home in English Law

In the same manner as the ECtHR, English courts seem to interpret the notion of *home* under Article 8 widely, applying a nontechnical test, taking full account of the factual circumstances rather than legal niceties. Thus, home has been defined by English courts as a place where a person lives and to which he returns and which forms the centre of his existence. Whether or not a particular habitation constitutes a home which attracts the protection of Article 8 has depended on the existence of sufficient and continuous links rather than property interests or contractual rights, with a person being able to make his home even in a place where he has no right to be or to have more than one home.<sup>375</sup> Solicitors' and business (company) premises were also considered one's home as were hotel rooms, care homes or Gypsies' caravans.<sup>376</sup>

It has been, however, the way some of the justifications for interferences with one's right to respect for home have been put forward under the HRA that has given rise to much of the litigation in domestic courts and, subsequently, in the ECtHR. The

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*Kingdom* (App no 37794/05) ECtHR 16 January 2007 (admissibility decision) (in which the domestic authorities had acted proportionately and within the margin of appreciation when deciding to convict the applicant of failing to comply with an enforcement notice after he had moved three caravans onto agricultural land he owned; indeed, Article 8 was held not to go so far as to allow individuals' preferences about their place of residence to override the general interest).

<sup>375</sup> *South Bucks DC v Porter* [2001] EWCA Civ 1549; [2002] 1 WLR 1359 (Gypsies who were occupying land in breach of planning control) or *Davis v Tonbridge and Malling BC* [2003] EWHC 1069 (QB); [2003] NPC 63 (travelling showmen occupied and developed a Green Belt site in breach of planning control); *Qazi v Harrow LBC* [2003] UKHL 43; [2004] 1 AC 983; *Leeds CC v Price* (n 111). Concerning the question of multiple homes, see *Wolff v Waddington* (1990) 22 HLR 72; [1989] 47 EG 148 (CA) where it was held, although for the purposes of the Rent Acts rather than from the human rights perspective and yet before the HRA, that it was possible for a person to have more than one home which he occupies as his residence.

<sup>376</sup> As to business (solicitors') premises, see *R (on the application of Miller Gardner Solicitors) v Minshull Street Crown Court* [2002] EWHC 3077; 2002 WL 31962026 (in which the court issued a search warrant pursuant to the PACE 1984 Sch 1 entitling constables to search a solicitor's premises); *Office of Fair Trading v X* [2003] EWHC 1042 (Comm); [2003] 2 All ER (Comm) 183 (in which the Office of Fair Trading applied without notice for search and enter warrants under the Competition Act 1998 s 28(1)(b) with respect to a company suspected of engaging in price fixing). Also to hotel rooms or care homes (hospitals), see *Uratemp Ventures Ltd v Collins* [2001] UKHL 43; [2002] 1 AC 301 (where the House of Lords held that a person's home was a hotel room, which he occupied as a long-term resident, and was no less so just because the person did not cook there); or *R v North and East Devon HA ex p Coughlan* [2001] QB 213; [2000] 2 WLR 622 (health authority's decision to close the home called Mardon House, a National Health Service facility for the long-term disabled, was in breach of Article 8 ECHR and also of a legitimate expectation brought about by a clear promise given by the health authority's predecessor to Miss Coughlan that she should have a home for life at a care home). See also *Johnson v Haverling LBC* [2007] UKHL 27; [2007] NPC 75 (which shows the practical implications of current English case law on the meaning of public authority that result in a situation in which some service users (eg individuals living in *private* care homes) seem to be deprived of a right to an effective remedy for any violation of the right to respect for home under Article 8 ECHR). As to Gypsies' caravans and sites, see case law referred to in n 375 and a further discussion in the main text.

following discussion, therefore, touches upon two seemingly most problematic areas in this regard: (i) entry and search of home by police; and (ii) planning restrictions and possession proceedings with respect to Gypsies' and Travellers' caravan sites.

As far as the first issue is concerned,<sup>377</sup> while the ECtHR has often emphasised that judicial authorisation of search warrants is not necessary in order to render powers of entry and search proportionate, the relatively recent case of *Keegan* is a prime example of the fact that it neither constitutes a sufficient safeguard against the arbitrary use of such powers.<sup>378</sup> As already discussed elsewhere in this thesis,<sup>379</sup> in

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<sup>377</sup> As far as the power of entry is concerned, the background principle in English law is that it is prima facie trespass unless there is lawful authority for the entry. One can lawfully enter another's premises only: (i) with the other's consent, (ii) under a rule of common law, or (iii) under the authority of an Act of Parliament. As to consent, it must be informed, can be express or implied and may be withdrawn at any time; see further *Davis v Lisle* [1936] 2 KB 434 (KB); *Robson v Hallett* [1967] 2 QB 939 (QB); *Faulkner v Willets* [1982] RTR 159 (DC); or *Hobson v Chief Constable of Cheshire* [2003] EWHC 3011; (2004) 168 JP 111. As for lawful entry at common law, s 17(5) and (6) PACE abolished all the rules of common law under which a constable had the power to enter premises without a warrant, apart from the power to enter premises to deal with or prevent a breach of the peace. However, there does still remain a very circumscribed residual common law power to entry (and to search and seize) without warrant that has survived the PACE but is rather limited; see *R (on the application of Rottman) v Commissioner of Police of the Metropolis* [2002] UKHL 20; [2002] 2 AC 692; or *Hewitson v Chief Constable of Dorset* [2003] EWHC 3296; 2003 WL 23145240. Finally, the police and other officials have powers under Acts of Parliament to enter premises without the consent of the occupier, either with or without a judicial warrant. The principal statutory authorisation for the police to enter without a warrant in the course of criminal investigation is at s 17 PACE. The use of the s 17 power has not given rise to great controversy but problems have arisen over the maintenance, by s 17(6), of the common law power of entry to deal with or prevent a breach of peace; see *Mcleod v United Kingdom* (n 367). The main general power for the police to seek a warrant for the purpose of investigating an ordinary offence is s 8 PACE (note that there are other statutory provisions which authorise police and other officials to obtain warrants in order to enter premises (and to search) in the course of criminal investigation, including the Terrorism Act 2000). For a much more detailed discussion on the law of entry (and also search and seizure), see R Stone (n 101).

<sup>378</sup> *Keegan v United Kingdom* (n 106). The point about a warrant is that it requires a degree of independent judicial supervision, exercised prior to the event, of the grounds on which the power to enter (and search and seize) is to be exercised. Thus, the assumption behind the requirement that warrants must in many cases be obtained from a magistrate is that this operates as a safeguard. S 15 and s 16 PACE introduce a number of safeguards in respect of both the issuing and execution of warrants. There are further requirements in Code B (The Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Person or Premises), which supplement the requirements of PACE in a number of ways. In *Keegan v United Kingdom*, the UK government took pains to stress the fact that a judicial warrant in English law was not mere rubber stamping, it not being sufficient for the judge (magistrate) to be satisfied by the officer's oath that he believed the grounds for the warrant but the cause for the belief had also to appear reasonable to him. Furthermore, the grant of warrants was subject to procedural conditions set out in domestic law and warrants could be quashed in proceedings for judicial review. Yet, there has been much criticism of the extent to which a proper scrutiny of police applications for a warrant by magistrates takes place. See SH Bailey, DJ Harris and DC Ormerod (n 11) 244, H Davis (n 11) 114; K Lidstone, 'Magistrates, Police and Search Warrants' [1984] Crim LR 449; and also n 385 below. On the issue of search warrants generally, see also *Cronin v UK* (App no 15848/03) ECtHR 6 January 2004 (admissibility decision) (in which the applicant complained under Articles 6 and 8 ECHR about the lack of written reasons for the issue of a warrant and/or a full record of the hearing. The ECtHR found the application

this case the ECtHR held that the police failed to take basic steps to verify the connection between the address and the offence under investigation when applying for the judicial warrant which then resulted in the police search being disproportionate, causing the applicants considerable fear and alarm, in breach of their Article 8 rights. Even before the ECtHR's decision, still at the domestic level, the fact that when applying for the search warrant proper enquiries had not been made by the police, had been accepted by the Court of Appeal. In this respect, Kennedy LJ stated his position as follows:

... there should never have been an application for a search warrant, but if an application was to be made it is clear to me that much more information should have been provided so as to enable the magistrate properly to exercise his function of deciding whether the operational needs of the police were such as to justify the proposed invasion in the early hours of a private home.<sup>380</sup>

Yet, by applying the law as it was in October 1999,<sup>381</sup> in particular the substantive common law rule that malice is a prerequisite of certain police liability, the Court of Appeal dismissed Keegan's claim by holding that actions for damages against the police at the material time (ie before the entry into force of the HRA) could only succeed where it could be shown that the police had acted with malice (negligence of the kind found in this case did not qualify).<sup>382</sup> When the case got before the ECtHR, it was in requiring proof of malice, the balance of English domestic law was held to

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to be inadmissible because, given the facts, the information laid before the justices contained all the relevant information the applicant might need to challenge the issue of the warrant. The ECtHR did not rule out that in an appropriate case, fuller reasons or a fuller note of the hearing would be necessary to satisfy the procedural requirements of Article 8 ECHR).

<sup>379</sup> The facts of the *Keegan* case are already well known, at approximately 7 am the police, mistakenly believing that an armed robber lived there, forcibly gained entry into Mr and Mrs Keegan's home (they used a metal ram to make a hole in the door), and carried out a search of the premises. On finding no one but Mr and Mrs Keegan and their four children in the house, the police sergeant apologised to them and arranged for repairs to be made to their front door (n 106 and 366).

<sup>380</sup> *Keegan v Chief Constable of Merseyside* [2003] EWCA Civ 936; [2003] 1 WLR 2187 [17].

<sup>381</sup> Since the present case related to events occurring before the implementation of the HRA, the Court of Appeal refused to consider the impact of Article 8 ECHR. It was held that 'if the present case related to events occurring after the implementation of the Human Rights Act 1998 it would have been necessary to consider the impact of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the requirement of proportionality, which may afford an answer to Mr Simbletis submission that there should be no wrong without a remedy, but our task is to apply the law as it was in October 1999 to the facts of this case', (ibid [20]).

<sup>382</sup> The malice requirement is old common law. It is one of the ingredients of the tort of malicious procurement (identified in *Gibbs v Rea* [1998] AC 786 (PC)) and its purpose is to allow the police to act without concern that an honest mistake will expose them to liability. It avoids the risk of claims after unavailing searches. Apart from their claim for damages for the malicious procurement of a search

weigh too heavily in favour of the police, resulting in breach of Article 8 and 13 ECHR. Although the ECtHR agreed with the domestic courts that the police did not act with malice and that they might have had relevant reasons for their actions, it was not a decisive factor to be taken into account as the ECHR was geared to protecting against abuse of power, however motivated or caused. The Court did not accept that a limitation of actions for damages to cases of malice is necessary to protect the police in their vital functions of investigating crime and stressed that the exercise of powers to interfere with home (and private life) must be confined within reasonable bounds to minimise the impact of such measures on the personal sphere of the individual guaranteed under Article 8 which is pertinent to security and well-being. In its response to the ECtHR's findings in *Keegan*, the UK government stated that had the events in this case occurred after October 2000, a claim for damages pursuant to s 7 and s 8 HRA would have provided an effective remedy for the applicants should similar violations of Articles 8 and 13 ECHR arise.<sup>383</sup> True, the HRA substantially fills gaps in the existing remedies, yet statutory suits are subject to a limitation period of twelve months under s 7(5)(a) HRA. In fact, in the light of what has been said in connection with the *Wainwright* case,<sup>384</sup> it is questionable whether the HRA on its own can be considered as a sufficient measure to execute the *Keegan* judgment, especially when the substantive law stays unaltered.<sup>385</sup>

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warrant, the Keegans also sued for trespass, but as the warrant on the face of it was lawful and so the entry pursuant to it was lawful, this was equally unsuccessful.

<sup>383</sup> In this respect, the UK government has also referred to the revised PACE Code B (Code of Practice for Searches of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises), which entered into effect on 1 January 2006 superseding the existing code which has been in operation since 1 August 2004. Paragraph 3.1 of Code B provides guidance on obtaining search warrants and clearly states that before making an application on the basis of information that appears to justify an application, the officer must take reasonable steps to check that the information is accurate, recent and not provided maliciously or irresponsibly, and make reasonable enquiries to establish whether anything is known about the likely occupier of the premises. See the Annotated Agenda (section 4.2) of the Ministers' Deputies of the CoE on their 997DH meeting on 5-6 June 2007 at

[https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH\(2007\)997&Language=lanEnglish&Ver=section4.1public&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH(2007)997&Language=lanEnglish&Ver=section4.1public&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75) accessed 30 September 2008.

<sup>384</sup> See the discussion in connection with *Wainwright v Home Office* (n 105).

<sup>385</sup> Some have argued, for example, that there should be no need to abolish the malice requirement if the procedure for applying for warrants is changed to require judicial inquiry into officers' evidence of reasonable suspicion. If dishonest information is relied on, an action for misfeasance in public office can proceed and malice is then irrelevant: the police can also be prosecuted. If there is insufficient basis for a warrant, it will be refused. Once the warrant is obtained, the police should be protected by the malice requirement; if they misuse the warrant because of an improper motive, only then can they be sued. P Ferguson, 'Malicious Intent' (2006) 156 NLJ 1464 and n 378 above. See also A Roberts, 'European Court of Human Rights: Search Warrant: Compatibility with Articles 8 and 13 of the



The second issue to be dealt with when talking about English law and right to respect for home under Article 8 is the question of planning restrictions and possession proceedings concerning Gypsies and Travellers' caravan sites, in particular the question of security of tenure on official local authority sites. Legally recognised as minority ethnic groups in the UK, Gypsies and Travellers are people who are, or have traditionally been, associated with a nomadic lifestyle.<sup>386</sup> They travel not because they are asocial or anti-social but because travel is part of their cultural heritage.<sup>387</sup> The need to preserve the culture of life of nomads by providing a network of public sites on which Gypsies and Travellers could continue their traditional way of life was the main intention behind the adoption of the Caravan Sites Act in 1968 (hereafter the 'CSA').<sup>388</sup> In order to achieve this aim, the CSA imposed not simply a power but a duty upon local authorities to provide such sites. The *duty to provide* suitable sites for Gypsies and Travellers was allocated to county councils and once established their *management* was undertaken by the district councils, which although having the *power to provide* a site had *no duty* to do so. At the same time, it was decided that the CSA would not provide security from eviction for Gypsies residing on local authority sites, which meant that Gypsy/Traveller residents on local authority sites would be legally licensees, normally with security of tenure limited to four weeks notice after which the court would have no choice but to make a possession order. The authority would not have to provide a reason for its decision to evict Gypsies/Travellers and the court was bound to make an order for possession and to order the eviction of an occupant provided that the four weeks' notice was given. In short, there was no

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European Convention on Human Rights' (2006) 70 J of Criminal L 479; or PW Ferguson, 'Malice and Negligence' (2007) 19 Scots L Times 127.

<sup>386</sup> The term Gypsies and Travellers is used in this thesis to refer to Gypsies (Roma) and Irish Travellers, as well as other nomadic Travellers. Nomadism is the most notable feature of Gypsies and Travellers in the UK. Yet, it is a state of mind rather than a state of faction and includes such persons who on grounds only of their own or their family or dependants' educational or health needs or old age have ceased to travel temporarily or permanently. Gypsies and Travellers are long established in Britain. Their histories and traditions stretch back many hundreds of years. They are recognised ethnic groups for the purposes of the Race Relations Act (1976) as amended by the Race Relations (Amendment) Act 2000, identified as having a shared culture, language and beliefs. Case law established Gypsies as a recognised ethnic group in 1988 (*Commission for Racial Equality v Dutton* [1989] QB 783 (CA)) and Irish Travellers in England and Wales in August 2000 (*O'Leary v Allied Domecq*, County Courts, 29 August 2000, CL 950275).

<sup>387</sup> D Kenrick and C Clark, *Moving On. The Gypsies and Travellers of Britain* (University of Hertfordshire Press, Hertfordshire 2000) 30.

<sup>388</sup> RJF Gordon, *Caravans and the Law* (Shaw and Sons, London 1978).

opportunity for the court to make any assessment of the justification for eviction in order to determine whether the interference with an occupier's rights under Article 8(1) ECHR was justified on an application of Article 8(2). Provided that the relevant formal requirements had been satisfied, the role of the court was purely mechanistic.<sup>389</sup> The absence of a proper security of tenure was said to be justified on the grounds that local authority sites needed greater flexibility in order to accommodate the nomadic lifestyle of occupiers, which envisages shorter stays, and the possibility of retaining a pitch for seasonal travelling.<sup>390</sup> In 1994, however, the duty to provide the sites by local authorities introduced by the CSA was repealed by s 80 of the Criminal Justice and Public Order Act and this in turn resulted in a growing shortage of authorised sites.<sup>391</sup> The resulting lack of provision of suitable sites for

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<sup>389</sup> Only in some very specific circumstance, would there be the right to ask the court to suspend the possession order for up to 12 months (see ss 2 – 4 CSA). Originally, the limited protection under ss 2 – 4 CSA applied only to the occupiers of district council sites, whereas the occupiers of county council sites had no such protection and would be treated as trespassers following the expiry of a basic notice period. Following the decision in *Connors* (n 360), however, s 209 of the Housing Act 2004 was passed as a holding measure, pending more comprehensive examination of the issues. The effect of this amending provision was to confer on occupiers on county council Gypsy sites the same limited protection as those on district council sites; see n 398 below.

<sup>390</sup> Department of the Environment, Circular 49/68 (WO 42/68) *the Caravan Sites Act (1968)*, which accompanied the CSA.

<sup>391</sup> The rationale for removing the duty, as set out in the consultation paper of the Department of the Environment, 'Local Authority Gypsy/Traveller Sites in England' (London 1992), was somewhat paradoxical. The Paper argued that 'the problem has grown faster than its remedy' (para 8) since the number of Gypsy caravans counted had risen from 3,400 in 1965 to nearly 13,500 in January 1992. A key sentence reads 'But site provision is not keeping pace with the growth in the number of caravans, and the Government considers there is no reason why this need should automatically be met by public provision, nor any reason why Gypsies – once settled – should remain on public sites indefinitely' (para 9). The consultation paper referred to changing economic circumstances and 'less need [for travellers] to move from place to place . . . So, while some traveller families retain a yearning to travel the open road, many have settled on permanent sites and a few have moved into permanent housing' (para 11). Drawing attention to the emergence of groups who do not wish to move to sites that are provided (including New Age Travellers and highly mobile Travellers working on the laying of tarmacadam) the Paper concluded that 'The Government considers that for the 1990s a fresh policy is needed which recognises the considerably greater number of travellers and the lessons which have been learned over the last 25 years' (para 12). See also *R v Lincolnshire CC ex p Atkinson* (1996) 8 Admin LR 529 (DC), in which Sedley J referred to the Criminal Justice and Public Order Act as 'Draconic' legislation. He commented that '[f]or centuries the commons of England provided lawful stopping places for people whose way of life was or had become nomadic. Enough common land had survived the centuries of enclosure to make this way of life still sustainable, but by s.23 of the Caravan Sites and Control of Development Act 1960 local authorities were given the power to close the commons to travellers. This they proceeded to do with great energy, but made no use of the concomitant powers given them by s.24 of the same Act to open caravan sites to compensate for the closure of the commons. By the Caravans Act 1968, therefore Parliament legislated to make the s.24 power a duty, resting in rural areas upon county councils rather than district councils. ... For the next quarter of a century there followed a history of non-compliance with the duties imposed by the Act of 1968, marked by a series of decisions of this court holding local authorities to be in breach of their statutory duty, to apparently little practical effect. The default powers vested in central government, to which the

Gypsies and Travellers has been the root cause of most, if not all, of the difficulties that they face living in the UK today. It has led to problems in some areas with unauthorised encampments or unauthorised developments - where Gypsies and Travellers bought land and developed it without planning permission.<sup>392</sup> Furthermore, shortfall in the availability of pitches made families with a pitch reluctant to leave a site and travel, as they might not be able to get a place on another site elsewhere in the country. They either stayed put - or if they moved off to travel - reserved their pitch to come back to later. Indeed, some empirical studies and surveys have indicated that the situation today is very different from what was envisaged at the time of 1968 and most residential sites seem now to be stable and provide long-term accommodation rather than specifically catering for nomadism.<sup>393</sup> The more settled people become, however, the more important tenure seems likely to be to them as long term residents begin to improve and develop their plots, build sheds of their own, and so on. Some may even have acquired mobile homes rather than caravans which would be difficult and expensive to move and re-site. The lack of security of tenure on local authority sites introduced by the CSA, which apart from facilitating nomadism is argued to be a

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court was required to defer, were rarely, if ever used. ... The culmination of the tensions underlying the history of non-compliance was the enactment of ... the Act of 1994 ...'.

<sup>392</sup> The then government policy towards Gypsy caravan sites – Circular 1/94 *Gypsy Sites and Planning* – favoured private over public site provision. 1/94 stated that Gypsies and Travellers should be 'encouraged' to purchase land themselves and apply to legitimise their own sites through the planning system. In theory, requiring Gypsies and Travellers to enter the planning system would seem an equitable approach but, for this policy to be credible, there has to be some real prospect of obtaining planning consent for private sites and this was far from evident. For the domestic courts' case law on the effectiveness of the policy, see, for instance, *Kent CC v Brockman* [1996] 1 PLR 1 (DC); *R v Wood (David)* [2001] EWCA Crim 1395; [2002] 1 PLR 1; *R v Clarke (Thomas George)* [2002] EWCA Crim 753; [2002] JPL 1372; *South Bucks DC v Porter* [2003] UKHL 26; [2003] 2 AC 558; *Wycombe DC v Wells* [2005] EWHC 1012; [2005] JPL 1640 (which went up to the ECtHR as *Wells v United Kingdom* (n 374)). As to the ECtHR case law in this respect, see *Coster v United Kingdom* (App no 24876/94) (2001) 33 EHRR 20; *Beard v United Kingdom* (App no 24882/94) (2001) 33 EHRR 19; *Smith (Jane) v United Kingdom* (App no 25154/94) (2001) 33 EHRR 30; *Lee v United Kingdom* (App no 25289/94) (2001) 33 EHRR 29; *Porter v United Kingdom* (App no 47953/99) ECtHR 30 January 2001 (admissibility decision); *Chapman v United Kingdom* (n 374). For some academic discussion on the relevant domestic case law, see Case Comment, 'Enforcement Notice - Section 179(3) Of The Town And Country Planning Act 1990' [2002] JPEL 219; Case Comment, 'Defence Under Section 179(3) of the Town and Country Planning Act 1990' [2002] JPEL 1372; or Case Comment, 'Enforcement Notice - Prosecution for Failure to Comply - Acquittal - Appeal - whether Magistrates Correctly Applied Statutory Defence under s.179(3) Of The 1990 Act' [2005] JPEL 1640; or C Johnson, A Murdoch and M Willers, 'The Law Relating to Gypsies and Travellers' available at <[http://www.gypsy-traveller.org/pdfs/The\\_law\\_relating\\_to.pdf](http://www.gypsy-traveller.org/pdfs/The_law_relating_to.pdf)> accessed 30 September 2008. For the relevant statistics and the number of caravans on socially rented sites, privately owned sites, on unauthorised developments of land (where Gypsies and Travellers own the land but do not have planning permission), and on unauthorised roadside encampments across England, see <<http://www.communities.gov.uk/housing/housingmanagementcare/gypsiesandtravellers/biannualcount/>> accessed 30 September 2008.

vital management tool in coping with anti-social behaviour on Gypsy sites, has, however, resulted in a situation in which people are in fact on four weeks notice even if they have lived 20 or 30 years in one place, behaved well over that time and have invested in developments of their plot or home. Even long-standing residents are dependent on the continued goodwill of the site operator, to an extent that few of them seem to recognise.<sup>394</sup> The clear absence of security of tenure for Gypsy caravan dwellers on local authority sites is nowadays in stark contrast to the protection that was conferred on occupiers of caravans on privately owned residential sites shortly after the CSA enactment by the mobile Homes Act 1983 or secure tenants of conventional flats or houses provided or managed by local authorities under the Housing Act 1985.<sup>395</sup> As one would expect, there have been a number of cases brought under the HRA concerning Gypsy/Traveller accommodation issues including unauthorised camping, security of tenure and planning enforcement action and the

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<sup>393</sup> *Smith v Barking and Dagenham LBC* [2002] EWHC 2400 (Admin); [2002] 48 EG 141 [29].

<sup>394</sup> A bright example is the case of *Connors v United Kingdom* (n 360). See also Office of the Deputy Prime Minister, 'Local Authority Gypsy/Traveller Sites in England' (London 2003) available at <<http://www.communities.gov.uk/documents/housing/pdf/138832.pdf>> accessed 30 September 2008.

<sup>395</sup> The Mobile Homes Act 1983 confers further protection upon a person who lives in a caravan or mobile home as his only or main residence. Such a person may not be evicted save by court order and on the site owner having established one of the stated grounds, inter alia, that the court is satisfied that the occupier is in breach of the licence agreement and has failed to remedy that breach within a reasonable time and that it is reasonable for the agreement to be terminated. This protection was conferred on occupiers of caravans on privately owned residential sites and also the occupiers of local authority sites. However, section 5(1) excluded land run by the local authority as a caravan site for Gypsies. The effect of this exclusion was analysed by the House of Lords in *Greenwich LBC v Powell* [1989] AC 995 (HL) (in which it held that the intention of the legislature in the Mobile Homes Act 1983 was clearly to exclude from the definition of 'protected site' sites provided by local authorities in discharge of their duty under s 6 of the CSA to accommodate those whom they bona fide believe to be Gypsies and Travellers because they are nomadic for part of the year, notwithstanding that they may establish a permanent residence on the site by returning from year to year; such a site will not become a 'protected site' even if some of the erstwhile nomads, as well they may, give up their nomadic way of life entirely. It would be different if the local authority adopted a policy of offering vacancies on the site to static residents with fixed full time employment). Secure tenants of conventional flats or houses provided or managed by local authorities under the Housing Act 1985 enjoy a similar regime of security of tenure to that conferred upon occupiers of a residential caravan site by the Mobile Homes Act 1983. A number of cases has been brought in the domestic courts challenging the lack of security of tenure on local authority Gypsy sites on the basis that it is discriminatory and incompatible with the HRA, for instance *Somerset CC v Isaacs* [2002] EWHC 1014; [2002] EHLR 18; *Sheffield City Council v Smart* [2002] EWCA Civ 4; [2002] HLR 34 and *Smith v Barking and Dagenham LBC* (n 393 above). In all three cases the courts rejected the arguments of the Gypsies and Travellers, accepting the UK government's position that the introduction of security of tenure would undermine the nomadic lifestyle of the residents and non-nomadic people might take up pitches on sites. See also CM Brand, *Mobile Homes and the Law* (Sweet & Maxwell, 1986 London); M Wilkie, P Luxten, J Morgan and Godfrey Cole, *Landlord and Tenant Law* (5th edn Palgrave Macmillan, Hampshire 2006); or the Memorandum dated 12 March 2007 from the Housing Law Practitioners Association, 'Implementation of Judgments of the European Court of Human Rights and Declarations of Incompatibility' in the

right to respect for home under Article 8 in the UK. Yet, the domestic courts have stopped short of finding any breach of the provisions of the ECHR, having regard inter alia to the perceived existence of legislative safeguards that diminished the impact on the individual Gypsy's rights and to a judicial reluctance to trespass on the legislative function in seeking to resolve the complex issues of economic and social policy to which no straightforward answer was possible.<sup>396</sup> At the European level, however, the ECtHR found that the summary eviction of the Connors family from a local authority Gypsy caravan site, without reasoned justification or sufficient

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Sixteenth Report of the Joint Committee on Human Rights, 'Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights' (n 97).

<sup>396</sup> The deference of the courts in the UK over the years to the legislature in respect of security of tenure for Gypsies is very well known and is based on the principles recently reaffirmed in *Qazi v Harrow LBC* (n 375) (although here the facts were slightly different and rather than the issue of security tenure for Gypsies the case dealt with the question of whether it was lawful for a public authority to recover possession from a former tenant by a procedure which led to possession being granted automatically, or whether the court must always be given an opportunity to consider whether the making of an order for possession would be proportionate). Despite the fact that the principle that the enforcement of a right to possession in accordance with domestic law of property could never be incompatible with Article 8 ECHR, has been slightly modified in the light of *Connors* (see n 360) in *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465, the exception has been only very narrowly defined (see, among others, *Leeds CC v Price* (n 111); *Doherty v Birmingham CC* [2008] UKHL 57; [2008] NPC 91; or *Smith v Buckland* [2007] EWCA Civ 1318; 2007 WL 4266113; see also on deference in generally, eg R Clayton, 'Judicial Deference and "Democratic Dialogue": the Legitimacy of Judicial Intervention under the Human Rights Act 1998' [2004] PL 33; Lord Steyn, 'Deference: a Tangled Story' [2005] PL 346; S Feldman, 'From Deference to Democracy: the Role of Equality under the Human Rights Act 1998' (2006) 122 LQR 53). The presumption being that domestic law strikes a fair balance and is compatible with the ECHR, it is not necessary for the local authority to plead or prove in every case that domestic law complies with the right to respect for home under Article 8 ECHR. If the court, following its usual procedures, is satisfied that domestic law requirements for making a possession order have been met, the court ought to make a possession order unless the occupier shows that, highly exceptionally, he has a seriously arguable case on one of the following two grounds: (i) that the law which requires the court to make a possession order is ECHR-incompatible (a seriously arguable challenge under Article 8 ECHR to the domestic law under which the possession was made, but only where it was possible, with the interpretative aid of the HRA, to adopt the domestic law to make it more compliant); and (ii) that the local authority's exercise of its power to seek a possession order is an unlawful act (when the local authority's decision is open to challenge but only on conventional judicial review grounds (that it is a decision that no reasonable person would consider justifiable, he ought to be permitted to do so provided that the point is seriously arguable) rather than on the grounds that it was contrary to Article 8 ECHR). Thus, while, in theory, where there is a serious challenge to the law under which a possession order is sought, there may be a successful defence under Article 8 ECHR, it seems to be difficult to conceive of a case other than *Connors* itself in which such a public law defence would succeed. This has indeed been very critically approached by the ECtHR in the recent case of *McCann v United Kingdom* (App no 19009/04) ECtHR 13 May 2008 [54], in which the ECtHR endorsed the reasoning of the minority in *Kay*. For some academic discussion, see I Loveland, 'The Impact of the Human Rights Act on Security of Tenure in Public Housing' [2004] PL 594; 'Gypsies, Eviction and the European Court of Human Rights' (2004) 6 Housing L Monitor 11; Ch Johnson, A Murdoch and M Willers, 'Gypsy and Traveller Law Update' Part I and II (2006) July/August Legal Action 20/ 39; DA Burnet, 'Possession Orders and the Impact of Article 8 of the European Convention' (2006) 3 Housing L Monitor 13; I Loveland, 'Much Ado about not Very Much after All? The (Latest) Last Word on the Relevance of ECHR, Article 8 to Possession Proceedings'

procedural safeguards breached the right to respect for home under Article 8.<sup>397</sup> Following *Connors* the UK government indicated their acceptance that certain legislative general measures would be necessary to give effect to this judgment, although some of the shortfalls have already been rectified via the new provisions of the Housing Act 2004, pending more comprehensive examination of the issues.<sup>398</sup> The Caravan Sites (Security) Bill, which was introduced by Julie Morgan MP in Parliament in 2006 and which would have provided Gypsies and Travellers on local authority sites with the same security of tenure as tenants in local authority housing, as well as extending other rights such as succession, assignment and exchange, to them, did not, however, move at its second reading. By including the Housing and Regeneration Bill in the draft legislative programme for summer 2008, the issue of security of tenure is currently again on the Parliament's agenda. It is yet to be seen, however, when and how the issue of security of tenure on official sites is going to be finally resolved in the UK as any minimalist reform of the sort indicated above is hardly going to improve the lot of Gypsies dramatically.<sup>399</sup>

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[2006] JPEL 1457; DA Burnet, 'Travellers and Summary Orders for Possession' (2007) 1 Housing L Monitor 141; or M Langely, 'Benchmarks: Taking Possession' (2007) 104 LS Gaz 35.

<sup>397</sup> *Connors v United Kingdom* (n 360).

<sup>398</sup> Firstly, prior to its amendment by the Housing Act 2004, s 4(6) of the Housing Act 1968 excluded the court's power to suspend the enforcement of a possession order under section 4(1) in the case of possession proceedings brought by local authorities (but for some exceptional cases referred to in n 389). The exclusion of local authority caravan sites from the ambit of the power to suspend under s 4(1) was removed with effect from 18 January 2005 as a response to the ECtHR's decision in *Connors* (n 360). Although the Housing Act 2004 now allows judges to suspend eviction orders against residents of local authority sites on certain terms, these are only very narrowly defined (see n 389). Secondly, the Housing Act 2004 also requires local authorities to include Gypsies and Travellers in the Accommodation Needs Assessment process, and to have a strategy in place which sets out how any identified needs will be met as part of their wider housing strategies. Furthermore, the new Planning Circular 01/2006 *Planning for Gypsy and Traveller Caravan Sites* has introduced the new planning system with an aim to ensure that a systematic and comprehensive approach to the assessment of housing needs and site provision is taken and that sites are included in development plan documents. Finally, the Gypsy and Traveller Sites Grant has made up to £56 million available nationally over the years 2006/2007 and 2007/2008 to fund new provision and refurbish existing sites. See further <<http://www.communities.gov.uk/housing/housingmanagementcare/gypsiesandtravellers/>> accessed 30 September 2008.

<sup>399</sup> The security of tenure offered under the Housing and Regeneration Bill to residents on local authority Gypsy and Traveller sites, which should bring local authority Gypsy and Traveller sites under the Mobile Homes Act 1983, is to be warmly welcomed. Indeed, although the amendment introduced by the Housing Act 2004 has changed the legislative landscape, it did so only in a very minimalistic way not going beyond what was completely necessary with respect to the deficiencies identified in *Connors*. As a result, the courts, for example, still do not have the power to control the circumstances in which and the basis on which a gypsy's right to occupy a local authority site may be terminated by the court. An occupier can be reduced to the status of trespasser without any judicial scrutiny of the overall merits of the owner's entitlement to evict. The only control available is in relation to the owner's enforcement of the owner's right to possession. And even if one assumes that the amendment sufficiently makes good the absence of procedural safeguards identified in *Connors*, furthermore, it

#### 4.3 Home: Conclusion

The above analysis of ECtHR case law makes clear that the question as to whether or not a particular habitation constitutes a home under Article 8 depends on factual circumstances, namely the existence of sufficient and continuous links between the person and the place (compare *Gillow v UK* with *O'Rourke v UK*), without being limited only to those places which one owns (*Mentes v Turkey*), which are lawfully occupied or which have been lawfully established (*Connors v UK*). The term 'home', however, still connotes what its literal meaning in English implies and cannot therefore be interpreted so broadly as to include cars parked in the streets (*X v Belgium*). Neither can one interpret the Strasbourg 'home' to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives (*Loizidou v Turkey*). The fact that one has an alternative place to live may weaken one's claim to a home, yet it is not at all a complete bar to the recognition of a house as a home under Article 8 (*Demades v Turkey*). It is now a well established principle that 'home' extends to a person's offices or other professional premises (*Niemetz v Germany*; further extended to include companies' rights to respect for their registered office or branches: *Société Colas Est v France*). Yet, the ECtHR has shown that there are some limits to this broad interpretation of the 'home' by refusing to describe the buildings used to house several hundred of the applicant's pigs as business premises (*Leveau v France*; cf *RL and M-JD v France* which concerned the applicant's restaurant and *Schuschou v Austria* in which the applicant complained about the entry of her inn). As for possible interferences with the right to respect for home, the most serious have been physical destruction of one's house by the state security forces or the denial of the right to access to one's home (*Bilgin v Turkey* or *Cyprus v Turkey*). The most common interferences have been home searches, which in order to be justified had to be attended by adequate procedural safeguards against arbitrariness and abuse (*Funke v France*), and proportionate to the legitimate aim pursued (*Keegan v UK*). The importance of procedural safeguards and of the principle of proportionality was equally stressed by the ECtHR in *Connors* which concerned the eviction of Gypsies from caravan sites. No interference was found when, as a

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does not seem to meet the discrimination point: why not give the gypsies security of tenure such as is afforded by the Mobile Homes Act 1983? See *Smith v Buckland* (n 396) [53] – [57].

result of the School Board's decision, the applicant's school project was abandoned and he and his family had to move out of the town and look for another job (*Hellström v Sweden*). The domestic court's decision to award half of the applicant's estate to her former husband in the divorce proceedings was not found to amount to any interference either as it did not give any indications as to who should eventually be allowed to stay in the house (*Sparrenlöv v Sweden*).

In the same manner as the ECtHR, English courts have interpreted the notion of a home widely, applying a nontechnical test and taking full account of the factual circumstances rather than legal niceties. Otherwise, the impact of the Strasbourg jurisprudence on domestic law in the specific areas examined above has been limited. One of the main reasons has been the unwillingness of UK organs to achieve more than the 'case-specific' level of ECHR compliance (ie to go beyond what the ECtHR strictly required in each individual case). In cases of Gypsy evictions, for example, only minimal legislative amendments were introduced by the Housing Act 2004 in order to rectify some of the shortfalls in *Connors* and the issue is still - four years after the ECtHR judgment - pending more comprehensive examination. In addition, given the judicial reluctance to trespass on the legislative function in seeking to resolve the complex issues of economic and social policy, the judiciary allowed *Connors* to modify the traditional principle that the enforcement of a right to possession in accordance with domestic property law could never be incompatible with Article 8 only in a very modest way. Accordingly, the court will make a possession order unless the occupier shows that, highly exceptionally, he has a seriously arguable case on one of the following grounds: (i) the law which requires the court to make a possession order is ECHR-incompatible (but only where it was possible, with the interpretative aid of the HRA, to adopt domestic law to make it more compliant); and (ii) that the local authority's exercise of its power to seek a possession order is an unlawful act and its decision is therefore open to challenge (but only on conventional judicial review grounds rather than on the grounds that it was disproportionate contrary to Article 8) (*Doherty v Birmingham CC*). As one can see, while, in theory, some procedural safeguards have been put in place, the question is whether they are really effective. Indeed, it seems to be difficult to conceive of a case other than *Connors* itself in which such an Article 8 defence would succeed. As for the disproportionate use of police search powers that occurred in *Keegan*, it is claimed



that as a result of the HRA coming into force, the gaps in domestic law have been filled. Such blind faith in the ability of ss 7 and 8 HRA to solve every single problem that domestic human rights law has encountered in Strasbourg has already been criticised in connection with the *Wainwright* judgment in 'Private Life: Conclusion' above.

## 5 Correspondence

### 5.1 Correspondence under the ECHR

#### 5.1.1 *What is not Correspondence and what does not constitute an Interference with one's right to it: a First Stage*

Again, there is no general definition of correspondence in the ECHR and as with the notions of private life, family life, and home, the ECtHR has dealt with the 'correspondence related' issues on an individual basis. Although such a 'case by case' approach makes it difficult to define categorically what constitutes correspondence or an interference with the right to it, it allows the ECHR in general and Article 8 in particular, 'to live'.<sup>400</sup> On the basis of case law, furthermore, one can generate some general guidance and principles as to what the current content of relevant interests covered by that notion is. This section looks at correspondence from a negative angle, ie from a 'what does not constitute a correspondence' and 'what does not amount to an interference with one's right to it' perspective.

The ECtHR's jurisprudence makes it clear that the right to respect for correspondence implies that any person shall have the right to communicate freely with any other person by post, telephone (both phone line and mobile), fax, telex, email, or by any other existing communication method, and that any censorship or control shall be prohibited.<sup>401</sup> As to correspondence by post, however, the protection of Article 8's right to respect for correspondence does not always extend to letters or other documents, which have already reached the addressee and are kept by him, as was shown in *G, S and M v Austria*.<sup>402</sup> Similarly, in *AD v Netherlands* the applicant could

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<sup>400</sup> A Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 Human Rights L Rev 57.

<sup>401</sup> It is established case law that insofar as the applicants wished to impart information and ideas to others through the above-mentioned modes of communication, their freedom of expression under Article 10 ECHR is absorbed by Article 8 ECHR. Eg *Silver v United Kingdom* (App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75) (1983) 5 EHRR 347 [107].

<sup>402</sup> (App no 9614/81) 34 DR 119 (admissibility decision) (the EComHR stated that since the business documents seized during the search had already reached their addressee, they no longer constituted correspondence within the technical meaning of the term. However, and this needs to be stressed, in reaching such a conclusion, the EComHR seemed to be influenced by the fact that the actual applicants were not in fact the persons concerned by the above search).

not invoke the protection of correspondence provided by Article 8 as the letters he wrote to the girl, which she and her mother subsequently passed on to the police, had already reached her and thus no longer constituted correspondence within the meaning of Article 8.<sup>403</sup> In *X v Sweden*, in which similar issues were discussed, the EComHR held that although neither the person who sends a letter nor the person who receives it shall be forced to disclose the contents of that letter, the right to respect for correspondence cannot be so construed as to imply that the person who sends a letter or the person who receives it should be bound by the ECHR not to disclose the contents of that letter. Accordingly, in this case the right to respect for correspondence could not be taken to imply that a public authority (Ministry of Education) to which a letter has been submitted should be prevented from communicating this letter, or disclosing its contents, to another authority (the Court of Appeal).<sup>404</sup>

As regards case law in which the complained of activity did not reach the seriousness of interference making the ECHR application manifestly ill-founded, many examples can be found in ‘prisoners’ correspondence’ cases. Indeed, there is clear case law to the effect that censoring and opening prisoners’ mail constitutes an interference with the right to respect for correspondence and unless justified under Article 8(2), it results in a breach of ECHR. In *Touroude v France*,<sup>405</sup> however, in support of his allegations that while he was in prison the prison authorities had opened his confidential correspondence on a number of occasions, the applicant produced only one envelope which had been addressed to him by the Registry of the ECtHR and marked ‘opened in error’. Naturally, the ECtHR held that given the fact that out of forty or so letters exchanged between the applicant and the ECtHR, only one had been opened ‘in error’ and that had occurred in a prison to which the applicant had recently been transferred, there was nothing to support the conclusion that the authorities had intended to interfere in the exchanges between the applicant and the Convention organs or that there had been a malfunctioning of the postal service that could indisputably be said to constitute an interference with the right to respect for his

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<sup>403</sup> (App no 21962/93) EComHR 11 January 1994 (admissibility decision).

<sup>404</sup> (App no 3788/68) EComHR 13 July 1970 (admissibility decision). Later confirmed by the ECtHR in *L and H v Finland* (App no 25651/94) ECtHR 8 June 1999 (admissibility decision).

<sup>405</sup> (App no 35502/97) ECtHR 3 October 2000 (admissibility decision).

correspondence. Accordingly, the application was rejected as manifestly ill-founded.<sup>406</sup>

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<sup>406</sup> The very same reasoning was more recently adopted in *Sayoud v France* (App no 70456/01) ECtHR 7 December 2006 (admissibility decision) and *Mocanu v Romania* (App no 56489/00) ECtHR 6 October 2005 (admissibility decision).

### 5.1.2 The scope of Correspondence Protection: a Second Stage

While the meaning or the definition of correspondence has not in itself been discussed overmuch in the ECtHR's judgments, case law clearly indicates that it denotes all written correspondence, including telegrams or telex messages, telephone conversations as well as electronic communication, use of emails and the internet.<sup>407</sup>

One can certainly assume that its scope may even widen in future in order to respond flexibly to any new technological developments in the area of communication. Similarly to the extension of the notion of home under Article 8 to cover business premises, the protection of correspondence has also been extended: it now applies to all communications, the ones that take place at business premises as well as the ones that occur in private places, regardless of whether the content of the communication is of a professional or a private nature.<sup>408</sup>

The majority of correspondence cases have concerned stopping, opening, delaying and/or censoring written correspondence of prisoners. The Convention organs have repeatedly stressed that a prisoner has the same right as a person at liberty to respect for his or her correspondence, though the ordinary and reasonable requirements of imprisonment are of relevance in assessing the justification for any interference with that right under the exceptions permitted by Article 8(2). Some measure of control over prisoners' correspondence may not be of itself incompatible with the ECHR,<sup>409</sup> yet the absence or imprecision of a legal basis for interference with prisoners' correspondence as well as the lack of any genuine justification for specific measures have over the years been found to be problematic in a succession of member States.<sup>410</sup>

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<sup>407</sup> See case law mentioned further in the text. For the relevant literature, see references in n 12 and 14.

<sup>408</sup> See, among other authorities, *Copland v United Kingdom* (App no 62617/00) ECtHR 3 April 2007 (monitoring by applicant's employer – a statutory body administered by the State – of her use of telephone, emails and Internet was not 'in accordance with law'); *Kopp v Switzerland* (App no 23224/94) (1999) 27 EHRR 91 (the interception of lawyers' telephone calls); *Halford v United Kingdom* (App no 20605/92) (1997) 24 EHRR 523 (telephone calls made from or to business premises, such as those of a law firm, using an office telephone were covered by the notion of correspondence (and that of private life) within the meaning of Article 8 ECHR); or *Niemietz v Germany* (n 54 and 70 and n 361).

<sup>409</sup> Eg *Puzinas (no. 2) v Lithuania* (App no 63767/00) ECtHR 9 January 2007 (minor disciplinary penalty for breach of requirement to conduct correspondence through prison administration was held not violate Article 8 ECHR).

<sup>410</sup> Notably, many of these problems have been raised by the ECtHR of its own motion. See, in general, *Puzinas v Lithuania* (App no 63767/00) ECtHR 9 January 2007; or *Frérot v France* (App no 70204/01) ECtHR 12 June 2007; *Musumeci v Italy* (App no 33695/96) ECtHR 11 January 2005; *Ciapas v Lithuania* (App no 4902/02) ECtHR 16 November 2006; *Poltoratskiy v Ukraine* (App no 38812/97) (2004) 39 EHRR 43; *AB v Netherlands* (App no 37328/97) (2003) 37 EHRR 48; *Lavents v Latvia* (App

In many of those cases, there has been interference with correspondence addressed to or received from the ECtHR or the former EComHR, in respect of which it has been held that such interference can be justified in only very exceptional circumstances.<sup>411</sup>

Other cases, on the other hand, have specifically concerned issues of lawyer-client privilege. Naturally, legal correspondence of prisoners (clients) and their lawyers has received particularly strong protection in Strasbourg, and interference in such cases has required solid justification.<sup>412</sup>

The lack of an adequate legal basis has led to many findings of a violation of the right to respect for correspondence (and often also for private life) in the cases in which the communication was intercepted. The ECtHR has accepted that the existence of some legislation granting powers of surveillance over the mail, post and telecommunications is, under certain conditions necessary and justified. Yet, whatever system of interception is adopted, domestic law must offer adequate and effective legal guarantees against possible abuses of the State's strategic monitoring powers in order to offer an adequate legal basis that meets the 'in accordance with law' requirement of Article 8(2).<sup>413</sup> This requires, firstly, that the impugned measure have some basis in domestic law;<sup>414</sup> secondly, domestic law must be accessible to the

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no 58442/00) ECtHR 28 November 2002; *Niedbala v Poland* (App no 27915/95) (2001) 33 EHRR 48; *Dimirtepe v France* (App no 34821/97) ECtHR 21 December 1999; *Silver v United Kingdom* (n 401); *Pfeifer and Plankl v Austria* (App no 10802/84) (1992) 14 EHRR 692.

<sup>411</sup> Eg *Łuczko v Poland* (App no 73988/01) ECtHR 3 October 2006; *Valašinas v Lithuania* (n 61); *Peers and Greece* (App no 28524/95) (2001) 33 EHRR 51; *Petra v Romania* (App no 27273/95) (2001) 33 EHRR 5; *Rehbock v Slovenia* (App no 29462/95) (1998) 26 EHRR CD 120.

<sup>412</sup> Eg *Zborowski v Poland* (App no 45133/06) ECtHR 15 January 2008; *Domenichini v Italy* (App no 15943/90) (2001) 32 EHRR 4; *Campbell v United Kingdom* (App no 13590/88) (1992) 15 EHRR 137; *Schönenberger and Durmaz v Switzerland* (App no 11368/85) (1989) 11 EHRR 202; *Golder v United Kingdom* (App no 4451/70) (1979-80) 1 EHRR 524. For non-prisoners cases in this respect, see *Foxley v United Kingdom* (App no 33274/96) (2001) 31 EHRR 25 (opening and copying of bankrupt's mail by the trustee in bankruptcy) or case law referred to in n 416.

<sup>413</sup> See, for example, *Klass v Germany* (App no 5029/71) (1979-80) 2 EHRR 214 (while accepting that the mere existence of legislation which allows a system for the secret monitoring of communications entailed a threat of surveillance for all those to whom the legislation may be applied, the ECtHR was of the opinion that the German system for controlling covert surveillance met the requirements of Article 8 ECHR even though the supervisory control was vested not in the courts but in a Parliamentary Board and body called the G10 Commission, which the Board appointed). See also the more recent case *Weber and Saravia v Germany* (App no 54934/00) ECtHR 29 June 2006 (admissibility decision). Compare with *Association for European Integration and Human Rights and Ekimdzhiev v Bulgaria* (n 369).

<sup>414</sup> Thus, surveillance measures will be problematic where they are not specifically authorised by statute and are regulated instead by administrative practice, however well established and observed, or other non-binding guidelines. See, for example, *Malone v United Kingdom* (App no 8691/79) (1985) 7 EHRR 14 (interception of postal and telephone communications); *Khan v United Kingdom* (App no 35394/97) (2001) 31 EHRR 45 (the use of a covert surveillance device by the police to eavesdrop on a private conversation); and post-*Khan* cases dealing with the similar issues, such as *Chalkley v United*

person concerned;<sup>415</sup> and, thirdly, domestic law must be foreseeable, ie sufficiently precise in its wording and must offer adequate safeguards against abuses of power.<sup>416</sup> Finally, in search and seizure cases, the ECtHR has often found that when a search by the public authority of the residential premises and/or the business premises of a person was followed by the subsequent seizure of evidence, such as documents, letters electronic data or even hard disks therefrom, it amounted to an interference not just with the right to respect for a person's home but also his or her right to have their correspondence respected. In this respect, it should be noted that where the lawyer-client privilege is at stake, even if there could be said to be a general legal basis for

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*Kingdom* (App no 63831/00) (2003) 37 EHRR 30; *Hewitson v United Kingdom* (App no 50015/99) (2003) 37 EHRR 31; *Lewis v United Kingdom* (App no 1303/02) (2004) 39 EHRR 9; or *Elahi v United Kingdom* (App no 30034/04) ECtHR 20 June 2006.

<sup>415</sup> As to the accessibility of the law, as a general rule, the ECtHR will regard that requirement as having been satisfied when the relevant legal acts governing the surveillance system are published. See, among others, *Volokhy v Ukraine* (App no 23543/02) ECtHR 2 November 2006 (interception and seizure of the postal and telegraphic correspondence of the applicants in connection with criminal investigations for tax evasion).

<sup>416</sup> *Liberty v United Kingdom* (App no 58243/00) ECtHR 1 July 2008 [62]; or *Weber and Saravia v Germany* (n 413) [93] – [95]. As to the requirement for a sufficiently precise wording of domestic law, it must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any surveillance measures that have the potential to interfere with Article 8 rights. Furthermore, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. The law must therefore contain adequate legal safeguards against abuses, ie indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference. In its case law on secret measures of surveillance (particularly in telephone tapping cases), furthermore, the ECtHR has developed the following minimum safeguards that should be set out in statute law in order to avoid abuse of power: the nature of the offences which may give rise to an interception order, a definition of the categories of people liable to have their telephones tapped, a limit on the duration of telephone tapping, the procedure to be followed for examining, using and storing the data obtained, the precautions to be taken when communicating the data to other parties, and the circumstances in which recordings may or must be erased or the tapes destroyed. Case law abounds: *Prado Bugallo v Spain* (App no 58496/00) ECtHR 18 February 2003; *Valenzuela Contreras v Spain* (App no 27671/95) (1999) 28 EHRR 483; *Kopp v Switzerland* (n 408); *A v France* (App no 14838/89) (1994) 17 EHRR 462; *Herczegfalvy v Austria* (App no 10533/83) (1993) 15 EHRR 437; *Huvig v France* (App no 11105/84) (1990) 12 EHRR 528; *Kruslin v France* (App no 11801/85) (1990) 12 EHRR 547. For case law in which the ECtHR found the national law to be incapable of protecting the applicants against arbitrariness on the authorities' part as it did not provide for sufficient safeguards, see, for instance, *Popescu v Romania* (App no 71525/01) ECtHR 26 April 2007. Naturally, in order for surveillance measures to be justified under Article 8(2), apart from the 'in accordance with law' requirement, the ECtHR must also ascertain the purpose and necessity of such measures. As to the necessity requirement, the ECtHR has paid particular attention to, inter alia, whether an 'effective control' was available to the applicant later on to challenge the surveillance measure to which he had been subjected in proceedings. See, for instance, *Matheron v France* (App no 57752/00) ECtHR 29 March 2005 or *Lambert v France* (App no 23618/94) (2000) 30 EHRR 346 - both these cases concerned judgments in which the Court of Cassation refused applicants locus standi to complain of telephone tapping of a line belonging to another.

the measures provided for in domestic law, the absence of applicable regulations specifying with an appropriate degree of precision the circumstances in which *privileged material* could be subject to search and seizure will deprive, pursuant to the ECtHR case law, the individuals of the minimum degree of protection to which they are entitled under the rule of law in a democratic society (emphasis added).<sup>417</sup>

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<sup>417</sup> See cases that concerned the searches of lawyers' premises, such as: *Sallinen v Finland* (App no 50882/99) ECtHR 27 September 2005 or *Niemietz v Germany* (n 54, 70 and 361). As under the notion of home, the right to respect for one's correspondence has also been explicitly held by the ECtHR to protect companies/legal persons (for a discussion on the human rights of companies under the ECHR see n 369) in the case of *Wieser and Bicos Beteiligungen GmbH v Austria* (n 369). In this case, which concerned the search and seizure by state authorities of electronic data of both natural and legal persons, the ECtHR - having regard to its case law that had extended the notion of home to a company's business premises, such as *Niemietz v Germany* (n 54, 70 and 361); or *Sallinen v Finland* (above) but most notably, *Société Colas Est v France* (n 368) - saw no reason to distinguish between the first applicant, who was a natural person, and the second applicant, who was a legal person, as regards the notion of correspondence. For other types of search and seizure case law, see searches and seizures in the investigation of tax evasion in *Funke v France* (n 364); *Mialhe v France* (App no 12661/87) (1993) 16 EHRR 332; or *Cremieux v France* (App no 1471/85) (1993) 16 EHRR 357. See also relevant case law in section '4.1 Home under the ECHR'.



## 5.2 Correspondence in English Law

As regards the way in which the right to respect for one's correspondence is protected in English law, the issue concerning prisoners' correspondence as well as various 'interception of communication' techniques, most notably telephone tapping, are addressed in this section.

As to the issue of prisoners' correspondence, first of all, it must be said from the very beginning that the ECtHR case law has played an especially constructive role in prompting the changes in this area of law in the United Kingdom.<sup>418</sup> Indeed, long before the HRA, whose enactment represents the major recent innovation with respect to the legal remedies available to prisoners, the scope of a prisoner's right to correspond with his lawyer and the permissible restrictions on that right were progressively clarified by the ECtHR in cases such as *Golder v United Kingdom*, *Silver v United Kingdom* or *Campbell v United Kingdom* and the present rules on prisoners' correspondence are in fact a direct outcome of this case law.<sup>419</sup> They can be found in secondary legislation, ie the Prison Rules 1999<sup>420</sup> and non-statutory administrative Prison Service Orders (PSO) and Instructions (PI) which themselves derive from the Home Secretary's broad rule-making power in the Prison Act 1952.<sup>421</sup> They aim at meeting the operational needs of the Prison Service while complying with Articles 8 and 10 ECHR and expressly acknowledge the importance of prisoners maintaining close relationships with family and friends through regular letter writing

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<sup>418</sup> As late as the early 1970s, prisoners' letters were still routinely read and stopped. S Livingstone, T Owen and A Macdonald, *Prison Law* (3<sup>rd</sup> edn OUP, Oxford 2003) 253.

<sup>419</sup> *Campbell v United Kingdom* (n 412) (the routine reading of legal correspondence concerning contemplated legal proceedings); *Golder v United Kingdom* (n 412) (stopping a prisoner from corresponding with his solicitor on the ground that the correspondence referred to a matter which had not been raised or decided upon within the prison); and *Silver v United Kingdom* (n 401) (stopping a letter to a solicitor on the ground that the complaints it contained had not previously been raised in the internal complaint mechanism – the 'prior ventilation rule').

<sup>420</sup> See n 102. The Prison Rules have legal force only in so far as the Prison Act 1952 (PA) gives authority for the Rule. PA is a relatively brief statute and is expressed in remarkably general terms given its subject matter, simply calling upon the Home Secretary to create and police an internal regime for prisons. It is the Prison Rules that contain the 'meat' of prison law.

<sup>421</sup> PSOs and PIs contain more detailed instructions that govern the conduct of prison life and are issued to prison governors and prison officers. They do not have any direct legal force in that they can be challenged if they breach the scope of the Prison Act 1952 or Prison Rules 1999. They are, however, an important source of vital information about prisoners' rights and entitlements and can provide important evidence as to the proper practice that should be adopted by the prison authorities. See the

as this will constructively contribute towards the prisoner's successful resettlement. Pursuant to them, the examination and reading of prisoners' correspondence should be undertaken only to the extent that it is strictly necessary to prevent its use to plan escapes or disturbances or otherwise jeopardise the security or good order of establishments; to detect and prevent offences against prison discipline or the criminal law; and to satisfy other ordinary and reasonable requirements of prison administration (for example, the need to record the receipt of money and other articles enclosed with incoming letters). Accordingly the extent to which correspondence needs to be read will vary according to the nature of the establishment, prisoner and correspondent. In general, prisoners' correspondence will not be routinely read<sup>422</sup> but envelopes will be opened to make sure they do not contain anything which is not allowed.<sup>423</sup> This only changes when the Governor decides, in exceptional circumstances,<sup>424</sup> to order routine reading. This should, however, continue for no longer than is strictly necessary and must be in accordance with PSO 1000.<sup>425</sup> Where there is no routine reading there may still be random reading but no more than 5% of

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HM Prison Service website <<http://www.hmprisonservice.gov.uk/resourcecentre/psispsos/>> accessed 30 September 2008.

<sup>422</sup> With the exception of legal and confidential mail, however, all correspondence that is sent or received may be subject to routine reading with respect to (i) all prisoners held at high security establishments; (ii) Category A prisoners; (iii) all prisoners on the Escape List, in any establishment; and, finally, (iv) where a prisoner is remanded in custody or convicted and sentenced for the offence of sending or attempting to send obscene correspondence, the Governor must introduce from the outset the routine reading of all outgoing mail (except for legal and confidential access correspondence) until such time as they are satisfied that it is no longer necessary to do so. For further detail, see the PSO 4411, para 9.5.

<sup>423</sup> In its paras 9.1 – 9.4, PSO 4411 states that the procedure of examining envelopes and packages for illicit enclosures is distinct from the reading of correspondence, and should be carried out with all due respect for the privacy of the contents of letters. Incoming correspondence should be opened and examined for illicit enclosures as a matter of routine at all establishments. Outgoing correspondence need only be examined where (i) routine reading is in force; (ii) there is a special instruction to read the prisoner's correspondence; or (iii) there is reason to believe that restrictions on the enclosure of other articles and papers have not been observed.

<sup>424</sup> Exceptional circumstances include where (i) it will assist in preventing or detecting criminal activities or in countering a threat to the security or good order of the establishment; (ii) a particular prisoner or his or her correspondent may attempt to breach any of the restrictions placed on correspondence set out in the PSO 4411; and (iii) reading may be in a particular prisoner's own interests (for instance, if a severely depressed prisoner is expecting to receive bad news which ought to be broken gently); see further PSO 4411, para 9.6.

<sup>425</sup> Unfortunately, since the secret PSO 1000 - National Security Framework is an internal document not available to the public (n 103), it is not possible to analyse the principles that it establishes with respect to the existence of the necessity of routine reading, although this seems to be very crucial in practice, see *R (on the application of Szuluk) v Governor of Full Sutton Prison* [2004] EWCA Civ 1426; [2005] 2 Prison LR 42.

incoming and outgoing letters per establishment can be randomly read, unless it is considered necessary and proportionate for security and good order or discipline.<sup>426</sup>

The general presumption is that a prisoner can correspond with whomever he wishes subject to the specific restrictions listed in the relevant rules.<sup>427</sup> There are also certain restrictions as to the content of prisoners' correspondence,<sup>428</sup> some of which seem to be fairly extensive (eg prohibition of material which is intended to cause distress or anxiety to the recipient or any other person, such as messages which are indecent or grossly offensive). Correspondence to and from prohibited correspondents and correspondence which contains prohibited material is liable to be stopped and the prisoner should be informed about it.<sup>429</sup>

Special confidential handling arrangements, however, apply to prisoners' legal and 'confidential access' correspondence.<sup>430</sup> All letters between prisoners, their legal advisers and/or the courts (including the ECtHR) constitute legal correspondence, known as 'Prison Rule 39' correspondence. All such letters must be treated as privileged by virtue of Prison Rule 39 and cannot be opened, read or stopped except in the specific circumstances set out in Prison Rule 39 itself.<sup>431</sup> Even then it may only be opened for examination in the presence of the prisoner concerned (unless the prisoner waives the opportunity) and the prisoner must be informed if it (or any enclosure) is to be read or stopped. This level of privilege is not attached only to legal correspondence at the point of sending and receipt, but likewise covers correspondence between a prisoner and his legal advisers found in the course of cell searches.<sup>432</sup> 'Confidential access' correspondence, which is outside Prison Rule 39, is

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<sup>426</sup> PSO 4411, para 9.8.

<sup>427</sup> PSO 4411, paras 4.1 – 4.14.

<sup>428</sup> See *R (on the application of Nilsen) v Governor of Full Sutton Prison* [2004] EWCA Civ 1540, [2005] 1 WLR 1028 (prisoner convicted of multiple murders could not seek publication of autobiography in which he justified his crimes; extent to which prisoner's freedom of expression was restricted was held to be justified).

<sup>429</sup> PSO 4411, 7.1.

<sup>430</sup> Prisoners' legal correspondence is the correspondence between prisoners, their legal advisers and/or the courts (including the ECtHR); the confidential access correspondence is the correspondence between prisoners and the other organisations/individuals listed in the PSO 4411, para 5.1.

<sup>431</sup> Specific circumstance set out in Prison Rule 39 are: (i) when the governor has reasonable cause to believe that it contains an illicit enclosure and any such enclosures shall be dealt with in accordance with the other provision of these Rules; or (3) when the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature.

<sup>432</sup> *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 (in which the House of Lords held that a policy requiring the inspection of a prisoner's cell in his absence, for the purpose of examining any legal correspondence, is an excessive infringement of the prisoner's basic rights).

entitled to the same privileged handling arrangements as legal mail, but applies to correspondence with certain statutory bodies and individuals (a full list may be found in paragraph 5.1 of the PSO 4411). The same handling arrangements apply to ‘confidential access’ correspondence, except that the envelope should be marked ‘confidential access’ (as opposed to ‘Prison Rule 39’) and should be clearly addressed to one of the qualifying bodies. Similarly all incoming mail from these bodies and individuals should bear the appropriate identifying mark that is commonly associated with that particular organisation. However, in some circumstances it may be appropriate for outgoing letters addressed to these organisations to be recorded in a Communications Log.<sup>433</sup>

On the whole, notwithstanding certain complexities of the legal framework resulting primarily from the number of non-statutory administrative instruments that detail the prisoners’ right to correspond, the overall legal regime, as discussed above, would appear to be in conformity with the relevant principles established by the ECtHR.

There is one more issue relating to actual domestic case law on prisoners’ correspondence that needs to be addressed here. The fact of the matter is that the analysis of relevant cases reveals that notwithstanding the coming into force of the HRA thus introducing a direct avenue of redress for prisoners whose ECHR rights have been breached, English prisoners continue basing their claims upon existing common law rights, especially a tort of misfeasance in a public office, and use the breach of HRA and Article 8 only as subsidiary arguments. From a claimant’s point of view, the HRA route has various shortcomings: it is only available in respect of events which occurred after 2 October 2000 and there is a one year limitation period (compared to a six year limitation period for certain torts).<sup>434</sup> Additionally, and this is the crux of the matter, in contrast to tort law where compensation is the norm (in case of a tort of misfeasance in a public office, even exemplary (punitive) damages can be obtained), under the HRA the award of damages is discretionary rather than of right.<sup>435</sup> This in fact reflects the ECtHR’s approach that damage is not a necessary

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<sup>433</sup> Communications Log is a record of the sender and addressee of the communication, see Prison Rule 35B.

<sup>434</sup> For further points see the discussion on the *Wainwright* case in the section: ‘Private Life in English Law’ above.

<sup>435</sup> See R Clayton’s article ‘The Human Rights Act Six Years On: Where Are We Now’ (2007) 1 Eur Human Rights L Rev 11, in which he states that in the period of 2000-2006, there have been only three reported cases where HRA damages have been made. It should be noted that exemplary damages,

ingredient of an ECHR violation. Thus it is possible for there to be a violation of a ECHR right that has not caused an applicant any damage, in which case the ECtHR does not award any remedy beyond declaring that the applicant's right has been violated.<sup>436</sup> Furthermore, even when the ECtHR decides to award damages, the amount is in comparison with what one can get when pursuing a claim against a public authority in tort in domestic courts, significantly lower. Besides, the ECtHR has never awarded exemplary (punitive) damages even for serious violations.<sup>437</sup> Since in determining whether to award damages, or the amount of an award, s 8(4) HRA imposes on domestic courts an obligation to take into account the principles applied by the ECtHR in relation to the award of compensation under Article 41 ECHR, domestic judges have by and large applied ECHR scales of damages and seem to be unwilling to depart from it just because the compensation awarded for a comparable domestic tort, if pursued, would be higher.<sup>438</sup> This approach, in fact, reflects the wider perspective that the HRA should mirror the ECtHR jurisprudence and that the duty of national courts is only to keep pace with Strasbourg jurisprudence over time as it evolves: no more, but certainly no less.<sup>439</sup> Since the monitoring of prisoners' correspondence usually gives rise to both a breach of HRA and a comparable tort of misfeasance in a public office, the claimants' preference for the letter which gives him the possibility of obtaining a much higher level of damages is understandable.<sup>440</sup> Yet, the difficulty with the tort of misfeasance in a public office is that it is not actionable per se but only upon proof of consequential material damage.<sup>441</sup> Such material damage, meaning financial loss or physical or mental injury, is however often absent

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which are by definition not compensatory, are not even available under the HRA, see, among others, *R (on the application of Anufrijeva) v Southwark LBC* [2003] EWCA Civ 1406; [2004] QB 1124.

<sup>436</sup> The ECtHR has held in the following cases relating to complaints involving the interception of the communications of suspected criminals by the police, that a finding of a violation of Article 8 rights should in itself constitute sufficient just satisfaction: *Taylor-Sabori v United Kingdom* (App no 47114/99) (2003) 36 EHRR 17 [28]; *Hewitson v United Kingdom* (App no 50015/99) (2003) 37 EHRR 31 [25]; or *Chalkley v United Kingdom* (n 414) [32].

<sup>437</sup> In general, the ECtHR's awards for compensation can be divided into an award for pecuniary damage and an award for non-pecuniary damage. However, on occasion, the ECtHR does make an award for non-pecuniary damage 'bearing in mind the seriousness of the violations', suggesting that an element of aggravated damage has infiltrated its awards; eg *Şimşek v Turkey* (App nos 35072/97 and 37194/97) ECtHR 26 July 2005.

<sup>438</sup> *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673. Compare with *R (on the application of KB) v Mental Health Review Tribunal (Damages)* [2003] EWHC 193; [2004] QB 936.

<sup>439</sup> See discussion in n 275 and n 277. See also R Clayton, 'Damage Limitation: The Courts and the Human Rights Act Damages' [2005] PL 429.

<sup>440</sup> R Stevens, 'Torts, Rights and Losses' (2006) 122 LQR 565.

in cases of monitoring of prisoners' correspondence.<sup>442</sup> There have been numerous attempts to overcome the rigidity of common law principles by referring to the fundamentality and inalienability of a prisoner's ECHR rights that were often breached by virtue of prison officers deliberately breaching the privacy of legal correspondence. It has been argued that the availability of damages should not be tied to a closed list of specific torts. Rather, it is determined by the character of the infringement of the right.<sup>443</sup> Domestic judges have so far refused all these attempts by expressly stating that they see no reason to treat the character of the right invaded as determinative of whether material damage as a constituent element of the tort of misfeasance of public office needs to be proved.<sup>444</sup>

Regulation of telephone tapping and other forms of interception of communications in the UK, which is the second issue to be analysed in the 'Correspondence in English law' section, is currently governed by the Regulation of Investigatory Powers Act 2000 (RIPA). As shown above, before the RIPA, English law on the interception of communication was found by the ECtHR to be incompatible with Article 8 on almost every occasion that this question arose.<sup>445</sup> Indeed, until 1985 the interception of communication as well as other surveillance activities such as planting listening devices, were largely legally unregulated.<sup>446</sup> The absence of the clear statutory

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<sup>441</sup> *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1 (HL).

<sup>442</sup> See, for example, *Watkins v Home Office* [2006] UKHL 17; [2006] 2 AC 395 (although the prisoner's correspondence with his legal advisers had been opened on more than one occasion both in bad faith and in breach of the relevant rules, he had not suffered any material damage. As a result, an essential ingredient of the tort was not established).

<sup>443</sup> See the discussion of the Court of Appeal in *Watkins v Home Office* [2004] EWCA Civ 966; [2005] QB 883, yet before it got to the House of Lords.

<sup>444</sup> *Watkins v Home Office* (n 442) in which the House of Lords precisely on this issue reversed the decision of the Court of Appeal. The House of Lords reasoning was further applied in *Francis v Home Office* [2006] EWHC 3021; 2006 WL 3880366 and *Woodin v Home Office* [2006] All ER (D) 475 (Jul) (QB). In these two cases, it was also analysed whether on the basis of facts, the claimants could be considered victims of violation of Article 8 rights; the judge finally held that although it was of concern that a number of errors had occurred in a relatively short space of time, having regard to all of the circumstances and the fact that the claimants had received an apology, it could not be said that they had been victims for the purposes of the HRA. To this extent a parallel can be drawn with the manifestly ill-founded case law of ECtHR discussed in n 405-406.

<sup>445</sup> See *Halford v United Kingdom* (n 408) or case law referred to in 414.

<sup>446</sup> Generally no statute permitted such activities but nor did any statute make them unlawful. Rather, interceptions were regulated directly only by non-statutory reports, papers and guidelines (such as the Report of the Committee of Privy Councillors on the interception of communication, the so-called Birkett Report (Cmnd 283, 1957) or the Home Secretary's Command Paper 'The Interception of Communications in Great Britain' (Cmnd 7873, 1980)). Interception of telephone communications was authorised by warrants signed by the Secretary of State so long as conditions were satisfied that normal methods of investigation had been tried and had failed or would be likely to fail, and that the material

regulation on the tapping of a public phone system was held by the ECtHR not to be, as required by Article 8, 'in accordance with the law' in *Malone v United Kingdom* as a result of which the Interception of Communication Act 1985 (ICA) was adopted making such interceptions an offence unless authorised by a warrant obtained from the Home Secretary.<sup>447</sup> Yet, the UK did not respond to the adverse decision in *Malone* by enacting a comprehensive scheme to regulate the whole field of interception, limiting the scope of ICA only to *public* telephone networks (emphasis added).<sup>448</sup> Such a state of minimal compliance of English law was highly criticised by the ECtHR in *Halford v United Kingdom* in which it was held that the interception of non-public phone systems, being wholly unregulated by statute, was not 'in accordance with the law' as required by Article 8.<sup>449</sup> Thus the need for statutory intervention again arose. In anticipation of the effects of the HRA 1998 and in the light of Council Directive 97/66 (known as the Telecommunications Data Protection Directive) a decision was made to bridge the gap in legal regulation by enacting the RIPA.<sup>450</sup> The RIPA adopted and expanded the offence of unlawful interception under the ICA to private telephone systems hence going some way to remedy the problem exposed in *Halford v United Kingdom*. At the same time, it offered a statutory basis for various forms of otherwise lawful, non-tortious forms of covert surveillance that were not covered by specific police or security and intelligence services legislation of

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in question was obtained for the purpose of detecting or preventing but not of prosecuting crime. Only when a criminal offence was committed or a tort (eg a trespass) could the courts provide a remedy. See *Malone v Commissioner of Police of the Metropolis (No.2)* [1979] Ch 344 (Ch).

<sup>447</sup> *Malone v United Kingdom* (n 414).

<sup>448</sup> As a result, the interception of private/internal systems or mobile phones of various kinds did not still have any legal basis in domestic law. The distinction between an interception taking place on a public or a private system was crucial to the issue whether it would fall within the prohibition in section 9 of the ICA. That issue was fact-sensitive and depended on characteristics which endured beyond the times when the system was being used for telephone calls, see, among others, *R v Effik* [1995] 1 AC 309 (HL); *R v Ahmed (Iftikhar)* [1995] Crim LR 246 (CA (Crim))

<sup>449</sup> *Halford v United Kingdom* (n 408). The only legislation that was adopted after 1985 concerned directly intrusive surveillance techniques where there was a physical invasion of property by the police or security and intelligence services, such as the Security Service Act 1989, the Intelligence Services Act 1994 and the Police Act 1997 (before the Police Act 1997 came into force, the use of equipment in police surveillance operations was regulated only by Home Office Guidelines (1984) on which the ECtHR held in *Khan v United Kingdom* (n 414) not to constitute a sufficient legal enactment to satisfy the stringent requirements of legal certainty imposed by Article 8 ECHR). See furthermore *Liberty v United Kingdom* (n 416) in which the ECtHR held that contrary to the settled requirement of ECHR law, the ICA was not formulated with sufficient precision as to be foreseeable.

<sup>450</sup> Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [1998] OJ L24/1; since repealed by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.

the 1990s, providing for their authorisation and use by the security and intelligence agencies, law enforcement and other public authorities of covert surveillance, agents, informants and undercover officers.<sup>451</sup> The RIPA thus seems to remedy the aforementioned problem of certain investigatory activities lacking a legal basis. Yet, pursuant to the ECtHR's case law on Article 8, 'in accordance with the law' is not a simple matter of having a legal basis; it also refers to the quality of the law in question, requiring that it should (i) be accessible to the person concerned, who must, moreover, (ii) be able to foresee its consequences for himself, and (iii) offer adequate safeguards against abuses in a manner that sufficiently clearly demarcates the scope of the authorities' discretion and defines the circumstances in which it is to be exercised compatibly with the rule of law.<sup>452</sup> The question, therefore, is whether and to what extent the RIPA complies with these requirements.<sup>453</sup>

Having no doubt about the public accessibility of the RIPA,<sup>454</sup> one can immediately start with the second requirement of 'in accordance with the law', ie the obligation to formulate the law with adequate precision.<sup>455</sup> There are two issues that need to be addressed in this respect. Firstly, it has been argued that the RIPA falls short of this requirement because of the ambiguous meaning of key concepts, most notably in terms of what amounts to interception.<sup>456</sup> And indeed, although a natural reading of s 2(2) RIPA where interception is defined may seem to leave little doubt as to which

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<sup>451</sup> While Part I of RIPA deals with the interception of communication, Part II of RIPA regulates other form of surveillance techniques requiring authorisation. Part II of RIPA divides surveillance activities into three categories: directed surveillance, intrusive surveillance, and the use and conduct of covert human intelligence sources. In all categories, the term 'covert' refers to behaviour calculated to ensure people subject to surveillance are unaware that it is or may be taking place. All three types of surveillance require different types of authorisation. Surveillance activities cover a number of situations besides the eavesdropping on or reading of communication and this section deals with surveillance only to the extent relevant for the purposes of right to respect for correspondence under Article 8 ECHR. For further details on English surveillance law in general, see, for example, V Williams (n 175).

<sup>452</sup> See case law referred to in n 413-416 and the related main text.

<sup>453</sup> For some critical analysis of the RIPA, see Y Akdeniz, N Taylor, and C Walker, 'RIPA 2000 (1) Bigbrother.gov.uk' [2001] Crim L Rev 73, or G Ferguson and J Wadham, 'Privacy and Surveillance: a Review of the Regulation of the Investigatory Powers Act 2000' [2003] Eur Human Right L Rev (Special Issue: Privacy) 101.

<sup>454</sup> See n 415. The authoritative version of RIPA as it received Royal Assent was published by the Stationery Office Limited and has also been made available in full text form on the Internet via Her Majesty's Stationery Office Web Pages <[http://www.opsi.gov.uk/acts/acts2000/ukpga\\_20000023\\_en\\_1](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000023_en_1)> accessed 30 September 2008).

<sup>455</sup> See M Cousins, *Surveillance Law* (LexisNexis, London 2004) 47-58.

<sup>456</sup> In this respect, see the scholarly discussion, eg S McKay, 'Court of Appeal: Regulation of Investigatory Powers Act 2000, Part I: Meaning of 'Interception'' (2005) 69 J of Crim L 104; A Hale and J Edwards, 'Getting It Taped' (2006) 12 Computer and Communication L Rev 71; H Bhatt, 'RIPA 2000: a Human Rights Examination' (2006) 10 Intl J of Human Rights 285.



activities fall within its meaning, such is the complexity and ambiguity of RIPA that doubt has been cast upon this basic issue by English courts in a number of cases.<sup>457</sup> There have been, furthermore, situations where although the issue of monitoring of communication was held to fall within the scope of RIPA as such, it was not definite whether a communication was intercepted within the meaning of Part I RIPA or whether what occurred was the surveillance and therefore fell within the scope of Part II RIPA.<sup>458</sup> In the light of the ECtHR case law on interception of communication in particular, the distinction may appear irrelevant as there seems to be no difference between the bug being placed in somebody's room or a person having his telephone conversation intercepted since both kinds of conduct constitute in essence the same exercise (that of overhearing or reading a communication belonging to an unsuspecting party) which interferes with the right to private life.<sup>459</sup> Yet, in English law it is relevant as the RIPA, when establishing regimes of authorisation and

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<sup>457</sup> *R v Hammond* [2002] EWCA Crim 1243 (the absence of a third party conducting the interception and the consent by the police officer to pursue the recording meant no interception could have taken place; in other words in cases where one party consented and no third party was involved, there would be no interception and thus no need for statutory protection to prevent it being classified as a criminal interception under RIPA completely ignoring the significance of the call being recorded (cf *A v France* (n 416) [34] – [35].); or *R v E* [2004] EWCA Crim 1243; [2004] 2 Cr App R 29 (the court conceded that although what was happening was independent of the operation of the telecommunications system, 'the recordings were made, questions of milliseconds apart, at the same time as the accused's words were being transmitted'. Consideration of this approach demonstrates that the difference between when a communication is intercepted during the course of its transmission may depend on nothing more than how the recording is made; if recorded simultaneously (without the sound waves being converted and capable of being interpreted by the brain as words) an interception takes place. If there is a millisecond's delay and the conversion takes place, there is no interception).

<sup>458</sup> Case law seems to indicate that consent plays a major role in distinguishing between an intercepted communication and a surveyed communication. In the case of surveillance one of the parties to the conversation has given consent to its being overheard. See *R v Hammond* (ibid). See also *R v Hardy* (Brian) [2002] EWCA Crim 3012; [2003] 1 Cr App R 30 (two undercover police officers tape-recorded conversation that took place between them and the appellants, both in person and on the phone; the Court of Appeal held that a tape recording of that conversation did not amount to the interception of a communication in the course of its transmission by means of a telecommunication system within the meaning of the RIPA 2000 s 2(2); rather the conduct of undercover officers did amount to surveillance within the meaning of s 26(1)(c) RIPA)). Be that as it may, the truth is that not only the difference between Part I and Part II issues but also between three different categories of surveillance under Part II (ie directed surveillance, intrusive surveillance, and the use and conduct of covert human intelligence sources) have caused much difficulty. There have been many situations where police officers have applied for intrusive surveillance authorisations when the activity in fact involved directed surveillance for which a different regime of authorisation should have been applied for (for further detail on these regimes and practical implications of subsuming surveillance activity under one of them, see n 460 below). The more detailed (non-statutory) Covert Surveillance Code of Practice does not provide much more clarification on the distinction between intrusive and directed surveillance either. JG Ferguson and J Wadham, 'Privacy and Surveillance: A Review of the Regulation of the Investigatory Powers Act 2000' [2003] Eur Human Rights L Rev (Special issue: Privacy) 101.

<sup>459</sup> *MM v Netherlands* (App no 39339/98) (2004) 39 EHRR 19 [40] – [43] (referring also to *A v France* (n 416)).

admissibility of evidence, makes substantial and marked differences between an intercepted communication and a surveyed communication. This in turn has practical implications on the scope of legal protection of Article 8 rights of UK citizens.<sup>460</sup> The second issue that needs to be considered when analysing the obligation to formulate the law with adequate precision, is the continued applicability of some of the previous legislation to the interception of communication, which, as the analysis of domestic

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<sup>460</sup> Intercepted communications must be authorised by a warrant issued by the Secretary of State at the request of authorised officials and the Secretary of State shall not issue this warrant except when satisfied of the existence of certain limited grounds (s 5(3) IPA). By contrast, in case of a surveyed communication, the RIPA allows for non-warrant authorisation (s 3(1) and (2) RIPA). Directed surveillance and use of covert human intelligence sources can, furthermore, be authorised by a greater number of officials and on wider grounds than those for authorising interception of communications (s 28 RIPA). For further discussion, see also n 463 below). It is also important to note that unlike the position for interception of communications, surveillance which is unauthorised under RIPA will not automatically be an offence or amount to a civil wrong. Accordingly, unless a civil wrong takes place within an established cause of action - such as where trespass to property or breach of confidence has occurred - then the only action available for unauthorised surveillance will be a claim under the HRA that the public authority in question had failed to act compatibly with one's rights under Article 8 ECHR by carrying out the surveillance. In other words, no crime is necessarily committed if a listening device is placed in a bedroom without authorisation. This has, in turn, implications for the different regimes of admissibility of evidence at trial established under English law which has an impact on UK citizens' Article 6 rights. Since in relation to unauthorised surveillance, no criminal offence is automatically established under the RIPA, there seems to be no reason why evidence obtained as a result of such activity should not be admissible at trial. With respect to the interception of communication under Part I RIPA, however, where the question of lawfulness of interception of a communication arises under s 1 RIPA, domestic courts may admit evidence only if they can conclude that the interception was lawful, ie no criminal offence was committed as the interception was made with lawful authority (see *Attorney General's Reference (No.5 of 2002)* [2004] UKHL 40; [2005] 1 AC 167). Many voices have been raised against such an approach arguing that removing the bar on intercept evidence would make a fair trial possible in a number of cases where, at present, people are subject to draconian executive measures like control orders (the way in which a defendant's fair trial rights could be reconciled with the public interest in maintaining secrecy without the need to change a statutory law was indicated by the House of Lords in *R v H* [2004] UKHL 3; [2004] 2 AC 134) and it would likewise be fully compatible with the ECtHR case law on the admissibility of evidence pursuant to which the mere fact that evidence has been obtained unlawfully does not in itself mean that it should be inadmissible (*Schenk v Switzerland* (1991) 13 EHRR 242, in which the ECtHR observed that it could not exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible and that it had only to ascertain whether the applicant's trial as a whole was fair); see, for instance, P Mirfield, 'Regulation of Investigatory Powers Act 2000: Part 2: Evidential Aspects' [2001] Crim Rev 91; D Ormerod, 'ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches' [2003] Crim L Rev 61; D Ormerod and S McKay, 'Telephone Intercepts and Their Admissibility' (2004) JAN Crim LR 15; JUSTICE, 'Intercept evidence: Lifting the Ban' (October 2006) available at <<http://www.justice.org.uk/inthenews/index.html>> accessed 30 September 2008; JUSTICE, 'Relaxing the Ban on the Admissibility of Intercept Evidence (February 2007) available at <[www.liberty-human-rights.org.uk/pdfs/policy07/liberty-intercept-evidence.pdf](http://www.liberty-human-rights.org.uk/pdfs/policy07/liberty-intercept-evidence.pdf)> accessed 30 September 2008; K Starmer, 'Setting the Record Straight: Human Rights in an Era of International Terrorism' (2007) 2 Eur Human Rights L Rev 124; or from a more historical point of view S Sharpe, 'Covert Police Operations and the Discretionary Exclusion of Evidence' [1994] Crim L Rev 793. Noteworthy, on 6 February 2008, the Prime Minister himself has announced (following the publication of the Chilcot Report, ie the report of the Privy Council review of the use of intercept as evidence headed by Sir John Chilcot) that intercept evidence – information gained from covert interception of private communications such as telephone calls and email – should be admissible in

case law shows, has resulted in confusion regarding the right statute to use. The RIPA's effect would be 'foreseeable' if it were the only piece of legislation available but when other statutes are brought in to the equation the situation may differ. The RIPA's effect could also be said to be 'foreseeable' if there was in existence at least domestic case law clarifying that the RIPA takes precedence over other statutes in cases where there is an overlap of applicability. Yet, no such case law is currently available. Crucially, if an equivalent provision in another legislative measure is used instead of the one given in the RIPA, this is likely to result in the safeguards created by the RIPA being by-passed and hence made ineffective.<sup>461</sup> On the whole, given both the ambiguity and imprecision of some of the key legal concepts under the RIPA and the continuing validity of pre-RIPA legislation in this area, it is questionable whether the RIPA is formulated with sufficient precision in conformity with the principles of foreseeability and legal certainty to enable citizens to properly regulate their conduct.<sup>462</sup>

As to the third requirement of 'in accordance with law', that is, the question whether the RIPA offers adequate safeguards against abuses in a manner that sufficiently clearly demarcates the scope of the authorities' discretion and defines the circumstances in which it is to be exercised compatibly with the rule of law, of a particular concern is that the UK tolerates executive authorisation in the context of interception of communication properly so called (ie under Part I of RIPA).<sup>463</sup> Section

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criminal trials; see <<http://www.number10.gov.uk/output/Page14490.asp>> accessed 30 September 2008.

<sup>461</sup> *R (on the application of NTL Group Ltd) v Ipswich Crown Court* [2002] EWHC 1585 (Admin); [2003] QB 131. The pre-RIPA legislative measures (eg the Police Act 1997 or the PACE (n 101)), which to a certain extent overlap with the RIPA as to their scope of applicability, do not have the same level of protection from abuse as the RIPA, as they were not created with interception of communication or information disclosure in mind. H Bhatt (n 456) 292-294.

<sup>462</sup> There are also other issues that could potentially be raised when assessing the RIPA's compatibility with the Strasbourg requirement to formulate the law with adequate precision. In the light of the ECtHR's findings in *Amann v Switzerland* (n 84), in which the ECtHR touched upon the issue of fortuitous interception, for example, one can criticise the lack of specific provisions of how to treat those who are necessary participants under the RIPA. Another issue is the lack of specific consideration of privileged communication under the RIPA. Once an interception is carried out in a manner that fully complies with the RIPA's provisions but involves a privileged communication, the privilege counts for nothing, the communication can be treated as if it were ordinary (contrast with *Niemietz v Germany* (n 54, 70 and 361)). Privileged communication is addressed only very partially in the relevant codes of practice issued under s 71 RIPA by the Secretary of State. The codes themselves are not, however, primary legislation (in this respect one must also remember the rejection of the Home Office guidelines in *Khan v United Kingdom* (n 414)) and their breach cannot in itself be the basis for either criminal or civil liability (though they are admissible in proceedings).

<sup>463</sup> Unlike the position for interception of communications, the surveillance regime under Part II of RIPA does not require a warrant to be issued by the Secretary of State for correspondence to be

1 RIPA creates an offence for a person to intercept any communication in the course of its transmission by post or telephone unless lawful authority, such as an interception warrant, has been obtained.<sup>464</sup> Interception warrants are issued by the Secretary of State, or, in urgent cases, by a senior official.<sup>465</sup> Although the ECtHR undoubtedly prefers judicial control over interception, a system under which a member of the executive (ie Secretary of State) is entrusted with the power to authorise an interception may also suffice provided there are sufficient counterbalances (safeguards) against abuse of such power, clearly demarcating the scope of the Secretary of State's discretion.<sup>466</sup> One such counterbalance<sup>467</sup> is

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surveyed: all that is needed is authorisation. There is, however, no requirement to obtain a warrant from the Secretary of State, see further n 460 above. Generally speaking, all three types of surveillance can be authorised by a wide number of officials and without any formal requirements although the authorising official must believe any authorisation to be necessary and proportionate to what is sought to be achieved. As for directed surveillance and surveillance by covert human sources, a wide range of public authorities is listed in Schedule 1 of RIPA and the Secretary of State identifies the ranks of officials within those authorities who can authorise surveillance in Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) Order 2000, SI 2000/2417. The list is by no means confined to the police, security and defence services. The authorisation of intrusive surveillance is subject to a tighter regime and intrusive surveillance by police and customs is subject to a different authorisation process from that for the security services. While any authorisation by police and customs must be approved by a Surveillance Commissioner, as appointed by the Police Act 1997, before it can be put into effect, security service authorisations require neither approval nor notification by a Surveillance Commissioner. In other words, the executive grants authorisation of intrusive surveillance in respect of defence and security targets on its own motion with no judicial or quasi-judicial supervision. For further details, see C Harfield and K Harfield, *Covert Investigation* (OUP, Oxford 2005).

<sup>464</sup> S 1(5) RIPA. Apart from interception authorised by an interception warrant, the interception can legally be carried out with 'other lawful authority' as defined by RIPA. This includes situations where the consent of both parties to a telephone conversation being recorded is obtained, or where there are reasonable grounds for believing that both parties have consented. Lawful authority also covers the situation in which the police are authorised under Part II of RIPA to conduct surveillance (*ibid*). There are also other specified forms of lawful authority which may apply, such as interception pursuant to the Telecommunications (Lawful Business Practice) Regulations 2000 (SI 2000/2699) (regulations) which were made by the Secretary of State in relation to business communications under RIPA. These regulations set out the circumstances in which employers can monitor or record employees' communications, including e-mail and telephone usage, without the consent of the employee or the other party to the communications and, among other things, require employers to take reasonable steps to inform employees of this (these regulations were not yet in force at the time of the monitoring of employee's e-mails in *Copland v United Kingdom* (n 408)).

<sup>465</sup> Warrants can be issued only to those persons described in s 6(2) RIPA. These are all law enforcement groups (eg Police or Customs and Excise) and as such are all part of the UK government, as is the Secretary of State. Thus there is no evident independence. H Davis (n 11) 131.

<sup>466</sup> *Klass v Germany* (n 413) [56].

<sup>467</sup> As for other, more general safeguards, RIPA establishes an obligation for the Secretary of State not to issue a warrant except when satisfied that the interception is necessary in the interests of national security, for the purpose of detecting or preventing serious crime or for the purpose of safeguarding the economic well-being of the United Kingdom. In addition, the Secretary of State must believe that the conduct authorised by the warrant is proportionate to the objective of the interception, which includes consideration of alternative means of achieving the objective. RIPA furthermore establishes limits on the duration of warrants (and disclosure notices), gives details of circumstances which merit the actions referred to, such as tapping telephone calls and establishes restrictions on the uses of intercepted

embodied in Part IV of RIPA which provides for independent scrutiny of the investigatory powers through the appointment of an Interception of Communications Commissioner (hereafter the ‘Commissioner’) by the Prime Minister.<sup>468</sup> Although recruited from the senior judiciary<sup>469</sup> and hence independent from the executive, the Commissioner’s powers are of a monitoring nature only. Indeed, the Commissioner’s main responsibility is to retrospectively review the granting and exercise of interception warrants<sup>470</sup> and report to the Prime Minister who then lays a copy of the report before each House of Parliament.<sup>471</sup> As a result, the extent to which the Commissioner is able to provide adequate protection from the misuse of powers and hence demarcate the scope of the Secretary of State’s discretion seems to be limited.<sup>472</sup> Another safeguard put in place by s 65 RIPA to complement the Commissioner, is the Investigatory Powers Tribunal (hereafter the ‘Tribunal’) which provides oversight by dealing with complaints about interceptions made by members

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materials (ss 5, 9, 22 and 23 RIPA), by which it complies with the ECtHR’s requirements to clearly indicate in national laws the nature of the offences which may give rise to an interception order, a definition of the categories of people liable to have their telephones tapped, a limit on the duration of telephone tapping, etc (see n 416 and case law referred to therein).

<sup>468</sup> As for the surveillance activities under Part II RIPA, covert surveillance is, in the main part, the responsibility of the Chief and Assistant Surveillance Commissioners, whereas the Intelligence Services Commissioner reviews the authorisation and exercise of covert surveillance activities and investigations into encrypted data undertaken by the intelligence services, Ministry of Defence and armed forces, in places other than Northern Ireland.

<sup>469</sup> Section 57(5) RIPA reads as follows: ‘[a] person shall not be appointed under this section as the Interception of Communications Commissioner unless he holds or has held a high judicial office (within the meaning of the [1876 c. 59.] Appellate Jurisdiction Act 1876)’.

<sup>470</sup> Part of the Commissioner’s review regime includes biennial inspection visits to those agencies conducting warranted interception and the departments of the relevant Secretaries of State. He also makes annual visits to Communications Service Providers charged with maintaining an interception capability and providing assistance to the agencies. See ‘Report of the Interception of Communications Commissioner for 2006’ (2008 HC 252) <<http://www.official-documents.gov.uk/document/hc0708/hc02/0252/0252.asp>> accessed 30 September 2008.

<sup>471</sup> It should be born in mind though that the Prime Minister has a power to ‘censor’ prejudicial matters in the report. It is for the Prime Minister to decide, how much of the report should be excluded from publication on the grounds that it is prejudicial to national security, to the prevention or detection of serious crime, to the economic well-being of the UK, or the continued discharge of the functions of any public authority whose activities include activities subject to my review (s 58(7) RIPA).

<sup>472</sup> According to JG Ferguson and J Wadham (n 458) ‘[r]etrospective review is likely to be less rigorous than prior scrutiny and it may well be easier to satisfy the requirements of necessity and proportionality when armed with the incriminating results of the surveillance. This creates the risk that although the statutory authorisation regime may comply with Art.8, individual exercises of the investigatory powers could be unnecessary or disproportionate.’. In particular, the Commissioner has no power over non-warrant, unauthorised interceptions. A further concern is that not all authorisations are subject to scrutiny; only those selected at random by the Commissioner will be reviewed. Accordingly, a substantial number of authorisations may never be subject to any form of independent scrutiny (eg ‘Report of the Interception of Communications Commissioner for 2006’ (n 470) [7]).

of the public.<sup>473</sup> The Tribunal is an investigatory body with an adjudicative role and functions outside the administrative tribunals system. With a Lord Justice of Appeal acting as its President, it determines its own procedure, with sole appeal to the Secretary of State. Crucially, the Tribunal rules on cases brought under s 7(1) HRA, involving communications, interception, acquisition and disclosure of data (Part I); surveillance and covert intelligence sources (Part II); and investigatory powers of the Intelligence Services.<sup>474</sup> Although the Tribunal does not have any power to convict, or fine, or even to recommend the prosecution of anyone found to have ordered or conducted illegal communications interceptions, it is empowered to order the destruction of the intercepted recordings, transcripts and communications data traffic logfiles, and to award financial compensation to the victims. As a rule, the Tribunal conducts its proceedings in private<sup>475</sup> and is not required to give reasons for its decisions, merely a statement to the complainant of whether the decision was for or against them.<sup>476</sup> Furthermore, there is no general right of appeal to the courts against

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<sup>473</sup> The Tribunal currently consists of seven members, including a President and Vice President. All members of the Tribunal are appointed by HM The Queen, and must be senior members of the legal profession. Both the President and Vice President must hold or have held high judicial office. The Tribunal came into being on 2 October 2000 and from that date assumed responsibility for the jurisdiction previously held by the Interception of Communications Tribunal, the Security Service Tribunal and the Intelligence Services Tribunal and the complaints function of the Commissioner appointed under the Police Act 1997. The Tribunal can thus investigate complaints about any alleged conduct by or on behalf of the Intelligence Services - Security Service (sometimes called MI5), the Secret Intelligence Service (sometimes called MI6) and GCHQ (Government Communications Headquarters). See the official website of the Tribunal <<http://www.ipt-uk.com>> accessed 30 September 2008.

<sup>474</sup> S 65(2) and (3) RIPA. In fact, an increasing number of appeals under the Human Rights Act have led to the appointment of a Registrar to assist the Lord Justice and his senior legal members of the Tribunal. See 'Report of the Interception of Communications Commissioner for 2006' (n 470); and also JH Turnbull, 'Tribunals, Show Trials and Judicial Legitimacy' (2006) 161 Crim L 3.

<sup>475</sup> It is interesting to note in this respect that in its decision of 2003, the Tribunal quashed a rule made by the Home Secretary, which obliged the Tribunal to conduct all proceedings in private, irrespective of the circumstances. This decision was described by the Tribunal itself as 'the most significant case ever to come before the Tribunal' (IPT/01/62 and IPT/01/77 (23 January 2003)). The relevant rule was rule 9(6) of The Investigatory Powers Tribunal Rules 2000 (SI 2000/2665). This transparency seems, however, to extend only to the procedural aspects of proceedings while the substantive content still remains secret. The current position is that complainants cannot be informed of arguments made or see evidence adduced by a public authority where to do so would entail a risk to national security, even when that information is critical to the case.

<sup>476</sup> It appears that so far, the Tribunal has ruled in favour of a complainant only once in IPT/03/32/H (14 November 2006), which was the case of unauthorised covert surveillance by a public authority of its employees and the definition of directed surveillance under RIPA. See the official website of Tribunal <<http://www.ipt-uk.com/default.asp?sectionID=17>> accessed 30 September 2008 as well as Annual reports by the Interception of Communications Commissioner and the Intelligence Services Commissioner which contain a section on the activities of the Tribunal.

the decisions of the Tribunal.<sup>477</sup> In fact, the Tribunal's procedural regime for hearings departs significantly from the fair trial standards ordinarily required by Article 6 ECHR in terms of the open adversarial determination of issues, though this has been said to be justified having regard to the kinds of cases dealt with by them.<sup>478</sup> Thus, while the Tribunal is fairly independent and a beneficial inclusion as far as safeguards against the abuse of the RIPA powers go, one should not forget that it is not a court of law and is not meant to offer the same remedies and freedom of access that the latter provides.

To sum up, the RIPA has admittedly remedied the problem of certain investigatory activities having no legal basis as exposed in *Halford v United Kingdom*.<sup>479</sup> In the context of ECtHR's qualitative requirements on such law, however, the RIPA can be found to be on the borderline in more than one respect.<sup>480</sup> There exist strong doubts, evidenced even among the judiciary in the UK,<sup>481</sup> as to the clarity and precision of the key legal concepts under RIPA which do not seem to fully comply with the second requirement of 'in accordance with the law', ie the obligation to formulate the law with adequate precision. In addition, although some safeguards, which balance a pure executive approach to authorising the interference with one's right to respect for communication, exist, they do not stand for more (if at all) than the borderline compliance with respect to the third requirement of 'in accordance with law' that the law should offer adequate and effective safeguards against abuses of power.<sup>482</sup>

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<sup>477</sup> Section 67(8) RIPA. More importantly, this 'ouster clause' also includes decisions of the Tribunal as to whether it has jurisdiction, as a result of which the question of its compatibility with one's right of access to the court under Article 6 ECHR arises. See H Davis (11) 140.

<sup>478</sup> The Tribunal held in its 2003 decision in IPT/01/62 and IPT/01/77 (n 475) that the Tribunal's procedure under RIPA and the Rules is compliant with Article 6 having regard to the kinds of cases dealt with by it. See also more recently, the Tribunal conclusion IPT/03/32/H (n 476) that in a situation in which there is sensitive information or intelligence, and in which national security or other public considerations could arise, the application of the special procedures for adjudicating on claims and for investigating complaints means that the applicant is bound to be deprived of the protection of ordinary procedures of an open adversarial hearing, of a reasoned decision and of a right of appeal against or judicial review of an unfavourable decision.

<sup>479</sup> *Halford v United Kingdom* (n 408) and (n 449).

<sup>480</sup> As one scholar has put it: 'It has been the staple procedure of English legislatures to achieve only the minimal level of compliance with whatever higher standards may exist.', H Bhatt (n 456) 310.

<sup>481</sup> See also *Attorney General's Reference (No.5 of 2002)* (n 460) [9], in which the House of Lords held, when comparing the ICA with the RIPA, that 'the 2000 Act is both longer and even more perplexing'.

<sup>482</sup> Another crucial point to remember is that privacy safeguards that may seem to be sufficient with respect to the use of the traditional postal-telecommunication may not be effective enough in cases of 'modern' types of communication and its interception, such as Internet communications because of the types and volume of information that could be sent through the Internet. See VO Benjamin, 'Interception of Internet Communications and the Right to Privacy: an Evaluation of Some Provisions

### 5.3 Correspondence: Conclusion

Keeping pace with modern technological developments, the ECtHR has interpreted the term ‘correspondence’ to cover not only classic types of communication such as letters, telegrams, telex messages or phone conversations but also electronic communication, including emails or use of Internet (*Copland v UK*). The protection of correspondence has covered communication that took place at business premises as well as ones that occurred in private places, regardless of whether the content of the communication was of a professional or a private nature (*Halford v UK* or *Kopp v Switzerland*; note that there was no right to respect for correspondence when after having received the communication, the recipient decided to share it with somebody else: *AD v Netherlands* or *X v Sweden*). Stopping, opening, delaying and/or censoring correspondence of prisoners has constituted one of the most frequent interferences. Although it has been recognised that the ordinary and reasonable requirements of imprisonment might justify some measures of control over prisoners’ correspondence, the absence or imprecision of a legal basis for such interference as well as the lack of any genuine justification for such intrusive measures have often resulted in the right to respect for correspondence being violated (*Silver v UK*; legal (privileged) correspondence of prisoners with lawyers or the Convention organs has received particularly strong protection in Strasbourg: *Campbell v UK*; *Golder v UK* or *Zborowski v Poland*, though no interference with Article 8 rights was found where only once and in error, a letter addressed to a prisoner by the ECtHR was opened and read by prison authorities: *Touroude v France*). The lack of an adequate legal basis has also led to many findings of a violation of the right to respect for correspondence in cases in which the communication was intercepted. In this respect, the ECtHR stressed the expression ‘in accordance with the law’ within the meaning of Article 8(2) requires, firstly, that the impugned measure should have some basis in domestic law; and, secondly, it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must, moreover, be able to foresee its consequences for himself, and be compatible with the rule of law (*Kruslin v France*). Finally, in search and seizure case law, the absence of applicable regulations

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of the Regulation of Investigatory and Powers Act against the Jurisprudence of the European Court of Human Rights’ (2007) 6 Eur Human Rights L Rev 637.



specifying with an appropriate degree of precision the circumstances in which privileged letters could be subject to search and seizure was held to have deprived the individuals of the minimum degree of protection to which they are entitled under the right to respect for correspondence (*Sallinen v Finland*).

The ECtHR case law has undoubtedly played a very constructive role in prompting the changes in domestic rules on prisoners' correspondence. Long before the HRA's enactment, the scope of a prisoner's right to correspond with his lawyer and the permissible restrictions on that right have been modified in the light of *Golder v UK*; *Silver v UK* or *Campbell v UK*. The later enactment of HRA has enlarged the range of remedies available to the prisoners whose ECHR rights were violated and who in the pre-HRA era could rely solely on the common law in general, tort of misfeasance in a public office in particular. This was not always satisfactory as not being actionable per se: the tort of misfeasance in a public office can only be used upon proof of consequential material damage (meaning financial loss or physical/mental injury) and this was very often absent in cases of the monitoring of prisoners' correspondence. Due to the different approach of domestic judges to the issue of awarding damages under the HRA when compared to the tort system (while in case of a tort of misfeasance even punitive damages can be obtained, under the HRA the award of damages is discretionary rather than of right which reflects the ECtHR's stance that damage is not a necessary ingredient of an ECHR violation), however, the UK prisoners have continued to pursue, whenever possible, their claims in common law torts rather than under the HRA. As for the development of the law on the interception of communication, here we have a clear example of the typical approach of the English legislator to the ECHR law which is based on the minimal, 'case-specific' compliance (changing domestic law only as much as is imperative in order to comply with the ECtHR findings in an individual UK case: *Malone v UK* followed by the enactment of ICA and then later on *Halford v UK* followed by the RIPA). Nevertheless, it must be admitted that the adoption of a relatively comprehensive legal basis for the investigatory activities with respect to both public and non-public phone systems in the UK was directly influenced by the adverse findings of ECtHR in this area. There has not been, however, much impact of the Strasbourg jurisprudence on the way in which the domestic law on interception of communication has responded

to the 'quality of law' requirement of the expression 'in accordance with the law' within the meaning of Article 8(2).

## 6 Positive Obligations

### 6.1 Positive Obligations and Private Life

#### 6.1.1 Positive Obligations and Private Life under the ECHR

To locate the positive dimension of Article 8 within the various ‘private life’ areas, again one can start by looking at ‘bodily privacy’ case law, ie case law which has concerned the physical and psychological integrity of an individual. In *X and Y v Netherlands*, to begin with, the ECtHR imposed on States a positive duty to legislate so as to prevent persons from sexual abuse.<sup>483</sup> The ECtHR stated its reasoning very broadly, by saying that positive obligations on the State under Article 8 might involve the adoption of measures even in the sphere of horizontal relations (ie between individuals themselves) and - while the choice of the means to secure compliance with Article 8 in the sphere of protection against the acts of individuals was in principle within the State’s margin of appreciation - effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life were at stake and in particular when children and other vulnerable individuals were involved, required efficient criminal-law provisions.<sup>484</sup> Applying these general principles to the facts before it, the ECtHR found a violation of Article 8 in its private life aspect in the present case since domestic law failed to provide for the effective, or indeed any, possibility of taking criminal proceedings against a man who had sexually assaulted the applicant’s mentally handicapped daughter, thus interfering with her bodily privacy. This situation was found to be significantly different from that in the later case of *August v United Kingdom* though,<sup>485</sup> in which a minor applicant claimed that the fact that he was not eligible for victim compensation under domestic legislation due to his alleged consent to sexual offences, disclosed a failure to protect his Article

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<sup>483</sup> *X and Y v Netherlands* (n 56). In *Stubbings v United Kingdom* (App no 22083/93) (1997) 23 EHRR 213, for example, the ECtHR held that the availability of criminal law offences prohibiting sexual abuse in the United Kingdom together with the given civil remedies satisfied the positive obligations incumbent upon the United Kingdom under Article 8 ECHR. Cf *Adelaide v France* (App no 78/02) ECtHR 6 January 2005 (admissibility decision) (impossibility for parents to obtain criminal conviction of the person responsible for the death of their unborn child (the domestic courts could not sustain a charge of manslaughter) as the French criminal law only protects a baby whose heart is beating and who is breathing at the time of his or her birth and the applicant’s baby was stillborn).

<sup>484</sup> *ibid* [23] – [27].

<sup>485</sup> (App no 36505/02) (2003) 36 EHRR CD115 (admissibility decision).

8 rights. Here, the ECtHR stressed that Article 8 did not as such include a right to receive such compensation. Nor could it be argued that ‘the provision of an *ex gratia* award by the State to the applicant forms part of a deterrent framework necessary to give ‘practical and effective’ protection of children against abuse by adult offenders.’ The applicant’s complaint was accordingly held to be manifestly ill-founded.<sup>486</sup> The ECtHR has, furthermore, accepted the possibility that the State’s positive obligation under Article 8 to safeguard the individual’s physical integrity may extend to questions relating to the effectiveness of a criminal investigation.<sup>487</sup> On that basis, the ECtHR found in *MC v Bulgaria* that States had a positive obligation inherent in Article 8 not just to enact criminal law provisions effectively punishing rape but also to apply them in practice through effective investigation and prosecution.<sup>488</sup> This does not mean, however, that there is an absolute positive right to prosecute or convict any particular person.<sup>489</sup> In a slightly different context but still within the bodily privacy area, with regard to persons in need of psychiatric treatment the ECtHR observed in the horizontal case of *Storck v Germany* that since the State was under a positive obligation to secure for its citizens their right to physical integrity under Article 8, it could not completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies, such as psychiatric clinics. It therefore remained under a duty to effectively exercise supervision and control over private psychiatric

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<sup>486</sup> See also *Iverson v United Kingdom* (App no 39030/97) (2002) 35 EHRR CD20 (admissibility decision) (in which the applicant’s mother had drawn to the attention of the authorities the fact that her daughter Fiona, who was under age at that time, was involved in sexual relationships with men who had criminal records and were introducing her to drugs and in which the police were unable to take any steps to prosecute the men for any alleged sexual offences as Fiona was not prepared to co-operate; the ECtHR held that though she was under age and thus vulnerable, this did not give the authorities *carte blanche* with regard to coercive or more draconian care measures and, furthermore, considerations of her own individual autonomy could not be excluded).

<sup>487</sup> Having found such a positive obligation under Article 8 ECHR to exist in *Osman v United Kingdom* (App no 23452/94) (2000) 29 EHRR 245 [GC], the facts of the case did not disclose its breach by the police whose response to the events as they unfolded was reasonable in the circumstances and not incompatible with the authorities’ duty under Article 8 ECHR to safeguard the applicant’s physical integrity.

<sup>488</sup> (App no 39272/98) (2005) 40 EHRR 20 (the failure to carry out a proper investigation was the result of the undue emphasis given to the need for direct proof of rape while little weight was attached to the applicant’s age and vulnerability, which were necessary factors in a case where a minor made a rape allegation). The case is one of the most striking examples of an increasing tendency on the part of the ECtHR to impugn not only the interpretation and application of domestic law by national courts and other authorities but also the sufficiency of the concrete measures taken by them to ensure that they are in a position to arrive at a proper decision.

<sup>489</sup> *Szula v United Kingdom* (App no 18727/06) ECtHR 4 January 2007 (admissibility decision) (in which the sequence of events did not disclose any culpable disregard, discernable bad faith or lack of will on the part of the police or prosecuting authorities as regards holding perpetrators of serious criminal offences properly accountable pursuant to domestic law).

institutions as far as the protection of individuals against infringements of their physical integrity was concerned.<sup>490</sup>

A woman's right to self-determination in respect of pregnancy in the field of artificial conception was found to fall within the positive ambit of Article 8 in *Evans v United Kingdom*.<sup>491</sup> The question which arose in this case was whether the existing positive obligation to facilitate conception of women or couples, who find it impossible or difficult to conceive by ordinary means, by allowing, for example, in vitro fertilisation (IVF), implied an obligation on the State to ensure that a woman who has embarked on treatment for the specific purpose of giving birth to a genetically related child should be permitted to proceed to implantation of the embryo notwithstanding the withdrawal of consent by her former partner, the male gamete provider. The ECtHR held that there was no implied obligation as there were strong policy considerations and an exceptionally detailed examination of the social, ethical and legal implications of recent developments in the field of human fertilisation and embryology underlying the decision of the UK legislature to favour such a clear 'bright-line' rule whereby it granted both parties undergoing IVF treatment the right to withdraw consent to the use or storage of their genetic material at any stage up to the moment of the implantation of the resulting embryo. In its view, the absolute nature of the rule set out in the Human Fertilisation and Embryology Act 1990, based on proper consultation and public debate, served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency, general interests that were legitimate and consistent with Article 8. Furthermore, there was no international consensus in this

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<sup>490</sup> (App no 61603/00) (2006) 43 EHRR 6. In the context of 'bodily integrity' case law, it should be furthermore noted that so far as preventive health in prisons is concerned, there is no ECtHR authority that places any obligation under Article 8 ECHR on a contracting State to pursue any particular preventive health policy. While it is not excluded that a positive obligation might arise to eradicate or prevent the spread of a particular disease or infection, matters of health care policy, in particular as regards general preventive measures, are in principle within the margin of appreciation of the domestic authorities who are best placed to assess priorities, use of resources and social needs. See, for instance, *Shelley v United Kingdom* (App no 23800/06) ECtHR 4 January 2008 (admissibility decision) (giving due leeway to decisions about resources and priorities and to a legitimate policy to try to reduce drug use in prisons, and taking account of the fact that some preventive steps had been taken (disinfecting tablets) and that the authorities were monitoring developments in needle exchange programmes elsewhere, the ECtHR concluded that the UK Government had not failed to respect the applicant's private life); or *Benito v Spain* (App no 36150/03) ECtHR 13 November 2006 (admissibility decision) (concerning passive smoking in prisons with no direct effect on a prisoner's private life).

<sup>491</sup> (App no 6339/05) ECtHR [GC] 10 April 2007 (dissenting judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele saw the case as one of interference with the applicant's right to respect for the decision to become a genetically related parent rather than a 'positive obligation' case and the interference itself not necessary and proportionate in the given circumstances).

regard and so the UK was afforded a wide margin of appreciation which it, for the reasons above, did not exceed and managed to maintain the fair balance required under Article 8.<sup>492</sup> Legal regulation of abortion also touches upon the woman's right to respect for her private life and self-determination since whenever a woman is pregnant her private life becomes closely connected with the developing foetus.<sup>493</sup> In the case of *Tysiack v Poland*,<sup>494</sup> the ECtHR held that a positive dimension of Article 8 guaranteed to a woman seeking termination of pregnancy on therapeutic grounds proper accountability and review of the decisions of the doctors responsible for giving consent. Having regard to the circumstances of the case as a whole, the ECtHR was not convinced that, by putting in place legal remedies which made it possible (only) retrospectively to establish liability on the part of medical staff, Poland complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of the controversy as to whether she was entitled to a therapeutic abortion.

Since *Goodwin v United Kingdom* and *I v United Kingdom*,<sup>495</sup> the ECtHR's case law appears to be well settled with respect to another positive dimension of private life protection which is the State's positive obligation to ensure the right of post-operative male-to-female or female-to-male transsexuals to respect for their sexual identity and self-determination, in particular through the legal recognition given to their gender re-assignments. This area of ECtHR's jurisprudence has indeed witnessed one of the most significant developments in the positive obligation doctrine in Strasbourg. Two judgments of the Grand Chamber mentioned above dealt with the absence of the legal recognition of post-operative transsexuals in the United Kingdom, which in a series of previous cases had been held not to violate the right to respect for private life.<sup>496</sup> Referring to evolving attitudes and in particular to the *uncontested evidence of a*

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<sup>492</sup> The margin of appreciation was held to extend both to the State's decision whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests. *ibid* [82].

<sup>493</sup> *Brüggenmann and Scheuten v Germany* (App no 6959/75) (1981) 3 EHRR 244.

<sup>494</sup> (App no 5410/03) ECtHR 20 March 2007.

<sup>495</sup> *I v United Kingdom* (App no 25680/94) (2003) 36 EHRR 53 [GC] and *Goodwin v United Kingdom* (App no 28957/95) (2002) 35 EHRR 18. See also *L v Lithuania* (App no 27527/03) ECtHR 11 September 2007 (a State's failure to adopt the necessary legislation in order to provide the applicant with a lawful opportunity to complete his gender-reassignment and obtain full recognition of the post-operative gender breached the applicant's rights under the ECHR, Article 8).

<sup>496</sup> *Sheffield and Horsham v United Kingdom* (App nos 22985/93 and 23390/94) (1999) 27 EHRR 163; *Cossey v United Kingdom* (App no 10843/84) (1991) 13 EHRR 622; *Rees v United Kingdom* (App no 9532/81) (1987) 9 EHRR 56.

*continuing international trend in favour of increased social acceptance of transsexuals*, the ECtHR reached the conclusion that the matter no longer fell within the State's margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the ECHR and that there had, accordingly, been a *failure to respect* the applicants' right to private life in breach of Article 8. In the case of *Grant v United Kingdom* the applicant,<sup>497</sup> a post-operative male-to-female transsexual, made a specific complaint about the refusal to accord her the pension rights applicable to women of biological origin, the ECtHR accepted her to be a victim of this aspect of the lack of legal recognition from the moment, after the *Goodwin* judgment, when the authorities refused to give effect to her claim. The United Kingdom was, accordingly, in breach of its positive duty to respect the applicant's private life contrary to Article 8. The more recent case of *L v Lithuania* has presented another aspect of the problems faced by transsexuals. Although Lithuanian law recognised transsexuals' right to change not only their gender but also their civil status, there was a gap in the pertinent legislation; there was no law regulating full gender-reassignment surgery. Until that law was adopted there did not appear to be suitable medical facilities reasonably accessible or available in Lithuania itself. As a result, Lithuania was held to be in breach of Article 8.<sup>498</sup> When, on the other hand, the applicants in *Parry v United Kingdom* claimed that having undergone gender reassignment surgery following their marriage,<sup>499</sup> their husbands were barred by domestic law from obtaining full gender recognition since they also wished to remain married, the ECtHR noted that:

... the requirement that the applicants annul their marriage flows from the position in English law that only persons of the opposite gender may marry; same-sex marriages are not permitted. Nonetheless it is apparent that the applicants may continue their relationship in all its current essentials and may also give it a legal status akin, if not

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<sup>497</sup> (App no 32570/03) (2007) 44 EHRR 1.

<sup>498</sup> *L v Lithuania* (n 495). In finding that the circumstances of the case revealed a limited legislative gap in gender-reassignment surgery which left the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity, the ECtHR added that whilst budgetary restraints in the public health service might have justified some initial delays in implementing the rights of transsexuals under the Lithuanian Civil Code, over four years had elapsed since the pertinent provisions came into force and the necessary legislation, although drafted, had yet to be adopted. Given the few individuals involved (some 50 people, according to unofficial estimates), the budgetary burden on Lithuania would not be expected to be unduly heavy. Consequently, the ECtHR considered that a fair balance was not struck between the public interest and the rights of the applicant.

<sup>499</sup> *Parry v United Kingdom* (n 79). See also *R and F v United Kingdom* (App no 35748/05) ECtHR 28 November 2006.

identical to marriage, through a civil partnership which carries with it almost all the same legal rights and obligations. It is true that there will be costs attached to the various procedures. However the Court is not persuaded that these are prohibitive or remove civil partnership as a viable option.<sup>500</sup>

Accordingly, the ECtHR held that the respondent State fulfilled its positive obligation to ensure the Article 8 rights of the applicants by introducing a system of gender recognition certificates following the judgment in *Goodwin* and that the requirement to end the first applicant's marriage to the second applicant as a precondition for her to obtain a gender recognition certificate was not shown to be disproportionate in the circumstances. Still in the transsexual case law context, in *Kück v Germany*,<sup>501</sup> the ECtHR held that the domestic courts touched upon the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination, when, in the context of a civil dispute with her private health insurance company, in which she unsuccessfully sought reimbursement of part of the costs of gender reassignment surgery and hormone treatment, they had failed to give appropriate consideration to her transsexuality. While it is for the national authorities, and notably the courts, to interpret domestic law and it is for the national courts to assess the evidence before them, the ECtHR essentially found that the German courts should have done more to ascertain all the relevant facts and should have interpreted domestic law in line with wider human rights consideration, even if there was no clearly established right at issue.<sup>502</sup>

In dealing with the question of whether the States have a positive obligation to provide their citizens with access to personal data or other related information under Article 8,<sup>503</sup> in *Gaskin v United Kingdom*,<sup>504</sup> in which there existed a file containing details of the applicant's childhood history which he had no opportunity of examining in its entirety, the ECtHR found that the United Kingdom, in handling his requests for

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<sup>500</sup> *ibid.* It is clear, therefore, that although the right to marry in Article 12 ECHR is applicable to union involving transsexual partners as the right is not restricted to purely biological criteria (eg *Goodwin v United Kingdom* (n 495)), the ECtHR has so far refused to apply it to homosexual couples.

<sup>501</sup> (App no 35968/97) (2003) 37 EHRR 51.

<sup>502</sup> In that respect, the approach was similar to that adopted in the *MC v Bulgaria* mentioned in the text above (n 488).

<sup>503</sup> One should note, however, that the ECtHR has never expressed any opinion on whether general rights of access to personal data and information may be derived from Article 8 ECHR. Dealing rather with concrete cases, it has never found it necessary to decide in abstracto on questions of general principle in this field.

<sup>504</sup> See *Gaskin v United Kingdom* (App no 10454/83) (1990) 12 EHRR 36.



access to those records, was in breach of a positive obligation flowing from Article 8.

In particular, it held that:

... a system like the British one, which makes access to records dependent on the consent of the contributor ... is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case.<sup>505</sup>

The later *Odièvre v France* case raised similar issues of the extent of an individual's right to obtain access to information about one's origins.<sup>506</sup> The applicant had been abandoned at birth by her mother, who had officially requested that her identity be kept secret. The Grand Chamber accepted that a positive obligation to make accessible information necessary to discover the truth concerning important aspects of an applicant's personal identity arose in this case. Yet, distinguishing this situation from the one which arose in the abovementioned *Gaskin* case, it held in para 43 that:

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<sup>505</sup> *ibid* [49]. See also *MG v United Kingdom* (App no 39393/98) (2003) 36 EHRR 3 (the applicant's inability to appeal against the local authority's refusal to provide him with access to all his childhood care records). The similar 'access to private life related information' issue has arisen in the case *Mikulić v Croatia* (n 215) (in which the applicant, a 5-year-old girl, complained of the length of a paternity suit which she had brought with her mother and the lack of procedural means available under Croatian law to enable the courts to compel the alleged father to comply with a court order for DNA tests to be carried out. The ECtHR weighed the vital interest of a person in receiving the information necessary to uncover the truth about an important aspect of his or her personal identity against the interest of third parties in refusing to be compelled to make themselves available for medical testing. It found that the State had a duty to establish alternative means to enable an independent authority to determine the paternity claim speedily. It held that there had been a breach of the proportionality principle as regards the interests of the applicant, who had been left in a state of prolonged uncertainty as to her personal identity). Compare with *Smith v United Kingdom* (App no 39658/05) ECtHR 4 January 2007 (admissibility decision) (here, unlike in *Gaskin*, the applicant was not seeking access to files holding information about his identity or personal history with a view to uncovering information with formative implications for his or her personality but rather to the information allegedly in the files held by a private bank that concerned the applicant's business transactions and that had not been obtained through any measure invasive of the applicant's privacy or held on a data base which was in use or involved the possibility of release of personal information to others; the ECtHR was accordingly not persuaded that the authorities failed in any positive obligation to protect the applicant's right to respect for his private life within the meaning of Article 8 ECHR and found the application manifestly ill-founded).

<sup>506</sup> (App no 42326/98) (2004) 38 EHRR 43 [GC] (in this case, the ECtHR noted that the applicant's purpose was not to call into question her relationship with her adoptive parents but to discover the circumstances in which she was born and abandoned, including the identity of her natural parents and brothers. For that reason, it considered it necessary to examine the case from the perspective of private life, not family life, since the applicant's claim to be entitled, in the name of biological truth, to know her personal history was based on her inability to gain access to information about her origins and related identifying data).

... [t]he issue of access to information about one's origins and the identity of one's natural parents is not of the same nature as that of access to a case record concerning a child in care or to evidence of alleged paternity. The applicant in the present case is an adopted child who is trying to trace another person, her natural mother, by whom she was abandoned at birth and who has expressly requested that information about the birth remain confidential.

In concluding that there had been no violation of positive obligation under Article 8, the Grand Chamber emphasised that there were competing interests, including those of third parties such as the applicant's adoptive parents and the members of her natural family, as well as a more general interest, namely the avoidance of illegal abortions and the abandonment of children other than under the proper procedure. Taking into account the entry into force in 2002 of new legislation intended to facilitate searches for information about biological origins by means of the creation of a new independent body, the Grand Chamber considered that the State's margin of appreciation had not been overstepped.<sup>507</sup> In the environmental context, for example, in the *Guerra* case the ECtHR held that by failing to provide the applicants with essential information concerning the risks posed to their health and well-being by severe environmental pollution, the respondent State did not fulfil its positive obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8.<sup>508</sup> Recently, in *Roche v United Kingdom* the Grand Chamber found a positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information which would allow him to assess any risk to which he had been exposed during his participation in chemical tests in 1962 had arisen.<sup>509</sup> As to compliance with such obligation, it held that as a matter of principle, the State could not be considered to fulfil its positive obligation of disclosure to an individual where the individual – in this case Mr Roche – had to litigate to obtain it.<sup>510</sup>

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<sup>507</sup> More recently, when considering whether a mother who had given birth anonymously in France and had relinquished her child for adoption subject to a two-month period in which to change her mind, could succeed in having the child returned to her outside that period, in *Kearns v France* (App no 35991/04) ECtHR 10 January 2008, the ECtHR reiterated, that the relevant French legislation strikes a fair balance and ensures sufficient proportion between the competing interests.

<sup>508</sup> *Guerra v Italy* (App no 14967/89) (1998) 26 EHRR 357.

<sup>509</sup> (App no 32555/96) (2006) 42 EHRR 30 [GC].

<sup>510</sup> Compare with *McGinley and Egan v United Kingdom* (App nos 21825/93 and 23414/94) (1999) 27 EHRR 1 (in which a positive obligation to provide information to the applicant servicemen who had participated in armed forces atmospheric tests of nuclear weapons was found to exist but not to be violated).

As far as respect for private life within the media context is concerned, *Von Hannover v Germany* raised important ‘positive obligation’ issues with regard to the balance between freedom of the press and the right to protection against invasion of privacy.<sup>511</sup> In this case, a positive aspect of private life protection under Article 8 resulted in some form of horizontality of ECHR given the fact that the original dispute arose between two private parties – Princess Caroline of Monaco and tabloid magazines which published photographs, taken without her knowledge, showing her going about her daily business, alone or in company, outside her home. Being only partly successful in the German courts, she decided to lodge her application with the ECtHR. In finding a violation of Article 8, the ECtHR placed emphasis on the fact that the photographs and accompanying commentaries had been published for the purposes of satisfying the curiosity of a particular readership as to the details of the private life of the Princess, who was not a public figure and did not fulfil any official function on behalf of Monaco, so that the publication had not contributed to any debate of general interest to society, in the proper sense of that notion. By giving the judgment in favour of the defendant magazines, the German courts did not strike a fair balance between the competing interests and failed thus in their positive obligations to ensure the effective protection of the applicant’s private life.<sup>512</sup>

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<sup>511</sup> (App no 59320/00) (2005) 40 EHRR 1. Given its topicality, literature on this judgment abounds: MA Sanderson, ‘Is von Hannover v Germany a Step backward for the Substantive Analysis of Speech and Privacy Interests?’ [2004] Eur Human Rights L Rev 631; H Tomlinson and M Thompson, ‘Bad News for Paprazzi-Strasbourg has Spoken’ (2004) 154 NLJ 1040; N Hatzis, ‘Giving Privacy its Due: Private Activities of Public Figures in *Von Hannover v Germany*’ (2005) 1 The King’s College LJ 143; or B Rudolf ‘Council of Europe: Von Hannover v Germany’ (2006) 4 J of Intl Constitutional L 533.

<sup>512</sup> For a case, in which similar issues arose but in which the applicant was a non-public figure, see *Gurgenidze v Georgia* (App no 71678/01) ECtHR 17 October 2006. For the cases in which the domestic courts made a thorough examination of the cases and balanced the opposing interests involved in conformity with ECHR standards, see *White v Sweden* (App no 42435/02) ECtHR 19 September 2006 (in which the ECtHR considered that in the series of articles, the newspapers endeavoured to present an account of the various allegations made against the applicant, a well-known person among representatives of organisations for the protection of animals and the conservation of nature, which was as balanced as possible and it found that the domestic courts made a thorough examination of the case and balanced the opposing interests involved). In this context, it should be noted that the ECtHR has only very recently confirmed that a person’s right to protection of his or her reputation is also protected by Article 8 ECHR as being part of the right to respect for private life, see *Pfeifer v Austria* (App no 12556/03) ECtHR 15 November 2007 [35]; *Anguelov v Bulgaria* (App no 45963/99) ECtHR 14 December 2004 (admissibility decision) (in which domestic courts adopted a correct balancing approach when they found that on the facts of the case it was not warranted to convict the reporter of insult after he had taken a single picture of the applicant, who was a public figure, in the courtroom as the accused in a criminal trial); or *Schüssel v Austria* (App no 42409/98) ECtHR 21 February 2002 (admissibility decision) (in which domestic courts were right to hold that neither the accompanying text nor the fact that the applicant’s picture was half overlapped by the picture of

While acknowledging that the effective enjoyment of Article 8 rights by disabled persons may, in certain circumstances, require the adoption of various positive measures by the competent state authorities, the ECtHR has been extremely reluctant to find states in violation of their positive obligations or, indeed, to impose the positive obligations in this area. Indeed, in *Botta v Italy* and *Zehnal and Zehnalová v Czech Republic*, it held that Article 8 was not applicable to situations in which it found no direct and immediate link between the measures sought by an applicant and his private life.<sup>513</sup> The first of these cases concerned the right of the disabled applicant to gain access to a private beach at a place distant from his normal place of residence during his holidays. Here the ECtHR found that such a right concerned interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link between the measures the State was supposed to take and the applicant's private life. The second case concerned a complaint that a large number of public buildings in the applicants' home town were not equipped with access facilities for people with impaired mobility, in which the ECtHR found by a majority that the applicants had failed to demonstrate the existence of a special link between the lack of access to the buildings in question and the particular needs of the first applicant's private life. Similarly, in *Molka v Poland*,<sup>514</sup> in which the applicant, who was confined to a wheelchair, complained about the lack of appropriate access for him to a polling station in local elections. The ECtHR noted that in this particular case it could not be excluded that the authorities' failure to provide appropriate access to the polling station for the applicant, who wished to lead an active life, might have aroused feelings of humiliation and distress capable of impinging on his personal autonomy, and thereby on the quality of his private life. It was also clear that it likewise touched upon the applicant's possibility of developing social relations with other members of his community and the outside world, and was pertinent to his own personal development. Nevertheless, the applicant did not show that he could not have been assisted in entering the polling station by other persons. Furthermore, bearing in mind

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another leading politician went beyond the limits of what is acceptable in the context of political battle in general and against the background of an electoral campaign in particular).

<sup>513</sup> *Zehanal and Zehnalová v Czech Republic* ECtHR 14 May 2002 (admissibility decision); *Botta v Italy* (App no 21439/93) (1998) 26 EHRR 241.

<sup>514</sup> One should note that in respect of the applicant's allegation that he was deprived of his right to vote on account of his disability, it was the ECtHR which raised of its own motion a complaint under Article 8 ECHR.

a State's wide margin of appreciation in this case (in its wider context the issue at stake concerned the allocation of limited state resources to provide such access for disabled persons), the ECtHR considered that Poland could not be said to have failed to ensure respect for the applicant's private life.<sup>515</sup>

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<sup>515</sup> Other examples include: *Pentiacova v Moldova* (App no 14462/03) ECtHR 4 January 2005 (admissibility decision) (although the ECtHR was prepared to assume for the purposes of this application that Article 8 was applicable to the applicants' complaints about insufficient funding of their treatment, the fact that the applicants' situation had considerably improved after the implementation of the medical care system reform, it considered that the respondent State could not be said, in the special circumstances of this case, to have failed to discharge its positive obligations under Article 8 ECHR); *Sentges v Netherlands* (App no 27677/02) ECtHR 8 July 2003 (admissibility decision) (the right to respect for the disabled applicant's private life, as guaranteed by Article 8 ECHR, did not entail a positive obligation for the State to provide him with, or pay for, his medical device – a robotic arm); or *Marzari v Italy* (App no 36448/9) ECtHR 4 May 1999 (admissibility decision) (in which it was held that no positive obligation for the local authorities could be inferred from Article 8 to provide the disabled applicant with a *specific* apartment). In this context, see also family life case law: *Maurice v France* (App no 11810/03) (2006) 42 EHRR 42 [GC] and also *Draon v France* (App no 1513/03) (2006) 42 EHRR 40 [GC] (in which the applicants complained of inaction on the part of the State in that it had not set up machinery to provide effective compensation for the special burdens occasioned by their child's disability which had not been detected before the child's birth).

### 6.1.2 Positive Obligations and Private Life in English Law

It is clear from *Hannover* that Article 8 imposes on states a positive obligation to provide individuals with effective protection against unjustified and intrusive dissemination of their personal information by media and press to a broad section of the public.<sup>516</sup> In the UK, the protection of information about one's private life against misuse by media and press has come about largely through the development of case law after the commencement of HRA.<sup>517</sup> Although the HRA has not enabled individuals to bring an action against another individual for a violation of Article 8 rights as such (the so-called direct horizontal effect),<sup>518</sup> its provisions have been used indirectly by individuals. Once they managed to fit their claims into the existing domestic action in breach of confidence,<sup>519</sup> courts had the obligation under the HRA

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<sup>516</sup> *Hannover v Germany* (n 511).

<sup>517</sup> UK legislation in respect of personal privacy is piecemeal and has evolved reactively, rather than proactively. There are two main statutes that can be mentioned: DPA and the Protection of Harassment Act 1997 (PHA). Although they provide very useful platforms from which to launch actions for invasions of privacy, each is customised with exemptions that might easily be utilised by the media. As for the media/press self-regulators, furthermore, there are two: Ofcom (regulates broadcast media) and the Press Complaints Commission (regulates print media). Yet, they are often found to be toothless as they do not have the power to impose stricter fines for persistent breaches of their codes or to restrain publication. See for more detailed analysis, Liberty's Report 'Overlooked: Surveillance and Personal Privacy in Modern Britain' (October 2007) at <[www.liberty-human-rights.org.uk/issues/3-privacy/pdfs/liberty-privacy-report.pdf](http://www.liberty-human-rights.org.uk/issues/3-privacy/pdfs/liberty-privacy-report.pdf)> accessed 30 September 2008.

<sup>518</sup> For academic discussion: M Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] PL 423; I Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth' (1999) 48 ICLQ 55; G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?' (1999) 62 MLR 824; HWR Wade, 'Horizons of Horizontality' (2000) 116 LQR 217; R Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48; S Gardbaum, 'The "Horizontal Effect of Constitutional Rights"' (2003 - 2004) 102 Michigan L Rev 393; or RS Kay, 'The European Convention on Human Rights and the Control of Private Law' (2005) 5 Eur Human Rights L Rev 466.

<sup>519</sup> Apart from an action in breach of confidence, in specific circumstances a complainant might be able to bring claims in public or private nuisance (the former perhaps only in very limited circumstances) or for trespass to land and/or to the person. Malicious falsehood and defamation might also be relevant in redressing invasions of personal privacy, however, neither will be appropriate if information that is revealed about the complainant is not false. Where information that is revealed through an invasion of private life is false, but not defamatory or injurious, a claimant could not seek redress (if it was not possible to institute 'false privacy' claims in this situation, a complainant would have less protection if the information revealed was false, than if it were true). See further SH Bailey, DJ Harris and DC Ormerod (n 11) 959; BS Markesinis, 'Our Patchy Law of Privacy – Time to Do Something about It' (1990) 53 MLR 802; G Phillipson and H Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63 MLR 660; G Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 MLR 726; B Markesinis, C O'Connell, J Fetke and M Hunter-Henin, 'Concerns and Ideas about the Developing English Law of Privacy (and How Knowledge of Foreign Law Might be of Help)' (2004) The Institute of Global Law Working Paper <[http://www.ucl.ac.uk/laws/global\\_law/publications/institute/index.shtml](http://www.ucl.ac.uk/laws/global_law/publications/institute/index.shtml)> accessed 30 September 2008; or T Aplin, 'The Development of the Action for Breach of Confidence in a Post-HRA Era' (2007) 1 Intellectual Property Q 19.

to decide upon them compatibly with Article 8 rights.<sup>520</sup> However, the equitable action of breach of confidence could only help privacy intrusion claimants to get to a court when they were able to show that the information that was disclosed, was disclosed without any authorisation, was confidential and that they imparted it to another person in circumstances importing an obligation of confidence.<sup>521</sup> Obviously, not every privacy invasion claim could fit it.<sup>522</sup> Yet, thanks to the well-famed flexibility of common law as well as the English courts' willingness in the post-HRA period to extend the use of the tort of breach of confidence to protect individuals from invasions of their personal privacy by the press up to the standards required by the ECHR, some of the formal and rigid requirements which would otherwise prevent using breach of confidence in purely personal privacy cases have been moderated or even rendered obsolete.<sup>523</sup> This has thus provided individuals with relatively effective redress in respect of invasions of personal privacy. As welcome as English judges' endeavour to accommodate the demands of ECtHR with respect to protection of personal data and information may be, however, by stretching traditional breach of confidence rather than by, for example, recognising a completely new tort, a lot of confusion has been brought into the well-established concepts of English tort law, resulting in overall unclarity of domestic law in this area. Although in invasion of privacy cases, domestic courts no longer ask whether the information was 'confidential', they will want to know whether the information was 'private' (first stage).<sup>524</sup> This is in order to see whether Article 8 is engaged. However, there is no black and white test to determine what is private and what is not. Case law shows that courts have various tests to choose from: (i) the reasonable expectation of privacy test,

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<sup>520</sup> S 6 HRA.

<sup>521</sup> *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415 (Ch).

<sup>522</sup> See, eg *Kaye v Robertson* [1991] FSR 62 (CA) or, in a slightly different context, *Peck v United Kingdom* (n 78)). Privacy and confidence, although sharing some similarities, are fundamentally different concepts. A claim for breach of confidence has its roots in the confidential relationship and the quality of information, and can be defeated if a defendant can show that the information is false, trivial or in the public domain. This may not be the case with privacy; see J Murphy, *Street on Torts* (12 edn OUP, Oxford 2007).

<sup>523</sup> Accordingly, in cases of misuse of personal information by media/press, what matters now in the court is not whether the information that has been used or disclosed without any authorisation was confidential, but whether it was private (ie whether the information contained details about one's private life) while the requirement to impart the information to another person in circumstance importing an obligation of confidence is not relevant any more. See, among others, *Campbell v MGN Ltd*; *Douglas v Hello! Ltd (No.6)*; or *McKennitt v Ash* (all three in n 181); *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776; [2008] Ch 57.

or (ii) the obviously private test.<sup>525</sup> Where information is obviously private, such as that concerning one's sexual life and sexual relationships, courts will consider it to be private and thus eligible for Article 8 protection.<sup>526</sup> The problem is, however, that the obviously private test is not always structured by reference to the Article 8 case law. For example, a specific rule, which does not appear to have its counterpart in Strasbourg jurisprudence and seems to arise out of moral rather than legal logic, has been introduced by domestic courts: the less stable such a sexual relationship is, the less protection will it be afforded by English courts.<sup>527</sup> This is obviously prone to introduce some subjectivity into the decision-making process and make its results less predictable by the litigants. As for the reasonable expectation of the privacy test, furthermore, domestic judges seem still to struggle with the question whether the ECtHR's conclusions in *Hannover* that even the most anodyne of information (for example, ordinary, everyday activities taking place in public) may well fall within the scope of Article 8, only applies to cases of press harassment whereas the disclosure of trivial information without any element of harassment will not be of such considerable importance and sensitivity to a particular person in certain circumstances to be treated as private and therefore covered by Article 8.<sup>528</sup> Once Article 8 is held to be engaged by finding either the misused information to be inherently (obviously) private or the complainant having a reasonable expectation of privacy in respect of the information

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<sup>524</sup> See n 523. Note that English courts tend to use the term 'private' information while the ECtHR prefers terminology such as personal data, information about one's private life, etc.

<sup>525</sup> There is also the possibility for the court to adopt the test of whether the disclosure would be highly offensive to a reasonable person of ordinary sensibilities although this test might not have survived following the decision of the House of Lords in *Campbell*. See *Campbell v MGN Ltd* (n 181) in which all three tests were discussed. See also G Phillipson and H Fenwick, *Media Freedom under the Human Rights Act* (OUP, Oxford 2006) ch 14.

<sup>526</sup> *X v Persons Unknown* [2006] EWHC 2783 (QB); [2007] EMLR 10 (in which an injunction against 'persons unknown' was granted in order to prevent further dissemination of allegations about the state of the claimants' marriage). Medical information, which was even before the HRA clearly recognised as confidential, is yet another example of obviously private information, eg *Ashworth Hospital Authority v MGN Ltd* [2001] 1 WLR 515 (CA) [47] – [48].

<sup>527</sup> *Theakston v MGN Ltd* [2002] EWHC 137; [2002] EMLR 22; *A v B Plc* [2002] EWCA Civ 337; [2003] QB 195; contra *CC v AB* [2006] EWHC 3083 (QB); [2007] EMLR 11.

<sup>528</sup> Compare *John v Associated Newspapers Ltd* [2006] EWHC 1611 (QB); [2006] EMLR 27 with *McKennitt v Ash* (n 181) in both of which courts made a distinction between *Campbell* and *Hannover* in this respect. Above all, see more recent discussion in *Murray v Express Newspapers Plc* [2007] EWHC 1908 (Ch); [2007] EMLR 22 rev'd [2008] EWCA Civ 446. One should bear in mind when talking about protecting trivial information that the ECtHR requires the intrusions to be sufficiently serious in nature in order to fall within the scope of Article 8. In effect, the disclosure of private information should be serious enough to warrant redress but this will depend on the specific facts of each individual case (n 13 and 17).



disclosed, the court will proceed directly to the second stage<sup>529</sup> which will include a balancing exercise between Articles 8 and 10.<sup>530</sup> In the traditional breach of confidence claims, it has been pointed out that there is a public interest in respecting confidences, and in maintaining confidentiality. The disclosure of confidential information could therefore be justified only when required by the public interest. In other words, the competing public interests in maintaining the bond of confidence and access to particular information had to be weighed against each other. In general, public interest defence was very narrowly construed and succeeded only in very specific cases, such as disclosure of information relating to crimes or in order to ensure the safety of the public from medically dangerous practices.<sup>531</sup> To use the old-style breach of confidence test of public interests in the cases of misuse of private information by the media would, however, mean ignoring the ECtHR call for proportionality whenever the need to balance Article 8 and Article 10 rights arose.<sup>532</sup> Domestic courts have therefore expressly recognised that the test has changed now and in misuse of information cases it is one of proportionality.<sup>533</sup> While the openly recognized shift away from the traditional public interest test in privacy cases is certainly a positive step, some recent judgments appear to show that there is still a considerable uncertainty about the interrelationship between the traditional public interest defence and the proper balancing exercise as required under the ECHR among judges themselves.<sup>534</sup> To conclude, although the flexibility with which domestic

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<sup>529</sup> As said above (n 523) the traditional breach of confidence requirement that confidential information is imparted in circumstances importing an obligation of confidence, is no longer of relevance to bringing an action in breach of confidence to the court, so the court will not need to consider it. Yet, in two recent cases, *McKennitt v Ash* (n 181) and *HRH Prince of Wales v Associated Newspapers Ltd* (n 523), the Court of Appeal emphasised that, where a case does involve a traditional relationship of trust and confidence, this will be important both in identifying the information in respect of which the claimant may have a reasonable expectation of privacy and in the balancing exercise where it will point in favour of giving the Article 8 right precedence over the Article 10 right.

<sup>530</sup> In weighing up their relative importance, the court must recognise that neither right has pre-eminence over the other, see *Campbell v MGN Ltd* (n 181).

<sup>531</sup> J Murphy (n 522).

<sup>532</sup> What is required is obviously different from what is, on the balance of two rights, acceptable. Clearly, the application of the public interest justification to misuse of privacy information cases would present a powerful defence to an invasion of privacy; see K Wilson and R Elliott, 'The New Black' (2007) 157 NLJ 393.

<sup>533</sup> *HRH Prince of Wales v Associated Newspapers Ltd* (n 523) [67] (Lord Phillips).

<sup>534</sup> In *McKennitt v Ash* (n 181) the possibility of equating the traditional public interest defence with a defendant's Article 10 right in a misuse of private information claim was raised. In *Beckham v Gibson* (Ch D, 23 April 2005), in which an injunction to prevent the Beckhams' nanny from revealing private details about the couple's life was refused on the ground that the story would be in the public interest (this seems contrary to the reasoning in both *Hannover* and *Campbell*; it may be that the thinking was that the couple have benefited extensively from their image as a happily married couple), seems to

courts have managed to accommodate positive obligation requirements of the private life limb of Article 8 with respect to media intrusion is to be welcomed,<sup>535</sup> the way in which they have done so, ie by recategorising the breach of confidence action – technically an equitable action – as the misuse of private information where it relates to the alleged disclosure of private information, has generated, as seen above, considerable uncertainty. While it is likely that English courts will continue clarifying the blurred law of privacy, by definition they can only do this on a case-by-case basis. Consequently, the current absence of any clearly defined legal concepts does not provide individuals with a clear, demonstrable legal basis for litigating complaints following violations of their privacy entitlements which seems to go against a State's duty imposed on it by the ECtHR to formulate the law with adequate precision.<sup>536</sup> The media also needs clearer guidance as to when the disclosure of personal information will be considered to infringe another's right to privacy in order to adjust its behaviour. It may well be argued, therefore, that acknowledgement of the right as one that is distinct from the law of confidence would enable much more coherent development.<sup>537</sup>

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show that even express duties of confidentiality might not be effective in some circumstances. For a more detailed discussion, see T Aplin (n 519); T Pinto, 'A Private and Confidential Update – Not For Publication' (2007) 18 Entertainment L Rev 170; or Liberty's Report (n 517).

<sup>535</sup> In addition to aforementioned positive changes in privacy law, one can also mention positive developments with respect to remedies available for invasions of one's privacy, ie damages and injunctions. As for recovering damages, since the commencement of the HRA, courts seem to be awarding damages, though in fairly modest amounts, for non-pecuniary harm (mental distress) in privacy cases with relative ease. As far as an injunction is concerned, notwithstanding s 12 HRA over which there was considerable doubt and speculation as to how this provision, seemingly favouring free speech, would be applied, the courts seem to have realised that in privacy cases damages will often be an inadequate remedy and so they are more willing to grant injunctions. See L Clarke, 'Remedial Responses to Breach of Confidence: the Question of Damages' (2005) 24 Civil Justice Q 316; N Witzleb, 'Monetary Remedies for Breach of Confidence in Privacy Cases' (2007) 27 LS 430; K Wilson and R Elliott (n 532) and T Aplin (n 519).

<sup>536</sup> See *Hannover v Germany* (n 511) [73]: '... in a State governed by the rule of law, the individual has precise indications as to the behaviour he or she should adopt ... they need to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.'

<sup>537</sup> Lord Nicholls in *Campbell v MGN Ltd* (n 181) [14] clearly acknowledged that the traditional breach of confidence doctrine and terminology do not sit comfortably with the protection of private information and that we talk now about the tort of misuse of private information rather than breach of confidence. There has been much academic debate about whether or not courts should openly recognise an independent tort of privacy. See, among others, R Singh and J Strachan, 'Privacy Postponed?' (2003) Eur Human Rights LR Special Issue: Privacy 12; J Caldwell, 'Protecting Privacy Post Lenah: Should the Courts Establish a New Tort or Develop Breach of Confidence' (2003) 26 University of New South Wales LJ 90; L Brazell 'Confidence, Privacy and Human Rights: English Law in the Twenty-first Century' (2005) 27(11) EIPR 405; R Mulheron, 'A Potential Framework for Privacy? A Reply to Hello!' (2006) 69 MLR 679; A Schreiber, 'Confidence Crisis, Privacy Phobia: Why Invasion of Privacy Should Be Independently Recognised in English Law' (2006) 2 Intellectual Property Q 160.

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For a broader analysis of not only judicial but also non-judicial ways in which the protection of privacy rights relating to the media might develop in the UK, see Liberty's Report (n 517). See also the report of the Working Group on Privacy (2006), which considered and prepared legislative proposals for introducing a general tort of privacy into Irish law: <[http://www.justice.ie/en/JELR/Pages/Privacy\\_report](http://www.justice.ie/en/JELR/Pages/Privacy_report)> accessed 30 September 2008.

## 6.2 Positive Obligations and Family Life

### 6.2.1 Positive Obligations and Family Life under the ECHR

In the sphere of family life one could witness the very first Article 8 case in which the ECtHR found a breach of positive obligation.<sup>538</sup> In the often cited case of *Marckx v Belgium*,<sup>539</sup> the ECtHR held that respect for family life implied, in particular, the existence in domestic law of legal safeguards that render possible the child's integration in his family from the moment of birth. In other words, there was an existing positive obligation on the part of the competent authorities to allow complete legal family ties to be formed between biological parents and their children. The illegitimacy laws in Belgium which required that the legal bond of maternal affiliation with a child born out of wedlock could be established only by a mother's formal act of recognition, was accordingly held to show a lack of respect for the mother's family life. Furthermore, in *Kroon v Netherlands* the existence of the positive obligation of legal recognition of family ties on the part of the competent authorities was reinforced by the principle that biological and social reality must prevail over a legal presumption, especially where such a presumption 'flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone'.<sup>540</sup> Accordingly, the ECtHR found a violation of a positive aspect of Article 8 in so far as the law did not allow the mother and biological father of a child born while the former's marriage to another man existed to contest the husband's paternity, in view of the legal presumption that a child born within wedlock was the child of the husband, who alone could challenge paternity. By contrast, in *Yousef v Netherlands*,<sup>541</sup> the ECtHR found that there was not simply a formal reason for

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<sup>538</sup> A Mowbray (n 17) 151.

<sup>539</sup> *Marckx v Belgium* (n 237).

<sup>540</sup> *Kroon v Netherlands* (n 214). See also *Johnston v Ireland* (n 233) (referring to the *Marckx* judgment, the ECtHR held that respect for family life implies an obligation for the State to act in a manner calculated to allow natural family ties between an illegitimate child and its parents to develop normally, placing the child, legally and socially, in a position akin to that of a legitimate child).

<sup>541</sup> (App no 33711/96) (2003) 36 EHRR 20. In fact, the ECtHR appears to be of the view that the principle that biological reality must prevail cannot be said to be fully applicable to the cases in which the wishes of a biological mother and a putative biological father as to the recognition of paternity are not in agreement. But see *Róžański v Poland* (n 213) (having regard to the overall circumstances of the case, in which the possibility of effectively making the declaration of paternity was dependent on the mother's consent and the launching of the paternity procedure depended on a decision of the authorities who enjoyed a discretionary power to decide whether to accede to such a request or to refuse it, Poland was found to fail to comply with its positive duty in this respect).

denying recognition of paternity; rather, the applicant had wished to disrupt his daughter's existing family situation. In those circumstances, notwithstanding the biological reality, domestic courts had correctly put the child's best interests first, so that there had been no violation of Article 8. *Znamenskaya v Russia* raised somewhat different questions which related to the position of the mother, who had given birth to a still-born child a few months after her divorce. Her former husband had been registered as the father but the applicant claimed that the true father was a man with whom she had been living for several years as man and wife and who had died a short time after the birth while in detention. The domestic courts refused to examine the applicant's request that this man be recognised as the father and that the child's patronym and surname be amended accordingly, as the child had not acquired civil rights. The ECtHR, noting that paternity was not disputed and that recognition of paternity would not have imposed any obligations on anyone, observed that the domestic courts had not referred to any legitimate or convincing reasons for maintaining the status quo. It therefore concluded that, as in the *Kroon* case (see above), a legal presumption had been allowed to prevail over biological and social reality 'without regard to both established facts and the wishes of those concerned and without actually benefiting anyone', which was not compatible with the positive obligation to secure effective respect for private and family life.<sup>542</sup> That being so, however, the fact that the law of the United Kingdom did not allow a special legal recognition of the relationship between an 'AID' child and the child's 'social' father, the mother's partner who was a female-to-male transsexual caring for the child, by refusing to register him also as the child's 'legal' father on her birth certificate, has not been found, at least for the time being, to amount to a failure to comply with the State's positive obligation to respect for family life within the meaning of Article 8.<sup>543</sup> The other side to the positive obligation to recognize family relationships is that the legal presumption of the husband's paternity of the child, when combined with the

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<sup>542</sup> (App no 77785/01) (2007) 44 EHRR 15. It is worth noting that while the exercise of Article 8 rights of family (and private) life pertains, predominantly, to relationships between living human beings, *Znamenskaya* is an example of an 'after death' situation to which the positive scope of Article 8 protection extends. See also, in a slightly different context, *Pannullo v France* (App no 37794/97) (2003) 36 EHRR 42, in which the ECtHR found that an eight-month delay by the judicial authority in issuing a burial certificate and returning the body of a four-year-old daughter to the applicant parents constituted interference with the latter's right to respect for their private and family life, having had regard to the circumstances of the case and the tragedy for the parents of losing their child.

<sup>543</sup> *X, Y and Z v United Kingdom* (n 235).

absence of any domestic remedy by which a putative father himself can challenge it, violates the right to respect for the husband's family life under Article 8. In fact, the respect for family life not only imposes the positive obligation on States to recognize family ties between biological parents and their children, but also requires that none of them should be compelled to such recognition. The States have therefore a positive obligation to provide putative fathers, who wish to contest the paternity of a child, with some form of legal means to challenge the legal presumption of paternity<sup>544</sup> or their own original declarations of paternity in the light of new biological evidence which was not known or accessible to them at the time of the original paternity proceedings,<sup>545</sup> in order to align the legal position to the true biological one.<sup>546</sup> Although the lack of a legal mechanism to enable a putative father to protect his private and family life can generally be explained by the legitimate interest in ensuring legal certainty and security of family relationships and by the need to protect interests of children, the ECtHR must be satisfied that in the specific circumstances of

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<sup>544</sup> *Mizzi v Malta* (App no 26111/02) ECtHR 12 January 2006 (the fact that due to the irrebuttable legal presumption the applicant was never allowed to contest his paternity of the child was not proportionate to the legitimate aims pursued). See also *Phinikaridou v Cyprus* (App no 23890/02) ECtHR 20 December 2007 (inability to bring a paternity suit as a result of an absolute time-bar that operated despite the applicant's lack of knowledge of the relevant facts) or *Shofman v Russia* (App no 74826/01) ECtHR 25 November 2005 (the fact that an applicant was prevented from disclaiming paternity, because he did not discover that he might not be the father until more than a year after he learnt of the registration of the birth, was not proportionate to the legitimate aims pursued).

<sup>545</sup> *Tavli v Turkey* (App no 11449/02) ECtHR 9 November 2006 (refusal of retrial to challenge paternity finding because scientific progress (DNA test) was not a valid ground for such a challenge pursuant to domestic law resulted in violation of Article 8 ECHR); *Paulík v Slovakia* (App no 10699/05) ECtHR 10 October 2006 (impossibility to challenge in court a judicial declaration of paternity notwithstanding the special features of the case, ie the substantial scientific progress that had been made between the time of the 1970 judgment and the 2004 DNA report and the fact that the parties (his daughter was almost 40) concerned had no objection to the applicant's disclaiming paternity, was found to be disproportionate). Compare with *BH v Austria* (App no 19345/92) EComHR 14 October 1992 (admissibility decision) (the statutory time-limit to raise objections against recognition of paternity did not disclose any lack of respect for the mother's family life when in 1986, at the time of recognition of paternity, she lived together with the child's father and her child; later she left her child with him and agreed that he be in charge of caring for and educating her child, while she was living and working abroad and when only in spring 1991 she became doubtful as to the paternity of the child's father, not disclosing any new circumstance which had not been known to her at the time after recognition by the child's father).

<sup>546</sup> The broad scope of paternity claims is of further significance in relation to discrimination arguments under Article 14 ECHR. Frequently, putative fathers have claimed that there has had been a violation of Article 14 taken in conjunction with Article 8 where, for instance, a man's right to contest paternity of a child born during his marriage was subject to time-limits, whereas his former wife was entitled to institute paternity proceedings at any time. See, the above cited case law (n 544) but also, for example, *Rasmussen v Denmark* (App no 8777/79) (1985) 7 EHRR 371.

each case a fair balance has been preserved between the interest of a putative father and the general interest.<sup>547</sup>

In the context of the husband-wife relationship, furthermore, in a well-known case *Airey v Ireland*,<sup>548</sup> the ECtHR held that although husband and wife were in principle under a duty to cohabit, the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together. Thus, effective respect for private or family life obliged the respondent State to make this means of protection effectively accessible, when appropriate, to anyone who might wish to have recourse thereto. Since in this case, the applicant was unable to meet the high costs of legal representation before the High Court, she was effectively prevented from seeking recognition in law of her de facto separation from her violent husband and was, therefore, the victim of a violation of Article 8.<sup>549</sup>

The ECtHR has repeatedly held that Article 8 includes a State's positive obligation to take necessary measures with a view to facilitating the reunion of parents with their children. In the custody and access context, a positive obligation arises under Article 8 obliging the State to take active measures with a view to enforcing court orders on matters of custody and contact after parents divorce. In recent years, there has been a noticeable increase in the number of cases concerning the adequacy of the measures taken by the domestic courts and authorities to ensure effective exercise of a parent's custody or access rights, an issue which has often had an international element involving application of the Hague Convention.<sup>550</sup> What seems to be decisive in this context is whether the national authorities have taken all necessary measures to facilitate the execution as can reasonably be demanded in the special circumstances of

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<sup>547</sup> *Yildirim v Austria* (App no 34308/96) ECtHR 19 October 1999 (admissibility decision) (in which the ECtHR found it justified that, once the limitation-period for the applicant's own claim to contest his paternity had expired, greater weight was given to the interests of the child than to the applicant's interest in disproving his paternity; thus, the public authority's refusal to introduce proceedings to contest the legitimacy of the child, did not disclose a lack of respect for the applicant's private life).

<sup>548</sup> (App no 6289/73) (1979-80) 2 EHRR 305.

<sup>549</sup> In aforementioned *Johnston v Ireland* (n 233 and 540), however, the ECtHR refused to extend *Airey* reasoning so as to impose a positive obligation upon States to enable couples to obtain a divorce when their marriages have collapsed by deriving a right to divorce from Article 8 ECHR.

<sup>550</sup> Pursuant to ECtHR case law, the positive obligations that Article 8 ECHR lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, all the more so where the respondent State is also a party to that instrument. See, in particular, *Maire v Portugal* (App no 48206/99) (2006) 43 EHRR 13; *Iglesias Gil v Spain* (App no 56673/00) (2005) 40 EHRR 3; *Voleský v Czech Republic* (App no 63627/00) ECtHR 29 June 2004; *Sylvester v Austria* (App

each case. In particular, due regard will be given to the swiftness of their implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with him or her.<sup>551</sup>

The underlying positive obligation to reunite children with their natural parents has also often been raised in cases where the public authorities have taken a child into care. Apart from the need to justify under Article 8(2) the decision to take a child into care, as discussed in chapter 3 'Family Life' above, the authorities have a positive duty to take measures to facilitate family reunification as soon as possible given the guiding principle in care cases whereby a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child. This positive duty will begin to weigh on the competent authorities with progressively increasing force from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child. After a considerable period of time has passed since the child was originally taken into public care, the interests of a child not to have his or her de facto family situation changed again may override the interests of

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no 36812/97) (2003) 37 EHRR 17; or *Ignaccolo-Zenide v Romania* (App no 31679/96) (2001) 31 EHRR 7.

<sup>551</sup> In this context, see the violations of Article 8 ECHR found in *Pawlik v Poland* (App no 11638/02) ECtHR 19 June 2007; *Zwadka v Poland* (App no 48542/99) ECtHR 23 June 2005; *Bove v Italy* (App no 30595/02) ECtHR 30 June 2005; or *Reigado Ramos v Portugal* (App no 73229/01) ECtHR 22 November 2005, all of which concerned the right of access of fathers to their children. No such violations were found in *Siemianowski v Poland* (App no 45972/99) (2007) 44 EHRR 24 (in which the ECtHR took into account in particular the fact that the applicant had not been completely deprived of access during the period in question); or in *Kálló v Hungary* (App no 70558/01) ECtHR 14 October 2003 (admissibility decision) (in which the ECtHR was satisfied that given the difficulties in reconciling the applicant's and his divorced wife's opposing positions – coupled with the children's apparent reluctance to meet the applicant – made reasonable efforts to enforce the applicant's right of access to his sons). As to proceedings under the Hague Convention, the recent cases include *Bianchi v Switzerland* (App no 7548/04) ECtHR 22 June 2006 (the failure by the Swiss authorities to enforce the judicial decisions ordering the return to Italy of the applicant's son, who had been abducted by the child's mother); *HN v Poland* (App no 77710/01) ECtHR 13 September 2005 (which concerned court decisions ordering the return of a child to its father to Norway); *Karadžić v Croatia* (App no 35030/04) ECtHR 15 December 2005 (concerned the adequacy of the measures taken by the Croatian authorities to return a child to its mother in Germany); or *Monory v Romania* (App no 71099/01) (2005) 41 EHRR 37 (concerned, inter alia, the adequacy of the measures taken by the Romanian authorities to secure the return of a child to its father, who had been awarded joint custody). Compare with *Guichard v France* (App no 56838/00) ECtHR 2 September 2003 (admissibility decision) (in which the French administrative authorities' refusal to allow the applicant the protection of the Hague Convention and to take all necessary measures to secure the prompt return of the removed child because the removal of his child could not be considered 'wrongful' for the purposes of the Hague Convention since he did not have parental responsibility, could not be regarded as a violation of Article 8 ECHR).



the parents to have their family reunited.<sup>552</sup> Indeed, the possibilities of reunification will be progressively diminished and eventually destroyed if the biological parent and the child are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur. The minimum to be expected of the authorities is to examine the situation anew from time to time to see whether there has been any improvement in the family's situation.<sup>553</sup>

Further examples of positive obligation to assist family reunification can be found in the immigration context especially in case law in which non-national family members have been seeking residence permits in Contracting States in order to join their relatives there.<sup>554</sup> The starting point is the fact that Article 8 does not entail a general positive obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory.<sup>555</sup> Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's positive obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest.<sup>556</sup> Factors to be taken into account in this context are the extent to which

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<sup>552</sup> *KA v Finland* (App no 27751/95) ECtHR 14 January 2003 (no serious and sustained effort towards reunification of the family, but an apparent presumption that long-term care was required; the restrictions on access further appeared directed towards prioritising bonding between the foster family over that with the biological parents.).

<sup>553</sup> *R v Finland* (App no 34141/96) ECtHR 30 May 2006 (there was no serious and sustained effort on the part of the social welfare authority directed towards facilitating a possible family reunification such as could reasonably be expected for the purposes of Article 8 ECHR during the many years throughout which the boy was in care; furthermore, the severe restrictions on the applicant's right to visit his son reflected an intention on the part of the social welfare authority to strengthen the ties between the boy and the substitute carers rather than to reunite the applicant and his son). Compare with *Hansson v Sweden* (App no 62402/00) ECtHR 13 November 2003 (admissibility decision) (the authorities in their efforts to reunite the mother and the child firstly by placing them together at the same centre for two years and thereafter, subsequent to the year when contact was prohibited, continued in their efforts to reunite mother and child, notably by increasing access and letting it take place at the mother's home as well); or *Thomasi v Finland* (App no 28339/95) ECtHR 19 March 1992 (admissibility decision) (in this case, it could not be maintained that there was a lack of effort on the part of the authorities to seriously consider the termination of public care as to constitute a violation of Article 8).

<sup>554</sup> These cases are actually very good examples of how ECtHR's approach to positive and negative obligations under Article 8 ECHR seems to merge. Indeed, the ECtHR does not find it necessary to determine whether in such cases the impugned decision, to refuse to grant a residence permit to the applicant constitutes an interference with his or her exercise of the right to respect for her family life or is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation. Eg *Priya v Denmark* (App no 13594/03) ECtHR 6 July 2006 (admissibility decision).

<sup>555</sup> *Beldjoudi v France* (App no 12083/86) (1992) 14 EHRR 801; or *Moustaquim v Belgium* (App no 12313/86) (1991) 13 EHRR 802.

<sup>556</sup> *Ahmut v Netherlands* (App no 21702/93) (1997) 24 EHRR 62; *Gül v Switzerland* (n 241); or *Abdulaziz, Cabales and Balkandali v United Kingdom* (App nos 9214/80, 9473/81, 9474/81) (1985) 7 EHRR 471.

family life is effectively ruptured, the extent of the ties in the State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, an issue of dependency, whether there are factors of immigration control (a history of breaches of immigration law, for instance) or considerations of public order weighing in favour of exclusion.<sup>557</sup> Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious (where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8).<sup>558</sup> Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and, those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time.<sup>559</sup> Furthermore, due consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with his or her children who, for the time being, have been left behind in their country of origin or a third country, and that it may be unreasonable to force the parent to choose between giving up the position which he or she has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company which constitutes a fundamental element of family life. Here, additional factors to be taken into account are the age of the children concerned, their situation in the country of origin and their degree of independence from their parents.<sup>560</sup> Overall, however, one can conclude that, given the sensitivity of immigration issues, the States have enjoyed a considerable width of margin of appreciation and most of the applications, including those of dependant young children, have been found to be inadmissible.

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<sup>557</sup> *Z and T v United Kingdom* (App no 27034/05) ECtHR 28 February 2006 (admissibility decision); or *Solomon v Netherlands* (App no 44328/98) ECtHR 5 September 2000 (admissibility decision).

<sup>558</sup> *Mitchell v United Kingdom* (App no 40447/98) (2003) 36 EHRR 52 (admissibility decision); *Shebashov v Latvia* (App no 50065/99) ECtHR 9 November 2000 (admissibility decision); or *Ajayi v United Kingdom* (App no 27663/95) ECtHR 22 June 1999 (admissibility decision).

<sup>559</sup> Cf *Khannam v United Kingdom* (App no 14112/88) 59 DR 265.

<sup>560</sup> *Mubilanzila Mayeka and Kanika Mitunga v Belgium* (App no 13178/03) ECtHR 12 October 2006; *Haydarie v Netherlands* (App no 8876/04) ECtHR 20 October 2005 (admissibility decision); *Ramos*

In a slightly different context, in *Dickson v United Kingdom*,<sup>561</sup> a prisoners' access to artificial insemination was held to fall within the ambit of Article 8. The case concerned the State's refusal to take exceptional steps to allow something (the possibility of the begetting of children by prisoners) not already an existing general right or entitlement. The UK government cited three justifications for the policy: (i) losing the opportunity to beget children was an inevitable and necessary consequence of imprisonment; (ii) public confidence in the prison system would be undermined if the punitive and deterrent elements of a sentence would be circumvented by allowing prisoners guilty of certain serious offences to conceive children; and (iii) the absence of a parent for a long period would have a negative impact on any child conceived and, consequently, on society as a whole. Reversing the judgment of the Fourth Section of ECtHR, the ECtHR Grand Chamber held that while the inability to beget a child might be a consequence of imprisonment, it was not an inevitable one, it not being suggested that the granting of artificial insemination facilities would involve any security issues or impose any significant administrative or financial demands on the State. There was no place under the Convention for automatic forfeiture of rights by prisoners based purely on what might offend public opinion. The Court was prepared to accept as legitimate that the authorities should concern themselves as a matter of principle with the welfare of any child, and the State had a positive obligation to ensure the effective protection of children. That, however, could not go so far as to prevent parents who so wished from attempting to conceive a child in circumstances such as the instant case, especially as the second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released. Moreover, the policy as structured effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case. In particular, the policy placed an inordinately high 'expectation' burden on the applicants. Even if the applicants' Article 8 complaint was before the Secretary of State and the Court of Appeal, the policy set the threshold so high against them from the outset that it did not allow a balancing of the competing individual and public interests and a proportionality test as required by the Convention. In addition, there

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*Andrade v Netherlands* (App no 53675/00) 6 July 2004 (admissibility decision); *Şen v Netherlands* (App no 31465/96) (2003) 36 EHRR 7.

was no evidence that when fixing the policy the Secretary of State had sought to weigh the relevant individual and public interests or assess the proportionality of the restriction. Since the policy was not embodied in primary legislation, the various competing interests were never weighed, nor were issues of proportionality ever addressed by Parliament. The absence of such an assessment had to be seen as falling outside any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interests involved.<sup>562</sup>

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<sup>561</sup> *Dickson v United Kingdom* (App no 44362/04) ECtHR [GC] 4 December 2007.

<sup>562</sup> It was held by twelve votes to five that there had been a violation of Article 8 ECHR. Five dissenting judges were of an opinion that in the specific circumstances of the case (the couple had established a pen-pal relationship while both were serving prison sentences; the couple had never lived together; there was a 14-year age difference between them; the man had a violent background; the woman was at an age where natural or artificial procreation was hardly possible and in any case risky; and any child which might be conceived would be without the presence of a father for an important part of his or her childhood years), it could not be said that the British authorities had acted arbitrarily or had neglected the welfare of the child which would have been born.

### 6.2.2 Positive Obligations and Family Life in English Law

As shown above, where immigration is concerned Article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of residence and to authorise family reunion in its territory.<sup>563</sup> While *no general* obligation to permit settlement and continued residence of even the very closest family members exists under the ECHR, refusal of entry of a person to a country where his or her immediate family resides may raise in *some circumstances* an issue under a positive realm of Article 8's right to respect for family life (emphasis added). If, for instance, refusal of entry would result in preventing a family member from visiting their relatives or someone from living with their husband, wife or partner, if the circumstances are such that it is not reasonable to expect the other members of the family to follow, then their right to respect for family life may indeed be violated, unless a fair balance between the rights of the individual and the public interest in effective immigration control and public order was struck by public authorities when refusing the entry.<sup>564</sup> It is this question of proportionality, set in the context of a particularly wide margin of appreciation afforded to States by the ECtHR in this politically sensitive area, that has been a crucial and decisive point in the great majority of Strasbourg 'immigration' case law with respect to both 'negative obligation' cases (where the impugned decision is treated as the interference, eg removal) and 'positive obligation' cases (where the issue of lack of respect is at stake, eg refusal of entry clearance) in Strasbourg.<sup>565</sup>

At the domestic level, since the commencement of the HRA, judicial assessment of proportionality in relation to immigration decisions has proved to be a very controversial exercise, especially because of the much disputed issue of whether - and if so, to what extent - judges should defer to a primary decision maker when balancing ECHR rights and the public interest.<sup>566</sup> The primary decisions in immigration matters are made by the Home Secretary and his officials (usually by immigration officers or

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<sup>563</sup> See case law cited in 555.

<sup>564</sup> See n 556-560.

<sup>565</sup> For some comments on the ECtHR's approach to positive and negative obligations under Article 8 that seem to merge in the immigration context see n 554.

<sup>566</sup> Even before the commencement of the HRA, M Hunt wrote 'the true obstacle to the effective use of human rights law will remain so long as English courts remain resistant to overtly recognizing the

entry clearance officers) who decide whether the requirements for entry contained in the Immigration Rules (IRs) are fulfilled in a given case so as to grant leave to enter or entry clearance.<sup>567</sup> If leave to enter/entry clearance is refused, an affected applicant can appeal against such a refusal on family rights grounds.<sup>568</sup> An appeal will be heard by the Asylum and Immigration Tribunal (AIT), which consists of immigration judges, often accompanied by non-legal members.<sup>569</sup> If the AIT decides to dismiss the appeal, an appellant may apply for permission to make a further appeal on human rights grounds to the appropriate appellate court.<sup>570</sup> Although on the whole, it may

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concept of proportionality', and this has proved to be the case in immigration and human rights appeals (M Hunt, *Using Human Rights Law in the English Courts* (Hart Publishing, London 1997)).

<sup>567</sup> The basic framework of UK immigration law - that is, the laws controlling the entry into, residence in and departure from the UK - is provided by a number of immigration acts, such as the Immigration Act 1971; the Asylum and Immigration Act 1996; the Immigration and Asylum Act 1999; the Nationality, Immigration and Asylum Act 2002; the Asylum and Immigration (Treatment of Claimants, etc) Act 2004; or the Immigration, Asylum and Nationality Act 2006. While the various immigration acts provide the statutory basis for the control of immigration, the powers granted under the acts are very general. How those powers are to be exercised is set out in much more detail in the IRs (also with respect to entry requirements for family members). The IRs are not in the form of legislation or secondary legislation, but they are set out in House of Commons Papers and come into force unless disapproved of by Parliament. They are not, therefore, exposed to detailed, parliamentary scrutiny and usually change every two or three years. The current IRs (and the most recent Statements of Changes) can be found on the Laws and Policy section of the website of the Border & Immigration Agency (which is part of the Home Office and was previously known as the Immigration and Nationality Directorate) at <<http://www.bia.homeoffice.gov.uk>> accessed 30 September 2008. Situations and applications not covered by the IRs are dealt with 'outside the rules' and are at the discretion of the immigration authorities. In some cases, the immigration authorities have formulated policies to deal with certain categories of applications outside the IRs. The Home Office issues detailed instructions to immigration officers on how they should operate the IRs. A disclosable version of these Instructions is published on the Internet, as are some of the concessionary policies 'outside the rules'. Not all of these policies are published. In some instances they come to public attention only because they have been referred to in Parliament or in a court/tribunal in individual cases (see *AS (Somalia) v Entry Clearance Officer (Addis Ababa)* [2008] EWCA Civ 149; Times, April 14, 2008 in which the Home Secretary's 2006 family reunion policy was mentioned). Note that the scope of this thesis section does not cover nationals of the Member States of the EU and of the EEA who enjoy the right of free movement under EU law, and are only subject to limited immigration control (see the Immigration (European Economic Area) Regulations 2006, SI 2006/1003 which implemented in domestic law Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States).

<sup>568</sup> As a caveat to the analysis which follows, it may be useful to point out that the issue of whether or not the right to respect for family life applies to entry clearance is often disputed. This section however proceeds on the basis that it does, since even if the geographical scope of the ECHR does not extend to the rights of those outside the State's jurisdiction, there will always be family members in the UK whose rights may be infringed by entry clearance decisions; for further detail see G Clayton, *Textbook on Immigration and Asylum Law* (OUP, Oxford 2006) 88.

<sup>569</sup> The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 abolished the previous two-tier system of immigration appeals that consisted of an initial appeal to an adjudicator with a second appeal to an Immigration Appeal Tribunal (<<http://www.ait.gov.uk/>> accessed 30 September 2008).

<sup>570</sup> The system of challenging the AIT's decision is rather complex as the route for challenge depends on the composition of the panel at first hearing. If there were three legally qualified members and the appeal is dismissed, the appellant may apply to the AIT for permission to appeal to the Court of Appeal. If the AIT refuses permission, an application may be made to the Court of Appeal on a point of

appear that the domestic appeal and judicial review system provides individuals and their human rights with effective judicial safeguards against poor decision-making or abuse of immigration control measures by the State, there is still a crucial question about the judicial deference which, if used, may well lessen the intensity of the proportionality review to such an extent as to render the above safeguards ineffective. Until very recently, when deciding how much weight was to be given to the policy of maintaining effective immigration control, the AIT<sup>571</sup> paid considerable deference to the Home State's view, whose immigration decisions when taken pursuant to the IRs were believed to be proportionate in all save a small minority of exceptional cases. Therefore, save in an *exceptional* case, the AIT used to determine whether an immigration decision was within the range of reasonable responses rather than deciding itself whether the decision was proportionate (emphasis added).<sup>572</sup> This led the AIT to treat exceptionality as a threshold requirement, linking it often to the requirement that the infringement of family rights must have consequences of very high gravity in order to potentially engage the operation of Article 8.<sup>573</sup> As for the Court of Appeal, supporting the view that the decision on proportionality was for the AIT, its usual question was not whether the AIT's decision was proportionate but solely whether a reasonable AIT might have found on the facts of the appellant's case that the situation was so exceptional as to justify a decision on the proportionality issue in the appellant's favour.<sup>574</sup> There was therefore a clear risk that if the AIT and/or the Court of Appeal deferred too readily to a primary decision-maker, there would be no effective consideration of the proportionality of an immigration decision,

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law only. If, on the other hand, fewer than three legally qualified members heard the first appeal, the appellant can apply to the High Court for a reconsideration order, which compels the AIT to look at the case again on the basis that it has made an error of law. After a reconsideration hearing there is an opportunity to appeal to the Court of Appeal, with permission, on a point of law. IA Macdonald and R Toal, *Macdonald's Immigration Law & Practice* (First Supplement to 6th edn LexisNexis Butterworths, London 2006) ch 18.

<sup>571</sup> For convenience the AIT shall also refer to former adjudicators and the Immigration Appeal Tribunal, without differentiation, which it replaced (see n 569 above).

<sup>572</sup> See the recent AIT's decision in *AM v ECO Ethiopia* [2007] UKAIT 00058 [47] based on the misrepresentation of *R (on the application of Razgar) v SSHD (No.2)* [2004] UKHL 27; [2004] 2 AC 368. G Clayton, 'Prediction or Precondition? The House of Lords Judgment in Huang & Kashmiri' (2007) 21 J of Immigration, Asylum and Nationality Law 311.

<sup>573</sup> See, for instance, *WK (Palestinian Territories)* [2006] UKAIT 00070.

<sup>574</sup> *Mongoto v SSHD* [2005] EWCA Civ 751; 2005 WL 1459186 [27]. The judicial authorities on the proper approach in the AIT to judging proportionality were based on judicial review cases and upon a highly disputed approach to judicial review couched in language reminiscent of the traditional Wednesbury ground of review. The beginning of the chain is the judgment in *Mahmood (Amjad) v SSHD* [2001] 1 WLR 840 (CA).

which might have implications for the ability of the UK to argue before the ECtHR that ECHR rights intrusions came within its margin of appreciation.<sup>575</sup> In 2007 it was hoped that the situation would finally be clarified by the House of Lords in *Huang*.<sup>576</sup> In this case, the House of Lords explained that on a human rights appeal the AIT was not reviewing the immigration decision of the primary decision maker; it was itself deciding whether or not it was unlawful to, for example, refuse leave to enter and this was done on up-to-date facts, as known at the time of the appellate hearing. In order to do that, the AIT had to firstly establish the relevant facts, and, secondly, decide the proportionality issue by weighing all the arguments on both sides. The decision on proportionality involves the ultimate question; whether taking full account of all considerations weighing in favour of the refusal of leave to enter, it prejudices the family life of the applicant in a manner so serious as to amount to a breach of the Article 8, ie of the State' positive obligation to respect an individual's family life.<sup>577</sup> At the same time, *Huang* made clear that no legal test of exceptionality should be applied in relation to the determination of proportionality under Article 8 and that it was therefore unnecessary to ask the additional question whether the case meets an exceptionality test. Above all, the AIT should not assume that the IRs had themselves struck the balance between the public interest and human rights.<sup>578</sup> Although this case

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<sup>575</sup> For scholarly discussion, see D Pannick, 'Principles of Interpretation of Convention under the Human Rights Act and the Discretionary Area of Judgment [1998] PL 545; R Singh, 'Is There a Role for the "Margin of Appreciation" in National Law after the Human Rights Act' (1999) 1 Eur Human Rights L Rev 15; J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity' [2003] PL 592; F Klug, 'Judicial Deference under the Human Rights Act 1998' (2003) 2 Eur Human Rights L Rev 125; M Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in N Bamforth and P Leyland (eds), *Public law in a Multi-layered Constitution* (Hart Publishing, Oxford 2003); R Clayton (n 396); Lord Steyn (n 396); S Feldman (n 396).

<sup>576</sup> *Huang v SSHD* [2007] UKHL 11; [2007] 2 AC 167.

<sup>577</sup> There are numerous factors which may arise in individual cases and which would be of relevance to the issue of proportionality and they, in fact, correspond to those allowed for by the ECtHR itself (n 557-560), covering matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin, factor of delay in processing the application, applicant's criminal history, etc. See A Kotzeva, L Murray and R Tam, *Asylum and Human Rights Appeals Handbook* (OUP, Oxford 2008) 112. The court/AIT's approach in applying those factors to individual facts seems to be the same whether the case involves positive obligations (eg. family reunion) or negative obligations (removal of a settled individual away from his family); see *Kugathas v SSHD* [2003] EWCA Civ 31; [2003] INLR 170 [15].

<sup>578</sup> It is interesting to note the House of Lords' reasoning behind the statement that IRs themselves do not strike the proper balance. It is because the IRs could be said not to represent considered democratic compromise in the way that domestic housing policy does (*Leeds CC v Price* (n 111)). Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years. The same cannot be said of the IRs, which are not the product of active debate in Parliament (n 567), where non-nationals seeking leave to enter (or remain) are not in any event represented (in



concerned primarily the AIT, the same principles may be applied to the Court of Appeal which, on an application for judicial review, must determine whether or not the AIT's decision is proportionate and compatible with ECHR rights.<sup>579</sup> At last, the traditional domestic rhetoric in immigration human rights law which talked in terms of exceptions, high thresholds, and even that the ECHR was not intended to protect immigrants or would-be immigrants at all, was reversed. Looking at the case law from the post-*Huang* period, however, it is clear that the issue of exceptionality, deference and proportionality is in practice still far from settled. The de facto use of exceptionality criteria with a generous deference to the executive have apparently persisted, even in the face of House of Lords authority.<sup>580</sup> It is really unfortunate that from AIT immigration judges up to the Court of Appeal, there is currently still no ready way in law for an appellant to know whether a proper approach based on proportionality will be employed rather than an alternative based on de facto exceptionality and judicial deference to primary legislation/decision maker.<sup>581</sup>

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addition, the premise of a general statutory scheme was such that applicants may fail to qualify under the IRs and still have a valid claim under Article 8 ECHR). This reasoning may be of further significance in any case where a public authority challenge on human rights grounds seeks to shelter behind a domestic statutory regime. As *Leeds* and *Huang* demonstrate, some statutory regimes will afford ample shelter while others will not. The regime in question must be analysed in its statutory and democratic context. Ch Bourne, 'A Mystery Solved?' (2007) 157 NLJ 688.

<sup>579</sup> This also stems from the fact that the duty under s 6 HRA applies, as *Huang* made clear beyond dispute, not only in appeals but also in judicial review. One difference between AIT adjudication and the Court of Appeal's judicial review in immigration cases remains though: whilst the AIT decides on the basis of up-to-date facts, the Court of Appeal decides by reference to circumstances prevailing at the relevant time. M Amos, 'Separating Human Rights Adjudication from Judicial Review' (2007) 6 Eur Human Rights L Rev 679.

<sup>580</sup> G Clayton (n 572). E Power is in fact talking about exceptionality 'through the back door', see 'Life after *Huang*' (2007) 157 NLJ 1348. For some case law, see: *KR (Iraq) v SSHD* [2007] EWCA Civ 514; [2007] All ER (D) 426 (May) (although the weighing exercise essentially accorded with *Huang*, it was still surprising to see exceptionality being used as part of a legal test); *R (on the application of Ajoh) v SSHD* [2007] EWCA Civ 655; [2007] All ER (D) 58 (Jul) (in which the phrase 'very small minority' seems to have merely replaced 'truly exceptional'); or *AM v ECO Ethiopia* (n 572) (the tribunal employed a threshold test of seriousness which is well above the minimum level required to engage the ECHR, and asserted that *Huang* anyway made little difference because 'it was always the case that immigration judges were guided to the effect that decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.')

<sup>581</sup> This was in fact admitted in *AG (Eritrea) v SSHD* [2007] EWCA Civ 801; [2008] 2 All ER 28 in which the question arose as to whether decisions of the AIT which adumbrated a test based on exceptionality were necessarily flawed and should be remitted for reconsideration. After holding that *Huang* had made it very clear that there was no legal test of exceptionality, the Court of Appeal added that 'there will be many cases in which it can properly be said by an appellate tribunal that on no view of the facts could removal be disproportionate. In such cases ... even if the AIT has applied the wrong test, permission to appeal to this court is unlikely to be granted.' [37].

## 6.3 Positive Obligations and Home

### 6.3.1 Positive Obligations and Home under the ECHR

The ‘positive’ nature of the ECHR has permitted a dynamic broadening of the scope of home protection from classic state intrusion such as searches of the home to more positive conceptions of concerns such as noise or environmental nuisance.<sup>582</sup> In the context of environmental nuisance, in *Fadeyeva v Russia* the State’s ‘positive’ responsibility arose from a failure to regulate private industry.<sup>583</sup> In this case the applicant and her family had their home in the sanitary security zone around the largest iron smelter in Russia, within which it was considered that the effects of pollution were excessive. While in theory residential accommodation was not permitted within the zone, thousands of people lived there. While it had been established that pollution levels were indeed unacceptable, the applicant’s attempts to secure resettlement had been unsuccessful, there being no priority for persons living within a sanitary security zone. Although the smelter had been privatised, the ECtHR noted that the State had authorised its continued operation and found that:

... although the polluting enterprise at issue operated in breach of domestic environmental standards, there is no information that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels.<sup>584</sup>

The ECtHR concluded that, despite the wide margin of appreciation left to the respondent State, it had failed to strike a fair balance between the interests of the

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<sup>582</sup> In recent years, the ECtHR has often recalled that the breaches of the right to respect of the home are not confined to concrete or physical breaches, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person’s right to respect of his home if it prevents him from enjoying the amenities of his home. Severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their Article 8 rights adversely. Yet, some members of ECtHR argue that ‘environmental rights’, in so far as they are protected by Article 8 ECHR, relate more to the sphere of ‘private life’ than to the ‘home’. In their view, the notion of home was included in the text of Article 8 with the clear intention of defining a specific area of protection that differs from ‘private and family life’. See, for instance, the concurring opinion of Judge Kovler in *Fadeyeva v Russia* (App no 55723/00) ECtHR 9 June 2005; or the dissenting opinion of Judge Greve in *Hatton v United Kingdom* (n 17).

<sup>583</sup> *Fadeyeva v Russia* (n 582). See also *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v Russia* (App nos 53157/99, 53247/99, 53695/00 and 56850/00) ECtHR 26 October 2006; and *López Ostra v Spain* (App no 16798/90) (1995) 20 EHRR 277.

<sup>584</sup> *ibid* [133].

community and the applicant's effective enjoyment of her right to respect for her home and private life. There had accordingly been a violation of Article 8.<sup>585</sup> In *Taşkin v Turkey* and *Giacomelli v Italy*, on the other hand, violations of Article 8 were found largely on the basis of the failure of the authorities to comply with domestic laws and regulations and with domestic court decisions.<sup>586</sup> In the *Taşkin* case, the authorities had failed to comply with a court decision annulling a permit to operate a gold mine using a particular technique on the grounds of its adverse effect on the environment, and had subsequently granted a new permit; in *Giacomelli v Italy*, the ECtHR lack of prior environmental study and failure of the State to enforce judicial decisions to suspend operation of a toxic emissions generating plant located close to dwellings (thirty metres away from the applicant's house), in which the activities at issue had been found to be unlawful, thereby rendering inoperative the procedural safeguards previously available to the applicant and breaching the principle of the rule of law, resulted in a violation of Article 8. In the context of noise nuisance, in *Moreno Gómez v Spain*,<sup>587</sup> the authorities were held to have repeatedly failed to respect regulations relating to the control of noise, granting permits for private discotheques and bars despite being aware that the area was zoned as noise saturated.<sup>588</sup> The relationship between serious noise disturbances, positive obligations and the right to respect for home (and also private and family life) was likewise considered in *Hatton*

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<sup>585</sup> Although Article 8 ECHR has been invoked in various cases involving environmental concern, it has not been violated every time that environmental deterioration has occurred, see *Kyrtatos v Greece* (App no 41666/98) (2005) 40 EHRR 16 (in which the disturbances coming from the applicants' neighbourhood as a result of the urban (tourist) development of the area (noises, night-lights, etc) had not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8). In the more recent case of *Fägerskiöld v Sweden* (App no 37664/04) ECtHR 26 February 2008 (admissibility decision), the ECtHR has again reiterated that for noise disturbance levels or light reflections to be serious enough to reach the high threshold established in cases dealing with environmental issues so as to engage Article 8 rights, one needs not only to be directly affected by them, but also needs to show that such nuisance reached the minimum level of severity set by ECtHR case-law.

<sup>586</sup> *Taşkin v Turkey* (App no 46117/99) (2006) 42 EHRR 50 whose findings were later applied in *Lemke v Turkey* (App no 17381/02) ECtHR 5 June 2007; or *Giacomelli v Italy* (App no 59909/00) ECtHR 12 October 2006. The cases represent a further example of the application of the ECtHR's 'two aspects of Article 8' test, which involves an assessment of not only the substantive merits of the relevant domestic authority's decision but also the procedural aspects, ie a decision-making process itself. More recent examples of this include *Hatton v United Kingdom* (n 17) discussed further in the text or *Gaida v Germany* (App no 32015/02) ECtHR 3 July 2007 (admissibility decision), which concerned radiation emanating from a mobile phone base station and its impact on the applicant's health.

<sup>587</sup> (App no 4143/02) (2005) 41 EHRR 40.

<sup>588</sup> Compare with *Ward v United Kingdom* (App no 31888/03) ECtHR 9 November 2004 (admissibility decision) (in which the applications concerning the refusal to relocate a Gypsy site to high levels of noise and pollution was declared inadmissible).

*v United Kingdom*.<sup>589</sup> The case concerned night noise in the vicinity of Heathrow Airport and in particular the adequacy of studies carried out by the authorities prior to implementing a system of noise quotas. Unlike the applicants in the abovementioned case *Moreno Gómez*, in this case the applicants did not claim that there was a failure by the national authorities to comply with some aspect of the domestic legal regime. Rather, the question was whether, in the implementation of the 1993 policy on night flights at Heathrow Airport, a fair balance was struck between the competing interests of the individuals affected by the night noise and the community as a whole. The Grand Chamber by majority found that there had been no violation of Article 8, reversing thus the Chamber's conclusion. Setting out the approach to be applied in environmental cases under the ECHR, it reiterated the fundamentally subsidiary role of the ECHR. The national authorities had direct democratic legitimation and were, as the ECtHR held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In the instant case, the ECtHR did not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the interests of individuals affected by those regulations and the conflicting interests of others and of the community as a whole. There were, furthermore, no fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.<sup>590</sup>

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<sup>589</sup> *Hatton v United Kingdom* (n 17). In previous cases concerning protection against aircraft noise the EComHR likewise did not hesitate to rule that Article 8 was applicable and declared complaints of a violation of that provision admissible, eg *Arrondelle v United Kingdom* (App no 7889/77) (1983) 5 EHRR CD303; or *Baggs v United Kingdom* (App no 9310/81) (1987) 9 EHRR CD235. In the first case the applicant's house was just over one and a half kilometres from the end of the runway at Gatwick Airport. In the second, the applicant's property was 400 metres away from the south runway of Heathrow Airport. These two applications, which were declared admissible, ended with friendly settlements. While that does not mean that there was a violation of the ECHR, it does show that the UK Government accepted at that time that there was a real problem. And it was for purely technical reasons that the ECtHR itself, in *Powell and Rayner v United Kingdom* (App no 9310/81) (1990) 12 EHRR 355 [41]; or *Keegan v Ireland* (n 214), which also concerned flights in and out of Heathrow, refused to look into the Article 8 ECHR issue.

<sup>590</sup> Whereas the *Hatton* case involved a challenge to noise created by night flights which themselves were governed by a regulatory scheme set up by the UK Government in 1993, the later case *Ashworth v United Kingdom* (App no 39561/98) ECtHR 20 January 2004 (admissibility decision) involved a claim that the UK Government had failed to adequately regulate local leisure flying in that they had left regulation to the operators of the private Denham Aerodrome, whose interests were not those of the applicants. Neither here, however, was the ECtHR able to find that, in adopting the policy approach to the regulation of a local aerodromes and thereby permitting the regulatory regime in effect at Denham Aerodrome, the UK Government exceeded the margin appreciation afforded to them or failed to take appropriate measures to strike a fair balance and to secure the rights of the applicants under Article 8 ECHR.

In a slightly different type of nuisance case, in *Surugiu v Romania*,<sup>591</sup> which concerned various acts of harassment by third parties who entered the applicant's yard and dumped several cartloads of manure in front of the door and under the windows of the house, the ECtHR also found the positive aspect of Article 8 to be engaged. In particular, the ECtHR pointed out that even supposing that the authorities' failure to take action could be explained by the fact that, originally, a third party had been granted a property title over the land in question, it appeared that even after that title had been revoked by a final judgment, the authorities had failed to take prompt measures to give the applicant possession of his land and put a stop to the repeated interference with the exercise of his right guaranteed by Article 8. On this point the ECtHR found it particularly striking that it was only one and a half years after the third party's title had been revoked that an administrative penalty was imposed on him, whereas his infringements of the applicant's right to peaceful enjoyment of his home appeared to have been a daily occurrence.<sup>592</sup>

There is, furthermore, a body of 'positive obligation' case law that concerns the facilitation of the Gypsy way of life. Following *Chapman*, the ECtHR has accepted that, in principle, the right to respect for one's home in Article 8 could impose a positive obligation on the authorities to provide accommodation for a homeless Gypsy which is such that it facilitates their Gypsy way of life.<sup>593</sup> However, the ECtHR has made obvious that this obligation can only arise where the authorities have such accommodation at their disposal and are making a choice between offering such accommodation or accommodation which is not 'suitable' for the cultural needs of a

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<sup>591</sup> (App no 48995/99) ECtHR 20 April 2004.

<sup>592</sup> See also *Novoseletskiy v Ukraine* (47148/99) (2006) 43 EHRR 53 (insufficiency of measures taken by the authorities with a view to re-establishing and protecting the applicant's rights to reside in his home when, following the allegedly unlawful entry into his flat, he had been unable to occupy it and had been forced to live with members of another household under conditions that prevented normal privacy); or *Babylonová v Slovakia* (App no 69146/01) ECtHR 30 May 2006 (as a result of deficiencies in the registration provisions of domestic legislation, the applicant had to endure various interferences in the enjoyment of her home (and private life), including the registration of an unrelated person as resident in her house, the payment of additional social contributions and fees, misdelivery of official mail and other documents and a visit by the police to her house for reasons unconnected with her). Compare with *Záfer v Slovakia* (App no 60228/00) ECtHR 19 September 2006 (admissibility decision) (in which the applicant claimed that his right to respect for his home was adversely affected as a result of disturbance by different persons who had difficulty in locating one of the companies with its headquarters but was not attempting to resolve the problem in line with the reasonable proposals made by the municipal authority).

<sup>593</sup> In *Chapman*, the ECtHR clearly stated that 'a measure affecting the applicant's ability to live in a caravan ... can have an impact going beyond the right to respect for her home, and can also affect her

Gypsy. Thus, in *Codona v United Kingdom*,<sup>594</sup> when no sites were found to be available upon which the applicant could lawfully place her caravan, the ECtHR refused to conclude that the authorities were under a positive obligation to create such a site for the applicant (and her extended family) and provide her with accommodation of her choosing. The ECtHR took into account the fact that the local council in this case had attempted to but could not find a suitable official site, and it accepted that the provision of bed and breakfast accommodation was unsatisfactory, and solely a temporary measure. Accordingly, it could only conclude that the domestic authorities were alive to, and complied with, any positive obligation that they owed under Article 8 to facilitate the applicant's Gypsy way of life, to the extent that such was possible given the constraints of available accommodation. To decide otherwise would mean 'to extend the positive obligation imposed by [a]rticle 8 far beyond the – limited – bounds established in previous case-law'.<sup>595</sup>

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ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition' (n 374) [73].

<sup>594</sup> (App no 485/05) ECtHR 7 February 2006 (admissibility decision).

<sup>595</sup> *ibid.* See also *Burton v United Kingdom* (App no 31600/96) (1996) 22 EHRR CD134 (an admissibility decision of the Commission, in which it had cause to consider the wish of a terminally ill Gypsy to return from settled (bricks and mortar) accommodation to living in a caravan in the last days of her illness; it concluded that Article 8 did not operate to extend a positive obligation on the respondent State to provide alternative accommodation of the applicant's choosing).

### 6.3.2 Positive Obligations and Home in English Law

Regarding the State's positive obligations under the 'home' limb of Article 8, the way in which the Grand Chamber's decision in *Hatton*<sup>596</sup> has been embraced by domestic courts and applied to domestic nuisance cases will be addressed here.

Traditionally, those whose right to respect for his/her home was affected by noise, pollution, emissions, smells, and so forth, had to invoke the common law of nuisance in order to obtain redress (an injunction and/or damages).<sup>597</sup> As originally conceived, however, the law of nuisance was not designed to protect personal injuries and was exclusively concerned with acts or omissions causing violations of land or interests in or over land. Accordingly, its use to protect one's right to respect for home was rather limited.<sup>598</sup> By having brought rights home, however, the HRA was said to have filled the gaps in the protection of individuals against nuisance by offering remedies in case of ECHR rights violations where none used to be available through traditional property-based tort action in nuisance.<sup>599</sup> Indeed, in the context of the right to respect for home, a good example of the HRA's growing role as an alternative, or supplement, to traditional action in nuisance, is *Dennis v Ministry of Defence*.<sup>600</sup> Here, the claimant, who owned and lived on an estate adjacent to an operational aerodrome, claimed that the noise from military aircraft interfered with his right to home (ie breach of a State's negative obligation). The court held that at common law the noise was at such a level as to constitute a nuisance, yet the public interest demanded that the flying of the aircraft should continue. However, the effect of the HRA was to require compensation as even though the public interest was greater than the individual private interests of the claimants, it was not proportionate to give effect to

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<sup>596</sup> See n 17.

<sup>597</sup> Alternatively, if the specific kind of activities that could amount to nuisance were regulated by statutes (eg the Control of Pollution Act 1974), an individual could bring a nuisance claim under the relevant Act. C Elliott and F Quinn, *Tort law* (6<sup>th</sup> edn Longman, Harlow 2007) ch 8.

<sup>598</sup> *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL) (only a person with an interest in land could sue in private nuisance); or *Southwark LBC v Tanner* [2001] 1 AC 1 (HL) (to be liable in nuisance one had to use their properties in an unreasonable way). Contrast with the ECtHR case law on the scope of home protection referred to in n 357-362.

<sup>599</sup> C Elliott and F Quinn (n 597).

<sup>600</sup> [2003] EWHC 793 (QB); [2003] Env LR 34. See also *McKenna v British Aluminium* [2002] Env LR 30 (ChD) (a case concerning pollution from a neighbouring factory where some of the claimants had no property interest in the affected land; yet the court refused the striking out application on the grounds that there was a real possibility that a court hearing the case might decide that the *Hunter* rule (n 598) was in conflict with Article 8 ECHR).

the public interest without compensating the individuals affected. It should not be overlooked that *Dennis* drew on the Court of Appeal's judgment in the 'positive obligations' case of *Marcic v Thames Water Utilities Ltd*,<sup>601</sup> decided in the wake of the judgment of ECtHR's Third Section in *Hatton*.<sup>602</sup> In *Marcic*, the Court of Appeal was asked to determine whether the national authorities took the necessary steps to ensure effective protection of Mr Marcic's right to respect for his home as guaranteed by Article 8. Mr Marcic complained that overflowing drains regularly flooded his house. Seeking an injunction and damages, he brought his claim on the twin bases of common law nuisance and human rights - the right to respect for home.<sup>603</sup> He claimed that Thames Water (TW), the relevant undertaker with statutory responsibilities under the Water Industry Act 1991 (WIA), had been under a common law duty to take such steps as had been reasonable to prevent the discharge of surface and foul water onto his property caused by the actions of third parties in connecting their properties to the sewerage system. The Court of Appeal concluded that TW's failure to construct new sewers with greater capacity gave rise to an actionable nuisance. The fact that this common law duty seemed to have co-existed with a specific statutory duty owed by TW under s 94(1)(a) WIA to members of the public - namely to 'improve and extend its sewerage system, so as to ensure that the local area is effectively drained' - did not mean that TW could establish a defence of statutory authority to the claims at common law since the nuisance was not the inevitable consequence of the exercise of its statutory duties or powers.<sup>604</sup> Referring to the relevant 'positive obligation' case law of the ECtHR, the Court of Appeal further concluded that the TW's failure to carry out works to bring to an end the repeated flooding of Mr Marcic's property also constituted an interference with his right to respect for his home under Article 8 (the

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<sup>601</sup> [2002] EWCA Civ 64; [2002] QB 929.

<sup>602</sup> (n 17) – ECtHR's Third section judgment of 2 October 2001, in which the UK was found to be in breach of its positive obligation to respect the claimant's right to home.

<sup>603</sup> The right to peaceful enjoyment of possessions was at stake as well but for our purposes only the Article 8 claim will be looked at.

<sup>604</sup> In supporting its reasoning the Court of Appeal referred to *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485. Furthermore, it expressly refused the argument that Marcic's claim was a concealed attempt to make the defendant perform a statutory duty under s 94(1)(a) in any case, the claim was clearly not of failure by the defendant to drain the plaintiff's property but of its drainage of others' property in such a way as to result in discharges onto the plaintiff's property thereby causing damage. H Wilberg found that these conclusions represented an existing trend in English law to expand the common law liability of public authorities that arises from the authority's inaction; see his 'Public Resource Allocation, Nuisance and the Human Rights Act 1998' (2004) 120 LQR 574. See also S Bailey, 'Public Authority Liability in Negligence: the Continued Search for Coherence' (2006) 26 LS 155.



interference resulted not from active interference but from a failure to act, for which TW could none the less be liable).<sup>605</sup> On finding that the interference was not justified - TW did not establish that its scheme of priorities had struck a fair balance between the competing interests of Mr Marcic and of their other customers - Mr Marcic's right to respect for home was held to be violated.<sup>606</sup>

On appeal, however, the House of Lords unanimously reversed the Court of Appeal's judgment.<sup>607</sup> As regards nuisance, it was held that to uphold cause of action in nuisance under common law would be contrary to the statutory scheme laid down in the WIA under which TW operated the sewers. According to the House of Lords the common law duty owed by TW to guard against the flooding of sewage was mirrored by a specific statutory duty under s 94(1)(a) of the WIA. Section 94(3) provided, so far as relevant, that a sewerage undertaker's duty to provide an adequate system of public sewers under s 94(1) was enforceable by the director under s 18, in accordance with a general authorisation given by the Secretary of State. Hence, according to the Lords, the remedy in respect of a contravention of the sewerage undertaker's general drainage obligation lied solely in the enforcement procedure set out in s 18, a route not taken by Mr Marcic. Only after such an order having been made, could Mr Marcic have brought court proceedings against a sewerage undertaker in respect of its failure to comply with an enforcement order.<sup>608</sup> In the Lords' point of view, a parallel common law right whereby individual householders might bring court proceedings where no enforcement order was made would set at nought the statutory scheme. As regards the human rights claim, more importantly, the Lords decided to adopt reasoning similar to that used in respect of the common law claim: that precedence should be given to the prescribed statutory scheme for enforcement, as long as that scheme strikes an appropriate balance between the needs of the individual and the community.<sup>609</sup> Accordingly, just as with nuisance, the Article 8 claim was found to be

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<sup>605</sup> (n 601) [68].

<sup>606</sup> Any right to damages that Mr Marcic had under the HRA was, however, displaced by his common law right to damages because the common law route was preferable from the claimant's point of view: the HRA only allowed recovery from its entry into force in 2000.

<sup>607</sup> [2003] UKHL 66; [2004] 2 AC 42.

<sup>608</sup> This was so subject to a savings provision in favour of remedies 'available in respect of [an] act or omission otherwise than by virtue of its constituting . . . a contravention' of the WIA's requirements (s18(8)).

<sup>609</sup> (n 607) [38]. While this interpretation of the WIA is strongly supported by its overall scheme and background, the express savings provision in s18(8) WIA, which in its terms clearly encompasses remedies under the HRA, is at least relevant as a factor against such an interpretation. This point was

ill-founded. Lord Nicholls nevertheless admitted in his leading judgment that to some extent the claim based on the HRA could be said to raise a broader issue, ie whether the statutory scheme as a whole, of which the enforcement procedure was part, was ECHR-compliant.<sup>610</sup> Heavily relying on the Grand Chamber's decision in *Hatton* decided just three months earlier, however, he pointed out that in that case the ECtHR expressly emphasised the fundamentally subsidiary nature of the ECHR and the fact that

... [n]ational authorities have "direct democratic legitimation" and are in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, "the role of the domestic policy maker should be given special weight" ... . A fair balance must be struck between the interests of the individual and of the community as a whole.<sup>611</sup>

Applying this reasoning to the facts in *Marcic*, he concluded that the statutory scheme was compliant with the ECHR: parliament had acted well within its bounds as a policy maker and struck the proper balance by imposing under the statutory scheme a general drainage obligation on a sewerage undertaker but entrusting enforcement of this obligation to an independent regulator (director) who had to balance the interests of individual homes at risk of flooding, and the interests of the company's customers who had to pay for the cost of works to alleviate that risk. Indeed, whether the system adopted by a sewerage undertaker was fair was held to be a matter inherently more suited for decision by the industry regulator than by a court.<sup>612</sup> After all, if there was doubt as to whether the necessary balance had been struck in the right place by the

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not touched upon in the two leading judgments in the House of Lords. Interestingly, more recent case law seems to indicate that claimants like Mr Marcic would not be prevented from bringing a human rights claim to the extent that (i) it is human rights involving negligence and not nuisance and (ii) it is based on operational as opposed to policy matters, see *Dobson v Thames Water Utilities Ltd* [2007] EWHC 2021 (TCC); [2008] 2 All ER 362 (in which the claimants were seeking to enforce duties which arose under section 94(1)(b) WIA in respect of odours from the Mogden Sewage Treatment Works (MSTW) and/or mosquitoes which were living and breeding as a result of sewage or sewage sludge at MSTW and/or the plant or equipment holding or treating such sewage or sludge).

<sup>610</sup> More specifically, was the statutory scheme unreasonable in its impact on Mr Marcic and other householders whose properties were periodically subjected to sewer flooding? (n 607) [40].

<sup>611</sup> *ibid* 41.

<sup>612</sup> *ibid* [38]; [64].

director, concluded Lord Nicholls, an individual could still apply for a judicial review of his decision.<sup>613</sup>

The decision raises various issues,<sup>614</sup> but perhaps the most striking is the House of Lords' deference to Parliament when assessing the overall compatibility of the statutory scheme with the ECHR, which seems to mirror the way in which the Grand Chamber approached the issue of margin of appreciation in *Hatton*. As seen above, the Lords rejected the claim based on the State's positive obligation of respect for one's home while stressing that in any case the statutory scheme, which covered cases like Mr Marcic's and should have been used in the first instance, was on the whole ECHR-compliant. In so concluding, they drew attention to the fact that the right to respect for the home is a qualified right, and the ECtHR's Grand Chamber in *Hatton* allowed a significant 'margin of appreciation' to States in deciding how to give effect to the requirements of the rights in the field of environmental law and to the subsidiary role of a reviewing court. Yet, it is argued that the reluctance of the ECtHR to interfere with the decisions in *Hatton* is significantly fuelled by its position as an international court, at one remove from member States and their legal orders, and hence less informed than the national courts which may be asked to rule on similar issues. It should follow, therefore, that national courts should be less deferential on such issues. In *Marcic*, however, such reasoning was strongly rejected. Referring to the obvious unsuitability of the domestic courts as the arbiters in the area of public resources allocation,<sup>615</sup> the House deferred to the primary and avoided thus making their own independent judgment on the statutory scheme's ECHR-compliance.<sup>616</sup>

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<sup>613</sup> Being a public authority within the meaning of the HRA (s 6) and hence having a duty to act in accordance with ECHR rights, added Lord Hoffmann, Mr Marcic would have been able to take action against a director under the HRA, had he exercised his decision-making power in a non-compliant way. *ibid* [71]. Contrast with Marcic's contra-arguments in this respect presented to the Court of Appeal (n 601) [970].

<sup>614</sup> Especially for those interested in the law of nuisance and the intersection between the statutory and common law duties of care owed by a public body, the decision raises interesting questions such as: what happens when a specific duty of care ascribed to a public body under statute seems to give rise to a parallel duty of care in common law; whether breach of that statutory duty allows a claimant to recover damages for the breach; or whether it depends on whether the common law duty owed is in nuisance or negligence. In this respect, see also a recent decision *Dobson v Thames Water Utilities Ltd* (n 609) and J Hyam, 'Muddy Waters' at <[http://www.1cor.com/1172/?form\\_1170.replyids=18](http://www.1cor.com/1172/?form_1170.replyids=18)> accessed 30 September 2008.

<sup>615</sup> M Lee, 'Private Nuisance in the House of Lords: Back to Basics' (2004) 15 King's College LJ 417 (The House of Lords' deference to the statutory scheme in *Marcic* is striking; and given the complexity and profoundly political and distributive nature of the decisions involved perhaps not surprising).

<sup>616</sup> It is at least arguable, for example, that the malfunctioning (procedural failings) of the statutory scheme in *Marcic* can well cast doubt on its ECHR compliance as it stands. The 'malfunctioning'

## 6.4 Positive Obligations and Correspondence

### 6.4.1 Positive Obligations and Correspondence under the ECHR

With regard to the ECtHR's case law on the final aspect of Article 8, it is clear that the right for correspondence does not oblige the State to provide a perfectly functioning postal system in its territory. This was decided in *Foley v United Kingdom*, in which the applicant complained that the letters sent by him in connection with the domestic proceedings pursued by him failed to reach their destination was found to be manifestly ill-founded.<sup>617</sup>

In the specific context of prison correspondence, in respect of telephone facilities, the ECtHR considered that Article 8 could not be interpreted as guaranteeing prisoners the right to make telephone calls, in particular where the facilities for contact by way of correspondence were available and adequate.<sup>618</sup> A positive aspect of Article 8, however, was found to guarantee prisoners the right to be informed by the prison authorities of the fact that their letters had been returned by the Post Office as 'insufficiently addressed' in order to be given a chance to complete the address and re-send them.<sup>619</sup> In *Boyle and Rice v United Kingdom*, the ECtHR held that Article 8 did not oblige the State to pay the postage of all outgoing letters of its prisoners and that the rules of payment of postage pursuant to which the prison authorities paid the postage of one outgoing letter per week and the postage of additional letters be met

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involved a number of legal and procedural flaws in TW's system of priorities. Most importantly, these included failure to adequately record flooding incidents, information which was obviously crucial for decisions on remedial work. Despite repeated complaints over several years both to the local authority and directly to TW, only one of sixteen incidents at Mr Marcic's property was recorded by Thames. Only when he finally complained to the responsible Minister was he referred to the appropriate office. Although Lord Nicholls conceded at [43] that 'matters plainly went awry' and the statutory scheme malfunctioned in this case, he nevertheless considered that this ought to have been resolved within the statutory scheme. There is also the question whether the WIA can be considered to provide adequate remedies in the absence of provision for compensating past damage once the regulator has upheld a complaint. Lord Nicholls alone touched on this, but he did not consider its implications for the WIA's ECHR-compliance. See H Wilberg (n 604). For discussion on the issue of deference and its impact on the intensity of proportionality review in English courts, see n 575.

<sup>617</sup> (App no 39197/98) ECtHR 11 September 2001 (admissibility decision). See also *Metelitsa v Russia* (App no 33132/02) ECtHR 28 April 2005 (admissibility decision); *Slimane-Kaïd v France* (App no 35684/97) ECtHR 20 May 1998 (admissibility decision); or *X v Germany* (App no 8383/78) 17 DR 227.

<sup>618</sup> *AB v Netherlands* (n 410) See also *Farrant v United Kingdom* (App no 7291/75) 50 DR 5 (right to respect for one's correspondence was held not to guarantee prisoners a choice of writing materials).

<sup>619</sup> *Grace v United Kingdom* (App no 11523/85) EComHR 4 March 1987.

from prison earnings of an individual were not in themselves unreasonable.<sup>620</sup> In *Cotlet v Romania*,<sup>621</sup> in which communication with the Convention organs was at stake, the ECtHR held that the refusal of the prison administration to supply the applicant with the envelopes, stamps and writing paper necessary for his correspondence with the ECtHR constituted a failure by the respondent State to comply with its positive obligation to ensure effective observance of the applicant's right to respect for his correspondence. According to the ECtHR, such failure of the prison authorities to give the applicant the necessary materials for his correspondence with the Convention organs (often combined with the delays in forwarding and the systematic opening of his letters to or from the ECtHR or the EComHR) constituted a form of illegal and unacceptable pressure which infringed, furthermore, the applicant's right of individual application, in breach of Article 34 ECHR. It was all the more so taking into account the vulnerability of the applicant, shut up in a closed space and thereby having few contacts with his close relatives or with the outside world.<sup>622</sup>

In the media context, in *Craxi v Italy*,<sup>623</sup> in which the extracts from the transcripts of some of the applicant's private telephone conversations that were made for the purpose of criminal investigation leaked out and appeared in a number of national newspapers, the ECtHR held that the authorities failed in their obligation to provide safe custody in order to secure the applicant's right to respect for his private life and correspondence and by reason of their failure to start effective investigations into the matter; the Italian authorities were not in a position to fulfil their alternative obligation of providing a plausible explanation as to how the applicant's private communications were released into the public domain, either.

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<sup>620</sup> (App nos 9659/82 and 9658/82) (1988) 10 EHRR 425.

<sup>621</sup> (App no 38565/97) ECtHR 3 June 2003.

<sup>622</sup> The Article 34 dimension of 'positive obligation' correspondence case law was also evident more recently in *Moisejevs v Latvia* (App no 64846/01) ECtHR 15 June 2006; and *Kornakovs v Latvia* (App no 61005/00) ECtHR 15 June 2006. See also *Metelitsa v Russia* (n 617).

<sup>623</sup> (App no 25337/94) (2004) 38 EHRR 47.

#### 6.4.2 Positive Obligations and Correspondence in English Law

As shown above, the settled and recognised ECtHR jurisprudence in this area stresses the importance of prisoners being able to correspond and hence be in contact with the outside world. Being locked up in a closed space, prisoners are indeed in a particularly vulnerable position and the possibility of sending a letter may be the only way for them to keep in touch with their families, lawyers or the courts. Thus, a State may be violating the right to respect for correspondence if it severely limits or completely denies prisoners the opportunity of corresponding purely for financial reasons (eg a prisoner's lack of private funds) or if it simply refuses to supply them with writing materials.<sup>624</sup>

As for English law, it should be noted that there has not been much litigation on this issue before either the ECtHR or domestic courts. In fact, looking at the ECtHR's reasoning in those UK cases that reached Strasbourg it seems that English law as it now stands complies with the minimum standards set out by the ECtHR in this area.<sup>625</sup>

With respect to letter writing in UK prisons, current legal rules on prisoners' correspondence aim to ensure that prisoners are encouraged through regular letter writing to maintain links with the outside world.<sup>626</sup> In general, prisoners are entitled to statutory (free), privilege (paid for by the prisoner from prison earnings or private cash) and special (special circumstances) letters. All these letters can be either domestic or overseas.<sup>627</sup> A statutory letter is one that a prisoner is entitled to under Prison Rule 35, and must not be withdrawn or withheld as part of a punishment. A privilege letter is one that a prisoner is regularly allowed to send over and above their statutory entitlement of letters. Unconvicted prisoners may send two statutory letters per week and as many privilege letters as they wish while those who are convicted may send one statutory letter per week and as many privilege letters as they wish,

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<sup>624</sup> See n 621.

<sup>625</sup> See n 617, 618 and 620 in particular. For more general information on the structure of the current body of prison law see n 420-421. See also S Livingstone (n 418).

<sup>626</sup> See PSO 4411. For related issues that were analysed from the 'negative obligation' perspective, such as confidentiality of prisoners' correspondence; its examination, reading and monitoring; specific restrictions on the correspondence' content and on who a prisoner can correspond with, see section '5.2 Correspondence in English law'.

<sup>627</sup> Compare with the facts in *Cotlet v Romania* (n 621), for example.

except at establishments where routine reading is in force.<sup>628</sup> In addition, both convicted and unconvicted prisoners may be granted special letters, which do not count against the statutory or privilege letters allowance. A special letter should be granted for some special reason, for example, after conviction to help settle business affairs, or when a prisoner is being transferred to a different prison, or to make arrangements regarding employment and accommodation on release.<sup>629</sup> At establishments where all or most correspondence is not monitored, there are no restrictions on the number of letters which prisoners may receive. At other establishments, however, prisoners are allowed to receive only as many letters as they are allowed to send.<sup>630</sup> As for the postage costs, as mentioned above, statutory letters are sent at public expense and privilege letters may be paid from prison earnings or private cash. The postage costs of special letters for convicted prisoners should normally be met from prison earnings or private cash whereas all special letters from unconvicted prisoners are free, ie sent at public expense.<sup>631</sup> Letters sent at public expense will normally be sent at the cheapest rate but a prisoner may pay the difference for a higher class of postage.<sup>632</sup>

In respect of telephone facilities, it should be remembered that the ECtHR itself held in *AB v Netherlands* that Article 8 ‘cannot be interpreted as guaranteeing prisoners the right to make telephone calls, in particular where the facilities for contact by way of correspondence are available and adequate’.<sup>633</sup> Yet, it may be argued that the telephone may represent a very important (often the only) medium of contact for those

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<sup>628</sup> At establishments where routine reading is in force, governors have the discretion to set limits on the number of privilege letters prisoners may send per week, subject to a minimum of at least one privilege letter in the case of adults and two in the case of young offenders. Prisoners should be allowed to send as many privilege letters as practicable taking account of the staff resources available to examine and read correspondence. PSO 4411 [2.3].

<sup>629</sup> There are two separate lists of special circumstances, one for convicted and one for unconvicted prisoners: (ibid) [2.1](c); [2.4].

<sup>630</sup> Talking about the rules on sending/receiving letters, it is interesting to note that the State’s obligation to inform a prisoner if a letter sent by post was returned as ‘insufficiently addressed’ formulated at the European level in *Grace v United Kingdom* (n 619) is not expressly reflected by any of the PSO 4411 provisions. In fact, when asked by the Committee of Ministers how the *Grace* judgment was executed, the UK government did not touch on this issue: Resolution DH (89) 21.

<sup>631</sup> These rules were held to be compatible with ECHR in *Boyle and Price v United Kingdom* (n 620).

<sup>632</sup> Letters will be sent first class or by air mail at public expense if: (a) they are special letters sent on transfer; (b) they are in connection with an appeal; (c) exceptionally, postage at the higher rate has been approved by the Governor; PSO 4411 [3.8].

<sup>633</sup> (n 410) [92].

prisoners who are illiterate or whose literacy is very low.<sup>634</sup> In the UK, the Prison Rules do not provide any absolute right to use telephones; yet PIN operated telephones (Pinphones) for the use of prisoners are now available in all public sector prisons. Pinphones replaced prisoner cardphones and one of the major features of this new system is 'enhanced monitoring and recording facilities and the degree of control of prisoners' use of telephones'.<sup>635</sup> In the light of this new system, prisoners are given an 8 digit personal identification number (PIN) to access their Pinphone account. In order to use the telephone system they have to input a PIN on the telephone keypad and then dial the number they wish to call. Of course, they need sufficient credit in their account to make calls. Prisoners must have no more than £50 in telephone credits in their telephone account at any time, except for foreign national prisoners where no limit applies.<sup>636</sup> Prisoners must be able to purchase Pinphone credits at least once a week. The Pinphone system offers two types of telephone services - Call enabling and Call barring.<sup>637</sup> Call enabling means that a prisoner can only call those numbers they have submitted and which have been approved by the Prison. Call barring means that the prisoner can call any number except those specifically barred by the prison. Prisoners subject to the call enabling system<sup>638</sup> are allowed up to 15 legal numbers on their individual legal numbers PIN account (if engaged in litigation,

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<sup>634</sup> Particularly when their families live abroad and cannot afford to visit them very often. Cf *Ciszewski v Poland* (App no 38668/97) ECtHR 6 January 2004 (admissibility decision).

<sup>635</sup> Telephone conversations which take place using prison Pinphones will be recorded and may be monitored by prison staff. The exception to this rule is that calls to prisoners' legal advisers (as registered on a Pinphone account), the Samaritans, the Prisons Ombudsman and the Criminal Cases Review Commission are regarded as privileged and will not be recorded or monitored (if a prisoner wishes to make a legal call the onus will be placed on the prisoner to inform staff that they wish to make such a call) except where the Governor has reasonable cause to believe that the calls would endanger prison security or the safety of others or are otherwise of a criminal nature. The decision will be taken by the Governor personally. In such circumstances recording will continue no longer than is necessary to establish the facts and to take any action necessary (PSO 4400 [4]). Procedures for recording and monitoring of prisoners' telephone calls are further governed by the secret PSO 1000 (n 103 and 425). Here, one should also mention the Scottish case of *Potter v Scottish Ministers*, in which the issue to be resolved was whether or not pre-recorded messages informing the recipient of the call that the person calling is in prison may, in some circumstance, be in breach of Article 8 rights: [2007] CSOH 56 (Court of Session OH) rev'd [2007] CSIH 67 (Court of Session, IH (1 Div)).

<sup>636</sup> Foreign Nationals will fund the cost of any additional balance (above £50) in their Pinphone accounts from their private cash only (ibid [2.9]). In addition, foreign national prisoners or those with close family abroad must be permitted a free five minute call once a month where they have had no domestic visits during the preceding month (ibid [6.8]).

<sup>637</sup> Pinphones do not take incoming calls. Incoming calls to an official telephone must only be permitted where prisoners who are either close relatives or partners are detained in different prisons (ibid [2.45]).



prisoners may be permitted a second account of a further 15 legal numbers).<sup>639</sup> They also have personal lists and are allowed up to 20 personal pre-authorised, pre-programmed numbers.<sup>640</sup> The Pinphone system is configured in a way that enables governors to restrict the maximum length of a call; the time between successive calls; maximum number of calls which can be made in a day; and maximum total call time in one day. Telephones can be scheduled to, for instance, come on and off according to the prison's working day. However, prisoners must be given access to the Pinphone during association and at other such times as are reasonably practicable, depending on the nature of the establishment's regime. The time available for using the telephones must not normally be less than two hours each day.<sup>641</sup> In the case of misuse of the telephone system by the prisoner, governors may prohibit the prisoner from using the Pinphone for a period to prevent further abuse. Such measures should normally only be imposed in response to abuses of the telephone system.<sup>642</sup>

Notwithstanding certain complexities of the legal framework in this area and the relatively restrictive nature of the rules on prisoners' use of telephone facilities, on the whole, English prison law seems to meet the minimum standards required by the settled and recognised Strasbourg jurisprudence with respect to the positive obligation under the 'correspondence' limb of Article 8.

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<sup>638</sup> PSO 4411 contains a list of categories of prisoner to which a call enabling regime operates: eg Category A prisoners, potential Category A prisoners, prisoners identified as being subject to harassment procedures, etc (ibid [2.16] and [2.17]).

<sup>639</sup> Under exceptional circumstances, governors will have discretion to allow a prisoner more than 30 legal numbers. (ibid [2.15]).

<sup>640</sup> It is not completely clear, however, what criteria prison authorities use to decide whether or not a personal number can be added to the list (although some more specific rules exist with respect to prisoners' business contacts and their contact with the media, see ibid [2.50] and [3.8]-[3.9]). In any case, these personal lists do not preclude the prisoners from having access to so-called globally and locally enabled numbers. Even here, however, PSO 4411 gives only exemplificative enumeration of such numbers (eg all of the courts in England and Wales; the Palace of Westminster; the Samaritans; etc) and there is no more detailed information on how these numbers are actually chosen.

<sup>641</sup> [ibid [2.38]]. Consideration must be given to allowing non-UK national prisoners to have access to telephones outside normal hours to make calls to their country of origin where there is a significant time difference between their country of origin and the UK (ibid [5.7]).

<sup>642</sup> ibid [5.4].

## 6.5 Positive Obligations: Conclusion

It is on the basis of dynamic and evolutive interpretation of the ECHR that the ECtHR has recognised the existence of positive obligations under Article 8 in a diverse range of circumstances, such as protection of persons from sexual abuse (*X and Y v Netherlands*); official recognition of post-operative transsexuals (*Goodwin v UK*); access to personal information or other related data held by public authorities (*Gaskin v UK* or *Roche v UK*); duty to secure personal privacy by providing remedies to prevent publication of or revelations about an individual's private life (*Hannover v Germany*); legal recognition of the family relationship between parents and illegitimate children (*Marckx v Belgium*); reuniting children with their natural parents (*Ignaccolo-Zenide v Romania*); protection from pollution (*Giacomelli v Italy*); facilitating the traditional lifestyles of minorities (*Chapman v UK*); access of prisoners to the postal system (*Cotlet v Romania*); and so forth. The ECtHR has also pointed out the outer boundaries of Article 8 when refusing to find the existence of positive obligation which would require the provision of access facilities for disabled persons (*Zehnal v Czech Republic*); respect for an immigrant's choice of the country of their residence and to authorise family reunion in its territory (*Moustaquim v Belgium*); the creation of new gypsy sites when alternative accommodation is available (*Codona v UK*); or the payment of the postage of all outgoing letters of prisoners (*Boyle and Rice v UK*). The above analysis of ECtHR case law makes clear that at the heart of all 'positive obligations' cases has been the notion of margin of appreciation. Notwithstanding its significant role in determining whether or not the given State complied with its positive duties, the ECtHR has not discussed the issue of margin of appreciation in any systematic manner. It is thus not possible to provide an all-embracing definition of this concept and to determine how it is going to work in every single case. Yet, if one looks beyond that, some coherence and consistency can nevertheless be found in the way the ECtHR has used this notion in the actual case law. Where a particularly important aspect of individual existence or identity is at issue under Article 8, the ECtHR is less likely to accept that the State should be afforded broad discretion (for example, *Goodwin v UK*; *Odièvre v France* or *Kroon v Netherlands*). The same would apply to cases which concern defects in legal regimes; procedural flaws as well as lack of procedural safeguards in the decision-making process (for example, *Mizzi v Malta*; *Cotlet v Romania* or *KA v Finland*). On the other

hand, wide margin will be allowed in more 'sensitive' cases in which economic, social and environmental issues are at stake (for example, *Botty v Italy*; *Hatton v UK*; or *Codona v UK*).

The development of the 'positive obligations' jurisprudence of the ECtHR with respect to Article 8 rights has certainly had an impact on the way in which English law has been developing. After the HRA coming into force in 2000, the ECtHR case law's influence has grown and in some areas has been stronger than in others. Yet, on the whole, the impact has been incremental and modest. In the section '(a) Private Life', the attention was focused on the issue of media intrusion into one's private life as this is actually one of the areas in which the ECHR influence has proved to be crucial in the rapid development of the common law after the HRA's commencement. Indeed, the impact of Strasbourg jurisprudence on the common law has resulted in a traditional tort of breach of confidence being transformed into a tort of invasion of privacy in English law 'in all but name'. Yet, domestic judiciary has decided to preserve the possibility of deciding how great a role to give to ECHR standards in domestic law. They have thus refused to allow direct reliance on Article 8 rights between private parties in place of the relevant common law cause of action in breach of confidence (horizontal effect) or to declare that a brand new, independent tort of invasion of privacy with its own name does exist in English law. This explains why eight years after the HRA came into force, there is still considerable ambiguity surrounding the issue of privacy protection against media intrusion in English law.

In the two subsequent sections, '(b) Family life' (which focused on domestic immigration cases in which the right to respect of family life was raised because of an individual being refused entry to a country where his or her immediate family resided) and '(c) Home' (dealing with the right to respect for home of those affected by noise, pollution, emissions, smells, and so forth, in the context of the common law of nuisance), a problematic issue of intensity of judicial review of administrative decisions and that of deference were touched upon. Although the impact of the relevant ECHR law has been to accelerate the judicial tendency to avoid excessive deference and to subject justification for decision to rigorous scrutiny when determining whether or not the means used to impair a right or freedom were not more than was necessary to accomplish the objective, there has still been a certain amount of resistance among some judges to some of the ECHR requirements.

Domestic judiciary has often been reluctant to replace completely the common law *Wednesbury* standard of review, ill-famed because of its circularity, imprecision and generous deference to the executive, with the ECHR standard of proportionality when determining whether or not the means used to impair a right or freedom were not more than was necessary to accomplish the objective. The issue of the extent to which the courts should defer to a ‘discretionary area of judgment’ enjoyed by the executive/Parliament gets even more complicated when linked to the question of deference’s relation (if any) to ECtHR doctrine of the margin of appreciation. Section ‘(e) Correspondence’ examined the issue of prisoners’ rights to respect for their correspondence. As observed above, English law appears to comply with the minimum standards set out by the ECtHR in this area and there have not been any major judgments in which the ECtHR would have held the UK to be in violation of its positive obligations in this respect. Accordingly, the impact of Article 8 jurisprudence on English law in this field has, at least so far, been minimal.

## 7 Conclusion

For the UK, as for any other contracting State, it is important to know precisely what its international obligations are under the ECHR. This is particularly true of Article 8 for which the ECHR does not provide an all-embracing, ‘ready-made’ definition and which has been described by many as one of the most open-ended provisions of the ECHR.<sup>643</sup> In order to delimit the State’s legal obligations under Article 8, one needs to fully grasp Article 8’s scope and this can be done only through analysis of both ‘admissibility’ and ‘merits’ decisions of ECtHR. While the admissibility decisions, which usually contain discussion on what constitutes private life, family life, home or correspondence, and in which ECtHR judges consider whether on the basis of Strasbourg jurisprudence the right invoked by an individual (for example, right to die) is in fact a right covered by the guarantees in Article 8, are able to show the outer limits of Article 8,<sup>644</sup> ‘merits’ decisions, in which the main ECHR principles, such as proportionality, margin of appreciation or dynamic interpretation, are applied by the ECtHR to the facts, indicate how far the Article 8’s scope stretches.

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<sup>643</sup> D Feldman, C Warbrick, C Ovey and R White: all cited in n 12. To understand the scope of the State’s obligations under Article 8 ECHR is all the more crucial when one puts Article 8 into a broader European context, ie in the light of the UK’s membership in the EU. Even though the European Community is not formally bound by the ECHR, it is required to respect, as a minimum, the standards of the ECHR which forms an integral part of Community law. Indeed, the ECJ case law acknowledged the ‘special significance’ of the ECHR, the underlying principles of which ‘must be taken into consideration in Community law’, and from all the ECHR articles, Article 8 has been one of the most oft-quoted in Luxembourg. The proper understanding of the scope of Article 8 will be even more desirable after the long-planned EU’s accession to the ECHR, ie after the EU institutions themselves become bound to observe it. See T Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> edn OUP, Oxford 2006) 341-342, 353-356.

<sup>644</sup> See n 13. At this stage, the ECtHR must also determine whether the interventions complained of reach a required level of severity to constitute an ‘interference’. This has, however, depended very much on the specific facts of each case. In theory, the power to declare an application inadmissible as manifestly ill-founded fits into the screening function which the drafters of the ECHR intended the admissibility examination to perform. For a proper discharge of that function no more is needed than the power to reject those applications the ill-founded character of which is manifest. Yet, the case law in this matter has not always been consistent. The EComHR stated in its report in *Powell and Rayner* (n 589), for example, that the term ‘manifestly ill-founded’ under the ECHR extends further than the literal meaning of the word ‘manifestly’ would suggest at first reading. Case law analysis has also shown that in practice it is often extremely difficult to delimit the mutual fields of application of the notion *ratione materiae* on one hand, and manifestly ill-founded on the other. It very often happens, for example, that a complaint can be rejected both as manifestly ill-founded and as incompatible *ratione materiae*.

The study has shown that in considering admissibility aspects of private life case law, the ECtHR's approach has been to analyse the facts to see whether they could be subsumed under the specific areas of private life, such as physical privacy, personal identity, autonomy, sociability, sexual orientation, privacy in public places or personal data recording. As for bodily privacy protection, it has been held that this aspect of private life was not meant to protect bodily integrity of dead bodies. Furthermore, the question whether sadomasochistic activities fall within the protective scope of private life has never been directly answered. One's personal identity protected under the notion of private life includes the issue of names/surnames but not the issue of hereditary titles. Being an important aspect of our private lives, personal autonomy may extend, at least theoretically, to one's autonomous decision to die rather than to live. Private life then embraces social aspects of one's private life and this includes the right to establish and develop relationships with other human beings but not with animals. Various elements of one's sexual life, such as gender identification and sexual orientation fall right within the heart of the protection of private life under Article 8. There is, furthermore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life, and this includes the use of CCTV, for example. Finally, records containing personal data compiled by a State on particular individuals, even without the use of covert surveillance methods, is an issue protected under the notion of private life. As far as the notion of family life is concerned, rather than asking whether the facts fall within the specific areas, the ECtHR has focused on whether the different types of relationships have the necessary quality of family life. A married couple's relationship certainly has this quality (even if the couple have not set up home together), unless the marriage is one of convenience. De facto relationships, in which partners live together as if they were married, are also covered but not if they are of a homosexual nature. There is a 'family life' relationship between a child and his biological parent but not when there are no further legal or factual elements indicating the existence of a close personal relationship nor when children grow up and become independent adults. In this context, it is to be noted that a relationship between a child and his putative biological father during paternity proceedings falls outside the scope of family life (though this issue comes under the private life ambit). Depending on the particular circumstances, family life extends to non-parental blood relationships, such as between an uncle and his nephew, or even non-blood relationships due to the 'social rather than biological

reality' approach pursued by the ECtHR in these types of cases. Relationships between adoptive/foster parents and adopted/foster children are of a family life nature but no right to adopt can be claimed by prospective adopters on this basis. In relation to the notion of home: analysis of admissibility case law shows that the ECtHR has developed quite a broad approach to the question whether or not a particular habitation constitutes an 'Article 8' home, extending it to business premises or secondary homes, yet has never gone beyond what the term 'home' literally connotes in English. Thus, it has categorically refused to describe as a home the car parked in front of one's house or piggeries that provide housing for several hundred pigs. In order to determine whether home constitutes a person's home in the meaning of Article 8, the ECtHR looks, furthermore, on the existence of sufficient and continuous links between the person and the place while stressing that the ownership of the place is neither necessary nor sufficient in itself to constitute such links. For the determination of whether a place constitutes one's home, it is not even decisive whether it is lawfully occupied or not (though this will be relevant for the question of justification at the 'merits' stage). Regarding the notion of correspondence, the question what constitutes 'correspondence' or what kind of 'correspondence' interests are covered by Article 8 has not generated a lot of case law. Typically, letters, telegrams, telex messages, telephone conversations or emails (Internet) have been considered as correspondence under Article 8. Similarly, to the extension of the notion of home to cover business premises, the term correspondence has also been extended to apply to all communications: the ones that take place at business as well as the ones that occur in private places, regardless of whether the content of the communication is of a professional or a private nature (though this has been relevant to the question of justification at the 'merits' stage as has been the identity of the correspondents (especially when the person is a prisoner)). On the whole, it can be concluded that 'private life', 'family life', 'home' and 'correspondence' have been interpreted in the admissibility cases autonomously, not as a mere reference to domestic law.<sup>645</sup> They have, furthermore, been interpreted dynamically in the light of present-day conditions which resulted in their scope having been widened up over the

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<sup>645</sup> Frequently, there has been considerable overlap between the four notions, especially with regard to the concept of private life which has often been seen as embracing the three other rights in addition to its own scope.

years.<sup>646</sup> Finally, in order not to withhold protection in borderline cases, the Convention organs have frequently – often also due to the parties’ agreement to this effect – assumed the facts to fall within the scope of Article 8 ECHR and proceeded directly to the question of possible justifications for the interference under Article 8(2).<sup>647</sup>

As shown in the individual chapters above, in order to determine whether the interference with Article 8 rights has been in accordance with the law,<sup>648</sup> has pursued a legitimate aim and has been necessary in a democratic society (‘negative obligations’ cases), or, alternatively, whether there has been a positive obligation on the State to respect and individual’s Article 8 rights which the State has not complied with (‘positive obligations’ cases), the ECtHR has developed a number of important principles to guide its decision-making. The main principles have been the principle of proportionality, the doctrine of margin of appreciation, the interpretation of the ECHR as a living instrument (in other words, dynamic interpretation) and the need for Article 8 rights to be practical and effective as distinct from being only theoretical or illusory (in other words, principle of effectiveness). The application of these general principles has ‘breathed life’ into the wording of Article 8 rights and the use of principles of dynamic interpretation and effectiveness have in addition equipped Article 8 with a needful flexibility of its scope to reflect the needs of a constantly developing society.<sup>649</sup> In order to determine whether interference with an Article 8 right was necessary in democratic society for the purposes of Article 8(2), first of all, the ECtHR has applied the proportionality test, which has, at its simplest level, involved balancing the rights of the individual and the interests of the State. The balancing exercise has usually been a complex process that has involved consideration of a number of factors, such as the type of interest to be protected from interference and the nature (severity) of interference (for example, criminalisation of homosexuality, restrictions on parental rights of access to their children taken into

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<sup>646</sup> See D Feldman (n 12) 527: ‘The interpretation of Article 8 is dynamic and continuous, so any account is only a snapshot of a developing process caught at a single moment.’; or L Doswald-Beck (n 14) 303: ‘If the Convention were only used to prevent totalitarian type legislation, as was envisaged during its formation, the Convention’s organs would find themselves with very little to do’.

<sup>647</sup> Cases concerning sadomasochistic activities are good examples: *Laskey, Jaggard and Brown* (n 22) and *KA and AD* (n 25).

<sup>648</sup> For detailed analysis of the principles applied to the meaning of ‘in accordance with law’, see n 413-416 and the ‘correspondence’ cases cited therein.

<sup>649</sup> See n 646.



care, physical destructions of people's homes, or, censoring legal correspondence of prisoners); or the existence and effectiveness of procedural safeguards in domestic law to protect individuals from arbitrary use of state power (particularly in 'family life' proceedings concerning custody, care, adoption or a fathers' access to a child; but also in cases in which Gypsies have been evicted from caravan sites). In deciding whether an interference with an Article 8 right was justified under Article 8(2), furthermore, the ECtHR has afforded to States a margin of appreciation (the discretion enjoyed by States when taking legislative, administrative or judicial action in the area of Article 8).<sup>650</sup> In general, the scope of the margin of appreciation under Article 8 has been influenced by many factors, such as common ground between the laws of the signatory States (for example, *Marckx v Belgium*, or, legal recognition of gender re-assignments of transsexuals); or according to the circumstances, background and the subject matter (for example, care cases: at the very stage when care measures are being envisaged as opposed to further limitations imposed on parental rights at the later stage, immigration case law, regulation of names/surnames, written correspondence of prisoners, or, cases such as *Pretty v UK* or *Keegan v UK*). One might note that the doctrine of the margin of appreciation has been relied upon by the ECtHR not only in 'negative obligations' cases when determining whether an interference was justified, but also in 'positive obligations' cases when assessing whether a State has done enough to comply with any positive obligations that it has under Article 8.<sup>651</sup> In fact, in the 'positive obligations' cases the ECtHR has most heavily relied upon the wide margins of appreciation in its reasoning and the principle of margin of appreciation has thus gradually formed the outer limits of the 'positive obligations' protection under Article 8 (for example, *Evans v UK*, *Abdulaziz v UK*,

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<sup>650</sup> Y Arai-Takahashi, *The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Oxford 2002). Through the doctrine of margin of appreciation, the ECtHR shows sensitivity to the different traditions and conditions in Contracting States and the only way in which the ECtHR can retain control over State conduct while leaving some scope for differential application of ECHR provisions when necessary. If the State's margin of appreciation is too wide, however, it may undermine the ECtHR's attempt to secure respect for consistent formulation of human rights which may finally lead to a less effective protection of human rights within the CoE. P Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism' (1998) 19 Human Rights LJ 1 (who is of the opinion that universal standards should not be sacrificed in favour of national diversity). See also F Ní Aoláin, 'The Emergence of Diversity: Differences in Human Rights Jurisprudence' (1995) 19 Fordham Intl LJ 101 (who is talking about the inconsistent applications in seemingly similar cases due to different margins allowed by the ECtHR. which might consequently raise concerns about judicial double standards).

<sup>651</sup> See n 17.

*Codona v UK, Hatton v UK or Boyle and Rice v UK*). As for the impetus behind the development of positive obligations under Article 8 as such, finally, it has been on the basis of the principle of effectiveness and the dynamic interpretation that the ECtHR has interpreted Article 8 not only as aiming to protect individuals against arbitrary action by the public authorities but also as requiring the State to act affirmatively to *respect* the wide range of Article 8 interests (emphasis added).<sup>652</sup> While aiming to ensure that Article 8 rights have relevance and practical effect, this dynamic interpretation has considerably enhanced the scope of Article 8 (for example, official recognition of post-operative transsexuals, access to official information, ability to challenge legal presumption of paternity, reuniting children with their natural parents, or, protection from various types of nuisance). As mentioned above, however, such a generous and proactive interpretation of Article 8 has never been without the limits as it has always been balanced by rather wide margins of appreciation.

As for the impact of the above-analysed jurisprudence on English law, it can be concluded that in only a few areas of English law, the influence of ECtHR case law under Article 8 has been full and direct. In the majority of cases, Article 8 has had only a very limited impact.<sup>653</sup> Some of the developments that have occurred in English law have clearly been a direct result of the influence of relevant Strasbourg cases, particularly those brought against the UK. The examples discussed in this study

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<sup>652</sup> *ibid.*

<sup>653</sup> Although the primary aim of this study is to determine the impact Article 8 has had on English law, it needs to be reminded that the issue of ‘impact’ is a two-way process under the ECHR. Indeed, in formulating its decisions the ECtHR considers the spectrum of attitudes across the Contracting States in order to determine the contemporary content of rights under the ECHR. In fact, while analysing the impact of admissibility case law jurisprudence of the ECtHR on English law, it has emerged that with respect to two specific issues under Article 8 it has been open to English judges to stimulate further developments of the ECHR law (rather than the other way around). The first issue, which concerned the right to family life of same-sex relationships, was actually a missed opportunity (*M v Secretary of State for Work and Pensions* (n 277): as R Wintemute stated: ‘[t]he inability of a UK court to bring a same-sex couple ... within the scope of “family life” for the purposes of the HRA ... is an excellent illustration of the harmful effects of “Lord Bingham’s rule”.’ in ‘Same-Sex Couples in Secretary of State for Work and Pensions v M: Identical to Karner and Godin-Mendoza, yet no Discrimination’ (2006) 6 Eur Human Rights LRev 722). A second issue concerns the question whether sadomasochistic activities can be subsumed under the bodily privacy protection of ‘private life’ for the purposes of Article 8. This question has always been approached by the ECtHR with a great caution and the Strasbourg judges have been rather indecisive on this point. In the light of domestic judge’s reasoning in the *Mosley* case (*Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); (2008) 158 NLJ 1112), the UK judges have clearly no doubts that sadomasochistic activities as such fall within the ambit of private life. The UK’s attitude together with the attitudes of other ‘like-minded’ European States may well become a source of persuasive authority for the ECtHR considering that a similar interpretation is likely to come about in Strasbourg in the near future.

concerned the issue of the removal of discrimination against gay and lesbian people consensually engaging in sexual activities,<sup>654</sup> enhancement of procedural safeguards in care proceedings,<sup>655</sup> or the rules on prisoners' correspondence.<sup>656</sup> Some bold developments have also occurred with respect to the interception of communication law<sup>657</sup> and the common law tort of breach of confidence.<sup>658</sup> The impact of Article 8 on the vast majority of domestic law areas, however, has been rather limited. As identified in the individual chapters of this thesis, the main reasons for such a limited nature of Article 8's influence on English law have included: judicial attachment to traditional common law doctrines and existing assertions that the common law itself sufficiently protects Article 8 rights, judicial deference and attitude towards the proportionality principle, minimal/case-specific compliance with the ECtHR's judgments and a tendency to treat the HRA as a panacea.<sup>659</sup> As for the persistence of common law doctrines and the belief that common law already conforms to the ECHR, one can mention the issue of reasonable chastisement within the 'private life' cases, welfare principle in the 'family life' area, the traditional assertion that the enforcement of a right to possession in accordance with domestic property law can never be incompatible with Article 8, only in a very modest way, discussed in the 'Home' chapter, and, finally, unwillingness of judges to abandon completely the traditional breach of confidence's principles when dealing with the issue of the media's intrusions into individuals' private lives, pointed out in the 'Positive Obligations' chapter. The analysis of positive rights under Article 8 in the domestic immigration cases and in the cases dealing with noise/pollution/and so forth, in the context of the common law of nuisance, have furthermore demonstrated the existing limitations in the intensity of judicial review of the proportionality of administrative decisions due to the extensive use of judicial deference to the executive/Parliament in the policy-sensitive areas. The fact that the principle of proportionality as established by the ECtHR under Article 8 has not managed to fully infiltrate the domestic legal

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<sup>654</sup> See section '2.2 Private Life in English Law'.

<sup>655</sup> See section '3.2 Family Life in English Law'.

<sup>656</sup> See section '5.2 Correspondence in English Law'.

<sup>657</sup> *ibid.*

<sup>658</sup> See section '6.1.2 Positive Obligations and Private Life in English Law'.

<sup>659</sup> Minimal or zero impact of Article 8 has also been identified with respect to those areas of English law which traditionally seem to comply with the minimal standards set out by the ECtHR (eg the issue of control over the name/surname changing or positive obligations to respect prisoners' right to correspond with the outside world).

system and UK society is also clear from the above discussion on the UK's DNA database (the largest DNA database in the world), the National Identity System containing an astounding amount of personal information or the over-extensive use of CCTVs. The case law concerning the interception of communication law or the rules on making a possession order are again typical examples of the traditional 'minimalistic' approach of the UK towards the execution of the ECtHR's judgments: any reform of domestic law goes only as far as (and never further than) is imperative to remedy the concrete faults condemned by the ECtHR in each individual case. In other words, Article 8 rights are respected, yet not really promoted in the UK. As for the tendency to treat the HRA as a panacea, finally, in a great majority of all examined cases a very tricky argument has been used. It has been claimed that in any case the adoption of HRA rectified all residual flaws of English law that had existed before 2000 with respect to Article 8 rights protection and so no reform of domestic law should ever be needed (for example, *Wainwright*). The focus is thus on the formal implementation of the ECHR itself, rather than the real efficacy and performance of ECHR rights in practice.

On the whole, one can conclude that all these 'limiting' factors - that is, judicial attachment to traditional common law doctrines, assertions that the traditional common law sufficiently protects Article 8 rights, judicial deference, the way the proportionality principle has been approached by domestic courts, minimal/case-specific compliance with the ECtHR's judgments and tendency to see the HRA as a panacea - have prevented Article 8 from having a significant impact on English law. Although some important developments have occurred in English law as a result of ECtHR jurisprudence and the 'ECHR language' has been quite generously used in the judgments of domestic courts especially in the post-HRA era, it is argued that the real potential of Article 8 and its practical effects on English law have yet to be realized.

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