THE UNRULY ARTICLE 8

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I am here to re-acquaint you with Article 8 – an article memorably described by Mr Justice Burnton as "*the least defined and most unruly of the rights enshrined in the Convention*".[1]

At first glance the trouble is not obvious. We have the familiar pattern whereby one provision, Article 8(1), sets out the basic right and another provision, Article 8(2), stipulates the basis on which those basic rights may be lawfully interfered with by the State. If the right is not engaged at all, then in theory it becomes unnecessary to examine whether there has been any unlawful interference under Article 8(2). In reality neither Strasbourg, nor the domestic courts draw a bright line between 8(1) and 8(2), so for example proportionality considerations creep into analysis of 8(1) and often, the courts express doubt about whether the Article is engaged but go on to consider justification under 8(2). Slightly artificially, I am billed to talk about Article 8(1). Others will cover 8(2).

Trouble first arises because Article 8's expanse is so broad. As you know, it covers four dimensions: private life, family life, home and correspondence. It is also less categorical

[1] in *Wright v Secretary of State for Health* [2006] EWHC 2886 (Admin)

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in its language than other Convention rights. It confers a right to "respect" for one's private and family life, home and correspondence: but not an absolute right to privacy or family life, or to a home. This language is unique to Article 8. It is also important because it accounts in part for the wide margin of appreciation granted to contracting states and public authorities in the application of Article 8.

So, what does Article 8 protect?

As Lord Bingham has observed, the broad purpose of the Article is clear: "*It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose*".[2]

So, the key to Article 8 is protection of the "private sphere." In the same case, Baroness Hale linked her notion of the ambit of Article 8 with two separate, but related, fundamental values:

> "*One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the*

[2] *Countryside Alliance and others v Attorney General and another* [2007] UKHL 52 at [10]

> *telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another.*
>
> *The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people*".[3]

This understanding of Article 8, which goes well beyond traditional notions of "privacy", has of course drawn on a consistent but evolving body of Strasbourg jurisprudence. In *Pretty v UK*[4], the Strasbourg Court had this to say about Article 8:

"*the concept of private life is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world."*

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[3] *ibid.* at [116]
[4] (2002) 35 EHRR 1

Pausing here, you will recall the seminal cases concerning the rights of transsexuals. In *I v UK*[5], the UK was held to have a positive obligation to amend birth registers to reflect individuals' post-operative genders. This is territory with which we are now familiar. A landscape in which Article 8 covers personal identity and lifestyle, reputation, family life, the home environment, physical integrity and communication.

Returning to *Pretty*, where the issue was the lawfulness of assisted suicide, the Court continued,

"*Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its [Article 8's] guarantees*" [6].

Although the ECHR did not find a violation of Article 8 in Mrs Pretty's case, its discussion of personal autonomy has taken the ambit of Article 8 beyond that which the domestic courts are willing to recognise. In this talk I will look at two important domestic cases where this dichotomy is made plain: the *Countryside Alliance* case and the High Court assisted suicide case, *R(Purdy) v DPP*[7].

[5] *I v United Kingdom* (2003) 36 EHRR 53 and *Goodwin* (2002) 35 EHRR 18
[6] *Pretty v UK* at [61]
[7] *R(Purdy) v DPP* [2008] EWHC 2565 (Admin) – Scott Baker LJ and Aikens J

Before I do this, I will consider a snatch of other domestic cases which go to the ambit of the private life right. But first a word about the development of positive obligations. As you are aware, Article 8 gives rise to both negative and positive obligations. "Negative" obligations to avoid interfering with the rights outlined in Article 8(1), unless the conditions of 8(2) are satisfied; and "positive" obligations requiring active steps to protect individuals' private lives, particularly against interference by others. To date, the most effective positive obligations which have emerged relate to the duties on public bodies to provide information in order to ensure respect for the four dimensions protected by Article 8. You will recall *Gaskin v UK*[8] where the ECHR held that the local authority's refusal to disclose details relating to a young man's time in care, violated his Article 8 rights[9]. In *Guerra v Italy*[10] the state authorities were not directly responsible for the contamination to the applicants' homes from a privately operated fertilizer factory. However, in failing to make available information about the hazard, they failed to take steps to ensure the effective protection of the applicant's rights. Other areas where the development of positive obligations is often considered, but rarely enforced, is in the area of medical and welfare provision. I will touch on this in my digest of the cases. Oliver will look at issues relating to access to information, privacy and press intrusion.

Re C (A Child) v XYZ County Council,[11] concerned a child of a young unmarried mother who wanted to keep the birth secret and placed the child for adoption at birth. The child's

[8] *Gaskin v UK* (1989) 12 EHRR 36
[9] See also McMichael v UK (1995) 20 EHRR 205 and Odievre v France (2004) 38 EHRR 43.
[10] *Guerra v Italy* (1998) 26 EHRR 357
[11] [2007] EWCA Civ 1206.

birth was the result of a fleeting sexual encounter. The issue was whether the local authority had a duty to make enquiries under the Adoption and Children Act 2002 to see if any of the child's birth family would be suitable carers.

Against the wishes of the mother, and pursuant to the right to family life, the judge at first instance ordered that the existence and identity of the child be disclosed to the extended maternal family and the putative father and any extended paternal family. Part of the judge's reason was that if adopted, a time would come when the child would want to know about its parentage. To prevent the child from having as much information as possible would, in the judge's view, have been cruel.

The Court of Appeal saw the matter differently. Considering the Convention jurisprudence, the Court observed that a number of questions arose as to the meaning of private and family life and as to the content of the state's duty to respect private and family life. Clearly, if a person has a right to respect for their family life with a child due for adoption, adoption will interfere with that right. Equally disclosure about confidential information about that child might violate the mother's right to respect for her private life.

The Court acknowledged that the concept of private life protected "*the interest which a person has in receiving information which is necessary for them to know and understand*

their identity".[12] However it also noted that in *Odievre v France*, the ECHR had held that it was within the state's margin of appreciation to choose the means to secure compliance with this aspect of the right. In that case no violation was involved in the French practice of permitting the mother to remain anonymous so the child could never ascertain who his mother was. The purpose of the law was to reduce unlawful abortions and the practice of abandoning a child without medical assistance.

As regards family life, the court noted Strasbourg jurisprudence to the effect that family life as between a father and child born out of wedlock is not automatic. The court held that this father, not knowing of the child's existence, and having never lived with her mother or expressed any commitment to her, had no family life with her and no rights under Article 8(1).

Delivering the leading judgment, Lady Justice Arden held that the statute placed the child's welfare at the centre of the decision-making process. Placing a child with its birth family will often be in the child's best interests but this is not necessarily so. In the light of the information given by the mother, the Court took the view that the child's best interests lay in placing her for adoption and finding her a permanent placement without delay. Accordingly, the Court reversed the Judge's orders to prevent further disclosure about the child to the birth family.

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[12] *ibid.* at [33] per Arden LJ, citing *Gaskin v UK* (1989) 12 EHRR 36.

The decision of the Lords in *Secretary of State for Work and Pensions v M,*[13] gives a useful indication of the limits of Article 8. The claimant, complained that her Article 14 rights taken in conjunction with Article 8 had been violated. She complained that her liability to pay child maintenance was calculated under a formula which was more onerous than that which applied to those in a heterosexual relationship.

The Lords concluded that Article 8 had not been engaged. In its view, the Strasbourg jurisprudence demonstrated that Article 8 was concerned with serious interferences such as intrusive interrogation, criminalising manifestations of an individual's sexuality, or banning someone from a wide range of posts.[14] As the Claimant's personal and sexual autonomy had not been invaded, nor had she been criminalised, threatened or humiliated, Article 8 was not been engaged.

The Lords went on to consider the scope of family life and potential violation. They held that the Claimant's right to respect for her continuing family life with her children had not been interfered with by her increased child support liability since it did not impair the love, trust, confidence, mutual dependence and unconstrained social intercourse which were the essence of family life.

"Activities of a professional or business nature"

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[13] [2006] UKHL 11.
[14] *ibid.* at [83]

Strasbourg jurisprudence establishes that private life may include "activities of a professional or business nature"[15]. It does not follow that Article 8 will necessarily be engaged when someone's employment is ended or they are disqualified from office or certain areas of work. This is becasue the Convention does not confer any right to work in a chosen profession. However, the particular circumstances of a case may engage Article 8.

In *Sidabrus and Dziautas v Lithuania,*[16] the ECHR held that the public disbarment of the claimants, who were former KGB agents, from employment in many fields, came within the ambit of Article 8. Two domestic decisions consider this same territory.

R (A) v B Council[17] concerned a Council's refusal to allow the Claimant to continue to drive vulnerable children once it became aware that she had serious convictions of violence dating back to her adolescence (30 years earlier). She had also been sectioned and had undergone inpatient psychiatric treatment. Lloyd Jones J was satisfied that Article 8 was engaged. In so finding he was influenced by the fact that the decision prevented the Claimant from working with a group of children she had worked with for 6 years. He also found that there was a considerable stigma attached to the decision, to the effect that she constituted a risk to children. Furthermore its inevitable consequence was a

[15] *Niemietz* (1992) 16 EHRR 97, See also *Amann v Switzerland* (2000) 30 EHRR 843
[16] (2004) 42 EHRR 104
[17] [2007] EWHC 1529 (Admin)

"*profound interference with her personal relationships with colleagues and the vulnerable persons*" with whom she had worked.

Nevertheless, on the facts, the decision was found to be lawful.

The reasoning in *R (Wright) v Secretary of State for Health,*[18] was similar. Burnton J held that a provisional placement on the Protection of Vulnerable Adults List, engaged Article 8. This was because the basis of the decisions to place the Claimant care-workers on the list was suspicion of misconduct serious enough to indicate that they constituted a risk to vulnerable persons, and that was calculated to interfere with their personal relationships with colleagues and the vulnerable persons with whom they had worked. On appeal[19], the Court of Appeal reversed the judge's finding that the provisions breached Article 6 but did not decide whether Article 8(1) was engaged. However it ruled that if it was engaged, listing was clearly justified under Article 8(2) in order to protect the rights of others.

The next case also served to mark out the limits of the application of Article 8. In *R (Johnson and others) v London Borough of Havering,*[20] the residents of a local authority care home[21] resisted its transfer to the private sector, arguing that by transfer their Article

[18] [2007] 1 AER 825.
[19] [2007] EWCA Civ 999
[20] [2007] 2 W.L.R. 1097.
[21] provided pursuant to section 21 of the National Assistance Act 1948

8 rights would be lost, or at least substantially diminished, as they could not take direct action against the actual carer. The Court of Appeal disagreed.

In Buxton LJ's opinion, care homes were already subject to legislative standards which protected residents in terms which exceeded anything that they could gain through the application of Article 8. It followed that "the residents lost nothing in Article 8 terms by the transfer".[22] Second, the argument that a change in the nature of the residents' remedies necessarily entailed a breach of their Convention rights was premised on a faulty assumption. It was false to assume that the state had an obligation to provide, and to maintain, a particular level of Article 8 protection. On the contrary, it was "*very doubtful whether Article 8, even when read in positive rather than in negative terms, places on a member state an obligation to make welfare provision of the type and extent required by s 21 of the 1948 Act*".[23]

The Court acknowledged that there were instances in which the Strasbourg Court had held that the state had a positive obligation to provide housing for a person who, for example, had a serious illness[24]. However, such instances were necessarily fact-specific and did not assist this case.

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[22] *Ibid.* at [12].
[23] *ibid.* at [16].
[24] See, for example, the admissibility decision in *Marzari v Italy* (1999) 28 EHRR CD175

Buxton LJ made the further important observation:

> *…the appellants' argument would place very far-reaching and surprising inhibitions on national policy. I can readily accept that, if national policy is indeed inconsistent with an article of the Convention, then it is no answer that the national government would wish to be free to act differently from the way that the Convention requires. But where the reach of an article is unclear, it is very relevant to enquire whether the jurisprudence and policy of the Convention intends the effect on freedom of government action that would follow from one asserted reaching of that article*.[25]

He noted that privatization of care homes had attracted very strong views, but emphasized that "*…those are views, to be adjudicated upon by the national democratic process, and a very good example of an area that the Convention will enter only with considerable diffidence*."

That is an approach which brings us neatly onto the decision of the Lords in the *Countryside Alliance* case, which also concludes with a dose of diffidence and deference to the legislature.

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[25] *Johnson* at [20].

In this case, the Claimants sought a declaration that the Hunting Act 2004, which prevented the hunting of wild mammals with dogs, infringed and was incompatible with Article 8 and other provisions of the Convention. The Claimants included people who were professionally involved in hunting and dependent on the sport for their livelihood and others, such as landowners, farmers and masters of hunts, who were active participants in hunting. They argued that the hunting ban infringed their Article 8 rights as it adversely affected their private life and personal autonomy, their cultural lifestyle, the use of their home, and threatened their livelihood.

The Lords concluded that their complaints did not fall within the scope of Article 8.

The starting point for the majority were the statements, cited above, by Lord Bingham and Baroness Hale – that the purpose of Article 8 was to protect individuals from unjustified intrusion into the private sphere within which they expected to be left alone to pursue their personal affairs and live as they chose.

Hunting with hounds, they found, was by its nature an activity conducted in public. It was as Lord Bingham put it, "*a very public activity, carried out in daylight with considerable colour and noise, often attracting the attention of on-lookers attracted by the*

spectacle"[26]. Lord Hope further observed that it was an activity which "*has many social aspects to it which involve the wider community*".[27]

Baroness Hale considered the purpose of Article 8 to be the protection of the private space, both physical and psychological, within which individuals could develop and relate to others, but this fell "*some way short of protecting everything they might want to do even in that private space; and it certainly does not protect things that they can only do by leaving it, and engaging in a very public gathering and activity*".[28]

Lord Bingham also considered the impact of the ban on the Claimant's enjoyment of their homes[29]. He reasoned thus: "home" is not a legal term of art and Article 8 is not directly concerned with property and contractual interests. Indeed, a property interest is not required nor is it sufficient of itself to make a home. It was therefore held that the meaning of "home" did not extend to land over which an owner permitted or caused sport to be conducted.

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[26] *Countryside Alliance* at [15]
[27] *ibid.* at [55].
[28] *ibid.* at [116].
[29] In *Qazi v London Borough of Harrow* [2003] UKHL 43 he had observed that it was unsurprising that Article 8 protects the home "*since few things are more central to the enjoyment of human life than having somewhere to live*".

In considering the complaint that the ban restricted the Claimants' livelihood, Lord Bingham expressed the view that, unlike *Sidabras*, the impact of the hunting ban on the claimants' livelihood was not sufficiently serious to engage Article 8. In *Sidabras* the restriction was very extensive. Here, it was not - every employment remained open to them save that of hunting wild animals with dogs. He also noted that in *Sidabras* the court did not find that Article 8 had been breached, only finding a breach of article 14 in the ambit of Article 8.

The Lords also refused to accept that the hunting fraternity qualified as a cultural group deserving of Article 8 protection [30].

Turning to the question of deference, for Lord Bingham, whilst it was clear that many people did not consider there was a pressing (or any) social need for the ban, the House of Commons had decided otherwise. He went on to explain:

> "*The degree of respect to be shown to the considered judgment of a democratic assembly will vary according to the subject matter and the circumstances. But the present case seems to be to be pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral*

[30] see *G and E v Norway* (1983) 35 DR 30

and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament"[31].

Lord Brown thought otherwise and refused to regard what he termed "the ethical objection of the majority" as a sufficient basis for holding the ban to be "necessary". This is how he put it:

"*Take music or dance; or chess or bridge; or polo or golf; or climbing or canoeing. Should not a human rights convention ideally operate to ensure that all such activities could only be banned for good reason. Some perhaps may be regarded as more personal than others, carried out in circumstances of greater intimacy. But why should that be critical? All of them are activities to which people may chose to devote much of their lives and which for some are all important. The alternative, clearly, is that any or all of these activities could be banned, perhaps by some Taliban-like administration, and that those affected…would have no right to call for a justification of the ban and no redress in the courts were none afforded. The government enacting such legislation would, of course, be politically accountable to the electorate. But if a majority in the country favoured such a ban, prompted, say, by feelings of prejudice or jealousy towards a wealthy or intellectual elite, there might in fact be political advantage in it…*[32]

[31] *Countryside Alliance* at [157].
[32] *Ibid* at [140]

Were the appellant's article 8 rights engaged here, I would have declined to find the hunting ban justifiable. I simply cannot regard the ethical objection of the majority as a sufficient basis for holding the ban to be necessary. As I observed at the outset, the genuineness of this objection is not to be doubted, but nor too is the genuineness of those who believe that hunting contributes to animal welfare rather than impairs i. How then can the ban be reconciled with the values of "pluralism, tolerance and broadmindedness" these "hallmarks of a democratic society"? Most would regard adultery (assuredly a pursuit engaging article 8) as unethical (and often causing suffering too). But could an intolerant majority ban it and then argue that it was necessary in a democratic society? Surely not…"[33]

It is now for Strasbourg to consider the case further. Meanwhile our domestic courts have had to grapple with another difficult decision as to the ambit of Article 8: *R(Purdy) v DPP*.

Like Diane Pretty, Mrs Purdy suffers from progressive multiple sclerosis. She anticipates a time when she will wish to travel abroad to end her life and to do this she will need the help of her husband. Her application to the Court sought clarification as to whether her husband would face prosecution under s.2 of the Suicide Act 1961 for assisting her suicide. Specifically, the issue was whether the DPP had acted unlawfully and in breach

[33] *Ibid* at [159]

of Article 8 in failing to publish detailed guidance as to the circumstances in which individuals will or will not be prosecuted for assisting others to commit suicide.

The first question for the Court was whether the right to choose the manner of one's death fell within the scope of the right. Secondly, it had to consider whether the ban on assisted suicide in Article 2(1) of the Act, constituted an interference with that right.

The House of Lords in *Pretty* concluded that Mrs Pretty's Article 8 rights were not engaged at all. The prevailing argument was that the right to private life under Article 8(1) relates to the manner in which a person conducts his life, not the manner in which he departs from it. The alleged right to self-determination to die, would extinguish the very benefit on which it is supposedly based.

What gave hope to Mrs Purdy was the ECHR judgment in *Pretty*. Having stated that the notion of personal autonomy was an important principle underlying the interpretation of article 8, it went on to observe that 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 morally harmful or dangerous nature for the individual concerned[34].

[34] *Pretty v UK* at [62]

It went on to note that "*the very essence of the Convention is respect for human dignity and freedom…*"[35] and continued "*the Applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8(1)*"[36].

The Court in Purdy acknowledged that the ECHR took a "*very different and wider view about the ambit of article 8 than the House of Lords*"[37]. However, it considered itself bound by the decision of the House and refused to find that Article 8 was engaged. In reaching this decision, it considered whether the Lords decision in *Countryside Alliance* case had widened the ambit of Article 8(1). It recognized that the Lords in *Countryside Alliance* "*gave general support for broadening the scope of article 8(1) to cover personal autonomy*". However, there was no reference to the dichotomy between the House of Lords and the Strasbourg decisions in Pretty and it had not been argued that the House had to follow the decision in Pretty. In conclusion, the Court did not accept the submission for Mrs Purdy that the House had moved on to a point where it accepted that Article 8 would be engaged in cases such as the present[38].

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[35] *Ibid* at [65]
[36] *Ibid* at [67]
[37] *R(Purdy) v DPP* at [41]
[38] The Court went on to note that even if Article 8(1) covered the personal autonomy of the Claimant, it was concerned not with the claimant but her husband, a third party. It also found, against the Claimant, that the provisions of the Code and the principles of administrative law were sufficiently precise to comply with the requirements of Article 8(2).

What conclusions can be drawn from this survey? First, it is apparent that the Courts still struggle to frame a clear principle by which it is possible to identify, whether on the facts of any given case, Article 8 is either engaged or violated.

As the framers of the Convention intended, Article 8 has evolved in line with social and cultural developments. However, this evolution is rarely entirely smooth. One battleground for the future will be over the development of Article 8 to protect a wider notion of personal autonomy.

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