

Article 8 and ‘private life’: the protean right
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“ Article 8

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 ... for the prevention of disorder or crime ... or for the protection of the rights and freedoms of others.”

Introduction

1. Article 8 expressly protects four core interests: the right to respect for home, private life, family life and correspondence. This evening I want to focus on one, ‘private life’. It is in this aspect that Article 8 has had probably the most profound impact by extending the protection of the Convention to a very broad range of individual interests. Harris O’Boyle & Warbrick in ‘The Law of the European Convention on Human Rights’, 2nd ed., observe at p. 361-2: ‘... a survey of the case law shows a generous approach to the definition of the personal interests protected’. As Laws LJ said in *R (Wood) v MPC* [2010] 1 WLR 123, para 19, the phrase is ‘very broad indeed’.
2. However I embark on my task with some trepidation: Harris O’Boyle & Warbrick also note that ‘the lack of precision in Article 8(1) ... has allowed the case law to develop in line with social and technical developments’, but ‘[t]he disadvantage may be the absence of a theoretical conspectus, which makes an account of the jurisprudence inevitably descriptive and prediction about likely progress hazardous’ (361-362). Still, as Laws LJ states in *Wood*, ‘it is an endeavour worth pursuing, since we need if possible to be armed at least with a sense of direction when it comes to the disputed cases at the margin’.
3. There have been a number of such ‘disputed cases at the margin’ litigated domestically and in Strasbourg in the last year or so. Developments in the context of press reporting have highlighted the dangers of over-reliance upon private life to the detriment of a free press, as described by Richard Spearman QC. Other cases featuring ‘private life’ have seen Article 8 applied in a number of diverse areas: a requirement that the DPP publish guidance setting out the factors relevant to the decision to prosecute offences of assisted suicide (*R (Purdy) v DPP* [2009] UKHL 45; [2009] 3 W.L.R. 403); an order requiring the Secretary of State for Justice to transfer a transsexual prisoner to a woman-only prison (*R (B) v Secretary of State for Justice* [2009] EWHC 2220 (Admin)); restrictions on the taking and storage of photographic images of anti-arms trade campaigners by the police (*R (Wood) v MPC* [2010] 1 WLR 123); a finding that the carrying out of searches under s 44 of the Terrorism Act 2000 was unlawful (*Gillan v United Kingdom*, 12 January 2010,

in which the ECHR took a different view from HL on the applicability of Art 8 in *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12; [2006] 2 A.C. 307). Article 8 has been found to be applicable in a case concerning the right to choose the manner of burial (*R (Ghai) v Newcastle CC* [2009] EWHC 978 (Admin), although decided in CA on basis of Article 9 [2010] EWCA Civ 59); and in *S and Marper v United Kingdom* the Strasbourg Court memorably ruled that the blanket collection and retention of the DNA of those who are arrested but not convicted was unlawful. Article 8 has been also been relied upon unsuccessfully in several cases, including *Norris v USA* [2010] UKSC 9 (extradition); *R (N) v Secretary of State for Health* [2009] EWCA Civ 795 (the ban on smoking as it applies to detained psychiatric patients, where the Court was divided 2-1 as to whether Article 8 was applicable for the purposes of Article 14); *R (Harrison & Garnham) v Secretary of State for Health* [2009] EWHC 574 (Admin); (2009) 12 C.C.L. Rep. 355 (lack of access to direct payments for patients receiving NHS Healthcare); and *Friend v United Kingdom*, 24 November 2009 (admissibility decision upholding the hunting ban, essentially upon the same grounds as the House of Lords in *R (Countryside Alliance) v Her Majesty's Attorney General* (2008) 1 AC 719).

4. Laws LJ in *Wood* described the 'private life' aspect of Article 8 as 'protean', and warned against it being read 'so widely that its claims become unreal and unreasonable' (*Wood*, para 22). I propose to discuss the areas where this aspect of Article 8 has been found to extend to and propose a number of factors which may explain the limits to its scope. My conclusion, however, is that it is highly unlikely that the jurisprudence – both domestic and Strasbourg – has yet explored, let alone colonised, the outer limits of the concept.

Some preliminary observations

5. First, I am concerned tonight *only* with the question of the 'applicability, 'scope' or 'ambit' of the concept of 'private life', *not* with the question of when State action (or inaction) will violate Article 8 in this aspect. Whether Article 8 is 'applicable' is only the first stage in the process of determining whether there has been a violation. In cases where state agents have acted (involving the so-called 'negative' obligation) it is necessary to go on to consider whether the act complained of is an 'interference' with the particular aspect of the article 8 right; if so, whether that interference is justified under Article 8(2) as being 'in accordance with the law', that it pursues a 'legitimate aim' and, if so, whether it is 'necessary in a democratic society', that is to say it strikes a fair (or proportionate) balance between the individual interest at stake and the legitimate aim it pursues. In cases where the putative breach arises out of State *failure* to protect against the actions of by non-State actors or the consequences of disease or disability or other vulnerability (where so-called 'positive obligations' are in play), if article 8 is 'applicable' the question must still be answered whether that failure gives rise to a breach of the positive obligation, involving a similar balancing exercise to that which must be undertaken under Article 8(2). Those are fascinating, and difficult, questions which – with some relief – I do not propose to explore this evening, save to note that the 'applicability' of article 8 may differ depending upon whether positive or negative obligations are in play (see further, below).

6. Second, I will try and avoid using the term that Article 8 is ‘engaged’, which is often used domestically as shorthand for whether Article 8 is ‘applicable’ and (sometimes) that there has been an interference with Article 8(1) requiring justification under 8(2). Lord Hope in *R (L) v MPC* [2009] UKSC 3; [2009] 3 W.L.R. 1056 urged caution in its use in these terms (at para 23):

“The word “engaged”, which Ms Barton used when she said that article 8 was not engaged in this case at all, requires to be examined with some care. It does not form part of the vocabulary of the European court and, as Laws LJ said in *Sheffield City Council v Smart* [2002] HLR 639 , para 22, its use is liable to be misleading and unhelpful. In *Harrow London Borough Council v Qazi* [2004] 1 AC 983, para 47 I said that I would not for my part regard its use as objectionable, so long as there was no doubt what it means in this context. I drew attention to the words of Sir Gerald Fitzmaurice in his dissenting opinion in *Marckx v Belgium* (1979) 2 EHRR 330 , in which he said that the question was whether the provision was “ applicable” — a concept which is juridically distinct from that of whether the provision has been breached. In other words, the question is whether the issue that has been raised is within the scope of the article. If it is not within its scope, the question of a possible breach of it does not arise at all. If it is, the question whether there is an interference with it which requires to be justified under article 8(2) is a separate question. The question whether something falls within the ambit of any of the rights or freedoms set forth in the Convention for the purpose of the prohibition of discrimination in article 14 reflects this approach.”

7. In fact – contrary to Lord Hope’s view – the term *does* form part of the vocabulary of the Strasbourg Court, to describe the situation where a Convention article has been *violated*, at least in the context of positive obligations: see e.g. *Öneryildiz v. Turkey* (2004) 39 EHRR 12 [GC], para 109, where the Grand Chamber held that the ‘State’s responsibility was engaged’ under Article 8 to mean that there had been a violation. It may be preferable if the term as it has been used domestically were to be allowed to wither away – although don’t be surprised if you find me using it during this evening’s talk!
8. Third, there is a divergence of view as to whether the ‘ambit’ of ‘private life’ is the same when considering the applicability of Article 8 on its own as when considering whether there has been discrimination for the purpose of that Article contrary to Article 14. The House of Lords has said that the term is the same in both contexts: Lord Hope in *R (L) v MPC*, para 23: ‘The question whether something falls within the ambit of any of the rights or freedoms set forth in the Convention for the purpose of the prohibition of discrimination in article 14 reflects this approach.’ The Court of Appeal in *R (N) v Secretary of State for Health* [2009] EWCA Civ 795 took much the same view. However in his concurring opinion in *Adami v Malta*, (2007) 44 EHRR 3, Judge Bratza explained:

“7. The central question which arises is what constitutes “the ambit” of one of the substantive Articles, in this case Article 4 [prohibition on slavery or forced labour]. It has been argued that “even the most tenuous

links with another provision in the Convention will suffice” for Article 14 to be engaged (see *Grosz, Beatson and Duffy: “The 1998 Act and the European Convention”*, 1st edn. Sweet & Maxwell 2000, § C14-10). Even if this may be seen as going too far, it is indisputable that a wide interpretation has consistently been given by the Court to the term “within the ambit”. Thus, according to the constant case-law of the Court, the application of Article 14 not only does not presuppose the violation of one of the substantive Convention rights or a direct interference with the exercise of such right, but it does not even require that the discriminatory treatment of which complaint is made falls within the four corners of the individual rights guaranteed by the Article. This is best illustrated by the fact that Article 14 has been held to cover not only the enjoyment of the rights that States are obliged to safeguard under the Convention but also those rights and freedoms that a State has chosen to guarantee, even if in doing so it goes beyond the requirements of the Convention (see eg., the “*Case relating to certain aspects of laws on the use of languages in education in Belgium*”(Merits), judgment of 23 July 1968, Series A no. 6, pp. 33-34, § 9; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 35, § 71). This would indicate in my view that the “ambit” of an Article for this purpose must be given a significantly wider meaning than the “scope” of the particular rights defined in the Article itself. [emphasis added]

9. This is not the time to explore whether Judge Bratza is right to conclude that the ‘ambit’ of an Article must be given a ‘significantly wider meaning than the “scope” of the particular rights defined in the Article itself’. I simply raise it as an issue upon which we are likely to hear more in future.

Positive and negative obligations

10. The case-law demonstrates that Article 8 protects a number of aspects of an individual’s ‘private life’, although there may be a considerable overlap between them and many situations will involve consideration of more than one of them. Underpinning all of these are the concepts of human dignity and personal freedom: as the Strasbourg Court memorably stated in *Pretty v UK*, (2002) 35 EHRR 1, para 65, ‘The very essence of the Convention is respect for human dignity and human freedom’. These rights have been described as ‘the defining characteristic of a free society’ which ‘we therefore need to preserve ... even in little cases’ (per Laws LJ in *Wood*, para 22). As Isaiah Berlin put it (referred to by Lord Clarke in *R (N) v Secretary of State for Health*, para 43):

“ The desire not to be impinged upon, to be left to oneself, has been a mark of high civilization both on the part of individuals and communities. The sense of privacy itself, of the area of personal relationships as something sacred in its own right, derives from a conception of freedom which for all its religious roots, is scarcely older, in its developed state, than the Renaissance or Reformation. Yet its decline would mark the death of a civilization, of an entire moral outlook.” (Inaugural Lecture, Oxford 1958)

11. But Article 8 is not limited to circumstances such as Berlin is describing where the State takes action that ‘interferes’ with a protected interest (the negative obligation); it also imposes positive obligations on States to take measures to protect individuals from the actions of non-State actors and even from the consequences of mental or physical disability or disease and harm that is self-inflicted. The positive obligations that have been developed under the Convention are of various and overlapping kinds, including the following:
 - (1). To put in place a legislative and administrative framework designed to provide effective deterrence against conduct that would infringe the relevant Convention right.
 - (2). In ‘certain well-defined circumstances’, to take operational measures to protect an individual who is at risk of suffering treatment that would infringe his Convention rights. Positive obligations of this kind have been implied so as to require States to take appropriate measures to protect individuals from the acts of non-State agents which would, if carried out by the State, constitute a Convention violation, most notably in *Osman v United Kingdom*, (2000) 29 EHRR 245. They have also been implied so as to require States to take measures to protect individuals or communities at risk from environmental pollution and to protect vulnerable individuals from acts of self-harm or from the consequences of naturally occurring disease or disability.
 - (3). To provide information and advice to individuals who are or may be at risk of a violation of their Convention rights. This obligation may be understood as one which thereby enables the individual either to avoid the risk or, if exposed to it, to take steps to mitigate its effects and/ or to seek a remedy if thereby harmed.
 - (4). To establish an effective independent judicial system so that responsibility for conduct infringing Convention rights may be determined and those responsible made accountable. Where conduct is deliberate this duty may require criminal proceedings to be brought by the State. This obligation has been found to arise under a number of Articles including Articles 2 and 3.
 - (5). To carry out an effective investigation into credible claims that serious violations of Convention rights have occurred, in particular where the State may bear responsibility, although the obligation is not limited solely to acts or omissions of State agents. Any such investigation must be at the instigation of the State and must ensure the victim is involved in the procedure to the extent necessary to safeguard his or her legitimate interests. This duty has been articulated in relation to Articles 2, 3, 8 and 5.
12. The imposition of such positive obligations is one of the most dynamic developments under the Convention which has allowed a Treaty that in its conception focused on civil and political rights to begin to provide for ‘third generation’ rights that can be described as ‘social and economic’. The imposition of such obligations can prove costly and

contentious, and the Strasbourg Court has tended to impose a high threshold before it has been prepared to find Article 8 to be applicable in such cases. I will return to this later.

The protected interests: a taxonomy

13. The protected interests can usefully be divided into six categories that may be distilled from the case-law (for which key recent cases include *EB v France* [GC] (2008) 47 EHRR 21, para 43; *Gillan v United Kingdom*, 12 January 2010, para 61; *Friend v United Kingdom*, paras 41-42; *Glor v Switzerland*, App 12444/04 30 April 2009, para 54):
 - (1). Physical and psychological (or ‘moral’) integrity; that is to say matters impacting upon a person’s body or their mental state. This will include physical assaults such as caning (*Costello-Roberts* (1995) 19 EHRR 112 (where the Court left open the question of whether corporal punishment not attaining the level of severity for Art 3 could nevertheless breach Art 8), *A v UK* (1995) 19 EHRR 112 (albeit an Art 3 case)), sexual assaults (*X & Y v. Netherland* (1986) 8 EHRR 235, *MC v Bulgaria* (2005) 40 EHRR 20), searches (*Gaskin v United Kingdom* (1989) 12 EHRR 36), medical treatment (*Storck v Germany* (2006) 45 EHRR 6, *Wilkinson v UK*, *Worwa v Poland* (2006) 43 EHRR 35), and hand-cuffing (*DG v Ireland* (2002) 35 EHRR 33, para 105), also the conditions of detention which cause physical or mental suffering (*Raninen v Finland* (1998) 26 EHRR 563, *Shelley v UK* (2008) 46 EHRR SE16 (lack of access to needle-exchange programme, art 8 applicable but no violation), *Price v United Kingdom* (2002) 34 EHRR 53 (an Art 3 case)). Other action or inaction which exacerbates the consequences of physical or mental disease or disability may engage this aspect of private life: I return to this, below.
 - (2). The right of autonomy or self-determination. *Pretty v United Kingdom*, para 62: “the ability to conduct one’s life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned”. This protects a person’s right to refuse medical treatment, even if the consequences are harmful or life-threatening to them or (in the case of a pregnant woman) their unborn child. It also protects the right to refuse medical treatment by proxy, such as by a parent on behalf of a child (*Glass v UK* (2004) 39 EHRR 15), but would also include refusals of treatment by way of advance decision or by a suitably authorized personal representative. It also protects the right to choose the timing and manner of one’s own death (*Pretty, Purdy*).
 - (3). The right to identity and personal development, including choice of names, (*Stjerna v Finland* (1997) 24 EHRR 195), gender identification (*Goodwin v UK* (2002) 35 EHRR 18, *R (B) v MOJ* [2009] EWHC 2220 (Admin)), sexual orientation (*Dudgeon v UK* (1983) 5 EHRR 573; *Norris v Ireland* (1991) 13 EHRR 186) and sexual life (*Laskey v UK* (1997) 24 EHRR 39), whether to have a child or not to have a child (*E.B. v France* (adoption by same-sex couple), *Evans v UK* [GC] (2008) 46 EHRR 34 (IVF fertilization, dispute between mother and father), *Tysiac v Poland* (2007) 45 EHRR 42 (abortion), *Brüggeman v Germany* (1981) 3 EHRR 244 (contraception), *Dickson v UK* [GC] (2008) 46 EHRR 41 (right of prisoner and his

wife by artificial insemination), the right to know one's family background (*Gaskin v UK*, *Mikulic v Croatia* (2002) 11 B.H.R.C. 689 (paternity), *Odièvre v France* (2004) 38 EHRR 43 (maternity)) and the right to choose the manner of one's burial (*Dodsbo v Sweden* (2007) 45 EHRR 22; *R (Ghai) v Newcastle CC*; *Borrows v HM Coroner for Preston* [2008] EWHC 1387 (QB)). This aspect (and 4, below) may also protect distinctive cultural traditions and life-styles (*Chapman v UK* (Gypsies); *G and E v Norway* *G. and E. v. Norway*, nos. 9278/81 and 9415/81, Commission decision of 3 October 1983, Decisions and Reports (DR) 35, p. 30; *Friend v United Kingdom*, No.. 16072/06, 24 November 2009).

- (4). The right to establish and develop relationships with other human beings. This protects, among others, the right of prisoners to associate with each other (*McFeeley v UK*, (1981) 3 EHRR 161, para 82) and to maintain contact with their families (*McCotter v UK* (1993) 15 EHRR CD98, *Wakefield v UK*, No. 15817/89, 1 October 1990). It is plainly engaged in deportation and extradition cases and protects relationships that are not close enough to fall within 'family life' (e.g. *Slivenko v Latvia* (2004) 39 EHRR 24). Adequate protection of this aspect of Article 8 may also necessitate individuals being relieved from the duty to live together (*Airey v Ireland* (1979-80) 2 EHRR 305 (lack of right to divorce)).
- (5). The protection of private sphere and private space ('privacy'). Arguably the core interest protected by 'private life', which may extend to certain business activities (*Niemitz v Germany* (1992) 16 EHRR 97 (search of business premises), *Halford v United Kingdom* (1997) 24 EHRR 523 (telephone tap in office), *Sidabras v Lithuania* (2006) 42 EHRR 6 (employment restrictions on former KGB officers) and to settings outside the 'home' such as prison cells. It may apply even to activities that take place in public: there is "a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'" in circumstances where the individual has a 'reasonable expectation' of privacy (*Peck v United Kingdom* 2003) 36 EHRR 719, *Von Hannover v Germany* (2005) 40 EHRR 1, *Friend v UK*). The publication of confidential information can clearly invade this aspect of private life (e.g. *White v Sweden* (publication of allegations of criminal activity), *Von Hannover* and many more), as may the taking of photographs by the police for intelligence purposes (*R (Wood) v MPC*), the collection and storage of personal data (*Klass v Germany* (1979-80) 2 EHRR 214, *S and Marper v United Kingdom* (2009) 48 EHRR 50), secret surveillance (*Malone v United Kingdom* (1985) 7 EHRR 14), and the interception of correspondence (*Herczegfalvy v Austria* (1993) 15 EHRR 437). The environmental cases ('quiet enjoyment') may also be considered to fall largely, if not exclusively, under this heading (*Lopez Ostra v Spain* (1995) 20 EHRR 277, *Powell & Rayner v United Kingdom* (1990) 12 EHRR 355, *Hatton v UK* (2003) 37 EHRR 28. As the Court made clear in *Kyrtatos v Greece* (2005) 40 EHRR 16, the factor that brings environmental pollution within the scope of Article 8 'is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment'.

- (6). State action having financial consequences such as financial penalties, taxation and the provision of state benefits (*Glor v Switzerland*, para 54), although these will be predominantly raised under A1P1.

Limitations on the protected interests

14. The reach of Article 8 in protecting 'private life' interests is not unlimited. As the ECHR stated in *Friend v UK*, 'A broad construction of Article 8 does not mean ... that it protects every activity a person might seek to engage in with other human beings in order to establish and develop such relationships.' Its reach cannot (yet) be equated with the libertarian principle described in the following passage to the Introductory Chapter of JS Mill's, 'On Liberty', (1859):

'... the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.'

15. As Baroness Hale made clear in *R (Countryside Alliance) v AG* [2008] 1 A.C. 719, at para 116, "Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them. But that falls some way short of protecting everything they might want to do even in that private space...". There are therefore limits to the protection of Article 8, and those limits are not only defined by the balancing exercise that is inherent in determining whether there has been a violation of the article under Article 8(2) (or, in the case of positive obligations, under 8(1)). In many cases the courts have found the Article is simply not applicable, so no balancing exercise is required. But what are the factors that are relevant in assessing whether the Article is applicable? The following appear to me to be some of them:

- (1). The level of seriousness of the conduct complained of or its impact upon the individual. The more trivial the complaint, the less likely it will fall within the scope of the Article. However this is a difficult concept to apply in practice, as the case of *Gillan* demonstrates. In the House of Lords it was held that the stop and search powers of s 44 Terrorism Act 2000 were not in breach of Article 8 because, among other things, their operation would not usually constitute to an interference with Article 8 (*R (Gillan) v MPC* [2006] 2 A.C. 307). Lord Bingham observed, at para 28, "... it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms, and I incline to the view that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level." The Strasbourg Court disagreed, ruling that "any search effected by the authorities on a person interferes with his or her private life." It did

not agree with Lord Bingham's analogy with the search that an air passenger must undergo before travelling, pointing out 'An air traveller may be seen as consenting to such a search by choosing to travel. He knows that he and his bags are liable to be searched before boarding the aeroplane and has a freedom of choice, since he can leave personal items behind and walk away without being subjected to a search. The search powers under section 44 are qualitatively different. The individual can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search.' (para 64). A similar approach is taken to medical treatment: 'even a minor interference with the physical integrity of an individual must be regarded as an interference with the right to respect for private life under Art.8, if it is carried out against the individual's will' (*Storck v Germany* (2006) 45 EHRR 6, para 143). On the other hand certain activities will be considered insufficiently important to attract the scope of Article 8(1) in themselves – hunting, smoking - in the absence of some other feature. Thus in *R (N) v Secretary of State for Health* the majority (Lord Clarke, Moses LJ) held that a ban on smoking in a public hospital did not fall within the scope of Article 8(1), noting at para 49 'Since the nature of the place in which the appellants seek to smoke tells against any right protected by art.8, those seeking protection are compelled to rely to a greater extent on the importance of the activity they seek freedom to pursue. The less the appellant can rely upon the nature of the place in which the activity is pursued, the more he must rely upon the proximity of the activity to his personal identity or physical and moral integrity'.

- (2). The applicant falls within a particularly distinctive and vulnerable class of individuals requiring special protection. Certain cultural or racial minorities may qualify for protection (e.g. gypsies, see *Chapman*), but the fact that 'people choose to socialize with people who share their interest in a particular activity or pastime' will not suffice for this purpose, as the Strasbourg Court found in the hunting ban case of *Friend v UK*, para 44. Particularly vulnerable groups such as detained prisoners or patients, children or women who are sexually assaulted (*X & Y v Netherlands*, *MC v Bulgaria*, *A v UK*) are more likely to qualify for protection, particularly where positive rather than negative obligations are in play (and see para (5) below).
- (3). The activities are conducted in private, rather than in public, or at least in circumstances where the individual has a *reasonable expectation* of privacy, such as in *Peck* (broadcast of CCTV footage of applicant attempting suicide) and *Von Hannover* (intrusive press photographs of the applicant while in public). For this reason both the House of Lords and, recently, the Strasbourg Court dismissed the challenges to the lawfulness of the hunting ban in the *Countryside Alliance* case and *Friend v UK*. In the latter case the Court said 'there is ... nothing in the Court's established case-law which suggest that the scope of private life extends to activities which are of an essentially public nature' and drew a distinction between activities which are carried out for personal fulfillment and those which are carried for a public purpose; hunting fell into the latter category (para 42). It is this aspect that told against finding Article 8 being applicable in the smoking ban cases, *R (N) v Secretary of State for Health*. The majority (Lord Clarke, Moses LJ) held that

‘the degree to which a person may expect freedom to do as he pleases and engage in personal and private activity will vary according to the nature of the accommodation in which he lives’ (para 41). While a ban on smoking in a person’s own home might fall within the scope of Article 8, the same ban in a high security hospital did not. Put another way, a person detained in a high security psychiatric hospital does not have the same ‘reasonable expectation of privacy’ as a person in their own home.

- (4). The existence (or absence) of a consensus in other Council of Europe member states. The Strasbourg Court in *Goodwin* found a violation of Article 8 in the failure to grant legal recognition to a transsexual’s change of sex, and in doing so departed from its earlier decisions (among others) in *Rees v UK* (1987) 9 EHRR 56 and *Sheffield & Horsham v UK* (1999) 27 EHRR 163. In doing so the Court attached ‘less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals’ (para 85). The absence of a consensus is accordingly an indicator that action or inaction falls outside the ambit of the Article.
- (5). Negative vs. positive obligations. Direct interferences by the State with the individual’s private life (the negative obligation) are more likely to fall within the ambit of Article 8 than where the action complained of arises from the acts of third parties or the consequences of disease or disability (the positive obligation). As Laws LJ said in *Wood*, the former are the ‘paradigm case’ of Article 8’s applicability: ‘where state action touches the individual’s personal autonomy, it should take little to require the state to justify itself’ (para 28). The Court is slower to require States to justify a failure to take protective measures, particularly those requiring the allocation of scarce communal resources. For example on a number of occasions the Strasbourg Court has held that action or inaction which exacerbates the consequences of physical or mental disease or disability *may* engage this aspect of private life e.g. *Botta v Italy* (1998) 26 EHRR 241 (lack of disabled access to beach), *Zehnalova v Czechoslovakia*, No 38621/97, 14 May 2002 (lack of disabled access to public buildings), *Marzari v Italy*, No 36448/97, 4 May 1999 (lack of disabled access to housing), *Sentges v Netherlands*, 8 July 2003 (lack of access to robotic arm); *Pentiacova v Moldova*, 30 April 2004 (lack of access to kidney dialysis treatment); *Clunis v United Kingdom*, 11 September 2001 (lack of psychiatric treatment in the community, leading to applicant becoming psychotic and killing a member of the public). However few cases have been successful. Not only are States permitted a wide margin of appreciation in such cases, but before the Article is found to be applicable a relatively high threshold test must be satisfied: see *Sentges v Netherlands*

The Court has held that Article 8 may impose such positive obligations on a State where there is a direct and immediate link between the measures sought by an applicant and the latter’s private

life (see *Botta v. Italy*, cited above, § 34). However, Article 8 does not apply to situations concerning interpersonal relations of such broad and indeterminate scope that there can be no conceivable link between the measures the State is urged to take and an individual's private life (see *Botta*, cited above, § 35). The Court has also held that Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in the exceptional cases where the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world. It is incumbent on the individual concerned to demonstrate the existence of a special link between the situation complained of and the particular needs of his or her private life (see *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V).

Such cases are only likely to fall within the scope of the Article if some other factor is present, such as the individual falls within a particularly distinctive and vulnerable class (e.g. prisoners), the benefit sought is available to other individuals but denied to the applicant, the impact upon the individual is particularly harsh (in which case issues may well arise under Art 3) or if there is objective evidence of an international consensus that the protection should be extended, of which the UN Convention on the Rights of Disabled Persons provides a recent example (and which was referred to, for example, in *Glor v Switzerland*).

- (6). Extradition and deportation cases. Consistent with the distinction outlined in (5) above between acts by State agents and those for which the State is not *directly* responsible, where the infringement into private life will take place in another State it will only be in exceptional cases that his removal to that State will breach Article 8. There is a very recent discussion of the relevant case-law by the Supreme Court in *Norris v USA* [2010] UKSC 9 and I do not propose to try and analyse it here. It may be that 'exceptionality' is only relevant at the justification stage rather than the applicability stage, which is what we are here concerned with.
- (7). The circumstances complained of are self-inflicted. In *McFeeley v United Kingdom*, for example, Article 8 was held not to be applicable in relation to the conditions of the applicants detention because those conditions had been self-inflicted, following a 'dirty protest'. On the other hand, Articles 2 and 3 have been held to be applicable to cases of deliberate self-harm, at least in the context of detainees suffering from mental disorder (e.g. *Keenan v United Kingdom* (2001) 33 EHRR 38, *Middleton* [2004] 2 A.C. 182, *Savage* [2009] 1 A.C. 681), so this is not a factor that necessarily excludes the applicability of Article 8.
- (8). 'Normal restrictions and limitations' consequent on the individual's status. There are certain inevitable restrictions and limitations inherent in the lives of prisoners (*DG v Ireland*, para 105), detained psychiatric patients (*R (N) v Secretary of State for Health*) and other categories of individual (e.g. soldiers, school children) that

may not fall within the ambit of Article 8, even though the same restrictions would clearly require justification if imposed upon other individuals. However it is important that such restrictions are kept to a minimum: a detained patient's right to respect for private life guaranteed by Article 8(1) is not necessarily lost by reason of his incarceration (*Raymond v Honey* [1983] 1 AC 1; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *R (P&Q) v Home Secretary* [2001] EWCA 1151, §78), and any restriction that is not a necessary incident of imprisonment may well require separate justification under Article 8.

Conclusion

16. The limiting factors I have listed above are by no means exhaustive. Nor do I suggest they will provide the necessary toolkit for determining the scope of Article 8 in every situation, though they may provide a handy starting point. As the extract from Harris, O'Boyle and Warbrick quoted at the outset makes clear, 'prediction about likely progress [is] hazardous'. That is particularly so given the Court's willingness to find Article 8 applicable in circumstances where it has earlier found that it is *not* applicable in order to reflect any developing international social and legal consensus, as in the transsexual cases. The only thing that is certain is that the right to 'private life' will continue to be invoked in an increasingly diverse array of circumstances.

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