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Case Comment: The Reasonable Expectation of Privacy and the Criminal Suspect

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In *In re JR38*, the Supreme Court unanimously dismissed an appeal from a 14 year-old boy who argued that the dissemination of his image, taken whilst he was participating in sectarian rioting, to local newspapers, violated his rights under Article 8 of the European Convention on Human Rights (ECHR). However, the Court was divided on whether or not the measures taken by the police engaged the applicant's Article 8(1) rights at all. This case raises fundamental questions as to the scope of the private life in the context of criminal investigations, and the place of the European Court of Human Rights' (ECtHR) 'reasonable expectation of privacy' test in determining whether Article 8(1) of the ECHR is engaged. This case comment subjects the majority's interpretation of Article 8(1) to critical scrutiny, concluding that this interpretation may unduly restrict the scope of Article 8 protection for those subject to criminal investigations.

B

Introduction

Does the dissemination of a suspected offender's image interfere with the enjoyment of his or her right to respect for private life under Article 8(1) of the ECHR? What if the suspected offender in question is a minor and the images are taken whilst he participates in a public riot? These issues were considered in the case of *In re JR38*,[1] where the Supreme Court unanimously dismissed an appeal from a 14 year-old boy (referred to as "JR38"). The applicant had argued that the dissemination of his image to local newspapers, taken by the police whilst he was participating in sectarian rioting, violated his rights under Article 8 of the ECHR. However, the Court was divided in its reasoning for dismissing the appeal. The majority (Lord Toulson, with whom Lord Clarke and Lord Hodge agreed) held that the measures taken by the police did not interfere with the applicant's Article 8(1) rights and, therefore, did not violate Article 8 of the ECHR. On the other hand, the minority (consisting of Lord Kerr, with whom Lord Wilson agreed) observed that, whilst the dissemination of the applicant's image in this case did engage Article 8, this interference could be justified as necessary to prevent and detect crime.

The significant point of divergence between the judgment of Lord Toulson and the dissent of Lord Kerr is what each attributes to the 'reasonable expectation of privacy' test set forth in the jurisprudence of the ECtHR.[2] Lord Toulson subscribes to the view, set out by Laws LJ in *R (Wood)* v *Commissioner of Police of the Metropolis*,[3] that the individual's 'reasonable

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[1] [2015] UKSC 42.

[2] First developed in the United States, in the Fourth Amendment case *Katz* v *United States* 389 US 347 (1967), the 'reasonable expectation of privacy' test has become the benchmark test for determining the applicability of privacy laws in domestic tort law, and the jurisprudence of the ECtHR in assessing an interference with Article 8: see *Halford* v *United Kingdom* (1997) 24 EHRR 523 at [43].

[3] [2010] 1 WLR 123, 136.

expectation of privacy' is the touchstone of Article 8(1), and without such an expectation Article 8 is not applicable. In finding the applicant's Article 8(1) rights had been engaged, Lord Kerr argued that the 'reasonable expectation of privacy' test was not a 'touchstone' test of Article 8(1) and the extent to which an individual can be said to hold a reasonable expectation of privacy is just one factor to be taken into account when determining if Article 8 is engaged by the police use of a measure which may set back privacy interests. This case comment surveys the merits and limitations of each interpretation of Article 8(1) in terms of their cogency, and the respective implications each might have for the privacy interests of those subject to the criminal justice process. Drawing on scholarly literature and principles from the case law regarding the scope and value of privacy interests, this note concludes that the 'reasonable expectation of privacy' test, as used by the majority in *In re JR38*, unduly restricts the scope of Article 8 protection.

B

The road to the Supreme Court

On 23 and 26 July 2010 two newspapers, the *Derry News* and the *Derry Journal*, published, at the request of the police, images of JR38 along with others who were suspected of being involved in public disorder in Derry.[4] The publication of these photographs was part of a police campaign known as 'Operation Exposure', which was designed to counteract sectarian rioting at 'interface areas' in parts of Derry.[5] JR38 argued the publication of photographs of him in this context violated his rights under Article 8 of the ECHR. Article 8 is a *qualified* fundamental human right, meaning it may justifiably be interfered with by state authorities in certain circumstances:

C **Article 8 – right to respect for private and family life**

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

On 21 March 2013, the Divisional Court of the Queen's Bench Division in Northern Ireland dismissed JR38's application for judicial review.[6] Unlike the Supreme Court, the majority in the Divisional Court held Article 8(1) was engaged by the dissemination of the images.[7] In finding there had been an interference with Article 8, Sir Declan Morgan LCJ took into consideration the applicant's age; the fact that, at the time of publication, it had not been established that the applicant had participated in any offence; the risk of the applicant becoming stigmatised as a result of the publication of the images; and the detrimental effect the publication may have on the applicant's subsequent rehabilitation.[8]

[4] n 1 above at [2].
[5] *ibid* at [2].
[6] *In re JR38* [2013] NIQB 44.
[7] With Higgins LJ dissenting: see *ibid* at [63].
[8] *ibid* at [30].

B

The case of *In Re JR38*

C **The majority decisions: there was no interference with Article 8(1)**

Lord Toulson relied on the analysis of Laws LJ in *R (Wood)* v *Commissioner of Police of the Metropolis,*[9] which sets forth three qualifications for establishing whether Article 8 is engaged:

> First, the alleged threat or assault to the individual's autonomy must (if Article 8 is to be engaged) attain 'a certain level of seriousness'. Secondly, the touchstone for Article 8(1)'s engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy' (in any senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to Article 8(2).[10]

Lord Toulson observed that the second of Laws LJ's qualifications identified the 'touchstone' of Article 8(1) as being whether the applicant in a particular case enjoyed on the facts a 'reasonable expectation of privacy' or 'legitimate expectation of protection' (which were taken to be synonymous).[11] In support of this argument, both Lord Toulson and Laws LJ relied on the judgment of the ECtHR in *Von Hannover* v *Germany*[12] and a number of other domestic cases.[13] Lord Toulson also noted the differences in the facts in *Sciacca* v *Italy,*[14] a case in which the ECtHR found an interference with Article 8(1) where the authorities published a photograph of the applicant following her involvement in a criminal process, and the *JR38* case. In the former case, Lord Toulson suggested the applicant had a legitimate expectation that the police would not disclose to the press a photo of her taken while she was under arrest, but that it was a very different question whether a member of a crowd engaged in a violent disturbance in a public space has a legitimate expectation of privacy.[15] Thus, Lord Toulson ruled the nature of the activity the applicant was involved in fell outside the scope of Article 8 protection.[16] While Lord Toulson accepted the fact that the applicant was a child was a potentially relevant factor in the application of the reasonable expectation of privacy test, this was not sufficient reason for departing from the test altogether.[17] Accordingly, the applicant's rights under Article 8(1) were not engaged.

Lord Clarke concurred with Lord Toulson's interpretation insofar as he held the applicant had no objectively reasonable expectation that the police would not publish his photograph under the circumstances.[18] However, Lord Clarke suggested that there might be circumstances where the publication of photographs of an individual in the course of criminal activity might engage his or her Article 8 rights if, for instance, the photographs were published for a purpose other than identification.[19]

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[9] n 3 above, 136.
[10] *ibid* 136.
[11] n 1 above at [87].
[12] *Von Hannover* v *Germany* (2004) 40 EHRR 1 at [50].
[13] See *Campbell* v *MGN Ltd* [2004] 2 AC 457, 466; *Murray* v *Express Newspapers plc* [2009] Ch 481, 502. Furthermore, Lord Toulson drew upon the following more recent authorities to the same effect: *Kinloch* v *HM Advocate* [2013] 2 AC 93 and *R (Catt)* v *Association of Chief Police Officers* [2015] AC 1065.
[14] *Sciacca* v *Italy* (2006) 43 EHRR 20 at [29].
[15] n 1 above at [94].
[16] *ibid* at [100].
[17] *ibid* at [95].
[18] *ibid* at [112].
[19] *ibid* at [112].

C **The minority judgment: the publication interfered with the applicant's Article 8(1) rights**

The core of Lord Kerr's dissent can be summarised in the following extract from his judgment:

> The *engagement* of the [Article 8] right, as opposed to justification of interference with it, must, of necessity, cover a wide field of an individual's activity. And the potential scope of application of the provision must vary according not only to the conditions in which it is invoked, but also to the circumstances of the individual concerned.[20]

Lord Kerr viewed the judgment of the ECtHR in *PG and JH* v *United Kingdom*,[21] that 'a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor'[22] as important in determining the applicability of Article 8. Thus, Lord Kerr suggested that, although JR38 was engaged in public disorder at the time the police photographed him, what is reasonable to expect in terms of privacy protection is just one factor to be taken account in deciding whether Article 8(1) is interfered with through the subsequent publication of the photographs.[23] Furthermore, Lord Kerr cited the case of *Sciacca* v *Italy*[24] as significant in making an 'unqualified statement of principle that the publication of a photograph falls within the scope of a private life.'[25] However, as Lord Kerr noted, the facts in *Sciacca* and *JR38* could be distinguished, as the photographs of the applicant in the former case were not taken as she was engaged in criminal activity in public space.

Lord Kerr noted the publication of the photographs ran counter to the applicant's best interests, and could have a stigmatising effect.[26] Disputing the majority's interpretation, that the reasonable expectation of privacy is the touchstone of Article 8(1), Lord Kerr observed the test for whether Article 8 is engaged is a contextual one involving an examination of a number of factors.[27] Furthermore, Lord Kerr suggested that the ECtHR's ruling in *Von Hannover* v *Germany*[28] is not authority for elevating the reasonable expectation of privacy test to an inviolable position simply because it determined the applicant in that case had a reasonable expectation of privacy.[29] Lord Kerr also questioned the extent to which Laws LJ's opinion in *R (Wood)* v *Commissioner of Police of the Metropolis* is supported in the cases of *Campbell* v *MGN Ltd*[30] and *Murray* v *Express Newspapers plc*.[31] Referring to the majority judgments, Lord Kerr states:

> [I]t is suggested that considerations such as the age of the child, the circumstances in which the avowed interference took place, the purpose of the publication of photographs and whether consent had been obtained are relevant only in so far as they may be said to conduce to the overarching "touchstone" of a reasonable expectation of privacy. The reason for adopting such an approach is not explained other than by reference to earlier authority,

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[20] *ibid* at [36].
[21] *PG and JH* v *United Kingdom* (2001) 46 EHRR 1272.
[22] *ibid* at [37].
[23] n 1 above at [39].
[24] n 14 above.
[25] n 1 above at [46].
[26] *ibid* at [53].
[27] *ibid* at [56].
[28] n 12 above.
[29] According to Lord Kerr, 'The Court (in *Von Hannover*) did *not* suggest that, if there was no reasonable expectation of privacy that would be determinative of the issue. Indeed, it did not even address that question.' See n 1 above at [57].
[30] *Campbell* v *MGN Ltd* n 13 above, 466.
[31] n 13 above, 502.

> which, in turn, does not contain any analysis of why reasonable expectation of privacy should be given such unique and overweening status.[32]

Finally, Lord Kerr drew attention to the fact Laws LJ's judgment relies on Strasbourg decisions prior to *S* v *United Kingdom*, which did not apply a reasonable expectation of privacy test.[33]Accordingly, Lord Kerr suggested the primary focus should be on the setbacks caused by the publication of the photographs and not on the applicant's expectations of privacy.

Regarding justification under Article 8(2), Lord Kerr first concluded that, as the dissemination of the applicant's image was plainly necessary for the administration of justice, the interference was both 'in accordance with the law' and in pursuit of a legitimate aim for the purposes of Article 8(2). The final requirement, that the interference must be 'necessary in a democratic society', boiled down to an analysis of whether the measures were proportionate. Applying the four-limbed proportionality test set forth in *Bank Mellat* v *HM Treasury*,[34] Lord Kerr concluded that, as the publication of the photographs was a measure of last resort which had 'unquestionable and considerable' benefits to the community, and because the applicant stood to gain by the opportunities afforded to him to be diverted from the criminal activity in which he had been engaged, it was a proportionate interference with the applicant's Article 8 rights.[35]

B

The Strasbourg position

The ECtHR has consistently held that the right to respect for 'private life' includes 'the physical and psychological integrity of a person'[36] and the collection and dissemination of personally identified or identifiable data.[37] The Strasbourg Court 'considers that the notion of personal autonomy is an important principle underlying the interpretation of Article 8's guarantees.'[38] As an individual's image contains personal information about him or her (e.g. information about his or her visually observable physical characteristics which are personally identifiable), and can provide third parties with the capacity to observe and identify the individual, the dissemination of such an image will, *prima facie*, fall within the scope of Article 8(1).[39] This point is articulated in the judgment of *Reklos* v *Greece,*[40] where the ECtHR ruled:

> A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image.[41]

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[32] n 1 above at [61].
[33] (2009) 48 EHRR 50.
[34] This test comprises four questions: (i) is the legislative objective sufficiently important to justify limiting a fundamental right?; (ii) are the measures which have been designed to meet it rationally connected to the fundamental right?; (iii) are the measures no more than is necessary to accomplish the objective?; and (iv) do they strike a fair balance between the rights of the individual and the interests of the community? See *Bank Mellat* v *HM Treasury* [2014] AC 700, 709.
[35] n 1 above at [79].
[36] See *Pretty* v *United Kingdom* (2002) 31 EHRR 1 at [61]. Earlier cases referred to the 'physical and moral integrity of the person' as an element of the 'private life': see, for example, *X and Y* v *Netherlands* (1985) 8 EHRR 235 at [22].
[37] *Z* v *Finland* (1998) 25 EHRR 371 at [95]-[97].
[38] *Pretty* v *United Kingdom,* n 36 above at [61].
[39] N. Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination' (2008) 1 EHRLR 44, 57.
[40] [2009] EMLR 16.
[41] *ibid* at [40].

The view that the dissemination of an individual's image can set back their privacy related interests is well-supported in academic scholarship.[42] The Court has also concluded that there is a 'zone of interaction with others, even in a public context, which may fall within the scope of "private life"'.[43] The ECtHR recognises that setbacks to the individual's privacy related interests can occur as the individual occupies public space. In *PG and JH* v *United Kingdom,*[44] the ECtHR held that where a public authority creates a systematic and permanent record of material collected from the public domain, such as an impression of an individual's image taken from a closed circuit television (CCTV) camera monitoring a public area, this can fall within the scope of an individual's private life.[45] However, in the context of criminal investigations, the Court's jurisprudence is less certain. On the one hand, in *Friedl* v *Austria,*[46] the (now disbanded) European Commission on Human Rights (ECommHR) held the taking and retention of photographs of the applicant by police as he participated in a public demonstration did not interfere with his Article 8 rights.[47] The ECommHR noted the following elements: (i) there was no intrusion into the 'inner circle' of the applicant's private life (i.e. the authorities did not enter any predesignated private domain of the applicant, such as his home); (ii) the photographs related to a public incident in which the applicant was taking part; and (iii) the photographs were taken for the purpose of recording the manifestation of the public demonstration and the authorities made no attempts to identify the applicant through data processing or any other means.[48] Whilst the first two criteria suggest the collection and use of a suspect's photograph as they occupy public space would not interfere with Article 8(1), the third element suggests this might not be the case where a public authority disseminates such images. Furthermore, in *Lupker* v *Netherlands*[49] and *Doorson* v *Netherlands,*[50] the ECommHR determined that public authorities could use photographs provided as part of an arrest or driving licence application for the purpose of identification because these photographs were not taken using intrusive methods, and because they had not been made available to the general public.[51]

The above decisions may indicate the Commission's inclination against finding an interference where an applicant's image is collected from public space and subsequently disseminated as part of a criminal process. However, subsequent decisions of the ECtHR seem to support the notion that such dissemination *will* engage Article 8(1). In *Peck* v *United Kingdom,*[52] where the CCTV footage of the aftermath of the applicant's suicide attempt was disclosed to, and subsequently published by, a number of media outlets, the Court held that an interference had occurred because: '[t]he relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on August 20, 1995.'[53]

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[42] See, for example, J. Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (New York: Cornell University Press, 1997) 75-77; T. Nagel, 'Concealment and Exposure' (1998) 27 Philos Public Aff 3, 4; D. Solove, *Understanding Privacy* (London: Harvard University Press, 2008) 136-160; B. von Silva-Tarouca Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart Publishing, 2011) 16-29; A. Marmor, 'What Is the Right to Privacy?' (2015) 43 Philos Public Aff 3.
[43] See n 21 above at [56].
[44] *ibid.*
[45] *ibid* at [57].
[46] (1996) 21 EHRR 83.
[47] *ibid* at [51].
[48] *ibid* at [49].
[49] *Lupker* v *Netherlands* ECommHR 7 Dec 1992.
[50] *Doorson* v *Netherlands* EcommHR 29 Nov 1993.
[51] *Lupker* v *Netherlands* n 49 above, 5; *Doorson* v *Netherlands* n 50 above, 2.
[52] *Peck* v *United Kingdom* (2003) 36 EHRR 41 at [41].
[53] *ibid* at [62].

The Court also considered other factors, such as the fact that the applicant was in a distressed state at the time the footage was recorded. The judgment suggests that, where images taken from public space are disseminated beyond what on any objective test the applicant might have foreseen, this may engage Article 8.

Additionally, in *Perry* v *United Kingdom*,[54] the ECtHR held the publication of CCTV footage of the applicant in a degree beyond that normally foreseeable may also engage Article 8(1).[55] In *Sciacca* v *Italy*,[56] the ECtHR found an interference with Article 8(1) had occurred where a photograph of the applicant was published in several newspapers whilst she was under investigation for (and subsequently convicted of) criminal association, tax evasion, and forgery.[57] In this judgment, the Court reiterated that Article 8(1) may be engaged where the alleged interference takes place in a public context, adding that the fact that the applicant was the subject of criminal proceedings cannot curtail the scope of Article 8.[58] This suggests that the scope of the individual's private life is not diminished by the fact that they are, for whatever reason, the subject of a criminal investigation.

Whilst there are distinctions to be made between the facts in all of the above cases and *In re JR38*, recent decisions of the ECtHR preponderantly favour finding an interference with Article 8(1) where images of an individual are disseminated to the public, notwithstanding that the images were collected from public space, and regardless of whether the individual was subject to a criminal process.

B Discussion

It is difficult to reconcile Lord Toulson's interpretation with the jurisprudence of the ECtHR. That the existence of a 'reasonable expectation of privacy' is not the conclusive factor in determining the scope of the private life is stated in *PG and JH* v *United Kingdom*:

> There are a number of elements relevant to a consideration of whether a person's private life may be concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, *a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor*.[59]

Lord Toulson viewed this passage as obscure and underdeveloped. He also observed that, in any case, this pre-dated the *Von Hannover* judgment, which clarifies the status of the reasonable expectation of privacy test.[60] Whilst it might have been helpful for the ECtHR to provide more guidance on the role of reasonable expectations, and how and when that test should be applied, any suggestion that the italicised sentence can be interpreted to imply that the individual's reasonable expectation of privacy is necessarily the conclusive factor in determining the scope of the private life seems inconsistent. Lord Toulson expresses his difficulty in reading the ECtHR jurisprudence as suggesting a situation may come within the

[54] *Perry* v *United Kingdom* (2004) 39 EHRR 3.
[55] *ibid* at [38].
[56] n 14 above.
[57] *ibid* at [29].
[58] *ibid* at [29].
[59] n 21 above at [57] (emphasis added).
[60] n 1 above at [93].

scope of Article 8 even where the person concerned had no reasonable expectation of privacy. However, later in the *PG and JH* judgment the ECtHR suggests an example of where this might be the case: '[a] person who walks down the street will, inevitably, be visible to any member of the public who is also present. … Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain.'[61]

In this passage, the ECtHR recognises that restricting privacy protection to only those instances where an individual can reasonably expect privacy unduly narrows the scope of the right to respect for private life. Such a standard has no substantive criteria to establish what Contracting States *should* recognise as a part of the individual's private life. As Solove highlights, the reasonable expectation of privacy test 'provides only a status report on existing privacy norms rather than guides us toward shaping privacy law and policy in the future.'[62] Indeed, as most British city centres are increasingly populated with public CCTV cameras it is becoming ever-more unrealistic for individuals to reasonably expect that, as they occupy public space, their movements will not be monitored or even recorded via CCTV. Whilst this proliferation might alter the extent to which an individual can reasonably *expect* privacy as they occupy public space, it does not mean that such a proliferation is innocuous for privacy interests. Thus it is important to look beyond what expectations are currently considered reasonable, and towards what the scope of the protection *should* be when assessing an interference with Article 8(1).

PG and JH does pre-date the *Von Hannover* judgment, however, Lord Kerr's assessment that the *Von Hannover* judgment is not authority for giving the reasonable expectation of privacy the privileged status of a 'touchstone' test for the engagement of Article 8(1) is worth consideration. The relevant passage in *Von Hannover* states:

> The court [ECtHR] has also indicated that, in certain circumstances, a person has a 'legitimate expectation' of protection and respect for his private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant 'would have had a reasonable expectation of privacy for such calls.'[63]

Granted the ECtHR highlights that an individual can, in certain circumstances, have a reasonable or legitimate expectation of privacy. Indeed, the existence of such an expectation may sway the Strasbourg Court towards finding that Article 8(1) is engaged in a particular case. However, in the passage above, the ECtHR does not explicitly state that, absent the existence of a reasonably held expectation of privacy, Article 8(1) cannot be applicable. Furthermore, in cases pertaining to the retention and disclosure of criminal suspects' personally identifiable information since *Von Hannover*, the applicant's reasonable expectations of privacy are seldom mentioned and, where they are, the ECtHR seems to simply declare such expectations exist rather than use the reasonable expectation test as an empirically verifiable standard for the engagement of Article 8.[64] In developing the normative content of Article 8, the ECtHR approach focuses on the degree to which a particular measure sets back the privacy related interests of the applicant, not on whether the individual can reasonably expect privacy in a

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[61] n 21 above at [57].
[62] D. Solove, *Understanding Privacy* (London: Harvard University Press, 2008) 73.
[63] n 12 above at [50].
[64] Notably two leading cases considering the United Kingdom's policies regarding the retention and dissemination of an individual's personal information as part of a criminal process make no mention of the applicants' reasonable expectations of privacy. See *S* v *United Kingdom* (2009) 48 EHRR 50; *MM* v *United Kingdom* ECtHR 13 Nov 2012.

particular situation, notwithstanding the fact that this may be one factor taken into consideration.[65]

This is a sound approach. In focussing on identifying exactly how a measure interferes with the individual's privacy interests and not reducing this enquiry to discussions of the context in which the measures are used and the reasonableness of any expectation of privacy, the ECtHR's approach does not incorporate factors better considered as part of its Article 8(2) assessment. Lord Toulson acknowledged the Court's need to be on guard against importing factors which should be considered as part of an analysis of the justification of the measures into the reasonable expectation of privacy test.[66] However, this seems unavoidable when attempting to assess the applicability of Article 8(1) by focusing solely on the applicant's reasonable expectations of privacy. For example, when distinguishing the facts in *JR38* from *Sciacca*, Lord Toulson considered the fact that the applicant in *JR38* was a member of a crowd engaged in a violent disturbance, and the police need to identify suspected offenders, to be the determinative considerations when assessing the extent to which the measures undertaken by the police interfered with the applicant's Article 8(1) rights.[67] One cannot expect to keep private - so the argument goes - activities of a criminal nature. This approach pre-empts the question of necessity in Article 8(2), as it focuses on the harm caused to society by the activity the applicant was involved in at the material time, and on countervailing societal interests such as identifying suspects in criminal investigations. These are factors which should properly be balanced against individual privacy interests and not factors that give an indication of the effect the measures taken by the police had on the applicant's private life. This distinction is important: such factors unduly narrow the scope of the protection of the right when they are considered as part of the Article 8(1) analysis.

Furthermore, to qualify reasonable expectations of privacy as determinative of whether Article 8(1) is engaged neglects other important factors. Granted, if the applicant has wilfully disregarded his own privacy interests by engaging in criminal activities in public space this is a factor to be taken into consideration when assessing the impact the alleged interfering measures had on the applicant's privacy interests, but this is not the sole or determinative factor. When one focuses on the impact the publication of the photographs might have on the life of the applicant it is clear this could seriously interfere with his privacy related interests. The applicant was a minor and was suspected of involvement in a public disturbance. Accordingly, the images formed part of a context, which disclosed to the public that the child was at least possibly involved in such activities.[68] The purpose of this publication was to enable those who know or recognise him to contact the police and identify him. It is not difficult to envisage how the public disclosure of such images could have lasting consequences for the applicant's capacity to make autonomous choices in different areas of his life.

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[65] Not only is this approach well-documented in the case law of the ECtHR, a number of academic commentators have also observed the limited role the applicant's reasonable expectations of privacy plays in determining an interference with Article 8(1): see S. Nouwt, B. Vries, and C. Prins (eds), *Reasonable Expectations of Privacy: Eleven Country Reports on Camera Surveillance and Workplace Privacy* (The Hague: Asser Press, 2005) 334-335; P. De Hert, 'Balancing Security and Liberty Within the European Human Rights Framework: A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies After 9/11' (2005) 1 Utrecht L Rev 68, 76; K. Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75 MLR 806, at 825.

[66] n 1 above at [88].

[67] *ibid* at [93].

[68] n 6 above at [30].

This much is acknowledged in the jurisprudence of the ECtHR and in scholarly literature on the normative value of privacy.[69] Not only is the disclosure of such information stigmatising, but when a criminal label is applied to a child (either through formal processes such as a criminal record or informal processes such as the sharing of knowledge of the individual's criminal activities in the community) this can lead to difficulties in rehabilitation and precipitate further offending behaviour.[70] It is for these reasons that specific provisions are made in international law to ensure the identity of a child is not revealed when they are subject to a criminal process.[71] As Lord Kerr suggested, the notion that the publication of the applicant's image does not fall within the scope of Article 8 and this is somehow in the best interests of the child is incongruous 'and is distinctly out of step with the philosophy which underpins Article 3.1 of UNCRC [United Nations Convention on the Rights of the Child].'[72]

However, Lord Kerr did not discuss the relationship between different factors which might be considered relevant in determining whether Article 8(1) is engaged, or their relative importance. Thus, while Lord Toulson's approach, which views the reasonable expectation of privacy standard as a 'touchstone' test of Article 8(1) engagement, overlooks important factors such as the age of the applicant, Lord Kerr's approach offers little guidance in terms of how such factors might be balanced against one another. A third approach might involve focusing on whether or not a measure sets back the applicant's privacy related interests to a reasonably significant degree.[73] Such an approach takes a broad view of privacy interests, which recognises the fact that privacy interests are related to, yet distinct from, a broad range of other normative values and do not exist only where the individual holds a reasonable expectation that these interests will be respected.[74] However, in incorporating a 'reasonably significant' test, the approach avoids an invidious system of over-regulation, which would result, if every possible set back to an individual's privacy related interests could be held to engage Article 8(1).[75] This third approach does not involve balancing incommensurable factors such as the existence of a reasonable expectation of privacy, the age of the applicant, or the purpose of the interfering measure. Instead, the approach focuses on attributing a weight to the interference based on the degree to which the measure sets back the applicant's privacy related interests.

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[69] See, for example, J. Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (New York: Cornell University Press, 1997) 75-77; T. Nagel, 'Concealment and Exposure' (1998) n 42 above, 4; D. Solove, *Understanding Privacy* (London: Harvard University Press, 2008) 136-160; B. von Silva-Tarouca Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart Publishing, 2011) 16-29; A. Marmor, 'What Is the Right to Privacy' (2015) n 42 above.

[70] See generally: J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989); P. Scraton and D. Haydon, 'Challenging the Criminalization of Children and Young People' in J. Muncie, G. Hughes and E. McLaughlin (eds), *Youth Justice: Critical Readings* (London: Sage, 2002) 311-329.

[71] Lord Kerr draws attention to Article 3.1 of the United Nations Convention on the Rights of the Child which provides: 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Furthermore, Rule 8 of the Beijing Rules, adopted by the General Assembly resolution 40/33 of 29 November 1985, Provides: '8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling. 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.'

[72] n 1 above at [50].

[73] A similar approach has been advanced as a way of overcoming inconsistencies caused by the 'reasonable expectation' standard in Fourth Amendment jurisprudence in the United States: see D. Solove, 'Fourth Amendment Pragmatism' (2010) 51 BCL Rev 1511, 1514.

[74] See J. Reiman, 'Privacy, Intimacy and Personhood' (1976) 6 Philos Public Aff 26, 28.

[75] For example, when I am subject to a passing glance by another individual as I walk down a public street, my privacy related interests may be set back as I am subject to some form of scrutiny and deprived of control over who can look at me. However, it seems incongruous to suggest that any such setbacks are significant enough to warrant the protection of Article 8.

Thus the approach allows for a full recognition of the impact of the interference on the individual's private life, taking into account the range of ways different measures can set back privacy interests. This method also avoids importing factors that are better considered as part of an Article 8(2) analysis into the Article 8(1) assessment. It is from this point only that a fair balance can be struck between the privacy interests of the individual and the countervailing aims of the measure.

In the immediate case, the majority does not dispute that the measures taken against the applicant could set back his privacy related interests. It is for this reason Lord Clarke posits that, if the photographs had been published for some reason other than identification, this might have engaged Article 8(1) because, for example, the applicant could reasonably expect that the police would not publish the photographs in an effort to maliciously shame him. However, the motivations for the publication are immaterial when considering the effect that the publication might have on the applicant's privacy interests. Considered as part of the Article 8(1) (and not the Article 8(2)) analysis, such factors serve to dilute a full consideration of the effect the measures have on the applicant's privacy related interests. The government should not be able to disseminate images of a child, taken as he occupies public space and is engaged in criminal activity, without any oversight. Such dissemination constitutes an interference with the child's right to respect for private life as it has a reasonably significant disruptive effect on the applicant's privacy related interests. Specifically, due to the potentially stigmatising effect this could have on the child in his local community, and any subsequent restrictions on the child's personal autonomy, which may derive from this stigmatisation (for e.g. if such stigmatisation has an inhibiting effect on the rehabilitation of the child, this may have innumerable 'knock-on' effects which could limit the range of social or economic opportunities available to the child in the future). It follows that such measures must only be used if they satisfy the requirements of Article 8(2).

Lord Kerr offers a thorough and well-reasoned analysis of Article 8(2) in this case. The measures were 'in accordance with the law' and 'in pursuit of a legitimate aim'. Both sides accepted that the measure pursued the legitimate aim of preventing disorder or crime. The images were also disclosed in compliance with the Data Protection Act 1998. Furthermore, the police devised a multi-agency policy directive aimed at identifying 'at risk' young people and diverting them away from offending behaviour. This policy directive is accessible to the public and contains a commitment to adhere to ECHR rights. Thus, the dissemination had a basis in domestic law, and was accessible to the applicant.[76] Regarding the necessity of the interference, Lord Kerr first recognised the ways in which the measures set back the privacy related interests of the applicant. He also gave due weight not only to the considerable benefits to the community gained from identifying the perpetrators of a public riot, but also to the possible benefits the publication of the photographs could have for the applicant in the long term, through the intervention of appropriate criminal justice agencies. Accordingly, the interference struck a fair balance between the rights of the applicant and other competing interests. In this regard, it is noteworthy that the images were disseminated only to local news outlets for identification purposes, thus limiting the intrusion into the applicant's private life to a minimal degree.[77]

[76] *Kopp* v *Switzerland* (1999) 27 EHRR 91 at [55].

[77] On this point, the measures of dissemination in this case can be distinguished from the case of *Peck* v *United Kingdom*, where the applicant's image was disseminated to national news outlets for the purposes of advertising the utility of CCTV surveillance. See n 52 above at [79].

B

Conclusions

Whilst it is not reasonable to expect that one can keep private one's participation in a public riot, the measures taken to identify the applicant in *JR38* evidently could set back his autonomy and privacy related interests in a number of ways. Taking into account the fact that the applicant was a child at the time of the incident, and he most likely could not have foreseen the subsequent publication of his image and the lasting consequences that this might have on his ability to manage his public reputation and lead an autonomous life, it seems proper that such measures should only be taken where there exist sufficient reasons to do so. The question whether such reasons exist falls to a consideration of the criteria set forth in Article 8(2) of the ECHR. The approach taken by the *JR38* majority runs the risk of unduly restricting the scope of Article 8 to exclude situations where an individual's privacy related interests are significantly set back as part of a criminal process. It is surprising that the Supreme Court has created a situation whereby the state is free to disseminate images of suspects in such situations without demonstrating a legitimate aim for the dissemination, and that such measures are necessary in pursuit of this aim.